

## Our position

# European Defence Industry Reinforcement through Common Procurement Act (EDIRPA)

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## Executive summary

The proposal for a Regulation establishing the European Defence Industry Reinforcement through common Procurement Act (EDIRPA) is a welcome move towards greater reinforcement of European defence industrial capacities. While aggregating EU Member States' demand in common defence procurement is an improvement for European defence industrial policy and can provide benefits to both customers and suppliers, under the current conditions **EDIRPA risks failing to fill urgent critical capability gaps. This can weaken long-term strategic resilience and reduce opportunities for interoperability and interchangeability among allies.** Therefore, the proposal should be amended to ensure that EDIRPA can fully support national armament requirements in the EU and benefit through legal clarity and process certainty.

EDIRPA should align with the existing legal defence procurement frameworks by:

- Adjusting articles 8(4) to 8(8), to align with the concept of 'certification' as per article 9 of the Transfers of defence-related products Directive (2009/43/EC).
- Removing article 8(9), to align with the concept of 'Security of Supply' as per article 23 of the Defence Procurement Directive (2009/81/EC), to strengthen the European Defence Technological and Industrial Base (EDTIB), and ensure that EDIRPA can fully support national armament requirements in the EU.
- Reforming article 8(10) by empowering the contracting authority / entity to determine what constitutes a subcontractor based on a workshare which is deemed proportionate to the requirement of the programme.

## Introduction

The European Commission has proposed that common procurement contracts under EDIRPA must not include defence products subject to restriction by a non-associated third country or a non-associated third country entity. Given the unprecedented security situation in Europe, **cost-effective replenishment at scale and speed** is of paramount importance for armed forces in the EU. Europe and North America must also work together to face the ongoing capacity issues by harnessing the power of their respective industries. In the 2009/81/EC Defence Procurement Directive the EU has a robust framework for defence procurement to build on. This can provide effective foundations on which the EU can build an effective joint-procurement instrument that can achieve the objectives expressed in the Investment Gap Analysis and EDIRPA.

The framework should align the concepts of 'certification' and 'security of supply' to existing legislation as well as ensure contracting authorities are empowered to determine eligibility criteria for 'subcontractors'.

## Challenges – current proposal

While aggregating the EU Member States' demand is a welcome advance in European defence industrial policy and can provide benefits to both customers and suppliers, there is concern over some aspects of the current proposal, namely:

- Despite the potential for EDIRPA to have distorting effects on defence procurement markets, the European Commission fails to align its proposal with well-established legislation in this area, namely the **Directive 2009/81/EC – 'Defence Procurement Directive'**.
- The current proposal does not **recognise the diverse set of capabilities** used by the EU's armed forces. Under the current conditions, EDIRPA is not able to replenish all vital defence products and therefore fails to fully serve Member State's armament requirements.
- EDIRPA **risks missing an opportunity to strengthen the EDTIB** by excluding certain products that include European technologies and components but nevertheless contain some percentage of third-country controlled items. As the EU looks to incentivise joint procurement in the long-run, this approach could also limit the potential leveraging effect of increasing European industrial participation in defence products of like-minded third-country entities via EU incentives.
- Over the longer-term, excluding defence products from like-minded third countries or like-minded third-country entities under common procurement initiatives increases the **risk of isolation and potentially reduces resilience** for any future alliance-led operations in particular.
- EDIRPA could **reduce opportunities for interoperability among allies**, a key deliverable of the 2016 EU-NATO Joint Declaration.

## Proposed changes

The EDIRPA regulation should **align with the well-established provisions and processes agreed by Member States in the 2009/81/EC Defence Procurement Directive**. To achieve this, co-legislators should:

- **Adjust articles 8(4) to 8(8)** to replace the concept of guarantees as introduced by the European Defence Fund (EDF) with the concept of 'certification' established in the 2009/43/EC Directive on 'simplifying terms and conditions of transfers of defence-related products within the Community.' Accordingly, the procurement authorities shall certify and establish the reliability of contractors based on article 9 of the same Directive. This will ensure continuity of existing procurement and transfer practices and ensure that participation conditions better reflect the unique requirements of joint procurement. Moreover, these certificates would be mutually recognised by Member States thereby reducing the administrative burden for contractors.
- **Remove article 8 (9)** to ensure that EDIRPA can fully support national armament requirements in the EU and remains aligned with existing defence procurement frameworks, most notably with article 23 of the 2009/81/EC Defence Procurement Directive. This will facilitate cost-effective replenishment at speed and maximise growth opportunities for the EDTIB.

- **Reform article 8(10)** by empowering the contracting authority / entity with the competencies to determine the conditions of subcontracting as per article 21 of the 2009/81/EC Defence Procurement Directive. The definition of a subcontractor should be determined by the contracting authority / entity at all contractual levels based on a workshare percentage which is deemed proportionate to the requirement of the programme.
- Build on the unmatched experience in joint procurement available to most EU Member States by explicitly **adding to EDIRPA's Recital (22)** the NATO Support and Procurement Agency (NSPA) as a possible procurement agent – supported by EDIRPA – for purchases execution.
- Provide **additional consideration** for and alignment with existing defence procurement frameworks in the recitals of the proposal:
  - 'The European defence industry Reinforcement through common Procurement Act should contribute to a strong, competitive and innovative EDTIB and ensure full alignment with the Union's initiatives towards a more integrated European defence market and, in particular, Directives 2009/43/EC and 2009/81/EC of the European Parliament and of the Council on Union transfers and procurement in the defence sector adopted in 2009, taking into account the European Commission notice on guidance on cooperative procurement in the fields of defence and security published on 8 May 2019.'
  - 'The Union's support should not affect the transfer of defence-related products within the Union, in accordance with Directive 2009/43/EC, or the export of products, equipment or technologies. The export of military equipment and technologies by the Member States is regulated by Council Common Position 2008/944/CFSP.'

## Anticipated benefits

Ensuring that the proposal fulfils the proposed suggestions will secure several positive outcomes, including (but not limited to) the following areas:

- **For the requirements of EU Member States' armed forces:** The majority of EU Member States' armed forces field a diverse set of capabilities, including defence products containing controlled items from like-minded third countries. As capability gaps emerge in light of new security and defence threats and stockpiles diminish as a result of the war in Ukraine, a more flexible EDIRPA will ensure that the instrument reflects this diversity. It will additionally allow EU Member States to use the instrument to address all of their critical – urgently needed – armament needs while maintaining support for the EDTIB.
- **For EU Industry:** A more flexible approach to common defence procurement can strengthen the EDTIB. The inclusion of products and services with like-minded third-country control, if properly executed, can create new opportunities and additional value-streams for EU industry. Moreover, by blocking the acquisition of collaboratively developed systems in the Euro-Atlantic area, the EDTIB may suffer. NATO's Airborne Warning and Control System (AWACS) capability is a great example of what can be achieved when the best and brightest on both sides of the Atlantic come together. For over 40 years, NATO AWACS aircraft have

been continuously engaged in maintaining peace and security around the world, from the former Yugoslavia to Afghanistan, and now in support of Ukraine.

- **For EU Security:** A more flexible approach to common defence procurement will ensure that armed forces have continued access to the best-in-class capabilities, including those that have like-minded third-country control, that they currently field. Maintaining this operational and technological edge will be critical to guarantee peace and security for the EU and its citizens.
- **For interoperability among allies:** A more flexible approach to common defence procurement would increase the inherent interoperability and interchangeability associated with products and capabilities that exist outside of the EU. More interoperable and interchangeable capabilities would reduce non-recurring engineering costs, thus driving overall programme costs down.

## Conclusion

Under its current form, the proposal risks **undermining the efforts to urgently fill critical capability gaps, which threatens resilience and the opportunities for interoperability and interchangeability among allies.** For EDIRPA to support national armament needs in the EU and maximise growth opportunities for the European Defence Technological Base (EDTIB), legislators must further mould the proposal into a more flexible model that fully embraces EU Member State armament requirements.