

Latest EU Commission Proposal to Reinforce EU Defence Industry: A new Regulation Establishing the European Defence Industry Reinforcement Through Common Procurement Act (EDIRPA) for 2022-2024

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By Mezouar Briane

On 19 July, the European Commission issued a communication COM(2022) 349 final 2022/0219 (COD) through which it adopted its proposal for a Regulation establishing the European Defence Industry Reinforcement through common Procurement Act (EDIRPA) for 2022-2024 (European Commission COM(2022) 349 final 2022/0219 (COD), 2022).

New brick, same approach: EDIRPA Regulation in line with EU's and members states' effort to bolster European defence capacities

Boosted by the current UE's geopolitical context, this Regulation proposal echoed previous initiatives (the European Defence Industrial Development Programme, the Preparatory Action on Defence Research, and the European Defense Fund) and was shaped to complete them consistently. Those instruments aim to rethink the EU's defence plans and capacities and enhance responsibility assumptions. The European Council triggered the EDIRPA Regulation initiative last May during the Versailles Declaration dating from 11 March (Informal meeting of the Heads of State or Government Versailles Declaration, 2022). On that occasion, the European Council expressed the need to « take more responsibility for [EU's] security and take further decisive steps towards building [...] European sovereignty ». Always according to European Council, this would induce some profound shift on keys issues keys area, among others « a) Bolstering our defence capacities; [...] c) Building a more robust economic base » (i.e. pp3-5 points 7 to 13 and pp7-9 points 20 to 23). Those efforts are in line with the quantum leap forward to increase the EU's defence capacities to allow the EU to act as a strong and coherent geopolitical actor (European Council, Strategic Compass for Security and Defence, 2022). On the ground of several findings on investment gaps and internal fragmentation which undermine the EU's defence industrial and technological base (EDTIB) development and competitiveness - later addressed in a joint communication (European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 2022). the European Council urged other EU institutions to propose any further initiative necessary to strengthen the EDTIB (i.e. pp 4-5., points 9.e, 11 Informal meeting of the Heads of State or Government Versailles Declaration, 2022).The joint communication on investment gaps aims to prevent further fragmentation (already noted in financial, industrial and capacity areas) and enhance more efficient investissement in EU's defence. Desire consequences are an increase of defence spending by member states must resulting in a much stronger EU defence technological and industrial base (« invest better and more together ») (i.e. p.1, § 4 European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 2022). Those findings set the ground for a call to use financial and economic levers to address the EU's defence architecture issues and the EDIRPA pretend to answer it. By increasing defence expenditures, EU Members States should step up cooperation through joint projects and procurement, boosting innovation and increased interoperability. The new EDIRPA Regulation is in line with this approach.

One of the key issues of this approach was to increase capital flows to the defence industry to increase production capacity and joint procurement. To avoid useless competition among member states for the same products and facilitate cost savings, the emphasis on convergence in export practices and policies and the increased ramp-up of manufactured capacities production appear to be key points of this EDIRPA Regulation addresses. Thus, last July, the Commission kept its promise to set up a short-term EU instrument reinforcing European defence industrial capacities through common procurement by EU Member States.

A more sectorial instrument despite complementarity with EDF

Although they both stand on the essential pillar of cooperation, they do not envisage its strengthening similarly. Thus, this break-up in approach conduct to a change in the legal basis. The European Defense Fund (EDF) is founded on two titles («Industry» and «Research, technological development and space») and four articles (173, 182, 183 et 188§2 TFEU). This reflects the dual approach (innovativeness and competitiveness) to address the capacity-building issue (financing fundamental research action to increase technological innovation and capacity, supported by improvements in the competitive environment to strengthen industrial capacity). While the EDIPRA is only based on the «Industry» title and one article (173 TFEU) with an approach exclusively focused on competitiveness by improving the framework and competitive environment to ensure better industrial development and competitiveness of operators within the EU (Explanatory memorandum, European Commission COM(2022) 349 final 2022/0219 (COD), 2022). They also differ regarding the subsidiarity assessment done by the Commission based on article 5(3) TEU and complete by motivation requirement from article 296 TFEU, which helps it (along with proportionality check) to choose the more appropriate instruments. For the EDF, Commission uses a two main justification. First, only a Regulation could guarantee the sustainable and feasible creation and functioning of a joint funding program in a single and exclusive area (the creation of a pluriannual funding program is an obligation of TFEU when research actions are planned) (i.e. pp.6-7 points 2 §5-§9, European Commission, Proposal for a regulation of the European Parliament and the Council establishing the European Defense Fund, 2018). Second, the Commission argue that because it aims to unify one single exclusive sector which did not fall into the EU's exclusive competencies. While for the EDIRPA Regulation act, the Commission argue that only a Regulation could be taken to incentive more cooperation and joint procurement to prevent further fragmentation and stop a national based-approach trend that undermines the competitiveness of the EDTIB and affects market prospects (i.e. p.34, §5-§9 European Commission COM(2022) 349 final 2022/0219 (COD), 2022). Sadly, what one perceives as a lack of consistency in the Commission subsidiarity assessment cannot be balanced with a traditional impact assessment that the Commission refuse to proceed with, arguing the European Council invited it to examine in emergency the instrument in a short-term so the co-legislator could receive the draft quicker (i.e. p.5 point 3§2, Council of the European Union, 2022). Finally, we note that EDIRPA Regulation didn't have the same third-countries cooperation framework as the EDF or the PESCO, which testifies the Commission's will to restrain this specific regulation to a purely internal purpose and effect.

In any case, EDIRPA Regulation follows the footsteps of EDF. They both tend to capacities building and reinforcement. Still while EDF plan to reach it through cooperative program research, and scientific and technological innovations, EDIRPA Regulation appears to have its gravity point essentially on the unification of member states' procurement practices and convergence of defence related industrial policies (and de facto doctrine) with a focus on harmonisation of defence expenditure practices. They address the same problems but do not point out the exact cause. Both instruments show a remarkable similarity and complementarity despite EDIRPA Regulation specificities.

Focus on core provisions: between identities and uncertainty

This instrument sets up high standards for eligibility and introduces a core body of principal and additional funding conditions and award criteria, both relying on the nature and the type of actions (article 7, 8) plus the entity's quality and nature (article 9). EDIRPA Regulation article 7 can be seen as a « mirror clause » since, like article 10 of the EDF, it only allows action that directly contributes to achieving the objectives of Instrument. It's open to new actions (news actions on products for the EDF) or action extending existing ones (or improvement of the existing products for the EDF). They also set up the obligations for entities to create a consortium of at least three member states. A nuance in the wording must be noted. The EDF use the formula « legal entities » to qualify applicant. In contrast, EDIRPA Regulation only use this term, referring specifically to « a procurement agent, contractors and subcontractors» acting on their behalf. This nuance can be understood since for procurement of military equipment and technologies, states have sovereign and legit competencies (guaranteed by both European and international law) to purchase, export, import (and of course produce) armament and defend themselves (i.e Article 51 United Nations Charter). The two documents also forbid support for goods or services, which are prohibited by applicable international law, or lethal autonomous weapons without the possibility for meaningful human control over selection and engagement decisions when carrying out strikes against humans (article 7(2.b) EDIPRA, article 10 (6.2) EDF). Such prohibition by principle can be discussed. When the three superpowers (USA, China and Russia) have made military AI and military robotic automation strategic priorities, the EU is invited to move forward more quickly in this field by becoming a creative, innovative and regulatory power (European Parliament, 2021).

While such a Regulation is also a response to the EU's defence market fragmentation (European Parliament, 25 March 2021), we can regret the lack of references to Directive 2009/81/EC which set the EU framework with fair and transparent rules for procurement in the fields of defence and security via public markets. Article 11 of EDIRPA Regulation mentioned the conditions for joint procurement to be included in the agreement between participants and procurement agent following the work-program provisions. But that seems to leave an empty seat about whether Directive 2009/81/EC and national transposition obligations should still totally be observed and how this Regulation would be articulated with those previous frameworks. That did not help to foresee if EDIRPA Regulation would avoid contributing to a trend the European Parliament previously highlighted, resulting in differences in transposition from slow or incomplete implementation in different member states, in a general lack of harmonisation of requirements and procedures between member states (European Parliament, 25 March 2021).

Another possible difficulty relies upon the use of ambiguous wording and standard, such as « appropriate amount to create the incentive effect necessary to induce cooperation » (article 6§2), and the possibility given to the Commission to delegate power to a third entity. While the reinforcement sought must pass through an incitation, the Regulation did not provide any further information on how this incentive amount will be determined, which offers less predictability and clarity for the applicant. Confusion still occurs about which entity will determine the « appropriate amount ». Since the funds are qualified as grants, they should follow core principles from substantial provisions of financial regulation (i.e. article 62, article 100 of Regulation No 2018/1046) and be ruled by title VIII of Regulation No 2018/1046. But articles 7 and 11 of the EDIRPA Regulation proposal stated and will determine the amount within the work program to which article 110(3.1) Regulation No 2018/1046 refers and according which the Commission is entitled to the direct management and transfer appropriations. But the article 4 of EDIRPA Regulation talks only of « implementation » by the Commission and not precisely of « determination » of the resources (focusing more on execution and technical use, spending of funds, and technical assistance). Thus, article 14 of EDIRPA Regulation stated the Commission should be assisted by a committee (such cooperation would be allowed under article 62 Regulation No 2018/1046). Even if the funds are in direct management of the Commission, it said that it « would adopt the multi-annual work programme following the committee's opinion under the examination procedure. A budgetary commitment shall be preceded by a financing decision adopted by the Union institution or by the authority to which the Union institution has delegated power through a work program that settles the global budgetary envelope reserved for the grants ». Since it seems the Commission should be the only actor to have a hand, it's difficult to foresee how the possibility the EDIPRA let for cooperation and participation of third entity will be in line with Regulation No 2018/1046 relevant rules. Will the appropriate amount will be only determined by the Commission's staff and appropriate experts that shape the work program, monitor the implementation, and asses the tender (i.e. p.19, point 1.5.1 European Commission COM(2022) 349 final 2022/0219 (COD), 2022)? Will the Defence Joint Procurement Task Force (if it can be qualified as « authority to which powers have been delegated » will play a significant role in determining process and which one?

Finally, we note that contrary to the EDF (i.e. whereas 21, 33), EDIRPA proposal shows less attention to coherence and complementarity with other instrument and/or program than EDF. Prima facie, it raise doubt on his articulation with numerous existing instruments it could interfere with (EDF, Horizon Europe framework, Directive 2009/81/EC...).

Where after? Between Temporary financial stimulus and long-term policy instrument

Despite diverging legal basis, EDF appears to set a framework for long-time project and cooperation and provide a stronger and deeper legal framework, while EDIRPA Regulation globally seems to be shaped to respond to an urgent situation as a punctual tool. As a matter of fact, it should address in priority « the most urgent and critical defence products needs, especially those revealed or exacerbated by the response to the Russian aggression against Ukraine » (Article 2(2), 7 (1§2)). The short period of validity (end in 31 December 2024) will probably require a quick adoption by the Parliament, since the Council of the European Union adopts it in emergency within a exceptionally short timeframe (Council of the European Union, 2022). The Commission already announced it will to propose a new regulation for a European Defence Investment Programme (EDIP), which might include more significantly the « joint procurement » chapter beside the « development » chapter. Still, this instrument will end before the EDF and it will be necessary to wait for ex-post assessment and implementation report (i.e article 12) before being able to say if this historical Regulation was a success.

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