



Council of the
European Union

153627/EU XXVII. GP
Eingelangt am 15/09/23

Strasbourg, 14 September 2023
(OR. en)

12895/23

Interinstitutional File:
2022/0219(COD)

CODEC 1583
INDEF 46
COPS 436
POLMIL 238
IND 463
MAP 47
COMPET 865
FISC 187
PE 107

INFORMATION NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on establishing the European defence industry Reinforcement through common Procurement Act - Outcome of the European Parliament's first reading (Strasbourg, 11 to 14 September 2023)

I. INTRODUCTION

In accordance with the provisions of Article 294 of the TFEU and the Joint declaration on practical arrangements for the codecision procedure¹, a number of informal contacts have taken place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this file at first reading.

¹ OJ C 145, 30.6.2007, p. 5.

In this context, the Chair of the Committee on Foreign Affairs (AFET), David McALLISTER (EPP, DE), and the Chair of the Committee on Industry, Research and Energy (ITRE), Cristian-Silviu BUŞOI (EPP, RO), presented, respectively on behalf of AFET and ITRE, a compromise amendment (amendment number 2) to the abovementioned proposal for a Regulation, for which Michael GAHLER (EPP, DE) and Zdzisław KRASNODEŃSKI (ECR, PL) had prepared a draft report. This amendment had been agreed during the informal contacts referred to above. No other amendments were tabled.

II. VOTE

When it voted on 12 September 2023, the plenary adopted the compromise amendment (amendment number 2) to the abovementioned proposal for a Regulation. The Commission's proposal as thus amended constitutes the Parliament's first-reading position which is contained in its legislative resolution as set out in the Annex hereto².

The Parliament's position reflects what had been previously agreed between the institutions. The Council should therefore be in a position to approve the Parliament's position.

The act would then be adopted in the wording which corresponds to the Parliament's position.

² The version of the Parliament's position in the legislative resolution has been marked up to indicate the changes made by the amendments to the Commission's proposal. Additions to the Commission's text are highlighted in ***bold and italics***. The symbol "■" indicates deleted text.

European defence industry reinforcement through common procurement (EDIRPA)

European Parliament legislative resolution of 12 September 2023 on the proposal for a regulation of the European Parliament and of the Council on establishing the European defence industry Reinforcement through common Procurement Act (COM(2022)0349 – C9-0287/2022 – 2022/0219(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2022)0349),
- having regard to Article 294(2) and Article 173(3) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C9-0287/2022),
- having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
- having regard to the opinion of the European Economic and Social Committee of 21 September 2022¹,
- having regard to the provisional agreement approved by the committees responsible under Rule 74(4) of its Rules of Procedure and the undertaking given by the Council representative by letter of 5 July 2023 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,
- having regard to Rule 59 of its Rules of Procedure,

¹ OJ C 486, 21.12.2022, p. 168.

- having regard to the opinions of the Committee on the Internal Market and Consumer Protection, of the Committee on Budgets and of the Committee on Budgetary Control,
 - having regard to the report of the Committee on Foreign Affairs and the Committee on Industry, Research and Energy (A9-0161/2023),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Position of the European Parliament adopted at first reading on 12 September 2023 with a view to the adoption of Regulation (EU) 2023/... of the European Parliament and of the Council on establishing *an instrument for the reinforcement of the European defence industry* through common procurement (*EDIRPA*)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 173(3) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee⁴,

Acting in accordance with the ordinary legislative procedure⁵,

⁴ OJ C 486, 21.12.2022, p. 168.

⁵ Position of the European Parliament of 12 September 2023.

Whereas:

- (1) The EU Heads of State or Government, meeting in Versailles on 11 March 2022, committed themselves to bolstering European defence capabilities in light of Russia's war of aggression against Ukraine. They agreed to increase defence expenditures *substantially, to develop further incentives to stimulate Member States' collaborative investments in joint projects and the joint procurement of defence capabilities, to invest further in the capabilities necessary to conduct the full range of missions and operations, to foster synergies and* boost innovation, and to strengthen and develop the European defence industry, *including small and medium-sized enterprises (SMEs).*
- (2) Russia's unjustified invasion of Ukraine on 24 February 2022 and its ongoing war of aggression have made it clear that it is critical to act *urgently* to address existing shortfalls. The return of high-intensity warfare and territorial conflict to Europe *has a negative impact on the security of the Union and the Member States and requires* a significant increase in the capacity of Member States to fill the most urgent and critical gaps, especially those exacerbated by the transfer of defence products to Ukraine.
- (3) *Russia's war of aggression against Ukraine has dramatically underlined the need to adapt the European Defence Technological and Industrial Base (EDTIB) to structural changes, to enhance the Union's military research and development, to modernise military equipment and to strengthen cooperation between Member States in the framework of procurement in the field of defence.*
- (4) On 18 May 2022, the Commission and the High Representative of the Union for Foreign Affairs and Security Policy (High Representative) presented a joint communication on 'the Defence Investment Gaps Analysis and Way Forward'. The joint communication *highlighted the effects of years of defence underspending and* the existence of financial, industrial and capability gaps in the Union's defence sector. *The joint communication specified that the return of warfare to Europe had revealed an accumulation of gaps and shortfalls in military inventories, reduced industrial production capacity, and limited joint procurement and collaboration. The joint communication also highlighted gaps immediately affecting the freedom of action of Member States' armed forces as well as the urgent need to replenish certain stockpiles, to replace obsolete military equipment,*

for example equipment designed or produced in the former Soviet Union, and to reinforce strategic capabilities.

- (5) The joint communication also proposed a dedicated short-term instrument, designed in a spirit of solidarity, as a tool to incentivise Member States to pursue, on a voluntary basis, common procurement to fill the most urgent and critical gaps, especially those created by the response to Russia's war of aggression against Ukraine, in a collaborative way.
- (6) The proposed new dedicated short-term instrument *is intended to* contribute to reinforcing common defence procurement and, through associated Union financing, to strengthening Union defence industrial capabilities, *including by increasing the production of defence products. It will also contribute to the collective benchmark of 35 % of total equipment procurement expenditure for European collaborative equipment procurement identified by the European Defence Agency Steering Board in 2007.*
- (7) Reinforcing the **EDTIB** should therefore be at the core of those efforts. Indeed, difficulties and gaps still exist and *fragmentation* remains, *causing a lack of* sufficient collaborative action and *interoperability* between products.
- (8) *The specific structure, eligibility conditions and criteria laid down in this Regulation are particular to the dedicated short-term instrument and are determined by specific circumstances and the current emergency situation.*
- (9) In the current defence market context, marked by an increased security threat and the realistic perspective of a high-intensity conflict, Member States are rapidly increasing their defence budgets and aiming to carry out similar purchases of defence products. This has resulted in a level of demand which *could exceed* EDTIB manufacturing capacities, which are currently tailored for peacetime production.
- (10) As a result, strong price inflation can be anticipated, as well as longer delays in delivery time, potentially harming the security of the Union and the Member States. Defence industries need to secure the production capacity necessary to process orders, as well as critical raw materials and sub-components. In this context producers might privilege major orders, potentially leaving the most vulnerable countries, which lack the critical size and financial means to ensure large orders, exposed.

- (11) *The current geopolitical situation in the Eastern neighbourhood countries has shown that, whereas a duplication of efforts should be avoided, a diversified defence market can contribute to the variety of products immediately available on the market and can therefore be beneficial to an adequate satisfaction of Member States' urgent needs.*
- (12) Furthermore, efforts should be made so that the increased spending results in a much stronger EDTIB *throughout the Union*. Indeed, *increased national investments, made without coordination or cooperation, can deepen* ■ *fragmentation* ■ .
- (13) In light of the above challenges and related structural changes ■ , it appears necessary to speed up the adjustment of the *EDTIB*, *to* enhance its competitiveness and efficiency, *in accordance with Article 173 of the Treaty on the Functioning of the European Union (TFEU)*, and thereby *to* contribute to strengthening and reforming Member States' defence industrial capabilities. Addressing industrial shortfalls should include promptly tackling the most urgent gaps.
- (14) Common investment and defence procurement should, in particular, be incentivised, as such collaborative actions would ensure that the necessary change in the *EDTIB* takes place in a collaborative manner, avoiding further fragmentation *and increasing interoperability*.
- (15) To that end a dedicated short-term instrument for increasing collaboration by Member States in the defence procurement phase (the 'Instrument') should be established. The Instrument should incentivise Member States to pursue collaborative actions and, in particular, when they procure in order to fill those gaps, to do so jointly, increasing interoperability and strengthening and reforming their defence industrial capabilities.
- (16) *Without prejudice to the prerogatives of the budgetary authority, the resources allocated to the Instrument will be financed within the existing multiannual financial framework without impacting funding already committed to specific Union actions.*
- (17) The ■ Instrument should offset the complexity and risks associated with *common procurement* while allowing for economies of scale in the actions undertaken by Member States to reinforce and modernise the *EDTIB, with a particular focus on SMEs) and mid-capitalisation companies (mid-caps)*, thereby *increasing* the Union's capacity, resilience and security of supply. *Incentivising* common procurement would also result in reduced

costs in respect of the *administrative burden and lifecycle management* of relevant systems. *The Instrument should be accompanied by efforts to strengthen the European defence and security markets, services and systems, and to create a level-playing-field for suppliers from all Member States. Common procurement on a common market for the EDTIB allows for economies of scale and assures innovation and efficiency in production and technology.*

- (18) *The Instrument builds on and considers the work of the Defence Joint Procurement Task Force established by the Commission and the High Representative and Head of the European Defence Agency, in line with the joint communication of 18 May 2022, to coordinate very short term defence procurement needs and to engage with Member States and Union defence manufacturers to support joint procurement in order to replenish stocks, in particular in light of the support provided to Ukraine.*
- (19) *The security situation in Europe requires urgent reflection as to how to reduce excessive fragmentation via stand-alone Union initiatives and how to strategically link relevant instruments. The Instrument is intended to ensure coherence with existing collaborative Union defence-related initiatives, such as the Capability Development Plan, the Coordinated Annual Review on Defence, the European Defence Fund as well as the Permanent Structured Cooperation, and to generate synergies with other Union programmes. The Instrument is fully coherent with the ambition of the Strategic Compass for Security and Defence. Where appropriate, regional and international priorities, including those established in the North Atlantic Treaty Organization context, can also be taken into account if they are in line with Union priorities and do not prevent any Member State or associated country from participating, while seeking to avoid unnecessary duplication.*
- (20) As the Instrument aims to enhance the competitiveness and efficiency of the Union's defence industry, common procurement contracts will, in order to benefit from it, need to be placed with *contractors or subcontractors* which are established in the Union or in associated countries and are not subject to control by non-associated third countries or by non-associated third-country entities. In that context, control *over a contractor or subcontractor* should be understood to mean the ability to exercise a decisive influence on a *contractor or subcontractor* directly, or indirectly through one or more intermediate legal entities. Additionally, in order to ensure the protection of security and defence

interests of the Union and the Member States, the infrastructure, facilities, assets and resources of the contractors and subcontractors involved in the common procurement which are used for the purposes of that procurement should be located on the territory of a Member State or of an associated ■ country.

- (21) In certain circumstances, it should be possible to derogate from the principle that contractors and subcontractors involved in a common procurement supported by the Instrument are not subject to control by non-associated third countries or non-associated third-country entities. In that context, a ***contractor or subcontractor*** established in the Union or in an associated ■ country and controlled by a non-associated third country or a non-associated third-country entity should be able to participate as contractor ***or*** subcontractor involved in the common procurement, ***provided that*** strict conditions relating to the security and defence interests of the Union and its Member States, as established in the framework of the common foreign and security policy pursuant to Title V of the Treaty on European Union (TEU), including in respect of strengthening the EDTIB, are fulfilled.
- (22) Furthermore, common procurement procedures and contracts ***should*** also include a requirement that the defence product not be subject to ***a*** restriction by a non-associated third country or a non-associated third-country entity ***that limits Member States' ability to use that defence product. In urgent cases, where the capacity of the EDTIB to fill the most urgent and critical gaps in the stocks of Member States is not sufficient or where the EDTIB is not able to provide the necessary defence products in an adequate timeframe, that requirement should not apply if the procured products were in use prior to 24 February 2022 within the armed forces of a majority of the Member States participating in the common procurement. Where that derogation applies, countries participating in the common procurement should study the feasibility of replacing the components causing the restriction with restriction-free components from the Union or associated countries.***
- (23) Grants provided under the Instrument ***should*** take the form of financing not linked to cost and should be based on the achievement of results by reference to work packages, milestones or targets of the common procurement process in order to create the necessary incentive effect.

- (24) *In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission, with respect to the adoption of a multiannual work programme to set out the funding priorities and the applicable funding conditions. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council⁶.*
- (25) *To generate an incentive effect, the level of Union contribution for each action should be able to be differentiated based on factors such as ■ the complexity of the common procurement, ■ the characteristics of the cooperation or the number of participating Member States or associated countries or the inclusion of additional Member States or associated countries in existing cooperations, but should not exceed 15 % of the overall budget of the Instrument and should be capped at 15 % of the estimated value of the common procurement contract per consortium of Member States and associated countries. Due to the higher costs usually associated with conducting procurement procedures including large numbers of contractors, or which entail transfers of purchased equipment to third countries, that cap should be raised to 20 % of the overall budget and 20 % of the estimated value of the common procurement contract per consortium of Member States and associated countries, where Ukraine or Moldova is one of the recipients of additional quantities of defence products in the procurement action or where at least 15 % of the estimated value of the common procurement contract is allocated to SMEs or mid-caps as contractors or subcontractors. The procurement of additional quantities of defence products for Ukraine and Moldova should be possible, with the agreement of participating Member States, given the particular security situation of those two Union candidate countries in light of Russia's war of aggression against Ukraine.*
- (26) Member States and associated countries should appoint a procurement agent to conduct a common procurement on their behalf. The procurement agent should be a contracting authority, as defined in Article 2(1), point (1), of Directive 2014/24/EU⁷ and Article 3(1)

⁶ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

of Directive 2014/25/EU⁸ of the European Parliament and of the Council, that is established in a Member State or an associated ■ country, the European Defence Agency or an international organisation.

- (27) In accordance with Article 193(2) of Regulation (EU, Euratom) 2018/1046 the European Parliament and of the Council⁹ (the ‘Financial Regulation’), a grant may be awarded for an action which has already begun, provided that the applicant can demonstrate the need for starting the action prior to signature of the grant agreement. *Russia’s war of aggression against Ukraine has caused a drastic change in the defence market conditions to which the EDTIB has to adapt in a very time-constrained environment. Given the urgency and the seriousness of that adaptation as well as the existence of a risk of further fragmentation of the internal market and of the supply chains of relevant defence products, actions by Member States starting cooperation for joint procurement were immediately needed to send a significant signal to the market and the EDTIB. As a consequence, early financial support from the Union should be possible. By way of derogation from Article 193 of the Financial Regulation, it should thus be possible to provide, in the financing decision, for financial contributions to actions that cover periods from ■ 24 February 2022, even if they started before the grant application was submitted, provided that they are not finished before the signature of the grant agreement.*
- (28) *This Regulation is without prejudice to the rules laid down in Directive 2009/81/EC of the European Parliament and of the Council¹⁰. However, this Regulation provides for more specific eligibility requirements. Directive 2009/81/EC provides that Member States may include in their legislation the possibility to impose, in the contract documentation, requirements related to the protection of security of supply or the security of*

⁸ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

⁹ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

¹⁰ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76).

information. This Regulation builds upon those provisions of Directive 2009/81/EC and creates obligations for procurement agents regarding eligibility requirements to be included in contract documentation. Such obligations should prevail over conflicting legislation of the Member State and associated countries in which the procurement agent concerned is established.

- (29) *Commission Recommendation (EU) 2018/624¹¹ aims to facilitate cross-border market access for SMEs and intermediate companies in the defence sector. In particular, it calls on Member States to use the flexibility offered by Directive 2009/81/EC, such as that introduced in Article 21 thereof or that offered by the increased recourse to lots or electronic procurement. It also calls on Member States to alleviate the administrative burden related to procurement, in particular by keeping requests for information or selection criteria proportionate. In the context of this Regulation, procurement agents appointed by Member States and associated countries should make best use of the Commission recommendations in the conduct of common procurement actions in order to ensure fair access for SMEs to supported procurement.*
- (30) This Regulation lays down a financial envelope for the Instrument *for the period from... [date of entry into force of this Regulation] to 31 December 2025*, which is to constitute the prime reference amount within the meaning of point 18 of the Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources¹², for the European Parliament and for the Council during the annual budgetary procedure.
- (31) In accordance with the Financial Regulation, Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council¹³ and Council Regulations (EC, Euratom) No

¹¹ Commission Recommendation (EU) 2018/624 of 20 April 2018 on cross-border market access for sub-suppliers and SMEs in the defence sector (OJ L 102, 23.4.2018, p. 87).

¹² OJ L 433 I, 22.12.2020, p. 28.

¹³ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).

2988/95¹⁴, (Euratom, EC) No 2185/96¹⁵ and (EU) 2017/1939¹⁶, the financial interests of the Union are to be protected through proportionate measures, including measures relating to the prevention, detection, correction and investigation of irregularities, including fraud, to the recovery of funds lost, wrongly paid or incorrectly used, and, where appropriate, to the imposition of administrative penalties. In particular, in accordance with Regulations (Euratom, EC) No 2185/96 and (EU, Euratom) No 883/2013, the European Anti-Fraud Office (OLAF) has the power to carry out investigations, including on-the-spot checks and inspections, with a view to establishing whether there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union. The European Public Prosecutor's Office (EPPO) is empowered, in accordance with Regulation (EU) 2017/1939, to investigate and prosecute criminal offences affecting the financial interests of the Union as provided for in Directive (EU) 2017/1371 of the European Parliament and of the Council¹⁷. In accordance with the Financial Regulation, any person or entity receiving Union funds is to fully cooperate in the protection of the financial interests of the Union, grant the necessary rights and access to the Commission, OLAF, the Court of Auditors and, in respect of those Member States participating in enhanced cooperation pursuant to Regulation (EU) 2017/1939, the EPPO, and to ensure that any third parties involved in the implementation of Union funds grant equivalent rights.

- (32) Pursuant to Article 85(1) of Council Decision (EU) 2021/1764¹⁸, persons and entities established in overseas countries or territories are eligible for funding subject to the rules and objectives of the Instrument and possible arrangements applicable to the Member State to which the relevant overseas country or territory is linked.

¹⁴ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ L 312, 23.12.1995, p. 1).

¹⁵ Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ L 292, 15.11.1996, p. 2).

¹⁶ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ L 283, 31.10.2017, p. 1).

¹⁷ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ L 198, 28.7.2017, p. 29).

¹⁸ Council Decision (EU) 2021/1764 of 5 October 2021 on the association of the Overseas Countries and Territories with the European Union including relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other (Decision on the Overseas Association, including Greenland) (OJ L 355, 7.10.2021, p. 6).

- (33) *For the purposes of this Regulation, defence products should be understood to mean products within the scope of Directive 2009/81/EC, as set out in Article 2 of that Directive, in particular as product types included in the list of arms, munitions and war material set out in Council Decision 255/58 of 15 April 1958¹⁹. That list includes only equipment which is designed, developed and produced for specifically military purposes. However, the list is generic and is to be interpreted in a broad way in light of the evolving character of technology, procurement policies and military requirements leading to the development of new types of equipment, for instance on the basis of the Common Military List of the Union. For the purposes of this Regulation, defence products should also be understood to cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material.*
- (34) *Pursuant to Article 4(2) TEU, national security remains the sole responsibility of each Member State. Member States determine among themselves the arrangements applicable to the protection of classified information for the purposes of the common procurements, in accordance with national laws and regulations.*
- (35) *The Commission protects EU classified information in accordance with the security rules set out in Commission Decision (EU, Euratom) 2015/444²⁰. In line with the Agreement of 4 May 2011 between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union²¹ and Council Decision 2013/488/EU²², Member States provide an equivalent degree of protection to EU classified information to that provided by the security rules of the Council set out in Decision 2013/488/EU.*
- (36) *The Commission should draw up an evaluation report for the Instrument and submit it to the European Parliament and to the Council not later than 31 December 2026. The evaluation report should evaluate the impact and effectiveness of the actions taken*

¹⁹ Decision defining the list of products (arms, munitions and war material) to which the provisions of Article 223(1)(b) — now Article 296(1)(b) — of the Treaty apply (doc. 255/58). Minutes of 15 April 1958: doc. 368/58.

²⁰ Commission Decision (EU, Euratom) 2015/444 of 13 March 2015 on the security rules for protecting EU classified information (OJ L 72, 17.3.2015, p. 53).

²¹ OJ C 202, 8.7.2011, p. 13.

²² Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information (OJ L 274, 15.10.2013, p. 1).

under the Instrument, while also thinking critically ahead about ways to secure all the components needed in the Union defence supply chain with due regard to the importance of security of supply arrangements, and the functioning of the EDTIB. Furthermore, the evaluation report should identify shortfalls and critical dependencies on non-associated third countries in respect of raw materials, components and production capacities, building on work undertaken in the context of the Observatory of Critical Technologies. The evaluation report should inform the Commission's work on technology roadmaps, including mitigation measures to address those shortfalls and critical dependencies.

- (37) *This Regulation is without prejudice to Member States' discretion in respect of their policy on the export of defence-related products.*
- (38) Since the objectives of this Regulation cannot be sufficiently achieved by the Member States but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (39) *In order to allow for the implementation of this Regulation to start as soon as possible, it should enter into force as a matter of urgency,*

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation establishes *a short-term instrument for the reinforcement of* the European defence industry ■ through common procurement ■ (the ‘Instrument’), *for the period from ... [date of entry into force of this Regulation] to 31 December 2025.*

Article 2

Definitions

For the purposes of this Regulation, the following definitions apply:

- (1) ‘common procurement’ means a ■ procurement jointly conducted by at least three Member States;
- (2) ‘control’, with regard to *a contractor or subcontractor*, means the ability to exercise a decisive influence over a *contractor or subcontractor* directly, or indirectly through one or more intermediate legal entities;
- (3) ‘executive management structure’ means a body of a legal entity, appointed in accordance with national law, and, where applicable, reporting to the chief executive officer, which is empowered to establish that legal entity’s strategy, objectives and overall direction, and which oversees and monitors management decision-making;
- (4) ‘non-associated third-country entity’ means a legal entity that is established in a non-associated third country or, where it is established in the Union or in an associated country, that has its executive management structures in a non-associated third country;
- (5) ‘procurement agent’ means a contracting authority *as defined in Article 2(1), point (1), of Directive 2014/24/EU and Article 3(1), of Directive 2014/25/EU* that is established in a Member State or an associated country, *the European Defence Agency or an*

international organisation and that is designated by Member States and associated countries to conduct a common procurement on their behalf **■** ;

- (6) *‘defence products’ means products that fall within the scope of Directive 2009/81/EC, as set out in Article 2 thereof, including combat medical equipment;*
- (7) *‘classified information’ means information or material, in any form, the unauthorised disclosure of which could cause varying degrees of prejudice to the interests of the Union, or of one or more of the Member States, and which bears an EU classification marking or a corresponding classification marking, as established in the Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union²³;*
- (8) *‘sensitive information’ means unclassified information and data that are to be protected from unauthorised access or disclosure because of obligations laid down in Union or national law, where applicable, or in order to safeguard the privacy or security of a natural or legal person.*

Article 3

Objectives

1. The Instrument has the following objectives:
 - (a) to foster the competitiveness and efficiency of the European Defence Technological and Industrial Base (EDTIB), *including SMEs and mid-caps*, for a more resilient *and secure* Union, in particular by speeding up, in a collaborative manner, the adjustment of industry to structural changes, including through *the creation and* ramp-up of its manufacturing capacities *and the opening of the supply chains for cross-border cooperation throughout the Union, thereby allowing the EDTIB to provide the defence products needed by Member States*;
 - (b) to foster cooperation in defence procurement *processes* between participating Member States *in order to contribute* to solidarity, *prevent crowding-out effects*,

²³ *OJ C 202, 8.7.2011, p. 13.*

increase the effectiveness of public spending and reduce excessive fragmentation, ultimately leading to an increase in the standardisation of defence systems and greater interoperability between Member States' capabilities, while preserving the competitiveness and diversity of products available to Member States and in the supply chain.

2. The objectives set out in paragraph 1 shall be pursued with an emphasis on strengthening and developing the **EDTIB throughout the Union** to allow it to address, in particular, the most urgent and critical defence **product** needs, especially those revealed or exacerbated by the response to the Russian war of aggression against **Ukraine, such as the shipment of defence products to Ukraine**, taking into account the **objectives of the Strategic Compass for Security and Defence and considering the** work of the Defence Joint Procurement Task Force. *This may be achieved through the replenishment of stockpiles which are depleted as a result of defence-product transfers to Ukraine, including with equipment available on the market, as well as through the replacement of obsolete equipment and the reinforcement of capabilities.*

Article 4

Budget

1. The financial envelope for the implementation of the Instrument for the period from ... [date of entry into force of this Regulation] to 31 December **2025** shall be EUR **300** million in current prices.
2. The financial envelope referred to in paragraph 1 may be used for technical and administrative assistance for the implementation of the Instrument, such as preparatory, monitoring, control, audit and evaluation activities including corporate information technology systems.
3. Resources allocated to Member States under shared management may, at their request, be transferred to the Instrument subject to the conditions set out in the relevant provisions of Regulation (EU) 2021/1060 of the European Parliament and of the Council²⁴. The Commission shall implement those resources directly in accordance with Article 62(1), first subparagraph, point (a), of the Financial Regulation. Those resources shall be used for the benefit of the Member State concerned.
4. Budgetary commitments for activities extending over more than one financial year may be broken down over several years into annual instalments.

Article 5

■ Associated *countries*

²⁴ Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (OJ L 231, 30.6.2021, p. 159).

The Instrument shall be open to the participation of those members of the European Free Trade Association which are members of the European Economic Area (associated countries), in accordance with the conditions laid down in the Agreement on the European Economic Area.

Article 6

Implementation and forms of Union funding

1. The Instrument shall be implemented under direct management in accordance with the Financial Regulation.
2. The Union funding shall be used to incentivise cooperation between Member States to fulfil the objectives set out in Article 3. The financial contribution shall be established taking into consideration the collaborative nature of the common procurement *and the need* to create the incentive effect necessary to induce cooperation.
3. *By way of derogation from Article 193 of the Financial Regulation*, financial contributions may, where necessary for the implementation of an action, cover *actions started* prior to the date of the request for financial contributions for that action, provided that *those* actions did not start prior to 24 February 2022 *and have not been completed before the signature of the grant agreement. Retroactively eligible actions shall comply with all eligibility criteria provided for in Articles 8 and 9 of this Regulation.*
4. Grants implemented under direct management shall be awarded and managed in accordance with Title VIII of the Financial Regulation.

Article 7

Use of financing not linked to costs

1. *Grants shall take the form of financing not linked to costs, pursuant to Article 180(3) of the Financial Regulation.*
2. *The level of the Union contribution attributed to each action may be defined on the basis of factors such as:*

- (a) *the complexity of the common procurement, for which a proportion of the estimated value of the common procurement contract and the experience gained in similar actions may serve as an initial proxy;*
 - (b) *the characteristics of the cooperation which are likely to give rise to greater interoperability outcomes and long-term investment signals to industry; or*
 - (c) *the number of participating Member States and associated countries or the inclusion of additional Member States or associated countries in existing cooperations.*
3. *The Union financial contribution to each action shall not exceed 15 % of the amount referred to in Article 4(1) and shall be capped at 15 % of the estimated value of the common procurement contract per consortium of Member States and associated countries.*
4. *By way of derogation from paragraph 3 of this Article, the Union financial contribution to each action may amount to up to 20 % of the amount referred to in Article 4(1) and shall be capped at 20 % of the estimated value of the common procurement contract where at least one of the following conditions is met:*
- (a) *Ukraine or Moldova are one of the recipients of additional quantities of defence products in the procurement action, in accordance with Article 9(3);*
 - (b) *at least 15 % of the estimated value of the common procurement contract is allocated to SMEs or midcaps as contractors or subcontractors.*

Article 8

Eligible actions

1. Only actions fulfilling all of the following criteria shall be eligible for **Union** funding *under the Instrument*:
- (a) they involve cooperation *between the eligible entities referred to in Article 10* for common procurement **addressing** the most urgent and critical defence products **needs and** implementing the objectives set out in Article 3;

- (b) they involve new cooperation, *including within an existing framework*, or an extension of existing cooperation to *at least one* new Member *State* or associated *country*;
- (c) they are carried out by a consortium of at least three Member States;
- (d) they fulfil the additional conditions set out in Article 9.

2. The following actions shall not be eligible for funding:

- (a) actions for the common procurement of goods or services which are prohibited by applicable international law;
- (b) actions for the common procurement of lethal autonomous weapons without the possibility for meaningful human control over selection and engagement decisions when carrying out strikes against humans.

Article 9

Additional *eligibility* conditions

1. Member States and associated ■ countries participating ***in a common procurement*** shall appoint, ***by unanimity***, a procurement agent to act on their behalf for the purposes of that common procurement. The procurement agent shall carry out the procurement procedures and conclude the resulting ***contracts*** with contractors on behalf of the participating ***countries. The procurement agent may participate in the action as a beneficiary and may act as the coordinator of the consortium and may therefore be able to manage and combine funds from the Instrument and funds from the participating*** Member States and associated countries.

This Regulation is without prejudice to the rules on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security laid down in Directive 2009/81/EC.

2. The procurement procedures referred to in paragraph 1 shall be based on an agreement to be signed by the participating Member States and associated countries with the procurement agent under the conditions set out in the work programme. ***The agreement shall, in particular, determine the practical arrangements governing the common procurement and the decision-making process on the choice of the procedure, the assessment of the tenders and the award of the contract.***
3. ***The agreement referred to in paragraph 2 may authorise the procurement agent to procure additional quantities of the concerned defence product for Ukraine or Moldova. Such an authorisation shall be unanimously approved by the Member States participating in the common procurement.***

Such additional procurement arrangements shall be without prejudice to applicable Union law and be in line with Member States' national laws and regulations relating to the export of defence-related products.

4. Common procurement procedures and contracts shall include the participation requirements for contractors and subcontractors involved in the common procurement set out in paragraphs 5 to **12**.
5. Contractors and subcontractors involved in the common procurement shall be established and have their executive management structures in the Union *or in an associated country*. They shall not be subject to control by a non-associated third country or by a non-associated third-country entity *or, alternatively, they shall have been subject to screening within the meaning of Regulation (EU) 2019/452 of the European Parliament and of the Council²⁵ and, where necessary, to mitigation measures, taking into account the objectives set out in Article 3 of this Regulation*.
6. By way of derogation from paragraph 5 of this Article, a legal entity established in the Union or in an associated █ country and controlled by a non-associated third country or by a non-associated third-country entity may participate █ in the common procurement █ if it provides guarantees *verified* by the Member State or associated █ country in which the contractor *or subcontractor involved in the common procurement* is established. *The guarantees shall provide assurances that the involvement of the contractor or subcontractor involved in the common procurement does not contravene the security and defence interests of the Union and the Member States as established in the framework of the common foreign and security policy pursuant to Title V of the TEU, or the objectives set out in Article 3 of this Regulation*.
- █
7. *The guarantees referred to in paragraph 6 of this Article may be based on a standardised template provided by the Commission, assisted by the committee referred to in Article 16, and shall be part of the tender specifications, in order to ensure a harmonised approach throughout the Union*. The guarantees shall, in particular, substantiate that, for the purposes of the common █ procurement, measures are in place to ensure that:

²⁵ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79 I, 21.3.2019, p. 1).

- (a) control over the contractor or subcontractor involved in the common procurement is not exercised in a manner that restrains or restricts its ability to fulfil the order and to deliver results; and
- (b) access by a non-associated third country or by a non-associated third-country entity to *classified* information *relating to the common procurement* is prevented and the employees or other persons involved in the common procurement have *a* national security clearance issued by a Member State *or an associated country in accordance with national laws and regulations*.

8. *Procurement agents shall provide the Commission with a notification on the mitigation measures applied within the meaning of Regulation (EU) 2019/452 referred to in paragraph 5 of this Article or the guarantees referred to in paragraph 6 of this Article. Further information on the mitigation measures applied or the guarantees shall be made available to the Commission upon request. The Commission shall inform the committee referred to in Article 16 of this Regulation of any notification provided in accordance with this paragraph.*
9. The infrastructure, facilities, assets and resources of the contractors and subcontractors involved in the common procurement which are used for the purposes of the common procurement shall be located on the territory of a Member State or of an associated country. Where *contractors or subcontractors* involved in the common procurement *have no* readily available *alternatives or relevant infrastructure, facilities, assets and resources* in the Union or in an associated country, they may use their infrastructure, facilities, assets and resources which are located or held outside the territory of the Member States or of the associated countries, provided that such use does not contravene the security and defence interests of the Union and the Member States and is consistent with the objectives set out in Article 3.
10. Common procurement procedures and contracts shall also include a requirement that the defence product not be subject to a restriction by a non-associated third country or a non-associated third-country entity *directly, or indirectly through one or more intermediary legal entities, which limits the ability of a Member State to use that defence product*.
11. *By way of derogation from paragraph 10 and in light of the geopolitical situation and the urgent need to procure defence products with the support of the Instrument, the*

requirement referred to in paragraph 10 shall not apply to urgent and critical defence products, provided that both of the following conditions are met:

- (a) Member States or associated countries participating in the common procurement commit to studying the feasibility of replacing the components that cause the restriction with an alternative, restriction-free, component Union origin;*
- (b) the procured defence products were in use prior to 24 February 2022 within the armed forces of a majority of the Member States participating in the common procurement.*

■

12. *The cost of components originating in the Union or associated countries shall not be lower than 65 % of the estimated value of the end product. No components shall be sourced from non-associated third countries that contravene the security and defence interests of the Union and the Member States, including respect for the principle of good neighbourly relations.*
13. For the purposes of this Article, ‘subcontractors involved in the common procurement’ means *any legal entity which provides critical inputs that possess unique attributes essential for the functioning of a product and which is allocated at least 15 % of the value of the contract.*

Article 10

Eligible entities

Provided that they comply with the eligibility criteria set out in Article 197 of the Financial Regulation, ■ entities ■ eligible for funding *are*:

- (a) public ■ authorities of Member States;*
- (b) public authorities of associated countries;*
- (c) procurement agents.*

Article 11

Award criteria

- 1.** The Commission shall evaluate proposals on the basis of the following *criteria for the awarding of the grants*:
- (a) the number of Member States or associated countries participating in each common procurement;
 - (b) *the estimated value of the common procurement*;
 - (c) *a demonstration of the action's contribution to the strengthening of the competitiveness and to the adaptation, modernisation and development of the EDTIB in order* to allow it to address, in particular, the most urgent and critical defence-product needs, as referred to in Article 3(2), including with regard to ■ delivery lead times, ■ availability and supply;
 - (d) *a demonstration of the action's contribution to the replenishment of stockpiles, including those depleted as a result of the response to Russia's war of aggression against Ukraine, to the replacement of obsolete equipment, and to the reinforcement of capabilities, as referred to in Article 3(2)*;
■
 - (e) the *extent* of the *action's contribution* to strengthening cooperation among Member States or associated countries, *in particular through the proportional sharing of technical and financial risks and opportunities based on a genuinely cooperative concept, as well as to the* ■ interoperability of products *procured under this Regulation*;
■
 - (f) *the action's contribution to overcoming obstacles to common procurement*;

- (g) *the extent of the action's contribution to the competitiveness and adaptation of the EDTIB to structural changes, including technological changes, through, inter alia, the envisaged creation or ramping-up of manufacturing capacities, the reservation of manufacturing capacities, and the security of supply;*
 - (h) *the participation of SMEs and mid-caps;*
 - (i) *the creation of new cross-border cooperation between contractors and subcontractors in the supply chains throughout the Union;*
 - (j) the quality and efficiency of the plans for carrying out ■ the action.
2. *The work programme shall lay down further details concerning the application of the award criteria laid down in paragraph 1, including any weighting to be applied. The work programme shall not set individual thresholds.*
 3. *The Commission shall share the call evaluation report with the committee referred to in Article 16. The Commission shall share with the applicants a detailed report of the outcome of the evaluation of their proposal.*

Article 12

Work programme

1. The Instrument shall be implemented through a **multiannual** work programme pursuant to Article 110 of the Financial Regulation (the 'work programme').
2. The Commission shall, by means of an implementing act, adopt the work programme. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 16(3).

3. *The work programme shall set out:*

- (a) the minimum financial size of the joint procurement actions;*
- (b) the indicative amount of financial support for actions carried out by the minimum number of Member States as required by Article 8(1), point (c);*
- (c) incentives for procurement of a higher value and the inclusion of additional Member States or associated countries in an existing cooperation;*
- (d) the overall amount of the Union contribution to each funding priority;*
- (e) a description of actions involving cooperation for common procurement;*
- (f) the estimated value of common procurement;*
- (g) the procedure for the evaluation and selection of proposals;*
- (h) a description of the milestones, which are to be designed in such a way as to mark substantial progress in the implementation of actions, the results to be achieved and the associated amounts that are to be disbursed;*
- (i) arrangements for the verification of the milestones referred to in point (h), the fulfilment of conditions and the achievement of results; and*
- (j) the methods for determining and, where applicable, adjusting the funding amounts.*

4. *The work programme shall set out funding priorities in line with the needs referred to in Article 3(2). Those funding priorities shall aim to ensure the availability of sufficient quantities of the most urgent and critical defence products to fill the most urgent capability gaps, as referred to in Section 4 of the joint communication on ‘the Defence Investment Gaps Analysis and Way Forward’.*

Article 13

Application of the rules on classified information and sensitive information

1. Within the scope of this Regulation:

- (a) Member States and associated countries participating in a common procurement shall determine, among themselves, the arrangements applicable to the protection of classified information for the purposes of that common procurement, in accordance with national laws and regulations.*
- (b) each Member State shall ensure that it offers a degree of protection of EU classified information equivalent to that provided by the security rules of the Council set out in Decision 2013/488/EU;*
- (c) the Commission shall protect EU classified information received in relation to the Instrument in accordance with the security rules set out in Decision (EU, Euratom) 2015/444.*

2. The Commission shall set up a secured exchange system in order to facilitate the exchange of classified information and sensitive information between the Commission and the Member States and associated countries and, where appropriate, with the applicants and the recipients. That system shall take into account Member States' national security regulations.

Article 14

Monitoring and reporting

- 1. The Commission shall monitor the implementation of the Instrument and shall report to the European Parliament and to the Council on progress made. To that end, the Commission shall put in place the necessary monitoring arrangements.**

2. By 31 December **2026**, the Commission shall draw up a report evaluating the impact and effectiveness of the actions taken under the Instrument (the ‘evaluation report’) and shall submit it to the European Parliament and to the Council.
3. The evaluation report shall build on consultations with Member States and key stakeholders and shall **■** assess the progress made towards the achievement of the objectives set out in Article 3. ***It shall evaluate potential bottlenecks in the functioning of the Instrument and, in particular, the contribution of the Instrument to:***
 - (a) *cooperation between Member States and associated countries, including the creation of new cross-border cooperation;*
 - (b) *the participation of SMEs and mid-caps in the actions;*
 - (c) *the creation of new cross-border cooperation between contractors and subcontractors in supply chains throughout the Union;*
 - (d) *the strengthening of the EDTIB’s competitiveness and the adaptation, modernisation and development to allow it to address, in particular, the most urgent and critical defence products needs;*
 - (e) *the overall value of common procurement contracts for the most urgent and critical defence products supported by the Instrument.*
4. ***Building on available contributions from the procurement agent, such as feasibility studies pursuant to in Article 9(11), point (a), and, where relevant, on work undertaken in the context of the Observatory of Critical Technologies, the evaluation report shall identify shortfalls and critical dependencies on non-associated third-countries with regard to products procured with financial support from the Instrument. The evaluation report shall inform the Commission’s work on technology roadmaps, including mitigating measures to address those shortfalls and critical dependencies. The Commission shall consider proposing measures to mitigate shortfalls and critical dependencies on non-associated third countries in the context of the European Defence Fund, where appropriate, thinking critically ahead about ways to secure all the components needed in the EDTIB’s supply chain.***

5. *All reporting requirements of Member States shall be without prejudice to national laws and regulations as well as Article 346 TFEU.*

Article 15

Information, communication and publicity

1. ***Without prejudice to the applicable Union law or national laws and regulations for the protection of classified information and sensitive information***, the recipients of Union funding shall acknowledge the origin and ensure the visibility of the Union funding, in particular when promoting the actions and their results, by providing coherent, effective and proportionate targeted information to multiple audiences, including the media and the public.
2. The Commission shall implement information and communication actions relating to the Instrument, to actions taken pursuant to the Instrument and to the results obtained.
3. Financial resources allocated to the Instrument shall contribute to the corporate communication of the political priorities of the Union, insofar as those priorities are related to the objectives set out in Article 3.

Article 16

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. The European Defence Agency shall be invited to provide its views and expertise to the committee as an observer. The European External Action Service shall also be invited to assist the committee.
3. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Where the committee delivers no opinion, the Commission shall not adopt the draft implementing act and Article 5(4), third subparagraph, of Regulation (EU) No 182/2011 shall apply.

Article 17

Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at ...,

For the European Parliament

For the Council

The President

The President