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CAN THE EU BECOME A DEFENCE CUSTOMER IN ITS OWN RIGHT ?

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AUTHOR'S PRESENTATION



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ABSTRACT

The European Union's (EU) defence industrial policy has been in a state of flux since Russia attacked Ukraine. The EU now seems destined to move beyond the role of mere industrial sponsor, to that of defence customer. The Commission's new proposals contained in the EDIP certainly point in this direction. At this stage, however, the EU cannot yet be considered as a defence customer in its own right. It is certainly moving towards this role, but it has not yet assumed it fully. The EU cannot buy or stock military components or equipment on behalf of the Member States. Could it do so one day? And what does it need to do so?

In order to answer these questions, this note will first outline how EU industrial policy has evolved not only in the military field, but also in strategic civilian and dual-use sectors. Secondly, the innovations proposed by EDIP will be reviewed. In its conclusions, the paper will finally examine the real room for maneuver that the European treaties leave the Union in its evolution towards a possible role of defence customer.

INTRODUCTION

As it has gone through a series of crises, the nature of the European Union (EU) has gradually changed, almost unnoticed. When it comes to security and defence, for example, the EU is no longer what it was just a few years ago. A letter written on 23 May 2024 by the prime ministers of Poland and Greece, Donald Tusk and Kyriakos Mitsotakis, bears witness to this. In this missive, Tusk and Mitsotakis propose the creation of an air defence shield covering the entire territory of the Union¹. What is surprising about the missive is not so much its content as its recipient. The addressee is not the European Council and its Member States, but the President of the European Commission, Ursula Von der Leyen.

The official services in Warsaw and Athens did not go to the wrong address. They did not make any diplomatic blunders. They knocked on the right door, aware that times have irrevocably changed. In recent years, the Commission has become a key player in the European Defence Technological and Industrial Base (EDTIB), which must be seen as a major innovation in the history of integration on the old continent. The Member States are therefore no longer alone at the helm of the EDTIB. And if Tusk and Mitsotakis have decided to turn to the Commission, it is because its competences in this area are set to grow in the near future, as are its budgets.

It is true that through its ordinary budget, the Union, and with it the Commission, can do a great deal for the defence industry. Since 2017, the EU has been able to finance military research and development (European Defence Fund). In 2022, it has adopted transitional programmes to support Ammunitions Production (ASAP) and Joint Procurement (EDIRPA). The previous year, in 2021, the EU even acquired powers to reimburse arms transfers to third countries via an ad hoc budget (European Peace Facility, from which the Commission is excluded). And the Member States are currently negotiating an ambitious proposal from the Commission to further strengthen the EU's competences and acquire new ones (European Defence Industrial Programme - EDIP).

But can the EU finance the purchase of complex weapons systems to be pre-positioned in defence of the continent's territory, as the missive from Tusk and Mitsotakis suggested? The letter from Tusk and Mitsotakis puzzled other heads of state and government. German Chancellor Olaf Scholz, for example, made it clear at a meeting with Donald Tusk a few days after the letter was made public that while the EU's ordinary budget could be used to support the defence industry, it could not be used to buy weapons². Ursula Von der Leyen, however,

¹ Joint letter of the Greek and Polish Prime Ministers to the President of the European Commission, May 24, 2024.

² "Germany should strengthen its role in European defence, according to Polish Prime Minister Donald Tusk", *Euractiv*, July 4, 2024.

is more nuanced than her compatriot on this subject. In her view, the EU could contribute to financing an air defence shield. She said so explicitly when she responded favourably to the Polish and Greek Prime Ministers³, and she repeated it implicitly on two occasions, both in her investiture speech to the European Parliament for her second term of office⁴, and in the policy paper she presented on this regard⁵. On both occasions, the President of the Commission spoke of the need to set up, at EU level, genuine "common European projects" in defence, probably referring to a proposal contained in the EDIP to launch "European Defence Projects of Common Interest" (EDPCI)⁶.

So where does this leave us? Will the EU be able, in the near future, to move beyond its role as a mere sponsor of the defence industry, and become closer to the role of defence customer? This is not an easy question to answer. At this stage, the EU can neither buy nor stock defence components or equipment on behalf of the Member States. However, given the rapid and constant evolution of its competences in the military industry, the cards on the table have been shuffled. In this context, it is not easy to understand what the EU can do today and what it will be able to do tomorrow via its ordinary budget, especially as the way in which the Treaties are interpreted in this respect is also evolving. How far are the Member States prepared to let the Commission go? Could the Union, one day, co-finance the implementation of a project such as the anti-aircraft shield, as Poland and Greece would like?

The notion of "Defence Customer"

What are the characteristics of defence customers? Procurement dimensions are important but it is necessary to distinguish the acquisition of equipment (core procurement) and the funding of technology and capability development through R&D and demonstrator contracts. A defence customer also covers end-users, which interact with suppliers during the in-service phase of programmes, including support, MRO and retrofit. Covering the whole spectrum of capability lifecycle, all these dimensions are required to fully implement a defence industrial strategy.

³ "Von der Leyen backs Polish, Greek calls for EU air defense shield", *Politico*, May 23, 2024.

⁴ Statement to the plenary session of the European Parliament by Ursula von der Leyen, candidate for a second term 2024-2029, July 18, 2024.

⁵ Ursula von der Leyen, *Choosing Europe - Political guidelines for the next European Commission 2024-2029*, Strasbourg, July 18, 2024.

⁶ Art. 15 of *EDIP Proposal for a Regulation of the European Commission*.

THE EU'S LONG ROAD TO BECOMING A DEFENCE CUSTOMER

In the early days, the path that enabled the EU to gradually become a player in the EDTIB was complicated and tortuous, before undergoing a sudden acceleration in recent years. Looking back at these early stages can help us better understand where the Union has got to today, and how far it could go tomorrow.

A paradigm shift: towards an unprecedented industrial policy

In 1957, the founding countries of the European Economic Community (EEC), which later became the EU, were not yet ready to unite politically. Initially, they preferred to integrate their markets, with a view to moving closer together politically at a later stage. This idea was based on a normative and liberal approach to European integration. The strategy followed was simple but effective: the Member States agreed to impose common rules on their companies (normative approach), while at the same time lifting restrictions on trade between them (liberal approach).

By following this method, however, the Union found itself for a long time without an industrial policy worthy of the name. An industrial policy at the EU level could only have been achieved by giving the Commission, the main common supranational institution, a political role that the founding countries were not yet prepared to accept. Things are different today. The Covid-19 pandemic, the war in Ukraine and the growing instability in the world have changed the situation. The Member States have realised that happy globalisation was an illusion, and that they can no longer depend on foreign countries to supply them with key critical goods and technologies. But they also realised that, with the level of economic integration they had achieved, any interventionist industrial policy could only be conducted at EU level, by the Commission.

Against this backdrop, the EU's liberal, prescriptive and passive approach to industry suddenly appeared ill-suited to the new geopolitical realities. The need for Brussels to adopt a genuine common industrial policy, with an interventionist and strategic (some would call it Colbertian) character, gradually became apparent. The Member States have begun to realise this, as demonstrated by their adoption of the "Next Generation EU" economic recovery plan in the wake of the Covid-19 pandemic. The EU subsequently acquired new competences in the industrial field, notably by launching initiatives to support strategic sectors such as health, semi-conductors, critical raw materials and, above all, defence.

It is in the military-industrial field that this evolution of the EU has been most visible and significant. In the past, defence industries and markets had been excluded from the scope of action of the EEC/EU. The economic integration process that begun in the 1950s had not been extended to this key sector of national sovereignty. This is no longer the case. The EU has also invested this field of action, including through its Community system.

In fact, the expansion of Community skills into the defence industry preceded the Covid pandemic and the war in Ukraine. It began in the first decade of the 2000s. In its early stages, however, the process was slow and timid, with much hesitation and mixed results. It never really got off the ground. In recent years, however, the process has accelerated sharply.

The first steps in dual use: Galileo and scientific research

The first steps in this process were taken in the early 2000s, when the Europeans decided, after lengthy discussions, to launch the **Galileo** satellite geolocation system. Unlike its American (GPS) and Russian (Glonass) competitors, which were initially military programmes, the Galileo system was conceived as a civilian programme. At the time, the idea that the EU could develop and finance a defence system was unthinkable. In launching Galileo, however, the Member States' ulterior motives were all military, although they remained unspoken. The Europeans did not want to be dependent on the American GPS for satellite positioning, not least for military reasons. Galileo has therefore been equipped with a secure strategic application, the Public Regulated Service (PRS), which can only be used by the public authorities of the Member States, including the military authorities. As such, it can be seen as a genuine dual-use asset, launched in the early 2000s in the name of what would later be called "European strategic autonomy".

If the EU has always had a limited and embryonic industrial policy in the past, then Galileo must be seen as the exception that proves the rule. An exception that has produced a clear result: the only large-scale, strategic industrial project launched by the EU in the past via its community system must be considered an undeniable success (which contrast to the many intergovernmental initiatives undertaken by the European Defence Agency). Galileo is capable of emitting a signal that is more accurate than those emitted by the American GPS, the Chinese Baidu and the Russian Glonass. What is interesting to note here is that Galileo is an infrastructure that legally belongs to the EU, and is therefore co-managed by the Commission. This means that the EU owns a complex system with military applications, built by military companies (Airbus, Thales, Leonardo, etc.). As a result, the EU, and with it the Commission, can be considered to have been customers of the EDTIB since 2001, when the programme was launched.

So it was through dual-use that the EU took its first steps into the defence industry. Just a few years after launching the Galileo system in 2001, the Member States decided to take another step, by formally extending the EU's programmes for funding **scientific research** to the dual-use sector and then to internal security. Although the military industry was still taboo, the fact that scientific research support programmes were managed through the Community method, and that they could indirectly concern the defence sector, was seen at the time as a step forward.

The defence industry and market become an EU competence

The first explicit attempt to extend the Community system to the defence industry itself dates back to 2009, but it cannot be considered a success. That year, the EU adopted **two directives** aimed at establishing common, albeit still limited, rules for defence procurement and for intra-Community transfers of military components. So it was through the traditional standards-based approach that the European Commission attempted to acquire its first competences in the military industry. However, the 2009 directives have only been partially complied with by the Member States, and the Commission has never dared to pursue infringement proceedings for failure to comply with Community standards.

It was not until the mid-2010s, and the changing international security context, that the EU began to timidly modify its liberal and normative approach. In 2014, Russia began its aggression against Ukraine, invading Crimea and launching a proxy war in the Donbass. Two years later Donald Trump had been elected President of the United States and the British had decided to leave the EU. At a time when the security situation on the continent was beginning to deteriorate, Anglo-Saxon security guarantees on the old continent were being called into question. It was this series of shock events that prompted the EU to change its tune.

In 2016, the EU decided to move from a prescriptive approach to an interventionist industrial policy, this time based on financial incentives. It launched a programme to finance military R&D via its ordinary budget, called the **European Defence Fund (EDF)**. The EDF should be seen as a genuine paradigm shift for European defence. Being financed by the EU's ordinary budget, the Fund could only be managed by the Community system, in which the Commission plays a central role. As a result, the Commission was finally able to gain a foothold in European defence industrial policies, which until then had remained the exclusive preserve of the Member States. Since then, the Commission has begun to acquire a role that will only increase in importance over the years.

The EDF cannot be considered as a tool for turning the Union into a defence customer in the strict sense of the term, since it only offers subsidies for military R&D. But faced with the war

in Ukraine and the urgent need to increase arms and munitions production to support Kiev, the Europeans have shown their intention to go beyond R&D. In 2023, the EU launched the **Act in Support of Ammunition Production (ASAP)** programme to support the industrial production of ammunition and missiles, thus extending its scope.

In the same year, the EU also adopted the **Defence Industry Reinforcement Through Common Procurement Act (EDIRPA)**, this time with the aim of financially compensating for the additional costs that may be incurred by joint arms procurement for delivery to Ukraine. In this respect, EDIRPA can be seen as another major turning point for the EU, since for the first time it is involved in military procurement. However, EU action in this area remains limited and circumscribed. EDIRPA's budget is only €310 million, and its co-financing does not exceed 20% of the total cost of the joint purchase. Above all, the military equipment acquired in this way remains the property of the purchasing countries. EDIRPA does not therefore make the EU a genuine defence customer in the strict sense of the term. But the EU, and with it the Commission, is nevertheless part of the equation.

At the same time, still in 2023, yet another programme, the European Peace Facility (EPF), which is an intergovernmental fund placed outside the ordinary budget to finance arms transfers from Member States to third countries, has been replenished and upgraded so that it can also support joint procurement of munitions and missiles to be sent to Ukraine (**EPF - Track 2**). Here, too, ammunition is purchased by groups of Member States jointly for shipment to Ukraine, but the European Defence Agency (EDA) can act as an intermediary in negotiating contracts with industry, following the example of the NSPA within NATO. The Member States remain the owners of the munitions purchased before transferring them to Ukraine, obtaining reimbursement from the EU. As in the case of EDIRPA, the EU is not the ultimate customer. However, unlike EDIRPA, it can become a kind of central purchasing agency via the EDA.

ASAP, EDIRPA and EPF-Track 2 are transitional programmes with limited budgets, adopted to deal with the emergency imposed by the war in Ukraine. But they are nonetheless very important. They have enabled the European Union to extend its competences beyond R&D and, in the case of EDIRPA and EPF Track 2, they allow the EU to play an indirect role as a customer defence. Above all, in the longer term, these programmes could pave the way for certain future EU competences in the regulatory field.

At least, that is what the Commission would like. On 5 March 2024, the European executive proposed that the Member States adopt a defence industrial strategy (**EDIS**) and, above all, a defence industrial programme (**EDIP**), designed to deepen and perpetuate its new role established through ASAP and EDIRPA. The EDIP programme, in particular, is highly ambitious,

since it is not limited to providing new funding to the EDTIB via the EU's ordinary budget. It also plans to intervene in a number of regulatory areas and in defence planning, thereby conferring new powers on the Commission. As such, it has already provoked grumblings in European capitals.

New skills for the strategic civil industry too

EDIP has the potential to move the EU further towards a role as a true defence customer and, as such, will be discussed in the next chapter. Before returning to this programme, however, another important element should be recalled here. With the war in Ukraine, the Union has not confined itself to relaunching its defence industrial policy. It has also developed other industrial tools aimed at supporting Europe's strategic industries more generally, whether civilian or military.

The Chips Act

By way of example, in 2023 the EU adopted a regulation, the **Chips Act**, to strengthen Europe's competitiveness and resilience in the field of semiconductors. In particular, the EU will fund R&D in this sector from the budgets of the Horizon Europe and Digital Europe programmes. A Joint Undertaking between the EU, its Member States (plus Turkey, Norway, Israel and Iceland) and semiconductor industry groupings has also been set up to facilitate work⁷. The Chips Act will also establish administrative mechanisms to encourage public and private investment in this area.

What is interesting about the Chips Act is that it establishes a procedure to enable the EU to strengthen its role in the event of crises and shortages. The procedure in question is activated, on the basis of crisis indicators, by a Board comprising the Commission, the Member States and the other European stakeholders concerned. More specifically, it is the Council that activates the state of crisis by a qualified majority, on a proposal from the Commission. Once a state of crisis has been established, the Commission can adopt a whole series of measures. For example, it can :

- Require the companies concerned to provide information on the production situation.
- Impose production priorities in agreement with the Member States concerned.

⁷European Union website, "Semiconductor Joint Undertaking", accessed September 6, 2024. https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/chips-joint-undertaking_fr#:~:text=R%C3%B4le%3A%20I,the%20joint%20C2%AB,%C3%A9electronics%20avanc%C3%A9s%20fabriqu%C3%A9s%20in%20Europe.

- Facilitating joint procurement between Member States that wish so. The Commission can also act as an intermediary, with a role that could be likened to that of a broker or central purchasing body. The Commission may also co-finance these purchases.

Such provisions do not turn the Commission into a customer in the strict sense of the term, since semiconductor purchases are made exclusively by the Member States. But they do allow it to play an active role which, in the event of a crisis, aims to strengthen demand vis-à-vis producers. Furthermore, when the Commission adopts a role akin to that of a central purchasing body, it is the Commission that negotiates contracts with the industries concerned and defines the terms, in agreement with the Member States involved in the purchase. As such, it is associated with the end customers (the Member States), whom it represents in dealings with suppliers.

The Critical Raw Materials Act (CRM Act)

In March 2024, the EU also adopted the **Critical Raw Materials Act**, taking up the philosophy of the Chips Act, but this time in favour of critical raw materials essential to strategic industrial sectors. Within this framework, the EU can also facilitate and co-finance joint acquisitions of a whole series of raw materials listed in the annex to the regulation, if the Council has declared a state of crisis by a qualified majority, and after this has been proposed by the Commission. The CRM Act also includes provisions designed to facilitate the development and financing of projects pre-identified as strategic. As in the case of semiconductors, however, the EU does not itself buy or stock the raw materials in question. It merely supports demand from the Member States and reinforces their position as purchasers⁸.

IRIS² like Galileo?

Another interesting dual-use industrial initiative is the **IRIS²** space programme, launched via an EU regulation also adopted in 2023, and currently under development. IRIS² aims to build and place in low orbit a constellation of telecommunications satellites providing secure, high-speed links, with applications for both the private sector and the security and defence sectors. As in the case of Galileo, IRIS² should also offer applications for the defence ministries of the member states, and could be made up of infrastructure partly owned by the EU itself. And in this case too, it is the Commission that is responsible for launching and awarding public contracts, contracting the companies involved, monitoring implementation and ensuring the

⁸ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020.

corresponding payments via the EU's ordinary budget. It is therefore the Commission which, on behalf of the EU, assumes the role of customer vis-à-vis the companies that will have to implement the constellation.

Intermediate conclusion: what can EU do today ?

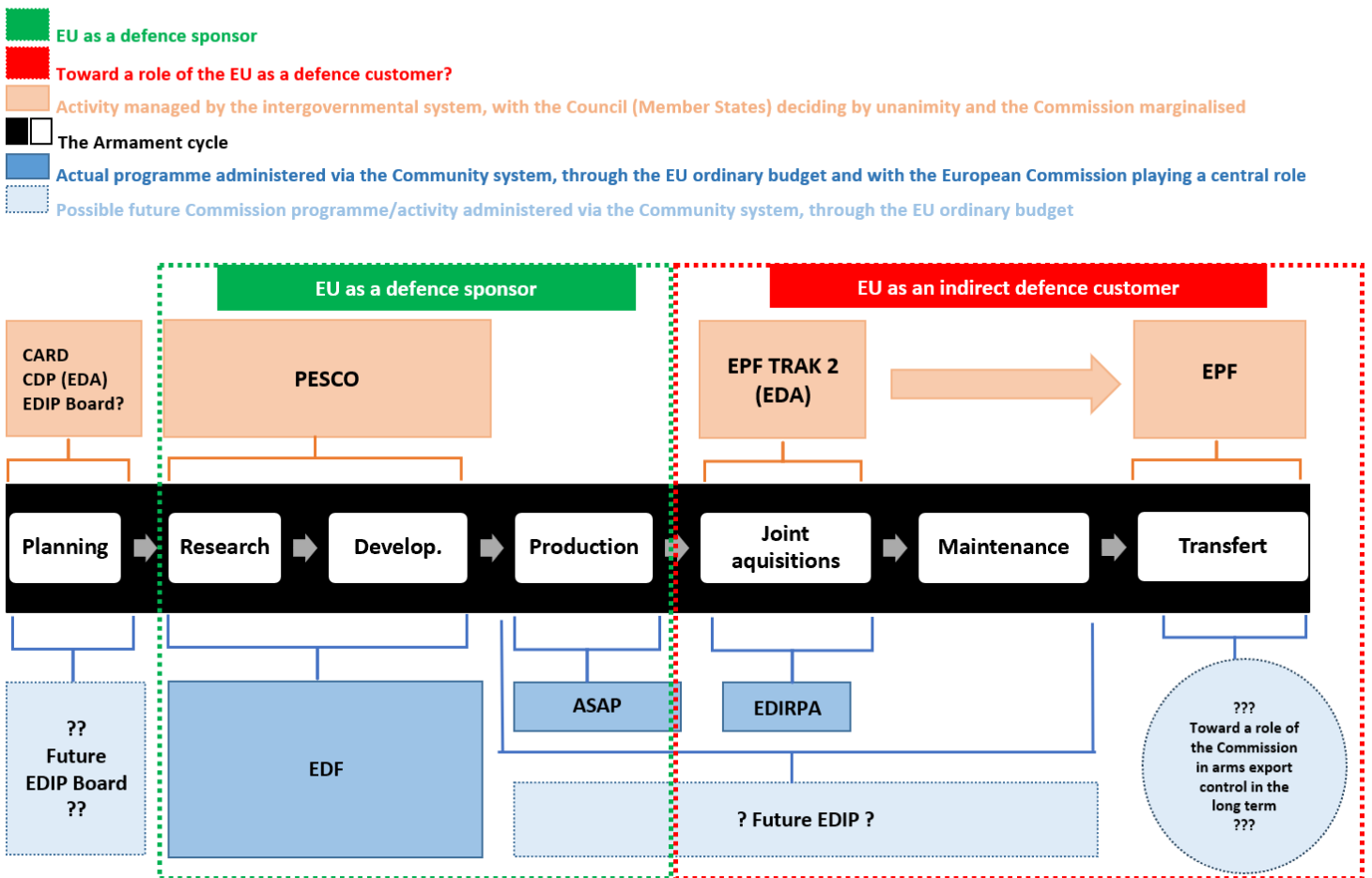
From this brief historical overview, it is clear that, to date, the EU has not yet become a defence end-customer in the strict sense of the term. However, over the course of time and the crises that have shaken it, it has acquired a role that is increasingly similar.

Today, the EU:

- Can provide financial support, through subsidies, for the entire armaments cycle, from R&D to industrial production (EDF, ASAP).
- Owns and manages dual-use infrastructures with major military applications (GALILEO, tomorrow IRIS²).
- It can impose priority orders and the supply of key information on certain civilian industries that are essential to the defence sector (semiconductors, critical raw materials) (Chips Act, CRM Act).
- Again for critical raw materials and semiconductors, it can, it can even act as a central purchasing body for joint acquisitions, which it can co-finance. However, purchases remain the responsibility of the Member States (Chips Act, CRM Act).
- It can co-finance Joint Armaments Procurement (EDIRPA).
- In particular, it can co-finance the joint procurement of missiles and munitions by turning the EDA into a kind of central purchasing agency (EPF-Track 2).
- It can finance arms transfers to third countries (classic EPF).

Despite this, the EU is still not in a position to acquire ownership of either critical components (civil or military) or weapons so that they can be made available to Member States if needed. How might things develop in the future, particularly if the EDIP programme is adopted?

Diagram 1
EU funding of the European defence industry cycle



The unfinished business of EDIP

EDIP is intended to deepen and sustain the new skills acquired by the EU through the transitional programmes EDIRPA, ASAP and FEP-Trak 2. In reality, EDIP goes well beyond these initiatives. For some activities, it puts in place mechanisms clearly inspired by those established by the EU's vaccine strategy, the Chips Act and the CRM Act. This is the case, for example, with the proposed mechanisms for securing supply chains for key defence products or the Commission central purchasing function for joint acquisitions.

A role increasingly similar to that of a defence customer

EDIP is a very complex programme containing a large number of disparate provisions aimed at both financing and regulating four distinct sectors:

- 1) joint acquisitions,
- 2) aid for industrial production,
- 3) supply chains for critical materials and components,
- 4) the integration of the Ukrainian military industry into the EDTIB.

If it were to be adopted as it stands, which is unlikely, the EDIP would significantly deepen the Commission's prerogatives in the field of defence. It would strengthen the capacity of the European executive to support, coordinate and rationalise Member States' demand for military equipment vis-à-vis the defence industry. It would also enable the Commission to negotiate defence contracts (which it could co-finance) on behalf of groups of Member States. EDIP would also give the European executive an unprecedented role in selecting defence projects of common interest that could be co-financed by the EU (particularly in the field of contested areas). Finally, EDIP would authorise the Commission, in exceptional circumstances and under certain strict conditions agreed with the Member States concerned, to impose priorities on defence companies in terms of military production and critical components, even going so far as to impose sanctions if necessary.

However, despite all these measures, EDIP would not allow the EU or the Commission to buy or stockpile anything. The ultimate buyers and owners of defence products would remain exclusively the Member States. If adopted in the initial version proposed by the Commission, the programme would therefore not transform the EU or the Commission into a 100% defence customer. But it would strengthen the role of support, negotiation and definition of requirements played by the Commission in support of the ultimate customers, i.e. the Member States.

EDIP measures bringing the EU closer to the role of a defence customer

EDIP is an ambitious programme, designed to shake up the powers of national capitals, and therefore to irritate them (which explains why its adoption as it stands remains uncertain). The main measures that would enable the Commission, if EDIP were to be adopted, to move closer to the role of defence client are as follows⁹ :

The **Board** (art. 57 EDIP). EDIP is to set up a “Defence Industrial Readiness Board” comprising the Commission, the High Representative (HR) and the Director of the European Defence Agency, as well as the Member States and associated countries. The Board will have two different functions:

- Ensuring joint programming of EU defence investment and procurement
- Support the implementation of EDIP.

The Board will not replace the traditional EU programme committees provided for in Regulation (EU) No 182/2011, as its political level and ambitions will be much higher. The Board is intended to ensure coordination between the key players and improve the vertical and horizontal coherence of EU action on defence industrial policy, whereas the Programme Committees have a more technical and day-to-day management function. The Board would therefore play a very important role in guiding EDIP funding, including that for joint procurement. And within this framework, the Commission would be destined to have a significant influence, given that it would have to chair the Board.

SEAPs (art.22-33 EDIP). The "Structure for European Armament Programme" (SEAP) are structures that should bring together Member States wishing to make joint purchases and to manage the equipment acquired. SEAPs are very important because they should have legal personality, taking the form of a sort of small international organisations that can sign contracts and make purchases. They would nevertheless remain subject to the supervision of the European Commission.

SEAPs should structure cooperation between states when they embark on joint procurement, also by organising joint maintenance of equipment. The Commission could facilitate and, above all, co-finance joint purchases within the SEAPs, particularly when the States concerned aim to create reserve stocks ("**defence industrial readiness pool**"). The Commission could also

⁹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products ('EDIP') (2024).

co-finance the costs of maintaining jointly purchased equipment throughout its life cycle. VAT exemptions are also planned.

The **European Military Sales Mechanism** (art. 14 EDIP). To promote the EDTIB, the EDIP proposes a complex mechanism to encourage government-to-government procurement, inspired by the US Foreign Military Sales (FMS) system. Under FMS, the US government uses the Department of Defence procurement system to buy defence articles and services on behalf of its partners. It is also possible that, when Washington purchases equipment to meet its own needs, it buys additional quantities to be able to resell them to its allies. In this way, the transaction is carried out directly from government to government, without going through the complex negotiations with manufacturers, who then have to obtain export licences. The EU therefore wants to adapt its rules to allow Member States to do the same. In this context, a **revision of the 2009 directive on defence procurement** is planned. The idea of creating a European Military Sales Mechanism is, of course, closely linked to that of the **defence industrial readiness pool** and the ambition to co-finance stockpile reserves, notably in the context of SEAPs.

European Defence Projects of Common Interest (EDPCI, art. 15 EDIP). The EDIP provides for the possibility of the Commission to pre-identify, with the Member States, "European Defence Projects of Common Interest", with a view to co-financing them. The assets or infrastructure concerned would, of course, remain the property of the Member States, but the European executive would nonetheless assume an unprecedented role in project selection. The proposal for a regulation on EDIP states that these EDPCIs should be identified on the basis of indications provided by the Defence Industrial Readiness Board and the Capability Development Plan of the European Defence Agency. Nevertheless, the role that the Commission would assume in helping to designate the projects to be supported brings it considerably closer to that of a defence customer.

A **single catalogue of defence equipment** (Art. 14 EDIP). The Commission is proposing to create an IT platform listing all the defence equipment produced in the EU. The aim here is to encourage the EDTIB and promote its products, both for the EU's internal market and for export.

The **Commission as a central purchasing body** (art. 35 EDIP). EDIP would enable the Commission to act as a central purchasing body for defence products, along the lines of the Chips Act and the CRM Act. It could thus negotiate joint arms acquisitions on behalf of a group of Member States (possibly structured within SEAPs). EPF-Track 2 also had temporarily provided for this possibility, but the fact that EDIP provides for the Commission (the EU's main

supranational institution) and not the EDA (which is an intergovernmental agency dependent on the Council) to play this role is an important innovation. Moreover, with EDIP this function would be permanent, whereas under EPF-Track 2 it is only transitory.

Advance purchasing agreements (art. 36 EDIP). When it operates as a central purchasing body, the Commission could also organise "advance purchasing agreements", under which Member States would undertake to purchase defence equipment that has yet to be produced. The proposed EDIP regulation even provides for the EU to cover any advance payments under this type of contract (art. 36.2 EDIP). The aim is to give companies greater visibility in order to facilitate their long-term investments and increase their production capacity. This measure is also clearly inspired by the Advance Purchase Agreements that the EU drew up with vaccine producers during Covid-19¹⁰.

Off-take agreements (art. 37 EDIP). In the context of joint procurement, the Commission may even organise "off-take agreements", which are intended to enable a group of Member States to acquire a certain quantity of defence products over a given future period. In this case, the interested member may ask the Commission to initiate a joint procurement procedure or to initiate a procurement procedure on its behalf.

Administrative support for joint procurement. The Commission is proposing to provide administrative capacity-building support to Member States that request it, in order to facilitate procurement, help reorganise national procurement services and simplify national procedures. Here too, the Commission would have an influence on demand. The Commission could also support cooperation between Member States on defence procurement, as well as in the areas of equipment standardisation, certification and interoperability.

The **state of supply crisis** (Articles 44-51 EDIP). The EDIP proposes that, in the event of a supply crisis for a key product for the defence industry (whether military or civilian), the Council, acting on a proposal from the Commission, may activate a "state of supply crisis" by a qualified majority. Once the "state of crisis" has been activated, the Commission can temporarily acquire important powers. The main ones are :

- The Commission collects information from companies that contribute to the production of products in crisis, in agreement with the Member State concerned, taking all possible precautions to ensure confidentiality and without asking the company concerned to disclose sensitive information. Under certain conditions and in

¹⁰ European Commission website, "EU Vaccines Strategy: Securing access to vaccines", accessed September 6, 2024. https://commission.europa.eu/strategy-and-policy/coronavirus-response/public-health/eu-vaccines-strategy_fr

agreement with the Member State concerned, financial penalties may be envisaged for failure to respond.

- A Member State facing a serious risk of shortage may ask the Commission to impose a priority production order on companies that help to produce the good in question. In this case too, financial penalties are provided for in the event of non-compliance with the measures adopted.
- Other measures to facilitate certification and intra-Community transfers are also envisaged.

Other key EDIP measures

Of course, EDIP includes many other measures which, if adopted, would reinforce the EU's role as a defence sponsor rather than a defence customer. They are briefly listed here:

- Strengthen and co-finance defence industrial production capabilities,
- Supporting small and medium-sized businesses operating in the defence sector,
- Supporting the industrialisation of projects financed by the European Defence Fund and their intra- and extra-Community transfers,
- Encouraging the integration of Ukrainian military companies into the European defence market,
- Promote the reduction of administrative delays in the management of EU funds,
- Adopt measures to support recruitment and human resources operating in the defence sector.

However, these latest measures do not affect the concept of defence customer.

Diagram 2 - EDIP in a nutshell



CONCLUSIONS : WHAT ARE THE OPTIONS FOR THE FUTURE ?

If the EDIP were to be adopted as presented by the Commission on 5 March 2024, the EU would take major steps forward as an industrial-military player. It would no longer simply be a sponsor of the military industry, but would move closer to the role of defence customer, without however fully integrating it. As explained throughout this article, the Union would strengthen the position of the Member States vis-à-vis their European suppliers, i.e. the manufacturers. But it would not become a buyer who decides and who holds and disposes of ownership of the goods acquired. The Member States are clearly not yet ready to take such an ambitious step towards integration. However, there is nothing legally to prevent them from taking this next step forward, in both the civilian and purely military sectors.

For dual-use goods, the EU can do anything

In the civilian and dual-use field, the Galileo programme has long since demonstrated that the EU can do anything, including becoming the owner of infrastructure that can be used for military purposes. By ricochet, if the Member States so wished, the EU could also buy and stock dual-use components that are essential to the defence industry, such as powders for explosives (it should be remembered that, for the moment, the Chips Act and the CRM Act allow the Union to support joint procurement, but do not provide for the possibility of the EU itself making purchases and building up stocks). Articles 163 and 165 of the Treaty on the Functioning of the European Union (TFEU), which aim to strengthen the competitiveness of European industry and the economy, could provide the legal basis for the EU to carry out these new tasks.

In the field of defence, is Article 41(2) TEU really an obstacle?

In purely military terms, things are admittedly more complicated, but they may not be as set in stone as some people think. The obstacle mentioned in this connection is the famous Article 41(2) of the Treaty on European Union (TEU). Under this provision, the EU cannot use its ordinary budget for military expenditure of an operational nature.

More specifically, the article states that:

"Operating expenditure to which the implementation of this Chapter [CHAPTER 2 of the TEU on Specific Provisions on the CFSP] gives rise shall also be charged to the Union budget, except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise (...)".

The first point to make here is that the EU could create an *ad hoc* fund, administered directly by the Council. This is what it has done to finance arms transfers to third countries, via the European Peace Facility (EPF). It could therefore do the same for military procurement. It could even more simply amend the CFSP decision establishing the Facility to enable it to purchase and build up strategic stocks of military components, which could then be redistributed to Member States in the event of shortages or disruptions in the supply chain.

The disadvantage of this option, however, is that it would rely exclusively on the EU's intergovernmental system, thereby excluding the Commission, which is responsible for the proper functioning of the internal market and, as such, manages most of the aid programmes for the armaments cycle. This would pose a problem of coherence for the EU.

In fact, the idea that the EU's ordinary budget cannot be used to buy military components is based on a restrictive interpretation of Article 41(2), which is now increasingly being challenged¹¹. Article 41(2) is not an isolated provision disconnected from the rest of the EU Treaty. It does not set out an absolute principle. This article is inserted in Chapter 2 of the EU Treaty, which deals specifically and solely with the Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP). More specifically, 41(2) was conceived and written in relation to the EU's military crisis management missions deployed beyond the Union's borders. In drafting this article, the legislator simply wanted to ensure that these military missions would not be funded from the EU's ordinary budget. The military industry as such was never in the sights of the drafters of the Treaties.

The only ambiguity there might be in this respect concerns the interpretation of the term "operation", as it appears explicitly in the article 41(2). If, in an EU military operation, a Member State were to use defence equipment purchased through the EU's ordinary budget, should the cost of purchasing the equipment in question be considered as operational expenditure? Would this mean that part of the operational expenditure in question was borne by the EU illegally?

Something needs to be considered here. The prohibition on financing the operational part of CSDP military missions is an exception to the general rule of European law, which is to use the Union's ordinary budget to implement its policies. However, what should remain a limited and well-defined exception cannot be transformed into a general rule prohibiting the procurement of any military component automatically, which in fact does not exist in the Treaties. Transforming an exception into a general rule goes against all legal logic.

¹¹ Interview with officials.

In the light of these considerations, it is clear that the margins for interpreting the Treaties are wide and that Article 41(2) is more permissive than some would like to believe. However, this provision has so far been interpreted restrictively, mainly by the EU's legal services. In the past, these services have systematically opposed the extension of the Union's ordinary budget to military matters, and they remain rather reticent about it to this day.

The EU's legal services, however, are not judicial authorities that have to rule definitively on how a norm should be interpreted. They are administrative offices that must confine themselves to advising their political hierarchies. The latter must then assume their responsibilities by making their choices, without hiding behind their respective bureaucracies. Only the Court of Justice of the EU could possibly give a definitive ruling on Article 41(2). To date, it has never done so.

What are the possible legal bases for a major EU role?

If Article 41(2) of the TEU does not prohibit the EU from extending its competences in the field of military industry, what legal basis could the Union use to become a fully-fledged defence customer?

This could be based on Article 173 TFEU (support for industrial competitiveness), as in the cases of the European Defence Fund, EDIRPA and ASAP, as well as on Article 175 TFEU (support for the economic policies of the Member States). Article 175 is particularly interesting in this respect, as it refers to the possibility of creating structural funds and carrying out "specific actions" to strengthen the European economy. Of course, with such a legal basis the EU would not be able to buy just any weapon. It could, however, acquire certain key military equipment to boost production capacity in specific critical sectors, such as munitions and missiles.

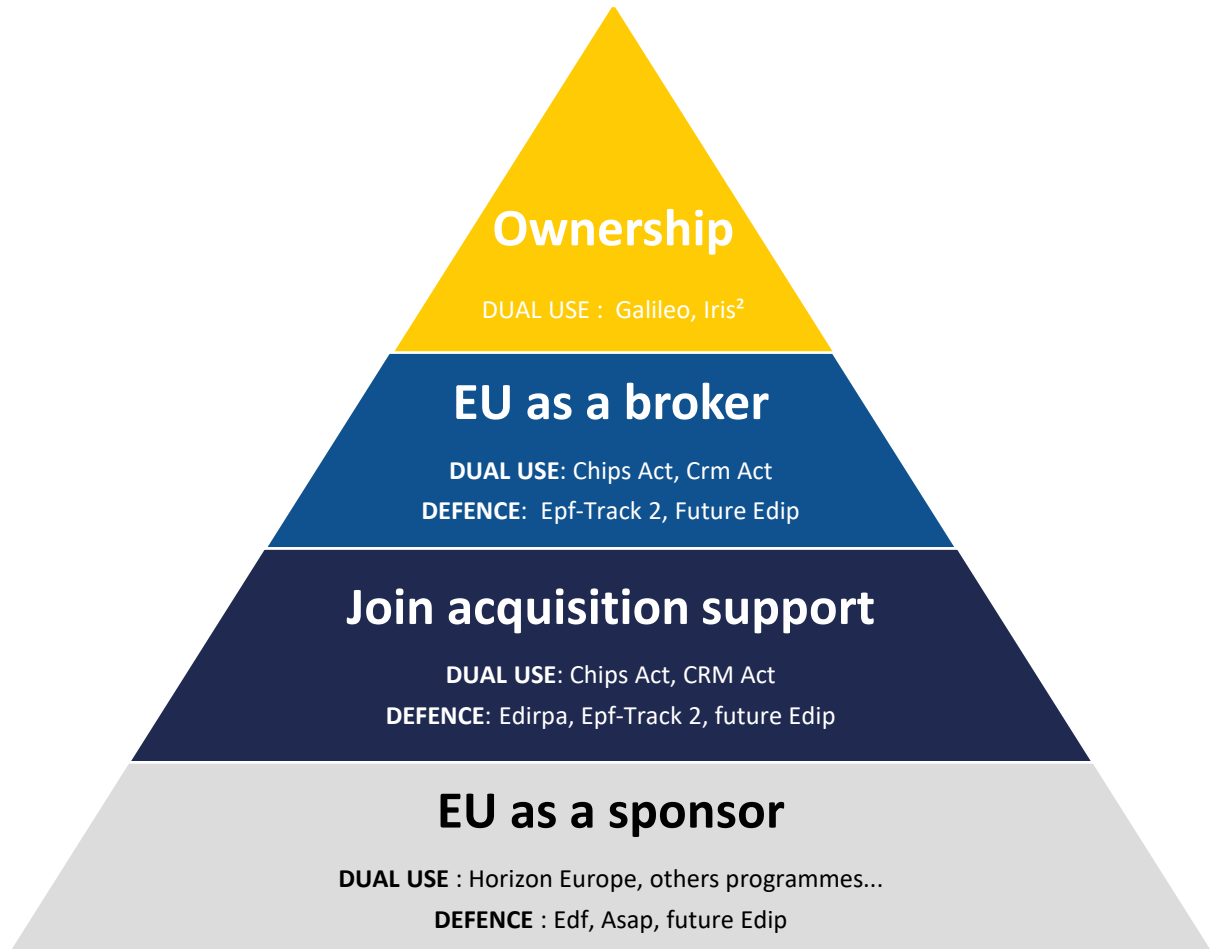
Another possible legal basis for EU procurement could be Article 45 of the TEU, which defines the role of the European Defence Agency. The Agency is to pursue the following tasks: "*promote harmonisation of operational needs*", "*propose multilateral projects to fulfil the objectives in terms of military capabilities*", and finally "*contribute to identifying and, if necessary, implementing any useful measure for strengthening the industrial and technological base of the defence sector and for improving the effectiveness of military expenditure*".

In the light of these provisions, it is conceivable that the Agency could purchase and store defence products, especially if we consider that it can rely on the Commission to carry out its functions, as specified in Article 45 TEU itself. This raises the question of whether the Commission can, at the Agency's request, use the EU's ordinary budget to make purchases to

strengthen the defence industry. A decision on this point would make it clear whether or not the EU's ordinary budget could one day be used to purchase a complex weapons system, such as the anti-aircraft defence system mentioned by the Greek and Polish Prime Ministers.

Diagram 3

The different roles that the EU can assume in relation to the defence industry to date



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