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The European Union Defence Procurement

Towards a Unified European Defence Equipment Market

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This paper was drawn up by Giuseppe Alfio Ira under the supervision and guidance of Mr Mario Blokken, Director of the Permanent Secretariat.

This Food for Thought paper is a document that gives an initial reflection on the theme. The content is not reflecting the positions of the member states but consists of elements that can initiate and feed the discussions and analyses in the domain of the theme. All our studies are available on www.finabel.org

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LIST OF ABBREVIATIONS

CARD	Coordinated Annual Review on Defence	ECC Treaty	Treaty Establishing the European Economic Community
CCP	Common Commercial Policy	ECJ	European Court of Justice
CDP	Capability Development Plan	EDA	European Defence Agency
CERTIDER	Register of the Certified Defence-related Enterprises	EDAP	European Defence Action Plan
Defence Directive	Defence and Security Procurement Directive 2009/81/EC	EDEM	European Defence Equipment Market
DG COMPT	Directorate-General for Competition	EDF	European Defence Fund
DG Growth	Directorate-General Internal Market, Industry, Entrepreneurship and SMEs	EDITB	European Defence Technological and Industrial Base
DG Markt	Directorate-General for Internal Market and Services	EEAS	European External Action Service
DG Trade	Directorate-General for Trade	ESDP/CSDP	European Security and Defence Policy/ Common Security and Defence Policy
E2I	Enable and Enhance Initiative	ESS	European Security Strategy
ECAP	European Capability Action Plan	EU	European Union

EUGS	EU Global Strategy on Foreign and Security Policy
FAC	Foreign Affairs Council
HLGs	Headline Goals 2003
HR/VP	High Representative of the Union for Foreign Affairs and Security Policy
IAEA	International Atomic Energy Agency
ICT Directive	Intra-Community Transfers Directive 2009/43/EC
MPF	Multiannual Financial Framework
MoD	Ministers of Defence

NATO	North Atlantic Treaty Organisation
PESCO	Permanent Structured Cooperation
R&D	Research and Development
SIPRI	Stockholm International Peace and Research Institute
SMEs	Small and Medium Enterprises
TFEU	Treaty on the Function of the European Union
UK	The United Kingdom

INTRODUCTION

Two possible scenarios are arising from the current pandemic crisis affecting European defence industry cooperation: COVID-19, as a key driver for EU integration, could trigger new impetus thanks to the European Defence Fund (EDF), or conversely, it could hamper EU integration which has already been strongly undermined by Brexit.

If the future of integration is still a blank page for EU defence, COVID-19 is unlikely to improve the situation. Josep Borrell, the High Representative of the Union for Foreign Affairs and Security Policy (HR/VP) stated during the second informal meeting of Ministers of Defence (MoD) of the EU on 15 May 2020 that: “the [COVID-19] pandemic will very likely deteriorate or security environment in the years to come” which means that “we need to strengthen our own preparedness and resilience for the future [...] we need to secure the necessary funding for security and defence, both in Member States and at EU level”.^{1 2} For the first time in EU history, Member States funds will be backed and supplemented by Union funds for military-related research.³ As foreseen by many scholars, the EDF was subject to collateral damage caused by the pandemic. If on the one hand Brexit “helped” EU member states to join forces and allocate a sum never seen in the entire history of the EU for financing EU defence projects; then, on the other, the pandemic shifted priorities and the Union has ended up with 8 billion euros instead of 13 billion for the new Multiannual Financial Framework

(MFF) of 2021-2027. At the beginning of the negotiations in December 2019, the Finnish semestral presidency of the Council proposed to allocate only 6 billion euros to the new EDF. Subsequently, in February 2020 at the European Council, President Charles Michael suggested increasing the budget to EUR 7 billion and then, in May 2020, the Commission Communication-which constituted the base for the budget negotiations- added an additional billion euros.⁴

When considering future military research and development (R&D) projects, it will be difficult to source adequate funds which will diminish the European Defence Technological and Industrial Base (EDTIB). EU Member States face priorities stemming from the pandemic’s direct and indirect effects – especially on the economy – resulting from consecutive lockdowns. This will put priority on structural rather than defence problems. Indeed, due to these reductions, Csernaton



1. Please note that when the author of the paper refers to “EU Member States” involved in defence projects Denmark is not included, as it has a specific opt-out on both defence and defence-industry matters. On the other hand, the UK will be still considered, unless otherwise stated.

2. European External Action Service, Video conference of Defence Ministers: Remarks by the High Representative/Vice-President Josep Borrell at the press conference, 12 May 2020, Brussels.

3. Commission, “A European Defence Fund: € 5.5 Billion per year to boost Europe’s Defence Capabilities”, Press Release. Brussels, 7 June 2017.

4. Commission, “Key instruments supporting the recovery plan for Europe”, 27 May 2020.

argued that the EU was heading “towards a European Defence Winter” and that an ensuing “wave of re-nationalisation of defence industries” would hit Europe, rather than bringing EU defence integration to the next level.⁵ Jiří Šedivý, Chief Executive of the European Defence Agency (EDA) disagrees, he believes that “this crisis makes collaborative capability development even more indispensable and urgent [because] the budgetary shockwave caused by the pandemic may heavily weigh on some Member States’ ability to sustain existing national defence programmes, let alone launch new ones”.⁶

However, in recent years, the pandemic has not been the only concern Europe had to cope with. EU Member States faced terrorism and far-reaching migration flows into their territories; additionally, the unstable situation in the south with Libya and Syria; Russia’s posture in Ukraine and the 2016 election of US President Donald Trump, failed to ease the situation. On a positive note, each of these events created momentum for European defence from the outset of the European

Union Global Strategy in 2016 (EUGS); followed by the launch of Permanent Structured Cooperation (PESCO), and the European Defence Agency’s (EDA) Coordinated Annual Review on Defence (CARD). The latter provides EU Member States with an overview of the state of the European capability landscape and identifies collaborative defence procurement and coordinated military spending.⁷ Lastly, considering the June 2020 Council Conclusions on Security and Defence, the follow-up of the EUGS, namely the Strategic Compass to be adopted by the Council in 2022, will allow EU strategic ambitions to be more precisely defined.⁸ This *Food for Thought* aims to describe the legal means adopted by the EU to establish a fully-fledged European Defence Equipment Market (EDEM) by showing the complex and sometimes overlapping legal provisions applying to this sensitive area. This will be done by tracing the historical context of the topic and then delving into the Commission and EU Member States’ manifold legal provisions.

HISTORICAL BACKGROUND

The European defence industry has deservedly been subject to a hot debate in recent years due to its poorly exploited economic yields. However, considering EU security and defence as a mere subject of Europe’s economy is an error, [because] the geopolitical shifts underway make the European Defence In-

dustrial Technological Base (EDITB) a vital component of the EU’s overall strategic toolbox”.⁹ The very first steps date back to the end of the Second World War (WWII) when several European countries agreed to join forces to develop joint armament projects, which in time they hoped would have led to a harmon-

5. Raluca Csernatosi, “EU Security and Defense Challenges: Toward a European Defense Winter?”, *Carnegie Europe - Carnegie Endowment for International Peace*, 11 June 2020.

6. European Defence Agency, “Enhancing Interoperability: Train together, deploy together”, *European Defence Matters (EDM)*, Issue 19, 2020, p. 4.

7. Y. Bencheikroun, F. Artese, C. Abdyaeva, “The progress of Land Forces Interoperability through the PESCO framework: an account of PESCO first initial phase” – FINABEL (2021).

8. *Council Conclusions on Security and Defence 8792/20*, Brussels, 17 June 2020.

9. Daniel Fiott, “Strategic Investment: Making Geopolitical Sense of the EU’s Defence Industrial Policy”, *EU/ISS* Chailott Paper, no. 156, (December 2019): 44.

isation of European Defence procurement practices and needs.

The Balkan wars of the 1990s put a great strain on the Union's role with respect to its unstable neighbourhood. In the aftermath of these secession wars, and due to a policy change in the United Kingdom (UK), Prime Minister Tony Blair and President Jacques Chirac held a key bilateral meeting in Saint-Malo in 1998 to take concrete provisions for an independent European Security and Defence Policy (ESDP).¹⁰ The Saint-Malo Declaration heralded the origins of ESDP, by stating that the EU "must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crisis".¹¹ Hereafter, the Union's military assets previously committed entirely to NATO could be used for EU missions. Several European Council meetings defined the military and civilian capabilities needed to fulfil the Petersberg tasks such as the Cologne European Council meeting, the Helsinki European Summit meeting (both in 1999), which introduced the Headline Goals 2003 (HLGs), and the Santa Maria da Feira European Council meeting (2000).¹² Helsinki was of great importance as it set a deadline for the HLGs, which launched the military capability development process:

"[...] to develop European capabilities, Member States have set themselves the headline goal: by the year 2003, cooperating together voluntarily, they will be able to deploy rapidly and then sustain forces capable of the full range of Petersberg

*tasks [...] up to corps level (up to 15 brigades or 50,000 – 60,000 persons). [...] Member States should be able to deploy in full at this level within 60 days [...]. They must be able to sustain such a deployment for at least one year [...]"*¹³

The fall of the Iron Curtain led to a strong reduction of many EU Member States' defence spending with a reallocation of those funds from the "peace dividends" to other areas. In the 1989-1998 period, the United Kingdom, Germany, and France reduced their defence budgets respectively by 28, 24, and 12 per cent.¹⁴

In 2001 the European Capability Action Plan (ECAP) was launched, and it had a twofold role: strengthening the Helsinki Council Conclusions and putting in place a plan that encouraged – albeit on a voluntary basis – EU Member States to meet capability shortfalls. Upon completion of the agreed target goals set by the HLG 2003, under the guidance of the very first High Representative of the Union for Foreign Affairs and Security Policy, Javier Solana (HR/VP), the EU put forward the European Security Strategy (ESS).¹⁵ Although this document provided guidance to EU Member States on a wide range of foreign and security issues, it failed to mention defence capabilities. Thus, in 2004, at the Brussels European Council Meeting EU Member States adopted a new "Headline Goal 2010". In 2004, all EU Member States except Denmark established a specific intergovernmental agency for defence capabilities (the European Defence Agency), responsible for managing European armament policy areas perceived

10. Maartje Rutten, "From St Malo to Nice, European Defence: core document", *Institute for Security Studies*, Chaillot Paper no. 47, (May 2001): 8. The name "European Security and Defence Policy (ESDP)" was used until the Treaty of Lisbon came into force in 2009, thereafter we refer to this EU policy as "Common Security and Defence Policy (CSDP)".

11. Rehr| Jochen, "Handbook on CSDP: The Common Security and Defence Policy of the European Union"

3rd Edition, Vienna, *Directorate for Security Policy of the Federal Ministry of Defence and Sports of the Republic of Austria*, 2017, p.17.

12. Rehr, Jochen, "Handbook on CSDP", p. 17

13. [European Council, Helsinki European Council, Annex IV of the Presidency Conclusion, 1999.](#)

14. SIPRI Yearbook, Oxford: Oxford University Press for SIPRI, 1999, p. 298. In Burkard Schmitt, "From Cooperation to Integration: defence and aerospace industries in Europe, *Institute for Security Studies*, Chaillot Paper No. 40 (July 2000): 5.

15. Council of the European Union, "[European Security Strategy: A Secure Europe in a better world](#)".

by Member States as to be outside the scope of the Treaties.¹⁶ Nonetheless, these initiatives yielded little results, and in 2005 limited cooperation was creating inefficiencies and jeopardising industrial competitiveness.¹⁷ 2008 was a pivotal year, as the EDA started playing a more prominent role in capability development and released the Capability Development Plan (CDP). The plan provided a list of priority capability areas (mine counter-measures, helicopters, medical support, network-enabled capability, etc.). It sought to scope out potential pooling and share opportunities for EU Member States.

EU Member States are among the world's top arms exporters. Data from the SIPRI Arms Transfer Database show that among the top fifteen arms exporters, six plus the UK are European states. The combined share of EU Member States accounts for 25,1 per cent of the global export. Three pillars legally regulate the provisions of arms and weapons: international law, European law, and domestic laws. For the purposes of this paper only EU legal instruments will be analysed. This cluster

can be divided into three main dimensions: the first one refers to export outside the EU and is regulated by the Council's "Common Position 2008/944/CFSP", its associated "User Guide" and other instruments.¹⁸ The Common Position 944 resembles the Arms Trade Treaty which entered into force in 2014. Common Position 944 sets a list of eight common criteria that EU countries are expected to abide by when they authorise export licences for their defence companies. However, the interpretation of these criteria pertains to EU Member States, thus resulting in different export behaviours amongst EU countries. The second cluster regulates the internal dimension and has the ICT Directive as its main legal point of reference, which regulates transfers of armaments in Art. 3(2).¹⁹ Lastly, the third cluster is represented by the EU restrictive measures classified as:

- I. Transposition of United Nations' sanctions.
- II. EU restrictive measures.
- III. Hybrid version of transposition of UN sanctions and EU sanctions.

EU MEMBER STATES ARMS PROCUREMENT

Procurement is defined as the process through which an entity, such as a business enterprise or a government agency, acquires the goods, services, or assets it needs to carry out its activities.²⁰ When referring to the procurement

of defence-related goods and services at EU level, it could be defined as "the section of public procurement performed for the benefit of the armed forces of the EU member states".²¹ Public procurement amongst EU

16. Martin Trybus, *Buying Defence And Security in Europe: The EU Defence and Security Procurement Directive in Context* (Cambridge: Cambridge University Press, UK, 2014), p. 9

17. *Ibid.*

18. [Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment \[2008\] OJ L335/99](#). It has also been subject to review by the Foreign Affairs Council (FAC) in 2012, link, [Council Decision 2009/1012/CFSP of 22 December 2009 on support for EU activities in order to promote the control of arms exports and the principles and criteria of Common Position 2008/994/CFSP among third countries \[2009\] OJ L348/16](#); [Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, \[2003\] OJ L156/79](#); [Council Decision \(CFSP\) 2019/1560 of 16 September 2019 amending Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, \[2019\] OJ L 239/16](#)

19. [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, \[2009\] OJ L146/1, Art. 3\(2\)](#), for a more detailed explanation see p. 15

20. Antonio Calcara, *European Defence Decision-Making: Dilemmas of Collaborative Defence Procurement*, (Abingdon, Oxon; New York: Routledge, 2020), 2.

21. Baudouin Heuninckx, *The Law of Collaborative Defence Procurement in the European Union* (Cambridge: Cambridge University Press, 2017), 1.

Member States has undergone several changes during recent decades to increase and improve competition and integration. However, EU Member States' procurement behaviour to safeguard domestic industries has undermined transparent practices and distorted the EU Internal Market. Considering these inefficient practices, the EU Commission began to update former noneffective practices to fix and harmonise, inter alia, European defence industries. Specifically, the notorious invocation of Art. 346 TFEU which has been a thorn in the Internal Market's side.²² This provision allows EU Member States to derogate from competition rules if "[...] necessary for the protection of the essential interest of [a MS] security". This provision has been invoked systemically, hampering competition monitoring on the grounds of national security, especially concerning the procurement of high-value, strategic, complex defence systems.²³ Not using procurement could have entailed considerable economic benefits. The EU Internal Market is the Union's beating heart, one of the motifs that in 1957 brought "the Six Founding Nations" together in Rome to sign the Treaty Establishing the European Economic Community (ECC Treaty). By facilitating businesses and consumers relations among EU nations, the Treaty sought to trigger competition of goods and services in the European market, while allowing free movement of people and capital. Until recently, the Commission coordinated its actions and operations in the Internal Market within its Internal Market and Services Directorate

General (DG Market), which was split in 2014 into Directorate-General Internal Market, Industry, Entrepreneurship and SMEs (DG Growth), Directorate-General for Competition (DG Compt) and Directorate-General for Trade (DG Trade).

According to the Commission, the Single Market has helped create nearly 2.8 million new jobs over the years.²⁴ Competition has always been one of the main drivers of economic prosperity because it stimulates competitors in the market to supply goods and services at a reasonable price. Otherwise, people undertakings and nations would buy from foreign competitors. On this account, research and development (R&D) for goods and services, as well as innovation, play a major role. Industries are responsible for innovation's creative processes, and competition would be meaningless without such innovation. This applies to the public and defence procurement practices because they guarantee that all actors and entities, regardless of their sizes, enjoy equal treatment when awarding public tenders to supply goods and services. As a result, competition and public procurement are the fundamental determinants of EU innovation.²⁵

In 2006 the European Commission aimed at reducing the application of the EU Treaties' exemption clause by issuing the "Interpretative Communication on the Application of Article [346] of the Treaty in the Field of Defence Procurement", which echoes a series of relevant case laws and emphasises that a potential exemption requires a case-by-case

22. The position of this article in the Treaty Establishing the European Economic Community was at Art. 223. Subsequently, in 1992, in the Treaty Establishing the European Community was at Art. 296, and lastly, with the entry into force of the Treaty on the Functioning of the European Union in 2009, we find it at Art. 346.

23. Martin Trybus and L.R.A. Butler, "The Internal Market and National Security: Transposition, Impact, and Reform of the EU Directives on Intra-Community Transfers of Defence Products", *Common Market Law Review*, Vol. 54(2), (2017): 403-442.

24. *European Parliament*, "20 years of the single market: achievements and challenges ahead", 26 April 2012. Please note that the term "Single Market" has now been replaced by the "Internal Market".

25. European Commission, "Putting Knowledge into Practice: A Broad-Based Innovation Strategy for the EU, COM (2006) 502 Final, 13 September.

assessment.^{26 27}

To increase oversight of defence procurement, on 13 July 2009 EU Member States passed the “Defence and Security Procurement Directive 2009/81/EC” (hereinafter “Defence Directive”). The Defence Directive is a European Union legal instrument tailored to regulate a particular area of procurement within the Internal Market. Its purpose is to contribute to the establishment of an Internal Market for defence and security goods and services, complementing the EU Arsenal of Procurement Directives.^{28 29} When referring to the Defence Directive, the “Intra-Community Transfers Directive 2009/43/EC” (hereinafter ‘ICT Directive’) has to be considered, as it complements the former by having as its main purpose the harmonisation and simplification of the defence transfer licences in the EU. By combining the two Directives and the Commission Communication “A Strategy for a Stronger and More Competitive European Defence Industry COM (2007) 764”, they form what most scholars call the “Defence Package”, because they represent the “cornerstone of the European defence market”.^{30 31}

The Defence Package’s overall objective is to create a European Defence Equipment Market (EDEM) by increasing competition, stimulating cross-border trade in defence and equipment, and by reducing duplication and administrative costs associated with licencing. Nevertheless, the TFEU allows for some degree of derogation to EU law under Arts. 346 and 347 TFEU for “national security” or



“external military security”. At the time of the Defence Directive drafting, EU policymakers took inspiration from the Public Sector Directive 2004/18/EC. As a secondary instrument of EU law, the Directive purports to complement and expand EU Internal Market rules of the TFEU. European Union Law is based on the Principle of Conferral, meaning that the EU may only act when there is a legal basis for action provided by the Treaties.³² As previously stated, the Directive aims to create an Internal Market for defence and security goods and services, therefore Internal Market law applies, given that Intra-Community

26. European Commission, “Interpretative Communication on the Application of Article 296 of the Treaty in the Field of Defence Procurement”, COM (2006) 779, 7 December.

27. See for instance, Case C-414/97, *Commission v. Spain* [1999] ECR I-5585 and Case C-337/05, *Commission v. Italy* [2008] ECR I-7313.

28. [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](#), [2009] OJ L 216/76, as amended.

29. In addition to the Defence Directive, the so-called ‘arsenal’ encompassed also the Directive of Public Sector Directive 2004/18/EC (replaced by Directive 2014/24/EU [2014] OJ L94/65), the Public Sector Procurement Remedies Directive 89/665/EEC [1989] OJ L395/33, the Utilities Procurement Directive 2004/17/EC [2004] OJ L134/1 (replaced by Directive 2014/25/EU [2014] OJ L94/243), and the Utilities Procurement Remedies Directive 92/13/EEC [1992] OJ L76/14. Further, the 2014 reforms added a new Directive 2014/23/EU on concessions [2014] OJ L94/1.

30. Trybus, *Buying Defence And Security in Europe*, 3, 137.

31. European Commission, “A Strategy for a Stronger and More Competitive European Defence Industry.” COM (2007) 764, 5 December.

32. Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012], OJ C 326/16, C 326/17, Arts. 1 and 4.

transfers of armaments and security sensitive goods as well as exports are regulated by the TFEU. The EU Internal Market is both an area of exclusive competence and of shared competence between the EU and its Member States.³³ Furthermore, the Defence Directive's scope goes beyond the Internal Market to merge control, State-aid (subsidies) and competition (anti-trust).³⁴ The most important provisions to armament procurement, but more generally to the public procurement, are enshrined in Art. 28 TFEU, which regulates the free movement of goods; Art. 49 TFEU, which regulates the freedom of establishment, and Art. 56 TFEU, which regulates the free movement of services. These articles are connected to Art. 18 TFEU, which prohibits protections and discriminant behaviour on grounds of nationality. There are, however, some limits and derogations to these Treaty articles based on public security under Arts. 36, 45(3), 52(1), 346 and 347 TFEU. The Preamble of the Defence Directive states that its legal bases are to be found in Arts. 53(1), 62 and 114 TFEU, respectively on the establishment, services, and the common Internal Market legal base.³⁵ When it comes to the material scope of the Defence Directive, its Article 2 states that it is subject to Art. 36, 51, 52, 62 and 346 TFEU and that it applies to the supply of military equipment, – including any parts, (sub-)components – to works, supplies and services directly related to such equipment, and finally to works and services for specifically military purposes.³⁶ In this context “goods” refer to military equipment, which is defined as “[...] equipment specifi-

cally designed or adapted for military purposes and intended for use as an arm, munitions or war material”, included as product types in the 1958 List of Armaments established by Council Decision 255/58 to which the provision of Art. 346(1)(b) TFEU applies.³⁷ However, the “1958 list” was subject to several discussions concerning its content, which was never disclosed up until the 1980s-1990s, and as it had not been updated and was even deemed obsolete by the Commission.³⁸ However, according to the wording of the list and to the Defence Directive guidance on how to interpret it on account of technological progress, it states that the list:

*“is generic and is to be interpreted in a broad way in the light of the evolving character of technology, procurement policies and military requirements which lead to the development of new types of equipment [. . .]”*³⁹

This does not mean that the list is to be interpreted broadly; on the contrary, the list is exhaustive and shall be interpreted narrowly, meaning that items not on this list are not to be covered by the Directive 2009/81/EC.⁴⁰ The list's legal status is also interesting because, at the time of the drafting of the Treaty of Rome in 1957, European States decided to postpone questions regarding the list and its content later, fearing that negotiations might have been excessively prolonged because of it. In 1958 the Council adopted this list of products subject to Art. 346 (1)(b) TFEU, which was treated as confidential until the 1990s and became accessible in 2001 thanks

33. Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012], OJ C 326/51, OJ C 326/59, Arts. 3, 4 and 26(3).

34. Trybus, *Buying Defence And Security in Europe*, 61.

35. Please note that the Defence Directive entered into force on 13 July 2009, before the introduction of the TFEU on December 2009. Therefore, the Articles mentioned within the Directive are 47(2), 55, 95 EC Treaty.

36. Defence Directive 2009/81/EC, Art. 2.

37. Council Decision 255/58 defining a list of arms, munitions and war material, including nuclear arms of 15 April 1958.

38. Commission, “Green Paper of 23 September 2004 on Defence Procurement”, COM (2004) 608 Final, 7.

39. Defence Directive 2009/81/EC, Recital 10.

40. For a detailed discussion, please see Trybus, *Buying Security and Defence in Europe*, p. 88-104

to a written request issued by a Member of the European Parliament (MEP), who asked the Council to disclose its content.⁴¹ Because of the 2008 impetus, for the first time an “Extract of Council Decision 255/58 of 15 April 1958” was published by the Council on 26 November of that year.⁴² Trybus analyses the use of the term “extract” in this document, and also category 13 on “other equipment”. He argues that although *prima facie* category 13 can be interpreted as a way for both the Council and EU Member States to add any type of product they could not think of when first compiling the list in 1958, the exhaustive character of the list is an essential component of the narrow interpretation of Art. 346 TFEU, thus prohibiting a wide interpretation.⁴³ The start point was set in the case of *Johnston*, which dealt with the prohibition of carrying firearms by female officers of the Royal Ulster Constabulary.⁴⁴ This prohibition’s discriminatory feature substantially constrained women’s activities and was challenged under the EU Equal Treatment Directive.⁴⁵ The ruling of the European Court of Justice (ECJ) is a milestone in this case for the narrow interpretation applicable to the Treaty public security derogations mentioned above (Arts. 36, 45(3), 52(1), 346 and 347 TFEU) to safeguard the proper functioning of the Internal Market, because of the articles:

“do not lend themselves to a wide interpretation and it is not possible to infer from them that it is inherent in the Treaty a general provision

*covering all measures taken for reasons of public safety”.*⁴⁶

However, the 1958 list remains general as it simply references the category and type of defence goods, and therefore broad interpretations can still be exploited by EU Member States. A solution to this problem, namely its modification, can only be achieved at the Council by unanimously approving the necessary amendments. Accordingly, “not modifying the 1958 list represents one of the main limits of the directives’ elaboration process”.⁴⁷ The Defence Directive’s transposition was everything but smooth. Only three Member States completed their transposition by 21 August 2011, and one more by September 2011.⁴⁸ Article 258 TFEU was therefore activated by the Commission launching a formal notice for an infringement procedure against 23 Member states and, by July 2012, four of the 23 EU Member States still had not notified any transposition measures.⁴⁹ By 2013 all EU Member States had the Defence Directive transposed into their national legislation. The context in which the Directive was born, namely the 2008 financial and economic crisis, led to national protectionist behaviours and substantial cuts in investments both in defence research and capability development. A few studies have attempted to assess the effect of the Defence Directive since its implementation. In the period 2011-2015 – considering that in some EU Member States the transposition process had not been finalised

41. Written Question E-1324/01 by Bart Staes (Verts/ALE) to the Council, [2002] OJ C-364 E, 20 December 2001, at 85–6, in Baudouin Heuninckx, “Towards a Coherent European Defence Procurement Regime? European Defence Agency and European Commission Initiatives”, *Public Procurement Law Review*, Vol. 17, Issue 1, (2008):3

42. Extract of the Council Decision 255/58 of 15 April 1958, document 14538/4/08 Rev 4. In Trybus, *Buying Security and Defence*, 88-93.

43. *Ibid.*, p. 93

44. Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] E.C.R. 1651.

45. Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women regards access to employment, vocational training, and promotion, and working conditions [1976] OJ L39/40.

46. *Ibid.* note 44, [26], after this case Articles 65(1)(b) and 72 TFEU were also added to the list of exemptions.

47. Alessandro Marrone, Michele Nones, “The EU Defence Market Directives: Genesis, Implementation and Way Ahead”, *Documenti IAI*, n. 20/18, (September 2020).

48. Commission. “Report from the Commission to the European Parliament and the Council on transposition of Directive 2009/81/EC on Defence and Security Procurement”, COM (2012) 565 final, 2 October.

49. Commission. “Report from the Commission to the European Parliament and the Council on transposition of Directive 2009/81/EC on Defence and Security Procurement”, COM (2012) 565 final, 2 October.

ed – the overall value of defence procurement expenditure by the then 28 EU and EEA countries ranged between 81-82 billion euros per year.⁵⁰ The Report highlights that despite the Directive’s uneven application among Member States, since its transposition, the value of defence and security contracts awarded has increased more than tenfold (around 30.85 billion euros).⁵¹ The study was conduct-

ed to assess whether, after five years since its transposition deadline, the Directive’s effects had impacted the EDITB. Unfortunately, the data shows that “it was difficult to determine that overall, the EDTIB has fundamentally changed in the period 2011-2015 as a result of the introduction of the Directive”.⁵²

ICT DIRECTIVE AND DUAL-USE GOODS

The Defence Directive is strictly related to the other centrepiece of EU secondary legislation for armaments transfers and procurement, the Intra-Community Transfer Directive 2009/43/EC (“ICT Directive”).⁵³ In particular, the ICT Directive was adopted within the Internal Market cluster and therefore lays out a relaxed authorisation regime. Interestingly, before the ICT Directive came into force on 30 June 2009, “no distinction was made between Intra-Community transfers on the one hand and exports to third countries on the other”.⁵⁴ To address this, Art. 3(2) of the ICT Directive defines a “transfer [as] any transmission or movement of a defence-related product from a supplier to a recipient in another Member State”. Intra-EU transfers of defence goods were regulated by national

laws, which further fragmented the market and increasingly complicated transfers among European countries. Different licences systems led to overly long and costly practices.⁵⁵ To tackle these issues, the EU adopted the ICT Directive, setting a new and common licensing framework to facilitate such transfers by having a uniform and more transparent system.⁵⁶ The ICT Directive aimed to foster preponderance of General and Global licenses as opposed to Individual licenses. Nonetheless, although the Directive facilitated and improved transparent transactions, “transfers of defence-related products among EU Member States remain subject to prior authorisation of the exporting member state”.⁵⁷ Furthermore, these transfer rules remain subject to public security exceptions

50. 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.

51. *Ibid.*

52. *Ibid.*

53. 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, [2009] OJ L146/1.

54. UNISYS, “Intra-Community Transfers of Defence Products”, Final Report of the Study ‘Assessment of Community initiatives related to intra-community transfers of defence products’, Brussels, February 2005 (for the European Commission), in Martin Trybus, Luke 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*, 54(2), 403-441.

55. Commission, “European Defence – Industrial and Market Issues Towards an EU Defence Equipment Policy”, COM(2003) 113 final, p.13

56. Three-tier licensing system: ICT Directive 2009/43/EC, Art. 5(1) regulates General Transfer Licences according to which Member States shall grant to suppliers established on their territory to perform transfers of defence-related products to a category or categories of recipients located in another Member State; Art. 6(1)(2) regulates Global Transfer Licences as specific authorisation granted by Member States in response to a request for transfer of defence-related products to an authorised recipient in one or more Member States for a period of three years; Art. 7 regulates Individual Transfer Licences as specific authorisation granted by Member States to an individual supplier at its request for a specified quantity of a specified defence-related product for a period of one year or can be fulfilled upon completion of the shipment of the goods.

57. Baudouin Heuninckx, *The Law of Collaborative Defence Procurement in the European Union*, p. 75.

under Art. 36 TFEU and national security exception 346 (1)(b) TFEU, and to the principle of proportionality within the meaning of Art. 34 TFEU for measures having an equivalent effect to a quantity restriction.⁵⁸ While licence requirements seem to be a proportional way of exerting control over transfers of defence equipment, the Commission Communication 2007/764 shows that the cost for businesses and industries of over 400 million euros is an unnecessary distortion of the Internal Market. Despite having created a new licencing framework, EU Member States chose to formulate different national lists of exempted items that would still require export licences although those transactions would be carried out within the Internal Market, reducing both the standardisation and benefits of the ICT Directive.⁵⁹

A key feature of the ICT Directive is enclosed under its Art. 4(2), which provides that Member States may exempt transfers of defence-related products from the obligation of prior authorisation set out in that paragraph where: (a) the supplier or the recipient is a governmental body or part of the armed forces; (b) supplies are made by the European Union, NATO, IAEA or other intergovernmental organisations for the performance of their tasks; (c) the transfer is necessary for the implementation of a cooperative armament programme between Member States; (d) the transfer is linked to humanitarian aid in the case of a disaster or as a donation in an emergency; or (e) the transfer is necessary for or after repair, maintenance, exhibition or demonstration.⁶⁰

The ICT Directive's transposition deadline for Member States was set by its Art. 18(1) on 30 June 2011. Although these laws would not come into effect until 30 June 2012 so as to "foster mutual trust [...] and evaluate progress on the basis of a Commission report", the Commission Transposition Report of 2012 evidenced incomplete transposition by seven EU Member States and launched infringement proceedings against them under Article 258 TFEU.^{61 62}

The ICT Directive strives to increase SME participation in armament development and production, which would produce the much desired yet difficult to achieve economies of scale. The 2016 Commission Report on the evaluation of the Directive 2009/43/EC reads that SMEs had little knowledge about the potential benefits of the Directive such as the General Transfer Licences.⁶³

For the first time, the ICT Directive established certification requirements for the recipients of Intra-Community transfers. Under Art.9(2)(a)-(f) we can find all the criteria that EU Member States need to evaluate before entitling adept authorities to control the certification of recipients on their territory.⁶⁴ As the body responsible for the control of the correct implementation of the ICT Directive, the European Commission Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG Growth) keeps a Register of the Certified Defence-related Enterprises (CERTIDER), references to applicable national legislation and specificities of the companies.⁶⁵ As of January 2021, sixty-seven

58. ICT Directive 2009/43/EC, Art. 1(2).

59. Hélène Masson et al., "The Impact of the 'Defence Package' Directives on European Defence" (European Parliament, DG for External Policies Policy Department, June 2015).

60. ICT Directive 2009/43/EC, Art. 4(2).

61. ICT Directive 2009/43/EC, Recital 40

62. Commission, "Report from the Commission to the European Parliament and the Council on transposition of Directive 2009/43/EC simplifying terms and conditions for transfer of defence-related products within the EU". COM (2012) 359 Final. (hereinafter "Transposition Report"), at 5. For the complete list of the EU Member States complete implementation please see the Annex. By May 2013 they had all notified complete transposition.

63. 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.

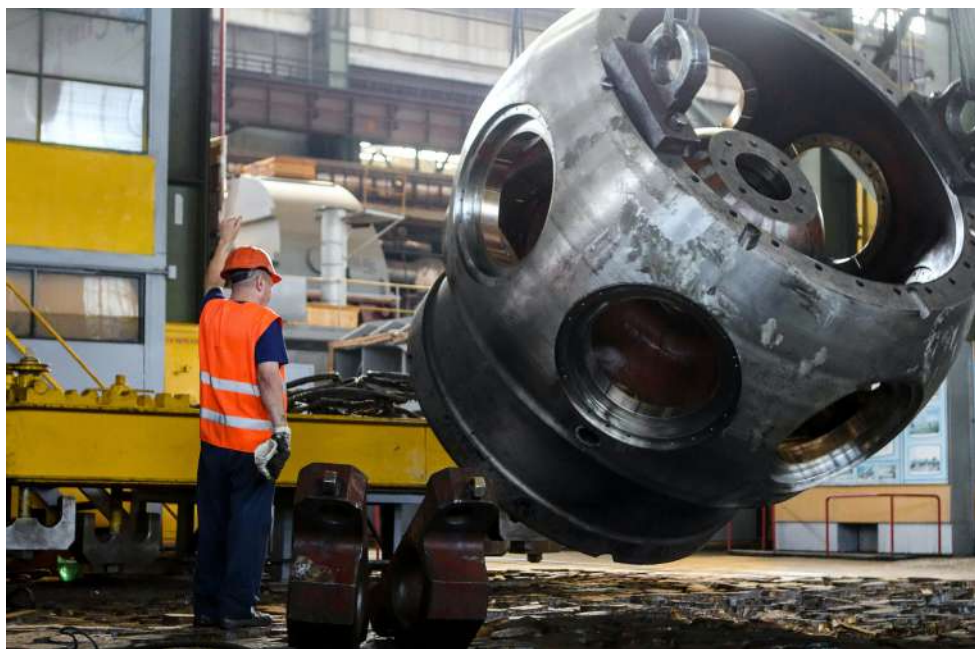
64. ICT Directive 2009/43/EC, Art. 9(1)

65. Commission, [Certified Enterprise Register, Certified Defence-Related Enterprises \(CERTIDER\) database](#).

companies in seventeen countries can import arms from other Member States under the simplified ICT Directive's procedure.⁶⁶

In the context of Council Common Position 944, in which implementation is overseen by the European External Action Service (EEAS), the EU Common Military List was adopted as envisioned by the ICT Directive.⁶⁷ The Common Military List identifies the equipment covered by the Common Position 944 governing exports of military equipment and technology to third countries. Article 12 of the Common Position reads that “[t]he EU Common Military List shall act as a reference point for Member States’ national military technology and equipment lists but shall not

directly replace them”.⁶⁸ As a matter of fact, despite being a CFSP binding instrument, it is exempted by ECJ jurisdiction. In other words, in case of a breach of one of the Common Position 944's eight revised criteria, EU Member States might be liable only before their national courts. Against this backdrop, in 2015-2016 NGOs and parliamentarians around Europe criticised the arms supply to Saudi Arabia in view of clear violations of International Humanitarian Law (IHL) in Yemen.⁶⁹ Indeed, at the EU level, the European Parliament called on Member States noting “[...] that the eight criteria [were being] applied and interpreted in different ways by Member States; and thus call[ed] for a uni-



66. Austria (2), Belgium (8), Bulgaria (2), Denmark (3), Finland (1), France (14), Germany (17), Hungary (4), Italy (1), Latvia (3), Lithuania (1), Netherlands (2), Poland (4), Portugal (1), Slovakia (1), Spain (1), Sweden (2)

67. Common Military List of the European Union [2007] OJ L88/58, ICT Directive, Recital 10.

68. Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment [2008] OJ L335/99, Art. 12.

69. Jon Stone, "EU Parliament votes for EU-wide arms export embargo against Saudi Arabia", *The Independent*, 25 February 2015.

form, consistent and coordinated application of the eight criteria and full implementation of the Common Position with all its obligations".⁷⁰ Since 2011, the Federal Republic of Germany has undertaken a preventive foreign and security policy programme called Enable and Enhance Initiative (E2I) at national, international (in the NATO and G7 context) and European levels. E2I purports to enhance stabilisation in areas of crisis by providing certain states with military goods and dual-use technology to sustain their own neighbourhoods in crisis prevention, crisis management, post-crisis rehabilitation, and peacebuilding activities.⁷¹ This approach is not without risks and derogations, but according to Puglierin "failure to act is just as open to moral criticism". More importantly, it should not be understood as a reckless export posture to unstable countries, but rather as a comprehensive means to restore stability in fragile regions.

Military technology is not simply used for military purposes. Accordingly, the EU has specific provisions regulating this area, which fall under Regulation (EC) 428/2009 on the brokering and transit of dual-use items and the Regulation EU 2016/2134.⁷² Dual-use goods are defined as items, including software and technology, which can be used for both civil and military purposes.⁷³ Regulation (EC) 428/2009 is enclosed within an area of EU exclusive competence, the Common Commercial Policy (CCP), and its implementation is controlled by the DG Trade of the EU Commission. Intra-Community transfers of some dual-use items may require authorisa-

tion requirements in accordance with its updated Annex III (formerly Annex IV).⁷⁴ On the other hand, Part II of its Annex III lists items of the Chemical Weapons Convention, whose transfers due to their risky nature shall not be covered by national general authorisation for intra-Community trade, but rather by a national individual authorisation analogous to the individual licence of the ICT Directive. Moreover, it is important to note that since 1996, EU Member States (excluding Cyprus and including the UK) have also established other international defence export control regimes, such as the Wassenaar Arrangement on Export Controls for Conventional and Dual-Use Goods and Technology (Wassenaar Arrangement), whose role is "promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations".⁷⁵

Owing to the dual nature of these goods, several landmark cases will exemplify how the ECJ placed the transfer of dual-use goods in the context of Member States invocation of Art. 346 (1)(b) within the domain of its jurisprudence. As stated above, derogations from Article 346 TFEU as well as the 1958 list shall be interpreted restrictively. In the case of Agusta Helicopters, the crux of the argument lies on the question of whether it was sufficient for an item to be on the 1958 list, or if further conditions had to be met to establish the grounds of the derogation of Article 346(1)(b). The case dealt with the supply of Agusta and Agusta Bell helicopters to both civilian and military organisations of the Italian

70. European Parliament, "[European Parliament Resolution of 14 November 2018 on arms exports: implementation of Common Position 2008/944/CFSP](#)", (2018/2157(INI)).

71. Jana Puglierin, "[Germany's Enable & Enhance Initiative: What Is It About?](#)", *Security Policy Working Papers*, n. 1/2016, p.1 in Alesandro Marrone, and Ester Sabatino, "Defence G2G Agreements: National Strategies Supporting Export and Cooperation", IAI Documents, 20/17, September 2020, p. 27-28.

72. Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering, and transit of dual-use items, [2009] OJ L134, repealing Council Regulation 1334/2000/EC of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology.

73. Regulation (EC) No 428/2009, Art. 2(1). The EU Military List is updated by the Council annually (ICT Directive, Art. 13(1)). Here you can find the latest version, [Common Military List of the European Union, OJ C 85/1 | 2020](#), 13 March 2020.

74. [Regulation 2020/1749 of 7 October 2020 amending Council Regulation \(EC\) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items](#), L 421/2, Recital 6, Art. 1(3).

75. Wassenaar Arrangement, at <https://www.wassenaar.org/>. Please note that this agreement is non-binding.

Republic, whereby Italy directly awarded the purchasing contracts to Agusta S.p.A without issuing any competitive tendering procedure in compliance with Art. 6 of the former Public Supplies Directive 93/36/EC.⁷⁶ Italy based its derogation on the grounds that the helicopters were dual-use items and therefore their military dimension provided for the armament exemption of Art. 346(1)(b) TFEU. However, based on its previous case law, the Court first underlined once again that derogations from public procurement procedures shall be interpreted strictly, and secondly that whatever measure Member States take to protect their essential security interest according to Art. 346(1)(b) must not alter the conditions of competition in the Internal Market regarding products “[...] the use of which for military purposes is hardly certain”.⁷⁷ The second historic case, known as Finnish Turntables (case C-615/10), concerns the procurement by the Finnish Defence Forces Technical Research Centre of tiltable turntable equipment outside the Public Sector Directive, hence without prior publication, on the grounds of Art. 10 of that Directive and Art. 346(1)(b) TFEU.⁷⁸ By comparing the two cases, in Finnish Turntables the items were purchased for purely military purposes. The ruling of the ECJ in Finnish Turntables constitutes a more thorough analysis because it first investigated whether the items in question were on the 1958 list, and then assessed

the national security interests. Therefore, after having established that those products were included in the list, it went further by saying that if their application can be used for civilian purposes, derogation on the grounds of the Public Sector Directive and 346 TFEU:

*“if such use is not solely that which the contracting authority intends to confer on it, but also (...) that which results from the intrinsic characteristics of a piece of equipment specially designed, developed or modified significantly for those purposes”.*⁷⁹

In the following paragraph, the Court stresses that the wording “insofar as they are of a military nature”, “military” and “exclusively designed” at 11, 14, and 15 of the 1958 list, entails that the turntables must have a specifically military nature in objective terms.⁸⁰ In the words of Trybus, the ECJ set a high threshold.⁸¹ Indeed, the ECJ concluded its judgement by saying that the derogation of Art. 10 of Directive 2004/18/EC read in tandem with Art. 346 TFEU in case of public contract awards in the field of defence for dual-use items “only if that material [tiltable turntable in this case], by virtue of its intrinsic characteristics, may be regarded as having been specially designed and developed, also as a result of substantial modifications, for such purposes”.⁸²

76. Public Supplies Directive 93/36/EC, [1993] OJ L199/1, replaced first by Directive 2004/18/EC OJ L134/114, and now by [Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC](#) [2014] OJ L 93/64

The procurement by the Italian state was *inter alia* for the State Police, Corps of the Fire Brigades, the Department of Civil Protection in the Presidency of the Council of Ministers.

77. Case C-337/05.

78. Case C-615/10 (“*Finnish Turntables*”) [JnsInsiöritojimisto JnsTijmi Oy](#) [2012] ECLI:EU:C:2012:324.

79. Case C-615/10 (“*Finnish Turntables*”) [JnsInsiöritojimisto JnsTijmi Oy](#) [2012] ECLI:EU:C:2012:324, para. 40.

80. *Ibid.*, para. 41.

81. Trybus, *Buying Security and Defence*, 102.

82. Case C-615/10, (“*Finnish Turntables*”) [JnsInsiöritojimisto JnsTijmi Oy](#), para. 47

CONCLUSION

The present Food for Thought has highlighted the legal means in place and subsequently adopted by the EU to foster a more harmonised and competitive European Defence Equipment Market. A thorough analysis of this topic requires a multi-disciplinary approach embracing political, legal, and economic rationales.

By analysing the 2008 financial crisis and its ensuing national defence cuts, it took more than ten years for EU Member States to restore their prior defence investment level. As witnessed, defence industries' protectionist measures will most likely make a comeback in the post-COVID economic crisis. However, a few considerations need to be made.

First, national authorities over the past two decades have managed to retain a notable control over export-control policies, partially undermining EU policies on this matter, and this is due to either their lack of willingness driven by the desire to support national industries or perhaps to the fact that they never fully considered such a framework as a realistic or even desirable one. The Commission jointly with other EU institutions have done outstanding work, but foreign and security policies will most likely continue to be shaped by national interest. Secondly, the Commission's attempts in 2016 and 2019 to improve defence procurement rules' implementation have not yet disentangled the causes for non-competitive tender procedures and methodical exclusions.^{83 84} Currently, sev-

eral EU defence collaborative projects within both PESCO and the EDF could be affected by inefficiencies. To this end, the Defence Directive and the ICT should be aligned to bridge those discrepancies that fracture the Internal Market, thus shielding both PESCO and the EDF from further collateral damage. The EDF stimulus represents an economic bonanza for EU Member States. If R&D activities manage to achieve the desired outcome, we could cross the much-feared "valley of death".⁸⁵ Marrone, Head of the Defence Programme at Istituto Affari Internazionali in Rome (IAI), put forward an interesting solution to facilitate Member States defence procurement funded under the EDF. He stated that Member States should buy defence equipment backed by the EDF funds by exploiting the exemption of the Defence Directive 2009/81, which in his words would "maximise the integration of supply chains and defence markets".⁸⁶

In conclusion, when picturing the future of the European defence industrial landscape, it should not be forgotten that national defence industries take different shapes, from totally private as is the case of Germany and the UK – the latter with a "golden share rule" –, to mostly state-owned – as in Italy and France. Moreover, mounting global competition of defence industries could negatively impact the European defence industries' ability to remain competitive. In light of these structural differences, the EU strategic autonomy and

83. Eva 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

84. Commission, "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. European Commission, "Commission Notice – Guidance on the award of government-to-government contracts in the fields of defence and security", [2016] C450/01, 2 December 2016.

85. The use of the figurative expression of the "valley of death" here signifies that defence research projects perish before being pulled through the development phase. For a detailed analysis, please see Daniel Fiott, "Strategic Investment: Making Geopolitical Sense of the EU's Defence Industrial Policy", *EUISS Chaillot Paper*, no. 156, Ch. 3, 30-40.

86. Marrone, Nones, "The EU Defence Market Directives: Genesis, Implementation and Way Ahead", IAI Documents. p.6.

the two directives should be more oriented towards creating a level playing field. Hopefully, the famous quote by Rahm Emanuel which has become a common expression applied al-

most everywhere in these days: “[...] never let a serious crisis go to waste” will be applied to EU defence to reverse nationalistic patterns and increase integration.

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Created in 1953, the Finabel committee is the oldest military organisation for cooperation between European Armies: it was conceived as a forum for reflections, exchange studies, and proposals on common interest topics for the future of its members. Finabel, the only organisation at this level, strives at:

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