

**EUROPEAN COMMISSION COMMUNICATION ON THE
DEFENCE AND SECURITY SECTOR:
TOWARDS A DEFINITION OF A STRATEGIC EDTIB?**

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September 2013

The European Commission's communication on the defence and security sector, published on 24 July 2013, is one of the contributions from European institutions to the preparation of the European Council on defence in December 2013. This communication is also part of a broader framework of European Commission projects concerning the defence industry. In September 2011, following the implementation of two "defence package" directives¹, the European Commission, on the initiative of its President José Manuel Barroso, launched the Defence Task Force, made up of "market" and "industry" Directorate-General services in collaboration with the European Defence Agency (EDA) and the European External Action Service (EEAS). A number of topic notes had already been circulated concerning the Defence Task Force contributing to a European Commission communication on industrial policy scheduled for publication in October 2012. In the end, with a European Council on defence issues scheduled for the end of 2013, it was decided to produce a communication specific to the defence industry.

This communication on the defence industry is not the first from the European Commission. It succeeds those published in 1996, 1997, 2003 and 2007 (the latter being accompanied by two draft directives

making up the "defence package"). These communications demonstrate the European Commission's interest in a sector which also falls within the competency of the Council due to its implications on the Common Security and Defence Policy (CSDP). Over time, a sort of European Commission defence industry body of doctrine has been built up. What can be learnt from this new communication?

I. Security interests or market relating to sovereignty: the debate is not clear cut

From the outset, the European Commission has justified its involvement in the defence industry by the cost incurred by the absence of a European defence industries market. In its initial communication in 1996, the European Commission referred to a study conducted in 1992 evaluating the cost of "non-Europe in the area of security and defence" at between 5 and 11 billion ecus² in a total market worth an estimated 65 to 70 billion ecus³. Since then, the European Commission has been pushing member states to open up national defence markets, hence the two directives adopted in 2009. Directive 2009/81/EC on the award of contracts in the fields of defence and security is intended to limit the possibility of invoking Article 346 of the Treaty on the Functioning of the

¹ The two directives were adopted in 2009: Directive 2009/43/EC of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community and Directive 2009/81/EC of 13 July 2009 on the coordination of procedures for the award of certain work contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, amending Directives 2004/17/EC and 2004/18/EC.

² The ecu (virtual European currency) has the same value as the euro.

³ Commission communication "The Challenges Facing the European Defence-Related Industry, a Contribution for Action at European Level" COM(96) final, Brussels, Commission of the European Communities, 24 January 1996.

European Union (TFEU) which makes it possible to limit defence procurement to national companies when essential security interests are at stake.

How the opening up of defence markets affects governments and companies

It would, however, be a mistake to think that governments and companies are always opposed to opening up European defence markets. In reality, it all depends on the interests of the different players involved. The more developed a government's national defence industry is, the more it tends to close its market. Conversely, the more a company is consolidated at European level, the more it benefits from the opening up of European markets due to being represented in several countries⁴.

On a more fundamental level, there are two opposing theories. One considers that the defence industry is an industrial sector like any other, dedicated to integrating into globalisation and internationalisation. For proponents of this school of thought, competition plays a beneficial role: enabling greater competitiveness and encouraging innovation while driving down the cost of materials. The other school starts from the premise that the defence industry would not exist if governments did not need security. Advocates of this school of thought consider that the defence industry is a government fabrication where research and development (R&D) is financed by the state rather than manufacturers in a bid to

develop the cutting-edge technologies required to manufacture arms which ensure military superiority. They also consider that non-European union export markets are governed by foreign and security policy considerations rather than economic considerations: a country buys arms from another country in order to examine its protection and it does not matter whether they obtain the best equipment at the best cost. Of course, there are a wide range of standpoints between these two schools of thought. Ultimately, the question is to find out the following: when we define the framework regulating the defence industry, what is the best possible balance between competition law rules and the introduction of exorbitant common law rules relating to state security interests and the guarantee of state sovereignty. The Commission's recent communication offers guarantees to both schools in relation to this issue.

In the introduction, the communication stresses the fact that the defence technological and industrial base is one of the key elements for ensuring the security of European citizens and the interests of the European Union. It also states that in order to assume its responsibilities for its security, the European Union needs "a certain degree of strategic autonomy [...] to be able to decide and to act without always depending on the capabilities of third parties." It concludes that "Security of supply, access to critical technologies and operational sovereignty are therefore crucial."

This paragraph satisfies all those who think that the issue of the European defence industry cannot be limited to the creation of a European defence equipment market. This opens up the way to public policy mechanisms designed to ensure the development of key defence

⁴ This analysis does not cover the official discourse. Germany and the United Kingdom officially support the opening up of defence markets. This does not, however, exclude choosing national suppliers in order to keep technological competencies and, in certain cases, jobs on domestic soil.

technologies exempt from market rules and according to a system which would see Europeans defining their own strategic interests. In this context, the European Commission's call for a revision of the European defence strategy, which is predicted, has become a call to Europeans to define a strategic approach covering military and non-military aspects. This recommendation is legitimate in the sense that it will not be possible to define these critical technologies in a European framework unless Europeans define their strategic interests. Also, the European Commission asks that these States develop an industrial strategy based on a shared vision of the European Union's strategic degree of autonomy.

Conversely, advocates of the theory that the defence industry should benefit from exorbitant common law rules relating to competition can feel legitimate concern about the paragraph of the communication dedicated to measures for combating market distortion. Paradoxically, opposition comes both from European countries with an arms industry and those without.

For countries with an insignificant or no arms industry, the question concerns the offsets (financial or commercial compensation) intended to develop local industry. Directive 2009/81/EC on defence and security procurement removed these and through its communication the Commission undertakes to obtain a rapid elimination of these offsets in order to avoid distortion in the European market. Countries with an insignificantly developed but very real industry, particularly in terms of the supply chain, fear that this policy will lead to the rapid disappearance of their industrial capabilities. This concerns Central European countries, former members of the Warsaw Pact and countries such as

Denmark and the Netherlands. It is certainly not a question of criticising a measure intended to eliminate a practice which created useless industrial duplications, but there is a risk that these countries will turn away from Europe to acquire military and CSDP materials. It would be necessary for these countries to be integrated into the European Defence Technological and Industrial Base (DTIB) via cooperation programmes as these programmes are excluded from the scope of the directive on defence and security procurement, with a policy of industry specialisation in certain segments. Unfortunately, this cannot be done overnight. A transition period should have been put in place with incentive mechanisms for cooperation agreements to gradually eliminate the practice of offsets. Today, the stringent application of market rules may lead certain countries to turn away from the construction of defence Europe, which is not the desired result.

The question of state aids is up for debate

There is also concern regarding state aids. The Commission indicates that dispensation from state aids in the military sector notification rules is only permitted if these aids are granted for essential security interests and therefore covered by Article 346 of the TFEU. A few years ago, the European Defence Agency carried out an assessment on state aids which resulted in casting doubt over the nature of defence R&D financing, suggesting that it could be considered as state aid⁵.

⁵ European Defence Agency, "Level playing field for European defence industries, the role of ownership and public aids practices", ISDEFE (Ingenieria de Sistemas para la Defensa de Espana) and Fraunhofer Institut für Naturwissenschaftlich Technische Trendanalysen, March 2009.

Directive 2009/81/EC certainly excluded research and technology (R&T) from the scope of the directive, but some people raise questions about the fate of R&D. With the reduction in defence budgets, it is likely that demonstration policies will increase in order to maintain the technological capabilities of defence companies. In this case, the concern is to maintain Europe's technological independence, but isn't there a risk of seeing this financing redefined as state aid unjustified by essential security interests in the eyes of the European Commission and the European Union Court of Justice? At this level, it is necessary that close dialogue is undertaken between the European Commission and the member states, particularly those with an arms industry. As part of communication preparation work, the Letter of Intent (LoI) countries addressed a contribution asking the Commission to strengthen dialogue with the main countries concerned by defence industry issues. The Commission seemed to address this requirement by setting up specific consultation mechanisms with the national authorities, the European Defence Agency and the EEAS to implement the road map which constitutes this communication.

II. How can the European Defence Technological and Industrial Base (EDTIB) be defined?

How can the defence technological and industrial base be defined to ensure European strategic autonomy? **The Commission has not stated its position but implicitly requires the member states to define this EDTIB.**

To its credit, France opened the debate with the notion of European defence economic operator (EDEO) which was submitted as a French contribution to the work of the Defence Task Force. Three criteria were listed to define this notion of EDEO:

- effective control of the company;
- the location of design departments and the efficient use of technologies and design;
- the ratchet effect on the supply chain.

In particular, this definition aims to "isolate" "bogus" European companies located on European soil but which are actually foreign, usually American or Israeli. Today the problem stems mainly from the fact that European countries have no control over technologies financed with European funds even if manufacturing takes place on European soil. This is particularly the case of American companies in Europe. The American ITAR (International Traffic in Arms Regulation) regulation on the control of exports in most cases results in the Americanisation of these technologies, even if they are developed in Europe. The risk is twofold in this case: the risk of losing security of supply as the financed technology is not freely available, and the risk of weakening the European DTIB as the funds allocated to these "bogus European companies" will be lacking in the European DTIB. The French definition is therefore beneficial in the sense that it would make it possible to remove these companies from calls for tender issued by European countries for equipment which is necessary to strategic autonomy. However, the scope of the strategic European DTIB (SEDITB) within the EDTIB remains to be defined, i.e. the DTIB required to maintain strategic autonomy.

In this regard, **the following proposal for defining the strategic European DTIB (SEDTIB)** may be made.

SEDTIB definition proposal

In its communication, the Commission clearly calls upon the member states to agree upon a common definition. However, we can suppose that at least two problems will arise.

First problem. Each country has its own definition of strategic autonomy. The more a country has a defence industry developed according to a broad conception of strategic autonomy, notably linked to its foreign policy, conception of sovereignty and feedback from military operations, the broader the view it has of the critical technologies that must be kept in Europe. We can also attempt to rank the size of the SEDTIB according to the country: France will define the largest scope, closely followed by the United Kingdom then Germany, Italy and so on.

The question is therefore to find out which rules should be applied to define the common scope of strategic European technologies. We can assume that if negotiations are conducted based on national lists, it will be impossible to determine a common scope. Even if we discount the opinion of the smaller countries, which will define an extremely restricted or zero scope, it will be difficult for the three largest European countries in the field of arms - France, the United Kingdom and Germany - to define a common scope. The British today accept a certain level of dependency upon the United States which France would never accept. Germany's low level of experience concerning the dependencies encountered during military operations will result in it

defining a scope which is more limited than France's.

The only solution is to combine the national scopes rather than negotiating a common list. This would correspond to the maximum level of ambition of the European Union common security and defence policy. It would be paradoxical to see the European Union's ambition in terms of foreign and defence policy lower than that of one of its member states. Let us imagine, as a comparison, that Germany wants Europe to have a lower ambition than its own in terms of economics. European strategic autonomy will be defined rather than national strategic autonomy. In other words, **the scope of European strategic autonomy must be broader than national strategic autonomy, i.e. the defined essential security interests referred to in Article 346 of the TFEU are limited to what is strictly necessary.** The notion of EDEO must also be used within the framework of the SEDTIB in order to exclude suppliers not offering guarantees in terms of security of supply and which would weaken the EDEO by making it impossible to achieve the strategic autonomy objective.

The second problem may stem from the large number of lists of key technological capabilities established on a national base which do not have the goal of defining a SEDTIB necessary for strategic European autonomy but of making it possible to invoke Article 346 of the TFEU and therefore of circumventing, under the guise of strategic autonomy, the directive on defence and security procurement in order to protect national industries.

Ultimately, military equipment and technologies will be divided into four categories:

- at the top will be sovereign technologies, the protection of which is organised on a national base and which are covered by Article 346 of the TFEU;
- the SEDTIB will be in a second category. This is covered by Directive 2009/81 on defence and security procurement. The notion of EDEO will apply to the SEDTIB in order to ensure security of supply and strategic autonomy. This SEDTIB would benefit from specific European legislation designed to protect its strategic nature, particularly in terms of R&D financing and control of strategic assets, i.e. destined to ensure the effective control and use of technologies in a European framework;

- military technologies and equipment considered as non-strategic would be in a third category. Directive 2009/81 would also apply to this category. On the other hand, the notion of EDEO would not apply to this category as we would consider that dependency with regard to non-European equipment and technologies is acceptable for this category of equipment;
- finally, a fourth category would contain defence and security equipment for which it is not necessary to invoke the specific provisions of Directive 2009/81 on defence and security procurement for calls for tender. In the latter case, the provisions of 2004 directives on procurement would be applicable.

The four categories are represented in the table below:

	Category 1	Category 2	Category 3	Category 4
Type of military technology and equipment	Military technology and equipment concerning the essential security interests of the member states	Technology and equipment which is strategic for the EU	Technology and equipment which is not strategic for the EU	Technology and equipment which is not of a specifically military nature
Legal instruments	Art 346 of TFEU, national instruments	Directive 2009/81 on defence and security procurement, in addition to which is the notion of European defence economic operator, specific European instruments on the control of assets and R&D financing (to be defined)	Directive 2009/81 on defence and security procurement	Directives 2004/17 and 2004/18 on procurement

As we have seen, this classification would result in reviewing the existing one which only takes into account national strategic interests and which does not differentiate between military technology and equipment which could be described as basic and strategic military technology and equipment. In particular, we can fear that Directive 2009/81 on defence and security procurement, such as it exists today, will, by failing to protect strategic European technology, lead states to abuse Article 346 of the TFEU. It is also necessary to define instruments required to protect and develop the SEDTIB at European level. These are in category 2 of the proposed classification.

III. Extending the Commission's competencies in the dual-use field

The European Commission's new communication implicitly expresses the EU authorities' desire to occupy a dominant place in the civil-military field at European level. This concerns R&D, which existed before, and now capabilities in addition. In the past, the European Commission has gradually succeeded in including and financing a programme of security research. The initiative was launched in 2004 with the preparatory action intended to increase Europe's industrial potential in the field of security research (PASR), an initiative that was extended by the European security research programme (ESRP) within the scope of the 7th framework programme for research and development (FPRD). Between 2007 and 2013, 1.4 billion euros was awarded to the programme in the form of a grant.

In its communication, the Commission stresses the dual character of certain projects in the 2020 framework programme for research: the 8th FPRD, covering 2014 to 2020, the Societal Challenge Secure Societies programme which is a kind of follow-up to the ESRP and the Key Enabling Technologies programme.

Above all, the Commission began to extend its competency in the field of acquisition of capabilities in two ways:

- In the short and medium terms, by envisaging pre-commercial procurement in three areas which have been the subject of joint research with the European Defence Agency: CBRN (chemical, biological, radiological and nuclear) detection, the insertion of Remotely-Piloted Air Systems (RPAS)⁶ in air traffic and software-defined radio.
- In the longer term, the European Commission refers to the space field by envisaging the possibility of developing capabilities in three areas: infrastructure protection, military communication satellites and high-resolution spatial imaging. In the latter two cases, if it is indeed the technology which is dual, the Commission is referring to military capabilities.

IV. Future steps (1). The European Union's acquisition of capabilities

In its communication, the European Commission refers to the next step as being the possibility for the European

⁶ Without using the actual term, drones are being referred to.

Union to exclusively acquire capabilities. The Commission currently limits the acquisition scope to "dual use" which can be used in the scope of a common defence and security policy. This forward-looking process must be carried out jointly with the EEAS to define systems which could be directly "acquired, possessed and implemented" by the European Union.

No system in particular is mentioned, but it is generally thought that the Commission could make capability development proposals in the field of Remotely-Piloted Air Systems (RPAS), i.e. a drone with civilian and military capabilities⁷. At the same time, the Commission raises the possibility of being a stakeholder, at different levels, in future space programmes such as space surveillance, military telecommunications satellites and high-resolution observation satellites (2025 objective).

Three remarks should be made at this point:

- firstly, these initiatives may appear as sometimes competing with those of the European Defence Agency, particularly with the pooling and sharing initiative which covers military telecommunications and space observation;
- next, the Commission acts according to a gradual competence development system. After confirming its competency in the dual R&D field (in 2004 then in 2007), it confirmed its competence in dual-use development (civilian and military) or acquisition;
- finally, the question of acquisition of capabilities at European Union

level, i.e. with EU funding, has been raised for the first time.

There will certainly be some opposition to seeing the European Commission propose that the European Union acquire capabilities that could have a military use, and in particular opposition to extending the capabilities of the European Commission, which is not an inter-governmental body. We cannot be concerned about seeing certain European countries shed defence-related responsibility at the same time as seeing the European Commission take an initiative destined to strengthen the military capability of the European Union. This proposal is consistent with the rationale of the Maastricht Treaty which presented a forward-looking and adaptable vision of the CFSP and led to the creation of a common defence and security policy (CSDP).

However, even if the initiative is currently limited to dual use, the question of consistency of the positions of European Union and NATO member states will be raised. NATO is already making acquisitions at integrated organisation level of equipment for solely military use. Some countries, and France in particular, are trying to limit these common acquisitions as much as possible in order to avoid putting strain on public finances through acquisitions which are deemed as non-opportune or to avoid systematically purchasing American equipment. It will therefore be necessary to define a consistent approach for the two organisations regarding common acquisition issues.

⁷ Possibility confirmed by the European Commission on the internal market, Michel Barnier, *Les Echos*, 24 June 2013.

V. Future steps (2). Moving towards extending the European Commission's competences in defence research?

In itself, the fact that the European Union is increasing its defence competences is not surprising. As mentioned earlier, this competence is included in the Maastricht Treaty. Article 2, paragraph 4 of the TFEU states that "The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy." Since the Lisbon Treaty merged the various pillars of European construction, the principle of CSDP intergovernmentality is no longer written in stone.

All the same, the CSDP was created on an intergovernmental base, the decisions on the CFSP and the CSDP are made unanimously according to Articles 22.1 and 31 of the TEU and the European Defence Agency, created based on Article 42, paragraph 3 of the TEU, is the intergovernmental agency representing the Union in defence matters.

In its communication, the Commission opens up the way for it to become competent in the field of defence-related research, envisaging the implementation of a research programme preparatory action linked to the CSDP, i.e. in the field of military capacity and in synergy with national research programmes⁸. Until now, the European Commission's

competence has been limited to two areas:

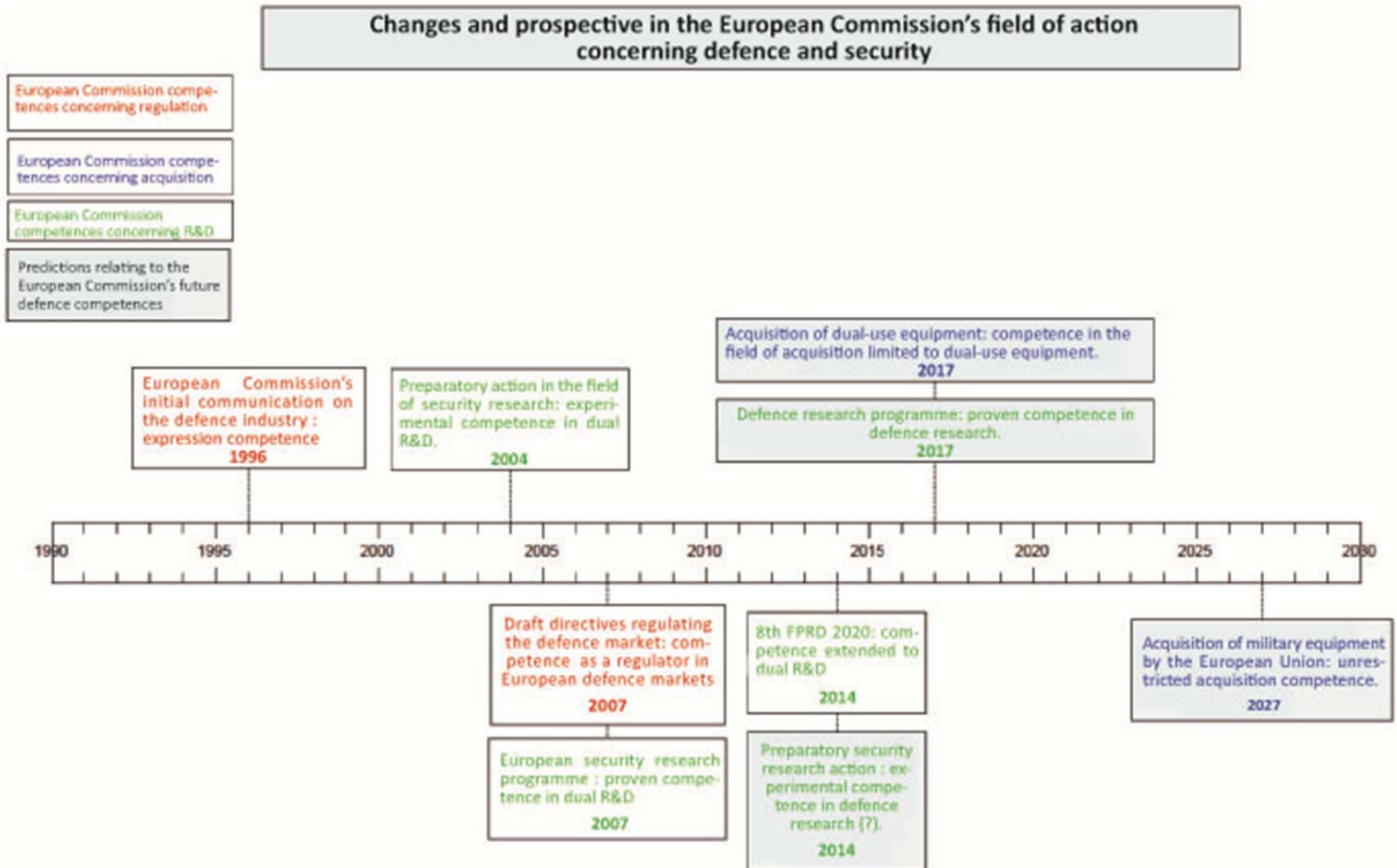
- the regulation of the internal market in areas outside those listed in Article 346 of the TFEU;
- dual R&D based on the FPRD with the security research programme.

We know that none of them proposed that the European Commission become competent in defence R&D matters in order to limit the negative effects of the reduced defence budgets. Some manufacturers, who at first supported such an initiative, subsequently changed their minds, fearing that the creation of an EU defence R&D budget would serve as justification to decrease defence budgets at a national level.

Neither of these arguments, however legitimate they may be, should mask the fact that the European Commission's initiative is a new step in the defence policy communitisation process. If the construction of defence Europe had to be measured today solely in terms of increasing the competences of the European Commission, we would observe that defence Europe has not ground to a halt.

We can therefore, through iterative reasoning, define the path travelled by the European Commission since 1996 to expand its field of action and predict what it could be like in years to come.

⁸ One possibility would be to use Article 185 of the TFEU, which allows the Union to participate in research programmes undertaken by several member states.



The dates on this table for the future are estimates but take into account the fact that it took the European Commission three years to transition from preparatory action on dual research to an actual programme and the fact that we can assume that the Union will be in a position to acquire dual-use equipment in 2017.

This dynamism is, in itself, a subject for examination. It proves that the centre of gravity of European institutions competent in defence matters has shifted from intergovernmental bodies towards the European Commission. Due to a lack of initiatives from the states and their inability to agree on proposals - when they

existed - in an intergovernmental framework, the European Commission has until now managed to put forward its proposals, benefiting from a decision adoption method concerning community matters which is well suited to sluggish consensus situations. This situation could give rise to complaints, with the level of adhesion of the states to the European Commission's proposals appearing sometimes limited or non-existent. On the other hand, we cannot help but notice the effectiveness of this approach when defence Europe such as it is in the intergovernmental framework has been completely stagnant for ten years. ■

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LES NOTES DE L'IRIS / SEPTEMBER 2013

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