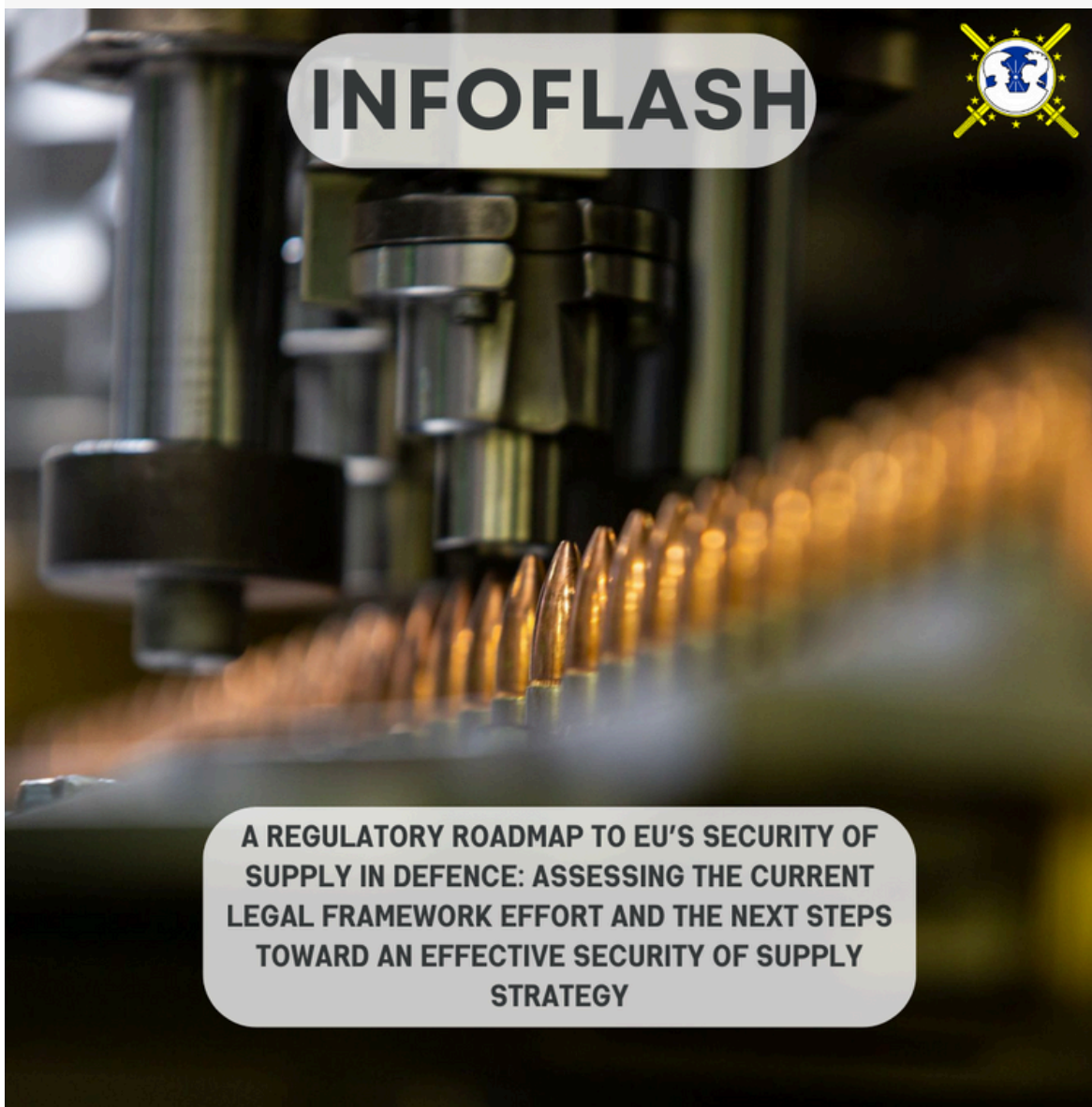


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Introduction

Security of Supply (SoS) has primarily been seen as the sole interest of Member States and defined at their level. However, since the Letter of Intent Framework Agreement (2012), where the six main European armaments producers, – Germany, Sweden, Spain, the United Kingdom, France, and Italy – decided to agree on measures to guarantee the Security of Supply in the defence sector, a lot has changed, putting a growing emphasis on the European Union (EU) level. In 2013, learning from the global economic crisis, the European Council called for developing a roadmap for a comprehensive EU-wide SoS regime, considering the globalised nature of critical supply chains (European Council, 2013, p. 11, §21). However, the reluctance of Member States led to no significant progress toward developing such a regime.

The decline in the defence budget during the post-Cold War and the strong dependence of Member States on external suppliers, with 78% of weapons acquired from non-European manufacturers (Ostanina & Tardy, 2024), led to limited military capabilities. Likewise, the EDTIB found itself unable to respond on time and with the necessary volume to accommodate the structural changes in the EU demand for defence products (European Commission, 2024). In this context, the COVID-19 pandemic and Russia's full-scale invasion acted as wake-up calls that pushed the issue of SoS to the forefront, reinforcing the need for a stronger European Defence Technology and Industrial Base (EDTIB) to ensure the EU's overall defence readiness and its ability to respond to Ukraine's needs (Fiott, 2024). Without any emergency tools at disposal, the Commission proposed two emergency measures to boost its military production: the European Defence Industry Reinforcement through Common Procurement Act (EDIRPA) and the Act in Support of Ammunition Production (ASAP).

This paper investigates the current regulatory framework pursuing the EU's SoS in the defence sector, pointing out inconsistencies, weaknesses and challenges in the pursuit of such effort. It argues that the current legal framework appears fragmented and too reactive, unable to support the EU's SoS effort comprehensively. While the paper intends to draw upon the current regulatory roadmap of the EU's SoS in defence, it does not aim to be exhaustive and focuses only on relevant instruments to support its objective. However, before diving into the core topic of this paper, it is essential to address the meaning of SoS.

1. Conceptualising Security of Supply in the EU's Defence Sector

While the EU lacks a formal definition of Security of Supply, the Guidance on Security of Supply on Directive 2009/81 defines it as “a guarantee of supply of goods and services

sufficient for a Member State to discharge its defence and security commitments in accordance with its foreign and security policy requirements” (European Commission, 2016, p. 1, §1). In Daniel Fiott’s words (2024), it “ensures that technologies, components and systems are delivered in such a way as to allow governments to fully exercise their defence and security policy”.

Accordingly, Security of Supply must be closely monitored through a geographical, temporal and functional approach, ensuring that defence-related products are delivered on time, fully functional, and eventually reach the destination of the buyer (Fiott, 2024). What constitutes a sufficient supply is susceptible to change over time and comes hand in hand with the security of supply risk assessment. These risks must be distinguished from what could be a crisis situation endangering SoS (Fiott, 2024). Overall, SoS implies adopting a general assessment relying on a multidimensional approach that is bound to change over time.

Furthermore, Fiott states (2024) that ensuring SoS at the EU level requires identifying the appropriate governance model, which will inevitably raise concerns and disagreements on the appropriate level at which it should be adopted. A National, Intergovernmental or Supranational approach will translate differently to ensure EU’s SoS regarding both methods and results. Without the willingness of Member States to cooperate, a coherent approach serving the SoS across the EU is unlikely to emerge (Finnish Ministry of Defence, Latvia Ministry of Defence, EUISS, 2021). Overall, the level of “communitarisation of defence” that Member States are willing to endorse (Ostanina & Tardy, 2024) will be decisive to the choice of governance and the shape of an EU SoS regime.

In addition to the governance model comes the challenge stemming from the multiplicity of actors engaged in SoS. Member States might bear primary responsibilities regarding SoS, but industries also play a crucial role in identifying bottlenecks and disruptions (Fiott, 2024). In order to integrate European industries in the EU effort to ensure a robust level of SoS, it will be essential to shift from competition to collaboration through state intervention, financial incentives and regulatory mechanisms (Ostanina & Tardy, 2024). Yet, EU industries are only interested in building a genuine EDTIB if it benefits their economic interests (Ostanina & Tardy, 2024). The EU’s challenge is to navigate between Member States interests and industry forces to strengthen SoS across borders.

Nevertheless, the main challenge to ensure EDTIB’s ability to deliver a sufficient level of SoS to the Member States is linked with the understanding of the EU’s supply chains and dependencies on third countries for critical resources (European Commission, 2024). As pointed out by the Commission (2023), Member States became mutually interdependent in the lower tier of the supply chain. It is therefore essential to map and manage cross-border

supply (Masson, 2013, p. 10) to guarantee a level of trust necessary to further engage in cross-border procurement (European Commission, 2023). The upper part of the supply chain, however, remains fragmented, strongly dependent on third countries. Consequently, dependencies must be assessed and measured to mitigate the risk of instrumentalization.

Despite these challenges, ensuring a high level of SoS remains essential for achieving EU Strategic Autonomy (Fonfría, 2013). Addressing these vulnerabilities by building EU industrial readiness and resilience will eventually forge the path to genuine EU strategic freedom.

2. An overview of the current regulatory framework supporting SoS with two-tier approaches

Slow and ineffective long-term approach: working on the defragmentation of the EU Defence Market without any significant results

While defence equipment procurement increased by 65% between 2017 and 2021, the value of intra-EU trade in defence remained low, with Member States favouring their national industries or third countries' suppliers (European Commission, 2024, p. 15, §2.1.3). Working on the defragmentation of the EU Defence Market should enhance the EU cross-border supply chains, thus bringing a higher level of SoS in the EU. It remains essential to encourage Member States to engage in cross-border procurement by developing safeguards strong enough to reassure them of the reliability of the EU cross-border supply (European Commission, 2023). Two specific legal instruments from the EU Single Market align with such objectives, the Directive on intra-EU transfers of defence-related products (Directive 2009/43/EC) and the Directive on defence procurement (Directive 2009/81/EC). To an extent, these directives complement each other by promoting the integration of the EU defence supply chain, tackling concerns such as fragmentation, duplication and inefficiency (European Parliament, 2020).

Directive 2009/81 streamlines procurement procedures for defence purposes and security-related works, supplies, and services (European Commission, 2018). If the Directive aims to improve transparency and openness to enable EU defence companies to access other Member States' Defence Markets, it strives for a balance with Member States's security interests (European Parliament, 2020). As such, Article 23 of the Directive integrates SoS concerns by allowing contracting authorities to impose conditions ensuring supply reliability in procurement. Authorities may require tenderers to prove supply chain stability through certifications (Article 23.c). Additionally, tenderers may offer additional guarantees, such as prioritization systems (point e). Since the directive does not prescribe detailed requirements, Member States can adapt SoS measures to specific risks (European Commission, 2012, p. 3).

These safeguards ensure reliability in cross-border supply chains, thus encouraging Member States to engage in cross-border procurement.

Along the same lines, Directive 2009/43 provides additional safeguards under Directive 2009/81. The Directive simplifies rules and procedures for intra-EU transfers of defence-related products. It aims at reducing the use of Individual transfer Licences (ITL) with more flexible licences, therefore stimulating the EU cross-border supply chain. More specifically, by requiring General Transfer Licences (GTLs) – which are open licences relying on ex-post verification and covering four mandatory circumstances – to cover transfers to national armed forces or defence contracting authorities (Article 5§2b) of Directive 2009/43), the Directive enables tenderers from other Member States to legally transfer and deliver the required defence-related products without unnecessary licensing delays (European Commission, 2016). Such a safeguard further enhances the reliability of the cross-border supply chain by facilitating intra-EU procurement.

By creating safeguards for Member States to engage in trustworthy cross-border supply chains, both directives participate in the defragmentation of the EU Defence Market. This stimulates SoS at the EU level and reduces dependencies on non-EU suppliers. However, despite their potential, these directives did not deliver the expected results (European Parliament, 2020).

Regarding Directive 2009/43, the Commission pointed out several flaws concerning its implementation. First, it is incomplete: three countries do not offer any GTLs and four do not offer all four mandatory types of GTLs (European Commission, 2016, p. 16). Second, industries lack awareness, knowledge and understanding of GTLs (European Commission, 2016, p. 20). Diverging conditions and exclusions in Member States' GTL regulations hinder the Directive's goal (European Commission, 2016, p. 20). For now, the Directive “is still left sufficiently open and flexible enough to interpretation to mean that there are still essentially 30 non-harmonised licensing systems across Europe” (European Commission, 2016, p. 21). These uncertainties lead industries to rely on ITLs, which are more familiar and bear fewer risks despite their administrative and time costs. Consequently, ITLs remain the main type of transfer licence used, constituting 89% of total transfers (European Commission, 2016, p. 20). Despite the proposal of the Commission to further harmonise the directive through Recommendation, a soft method appears insufficient regarding the highly diverging conditions under GTLs. (Trybus & Butler, 2017).

Additionally, the alignment of Directive 2009/43 with Directive 2009/81 on defence procurement did not prove itself useful as GTLs for armed forces have been progressively slowing down (European Commission, 2016, p. 5). Regarding Directive 2009/81 specifically,

several elements hinder its full effectiveness. Member States tend to exclude high-value systems from the scope of the directive under Article 346 TFEU (European Commission, p. 35). Additionally, the disparity in publication between Member States, with a small group carrying out the Directive, raises concerns regarding asymmetry and reciprocity. Particularly, considering the lack of compensation for the loss of contracts for the national market of the Member States playing by the rules (Masson & Martin, 2015, p. 37).

Such weaknesses hinder both Directives' objective of enhancing EU cross-border supply chains by defragmenting the EU Defence Market, consequently leaving the issue of EU-wide SoS unresolved.

Reactive approach in the short-term: responding to a threat without addressing the underlying issue of SoS

The vulnerabilities in the existing supply chains and the EDTIB's inability to respond promptly and sufficiently to the sudden spike in demands of Member States's urgent needs after Ukraine's invasion led the Commission to table two legislative proposals for an EDIRPA and ASAP.

EDIRPA incentivises Member States' joint procurements of critical defence equipment through 300-million-euro funds (Schnitzler, 2023, p. 3). By consolidating the demand side, it enhances visibility for industries through "stronger and long-term signals", allowing the EDTIB to ramp up its production to better respond to Member States' needs during critical moments (European Commission, 2024). It also contributes to achieving economies of scale while ensuring that smaller Member States benefit from the supply of critical equipment and systems. Overall, EDIRPA aims at reducing excessive EDTIB fragmentation by opening the supply chains for cross-border cooperation and speeds up its adjustment to structural changes (Article 3.a and 3.b of EDIRPA), thus enhancing SoS and preserving the diversity within the supply chain.

In contrast, ASAP targets industry production capabilities, mobilising 500 million euros to ramp up ammunition production while helping Member States address their insufficient equipment stockpiles and deliver ammunition to Ukraine. Through the form of grants, it introduces an instrument to support projects contributing to increasing the production of ammunition and missiles while addressing bottlenecks in production capacities and supply chains (Article 8 of ASAP). To this end, actions covered by Article 11 aim to strengthen the EU Industrial production capacities throughout the whole supply chain, allowing for the timely availability of ammunition and missiles, thus ensuring SoS within the EU. It further strengthens SoS by streamlining permit procedures (Article 13) and allowing new parties to

join existing defence procurement agreements without altering the original deal (Article 14), thus accelerating delivery and production.

Despite such potential, the results obtained after the application of ASAP and EDIRPA show the limit stemming from a short-term regulation to address the lack of readiness of the EDTIB to immediately adjust to urgent demands as well as vulnerabilities in EU SoS. The EU only provided half of the pledged amount of ammunition rounds to Ukraine (Posaner, 2023). Several reasons explain the inability of the EDTIB to ramp up ammunition and missile production. Besides a rather low budget granted for each of these instruments, adopting a competition approach rather than opting for direct awards leads to a longer and more difficult selection process, thus contradicting the regulation's urgency (Schnitzler, 2023, p. 7). Moreover, the ASAP suffers from a significant flaw: its final version erases the Priority Rated Orders proposed in the original version of the regulation (European Commission, 2023). Such a mechanism would have allowed the Commission to compel a company to produce military equipment as a matter of priority, thus firmly ensuring a satisfactory SoS at the EU level by replacing the existing yet ineffective tools like the non-binding principles under the Letter of Intent Framework Agreement (European Commission, p. 5). Besides these challenges, both regulations lack a holistic approach. They fail to address the rudimentary understanding of the EU supply chains, leaving issues such as military mobility (Berretta, 2025) and SoS mapping out of their scope despite their critical relevance regarding SoS. Emergency measures reveal themselves as unreliable tools that are unable to address the underlying issue regarding SoS for ammunition and missiles (Ostanina & Tardy, 2024, p. 6).

The results stemming from ill-adapted emergency instruments led the EU to reconsider its approach to SoS by shifting from punctual emergency instruments to “structural EU defence readiness across all time horizons” to continuously secure the availability of military capabilities (European Commission, 2024, p. 22). This approach should eventually ensure EU-wide security of supply as well as enhance EU's strategic autonomy (Ostanina & Tardy, 2024, p. 4). Consequently, in March 2024, the Commission addressed SoS concerns in its European Defence Industrial Strategy (EDIS), whose legislative leg, the European Defence Industrial Programme (EDIP), made SoS a core pillar of the EU's strategy to ensure that Member States “invest more, better, together and European” (European Commission, 2024).

Taking note of the gaps in the current legislative framework, EDIP proposes three pillars (European Commission, 2024). The first one extends the logic of EDIRPA and ASAP beyond the scope of ammunition and missiles, thus helping EDTIB to adapt to the new market reality and making it more flexible to sudden changes. The second pillar specifically targets SoS by establishing a SoS regime through a two-layer gradual crisis framework (EU Monitor, 2024), finally addressing the “legal vacuum” that existed in times of crisis (European Commission,

2024, §3.2). The measures proposed vary, ranging from prioritising defence over civilian suppliers - priority-rated orders (Article 50) - to information gathering (Article 49), while reaffirming the role of other legal instruments, such as the directive on intra-EU transfers of defence products to process transfers in an efficient and timely manner (Article 51). Completing these “crisis state” mechanisms, the creation of new bodies, such as the EU Observatory of Critical Technologies and the Defence Industrial Readiness Board (DIRB), should bring greater monitoring of dependencies and bottlenecks in the supply chains, which was lacking in the ASAP regulation (Ostanina & Tardy, 2024).

If the EDTIB relies on a more holistic approach to EU SoS, the fact that these emergency tools mainly consist of information exchange, coordination, guidance and crisis measures review via the DIRB still reveals a partial approach to SoS (Fiott, 2024). Moreover, the fact that the EU does not have a direct competence regarding SoS, a term that is nowhere to be found in the EU Treaties, is also a real concern regarding its ability to fully ensure a comprehensive EU SoS regime. For the time being, the EU relies on ‘the dual effect’ of its legislation to address SoS by relying on the flexibility of its internal market law (Tuominen, Halonen, & Salminen, 2023, p. 258). Not only does such a method raise questions regarding the democratic legitimacy of this approach, but it also bound the Commission not to be able to coherently approach EU SoS (Tuominen, Halonen, & Salminen, 2023, p. 242). Basing the EDIP on Article 114 TFEU also triggers the possible use of Article 346 TFEU, thus allowing Member States to bypass these regulations by potentially pretexting national security concerns (Fiott, 2024).

Yet, the main challenge for the Commission remains to put in place a regime that all Member States can support, a “one size fits all” approach still able to target the EU specific SoS needs (Finnish Ministry of Defence, Latvia Ministry of Defence, EUISS, 2021, p. 4). In light of the creation of a new EU defence commissioner, EDIP also reinforces concerns regarding the growing role of the Commission in a field that remains the sole competence of Member States as enshrined in Article 4§2 TEU. Beyond EDIP, EDIS puts the Commission in a central position for key initiatives, from the Structure for European Armament Programme to the European Military Sales Mechanism (Ostanina & Tardy, 2024, p. 10).

Even so, navigating between institutional and legal concerns remains critical if the EU wants to equip itself with a robust and comprehensive EU-wide SoS regime. Member States' adherence to such a regime is essential, and at stake is the strategic autonomy of the EU and its ability to act autonomously during crises.

Conclusion

While Security of Supply has primarily been seen as the sole interest of Member States, consecutive events – from the Global Crisis of 2008 to COVID-19 and Russia’s full invasion – put increased focus on the EU level to better address SoS concerns.

However, the current regulatory framework is not robust enough to support the EU’s effort to ensure the Union’s Security of Supply. Such a framework has been built through successive crises and does not offer effective and comprehensive tools. Directive 2009/43 and 2009/81 despite developing safeguards strong enough to reassure Member States of the reliability of the EU cross-border supply suffer significant flaws vis-à-vis their implementation that prevent their full potential application. ASAP and EDIRPA show the limit stemming from a short-term regulation to address the lack of readiness of the EDTIB to immediately adjust to urgent demands as well as vulnerabilities in EU SoS. The overall limited “peacetime” production capacities and dependencies invite the EU to better reflect through a long-term approach upon its Security of Supply strategy while addressing the ability of EDTIB to ensure a sufficient level of SoS during crisis and war.

Despite lacking a direct competence to legislate on SoS, the EU needs to shift to a more cohesive and robust regime, which EDIP seeks to achieve. Such effort goes beyond the necessity of ensuring SoS at all times: it goes hand in hand with the EU’s Strategic Autonomy and its ability to act autonomously during crises.

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