

Our position

The European Defence Action Plan

Challenges and perspectives for a genuine transatlantic defence and industrial relationship

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2016, directly supports more than 4.5 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

In light of the resurgence of populist and protectionist rhetoric on both sides of the Atlantic, the American Chamber of Commerce to the European Union (AmCham EU) stresses the need for openness and accessibility of global markets as a prerequisite of sustainable and mutually reinforcing defence industrial bases. Tensions in trade and economic dealings might affect national attitudes toward other basic transatlantic arrangements, including those in the realm of security and defence.

A strong and ambitious EU is instrumental in maintaining transatlantic cooperation and achieving global security. Moreover, a robust European Defence Technological and Industrial Base (EDTIB), to which many member companies of AmCham EU are legitimate and proud contributors, is crucial for a prosperous Transatlantic Defence Industrial Cooperation (TADIC) and sustainable growth in the US and in the EU.

AmCham EU welcomes the strong momentum recently gained by defence in the EU's global agenda, codified by the European Defence Action Plan (EDAP) and the European Commission's flagship proposal to establish a European Defence Fund (EDF) aimed at incentivising European collaborative defence research (EDRP) and capability development (DIDP).

Policy-makers need to safeguard and strengthen the competitiveness of TADIC by ensuring a level playing field in the context of the implementation the EDAP, with particular emphasis on three areas:

- **The EU's strategic autonomy should be both capability and technology driven**, not nationally-driven.
 - *US-headquartered companies and undertakings, whether legally based in the US or the EU, should be granted access to the European defence market. They should be able to participate in EU-funded defence capability projects when prior assessment proves off-the-shelf procurement to be the 'best value for money' option.*
- **Transatlantic reciprocity in public spending and investment is essential for the defence sector.**
 - *US-headquartered companies and undertakings, whether legally based in the US or the EU, should also be allowed to participate in EU-funded defence research and capability projects.*
- **The defence industry is a global and collaborative industry.**
 - *US-headquartered companies and undertakings, whether legally based in the US or the EU, should be allowed to participate in EU-funded defence research projects if their extended operations employ and produce in the EU and if their proposed research activities are carried out in the EU.*

Introduction

In a global environment where security and defence challenges are becoming more complex and demanding, transatlantic partnerships and cooperation will remain indispensable.

Member companies of AmCham EU have actively participated in the EU's security and defence community for many years - as partners, customers, suppliers and with their manufacturing presence. Many of them engage in the research, design, development, manufacture, integration and sustainment of advanced technology systems, products and services. Others focus on extensive partnerships with local industries, suppliers and universities thus contributing to and benefiting from the EU's tradition of innovation and excellence.

As it promises to strengthen the EU's contribution to the transatlantic security and defence relationship, AmCham EU welcomes the:

- **European Defence Action Plan (EDAP)**, launched on 30 November 2016, through which the European Commission proposes to (1) set up a European Defence Fund; (2) foster investments in small- and medium-sized enterprises (SMEs), start-ups, mid-caps and other suppliers to the defence industry; and (3) strengthen the European Single Market for defence.¹
- **European Defence Fund (EDF)**, launched by the European Commission in June 2017, aiming at coordinating, supplementing and amplifying national investments by EU Member States in defence research, in the development of prototypes and in the acquisition of defence equipment and technology.²
- **Implementation Plan on Security and Defence** launched on 14 November 2016 by Federica Mogherini, the High Representative of the EU for Foreign Affairs and Security Policy, Vice-President of the European Commission, and Head of the European Defence Agency.³
- Joint declaration by , Donald Tusk, President of the European Council, , , Jean-Claude Juncker, President of the European Commission and, and , Jens Stoltenberg, Secretary General of NATO, in which they confirm *'there is an urgent need to facilitate a stronger defence industry and greater defence research and industrial cooperation within Europe and across the Atlantic.'*⁴
- A common set of over 40 proposals for the implementation of the 6 July 2016 EU-NATO Joint Declaration, endorsed by the Council of the EU on 6 December 2016.⁵
- Global Strategy for the EU's Foreign and Security Policy (EUGS) which includes the ambition of 'strategic autonomy' for the EU.⁶

This paper examines the state of play of the EU's defence policy initiatives from the perspective of the transatlantic EU-US partnership. It introduces defence industry-related issues linked to:

- cross-border investments in research;
- defence procurement market access;
- export controls.

The list of recommendations will help policy-makers to identify the potential for convergence and/or joint EU-US action and to strengthen the competitiveness of the EU and US defence industrial bases.

¹ http://europa.eu/rapid/press-release_IP-16-4088_en.htm

² http://europa.eu/rapid/press-release_IP-17-1508_en.htm

³ https://eeas.europa.eu/sites/eeas/files/eugs_implementation_plan_st14392.en16_0.pdf

⁴ <http://www.consilium.europa.eu/en/press/press-releases/2016/07/08-eu-nato-joint-declaration/>

⁵ <http://data.consilium.europa.eu/doc/document/ST-15283-2016-INIT/en/pdf>

⁶ http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf

1. Transatlantic collaborative defence research

1.1. Concern

US-headquartered defence companies and undertakings, legally based in the EU, could be excluded from participation and/or EU funding in the scope of EU defence-related research projects. This can negatively impact transatlantic defence interoperability and the transatlantic security partnership as a whole.

1.2. Background

As stated in the European Parliament's report on 'The Future of EU Defence Research'⁷:

- *'The relations with third countries which could participate in the future European Defence Research Programme (EDRP) should be addressed. We also suggest the definition of 'European Defence Research Entities' (EDRE) to make sure that the Union's taxpayer money is conveyed to authentic European Defence Companies and undertakings. The guiding principle of spending must be: European money for European value'.*
- *'By any measurement, the gap in State funding between the US (EUR 67 billion) and the EU (no money from the Union, EUR 8 billion from the Member States), is so wide that we cannot see the EDRP becoming an irritant in a context of the US deservedly asking for more European defence expenditure'.*
- *'The gap between the EU and the US seems bound to widen even further after the launch of the US 'Defence Innovation Initiative' (DII), often referred as the 'third offset strategy initiative', in November 2014'.*

1.3. Analysis

Company ownership, supplier bases and product markets have all become increasingly 'multinational' in nature in the defence sector. Defence companies are often transatlantic in both operation and ownership.

Participation in each other's defence research and development activities on a basis of reciprocity can and will provide mutual benefits.

Examples:

- One way to innovate is to seek out and leverage new technologies and approaches with their friends and Allies. Therefore, the US Department of Defence (DoD) launched the Foreign Comparative Testing (FCT) Programme which tests items and technologies of its foreign Allies and friends that have a high Technology Readiness Level (TRL) in order to satisfy valid defence requirements more quickly and economically. Since 1980, the FCT Programme has helped to foster the two-way street in defence spending between the US and its Allies through the procurement of more than \$5 billion in foreign items. Additionally, the FCT Programme has served as a catalyst for industry teaming arrangements, which have been productive for both US and foreign industries in an increasingly competitive global market.⁸
- Non-US multinationals' affiliates (located in the US) received, between 2008 and 2010, some \$1.4 to \$1.7 billion in federal funding for R&D yearly, and another \$5 to \$ 8 billion from other sources, including state, local, or other third parties.⁹

⁷ http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535003/EXPO_STU%282016%29535003_EN.pdf

⁸ <https://cto.acqcenter.com/osd/portal.nsf/Start?ReadForm>

⁹ <https://www.nsf.gov/statistics/2016/nsf16305/nsf16305.pdf>

- In 2016, the US Defense Advanced Research Projects Agency (DARPA), which also contains an International Cooperation Office, selected:
 - DRS Technologies (a Leonardo Company) to enhance the performance of the company's ultra-small pixel infrared focal plane arrays (FPA) under the agency's Lambda Scale programme.¹⁰ Improvements to the FPAs will potentially enhance the technology that can help pilots see more clearly in conditions that previously caused severe safety concerns.
 - BAE Systems to develop an undersea navigation system aimed at enhancing the US Navy's ability to provide precise, global positioning throughout the ocean basins.¹¹
 - Saab to perform research focused on the development of a precision-engagement capability for shoulder-fired weapons.¹²
- The US DoD's Third Offset Strategy pursues next-generation technologies and concepts. A constructive transatlantic dialogue on this strategy is needed. The EU should engage more with the US DoD to promote, for instance, EU niche industries' contribution to this US initiative.

1.4. Recommendations

- US-headquartered companies and undertakings should be allowed to participate in EU-funded defence research projects (Preparatory Action on Defence Research¹³ (PADR), European Defence Research Programme¹⁴ (EDRP), if their operations employ and manufacture in the EU and if their proposed research activities are carried out in the EU.
- US-headquartered defence companies and undertakings, not located in the EU, should also be allowed to participate in EU-funded defence research projects, based on reciprocal co-funding or access to co-funding in the US
- Agreements could still be put in place if the EU doesn't want to have the US parent companies have access to either classified or export-controlled unclassified information.
- A foreign government-owned or -controlled undertaking or undertaking from a non-EU/non-NATO Member Country could be excluded from EU-funded defence research projects, because their decision-making might be influenced by foreign national political as well as internal economic factors, defying our transatlantic common security interests.
- The EU and its Members should engage more with the US DoD to promote EU niche industries' contribution to the US Third Offset Strategy initiative. NATO's Allied Command Transformation¹⁵ (ACT), NATO's Science and Technology Organization¹⁶ (STO) and the European Defence Agency¹⁷ (EDA) could play an important coordinating role in this debate.
- The US and EU have traditionally cooperated in the area of science and research, yet in order to maintain technological leadership, further steps should be taken.

¹⁰ <http://www.leonardodrs.com/news-and-events/press-releases/drs-technologies-and-the-defense-advanced-research-projects-agency-enhance-performance-of-cooled-infrared-sensors/>

¹¹ <http://www.baesystems.com/en/article/undersea-navigation-and-positioning-system-development-to-begin-for-u-s--navy>

¹² <http://saabgroup.com/Media/news-press/news/2016-10/saab-awarded-research-contract-from-darpa/>

¹³ <https://www.eda.europa.eu/what-we-do/activities/activities-search/preparatory-action-for-defence-research>

¹⁴ [http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/593494/EPRS_ATA\(2016\)593494_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/593494/EPRS_ATA(2016)593494_EN.pdf)

¹⁵ <http://www.act.nato.int/>

¹⁶ <https://www.sto.nato.int/Pages/organization.aspx>

¹⁷ <https://www.eda.europa.eu/Aboutus/how-we-work/expert-teams/capability-technology-areas>

2. Transatlantic access to defence procurement markets

2.1. Concerns

- US-headquartered defence companies and undertakings, whether or not legally based in the EU, could lose access to EU-led and/or EU Member State-led defence procurements.
- The uncertainties concerning the use of offset requirements that came along with the EU's 2009/81/EC Defence Procurement Directive create legal and financial risks for EU- and US-based US bidders for contracts where such offsets are still required.
- EU Member States, considering it as an essential security interest to have in certain strategic sectors key industrial capabilities on their own territory in certain strategic sectors, may decide not to depend on non-national suppliers, such as US suppliers.
- Certain EU defence companies and EU Institutions believe that the US Foreign Military Sales¹⁸ (FMS) Programme provides a competitive advantage to US defence companies.

2.2. Background

Access to defence procurement market

The European Defence Fund aims at creating incentives for EU Member States to cooperate on joint development and the acquisition of defence equipment and technology through co-financing from the EU budget and practical support from the European Commission. Member States may for example jointly invest in developing drone technology or satellite communication, or bulk buy helicopters to reduce costs.¹⁹

On 7 June 2017, the European Commission launched a proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovative capacity of the EU defence industry.²⁰ Article 7 of this proposal sets out the following criteria for 'eligible entities': *'1. Beneficiaries shall be undertakings established in the Union, in which Member States and/or nationals of Member States own more than 50% of the undertaking and effectively control it within the meaning of Article 6(3), whether directly or indirectly through one or more intermediate undertakings. In addition, all infrastructure, facilities, assets and resources used by the participants, including subcontractors and other third parties, in actions funded under the Programme shall not be located on the territory of non-Member States during the entire duration of the action.'*

The Recital 18 of the 2009/81/EC Directive underlines that *'Member States retain the power to decide if their contracting authority/entity may allow economic operators from third countries (such as the US) to participate in contract award procedures.'*²¹

For many years, some EU officials and industry representatives are trying to formalise the notion of a 'European defence economic operator'.²²

¹⁸ <http://www.dsca.mil/resources/faq>

¹⁹ http://europa.eu/rapid/press-release_IP-17-1508_en.htm

²⁰ <https://ec.europa.eu/docsroom/documents/23606>

²¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:216:0076:0136:en:PDF>

²² <https://www.frstrategie.org/publications/notes/defining-the-european-defence-technological-and-industrial-base-debates-dilemmas-i-2013-23>

The report *“The future of EU Defence Research”*²³ states: *‘The main direct restrictions on the access of foreign companies to US government procurement is related to provisions of two laws: (1) The Buy American Act for public supply and construction (but not services); (2) The Balance of Payment Programme), which is exclusively for public contracts for goods intended for use abroad.’*

Countering US President’s pledge to ‘Buy American and Hire American’, the newly elected French President Macron’s manifesto includes a proposal for a ‘Buy European act’ that might make it harder for US companies to obtain access to defence contracts in the EU. Eric Trappier, the Chairman and CEO of Dassault Aviation confirms that nations should protect their interests so it’s normal for the US to have a Buy American act just as Europe should Buy European.²⁴

However, European Commission Vice-President Jyrki Katainen warned against such proposals, which he said would *‘distort the EU market.’* Katainen added that *‘the EU as a whole cannot afford to restrict public procurement,’* and pushes instead for a *‘global public procurement system’* although he recognises that this will be difficult to achieve.²⁵

Offsets / Industrial Return

According to a 30 November 2016 European Commission Staff Working Document²⁶, *‘businesses’ replies to an online survey show that the perception is that of a reduction, albeit to a very limited degree, in the frequency of offsets/industrial return requirements after the launch of the 2009/81/EC Defence Procurement Directive. The European Commission will also consider developing further guidance on the use of offsets/industrial return requirements.’*

Security of Supply

Security of Supply can be defined 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. This includes the ability of Member States to use their armed forces with appropriate national control and, if necessary, without third-party constraints. Such a broad concept can cover a wide range of different industrial, technological, legal and political aspects.’*

The European Commission stresses that *‘Member States may consider it as an essential security interest to have in certain strategic sectors key industrial capabilities on their own territory in certain strategic sectors, and not to depend on non-national suppliers’* and that *‘a contracting authority/entity can exclude a candidate or tenderer from the procedure if it considers that the geographical location of non-EU sources could compromise their ability to comply with its requirements, in particular those related to Security of Supply.’*²⁷

During the transposition of the 2009/81/EC Directive into French law, the French Parliament held hearings where senior officials from the French defence industry and the French Senate referred to non-EU based companies who own defence companies in Europe as Trojan horses and sock puppets, located in Europe for purposes of deception.²⁸

²³ http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535003/EXPO_STU%282016%29535003_EN.pdf

²⁴ <http://defaeroreport.com/2017/07/05/dassault-aviation-ceo-us-wants-buy-american-europe-buy-european/>

²⁵ <http://www.politico.eu/article/commission-vice-president-the-eu-cannot-afford-macrons-buy-european-act/>

²⁶ <http://ec.europa.eu/DocsRoom/documents/20376>

²⁷ <http://ec.europa.eu/DocsRoom/documents/15413/attachments/1/translations/>

²⁸ <http://www.senat.fr/rap/l10-306/l10-30616.html>

*'Foreign Direct Investment (FDI) - through shareholdings, mergers and acquisitions made in and with third-countries - by non-European strategic competitors is a particular challenge for the European Defence Technological and Industrial Base (EDTIB).'*²⁹

US Foreign Military Sales

In 2012, the European Commission published a non-paper addressing the situation facing Europe's defence industry and identifying possible ways forward.³⁰ The Commission looked for opinions on the US Foreign Military Sales³¹ (FMS) Programme, an example of Government-to-Government sales, and its possible impact on Europe's defence market and industry.

Based on the European Commission's Guidance Note on Government-to-Government Sales³², contracting authorities in the EU will start a procurement procedure under the 2009/81/EC Procurement Directive if an impartial assessment of the information gathered from pre-procurement advertising shows that one or more EU economic operators are able to deliver a better value for money solution than the one offered by the FMS programme and there is no objective justification to procure from the US Government.

2.3. Analysis

Access to defence procurement market

Transatlantic defence industrial links are a potential source of greater political-military cohesion within NATO and of a stronger Alliance industrial underpinning, and thus will help to promote more uniform modernisation and enhance US-European interoperability and standardisation. Such links could also amplify NATO's fighting strength by enhancing US-European interoperability and narrowing the US technological gap. Most important, strong transatlantic industrial links could help avert a distinctly negative outcome: the emergence of protectionist 'Fortress Europe - Fortress America' defence trade blocs that could serve to widen the US-European military-technological gap and weaken overall NATO integrity.³³

Policy-makers should recognise that current global pressures require a common and forward-looking approach to ensure that European and US defence industries can thrive.

Policy-makers should acknowledge the benefits of fair transatlantic defence and industrial cooperation in terms of increased competition, lower prices and improved prospects for co-operation between Allies, while at the same time, mitigating the risks of technology leaking to potential adversaries, and of increasing dependence on foreign suppliers.

Continued progress in addressing barriers to and misunderstandings of transatlantic defence industrial cooperation³⁴ (TADIC) will only be possible with open dialogue from stakeholders on both sides of the Atlantic. Likewise, the EU's strategic autonomy should be both capability driven and technology driven, not nationality driven. Indeed, the EU must be able to decide and to act without depending on the capabilities of third parties. This means, for instance, that EU governments should be able to carry out low- and high-intensity military operations without US Government support, if necessary. However, this doesn't necessarily mean that Europeans have to develop/manufacture

²⁹ <http://www.egmontinstitute.be/content/uploads/2013/09/SPB41.pdf?type=pdf>

³⁰ http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede270513taskforcononpaper_/sede270513taskforcononpaper_en.pdf

³¹ <http://www.dsca.mil/programs/foreign-military-sales-fms>

³² <http://ec.europa.eu/DocsRoom/documents/20358>

³³ <https://www.files.ethz.ch/isn/13467/Globalization%20and%20Security.pdf>

³⁴ https://diweb.hq.nato.int/indrel/Shared%20Documents/Brochure_TADIC_SG180.pdf

their own capabilities. In other words, this EU strategic autonomy could be strengthened by ensuring the participation of US defence companies in the EU's acquisition and sustainment of capabilities in domains such as: Intelligence, Surveillance and Reconnaissance (ISR), Remotely Piloted Aircraft Systems (RPAS), Air-to-Air Refuelling (AAR), satellite communications, access to space, permanent earth observation, border control, maritime security, resilience building (cyber security, ...).

According to the European Parliament's Directorate-General for External Policies Report on the Development of a European Technological and Industrial Base³⁵ (EDTIB), *'Data suggest that US involvement in European market is slowly being eroded by a growing 'buy European' preference. A review of 33 major competition programmes (with value over USD50 million) awarded in Europe between 2006-2008 shows that US firms were successful only three times, only when the US product was clearly superior or there were no existing, affordable or reliable European alternatives.'*

Statistics in a Eurodéfense France 2014 report³⁶ indicate the following trends in military trade between the US and the EU from 1998 through 2012: *'\$0.9 billion to \$3.0 billion (from the EU to the US) and \$3.8 billion to \$3.4 billion (from the US to the EU).'* This clearly shows the EU is catching up. According to a Décision Etudes Conseil & US-CREST report³⁷, *'European defence exports to the US have doubled over five years to reach \$2.2 billion in 2008' and 'the footprint of the European defence industry in America - owning 100% of a US subsidiary - has also increased significantly and is generating in 2009 business revenues which exceed \$20 billion.'*

Buy American and Buy European Acts will make the products and services Governments in the EU and the US acquire less interoperable and more expensive by reducing competition. And, without needing to have an edge on foreign competitors, European and American defence companies won't have as big an incentive to innovate.

However, on the US side, the US Department of Defence (DoD) co-signed Reciprocal Procurement Memoranda of Understanding (MOU) with its counterparts in many EU Member States. The EU Member States, with which the US DoD has co-signed these MOUs, are considered 'qualifying countries'. And, the US DoD has determined it inconsistent with the US public interest to apply restrictions of the Buy American statute or the Balance of Payments Program to the acquisition of 'qualifying country' end products from those 'qualifying countries'.³⁸

According to a Report on *'Not made in the USA: Buy American Act Waivers and Connecticut Manufacturing Jobs'*,³⁹ published by the Office of US Senator Christopher Murphy, the US DoD has, from the years 2007 through 2013, granted 274.186 waivers of the Buy American Act and given \$163.4 billion to foreign manufacturers, of which \$34.3 billion went to 'qualifying countries' such as many EU Member States. In 2013 approximately \$6 billion of the US DoD's procurement budget went to foreign entities in the EU, according to a May 2014 report from the US Under Secretary of Defense for Acquisition, Technology and Logistics.⁴⁰

The US DoD's Defense Procurement and Acquisition Policy (DPAP) branch encourages companies to do business with the US DoD. To make it easier for companies to understand how to engage in the business process with DoD, DPAP offers an introductory overview for companies based in the US as well as a guide for foreign companies.⁴¹

³⁵ [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433838/EXPO-SEDE_ET\(2013\)433838_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433838/EXPO-SEDE_ET(2013)433838_EN.pdf)

³⁶ <https://eurodefenseinfo.files.wordpress.com/2014/07/2014-07-15-effort-de-dc3a9fense-2014-franc3a7ais.pdf>

³⁷ <http://ec.europa.eu/DocsRoom/documents/10489/attachments/1/translations>

³⁸ http://www.acq.osd.mil/dpap/cpic/ic/reciprocal_procurement_memoranda_of_understanding.html

³⁹ <https://www.murphy.senate.gov/download/buy-american-act-waivers-and-connecticut-manufacturing-jobs-report>

⁴⁰ [http://www.acq.osd.mil/dpap/cpic/cp/docs/Transmittal_Itrs_%26_RTC_FY13_Foreign_Entities_\(Approps\)_signed_3_June_14.pdf](http://www.acq.osd.mil/dpap/cpic/cp/docs/Transmittal_Itrs_%26_RTC_FY13_Foreign_Entities_(Approps)_signed_3_June_14.pdf)

⁴¹ http://www.acq.osd.mil/dpap/cpic/cp/doing_business_with_the_department_of_defense_dod_us.html

If a company from a country outside the US has difficulty fully understanding contracting rules and regulations, or if it thinks it was unfairly excluded from defence procurement in the US, the company may contact the US DoD Ombudsman.⁴²

However, policy-makers shouldn't only look at government-led defence procurements. Many US defence companies, receiving contracts from the US DoD, also tap into the EU's supply chains.

Some examples:

- The multinational F-35 joint strike fighter (JSF) programme⁴³ is designed specifically to have industrial participation from many EU Member States, such as Denmark, Italy, the Netherlands, Norway and the UK, putting an inherently transatlantic supply chain at the heart of the US DoD's largest acquisition programme.
 - In 2017, Dutch suppliers, for instance, have already been awarded F-35 programme-related contract worth more than €1 billion.⁴⁴
 - According to an August 2017 Italian Court of Audit report on the Italian Participation on the F-35 Programme, Italian companies already secured contracts worth €2.3 billion linked to this programme by the end of 2016.⁴⁵
 - In the UK, it is estimated that, when at peak F-35 production, 25.000 jobs will be sustained across the country by more than 500 companies in the supply chain.⁴⁶
- Rheinmetall, a German company, booked an order in 2017 from the US Air Force to supply ammunition for the F-35. The contract is worth over \$6.5 million.⁴⁷
- Saab President and CEO Hakan Bushke (Sweden) said that cooperation with the Boeing Company on the US's Air Force's Feature T-X trainer programme is going tremendously well.⁴⁸ In addition, Saab and Boeing jointly developed and marketed the Ground-Launched Small-Diameter Bomb.⁴⁹
- A joint technology collaboration established by a consortium developed by Boeing (USA), Fokker (NLD) and Royal Ten Cate (NLD) resulted in the Thermoplastic/Composite Research Center (TPRC), which provides valuable links to future product development as well as new technology opportunities.⁵⁰

While remaining cautious, EU Member States and EU defence companies should stay open to foreign direct investment provided by US sources. US direct investment in the EU also helps the EU in advancing its defence manufacturing capacity. Examples:

- Polskie Zakłady Lotnicze Sp. z o.o. (PZL Mielec), a US-headquartered Sikorsky Aircraft / Lockheed Martin Company, is the biggest Polish manufacturer of aircraft. In 2017 it employed over 1.700 people in Poland. It also holds the technical, organisational and manufacturing certificates for designing and manufacturing aircraft and conducting aviation development programmes.⁵¹
- Ratier-Figeac, a US-headquartered United Technologies Company, is a leading supplier of propeller systems for turboprop aircraft. Today, in the EU, they develop, certify, manufacture

⁴² http://www.acq.osd.mil/dpap/cpic/ic/dod_ombudsman.html

⁴³ <https://www.f35.com/global>

⁴⁴ <https://www.government.nl/topics/commissariat-for-military-production/orders-in-the-f-35-programme-jsf>

⁴⁵ http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sez_contr_affari_com_internazionali/2017/delibera_15_2017_e_relazione.pdf

⁴⁶ <https://www.gov.uk/government/news/from-lancashire-to-texas-10-production-milestone-achieved-for-f-35-lightning-ii-fighter-jets>

⁴⁷ https://www.rheinmetall.com/en/rheinmetall_ag/press/news/latest_news/index_10816.php

⁴⁸ http://saab.com/region/india/about-saab/saab-in-media/saab-media/2015/saab-and-boeing-on-t_x-programme/

⁴⁹ <https://saab.com/sv/land/weapon-systems/surface-tosurface-missile-systems/ground-launched-small-diameter-bomb/>

⁵⁰ <http://www.tencate.com/txtures/039-Spring-2014/Fokker-Aerostructures-and-TenCate-a-natural-match.aspx>

⁵¹ <http://www.pzlmielec.pl/en/company/company-profile/>

and support large composite propellers for all major turboprops to customers such as: US Navy, US Air Force, French Air Force, German Air Force, ATR, Airbus Defense & Space, Bombardier. In 2017, this company employs over 1.200 employees in France.⁵²

At the same time the footprint of the European defence industry in America owning 100% of a US subsidiary has also increased significantly. In 2009, for instance, the amount of business generated by US subsidiaries, owned by European primes, was far greater than the European defence exports to the US (a few tens of billions of dollars in the first instance and only \$2 billion in the latter one).⁵³

EU governments have certainly the right to call for tougher controls on foreign investment in the EU defence sector. However, certain EU Member States maintain excessive controls on foreign investment, unnecessarily restricting the ability of their defence companies to access benign capital from non-EU 'Allies', such as the US.

Offsets / Industrial Return

Defence companies can no longer rely on a classic framework, in which a US-based defence company, for instance, does business with an EU Member State only as an exporter of products. Instead, EU and US defence companies will have to establish closer relationships with more countries: assessing each market individually, deciding which are appropriate to do business with, and designing programmes tailored to each country for business development, industrial participation by local undertakings, and long-term investment.

AmCham EU acknowledges that, from an EU law standpoint, offsets/industrial return requirements in the EU are restrictive measures which go against the basic principles of the Treaty on the Functioning of the European Union (TFEU), because they discriminate against economic operators, goods and services from other EU Member States and impede the free movement of goods and services. Therefore, they can only be justified on the basis of one of the TFEU-based derogations, in particular Article 346 TFEU.

AmCham EU also agrees with the European AeroSpace and Defence Industries Association (ASD)'s reply to a European Commission's online survey, in which they point out that *'uncertainties concerning the use of offset requirements that came along with the 2009/81/EC Directive also create legal and financial risks for bidders for contracts where such offsets are required.'* In this context, ASD argues that *'legal certainty would benefit from further clarification of the conditions for requests for industrial participation.'*⁵⁴

Security of Supply

The US DoD has entered into arrangements with several EU Member States to ensure the mutual supply of defence goods and services. These bilateral Security of Supply arrangements (SSA) allow the US DoD to request priority delivery for US DoD contracts, subcontracts, or orders from companies in these EU Member States. Similarly, the arrangements allow the signatory EU Member States to request priority delivery for their contracts and orders with US firms.⁵⁵

⁵² <http://www.ratier-figeac.com/?q=en/content/produitsservices/propellers/en>

⁵³ <http://ec.europa.eu/DocsRoom/documents/10489/attachments/1/translations>

⁵⁴ <http://ec.europa.eu/DocsRoom/documents/20376>

⁵⁵ <http://www.businessdefense.gov/security-of-supply/>

US Foreign Military Sales

The US Foreign Military Sales (FMS) programme is a form of US security assistance and a fundamental tool of US foreign policy. The US may sell defence articles and services to foreign countries and international organisations when the US President formally finds that to do so will strengthen the security of the US and promote world peace. Under FMS, the US Government and a foreign government enter into a government-to-government agreement. Example: in 2016, eight European nations led by Denmark agreed on a legal framework through which the NATO members, with the support of the NATO Support and Procurement Agency (NSPA) will jointly buy precision-guided munitions (PGMs) from the US through the FMS system.⁵⁶

EU companies, legally based in the US, can also sell products through the FMS system. Example: EADS North America delivered four Airbus Military CN235-300 MPAs to the Mexican Navy in 2011 and 2012 under a US Coast Guard managed FMS agreement.⁵⁷

Between 1 October 2014 and 1 October 2015, the total value of US defence articles and defence services, purchased by the EU-28 through the FMS programme, amounted to \$3,2 billion (≈ €2,8 billion), which represents only 3% of the total budget the EU-28, spent on defence investment (including R&D and R&T) and operations and maintenance.⁵⁸ 92% of the total FMS spent by the EU-28 that year came from 9 countries: Belgium, France, Germany, Greece, The Netherlands, Poland, Romania, Slovakia and the UK.⁵⁹

2.4. Recommendations

Access to defence procurement market

- If European policy-makers continue pursuing a Buy European Act in the defence sector, they might consider granting waivers to certain Allies, such as the US. If they don't, the US could retaliate by closing off its own - approximately 4 times bigger - defence market to European companies such as Airbus, BAE Systems, Leonardo, Rheinmetall, Rolls-Royce, Saab, Safran and Thales, while these EU companies also have relevant footprint in the US.
- AmCham EU advocates for a transatlantic security cooperation strategy that lays out pragmatic goals for the transatlantic Alliance so that defence companies on both sides of the Atlantic can better target their investments and activities in support of transatlantic security.
- To enhance the transatlantic security relationship, the US DoD should have a formalised agreement with the European Defence Agency which would allow US DoD to discuss matters of common security and defence interests directly with key European stakeholders.

Areas of interest could include interoperability, the impact of the EU's chemical regulation 'REACH'⁶⁰ on military systems and operations, and military mobility in Europe.

Such a US DoD-EDA agreement could enable US companies to participate in EU and EDA projects and programmes such as: Intelligence, Surveillance and Reconnaissance (ISR), Remotely Piloted Aircraft Systems (RPAS), Air-to-Air Refuelling (AAR), satellite communications, access to space, permanent earth observation, border control, maritime security, resilience building (cyber security, ...).

- If governments will be restricted to 'buying European' or 'buying American,' policy-makers should define what European and American really means. AmCham EU believes that the policy-

⁵⁶ <http://www.dsca.mil/news-media/news-archive/nato-group-agrees-joint-purchases-us-guided-bombs>

⁵⁷ <http://northamerica.airbus-group.com/north-america/usa/Airbus-Group-Inc/news/press.EADS-North-America-to-provide-support-and-service-to-four-CN235-Maritime-Patrol-Aircraft-for-Mexican-Navy.html>

⁵⁸ http://ec.europa.eu/eurostat/statistics-explained/index.php/Government_expenditure_on_defence

⁵⁹ http://www.dsca.mil/sites/default/files/historical_facts_book_-_30_september_2015.pdf

⁶⁰ <https://echa.europa.eu/regulations/reach>

makers should rather advocate for job creation and manufacturing instead of looking at the nationality of the companies. EU and US foreign direct investors in each other's defence sector shouldn't face future exclusions from defence procurement. They create high-skill, high-wage manufacturing jobs, spur innovation and engage in communities.

Discrimination among Allied countries on grounds of nationality should be prohibited.

- AmCham EU also calls on policy-makers to continue addressing the importance of small- and medium-sized enterprises (SMEs) participation in transatlantic defence procurement and supply chains.
- Exporting less expensive/cost-effective commercial- or military-off-the-shelf (COTS or MOTS) US systems to European nations can lead to a certain level of harmonisation of supply and free up European resources for other investments or purchases, and vice-versa. A COTS/MOTS acquisition from the US could be further reinforced, for instance, by including EU Allies in the sustainment phase, whose value is normally 65-70% of the total lifecycle cost. This should not be in contradiction to the desire to strengthen the European Defence Technological and Industrial Base (EDTIB).
- With cross-border cyber threats facing both sides of Atlantic equally, AmCham EU believes the US and EU, now more than ever, need to pull their best resources together to cooperate, continue to drive global cyber policy shaping and jointly advance their transatlantic community's cyber preparedness and resilience.

(Please see our recommendations for the eligibility criteria of the European Defence Industrial Development Programme (EDIDP) in annex 1 – at the end of the paper)

Offsets / Industrial Return

- The EDA's Code of Conduct on Offsets⁶¹, launched in 2008, has been abandoned in 2014. The European Commission could maybe retrieve some of aforementioned EDA Code's guidelines in any future European Commission's additional guidance on offsets.
- The European Commission should investigate possibilities for additional measures to open up supply chains to defence companies, including SMEs, from 'all' EU Member States.

Security of Supply

- More security of supply arrangements between the US and the EU might lessen current security of supply issues. AmCham EU believes that it is particularly important for contracting authorities/entities to ensure that their security of supply requirements comply with the principle of non-discrimination between EU and US suppliers. EU and US governments should recognise the potential for a certain degree of mutual interdependence and explore solutions to achieve transatlantic security of supply, whether related to non-dependencies, supply chains or (cross-border) investments in key technological and industrial capabilities.
- As the UK will also become a non-EU country, the security of supply topic should also be integrated in the Brexit negotiations.

US Foreign Military Sales

⁶¹ [http://www.infodefensa.com/wp-content/uploads/TheCodeofConductonOffsets\[1\].pdf](http://www.infodefensa.com/wp-content/uploads/TheCodeofConductonOffsets[1].pdf)

- AmCham EU stresses that a US Government-led FMS programme does not cause market distortions in the EU. Besides a FMS procurement option, contracting authorities in the EU can still examine the market and establish whether at least one EU economic operator could genuinely compete to satisfy the requirements of the EU contracting authority.
- The EU and its Member States should ensure that application of the 30 November 2016 European Commission's Guidance Note on Government-to-Government Sales does not discriminate against US FMS solutions to European military requirements.

3. Transatlantic harmonisation of defence export controls

3.1. Concern

The technological and operational gap between the EU and the US might be widened if European governments and/or companies try to design out or avoid the purchase of defence goods and services which are controlled by the US Government.

3.2 Background

The report on 'The future of EU Defence Research' states: *'Until recently, the US International Traffic in Arms Regulations⁶² (ITAR) discouraged European prime contractors from using US suppliers, and to some extent favoured the existence of a European supply chain. By removing the constraints posed by ITAR on very sensitive materials, the US export control reform reverses this perspective: the attractiveness of the US supply chain is increased whilst the restrictions of non-re-export imposed in intra-EU transfers hamper European suppliers.'*⁶³

The European Commission's Communication COM (2007) 764 states that *'A more European approach to cooperation at home is the first step in reducing European technological dependency. In particular, joint action to identify and develop key technologies and industrial capabilities and secure them for the EU would greatly enhance credibility and reduce the burden of ITAR restrictions.'*⁶⁴

The European Commission Decision of 11 April 2017 on *'The financing of the Preparatory action on Defence research and the use of Unit Costs for the year 2017'* underlines that *'The Preparatory Action on Defence Research will include actions to develop a sustainable strategic technology foresight methodology. In view of the reform of the International Traffic in Arms Regulations (ITAR), an important part in this Area would be to launch a stocktaking exercise of ITAR related components in Europe's armament systems, including in future technologies.'*⁶⁵

3.3 Analysis

⁶² https://www.pmdtc.state.gov/regulations_laws/itar.html

⁶³ [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535003/EXPO_STU\(2016\)535003_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535003/EXPO_STU(2016)535003_EN.pdf)

⁶⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0764:FIN:en:PDF>

⁶⁵ [https://www.eda.europa.eu/docs/default-source/brochures/decision-on-the-financing-of-the-preparatory-action-on-defence-research-\(pdr\)-and-the-use-of-unit-costs-for-the-year-2017.pdf](https://www.eda.europa.eu/docs/default-source/brochures/decision-on-the-financing-of-the-preparatory-action-on-defence-research-(pdr)-and-the-use-of-unit-costs-for-the-year-2017.pdf)

The EU's 2009/43/EC Intra-Community Transfer Directive⁶⁶ encourages European system integrators to work with EU suppliers rather than third-country suppliers because of the improved guarantee of security of supply when the European system integrators source components in the EU.

The US government has been overhauling its primary export control regime for authorizing the export of defence articles, technical data, and defence services, known as the International Traffic in Arms Regulations⁶⁷ (ITAR). This effort has included reviewing and moving items from the US Munitions List (USML) to the Commerce Control List (CCL) under the Export Administration Regulations⁶⁸ (EAR).

In 2014, Kevin Wolf, then-US Secretary of Commerce for Export Administration, said: *'Indeed, a key justification for the reform effort is the increasing interoperability among the US and its NATO and other close allies to better confront shared security challenges. The regulatory changes will make it easier for European companies to: (1) jointly develop with US companies most defence and dual use items; (2) sell to US companies; (3) export European-made items containing US-origin content to countries not subject to sanctions or arms embargoes. The export to non-embargoed destinations of European-made defence, space, and other controlled articles containing less than 25 percent US-origin content controlled by Commerce is not subject to any US regulatory requirements.'*⁶⁹

So, the purpose of the US Export Control Reform (ECR) was certainly not to sell more US defence and dual-use products in the EU. ECR incentivises many EU actors to include US-origin parts in their own commercial items while avoiding the implications of the 'see through' rule⁷⁰. This rule would subject an EU company's commercial exports to re-apply for US licenses.

As indicated by Rosa Rosanelli in her *'Handbook on US export control regulations explained to the European exporter'*: *'The American market is still the most important for high technology and defence-related commodities, and companies operating in this field cannot afford having it precluded. European companies that want to access this market and trade in strategic, 'dual use' or military items need to include 'US export control reasoning' in their procedures, in addition to their national obligations.'*⁷¹

3.4 Recommendations

- The EU and US governments and defence manufacturers should continue buying from each other and including each other's parts and components in their defence and dual-use products. This will lead to enhanced competitiveness and interoperability within the transatlantic security and defence sector and narrow the technological and operational gap between the two.

More open, less restricted competition will make companies on both sides of the Atlantic also more efficient. It will lead to greater economies of scale and lower prices.

- National and multinational export control regulations that affect transatlantic defence and industrial cooperation and technology exchange should be considered as parameters for acquisition arrangements, but never as reasons not to engage in transatlantic defence and industrial cooperation.

⁶⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:146:0001:0036:EN:PDF>

⁶⁷ https://www.pmdtc.state.gov/regulations_laws/itar.html

⁶⁸ <https://www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear>

⁶⁹ <http://www.securityeurope.info/europe-along-with-the-united-states-will-benefit-from-the-us-export-control-reform/>

⁷⁰ <https://www.bis.doc.gov/index.php/forms-documents/pdfs/1094-ecr-brochure-nov-14-2014/file>

⁷¹ http://local.droit.ulg.ac.be/jcms/service/file/20140108134656_Handbook-RR-0801.pdf

Conclusion

The EU and its Member States and the US Government need to be able to respond to the transatlantic community's security and defence requirements. EU and US-headquartered security and defence companies will play a crucial role in providing an appropriate mix of public and private capabilities.

A strong transatlantic defence and security industry requires open and competitive markets and the removal of outstanding barriers to market access.

The EU's strategic autonomy should be both capability driven and technology driven, not nationality driven.

The fundamentals have not changed: the EU and the U.S. are more deeply integrated across more economic areas than any other two regions in the world. The transatlantic economy generates close to \$5 trillion in total commercial sales a year and employs up to 15 million workers on both sides of the Atlantic. Cooperation between the EU and US remains critical in order to ensure that the global economy and markets are safe, sound and well-regulated. By working together as partners, both can maximise their influence and project their vision for a better, more prosperous and secure world. This partnership must be built around joint commitments to the values we uphold: the rule of law, free trade, market economy and open borders.

AmCham EU believes in mutual market access and in the ability of security and defence companies to compete in the transatlantic marketplace. We believe this is occurring as a result of market forces, technological trends, and economies of scale and the desire for common capabilities and interoperable equipment on the part of the security and defence customer. We therefore oppose efforts to try to enforce market access rights through regulation or to condition market access on such a basis. Attempts to legislate in this manner could have the effect of creating rather than removing barriers and slow down the trends toward market integration and increasing competitiveness that are underway. While implementing the 'European Defence Action Plan' and the 'America First Policies', the EU and US policy-makers should resist any national preference language and continue to pursue the shared thrust towards openness and competitiveness in transatlantic security/defence research and procurement projects.

During his speech at the American Enterprise Institute Conference on 20 April 2017 in Washington DC, Valdis Dombrovskis, Vice-President of the European Commission, rightfully underlined that *"Laws change, governments change, the context changes ... but it is important that the principles and trust binding the EU and the U.S. remain the same."*⁷²

AmCham EU will continue to be committed to working closely with policy-makers on both sides of the Atlantic to advance transatlantic security cooperation that unlocks the EU and US security and defence industry's full potential.

⁷² http://europa.eu/rapid/press-release_SPEECH-17-1043_en.htm

Proposal for a regulation of the European Parliament and of the Council establishing the European Defence Industrial Development Programme (EDIDP)

An inclusive defence fund, for a strong transatlantic defence industrial cooperation

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the direction European legislators took towards a more inclusive EDIDP. The texts agreed in the Council and the European Parliament acknowledge the global nature of the aerospace and defence value chains and that their capital structures span across continents. By widening the scope of the EDIDP framework and allowing European companies to partner with third-country entities, located in the EU, both institutions reaffirm the guiding principle of capability development, attaining the best strategic value for money. This will allow Member States to purchase interoperable, cost-effective and readily available capabilities that ensure the highest military effect.

Third-country entity participation

Inclusiveness implies transparency and in this regard AmCham EU praises the European Parliament report, as it provides much-needed clarity on the specifics of the mechanisms that allow participation and funding for third-country entities in EDIDP projects:

Article 7 (1b) of the 26.2.2018 European Parliament report lays down three conditions that third-country entities need to fulfil in order to participate in EDIDP projects:

(1) Removal of the effective control over the undertaking by a third country or a third country entity:

Defining the notion of 'effective control' will always be a difficult task. Even with article 6(3) providing some guidance, it is difficult to tell where the line will be drawn in each independent case. We therefore believe that the Member States, in which the third-country entities are located in, are best suited to determine whether effective control by third countries or third-country entities, as defined in article 6(3), has been removed.

(2) Prevention of access to sensitive information relating to the action:

European legislators could refer to proven mechanisms that already exist in the US, to facilitate cooperation between domestic and European primes. Options available could include board resolutions, proxy agreements or special security agreements (SSAs).

An example of such a mechanism can be found in the EU's Clean Sky 2 Agreement, where policy-makers have ensured that the joint undertaking (JU) is able to reject any transfer or exclusive licensing. In article 30.3 of the agreement, the JU can reject the transfer of ownership or exclusive licensing when it is to a third-country entity or when not in line with the EU's economic, ethical or security interests. These are proven safeguards that have helped ensure valuable non-EU participation while protecting the Union's interests. Policy-makers should recognize the value of these tried and tested mechanisms.

(3) No control nor restriction of ownership of the intellectual property by a third country:

The legal framework of the collaborative programme should make sure that the IP that is generated in the EU remains 'insulated' from external exploitation or restriction, in particular with a view to potential subsequent export. Contrary to popular believe, US export controls do not apply to all US companies manufacturing in the EU. US subsidiaries in the EU that design, manufacture and support certain dual-use and defence products are, for example, not subject to these controls. This means that there would be no extraterritorial control by third countries on the infrastructure, facilities, assets and resources used or produced by the consortium.

Member State involvement

While transparency and certainty around the conditions for third-country entities to participate are essential, we recognise the need for Member State involvement in the implementation and enforcement of the EDIDP. National governments are best placed to recognise the value that actors located in their territories, irrelevant of ownership, bring to their respective Defence Technological and Industrial Base (DTIB) in terms of employment and wealth creation. Moreover, national authorities will have the experience with third-country entities located in their territories, to ensure that no national nor European security interests are threatened. A successful EDIDP will centre on a strong Member State participation, commitment and procedural involvement.

Member State involvement in defence programmes has already been successfully applied within NATO for their 'Internal Competitive Bidding' procedures. Given the proven track-record of the NATO scheme and the similar objective of the EDIDP, AmCham EU urges negotiators to consider a similar framework for Member State involvement in the EDIDP programme.

In Article 5 (ii) of the NATO AC/4-D/2261 directive on the procedures for internal competitive bidding, Member States must declare that the entity has the necessary security clearances and is 'technically, financially and professionally capable of undertaking a project of the scope envisaged'. This would not only ensure that the undertaking is economically sustainable, but also that the security and defence interests of the Union and its Member States are respected.

Contribution to the EDTIB and Europe's strategic autonomy

EU-based subsidiaries with third-country parentage strengthen the European Defence Technological and Industrial Base (EDTIB) and support Europe in achieving its strategic autonomy. By providing high-end products and services, third-country entities, located in the EU, contribute to the Member States' ability to decide and act without depending on the capabilities of third countries, while remaining technologically competitive and well equipped. Apart from making key contributions to government revenues through corporate taxes, personal income taxes or property taxes, amongst others, third-country

entities located in the EU form a vital pillar of the Member States' efforts to reach strategic autonomy. A status that must be capability driven, technology driven and not determined by ownership. An inclusive and vibrant European defence industry is critical for the economic prosperity and national security on both sides of the Atlantic.

As the EDIDP initiative enters into its final negotiation phase, AmCham EU would like to reassert the need for **openness and accessibility of the transatlantic defence markets**, as these are essential prerequisites for a sustainable and mutually reinforcing transatlantic defence industrial base.
