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# EU Defence Package: Defence Procurement and Intra-Community Transfers Directives

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European  
Implementation  
Assessment

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STUDY

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EPRS | European Parliamentary Research Service

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PE 654.171 – October 2020

EN



# EU Defence Package: Defence Procurement and Intra-Community Transfers Directives

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On 26 November 2019, the Conference of Committee Chairs approved a request made by the Committee on Internal Market and Consumer Protection (IMCO) to draw up an implementation report on the implementation of Directive 2009/81/EC concerning procurement in the fields of defence and security and of Directive 2009/43/EC concerning the transfer of defence-related products (rapporteur: Kris Peeters, EPP, Belgium). This European Implementation Assessment (EIA) seeks to support the scrutiny work of the IMCO committee on this issue and to accompany the preparation of the aforementioned implementation report.

This study examines the implementation of the European Union (EU) defence package, which consists of the Defence Procurement Directive 2009/81/EC and the Intra-Community Transfers Directive 2009/43/EC, during the period from 2016 to 2020. It is organised in two parts.

The first part of the study, prepared internally, examines the evaluations carried out on the implementation of the two directives to identify persisting challenges. It surveys institutional and policy novelties in the field of EU defence cooperation so as to place the implementation of the two directives in context, and then examines Parliament's oversight work. It goes on to lay out the main elements that are likely to affect the future of EU defence industrial cooperation, and provides options for moving forward.

The second part of the study, which was outsourced, is based on primary research (a survey and interviews) and aims to assess the effectiveness, efficiency, relevance and added value of the Defence Procurement Directive and the Intra-Community Transfers Directive. It also seeks to identify limitations and challenges, and explore – where possible – the links between the implementation of the two directives.

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The author would like to thank Ilaria Giustacchini, EPRS, for her research assistance and for co-drafting Chapter 4.

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This research paper was written at the request of the Ex-post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament.

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## LINGUISTIC VERSIONS

Original: EN

Manuscript completed in October 2020.

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PE 654.171

ISBN: 978-92-846-6946-2

DOI: 10.2861/817967

CAT: QA-02-20-587-EN-N

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## Table of contents

List of acronyms	III
PART I: EU Defence Package: Policy context and way forward	1
Executive summary	1
<b>1. Introduction</b>	<b>3</b>
1.1. Defence Procurement Directive 2009/81/EC	5
1.2. Intra-Community Transfers Directive 2009/43/EC	6
1.3. Objectives	7
1.4. Methodology	9
2. Evaluations of the EU defence package	10
2.1. Evaluating the Defence Procurement Directive	10
2.2. Evaluating the Intra-Community Transfers Directive	12
3. EU defence industry cooperation: a change of approach?	15
3.1. EU defence ambitions	16
3.2. New EU defence mechanisms	19
3.3. Engagement of defence sector small and medium-sized enterprises	22
4. European Parliament's oversight of the EU defence package	27
4.1. Inter-institutional relations on the implementation of the EU defence package	28
4.2. Inter-institutional relations on EU defence cooperation	31
4.3. Members' written questions to other EU institutions and responses	39
5. What future for EU defence industry cooperation?	46
5.1. Consequences of Brexit for EU defence capabilities	46
5.2. Impact of EU defence cooperation on transatlantic relations	48
5.3. Post-pandemic financing for EU defence	48

5.4. Options moving forward _____	50
5.4.1. More EU defence industry cooperation to equip strategic autonomy _____	50
5.4.2. Adequate financing for EU defence _____	51
5.4.3. More transparency and sharing of information _____	52
5.4.4. Enhanced enforcement of the EU defence package _____	52
Main references _____	54
PART II: Research paper on the implementation of Directive 2009/81/EC, concerning procurement in the fields of defence and security, and of Directive 2009/43/EC, concerning the transfer of defence-related products _____	61

## Table of figures

Figure 1 – Developments in defence cooperation at EU institutional level, 2016-2020 _____	18
Figure 2 – Interaction among the new EU defence mechanisms _____	22

## List of acronyms

<b>CARD</b>	Coordinated annual review on defence
<b>CDP</b>	Capability development plan
<b>CFSP</b>	common foreign and security policy
<b>COSME</b>	Competitiveness of enterprises and small and medium sized enterprises
<b>CSDP</b>	common security and defence policy
<b>DG DEFIS</b>	Directorate-General for Defence Industry and Space, European Commission
<b>EDA</b>	European Defence Agency
<b>EDAP</b>	European defence action plan
<b>EDEM</b>	European defence equipment market
<b>EDF</b>	European Defence Fund
<b>EDIDP</b>	European defence industry development programme
<b>EDTIB</b>	European defence technological and industrial base
<b>EDU</b>	European Defence Union
<b>EEAS</b>	European External Action Service
<b>EEN</b>	Enterprise Europe Network
<b>EFSI</b>	Fund for Strategic Investments
<b>EIB</b>	European Investment Bank
<b>ELSA</b>	Ethical, Legal and Societal Aspects
<b>EP</b>	European Parliament
<b>ESIF</b>	European structural and investment funds
<b>EU</b>	European Union
<b>EUGS</b>	European Union Global Strategy
<b>GTL</b>	general transfer licences
<b>HRVP</b>	High Representative of the Union for Foreign Affairs and Security Policy/Vice President of the European Commission
<b>ICT</b>	intra-Community transfers
<b>IMCO</b>	Committee on Internal Market and Consumer Protection
<b>MEP</b>	Member of the European Parliament
<b>MFF</b>	multiannual financial framework
<b>NATO</b>	North Atlantic Treaty Organization
<b>PADR</b>	Preparatory action for defence research
<b>PESCO</b>	Permanent structured cooperation
<b>R&amp;D</b>	research and development
<b>R&amp;D&amp;I</b>	research and development and innovation
<b>R&amp;T</b>	research and technology
<b>SCAP</b>	supply chain action plan
<b>SEDE</b>	Sub-committee on Security and Defence, European Parliament
<b>SME</b>	small and medium-sized enterprises
<b>TEPSA</b>	European Policy Studies Association
<b>UN</b>	United Nations



# PART I: EU Defence Package: Policy context and way forward

## Executive summary

Setting the scene and aiming to provide a context for the two directives comprising the EU defence package – the Defence Procurement Directive and the Intra-Community Transfers (ICT) Directive, the first part of the study begins by examining available evaluations of the EU defence package to identify limitations in its implementation and perennial difficulties in the 2016-2020 period.

The 2016 European Commission evaluation of the Defence Procurement Directive found that its application in terms of competition, transparency and non-discrimination remained uneven across Member States. The evaluation also found that a very high volume of procurement expenditure was still made outside the Defence Procurement Directive, in particular when it came to the procurement of high-value, strategic, complex defence systems. The study shows that problems persist in the implementation of the Defence Procurement Directive despite the guidance notes issued to facilitate their implementation.

The ICT Directive has been described as a significant first step towards reducing barriers to intra-EU trade in defence-related products. It encourages the harmonisation and simplification of an EU framework for licences and procedures in the place of diverse national regimes. However, as with the Defence Procurement Directive, evaluations of the ICT Directive's implementation have demonstrated that it has been unevenly applied across Member States. Challenges include slow uptake of the new licensing options embedded in the directive, an ambivalent approach to minimum harmonisation, slow pace of the certification of defence companies, and a shift of liability (and risk) from competent authorities to individual economic operators.

To improve understanding of the context of these challenges, the study also examines developments at EU level since 2013 (at political level) and since 2016 (at institutional level). The development of an 'alphabet soup' of EU defence acronyms, including both new structures and new programmes supporting EU defence industry development and cooperation has meant that the Defence Procurement Directive and the ICT Directive have had to operate in an increasingly busy field, featuring a number of building blocks for developing EU defence industry cooperation. While the development of new instruments and programmes has boosted EU defence capabilities and supported EU defence industrial cooperation, it has not reinforced use of the two directives examined here.

The first part of the study goes on to analyse Parliament's oversight work over the past four years, to identify the attention given to EU defence cooperation and capability development in general, and to the two directives more specifically. The salience of defence-related issues in Parliament has remained steady throughout the timeframe of the study. Parliament has supported the EU's quest for stronger EU defence cooperation as expressed in the 2016 EU Global Strategy and the strengthening of EU defence industrial cooperation. In that context, it has called repeatedly for the reinforcement of the implementation of the Defence Procurement Directive and the ICT Directive. Parliament has also mentioned the EU defence package systematically in its resolutions and positions relating to EU defence cooperation.

At a time when Europe is grappling with limited military capabilities, gaps in technological innovation, a lagging defence industrial base, and lacklustre national defence expenditure, this first part of the study outlines the main elements on the EU agenda that are likely to affect the future of EU defence cooperation. In that context, the study contends that the possible consequences of Brexit, the impact of EU defence cooperation on transatlantic relations and the availability of sufficient EU funding in the next multiannual financial framework (MFF) to boost EU defence

industrial cooperation, will be key elements when it comes to consolidating the development of a genuine European defence technological and industrial base (EDTIB). To remedy this situation, more EU cooperation is needed on defence in order to equip the EU with strategic autonomy. Adequate financing for EU defence is also essential if progress is to be made on EU defence innovation and the consolidation of the EDTIB. Finally, transparency and information-sharing are a must for effective monitoring and evaluation of the implementation of the Defence Procurement Directive and the ICT Directive.

The research paper in the annex provides a thorough analysis of the implementation of the Defence Procurement Directive and the Intra-Community Transfers Directive, on the basis of primary (a survey and interviews) and more qualitative secondary research. This part of the study also makes more specific recommendations for improving the two directives' effectiveness, efficiency, relevance and added value. It also seeks to identify limitations and challenges, and explore – where possible – the links between the implementation of the two directives.

# 1. Introduction

A number of concerns relating to national security, sovereignty, and industrial considerations, have inhibited the integration of defence into the EU's internal market and contributed to what some have called 'a significant degree of opacity of acquisition practices'.<sup>1</sup> As a result, for many years, defence-related goods have remained exempt from the rules governing the EU single market, owing to various legal, political, economic and historical factors. Nevertheless, a combination of internal and external factors have highlighted key deficiencies in the EU's collective military capabilities and the constraining impact of the fragmented European defence industries.

First and foremost, in the wake of the global financial crisis and European interest in re-industrialisation strategies, it seemed logical to opt for market liberalisation through regulation to facilitate greater intra-EU transfers of defence goods and services, something that was hoped would eventually lower the cost of defence for European states. The fiscal austerity and subsequent defence spending cuts that followed the 2007-2008 global financial crisis, and the rising costs of increasingly technologically complex defence capabilities aggravated capability shortfalls. Defence industrial cooperation quickly became linked to the economic benefits of maintaining a national defence industry in terms of jobs and local and regional development, as well as improving the interoperability of Europe's armed forces at EU level.<sup>2</sup> Second, another reason for the need to boost EU defence industry cooperation was the realisation as early as 2012 to 2013 that national defence technological and industrial bases (DTIBs) were unable to compete in terms of technological sophistication and cutting edge technology.<sup>3</sup> Thirdly, a more challenging security environment in Europe, as a result for instance of the military operations in Libya and the civil war in Syria, and their consequences, pointed to the need for a stronger EU common security and defence policy (CSDP) and, therefore, more effective EU defence cooperation.<sup>4</sup> The potentially disruptive impact of the Brexit negotiations and the (negative) consequences of the Trump administration for multilateralism could also be added to the list. In parallel, the fact that emerging global actors, such as Russia, China and India, have increasingly boosted their defence spending and upgraded their military capabilities, has further emphasised the need for EU Member States to boost defence industrial cooperation.<sup>5</sup>

This threat assessment and the potential economic benefits of EU defence cooperation have provided a strong argument for improving the efficiency of the European defence sector by integrating defence procurement into the EU internal market. The European Commission has highlighted 'persisting fragmentation of European markets, [leading to] unnecessary duplication of

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<sup>1</sup> M. Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*, Cambridge University Press, 2014; H. Masson, K. Martin, Y. Queau and J. Seniora, [The impact of the 'defence package' Directives on European defence](#), Directorate-General for External Policies, European Parliament, 2015.

<sup>2</sup> D. Fiott, 'European defence-industrial cooperation: from Keynes to Clausewitz', *Global Affairs*, Vol. 1(2), 2015, pp. 159-167.

<sup>3</sup> V. Briani et al., [The development of a European Defence Technological and Industrial Base \(EDTIB\)](#), Policy Department, Directorate B, Directorate-General for External Policy of the Union, European Parliament, July 2013.

<sup>4</sup> European Commission, [Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions: Towards a more competitive and efficient defence and security sector](#), COM(2013) 542 final, 2013.

<sup>5</sup> E. Lazarou, [Europe of Defence? Views on the future of defence cooperation](#), EPRS, European Parliament, June 2016, p. 2.

capabilities, organisation and expenditures'.<sup>6</sup> In response, EU public procurement legislation, including in defence, was passed in an attempt to liberalise public procurement markets across the EU Member States, establishing safeguards against discrimination on grounds of nationality, and facilitating public procurement within the EU internal market.<sup>7</sup> In 2009, as part of a wider effort to open up and increase transparency and harmonise relevant rules and practices in the security and defence procurement markets, the so-called 'EU defence package' was adopted. This package was aimed at 'liberalising and regulating the European defence equipment market (EDEM)' and included the Defence Procurement Directive 2009/81/EC and the EU Intra-Community Transfers (ICT) Directive 2009/43/EC.<sup>8</sup> While the EU defence package has injected some much-needed transparency and EU-wide competition into a sector traditionally afflicted by fragmentation, duplication and inefficiency, the European Commission itself admits that more progress is needed to ensure the consistent application of the EU defence package, proper enforcement and the use of new transparency tools.<sup>9</sup> Like all other industrial activities, EU defence industry is required to deliver increased efficiency in order to provide value for money for its customers and, at the same time, protect its shareholders' interests.

Ultimately, the EU's ambition is to become a more strategically autonomous security player capable of taking more independent action, especially in its own neighbourhood. The Juncker Commission followed by the von der Leyen Commission have worked on the hypothesis that for the EU to be more autonomous and strategic it needs civilian and operational capabilities and the means to produce the necessary capabilities through a competitive high-tech European defence industrial base. In practice, these efforts have led to the development of a wide range of EU defence initiatives, including new structures and new programmes supporting EU defence industry development and cooperation. This has meant that the Defence Procurement Directive and the Intra-Community Transfers (ICT) Directive have had to operate in an increasingly busy field, featuring a number of building blocks for developing EU defence industry cooperation.

Against this backdrop, on 26 November, the European Parliament's Conference of the Committee Chairs approved the request from the Committee on Internal Market and Consumer Protection (IMCO) to draw up an implementation report on the Implementation of Directive 2009/81/EC concerning procurement in the fields of defence and security<sup>10</sup> and of Directive 2009/43/EC concerning the transfer of defence-related products.<sup>11</sup>

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<sup>6</sup> European Commission, [Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions: Towards a more competitive and efficient defence and security sector](#), COM(2013) 542 final, 2013.

<sup>7</sup> M. Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*, Cambridge University Press, 2014.

<sup>8</sup> D. Fiott, 'Patriotism, Preferences and Serendipity: Understanding the Adoption of the Defence Transfers Directive', *Journal of Common Market Studies*, Vol. 55(5), 2017, pp. 1045-1061.

<sup>9</sup> European Commission, Message from Elzbieta Bieńkowska, Commissioner for Internal Market, Industry, Entrepreneurship and SMEs (2014-2019), 10th anniversary event for the Defence and Security Procurement Directive, 23 October 2019.

<sup>10</sup> [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 \(Text with EEA relevance\)](#), OJ L 216 20.8.2009, p. 76.

<sup>11</sup> [Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community \(Text with EEA relevance\)](#), OJ L 146 10.6.2009, p. 1.

## 1.1. Defence Procurement Directive 2009/81/EC

The EU Directive 2009/81/EC on defence and sensitive security procurement sets out European rules for the procurement of arms, munitions and war material (plus related works and services) for defence purposes. It also sets out rules for the procurement of sensitive supplies, works and services for security purposes.<sup>12</sup> These rules are tailored to the specificities of defence procurements, which tend to be particularly complex and sensitive. They aimed to enhance transparency and openness in defence markets between EU countries, so as to make it easier for defence companies in EU Member States to access other Member States' defence markets, paving the way for more competition in the European defence market to the benefit of defence industry and security providers, while also ensuring that individual countries' security interests are protected. For this to happen, the directive sought to ensure that defence and sensitive security procurement in that market is carried out under EU rules based on competition, transparency and equal treatment, by means of tailor-made rules. In practice, Directive 2009/81/EC contains a number of innovations geared to the specific needs of procurement in defence and security markets. They include:

- awarding authorities may use the negotiated procedure with prior publication as a standard procedure, which gives them flexibility to fine-tune all details of the contract;
- candidates may be required to submit specific guarantees ensuring security of information (safeguarding of classified information) and security of supply (timely and reliable contract execution, especially in crisis situations);
- specific rules on research and development contracts strike a balance between the need to support innovation and the necessary openness of production markets;
- awarding authorities may oblige contractors to award subcontracts in a competitive manner, opening-up supply chains and creating business opportunities for SMEs in the defence and security sector;
- a set of national review procedures will provide effective remedies to protect the rights of businesses taking part in the award procedure.

While the directive maintains provisions for the exemption of defence contracts under Article 346 TFEU,<sup>13</sup> it was thought that the embedded framework for cross-border intra-EU defence procurement would encourage Member States to limit the use of the exemption clause to exceptional cases, and provide greater transparency within their defence procurement activities, facilitating greater access for all European defence companies to the defence markets of all Member States.<sup>14</sup> This article enables Member States to exclude the application of TFEU on grounds of national security, including 'protection of the essential interests of its security in relation to the production of or trade in arms, munitions, and war materiel'.<sup>15</sup> Prior to the introduction of the EU Defence Package, public procurement frameworks, and the EU Public Sector Directive 2004/18/EC

<sup>12</sup> [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 \(Text with EEA relevance\)](#), OJ L 216 20.8.2009, p. 76.

<sup>13</sup> Treaty on the Functioning of the European Union (TFEU); ex Art. 296 TEC.

<sup>14</sup> H. Masson et al., [The impact of the 'defence package' Directives on European defence](#), Directorate-General for External Policies, European Parliament, 2015; A.F. Hanzalik and S. Ondrej, [The Defence & Security Directive 2009/81/EC: A comparative evaluation of the position of the individual firm within the procurement process in a European and international setting](#), Maastricht University, 2013.

<sup>15</sup> [Consolidated version of Treaty on the Functioning of the European Union \(TFEU\)](#), OJ C 202, 7.6.2016.

in particular, were subject, inter alia, to Article 346 TFEU. In this way, the hope was to boost both the directive's overall objective of supporting the establishment of an open and competitive European defence equipment market (EDEM) and also the competitiveness of the European defence technological and industrial base (EDTIB).<sup>16</sup> However, despite repeated guidance from the European Commission and CJEU<sup>17</sup> that Article 346 TFEU should be used only for specific reasons and on a case-by-case basis, in practice many Member States have continued to interpret the provision 'as a categorical or automatic exclusion of armaments from the application of EU law'.<sup>18</sup> This has limited the transparency and equality of defence procurement within the EDEM, while also potentially hindering the competitiveness of the EDTIB. For a fuller presentation of the legal basis and limitations of Article 346 TFEU, refer to the study in the annex.

On 20 April 2018, the European Commission published the 'Recommendation on cross-border market access for sub-suppliers and small and medium sized enterprises (SMEs) in the defence sector' to cross-border defence and security contracts, an area in which SMEs face considerable challenges.<sup>19</sup> The European Commission has also adopted several guidance notices – the latest on cooperative defence procurement,<sup>20</sup> adopted in May 2019 – in order to improve implementation of the defence procurement rules already in force.

## 1.2. Intra-Community Transfers Directive 2009/43/EC

The absence of controls on intra-EU transfers constituted a significant concern for the European Commission, owing to the potential for this to exacerbate the risk of illicit exports outside the EU. Disproportionate licensing requirements also 'incurred significant costs and delays, creating barriers to trade' in defence-related products within the EU.<sup>21</sup> As such, Directive 2009/43/EC on intra-EU transfers of defence-related products was introduced to complement measures to harmonise EU rules and practices on defence procurement. It simplified the conditions and procedures for transferring such products throughout the EU by introducing a new licensing framework to facilitate the legal movement of defence items within the internal market. This uniform and transparent system includes the three following types of licences:<sup>22</sup>

- General transfer licences (GTLs) are 'open licences' that rely on ex post verification and cover a pre-determined range of products for specified recipients or for a specific purpose. No prior request is needed. However, suppliers must inform the competent authorities of their Member States when they intend to use a GTL for the first time.

<sup>16</sup> European Commission, [Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73\(2\) of that Directive \[SWD\(2016\) 407 final\]](#), COM(2016) 762 final, 30 November 2016.

<sup>17</sup> Court of Justice of the European Union (CJEU).

<sup>18</sup> A.F. Hanzalik and S. Ondrej, [The Defence & Security Directive 2009/81/EC: A comparative evaluation of the position of the individual firm within the procurement process in a European and international setting](#), Maastricht University, 2013.

<sup>19</sup> [Commission Recommendation \(EU\) 2018/624 of 20 April 2018 on cross-border market access for sub-suppliers and SMEs in the defence sector](#), OJ L102, 23.4.2018, p 87.

<sup>20</sup> [Commission notice on guidance on cooperative procurement in the fields of defence and security \(Defence and Security Procurement Directive 2009/81/EC\)](#), OJ C 157, 8.5.2019, pp. 1-9.

<sup>21</sup> European Commission, ['Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73\(2\) of that Directive'](#), COM(2016)762 final, 2016.

<sup>22</sup> The specific conditions for the use of these distinctive licences and the evaluation of their use are analysed in the annexed research paper.

- Global transfer licences rely on ex ante verification and allow several shipments of a category of products under the same licence to one or more recipients in other Member States over a specified time.
- Individual transfer licences are for one transfer of a specified quantity of specified products to one recipient in another Member State.

The Intra-Community Transfers (ICT) Directive seeks to improve the conditions for SME participation in armament development and production and to increase industrial cooperation on defence-related products to generate economies of scale. In that light, the certification of companies is a key element of the directive. Companies that are considered trustworthy are entitled to undertake transfers under general licences. Individual licensing should become an exception and be limited to clearly justifiable cases. Equally, the directive defines a 'European licence system' for the transfer of defence-related-products inside the Union that are listed in the annex of the directive. All these products correspond to those listed in the 'common military list of the European Union' and whenever this list is updated, an amendment is adopted to update the 'European licence system'.<sup>23</sup> The ICT Directive, like the Defence Procurement Directive, therefore aims to boost the internal market for defence-related products and by extension strengthen the competitiveness of the European defence market.

Following its 2016 evaluation of the ICT Directive (discussed in the next chapter), the European Commission chose at the time to focus on improving the Directive's implementation rather than amending it. A number of recommendations were also adopted, namely on the harmonisation of the scope of and conditions for general transfer licences for armed forces and contracting authorities<sup>24</sup> and certified recipients.<sup>25</sup>

### 1.3. Objectives

The two directives were last formally evaluated by the European Commission in 2016, at which time the European Parliament did not ask for any amendments. Nonetheless, a number of questions remain, including on the level at which the two directives have each been understood and applied by EU Member States; the extent, ways and reasons why Member States have chosen to use exemptions or not apply either of the directives in full; and the degree to which this (partial) implementation has contributed to achieving the EU's overarching objectives of opening up the European defence equipment market (EDEM) and preventing unnecessary duplication, so as to drive more efficient use of finite government resources for defence procurement, promote pooling and sharing of military capabilities, and enhance the openness, fairness and competitiveness of the European defence technological and industrial base (EDTIB). In that context, the overarching objective of this study is to evaluate the implementation of the EU defence package in the Member States to assess the effectiveness, efficiency, relevance and added value of the two directives that comprise it.

<sup>23</sup> See, for example: [Commission Directive \(EU\) 2016/970 of 27 May 2016 amending Directive 2009/43/EC of the European Parliament and of the Council as regards the list of defence-related products](#), OJ L 163, 21.6.2016, pp. 1-34; [Commission Directive \(EU\) 2017/2054 of 8 November 2017 amending Directive 2009/43/EC of the European Parliament and of the Council as regards the list of defence-related products](#), OJ L 311, 25.11.2017, pp. 1-37.

<sup>24</sup> [Commission Recommendation \(EU\) 2016/2123 of 30 November 2016 on the harmonisation of the scope of and conditions for general transfer licences for armed forces and contracting authorities as referred to in point \(a\) of Article 5\(2\) of Directive 2009/43/EC of the European Parliament and of the Council](#), OJ L 329, 3.12.2016, pp. 101-104.

<sup>25</sup> [Commission Recommendation \(EU\) 2016/2124 of 30 November 2016 on the harmonisation of the scope of and conditions for general transfer licences for certified recipients as referred to in Article 9 of Directive 2009/43/EC of the European Parliament and of the Council](#), OJ L 329, 3.12.2016, pp. 105-108.

There is also a recognised shortfall in knowledge of the links and ways in which the two directives interact with each other in their implementation, i.e. whether they have proven to be mutually reinforcing, or whether the practical application of one directive has interfered with achieving the objectives of the other. This reflects constraints on available data, as well as the focus of previous evaluations on each individual directive, rather than the net effects of implementation of the EU defence package as a whole.

In this light, the first part of the European Implementation Assessment, which was prepared internally, sets the scene, analysing the EU-level political and institutional context on EU defence cooperation, so as to examine the extent to which it has facilitated the implementation of the Defence Procurement and ICT directives. As the analysis will demonstrate, the EU defence scene has evolved significantly since the adoption of the directives in 2009 and, in particular, since their last evaluation in 2016 – an element that is key to understanding the implementation of the two directives. In this context, this first part of the EIA outlines the aims of the two directives making up the EU defence package. It then examines the European Commission evaluations of the implementation of the EU defence package, and studies other relevant evaluations carried out by think tanks and other EU institutions. The development of a European defence technological and industrial base (EDTIB) has become a point of reference not only for the Member States and the European Commission, but also for the European Parliament. Accordingly, Parliament has actively and consistently monitored the implementation of the EU defence package and developments in defence policy, defence industry and markets through a number of resolutions, recommendations, positions and written questions to the other EU institutions, all of which is analysed here. The study then outlines the development of the political and institutional EU context surrounding the EU defence package and, given this context, analyses the oversight work conducted by Parliament of the EU defence package during the 2016-2020 period. Subsequently, the first part of the study also examines the possible impacts of this complex politico-institutional context on the future of the EU defence industry in a post-Brexit and post-Covid19 fractured global scene, where transatlantic relations are complex and funds are scarce.

The second part of the European Implementation Assessment, which was outsourced to the Trans-European Policy Studies Association (TEPSA), aims to provide an independent and up-to-date study that evaluates specifically the implementation and impact of the EU defence package. The annexed research paper aims to assess the effectiveness, efficiency, relevance and added value of the Defence Procurement Directive and the ICT Directive. It also seeks to identify limitations and challenges, and explore – where possible – the links between the implementation of the two directives. Furthermore, it considers the degree to which implementation has been improved by the introduction of relevant amendments, guidance notes and recommendations over time since 2009. It focuses in particular on subcontracting provisions to remove the need for offsets and the impact on SMEs; the role of prime-contractors in furthering cross-border defence cooperation; the use of exemptions under Article 346 TFEU; the state of certification; and the effectiveness of transparency tools and information sharing.

In a final section, the annexed research paper considers ways of responding to any implementation challenges identified; mitigating the unintended negative effects of the two directives; further building an open and competitive EDEM for both prime-contractors and SMEs; enforcing EU procurement rules in the area of defence and security; and improving cooperation and coordination in the EDEM (to the benefit of both European governments/militaries, as customers, and of the European defence industry, by promoting a more competitive, efficient and sustainable EDTIB).

## 1.4. Methodology

The timeframe under examination for the entire study is 2016-2020, as the European Implementation Assessment aims to build on the European Commission evaluations of the two directives and therefore picks up where the European Commission evaluations ended (end of 2015). However, the chosen timeframe also makes sense substantively, as it offers the opportunity to examine whether the defence and security ambitions set out in the 2016 EU Global Strategy (EUGS) are matched in the implementation of the EU defence package, crucial to the EU ambition of strategic autonomy.

The first part of the study is based on qualitative research and on the review of the secondary literature available (EU official documents, academic publications, think tank pieces, and publications by other international organisations, trade unions and business).

The analysis of Parliament's oversight of the implementation of the EU defence package is made through a qualitative examination of Parliament consolidated texts adopted in plenary. The relevant documents were identified by means of archival research on the European Parliament's public register of documents, using keywords that not only deal with the EU defence package specifically, but also try to capture the EU politico-institutional context of EU defence cooperation and developments in defence policy and the defence industry. The data collected was refined in terms of relevance on three levels: first, Parliament resolutions, positions and recommendations referring directly to the two directives; second, those referring to the defence industry and defence markets; and third, those referring more generally to EU defence policy and developments in recent years. For example, documents relating to defence and connected exclusively with EU external action, such as Parliament's position on conflict prevention and mediation or the European Peace Facility, were excluded from this study, as they concern matters beyond the scope of the analysis.

The outsourced research paper uses a mixed methodology that combines quantitative and qualitative methods. More specifically, a literature review is used when needed to substantiate the primarily quantitative research (through the use of surveys and the consultation and analysis of TED data). The literature review also supports primary research (interviews of key stakeholders from industry, trade associations, governments and EU institutions) to complement, contextualise and qualify the quantitative data. The choice of methodology used in the annexed research paper is important as it aims to enable a comparison of the results of the research on the implementation of the two directives during the 2016-2020 period with the findings of the 2016 European Commission evaluations, which covered the 2011-2015 period. Ultimately, the aim was to enable the study to draw some conclusions on the entire life span of the two directives. The qualitative research (including the interviews) allowed conclusions to be drawn on the links between the two directives and their implementation.

## 2. Evaluations of the EU defence package

Evaluations carried out by the EU institutions and also by independent researchers point to the potential benefits of strengthened EU cooperation and integration of defence markets. Yet, 10 years since the European Commission tried to regulate defence procurement with the 2009 EU defence package, there is still no single European defence market. The Defence Procurement Directive and the Intra-Community Transfers Directive, which aimed to help develop the defence equipment market to increase competition, reduce duplication and reduce prices, have had limited results according to the European Commission evaluations. This section reviews the key evaluations of the two directives being examined, carried out by the EU institutions and other think tanks and academic researchers.

### 2.1. Evaluating the Defence Procurement Directive

For companies in the defence and security industry, the adoption and implementation of the Defence Procurement Directive meant that there would most likely be an increase in invitations to tender in the fields of defence and security. It also meant that companies would be required to cope with new demands and requirements, for example, on their capacity to handle sensitive information and guarantee security of supply. However, the 2016 European Commission evaluation of this directive argued that the objectives of the directive had been achieved only to a partial extent and pointed to some intra-EU factors compromising its implementation. The evaluation highlighted that, while between 2011 and 2015, the Defence Procurement Directive had led to a more than twofold increase in the value of defence and security contracts published EU-wide and awarded, when it came to competition and in the rules on transparency and equal treatment, the degree of application of the directive remained uneven across Member States. This means that the increase in competition, transparency and non-discrimination in the implementation of the directive was also uneven across Member States.<sup>26</sup>

In addition, the evaluation found that a very high volume of procurement expenditure was still made outside the directive, in particular when it came to the procurement of high-value, strategic, complex defence systems. On cross-border procurement penetration, the same evaluation found that around 10% of the value of contracts awarded under the directive had been won directly by foreign companies, while the total value of indirect cross-border awards in 2011-2015 equalled roughly 40% of the total value of contracts awarded under the directive (€12.44 billion). In order to secure competition, transparency and equal treatment, the evaluation recommended that guidance be provided on the application of some of these provisions.<sup>27</sup> The European Commission has since issued two guidance notices – the latest one on cooperative defence procurement,<sup>28</sup> adopted in May 2019 – the implementation of which is evaluated in the annexed research paper. The challenges

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<sup>26</sup> [Evaluation](#): Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73(2) of that Directive, COM(2016) 762 final, Brussels, 30.11.2016; and Commission Staff Working Document, Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security, Accompanying the document Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73(2) of that Directive, SWD(2016) 407 final, 30 November 2016.

<sup>27</sup> European Commission, [Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73\(2\) of that Directive \(SWD\(2016\) 407 final\)](#), COM(2016) 762 final, 30 November 2016, pp. 4-6.

<sup>28</sup> [Commission notice on guidance on cooperative procurement in the fields of defence and security \(Defence and Security Procurement Directive 2009/81/EC\)](#), OJ C 157, 8.5.2019, pp. 1-9.

uncovered were also borne out by evaluations conducted by the expert community. Their findings included: uneven application of the directive across Member States, continued 'unjustified use of negotiated or single source procedures',<sup>29</sup> defence tenders and purchases being designated as 'sensitive or not released for unjustified reasons',<sup>30</sup> and significant amounts of defence procurement still taking place outside of the directive, particularly 'the procurement of high-value, strategic, complex weapons systems'.<sup>31</sup>

In terms of facilitating the participation of SMEs in the defence market, the European Commission evaluation found that 27.9% of contracts were won by firms whose bids also included SMEs. In terms of market share, these contracts accounted for 6.1% of the total value of contracts in the sample for the 2011-2015 period. In around 10% of contract award notices under the directive (which accounts for about 42% of overall procurement under this directive, equivalent to almost €4 billion), the contracting authorities stated that some share of the awarded contract was likely to be subcontracted to third parties. Overall, however, the use of the subcontracting provisions had been negligible.<sup>32</sup> The European Commission evaluation also pointed to the fact that there was no incentive for Member States to use these provisions since there was no guarantee that local companies would participate. While these provisions sought to open supply chains for the award of specific contracts, it was considered that using this form of competitive subcontracting would generate several legal and administrative problems.

Overall, the European Commission evaluation concluded that '[t]he analysis conducted on the state of Europe's defence industry, based on the available data, shows that it is difficult to conclude that overall the EDTIB has fundamentally changed in the period 2011-2015 as a result of the introduction of the Directive'.<sup>33</sup> Accordingly, it was not possible to establish a causal link between the effects of the directive and developments in the EDTIB five years after the transposition deadline.

Some of the problems identified result from external factors. These include Member States' budgets, the emergence of new competitors on non-EU markets, and technological developments. Experts have also argued that this integration will enable the Europe to retain a competitive European defence technological and industrial base (EDTIB) in light of declining defence budgets. The assessment of the European Defence Agency (EDA), for example, argues that defence budget cuts, insufficient synchronisation of budget cycles, and lack of harmonisation of requirements (rather than the malfunctioning of the directive per se) have led to problems with the launch of defence cooperation initiatives.<sup>34</sup> The integration of European defence procurement and facilitation of greater equipment transfers is expected to contribute significantly to bringing about economic

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<sup>29</sup> E. Anderson, [Evaluation of the functioning and impact of the EU Defence and Security Public Procurement Directive \(2009/81/EC\) across 20 EU states](#), Transparency International UK, 2016.

<sup>30</sup> European Commission, ['Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73\(2\) of that Directive'](#), COM(2016)762 final, 2016.

<sup>31</sup> M. Trybus and L.R.A. Butler, 'The Internal Market and National Security: Transposition, Impact, and Reform of the EU Directive on Intra-Community Transfers of Defence Products', *Common Market Law Review*, Vol. 54(2), 2017, pp. 403-442.

<sup>32</sup> *Ibid.*, p. 7.

<sup>33</sup> European Commission, [Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73\(2\) of that Directive \(SWD\(2016\) 407 final\)](#), COM(2016) 762 final, 30 November 2016, p. 6.

<sup>34</sup> ['Commission notice on guidance on cooperative procurement in the fields of defence and security \(Defence and Security Procurement Directive 2009/81/EC\)'](#), C/2019/3290, OJ C 157, 8.5.2019, pp. 1-9.

benefits, particularly for EU taxpayers.<sup>35</sup> Such benefits would result from the reduced cost of equipment, increased competitiveness of European industries and the ensuing job generation, and incentives for innovation in EU defence capabilities. An integrated European defence market 'allows for economies of scale and learning, greater competition and transparency'. In contrast, insufficient integration in EU defence is therefore likely to incur economic and strategic costs because of limited interoperability between national capabilities.<sup>36</sup>

The business community for its part noted the absence of a genuine level playing field, which it considered to be the only practical way to establish fair competition in the EU defence market. It also maintained that the directive had not been used sufficiently, not so much because of its content, but rather because of lack of clarity regarding the application of the directive in government-to-government business, procurement by an agency or in subcontracts. To remedy these problems, it called for the Defence Procurement Directive to be clarified and refined, but did not go as far as to suggest amending the directive.<sup>37</sup>

## 2.2. Evaluating the Intra-Community Transfers Directive

Under Article 17 of the Intra-Community Transfers (ICT) Directive, the European Commission must report to the Parliament and the Council on the review of the directive's implementation. If necessary, the report should be accompanied by a legislative proposal. Therefore, as with the Defence Procurement Directive, the European Commission carried out an evaluation of the Intra-Community Transfer Directive in November 2016, three years after the transposition deadline, which made it difficult to assess whether the long-term objectives of the directive had been achieved. As required in Article 17, the Commission evaluated the directive's impact on the development of a European defence equipment market (EDEM) and the European defence technological and industrial base (EDTIB), also with regard to SMEs.

The European Commission evaluation concluded that while the tools created by the ICT Directive responded to the needs and risks that had been identified, the directive was nonetheless underused. It highlighted that the uptake of new licencing options and certification had been slower than anticipated. This affected primarily integrators (as opposed to component suppliers). Although the number of certified companies in the EU had increased, the majority were located in only two Member States, Germany and France. 'A further obstacle [was] the low awareness, particularly among SMEs, of the tools available under the directive and their benefits across industry within individual Member States. For example, companies could reduce time and administrative burden by using General Transfer Licences to transfer supplies to a certified enterprise'.<sup>38</sup>

The same evaluation pointed out that differences in how the directive had been transposed had led to 'major barriers to its effective application'. More specifically, it meant that there was slow or incomplete application in individual Member States; a general lack of harmonisation in requirements and procedures between Member States; and/or highly diverging conditions and

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<sup>35</sup> M. Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*, Cambridge University Press, 2014.

<sup>36</sup> V. Briani, [The costs of non-Europe in the defence field](#), Moncalieri, Centre for Studies on Federalism and Instituto Affari Internazionali, 2013.

<sup>37</sup> Federation of German Security and Defence Industries/ Bundesverband der Deutschen Sicherheitsund Verteidigungsindustrie, [BDSV Position Paper on the European Commission's Defence Action Plan](#), November 2016, pp. 10-12.

<sup>38</sup> European Commission, [Report from the Commission to the European Parliament and the Council, Evaluation of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community](#), COM(2016) 760 final, 30 November 2016, p. 6.

limitations in general transfer licences published by the Member States. This evaluation also noted that it was difficult to assess the ICT Directive's impact on the development of the EDTIB and EDEM. 'In most Member States, transfers are a minor, though not negligible, part of the overall defence trade.'<sup>39</sup>

Independent expert evaluations of the effectiveness and impact of the ICT Directive indicate that there are a number of prevailing barriers and challenges to achieving the full benefits of this directive. Trybus and Butler argue that an ambivalent approach to harmonisation has contributed significantly to the ICT Directive's limited operational effectiveness. They also hold that the dividing line between optional exemption from prior authorisation and mandatory licences is unclear, as is the co-existence of legally and non-legally binding instruments. Some in the defence industry have argued that a common EU definition of the term 'specially designed' (for military purpose/use) should be developed to ensure a clear and harmonised distinction between items that are to be controlled – regardless of whether or not they are sensitive, less sensitive or non-sensitive – and those to which export controls should not apply. The same actors have argued that the 'EU definition should be comparable in its effect to the US definition and apply to both the use of the Transfer Directive and the Common Position on Arms Exports to ensure consistency between the licencing systems for intracommunity transfers and exports'. Hence, those parts and components that do not fall within the definition of 'specially designed' would no longer require a transfer or export licence.<sup>40</sup> The concern over lack of clarity on the phrase 'specially designed for military purpose' persists, as the annexed research paper demonstrates.

Trybus and Butler also explain that Member States still determine their transfer and export control policies. As a result, an overriding export control mentality is pervasive, as evidenced by continuing preference for individual licences and restrictively defined general licences. The certification regime is similarly unclear hindering minimum harmonisation. For these reasons, the authors conclude that at this stage in EU defence integration, intra-EU transfers are still considered to present security risks that legitimise certain controls. Over time, Member States would need to ensure that licensing decisions are a true reflection of risk.<sup>41</sup> On this issue, some in the defence industry have called for the 'less sensitive parts and components from the Military List [to] become eligible for General Transfer Licences with no re-export restrictions and simplified rules for their incorporation into larger products'.<sup>42</sup>

Other evaluations, including the one commissioned by the European Commission in 2016, pointed to the slow uptake of the new licensing options embedded in the ICT Directive and 'a shift of liability (and risk) from Competent Authorities to individual economic operators'.<sup>43</sup> The same evaluation also argued that there was a perceived lack of consistency between the ICT and relevant national and EU

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<sup>39</sup> Ibid., p. 7.

<sup>40</sup> Federation of German Security and Defence Industries/ Bundesverband der Deutschen Sicherheitsund Verteidigungsindustrie, [BDSV Position Paper on the European Commission's Defence Action Plan](#), November 2016, p. 13.

<sup>41</sup> M. Trybus and L.R.A. Butler, 'The Internal Market and National Security: Transposition, Impact, and Reform of the EU Directive on Intra-Community Transfers of Defence Products', *Common Market Law Review*, Vol. 54(2), 2017, pp. 403-442.

<sup>42</sup> Federation of German Security and Defence Industries/ Bundesverband der Deutschen Sicherheitsund Verteidigungsindustrie, [BDSV Position Paper on the European Commission's Defence Action Plan](#), November 2016, pp. 12-14.

<sup>43</sup> N. Brown et al., [Evaluation of Directive 2009/43/EC on the Transfers of Defence-Related Products within the Community](#), Final report, Technopolis group et al., Prepared for Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, European Commission, June 2016.

legislative and regulatory frameworks.<sup>44</sup> (This was also found to be true for the Defence Procurement Directive.) This issue has been posited as another reason for uneven implementation across EU Member States.

Further challenges, such as differences in the extent of implementation across Member States, are shared with the Procurement Directive. In part, this variability in implementation can be explained by factors such as differences in national perceptions of arms trade controls, and the realities of trying to sustain national defence industries.<sup>45</sup> This same evaluation also pointed to the slow pace of certification of defence companies.<sup>46</sup>

Rather than amend the ICT Directive, to remedy the above-mentioned problems, the European Commission had committed to:<sup>47</sup>

- improving the directive's implementation in individual Member States by starting a dialogue with national authorities to clarify and better understand the modalities of transposition of the directive into the national legal orders and the reasons for non-implementation of some provisions in certain Member States and to solve any outstanding issues in this regard;
- encouraging Member States to add other products and components within the scope of their general transfer licences (GTL), since the list of products covered by the two recommendations to encourage harmonised functioning of GTLs for armed forces and for certified recipients is not exhaustive. However, Member States were discouraged from adding conditions for transfers under the GTL that contradicted or undermined the conditions listed in the recommendations;
- continuing to work closely with the Member States on the harmonisation of further GTLs specified by the directive and to identify concrete areas for more harmonised certification across the EU, including creating synergies with other regimes, such as dual-use product control, to the extent possible. This could lead to further recommendations to the Member States;
- providing incentives to industry to join the licence schemes;
- raising awareness of the directive's tools and benefits, including through the use of outreach in the Defence SMEs Network meetings and through Member States encouraging operators to use the GTLs;
- clarifying the information on licensing: 'expand the CERTIDER database by additional information, such as concise but meaningful information on national systems with links to their internet presence'. As the annexed research paper shows, the data in CERTIDER still raises questions about its accessibility and usability.

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<sup>44</sup> N. Brown et al., [Evaluation of Directive 2009/43/EC on the Transfers of Defence-Related Products within the Community](#), Final report, Technopolis group et al., prepared for Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, European Commission, June 2016.

<sup>45</sup> H. Masson et al., [The impact of the 'defence package' Directives on European defence](#), Directorate-General for External Policies, European Parliament, 2015.

<sup>46</sup> H. Masson et al., [The impact of the 'defence package' Directives on European defence](#), Directorate-General for External Policies, European Parliament, 2015.

<sup>47</sup> European Commission, [Report from the Commission to the European Parliament and the Council, Evaluation of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community](#), COM(2016) 760 final, 30 November 2016, pp. 10-13.

### 3. EU defence industry cooperation: a change of approach?

In response to a challenging new global environment, EU institutional and policy efforts have increasingly converged on European strategic needs, have advocated for more coherent and interoperable military capabilities, and have aimed to avoid further duplication in the research and development (R&D) of weapons systems. There was a shift in the Union's approach to EU defence industrial cooperation in December 2013, when the European Council held a thematic debate on defence for the first time.<sup>48</sup> Since then, European defence cooperation has been a rolling item on its agenda.<sup>49</sup> But it was in 2016 that the EU put its approach in practice, one that adopts a more market demand-driven perspective<sup>50</sup> to building defence industry cooperation rather than just a rules-based approach to defence capacity development based on market procurement. 'The aim was to offer lucrative financial incentives for the European defence sector and encourage cross-border collaboration'.<sup>51</sup> In that spirit, the EU aimed for a more integrated and competitive European defence industry and market and consequently has launched new defence initiatives to enhance cooperation between Member States. The introduction of Permanent structured cooperation (PESCO), the establishment of the Coordinated annual review on defence (CARD), the European Defence Fund (EDF) and its preparatory programmes (the Preparatory action for defence research [PADR] and the European defence industry development programme [EDIDP]) constitute a turning point for the European defence industrial and market landscape. See Figure 1.

The case for greater EU cooperation on security and defence has also been supported by economic considerations. The fact is that defence has a strong economic and industrial dimension. Limited cooperation between Member States, together with cuts in their defence budgets since 2005, have led to inefficiencies in the EU defence sector, thus threatening the industry's global competitiveness and its capacity to develop the military capabilities needed.<sup>52</sup> This may explain why the EU defence package, which is at its core a set of procurement procedures, has seen small investments by Member States. The contrary can also be argued: that the shortage of investment in large procurement programmes has provided fertile ground for the development of new mechanisms to boost EU defence cooperation, including in the defence industry.

Unsurprisingly then, the EU and its Member States have continued strengthening their defence cooperation and developing the defence industrial base. The dense development of new EU defence cooperation illustrated in Figure 1 above points to three key elements:

- 1 2016 (also the year that the European Commission published its evaluations) was a turning point for EU defence capacity-building;
- 2 actual engagement on EU defence cooperation has led to concrete new initiatives and EU institutional changes;

<sup>48</sup> European Council conclusions of 19-20 December 2013, [EUCO 217/13](#).

<sup>49</sup> S.E. Anghel with B. Fogel, [The European Council's 'rolling agenda' on European defence cooperation](#), PE 621.832, EPPS, European Parliament, June 2018.

<sup>50</sup> European External Action Service, p. 12.

<sup>51</sup> R. Csernaton, [EU Security and Defense Challenges: Toward a European Defense Winter?](#), Carnegie Europe, 11 June 2020.

<sup>52</sup> Commission staff working document, [Impact Assessment accompanying the document 'Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Fund'](#), SWD(2018) 345 final, 13 June 2018.

- 3 the more complex EU defence environment means that today the Defence Procurement Directive and the ICT Directive are only one building block among many on the EU defence cooperation scene.

This chapter aims to outline the novelties introduced in order to deepen EU defence cooperation following the European Commission evaluations of the Defence Procurement Directive and Intra-Community Transfer Directive. The new mechanisms for strengthening EU defence cooperation are linked to the two directives, namely through the guidance notes that the European Commission issued in 2018 and 2019.<sup>53</sup>

### 3.1. EU defence ambitions

Following the 2013 Council conclusions, European defence cooperation has made unprecedented strides. In 2014, while still only a candidate for European Commission Presidency, in his speech to the European Parliament before his election, Jean-Claude Juncker had called on Member States to 'create more synergies in defence procurement. In times of scarce resources, we need to match ambitions with resources to avoid duplication of programmes. More than 80% of investment in defence equipment is still spent nationally today in the EU. More cooperation in defence procurement is therefore the call of the day, and if only for fiscal reasons'.<sup>54</sup> In June 2015, the European Council conclusions stated that work on the further development of civilian and military capabilities and the strengthening of Europe's defence industry would continue.<sup>55</sup>

Unsurprisingly, these needs were also articulated in the 2016 EU Global Strategy (EUGS), which called for the EU to 'move towards defence cooperation as the norm'. To operationalise that, the Global Strategy stated, '[t]he EU will systematically encourage defence cooperation and strive to create a solid European defence industry, which is critical for Europe's autonomy of decision and action'.<sup>56</sup> In the area of defence, more was achieved in the year following the agreement on the EUGS than in the previous decade. Issues that had previously seemed out of reach began to become approachable. The foundations of a European defence union seemed to be rapidly and solidly taking shape. The EU presented the consolidation of a strong European defence technological and industrial base as a top mission for this new effort, and the European Commission identified the integration of the EU's defence industry and market as a key priority<sup>57</sup>. In this light, the Implementation plan on security and defence presented by the High Representative of the Union for Foreign Affairs and Security Policy/Vice President of the European Commission (HR/VP) in November 2016 went beyond specifying the 'civil-military level of ambition, tasks, requirements and capability priorities stemming from [the security and defence] strategy', agreed by Council when adopting the EUGS.<sup>58</sup>

<sup>53</sup> ['Commission notice on guidance on cooperative procurement in the fields of defence and security \(Defence and Security Procurement Directive 2009/81/EC\)', C/2019/3290, OJ C 157, 8.5.2019, pp. 1-9.](#)

<sup>54</sup> Setting Europe in Motion President-elect Juncker's Main Messages from his speech before the European Parliament, Statement in the European Parliament plenary session ahead of the vote on the College Plenary Session, 22 October 2014, p. 12.

<sup>55</sup> European Council conclusions (25-26 June 2015), [EUCO 22/15](#), 26 June 2015.

<sup>56</sup> European External Action Service, [Shared Vision, Common Action: A Stronger Europe: A Global Strategy for the European Union's Foreign and Security Policy](#), June 2016, pp. 45, 11.

<sup>57</sup> R. Cernatoni, [EU Security and Defense Challenges: Toward a European Defense Winter?](#), Carnegie Europe, 11 June 2020.

<sup>58</sup> European Council, [EU-NATO joint declaration: Joint declaration by the President of the European Council, Donald Tusk, the President of the European Commission, Jean-Claude Juncker, and the Secretary General of NATO, Jens Stoltenberg](#), 8 July 2016.

Drawing on the Implementation plan on security and defence, the Foreign Affairs Council Conclusions in November 2016 agreed on a new level of ambition in security and defence, based on three strategic priorities derived from the EUGS: responding to external conflicts and crises, building capacities of partner countries, and protecting the EU and its citizens. The same month, the European Commission put forward the European defence action plan.<sup>59</sup> In an unprecedented move, this document proposed a new tool under the EU budget to finance cooperation and investment in the joint research and development (R&D) of strategic defence equipment and cutting-edge technologies, as further developed in the next section. In the same spirit, the July 2016 EU-NATO Joint Declaration stressed, inter alia, that defence cooperation was the answer to mounting security challenges, increasing costs of new defence systems and budgetary constraints of Member States, and high levels of duplication and fragmentation in the EU defence sector.<sup>60</sup>

In November 2016, the Implementation plan for the EU Global Strategy highlighted that developments in EU defence should contribute to ensuring that the European defence technological and industrial base (EDTIB) could fully meet Europe's current and future security needs and, in that respect, enhance its strategic autonomy and strengthen its ability to act with partners. Equally, it recalled that Council expected these efforts to provide for equal opportunities for the defence industry in the EU, balanced and in full compliance with EU law.<sup>61</sup> In December 2016 this level of ambition and work plan were endorsed by the European Council, as part of a broader defence package, which also included the European Commission's European defence action plan (EDAP),<sup>62</sup> aimed at facilitating and incentivising defence cooperation between Member States through the establishment of a research and of a capability window, and the implementation of the Warsaw Joint Declaration of EU and NATO leaders.<sup>63</sup>

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<sup>59</sup> European Commission, [European Defence Action Plan: Towards a European Defence Fund](#), 30 November 2016.

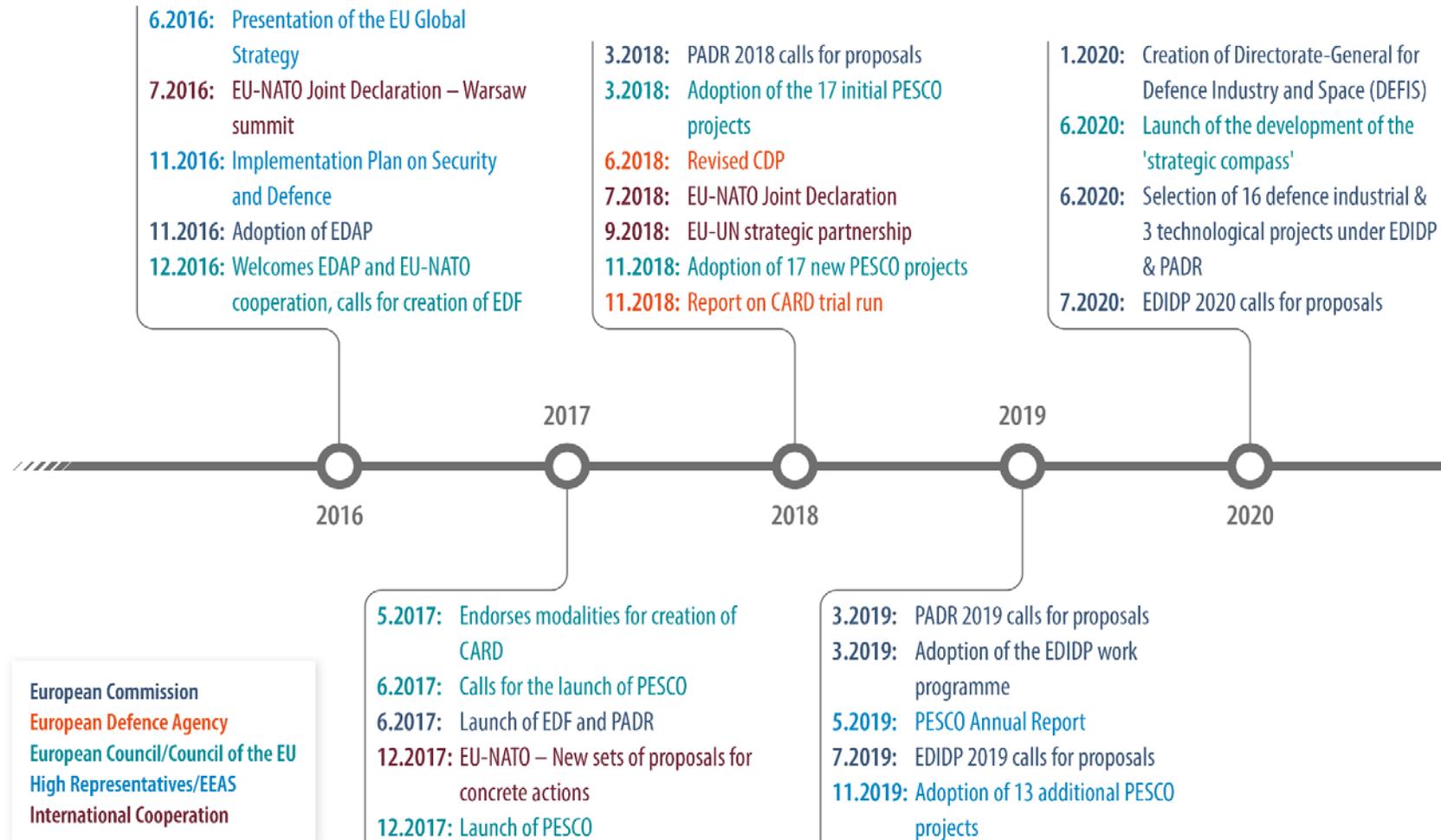
<sup>60</sup> European Council, [EU-NATO joint declaration](#), 8 July 2016.

<sup>61</sup> Council of the European Union, [Implementation Plan on Security and Defence](#), 14392/16, 14 November 2016, p. 7.

<sup>62</sup> European Commission, [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Space Strategy for Europe](#), COM(2016) 705 final, 26 October 2016.

<sup>63</sup> European External Action Service, [From Shared Vision to Common Action: Implementing the EU Global Strategy Year 1. A Global Strategy for the European Union's Foreign and Security Policy](#), June 2017, p. 21.

Figure 1 – Developments in defence cooperation at EU institutional level, 2016-2020



Source: Data from EDA, European Council, European Commission, and NATO; graphic by Samy Chahri, EPRS.

## 3.2. New EU defence mechanisms

Political promises were made and quickly turned into action. The 2016 EU Global Strategy (EUGS) and its Implementation plan on security and defence set a higher level of ambition on defence, with the objective of promoting a stronger Europe, launching a number of mutually reinforcing cooperative defence initiatives and mechanisms in recent years to support the development and use of European capabilities, including through strengthening the European defence technological and industrial base (EDTIB). These include the Coordinated annual review on defence (CARD), Permanent structured cooperation (PESCO) and the European Defence Fund (EDF), which were introduced so as to enable EU Member States to work together to identify defence capability shortages and, subsequently, develop new ones. Although distinct and different (in terms of legal bases, objectives and governance), these initiatives form part of the wider implementation of the EUGS in the area of security and defence, and support the implementation of the EU capability development priorities as derived from the Capability development plan (CDP). The CDP is the instrument for setting common priorities and defining capability requirements at EU level over time and integrating a number of different perspectives: the current CSDP shortfalls, the lessons from CSDP operations, the overview of Member States' defence plans and programmes (mid-term perspectives) and long-term capability trends, taking into consideration technological perspectives and potential changes in the security context.<sup>64</sup>

The implementation of the priorities identified by Member States in the revised CDP are analysed in the CARD, and subsequent new collaborative projects can be launched by Member States in various formats – under PESCO, within the EDA or in other bilateral or multinational frameworks – some of which may be co-funded by the EDF in the next MFF.<sup>65</sup> More specifically, in the November 2016, Council conclusions on implementing the EUGS in the area of security and defence, Member States invited the HR/VP or Head of the EDA to present proposals on the scope, modalities and content of a Coordinated annual review on defence (CARD). This annual review aims to provide a full picture of the European capability landscape over time, monitoring the implementation of EU Capability development priorities (including R&D and the industrial dimension), assessing the state of defence cooperation in Europe, and serving as pathfinder for new collaborative projects. In that way, CARD aims to help foster, on a voluntary basis, the development of a more structured way to deliver identified capabilities to address shortfalls, deepen defence cooperation and ensure more optimal use, including coherence, of defence spending plans.

In June 2017, the European Commission proposed the creation of the European Defence Fund (EDF) to make use of the EU budget to fund industrial and scientific cooperation in defence research and development. The EDF will finance a share of 'defence research' and 'industrial development' (research and technology as well as research and development) for future defence equipment and technologies. It aims to remedy the lack of national resources for research into these new technologies, as well as the fragmentation of the defence market in Europe (i.e. the lack of cooperation between Member States). However, Article 346 of the Treaty still applies, as with the two directives examined in this study, giving Member States the opportunity to use national security considerations as cause for exempting defence industrial orders from cross-border competition. It

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<sup>64</sup> The CDP thus includes the 'high impact capability goals' identified as part of the 'headline goal process' (and presented in the progress catalogue) to address, in a phased approach (short and medium term), the major shortfalls faced by the EU in meeting the military requirements necessary to undertake CSDP operations autonomously, as part of the EU level of ambition in security and defence.

<sup>65</sup> European External Action Service, [Coordinated Annual Review on Defence \(CARD\)](#), 29 November 2017.

is a practice that is widely used by Member States – not necessarily for reasons of national security but rather for economic interests.<sup>66</sup>

In the longer term, the EDF intends to foster innovation in the European defence industrial and technological base (EDITB), contribute to the strategic autonomy of the EU, and meet its security needs.<sup>67</sup> It should be noted, however, that the EDF does not finance the 'manufacturing' part of a defence product. Like its pilot programmes, the European defence industrial development programme (EDIDP)<sup>68</sup> and the Preparatory action on defence research (PADR) (adopted on 18 July 2018), the EDF focuses in particular on projects that Member States alone cannot finance or projects with high financial risks but of strategic interest for the EU. The PADR, supporting collaborative defence research, has been delivering since 2017 with the first two work programmes adopted on 11 April 2017 and on 9 March 2018 and projects approved in June 2020. A number of projects have been approved under these schemes. These projects will support the development of European defence capabilities such as drones and related technologies, space technologies, high precision missile systems, future naval platforms, airborne electronic attack capability, tactical and highly secured networks, cyber situational awareness platforms, or next-generation active stealth technologies.<sup>69</sup> Moreover, in 2019, the European Commission proposed to increase spending on R&D projects relating to defence in its 2021-2027 budget from €590 million to €13 billion. This represents a 22-fold increase compared to the present seven-year cycle.<sup>70</sup> It remains to be seen whether these ambitions will materialise in the agreed EU budget.<sup>71</sup>

Two months later, in December 2017, the Council established Permanent structured cooperation (PESCO), in which 25 Member States participate. PESCO is a framework and process to deepen defence cooperation between those EU Member States that are capable and willing to take part. Member States that have joined PESCO have subscribed to more binding commitments – this being a novelty compared to past defence cooperation – to invest, plan, develop and operate defence capabilities more together, in the EU context. It is thought that this collaborative approach to fulfilling capability gaps and strengthening the EDITB collaboration will lead to increased defence spending and joint investment, harmonised requirements, coordinated use of capabilities, enhanced operational availability, interoperability, flexibility and deployability of forces for national and multinational (EU, NATO, UN, etc.) missions and operations, and for generating and implementing capability and operational projects.<sup>72</sup> Ultimately, '[t]his will enhance the EU's capacity as an international security actor, contribute to the protection of the EU citizens and

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<sup>66</sup> Clingendael report, pp. 2, 4.

<sup>67</sup> European External Action Service, [Implementing the EU Global Strategy Year 2](#), June 2018, p. 7.

<sup>68</sup> Under the EDIDP, actions funded by the EU budget have to be consistent with defence capability priorities commonly agreed by Member States within the CFSP framework and particularly in the context of the CDP, while regional and international priorities may also be taken into account when they serve the Union's security and defence interests. References are also made to the overarching strategic research agenda, which identifies common defence research objectives, and to CARD.

<sup>69</sup> ['European Defence Fund: €205 million to boost the EU's strategic autonomy and industrial competitiveness'](#), *Spacewatch Europe*, June 2020.

<sup>70</sup> European Commission, [EU budget for 2021-2027: Commission welcomes provisional agreement on the future European Defence Fund](#), Directorate General for Internal Market, Industry, Entrepreneurship and SMEs, 20 February 2019.

<sup>71</sup> European Council, [President Charles Michel presents his proposal for the MFF and the recovery package](#), press release, 10 July 2020.

<sup>72</sup> European External Action Service, [Report by the High Representative, acting also in her capacity of Vice-President of the Commission and Head of the European Defence Agency, to the Council of 29/05/2019 on interactions, linkages and coherence among EU defence initiatives](#), HR(2019) 52.

maximise the effectiveness of defence spending'.<sup>73</sup> PESCO projects are eligible for co-funding from the EU budget – through the EDF – and they benefit from an extra 10% of funding, compared with regular projects. In that context, following the EDIDP call for proposals in June 2020, nine of the 16 awarded projects relate to PESCO projects and deal with such issues as maritime surveillance, cyber situational awareness, secure communications and strategic command and control.<sup>74</sup>

The introduction of these mechanisms has boosted the secretarial role of the European Defence Agency, without substantively increasing its resources (financial or manpower). It has also led to the creation in the von der Leyen Commission of the Directorate-General for Defence, Industry and Space (DG DEFIS), as part of the internal market portfolio of Commissioner Thierry Breton. The new Commissioner has been mandated to implement plans for the European Defence Fund; to build an open and competitive European defence equipment market by enforcing EU procurement rules on defence; and to implement plans to increase military mobility. This mandate points to two key aspects of the Commissioner's work. One relates to the scope: the new DG's activities are focused on the defence market rather than on defence policy per se. The other decision about the Commission's mandate relates to the scale of the work: the new DG has been tasked with focusing on implementation – new EU defence formats, initiatives and plans need to be brought to fruition over the next few years.<sup>75</sup> Importantly, the DG DEFIS brings under one roof all the defence programmes, including the monitoring of their implementation, and links more directly the EU defence package with the recent initiatives in EU defence cooperation that are described in this chapter.

Together, the revised Capability development plan (CDP), Permanent structured cooperation (PESCO), the European Defence Fund (EDF), and the Coordinated annual review on defence (CARD) promise to form the cornerstone of a coherent EU mechanism to boost collaborative defence capability planning, development, procurement and operation. The interaction between these instruments is illustrated in Figure 2 below.

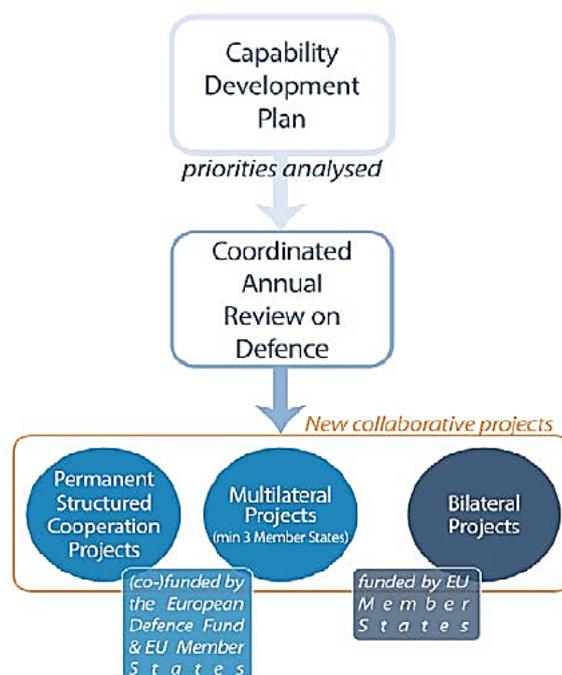
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<sup>73</sup> For further information, refer to [dedicated website on PESCO](#).

<sup>74</sup> European Commission, [European Defence Industry – results of the calls](#), Factsheet, 15 June 2020.

<sup>75</sup> S. Besch, [Can the European Commission develop Europe's defence industry?](#), Centre for European Reform, 18 November 2019, p. 2.

Figure 2 – Interaction among the new EU defence mechanisms



Source: EPRS, with data from [EEAS](#).

On 16 June 2020, the Member States' defence ministers officially launched work on the EU's 'strategic compass' to be adopted by the Council in 2022. The Commission and the European Defence Agency will be associated in the process as appropriate. The strategic compass aims to enhance and guide implementation of the level of ambition agreed in November 2016 in the context of the EUGS and to further contribute to developing a common European security and defence culture, based on EU shared values and objectives and that respects the specific character of the security and defence policies of the Member States. Building on the threat analysis and other possible thematic input, the strategic compass will seek to define policy orientations and specific goals and objectives in areas such as crisis management, resilience, capability development and partnerships. The ongoing work on the security and defence initiatives will also feed into this process while the strategic compass should provide coherent guidance for these initiatives and other relevant processes.<sup>76</sup> Hence, the strategic compass could help create a common strategic culture, which would also help to forge a common level of ambition for a common defence policy.

### 3.3. Engagement of defence sector small and medium-sized enterprises

The defence market's uniqueness relates to a number of issues, including technological level, programme cycles, security of supply, market regulation, information security, and business models, depending on public investment and the industry's relationship with governments. Governments dominate the sector through a variety of roles, for instance as regulators, owners, controlling shareholders, funders of R&D and principal customers. This is why a shift in the focus of government

<sup>76</sup> [Council Conclusions on Security and Defence](#), 8910/20, 17 June 2020, p. 3.

attention is needed to consider all supplier stakeholders, including SMEs, not only prime contractors.

Already in 2007, the strategy for the European defence technological and industrial base (EDTIB) stressed that the future success of European defence industry would depend on the effective use of human capital and innovation wherever these are to be found in Europe, including in small and medium-sized enterprises (SMEs) and suppliers not always associated with defence.<sup>77</sup> The 2013 December European Council highlighted SMEs as an important element in the defence supply chain, a source of innovation and key enablers for competitiveness. The role of SMEs in the defence supply chain is also acknowledged in the European Commission communication 'Towards a more competitive and efficient defence and security sector' and its related implementation roadmap.<sup>78</sup>

In practice, SMEs are active in defence both as direct suppliers to defence ministries and as subcontractors in the defence supply chain. A number of SMEs that participate in defence markets are involved in dual-use and the increasing convergence of the defence and security sectors appears to be creating even greater emphasis on dual-use products. Other SMEs remain specialised in defence-related activities or in 'niche' competencies and are consequently particularly dependant on military business. More specifically, SMEs are among the key beneficiaries of €205 million in EU financing for the 16 newly announced pan-European defence industrial projects and three disruptive technology projects that has been made available through the Preparatory action on defence research (PADR) and the European defence industrial development programme (EDIDP). 'SMEs represent 37% of the total number of entities receiving funding (83 SMEs) from EDIDP, confirming the importance of specific SMEs calls and dedicated SMEs bonuses'.<sup>79</sup> For their part, Member States and prime contractors recognise the contribution of SMEs and their ability to respond promptly to changing military needs as well as their important role in research, technology and innovation.

Despite being an important part of the defence supply chain, small and medium sized enterprises face considerable challenges when trying to participate in the EU defence market, in particular cross-border access to defence contracts. These include legal, administrative, geographic, language and cultural obstacles, as well as access to classified information, security of supply requirements, standardisation and certification, and national export control regulations.<sup>80</sup> SMEs claim to face barriers in promoting their innovative solutions to government authorities and large companies. As defence supply chains have a substantial national focus, there are additional challenges for SMEs that wish to enter defence supply chains in other European countries. These result in part from concerns regarding security of supply. Other factors compromising SME participation in EU defence cooperation include specialisation, standardisation, certification or export control. Moreover, due to the limited scale effect of most of military programmes, sourcing strategies sometime lead to single source procurements, with limited flexibility for qualifying alternative sub-suppliers. This situation contributes to the fragmentation of the European defence equipment market and hinders transparency and openness between EU countries. It also affects the efficiency and competitiveness

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<sup>77</sup> European Defence Agency, [A Strategy for the European Defence Technological and Industrial Base](#), 14 May 2007.

<sup>78</sup> European Commission, [Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a more competitive and efficient defence and security sector](#), COM(2013) 542 final, 24 July 2013.

<sup>79</sup> European Cluster Collaboration Platform, [Major role for SMEs in newly announced EU-funded defence projects](#), June 2020.

<sup>80</sup> See, for example, P. Bellouard and A Fonfria, [The Relationship between prime contractors and SMEs: How to Best Manage and Fund Cooperative Programmes](#), Policy Paper No 24, Armament Industry European Research Group, January 2018; M. Drent and D. Zandee, [More European defence cooperation: The road to a European defence industry?](#), Policy Brief, Clingendael, June 2018, p. 4.

of the European defence technological and industrial base, undermining the EU's strategic autonomy.

In response, the European Commission has set up an advisory group on cross-border access for SMEs to defence and security contracts. This network of Member State SME points of contact has been established in order to promote and monitor the use and implementation of the guidelines and to discuss further policies and measures relating to SMEs. The group has prepared a report, outlining recommendations on government procurement, prime contractors, EU-wide access to supply chains and contracts, SMEs and sub-suppliers' capacity building, research and technology (R&T) and innovation, and intra-community transfer of defence-related products.

In addition, the EDA's 'Guidelines for facilitating SMEs' access to the defence market',<sup>81</sup> approved in 2009 and revised in May 2015, provide Member States with recommendations on how to improve access by defence-related SMEs to information, defence procurement, supply chains and finance as well as on how to promote innovation and the competitiveness of SMEs. The first progress report on the implementation of the guidelines was approved by the EDA Steering Board in December 2016. Implementation of the accompanying SME action plan of March 2013 is an on-going process, being conducted in close interaction with Member States, the European Commission and industry.

In addition, an EDA 'SME action plan', approved by the EDA Steering Board in March 2013, addresses measures in support of defence-related SMEs. The main measures endorsed are:

- increasing interaction with the European Commission's work on SMEs and clusters, with a focus on specific action to support defence-related SMEs and making best use of existing tools;
- improving information sharing about business opportunities through the creation of an EDA forum/portal for defence-related SMEs;
- supporting innovation by enhancing SME access to defence-related research and technology, and doing so by developing bridges between university research and SMEs;
- enhancing defence SME market conditions by further developing, on the one hand, the existing SME guidelines, and on the other, Member States' and National Defense Industrial Association best practice, on the other;
- facilitating efficient use of subcontracting provisions in the recent Defence and Security Procurement Directive, through sharing of best practice.<sup>82</sup>

To implement the SME action plan, the EDA has launched a number of initiatives:

- In June 2013, EDA launched a new portal, the [Defence Procurement Gateway](#), on its website. It is a one-stop shop dedicated to defence procurement-related business opportunities and information at both EU and national level. In December 2016, an [SME corner](#) was created within the Defence Procurement Gateway.
- The EDA has organised and supported targeted workshops on European defence opportunities for SMEs.

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<sup>81</sup> European Defence Agency, [Guidelines for Facilitating SME's Access to the Defence Market](#), June 2015.

<sup>82</sup> See the website of the European Defence Agency (EDA), [activities for SMEs](#), 16 October 2017.

- In order to promote greater innovation across the defence industry in Europe, with a special focus on SMEs, the EDA has initiated activities to facilitate access to the European structural and investment funds (ESIF) for dual-use technology projects.
- As a part of the new market and industry approach, the EDA supply chain action plan (SCAP)<sup>83</sup> (complementary to the work on SMEs) was approved by the EDA Steering Board in May 2014. Among other tasks, the SCAP is the framework for regular targeted meetings/information sessions with stakeholders at bilateral, regional and European level, and for monitoring the impact of the Defence Procurement Directive on the supply chain as part of the EDTIB.
- The EDA has launched the [SME modelling and simulation platform](#) (January 2016) and published a handbook for defence-related SMEs (March 2016).<sup>84</sup>
- With a view to reinforcing SME involvement in defence, the EDA Chief Executive appointed two senior EDA advisers on SMEs to boost its own institutional framework.
- EDA conducted a study on defence-related SMEs' composition in EU.<sup>85</sup>
- EDA also enhanced its role in facilitating defence-related SMEs' access to EU tools (e.g. by developing the ESIF and COSME web platforms in 2016 and 2017, and liaising with the Enterprise Europe Network (EEN) to increase SME participation in EDA CapTechs).

In the broader context of support for the defence industry, the EDA has developed other initiatives that have also had an impact on SMEs, such as 'Balanced access to the EDTIB-central and eastern European countries' and 'Access to EU funding'.<sup>86</sup> In addition, based on the EU Global Strategy's call for 'a structured dialogue with industry' and given the evolving industrial and innovation landscape, the EDA recently reviewed its work with industry and developed an EDA industry engagement concept. On 18 May 2017, the Steering Board – in Ministers of Defence format – supported the EDA's revised approach, recognising support for SMEs as a key area of focus.

In parallel, the EDF has reinforced SME access to the defence market in two key areas: collaboration between defence companies, and access of SMEs and companies with medium market capitalisation (mid-caps) to the programme. This was a very clear demand from several Member States and parliamentarians from countries that do not have an industry as developed as the few major defence countries (France, Germany, Italy, Spain): so as not to benefit only big companies in those countries. Following the European Commission proposal for the EDF, whereby a commitment was made to explore how to mobilise new financial instruments from the European Investment Bank and other players to support SMEs and mid-caps, the European Investment Bank (EIB) and EDA concluded an agreement that includes access to COSME – the EIB's SME financing programme – to support defence investments.<sup>87</sup>

The last of the 2019 calls for proposals of the European defence industrial development programme (EDIDP) (call EDIDP-SME-2019) was specifically devoted to SMEs. Focusing on innovative and future-oriented defence solutions, this call is aimed at 'supporting any action on innovative defence products, solutions, materials and technologies, including those that can create a disruptive effect

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<sup>83</sup> European Defence Agency, [EDA Supply Chain Action Plan](#), May 2014.

<sup>84</sup> European Defence Agency, [Handbook for defence-related SMEs](#), 2016.

<sup>85</sup> IHS, [16.ESI.NP1.106: 'Analysis of defence-related SMEs' composition in EU'](#), Executive Summary, Prepared for the European Defence Agency, 13 December 2016.

<sup>86</sup> European Defence Agency, [Small and Medium Sized Enterprises \(SMEs\)](#), 16 October 2017.

<sup>87</sup> European Defence Agency, [The European Investment Bank joins EDA's 'IdentiFunding'](#), 22 July 2019.

and improve readiness, deployability, reliability, safety and sustainability of union forces in all spectrum of tasks and missions, for example in terms of operations, equipment, infrastructure, basing, energy solutions, new surveillance systems'.<sup>88</sup> The EU's financial support for actions resulting from the 2019 calls was €243 250 000 and for 2020 is €254 500 000.<sup>89</sup> The 2020 EDIDP calls for proposals also included a call dedicated to SMEs on the same topics. The EU 'is considering a contribution of up to EUR 10 000 000 to support several proposals addressing any subject of interest for defence, while considering a contribution of up to EUR 2 500 000 to support an individual proposal'.<sup>90</sup>

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<sup>88</sup> European Commission, [2019 calls for proposals: European defence industrial development programme \(EDIDP\)](#), 19 June 2019.

<sup>89</sup> European Commission, Brussels, [Commission Implementing Decision of 19.3.2019 on the financing of the European Defence Industrial Development Programme and the adoption of the work programme for the years 2019 and 2020](#), C(2019) 2205 final, 19 March 2019, p. 2.

<sup>90</sup> European Commission, [European Defence Industrial Development Programme \(EDIDP\) - 2020 calls for proposals, conditions for the calls and annexe, based on Regulation \(EU\) 2018/1092 and on Commission implementing Decision C\(2019\) 2205](#), 23 July 2020, p. 97.

## 4. European Parliament's oversight of the EU defence package

The European Parliament has actively and consistently monitored the implementation of the EU defence package and developments in defence policy, defence industry and markets through a number of resolutions, recommendations and positions. For the purpose of this study, with the aim of analysing European parliamentary monitoring of the Defence Procurement Directive and the Intra-Community Transfers Directive, 43 relevant resolutions have been identified through archival research, since January 2016. The annual reports on common security and defence policy (CSDP) and on common foreign and security policy (CFSP) for the 2016-2020 period (the period under examination) are also included in the pool of relevant resources, due to their connection with the defence industry and defence markets.

The salience of defence-related issues in Parliament remained steady throughout the timeframe of the study. Parliament has supported the EU's quest for stronger EU defence cooperation as expressed in the 2016 EU Global Strategy: '[d]eeper defence cooperation engenders interoperability, effectiveness, efficiency and trust: it increases the output of defence spending. Developing and maintaining defence capabilities requires both investments and optimising the use of national resources through deeper cooperation'.<sup>91</sup> In addition, Parliament's intensity of action has followed the rhythm of developments on EU defence cooperation, in particular the development of new initiatives and instruments (see Figure 1). Accordingly, direct reference to the two directives and the EU defence package was more frequent in 2016 (three out of six documents), with the evaluation of the two directives, and continued sporadically in 2017 to 2018. Attention was renewed in 2019 with six documents mentioning either or both directives before the beginning of the ninth legislature. Parliament's position and recommendations on the EU defence package are analysed later in this chapter.

In a separate section, this chapter examines the extent to which and the ways in which Parliament has monitored the development of EU defence and its implications for defence industry cooperation and the development of the EU defence market. The analysis below is based on identification of relevant Parliament resolutions using a set of chosen keywords as indicated in the methodology of this study. It also looks into the European Commission follow up to Parliament resolutions, when available. It is important to note that some resolutions do not deal with defence matters directly, but touch on them in the context of other policy areas. For this reason, only relevant Commission follow-up to Parliament resolutions is considered.<sup>92</sup>

In addition, when considering Parliament's monitoring of the EU defence package and developments in defence policy and the defence industry, the study also examined relevant written questions sent by individual Members to the European Commission or the Council. For the period under examination, 62 relevant written questions were identified. Defence-related issues were raised mainly in the 2017-2018 period (22 and 20 questions respectively). Specific attention to the EU defence package is quite scattered, with only two questions in 2016 directly relating to the Defence Procurement Directive and two on the Intra-Community Transfers Directive. Correspondingly, European Commission replies to MEPs' written questions were also analysed.

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<sup>91</sup> European External Action Service, [Shared Vision, Common Action: A Stronger Europe: A Global Strategy for the European Union's Foreign and Security Policy](#), June 2016, p. 20.

<sup>92</sup> Out of six available European Commission follow-ups, only three addressed defence-related concerns and/or requests brought forward in Parliament resolutions: the follow-up to the [European Parliament resolution of 31 May 2018](#), to the [European Parliament resolution of 8 June 2016](#) and to the [European Parliament resolution of 22 November 2016](#).

## 4.1. Inter-institutional relations on the implementation of the EU defence package

The research identified 13 relevant resolutions and/or positions that mention the EU defence package: the two directives are addressed an equal number of times and on many occasions together, demonstrating how from the onset Parliament understood the importance of cross-fertilisation between these two directives.

A first set of resolutions was adopted in 2016, the same year as the European Commission evaluations were published, and mention the two directives specifically. They note the 'importance of fully and correctly applying the defence package [and] call for a better implementation'.<sup>93</sup> In this context, in its 2016 resolution on the implementation of the CSDP, Parliament used strong language to express its regret for the fact that Member States apply the Defence Procurement Directive and the ICT Directive to totally different extents. Accordingly, Parliament called on the European Commission 'to apply the guidance note on Article 346, and to assume its role as guardian of the Treaties by starting to implement infringement proceedings in the event of violations of the directives', on Member States 'to improve multinational efforts on the demand side of military procurement, and on European industries on the supplier side to strengthen their global market positions through better coordination and industrial consolidation'.<sup>94</sup> Parliament used similar language in a later resolution regretting 'that the Defence Procurement Directive has not yet delivered the desired results, in particular with regard to trans-national infrastructure projects', and urging the Commission and the Member States 'to intensify their efforts to better implement the currently applicable rules'.<sup>95</sup>

Equally, Parliament's resolution of November 2016 on the European Defence Union (EDU) made explicit mention of the European Commission's evaluations of the two directives in the recitals and noted that 'the cost of non-Europe in defence and security is estimated at €26.4 billion annually, as the result of duplication, overcapacity and barriers to defence procurement'. In the same resolution, Parliament called on Member States to make the most of existing tools, to 'explore the possibility of joint procurement of defence resources [and noted] that the protectionist and closed nature of EU defence markets makes this more difficult'. It stressed 'the need to ensure that the Defence Procurement Directive and the Intra-Community Transfers Directive are correctly applied across the EU [and] urge[d] the Commission and the Member States to guarantee the full implementation of the two defence-related directives of the so-called defence package'.<sup>96</sup>

In terms of recommendations, Parliament pointed to the European Defence Agency as being 'indispensable for an efficient EDU in terms of coordinating capability-driven programmes and projects and establishing a common European capabilities and armaments policy, in pursuit of greater efficiency, elimination of duplication and reduction of costs and [...] and harmonised national defence planning and procurement processes with regard to those specific capabilities'. In that light, Parliament called for action to strengthen the EU's capabilities through joint procurement and other forms of pooling and sharing that could provide a much-needed boost to Europe's

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<sup>93</sup> European Parliament resolution of 21 January 2016 on the mutual defence clause (Article 42(7) TEU), [P8\\_TA\(2016\)0019](#), p. 3.

<sup>94</sup> European Parliament resolution of 23 November 2016 on the implementation of the Common Security and Defence Policy (based on the Annual Report from the Council to the European Parliament on the Common Foreign and Security Policy), [P8\\_TA\(2016\)0440](#), p. 9.

<sup>95</sup> European Parliament resolution of 4 October 2018 on the public procurement strategy package, [P8\\_TA\(2018\)0378](#), p. 7.

<sup>96</sup> European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#), p. 9.

defence industry, SMEs included. It also called for the introduction of a European defence semester, whereby Member States would consult each other's planning cycles and procurement plans, to help overcome the current state of defence market fragmentation.<sup>97</sup>

In response, the European Commission pointed to the adoption of the European defence action plan on 30 November 2016. It argued that, as requested in the Parliament resolution, this action plan represented the Commission's contribution to stronger European defence by ensuring that the European industrial base was robust enough to be able to meet future security needs, including capabilities that Member States jointly identified as priorities. It also claimed the measures in the action plan would have a positive impact on the fragmented market for defence, and on the competitiveness of the industry.

To improve EU-wide competition for defence procurement contracts and ensure a more transparent defence market, which it said it also wanted, the European Commission had proposed measures to improve implementation of the two defence-related directives, namely the Defence Procurement Directive and the ICT Directive, first, regarding the issuing of guidance aimed to help Member States to effectively and consistently implement the Defence Procurement Directive and balance the basic public procurement principles while respecting the specificities of the defence sector. Together with Member States, the European Commission had prepared guidance on government-to-government sales. The European Commission also mentioned providing guidance on the use of subcontracting provisions and cooperative procurement.

Second, the European Commission has also adopted two recommendations to encourage harmonised use of the ICT Directive, by defining a minimum list of less sensitive components for licensing in order to facilitate the transfer of defence-related products throughout the EU. To ensure consistent implementation of the two directives across the EU, the European Commission noted that it also monitored legislation in the Member States closely and requested clarifications from national authorities where needed. It said it would consider taking enforcement action with regard to both directives with the aim of creating a level-playing field for all players in the single market.

The European Commission admitted that the problem of cross-border market access was a particular problem for SMEs outside existing defence supply chains. It spoke of opening up funding opportunities on EU financial instruments based on EIB lending, for example the European Fund for Strategic Investments (EFSI) or the programme for the 'Competitiveness of enterprises and small and medium sized enterprises' (COSME), which could help with dual-use defence-related activities. It also proposed promoting the use of the European structural and investment funds (ESIF) to support investment projects (both innovative products and modernisation of industrial facilities and infrastructures) in the defence sector. On practical measures to support cross-border market access for SMEs, in 2017 the Commission adopted recommendations encouraging procurement authorities to facilitate cross-border and SME participation in defence procurement procedures and defence supply chains.<sup>98</sup>

Importantly, Parliament had linked the establishment of the European Defence Fund with the use of the EU defence package in its legislative resolution of April 2019 on the proposal for a regulation for establishing the European Defence Fund. Specifically, it had argued that '[t]he Fund would contribute to the establishment of a strong, competitive and innovative European defence technological and industrial base and go hand in hand with the Union's initiatives towards a more integrated European defence market and in particular, the two directives on procurement and on

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<sup>97</sup> Ibid., pp. 7-8.

<sup>98</sup> European Commission follow up to the European Parliament resolution of 22 November 2016 on the European Defence Union 2016/2052 (INI), [SP\(2017\)148](#), 22 March 2017.

EU transfers in the defence sector adopted in 2009'. It had also noted that EU 'financial support should not affect the transfer of defence-related products within the Union in accordance with Directive 2009/43/EC of the European Parliament and the Council nor the export of products, equipment or technologies'.<sup>99</sup>

In a resolution of 2017 on the Common position on the implementation of arms exports, Parliament mentioned the ICT Directive and pointed to the fact that 'the industrial landscape of defence in Europe is a sector of key importance and is, at the same time, characterised by overcapacities, duplication and fragmentation'. Parliament also noted that this situation acts as a brake on the competitiveness of the defence industry, which has also meant that a competitive and innovative European defence technological and industrial base has yet to be developed.<sup>100</sup> Specifically on the ICT Directive, Parliament noted that 'the implementation of Directive 2009/43/EC simplifying terms and conditions of transfers of defence-related products within the Community should be in consistent with the implementation of the Common Position, including spare parts and components; notes that the Common Position is non-restrictive in scope and, accordingly, the eight criteria also apply to exports within the EU'.<sup>101</sup> The European Parliament also mentioned the ICT Directive in a legislative resolution it adopted on the proposal for a regulation of the European Parliament and of the Council establishing the European defence industrial development programme aiming at supporting the competitiveness and innovative capacity of the EU defence industry.<sup>102</sup> The same points were raised in Parliament's resolution of November 2018 on the implementation of the same Common Position.<sup>103</sup>

Furthermore, in its resolution (initiated and led by IMCO) of October 2018 on the public procurement strategy package, Parliament mentioned the Defence Procurement Directive and emphasised the importance of the increased use of strategic procurement and quality criteria.<sup>104</sup> The Commission, in response, noted that it had been and intended to continue to be vocal about the advantages brought by awarding public contracts based on quality criteria. Furthermore, it intended to continue to promote the use of sustainability criteria.<sup>105</sup>

In a resolution of April 2019 on adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 TFEU, the two directives under examination were struck out of the consolidated text.<sup>106</sup> Equally, another Parliament legislative resolution of April 2019 mentioned the Defence Procurement Directive and the ICT Directive in

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<sup>99</sup> European Parliament legislative resolution of 18 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund, [P8\\_TA\(2019\)0430](#), pp. 4, 19.

<sup>100</sup> European Parliament resolution of 13 September 2017 on arms export: implementation of Common Position 2008/944/CFSP, [P8\\_TA\(2017\)0344](#), p. 4.

<sup>101</sup> Ibid. p. 10.

<sup>102</sup> European Parliament legislative resolution of 3 July 2018 on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovative capacity of the EU defence industry, [P8\\_TA\(2018\)0275](#).

<sup>103</sup> European Parliament resolution of 14 November 2018 on arms exports: implementation of Common Position 2008/944/CFSP, [P8\\_TA\(2018\)0451](#).

<sup>104</sup> European Parliament resolution of 4 October 2018 on the public procurement strategy package, [P8\\_TA\(2018\)0378](#).

<sup>105</sup> European Commission follow up to the European Parliament non-legislative resolution on the public procurement strategy package, [SP\(2018\)795](#), 22 February 2019.

<sup>106</sup> Adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 TFEU - Part II \*\*\*I, European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union, [P8\\_TA\(2019\)0409](#).

relation to a proposed directive that aimed to enhance the enforcement of Union law and policies in specific areas on common minimum standards providing for a high level of protection of persons reporting on breaches in a wide range of areas, including public procurement.<sup>107</sup> For its part, the Defence Procurement Directive is mentioned in the resolution of 2018 on the establishment of the Horizon Europe programme<sup>108</sup> and the space programme of the Union and the European Union Agency for the Space Programme.<sup>109</sup>

In its latest relevant resolution, on arms control, Parliament 'calls on the Commission to ensure the effective implementation of Directives 2009/81/EC and 2009/43/EC, including enforcement actions as regards procurement'.<sup>110</sup> This resolution enumerates all the instruments developed since 2016 along with the EU defence package demonstrating the complementarity between them and their unequivocal contribution to underpinning the industrial and technological foundations of the European defence sector.

## 4.2. Inter-institutional relations on EU defence cooperation

This section examines European Parliament resolutions, positions and recommendations that consider various aspects of EU defence cooperation (selected according to the relevant keywords as explained in the methodology section of this study). Firstly, Parliament's stance and concerns on to defence industry, defence markets and defence research are presented. Secondly, the analysis focuses on Parliament's monitoring of defence related instruments, initiatives and programmes – i.e. PADR, CARD, PESCO, EDF, and EDIDP.

Over the last four years the European Parliament has called consistently for increased cooperation and harmonisation at the level of the defence industry, with particular reference to the 2016 EU Global Strategy, which – according to a resolution of November 2016 – 'requires that the EU systematically encourage defence cooperation over the full spectrum of capabilities, in order to [...] create a solid European defence industry as being critical for the Union's strategic autonomy of decision and action'.<sup>111</sup> This was reaffirmed in its 2019 annual report on the implementation of common security and defence policy, which also argued that 'a competitive defence industry is crucial for Europe' and warned that, 'despite the efforts made during the last years, [...] different national regulations, licensing procedures and export control lists, as well as lack of information sharing, remain as the key obstacles to building a true and effective European defence industry'.<sup>112</sup>

Parliament has also pointed consistently to the need for greater EU defence coordination and cooperation. In a resolution of 5 July 2018, Parliament emphasised that defence 'is a clear example of how greater effectiveness could be achieved by transferring certain competences and actions

<sup>107</sup> European Parliament legislative resolution of 16 April 2019 on the proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, [P8\\_TA\(2019\)0366](#).

<sup>108</sup> European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, [P8\\_TA\(2019\)0395](#).

<sup>109</sup> European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the space programme of the Union and the European Union Agency for the Space Programme and repealing Regulations (EU) No 912/2010, (EU) No 1285/2013, (EU) No 377/2014 and Decision 541/2014/EU, [P8\\_TA\(2019\)0402](#).

<sup>110</sup> European Parliament resolution of 17 September 2020 on Arms export: implementation of Common Position 2008/944/CFSP, [P9\\_TA-PROV\(2020\)0224](#).

<sup>111</sup> European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#).

<sup>112</sup> European Parliament report on the implementation of the common security and defence policy – annual report, [P9\\_TA\(2020\)0009](#), 11 December 2019.

[...] to the EU'.<sup>113</sup> In addition to efficiency gains, in other relevant resolutions, it has consistently pointed out that coordinated action at European level in the field of defence is enshrined in the Treaty of Lisbon through the implementation of the CSDP. More specifically, in its resolution of 16 March 2017, Parliament stated that 'the Union should use this competence to improve coordination and efficiency, and to supplement the actions of the Member States'.<sup>114</sup>

In this light, since 2016, Parliament has called for the establishment of a European defence union,<sup>115</sup> expressing concern at the slow pace at which the integration process is proceeding<sup>116</sup> and has stressed the urgency of the matter, considering the 'increasing deterioration in the security environment at the EU's borders',<sup>117</sup> coupled with the consequences of Brexit.<sup>118</sup> More specifically, in a resolution on February 2020,<sup>119</sup> Parliament underlined that the United Kingdom was still to apply all defence-related measures during the transition period, and that cooperation on this issue was to be 'an integral part of the comprehensive partnership agreement'.<sup>120</sup> Parliament held that it is in fact of common interest to both the European Union and the UK to collaborate on enhancing defence capabilities and strengthening the defence industrial base.

More generally, Parliament has referred to the defence industry repeatedly throughout the eighth legislature,<sup>121</sup> giving it increased attention in the 2017-2018 period, during the preparation of the European defence industrial development programme (EDIDP), which was launched in 2018. The defence industry is also mentioned in all CSDP and CFSP annual reports, where its crucial role in strengthening the EU's strategic autonomy is consistently reiterated, as is the need to improve efficiency by promoting a fully integrated defence market.

In the 2016-2020 period, Parliament has also repeatedly underlined the importance of developing a strong European defence technological and industrial base (EDTIB) for the enhancement of the security and self-defence capabilities of Member States.<sup>122</sup> In its most recent resolution of 17 September 2020 on arms control, Parliament stressed that a viable European market would reduce dependency on arms exports to third countries'.<sup>123</sup>

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<sup>113</sup> European Parliament resolution of 5 July 2018 on the mandate for the trilogue on the 2019 draft budget, [P8\\_TA\(2018\)0311](#), p. 6.

<sup>114</sup> European Parliament resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty, [P8\\_TA\(2017\)0092](#), p. 4.

<sup>115</sup> European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union, [P8\\_TA\(2017\)0048](#).

<sup>116</sup> Ibid.

<sup>117</sup> European Parliament resolution of 23 November 2016 on the implementation of the Common Security and Defence Policy (based on the Annual Report from the Council to the European Parliament on the Common Foreign and Security Policy), [P8\\_TA\(2016\)0440](#), p. 6.

<sup>118</sup> European Parliament resolution of 12 February 2020 on the proposed mandate for negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland, [P9\\_TA\(2020\)0033](#).

<sup>119</sup> Ibid.

<sup>120</sup> European Parliament resolution of 12 February 2020 on the proposed mandate for negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland, [P9\\_TA\(2020\)0033](#), p. 17.

<sup>121</sup> The EU defence industry has been mentioned in four documents in 2016, seven in 2017, eight in 2018, five in 2019 and two in 2020.

<sup>122</sup> European Parliament resolution of 13 September 2017 on arms export: implementation of Common Position 2008/944/CFSP, [P8\\_TA\(2017\)0344](#).

<sup>123</sup> European Parliament resolution of 17 September 2020 on arms export: implementation of Common Position 2008/944/CFSP, [P9\\_TA-PROV\(2020\)0224](#).

Parliament also believes that the full potential of the sector remains unfulfilled.<sup>124</sup> In this regard, it has often expressed its concern regarding the severe underfunding of the defence sector, a factor that hinders the development of a strong EDTIB. The 2018 European Parliament annual report on the implementation of the CSDP rightly notes that possible additional budgetary appropriations could be needed to cover the administrative expenditure of the European External Action Service (EEAS) and the EDA so as to allow them to fulfil their function as the PESCO secretariat, and for the EDA to run the next CARD phase successfully.<sup>125</sup> The need for more funding was also highlighted in the seven budget-related resolutions that mention European defence, namely those addressing budget preparation,<sup>126</sup> the trilogue for the draft budget,<sup>127</sup> and the multiannual financial framework.<sup>128</sup> In these resolutions, Parliament underlines notably that funding for defence-related programmes and initiatives must not come at the detriment of other European programmes.<sup>129</sup> In its defence, the European Commission explained in its answer to the Parliament resolution of 31 May 2018 that the Connecting Europe Facility programme was aimed at supporting civil-military dual use infrastructure and would therefore contribute to the European defence union.<sup>130</sup> Parliament has called for increased defence spending in five resolutions.<sup>131</sup> Equally, more recently and in the context of the MFF, Parliament has called on the EU to 'match additional responsibilities with additional financial means'<sup>132</sup> and to increase funding dedicated to the European Defence Fund.<sup>133</sup>

<sup>124</sup> European Parliament resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty, [P8\\_TA\(2017\)0092](#); European Parliament resolution of 13 September 2017 on arms export: implementation of Common Position 2008/944/CFSP, [P8\\_TA\(2017\)0344](#).

<sup>125</sup> European Parliament resolution of 12 December 2018 on the annual report on the implementation of the Common Security and Defence Policy, [P8\\_TA\(2018\)0514](#).

<sup>126</sup> European Parliament resolution of 15 March 2017 on general guidelines for the preparation of the 2018 budget, Section III – Commission, [P8\\_TA\(2017\)0085](#); European Parliament resolution of 15 March 2018 on general guidelines for the preparation of the 2019 budget, Section III – Commission (2017/2286(BUD)), [P8\\_TA\(2018\)0089](#); European Parliament resolution of 14 March 2019 on general guidelines for the preparation of the 2020 budget, Section III – Commission (2019/2001(BUD)), [P8\\_TA\(2019\)0210](#).

<sup>127</sup> European Parliament resolution of 5 July 2017 on the mandate for the trilogue on the 2018 draft budget, [P8\\_TA\(2017\)0302](#); European Parliament resolution of 5 July 2018 on the mandate for the trilogue on the 2019 draft budget, [P8\\_TA\(2018\)0311](#).

<sup>128</sup> European Parliament resolution of 14 March 2018 on the next MFF: Preparing the Parliament's position on the MFF post-2020, [P8\\_TA\(2018\)0075](#); European Parliament resolution of 10 October 2019 on the 2021-2027 multiannual financial framework and own resources: time to meet citizens' expectations, [P9\\_TA\(2019\)0032](#).

<sup>129</sup> European Parliament resolution of 5 July 2017 on the mandate for the trilogue on the 2018 draft budget, [P8\\_TA\(2017\)0302](#); European Parliament resolution of 15 March 2018 on general guidelines for the preparation of the 2019 budget, Section III – Commission (2017/2286(BUD)), [P8\\_TA\(2018\)0089](#); European Parliament resolution of 31 May 2018 on the Transport Pillar of the Connecting Europe Facility after 2020, [P8\\_TA\(2018\)0237](#).

<sup>130</sup> European Commission, Follow up to the European Parliament non-legislative resolution of 31 May 2018 on the Transport Pillar of the Connecting Europe Facility after 2020, [SP\(2018\)515](#).

<sup>131</sup> European Parliament resolution of 13 April 2016 on the EU in a changing global environment – a more connected, contested and complex world, [P8\\_TA\(2016\)0120](#); European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#); European Parliament resolution of 14 March 2018 on the next MFF: Preparing the Parliament's position on the MFF post-2020, [P8\\_TA\(2018\)0075](#); European Parliament resolution of 14 March 2019 on general guidelines for the preparation of the 2020 budget, Section III – Commission (2019/2001(BUD)), [P8\\_TA\(2019\)0210](#); European Parliament resolution of 10 October 2019 on the 2021-2027 multiannual financial framework and own resources: time to meet citizens' expectations, [P9\\_TA\(2019\)0032](#).

<sup>132</sup> European Parliament resolution of 10 October 2019 on the 2021-2027 multiannual financial framework and own resources: time to meet citizens' expectations, [P9\\_TA\(2019\)0032](#), p. 2.

<sup>133</sup> European Parliament, European Parliament resolution of 13 June 2018 on cyber defence, [P8\\_TA\(2018\)0258](#).

Moreover, Parliament has consistently reiterated the loss of efficiency stemming from fragmentation and duplication in defence markets in six resolutions.<sup>134</sup> In this regard, in its resolution of 14 March 2018, Parliament also emphasised that the 2020-2027 MFF 'must support the establishment of a European Defence Union'<sup>135</sup> and reiterated the efficiency gains that would result from increased coordination and pooling of resources in the sector. Moreover, Parliament 'believes that collaborative research can help reduce such fragmentation and improve competitiveness'.<sup>136</sup> In fact, in two of its resolutions (in March<sup>137</sup> and July 2017<sup>138</sup>), it highlighted the role of defence research in enabling more efficient defence spending at national level by enhancing competitiveness and innovation in the industry. Such an approach, Parliament argues, would in turn create jobs and stimulate economic growth. Throughout the timeframe of this study, Parliament has also pointed consistently to the interconnectedness between defence markets, defence industry and research. In this context, on 16 February 2017, Parliament strongly advocated for the role of the European Defence Agency 'in helping develop a single defence market that is competitive, efficient, underpinned by intensive R&D&I [Research & Development & Innovation] and focused on creating specialised jobs',<sup>139</sup> thus asking that appropriate funding be directed towards it.<sup>140</sup>

Parliament has also been particularly attentive in asking the Commission to take account of the interplay between technology and security issues<sup>141</sup> (e.g. the role of space technology, industry and research in the development of the defence industry, EU defence capabilities, cyber-security and cyber-defence) and to facilitate cooperation between civilian and military spheres.<sup>142</sup> In its response

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<sup>134</sup> European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#); European Parliament resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty, [P8\\_TA\(2017\)0092](#); European Parliament resolution of 13 September 2017 on arms export: implementation of Common Position 2008/944/CFSP, [P8\\_TA\(2017\)0344](#); European Parliament resolution of 14 March 2018 on the next MFF: Preparing the Parliament's position on the MFF post-2020, [P8\\_TA\(2018\)0075](#); European Parliament resolution of 14 November 2018 on arms exports: implementation of Common Position 2008/944/CFSP, [P8\\_TA\(2018\)0451](#); European Parliament resolution of 10 October 2019 on the 2021-2027 multiannual financial framework and own resources: time to meet citizens' expectations, [P9\\_TA\(2019\)0032](#).

<sup>135</sup> European Parliament resolution of 14 March 2018 on the next MFF: Preparing the Parliament's position on the MFF post-2020, [P8\\_TA\(2018\)0075](#), p. 24.

<sup>136</sup> European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#), p. 8.

<sup>137</sup> European Parliament resolution of 15 March 2017 on general guidelines for the preparation of the 2018 budget, Section III – Commission, [P8\\_TA\(2017\)0085](#).

<sup>138</sup> European Parliament resolution of 5 July 2017 on the mandate for the trilogue on the 2018 draft budget, [P8\\_TA\(2017\)0302](#).

<sup>139</sup> European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty, [P8\\_TA\(2017\)0049](#), p. 21.

<sup>140</sup> See also: European Parliament resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty, [P8\\_TA\(2017\)0092](#).

<sup>141</sup> European Parliament resolution of 8 June 2016 on space capabilities for European security and defence, [P8\\_TA\(2016\)0267](#); European Parliament resolution of 12 September 2017 on a Space Strategy for Europe, [P8\\_TA\(2017\)0323](#); European Parliament resolution of 13 June 2018 on EU-NATO relations, [P8\\_TA\(2018\)0257](#); European Parliament resolution of 11 December 2018 on military mobility, [P8\\_TA\(2018\)0498](#); European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union, [P8\\_TA\(2019\)0410](#); European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the European Cybersecurity Industrial, Technology and Research Competence Centre and the Network of National Coordination Centres, [P8\\_TA\(2019\)0419](#).

<sup>142</sup> European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#); European Parliament resolution of 11 December 2018 on military mobility, [P8\\_TA\(2018\)0498](#).

to the parliament resolution of June 2016,<sup>143</sup> the European Commission agreed on the interconnectedness of space policy with security and defence, which it would address in the new space strategy.<sup>144</sup> The Commission stated that it would aim to reduce costs and improve efficiency, and highlighted a number of projects concretely benefiting from such synergies, and the role Preparatory action on defence research (PADR) would play once launched in further strengthening synergies.<sup>145</sup> Moreover, the new space strategy published in 2016 did include security and defence among its priorities, as well as the aforementioned civil-military synergies.<sup>146</sup> The new space strategy was welcomed by Parliament in a resolution on 12 September 2017.<sup>147</sup>

Other concerns frequently raised by Parliament in relation to defence and the defence industry include strengthening the governance of European defence<sup>148</sup> by turning the Security and Defence (SEDE) subcommittee into a fully-fledged committee, creating a Directorate General for Defence in the European Commission (an idea that has been taken up by the von der Leyen Commission), setting up a permanent Defence Council, and publishing a white paper on security and defence. Parliament has also called for enhanced cooperation and coordination with NATO.<sup>149</sup>

Parliament considers that tackling all the aforementioned shortcomings is necessary for establishing a 'strong and sustainable European Defence Union' (EDU),<sup>150</sup> in terms of the EDU operating effectively.<sup>151</sup> In response to these concerns, namely through its follow-up to Parliament's resolution of November 2016 on the EDU,<sup>152</sup> the European Commission explained that it would tackle the shortcomings raised by Parliament by means of the measures set out in the European

<sup>143</sup> European Parliament resolution of 8 June 2016 on space capabilities for European security and defence, [P8\\_TA\(2016\)0267](#).

<sup>144</sup> European Commission, Follow up to the European Parliament resolution on space capabilities for European security and defence, adopted by the Commission on 4 October 2016, [SP\(2016\)612](#).

<sup>145</sup> Ibid.

<sup>146</sup> European Commission, [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Space Strategy for Europe](#), COM(2016) 705 final, 26 October 2016.

<sup>147</sup> European Parliament resolution of 12 September 2017 on a Space Strategy for Europe, [P8\\_TA\(2017\)0323](#).

<sup>148</sup> European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#); European Parliament resolution of 13 April 2016 on the EU in a changing global environment – a more connected, contested and complex world, [P8\\_TA\(2016\)0120](#); European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty, [P8\\_TA\(2017\)0049](#); European Parliament resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty, [P8\\_TA\(2017\)0092](#); European Parliament resolution of 13 June 2018 on cyber defence, [P8\\_TA\(2018\)0258](#); European Parliament resolution of 13 February 2019 on the state of the debate on the future of Europe, [2018/2093\(INI\)](#).

<sup>149</sup> European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#); European Parliament resolution of 13 April 2016 on the EU in a changing global environment – a more connected, contested and complex world, [P8\\_TA\(2016\)0120](#); European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union, [P8\\_TA\(2017\)0048](#); European Parliament resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty, [P8\\_TA\(2017\)0092](#); European Parliament resolution of 13 June 2018 on EU-NATO relations, [P8\\_TA\(2018\)0257](#).

<sup>150</sup> European Parliament resolution of 21 January 2016 on the mutual defence clause (Article 42(7) TEU), [P8\\_TA\(2016\)0019](#).

<sup>151</sup> European Parliament resolution of 21 January 2016 on the mutual defence clause (Article 42(7) TEU), [P8\\_TA\(2016\)0019](#); European Parliament resolution of 13 April 2016 on the EU in a changing global environment – a more connected, contested and complex world, [P8\\_TA\(2016\)0120](#); European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#); European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty, [P8\\_TA\(2017\)0049](#).

<sup>152</sup> European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#).

defence action plan (EDAP).<sup>153</sup> The EDAP<sup>154</sup> – presented at the end of 2016 focused in particular on supporting investment in defence research and capability development, as well as fostering market integration, space industry contributions and SME involvement in the defence sector. In fact, a number of the measures requested by Parliament in its resolution of November 2016 (e.g. the establishment of defence research and a defence capabilities fund) are now a reality, as highlighted in the following paragraphs.

An examination of the relevant Parliament resolutions and positions regarding EU defence and the defence industry more specifically shows that Parliament's most recurrent recommendation to the European Commission has been to foster defence cooperation among Member States. Parliament's request seems not to have fallen on deaf ears. Since 2016, important initiatives have been taken at the EU level to enhance cooperation, and harmonise and pool defence resources among Member States. These include: the European Defence Fund (EDF), the Preparatory action on defence research (PADR), the European defence industrial development programme (EDIDP), Permanent structured cooperation (PESCO) and the Coordinated annual review on defence (CARD). Parliament acknowledged the progress made in defence cooperation, stating in a resolution in January 2019 that 'enhanced cooperation under the common security and defence policy is now a reality, contributing to the construction of a genuine European Defence Union'<sup>155</sup> and identifying PESCO, CARD and EDF as important steps.<sup>156</sup> Parliament has been actively monitoring their establishment and implementation, as presented in the following paragraphs.

The European Defence Fund (EDF) is an instrument for which Parliament advocated strongly between 2016 and 2018.<sup>157</sup> In its resolution of 5 July 2018, Parliament welcomed the work on the EDF, as it believes 'this shared commitment will contribute to achieving economies of scale and greater coordination among Member States and businesses, allowing the EU to retain its strategic autonomy and become a genuine world player'.<sup>158</sup> However, it has also expressed concerns regarding the appropriate governance, financing and objectives.<sup>159</sup> The EDF was finally launched in 2019, with Parliament exercising its right in co-decision, with the objective of boosting 'activities aiming to foster the competitiveness, efficiency and innovation capacity of the European defence, technological and industrial base'.<sup>160</sup>

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<sup>153</sup> European Commission, Follow up to the European Parliament resolution of 22 November 2016 on the European Defence Union, [SP\(2017\)148](#).

<sup>154</sup> European Commission, [European Defence Action Plan: Towards a European Defence Fund](#), 2016.

<sup>155</sup> European Parliament resolution of 17 January 2019 on differentiated integration, [P8\\_TA\(2019\)0044](#), p. 2.

<sup>156</sup> European Parliament resolution of 13 February 2019 on the state of the debate on the future of Europe, [P8\\_TA\(2019\)0098](#), p. 11.

<sup>157</sup> European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#); European Parliament resolution of 15 March 2017 on general guidelines for the preparation of the 2018 budget, Section III – Commission, [P8\\_TA\(2017\)0085](#); European Parliament resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty, [P8\\_TA\(2017\)0092](#).

<sup>158</sup> European Parliament resolution of 5 July 2017 on the mandate for the trilogue on the 2018 draft budget, [P8\\_TA\(2017\)0302](#), p. 3.

<sup>159</sup> European Parliament resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty, [P8\\_TA\(2017\)0092](#).

<sup>160</sup> European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, [P8\\_TA\(2019\)0395](#), p. 47; see also: European Parliament legislative resolution of 18 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund, [P8\\_TA\(2019\)0430](#).

With this goal in mind, Parliament believes that synergies with other funding programmes, such as Horizon 2020, are crucial to avoid duplication and make effective use of available funds.<sup>161</sup> Spending for collaborative defence research projects in particular is considered a pillar of the EDTIB.<sup>162</sup> In three resolutions Parliament has requested adequate investment in the field.<sup>163</sup> The pilot Preparatory action on defence research (PADR) – through which the research stream of European Defence Fund funding has been channelled since 2018 – has been subject to close scrutiny, with Parliament calling for cautious monitoring of its implementation.<sup>164</sup> PADR is complemented by the EDIDP, which featured in a European Parliament resolution of 3 July 2018. The position explains that 'the Programme should aim to enhance the competitiveness of the Union's defence industry, contributing to the improvement of defence capabilities [...] by supporting cooperation between undertakings throughout the Union'.<sup>165</sup> For this reason, Parliament's position is to support the awarding of funding to projects that entail at least two Member States acting in a coordinated way. Moreover, in its resolution of April 2019, Parliament argues that this criterion would help bridge the gap between defence research and production. It also holds that the EDIDP can have positive spillover effects in the civilian sector by promoting innovation across the board.<sup>166</sup>

Parliament recognises the role of SMEs as active and necessary actors in the EDTIB. Parliament had in fact long pushed for a start-up fund to enhance competitiveness and innovation in the sector.<sup>167</sup> In fact, the Parliament recognises as the scope of the EDF 'to foster an ecosystem that can provide opportunities for SMEs and start-up companies'.<sup>168</sup> Parliament calls for better integration in the defence market to increase the cross-border activities of SMEs through the EDIDP,<sup>169</sup> and – with this aim in mind – for measures involving SME participation to enjoy increased funding rates under the EDF.<sup>170</sup>

<sup>161</sup> European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, [P8\\_TA\(2019\)0395](#).

<sup>162</sup> European Parliament legislative resolution of 18 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund, [P8\\_TA\(2019\)0430](#).

<sup>163</sup> European Parliament resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty, [P8\\_TA\(2017\)0092](#); European Parliament resolution of 15 March 2017 on general guidelines for the preparation of the 2018 budget, Section III – Commission, [P8\\_TA\(2017\)0085](#); European Parliament resolution of 13 June 2017 on the assessment of Horizon 2020 implementation in view of its interim evaluation and the Framework Programme 9 proposal, [P8\\_TA\(2017\)0253](#).

<sup>164</sup> European Parliament resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty, [P8\\_TA\(2017\)0092](#).

<sup>165</sup> European Parliament legislative resolution of 3 July 2018 on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovative capacity of the EU defence industry, [P8\\_TA\(2018\)0275](#), p. 4.

<sup>166</sup> European Parliament legislative resolution of 18 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund, [P8\\_TA\(2019\)0430](#).

<sup>167</sup> European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#); European Parliament report on the implementation of the common security and defence policy – annual report, [P9\\_TA\(2020\)0009](#), 11 December 2019.

<sup>168</sup> European Parliament resolution of 13 June 2018 on cyber defence, [P8\\_TA\(2018\)0258](#), p. 5; see also European Parliament legislative resolution of 18 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund, [P8\\_TA\(2019\)0430](#).

<sup>169</sup> European Parliament legislative resolution of 3 July 2018 on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovative capacity of the EU defence industry, [P8\\_TA\(2018\)0275](#).

<sup>170</sup> European Parliament legislative resolution of 18 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund, [P8\\_TA\(2019\)0430](#).

The Coordinated annual review on defence (CARD) launched in 2017 has been mentioned sporadically since then, particularly in the context of the CSDP Annual Reports (2017<sup>171</sup> and 2018<sup>172</sup>) and the CFSP annual reports (2017<sup>173</sup> and 2020<sup>174</sup>). The Parliament defines the purpose of the CARD as being to help Member States 'coordinate their defence spending and capability plans'.<sup>175</sup> In a resolution on 16 March 2017,<sup>176</sup> Parliament asked for a more prominent role for the SEDE committee in the scrutiny of the CARD procedures. Moreover, Parliament highlighted the need to ensure coherence between the annual review and other planning processes (e.g. in NATO)<sup>177</sup> and CARD's role in 'taking forward opportunities for enhanced cooperation with a view to fulfilling the EU level of ambition on security and defence'.<sup>178</sup>

Before the establishment of PESCO, Parliament had long called for progress on defence structural cooperation.<sup>179</sup> In fact, PESCO is mentioned consistently (from three to five Parliament resolutions per year since 2016). In 15 out of 18 Parliament resolutions,<sup>180</sup> PESCO is mentioned alongside the defence industry, highlighting the link between harmonising the EDTIB and developing stronger defence capabilities. The salience of PESCO-related activity is also underlined by the fact that actions undertaken in this framework are eligible for increased funding rates under EDIDP.<sup>181</sup> In a recent draft resolution, the voluntary scope of PESCO was characterised as too weak and as lacking sufficient funding or governance to transform capability development in Europe. The same draft resolution posits that PESCO's current 47 projects have no 'coherence or strategic ambition' and that major European capability efforts remain outside its scope; thus, PESCO's projects do not adequately address the priority shortfalls identified by the 25 PESCO countries themselves.<sup>182</sup>

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<sup>171</sup> European Parliament resolution of 13 December 2017 on the Annual report on the implementation of the Common Security and Defence Policy (2017/2123(INI)), [P8\\_TA\(2017\)0492](#).

<sup>172</sup> European Parliament resolution of 12 December 2018 on the annual report on the implementation of the Common Security and Defence Policy, [P8\\_TA\(2018\)0514](#).

<sup>173</sup> European Parliament resolution of 13 December 2017 on the Annual Report on the implementation of the Common Foreign and Security Policy (2017/2121(INI)), [P8\\_TA\(2017\)0493](#).

<sup>174</sup> European Parliament resolution of 15 January 2020 on the implementation of the common foreign and security policy – annual report, [P9\\_TA\(2020\)0008](#).

<sup>175</sup> European Parliament resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty, [P8\\_TA\(2017\)0092](#), p.11.

<sup>176</sup> European Parliament resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty, [P8\\_TA\(2017\)0092](#).

<sup>177</sup> European Parliament resolution of 13 June 2018 on cyber defence, [P8\\_TA\(2018\)0258](#).

<sup>178</sup> European Parliament legislative resolution of 18 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund, [P8\\_TA\(2019\)0430](#).

<sup>179</sup> European Parliament resolution of 13 April 2016 on the EU in a changing global environment – a more connected, contested and complex world, [P8\\_TA\(2016\)0120](#); European Parliament, European Parliament resolution of 22 November 2016 on the European Defence Union, [P8\\_TA\(2016\)0435](#).

<sup>180</sup> This number does not include the [draft AFET resolution on PESCO](#), which has not yet passed through plenary (see footnote 174).

<sup>181</sup> European Parliament legislative resolution of 3 July 2018 on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovative capacity of the EU defence industry, [P8\\_TA\(2018\)0275](#).

<sup>182</sup> [Draft report on a European Parliament recommendation to the Council and the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy concerning the implementation and governance of Permanent Structured Cooperation \(PESCO\) \(2020/2080\(INI\)\)](#), Committee on Foreign Affairs (rapporteur: Radosław Sikorski), 5 June 2020.

### 4.3. Members' written questions to other EU institutions and responses

Members of the European Parliament have posed about 60 relevant questions relating to EU defence to the Council and the European Commission to obtain clarifications and raise concerns regarding European defence programmes aimed at enhancing cooperation and pooling defence resources so as to harmonise – among other things – the defence industry and markets. As explained in the previous chapter, the EU defence field has seen the development of a number of new initiatives in the move forward defence cooperation, including some relating to the defence industry and defence market.

Members posed five written questions to the European Commission, referring specifically to the EU defence package, three questions on the Defence Procurement Directive and two on the ICT Directive. In anticipation of the publication of the European Commission evaluation on the directive in November 2016, a question posed on 31 May 2016 pointed out that one of the aims of the Defence Procurement Directive had been to 'create an open and competitive European defence equipment market'<sup>183</sup> and it highlighted that many Member States had failed to fully implement it. Together with a question posed in March 2016,<sup>184</sup> Members asked the European Commission about investigating breaches of the Procurement Directive (both in generally and specifically in the cases of Hungary and Spain).

In both instances, the European Commission clarified its competence – or lack thereof – to examine the matter concerning individual Member States. In its reply to the question posed in May 2016,<sup>185</sup> the Commission also highlighted that, at the time, a full evaluation of the implementation of the Procurement Defence Directive was in progress. The Commission did not comment on the possibility to launch further investigations into breaches of the Defence Procurement Directive across the board.

Another reference to the Defence Procurement Directive was made in 2017,<sup>186</sup> in which the requirement for further reporting obligations in this area were seen to be potentially compromising for Member States' security and commercial interests. The European Commission replied by saying that the directive was 'broadly fit for purpose' and that more emphasis was to be placed on its proper implementation.<sup>187</sup>

Two questions were posed on matters linked to the ICT Directive. One referred to a discrepancy in Irish accounts of licensed arms exports specifically,<sup>188</sup> while the second question – directed to the Council – concerned the trade and market distortionary power of licensing requirements applied

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<sup>183</sup> Tibor Szanyi (S&D), [Open and competitive European defence equipment market](#), Question for written answer to the Commission, E-004414-16, 31 May 2016.

<sup>184</sup> Javier Couso Permuy (GUE/NGL) and Marina Albiol Guzmán (GUE/NGL), [New irregular public procurement contracts for companies associated with the Spanish Defence Minister](#), Question for written answer to the Commission, E-001914-16, 1 March 2016.

<sup>185</sup> Answer given by Ms Bieńkowska on behalf of the Commission, [E-004414/2016\(ASW\)](#), 29 July 2016.

<sup>186</sup> Bill Etheridge (EFDD), [European defence markets](#), Question for written answer to the Commission E-000359-17, 24 January 2017.

<sup>187</sup> Answer given by Ms Bieńkowska on behalf of the Commission, [E-000359/2017\(ASW\)](#), 2 May 2017.

<sup>188</sup> Lynn Boylan, [Ireland's reported arms exports under the EU Common Position on Arms Exports](#), Question for written answer to the Commission, E-005657/2018, 7 November 2018.

beyond the scope of the directive – i.e. also to exports.<sup>189</sup> To the latter, the Council replied stating that export licences remained an 'exclusively national prerogative' and that the aim of the ICT Directive was to support the functioning of the European single market and intra-EU trade in defence-related products. In response to the question on licensed arms exports, the European Commission referred to the requirements on transparency and reporting for Member States.

In addition to the two directives, since 2016, a key issue of interest for Members (as demonstrated in the number of questions posed; 29 overall) has been the allocation of funding to enhance defence cooperation and development, particularly in the context of the European Defence Fund (EDF).<sup>190</sup> The main concerns relate to eight aspects of the EDF, as listed below.

- 1 The redirection of funds from other programmes to defence research, EDIDP and the EDF more generally.<sup>191</sup>

In response to these concerns, the European Commission pointed out that when the redirection of 'partly unallocated funds' took place, it respected the margins set by the EU Inter-institutional Agreement, thus not impacting any ongoing project. In the context of the next MFF, the European Commission stated that its aim was to provide 'adequate support for new and existing priorities'.<sup>192</sup>

It is noteworthy that only one question in 2018 implied the level of funding allocated to foster the European defence industry and protect jobs in the sector was too low compared to the allocation of funds towards other purposes (i.e. EIB investments in Kenya).<sup>193</sup> One question in 2019<sup>194</sup> also defined EDF funding in the next MFF as 'limited' and questioned the ability to ensure European strategic autonomy due to the sensitivity of defence matters for Member States.

- 2 The overall increase in funds directed to defence and security through the EDF despite the socio-economic difficulties that European citizens and some Member States face.<sup>195</sup>

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<sup>189</sup> Ondřej Kovařík, [Export and transfer of military material – problem of transit licences](#), E-004172/2019, 3 December 2019.

<sup>190</sup> Issues surrounding the EDF were raised in two written questions in 2016, nine questions in 2017, twelve questions in 2018, five questions in 2019 and one in 2020.

<sup>191</sup> Neoklis Sylikiotis (GUE/NGL), [Defence industry programme](#), Question to the Commission for written answer, E-007313/2017, 28 November 2017; Joao Pimenta Lopes (GUE/NGL), [European Defence Industrial Development Programme](#), Question to the Commission for written answer, E-003345/2018, 20 June 2018; Kateřina Konečná (GUE/NGL), [European Defence Fund](#), Question to the Commission for written answer, E-005894/2018, 22 November 2018.

<sup>192</sup> Answer given by Ms Bieńkowska on behalf of the European Commission, [E-005894/2018\(ASW\)](#), 7 March 2019.

<sup>193</sup> Dominique Martin (ENF), [The European Investment Bank and 'the 57 million dollar annual turnover of a refugee camp'](#), Question to the Commission for written answer, E-004943/2018, 28 September 2018.

<sup>194</sup> Olivier Chastel (Renew), [A European defence force and the European Defence Fund](#), Question to the Commission for written answer, E-004244/2019, 5 December 2019.

<sup>195</sup> Javier Couso Permuy (GUE/NGL), [VP/HR – European Defence Union](#), Question to the Commission for written answer, E-009053/2016, 30 November 2016; Ruža Tomašić (ECR), [Future of European Defence](#), Question to the Commission for written answer, E-004539/2017, 4 July 2017; Neoklis Sylikiotis (GUE/NGL), [Need to cancel plans for the European Defence Fund](#), Question to the Commission for written answer, E-006029/2017, 27 September 2017; Sophie Montel (EFDD), [Development of the European defence sector](#), Question to the Commission for written answer, E-002378/2018, 27 April 2018; Jiří Pospíšil, [Questions about the defence industrial support programme](#), Question to the Commission for written answer, E-004090/2018, 20 July 2018; Kateřina Konečná (GUE/NGL), [European Defence Fund](#), Question to the Commission for written answer, E-005894/2018, 22 November 2018; Matt Carthy (GUE/NGL), [Illegal use of the European Defence Fund](#), Question to the Commission for written answer, E-000144/2019, 14 January 2019.

To address Members' concerns about the overall increase in defence budget, the European Commission explains that the proposed funding is used according to the relevant endorsed Council conclusions<sup>196</sup> and that increased efficiency in the sector will bring economic benefits, technological advancement and job creation.<sup>197</sup> In addition, the European Commission pointed at the role of the EDF in helping to avoid duplications in the industrial cycle, thus fostering a better allocation of resources.<sup>198</sup>

- 3 The potential of the EDF to exacerbate existing regional and territorial rift in the distribution of funds and subsequent development of the defence industry and market.<sup>199</sup>

In response, the European Commission reiterated that the EU budget would only support collaborative research projects where more than one Member State was represented (a minimum of three is needed), so as 'to reach out to all relevant actors across the EU'.<sup>200</sup>

- 4 The lack of transparency in EDF funding.<sup>201</sup>

To ensure transparency, the European Commission would transmit to Parliament the results of the EDF interim and final evaluations.<sup>202</sup>

- 5 Ethical aspects of PADR, EDIDP and EDF, including the use of funds for illegal purposes and/or the development of questionable technologies (e.g. artificial intelligence).<sup>203</sup>

On Members' concerns about the possible ethical implications of defence funding, the European Commission assured Parliament that the EDF would not support 'actions relating to products and technologies prohibited by international law'.<sup>204</sup> Moreover, the European Defence Agency (EDA) has conducted 'ethical, legal and societal aspects (ELSA) reviews' for all shortlisted projects under the PADR and, although such reviews are not required for the EDIDP, they have also been envisaged for the allocation of EDF funding.

<sup>196</sup> [Council conclusions on implementing the EU global strategy in the area of security and defence](#), 14 November 2016.

<sup>197</sup> Answer given by Vice-President Mogherini on behalf of the Commission, [E-009053/2016\(ASW\)](#), 14 February 2017.

<sup>198</sup> Answer given by Ms Bieńkowska on behalf of the Commission, [E-004539/2017\(ASW\)](#), 5 October 2017.

<sup>199</sup> Margot Parker (EFDD), [European Defence Fund](#), Question to the Commission for written answer, E-007075/2016, 26 September 2016; Adam Szejnfeld (PPE) [Doubts about implementation of the European Defence Industry Development Programme for 2019-2020](#), Question to the Commission for written answer, E-005201/2017, 16 August 2017; Dariusz Rosati (PPE), [European Defence Fund in the context of Central Europe, including facilities in Radom and Pionki](#), Question to the Commission for written answer, E-001937/2019, 17 April 2019.

<sup>200</sup> Answer given by Ms Bieńkowska on behalf of the European Commission, [E-001937/2019\(ASW\)](#), 1 July 2019.

<sup>201</sup> Kateřina Konečná (GUE/NGL), [European Defence Fund](#), Question to the Commission for written answer, E-005894/2018, 22 November 2018.

<sup>202</sup> Answer given by Ms Bieńkowska on behalf of the European Commission, [E-005894/2018\(ASW\)](#), 7 March 2019.

<sup>203</sup> Bogdan Andrzej Zdrojewski (PPE), [Artificial Intelligence within the European Defence Fund](#), Question to the Commission for written answer, E-005171/2018, 10 October 2018; Dubravka Šuica (PPE), [Ethics in the use of artificial intelligence in the field of defence](#), Question to the Commission for written answer, E-002088/2018, 12 April 2018; Bart Staes (Green/EFA), [Ethics reviews in the context of the PADR](#), Question to the Commission for written answer, E-001105/2019, 28 February 2019; Luke Ming FLANAGAN, [Ethical, legal and societal aspect reviews of EDIDP project proposals](#), Question to the Commission for written answer, E-003854/2019, 18 November 2019.

<sup>204</sup> Answer given by Ms Bieńkowska on behalf of the Commission, [E-002088/2018\(ASW\)](#), 28 June 2018; see also Answer given by Ms Bieńkowska on behalf of the European Commission, [E-005171/2018\(ASW\)](#), 16 January 2019.

- 6 The compatibility of EDF and defence funding with the Treaties<sup>205</sup> – as they preclude the allocation of the budget towards operations with defence and military implications.

On this point, the European Commission highlights that the TFEU prohibits the use of EU budget for 'operations having military or defence implications'.<sup>206</sup> It reminds Members that the purpose of the EDF is to foster competition and innovation within the EDTIB by fostering research and development. Therefore, the EDF will not fund any operations other than those specified in the Treaty and as already approved in the EDF regulation that was approved by Parliament.<sup>207</sup>

- 7 Clarifications on the allocation of EDF, PADR and EDIDP funds.<sup>208</sup>

The European Commission has provided details and assured Parliament that non-EU firms are not eligible for funding, unless established in a Member State that would provide guarantees. Moreover, EDF funding covers research expenses fully, but development expenses of approved projects only partially and cannot be used to purchase new equipment. The European Commission did not provide clarifications on EDF-funded cybersecurity projects nor on the use of EDIDP funding for civilian-military synergies in space research –stating only that, at the time the EDIDP was still being prepared, it was considered a policy priority.<sup>209</sup>

- 8 Frameworks regarding evaluation, scrutiny and governance in the EDF, EDIDP and EDAP.<sup>210</sup>

In 2017, the European Commission assured Parliament that Member States were actively engaged in defining the details of the EDF. The European Commission also clarified that the regulation establishing the EDIDP envisaged an evaluation to be carried out 'against its objectives' and in particular of its 'capacity to incentivise increased levels of collaboration in defence development

<sup>205</sup> Sabine Lösing, [Article 41\(2\) of the Treaty on European Union](#), Question to the Commission for written answer, E-003113/2017, 03 May 2017; Matt Carthy (GUE/NGL), [Illegal use of the European Defence Fund](#), Question to the Commission for written answer, E-000144/2019, 14 January 2019.

<sup>206</sup> Answer given by Ms Bieńkowska on behalf of the European Commission, [E-000144/2019\(ASW\)](#), 11 April 2019; see also Answer given by Ms Bieńkowska on behalf of the Commission, [E-003113/2017\(ASW\)](#), 10 October 2017.

<sup>207</sup> Answer given by Ms Bieńkowska on behalf of the Commission, [E-003113/2017\(ASW\)](#), 10 October 2017.

<sup>208</sup> Miriam Dalli (S&D), [Cybersecurity](#), Question to the Commission for written answer, E-004700/2017, 12 July 2017; Franck Proust (PPE), [Space sector & European defence policy](#), E-005688/2017, 13 September 2017; Joao Pimenta Lopes (GUE/NGL), [European Defence Industrial Development Programme](#), Question to the Commission for written answer, E-003345/2018, 20 June 2018; Maria Spyraiki (PPE), [European Defence Fund](#), Question to the Commission for written answer, E-003814/2018, 11 July 2018; Sabine Lösing (GUE/NGL), [Military projects under the Preparatory Action on Defence Research \(PADR\)](#), Question to the Commission for written answer, E-005323/2018, 18 October 2018; Sabine Lösing (GUE/NGL), [Developing drone capabilities as part of the Ocean 2020 project](#), Question to the Commission for written answer, E-002893/2018, 29 May 2018.

<sup>209</sup> Answer given by Ms Bieńkowska on behalf of the Commission, [E-005688/2017\(ASW\)](#), 18 December 2017.

<sup>210</sup> Rachida Dati (PPE), [Establishing a European Defence Fund](#), Question to the Commission for written answer, E-000059/2017, 9 January 2017; Bogdan Andrzej Zdrojewski (PPE), [European Defence Industrial Development Programme](#), Question to the Commission for written answer, E-005327/2017, 29 August 2017; Sabine Lösing (GUE/NGL), [Have your say feedback mechanism: European Defence Industrial Development Programme](#), Question to the Commission for written answer, E-000010/2018, 4 January 2018; Sabine Lösing (GUE/NGL), [Consultation Forum for the European Defence Action Plan](#), Question to the Commission for written answer, E-005849/2018, 20 November 2018; Markéta Gregorová (Green/EFA), [EDIDP-funding scrutiny](#), Question to the Commission for written answer, E-000229/2020, 15 January 2020.

projects'.<sup>211</sup> Moreover, the European Commission is in charge of ensuring that no technologies infringing international law are developed using EDIDP funding.<sup>212</sup>

In addition to EDF-related concerns, Members have also questioned the level of European Commission support for SMEs in the defence industry.<sup>213</sup> The Commission agrees on the importance of improving EU defence industry competitiveness and the importance of guaranteeing cross-border market access to SMEs, increasing transparency of supply chains and reducing administrative market barriers. In this regard, in 2016, the European Commission referred to the European defence action plan and its willingness to unblock EIB funding for defence purposes.<sup>214</sup> Moreover, the Commission pointed out that the EDIDP included a category of funding that dedicated to SMEs, and aimed at ensuring that a minimum of 10% of the allocated budget would 'benefit the cross-border participation of SMEs'.<sup>215</sup>

In several other questions sent to the European Commission, Members raised concerns regarding various aspects of Permanent structural cooperation (PESCO).<sup>216</sup> Written questions primarily addressed PESCO's practical implementation, i.e. the criteria for joining the scheme<sup>217</sup> and the criteria for project selection;<sup>218</sup> the role of the High Representative/Vice-President (HR/VP) and EDA within PESCO;<sup>219</sup> the relationship with NATO and measures available to avoid duplication with

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<sup>211</sup> Answer given by Ms Bieńkowska on behalf of the Commission, [E-005327/2017\(ASW\)](#), 14 December 2017.

<sup>212</sup> Answer given by Mr Breton on behalf of the European Commission, [E-000229/2020](#), 4 May 2020.

<sup>213</sup> Maria Grapini (S&D), [Financing for SMEs in the defence industry supply chain](#), Question to the Commission for written answer, E-007574/2016, 5 October 2016; Adam Szejnfeld (PPE), [Doubts about implementation of the European Defence Industry Development Programme for 2019-2020](#), Question to the Commission for written answer, E-005201/2017, 16 August 2017; Maria Grapini (S&D), [Support for defence industry companies to resume production](#), Question to the Commission for written answer, E-001739/2018, 21 March 2018.

<sup>214</sup> Answer given by Ms Bieńkowska on behalf of the Commission, [E-007574/2016\(ASW\)](#), 8 February 2016.

<sup>215</sup> Answer given by Ms Bieńkowska on behalf of the European Commission, [E-003345/2018\(ASW\)](#), 15 October 2018.

<sup>216</sup> In this regard, 6 written questions were raised in 2017, 1 in 2018; 2 in 2019, and 1 in 2020.

<sup>217</sup> Kazimierz Michał Ujazdowski (ECR), [Criteria for joining PESCO](#), Question to the Commission for written answer, E-006304/2017, 6 October 2017.

<sup>218</sup> Kazimierz Michał Ujazdowski (ECR), [PESCO work on the eastern flank of Europe, Question to the Commission for written answer, E-006305/2017](#), 06 October 2017; Rachida Dati (PPE), [Selection criteria for projects under Permanent Structured Cooperation](#), Question to the Commission for written answer, E-007933/2017, 21 December 2017.

<sup>219</sup> Beatriz Becerra Basterrechea (ALDE), [VP/HR - Future prospects for the Europe of Defence](#), Question to the Commission for written answer, E-007064/2017, 16 November 2017.

NATO;<sup>220</sup> cooperation with non-PESCO countries;<sup>221</sup> the rationale behind PESCO and the use of EU battlegroups;<sup>222</sup> and the lack of transparency surrounding PESCO projects.<sup>223</sup>

The European Commission provided clarifications on the criteria and role of the HR/VP and EDA, as well as on the terms for possible third-country contributions. The Commission also explained that one of PESCO's commitments required Member States to make recurrent contributions to EU battlegroups, which the European Commission considered 'an effective transformation tool enhancing the deployability and sustainability of national armed forces, as well as a useful vehicle for multinational cooperation and interoperability'.<sup>224</sup>

On EU-NATO cooperation, the European Commission believed that strengthening capabilities within the Union (also through PESCO and the EDF) would help to strengthen the participation of EU Member States in the context of NATO, as it would help address national defence gaps as well as EU-wide ones. Coordination with NATO would help avoid duplication, as PESCO is complementary to it and not a substitute. Moreover, 'cooperation with NATO has been central to the Commission's work on defence policy' and leaving the Alliance has not been discussed in Council.<sup>225</sup>

Members have also raised questions regarding the future of the CSDP<sup>226</sup> and the fragmentation of European defence policy,<sup>227</sup> concerns owing mainly to Member States' national strategic interests and the implications for national sovereignty.<sup>228</sup> In response, the European Commission reiterated

<sup>220</sup> Edouard Ferrand (ENF), Leaving NATO, Question to the Commission for written answer, E-007658/2016, 24 October 2016; Jérôme Lavrilleux (PPE), [Common Defence Policy](#), Question to the Commission for written answer, E-009016/2016, 30 November 2016; Kazimierz Michał Ujazdowski (ECR), [PESCO work on the eastern flank of Europe, Question to the Commission for written answer](#), E-006305/2017, 06 October 2017; Tonino Picula (S&D), [Implementation of PESCO](#), Question to the Commission for written answer, E-006756/2017, 31 October 2017; John Stuart Agnew (ENF), [Defence capability contributions](#), Question to the Commission for written answer, E-001922/2019, 17 April 2019; Jiří Pospíšil (PPE), [European Defence Fund, Question to the Commission for written answer](#), E-001907/2017, 22 March 2017; Neoklis Sylikiotis (GUE/NGL), [VP/HR – PESCO](#), Question to the Commission for written answer, E-007371/2017, 30 November 2017; Beatriz Becerra Basterrechea (ALDE), [VP/HR - Future prospects for the Europe of Defence](#), Question to the Commission for written answer, E-007064/2017, 16 November 2017; Henna Virkkunen (PPE), [A more precise definition and application of the EU mutual assistance obligation](#), E-004744/2018, 19 September 2018.

<sup>221</sup> Tonino Picula (S&D), [Implementation of PESCO](#), Question to the Commission for written answer, E-006756/2017, 31 October 2017.

<sup>222</sup> Neoklis Sylikiotis (GUE/NGL), [VP/HR – PESCO](#), Question to the Commission for written answer, E-007371/2017, 30 November 2017; Henna Virkkunen (PPE), Using the EU Battlegroups, Question to the Commission for written answer, E-004550/2018, 6 September 2018; Lars Patrick Berg (ID), [Permanent Structured Cooperation \(PESCO\)](#), Question to the Commission for written answer, E-002376/2020, 20 April 2020.

<sup>223</sup> Lynn Boylan (GUE/NGL), [Irish observer involvement in PESCO projects](#), Question to the Commission for written answer, E-000791/2019, 11 February 2019.

<sup>224</sup> Answer given by Vice-President Mogherini on behalf of the European Commission, [E-004550/2018\(ASW\)](#), 31 October 2018.

<sup>225</sup> Reply of the Council to question E-007658/2016, E-007658/2016(ASW), 6 March 2017.

<sup>226</sup> Lefteris Christoforou (PPE), [European Common Security and Defence Policy](#), Question to the Commission for written answer, E-005799/2017, 18 September 2017.

<sup>227</sup> Jérôme Lavrilleux (PPE), [Common Defence Policy](#), Question to the Commission for written answer, E-009016/2016, 30 November 2016; Javier Couso Permuy (GUE/NGL), [VP/HR - European Defence Union, Question to the Commission for written answer](#), E-009053/2016, 30 November 2016; Olivier Chastel (Renew), [A European defence force and the European Defence Fund](#), Question to the Commission for written answer, E-004244/2019, 5 December 2019; Athanasios Konstantinou (NI), [Limitations of European defence](#), Question to the Commission for written answer, E-000770/2020, 7 February 2020.

<sup>228</sup> Nadine Morano (PPE), [EU defence policy](#), Question to the Commission for written answer, E-006131/2016, 29 July 2016; Joëlle Mélin (ENF), [Consequences of the European Defence Fund](#), Question to the Commission for written answer, E-005832/2017, 19 September 2017.

that increasing defence cooperation is a 'Member State driven process',<sup>229</sup> offered to facilitate this process, and insisted that a strong European Union 'cannot be achieved without innovating and pooling resources in the European defence industry'.<sup>230</sup>

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<sup>229</sup> Answer given by Vice-President Mogherini on behalf of the Commission, [E-009016/2016\(ASW\)](#), 14 February 2017.

<sup>230</sup> Answer given by Mr Breton on behalf of the European Commission, [E-004244/2019](#), 12 May 2020.

## 5. What future for EU defence industry cooperation?

EU defence industrial strategy is likely to feature among the top EU political ambitions, and the creation of the new Directorate General for Defence Industry and Space within the Commission – along with the financial resources endowed under the European Defence Fund (EDF) – are likely to raise questions about whether the EU can develop its strategic autonomy in a world that has been further unsettled by the coronavirus pandemic. European Commission President Ursula von der Leyen has called for a 'geopolitical Commission' and 'technological sovereignty' for the Union in strategic sectors. This is also among the European Council's strategic priorities: 'In a world of increasing uncertainty, complexity and change, the EU needs to pursue a strategic course of action and increase its capacity to act autonomously to safeguard its interests, uphold its values and way of life, and help shape the global future'.<sup>231</sup>

This section echoes the question raised by Daniel Fiott in 2019 and which the new geopolitical and EU socio-political conditions, as well as budgetary constraints, have made even more urgent: are the EU Member States genuinely committed to building a European defence technological and industrial base (EDTIB) beyond a desire to protect national markets – to the extent that these markets exist on a national basis?<sup>232</sup> Fiott's question is important because it conceives of the EU defence market as being more than a market, by placing it in the geopolitical context.

Some experts have argued that the world that will emerge from the crisis will be recognisable and will be characterised by the same factors that underpinned the pre-coronavirus world: waning US leadership, faltering global cooperation, great-power discord. What will change, however, according to the same experts, is that the pandemic has brought these geopolitical features into sharper-than-ever relief. They are likely to be even more prominent features of the world that follows.<sup>233</sup> At the same time, the world economy is in free fall, with unemployment rising dramatically, trade and output plummeting, and no hopeful end in sight. In that light, some analysts have argued that in a post-pandemic world, the defence industry will be hit as funds are allocated to other policy areas. The question is whether the EU will have the financial ability to meet its ambitious goals of strategic sovereignty and autonomy.

The changed political context since the UK's departure from the union in January 2020 and the contentious negotiations over the EU's 2021–2027 budget will also be among the factors affecting the EU's future defence ambitions, including the proper use and implementation of the Defence Procurement Directive and Intra-Community Transfers Directive.

### 5.1. Consequences of Brexit for EU defence capabilities

The EU is seeking to establish a comprehensive new partnership with the UK that covers the areas of interest outlined in the Political Declaration: trade and economic cooperation, law enforcement and judicial cooperation in criminal matters, foreign policy, security and defence, and thematic areas of cooperation. Until 31 December 2020, the United Kingdom is obliged to contribute to the financing of the European Defence Agency, the European Union Institute for Security Studies, and the European Union Satellite Centre, and to the costs of the common security and defence policy

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<sup>231</sup> European Council, [A New Strategic Agenda 2019-2024](#), 20 June 2019, p. 6.

<sup>232</sup> D. Fiott, [Strategic Investment: Making geopolitical sense of the EU's defence industry](#), Chaillot Paper 156, European Union Institute for Security Studies, December 2019.

<sup>233</sup> R.N. Haas, [The Pandemic Will Accelerate History Rather Than Reshape It](#), *Foreign Affairs*, 7 April 2020.

(CSDP) operations. Until that date, the United Kingdom will also have to respect the relevant EU decisions and legislation, including on procurement and transfers in the field of defence.

The UK negotiating objectives published on 27 February 2020 stated that foreign policy will be determined within a framework of broader friendly dialogue and cooperation between the UK and the EU, which contrasts with the provisions of the Political Declaration, which contains a part dedicated specifically to the EU-UK future security partnership, and to which the UK has agreed. However, despite its inclusion in the jointly agreed Political Declaration, the UK has refused to discuss security and defence in the future relationship negotiations. It appears that the UK rejects any institutionalised form of cooperation and prefers bilateralism and coordination on a case-by-case basis, which would result in a less predictable and reliable security partnership.<sup>234</sup>

For its part, the EU's position has consistently been that foreign policy, security and defence should be part of a comprehensive agreement governing the future EU-UK relationship. It considers that it is in the common interest of the UK and the EU to cooperate on the development of effective and genuinely interoperable defence capabilities, including within the European Defence Agency, and to continue the highly valuable partnerships within NATO and EU programmes on defence and external security. The UK has shown no ambition for relations with the EU in the field of foreign policy, security and defence. These were not covered explicitly by the UK mandate and therefore do not form part of the 11 negotiating tables.

The UK's future foreign policy, including its defence policy, outlined under the slogan 'Global Britain', remains ill-defined. It is based on the nebulous image of a UK that is 'more outward-looking, more engaged with the world than ever before'.<sup>235</sup> London wanted to limit the repercussions of Brexit on its own defence industry and preserve its access to the EU market and future cooperation projects like the EDF, but this was not possible. While concerns have been raised as to the UK potentially becoming a defence competitor, doubts over the reliability of the transatlantic relationship (especially since the UK will no longer have the balancing power between the EU and the United States that it used to have) are likely to reinforce the UK's tendency to want more EU security and defence cooperation in the longer term. Moreover, experts have pointed out that the economic shocks of Brexit and the pandemic are likely to lead to economic pressures on the UK defence budget and a reduction in real terms.<sup>236</sup> In parallel, however, the legal framework for EU defence cooperation – in particular single market rules – makes it harder for the non-member UK and its defence industry to participate, as exemplified first by Galileo and more recently by the EDF. In this light, London has sought to strengthen bilateral relationships on security and defence in Europe, as evidenced by agreements/discussions with France, Poland (on defence industry) and Germany.<sup>237</sup>

Trust between the EU and the UK, will be a key factor in ensuring a mutually beneficial EU-UK relationship (not only on defence issues), but this has been put to the test. For its part, the EU will need to walk a thin line between ensuring that its principles in the future relationship negotiations are not compromised, while its security interests are protected in an environment where the ongoing pandemic has reinforced global trends, including rising US-China tensions, an increasingly

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<sup>234</sup> J. Wachowiak and F. Zuleeg, The bigger picture: The impact of COVID-19 on the EU-UK relationship, in A. Aktoudianakis et al., [Towards an ambitious, broad, deep and flexible EU-UK partnership?](#), European Policy Centre, June 2020, p. 17.

<sup>235</sup> B. Johnson, 'The rest of the world believes in Britain. It's time that we did too', *The Telegraph*, 15 July 2018.

<sup>236</sup> J. Wachowiak and F. Zuleeg, The bigger picture: The impact of COVID-19 on the EU-UK relationship, in A. Aktoudianakis et al., [Towards an ambitious, broad, deep and flexible EU-UK partnership?](#), European Policy Centre, June 2020, p. 17.

<sup>237</sup> C. Major and N. von Ondarza, [No "Global Britain" after Brexit](#), Stiftung Wissenschaft und Politik, SWP Comment No 24, June 2018.

protectionist trade environment, and the prevalence of cross-border security threats. These trends also highlight shared EU-UK strategic interests and the need for close cooperation.

## 5.2. Impact of EU defence cooperation on transatlantic relations

The goal of turning industrial defence matters into a European—not an exclusively national—pursuit was also aimed at legitimising efforts to build defence sovereignty in Europe. The new narrative of 'strategic autonomy' was grounded in talk of an emerging 'European military industrial complex',<sup>238</sup> a balanced relationship with Washington, and an overall stepping-up of defence cooperation.<sup>239</sup> The 2016 European Commission evaluation of the ICT Directive noted that several defence companies felt that 'recent reforms of US export control, which facilitated the exports of a number of defence products and components, had put US and European companies on an unequal footing, giving US exporters a regulatory advantage.'<sup>240</sup>

The EU's ambition to develop a home-grown European defence industry has faced stiff headwinds in an area dominated by national interests, the US and NATO. As US-Chinese rivalry intensified during Donald Trump's presidency, Europe began gingerly to adjust its approach to a world increasingly defined by great-power competition. The European Union began debating the notion of 'strategic autonomy', which calls for Europe to defend its sovereignty and advance its interests independently from the United States. In the midst of a pandemic, strategic autonomy looks less like a concept for EU leaders to debate and more like an urgent policy to enact. Instead of looking to an American ally that has grown defensive under the Trump administration or to an increasingly assertive (some would even say aggressive) China for global leadership, European leaders are finding they have to look to Europe.<sup>241</sup>

Military technology is increasingly seen as a power amplifier for countries such as the United States, China and Russia. As concrete proof, the US administration had written to former HR/VP Federica Mogherini that the creation of EDF regulation and PESCO general conditions represented a dramatic reversal of the last three decades of increased integration of the transatlantic defence sector. The US administration had called on the EU to review the draft EDF regulation with an eye to EU-US shared long-term objectives for the transatlantic security partnership. As EU Member States have traditionally preferred to purchase US products rather than implement the EU defence package and therefore ensure better EU defence industrial cooperation, the US defence market perceives the EDF as a threat, as it would risk losing European buyers.

## 5.3. Post-pandemic financing for EU defence

The EU defence industrial cooperation and integration programmes that have developed since 2016 are likely to see their funding impacted as the negotiations for the EU's next multiannual financial framework unfold in the context of coronavirus-ravaged economies. Recent budgetary proposals

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<sup>238</sup> J. Mawdsley, 'The Emergence of the European Defence Research Programme', in N. Karampekios et al. (eds), *The Emergence of EU Defense Research Policy*, Springer, 2018, pp. 205–217.

<sup>239</sup> R. Csernaton and B. Oliveira Martins, [The European Defence Fund: Key Issues and Controversies](#), PRIO Policy Brief 03/2019, Peace Research Institute Oslo, 2019.

<sup>240</sup> European Commission, [Report from the Commission to the European Parliament and the Council, Evaluation of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community](#), COM(2016) 760 final, 30 November 2016, p. 8.

<sup>241</sup> M. Bergmann, ['Europe's Geopolitical Awakening: The Pandemic Rouses a Sleeping Giant'](#), *Foreign Affairs*, 20 August 2020.

had already reduced the amounts for initiatives such as the European Defence Fund (EDF), military mobility and the European Peace Facility even before the pandemic hit Europe.

In the initial European Commission proposal on the 2021-2027 MFF,<sup>242</sup> the largest item under the defence heading was the European Defence Fund, which included the European defence industrial development programme (EDIDP) and preparatory action on defence research. Their collective budget increased almost 20-fold (from €575.3 million to €11.5 billion). In addition, the initially proposed MFF included a new €5.8 billion 'military mobility' budget earmarked within the transport envelope of the Connecting Europe Facility, to upgrade EU transport infrastructure so that military assets could be moved swiftly between EU countries.<sup>243</sup> The European Commission's revised MFF proposal slimmed down the funding available for EU defence – bringing the financing for EDF down from €11.5 to €8 billion and for military mobility from €5.8 to €1.5 billion.<sup>244</sup>

'The coronavirus pandemic will very likely deteriorate our security environment in the years to come, increasing the need for a stronger European Union security and defence policy, and for a stronger Union in the world.'<sup>245</sup> This is a point that the HR/VP Josep Borrell also made when addressing the Security and Defence subcommittee on 26 May 2020 to emphasise why the EU needs a true EU defence capacity. He stressed that the pandemic has far-reaching implications for our security situation and therefore the EU cannot lower the level of its ambition in defence. 'If we want to keep Europe safe, we cannot afford to lower our level of ambition for EU security and defence policy'. Given the new economic realities post-Covid-19, efficiency will have to be encompassed in future defence spending, warned the EU foreign policy chief, adding that armed forces have been playing an important role in helping authorities to fight the pandemic.<sup>246</sup>

The pandemic has been another nail in the coffin for EU trust in US leadership and whereas the idea of European autonomy has been strengthened by the crisis, the ability to finance EU defence has in parallel been put on ice. In the EU's pre-virus negotiations over the next seven-year budget, more contentious than usual because of the gap created by Brexit, military spending was much reduced. The European Commission cut the defence fund by more than half, to €6 billion. Proposed funding for military mobility dropped from €6.5 billion to €2.5 billion, then €1.5 billion and now, in the latest proposal, to zero.<sup>247</sup> That, however, would mean that the EU would be unable to claim its vaunted strategic autonomy and consequently remain dependent on the US defence market. Europe's retreat on military spending will complicate relations with Washington, with its own huge budget pressures, no matter who wins the presidency. Paradoxically, what is good news for the US defence industry is less good news for the US administration. With fewer resources to invest in key capabilities, Europe's reliance on the United States as the main provider of common security will continue, a dependency that is resented both by the Democratic and the Republican parties. This

<sup>242</sup> European Commission, [Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A Modern Budget for a Union that Protects, Empowers and Defends. The Multiannual Financial Framework for 2021-2027](#), COM(2018) 321 final, 2 May 2018.

<sup>243</sup> See detailed Breakdown of MMF programmes produced by the European Parliament Library [here](#).

<sup>244</sup> European Commission, Communication the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, [The EU budget powering the recovery plan for Europe Brussels](#), COM(2020) 442 final, 27 May 2020.

<sup>245</sup> European External Action Service, [European defence: fighting COVID-19, preparing for the future](#), 14 May 2020.

<sup>246</sup> [EU must guarantee security to its citizens, warns Defence Subcommittee Chair](#), press release, Security and Defence Committee (SEDE), 26 May 2020.

<sup>247</sup> European Commission, [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The EU budget powering the recovery plan for Europe](#), COM(2020) 442 final, 27 May 2020.

could mean either party winning the US presidential elections would be an unreliable defence partner to the EU at a time when Washington will concentrate its firepower on China. It is not for lack of American will to come to Europe's defence if needed, but questions are raised on the ability of the United States to respond to and meet the demands of two regional fronts at once. Ultimately, the absence of sufficient financial investment in the EU defence is perceived (not only across the Atlantic) as hurting EU credibility.<sup>248</sup>

## 5.4. Options moving forward

In response to the challenges and open questions outlined above, the following options could be considered. This section also outlines the most important recommendations developed in the annexed research paper.

### 5.4.1. More EU defence industry cooperation to equip strategic autonomy

An expert study carried out for Parliament's SEDE sub-committee in 2013 found that 'Member States increasingly contradict themselves by on the one hand insisting upon a national DTIB while on the other decreasing investments and thus fuelling the entry of national companies into the globalised production and market of defence goods and services'.<sup>249</sup> In short, while the governments think nationally, their industries increasingly act globally. The same study showed that the top companies in the EU -- BAE Systems, EADS, Finmeccanica, Thales -- are actually global rather than European players and that defence industrial centres are concentrated in western Europe rather than developing across the continent.<sup>250</sup> As the annexed research paper shows, this remains a problem in the defence industrial landscape.

More than 10 years since the adoption of the two directives being examined, experts warn that if Member States continue their current practices, whereby on average less than 20 % of defence procurement results in collaborative projects, the European defence industry and its technological innovation capacity are doomed to decline.<sup>251</sup> The lessons learned from the coronavirus crisis, including the increased demand for the military to play a supporting role to civilian authorities in such crises, should act as a further incentive for the development of capacities in defence cooperation. The EU needs to stay abreast of the emergence of rapidly evolving technologies and new actors, as these will be key for Europe's industrial future and technological sovereignty, especially as the coronavirus crisis is hitting industry severely, as the recently published European Commission roadmap on defence attests.<sup>252</sup> Staying on the technological edge is one of the most daunting challenges European defence companies face. Dependencies on the civilian commercial sector have grown, in particular in areas such as big data, robotics, blockchain technology and advanced materials. Nevertheless, it is SMEs that are suffering the brunt of the crisis. More specifically, SMEs bear the negative impact of the lack of a level playing field as they have the

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<sup>248</sup> S. Erlanger, '[European Defense and 'Strategic Autonomy' Are Also Coronavirus Victims](#)', *New York Times*, 23 May 2020.

<sup>249</sup> V. Briani et al., '[The development of a European Defence Technological and Industrial Base \(EDTIB\)](#)', Policy Department, Directorate B, Directorate-General for External Policy of the Union, European Parliament, July 2013, p. 8.

<sup>250</sup> Ibid.

<sup>251</sup> P. Serrano, 'Truth and dare: A personal reflection on 20 years of CSDP', in D. Fiott (ed.), '[The CSDP in 2020: The EU's legacy and ambition in security and defence](#)', EU Institute for Security Studies, 2020, p. 24.

<sup>252</sup> European Commission, '[Action Plan on synergies and cross-fertilisation between the civil, defence and space industries](#)', feedback period: 25 September 2020-23 October 2020.

greatest difficulties in entering cross-border defence markets due to limited staff and other disproportionate burdens.<sup>253</sup>

In this light, analysts have repeatedly pointed to the need to make clearer links between the two directives that are part of the EU defence package; so does the expert research paper that is annexed. Despite the challenges that the European Commission's new DG DEFIS is likely to face, also linked to the expected teething problems any new service must face, the creation of DG DEFIS is a step in the right direction.<sup>254</sup> The monitoring and management of the two directives can now take place under the same roof, which it is thought will allow for cross-fertilisation across the two directives. In addition, the ongoing defence projects and permanent structured cooperation (PESCO) can play a role, but new areas of cooperation should be explored. One of the problems that the EU defence industry will face will be how to sell its commonly produced products.

Moreover, technical cooperation – either through the EU defence package or the more recent developments in the EU defence industrial cooperation – will not be enough to move the EU to commit to further EU defence industrial cooperation, a necessary ingredient for strategic autonomy. As Besch correctly argues, '[m]oving forward, to ensure coherence and coordination between the EU's new initiatives it will be important to create and maintain direct links between the Union's strategic objectives, its level of ambition and any planned industrial projects'.<sup>255</sup> It is therefore a question of political will. In that context, experts point to the need to create a common EU defence culture and that this will spill over into more technical aspects of defence – the forthcoming discussions on and development of the strategic compass will be key in creating a common understanding of the Union's defence objectives and means.

#### 5.4.2. Adequate financing for EU defence

The coronavirus crisis has already had major financial consequences. In this context, it will nonetheless be important to ensure the financing of security and defence. Previous EU attempts to support the establishment of an open and competitive European defence equipment market were unsuccessful. Limited cooperation between Member States has led to inefficiencies in the EU defence sector, thus threatening the industry's global competitiveness and its capacity to develop the military capabilities needed. However, the significant increase in funding to support defence-oriented research and development activities also runs the risk of becoming an exercise with no real impact on the competitiveness of the European defence industry.<sup>256</sup>

The reduction of the European Defence Fund (EDF) to €7 billion by the European Council in the negotiations on the 2021-2027 multiannual financial framework, compared with the €13 billion initially planned, is not viewed favourably by the European Parliament. With €7 billion, some supranational cooperation projects in this area may not be able to be carried out, not to mention the objective of opening the sector up to new players.<sup>257</sup> The consequences of reduced defence budgets was already clear in the European Commission's 2015 evaluation of the ICT Directive, which emphasised that 'the steady decrease in defence investment in the EU since the financial and

<sup>253</sup> M. Drent and D. Zandee, [More European defence cooperation: The road to a European defence industry?](#), Policy Brief, Clingendael, June 2018, pp. 10-11.

<sup>254</sup> S. Besch, [Can the European Commission develop Europe's defence industry?](#), Centre for European Reform, 18 November 2019.

<sup>255</sup> S. Besch, [EU's Institutional Framework regarding Defence Matters](#), in-depth analysis requested by the sub-committee on security and defence, Policy Department for External Relations, Directorate General for External Policies of the Union, European Parliament, January 2020, p. 10.

<sup>256</sup> European Court of Auditors, [European Defence](#), Review No 9, 2019, p. 5.

<sup>257</sup> ['MEPs regret Member States' lack of ambition in the post-2020 EU budget'](#), *Agence Europe*, 22 July 2020.

economic crisis' was a factor that had 'a strong impact'. At the time, some stakeholders had indicated that decreased defence investments had contributed to renationalisation of supply chains, which was counter to the directive's original objective of de-fragmenting markets.<sup>258</sup> The level of finances relates directly to the political will (or not) for EU strategic autonomy.

### 5.4.3. More transparency and sharing of information

The annexed research study points to discrepancies in data availability and difficulties of accessing data. In order to evaluate implementation of the Defence Procurement Directive, use was made of the Tendering Electronic Daily (TED) database, which compiles data provided by Member States on their procurement activity. Although available, the TED data are inaccurate because of differences across Member States when filling in the TED forms. The lack of quantitative information on the different types of licences introduced by the ICT Directive is more troubling and seriously impinges on the ability to monitor progress on the implementation of the directive and its evaluation. This situation also hinders the evaluation of the links between the two directives, as the annexed research paper demonstrates. Consequently, it also hinders the ability to assess the cumulative effect of the EU defence package. Overall, the political (including parliamentary) accountability of monitoring and evaluating the EU defence package is substantially compromised.

This problem is not new and it was already pointed out, in particular for the case of the ICT Directive, in the 2016 European Commission evaluation, including the need to expand the CERTIDER database.<sup>259</sup> To remedy these deficiencies, the annexed research papers calls for the expert group on intra-EU transfers to look into this deficiency. It also calls on Eurostat, in the European Commission, to launch a reflection on the adaptation of the existing statistical apparatus to account for defence and armament specificities, as transparency is one of the fundamental conditions for democratic accountability.

### 5.4.4. Enhanced enforcement of the EU defence package

The annexed expert paper, having examined the implementation of the Defence Procurement Directive and the ICT Directive in detail, does not recommend amending the directives per se, but rather a more 'assertive enforcement policy' that should focus in particular on correct implementation of exceptions provided for by the directives and the Treaties. On the Defence Procurement Directive, the annexed research study recommends, in particular, better scrutiny of recourse to government-to-government contracts (covered either by the specific exclusion or by Article 346 TFEU) to check whether or not the conditions have been respected, especially since large budgets are contracted in this way.

The assessment of the ICT Directive yielded mixed results, as the annexed study highlights. On the one hand, this directive has enabled the simplification of procedures and reduced the duration of the control procedure, therefore impacting positively on the efficiency of several Member States' national control systems. On the other hand, the overall effectiveness of the ICT Directive 'remains mainly low as its main provisions have not delivered their potential' in the use of general transfer licences, the certification process, and the end-use/end-user control and restrictions on exports. The authors of the expert research paper also point to cultural and policy discrepancies among the

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<sup>258</sup> European Commission, [Report from the Commission to the European Parliament and the Council, Evaluation of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community](#), COM(2016) 760 final, 30 November 2016, p. 7.

<sup>259</sup> European Commission, [Report from the Commission to the European Parliament and the Council, Evaluation of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community](#), COM(2016) 760 final, 30 November 2016.

Member States and the lack of a proper forum for national control communities to meet and exchange as reasons reinforcing the tendency to fall back on sovereignty prerogatives. In response to these weaknesses, the annexed research paper calls for the creation of a minimum below which Member States would not need to apply any restriction or control to export (set for instance at 20 % of the total value of the final product). It also calls for the implementation of the European Commission's recommendations, which provides for a certain harmonisation of the scope and conditions for the application of general transfer licences. When looking at more recent developments in EU defence cooperation, the projects that fall under the European Defence Funds may also offer opportunities to develop harmonised transfer licences and to smooth collaborative projects.

The annexed research paper offers detailed recommendations on improving both the implementation of each of the two directives comprising the EU defence package and their cumulative effect.

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Part II:  
Research paper on the implementation of  
Directive 2009/81/EC, concerning  
procurement in the fields of defence and  
security, and of Directive 2009/43/EC,  
concerning the transfer of defence-related  
products

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## LINGUISTIC VERSIONS

Original: EN

Manuscript completed in September 2020.

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PE 654.171

ISBN: 978-92-846-6946-2

DOI: 10.2861/817967

CAT: QA-02-20-587-EN-N

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<http://www.eprs.ep.parl.union.eu> (intranet)

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## Executive summary

The aim of the report is to assess the implementation of Directives 2009/81/EC on defence and security procurement and 2009/43/EC on the transfer of defence-related products (the so-called EU defence package). It also tries to assess the cumulative effect of these directives. This study covers a timeframe from 2016 to June 2020, using both quantitative (when available) and qualitative analysis (interviews and, for Directive 2009/43/EC, questionnaires).

### The scarcity and the low reliability of data

This study had to cope with a major difficulty, namely the scarcity of publicly available data and, when available, its reliability.

Assessing the implementation of Directive 2009/81/EC has been based primarily on the Tendering Electronic Daily (TED) database, which compiles data provided by Member States on their procurement activity under EU procurement directives. Although available, TED data is not necessarily consistent due to national differences in filling TED forms. Consequently, it required manual corrections. Interviews with public and private stakeholders completed this quantitative analysis with elements not collected through TED (notably on procurement procedures covered by one of the exceptions of the directive or the Treaties).

Assessing the implementation of Directive 2009/43/EC has proven to be much more complex, as there is currently no relevant quantitative data available on the recourse to the different types of licences introduced by the directive. As a consequence, the assessment of Directive 2009/43/EC is mainly based on qualitative data gained through questionnaires and interviews with relevant stakeholders. This situation is not satisfactory, neither from an academic point of view nor from a democratic perspective.

In addition, assessing the cumulative effect of the defence package and more generally the deepening of the defence internal market proved impossible due to the lack of adapted statistical apparatus.

- Based on this observation, the study contains recommendations to improve the quality and availability of data, among which:
- The European Commission should continue its work with Member States to improve the overall quality of TED data.
- The European Commission should explore ways of improving the monitoring of the different type of licences with Member States. The expert group on intra-EU transfers appears as the most adequate forum for such a discussion, at least in a first instance.
- The European Commission (Eurostat) should launch a reflection on the adaptation of existing statistical apparatus to defence and armament specificities, as transparency is one of the fundamental conditions for democratic accountability.

### Defence procurements: a certain improvement that needs to be consolidated

During the 2016-2019 period, the study suggests that the implementation of Directive 2009/81/EC has improved compared to 2011-2015 but remains at a significantly lower level than for non-defence procurements. In particular, the publication rate (i.e. the proportion of procurements that have been tendered competitively through TED) for defence procurements has reached 11.71 % in average over the 2016-2018 period which is higher than on the 2011-2015 period (8.5 % in average). However, it remains significantly lower than for non-defence procurements (around 24 % for procurements covered by the 'general directive'). Despite a certain improvement, TED data suggests that most contracts remain awarded on a purely national basis (82 % in average).

In order to explain these modest although positive results, the study suggests that procuring authorities continue to recourse to exceptions provided either through the directive or according to the Treaties, namely Article 346 of the Treaty on the Functioning of the European Union (TFEU). More precisely:

- Assessing access to the exception in **article 346 TFEU** is particularly difficult due to the very mechanics of the article (ex-post invocation). However, interviews suggest that it remains quite largely used with important differences in Member States' practices.
- Clarifications on the **collaborative programme exception** (Article 13(c) of the directive) have been welcomed. The use of this exception is expected to increase with the implementation of the European Defence Fund.
- The **government-to-government (G2G) exception** (Article 13(f)) concerned, during the considered period, several major defence contracts (in particular under the form of US Foreign Military Sales (FMS)). Interviews suggest that at least some of them did not respect the European Commission's recommendation to perform a market analysis in order to make sure that European solutions do not exist and have therefore deprived European industry from market access.
- The use of a negotiated procedure without prior publication of a contract notice still represents a significant part of contract award notices (51 % in value).

In addition, the cooperative strategy adopted by the European Commission and its work to clarify conditions of certain exceptions have been overall positive, but need to be revised in order to support the implementation of the Directive. Interviews with industry and procuring authorities suggest that the enforcement of Directive 2009/81/EC now appears as the most promising way to ensure its potential is fully displayed whereas its lack of enforcement would raise questions on the European Commission's willingness and/or capacity to implement the Directive.

Regarding the Europeanisation of defence value-chains, optional subcontracting provisions are completely ignored by procuring authorities (only 11 subcontracting notices over the considered period). The study also suggests that offset requirements have evolved to adapt to EU law constraints (article 346 TFEU) but may remain problematic from a legal point of view (e.g. financial valuation of these requirements, which is considered incompatible with EU law by the European Commission).

Consequently, the study draws one main recommendation: the Commission should adopt a more assertive enforcement policy regarding Directive 2009/81/EC and defence procurements, based on *ex officio* cases. The study suggests this policy should particularly focus on the correct implementation of exceptions provided for by the Directive and the Treaties. In particular, given the magnitude of concerned budgets, the recourse to government-to-government contracts (either covered by the specific exclusion or by Article 346 TFEU) should be scrutinised to check whether or not the conditions for their recourse have been respected.

Intra-EU transfers: limited effects at European level despite certain improvements at national level

The absence of available and exhaustive data on arm transfers within the EU raises serious questions, notably in terms of political accountability, on the possibility to monitor the implementation of Directive 2009/43/EC. Facing this context, data on the recourse to different types of licences have been collected through questionnaires and interviews.

The study suggests a contrasting picture on the implementation of Directive 2009/43/EC. On a positive note, it has enabled some improvements of efficiency for several Member States' national control systems. In these Member States, improvements have resulted, for instance, in the

simplification of procedures and the reduction of the control procedure's duration. However, at the European level, interviews with industry suggest that the effectiveness of Directive 2009/43/EC's implementation remains mainly low as its core provisions have not delivered on their potential:

- Recourse to **General Transfer Licences (GTL)**, although it seems to widely vary among Member States, appears to be still very limited at European level and in the main exporting Member States. The study suggests that Directive 2009/43/EC proved ineffective in overcoming the patchwork of different national systems that existed before its adoption thanks to harmonized GTLs. However, it did at least ensure that the 'new European system' works within a common framework with common terms of reference, making possible for national systems to potentially converge in the future. The study nonetheless suggests that the level of harmonization of GTLs' application, scope and attached conditions remain largely insufficient.
- **Certification** is perceived by industry as ineffective, since it has failed to provide sufficient incentives for obtaining certification. Additionally, constraints on national certification processes are sometimes important. It is nonetheless increasingly perceived, at prime contractor level, as a means to strengthen companies' internal export control processes and even sometimes to harmonise them at group level. As a consequence, there is a growing perception among national authorities that certification is a guarantee of certified companies' reliability, bringing a reputational added value and creating links between control authorities and industry.
- **End-use/end-user control and restrictions to export** have been identified as a major source of impediments to the effective implementation of Directive 2009/43/EC. However, given the sensitivity of the issue, national authorities remain very cautious on this issue and do not necessarily consider it an EU matter.

The study suggests several factors that explain why Directive 2009/43/EC did not achieve its full potential. Firstly, Member States to a large extent consider that the implementation of Directive 2009/43/EC has strong implications for arms exports policies. Indeed, arms exports (as opposed to transfers) of defence-related products are still largely considered a matter of national sovereignty and responsibility. Beyond this issue, which is to be solved within the framework of the Common Foreign and Security Policy (CFSP), other factors may explain the relatively disappointing results of the directive. The cultural and policy discrepancies among Member States remain important and the lack (for long) of a proper forum for national control communities to meet and exchange good practices has reinforced this diverging trend.

Therefore, the study draws the following recommendations:

- In order to alleviate the consequences of different national export policies, the study suggests to fully implement the article 4 (8) of Directive 2009/43/EC by creating a de minimis threshold (for instance 20 % of the total value of the final product) below which Member States do not apply any restriction or control to export.
- The study also suggests some evolutions for the European system of general transfer licences. The most promising one would be the implementation of the European Commission's recommendations which provides for a certain harmonisation of general transfer licences' application scopes and conditions. The European Defence Funds' projects may also offer opportunities to develop harmonised transfer licences to facilitate collaborative projects.
- Ultimately, the creation of a truly European transfer control community (through notably the expert group on intra-EU transfers and training sessions) appears as a very promising endeavour in the mid-term to reconcile national approaches and favour the emergence of a common control culture.

### Very little (if any) cumulative effect of the defence package

The defence package's cumulative effect appears to be extremely difficult to assess for methodological reasons. Severe limitations, such as the lack of a relevant metric significantly hinders any attempt to assess a potential cumulative effect of the two directives. Although they both aim at deepening the internal market for defence, the lack of a statistical apparatus that is adapted to defence activities (e.g. NACE or NC classification) makes it virtually impossible to measure such an evolution. The evolution of defence collaboration could also be partly relevant, as one of the ambitions of the EU with this directive was to boost cooperation. In this respect, EDA data show relatively modest results: although budgets dedicated to collaborative programmes (procurements and R&T) have increased since 2014, they have still not recovered from 2011-2012 budgetary cuts. Nevertheless, this evolution in cooperative spending is affected by several political and economic factors independent of the defence package. Hence, its effect cannot be singled out. The study suggests that it is relatively marginal.

The only direct link that may exist between the two directives would be the case where the level of implementation of the intra-EU transfers directive would threaten national security of supply strategies, and thus limit the willingness of Member States to have recourse to non-domestic economic operators. Interviews have suggested that such a hypothesis remains highly theoretical.

## Table of Contents

Executive summary	63
1. Introduction	74
1.1. Defence procurements before Directive 2009/81/EC: A European Defence Equipment Market divided along national lines	74
1.1.1. A de facto exclusion of defence from internal market	74
1.1.2. Several intergovernmental attempts to increase transparency and competition with little effect	76
1.1.3. Objectives of Directive 2009/81/EC on defence procurements	77
1.2. Intra-EU transfers before Directive 2009/43/EC: a disproportionate system	78
1.2.1. A costly regulatory patchwork	78
1.2.2. Intergovernmental attempts to facilitate intra-EU trade of defence-related products	79
1.2.3. Objectives of Directive 2009/43/EC on intra-EU transfers	80
2. Methodology	81
2.1. The methodological choice of continuity and comparability	81
2.2. Assessing the implementation of Directive 2009/81/EC	81
2.2.1. Statistical analysis of TED data	81
2.2.2. Assessing the qualitative impact of Directive 2009/81/EC	82
2.3. Assessing the implementation of Directive 2009/43	83
2.3.1. The lack of reliable and centralised data	83
2.3.2. The importance of questionnaires	83
2.3.3. The added value of interviews	84
2.4. An attempt to measure the cumulative effect of Directives 2009/43/EC and 2009/81/EC	85
3. Assessing implementation of Directive 2009/81/EC on defence and security procurements	86
3.1. Measuring the implementation of Directive 2009/81/EC: making sense of the TED data	86

3.1.1. Assessing the level of transparency in the European defence market _____	86
3.1.2. Assessing the level of competition in European procurements _____	94
3.2. Explaining the implementation of Directive 2009/81/EC _____	100
3.2.1. The largely unexploited potential of Directive 2009/81/EC _____	100
3.2.2. Enforcement: clarification and cooperation _____	112
3.2.3. The limited effect of Directive 2009/81/EC on the Europeanisation of defence value chains _____	117
4. Assessing the implementation of Directive 2009/43/EC on intra-EU transfers of defence-related products _____	120
4.1. Measuring the implementation of Directive 2009/43/EC (2016-2019): main benefits are still to be reaped _____	120
4.1.1. The issue of sources for assessing the implementation of Directive 2009/43/EC: no reliable data on transfers of defence-related products _____	120
4.1.2. A general improvement in control systems nationally, but not at European level ____	122
4.1.3. General transfer licences have still not delivered benefits _____	123
4.1.4. The cost/benefit balance of certification remains largely uncertain _____	128
4.1.5. End-use/end-user control and export limitations are still the norms _____	130
4.2. Explaining the implementation of Directive 2009/43/EC _____	131
4.2.1. The link between intra-EU transfers and extra-EU exports: the national sovereignty nexus _____	131
4.2.2. Different control cultures and policies _____	133
4.2.3. The consequences of the absence of Europeanisation of transfer control communities	134
5. Assessing the potential cumulative effect of the EU defence package _____	136
5.1. The difficulty to measure the EU defence package's cumulative effect _____	136
5.1.1. A methodological stalemate _____	136
5.1.2. Is European defence cooperation increasing? _____	137
5.2. Explaining the lack of a cumulative effect of the EU Defence package _____	140

5.2.1. Very limited direct links ('cross-effect') between the two directives examined _____	140
5.2.2. Other factors playing a role in the evolution of the EU defence landscape _____	141
6. Recommendations _____	143
6.1. Improve the quality and availability of data _____	143
6.1.1. Continually improve the quality of TED data _____	143
6.1.2. Make data available on intra-EU transfers _____	143
6.1.3. Create a statistical apparatus covering defence-related activities _____	144
6.2. Defence procurements: enforce Directive 2009/81/EC _____	144
6.2.1. No need for a revision of Directive 2009/81/EC _____	144
6.2.2. A crossroad for Directive 2009/81/EC's credibility: enforcement as a litmus test _____	145
6.3. Intra-EU transfers of defence-related products: simplify and fine tune the current system _____	147
6.3.1. Alleviate the consequences on export policy of the application of the Directive 2009/43/EC: operationalise article 4 (8) _____	147
6.3.2. An evolution of the European system for general transfer licences is necessary _____	148
Main references _____	152
Annexes _____	156
Annex 1. Manual corrections on TED data _____	156
Annex 2. List of interviews _____	157
Annex 3. Non-exhaustive list of Foreign Military Sales (FMS) contracts with EU-27 Member States, the UK and Norway _____	162
Annex 4. Publication rates (2016-2018) _____	166
Annex 5. Is the European Defence Equipment Market (EDEM) deepening? _____	172
Annex 6. Questionnaires for assessing the implementation of Directive 2009/43/EC _____	177
Annex 7. Interview grids _____	182

## Table of figures

Figure 1 – Origin of respondents _____	84
Figure 2 – Number of notices published in TED per year (2016–2020*) _____	88
Figure 3 – Number of notices published in TED per type (2016–2020*) _____	89
Figure 4 – Procedures used in contract notices _____	95
Figure 5 – Procedures used in contract award notices (2016–2020) _____	96
Figure 6 – Contract award notices: nature of contract (2016–2020*) _____	97
Figure 7 – Location of successful operators in number (2016–2020*) _____	98
Figure 8 – Proportion of European collaborative programmes in defence procurement expenditures, in € million _____	106
Figure 9 – The Foreign Military Sales (FMS) process _____	109
Figure 10 - Number of certified companies and repartition across the EU _____	129
Figure 11 – Evolution of European defence collaborative programmes, in € million _____	139
Figure 12 – Number of transfer licences granted (2008–2018; EU28) _____	173
Figure 13 – Value of transfer licences requested (2008–2018; EU28, minus France) _____	173
Figure 14 – Number of transfer licences granted and value of transfer licences requested, in € million (2008–2018; EU28 total) _____	174
Figure 15 – Evolution of intra-EU trade for certain categories of weapons and ammunitions (NC93) _____	176

## Table of tables

Table 1 – Disaggregated data of contracts tendered through CPD in the UK, France and Italy in the years 1996/1997 _____	76
Table 2 – Number of contracts and contract award notices _____	89
Table 3 – Government procurement expenditure on military defence, in € million _____	91
Table 4 – Publication rate, value in € million _____	92
Table 5 – Publication rates for defence procurement (by Member States) _____	93
Table 6 – Comparison of thresholds for Directives 2009/81/EC and 2014/24/EC, in € _____	101
Table 7 – Comparison of exceptions for the use of Directives 2009/81/EC and 2014/24/EC _____	101
Table 8 – Total FMS acquisitions (estimated amounts), in € million _____	110
Table 9 – Latest available national reports on arms export for the main European exporters _____	121
Table 10 – General transfer Licences (GTL) offered in 2016, by country _____	124

## List of acronyms

<b>CARD</b>	Coordinated Annual Review on Defence
<b>CERTIDER</b>	Certified Defence related Enterprises
<b>CFSP</b>	Common Foreign Security Policy
<b>COARM</b>	Conventional Arms Exports
<b>COFOG</b>	Classification of the Functions of Government
<b>CPD</b>	Coherent Policy Document
<b>CSDP</b>	Common Security Defence Policy
<b>DCS</b>	Direct Commercial Sales
<b>DCSA</b>	US Defence Security Cooperation Agency
<b>DG DEFIS</b>	Directorate General for Defence Industry and Space
<b>DG GROW</b>	Directorate General for Internal Market, Industry, Entrepreneurship and SMEs
<b>DTIB</b>	Defence and Technological Industrial Base
<b>EBB</b>	Electronic Bulletin Board
<b>EC</b>	European Commission
<b>ECJ</b>	European Court of Justice
<b>EDA</b>	European Defence Agency
<b>EDEM</b>	European Defence Equipment Market
<b>EDF</b>	European Defence Fund
<b>EDTIB</b>	European Defence Technological and Industrial Base
<b>EEA</b>	European Economic Area
<b>EP</b>	European Parliament
<b>EU</b>	European Union
<b>FMS</b>	Foreign Military Sales
<b>G2G</b>	Government to Government
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GTL</b>	General Transfer Licences
<b>IEPG</b>	Independent European Program Group
<b>LoA</b>	Letter of Acceptance

<b>LoI/FA</b>	Letter of Intent / Framework Agreement
<b>LoR</b>	Letter of Request
<b>MTCR</b>	Missile Technology Control Regime
<b>NACE</b>	Statistical classification of economic activities in the European Community
<b>NATO</b>	North Atlantic Treaty Organization
<b>NC</b>	Nomenclature Combined
<b>NSPA</b>	NATO Support and Procurement Agency
<b>OCCAr</b>	Organisation Conjointe de Coopération en matière d'Armement / Organisation for Joint Armament Co-operation
<b>OEM</b>	Original Equipment Manufacturer
<b>OEM</b>	Original Equipment Manufacturer
<b>P&amp;A</b>	Price and Availability
<b>PESCO</b>	Permanent Structured Cooperation
<b>PPA</b>	Pattugliatori Polivalenti d'Alta
<b>R&amp;D</b>	Research and Development
<b>SIPRI</b>	Stockholm International Peace Research Institute
<b>SME</b>	Small and Medium-sized Enterprise
<b>TED</b>	Tendering Electronic Daily
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>VEAT</b>	Voluntary Ex Ante Transparency
<b>WEAG</b>	Western European Armament Group

# 1. Introduction

On 6 May 2009, the European Parliament and the Council of the EU adopted two directives whose objective was to improve the functioning of the internal market for defence products, namely:

- Directive 2009/81/EC 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 ('Directive on defence procurements');
- Directive 2009/43/EC simplifying terms and conditions of transfers of defence-related products within the Community ('Directive on intra-EU transfers').

These directives are also known as the EU defence package.

The objective of this study is to assess the implementation of these two directives.

## 1.1. Defence procurements before Directive 2009/81/EC: A European Defence Equipment Market divided along national lines

### 1.1.1. A de facto exclusion of defence from internal market

Before the adoption of Directive 2009/81/EC, defence procurements were de facto excluded from the internal market's scope. This directly resulted from the term 'extensive use'<sup>1</sup> of Article 346 (1) (b) TFEU, although the European Court of Justice (ECJ) consistently stated that 'any derogation from the rules intended to ensure the effectiveness of the rights conferred by the Treaty must be interpreted strictly'.<sup>2</sup>

Article 346 of the Treaty on the Functioning of the European Union (TFEU), states in its paragraph (1) (b) that 'any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes'. This provision was introduced by the Treaty of Rome (1957) and has never been changed. It is inspired by Article XXI of the General Agreement on Tariffs and Trade (GATT),<sup>3</sup> but has a more limited scope as, in the case of the European provision, dual-use products are not covered by this

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<sup>1</sup> European Commission, [Impact Assessment – Commission Staff Working Document accompanying the proposal for a directive from the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security](#), SEC(2007) 1598, 5 December 2007, p. 14.

<sup>2</sup> Ibid.

<sup>3</sup> Article XXI of the [GATT Treaty](#) states that: 'Nothing in this Agreement shall be construed [...]  
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests  
(i) relating to fissionable materials or the materials from which they are derived;  
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;  
(iii) taken in time of war or other emergency in international relations;'

exemption. The ECJ has constantly recalled in its jurisprudence<sup>4</sup> that this exception (as with any other exception to Treaty rules) 'deals with exceptional and clearly defined cases' and 'must, in accordance with settled case-law in respect of derogations from fundamental freedoms, be interpreted strictly'.<sup>5</sup>

However, in practice, Member States have been using this exception as a general exemption for shielding defence activities from internal market rules. Regarding procurement, before adoption of Directive 2009/81/EC, defence public contracts had since 2004 been theoretically covered by Directive 2004/18/EC.<sup>6</sup> Its Article 10 specifically stipulated that it 'shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article [346] of the Treaty [TFEU]'. However, according to an impact assessment published by the European Commission alongside its proposal for a Defence Procurement Directive (Directive 2004/18/EC), it is 'generally considered ill-suited to many defence contracts'. This would explain why Member States would have used it. According to the European Commission, between 2008 and 2010, 1 500 notices (representing a total value of approximately €4 billion) have been published in the Tendering Electronic Daily (TED), which is equivalent to 1.5 % of the aggregated value for defence expenditure at EU level during the same period.<sup>7</sup>

As a consequence, several practices contravening European primary rules were still being applied in defence procurements. National preference was quasi-systematically applied by Member States with a solid defence and technological industrial base (DTIB), even when competition was open to non-national bidders (see figures below). Member States with a smaller or no DTIB often required offsets from non-national industry as a condition for the award of a defence contract. Offsets aim at ensuring a certain economic return for national economies from public defence investment and sometimes a certain level of national strategic autonomy. They can take many forms, may be related (or not) to the object of the contract, but can always be qualified as discriminations on the basis of nationality and as an undue restriction to one or several EU fundamental freedoms.<sup>8</sup> In addition, outside the framework of EU law, procedural protection for bidders (such as the right to challenge decisions before a Court) was inconsistent among Member States.

<sup>4</sup> See for instance: Judgment of the Court, [Case C-222/84 Johnston](#), 15.5.1986; Judgment of the Court, [Case C-367/89 Richardt and Les Accessoires Scientifiques](#), 4.10.1991; Judgment of the Court, [Case C-328/92 Commission v Spain](#), 3.5.1994; Judgment of the Court, [Case C-324/93 Evans Medical and Macfarlan Smith](#), 28.3.1995; Judgment of the Court, [Case C-273/97 Sirdar](#), 26 October 1999; Judgment of the Court, [Case C-414/97 Commission v Spain](#), 16.9.1999; Judgment of the Court, [Case 285/98 Kreil](#), 11.1.2000; Judgment of the Court, [Case C-423/98 Albore](#), 13.7.2000; Judgment of the Court, [Case C-186/01 Dory](#), 11.3.2003; Judgment of the Court, [Case C-252/01 Commission v Belgium](#), 16.10.2003; Judgment of the Tribunal, [Case T-26/01 Fiocchi Munizioni v Commission](#), 30.9.2003; Judgment of the Court, [Case 82/03 Commission v Italy](#), 13.7.2004; Judgment of the Court (Grand Chamber), [Case C-337/05 Commission v Italy](#), 8.4.2008; Judgment of the Court (Second Chamber), [Case C-157/06 Commission v Italy](#), 2.10.2008; Judgment of the Court (Fourth Chamber), [Case C-615/10 Insinöörtoimisto InsTiimi Oy](#), 7.6.2012; Judgment of the Court, [Case C-246/12 Ellinika Nafpiqia AE](#), 28.2.2013.

<sup>5</sup> Judgement of the Court (fourth chamber), [Case C-615/10 Insinöörtoimisto InsTiimi Oy](#), 7.6.2012.

<sup>6</sup> [Directive 2004/18/EC](#) of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 31.3.2004.

<sup>7</sup> Estimated, by the European Commission, at €263.23 billion. Estimations for the covered period are outlined later in this text.

<sup>8</sup> In 2007, a study commissioned by the European Defence Agency concluded that 18 Member States had an offset policy: E. Anders Eriksson & al., [Study on the effects of offsets on the Development of a European Defence Industry and Market](#), Final Report, 06-DIM-022, 12 July 2007.

### 1.1.2. Several intergovernmental attempts to increase transparency and competition with little effect

Despite its relatively recent adoption, Directive 2009/81/EC pursues objectives that have been formally set for a long time by European states. At least two intergovernmental (and non-binding) initiatives were implemented prior to 2009 in order to improve transparency and increase recourse to EU-wide competition in defence procurement.

#### The Coherent Policy Document (1990)

Several European states have been willing to liberalise their defence procurements at European level, within the Independent European Programme Group (IEPG) from 1976 to 1992, and then within the Western Europe Armament Group (WEAG) from 1993 to 2005. The adoption of the Coherent Policy Document (CPD) in 1990<sup>9</sup> was the first attempt to 'draw together the principles for the operation of the open defence equipment market'.<sup>10</sup>

The results of this initiative are not conclusive due to difficulties in accessing exhaustive data.<sup>11</sup> Such difficulties arise from the lack of centralisation of national bulletins. However, several studies<sup>12</sup> concluded that the CDP achieved limited results. It was notably found that the vast majority of contracts tendered through national bulletins were awarded to national bidders.<sup>13</sup> For instance, for the year 1996/1997, the following data is available:

Table 1 – Disaggregated data of contracts tendered through CPD in the UK, France and Italy in the years 1996/1997

1996/1997	Number of contracts tendered through CPD	Competitive calls for tenders	Contracts awarded on a national basis
United Kingdom	730	56 %	95 %
France	99	27 %	100 %
Italy	341	26 %	81 %

Source: S. Mezzadri, *ibid.*, p. 12.

In the same study, the author estimates that 10% of contracts (20% in value) were opened to foreign bidders. These are relatively modest results.

<sup>9</sup> At that time, WEAG counted 13 members: the 10 full members of Western European Union (WEU) (Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom) and three NATO members (Denmark, Norway, and Turkey). In 2000, WEAG members were 20.

<sup>10</sup> Commission III, Coherent Policy Document - Document D/45, WEAG, October 1990, p. 1.

<sup>11</sup> The lack of centralisation for national bulletins is a major concern in this perspective.

<sup>12</sup> Luis Balsells-Traver, Analysis of Data on the European Defence Equipment Market provided by WEAG Nations, WEAG ArmSec, 2000; Sandra Mezzadri, [L'ouverture des marchés de la défense : enjeux et modalités](#), Occasional Paper n° 12, EU Institute for Security Studies, 2000.

<sup>13</sup> Sandra Mezzadri, *ibid.*, p. 12.

## The European Defence Agency (EDA) Code of conduct (2005)

Fifteen years after the CPD's adoption, EDA's board adopted a Code of Conduct on defence procurement,<sup>14</sup> whose objective has been very close to that of the CPD, namely: implementing 'a voluntary, non-binding intergovernmental regime aimed at encouraging application of competition [...] on a reciprocal basis between those subscribing to the regime'.<sup>15</sup> The material scope of this code of conduct and its exceptions are very similar to those of the CPD. However, the geographical scope, which is much wider, covers all EU Member States (except Denmark which enjoys an opt-out for the Common Security and Defence Policy [CSDP]).

Although centralised at the EDA level, the Electronic Bulletin Board (EBB) data are no longer publicly available. According to an assessment by the European Commission,<sup>16</sup> approximately 300 notices representing a value of €4.76 billion, were published on the EBB.

The limited availability of CPD and EBB data make it too sparse and unreliable to be statistically significant. However, they can offer a useful point of reference when contextualising data on the implementation of Directive 2009/81/EC.

### 1.1.3. Objectives of Directive 2009/81/EC on defence procurements

Theoretically, the 2004 'general directive' on procurements<sup>17</sup> was supposed to encompass defence procurements. However, according to the proposal of the European Commission, Member States extensively used exemptions from the Treaty and Directive 2004/18/EC. As a consequence, the overwhelming majority of defence procurements were not purchased in compliance with EU rules and principles.<sup>18</sup>

Hence, the objectives of Directive 2009/81/EC are to:

- 'circumscribe the use of exemptions from the Treaty and Directive 2004/18/EC in the fields of defence and security to exceptional cases';<sup>19</sup>
- Enhance transparency and openness to competition of defence procurements.<sup>20</sup>

<sup>14</sup> European Defence Agency, [The Code of Conduct on Defence Procurement of the EU Member States participating in the EDA](#), EDA Steering Board, 21.11.2005.

<sup>15</sup> Ibid., p. 1.; The similarities of both initiatives have been studied, for instance, in A. Georgopoulos, 'The European Defence Agency's Code of Conduct for Armament Acquisitions: A Case of Paramnesia?', *Public Procurement Law Review* 2, 2006, pp. 51-61.

<sup>16</sup> European Commission, [Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security](#), Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73(2) of that Directive, SWD(2016) 407, 30 November 2016, p. 19.

<sup>17</sup> European Parliament and Council of the EU, [Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts](#), 31 March 2004.

<sup>18</sup> European Commission, [Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security](#), COM/2007/0766, 5 December 2007.

<sup>19</sup> Ibid.

<sup>20</sup> European Commission, [A strategy for a stronger and more competitive European defence industry](#), COM(2007)764, 5 December 2007.

## 1.2. Intra-EU transfers before Directive 2009/43/EC: a disproportionate system

Control of exports of arms (or, broadly speaking, defence-related products) is an international obligation under several international treaties and agreements, of which EU Member States are part.<sup>21</sup> However, these controls imply impediments to the trade of defence-related products, which can appear as relatively disproportionate in the EU context, given the extremely low number of licence denials each year and the general European approach to rule of law, the use of force, and multilateralism.

### 1.2.1. A costly regulatory patchwork

Before the introduction of Directive 2009/43/EC, each Member State had its own national system to regulate and control exports, imports and transfers of defence products. According to a 2005 reference study,<sup>22</sup> which focused on the then 25 Member States and three European Economic Area (EEA) countries, even though all national systems relied on ex-ante licensing systems and did not differentiate between intra-Community and extra-Community exports, they diverged on many aspects:<sup>23</sup>

- Their material scope: the list of products covered;
- The national authority in charge of control: from regional authorities to defence or foreign affairs or economy ministry;
- The type of licences;
- The conditions of licences' validity (duration, criteria);
- The licensing process (steps, duration).

Furthermore, this study notes the absence of any consolidated information on the various national systems, which constitutes the first obstacle for enterprises towards any intra-Community transfer. As a result, it could be argued that the situation has induced both direct (related to the administrative cost of the licensing system) and indirect ('costs resulting from market inefficiency: poor scaling effects, inefficiencies in international partnerships, juste retour policies, etc.') costs.<sup>24</sup> The total cost of such regulatory patchwork has been estimated to reach €3.16 billion per year, of which only €430 million represented direct costs.<sup>25</sup>

This cost must be weighed against very few refusals of licences among European Member States: rarely more than one refusal per year out of a total exceeding 10 000 granted licenses per year.<sup>26</sup> In

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<sup>21</sup> The most well-known treaty is the [Arms Trade Treaty](#) (ATT) which entered into force in 2014. To date, 110 States have ratified and 31 have signed but not ratified the ATT. Article 5 (2) of ATT reads that 'Each State Party shall establish and maintain a national control system, including a national control list, in order to implement the provisions of this Treaty'. See: European Parliament, [Resolution on Arms export: implementation of Common Position 2008/944/CFSP](#), 17 September 2020.

<sup>22</sup> UNYSIS, [Intra-Community Transfers of Defence Products, study commissioned by the European Commission](#), February 2005.

<sup>23</sup> *Ibid.*, pp. 8-35.

<sup>24</sup> *Ibid.*, p. 3.

<sup>25</sup> *Ibid.*, p. 114.

<sup>26</sup> European Commission, [Impact assessment, Commission Staff Working Document accompanying the proposal for a directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community](#), SEC(2007) 1593, 5 December 2007.

other words, an extremely expensive system to control activities is in place within the EU, when in any case the compliance rate is at 99.99 %.

### 1.2.2. Intergovernmental attempts to facilitate intra-EU trade of defence-related products

The objective of facilitating intra-European trade in defence-related products has existed at European level since the middle of the 1990s. This objective has been underlined in different intergovernmental fora, but has met little success until now.

#### The lack of development in the European Defence Agency

Despite several EDA documents referring to a necessity for simplification of conditions covering the transfer of defence-related products,<sup>27</sup> no progress has been achieved within the EDA framework. In essence, Member States have failed to implement non-legally binding guidelines, strategies and arrangements.

#### The Letter of Intent/Farnborough Framework Agreement

In the Letter of Intent/Framework Agreement (LoI/FA), six EU Member States<sup>28</sup> have worked for more than two decades to develop a common approach to defence industry policy, including transfers and exports within the EU. In 2000, the signature by these six states of the Farnborough Framework Agreement has facilitated the development and implementation of 'global project licences' in order to facilitate defence-related product transfers within cooperative weapon programmes. These licences were aimed at lifting any restriction (in the amount or volume) for the whole duration of a project.<sup>29</sup>

Generally speaking, **activities within the LoI/FA have reached some significant results in terms of facilitating cross-border restructuring of defence industries, but did not make a breakthrough in opening the European defence equipment market concerning exports and transfers.** Firstly, global project licences have been a failure. According to French Member of Parliament, Yves Fromion, between 2004 and 2008, only two global project licences were issued.<sup>30</sup> Secondly, this initiative had a very restrictive geographical scope, which is not consistent with the idea of an EU internal market and its principle of non-discrimination on the ground of nationality. According to a reference report issued in 2005,<sup>31</sup> the results of the LoI and Farnborough Framework have been limited and failed to create a simple framework. The LoI's limited geographical scope and operating rules 'clearly show that the LoI is not a sufficient basis for the removal of internal trade barriers in the EU defence market as a whole'.

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<sup>27</sup> See for instance: Steering Board of the European Defence Agency, [A strategy for the European Defence Technological and Industrial Base](#), 14 May 2007, point 14; Steering Board of the European Defence Agency, [Framework Arrangement for security of supply between subscribing Member States in circumstances of operational urgency](#), 2006, p. 1.

<sup>28</sup> Namely: France, Germany, Italy, Spain, Sweden and the United Kingdom.

<sup>29</sup> See: L. Beraud-Sudreau, [French adaptation strategies for arms export controls since the 1990s](#), Paris Paper #10, Institute for Strategic Research of the Ecole Militaire (IRSEM), October 2014, p. 20.

<sup>30</sup> Y. Fromion, Annex 4, [Les moyens de développer et de structurer une industrie européenne de défense](#), Official report to the Prime Minister, 30 June 2008, p. 50.

<sup>31</sup> Unysis, [Intra-Community Transfers of Defence Products, report to the European Commission](#), 2005, p. 47 onwards.

### 1.2.3. Objectives of Directive 2009/43/EC on intra-EU transfers

In response to this context, the objectives set for the Directive 2009/43/EC were to:

- 'reduce obstacles to the circulation of defence-related products within the internal market';<sup>32</sup> and
- 'diminish the resulting distortions of competition, by simplifying and harmonizing licensing conditions and procedures'.<sup>33</sup>

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<sup>32</sup> European Commission, [Proposal for a Directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community](#), COM(2007) 765, 5 December 2007.

<sup>33</sup> Ibid.

## 2. Methodology

### 2.1. The methodological choice of continuity and comparability

In order to evaluate correctly the effectiveness, efficiency, impact and added value of Directives 2009/43/EC and 2009/81/EC, this study has adopted a methodology based both on quantitative and qualitative analysis, even though the assessment of each Directive triggers very distinct methodological challenges in terms of data availability or measurement criteria.

Given the relatively short timeframe covered by this study (2016-2020), our aim in terms of both data and analysis is to ensure a high degree of comparability with previous evaluations covering the period 2011-2015. Accordingly, this choice enabled the study to draw some conclusions on these directives' entire 'life span'.<sup>34</sup>

Specific attention has been paid to ensuring a certain methodological continuity with the study undertaken on behalf of the European Parliament<sup>35</sup> ('first European Parliament [EP] study'). Where relevant, references are also made to other evaluations. In particular, this methodological continuity directly impacted the collection, refining and analysis of data:

- For Directive 2009/81/EC, the principal source of quantitative data is TED, an online version of the Official EU Journal's procurement supplement. As with the first EP study, TED data remains central to our analysis and hence the study has primarily focused on the same measurement criteria (see below).
- For Directive 2009/43/EC, data is sparse as no centralised dataset exists at the European level. Accordingly, and in line with the first EP study, data was gathered through questionnaires (see below) and thus was subject to the cooperation and willingness of recipients.

However, methodological continuity does not mean that methodology needs to remain exactly the same. Deviations are possible, especially as this evaluation's scope is wider than the previous study conducted for the European Parliament. Hence, this required us to use additional data sources:

- For Directive 2009/81/EC, this study intends to enrich existing quantitative analysis by adding qualitative data so as to assess notably the impact of recourse to exceptions provided by this Directive and explicated by guidance notes issued by the European Commission.
- This study provides a first attempt to assess (both in a quantitative and a qualitative way) the cumulative application of both Directives.

### 2.2. Assessing the implementation of Directive 2009/81/EC

#### 2.2.1. Statistical analysis of TED data

The main objective of this study when it comes to assessing the impact of Directive 2009/81 is to use data from the TED dataset in the most beneficial way. This use comprised a three-step process:

<sup>34</sup> Deadlines for the implementation of directive 2009/43/EC and 2009/81/EC were respectively 30 June 2011 (for an application from 30 June 2012) and 21 August 2011.

<sup>35</sup> H. Masson, K. Martin, Y. Queau and J. Seniors, [The impact of the 'defence package' directives on European defence](#) ('The 2015 study'), PE 549.044, June 2015.

- *Collecting data:* extraction and constitution of a proper dataset to form an Excel table which enables the merging of data.
- *Refining data:* because data contained in TED is not necessarily complete or exhaustive, manual corrections have been necessary to ensure the highest degree of data quality from our datasets.<sup>36</sup>
- *Analysing and comparing data:* data was then analysed alongside the directive's two main objectives: (1) improve the level of transparency for defence procurements at European Union (EU) level and (2) improve the level of openness for these procurements on an EU basis. In addition, comparison with data on national defence investment (EDA and/or Classification of the Functions of Government [COFOG]) have facilitated the measurement of this Directive's de facto scope. It proved impossible to contextualise the number of procurements tendered or publicised through TED with (European or national) data on the total number of procurements, as this data is mostly unavailable. Finally, the effectiveness of Directive 2009/81/EC was ultimately assessed in comparison with data on non-defence procurements directives.<sup>37</sup> Of course, this comparison presents some limitations mainly due to the different scope of applications of applicable directives (especially when it comes to exceptions).<sup>38</sup> However, it can offer more useful concrete and realistic ideas of expectations regarding the implementation of Directive 2009/81/EC.

### 2.2.2. Assessing the qualitative impact of Directive 2009/81/EC

In addition to this quantitative assessment, several aspects regarding the impact of Directive 2009/81/EC have called for recourse both to qualitative analysis and field research. In particular, this qualitative analysis concerns the following aspects:

- The recourse to Article 346 in defence procurement;
- The potential importance of offsets and offset-like measures' requirements;
- The recourse to exclusions and respect for the European Commission's guidelines (2011);
- The impact of the Guidance notice on cooperative defence procurement (2019);
- The impact of the Notice providing guidance on government-to-government contracts in defence (2016).

Recourse to optional mechanisms and their potential impact on the Directive's use:

- Recourse to the 'Recommendation on cross-border market access for sub-suppliers and SMEs in the defence sector' (2018).<sup>39</sup>

To collect such data, structured interviews were conducted with:<sup>40</sup>

<sup>36</sup> Please see Annex 1 for a detailed explanation of manual corrections that have been necessary.

<sup>37</sup> [Directive 2014/24/EU](#) of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [Directive 2014/25/EU](#) of the European Parliament and 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, and [Directive 2014/23/EU](#) of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

<sup>38</sup> See Chapter 3 of this study (section 3.3.1.) for a comparison of the scope of application of directives 2009/81/EC and 2014/24/EU.

<sup>39</sup> European Commission, [Commission Recommendation \(EU\) 2018/624 of 20 April 2018 on cross-border market access for sub-suppliers and SMEs in the defence sector](#), 2018.

<sup>40</sup> See Annex 2 for the list of interviews.

- The European institutions: the European Commission (DG DEFIS) and the European Defence Agency;
- Procuring entities at national level in a selection of Member States<sup>41</sup>
- Defence trade associations;
- Defence companies of different sizes<sup>42</sup>

These necessary interviews were held either physically or remotely, in light of Covid-19 restrictions applied during the preparation of this study.

## 2.3. Assessing the implementation of Directive 2009/43

### 2.3.1. The lack of reliable and centralised data

Data on intra-EU transfers of defence-related products is sparse, being neither publicly available nor particularly coherent. At EU level, the Register of the Certified Defence-related Enterprises (CERTIDER) compiles a certain amount of information, but none is quantitative. Conversely, annual reports on arms exports (or COARM reports) contain data on the number and value of licences granted by each Member State per destination and per category of weapon systems. However, such reports contain no reference to the category of licences (in accordance with Directive 2009/43/EC) that have been used. As a consequence, it cannot offer any relevant information on the implementation of this directive.

Several Member States publish details of their own arms' exports annually. The Stockholm International Peace Research Institute's (SIPRI) updates a list of these reports on its website.<sup>43</sup> An analysis of data from these reports (despite limitations triggered by the diversity of methodologies used by Member States) may offer an interesting panorama. Given time constraints, priority has been given to European countries listed by SIPRI among the 25 main arms exporters worldwide. These include:<sup>44</sup> France (3), Germany (4), the United Kingdom (6), Spain (7), Italy (9), Netherlands (11), Sweden (15), Norway (17), the Czech Republic (21) and Portugal (25). This listing offers a good sample of diverse European situations.

### 2.3.2. The importance of questionnaires

In the absence of a consolidated EU database on intra-EU transfers of defence-related products, our assessment is based on available data at the national level, thanks to questionnaires sent to Member States' relevant authorities. These questionnaires focus on the following themes:

- The general assessment of the Directive;
- The impact of General and Global Transfer Licences;
- The added value of certification;
- The Directive's future.

These questionnaires were sent out to 68 interlocutors (30 national authorities and 38 trade associations) on 29 May 2020 with a deadline of 9 June for their return. Subsequently, reminders were sent on 12 June (with no deadline) to those stakeholders who had not yet replied. By that time, 10 national authorities and 10 defence trade associations had returned completed questionnaires.

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<sup>41</sup> See Annex 2 for the list of interviews.

<sup>42</sup> Four prime contractors and one SME.

<sup>43</sup> See: [Stockholm International Peace Research Institute \(SIPRI\) National Reports](#).

<sup>44</sup> P. Wezeman, A. Fleurant, A. Kuimova, D. Lopes da Silva, N. Tian and S. Wezeman, [Trends in International Arms Transfers, 2019](#), SIPRI Factsheet, Stockholm International Peace Research Institute, March 2020.

The reply rate of almost 30% is low but acceptable, as questionnaires have also been completed during interviews with the representatives of national authorities, business associations, companies and experts. The particular circumstances of the coronavirus pandemic could also be a factor explaining the low turnaround of completed questionnaires.

As to the origin of respondents (Figure 1), it should be noted that some major exporting countries have not replied to the questionnaire. Among the major exporting countries listed by SIPRI, neither a public authority nor a trade association from Italy, Portugal, Spain and the United Kingdom have replied to our survey. To compensate for the absence of a completed questionnaire, interviews with relevant representatives from Italy and Spain were conducted to fill the gap for these two countries.

Figure 1 – Origin of respondents



Source: Authors' own elaboration

### 2.3.3. The added value of interviews

In addition to these questionnaires, several aspects of Directive 2009/43/EC's impact require recourse to qualitative analysis and field research. Assessing the use of general licences, the efficiency of certification processes or the importance of end-use/end-user controls may require interviews with representative stakeholders from national governments (export control level), industry and/or EU institutions.

In-depth interviews<sup>45</sup> were conducted with representatives from national authorities and industry (primarily business associations, but also Original Equipment Manufacturers (OEMs), an SME and a research centre). A specific focus has been applied to the prime contractor level,<sup>46</sup> because multinational companies based in several Member States and managing long value chains are the most likely organisations to be confronted with all aspects of the EU transfer system. However, Directive 2009/43/EC also impacts the Europeanisation of SMEs, with this study incorporating the

<sup>45</sup> See Annex 2 for the list of interviews.

<sup>46</sup> See annex 2 for the list of interviewed prime contractors.

views of SMEs in two ways: through direct contact with SMEs (which proved nearly impossible as only one interview was conducted with SMEs representatives) and through contact with national defence industry associations, especially in countries where the Defence Technological and Industrial Base comprises mainly SMEs.<sup>47</sup>

These interviews were based on interview grids<sup>48</sup> sent in advance to interviewees. These grids covered the main themes explored in the questionnaires. The interviews aimed at deepening the results of the questionnaire and expanding the geographical representativeness of the study. They were aimed at bringing added value, even if it was not possible to engage with all relevant major businesses and SMEs in every relevant Member State. Nevertheless, interviews can be considered in positive terms as having provided added value to the study.

Interviews were held either physically or remotely, in light of the Covid-19 restrictions in place at the time of the study. In order to obtain precise and accurate information and to preserve the privacy of the participants, the sources of information disclosed during audits have not been explicitly or implicitly identified in this study.

## 2.4. An attempt to measure the cumulative effect of Directives 2009/43/EC and 2009/81/EC

From a methodological point of view, assessing the two Directives' cumulative effect has been achieved only to a certain extent. Firstly, a causal relationship between any given situation and the joint application of Directives 2009/43/EC and 2009/81/EC may not exist. Secondly, in some Member States, stakeholders do not see the need to link the two directives, since each of them has its own rationale, purpose and application issues. Having said that, some reflections in this regard have been articulated in the study's final section.

Given that the EU defence package has aimed 'to contribute to the progressive establishment of a European Defence Equipment Market (EDEM); where suppliers established in one Member State can serve, without restrictions, all Member States',<sup>49</sup> measurement indicators have encompassed **data on internal trade of defence-related products, services and works**. It was therefore considered necessary to use different methodological approaches. In addition, specific attention has been given to **the evolution of European cooperation in the defence field**, since strengthening such cooperation is a stated objective of the EU defence package.

However, for each of these trends other factors had to be taken into account to assess the real effect of the defence package. In addition or alternatively, a more qualitative assessment was needed through interviews with the aforementioned relevant stakeholders.

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<sup>47</sup> Ibid.

<sup>48</sup> See Annex 7 for the interview grids that have been sent.

<sup>49</sup> European Commission, [A strategy for a stronger and more competitive European defence industry](#), COM(2007)764, 5 December 2007.

### 3. Assessing implementation of Directive 2009/81/EC on defence and security procurements

**Main findings:**

1. During the 2016-2019 period, the implementation of Directive 2009/81/EC has improved compared to the 2011-2015 period but remains at a significantly lower level than for non-defence procurements.
2. The potential of the internal market for defence procurements remains largely unexploited due mainly to an extensive use of exemptions provided by the directive itself and by the Treaties. This situation calls for a more assertive enforcement policy from the European Commission.

#### 3.1. Measuring the implementation of Directive 2009/81/EC: making sense of the TED data

Tenders Electronic Daily (TED) is an online version of the procurement supplement of the Official Journal of the EU. It takes the form of an online platform on which procurements are indexed and published in accordance with obligations laid down in the four EU procurement directives. Beyond open competition, TED stores archive procurements and makes them publicly available. Our quantitative analysis is thus primarily based on TED data (both archived and open competitions) that have been published between 1 January 2016 and 1 June 2020.

##### 3.1.1. Assessing the level of transparency in the European defence market

**Main findings:**

1. Aside from the noticeable slowdown in the first months of 2020 (probably due to the Covid-19 outbreak), the quantitative analysis of contract notices and contract award notices published on TED suggests an overall improvement of the recourse to the Directive 2009/81/EC since 2016.
2. However, this positive tendency hides important national discrepancies in the implementation of Directive 2009/81/EC across Europe (including the UK and Norway).
3. Compared to non-defence procurements, the publication rate for defence procurements is significantly lower (11.71 % vs 24 %).

Article 30 of Directive 2009/81/EC requires Member States to publish notices under certain circumstances, either to announce a competition ('contract notice') or to publicise the award of a procurement ('contract award notice'). The publication of contract award notices primarily enables unsuccessful bidders (or operators potentially deprived from the possibility of taking part in a procurement process) to claim their rights. Hence, this is an essential feature which ensures a high degree of transparency in the European defence market. Further to these compulsory publications, which are limited to procurements covered by the directive, Directive 2009/81/EC allows Member States to publish in advance notices publicising contracts that are due to be tendered ('Voluntary

ex-ante transparency notice') or contracts that are going to be tendered without call to competition ('Prior information notice without call for competition').

Between 1 January 2016 and 1 June 2020, 16 639 notices were published in TED in accordance with the application of Directive 2009/81/EC (Figure 2):

- 7 497 contract award notices (representing more than €60 billion from which only €28 billion have been tendered through a competitive procedure);<sup>50</sup>
- 6 680 contract notices;
- 1 511 voluntary ex-ante transparency notice;
- 601 prior information notices without a call for competition;
- 198 corrigenda and modification notices;
- 141 buyer notices;
- 11 subcontracting notices.

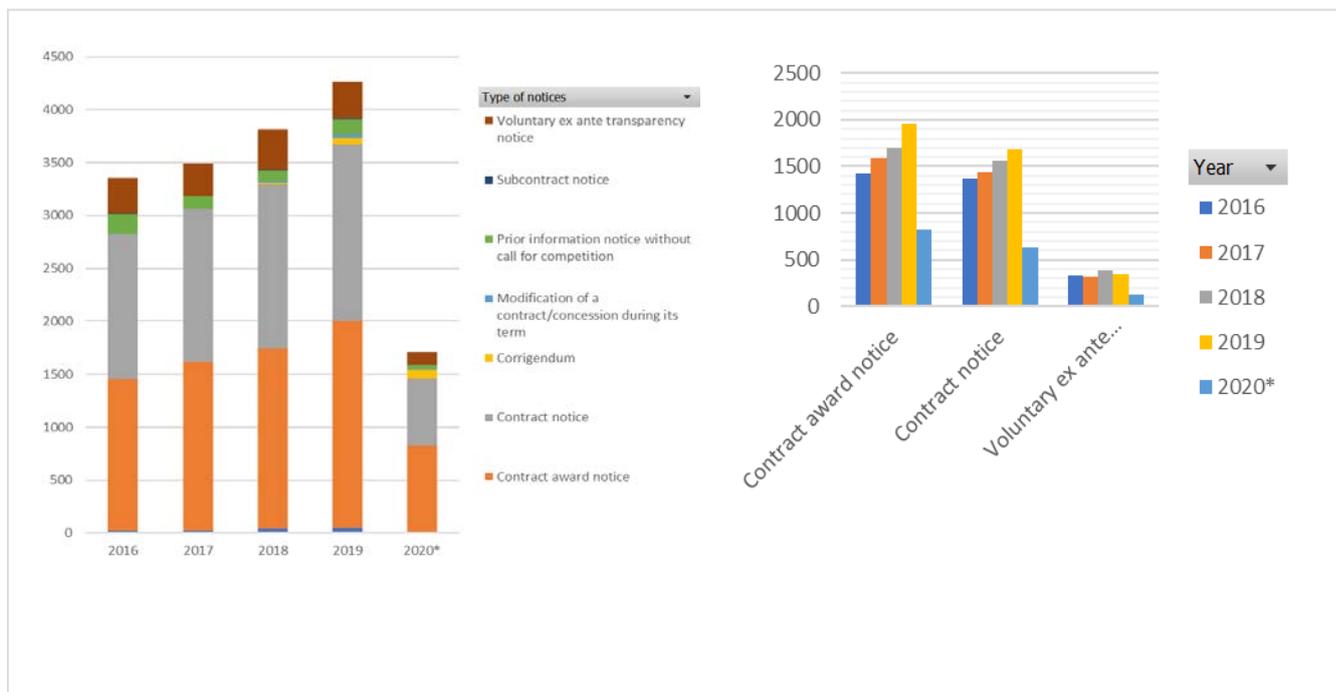
It is worth noting that over the period covered by our study the numbers of contract notices and contract award notices have shown constant annual increases. This trend is consistent with what has been observed over the 2011-2014 period and thus suggests a still increasing implementation of the Directive (which is still quite recent in comparison to non-defence procurement directives)<sup>51</sup> by Member States. Nonetheless, there has been a slowdown in the first months of 2020, which can be explained by the Covid-19 outbreak and its consequences. However, this increasing trend is not apparent when it comes to voluntary ex-ante transparency notices, which have been stagnating between 300 and 390 annual publications since 2013.

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<sup>50</sup> Please note that most of these contracts have been awarded through non-competitive procedures (i.e. contract award without prior publication of a competition notice).

<sup>51</sup> While the current non-defence directives were adopted in 2014, the first directives on procurement date back to the 1970s.

Figure 2 – Number of notices published in TED per year (2016–2020\*)<sup>52</sup>



Source: TED, 2020\*: January–June 2020

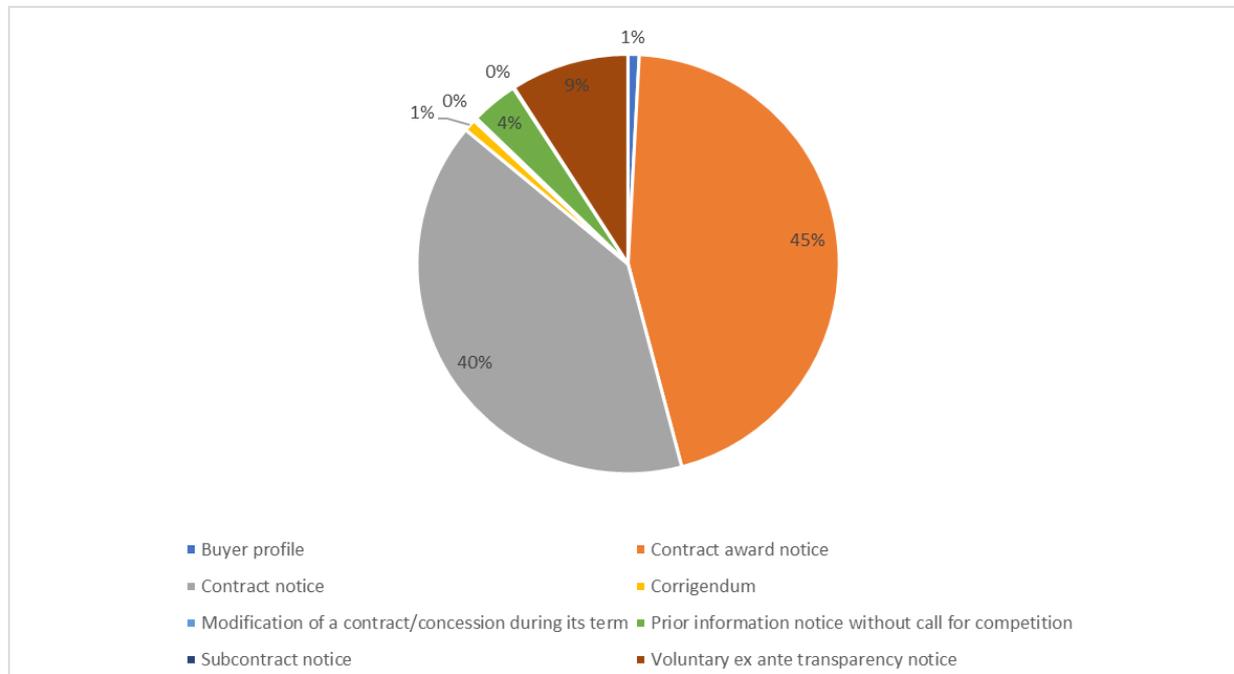
Source: TED, 2020\*: January–June 2020

As Figure 3 shows, the use of different types of notice distribution over the period reflects a certain stability when compared with the 2011–2014 period (Figure 2). This is especially the case for contract award notices, which accounted for 46 % of the total over this period,<sup>53</sup> as opposed to the 45 % observed over the 2016–June 2020 period. However, one should note a certain proportional increase in the number of contract notices (from 35 % to 40 %).

<sup>52</sup> 2020\* refers to the period covering 1.1.2020 to 31.5.2020.

<sup>53</sup> Masson, H., Martin, K., Queau, Y., and Seniora, J., The impact of the 'defence package' directives on European defence, DG for External Policies of the Union (DG EXPO), European Parliament, June 2015, p. 16.

Figure 3 – Number of notices published in TED per type (2016–2020\*)



Source: TED, 2020\*: January–June 2020

A country-by-country analysis seems to suggest relatively wide divergences in the way that EU and EEA Member States apply these Directives over the period. Once again figures for 2020 cover only the first five months of the year and have been influenced by the Covid-19 outbreak and its consequences.

Table 2 – Number of contracts and contract award notices

Member State	2016	2017	2018	2019	2020*	Total
Austria	19	21	22	25	4	91
Belgium	56	64	63	47	18	248
Bulgaria	62	55	88	100	40	345
Croatia	32	53	51	60	25	221
Cyprus	4	6	10	10	0	30
Czech Republic	105	195	204	193	59	756
Denmark	101	92	85	89	43	410
Estonia	18	21	48	39	17	143
Finland	74	73	91	115	48	401
France	623	519	540	584	237	2 503
Germany	636	652	672	801	345	3 106
Greece	7	12	18	10	7	54
Hungary	33	46	57	42	9	187
Iceland (EEA)	0	0	0	0	0	0

Member State	2016	2017	2018	2019	2020*	Total
Ireland	6	3	8	2	0	19
Italy	96	100	156	115	84	551
Latvia	17	25	30	33	11	116
Lithuania	79	63	61	81	21	305
Luxembourg	0	0	0	6	2	8
Malta	0	0	0	0	0	0
Netherlands	73	65	61	61	14	274
Norway (EEA)	56	62	64	72	22	276
Poland	261	417	412	457	154	1 701
Portugal	7	4	8	9	2	30
Romania	104	116	134	114	125	593
Slovakia	14	16	10	19	7	66
Slovenia	24	24	47	41	23	159
Spain	2	49	80	261	51	443
Sweden	43	62	54	38	25	222
United Kingdom	247	219	178	208	55	907
<b>Total</b>	<b>2 799</b>	<b>3 034</b>	<b>3 252</b>	<b>3 632</b>	<b>1 448</b>	<b>14 165</b>

Source: TED, 2020\*: January–June 2020

In particular, some Member States seem to have a very limited publication frequency. This is especially the case of the United Kingdom, which publishes up to three times fewer notices than France, for instance, whereas UK defence equipment procurement budget is higher than the French one (by almost 30 % in 2017).<sup>54</sup> Spain seems to have a very irregular publication policy: the issuance of two contract notices in 2016 does not seem to reflect the reality of its procuring activity. Similarly, its reported 2019 procuring activity represents an increase by more than 300 %.

The study of contract values that have been tendered and/or publicised through TED (i.e. contract award notices) offers a good opportunity to assess the de facto scope of application of Directive 2009/81/EC. However, one should be particularly cautious when it comes to studying values of contracts for at least two reasons:

- Firstly, data provided by Member States through TED is inconsistent (due to differences in inputs) and frequently erroneous. In its 2016 evaluation,<sup>55</sup> the European Commission underlined that some corrections by Member States' services have been necessary to improve the consistency of TED data. This study has not been designed to replicate such a process and is based on TED available data.<sup>56</sup>

<sup>54</sup> [EDA defence data portal](#)

<sup>55</sup> See Annex III in European Commission, [Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security](#), Staff Working Document, SWD(2016) 407, November 30<sup>th</sup> 2016.

<sup>56</sup> In particular, several contract award notices have no available budgetary data.

- Secondly, defence procurement budgets are not necessarily standardised. Basically, these budgets are published by EDA on an annual basis,<sup>57</sup> but they can also be approximated thanks to COFOG data.<sup>58</sup> It appears that data from these two sources do not tally with each other and indeed may on occasion present significant variations.<sup>59</sup> As it is not possible to reconcile these sources, this study uses COFOG data to assess the publication rate under Directive 2009/81/EC in order to mirror the evaluation issued by the European Commission in 2016. More precisely, ‘gross fixed capital formation’ and ‘intermediate consumption’ from COFOG classification for military defence (GF0201) have been used to approximate defence procurement budgets for the 27 EU Member States, the UK, Iceland, and Norway.

Table 3 – Government procurement expenditure on military defence, in € million

Member State	2016	2017	2018	Average 16-18
Austria	422.4	479.7	480	460.7
Belgium	503.1	494.9	528	508.7
Bulgaria	76.9	73.9	93.6	81.5
Croatia	136.8	141	146.2	141.3
Cyprus	27.9	27.1	26.1	27
Czech Republic	332.1	303.2	486.9	374.1
Denmark	1 283.6	1 512.4	1 517.2	1 437.7
Estonia	164.9	165.3	180	170.1
Finland	1 136	1 245	1 094	1 158.3
France	11 181	12 421	12 540	12 047.3
Germany	10 534	11 146	11 482	11 054
Greece	712	729	714	718.3
Hungary	275.3	413.8	396.9	362
Iceland	0	0	0	0
Ireland	86.3	90.6	99.1	92
Italy	881	1 113	1 110	1 034.7
Latvia	65.7	64.3	72.5	67.5
Lithuania	105.6	119.1	142.8	122.5
Luxembourg	20.3	19.6	43.6	27.8
Malta	6.1	6.9	6.8	6.6
Netherlands	2 457	2 524	2 809	2 596.7
Norway	1 515.7	1 563.3	1 555.6	1 544.9
Poland	1 790.9	1 933.6	2 163.4	1 962.6

<sup>57</sup> [EDA defence data portal](#).

<sup>58</sup> COFOG database is available on the [Eurostat website](#).

<sup>59</sup> For instance, the French defence procurement budget for 2016 varies from €7.6 billion (EDA) to €11.2 billion (COFOG).

Member State	2016	2017	2018	Average 16-18
Portugal	250.2	300.1	309.3	286.5
Romania	184.9	242.3	272.5	233.2
Slovakia	176.7	217.7	297.7	230.7
Slovenia	63.5	54.8	86	68.1
Spain	1 282	1 068	1 118	1 156
Sweden	1 787.6	1 817.7	1 996.7	1 867.3
United Kingdom	18 350.7	17 436.4	17 372.9	17 720
<b>Total</b>	<b>55 810.2</b>	<b>57 723.7</b>	<b>59 140.8</b>	<b>57 558.2</b>

Source: Eurostat, [general government expenditure by function \(COFOG\) \[gov\\_10a\\_exp\]](#)

That being said, it seems that the most relevant indicator to assess the impact of Directive 2009/81/EC is the publication rate, which may be defined as the proportion of procurements that have been subject to ex-ante publication.

Table 4 – Publication rate, value in € million

	2016	2017	2018	Average
Amount tendered through TED	5 855.7	8 391.5	5 975.1	6 740.7
COFOG data	55 804.1	57 716.8	59 134	57 551.6
Publication rate	10,49%	14,54%	10,10%	11,71%

On average, over the period 2016-2018 the publication rate (proportion of procurements that have been tendered competitively through TED)<sup>60</sup> has been 11.71%.<sup>61</sup> Over the previous period, the publication rate was 8.5%,<sup>62</sup> hence an increase of over 3%. These numbers seem to confirm a progressive improvement in the implementation of Directive 2009/81/EC, as observed in 2016 by the European Commission.<sup>63</sup> However, there is no regular improvement in the level of openness for procurements during this period, even though it should be noted that data is not yet available for 2019.

A comparison with non-defence procurements may be insightful in assessing the progress achieved on Directive 2009/81/EC. Between 2014 and 2017, procurements tendered under the general Directive accounted on average for 24% of the procurement budget.<sup>64</sup> **In general terms, the level of openness in defence procurement remains inferior to that in non-defence procurements.**

This figure hides a huge discrepancy of situations (Table 5). Over the period, 14 Member States presented lower publication rates than the EU 27+2 average, with only 2 Member States (namely,

<sup>60</sup> Financial estimates for contract awards without prior publication of a contract notice (only ex post publications) are not taken into account.

<sup>61</sup> For the precise publication rates, please see Annex 4.

<sup>62</sup> European Commission, [Evaluation of Directive 2009/81/EC](#), SWD(2016) 407, 30 November 2016, p. 53.

<sup>63</sup> Ibid.

<sup>64</sup> European Commission, [Public Procurement Indicators 2017](#), Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), unit G4, 9 July 2019, table 7.

Luxembourg and Malta) presenting a publication rate which equals 0. Conversely, 7 Member States (Croatia, Lithuania, Romania, Latvia, the Czech Republic, Slovenia and Bulgaria) present a publication rate at least double the European average. These discrepancies prove to be quite stable in comparison with the 2011-2015 period.<sup>65</sup>

This discrepancy of situations can equally be found among the top 10 spenders.<sup>66</sup> The Netherlands or Germany, for instance, presented publication rates lower than 2% when French or British rates were higher than 17%.

Table 5 – Publication rates for defence procurement (by Member States)

Country	Average (2016-2018)	2016	2017	2018
Malta	0.00 %	0.00 %	0.00 %	0.00 %
Luxembourg	0.00 %	0.00 %	0.00 %	0.00 %
Netherlands	0.78 %	0.32 %	0.35 %	1.57 %
Ireland	0.94 %	0.00 %	2.87 %	0.00 %
Austria	1.19 %	0.41 %	0.15 %	2.93 %
Germany	1.80 %	2.57 %	1.17 %	1.69 %
Greece	2.06 %	0.19 %	0.30 %	5.71 %
Spain	2.28 %	0.00 %	1.09 %	6.04 %
Finland	2.70 %	3.66 %	1.63 %	2.93 %
Belgium	3.18 %	0.24 %	2.44 %	6.67 %
Sweden	3.28 %	0.08 %	9.23 %	0.73 %
Portugal	3.33 %	3.24 %	0.00 %	6.63 %
Norway	3.76 %	3.23 %	2.26 %	5.79 %
Italy	5.46 %	7.12 %	5.61 %	3.99 %
Slovakia	6.03 %	4.76 %	9.15 %	4.51 %
Total EU-27 + 2	11.71 %	10.49 %	14.54 %	10.10 %
Hungary	13.63 %	9.80 %	22.84 %	6.68 %
Denmark	15.42 %	4.75 %	30.95 %	8.96 %
Cyprus	15.62 %	0.00 %	0.58 %	47.93 %

<sup>65</sup> European Commission, [Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security](#), op. cit., p. 52.

<sup>66</sup> Namely: The United Kingdom, France, Germany, the Netherlands, Poland, Norway, Sweden, Denmark, Spain and Italy.

Country	Average (2016-2018)	2016	2017	2018
United Kingdom	17.08 %	19.79 %	16.00 %	15.28 %
France	17.86 %	10.77 %	29.93 %	12.21 %
Poland	19.11 %	13.13 %	22.65 %	20.90 %
Estonia	19.43 %	19.03 %	19.01 %	20.19 %
Croatia	25.82 %	7.24 %	38.78 %	30.70 %
Lithuania	26.02 %	33.47 %	35.26 %	12.81 %
Romania	26.09 %	11.46 %	19.85 %	41.56 %
Latvia	30.76 %	0.00 %	11.00 %	76.17 %
Czech Republic	33.62 %	17.77 %	45.30 %	37.15 %
Slovenia	55.58 %	60.51 %	32.85 %	66.42 %
Bulgaria	66.24 %	61.85 %	93.75 %	48.12 %

Source: TED/COFOG.

### 3.1.2. Assessing the level of competition in European procurements

#### Main findings:

1. Despite a certain improvement, TED data suggests that a majority of contracts remain awarded on a purely national basis.
2. Optional subcontracting provisions remain largely neglected by procuring authorities.

#### Main finding:

According to contract award notices, more than a third of procurements publicised in TED are awarded without prior publication of a competition notice (most frequent procedure).

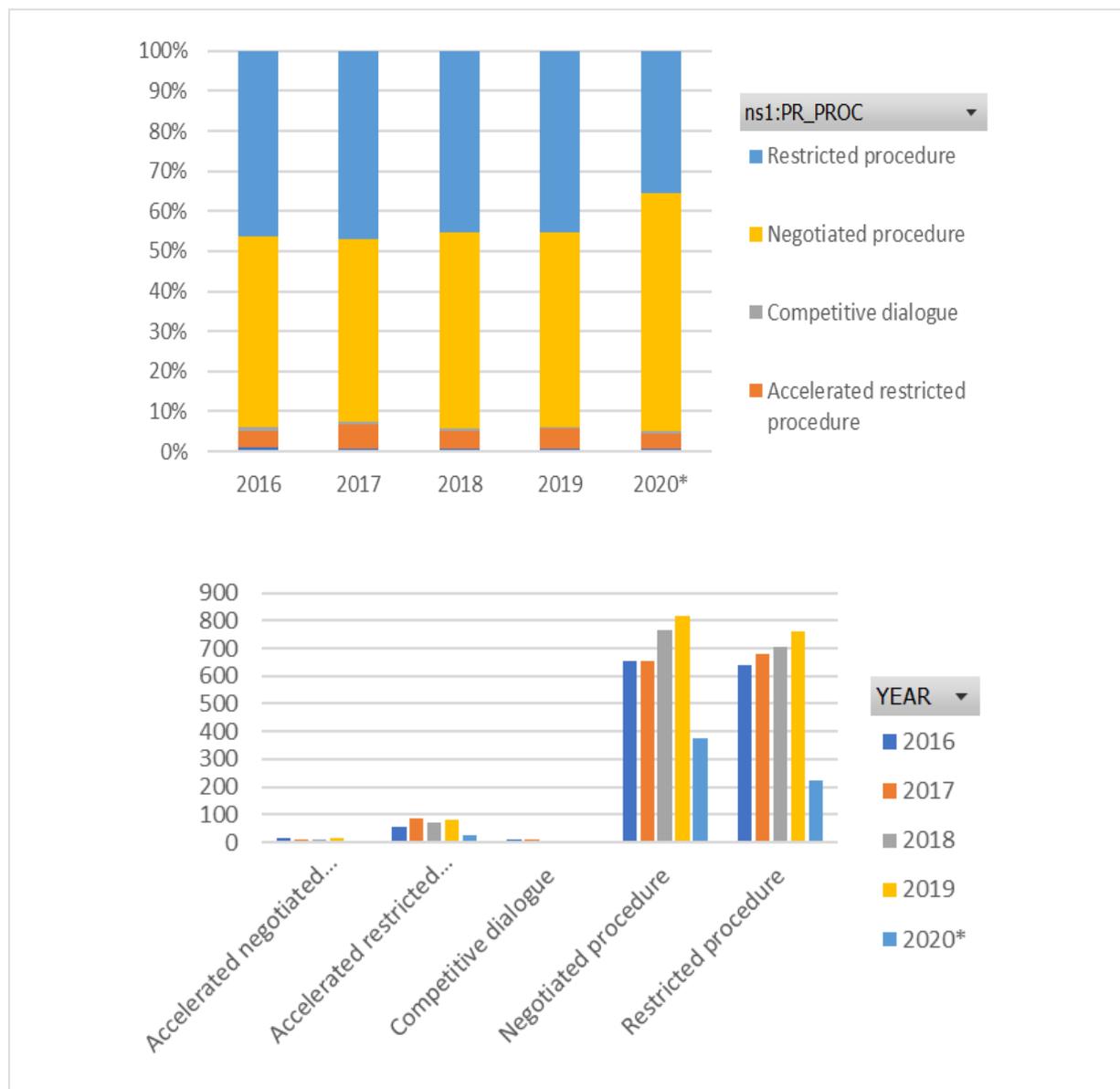
#### Procedures used

According to Directive 2009/81/EC (Article 25), procuring authorities should apply by default either the restricted or the negotiated procedure with publication of a contract notice. Both procedures are deemed to ensure the highest level of transparency and competition for defence contracts.

In the case of particularly complex procurements, procuring authorities may have recourse to the competitive dialogue procedure, which organises any exchange between the procuring entity and bidders in a specific way. Ultimately, in very specific cases (urgency, absence of results of a restricted or a negotiated procedure, R&D services, etc.), procuring entities may have recourse to a negotiated procedure without the need to publish a contract notice.

The study of contract notices (Figure 4) shows a certain stability in the distribution of procedures used by Member States. The negotiated procedure is used in approximately 50 % of the contract notices published each year, whereas restricted procedure applies to around 45 % of notices. This situation tends to have stabilised when compared with the 2011-2014 period.

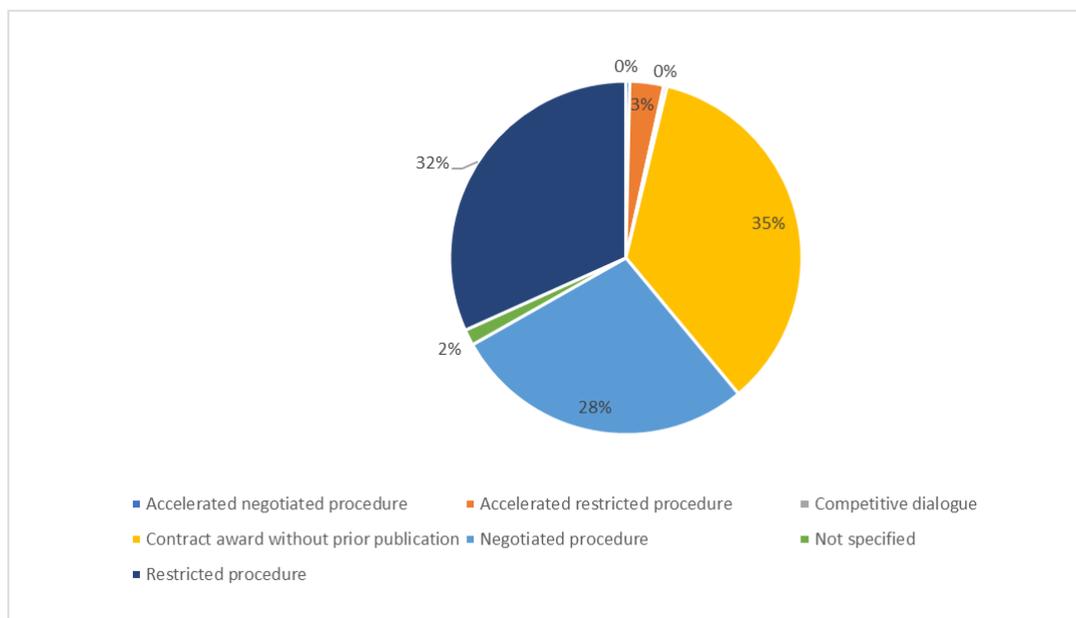
Figure 4 – Procedures used in contract notices



Source: TED, 2020\*: January–June 2020.

At contract award notice level, the main procedure reported is the award without publication of a contract notice (Figure 5). However, compared with the period 2011-2014, it should be noted that recourse to such procedures, which a priori exclude any form of competition (over-the-counter contracts), has proportionally decreased from 39 % to 35 %. This slight decrease does not change the fact that a substantial portion of TED-recorded procurement takes place without any EU-wide competition. On the contrary, restricted procedures, which are the most competitive kind of procedures, now represent the same proportion of awarded procurements (vs 30 %, 2011–2014).

Figure 5 – Procedures used in contract award notices (2016-2020)

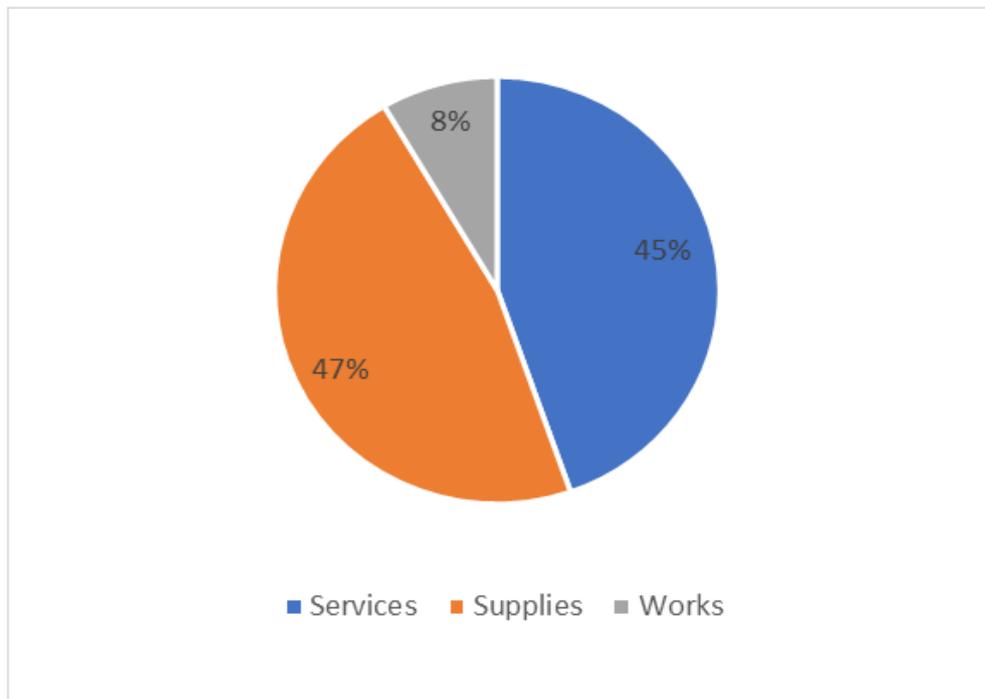


Source: TED, 2020\*: January–June 2020.

### Nature of contracts: an increased proportion of supply contracts

Focusing on the nature of contracts tendered through TED (Figure 6) may enable better assessment of what Member States have prepared for tender. Whereas between 2011 and 2014 Member States tendered mainly services contracts through TED (approximately 51 % over the period with no annual change), the situation is now more balanced between service and supply contracts. Either as contract notices or contract award notices, service contracts represent 45 %-46 % of the total, whereas supply contracts equate to 47 %-48 % (vs 42 % between 2011 and 2014).

Figure 6 – Contract award notices: nature of contract (2016-2020\*)



Source: TED, 2020\*: January–June 2020.

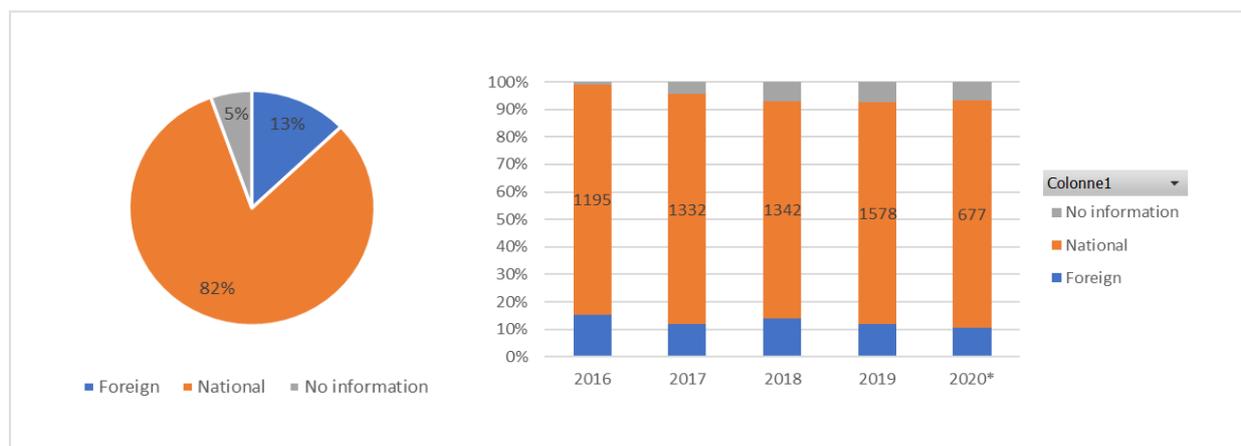
### Successful operators remain largely national

**Main finding:**

A majority of contracts remain awarded on a purely national basis (82%), which shows a slight improvement compared to the previous period.

Out of the 7 497 contract award notices analysed, 407 do not make reference to any successful operator. On some occasions, contract tendering processes have been interrupted (for instance, because compliant offers are lacking), which is the case with 31 contract award notices. For the remaining 376 notices, it is not possible to draw conclusions on what causes of such a lack of information (including interruption of the tendering process or non-divulgence of the successful tenderer's name). Of the other 7 090 contract award notices, 557 did not contain any reference to the successful operator's country of origin. However, deductions from successful tenderers' addresses or social forms together with desk research have enabled us to draw conclusions about the originating country on all but two successful bidders. Of those 7 090 contract award notices, 6 124 were awarded nationally (86%) and 966 went to bidders in another country (14%) (Figure 7).

Figure 7 – Location of successful operators in number (2016-2020\*)



Source: TED, 2020\*: January–June 2020.

This distribution appears to be quite stable over the period (even for the first five months of 2020 affected by exceptional Covid-19 circumstances) and even show a slight progress compared with results from the 2015<sup>67</sup> and 2016 studies. Indeed, the latter revealed that the proportion awarded on a national basis between 2011 and 2016 was 88 %.

**However, these figures need to be used carefully and may not reflect the reality of cross-border awards or European penetration of defence markets. Indeed, in several cases successful bidders are national subsidiaries of foreign companies.** For instance, Thales Italia SpA, Thales Austria GmbH or Thales Belgium SA are respectively the Italian, Austrian and Belgian branches of the French group Thales. Similarly, Eurospike GmbH is a joint-venture between Diehl Defence GmbH & Co. KG, Rheinmetall Electronics GmbH and Rafael Advanced Defense Systems Ltd which sells Israeli Spike missiles, with its assembly activity solely in Germany. In these cases, while awards may appear to have been granted on a 'national' basis in TED, this merely implies that the contract will at least partially be executed at national level. In cases of integrated European OEMs, such as Airbus or MBDA, and in absence of a unified legal regime for European companies, they appear in TED as their national subsidiaries. However, this does not reflect where the contract will be executed. More broadly, the focus on OEM/prime level does not offer any data on value-chain structures for successful bidders.

<sup>67</sup> Masson, H., Martin, K., Queau, Y., and Seniors, J., [The impact of the 'defence package' directives on European defence](#), DG for External Policies of the Union (DG EXPO), European Parliament, June 2015, p. 36.

## Subcontracting provisions (articles 50-54) remain largely unused

### **Main finding:**

Optional subcontracting provisions are completely ignored by procuring authorities (only 11 subcontracting notices over the considered period).

Directive 2009/81 makes a provision for procuring authorities to allow successful tenderers to subcontract up to 30% of the total contract value. In these cases, contractors must apply dedicated provisions,<sup>68</sup> which provides a very specific procedure for awarding these subcontracts. Indeed, they must publish subcontract notices in TED and organise a competition among potential subcontractors according to principles and rules inspired by Directive's rules applicable to public contracting authorities. However, between 2016 and 1 June 2020, this mandatory provision has been used 11 times, with only one notice containing an estimated amount of the procurement's subcontracted portion of the procurement (€538 515).<sup>69</sup>

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<sup>68</sup> Articles 50 to 54 of [Directive 2009/81/EC](#).

<sup>69</sup> Namely: [Subcontract notice 2020/S 029-068957](#).

## 3.2. Explaining the implementation of Directive 2009/81/EC

### Main findings:

1. Interviews suggest that (1) Member States have recourse in an extensive way to Directive's exceptions and (2) the cooperative strategy adopted by the European Commission regarding enforcement has been fruitful, but needs to be revised in order to support the implementation of the Directive.
2. Directive 2009/81/EC had little (if any) effect on the Europeanisation of defence value-chains. The study suggests that the directive is not the most effective tool to tackle this issue.

### 3.2.1. The largely unexploited potential of Directive 2009/81/EC

#### Main finding:

The lower level of implementation of the Defence Procurement Directive compared to Directive 2014/24/EU (the 'general directive' on public procurements) may be explained by the existence of specific exceptions within Directive 2009/81/EC, which are extensively used by Member States.

#### Main finding:

Directive 2009/81/EC provides for exceptions, which are specific to defence procurements (procurements through international organisations, government-to-government purchases, etc.) and which de facto limit its scope of application.

#### A restricted scope of application

According to TED data,<sup>70</sup> procurements covered by Directive 2009/81/EC are still lagging behind those covered by Directive 2014/24/EU (the 'general directive' on public procurements) in terms of transparency and openness. The average publication rate for defence procurements is 11.71 %, compared to the 24 % average publication rate for the general directive. This difference may be explained by the application scope of Directive 2009/81/EC, which in relative terms is more restrictive than that of the 'general directive', and by the understanding and constructive attitude of the European Commission when it comes to enforcing Directive 2009/81/EC.

#### Thresholds for the application of Directive 2009/81/EC

The lower level of transparency and openness to competition of defence procurements under Directive 2009/81/EC when compared with 'non-defence' ones, may be firstly explained by its scope of application, which is more restrictive than in the 'general directive'. This is due to the different thresholds in use (Table 6).

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<sup>70</sup> See data in section 3.1.

Table 6 – Comparison of thresholds for Directives 2009/81/EC and 2014/24/EU, in €<sup>71</sup>

	Directive 2014/24/EU	Directive 2009/81/EC
Works contracts	5 350 000	5 350 000
Supplies contracts	Central government level: 139 000 Exception: 214 000 <sup>72</sup>	428 000
Services contracts	Social and specific services: 750 000 Subsidised services: 214 000 Other services: 139 000	428 000

Source: European Commission, Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW).

By definition, contracts under the thresholds are not published in TED (even though the possibility exists), while at national level statistics may not always exist or be publicly available. Nevertheless, procurements under these thresholds may still cover a significant proportion of public spending, notably in the field of defence. The only Member State that produced data reported that more than 60 % of its defence procurements (in number) were below the thresholds of Directive 2009/81/EC. It would be dangerous to draw general conclusions from this figure, but in any case, it seems to confirm that the directive's actual scope of application is substantially lower than the cumulative amount of its procurement budget. It must be remembered that these thresholds are deemed to define which procurements are of cross-border interest (which is one of the conditions for the application of EU law).

#### Exceptions within Directive 2009/81/EC

The relatively more restrictive scope of application within the Defence Procurement Directive does not suffice to explain the low level of transparency. Indeed, Directive 2009/81/EC provides for some major exceptions that potentially further restrict its scope and which hence are largely used by Member States.

Table 7 – Comparison of exceptions for the use of Directives 2009/81/EC and 2014/24/EU

Exceptions in contracts by sector	Directive 2014/24/EU	Directive 2009/81/EC
Electronic communications	Article 8	N/A
Public contracts awarded pursuant to international rules	Article 9 (1) (a)	Article 12 (a)
Public contracts awarded pursuant to the rules of an international organisation	Article 9 (1) (b) & (2)	Article 12 (c)
Public contracts awarded pursuant to a concluded international agreement or arrangement relating to the stationing of troops	N/A	Article 12 (b)

<sup>71</sup> Source: [https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds\\_en](https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en)

<sup>72</sup> This exception concerns supplies contracts awarded by contracting authorities operating in the field of defence concerning products that are not listed in Annex III of [Directive 2014/24/EU](#).

Exceptions in contracts by sector	Directive 2014/24/EU	Directive 2009/81/EC
Contracts for which application of the rules of this Directive would oblige a Member State to supply information, the disclosure of which it considers contrary to the essential interests of its security	N/A	Article 13 (a)
Contracts for the purposes of intelligence activities	N/A	Article 13 (b)
Contracts awarded in the framework of a cooperative programme based on R&D	N/A	Article 13 (c)
Contracts awarded in a third country carried out when forces are deployed outside the Union's territory	N/A	Article 13 (d)
Acquisition or rental of land, existing buildings or other immovable property	Article 10 (a)	Article 13 (e)
Acquisition, development, production, or co-production of programme material intended for audio visual media services or radio media services	Article 10 (b)	N/A
Government to government contracts	N/A	Article 13 (f)
Arbitration and conciliation services	Article 10 (c)	Article 13 (g)
Certain legal services	Article 10 (d)	N/A
Financial services	Article 10 (e) & (f): certain financial services	Article 13 (h): except insurance services
Employment contracts	Article 10 (g)	Article 13 (i)
Certain specific services (civil defence and protection, political campaigns)	Article 10 (h) & (j)	N/A
Research and Development services	N/A	Article 13 (j)

Source: Own elaboration from the texts of Directives 2009/81/EC and 2014/24/EC.

Beyond the mere observation that Directive 2009/81/EC allows more exceptions than Directive 2014/24/EC, it should be acknowledged that some exceptions provided for defence procurements cover some relatively frequent procurement cases and significant amounts.<sup>73</sup> Collaborative programmes and government-to-government contracts are hence quite frequent in the field of defence and armaments. Once again, the only Member State that agreed to produce statistical data on its recourse to these exceptions reported that they represented between 15 % and 25 % of its defence procurements by number.

<sup>73</sup> See below section 3.3.1.2.

Furthermore, in the case of defence procurements, Article 346 TFEU may be invoked by Member States to exempt a procurement (totally or partially) from the application of Directive 2009/81/EC when essential security interests may be endangered. In formal terms, Article 346 TFEU does not need to be invoked prior to relevant procurements, but only ex-post in the case of a legal contestation before a Court or from the European Commission. Thus, it is very hard even to estimate the amount of recourse to Article 346.

### The extensive use of exceptions to Directive 2009/81/EC

**Main finding:**

The study suggests that Member States have recourse in an extensive way to exceptions provided by the Treaties (article 346 TFEU) and Directive 2009/81/EC, which limits the effectiveness of Directive's implementation.

Directive 2009/81/EC provides for a certain number of exceptions and mechanisms which preclude its application or the application of certain key provisions. Most are specific to defence procurements and Directive 2009/81/EC. Although one of the Directive's objectives has been to support competition within the European defence industry in order to improve its market access, the over-extensive use of these exceptions seriously limits achievement in this regard.

## Article 346 (1) (b) TFEU and the protection of essential national security interests

**Main finding:**

Assessing the recourse to article 346 TFEU exception is particularly difficult due to the very mechanic of the article (ex-post invocation). However, interviews suggest that it remains quite largely used with important differences in Member States' practices.

Presumably, the extensive use of Article 346 (1) (b) TFEU was the main cause for non-compliance with public procurements directives before the introduction of Directive 2009/81/EC.<sup>74</sup> Given the functioning of Article 346 (1) (b) TFEU, which does not call for the use of an ex-ante announcement (but solely an ex-post invocation in case of potential litigation), **it is by definition impossible to assess its exact scope of application.**

From the interviews conducted, it can be concluded that procuring authorities and industry agree that the introduction of Directive 2009/81/EC significantly reduced the de facto scope of application of Article 346. In addition, the introduction of Directive 2009/81/EC and concerns over the legal conditions for using Article 346 TFEU pushed several Member States, such as Belgium, to introduce in their legislation a specific procedure applying to contracts covered by Article 346 (1) (b) TFEU. It should be underlined that just one Member State (namely Belgium) seems to practise recourse to Article 346 (1) (b) TFEU to preclude parts rather than all of its procurements from the application of EU law (notably, Article 10 TFEU). However, it seems that Article 346 (1) (b) TFEU largely remains in use. Interviewed stakeholders disagree on whether or not the Article 346 exception has been used for justified reasons of protecting essential national security interests, or merely as a way to limit the application of Directive 2009/81/EC. **In general, it can be said that the issue remains on the table, since there is no general consensus on whether the regulation currently in place and its enforcement mechanism suffice to limit use of the Article 346 exception to justified reasons of protecting essential national security interests.** Several industrial respondents reported recourse to this exemption notably for the acquisition of complex systems (such as the renewal of jet fighter fleets) and in the case of contracts for which offset-like measures have been required.

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<sup>74</sup> As a reminder, [Directive 2004/81/EC](#) article 10 stated that 'This Directive shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article 296 of the Treaty'.

## The collaborative programme exception (Article 13 (c))

**Main findings:**

1. According to EDA data on collaborative procurement, this exception could concern up to 17 % of defence procurement.
2. Clarifications given by the European Commission have been welcomed by public authorities and industry.

Article 13 (c) of Directive 2009/81/EC stipulates that ‘contracts awarded in the framework of a cooperative programme based on research and development, conducted jointly by at least two Member States for the development of a new product and, where applicable, the later phases of all or part of the life-cycle of this products’, are excluded from this directive’s scope of application. EDA defence data<sup>75</sup> may offer a first idea of the scope of such an exception. According to this database, alone in differentiating collaborative defence procurement expenditure, the total budget that the 27 Member States participating in the EDA<sup>76</sup> dedicate to European collaborative defence procurement totalled €6.4 billion in 2018 (last year for which data is available).<sup>77</sup> Even though Article 13 (c) covers only a part of these procurements, **it means that this exception could have represented up to 17 % of the total defence procurement budget in 2018 (see Figure 8).**<sup>78</sup>

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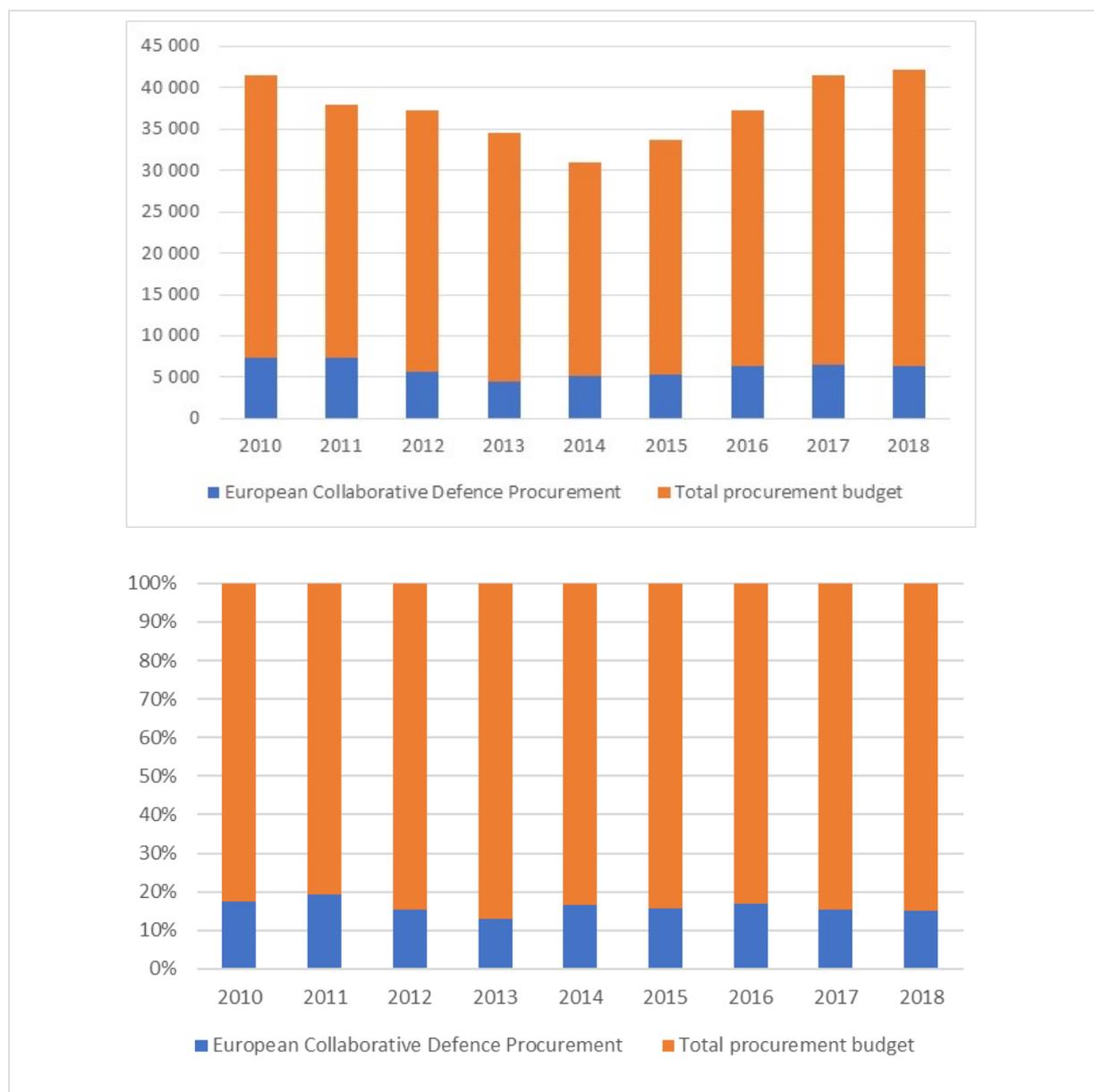
<sup>75</sup> Source: [EDA defence data portal](#)

<sup>76</sup> Including the UK.

<sup>77</sup> Please note that, according to EDA itself, these figures are partial as, from 2012, some Member States have not been able to provide the data in question.

<sup>78</sup> Based on COFOG data, total defence procurement was for EU-27+2 was €35.7 billion.

Figure 8 –Proportion of European collaborative programmes in defence procurement expenditures, in € million



Source: [EDA Defence data portal](#) and [COFOG](#).

The guidance notice on defence- and security-specific exclusions published by the European Commission<sup>79</sup> in 2011 brought to light the first clarification on conditions for this exception's application. The guidance notice on collaborative procurement, published in 2019 by the European Commission, has further clarified these conditions.<sup>80</sup> This second guidance notice has been based

<sup>79</sup> European Commission, [Directive 2009/81/EC on the award of contracts in the fields of defence and security- Guidance Note – Defence- and Security-specific exclusions](#), Directorate General Internal Markets and Services, 2011.

<sup>80</sup> European Commission, [Notice on guidance on cooperative procurement in the fields of defence and security \(Defence and Security Procurement Directive 2009/81/EC\)](#), C157/01, 8 May 2019.

on exchanges with the Expert Group on Defence and Security procurement,<sup>81</sup> which comprises representatives from Member States. Hence, it has presented an opportunity to clarify some of the practical issues met by Member States when considering their recourse to such exceptions. Such practicalities include the definition of research and development or the conditions under which a Member State may join the cooperative programme at a later stage and hence benefit from application of the exception.

On this last issue, the guidance notice specifies notably that any Member State wanting to join the programme at a later stage would need to become a ‘fully-fledged member of the programme’, implying that it needs to enjoy the same rights and obligations as all other members.<sup>82</sup> This exception has notably been used by the United Kingdom, when it decided to procure 500 Boxers through OCCAr (€2.6 billion).<sup>83</sup>

Another contentious issue is the extent to which the exemption covers those procurements within international organisations, which concur with the goals of the organisations itself, even if only one country participates in the procurement. This has been the case with Italy’s procurement of Pattugliatori Polivalenti d’Altura (PPA), managed through OCCAr, even though this involved only the Italian government and the national shipbuilding industry Fincantieri.

It must also be noted that this exception specifically targets programmes aiming at the development of new products. As such, this exception could have acted as an incentive for Member States to increase their budgets for collaborative R&D programmes. However, figures aggregated by EDA show that this incentive effect has yet to be realised, with such expenditures having dramatically decreased from 2007, but then having plateaued since 2012. The reason may be cuts to the defence budget that took place during and after the 2008-2009 financial crisis, which was succeeded by the 2010 Euro-area crisis. In other words, the directive’s impact should be weighed in light of other issues. Article 13 (c) is expected to cover procurements subsequent to future European Defence Fund programmes. Depending on its uptake by Member States and associated countries (including Norway),<sup>84</sup> the scope of Article 13 (c) may be subject to an increase in the foreseeable future.

Broadly speaking, it should be noted that cooperative programmes among EU Member States concur with the competitiveness of the European defence technological and industrial basis (EDTIB), the contracting of national procurement to consortium involving companies from different Member States and the establishment of cross-borders supply chains. They contribute to reaching the ultimate goals of Directive 2009/81/EC even if they have a limiting effect on its implementation. **As such, cooperative procurement should be considered differently from recourse to Article 346 TFEU in assessing exemption from the Directive.**

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<sup>81</sup> See: [Expert Group on Defence and Security procurement](#).

<sup>82</sup> The [Guidance notice on cooperative procurement](#), par. 3.3 stipulates: ‘A Member State which joins a cooperative programme after the end of the R&D phase can benefit from the exclusion under Article 13(c) for the later phases of the life-cycle of the product, provided it becomes a fully-fledged member of the programme. This means that its participation is formalised in an agreement or arrangement with the other participating Member States and implies specific rights and obligations which are reserved for members of the cooperative programme. In such a case, the Member State concerned must also notify its accession to the programme’.

<sup>83</sup> See [the voluntary ex ante transparency notice](#) published by the UK on TED to announce this procurement.

<sup>84</sup> The treatment of the United Kingdom should be settled by the potential agreement on the future relationship between the United Kingdom and the European Union.

## The government-to-government (G2G) exception (Article 13 (f))

**Main findings:**

1. Between 2016 and June 2020, several major defence contracts were procured through government-to-government purchases, in particular through US Foreign Military Sales (FMS).
2. According to open data, between 2016 and 2018, FMS contracts (which can be pluriannual for their execution) accounted for €55 billion. It represents approximately 50% of European defence procurement budgets.

According to Article 13 (f), the following contracts are excluded from Directive 2009/81/EC's scope of application: 'contracts awarded by a government to another government relating to (i) the supply of military equipment or sensitive equipment, (ii) works and services directly linked to such equipment, or (iii) works and services specifically for military purposes, or sensitive works and sensitive services'. When Directive 2009/81/EC was adopted, the main hypothesis for such an exception were the procurement of second-hand materials from another Member State; and recourse to US FMS contracts. According to the FMS process (see Figure 9),<sup>85</sup> the procuring state must send a Letter of Request (LoR) to the US government for a specific equipment. Once the request has been accepted, a Letter of Acceptance (LoA) is sent to the procuring state, for signature. This exchange of letters constitutes an international agreement. Some defence items are available only through FMS, while others can be bought (or made available) through Direct Commercial Sales (DCS). FMS contracts are quite common in Europe, in particular with NATO Member States. Government-to-government contracts between Member States to procure second hand materials were quite common after the end of the Cold War,<sup>86</sup> but were rarer at the time of the Directive's adoption and have been significantly developed in the period since then.<sup>87</sup>

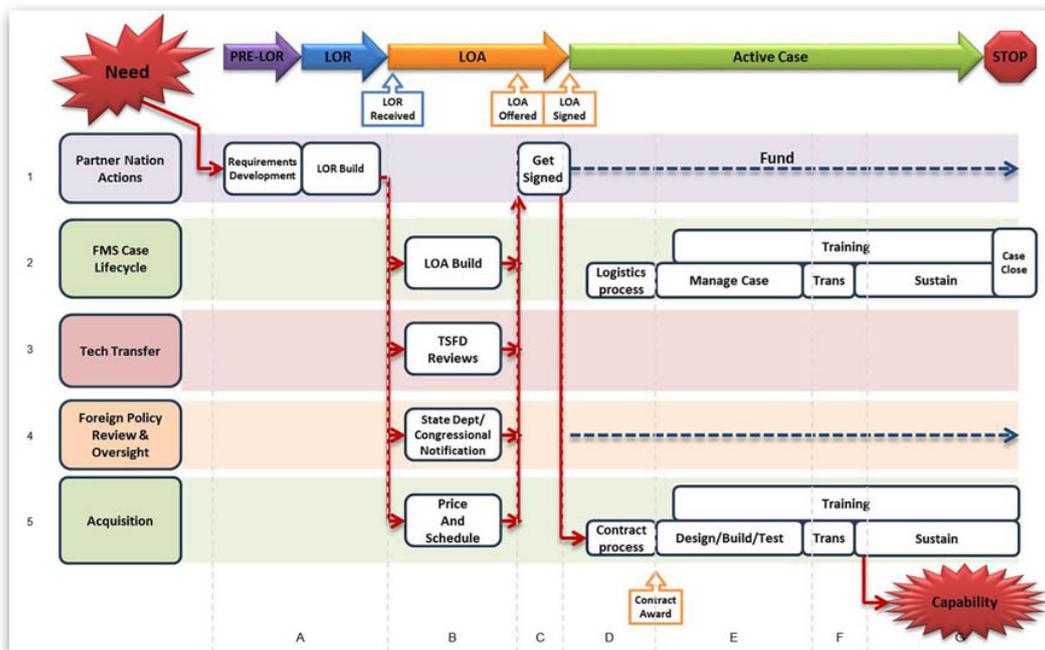
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<sup>85</sup> For a comprehensive presentation of the FMS process, please refer to: D. Gilman, R. Nichols, J Totman & C. Minarich, [Foreign Military Sales & Direct Commercial Sales](#), 30 September 2014.

<sup>86</sup> [Treaty on Conventional Armed Forces in Europe \(CFE\)](#) required a divestment of material surpluses (mainly battle tanks).

<sup>87</sup> Source: interview with a European authority.

Figure 9 – The Foreign Military Sales (FMS) process



Source: [Defence Security Cooperation Agency \(DSCA\)](#)

The 2011 guidance notice on exclusions remained relatively evasive on the conditions for recourse to such an exception. It solely recalled that this exception could not be used to circumvent the application of Directive 2009/81/EC,<sup>88</sup> ‘which is particularly relevant in situations where market conditions are such that competition within the internal market would be possible’. In 2016, the European Commission issued a dedicated guidance notice in which it detailed its opinion regarding the conditions for the application of this exception.<sup>89</sup> It was stated that any decision resulting in seeking recourse to government-to-government agreements rather than commercial procurement must be preceded by a market analysis. The objective of this analysis is to determine whether any potential for competition could exist, particularly within the internal market. **Despite the relatively good reaction of procuring authorities to this guidance notice, it appeared from interviews that market analyses are relatively rarely applied.** The main argument has been that market analysis is generally a long and costly process. However, this argument appears quite weak in the face not only of industry claims, but also the practices of several Member States of different sizes.

- France introduced in its legislation the principle of ‘European preference’ for its defence and security procurements.<sup>90</sup> France may still seek recourse to FMS (and more generally procure from non-EU operators) but on a case-by-case basis and only if a European solution does not exist. Such an obligation de facto makes compulsory the realisation of a market analysis before procuring through FMS, before opening up competition to

<sup>88</sup> This should be read in conjunction with article 11 of the Directive which states that, ‘None of the rules, procedures, programmes, agreements, arrangements or contracts referred to in this section may be used for the purpose of circumventing the provisions of this Directive’.

<sup>89</sup> European Commission, [Notice on the Guidance on the award of Government-to-Government contracts in the field of defence and security \(Article 13.f of Directive 2009/81/EC\)](#), C(2016)7727, 30 November 2016.

<sup>90</sup> Article L2353-1 of [French Public Procurement Code](#).

non-EU economic operators. This does not preclude France ultimately from having recourse to FMS.<sup>91</sup>

- Belgium was seeking to replace its F-16 fighter aircraft and accordingly organised a competition for which different offers competed, among which was Lockheed-Martin F35-A through an FMS.<sup>92</sup>

This last case appears to be particularly interesting as it proves that it is possible to organise a competition in such circumstances, even under Article 346 TFEU. In the terms of the FMS process there is provision for a letter of request to be sent asking for a Price and Availability (P&A) Letter before asking for a LoA.

Between 2016 and 2020, several major defence contracts were procured through government-to-government agreements, in particular through FMS.<sup>93</sup> According to our calculation, based on open sources,<sup>94</sup> FMS sales have represented the equivalent of €70 billion between 2016 and July 2020 (see Figure 10). The main Member States that have had recourse to FMS over the period examined are Poland (€18.7 billion), the United Kingdom (€10.6 billion), Belgium (€7.2 billion), Romania (€5.2 billion) and Germany (€4.6 billion). Although smaller in size, FMS are very frequent in Central and Eastern Europe, the Baltic States and South Eastern Europe, in light of the strong political relations between these countries and the United States. Through interviews, we discovered that some defence companies located in Western Europe have been confronted to problematic recourses to the G2G exception, despite the guidance notice. According to this criticism, even if market analysis were performed, in some cases the requirements to be satisfied clearly pointed towards American equipment. Such criticisms have notably been addressed against procurement agreements between the Czech Republic and the US concerning rotary wing platforms.<sup>95</sup>

It should also be noted that Member States did not necessarily have recourse to the G2G exception for these contracts. For instance, Poland invoked Article 346 TFEU and the necessity to protect itself from Russia as a reason not to apply Directive 2009/81/EC to its procurement of new generation jet fighters. While acquisition of the Polish F35s was achieved through an FMS (F35s are solely available through FMS), the Article 346 TFEU exception applied.

Table 8 – Total FMS acquisitions (estimated amounts), in € million

Member State	Total (2016-2020*)
Poland	18 655
United Kingdom	10 600
Belgium	7 163.3
Romania	5 150
Germany	4 553.9

<sup>91</sup> See, for instance, the [recent planned acquisition through FMS of E-2D Advanced Hawkeye Aircrafts and related equipment](#) for an estimated cost of \$2 billion.

<sup>92</sup> G. de Briganti, [Belgian RFP Sets Open Competition for F-16 Replacement](#), Defense-aerospace.com, 27 March 2017.

<sup>93</sup> Please see, in annex 3, a non-exhaustive list of main 'public' FMS contracts.

<sup>94</sup> This evaluation is based on data provided by the Major Arms Sales (via FMS) Notification Tracker of the Forum on the Arms Trade: <https://www.forumarmstrade.org/major-arms-sales-notifications-tracker.html>.

<sup>95</sup> See: [Czech Republic to buy 12 Bell military helicopters for \\$630 million](#), The Defence Post, 12 November 2019.

Member State	Total (2016-2020*)
Sweden	3 200
Greece	3 084
Slovakia	3 060
Spain	2 267.4
France	2 120
Netherlands	1 954.8
Norway	1 920
Bulgaria	1 673
Czech Republic	1 580
Finland	960.7
Hungary	730
Lithuania	550.8
Denmark	442
Latvia	200
Croatia	115

Source: Major Arms Sales Notification Tracker; Forum on the Arms Trade.

**For the period 2016-2018, FMS sales accounted for €55 billion, which represented 31.8 % of the total defence procurement expenditures for all EU countries.**<sup>96</sup> However, it should be noted that these numbers concern programmes that are often pluriannual. This explains why Poland's purchases through FMS over the period were the equivalent of around four times its defence procurement budget over the same period. Of this total, it remains impossible to determine which proportion has been preceded by a market analysis. Yet, over the period, only 20 voluntary ex ante transparency (VEAT) notices and 17 contract award notices refer to FMS, despite the European Commission's recommendation in the 2016 guidance notice.

<sup>96</sup> Based on COFOG data.

## Other direct awards: negotiated procedure without competition

**Main findings:**

1. Cases allowing recourse to this procedure under Directive 2009/81/EC are more numerous than under the general procurement directive.
2. Contract awards without prior publication of a contract notice account a total of €29.9 billion, which represents 49% of total budget advertised through TED.

In addition to these exceptions, Member States may have sought recourse to the negotiated procedure without prior publication of a contract notice (Article 28 of Directive 2009/81/EC). Similarly to exceptions, cases allowing recourse to this procedure under Directive 2009/81/EC are more numerous than under the general procurement directive.

The main difference between this procedure and Article 346 (1) (b) TFEU is the necessity to publish ex-post a contract award notice as soon as possible.

Out of the 7 497 contract award notices, awards without prior publication of a contract notice account for 2 638 notices and a total of €29.9 billion,<sup>97</sup> which represents 49% of total budget advertised through TED. This figure is quite high. It suggests that the room for competition under Directive 2009/81/EC has reduced significantly. During the period 2016-2018, contract awards without prior publication of a contract notice account for €16.1 billion, which represents 9.33% of defence procurement expenditures.<sup>98</sup>

### 3.2.2. Enforcement: clarification and cooperation

**Main finding:**

Despite the European Commission's cooperative strategy and the guidance provided, certain problematic practices by Member States seem to be persistent.

During the period 2016-2019, the European Commission has continued to adopt a constructive and supportive attitude towards Member States implementing Directive 2009/81/EC, which in broad terms comprised:

- provide further clarification of some provisions, which remained sources of interrogations and divergent interpretation by Member States;
- to monitor in a cautious manner. When it comes to enforcing the directive our research suggests that the European Commission has privileged cooperation. The fact that two infringement procedures, initiated in January 2018,<sup>99</sup> have still neither been closed nor gone to the stage of the issuance of a reasoned opinion witnesses this cooperative and rather cautious approach.

<sup>97</sup> 471 contract award notices do not contain any budgetary data.

<sup>98</sup> According to COFOG data.

<sup>99</sup> European Commission, [Defence procurement: Commission opens infringement procedures against 5 Member States](#), press release, 25 January 2018.

## The further clarification of certain provisions

### Main findings:

1. Given the specificity of defence procurement and exceptions introduced by Directive 2009/81/EC, several guidance notices and recommendations have been necessary to clarify their conditions of its application.
2. Interviews with industry suggest that despite their usefulness, notices and recommendations have not resulted in any change in Member States' practices.

As highlighted above, several exceptions introduced by Directive 2009/81/EC do not exist in the 'general procurement' directive, since they correspond to situations that are specific to defence and security procurements. This specificity made necessary the release in 2011 of a dedicated guidance notice,<sup>100</sup> which detailed and clarified application conditions. Likewise, subcontracting provisions were an innovation in the EU procurement law and their conditions of application have been further specified in the same dedicated guidance notice released in 2011.<sup>101</sup> However, following the implementation of Directive 2009/81/EC, its first years of operation proved that these notices were not specific enough, in that the provisions were sources of queries and divergent interpretations by Member States. In its 2016 study on the Directive's implementation,<sup>102</sup> the Commission stated that 'exemptions, including Article 346 TFEU, appear to be still subject to an overly broad interpretation' and that 'the specific, optional, subcontracting provisions of the Directive have not been used by Member States' contracting authorities as they are seen by them as ineffective'.<sup>103</sup> To support the effective implementation of Directive 2009/81/EC, the Commission suggested that new soft law instruments should be put in place to provide additional guidance. Accordingly, two guidance notices and one recommendation were issued as follows:

- A notice providing guidance on government-to-government contracts in defence;<sup>104</sup>
- A notice providing guidance on cooperative procurement in the fields of defence and security;<sup>105</sup>
- A recommendation on cross-border market access for sub-suppliers and SMEs in the defence sector.<sup>106</sup>

These notices and the recommendation were primarily based on consultations with two expert groups,<sup>107</sup> which comprised representatives from Member States. However, it is important to note that the contents of these documents are not the result of a negotiation between the European

<sup>100</sup> European Commission, [Directive 2009/81/EC on the award of contracts in the fields of defence and security - Guidance Note – Defence- and Security-specific exclusions](#), Directorate General Internal Markets and Services, 2011.

<sup>101</sup> Ibid.

<sup>102</sup> European Commission, [Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security](#), SWD(2016) 407, 30 November 2016.

<sup>103</sup> Ibid., p. 117.

<sup>104</sup> European Commission, [Commission Notice on Guidance on the award of government-to-government contracts in the fields of defence and security \(Article 13.f of Directive 2009/81/EC\)](#), C(2016) 7727, 30 November 2016.

<sup>105</sup> European Commission, [Commission Notice on guidance on cooperative procurement in the fields of defence and security \(Defence and Security Procurement Directive 2009/81/EC\)](#), C(2019)3290, 7 May 2019.

<sup>106</sup> European Commission, [Commission Recommendation \(EU\) 2018/624 of 20 April 2018 on cross-border market access for sub-suppliers and SMEs in the defence sector](#), C/2018/2281, 20 April 2020.

<sup>107</sup> See: [Expert Group on Defence and Security procurement](#) and [Advisory Group on cross-border access for SMEs to defence and security contracts](#).

Commission and Member States, but rather reflect the European Commission's position, which has been fed notably by exchanges with Member States.

The two guidance notices on exceptions have generally been welcomed by procuring authorities and industry as they bring more clarity to the legal framework of these exceptions. It has been particularly the case for government-to-government contracts (Article 13 (f)) and procurement through international organisations (Article 12 (c)), for which the European Commission somehow deepened its understanding of Member States' needs. This is, for instance, the case for procurement through international organisations, such as the NATO Support and Procurement Agency (NSPA). It should be noted that some concerns have been expressed on these documents' absence of legal effectiveness, but this does not hinder their usefulness. On the contrary, they are considered useful. However, their effect on Member States' practices remain widely unknown of stakeholders and has been questioned repeatedly by representatives from industry and procuring authorities.<sup>108</sup> Some procuring authorities are still concerned over the interpretation of Article 12 (c), which is not uniform across national procuring authorities in the EU.

Stakeholders have equally welcomed the recommendation on cross-border market access for defence sub-suppliers and SMEs dealing with subcontracting provisions of the directive, but not limiting to them. However, the recommendation cannot address the perceived lack of standardisation in those subcontracting provisions which primarily aim to open up defence supply-chains. In addition, the effects and effectiveness of the recommendation have generally been called into question by certain industry respondents and procuring authorities, because the provisions are deemed too complex and expensive to be applied. In essence, it does not seem to have resulted in any change to Member States' practices.

## Monitoring and enforcement

### Main findings:

1. Interviews suggest that the understanding and cooperative strategy adopted by the European Commission has been useful during the uptake phase of the Directive, but it now raises questions about the European Commission's will and/or capacity to enforce more strictly the Directive 2009/81/EC.
2. A solid majority of respondents (both from the industry and Member States) would be in favour of a stricter approach regarding Directive 2009/81/EC's enforcement.

In addition to the work involved in clarifying the Directive's provision, the European Commission (ex-DG GROW, now DG DEFIS) has monitored and controlled the correct application of the Directive by Member States, based on TED data, desk research, specialised press and publications, contacts with stakeholders, etc. Overall, as already explained, the European Commission's enforcement strategy may be qualified as having been understanding and cooperative. Indeed, according to interviews with the European Commission, procuring authorities and industry, several Member States merely received letters asking for clarification on several procurements, without any follow-up action extending to infringement procedures.

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<sup>108</sup> Procuring authorities have questioned other Member States' uptake of these guidance notices and generally considered the implementation of these notices as effective.

During the period between 2016 and June 2020, infringement procedures were only launched against five Member States in January 2018<sup>109</sup> (adding to three other cases that were live before 2016). These infringement procedures concern: firstly, Italy, Poland and Portugal for direct awards of contracts to a domestic supplier, allegedly breaching the Defence Procurement Directive. Secondly, infringement procedures were launched against Denmark and the Netherlands for having imposed potentially prohibited offset requirements (i.e. unjustified restrictive measures on free movement of goods and services). Of these five cases, the first three have been closed following exchanges with the Member States concerned. The two latest cases are still open, with exchanges between the European Commission and Member States ongoing.

The European Commission's 'softer' approach has been consistent with the fact the directive is regarded as being in its uptake phase by Member States, with several legal clarifications still needed on major provisions. However, this relative leniency shown by the European Commission towards Member States also triggered frustration in some interviewees, with questions being raised about the European Commission's will and/or capacity to enforce the Directive 2009/81/EC more strictly. In particular, several stakeholders expressed concerns about a potential discrimination between 'bigger' and 'smaller' Member States at the expense of the latter. In this context, it is worth noting the law approved by the German Parliament in April 2020, which reforms defence procurement and inter alia allows the Bundeswehr to accelerate its procurement of urgently needed armaments without holding competitions.<sup>110</sup> Several representatives from industry also expressed a certain tiredness towards perceived indifference. Others industrial stakeholders lamented that smaller Member States with no local DTIB prefer to avoid implementing directive provisions by signing G2G agreements with the US, even for equipment which is available at similar 'best value for money' conditions in the EU market.

A solid majority of respondents (both from industry and Member States) would be in favour of a stricter approach regarding the enforcement of Directive 2009/81/EC. Some of them even estimated that ECJ case laws were now needed to enhance the directive's effectiveness. **From a more political perspective, now that these uncertainties have been resolved, a decade for uptake can be regarded as having been sufficient.** This conclusion appears to be justified even though the directive is considered as complex, hence calling for specific training.

The risks linked to the integration of the defence internal market and European strategic autonomy

#### Main findings:

1. According to interviews, the enforcement of Directive 2009/81/EC now appears as the most promising way to ensure its potential is fully exploited.
2. Several respondents from industry signalled a risk of increasing national focus and progressive marginalisation of the Directive in case of non-enforcement.

To date, despite its limitations, the European Commission's constructive and cooperative attitude towards Member States' implementation of the directive, has largely been fruitful as it mainly enabled procuring authorities to adopt and get used to the directive. However, this present

<sup>109</sup> European Commission, [Defence procurement: Commission opens infringement procedures against 5 Member States](#), press release, 25 January 2018.

<sup>110</sup> Marc Selinger, Germany's defence procurement reforms become law, Janes, 3 April 2020

constructive attitude may not prevail anymore once the learning period is over, as the European Commission could adopt a more assertive enforcement policy.

Despite the methodological limitations of the publication rate indicator,<sup>111</sup> it remains significantly lower (by more than 13 %) for defence procurement than for the 'general directive'. Together with the intensive recourse to certain exceptions of Directive 2009/81/EC, it raises questions from a growing number of (private and public) stakeholders on the overall effectiveness and usefulness of this directive. **As a consequence, enforcement of Directive 2009/81/EC now appears as the most promising way to ensure that the potential of this directive is fully exploited.** On the contrary, the absence of enforcement may now result in reversing the observed progress in the recourse to Directive 2009/81/EC. This is one of the lessons from the interviews that have been conducted.

In addition, there is a genuine risk (expressed by several respondents in the industry) of there being an increasing national focus and progressive marginalisation of the directive. Emergence of political discourses on the importance of the security of supply following the Covid-19 crisis and disruptions in strategic value chains may create a motive (if needed) for the re-nationalisation of defence procurement policies. For instance, it could be possible to see an increase in having unjustified recourse to Article 346 (1) (b) TFEU either to award procurements directly (to a domestic or foreign supplier) or impose new measures equivalent to offsets. In addition, abusive recourse to the government-to-government exception with non-EU Member States may seriously harm the European defence industry's competitiveness as it deprives European companies of market access. This is particularly worrying at a time when some major weapon systems are being renewed for the next 20 to 30 years.

Furthermore, consequences from a lack of effectiveness (and hence enforcement) of Directive 2009/81/EC could hinder other EU policies in the field of defence. The creation of a European Defence Fund under the multiannual financial framework 2021-2027 will aim to boost cooperation in the development of new capabilities. Beyond Member States participating in the EDF project, a true internal market for defence equipment could significantly boost the economic viability of such capabilities and reinforce competitiveness of the EDTIB. In addition, the European Commission under President Ursula von der Leyen has regularly reiterated and emphasised its objective of achieving European technological sovereignty and strategic autonomy. The future EDF promises to be a big step towards such an objective. Here again, Directive 2009/81/EC's low level of take-up may hinder efforts in this direction. For instance, resales of second-hand US equipment to other Member States may appear problematic in some cases as they de facto enhance technological dependency on the United States. Indeed, a recent acquisition by Romania of used F-16 fighter aircraft from Portugal has been accompanied by official requests from Romania to buy from the US Defence Security Cooperation Agency (DSCA) in order to upgrade the Portuguese jet fighters.<sup>112</sup> **This should lead to pay particular attention to the compliance of Member States with Directive 2009/81/EC and to the use of sanctions against Member States in the event of abuse.**

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<sup>111</sup> See section 3.2.

<sup>112</sup> [Nothing but Netz: Used F-16s for Romania](#), Defense Industry Daily, 30 January 2020.

### 3.2.3. The limited effect of Directive 2009/81/EC on the Europeanisation of defence value chains

#### Main findings:

1. Given the complexity of subcontracting provisions, their use is very limited.
2. Although positive changes have been noticed, the persistence of some practices, such as the financial valuation of offsets requirement, suggests a need for a more assertive enforcement policy.

#### The failure of sub-contracting provisions

#### Main findings:

1. Subcontracting provisions have been described as very complex to use and as incompatible with Member States' needs and industrial reality, especially as they induce changes in already structured value-chains and additional costs.
2. It appears that subcontracting provisions had no or very limited impact on the cross-border access of sub-suppliers and defence SMEs.

Limited use of subcontracting provisions (only 26 notices have been published since 2011) does not necessarily demonstrate procuring authorities' lack of interest in cross-border access to sub-suppliers and defence SMEs, but rather demonstrates the complete unsuitability and incompatibility of these provisions with Member States' needs and industrial reality.

Indeed, these provisions were partly introduced to replace offsets in a manner compliant with EU law. The rationale was that such offsets were required mostly to compensate for the national structure of defence value-chains. However, these provisions have unanimously been described as either very complex or impossible to use, while not offering any certainty on the location of the subcontract's execution because of the EU's principle prohibiting discrimination on the grounds of nationality. Very few procuring entities have actually used these provisions and their experience confirms how very complex they are to use. Only one of the interviewed Member States, which appeared to be one of the main exporting European countries, had on one occasion used the provisions, describing them as a 'labyrinthine system' and as 'extraordinarily hard to monitor'.

From an industrial point of view, the obligation to apply a specific procedure, which differs significantly from companies' purchasing processes, is both a matter of additional complexity and a source of potential administrative mistakes. In addition, recourse to these provisions generally induces changes in already structured value-chains and hence additional costs are very likely to be added to the final contract price.

**In conclusion, it appears that subcontracting provisions had no or very limited impact on the cross-border access of sub-suppliers and defence SMEs.** This failure is not only due to the complexity introduced by these provisions (efficiency), but also to the lack of adequacy between the objective (the Europeanisation of defence value-chains) and the tool (the subcontracting provisions). Directive 2009/81/EC does not introduce any incentive for the opening of value-chains

and is probably ill-equipped to do so. This is clearly at odds with the future European Defence Fund being widely described as a better tool to structure these value-chains at European level.

Offset requirements: some positive changes, but still a huge margin for improvement

#### Main findings:

1. Offsets are generally defined as ‘transactions required by governments as a condition for the awarding of a public procurement to a foreign company’.
2. Interviews led to a contrasting picture: though several Member States have abandoned their offset legislation and others have significantly adapted it to EU law constraints, some worrying practices (such as financial valuation of offset requirements) still exist.

Offsets are generally defined as ‘transactions required by governments as a condition for the awarding of a public procurement to a foreign company’.<sup>113</sup> Historically, they have been aimed at ‘[encouraging] local development or [improving a State’s] balance-of-payments accounts’,<sup>114</sup> but they may also be justified by strategic imperatives, notably in terms of security of supply.

Directive 2009/81/EC does not directly forbid offset requirements. Indeed, the prohibition of offsets is rooted in the Treaty itself, because offset practices are by their very nature discriminations on grounds of nationality, which are strictly prohibited by Article 18 TFEU.<sup>115</sup> The introduction of this directive has created an opportunity to enforce this prohibition in a domain (‘defence procurement’) that was de facto outside the scope of EU treaties’ application.

Alongside the publication of guidance notes for the implementation of Directive 2009/81/EC, DG MRKT (now DG DEFIS) issued an explanatory note on offsets<sup>116</sup> that specifies its view on the possibility for Member States to require offsets. DG MRKT’s legal interpretation has been very restrictive compared with the actual practice by Member States. According to the impact assessment which accompanied the proposal for a directive on defence procurements,<sup>117</sup> offset policies and practices were very diverse in their nature (direct, indirect, semi-direct), their names (offsets, industrial participation, etc.), their thresholds, their required volume (which could be up to 200 % of the contract value) and so on. The guidance note on offsets stated that these requirements could be justified only when applying one Treaty-based derogations; hence, in the case of the defence procurements Article 346 (1) (b) TFEU may apply. It means that these requirements must be justified by a need to protect an essential security interest: ‘Member States must be prepared to specify the essential security interest that makes the specific requirement necessary, to demonstrate

<sup>113</sup> V. de Beaufort et E. Devilder, [Competitiveness of European companies and international economic countertrade practice](#), *International Business Law Journal*, 2014:1, 2014, pp. 1-40.

<sup>114</sup> Revised Agreement on Government Procurement, article 1.

<sup>115</sup> Art. 18 TFEU: ‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’.

<sup>116</sup> European Commission, [Directive 2009/81/EC on the award of contracts in the fields of defence and security - Guidance Note – Offsets](#), Directorate General Internal Markets and Services, 2011.

<sup>117</sup> European Commission, [Impact Assessment – Commission Staff Working Document accompanying the proposal for a directive from the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security](#), SEC(2007) 1598, 5 December 2007, p. 24.

that this requirement is an appropriate means to protect that interest, and to explain why it is not possible to achieve the same objective by less restrictive means'.<sup>118</sup> As a consequence, practices that were then common, such as indirect offset requirements (i.e. with no link with the main contract) or expression of the requirement as a percentage of the main contract's total value have been deemed illegal by the European Commission.

Against this setting, **interviews with national authorities and industry led to a contrasting picture**. On the one hand, some improvements have been noticeable. Although it is not possible here to give a precise and comprehensive report of offset legislation and practices in Europe,<sup>119</sup> it has been reported that several Member States have abandoned their offset legislation and hence no longer have any formal requirement in this regard. Similarly, it appears that Member States that still seek offset-like measures have focused purely on direct offsets (i.e. directly related to the object of the main procurement). In several Member States, offset policies seem to have focused on the issue of security of supply and thus on maintenance activities, although local content requirements may still persist. The impact of monitoring and pressure from the European Commission appears to have been instrumental in bringing about this situation. Likewise, the directive's entry into force has motivated Member States to specify the circumstances under which they would resort to Article 346 (1) (b) TFEU. Consequently, they have specified their essential security interests, notably by referring to capability areas or technologies deemed to be critical. These clarifications offer a clearer perspective to industry.

However, on the other hand, several substantial issues remain. Primarily, some practices from Member States still appear to be in open contradiction with Treaty rules. For instance, the persistence of offset requirements' financial valuation (generally expressed as a percentage of the procurement's total value), even though they now usually seem to be capped at a lower level (e.g. 30 % of the contract's total value), is in clear contradiction with Article 346 (1) (b) TFEU. According to the Article, only strategic considerations (i.e. related to protecting the relevant Member State's essential security interests) can be taken into consideration when designing protective measures, such as offsets. Financial valuation appears to be inconsistent with this requirement, whether or not it is taken into consideration as an awarding criterion for the procurement.

In addition, uncertainty on the legality of certain offset requirements is expected to be of increasing concern for industry as compliance is reportedly becoming more important in decisions of whether or not to initiate bids. Ultimately, a call for exclusive direct offsets justified by the protection of essential national security interests may lead to the creation of new defence industrial duplication, rather than the long-standing objective of rationalisation.

Other industrial stakeholders reported that the softening of offset practices brought about by the directive is already sufficient and the current situation is acceptable. Once offsets are no longer legally enshrined in procurement documents, in most cases it is up to the bidder to establish relations with SMEs from the country issuing the tender, in order to make the proposal more appealing from strategic and political perspectives.

If enhanced enforcement of EU Treaty-based rules appears as the most efficient way to tackle most of these issues, this cannot be squared with the risk of industrial duplication, as it is linked to strictly national protective measures of essential security interests. In this case, a broader coordination of Member States' essential security interests and related policies is needed.

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<sup>118</sup> Ibid, p. 6.

<sup>119</sup> Such a panorama could certainly be built thanks to commercial sources, such as [The Offset Guidelines Quarterly Bulletin](#), edited by Countertrade and Offset.

## 4. Assessing the implementation of Directive 2009/43/EC on intra-EU transfers of defence-related products

### Main findings:

1. Quantitative analysis of the implementation of Directive 2009/43/EC is impossible due to the lack of available data.
2. Interviews suggest that Directive 2009/43/EC's main provisions did not deliver their full potential and that their effects remain quite limited, despite some improvements at national levels.

### 4.1. Measuring the implementation of Directive 2009/43/EC (2016-2019): main benefits are still to be reaped

#### 4.1.1. The issue of sources for assessing the implementation of Directive 2009/43/EC: no reliable data on transfers of defence-related products

### Main findings:

1. The absence of available data on arm transfers within the EU raises serious questions, in terms of political accountability, on the possibility to monitor the implementation of Directive 2009/43/EC.
2. In response to this limitation, additional data on the recourse to different types of licences have been collected for the purpose of this study through questionnaires and interviews.

In the absence of any centralised – or even available – data on arms transfers within the EU, our assessment of Directive 2009/43/EC must rely on qualitative data, i.e. on questionnaires and interviews carried out with the main stakeholders.

As previously mentioned, the main difficulty when assessing the implementation of Directive 2009/43/EC is the lack of available data at European and national level regarding the different kinds of transfer licences. It is therefore impossible to offer any representative or credible figures on the directive's effectiveness. A first source of information could have been the annual reports drawn up according to Article 8(2) of Council Common Position 2008/944/CFSP which define the common rules governing the control for exports of military technology and equipment ('COARM reports').<sup>120</sup> However, in addition to their own methodological limitations (such as the lack of data on realised exports),<sup>121</sup> the figures do not account for the different kinds of licences used. Another source of information could have been annual reports produced by some Member States which are listed on

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<sup>120</sup> The annual reports are available on the [website of the European External Action Service](#) (EEAS). The latest report covers the 2018 exports.

<sup>121</sup> See previous section for a more detailed account of these limitations.

SIPRI's website.<sup>122</sup> Focusing on the ten main European exporting countries<sup>123</sup> (namely, France, Germany, the United Kingdom, Spain, Italy, the Netherlands, Sweden, Norway, the Czech Republic and Portugal), available data is quite sparse. Apart from Portugal, these countries report on their arms exports annually.

Table 9 – Latest available national reports on arms export for the main European exporters

SIPRI 2019 Ranking	Member State	Latest report available
3	France	<u>2019</u>
4	Germany	<u>2019</u>
6	United Kingdom	<u>2018</u>
7	Spain	<u>2018 (1st half)</u>
9	Italy	<u>2019</u>
11	Netherlands	<u>2018</u>
15	Sweden	<u>2019</u>
17	Norway	<u>2019</u>
21	Czech Republic	<u>2018</u>
25	Portugal	<u>2014</u>

Source: [SIPRI national reports database](#).

A close examination of these reports shows a wide diversity in reported data, which greatly hinders any effort to compare these figures. Not all Member States report on the number of transfer licences granted. For instance, the Netherlands and the UK do so, but Italy aggregates intra-EU transfers with exports towards NATO allies. Most Member States report only global annual values and do not differentiate according to the types of licences used. The focus of COARM reports is on the destination country and the type of weapons exported. Overall, Sweden remained (until 2018) the only Member State to report on licence types in number. In 2017, individual licences accounted for 66 % of the number granted (vs. 34 % of global licences).<sup>124</sup> However, no data was published on the value or number of transfers covered by general transfer licences, despite exporting companies' reporting obligations.

Another source of data could have been interviews. Nevertheless, from the interviews conducted, it appears that in most Member States these data were not available – at least not publicly. According to national authorities, no statistical data is derived from the reporting activities of companies under their obligations associated with general transfer licences. Sometimes it seems that reporting companies are presenting incomplete or imprecise information. However, the conducting interviews has enabled the collection of some partial data on the use of the different types of licences. Nonetheless, these data are comparable with each other only to a limited degree and are

<sup>122</sup> [National reports on arms exports](#), SIPRI database, regularly updated.

<sup>123</sup> Wezeman, P., Fleurant, A., Kuimova, A., Lopes da Silva, D., Tian, N., and Wezeman, S., [Trends in International Arms Transfers, 2019](#), SIPRI Fact sheet, Stockholm International Peace Research Institute, March 2020.

<sup>124</sup> Logically, transfers under a General transfer Licence are not accounted for.

flawed by methodological uncertainties. Based on these partial data, it is possible to conclude that individual transfer licences remain the norm in every Member State (more than 50 % of all requested transfer licences). Recourse to global transfer licences varies widely from one Member State to another (from 1 % to [20-30] % of transfer licences requested). The structure of Defence Technological and Industrial Bases does not appear to be an essential factor for explaining these discrepancies; for instance, two Member States with a comparable structure of DTIB presented very different levels in the use of individual (vs global) transfer data: from 1 % to 25 %.

#### 4.1.2. A general improvement in control systems nationally, but not at European level

##### **Main findings:**

1. There is a clear perception mismatch between national authorities and industry on the contribution of Directive 2009/43/EC. While national authorities have acknowledged a certain improvement in the efficiency of their own national systems, industry is confronted with the lack of effectiveness of the European system as a whole, suggesting limited results for Directive 2009/43/EC.
2. It appears that Directive 2009/43/EC has enabled in some cases a reduction in the duration of control procedure and did not worsen the situation. At the very least Directive 2009/43/EC has maintained the same level of control.

From the perspective of national authorities, the first consequence has been a general improvement in the efficiency and effectiveness of national transfer control systems. This is the key feedback from national authorities, all of which acknowledge that the implementation of Directive 2009/43/EC has pushed them to rethink their own national systems. This has in turn led to a global simplification of national systems.

- In France, for example, a two-level authorisation system has been replaced by a single licence system.
- In Germany, it is generally considered that Directive 2009/43/EC has brought about a very high degree of simplification.

This observation mainly concerns the directive's main users, a primary focus having been the 10 European countries that export most.<sup>125</sup> Nevertheless, relative improvements in the efficiency and effectiveness of national systems have also been recorded for smaller exporters of defence-related products. Indeed, this was the position reported during interviews carried out with representatives from national authorities in Member States where the directive is used less intensively.

This effect on the efficiency and effectiveness of national systems can certainly be explained, at least partly, by the adoption procedure of the directive itself. According to an observer interviewed, negotiations at Council level were driven principally by the objective of preserving the main features of national systems.

From an industry perspective, the general assessment of the directive's implementation is less enthusiastic and marked by a certain degree of disappointment. Industry does acknowledge that Directive 2009/43/EC has brought about improvements to national transfer control systems (for example, in France or Germany where implementation of the directive has led to a significant

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<sup>125</sup> See Table 10 for the list of the main exporting Member States.

simplification of their control system). Overall, it appears that the directive has enabled, in some cases, a reduction in the control procedure's duration while at the same time maintaining the same level of control.

However, whereas Member States and national authorities are much more concerned with the effectiveness and efficiency of their own control systems, industry is confronted with the whole internal market, hence the effectiveness and efficiency of the European system in its entirety. From that perspective, the results of Directive 2009/43/EC appear to be disappointing, as the directive has not achieved its proposed objectives, which include: simplifying transfers at European level; easing the circulation of defence-related products within the internal market; and harmonising contents of and conditions for general transfer licences.<sup>126</sup> At best, according to some respondents, the situation is generally the same as it was before the adoption of Directive 2009/43/EC, with a patchwork of 27 control systems (29 with the UK and Norway), and little evidence of a standardised approach. For at least one industrial respondent, the situation is worse than before and intra-EU transfers are now more complex due to the very different implementation and understanding of the Directive across Europe. However, this opinion seems relatively isolated and our research generally shows a slight improvement in the European system as a whole. This is mainly due to Member States now using the same framework (the EU military list). As a consequence, **industry representatives overall reported that the effect of Directive 2009/43/EC on their business was neutral and that it did not lead to any significant economic gain.**

**Therefore, there is a clear perception of mismatch between national authorities and industry on the contribution of Directive 2009/43/EC.** What emerges from the research for the preparation of this study is that this perception gap (which reflects an interest gap) could be one of the main problems hindering the effectiveness of the whole control system of intra-EU transfers.

#### 4.1.3. General transfer licences have still not delivered benefits

##### Main findings:

1. The recourse to General Transfer Licences (GTL) appears to still be very limited at European level and is only found in the main exporting Member States.
2. The study suggests that the level of harmonisation of the GTLs' application scope and attached conditions remains largely insufficient.

Article 5 of Directive 2009/43/EC imposes the creation of at least four types of general transfer licences for the following cases:

- Transfer towards armed forces, which purchase 'for exclusive use by the armed forces of a Member State';
- Transfer towards a certified company;
- Transfer for the purposes of demonstration, evaluation or exhibition;
- Transfer for the purposes of maintenance and repair, 'if the recipient is the originating supplier of the defence-related products'.

<sup>126</sup> See the next sections for a more detailed analysis.

According to the latest exhaustive study on the implementation of the Directive,<sup>127</sup> in 2016 three Member States had not implemented any of the general transfer licences and four other Member States had only partially implemented the four general transfer licences. Among the 10 main exporter countries, only two had not fully implemented the general transfer licences provided for by the directive (see Table 10).

Table 10 – General transfer Licences (GTL) offered in 2016, by country

Member State	GTL for armed forces	GTL for certified enterprises	GTL for demo., evaluation or exhibition	GTL for maintenance and repair
Czech Republic	Yes	Yes	Yes	Yes
France	Yes	Yes	Yes	<b>No</b>
Germany	Yes	Yes	Yes	Yes
Italy	Yes	Yes	<b>No</b>	<b>No</b>
Netherlands	Yes	Yes	Yes	Yes
Norway	Yes	Yes	Yes	Yes
Portugal	Yes	Yes	Yes	Yes
Spain	Yes	Yes	Yes	Yes
Sweden	Yes	Yes	Yes	Yes
United Kingdom	Yes	Yes	Yes	Yes

Source: European Commission, [SWD\(2016\) 398](#).

Four years later, the situation has slightly evolved:

- Italy has implemented the last two general transfer licences<sup>128</sup> and completed the two others (in 2016).<sup>129</sup>
- France has not implemented the general transfer licence for maintenance and repair. Nevertheless, France used the possibility provided for by the directive to create an exemption for maintenance and repair.<sup>130</sup> As a consequence, implementing a general transfer licence for maintenance and repair is not useful.

<sup>127</sup> European Commission, [Evaluation of the Transfers Directive](#), Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, SWD(2016) 398, 30 November 2016.

<sup>128</sup> Autorizzazioni Generali di Trasferimento (AGT) 3 ([maintenance and repair](#)) and 6 ([demonstration, evaluation or exhibition](#)).

<sup>129</sup> AGT 4 ([certified companies](#)) and 5 ([armed forces](#)).

<sup>130</sup> Article 4, [Directive 2009/43/EC](#).

Only one national authority (from those interviewed for this study) reported that it had not adopted any Global or General Transfer Licences. **Therefore, it can be considered that the level of implementation of Directive 2009/43/EC has improved since 2016.**

### Limited recourse to general transfer licences

#### Main findings:

1. The uptake of general transfer licences from one Member State to another appears to vary widely.
2. The level of industry knowledge on general transfer licences seems to depend on the organisation of training or awareness-raising sessions by national authorities.

General transfer licences were one of the main (if not the principal) innovations introduced by Directive 2009/43/EC. The objective of such licences was to facilitate intra-EU transfers of licences by waiving ex-ante control on less sensitive defence-related products. According to an expert who took part in the initial discussions and debates on the directive's adoption, the project's initial philosophy was to cover up to 90% of defence-related products.

According to the questionnaire responses and the interviews conducted, despite the impossibility of properly assessing this quantitatively, recourse to general transfer licences still remains marginal at European level and in most EU exporting countries. For instance, only one respondent (from a Nordic country), described a policy favouring the use of general transfer licences and limiting that of individual transfer licences. Generally speaking, national authorities remain rather neutral regarding the type of licences used by the industry. Finally, the uptake of general transfer licences from one Member State to another appears to vary widely. Feedback from industry on their use of general transfer licences depends very much on the country where respondents and interviewees are located. For instance, in one Member State, respondents stated that only 10% of exports were covered by general transfer licences, whilst in another they went as high as 90%.

Regarding the availability of General Transfer Licences, information is generally publicised on national official websites. Only one Member State reported using CERTIDER as a way of providing this information and thus updating the database. Globally speaking, CERTIDER's 'optional' bases (i.e. every base outside the database of certified companies) are not used and updated by Member States. Industry's knowledge about the availability of data also differs widely. The lack of translation of certain legislation/lists of products covered by licences is perceived as a barrier to progress by certain respondents from major exporting countries.

The level of industry knowledge regarding the system of control and especially general transfer licences is influenced by the organisation of training or awareness-raising sessions by national authorities. These sessions are the responsibility of Member States and hence their organisation varies widely across the continent. Some countries (and industries) organise regular training sessions (notably during defence industry days or *fora*), while others consider these sessions to be unnecessary (not always the opinion of their industry representatives). In addition, the level of awareness in certain Member States which do not use frequently the directive, may present an additional difficulty.

## Harmonisation of GTLs' application scopes and conditions still at an unsatisfactory level

### Main findings:

1. Directive 2009/43/EC proved ineffective in overcoming the patchwork of different national rules and procedures that existed before its adoption, but it did at least ensure that the 'new European system' works within a common framework, with common terms of reference. This new reality makes it possible for national systems to potentially converge.
2. Issues have arisen when interpreting certain key concepts contained in the directive, such as the definition of the expression 'specifically designed for military purpose'.

Beyond the uptake by Member States and industry of general transfer licences, facilitating intra-EU trade of defence-related products requires a certain level of harmonisation in their content (scope of application) and conditions of use. Yet, from a general point of view, the level of harmonisation enabled by this directive appears to be quite low and not sufficient to remove major obstacles from the European defence market integration. Moreover, the desire to further harmonise General Transfer Licences' scope of application and conditions varies widely across Europe.

Directive 2009/43/EC has given Member States a very significant room of manoeuvre regarding content definition and the conditions attached to general transfer licences. Reference to the European Union military list<sup>131</sup> and its 22 categories for defining general transfer licences' scope of application has led to a system where general transfer licences differ from one Member State to another. Products excluded from General Transfer Licences vary widely across Europe, from no exclusion to specific exclusions regarding certain categories of product. Similarly, the implementation of exemptions provided by Article 4 of Directive 2009/43/EC<sup>132</sup> varies widely across Europe, from the Netherlands where these exemptions have not been implemented to France where all exemptions have been implemented and match with exemptions previously applicable. In other words, **Directive 2009/43/EC has proven to be ineffective in overcoming the patchwork of different rules that existed before its adoption. This being said, the directive at least ensures that the 'new European system' works within a common framework, with common terms of reference, which makes it possible, if not easier, for national systems to converge.**

In order to facilitate harmonisation of the general transfer licences' scope of application and associated conditions, the European Commission adopted five recommendations between 2016 and 2018,<sup>133</sup> based on the work of an expert group comprising Member States' representatives. The

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<sup>131</sup> The Council adopted the latest version of the [Common Military List of the EU](#) on 17 February 2020.

<sup>132</sup> Article 4 provides that Member States may exempt transfers of defence-related products from the obligation of prior authorisation in at least 5 cases.

<sup>133</sup> European Commission, [Recommendation \(EU\) 2016/2123 on the harmonisation of the scope of and conditions for general transfer licences for armed forces and contracting authorities](#), 30 November 2016; European Commission, [Recommendation \(EU\) 2016/2124 on the harmonisation of the scope of and conditions for general transfer licences for certified recipients](#), 30 November 2016; European Commission, [Recommendation \(EU\) 2018/2051 on aligning the scope of and conditions for general transfer licences for the purposes of repair and maintenance](#), 19 December 2018; European Commission, [Recommendation \(EU\) 2018/2052 on aligning the scope of and conditions for general transfer licences for the purpose of exhibition](#), 19 December 2018; European Commission, [Recommendation \(EU\) 2018/2050](#)

harmonisation of the scope of application of general transfer licences consists in lists of items that could or should be covered by the different types of general transfer licences.

According to national authorities that have been interviewed, recommendations from the European Commission have been useful, even though they have not necessarily been implemented in positive law.

This opinion does not reveal the real level of implementation of these recommendations, particularly as they are generally used as 'guidance' for the application of general transfer licences. Accordingly, it seems fair to consider the harmonisation they enabled as still quite limited. That view is echoed by several representatives of industry or other experts, for whom the effectiveness of these recommendations remains vastly theoretical. On the contrary, industry argues that the current effect of harmonisation of general transfer licences on business remains marginal at best, rather than beneficial.

Generally speaking, public authorities' appreciation of how much harmonisation has been enabled by Directive 2009/43/EC differs considerably across Europe. Relatively important exporters tend to consider that the level of harmonisation could not be higher (even though it is acknowledged that this level is quite low). From the industry's point of view, the level of harmonisation achieved by this directive, with only one exception, is considered insufficient. It is perceived as an obstacle to any increase in European industrial cooperation. This discrepancy between public authorities' and industry's assessment is not *per se* surprising and confirms the perception gap analysed previously.

Beyond the convergence of lists used as scope of application of general transfer licences, other issues have arisen when interpreting some key concepts of the directive and the EU military list, leading to divergent visions and different styles of implementation among Member States. The most significant issue concerns a definition of the expression 'specifically designed for military purpose', to which the EU military list (and as a consequence national general transfer licences) refers frequently.<sup>134</sup> This definition is particularly important as it covers the delineation of the scope of application of general transfer licences and has a real impact on the industry' activities, notably because the lack of a common definition constitutes an obstacle to a European level playing field.

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[on aligning the scope of and conditions for general transfer licences for the purposes of demonstration and evaluation](#), 19 December 2018.

<sup>134</sup> The military list of the EU refers more than 30 times to this expression (excl. references in notes).

#### 4.1.4. The cost/benefit balance of certification remains largely uncertain

**Main findings:**

1. There mostly exists a rather negative perception of the effectiveness of certification in the industry, due to the lack of sufficient incentives.
2. Two main benefits of becoming certified have nevertheless been identified: (1) certification is perceived by industry as a means for strengthening companies' internal export control processes and sometimes to harmonise them at European level; (2) certification is increasingly perceived as a guarantee of the reliability of certified companies, bringing a reputational added value and enables the strengthening of the relationship between national authorities and industry.

Article 9 of Directive 2009/43/EC states that companies that go through a certification process, which ensures their reliability, may receive defence-related products that are covered by general transfer licences for certified recipients. The objective of certification is to ease the Europeanisation of defence value-chains.

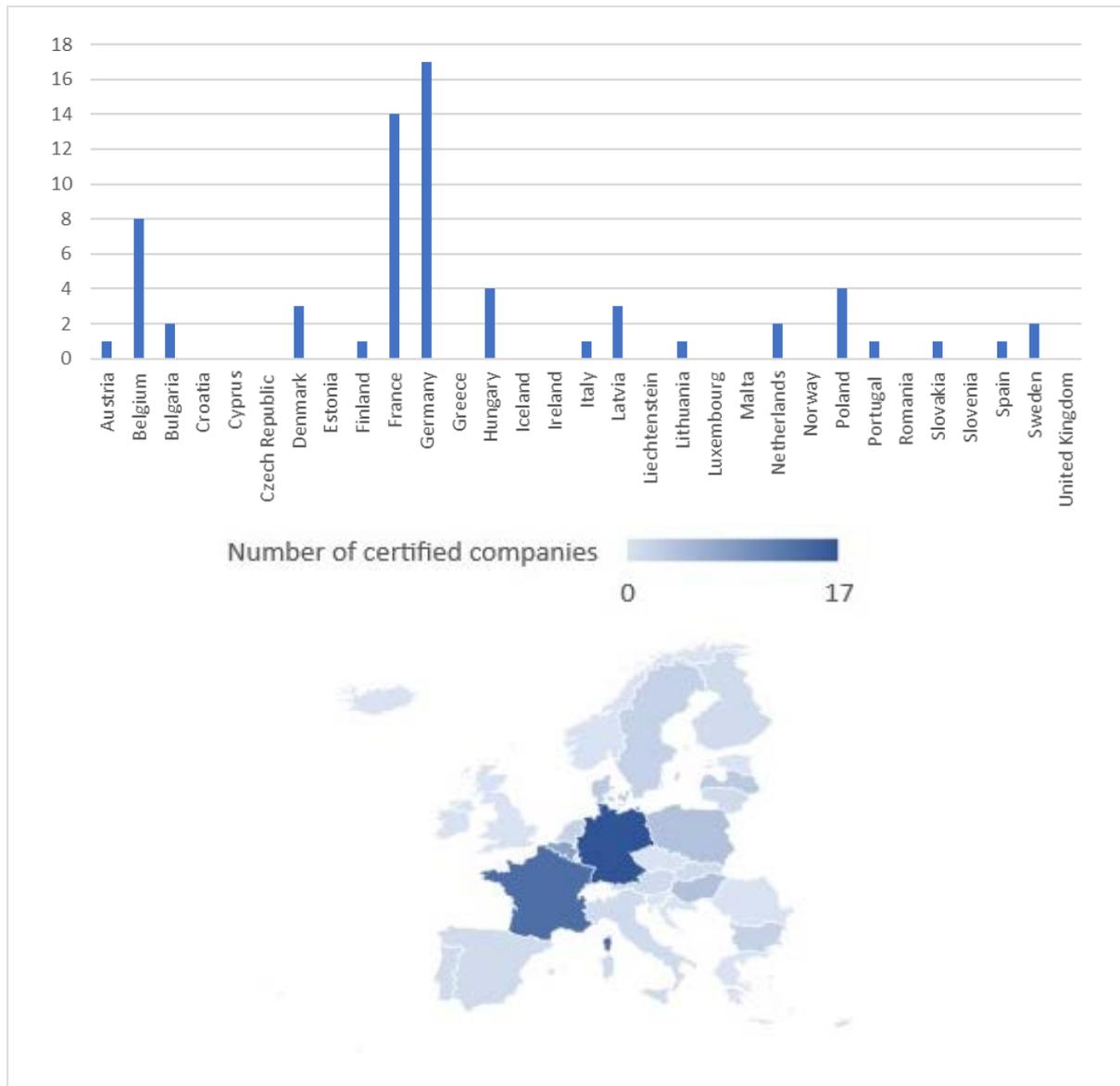
According to CERTIDER,<sup>135</sup> by 22 August 2020, 66 enterprises had been certified across Europe, compared to only 39 in 2015.<sup>136</sup> Nevertheless, the general level of certification remains quite limited as only 17 Member States have certified at least one company, among which only 10 have certified more than one company (see Figure 10). However, one should probably not overestimate the number of European companies for which it would make sense to achieve certification. Indeed, certification targets companies that are recipients of defence-related products, in other words mainly systems integrators or Original Equipment Manufacturers (OEM).

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<sup>135</sup> [Certified Enterprises Register](#) (CERTIDER).

<sup>136</sup> Masson, H., Martin, K., Queau, Y., and Seniora, J., [The impact of the 'defence package' directives on European defence](#), DG for External Policies of the Union (DG EXPO), European Parliament, June 2015.

Figure 10 - Number of certified companies and repartition across the EU



Source: CERTIDER.

Industry knowledge levels regarding national certification processes vary widely across Europe. That said, there mostly exists a rather negative perception of certification and little perception of potential benefits, which could go some way to explaining the low number of certified companies. In particular, **certification processes are mostly regarded as lengthy, costly, and burdensome, hence neither accessible nor attractive to SMEs. This is probably why certification is mostly deemed to be more interesting for primes, systems integrators and 'big' subcontractors.**

In addition, considering the low level of harmonisation covering general transfer licences, direct benefits (in terms of economic gains or gains in time) are null and perhaps negative. The cost/benefit ratio of certification is questioned as little or no incentive is perceived either at national or EU level. It has also been stated that the lack of available financial and human resources in enterprises was an obstacle to certification. However, this may yet again be interpreted as a consequence of what enterprises perceive as low incentivisation. In certain cases, it has even been stated that certification means added business risks due to the lack of procedural flexibility for certified companies and

criminal liability in the event of breaches. In addition, the absence of harmonised general transfer licences for certified recipients limits the interest for European value chains.

Finally, interviews highlighted two main benefits of becoming certified:

- Firstly, certification is perceived by industry as a means for strengthening companies' internal export control processes and sometimes to harmonise them at European level. Certification acts as a robustness test for companies' practices and procedures.
- Secondly and as consequence, among national authorities there is a growing perception of certification as a guarantee of the reliability of companies. As such, certification appears to bring a reputational added value and enables the strengthening of the relationship between national authorities and industry.

All respondents (both public and private actors), with only one exception, agreed that intra-EU transfers were different from exports outside the EU due to their reduced sensitivity and would consequently be treated more favourably. To them, the intra-EU transfer system needs to be further simplified. For some respondents, this preferential treatment should also be extended to NATO members and other allies.

As for CERTIDER, all national authorities and most industry representatives consider this to be a very non-user-friendly platform, which offers little to no practical benefit. There are questions about the up-to-date character of certain data (optional information on licences, for instance). A more reliable platform would be judged as having greater use. One respondent even suggested that CERTIDER could become a powerful platform for promoting industrial cooperation if in addition to certified companies it registered a list of enterprises authorised to receive defence-related products.

#### 4.1.5. End-use/end-user control and export limitations are still the norms

##### **Main findings:**

1. The majority of industry representatives identified end-use/end-user control and export limitations as a source of impediment to intra-EU trade in defence-related products, with additional re-exportation constraints and a further complexification of exports to non-EU states.
2. The study suggests that Member States remain very cautious on this issue due to its sensitivity and do not consider it as a priority or an area for immediate progress.

Directive 2009/43/EC provides the possibility for Member States to impose export limitations and/or conditions on components, subsystems, systems that have been produced or assembled on their soil. Article 4 states that 'Member States may, whilst complying with Community law, avail themselves of the possibility to request end-use assurances, including end-user certificates'. Regarding export limitations, recital 30 states that 'the directive should not prevent Member States from determining the terms and conditions of transfer licences of defence-related products, including possible export limitations, in particular where this is necessary for the purposes of cooperation in the framework of that Common Position'. However, the rule established by the directive is that these limitations will remain exceptions and that 'Member States, except where they consider that the transfer of components is sensitive, [...] shall refrain from imposing any export limitations for components where the recipient provides a declaration of use in which it declares that the components subject to that transfer licence are integrated or are to be integrated into its own products and cannot at a later stage be transferred or exported as such, unless for the purposes

of maintenance or repair'.<sup>137</sup> These limitations have to be communicated by the provider to the supplier. As such, they can constitute obstacles to the Europeanisation of defence value chains.

End-use/end-user controls may intervene at different stages. Some Member States limit it to the stage of licensing, while others add additional controls or monitoring at the stage of delivery and even later in the chain. For national authorities, this question remains a matter of national sovereignty, which was even regarded as a 'non-European issue' by one interviewee. It appears that, for now, Member States remain very cautious on this issue and do not consider it as a priority or an area for immediate progress. The majority of industry representatives that responded to the questionnaires or were interviewed for the purposes of this study, identified end-use/end-user control and export limitations as a source of impediment to intra-EU trade in defence-related products, as re-exportation constraints add up to export control and make more complex exports to non-EU countries. More precisely, industry acknowledges that imposing these limitations and control are sovereign prerogatives and, as such, necessary. However, referring to Article 4 (8) of the directive, the majority of respondents and interviewees considered that Member States do not limit themselves to exceptional situations. Industry remains quite pessimistic globally on the possibility that this situation could improve in the foreseeable future.

The perspective of harmonising end-use/end-user certificates divides opinion, with some pleading for further harmonisation and others considering that such harmonisation would be rather limited and too close to the actual situation. More or less 60% of trade association respondents believe such a harmonisation would ease intra-EU trade of defence-related products. However, some did stress that certificates are only part of this issue and harmonisation could, therefore, be a good first step.

## 4.2. Explaining the implementation of Directive 2009/43/EC

To explain the relatively limited effects of Directive 2009/43/EC, questionnaires and interviews led us to identify three main factors: (1) the persistence across Europe of a conception of arms transfers and exports as a matter of national sovereignty; (2) the persistence of different 'control cultures', which result in different practices, and; (3) the absence of Europeanisation of actors involved in transfer control, which prevents national systems from properly integrating interdependencies.

### 4.2.1. The link between intra-EU transfers and extra-EU exports: the national sovereignty nexus

#### Main findings:

1. To a large extent, Member States consider that the implementation of Directive 2009/43/EC has strong implications for arms exports policies.
2. Arms exports (as opposed to transfers) of defence-related products are still largely considered a matter of national sovereignty and responsibility.

Before the adoption of Directive 2009/43/EC, Member States generally did not distinguish between intra-EU transfers and exports towards third countries.<sup>138</sup> The very notion of 'intra-Community (or intra-EU) transfer' has been introduced by Directive 2009/43/EC. As such, this directive was

<sup>137</sup> [Directive 2009/43/EC](#) Article 4 (8).

<sup>138</sup> See: European Commission, [Report on the evaluation on Directive 2009/43/EC](#), COM(2016) 760, 30 November 2016, p. 3.

conceptually an extremely significant innovation, even though the number of licence refusals for exports towards EU Member States were very few before its adoption.

The partial and limited success of Directive 2009/43/EC and its main provisions (general transfer licences and certification mostly) appear to be related to the very nature of this ‘conceptual revolution’, which so far has proven to be unfinished. According to interviews conducted for this study, Member States to a large extent still consider that the implementation of Directive 2009/43/EC has strong implications for arms exports policies. Indeed, **exports (as opposed to transfers) of defence-related products are considered a matter of national sovereignty and responsibility.** This is particularly obvious when it comes to export limitations and restrictions imposed by Member States to numerous transfers<sup>139</sup> covered by Directive 2009/43/EC. Indeed, defence-related products, such as components, sub-systems or systems that have been transferred within the EU may well, in fine, be exported towards a third country (whether or not integrated in another product). Accordingly, Member States tend generally to limit or at least monitor and control (via an obligation of prior authorisation, for instance) these potential exports despite Article 4 (8). This article stipulates that, ‘Member States shall refrain from imposing any export limitations for components where the recipient provides a declaration of use in which it declares that the components subject to that transfer licence are integrated or are to be integrated into its own products and cannot at a later stage be transferred or exported as such’. The most frequent reason that has been put forward to justify export limitations attached to transfers has been the potential reputational effect at national level of an export towards a third country that is not considered as a safe destination by the transferring Member State.

Another example of this national focus when it comes to transfer- and export-control of defence-related products is the choice that has been made to refer to a positive list of products in determining the scope of application of general transfer licences. As a reminder, the initial objective of this Directive was ‘to reduce obstacles to the circulation of defence-related goods and services (products) within the internal market, and to diminish the resulting distortions of competition, by simplifying and harmonising licensing conditions and procedures [...] [thanks to] a streamlined system of general or global licences, to which individual licensing would remain the exception’.<sup>140</sup> Recourse to general transfer licences should have become the rule, but that is far from being the case today – at least at EU/EEA level. From this perspective, determination of the most sensitive defence-related products, which cannot be covered by general transfer licences (negative list), would certainly have been the most effective way to proceed. However, the lack of a common definition covering the scope of these licences’ application at European level and the systematic recourse by Member States<sup>141</sup> to positive lists as a way of trying to define the scope have so far significantly limited the effectiveness and usefulness of these licences.

**In other words, there is still no Europeanisation of transfer controls.** Of course, Member States consider other Member States as safe destinations, but in the same way are perceived also NATO countries (for NATO members) and other reliable allies. Hence, some Member States have extended the benefit of general transfer licences to these third countries.

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<sup>139</sup> It has not been possible to assess the exact proportion of transfers concerned by export limitations. Interviewees reported that this practice was quite frequent (although not systematic) and widespread across Europe.

<sup>140</sup> European Commission, [Proposal for a Directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community](#), COM(2007) 765, 5 December 2007, p. 2.

<sup>141</sup> No counter-example of a Member State referring to a negative list to define the scope of application of one or several general transfer licences has emerged from this study. However, as the geographical scope of this study is not exhaustive, such counter-examples may exist, even though they would in all likelihood be marginal.

Such a national focus, when it comes to transfer control, goes a long way in explaining the lack of appetite by main exporters for further harmonising the scope of application of general transfer licences, for instance, while the effectiveness of the European Commission's recommendations remains questionable.

#### 4.2.2. Different control cultures and policies

**Main finding:**

Cultural discrepancies (e.g. relationships between national authorities and companies) are such that the gains in time or economic interests induced by the use of general transfer licences and certification are not incentivising enough to ensure their success.

The relatively low level of harmonisation with transfers control systems enables a great diversity of control policies to coexist in Europe. This study has confirmed some of the findings from a 2017 report<sup>142</sup>, which had a broader focus and encompassed both transfer- and export-control policies. There exists in Europe a 'diverging convergence'<sup>143</sup> when it comes to the harmonisation of arms transfer policies.

Questionnaires and interviews conducted for this study have confirmed that the institutional framework and the scope of control application, as well as the attendant conditions attached to this control, vary widely across Europe. However, it has also been revealed that pre-existent cultural differences in control systems remain. For instance, one of the interviewed experts noted that exemptions provided for by Article 4 of Directive 2009/81/EC match the existing exemptions in French law and that the whole system of general transfer licences was inspired by the UK export control system. He described the directive as merely a way to only marginally adjust existing systems in bigger Member States.

A concrete example of this cultural gap in Europe exists in the relationship between national authorities and companies. Directive 2009/43/EC and its main provisions (general transfer licences and certification) brought about a major innovation in transferring to companies a potentially significant part of monitoring the transfers of defence-related products. As a consequence, a particular liability regarding compliance with transfer rules has also been passed on companies. Yet, the relationship to risk, compliance and liability is a deeply cultural factor that is still subject to wide variations across Europe and has led to the development of distinct and not always compatible legal systems. Such an explanation may be reflected in some Member States, where the liability of industry was limited before the adoption of Directive 2009/43/EC, by the proportion of companies that prefer to use individual transfer licences, even though general transfer licences would be available. Facing such cultural discrepancies, the gains in time or economic interests induced by the recourse to general transfer licences and certification are not incentivising enough to ensure their success.

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<sup>142</sup> D. Cops, N. Duquet & G. Gourdin, [Towards Europeanised arms export controls? Comparing control systems in EU Member States](#), Flemish Peace Institute, 15 June 2017.

<sup>143</sup> *Ibid.*, p. 187.

### 4.2.3. The consequences of the absence of Europeanisation of transfer control communities

#### Main findings:

1. It appeared from interviews that contacts and exchanges between national control communities were quite sparse, leading to the total absence of industrial interdependency and integration issues in the current system and nurturing a lack of trust among Europeans regarding the robustness of their national control systems and policies.
2. The sole exception has been the expert group set up by the European Commission in 2016, which resulted in recommendations adopted by the European Commission on the harmonisation of the scope of application and the conditions of the general transfer licences.

What has emerged from our interviews is that contacts and exchanges between national control communities were quite sparse, more by exception than the norm. This lack of Europeanisation among national control communities is particularly striking when it comes to issues such as harmonising of the scope of application and the conditions of general transfer licences. Whereas this issue appears to be of significant importance to industry (i.e. the more harmonised general transfer licences are, the easier industrial cooperation at European level will be), it seems to be only secondary for national authorities, which logically are more focused on the effectiveness and efficiency of their national systems. Similarly, the objective of facilitating transfers of defence-related products within the internal market has regularly been considered as secondary and interpreted in a relatively narrow sense, namely as a vector for improving export positions in Europe.

This lack of Europeanisation for issues related to transfer controls has resulted in a total absence of industrial interdependency and integration within the current system. Several industry representatives from Member States with smaller DTIBs reported the difficulties they faced with the consequences of Germany's transfer control system, which is considered to be particularly stringent. With the current system, links between national authorities and the industry remain organised on a national basis and prevent the creation of industrial interdependencies.

This lack of contacts and exchanges is also likely nurturing a lack of trust among Europeans regarding the robustness of other national control systems and policies, an issue which was frequently mentioned during interviews. This lack of trust may be explained by the divergence underlined above, but could also result from the shortage of skills in certain national authorities. Certainly, the lack of cooperation on these issues plays a role in the mutual perception of limitations.

The sole exception to this lack of Europeanisation among national transfer control communities has been the expert group set up by the European Commission. Initially, this group was constituted in 2016, primarily to evaluate the implementation of Directive 2009/43/EC.<sup>144</sup> Meetings of this group resulted in some concrete progress, for example, through the adoption of recommendations by the European Commission on the harmonisation of the scope of application and the conditions of general transfer licences. However, as described at least once during the interviews conducted, this also resulted in raising the interest of participants in exchanging with their counterparts on the respective hurdles national authorities are facing when it comes to applying the directive. In this

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<sup>144</sup> See: European Commission, [Report on the evaluation of Directive 2009/43/EC](#), COM(2016)760, 30 November 2016.

regard, a representative from one of the main exporting countries stated that he did not necessarily know his European counterparts before the creation of this working group.

## 5. Assessing the potential cumulative effect of the EU defence package

### Main findings:

1. The cumulative effect of the EU defence package appears to be extremely difficult to assess for methodological reasons.
2. Based on the analysis of the evolution of defence and armament intergovernmental cooperation, the cumulative effect appears rather modest due to the limited cross-effect of the two directives and because of the importance of several political and economic factors.

### 5.1. The difficulty to measure the EU defence package's cumulative effect

#### Main findings:

1. From a methodological point of view, severe limitations significantly hinder any attempt to define the cumulative effects of two directives.
2. In addition, the lack of a statistical apparatus adapted to defence activities (e.g. NACE or NC classification) makes it virtually impossible to measure any deepening of the internal market for defence-related products.

#### 5.1.1. A methodological stalemate

#### Main findings:

1. Given that Directives 2009/81/EC and 2009/43/EC pursue specific and distinct objectives, there is no relevant metrics to assess their cumulative effect.
2. An effective implementation of both directives should remove obstacles to fundamental freedoms in the defence market and defence industry generally. However, available data on arms transfers within the EU (COARM reports) or on international trade (Eurostat and Combined Nomenclature classification of flows) have proven inconclusive.

The first and key difficulty when trying to assess the EU defence package's cumulative effect is the absence of relevant benchmarks to do so. Directives 2009/81/EC and 2009/43/EC are pursuing specific and distinct objectives (increase of transparency and recourse to competition for Directive 2009/81/EC and facilitating trade in defence-related products for Directive 2009/43/EC). Both Directives have different areas of application and, *stricto sensu*, produce no cumulative effect.

From a theoretical point of view, as stated in the European Commission communication 'A Strategy for a Stronger and More Competitive Defence Industry',<sup>145</sup> the cumulative implementation of both 2009 directives should result in 'the progressive establishment of a European Defence Equipment Market (EDEM); where suppliers established in one Member State can serve, without restrictions, all Member States'.<sup>146</sup> In other words, an effective implementation of both directives should remove (or at least alleviate) obstacles to fundamental freedoms in the defence market and defence industry generally. This should normally result in increasing trade flows for defence-related products and/or more efficient transfers. However, **available data on arms transfers within the EU (COARM reports) or on international trade (Eurostat and Combined Nomenclature classification of flows) have proven inconclusive when it comes to measuring the deepening of the internal market for defence-related products.**<sup>147</sup>

### 5.1.2. Is European defence cooperation increasing?

#### Main findings:

1. Another way to (imperfectly) estimate the cumulative effect of the EU defence package is to examine the functioning of cooperative programmes and their evolution.
2. In this perspective, the effect of the defence package seems relatively modest: although budgets dedicated to collaborative programmes (procurements and R&T) have increased since 2014, they have still not recovered from 2011-2012 budgetary cuts.

Alternatively, one could consider that a deepening of the internal market should result in an increase of collaborative defence programmes. Several arguments seem to reinforce this idea. Firstly, the relative importance of collaborative programmes for the development of major defence capabilities (jet fighters, for instance) has been a characteristic trend since the end of World War II. Secondly, both directives seek to promote cooperative programmes. Under Directive 2009/43/EC, the general transfer licence for certified companies explicitly aims at fostering the 'cooperation between, and the integration of, those undertakings, in particular by facilitating optimisation of supply chains and economies of scale'.<sup>148</sup> Directive 2009/43/EC also provides for the possibility of creating specific general transfer licences for collaborative projects.<sup>149</sup> Directive 2009/81/EC states that procurements, which result from a collaborative programme based on R&T, are excluded from its scope and thus benefit from an administrative advantage compared with purely national procurements.

EDA provides annual data on collaborative projects (procurement and R&D).<sup>150</sup> It is the only database with this degree of precision. This database does not cover Denmark, which benefits from

<sup>145</sup> European Commission, [A strategy for a stronger and more competitive European defence industry](#), COM(2007)764, 5 December 2007.

<sup>146</sup> Ibid., p. 6.

<sup>147</sup> See Annex 5 for the detailed analysis of COARM and EUROSTAT data.

<sup>148</sup> Recital 23, Directive [2009/43/EC](#).

<sup>149</sup> Article 5, Directive [2009/43/EC](#).

<sup>150</sup> [EDA defence data portal](#).

an opt out for CSDP-related policies, nor EEA countries, but it remains the only database available that deals with cooperation.

According to EDA data,<sup>151</sup> there is indeed an increase in European collaborative defence procurement (see Figure 11). Between 2013 and 2018, collaborative procurement budgets increased by 41.8%. However, it should be noted that this increase has not been sufficient to offset the very sharp decrease experienced after 2011, which has probably resulted from the fiscal consolidation policies implemented across Europe after the 2010 eurozone crisis. Indeed, the 2018 collaborative procurement aggregated budget is still 13% lower than the 2011 level.

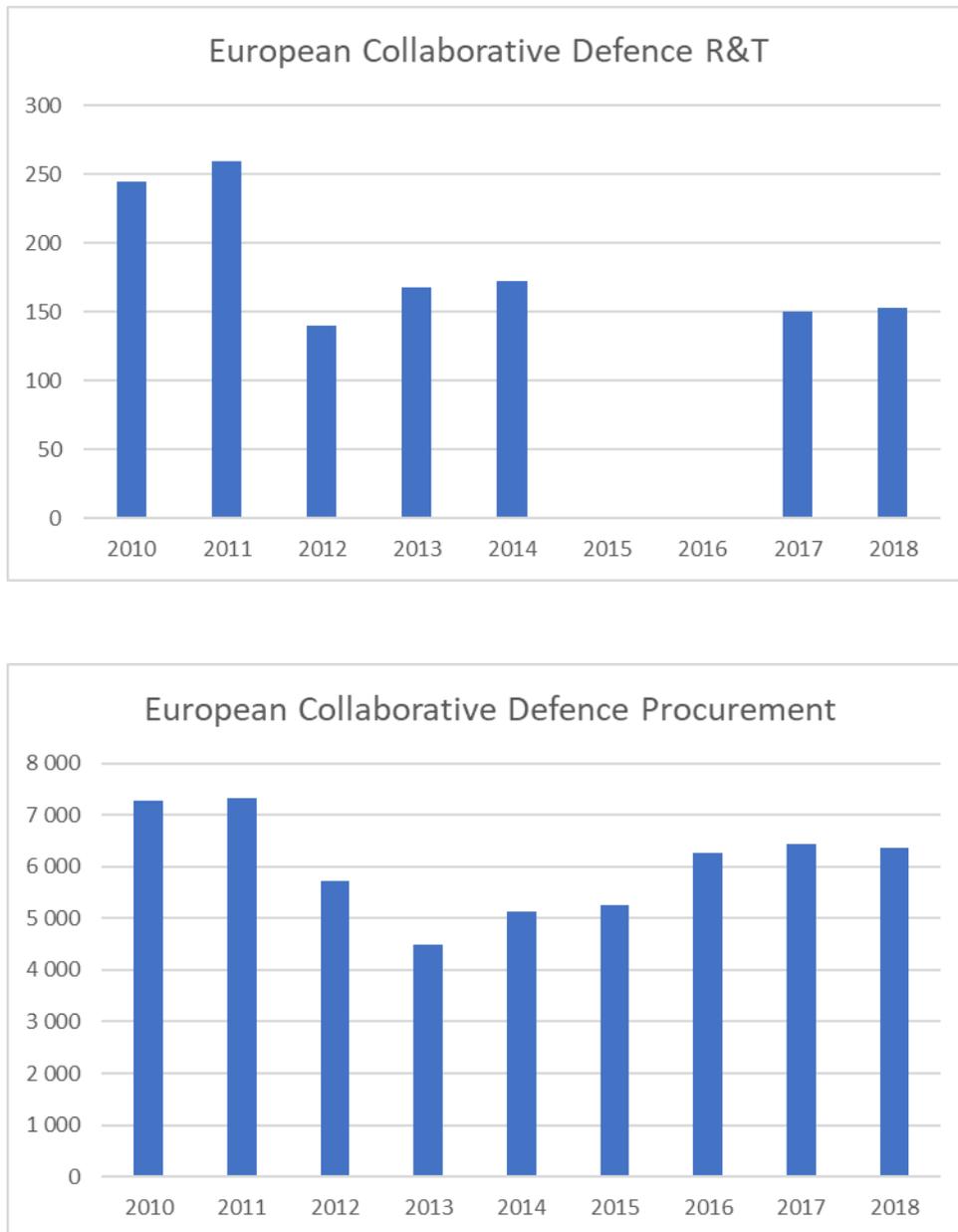
When it comes to collaborative R&T programmes, the outcome is not very positive as the extent of collaborative investment is still far from its 2011 level (see Figure 11). Indeed, in 2018 EU Member States together spent less than 60% of what they spent on a collaborative basis 7 years earlier (see figure 11).

If the evolution of defence cooperation were to be considered relevant in assessing the cumulative effect of the EU defence package, at the very least, these figures would suggest that this effect is relatively modest.

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<sup>151</sup> Ibid.

Figure 11 – Evolution of European defence collaborative programmes, in € million



Source: [EDA defence data](#).

## 5.2. Explaining the lack of a cumulative effect of the EU Defence package

### 5.2.1. Very limited direct links ('cross-effect') between the two directives examined

#### Main findings:

1. The only likely direct link between the two directives would be the case where the level of implementation of the intra-EU transfers directive would threaten national security of supply strategies and thus limit the willingness of Member States to recourse to non-domestic economic operators.
2. Interviews suggest that this hypothesis remains highly theoretical.

One of the reasons for the absence of a measurable cumulative effect is the very weak direct link between the two directives. From an intellectual point of view, it seems quite plausible that the removal of obstacles to a free circulation of defence-related products (Directive 2009/43/EC on intra-EU transfers) will increase any effects from implementing the free movement of goods and services (Directive 2009/81/EC on public procurements). However, such a link is extremely hard to occur in practical terms, which makes it difficult to engage in any kind of assessment.

From a more practical perspective, it seems that there is only one hypothesis regarding a possible link between these two directives. Directive 2009/81/EC acknowledges that security of supply is a legitimate public purpose when it comes to procurement and organises the inclusion of such a purpose. According to provisions on security of supply (Article 23), a Member State can require that the tender contains 'the indication of any restriction on the contracting authority/entity regarding disclosure, transfer or use of the products and services or any result of those products and services, which would result from export control or security arrangements'. However, this same article clearly states that a tenderer cannot limit the ability of another Member State to apply its national transfer or export legislation for a certain procurement.<sup>152</sup> As such, Directive 2009/81/EC acknowledges that national legislation on transfers and exports may act as an impediment to security of supply strategies. Interview grids included a question to test the hypothesis according to which limited progress in the implementation of Directive 2009/43/EC may, from a purely national perspective and regardless of such a decision's legality at EU level, justify not awarding a public procurement to an economic operator established on the territory of another Member State.

The interviews conducted with representatives from public authorities and industry have shown that this hypothesis remains mostly theoretical and only one example that dates back to the beginning of the 1990s – i.e. almost 20 years before the adoption of the EU defence package, has been reported: during the first Gulf War, Belgium refused to sell ammunition to the United Kingdom.<sup>153</sup> Although in theory such a denial may still happen today, it is a widely shared perception that these considerations have not prevailed, particularly, for example, in a decision to seek recourse to Article 346 TFEU in procuring certain weapon systems.

<sup>152</sup> [Directive 2009/81/EC](#) Article 23 : 'A tenderer may not be required to obtain a commitment from a Member State that would prejudice that Member State's freedom to apply, in accordance with relevant international or Community law, its national export, transfer or transit licensing criteria in the circumstances prevailing at the time of such a licensing decision'.

<sup>153</sup> See: H. Scotland, [Why Belgium didn't send the bullets](#), 14 April 2000.

## 5.2.2. Other factors playing a role in the evolution of the EU defence landscape<sup>154</sup>

### Main findings:

1. Evolution in collaborative spending is affected by several political and economic factors independent of the EU defence package.
2. The effect of the EU defence package cannot be precisely singled out, but the study suggests that it is relatively marginal.

The other major reason for an absence of a measurable cumulative effect from the two defence package directives is the existence of other factors that have impacted, sometimes significantly, on the proposed metrics and the general EU defence landscape. As a consequence, it appears that (1) it is not possible to single out the effects of implementation of the EU defence package from these metrics and general landscape and (2) that these effects were probably marginal compared with the effects of these other factors, three of which are detailed here:

- **The Effects of the 2010 eurozone crisis on European defence budgets** and the European Defence Technological and Industrial Base have been well documented.<sup>155</sup> Following the global financial crisis (2007) and its consequences for the eurozone (2010), a number of fiscal consolidation policies have been implemented throughout Europe to fight public budgetary deficits and debts. In particular, it has been reported that such policies had an impact on defence spending: 'With the exception of Sweden, Poland, France, Finland and Denmark, all states are implementing more or less drastic consolidation measures strongly affecting defence spending'.<sup>156</sup> Effects have been different among European countries, but the crisis resulted mainly in significant defence spending cuts with European states implementing cuts generally between 10% and 20%.<sup>157</sup> Similar questions have been raised in the aftermath of the Covid-19 crisis.<sup>158</sup>
- In contrast, **the resurgence of major geopolitical threats at the European Union's frontiers since 2014** are deemed to have the opposite effect on defence budgets. In particular, the Russian annexation of Crimea notably led to increases in defence budgets in Central and Eastern Europe.<sup>159</sup>
- **The adoption of new European initiatives to support cooperation.** Following the 2010 eurozone crisis and the fiscal consolidation policies it triggered across the continent, Europeans acknowledged that the mere liberalisation of defence markets at European level was not enough to build a truly European defence system or even ensure that Europeans still have the means to maintain key capabilities and develop the next generations of defence capabilities. This capacity was already in question before

<sup>154</sup> For a more exhaustive examination of these factors, please see the first part of this study.

<sup>155</sup> C. Mölling & S.-C. Brune, [The impact of the financial crisis on European defence](#) DG for External Policies of the Union (DG EXPO), European Parliament, April 2011.

<sup>156</sup> *Ibid.*, p. 36.

<sup>157</sup> *Ibid.*, p. 37.

<sup>158</sup> Arteaga, S., et al, [European Defence should not be the Casualty of the 'Great Lockdown'](#), op-ed published in several European media, Armament Industry European Research Group (ARES), 30 April 2020.

<sup>159</sup> See, for instance: N. Tian, A. Fleurant, A. Kuimova, P. Wezeman and S. Wezeman, [Trends in World Military Expenditure, 2018](#), April 2019.

the eurozone crisis<sup>160</sup> and it has been severely threatened by the austere fiscal policies that have been implemented since 2010 across Europe. In December 2013, the European Council recalled that '[c]ooperation in the area of military capability development is crucial to maintaining key capabilities, remedying shortfalls and avoiding redundancies. Pooling demand, consolidating requirements and realising economies of scale will allow Member States to enhance the efficient use of resources and ensure interoperability, including with key partner organisations such as NATO. Cooperative approaches whereby willing Member States or groups of Member States develop capabilities based on common standards or decide on common usage, maintenance or training arrangements, while enjoying access to such capabilities, will allow participants to benefit from economies of scale and enhanced military effectiveness'.<sup>161</sup> The importance of cooperation in the area of capability development triggered a change of attitude at EU level where the sole internal market approach (constituted in the EU defence package) has been completed by more incentivising approaches. Following these Council Conclusions and issuing of the EU Global Strategy in 2016, several major initiatives to boost cooperation in the field of capability development have been adopted:

- **The Permanent Structured Cooperation (PESCO)** was officially launched in 2017. Modular and inclusive, it comprises two layers: (1) the more binding commitments and (2) the development of cooperative projects (the so-called 'PESCO projects'). PESCO projects are supposed to implement several commitments. Of particular importance is the third commitment, which states that participating Member States shall 'increase joint and 'collaborative' strategic defence capabilities projects. Such joint and collaborative projects should be supported through the European Defence Fund if required and as appropriate'.<sup>162</sup> To date, 47 projects have been launched. These projects do not necessarily entail a procurement aspect and are at different stages of development.
- **The European Defence Fund (EDF)** aims at developing European collaboration at R&T and R&D level. It does not per se entail procurement activities. However, it does aim at developing new capabilities and should logically results in procurement activities. According to the 21 July 2020 European Council agreement, the European Defence Fund will be granted a budget of €7 billion for the 2021-2027 period (i.e. €1 billion annually).
- Complementarily, **the Coordinated Annual Review on Defence (CARD)** aims at identifying areas of potential cooperation and may intervene as a facilitator for future EU cooperation in the area of defence capabilities.

In conclusion, it appears that assessing the cumulative effect of Directives 2009/43/EC and 2009/81/EC remains largely inconclusive, mainly due to the lack of relevant statistical indicators. The evolution of defence cooperation is certainly a good indicator for the internal market's deepening.<sup>163</sup> However, the causal effects of the EU defence package remains impossible to prove and are probably marginal compared with other factors at stake.

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<sup>160</sup> See, for instance, the debates on capability shortfalls such as for air-to-air refuelling capabilities. See, notably: E. Quintana, H. Heidenkamp & M. Codner, [Europe's Air Transport and Air-to-Air Refuelling Capability Examining the Collaborative Imperative](#), RUSI Occasional paper, Royal United Service Institute, 2014.

<sup>161</sup> European Council, [Conclusions of the 19/20 December 2013 Council](#), 20 December 2013.

<sup>162</sup> Council of the European Union, [Decision \(CFSP\) 2017/2315 establishing permanent structured cooperation \(PESCO\) and determining the list of participating Member States](#), 11 December 2017.

<sup>163</sup> See the first part of this study – Scene setter.

## 6. Recommendations

Given certain differences between the two directives making up the so-called EU defence package and the specific challenges each directive must face regarding implementation, recommendations from this study will clearly distinguish between the respective areas of defence procurement and the control of intra-EU transfers.

### 6.1. Improve the quality and availability of data

Many of the difficulties this study has coped with were related to the absence or non-availability of data to assess the implementation of Directives 2009/81/EC and 2009/43/EC. This is a crucial issue affecting EU institutions' ability to monitor how both directives have been implemented. Solid, publicly available data is vital to assess the impact of the EU defence package effectively, and as such all Member States must properly enforce and formulate further proposals for action in this field.

#### 6.1.1. Continually improve the quality of TED data

For years, the need to maintain and update TED data has called for close cooperation between the European Commission and Member States to achieve the highest possible level of consistency and to correct possible errors. This ex-post work should be praised and encouraged. It is probably the most effective way to monitor the true situation regarding implementation of Directive 2009/81/EC.

In addition to these efforts, it would be useful to keep on improving this consistency also ex-ante. Indeed, this study has revealed that Member States (and sometimes procuring authorities in the same Member States) have different reporting practices. It is especially the case when it comes to values (expressed with VAT or not) or lots (final value of the contract and the aggregated value of the different lots do not always match). Using common reporting practices would limit ex-post work and above all make data more accurate, comparable and valuable within a continual monitoring process.

#### 6.1.2. Make data available on intra-EU transfers

The main problem encountered in attempting to assess the implementation of Directive 2009/43/EC is the complete lack of available data dealing with the recourse to different types of licences. As such, it is simply impossible to evaluate precisely and accurately the effects of this directive and hence its effectiveness or added value. This situation is not satisfactory either from an academic point of view (as the robustness of academic analyses can be questioned) or from a political perspective (as transparency is one of the fundamental conditions for democratic accountability). Even though this issue remains generally very sensitive at political and business levels, it is far from acceptable that even the European Commission is barred from having access to more precise data on intra-EU transfers compared with the data that is available for exports to non-EU countries. Moreover, in most cases, these data are not classified, but are simply not made public. Thus, any argument put forward on the grounds of security could not be supported.

Given this situation and the fact that the revision of Directive 2009/43/EC is unlikely, **the European Commission should continue to explore ways of improving the monitoring of the different types of licences with support from the expert group on intra-EU transfers.** A specific challenge concerns the monitoring of recourse to general transfer licences as, by definition, they lift ex-ante notification obligations. Yet, interviews with national authorities have revealed that raw data generally exists at national level, thanks to the reporting activities of companies using general transfer licences, even if it is not necessarily utilised for statistical purposes and hence may raise some issues of consistency. Public availability of such data is likely to remain a bone of contention

for at least some Member States. Accordingly, **the release of aggregated data by the European Commission on an annual basis could represent a useful first step, once this data has been made available.**

In addition, it has emerged from interviews and questionnaires that industry has faced difficulties in accessing national rules on applicable transfer licences (particularly general transfer licences). These rules are usually published on national websites without translation and the CERTIDER tab dedicated to general transfer licences (optional) is far from being up-to-date. **To reduce industry business, it would probably make sense for the European Commission to update CERTIDER regularly. Accordingly, Member States should notify the European Commission in due time of any change they make to their general transfer licences.**

Moreover, **the European Commission should ensure that a translation of each national transfer licences regulation is available, at least in English.** CERTIDER currently offers summaries but these seem to be largely unknown to industry.

### 6.1.3. Create a statistical apparatus covering defence-related activities

Overall, this study has reiterated that the European statistical apparatus has not been designed to measure the economic performance or evolution of defence-related economic activities. The almost total absence of dedicated NACE or NC codes hinders any attempt at measuring how the structure of the European defence industry has evolved. In the absence of such data, it is simply impossible to assess the true Europeanisation of defence value-chains (especially as they have been experiencing a relative hybridisation with non-defence chains, such as electronic value chains) or the cross-border market access of defence SMEs and mid-cap companies.

The European Commission recently created a Directorate General dedicated to defence industry and space and has adopted a communication on industrial policy<sup>164</sup> identifying defence industry as a crucial industrial ecosystem for the future of Europe. Being able to access up-to-date, precise data on this industrial ecosystem would enable the European Commission to design and implement the policies needed to: (1) bring about the emergence of a truly European Defence Technological and Industrial Base; (2) support the production in Europe of the next generations of defence capabilities; (3) ultimately reinforce European strategic autonomy and technological sovereignty.

## 6.2. Defence procurements: enforce Directive 2009/81/EC

Regarding the implementation of Directive 2009/81/EC, it appears that the positive and constructive attitude of the European Commission towards Member States has produced some benefits. Notably, it has contributed to clarifying some provisions introduced by the directive and conditions that would otherwise have remained obscure. In this context, it appears that a revision of Directive 2009/81/EC would have no real added value and that the priority should be enforcement, as it is increasingly perceived as a test for the EU's (and the European Commission's) credibility in the regulation of defence markets.

### 6.2.1. No need for a revision of Directive 2009/81/EC

Interviews conducted for the purpose of this study revealed that there is no immediate need for revision of Directive 2009/81/EC and that progress may be achievable within the current framework. Some procuring authorities have underlined that it could be useful to make available for defence

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<sup>164</sup> European Commission, [A New Industrial Strategy for Europe](#), COM(2020) 102, 10 March 2020.

procurements the open procedure or new procedures introduced by Directive 2014/24/EU (the 'general procurement' directive).

These potential changes do not appear to justify substantial revision of the directive. It is true that Directive 2009/81/EC does not formally provide for the possibility to have recourse to the open procedure, which could be advantageous for certain procurements (e.g. ammunition). However, it seems that the unavailability of the open procedure could be resolved through the adoption of national legislative acts. Open procedure ensures a higher level of transparency and competition, which is precisely the objective of Directive 2009/81/EC in regards to defence procurement. Accordingly, it would be hard to support the idea that a Member State has failed to transpose correctly Directive 2009/81/EC by opening the possibility to procuring authorities to use open procedures for procurements covered by Directive 2009/81/EC. Similarly, the introduction of new procedures that have been developed for non-defence procurement by Directive 2014/24/EU would certainly offer added value to procuring authorities. However, they do not per se justify a revision of Directive 2009/81/EC.

Benefits from a potential revision would thus be secondary, as the Defence Procurement Directive still faces hurdles regarding its correct application. In addition, a potential revision process would reopen some 'old wounds' without any new prospects of settling the above-mentioned limitations. For instance, a revision would unlikely settle the blatant failure of subcontracting provisions to enhance cross-border market access for SMEs, as the interviews suggested.

### 6.2.2. A crossroad for Directive 2009/81/EC's credibility: enforcement as a litmus test

**While a revision of Directive 2009/81/EC is not considered necessary in the short run, its enforcement should become a political priority for the European Commission.** The interviews carried out have revealed that the understanding and constructive attitude displayed by the European Commission has produced concrete results in terms of national procuring authorities accepting the directive, notably by clarifying certain provisions. Yet, this attitude also provoked some growing frustration and agitation in stakeholders, especially (but not exclusively) in the business community. The European Commission's enforcement policy regarding Directive 2009/81/EC is now widely considered as a *litmus* test for its willingness to regulate defence markets. As such, the credibility of Directive 2009/81/EC and the European Commission's ability to act are now at stake. In addition, the creation of a European Defence Fund in the European budget<sup>165</sup> increases the need for Directive 2009/81/EC to be correctly applied. Indeed, it is a matter of policy consistency to ensure that the EU's efforts to support defence industry's competitiveness and the emergence of a truly European Defence Technological and Industrial Bases through the European Defence Fund are not weakened by the poor application of Directive 2009/81/EC.

Of course, expectations regarding the potentially positive impacts of Directive 2009/81/EC have to be handled. Defence procurement will remain a sensitive policy area where essential national security interests must be taken into account. It is probably not realistic to expect a similar level of transparency in defence procurements to that in non-defence procurements. However, this study has highlighted that significant room for improvement exists in the application of Directive 2009/81/EC. In particular, it appears that the following areas should be scrutinised:

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<sup>165</sup> The European Council agreement on the multiannual financial framework (MFF) provides that the budget of the EDF will be €7.014 billion, which represents less than 1 % of the total MFF (€1074.3 billion). See: European Council, [Conclusions of the Special 17-21 July 2020 Council](#), 21 July 2020.

- **The potentially abusive use of Article 346 TFEU** should remain a priority for the European Commission. Despite the relatively important and precise case law, which insists on the exceptional character of this exemption, recourse to Article 346 TFEU still appears quite frequent. In particular, assessing the necessity and proportionality of the derogatory measures - in line with the most recent decisions of the ECJ -<sup>166</sup> should be a priority.
- **The correct application of exclusions.** In recent years the European Commission has dedicated much energy and work to further detailing the conditions for the application of certain exclusions. It is now time to ensure that the application of these provisions by Member States is compliant with these clarifications and, where necessary, enforce the directive through infringement procedures. In particular, given the magnitude of concerned budgets, the recourse to government-to-government contracts (either covered by the specific exclusion or by Article 346 TFEU) should be scrutinised to check whether or not the conditions for their recourse have been respected.
- More broadly, the significant number of procurements that have been directly awarded without any form of competition should be a matter of concern and as such be carefully investigated.
- Ultimately, offsets are still used too often as industrial policy measures, with little to no connection to the preservation of national (or European) 'essential strategic interests'.

The European Commission has a particular responsibility regarding the enforcement of Directive 2009/81/EC as the very structure of defence markets (usually characterised as monopsonies)<sup>167</sup> generally prevents industry from seeking the enforcement of directives judicially. Interviews with industry representatives and with administrative officials have confirmed the long-lasting nature of this attitude. Industry tends to remain cautious about the possibility of complaining directly to the European Commission due to the small size of the market. **To be truly effective, the European Commission's enforcement policy should be based on more active monitoring of EU defence markets.**

When industries do decide to complain directly to the European Commission, a timely reaction from Brussels is crucial. **The sooner the European Commission can evaluate such complaints and issue first warnings and/or requests for clarifications from the Member States concerned, the more those States are incentivised to reflect further on the procurement choices they are making.** If the first action from Brussels is taken after a contract is signed, it is much more difficult to induce behaviour that is more compliant with the directive, since obligations would have already been generated through steps undertaken at national level.

The expectations of a rapid evaluation process by the European Commission is also likely to make sure Member States reset their priorities regarding the enforcement of decisions. If the general expectation is that the European Commission will ultimately act, but that its decision will come too late to affect the procurement decision, any incentive to apply the Defence Procurement Directive fully is significantly reduced. By contrast, if it is expected that any deviation from complete enforcement of the Directive will be closely scrutinised by the European Commission and result in timely warnings or requests for clarification, the procuring authorities are likely to pay greater attention to the full enforcement of the directive.

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<sup>166</sup> See, in particular: ECJ, [Schiebel Aircraft GmbH v Bundesminister für Wirtschaft, Familie und Jugend, Case C-474/12](#) Judgment of the Court (Fifth Chamber), 4 September 2014.

<sup>167</sup> A monopsony is a market characterised by a unique buyer, i.e. the State in the case of the defence market.

## 6.3. Intra-EU transfers of defence-related products: simplify and fine tune the current system

### 6.3.1. Alleviate the consequences on export policy of the application of the Directive 2009/43/EC: operationalise article 4 (8)

Arms exports and transfers are very distinct issues in the context of EU policy and legal framework. Indeed, these fields are subject to different rules:

- The issue of exports towards non-EU countries is part of the Common Security and Defence Policy (CSDP) and subject to unanimity and intergovernmental decision-making rules.
- On the contrary, transfers of defence-related products are part of the internal market and Directive 2009/43/EC has been adopted according to the ordinary legislative procedure.

However, despite these structural differences, the interviews conducted have revealed that the application of the intra-EU transfers regulation has consequences on export policies. Notably, one of the main obstacles to facilitating the movement of defence-related products in the internal market has been the existing congestion of restrictions and conditions for exports. As a consequence, the export of a product is not only affected by the export authorisation of the producer's Member State, but also by the sum of export authorisations and restrictions of the other Member States involved in the production process. This situation *de facto* contradicts the principle outlined in Article 4 (8) of Directive 2009/43/EC.<sup>168</sup>

The complete removal of such restrictions is not feasible in the short-term, mainly due to the differences in export policies and export control policies across Member States. Yet, it has appeared in the interviews conducted that a number of solutions have already been implemented. Some Member States apply for components<sup>169</sup> a *de minimis* threshold below which there is no restriction or control on export, as is the case with the American EAR regulation on dual-use components. This *de minimis* threshold is calculated as a percentage of the exported final product value. The 2019 Franco-German Agreement on export control<sup>170</sup> provides for such a *de minimis* threshold (20%) on a general basis and for a more favourable regime covering defence-related products that have been produced within bilateral industrial cooperation. **Generalising such a *de minimis* rule at European level would result in an increase of the administrative burden for OEMs (as they would have to monitor value repartition of exported products), but it would most certainly improve the current situation and is thus worthy of being pursued.**

Another way to proceed would be to distinguish between key cutting edge components and non-cutting edge components. For the latter type, no restrictions should be applied and a common EU list should be compiled.

**The objective, in the mid-term, must remain to progressively consider intra-EU transfers as supplies taking place within a single country: national authorities need to know what is**

<sup>168</sup> [Directive 2009/43/EC](#) Article 4 (8): 'Except where they consider that the transfer of components is sensitive, Member States shall refrain from imposing any export limitations for components where the recipient provides a declaration of use in which it declares that the components subject to that transfer licence are integrated or are to be integrated into its own products and cannot at a later stage be transferred or exported as such, unless for the purposes of maintenance or repair'.

<sup>169</sup> Products which are intended for integration.

<sup>170</sup> Available (in French) on the [Legifrance website](#).

**transferred from one company to another, but the authorisation should not be an issue of contention.** EU institutions, and particularly the High Representative/Vice President, the European Commission, the European Parliament and the European Defence Agency should make the case for this change of narrative in the discourse framing European strategic autonomy and technological sovereignty, as well as in relation to the European Defence Fund and the ongoing process on defining the strategic compass. Having said that, one should acknowledge that the current EU system may still largely be improved in the short-run.

### 6.3.2. An evolution of the European system for general transfer licences is necessary

There is no consensus among stakeholders (national authorities and industry) on the need for substantial revision of Directive 2009/43/EC by, for example, replacing it with a regulation (which would have the advantage of ensuring a very high – if not the highest – level of harmonisation regarding rules and control practices). If this were the case, the Dual-Use Regulation<sup>171</sup> could serve partly as a model,<sup>172</sup> but this perspective is far from having reached consensus among industry representatives. Even if around half of them would strongly support this possibility, the other half prefers keeping a certain stability in the current system. Yet, industry as a whole strongly supports any further harmonisation of the licence system. Furthermore, in some countries such as Italy, the directive has been enshrined in national law by adding to existing national legislation rather than replacing or reforming it. This has resulted in the creation of a difficult legal framework, which was certainly not the directive's objective.

On the contrary, national authorities are much more reluctant to agree to any substantial change to the directive or to any further harmonisation through legislative means. During an interview, a representative from one of the main exporting countries acknowledged that while of course harmonisation of the scope and conditions of general transfer licences was a good idea, the lack of further harmonisation would nevertheless not be detrimental to the system's functioning. Another national representative held that it is necessary to deepen the process launched with the group of experts in 2016 so as to enlarge the number of countries issuing general licences. It was thought that this would make it possible to assess the results of the recommendations on a common list of general licences and improve Member States awareness of the intra-EU transfers directive along with the consequences on national process of export control policy. Yet, this study has demonstrated that the current system has not fully achieved the results that were initially expected. It appeared from the responses given by industry associations that Directive 2009/43/EC failed to reach at least some of its main objectives, in particular facilitating the circulation of defence-related products within the internal market. As a consequence, it appears that the status quo is not satisfactory, particularly considering how the creation of a European Defence Fund is expected to increase the intensity of industrial cooperation on defence in Europe.

#### Implement the European Commission's recommendations

The introduction of a more centralised system (matching the existing model for transfer and export control of dual-use items) would make perfect sense from a purely academic perspective. However, it must be concluded that the present political conditions for such a 'revolution' are not being met. Furthermore, any attempt in this direction would face a firm opposition from a majority of Member States. It is probably too early to demonstrate to Member States the added value of a European

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<sup>171</sup> Council of the EU, [Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items](#), 5 May 2009.

<sup>172</sup> Indeed, the [Dual-Use Regulation](#) also covers exports of dual-use items whereas the control of exports of defence-related products is covered by the [EU common position 2008/944/CFSP](#).

sovereignty in this domain. Nevertheless, that does not mean that such a system cannot evolve in time. The European Commission's recommendations on the application, scope and conditions of the general transfer licences have been based on exchanges with the expert group on intra-EU transfers. Given that they have been very much welcomed, it can be firmly concluded that some substantial progress can be made in this difficult area. **Accordingly, the European Commission should consider it a priority to follow up on the implementation of these recommendations.**

This study has not been designed to build up an exhaustive assessment covering the implementation of these recommendations in national transfer control systems, even though it appeared from several interviews that they remain implemented in a predominantly non-binding way. Monitoring more precisely the implementation of these (still quite recent) recommendations would be a necessary first step. If monitoring leads to the conclusion that these recommendations have largely been ineffective in achieving a higher level of harmonisation, then the introduction of their main provisions at legislative level should be considered (i.e. through a revision of Directive 2009/43/EC, which would detail more precisely the minimal scope of application of general transfer licences). The perspective of progressively harmonising the scope of application and conditions of the general transfer licences should remain an overarching objective in the coming years.

Equally important is the objective of granting to the general transfer licences the widest possible scope of application. Harmonised general transfer licences with a very narrow scope would bring about only limited added value. This study has demonstrated that the most effective way to achieve a higher degree of openness and convergence is to determine the scope of application of licences by reference to a very strict exceptions list (i.e. a list of defence-related products that cannot be covered by general transfer licences for the preservation of essential national security interests). As a first step, components below a small threshold (such as 20 %) of any weapons system's value should by default be exempted of any restriction and/or condition to export.<sup>173</sup>

### Clarify key notions

As exposed above,<sup>174</sup> certain notions which are key for the implementation of Directive 2009/43/EC still need to be clarified. The most frequently cited example is the expression 'specifically designed for military purpose'. This is referred to frequently in the EU military list (and, as a consequence, the national general transfer licences, as it strongly affects the extent of the directive's scope of application.<sup>175</sup>

Different solutions may be envisaged to settle this issue. One would be to define the scope of general transfer licences in a negative way, namely by referring to a list of products that would not be covered by the general transfer licences as they are too sensitive. Such a definition would have the advantage of returning to the directive's initial philosophy by providing that ex-ante transfer control should be the exception rather than the norm. However, this solution also faces very serious and fierce opposition from several Member States, including some major exporting countries. Another solution would then be to centre on a common definition of the expression 'specifically designed for military purpose', by referring, for instance, to the definition proposed by the Missile Technology Control Regime (MTCR) annex on equipment, software and technology.<sup>176</sup> A third

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<sup>173</sup> See above section on de minimis threshold

<sup>174</sup> See section 4.2.3.

<sup>175</sup> See section 4.3.3.

<sup>176</sup> Missile Technology Control Regime, [MTCR equipment, software and technology annex](#), MTCR/TEM/2017/Annex, 18 May, 2017, point III (a): "specially designed" describes equipment, parts, components or software which, as a result of "development," have unique properties that distinguish them for certain predetermined purposes. For example, a piece of equipment that is "specially designed" for use in a missile will only be considered so if it has no other function

option would be to refer to ECJ case law on Article 346 TFEU,<sup>177</sup> as measures adopted pursuant to this article 'shall not adversely affect the conditions of competition in the internal market regarding products that are not intended for specifically military purposes'.

Similarly, the notion of technology needs to be further clarified in a way that does not exponentially inflate the scope of application of Directive 2009/43/EC.

### Prepare for the future: making the European Defence Fund a success

EU Member States (with support from the European Commission) could benefit from the opportunity offered by a future European Defence Fund to progress on the harmonisation of their control systems. Article 5 (3) of Directive 2009/43/EC provides that 'Member States participating in an intergovernmental cooperation programme concerning the development, production and use of one or more defence-related products may publish a general transfer licence for such transfers to other Member States which participate in that programme as are necessary for the execution of that programme'. The European Defence Fund - or at least some of the projects it supports -, would offer a perfect trial run for any further harmonisation of already existing licences. In addition, the European Defence Fund Regulation<sup>178</sup> provides that export policies of participating Member States would remain unaffected. This implies that Member States participating in a project will have to reach an agreement among themselves on the export policy that will apply in accordance with the results from this project. **This likely harmonisation of specific export policies would make it easier to define a common general transfer licence applicable for the project.** In this perspective, the European Commission could usefully support participating Member States in the drafting of general transfer licences for EDF projects and/or drafting guidelines for maximising the reach and the effectiveness of such general transfer licences.

### Create a European transfer control community

Facing the divergence of transfer control practices across Europe and the lack of trust among Member States, there is a genuine need for developing contacts and exchanges between the national control communities. **As such, the perpetuation of the expert group on intra-EU transfers of defence related products and the enlargement of its scope of activities would be of great benefit in encouraging the emergence of a shared perception on transfer-related issues.**

In addition, **the appointment of unique national points of contact for intra-EU transfers-related issues would certainly help to widen the scope for industrial interdependencies.**

Eventually, **the organisation of training sessions for transfer controllers by the European Commission** would contribute to ensure that each national control system meets the highest criteria of reliability and effectiveness. This guarantee would probably ease discussions about enlarging the scope of application of the general transfer licences as it would limit risks of proliferation, which is a legitimate concern for Member States and the EU.

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or use. Similarly, a piece of manufacturing equipment that is "specially designed" to produce a certain type of component will only be considered such if it is not capable of producing other types of components'.

<sup>177</sup> See for instance: European Court of Justice, Case C-615/10, [Insinöörtoimisto InsTiimi Oy](#), 7 June 2012, pt. 40 and Opinion of the Advocate General Kokott in the same case (notably pt. 48).

<sup>178</sup> The European Defence Fund is still to be formally adopted. Yet, an interinstitutional agreement was reached in 2019 and adopted by the European Parliament. See: European Parliament, [Legislative resolution on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund](#), 18 April 2019.

## Standardising administrative documents

**Although interviewees presented rather mixed feelings about the standardisation of administrative forms/template/documents to be completed by private actors, it seems that such a reform is desirable for at least two reasons.** First and foremost, the existence of common administrative forms would enhance the idea of a European approach to transfers. Second, in the likely case of an intensification of transfers of defence-related products and in the light of the Europeanisation of value-chains, the existence of common administrative documents would lower businesses' administrative burden. At the very least, such an harmonisation would not worsen the current situation.

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## Annexes

### Annex 1. Manual corrections on TED data

The main corrections and choices that have been made to TED data concern the expressed **value of contracts**. Indeed, the reporting of contracts' values is characterised by a certain heterogeneity induced by several factors (differences in reporting methods, case of procurements divided into lots, lack of data).

With effect from 10 September 2020, a notice refers to a unique value for the procurement (contained either in section 'V4. Final value of the contract', 'II2. Final value of the contract' or 'V4. Initial estimated total value of the contract'). When many of these fields were documented, the field 'V4. Final value of the contract' was always preferred. In the case of contracts with lots, the final value of lots have conservatively been preferred to any other value, including the final value of the contract.

In the end, we have converted the different currencies into euros, using the following table and rates:

Currency	Conversion rate in
Bulgarian Lev (BGN)	1 BGN = 0.51
Swiss Franc (CHF)	1 CHF = 0.94
Czech crown (CZK)	1 CZK = 0.037
Danish krone (DKK)	1 DKK = 0.13
British Pound (GBP)	1 GBP = 1.11
Croatian Kuna (HRK)	1 HRK = 0.13
Hungarian Forint (HUF)	1 HUF = 0.0028
Norwegian Krone (NOK)	1 NOK = 0.094
Polish zloty (PLN)	1 PLN = 0.22
Romanian Leu (RON)	1 RON = 0.21
Swedish Krona (SEK)	1 SEK = 0.095
US dollar (USD)	1 USD = 0.89

However, as a potentially important limitation, we have not been able to take into account the inclusion (or not) of VAT in values documented in TED notices.

Another important correction that has been made to the TED database concerns the **country in which the successful bidder is located**. Indeed, approximately 700 notices have presented incomplete data. In these cases, the country could be deducted from the town/postal code/legal status of companies.

## Annex 2. List of interviews

Name	Function and Organisation	Date
Renaud Bellais Romain Broner David Corvina Didier Gondallier de Tugny	Institutional Advisor Export Control Project Leader Head of International Trade Compliance Office Advisor in charge of EU-NATO affairs and French institutional relations  <b>MBDA (industry)</b>	18 June 2020
Costas Tataroglou	Policy Officer Industry Engagement and EU Policies  <b>European Defence Agency</b>	1 July 2020
Lieut.-Col. Baudouin Heuninckx	Head of Legal and Financial Affairs (MRMP-G/E)  <b>Belgian Ministry of Defence, Defence Procurement Division</b>	2 July 2020
Tomas Ilsøe Andersen	Partner  <b>Kammeradvokaten Advokatfirmaet Poul Schmith (DK)</b>	8 July 2020
Jelle Leunis	Policy Advisor  <b>Flemish (BE) Department of Foreign Affairs</b>	10 July 2020
Michael Enberg Robert Limmegård	Vice Chairman of the Legal Committee Secretary General  <b>Swedish Security and Defence Industry Association (SOFF)</b>	10 July 2020
Lars Løken  Ole-Mikael Stavnum	Senior Adviser  Senior Adviser	13 July 2020

Name	Function and Organisation	Date
	<b>Norwegian Ministry for Foreign Affairs, Section for Export Control</b>	
Ulrick Beck	VP Finance	13 July 2020
Pascal Belmin	VP Head of EU Regulatory Affairs	
Dominik Eisenhut	Legal team leader UAS and FCAS	
Camille Mangin	EU policy analyst	
Eric Michel	VP Head of EU & NATO Affairs for Helicopters	
Emilio Robledano	Proxy for Airbus Defence and Space	
Enno Schumacher	Key Account Manager	
Donough Tierney	VP Airbus Strategy & International	
	<b>Airbus</b>	
Ron Nulkes	Director	13 July 2020
	<b>The Netherlands Industry for Defence and Security (NIDV)</b>	
Tarja Jaakola	Head of Unit	15 July 2020
Frans Peltonen	Senior Adviser	
	<b>Finnish Ministry of Defence, Materiel Unit, Resource Policy Department</b>	
Christa Talliniemi	Commercial Legal Advisor	15 July 2020
	<b>Finnish Ministry of Defence, Logistics Division (J4), Finnish Defence Command</b>	
Larisa Antohi	Policy Officer	16 July 2020
Ruth Grech	Policy Officer	
Nicolas Imbert	Team Leader	
Marcyn Kotula	Policy Officer	

Name	Function and Organisation	Date
	<b>European Commission, Directorate-General for Defence Industry and Space (DGDEFIS)</b>	
Arnaud Idiart	Expert, co-author of Export Control Law and Regulations Handbook (Lavoisier ed.) <b>Arnaud Idiart Export Control Expertise (AIE)</b>	17 July 2020
Erik Mulder	Trade Compliance Officer <b>Thales Nederland B.V.</b>	17 July 2020
Lisa Antoine	Adjointe au sous-directeur ' stratégie industrielle et intelligence économique ' du Service des affaires industrielles et de l'intelligence économique, chargée des relations avec les institutions européennes	24 July 2020
IGA Bernard Piekarski	Chef du département ' Politique et Stratégie d'Achat ' du Service des achats d'armement <b>French Direction Générale de l'Armement</b>	
Elise Daniel	Chargée d'étude au sein du bureau du droit européen de la sous-direction du droit international et du droit européen <b>French Ministry of Defence (DAJ)</b>	
Lutz Kneer	Head of Brussels Office <b>Bundesverband der Deutschen Luft- und Raumfahrtindustrie e.V. (BDLI) – German Aerospace Industries Association</b>	27 July 2020
Chantal Dagnaud Alain Fernandez	Chairwoman Treasurer <b>European Club for Countertrade and Offsets</b>	28 July 2020

Name	Function and Organisation	Date
Bettina Krug Thomas Solbach	Desk Officer Head of Division  <b>German, Federal Ministry for Economic Affairs and Energy, division IB6 (Public procurement, procurement review office, real estate sector)</b>	28 July 2020
IGA Bertrand Le Meur  ICETA Gaël Denis Céline Vonesch Jérôme Piodi	Directeur adjoint des affaires internationales, stratégiques et technologiques (AIST)  Sous-directeur adjoint des exportations de matériels de guerre à AIST  Chargée de missions Chargé de missions  <b>French Secrétariat Général de la Défense et de la Sécurité Nationale</b>	29 July 2020
ICA Matthieu Fossat  Lieut.-col. Régis Lamarque	Sous-directeur adjoint gestion des procédures de contrôle (SDGPC)  <b>French Direction générale de l'armement (DGA)</b>  Chef du bureau contrôle des matériels de guerre à la sous-direction de la lutte contre la prolifération et contrôle (DSPC)  <b>French Direction générale des relations internationales et de la stratégie (DGRIS)</b>	
Thomas Barowski  David Grebe Willy Jeanrond	Head of Division for General and Procedural Issues  Desk officer, Division for General and Procedural Issues Head of Division for Conventional Arms  <b>German Federal Office for Economic Affairs and Export Control (BAFA)</b>	30 July 2020

Name	Function and Organisation	Date
Tuija Karanko	Secretary General <b>Association of Finnish Defence and Aerospace Industries (AFDA)</b>	6 August 2020
Sabine van Gastel	Export Control Officer <b>Netherlands Organisation for Applied Scientific Research (TNO)</b>	11 August 2020
Tommi Nordberg	Senior Adviser <b>Finnish Ministry of Defence</b>	12 August 2020
Åge Skøelv	Senior Adviser <b>Norwegian Ministry of Defence, department of investments</b>	13 August 2020
Anonymous	<b>Czech licensing administration, Ministry of Industry and Trade</b>	7 September 2020

In addition, some written contributions were produced by:

- MBDA (defence industry)
- The Greece General Directorate for Defence Investments and Armaments (GDDIA)
- The German Ministry of Defence
- The Directorate-General for Economic Affairs, Spanish Ministry of Defence
- Two Italian prime contractors
- One Italian SME
- The Italian licensing administration
- The Italian Ministry of Defence

## Annex 3. Non-exhaustive list of Foreign Military Sales (FMS) contracts with EU-27 Member States, the UK and Norway

This list is based on open-source data published by the Forum Arms Trade (FMS notification tracker)<sup>179</sup> and has been cross-checked during several interviews conducted for this study.

Year	Country	Estimated cost (in \$ million)	Title
2020	Belgium	33.3	MK 54 Lightweight Torpedoes (LWT)
2020	France	2 000	E-2D Advanced Hawkeye Aircraft, Spares and Support Equipment
2020	Germany	130	MK 54 Lightweight Torpedoes (LWT)
2020	Hungary	230	Advanced Medium Range Air-to-Air Missiles Extended Range (AMRAAM-ER)
2020	Lithuania	380	UH-60M Black Hawk Helicopters
2020	Netherlands	85	MK-48 Torpedo Conversion Kits
2020	Netherlands	40.550	Excalibur Projectiles
2020	Netherlands	39	AIM-120C-8 Advanced Medium Range Air-to-Air Missile (AMRAAM)
2020	Poland	100	Javelin Missile and Command Launch Unit
2019	Belgium	600	MQ-9B SkyGuardian Remotely Piloted Aircraft (RPA)
2019	Bulgaria	1 673	F-16C/D Block 70/72 Aircraft with Support
2019	Croatia	115	UH-60M Black Hawk Helicopters
2019	Czech Republic	205	AH-1Z Attack Helicopters
2019	Czech Republic	800	UH-60M Black Hawk Helicopters
2019	Denmark	200	Airborne Low Frequency Sonar System and Sonobuoys
2019	Germany	122	AGM-88E AARGM Missiles - through the NATO Support and Procurement Agency (NSPA)
2019	Germany	401	Patriot Advanced Capability 3 (PAC-3) Missiles Segment Enhanced
2019	Greece	600	MH-60R Multi-Mission Helicopters

<sup>179</sup> Forum Arms Trade, [FMS notification tracker](#).

Year	Country	Estimated cost (in \$ million)	Title
2019	Hungary	500	AIM-120C-7 Advanced Medium-Range Air-to-Air Missiles (AMRAAM)
2019	Lithuania	170,8	Joint Light Tactical Vehicles
2019	Poland	6 500	F-35 Joint Strike Fighter Aircraft
2019	Spain	107	Assault Amphibious Vehicles
2018	Belgium	6 530	F-35 Joint Strike Fighter Aircraft
2018	Denmark	90	AIM-120 C-7 Advanced Medium Range Air-to-Air Missile (AMRAAM)
2018	Denmark	152	SM-2 Block IIIA Standard Missiles
2018	Finland	112.7	Evolved SEASPARROW Missiles (ESSM)
2018	Finland	622	Harpoon Block II+ Missiles
2018	Finland	70	Mk 41 Vertical Launching Systems
2018	Germany	2 500	MQ-4C Triton Unmanned Aircraft Systems (UAS)
2018	Germany	1 400	C-130J and KC-130J Aircraft
2018	Latvia	200	UH-60M Black Hawk Helicopters
2018	Netherlands	1 191	AH-64E Remanufactured Apache Attack Helicopters
2018	Netherlands	110	F-16 Formal Training Unit at Tucson Air National Guard Base (ANGB), Arizona
2018	Netherlands	70	M1156 Precision Guided Kits
2018	Netherlands	169	MK 54 Lightweight Torpedoes
2018	Netherlands	105	Patriot Recapitalisation (RECAP)
2018	Poland	655	High Mobility Artillery Rocket System (HIMARS) and Related Support and Equipment
2018	Slovakia	2 910	F-16 Block 70/72 V Configuration Aircraft
2018	Spain	1 300	CH-47F Aircraft
2018	Spain	860.4	AEGIS Combat System
2018	Sweden	3 200	Patriot Configuration-3+ Modernised Fire Units
2018	United Kingdom	500	MQ-9 Continuing Contractor Logistics Support

Year	Country	Estimated cost (in \$ million)	Title
2018	United Kingdom	650	AIM-120D Advanced Medium Range Air-to-Air Missile (AMRAAM)
2018	United Kingdom	90	SEAL Delivery Vehicle (SDV) MK 11 Shallow Water Combat Submersibles (SWCS)
2018	United Kingdom	75	Phalanx Baseline 2 Radar Upgrade Kits
2018	United Kingdom	3 500	H-47 Chinook (Extended Range) Helicopters and Accessories
2017	Czech Republic	575	UH-1Y Utility Helicopters
2017	Greece	80	CH-47D Helicopters
2017	Greece	2 404	Upgrade of F-16 Aircraft to F-16 Block V Configuration
2017	Netherlands	58,2	AN/AAR-57A(V)7 Common Missile Warning System (CMWS)
2017	Netherlands	34	AGM-114R Hellfire Missiles
2017	Netherlands	53	AIM-120 C-7 Advanced Medium Range Air-to-Air Missile (AMRAAM)
2017	Norway	170	AIM-120 C-7 Advanced Medium Range Air-to-Air Missiles (AMRAAM)
2017	Poland	10 500	Integrated Air and Missile Defense (IAMD) Battle Command System (IBCS)-enabled Patriot Configuration-3+ with Modernised Sensors and Components
2017	Poland	250	High Mobility Artillery Rocket System (HIMARS)
2017	Poland	250	AIM-120C-7 Advanced Medium Range Air-to-Air Missiles (AMRAAM)
2017	Poland	200	F-16 Follow-on Support
2017	Romania	3 900	Patriot Air Defense System
2017	Romania	1 250	High Mobility Artillery Rocket Systems (HIMARS)
2017	Slovakia	150	Bell 429 Light Utility Helicopters
2017	United Kingdom	400	Continuation of C-17 Logistics Support Services and Equipment
2017	United Kingdom	150	Hellfire Missiles

Year	Country	Estimated cost (in \$ million)	Title
2017	United Kingdom	1 035	Joint Light Tactical Vehicles (JLTV) and Accessories
2016	Finland	156	F/A-18 Mid-Life Upgrade Program
2016	France	90	Guided Multiple launch rocket system GMLRS Unitary rocket pods and related support
2016	France	30	Hellfire missiles
2016	Norway	1 750	P-8A Aircraft and Associated Support
2016	Poland	200	JASSM-ER with Support
2016	United Kingdom	3 200	P-8A Aircraft and associated equipment, training, and support
2016	United Kingdom	1 000	Certifiable Predator B Remotely Piloted Aircraft

## Annex 4. Publication rates (2016-2018)

2016			
Country	Amount tendered through TED, in €	COFOG data, in €	Publication rate
Austria	1 712 924	422 400 000	0.41 %
Belgium	1 202 400	503 100 000	0.24 %
Bulgaria	47 562 181	76 900 000	61.85 %
Croatia	9 902 374	136 800 000	7.24 %
Cyprus	0	27 900 000	0.00 %
Czech Republic	59 019 145	332 100 000	17.77 %
Denmark	60 992 172	1 283 600 000	4.75 %
Estonia	31 383 706	164 900 000	19.03 %
Finland	41 559 437	1 136 000 000	3.66 %
France	1 204 675 742	11 181 000 000	10.77 %
Germany	270 570 683	10 534 000 000	2.57 %
Greece	1 325 775	712 000 000	0.19 %
Hungary	26 983 855	275 300 000	9.80 %
Ireland	0	86 300 000	0.00 %
Italy	62 746 167	881 000 000	7.12 %
Latvia	0	65 700 000	0.00 %
Lithuania	35 342 851	105 600 000	33.47 %
Luxembourg	0	20 300 000	0.00 %
Netherlands	7 959 474	2 457 000 000	0.32 %
Norway	48 904 514	1 515 700 000	3.23 %
Poland	235 124 203	1 790 900 000	13.13 %
Portugal	8 115 000	250 200 000	3.24 %
Romania	21 188 299	184 900 000	11.46 %
Slovakia	8 417 634	176 700 000	4.76 %

2016			
Country	Amount tendered through TED, in €	COFOG data, in €	Publication rate
Slovenia	38 423 000	63 500 000	60.51 %
Spain	0	1 282 000 000	0.00 %
Sweden	1 485 800	1 787 600 000	0.08 %
United Kingdom	3 631 102 666	18 350 700 000	19.79%
<b>Total EU-27 + 2</b>	<b>5 855 700 002</b>	<b>55 804 100 000</b>	<b>10.49 %</b>

2017			
Country	Amount tendered through TED, in €	COFOG data, in €	Publication rate
Austria	697 500	479 700 000	0.15 %
Belgium	12 089 244	494 900 000	2.44 %
Bulgaria	69 281 257	73 900 000	93.75 %
Croatia	54 681 808	141 000 000	38.78 %
Cyprus	158 222	27 100 000	0.58 %
Czech Republic	137 356 916	303 200 000	45.30 %
Denmark	468 045 966	1 512 400 000	30.95 %
Estonia	31 419 313	165 300 000	19.01 %
Finland	20 284 328	1 245 000 000	1.63 %
France	3 717 682 129	12 421 000 000	29.93 %
Germany	130 820 492	11 146 000 000	1.17 %
Greece	2 189 040	729 000 000	0.30 %
Hungary	94 495 973	413 800 000	22.84 %
Ireland	2 599 380	90 600 000	2.87 %
Italy	62 493 539	1 113 000 000	5.61 %
Latvia	7 075 325	64 300 000	11.00 %

2017			
Country	Amount tendered through TED, in €	COFOG data, in €	Publication rate
Lithuania	41 993 453	119 100 000	35.26 %
Luxembourg	0	19 600 000	0.00 %
Netherlands	8 778 710	2 524 000 000	0.35 %
Norway	35 292 385	1 563 300 000	2.26 %
Poland	438 043 295	1 933 600 000	22.65 %
Portugal	0	300 100 000	0.00 %
Romania	48 097 018	242 300 000	19.85 %
Slovakia	19 921 222	217 700 000	9.15 %
Slovenia	17 999 320	54 800 000	32.85 %
Spain	11 650 929	1 068 000 000	1.09 %
Sweden	167 715 993	1 817 700 000	9.23 %
United Kingdom	2 790 601 230	17 436 400 000	16.00 %
<b>Total EU-27 + 2</b>	<b>8 391 463 987</b>	<b>57 716 800 000</b>	<b>14.54 %</b>

2018			
Country	Amount tendered through TED, in €	COFOG data, in €	Publication rate
Austria	14 075 210	480 000 000	2.93 %
Belgium	35 197 992	528 000 000	6.67 %
Bulgaria	45 044 066	93 600 000	48.12 %
Croatia	44 881 721	146 200 000	30.70 %
Cyprus	12 508 955	26 100 000	47.93 %
Czech Republic	180 880 904	486 900 000	37.15 %
Denmark	135 916 639	1 517 200 000	8.96 %
Estonia	36 333 533	180 000 000	20.19 %

2018			
Country	Amount tendered through TED, in €	COFOG data, in €	Publication rate
Finland	32 083 471	1 094 000 000	2,93 %
France	1 531 145 568	12 540 000 000	12.21 %
Germany	193 991 283	11 482 000 000	1.69 %
Greece	40 799 807	714 000 000	5.71 %
Hungary	26 516 650	396 900 000	6.68 %
Ireland	0	99 100 000	0.00 %
Italy	44 286 727	1 110 000 000	3.99 %
Latvia	55 222 577	72 500 000	76.17 %
Lithuania	18 298 100	142 800 000	12.81 %
Luxembourg	0	43 600 000	0.00 %
Netherlands	44 039 550	2 809 000 000	1.57 %
Norway	90 033 788	1 555 600 000	5.79 %
Poland	452 061 512	2 163 400 000	20.90 %
Portugal	20 495 000	309 300 000	6.63 %
Romania	113 261 067	272 500 000	41.56 %
Slovakia	13 426 434	297 700 000	4.51 %
Slovenia	57 124 440	86 000 000	66.42 %
Spain	67 520 293	1 118 000 000	6.04 %
Sweden	14 522 286	1 996 700 000	0.73 %
United Kingdom	2 655 388 787	17 372 900 000	15.28 %
<b>Total EU-27 + 2</b>	<b>5 975 056 360</b>	<b>59 134 000 000</b>	<b>10.10 %</b>

Average (2016-2018)			
Country	Amount tendered through TED, in €	COFOG data, in €	Publication rate
Austria	5 495 211	460 700 000	1.19 %
Belgium	16 163 212	508 666 667	3.18 %
Bulgaria	53 962 501	81 466 667	66.24 %
Croatia	36 488 634	141 333 333	25.82 %
Cyprus	4 222 392	27 033 333	15.62 %
Czech Republic	125 752 322	374 066 667	33.62 %
Denmark	221 651 592	1 437 733 333	15.42 %
Estonia	33 045 517	170 066 667	19.43 %
Finland	31 309 079	1 158 333 333	2.70 %
France	2 151 167 813	12 047 333 333	17.86 %
Germany	198 460 820	11 054 000 000	1.80 %
Greece	14 771 541	718 333 333	2.06 %
Hungary	49 332 159	362 000 000	13.63 %
Ireland	866 460	92 000 000	0.94 %
Italy	56 508 811	1 034 666 667	5.46 %
Latvia	20 765 967	67 500 000	30.76 %
Lithuania	31 878 135	122 500 000	26.02 %
Luxembourg	0	27 833 333	0.00 %
Netherlands	20 259 245	2 596 666 667	0.78 %
Norway	58 076 895	1 544 866 667	3.76 %
Poland	375 076 337	1 962 633 333	19.11 %
Portugal	9 536 667	286 533 333	3.33 %
Romania	60 848 795	233 233 333	26.09 %
Slovakia	13 921 764	230 700 000	6.03 %
Slovenia	37 848 920	68 100 000	55.58 %

Average (2016-2018)			
Country	Amount tendered through TED, in €	COFOG data, in €	Publication rate
Spain	26 390 407	1 156 000 000	2.28 %
Sweden	61 241 360	1 867 333 333	3.28 %
United Kingdom	3 025 697 561	17 720 000 000	17.08 %
<b>Total EU-27 + 2</b>	<b>6 740 740 117</b>	<b>57 551 633 333</b>	<b>11.71 %</b>

## Annex 5. Is the European Defence Equipment Market (EDEM) deepening?

Given the statistical shortcomings proper to trade in defence-related products,<sup>180</sup> our study explored two different methods of assessing this deepening of the EDEM:

### Method 1: COARM reports

According to a first hypothesis, any deepening of the internal market should be reflected by an increase in the number and value of transfer licences granted by Member States. It should indeed reflect an intensification of the intra-EU trade, based on an assumption that Directive 2009/43/EC had relatively little effect on recourse to transfer licences.

As previously mentioned, Member States report their arms export control activities on an annual basis at EU level.<sup>181</sup> However, several reports have pointed to the lack of data comparability within these reports, due notably to the lack of common definitions on some key concepts, such as 'licensed value' or 'actual exports'.<sup>182</sup> In addition, the lack of user-friendliness in the current template for these reports<sup>183</sup> very much hinders any attempt to use the data. For the purpose of this study, the publication of the COARM reports data in a structured way<sup>184</sup> has been particularly useful.

However, our use of COARM data is not particularly conclusive when it comes to any potential deepening of the internal market. National trajectories concerning the number of transfer licences granted and the value of transfer licences requested are quite heterogeneous. For instance, France has experienced a significant decrease in the number of transfer licences granted since 2014 (-42 % between 2013 and 2018), but a very significant increase in the value of transfer licences requested (from an average of €2.7 billion for the period 2008-2013 to an average of €15.8 billion for the period 2014-2018). For some countries (such as Italy or Poland), figures for the number of transfer licences granted seem to suggest an increase of trade intensity in defence-related products. However, data on the value is less conclusive.

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<sup>180</sup> See above.

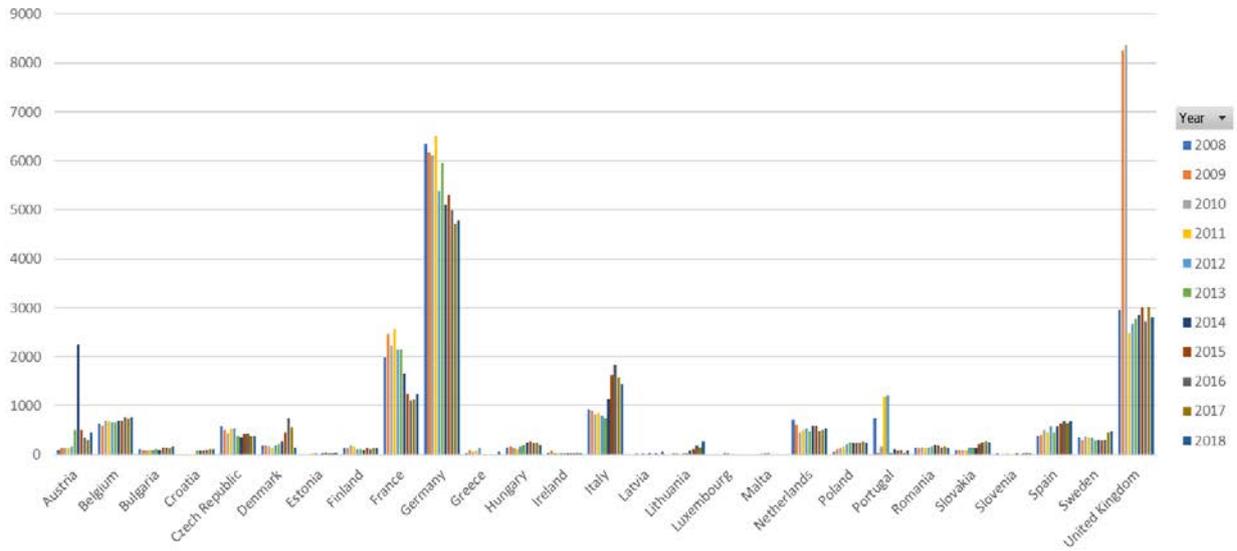
<sup>181</sup> See the above chapter on Directive 2009/43/EC.

<sup>182</sup> See for the most recent one: I. Stewart, C. Meyer, B. Wilkinson, [Recommendations for a transparent and detailed reporting system on arms exports within the EU and to third countries, In-depth analysis for the European Parliament](#), DG for External Policies of the Union (DG EXPO), European Parliament, May 2020, p. 15 and following.

<sup>183</sup> Data is not published in as a flat data or even a structured file.

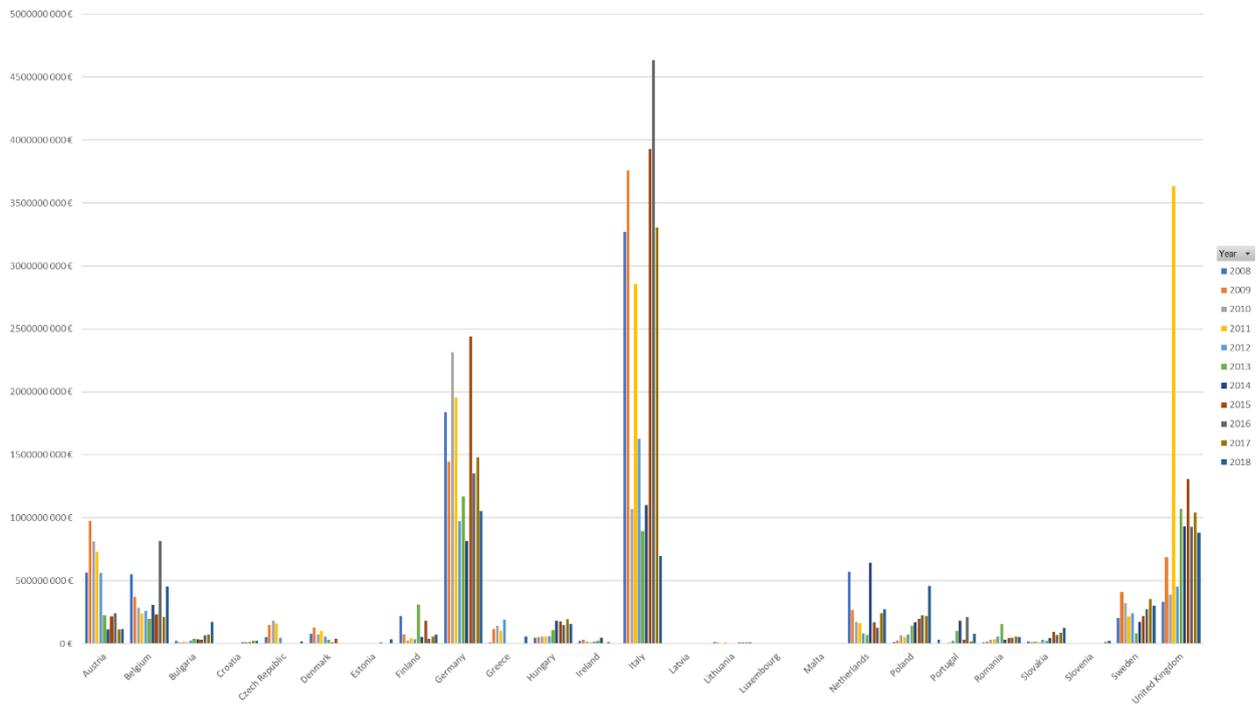
<sup>184</sup> Campaign Against the Arms Trade, [EU Arms Export Data](#), 26 November 2019.

Figure 12 – Number of transfer licences granted (2008-2018; EU28)



Source: COARM report/CAAT.

Figure 13 – Value of transfer licences requested (2008-2018; EU28, minus France)<sup>185</sup>

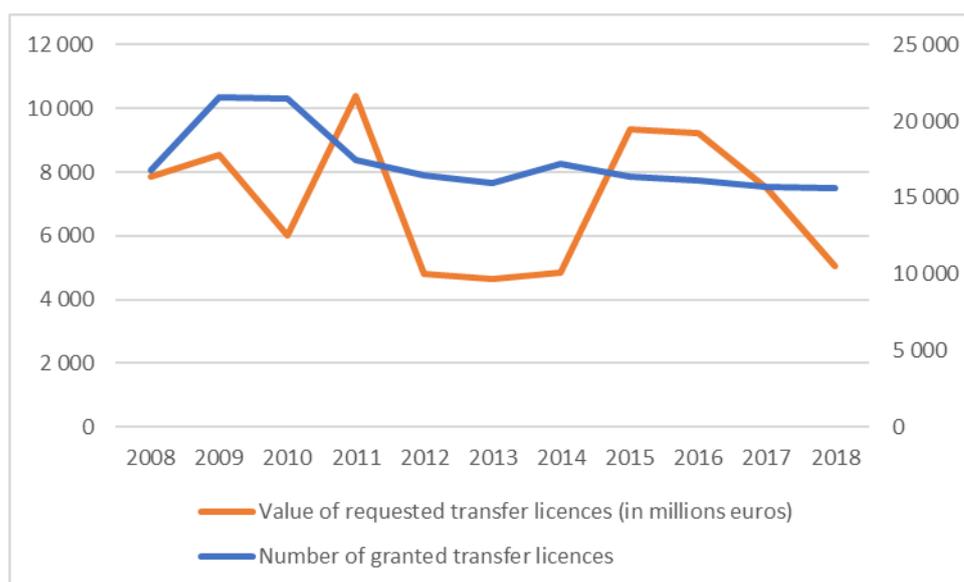


Source: COARM report/CAAT.

<sup>185</sup> French reported figures are too important to be represented together with other EU Member States.

When comparing the total figures, it is not possible to draw any conclusions as no real trend seems to emerge. Values do not reflect any strong trend, while the number of licences granted is experiencing a very slow decrease.

Figure 14 – Number of transfer licences granted and value of transfer licences requested, in € million (2008-2018; EU28 total)



Source: COARM report/CAAT.

The absence of reliability of COARM data (and especially the lack of data on the final value of transfers) and the inability to verify the assumptions on which this method is based (i.e. Directive 2009/43/EC's lack of effectiveness) represent genuinely serious limitations.

### Method 2: international trade data (CN codes)

An alternative method for assessing any deepening of the internal market when it comes to defence-related products would be through recourse to general trade and customs statistical indicators, such as the CN (Combined Nomenclature) or NACE (Nomenclature statistique des Activités économiques dans la Communauté Européenne / Statistical Classification of Economic Activities in the European Community) classification systems. However, the main issue with those particular systems is that they do not encompass any specific codes for defence-related activities. Indeed, with a few exceptions which are directly related to weapons and ammunitions, there are no dedicated CN or NACE codes to assess the evolution of defence-related trade. As such, 'the defence industry is not an industry in a statistical sense'.<sup>186</sup> The Combined Nomenclature is even less adapted than the NACE classification, which has at least been progressively enhanced by the addition of some specific codes.<sup>187</sup> Even the chapter dedicated to weapons and ammunitions cannot be considered as relevant in itself, as it also covers non-military weapons (such as sporting or hunting shotguns).

<sup>186</sup> Europe Economics, *Openness of Member States' defence markets*, November 2012, p. 89 quoted in European Commission, [Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security](#), SWD(2016) 407, p. 23.

<sup>187</sup> For instance, the code C304, Military fighting vehicles that does not exist within the NC classification.

A rigorous assessment of a deepening in the internal market for defence-related products would require such data for two reasons: important parts of defence industry are actually recorded in an aggregated way with civilian industry (shipbuilding, aircraft, electronics industry); and defence value chains are increasingly hybridised with their civilian counterparts.<sup>188</sup> As a consequence, it is even harder to assess properly the dynamics of the trade in defence-related products.

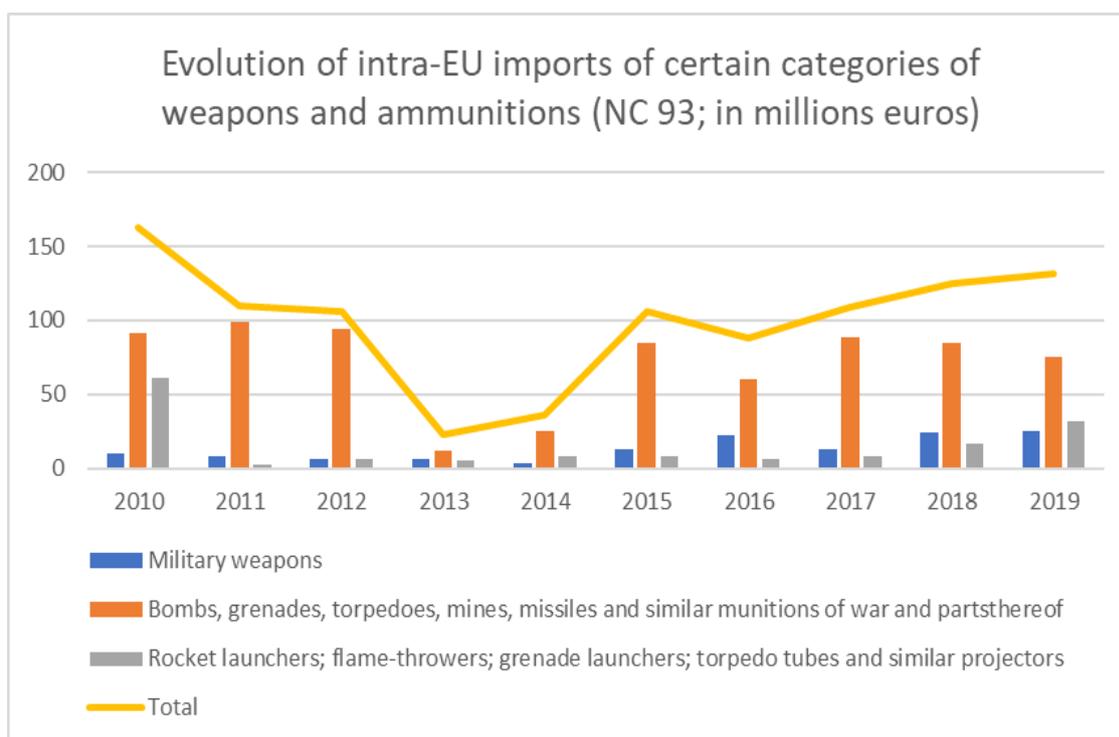
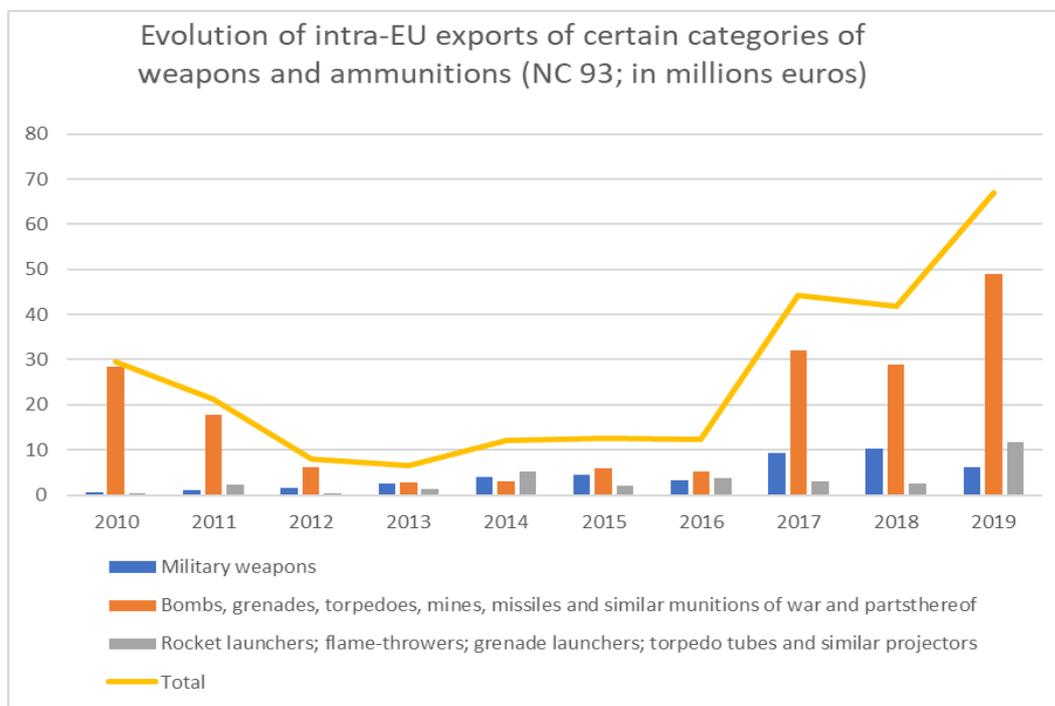
As a consequence, focusing on purely defence NC codes<sup>189</sup> offers only a biased view and hence must be considered as mostly inconclusive. Indeed, a clear increase in intra-EU exports of arms and ammunitions (more moderated in the case of intra-EU imports) can be observed since 2013-2014, but such an observation remains too narrow to be relevant. In particular, it does not say anything about the Europeanisation (or the lack thereof) of defence value chains as these codes mainly cover end products.

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<sup>188</sup> See, P. Herault, [thèse de doctorat, Université de recherche Paris Science et Lettres](#), 2018, p. 294..

<sup>189</sup> Namely: codes 9301 'Military weapons' incl. 'Artillery weapons' and 'Rocket launchers; flame-throwers; grenade launchers; torpedo tubes and similar projectors' and 9306 'Bombs, grenades, torpedoes, mines, missiles and similar munitions of war and parts thereof; cartridges and other ammunition and projectiles and parts thereof, including shot and cartridge wad'.

Figure 15 – Evolution of intra-EU trade for certain categories of weapons and ammunitions (NC93)



Source: [Eurostat NC8](#).

## Annex 6. Questionnaires for assessing the implementation of Directive 2009/43/EC

### Questionnaires for Member States

#### **General comments on the application of the directive**

**Q1.** Can you explain how to access to the implementing measure of directive 2009/43/EC?

**Q2a.** How would you assess the impact of the directive on the activities of the businesses present on your territory?

- Positive
- Rather positive
- Neutral
- Rather negative
- Negative

**Q2b.** Can you specify your answer?

**Q3a.** Have you identified hurdles in the application of the directive?

- Yes
- No

**Q3b.** If yes, can you specify?

**Q4a.** Have you identified good practices regarding the implementation and the application of the directive?

- Yes
- No

**Q4b.** If yes, can you specify?

#### **General and global licences**

**Q5a.** In your country, are there defence-related products specifically excluded from the general and/or global licences?

- Yes
- No

**Q5b.** If yes, can you name them (or the categories)?

**Q6a.** Are your general licences publicly available?

- Yes
- No

**Q6b.** If yes, please explain how to access to this document (URL, for instance)?

**Q6c.** If no, please explain why is the document not publicly available?

**Q7a.** In your opinion, is the level of harmonisation of general and global licences introduced by the directive facilitating the commercial relationships between defence companies?

- Yes
- No

**Q7b.** Please explain your answer (pros & cons).

**Certification**

**Q6.** In your opinion, with respect to the size of the firms, what type of companies in your country profits the more from the certification? You can select more than one option.

- Enterprises with a number of employees between 1 and 250 employees
- Enterprises with a number of employees between 251 to 1 000 employees
- Enterprises with a number of employees between 1 000 to 5 000 employees
- Enterprises with a number of employees superior to 5 000 employees

Comments:

**Q7.** In your opinion, considering the type of activity, what type of companies in your country profits the more from the certification? You can select more than one option.

- Systems integrators and program managers
- Prime contractors, major subsystems producers and integrators
- Secondary subsystems producers and major components suppliers
- Other components suppliers

Comments:

**Q8a.** To your knowledge, do companies in your country face obstacles in the certification process?

- Yes  No  N/A

**Q8b.** In case of yes, please explain your answer.

**Q9a.** In your opinion, is it relevant to make a distinction between transfers within the European Union and exports outside the European Union?

- Yes  No

**Q9b.** In case of yes or no, please explain your answer.

**Q10a.** Do you know CERTIDER?

- Yes  No

**Q10b.** If yes, do you use it?

- Yes  No

**Q10c.** In your opinion, how useful is CERTIDER?

**End User Controls**

**Q9a.** In your country, are there procedures for:

- End use[r] controls at the stage of licensing
- Delivery verification
- Post-shipment end-use monitoring

**Q9b.** Please specify the documentation and/or summarise the procedures

**Q10a.** In your opinion, would a harmonisation of end-user certificated facilitate the trade of defence related-products?

- Yes  No

**Q10b.** Please explain your answer (pros & cons).

**Q11a.** In your opinion, is it necessary to improve end user controls for exports outside the European Union?

Yes  No

**Q11b.** In case of yes or no, please explain your answer.

**Q12a.** In your opinion, is it necessary to maintain end user controls for transfers inside the European Union?

Yes  No

**Q12b.** In case of yes or no, please explain your answer.

**Future of the directive**

**Q13a.** In your opinion, should the directive be substantially revised?

Yes  No

**Q13b.** If yes, please specify.

**Q13c.** In particular, is a further harmonisation of the scope of licences at EU level desirable?

**Q14.** In your opinion, how could cooperation between national authorities (notably on end-use/end-user control) be improved?

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**Questionnaires for defence associations**

**General comments on the application of the directive**

**Q1.** Are you familiar with the Directive on transfers of defence-related products within the EU (Directive 2009/43/EC)?

- Not at all
- We have heard about it
- We know about it
- We thoroughly examined it

Comments:

**Q2a.** How would you assess the impact of the directive on the activities of the companies in your association?

- Positive
- Rather positive
- Neutral
- Rather negative
- Negative

**Q2b.** Can you specify your answer?

**Q3a.** Have you identified hurdles in the application of the directive?

Yes  No

**Q3b.** If yes, can you specify?

**Q4a.** Have you identified good practices regarding the implementation and the application of the directive?

Yes  No

**Q4b.** If yes, can you specify?

**General and global licences**

**Q5.** Do you have access to the general licences published by European Union Member States?

Yes  No

Comments.

**Q6a.** In your opinion, is the level of harmonisation of general and global licences introduced by the directive facilitating the commercial relationships between defence companies?

Yes  No

**Q6b.** Please explain your answer (pros & cons).

**Certification**

**Q7.** In your opinion, with respect to the size of the firms, what type of companies in your country will profit the more from the certification? You can select more than one option.

- Enterprises with a number of employees between 1 and 250 employees
- Enterprises with a number of employees between 251 to 1 000 employees
- Enterprises with a number of employees between 1 000 to 5 000 employees
- Enterprises with a number of employees superior to 5 000 employees

Comments:

**Q8.** In your opinion, considering the type of activity, what type of companies in your country will profit the more from the certification? You can select more than one option.

- Systems integrators and program managers
- Prime contractors, major subsystems producers and integrators
- Secondary subsystems producers and major components suppliers
- Other components suppliers

Comments:

**Q9a.** To your knowledge, do companies in your association face obstacles in the certification process?

Yes  No

**Q9b.** In case of yes, please explain your answer.

**Q10a.** In your opinion, is it relevant to make a distinction between transfers within the European Union and exports outside the European Union?

Yes  No

**Q10b.** Please explain your answer.

**Q11a.** Do you know CERTIDER?

Yes

No

**Q11b.** If yes, do you use it?

Yes

No

**Q11c.** In your opinion, how useful is CERTIDER?

**End User Controls**

**Q12a.** In your opinion, is the absence of harmonisation of end user controls for exports outside the European Union a source of impediments for intra-EU transfers?

Yes

No

**Q12b.** Please specify your answer.

**Q13a.** If yes, could these impediments be removed?

Yes

No

**Q13b.** Please explain your answer.

**Q14a.** In your opinion, would a harmonisation of end-user certificates facilitate the trade of defence related-products?

Yes

No

**Q14b.** Please explain your answer (pros & cons).

**Q15a.** In your opinion, is it necessary to improve end user controls for exports outside the European Union?

Yes

No

**Q15b.** Please explain your answer.

**Future of the directive**

**Q16a.** In your opinion, should the directive be substantially revised?

Yes

No

**Q16b.** If yes, what are they?

**Q17.** Is a further harmonisation of the scope of licences at EU level desirable?

**Q18.** In your opinion, how could cooperation between national authorities (notably on end-use/end-user control) be improved?

## Annex 7. Interview grids

### **Interview grids for interviews with national authorities on the implementation of Directive 2009/81/EC**

#### **General assessment**

Q1. How would you assess the implementation of directive 2009/81/EC in your country and its impact on transparency and competition for your procurements? Does the directive has reduced the recourse to art 346 TFEU?

Q2. Do you currently face particular hurdles in implementing the directive?

Q3. Have you identified unintended consequences of the introduction of directive 2009/81/EC?

Q4. Could you provide data on the proportion of your procurements that are respectively covered by directive 2009/81/EC (i.e. publicised through TED) and exceptions (below thresholds, article 346 TFEU, other exceptions)?

#### **Exceptions to the directive**

*The directive provides for a certain number of exceptions which justify the non-application of the directive to certain type of procurements. We would like to have your feedback on your recourse to some of them.*

Q5. Directive 2009/81/EC provides for an exception for certain contract awarded by a government to another government (G-to-G): Have you already used this exception?

Q5b. Have you ever resorted to FMS contracts? If so, why did you do so? And did you recourse to any form of competition during the award process (e.g. between different G-to-G contracts)?

Q5c. The European Commission published, in 2016, a [guidance notice](#) to detail the conditions under which covered Member States may recourse to this exception: How would you assess its impact and its added-value?

Q6. Directive 2009/81/EC provides for an exception for certain contract awarded within a collaborative programme: Have you already used this exception?

Q6b. The European Commission published, in 2019, a [guidance notice](#) to detail the conditions under which covered Member States may recourse to this exception: How would you assess its impact on your practice?

Q7. More generally, the Treaty provides that covered Member States may not apply EU rules when they would imply a threat to their 'essential security interests' (346 TFEU): have you ever used this exception? If so, why (reasons) and how (tendering process) did you do so?

#### **Relation with directive 2009/43/EC on intra-EU transfers of defence-related products**

Q8. Has the need for a transfer licence from another covered State ever been the cause for the rejection of a European response to a public tender?

#### **Enforcement of the directive**

Q10. Have you ever faced legal actions from an unsuccessful bidder or an allegedly aggrieved economic operator?

Q11. Did the Commission ever raise questions on and/or initiated an infringement procedure about one of your procurements? If so, what has been the outcome of the Commission's actions?

**Offsets requirements**

*With the application of directive 2009/81/EC, the European Commission planned a 'progressive phasing out' of offsets requirements on the Internal Market. We would like to have your feedback on the effect of the directive on such practices and on the action of the European Commission on this specific issue.*

Q12. Do you require offsets / industrial compensations / offsets-like measures to protect essential security interests?

Q12b. If so, could you precise the type of requirements you impose to economic operators (types of obligation, valuation, etc.)?

**Subcontracting provisions**

The directive 2009/81/EC provides for the possibility for Member States to require the successful bidder to publicly tender (according to the directive provisions) certain parts of the procurement to SMEs. In order to favour the recourse to such provisions, the European Commission issued, in 2018, a [Recommendation on cross-border market access for sub-suppliers and SMEs in the defence sector](#).

Q13. Have you ever used such clauses?

Q13b. If not, why?

Q13c. If so, how would you assess these provisions?

Q14. How would you assess the impact of the Commission's Recommendation on cross-border market access for sub-suppliers and SMEs in the defence sector?

**Future of the directive**

Q15. How do you envision the relation of this directive with other EU defence initiatives, especially PESCO and the future EDF?

Q16. Does the enforcement of the directive need to remain a policy priority for the current mandate of the European Commission?

Q17. Do you consider that the directive needs to be substantially revised / further precised by a non-binding guidance / other? If so, in what sense?

\*\*\*

**Interview grids for interviews with national authorities on the implementation of Directive 2009/43/EC**

**General assessment**

Q1. How would you assess the implementation of the directive in your country and its contribution to the objectives of (1) simplifying the rules and procedures applicable to the intra-Community transfer of defence-related products and (2) improving the competitiveness of EU defence industry?

In particular, could you provide data on gains of time in intra-EU transfer and/or economic gains enabled by the directive?

Q2. Have you identified unintended consequences of the directive 2009/43/EC?

Q3. To what extent is the Directive guaranteeing greater security of supply?

### **Transfer licences**

Q4. Do you use some or all exemptions from the obligation of prior authorisation that are provided for by article 4 of the directive?

Q5. How many General Transfer Licences exist in your country? How did you define their scope?

Q6. How effective is the system of General and Global Transfer Licences?

Q7. Could you share data on the recourse to general / global / individual transfer licences, ideally since the implementation of the directive?

Q8. In your opinion, is the level of harmonisation at EU level of general and global transfer licences facilitating the commercial relationships between defence companies?

Q8b. How would you assess the cooperation on a potential further harmonisation of transfers licences among covered Member States?

### **Certification**

Q9. How many companies have been certified in your country?

Q9b. According to your knowledge, what kind (size, role in the supply chain, etc.) of companies may benefit from the certification process?

Q10. How would you assess the efficiency of your certification process?

Q10b. Do companies generally face difficulty complying with requirements of the certification process? If so, did you take it into account by modifying your process?

Q10c. How long does the certification process generally last?

Q10d. Have you any data on the estimated economic and/or time gains for certified enterprises?

Q11. According to you, what is the value-added of getting certified for a company? Could this value-added be improved?

\*\*\*

### **End-use/end-user control and conditions/limitations to re-export**

Q12. What procedures exist to control the end-use and/or end-user of transferred within the internal market defence-related products and do they differ from those applicable to exports outside the EU?

Q13. In your opinion, is the absence of harmonization of end user controls for exports outside the European Union a source of impediments for intra-EU transfers?

Q13b. How do conditions and/or limitations to re-export affect intra-EU trade of defence related products?

Q14. In your opinion, would a harmonisation of end-user certificates facilitate the trade of defence-related products?

#### **Action of the European Commission**

Q15. How would you assess the action of the European Commission to favour a higher degree of harmonisation at EU level?

Q16. How would you assess the impact of European Commission's [recommendations](#) on certain General Transfer Licences and on certification?

#### **Future of the directive**

Q17. Should a further harmonisation of the content of general and/or global licences be sought? If so, what would be the most effective way to proceed (legislative, non-binding guidelines, sharing of good practices, etc.)?

Q18. How do you envision the relation of this directive with other EU defence initiatives, especially PESCO and the future EDF?

Q19. Would you be favourable to specific global licences for EDF and / or PESCO projects to ease them? Would another solution be preferable?

Q20. Would the directive need to be substantially revised? If so, should the directive be replaced by a Regulation?

Q21. Would a centralized database on general and/or global licences be useful? If so, should it contain statistical data on the recourse to each type of licence?

\*\*\*

### **Interview grids for interviews with business associations and companies on the implementation of Directive 2009/81/EC**

#### **General assessment**

Q1. What is your general assessment of the implementation of directive 2009/81/EC by covered Member States and on its contribution to the increase in transparency and competition on Member States' defence procurements?

Q1b. How would you assess the effect of implementation of this directive on your business in Europe?

Q1c. Have you identified unintended consequences of the introduction of directive 2009/81/EC?

Q2. Have you noticed differences of practice among covered Member States in the implementation of directive 2009/81/EC?

Q3. What is (or are) the main problem(s) you are confronted with in the implementation of this directive?

### **Exceptions to the directive**

*The directive provides for a certain number of exceptions which justify the non-application of the directive to certain type of procurements. We would like to have your feedback on the recourse by covered Member States to some of them.*

Q4. Directive 2009/81/EC provides for an exception for certain contract awarded by a government to another government: Have you already been confronted to the use of this exception in Europe?

Q4b. More precisely, have you ever been confronted to FMS contracts?

Q4c. The European Commission published, in 2016, a [guidance notice](#) to detail the conditions under which covered Member States may recourse to this exception: are you aware of such a guidance? How would you assess its impact on covered Member States' practices?

Q5. Directive 2009/81/EC provides for an exception for certain contract awarded within a collaborative programme: Have you already been confronted to the use of this exception?

Q5b. The European Commission published, in 2019, a [guidance notice](#) to detail the conditions under which covered Member States may recourse to this exception: are you aware of such a guidance? How would you assess its impact on covered Member States' practices?

Q6. More generally, the Treaty provides that covered Member States may not apply EU rules when they would imply a threat to their 'essential security interests' (346 TFEU): according to your knowledge, how frequent is the recourse to article 346 TFEU by covered Member States? Have you noticed geographical disparities in the recourse to article 346 TFEU?

Q7. How would you assess the impact of these exceptions on your activity?

### **Relation with directive 2009/43/EC on intra-EU transfers of defence-related products**

Q8. Have you ever been confronted with covered Member States using the potential denial of a licence to refuse a non-local solution?

### **Enforcement of the directive**

Q9. Have you ever considered filing a complaint before a national jurisdiction against a procurement practice of a covered member State? If so, did you do so?

Q9b. In the case you did not file a complaint, could you specify reasons that prevailed in your decision?

Q10. Have you ever signalled procurement practices of covered Member States to the European Commission? If so, what have been the eventual consequences of your signalling?

Q11. How would you assess the action of the European Commission in enforcing the directive?

### **Offsets requirements**

*With the application of directive 2009/81/EC, the European Commission planned a 'progressive phasing out' of offsets requirements on the Internal Market. We would like to have your feedback on the effect of the directive on such practices and on the action of the European Commission on this specific issue.*

Q12. How would you assess the evolution of offset practices from covered Member States since the implementation of the directive (September 2011)?

Q13. The European law only permits offsets in some very specific case, i.e. where they are absolutely necessary to the protection of 'essential security interests' of the concerned covered Member State. As a consequence, practices such as indirect offsets, offsets affecting civilian or dual-use technologies and markets, or valuation of offsets requirements (notably as a percentage of the procurement) are forbidden by the EU law. According to you, do covered Member States comply with their obligations regarding offsets requirements?

Q14. How would you assess the effect of European Commission's actions on such practices? In particular, would you say its action is more or less effective than the one the European Defence Agency had before the implementation of the directive?

### **Subcontracting provisions**

The directive 2009/81/EC provides for the possibility for Member States to require the successful bidder to publicly tender (according to the directive provisions) certain parts of the procurement to SMEs. In order to favour the recourse to such provisions, the European Commission issued, in 2018, a [Recommendation on cross-border market access for sub-suppliers and SMEs in the defence sector](#).

Q15. Have you ever been confronted (directly or indirectly) to such requirements from a covered Member State?

Q15b. If so, how would you assess these provisions?

Q16. Are you aware of the European Commission's recommendation? If so, how would you assess its effectiveness?

Q17. Beyond these provisions, how would you assess the proportion of non-domestic suppliers in your supply chain(s)?

Q17b. How would you assess the evolution of the localisation of your supply chain(s) over the last ten years?

### **Future of the directive**

Q18. How do you envision the relation of this directive with other EU defence initiatives, especially PESCO and the future EDF?

Q19. Does the enforcement of the directive need to remain a policy priority for the current mandate of the European Commission?

Q20. Do you consider that the directive needs to be substantially revised / further specified by a non-binding guidance / other? If so, in what sense?

\*\*\*

## **Interview grids for interviews with business associations and companies on the implementation of Directive 2009/43/EC**

### **General assessment**

Q1. How would you assess the implementation and the application of the directive by covered Member States?

Q1b. Have you identified unintended consequences of the introduction of directive 2009/43/EC?

Q2. How would you assess the impact of this directive on your business in Europe?

Q2b. In particular, can you provide some information on the potential economic gains or cost overrun (both direct and indirect) that has provoked the implementation of the directive?

Q3. Have you identified hurdles in the application of the directive?

Q3b. On the contrary, have you identified good practices from covered Member States?

### **General and Global licences**

Q4. Have you ever used general and/or global licences in one or several covered Member States? If so, how would you assess their practical usefulness?

Q5. How would you assess the level of transparency of national legislations and rules of utilisation of general and global licences?

Q6. How would you assess the level of harmonisation of these licences among covered Member States and its impact on your business activity in Europe?

Q6b. Have you mapped the different national systems of general licences? If so, would you agree to share your analysis/comments with us?

### **Certification**

Q7. Is your company "certified" in the meaning of directive 2009/43/EC?

Q8. If so, can you explain the rationale for such a decision? If not, go directly to Q9.

Q8b. How would you assess the certification process(es)? In the case you have been confronted with several national processes, how would you assess their (dis)similarity?

Q8c. How would you assess the economic gains (or cost overruns), including time gains, of such a decision on your activity in covered Member States?

Q8d. How would you assess the risk/benefit balance of certification?

Q9. If your company is not certified in the meaning of directive 2009/43/EC, can you explain why?

### **End-use/end-user control**

Q10. In your opinion, is the absence of harmonisation of end user controls for exports outside the European Union a source of impediments for intra-EU transfers?

Q11. In your opinion, would a harmonisation of end-user certificates facilitate the trade of defence-related products?

Q12. In your opinion, is it necessary to improve end user controls for exports outside the European Union?

**Action of the European Commission**

Q13. How would you assess the action of the European Commission to favour a higher degree of harmonisation at EU level?

**Future of the directive**

Q14. Would the directive need to be substantially revised? If so, should the directive be replaced by a Regulation?

Q14.b. If not, should Member States be incentivised to further harmonize their general licences?

Q15. How do you envision the relation of this directive with other EU defence initiatives, especially PESCO and the future EDF?

Q15.b. Would you be favourable to specific global licences for EDF and / or PESCO projects to prevent them from administrative burden? Would another solution be preferable?

Q16. Would a centralized database on general and/or global licences be useful? If so, should it contain statistical data on the recourse to each type of licence?

Q17. Should a further harmonisation of the content of general and/or global licences be sought? If so, what would be the most effective way to proceed (legislative, non-binding guidelines, sharing of good practices, etc.)?





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This study examines the implementation of the European Union (EU) defence package, which consists of the Defence Procurement Directive 2009/81/EC and the Intra-Community Transfers Directive 2009/43/EC, during the period from 2016 to 2020. It is organised in two parts.

The first part of the study, prepared internally, examines the evaluations carried out on the implementation of the two directives to identify persisting challenges. It surveys institutional and policy novelties in the field of EU defence cooperation so as to place the implementation of the two directives in context, and then examines Parliament's oversight work. It goes on to lay out the main elements that are likely to affect the future of EU defence industrial cooperation, and provides options for moving forward.

The second part of the study, which was outsourced, is based on primary research (a survey and interviews) and aims to assess the effectiveness, efficiency, relevance and added value of the Defence Procurement Directive and the Intra-Community Transfers Directive. It also seeks to identify limitations and challenges, and explore – where possible – the links between the implementation of the two directives.

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This is a publication of the Ex-Post Evaluation Unit  
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ISBN: 978-92-846-6946-2  
DOI: 10.2861/817967  
CAT: QA-02-20-587-EN-N