



INSIGHT

THE RUSSIAN WAR AGAINST UKRAINE AND THE LAW OF THE EUROPEAN UNION

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FINANCING EUROPEAN DEFENCE: THE END OF BUDGETARY TABOOS

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ABSTRACT: Since the Treaty of Lisbon, signed in 2007, the common security and defence policy shall include the progressive framing of a common Union defence policy, which may lead to a common defence. However, the key question is the financing of such policy. To address this issue, several taboos have been progressively lifted in terms of financial resources, both out of the EU Budget with new players (notably the European Defence Agency) and new instruments (especially the European Peace Facility) and within the EU Budget, with a multiplication of initiatives to reinforce the European defence industry (from the first dedicated program in 2017 to the new instrument for supporting the production of ammunition in 2023). The Ukrainian war was and is still a decisive factor to contribute to and accelerate that evolution.

KEYWORDS: Common Security and Defence Policy – EU budget – European Defence Agency – European Peace Facility – European Defence Fund – Ukrainian war.

I. INTRODUCTION

“Because people only slit their throats for money, and these sinews of war are lacking in all those who wage war today”. This phrase, attributed to D’Alembert,¹ reminds us that the expression the “sinews of war”, which first appeared in the 17th century, referred to the sums spent by the Lords of the Middle Ages to fight each other. A few centuries later,

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¹ According to the dictionary Littré, in a letter from Mr D’Alembert to the King of Prussia dated 11 October 1782: E Littré, “Nerf” (16 January 2024), Dictionnaire Littré www.littre.org. Free translation of : “Parce qu’on ne s’égorge qu’à prix d’argent, et que ce nerf de la guerre manque à tous ceux qui la font aujourd’hui”.



the expression is still relevant, given the return of war to the European continent, with Russian aggression on Ukraine, which began on 24 February 2022.

Beyond the financing of this new conflict in the 21st century, the question of budgetary resources for European defence, in the broadest sense of the term (*i.e.*, any initiative of the European Union (EU) covering the spectrum from defence research to military operations or missions)² is also a pressing issue today.

Admittedly, the Treaty of Lisbon (signed in 2007) paves the way for the affirmation of a common security and defence policy (CSDP), as an integral part of the common foreign and security policy (CFSP). The latter must include the progressive framing of a common defence policy for the Union, which "will lead to a common defence, once the European Council, acting unanimously, has so decided" (see art. 42(2), first paragraph of the Treaty on European Union, hereinafter "TEU"). However, the question of financing this policy is approached from a rather limited angle: while the administrative and operational expenditure of the CFSP is in principle borne by the EU budget, an exception is explicitly made for "expenditure on operations having military or defence implications..." (see the first paragraph of art. 41(2) TEU). This can be seen as the main budgetary obstacle to any desire on the part of the Union to participate in the financing of a war.

Is the Russian-Ukrainian conflict reshuffling the cards? I would be inclined to answer that it is more likely to highlight and encourage developments that preceded it, revealing ways of adapting, not to say circumventing, art. 41(2) TEU.

In this respect, following the example of the development of the internal market for defence equipment and products, which began in the late 1990s³ and was given a major boost from 2013,⁴ the way in which Europe's defence is financed oscillates between co-operation and integration.⁵ In doing so, it will follow both the beaten track outside the EU

² We agree with the categorisation proposed by Jean-Marc Laurent in his article 'Défense de l'Europe et BITD européenne', in O Delas, M Mondélice and O Bichsel (eds), *L'Union européenne, puissance globale dans les relations internationales et transatlantiques* (Bruylant 2023) 183-200, specifically 188, which refers to "Defence Europe" as "Europe's second level of defence", after national defences (1st level) and before the current "shared defence" (3rd level) and the future "common defence" (4th level). See also the distinction between a "Europe of defence" and a "Europe of defences", used by Messaoud Saoudi: 'Le budget de la PSDC: une Europe de la défense ou une Europe des défenses', in N Clinchamps and P-Y Monjal (eds), *L'autonomie stratégique de l'Union européenne. Perspectives, responsabilité, ambitions et limites de la défense européenne* (Larcier 2015) 181-192.

³ See Communication COM(96) 10 final from the Commission of 24 January 1996, 'The challenges facing the European defence-related industries – A contribution for action at European level'; Communication COM(97) 583 final from the Commission of 4 December 1997, 'Implementing the Union's defence industrial strategy'.

⁴ See Communication COM (2013) 542 final from the Commission of 24 July 2013, 'Towards a more competitive and efficient defence and security sector', followed by a roadmap (see Communication COM(2014) 387 final from the Commission of 24 June 2014, 'A New Deal for European Defence. Implementation Roadmap for Communication COM(2013) 542') and by an action plan (see Communication COM(2016) 950 from the Commission of 30 November 2016, 'European Defence Action Plan').

⁵ In this sense: S Rodrigues, 'Le marché européen de la défense : entre coopération et harmonisation', in N Clinchamps and P-Y Monjal (eds), *L'autonomie stratégique de l'Union européenne. Perspectives,*

budget (section II) and the more standardised path of the European budgetary procedure (section III).

II. FINANCING EUROPEAN DEFENCE OUTSIDE THE EU BUDGET

The option of financing operations outside the EU budget deserves to be addressed first, as it was tested to some extent before the Treaty of Lisbon, when the European Defence Agency was set up in 2004 and had to be given a budget (section II.1). But this experiment took place somewhat "under the radar". It was only more recently, that a financial instrument specifically for military operations, named ATHENA,⁶ created the same year than the AED and still outside the EU budget, was modified to become the European Peace Facility (EPF) and took a significant turn after the outbreak of the Russian-Ukrainian war (section II.2).

II.1. FUNDING THROUGH THE BACK DOOR: THE EUROPEAN DEFENCE AGENCY

The idea of a European armaments' agency was put forward in 2003 by four Member States (Belgium, France, Greece, and Luxembourg) of the Western European Union (WEU).⁷ The following year, based on Joint Action 2004/551/CFSP of the Council of 12 July 2004,⁸ the Agency in the field of defence capabilities development, research, acquisition, and armaments (known as the European Defence Agency, hereinafter "EDA") was set up and subsequently "anchored" in the Treaty of Lisbon (see art. 42(3) TEU).⁹

Among the tasks entrusted to the EDA by art. 45(1) TEU, those for which financial leverage is essential should be emphasised: the management of specific cooperation programmes, support for defence technology research and the implementation of "any

responsabilité, ambitions et limites de la défense européenne (Larcier 2015) 137-161 and F Santopinto, 'Le financement de la défense entre coopération et intégration', in A Hamonic (dir.), *Quelle spécificité de la défense en droit de l'Union européenne, proceedings of the colloquium of 21-22 October 2021, Université Rennes 1* (Presses universitaires de Rennes, forthcoming).

⁶ See Council Decision 2004/197/CFSP of 23 February 2004 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications.

⁷ The WEU was established by the Paris' Protocol dated on 23 October 1954, amending the Brussels' Treaty of 27 March 1948 establishing the Western Union signed by Belgium, France, Luxembourg, the Netherlands and the United Kingdom. It included Germany and Italy, joined later by Portugal, Spain, and Greece. The WEU officially closed on 30 June 2011.

⁸ Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, repealed and replaced by Council Decision 2011/411/CFSP of 12 July 2011 defining the status, seat and operating procedures of the EDA, itself repealed and replaced by Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency (recast). See also Council Decision (EU) 2016/1351 of 4 August 2016 on the Staff Regulations of Officials of the EDA and repealing Decision 2004/676/EC; and Council Decision (EU) 2016/1352 of 4 August 2016 on the rules applicable to national experts on secondment to the EDA and repealing Decision 2004/677/EC.

⁹ On the EDA, see G Starkle, *L'Agence européenne de défense. Régime juridique, organisation et réalisations* (Bruylant 2010).

measure conducive to strengthening the industrial and technological base of the defence sector and to improving the effectiveness of military spending".¹⁰ The EDA is thus intended to act as a catalyst for the pooling of capabilities between Member States.¹¹ But does it have the financial resources? After many lean years (under considerable pressure from the United Kingdom to limit the Agency's initiatives),¹² one of the consequences of Brexit is that it has led to an increase in the general budget: from 36 billion euros in 2020 to almost 40 billion euros in 2022.

This is where a closer analysis of the budgetary rules applicable to the EDA may prove interesting. In addition to Chapters III and IV of Decision (CFSP) 2015/1835, mentioned above, it is also Council Decision (EU) 2016/1353 which lays down the EDA's financial rules.¹³

We thus learn that while the bulk of the EDA's revenue is made up of contributions payable by the participating Member States on the basis of the gross national income (GNI) scale referred to in the second paragraph of art. 41(2) TEU,¹⁴ so-called "additional" revenue may come from third countries but also, and above all, be "deducted from the general budget of the Union on a case-by-case basis".¹⁵ In this respect, it is explicitly stated¹⁶ that these contributions from the EU budget may be made to ad hoc budgets which have been established for ad hoc projects or programmes managed by the EDA.¹⁷

Therefore, insofar as the EDA's activities may include procurement through public contracts or grants, such activities are likely to be financed indirectly by contributions from the EU budget. Nonetheless, the agency remains fundamentally managed as an intergovernmental body dependent mainly on the resources of the participating Member States. This has led some authors to say that "[t]he national reflex prevails (...) when it comes to financing the CFSP and especially the CSDP".¹⁸ In fact, by way of example, the three research pilot projects managed since June 2017 by the EDA on the basis of funding mainly from the EU budget: SPIDER (navigation and situation assessment inside buildings), TRAWA (standardisation of the drone detection and avoidance system) and EuroSWARM (heterogeneous

¹⁰ See also art. 5 of Council Decision (CFSP) 2015/1835 cit. which specifies the "functions and tasks" of the EDA.

¹¹ The EDA is open to all Member States. Denmark, which had negotiated an opt-out clause (see Protocol No. 22 to the EU Treaties), joined the agency on 1 July 2022 in the wake of the shock in Ukraine.

¹² A De Neve, 'L'Agence européenne de défense dans le paysage européen de la coopération en matière d'équipements de défense' (2009) *Sécurité & Stratégie* 103; A Georgepoulos, 'The New European Defence Agency: Major Development or Fig Leaf?' (2005) *Public Procurement Law Review* 103-109.

¹³ Council Decision (EU) 2016/1353 of 4 August 2016 concerning the financial rules of the European Defence Agency and repealing Decision 2007/643/CFSP.

¹⁴ See art. 13(9) of Council Decision (CFSP) 2015/1835 cit.

¹⁵ See art. 15(1) of Council Decision (CFSP) 2015/1835 cit.

¹⁶ In art. 22 of Council Decision (CFSP) 2015/1835 cit.

¹⁷ See the classification of programmes A and B, according to whether an opt-out is provided for: arts 19 and 20 of Council Decision (CFSP) 2015/1835 cit.

¹⁸ J Auvret-Finck, 'Politique étrangère et de sécurité commune (PESC). Moyens d'action. Financement', in F Picod (ed.), *JurisClasseur Europe Traité* (Lexis Nexis 2021, vol. 2611 n. 69).

unmanned sensor platforms), have a total budget that is still very modest (1.4 million euros). Another way to proceed is to entrust the EDA with the indirect management of projects financed by the European Defence Fund (see below, section III.1), such as the ARTURO (advanced radar technology) and ECOBALLIFE (eco-designed ballistic systems for light and durable protection against threats) projects, which have been launched in 2021-2022, but again with a relatively modest budget (around 30 million euros for these two projects).

More recently, in reaction to the Ukrainian conflict, 24 EU Member States and Norway have signed on 20 of March 2023, the EDA project arrangement for the collaborative procurement of ammunition. A two-steps approach was decided as follows: a two-year, fast-track procedure for 155mm artillery rounds and a seven-year project to acquire multiple ammunition types.¹⁹

More ambitious and more widely publicised, however, is the funding, without recourse to the EU budget, which is being channelled through the new European Peace Facility.

II.2. FINANCING "THROUGH THE FRONT DOOR": THE EUROPEAN PEACE FACILITY

The European Peace Facility (hereinafter "EPF") has its origins in the African Peace Facility (hereinafter "APF") set up in December 2003²⁰ and the ATHENA mechanism created in 2004 two instruments whose functions it now combines.

As part of the EU's relations with the countries of the ACP (Africa Caribbean Pacific) group,²¹ the APF was intended, as the European Commission pointed out, to "strengthen the financial capacities of African institutions with a view to promoting peace and security on the continent, in response to a request made at the African Union summit in Maputo in July 2003".²²

Between 2004 and 2020, more than 4 billion euros will have been mobilised by the APF, most of it for peace support operations (more than fifteen to date), part of the funding for which (around 25 per cent) is now provided by the AU itself.

At the same time, the entry into force of the Lisbon Treaty in December 2009 has led to a more structured organisation of the management of the financing of the common

¹⁹ It was announced by EDA on 2 October 2023 that 7 EU Member States have placed orders with European industry through its fast-track joint procurement scheme for 155mm ammunition: eda.europa.eu.

²⁰ Decision 3/2003 of the ACP-EC Council of Ministers of 11 December 2003 on the use of resources from the long-term development envelope of the 9th European Development Fund to create a Peace Facility for Africa. On the genesis : S Loisel, 'La création de la 'Facilité de paix pour l'Afrique'. Jeux sectoriels dans l'élaboration d'un instrument européen de gestion des crises' (2016) Politique européenne 86-116.

²¹ Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000. Extended until 30 June 2023 or beyond depending on the progress of the negotiations to revise the agreement begun in 2018: Decision 1/2022 of the ACP-EU Committee of Ambassadors of 21 June 2022 amending Decision 3/2019 of the ACP-EU Committee of Ambassadors to adopt transitional measures under art. 95(4) of the ACP-EU Partnership Agreement.

²² European Commission, *African Peace Facility. Annual Report 2013* publications.europa.eu 6.

costs of EU operations having military or defence implications, within the meaning of art. 41(2) TEU. This will be the objective of the successive revisions of the 2004 ATHENA mechanism, an "ad hoc financial instrument",²³ first in 2011,²⁴ and then in 2015,²⁵ before being replaced by the EPF, after ten years of experience.

After the European Council of 17-21 July 2020 announced the replacement of the APF and ATHENA, Council Decision (CFSP) 2021/509 of 22 March 2021 established the EPF²⁶ with an initial budget of 5.692 billion euros for the period 2021-2027. However, mobilisation of this budget proved to be faster than expected, under pressure from the Russian-Ukrainian conflict (see below, at the end of that section), leading the Council to increase the total budget, first, to 7.979 billion euros²⁷ and then after, to 12,04 billion euros.²⁸ The EPF is now called upon to finance both the common costs of EU operations with military or defence implications (ex-ATHENA)²⁹ and assistance measures consisting of EU actions under art. 28 TEU,³⁰ where the resulting operational expenditure is borne by the Member States, as was the case for measures previously targeted by the APF.³¹

As authoritative doctrine has pointed out, "the EPF inaugurates (...) over and above the merger of the two instruments that it brings about, innovations driven by the Union's desire to strengthen its ambitions and the financial resources that it has hitherto devoted to crisis management".³² But before analysing these innovations, it is worth briefly outlining the overall legal framework, inspired by the ATHENA model.

²³ In the words of Messaoud Saoudi: M Saoudi: 'Le budget de la PSDC: une Europe de la défense ou une Europe des défenses' cit. 191.

²⁴ Council Decision 2011/871/CFSP of 19 December 2011 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena).

²⁵ Council Decision (CFSP) 2015/528 of 27 March 2015 repealing Decision 2011/871/CFSP.

²⁶ Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility and repealing Decision (CFSP) 2015/528; last amended by Council Decision (CFSP) 2023/994 of 22 May 2023 on the consequences of Denmark informing the other Member States that it no longer wishes to avail itself of art. 5 of Protocol No 22 on the position of Denmark.

²⁷ Council Decision (CFSP) 2023/577 of 13 March 2023 amending Decision (CFSP) 2021/509 establishing a European Peace Facility.

²⁸ Council Decision (CFSP) 2023/1304 of 26 June 2023 amending Decision (CFSP) 2021/509 establishing a European Peace Facility.

²⁹ It should be noted that the scope of the operations concerned is extended beyond the spectrum of art. 42 TEU, to include missions entrusted to a group of Member States in accordance with art. 44 TEU (see art. 4(a) of Council Decision (CFSP) 2021/509 cit.).

³⁰ As a reminder, the first paragraph of art. 28 TEU states that "[w]here an international situation requires operational action by the Union, the Council shall adopt the necessary decisions. Such decisions shall lay down their objectives, their scope, the means to be made available to the Union, the conditions for their implementation and, if necessary, their duration".

³¹ See art. 1(2) of Council Decision (CFSP) 2021/509 cit.

³² C Schneider, 'La facilité européenne pour la paix (FEP) ou les nouveaux avatars de l'Union et de la PSDC en tant qu'contributeur de paix et de sécurité', in L Potvin-Solis (ed.), *L'Union européenne et la paix*, (Bruylant 2023) 439-463, specifically 445.

With full legal capacity to carry out its tasks,³³ the EPF is managed under the authority of a committee made up of one representative per Member State, at whose meetings representatives of the European External Action Service (EEAS) and the EDA in particular are invited to attend.³⁴ The voting rule is unanimity, except where a simple majority is required for procedural matters. As for determining the Member States' contributions and their distribution, reference is made, as in the case of the EDA, to the GNP key referred to in art. 41(2) TEU.³⁵ In addition, as was the case with ATHENA, the EPF has a minimum deposit system for pre-financing EU rapid reaction operations and emergency measures.³⁶

From a functional point of view, it is on behalf of the EPF that an administrator is appointed to manage each operation and each assistance measure, but the appointing authority differs: the Secretary-General of the Council in the first case, the High Representative for Foreign Affairs and Security Policy (hereinafter "the High Representative") in the second case.³⁷

In fact, the financial rules also differ according to the nature of the measure implemented, *i.e.*, an operation or an assistance measure. However, it should be noted that in both such situations, the prior adoption of a Council decision is always required.³⁸

About the specific rules applicable to operations,³⁹ which are also applicable to the Union's military exercises,⁴⁰ all the common costs borne by the participating States are defined and listed in several annexes to the EPF decision, to cover both the preparatory phase and the active phase and then the winding-up of the operation.⁴¹ The

³³ See art. 3 of Council Decision (CFSP) 2021/509 cit.

³⁴ See arts 10 and 11 of Council Decision (CFSP) 2021/509 cit.

³⁵ See art. 26 of Council Decision (CFSP) 2021/509 cit., paragraph 7 of which states that if a Member State fails to participate in an assistance measure, it will pay an additional amount to cover expenditure other than that on military equipment "designed to release lethal force".

³⁶ See art. 28 of Council Decision (CFSP) 2021/509 cit.

³⁷ See art. 12 of Council Decision (CFSP) 2021/509 cit. A dedicated service of the Commission, the Service for Foreign Policy Instruments ("FPI"), is acting as administrator for assistance measures, under the supervision of the HR/VP. See the last Annual Activity Report 2021 of FPI: European Commission, Service for Foreign Policy Instruments, 'Annual Activity Report for 2021', document Ares(2022)2420169 of 31 March 2022.

³⁸ See art. 7 of Council Decision (CFSP) 2021/509 cit. which refers to arts 42(4) and 43(2) TEU for operations and art. 28 TEU for assistance measures, as mentioned above.

³⁹ See Title III, arts 44 to 55, of Council Decision (CFSP) 2021/509 cit.

⁴⁰ For example, 5 million euros has been budgeted by the EPF for the EU's military crisis management exercise for 2023 (MILEX 23), which has taken place from 18 September 2023 to 22 October 2023, involving more than 2.800 military staff from several EU Member States.

⁴¹ Catherine Schneider points out that the new Annex III on the costs borne in the preparatory phase makes it possible to take account of "battlegroups" (C Schneider, 'La facilité européenne pour la paix (FEP) ou les nouveaux avatars de l'Union et de la PSDC en tant qu'contributeur de paix et de sécurité' cit. 449), thus making it possible to prefigure, by 2025, the establishment of an EU rapid deployment capability of up to 5 000 troops in a hostile environment, as prescribed in the Strategic Compass adopted by the EU Council on 4 May 2022 (see p. 19 of Council, A Strategic Compass for Security and Defence – For a European

nomenclature referred to under the ATHENA mechanism is essentially the same, as is the possibility, on an exceptional basis, for the EPF to pre-finance certain expenditure on an operation in order to facilitate the initial deployment of forces, prior to confirmation by the participating Member States.⁴²

Regarding the assistance measures, rather than dwelling on the specific financing rules,⁴³ it should first be noted that, unlike the operations, reference is made to compliance with the general EU Financial Regulation.⁴⁴ Although they are still based on the APF framework, they differ in several respects. This is the case, first and foremost, in terms of territorial scope: the EPF now has a “global geographical scope”⁴⁵ and no longer refers solely to the African continent. Secondly, aid can no longer be provided only to regional and international organisations but also to third countries.⁴⁶ Finally, and perhaps most importantly, support for the supply of lethal weapons is now possible.⁴⁷

These last two innovations were inaugurated in spectacular fashion in the context of the Russian-Ukrainian conflict.⁴⁸ Just four days after the outbreak of war by Russia, the Council adopted an initial assistance measure “for the supply to the Ukrainian armed

Union that protects its citizens, values and interests and contributes to international peace and security, Doc. 7371/22, 21 March 2022).

⁴² See art. 49 of Council Decision (CFSP) 2021/509 cit., with a ceiling of 20 per cent of the reference amount of the costs concerned.

⁴³ See Title IV, arts 56 to 68, of Council Decision (CFSP) 2021/509 cit., resulting, notably, a broadening of the objectives assigned to assistance measures (art. 56(1)), a greater emphasis placed on the principles to be respected (art. 56(2): consistency, conformity with EU law, compliance with international obligations, etc.) and a reinforcement of controls on expenditure and assets financed under the EPF and entrusted to implementing actors, including an assessment of the capacity of those actors to implement expenditure (art. 66).

⁴⁴ See art. 11(6)(b) of Decision (CFSP) 2021/509 cit., which refers to Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the European Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014 and Decision No 541/2014/EU, and repealing Regulation (EU, Euratom) No 966/2012. It should be noted however, that the EPF is not under the scrutiny of the EU Court of auditors (ECA), which the latter regrets, by the way: see ECA Special Report 05/2023 of 17 January 2023, ‘The EU’s financial landscape – A patchwork construction requiring further simplification and accountability’.

⁴⁵ See recital (18) of Council Decision (CFSP) 2021/509 cit.

⁴⁶ See recital (11) and art. 56 of Council Decision (CFSP) 2021/509 cit.

⁴⁷ See arts 57 (in the preparatory phase) and 59 (in the active phase) of Council Decision (CFSP) 2021/509 cit. It should be worth mentioning that “[n]o assistance measure shall be used for the supply of any items which would be inconsistent with Union law or with the international obligations of the Union or of all the Member States” (see art. 59(5) of Council Decision (CFSP) 2021/509 cit.).

⁴⁸ It should be pointed out, however, that an initial assistance measure, which in many respects was premonitory in that it was already aimed at supporting the Ukrainian armed forces, had been adopted before the conflict, by Council Decision (CFSP) 2021/2135 of 2 December 2021 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces, with an initial maximum envelope of 31 million euros. Only non-lethal equipment was concerned: field hospitals, mine clearance, cyber defence, etc.

forces of military equipment and platforms designed to deliver lethal force", with a budget of 450 million euros.⁴⁹ Since then, the budget has been constantly increased, and now stands at over 4 billion euros.⁵⁰ At the same time, an EU military assistance mission was set up to support Ukraine (known as EUMAM Ukraine).⁵¹ It was also in favour of Ukraine that the new EPF minimum deposit system set up to pre-finance the Union's rapid reaction operations and emergency measures⁵² was used for the first time. Finally, particular attention was paid to the supply of munitions to the Ukrainian armed forces, with an additional billion euros shared between twenty-three Member States.⁵³

However, the Ukraine's situation should not overshadow other potential recipients of EPF aid, in particular African countries detract from the other potential recipients of EPF aid, in particular African countries. Indeed, the assistance to be provided may take the form not only of a specific measure (as illustrated in the Ukrainian case or for the

⁴⁹ Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the provision to the Ukrainian armed forces of military equipment and platforms designed to deliver lethal force; and Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian armed forces, with an initial "extension" of 50 million euros (for non-lethal force equipment). For Aymeric Potteau, "[w]ithout underestimating the political significance of such a decision, which in many respects reveals the geopolitical trajectory of the EU, it is important to stress that it is an extension of the maturing process of the Common Foreign and Security Policy (CFSP), which had already laid the groundwork, which undoubtedly facilitated the move to action", in A Potteau, "Les instruments financiers de l'Union européenne au soutien de l'Ukraine" (11 March 2022) Blog du Club des juristes www.leclubdesjuristes.com.

⁵⁰ Council Decision (CFSP) 2022/636 of 13 April 2022 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, with a new budget of 1.350 billion euros; supplemented by Council Decision (CFSP) 2022/637 of 13 April 2022 amending Decision (CFSP) 2022/339 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces, providing for an extension of 50 million euros, and by Council Decision (CFSP) 2022/2245 of 14 November 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces trained by the European Union Military Assistance Mission in support of Ukraine with military equipment, and platforms, designed to deliver lethal force, with an extension of 16 million euros. Lastly, the reference amount was increased to 3.12 billion euros (see Council Decision (CFSP) 2023/230 of 2 February 2023) and then to 4.12 billion euros (see Council Decision (CFSP) 2023/810 of 13 April 2023). See also: Council Decision (CFSP) 2023/2689 of 27 November 2023, amending the Council Decision (CFSP) 2022/2245 which adds 184 million euros.

⁵¹ Council Decision (CFSP) 2022/1968 of 17 October 2022 on a European Union military assistance mission in support of Ukraine (EUMAM Ukraine). By 15 June 2023, some 24.000 Ukrainian soldiers had been trained in this way (see C-C Gessant, 'According to Josep Borrell, Member States have already submitted reimbursement requests of over €900 million for munitions sent to Ukraine' (2023) Europe Daily Bulletin No. 13202). See also: Council Decision (CFSP) 2023/231 of 2 February 2023, as amended by Council Decision (CFSP) 2023/2677 of 27 November 2023.

⁵² Council Decision (CFSP) 2023/577 cit.

⁵³ Council Decision (CFSP) 2023/927 of 5 May 2023 on an assistance measure under the European Peace Facility to support the Ukrainian armed forces through the supply of ammunition. Not participating in its financing: Austria, Hungary, Ireland and Malta.

benefit of other countries),⁵⁴ but also of a general support programme focused on a given geographical area or theme. To date, the only general programme instituted is that in support of the AU, in July 2021.⁵⁵ The objectives pursued are "to reduce the incidence, duration and intensity of violent conflicts in Africa and to strengthen the role of the African Union (AU) with regard to peace and security on the African continent".⁵⁶ Expenditure on this programme was covered to the tune of 130 million euros for 2021. In so doing, this first "new formula" general programme will have "ensured a smooth transition between the APF and the EPF and reassured African security organisations".⁵⁷

⁵⁴ This is the case for two of Ukraine's neighbours: Georgia (see Council Decision (CFSP) 2021/2134 of 2 December 2021 on an assistance measure under the European Peace Facility in support of the Georgian defence forces, and Council Decision (CFSP) 2023/920 of 4 May 2023 on an assistance measure under the European Peace Facility in support of the Georgian defence forces) and Moldova (see Council Decision (CFSP) 2021/920 of 4 May 2023 on an assistance measure under the European Peace Facility in support of the Georgian defence forces). Council Decision (CFSP) 2021/2136 of 2 December 2021 on an assistance measure under the European Peace Facility in support of the armed forces of the Republic of Moldova, and Council Decision (CFSP) 2023/921 of 4 May 2023 on a measure of assistance under the European Peace Facility to support the armed forces of the Republic of Moldova); and for two African countries facing a regional crisis, namely Mali (see Council Decision (CFSP) 2021/2137 of 2 December 2021 on an assistance measure under the European Peace Facility to support the armed forces of the Republic of Mali in conjunction with the European Union training mission in Mali) and Niger, which becomes the second country to receive financial assistance from the EPF for the supply of lethal weapons (see Council Decision (CFSP) 2023/1136 of 8 June 2023 on an assistance measure under the European Peace Facility to support the armed forces of Niger with military equipment designed to deliver lethal force, supplemented by Council Decision (CFSP) 2023/1137 of 8 June 2023 on an assistance measure under the European Peace Facility to support the armed forces of Niger). See also: Council Decision (CFSP) 2023/1440 of 10 July 2023 on an assistance measure under the European Peace Facility to support the Ghana Armed Forces, and Council Decision (CFSP) 2023/2062 of 25 September 2023 on an assistance measure under the European Peace Facility to support the Beninese Armed Forces; Council Decision (EU) 2023/2680 of 27 November 2023 on an assistance measure under the European Peace Facility to support the Somali National Army with military equipment designed to deliver lethal force and Council Decision (CFSP) 2023/2682 of 27 November 2023 on an assistance measure under the European Peace Facility to support military actors and navies of coastal states involved in maritime security operations in the Gulf of Guinea.

⁵⁵ Council Decision (EU) 2021/1210 of 22 July 2021 on an assistance measure in the form of a general support programme for the African Union under the European Peace Facility in 2021. For the period 2022-2024, see: Council Decision (CFSP) 2022/667 of 21 April 2022, as amended by Council Decision (CFSP) 2023/510 of 7 March 2023 and by Council Decision (CFSP) 2023/2687 of 27 November 2023. The budget for that period is of 600 million euros.

⁵⁶ See art. 1(2) of Decision (EU) 2021/1210.

⁵⁷ A Hamonic, "Chronique Action extérieure de l'UE - Débuts retentissants pour la Facilité européenne de la paix (FEP)" (2022) RTDE 521. See also: Council Decision (CFSP) 2023/1599 of 3 August 2023 on a European Union Security and Defence Initiative in support of West African countries of the Gulf of Guinea and Council Decision (CFSP) 2023/2786 of 11 December 2023 launching the European Union Security and Defence Initiative in support of West African countries of the Gulf of Guinea (with a budget of 787.000 euros for the military plan on the period 2023-2025).

As other specialists have pointed out, the European Peace Facility is a "game changer" in the way the EU can help third countries in the defence sector.⁵⁸ However, this is still a limited instrument, for two main set of reasons. First, as pinpointed by some experts, the EPF as "the only form of EU support to the acquisition of weaponry, is limited to arsenal replenishment, which does not represent more than 5per cent of the market in 2022-2023", revealing "a discrepancy between Europe's urgent needs and the common policies intended to have a long-term impact on the European Defence Technological and Industrial Base (EDTIB)".⁵⁹ Secondly, the EPF still depends on national contributions (the Member States being reimbursed by the EPF) and military capabilities. Moreover, the EPF does not finance capabilities "which are funded under the EU budget".⁶⁰ By clarifying this, the EPF decision highlights the limits of an autonomous European defence strategy⁶¹ and leads us to turn to the EU budget as another potential source of funding for European defence.

III. EU BUDGET FUNDING FOR EUROPEAN DEFENCE

For a long time considered impracticable, at least from a political, if not a legal, point of view,⁶² the path of using the EU budget to finance European defence was finally taken, timidly at first, before being more openly displayed by making use of the EU's competences in the fields of research and industrial policy (section III.1). Since then, the mobilisation of budgetary resources has extended to other areas of EU action, in small steps that could foreshadow an even wider financial spectrum (section III.2).

III.1. UNPRECEDENTED BUDGETARY EFFORTS THROUGH THE IMPLEMENTATION OF EU INDUSTRIAL AND RESEARCH POLICIES

It may be useful to remember that 26 Member States of the European Defence Agency devote around 4,3 per cent of their total defence spending to defence R&D (9.2 billion

⁵⁸ C Fries, "Les institutions européennes face aux crises", (9 May 2023) Question d'Europe www.robert-schuman.eu, 2.

⁵⁹ See J-P Maulny, "The Impact of the War in Ukraine on the European Defence Market" (September 2023) IRIS Policy Paper www.iris-france.org, 18.

⁶⁰ See recital (11) of Decision (CFSP) 2021/509 cit.

⁶¹ Other limits must be also taken into account, like the unanimity required for the Council voting and the dependency to NATO. See A Santeix, 'La Facilité européenne pour le maintien de la paix : quelle mise en œuvre dans le cadre de la guerre en Ukraine', in L Clement-Wilz, S De La Rosa and L Xenou (dir.), *Vers une Europe indépendante : les grands enjeux de la souveraineté numérique et de l'autonomie stratégique* (16 January 2024) mil.u-pec.fr 33-37.

⁶² This raises the question of whether contributing to the co-financing of research activities that could lead to the development of defence technologies or products is compatible with art. 41(2) TEU, in the same way as co-financing defence product acquisitions (see below, on the EDIRPA and ASAP instruments).

euros, out of a total defence expenditure of 214 billion euros, in 2021).⁶³ In comparison,⁶⁴ 14 per cent of the USA overall defence budget in 2022 (766 billion dollars) were spent in R&D, test and evaluation⁶⁵ and, in Japan, almost 5 per cent for 2020-2021.⁶⁶

The possibility of a “boost” from the EU was therefore a legitimate question in the eyes of the Commission. In its aforementioned communication of 2013, it announced that it wanted to “exploit the potential dual use of research and promote innovation” in the defence sector, while exploring new avenues “to advance the strategic debate in Europe” and above all to “pave the way for broader and deeper European cooperation”.⁶⁷

The idea was therefore to deploy the EU's shared competence in the field of research and technological development, extended to the space sector⁶⁸ by the Treaty of Lisbon (see art. 4(3) TEU and arts 179 to 190 TFEU). The first discreet incursion was made through the “Security” strand of 7th Framework Program for Research and Development (FP7) (2007-2013).⁶⁹ Some projects of a dual nature (projects of a civilian nature but likely to have a military application) were funded in this way.⁷⁰ However, it no longer seems possible to fund them under the current Horizon Europe FP7 for 2021-2027, which contains a ‘Civil Security for Society’ strand aimed primarily at cybercrime and natural or man-made disasters.⁷¹

⁶³ See European Defence Agency, *Defence Data 2020-2021. Key findings and analysis* eda.europa.eu. It is interesting to stress that among the Member States who are also members of the UN Security Council, the difference is quite significant between France (13,5 per cent of 47,9 billion euros) and Germany (3,8 per cent of 52,4 billion euros). Please note that EDA data distinguish R&D expenditure from R&T expenditure.

⁶⁴ For Russia, the statistics are more difficult to be double-checked. According to the Swedish Defence Research Agency (FOI), in 2018, 11,5 per cent of the Russia overall defence budget (RUE 2.827 billion) have been spent in R&D: see foi.se. For China, we failed to find specific data on percentage of R&D in Defence Budget (which has been announced of 227.79 billion dollars for 2023 according to Chinese State Council Information Office: english.scio.gov.cn).

⁶⁵ See Peter G. Peterson Foundation, *Budget Basics: National Defense*, April 2023 www.pgpff.org.

⁶⁶ 291.1 billion yen of R&D expenses out of a total of 5.8661 trillion yen, for the Defence Budget 2020-2021. See: www.mod.go.jp.

⁶⁷ See Communication COM(2013) 542 final from the Commission of 24 July 2013, ‘Towards a more competitive and efficient defence and security sector’, 5.

⁶⁸ See Joint Communication JOIN(2023) 9 final from the Commission and the High Representative on the EU Space Strategy for Security and Defence of 10 March 2023, ‘European Union Space Strategy for Security and Defence’.

⁶⁹ See Decision 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development, and demonstration activities (2007-2013).

⁷⁰ See in particular the AMASS (Autonomous Maritime Surveillance System), EULER (European software defined radio for wireless joint security operations) and OPTIX (Optical Technologies for Identification of Explosives) projects.

⁷¹ See Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing the “Horizon Europe” framework programme for research and innovation, laying down the rules for its participation and dissemination and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013. Art. 5 explicitly refers essentially to the specific programme of the European Defence Fund (see below).

Finally the Commission openly lifted the budgetary taboo in 2017 by adopting two initiatives: firstly, a Preparatory Action in Research Defence (hereinafter "PADR"), funded to the tune of 90 million euros over the period 2017-2019,⁷² with the EU Financial Regulation as its legal basis.⁷³ Implemented in cooperation with the European Defence Agency, the PADR focuses on several priority research themes: in 2017, drones, individual protection systems and the strategic methodology of technology;⁷⁴ in 2018, defence electronics, high-power laser and dependency mapping, for 2018;⁷⁵ and finally, in 2019, multifunctional radio frequency systems, disruptive technologies (artificial intelligence, quantum, augmented soldier...) and interoperability standards for unmanned systems.⁷⁶

At the same time, the Commission adopted a proposal for a regulation establishing "the European Defence Industrial Development Programme to support the competitiveness and innovation capacity of the EU defence industry" (hereinafter "EDIDP"),⁷⁷ a programme that was to be established by Regulation (EU) 2018/1092 of the European Parliament and of the Council of 18 July 2018.⁷⁸ With a budget of 497.750.000 euros over 2019-2020,⁷⁹ the EDIDP's main legal basis is art. 173 TFEU, on the grounds in particular of "strengthening the competitiveness, efficiency and innovation capacity of the defence industry throughout the Union, which contributes to the Union's strategic autonomy, by supporting actions during their development phase".⁸⁰

⁷² See Commission Decision C(2017)2262 final of 11 April 2017 on the financing of the "Preparatory action on Defence research" and the use of unit costs for the year 2017. On its genesis: D Fiott and R Bellais, 'A "Game Changer"? The EU's preparatory action on defence research' (April 2016) ARES Policy Paper www.iris-france.org.

⁷³ The one in force in 2017, *i.e.*, Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002; in particular, arts 54(2)(b), 84(2) and 124 are referred to. To date, art. 58 of Regulation (EU, Euratom) 2018/1046 is the legal basis for preparatory actions and pilot projects.

⁷⁴ For example, the first projects selected in 2018 relate to drone surveillance at sea (Ocean 2020), the design of adaptive camouflage for soldiers (ACAMSII), the compatibility of complex devices equipping soldiers (GOSSRA) and the design of ultralight protective suits for infantrymen (VESTLIFE).

⁷⁵ Commission Decision C(2018) 1383 final of 9 March 2018 on the adoption of the work programme for 2018 and on the financing of the "Preparatory action on Defence research", and authorising the use of unit costs under the preparatory action.

⁷⁶ Commission Decision C(2019)1873 of 19 March 2019 on the financing of the APRD and the adoption of the work programme for 2019.

⁷⁷ See Commission 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, COM (2017) 294 final of 7 June 2017.

⁷⁸ Regulation (EU) 2018/1092 of the European Parliament and of the Council of 18 July 2018 establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovation capacity of the Union's defence industry.

⁷⁹ Commission Implementing Decision C(2019)2205 of 19 March 2019 on the financing of PEDIP and the adoption of the work programme for 2019-2020.

⁸⁰ Art. 3(a) of Regulation (EU) 2018/1092 *cit.*

There is no need here to examine in detail the rules governing the eligibility and selection of projects. Instead, we will focus on the financial aspects. With the EDIDP, the EU can make use of all the financial assistance tools authorised by the General Financial Regulation and in particular the award of public contracts and grants.⁸¹ It is worth noting that, unlike most EU programmes, co-financing seems to be the exception: while the financial assistance provided by the Union may not exceed 20 per cent of the total cost of the action in the case of prototyping, in all other cases the assistance may cover up to the total eligible cost of the action. In addition, three cases qualify for a 10 per cent increase in the funding rate: CSP projects,⁸² projects carried out by an SME established in the EU and projects carried out by a mid-cap company, also established in the EU.

In order to maintain the momentum of defence R&D funding after 2020, the EDIDP will be replaced by the European Defence Fund (hereinafter "EDF"), established by Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021⁸³. The legal bases have been enriched: arts 182, 184 and 188 TFEU relating to R&D and space policy have been added to art. 173 TFEU;⁸⁴ this makes the instrument more secure and shows that the intention was to learn the lessons of the PADR⁸⁵ and the EDIDP, on which the overall structure of the EDF is based.⁸⁶ Here again, the emphasis will be on the financial provisions of this new instrument rather than on the project selection process.

⁸¹ In 2020, a direct grant of 100 million euros was awarded to the EURODRONE project, and 37 million euros to the ESSOR project (digital radio for military communications). Note: these two projects were set up and continue to be managed by the Organisation for Joint Armament Cooperation (OCCAR), which was set up in 1996 and now has six members (Belgium, France, Germany, Italy, Spain and the United Kingdom).

⁸² For 2020, this involved the following CSP projects: EURNS (receivers based on Galileo, 95.2 million euros), UGS (unmanned ground vehicles, 32.6 million euros) and EUDASS (detection and avoidance system for military drones, 27.4 million euros).

⁸³ Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092. On that new instrument : R Chaker, 'Le Fonds européen de la défense: genèse, ambitions et premier bilan' (2023) *Revue de l'Union européenne* 390.

⁸⁴ With a general objective set out in art. 3(1): "to strengthen the competitiveness, efficiency and innovation capacity of the European Defence Technological and Industrial Base (EDTIB) throughout the Union, thereby contributing to the Union's strategic autonomy and freedom of action, by supporting collaborative actions and cross-border cooperation between legal entities throughout the Union, in particular SMEs and mid-caps, as well as strengthening and improving the flexibility of defence supply and value chains, broadening cross-border cooperation between legal entities and promoting better exploitation of the industrial potential of innovation, research and technological development at every stage of the industrial life cycle of defence products and technologies".

⁸⁵ This is what the European Court of Auditors also sought to do in its Special Report No. 10/2023, adopted on 28 February 2023 and devoted to PADR, with the following subtitle that announces the tone of the document: "Some useful lessons, but a mixed record as a test bed for increased EU defence spending, due to time constraints and mixed results".

⁸⁶ See F Mauro, E Simon and Al Xavier, *Review of the Preparatory Action on Defence Industrial Development Programme (EDIDP): lessons for the implementation of the European Defence Fund (EDF)* (European Union 2021) www.europarl.europa.eu.

With a budget of 7.9 billion euros for 2021-2027,⁸⁷ the EDF will, in principle, provide funding for up to 100 per cent of eligible costs.⁸⁸ And the same bonuses apply as under the EDIDP. Under the first work programme for 2021, the Commission has selected 61 projects, involving around 700 companies.⁸⁹ For 2022, 41 collaborative projects have been chosen, with a total EU support of almost 832 millions of euros.⁹⁰

With the European Defence Fund on track, the situation could have focused on its implementation until the end of the 2021-2027 multiannual financial framework, without any other major initiative. But the war in Ukraine decided otherwise. At the invitation of the Heads of State and Government meeting informally on 10-11 March 2022 (in Versailles) and of the European Council of 24-25 March 2022, the Commission, on the basis of the aforementioned strategic compass and an analysis of defence investment deficits,⁹¹ presented in July 2022 a proposal for a regulation on the establishment of an instrument to strengthen the European defence industry through joint procurement (known as "EDIRPA").⁹² This new instrument has been confirmed by Regulation (EU) 2023/2418 adopted on 18 October 2023 by the European Parliament and the Council,⁹³ with a budget of 300 million euros for the period from 27 October 2023 to 31 December 2025.⁹⁴

In a way, this is a return to the EDIDP approach: only art. 173(3) TFEU is used as a legal basis, with a twofold objective: on the one hand, "to increase the competitiveness and effectiveness of the European Defence Technological and Industrial Base (EDTIB) for a more

⁸⁷ Divided between two components: 2.6 billion euros for research and 5.3 billion euros for development. The Commission was counting on a more generous budget of 13 billion euros. In its proposal of mid-term revision of the Multiannual Financial Framework 2021 – 2027 (see Communication COM(2023) 336 final from the Commission of 20 June 2023, 'Mid-term revision of the Multiannual Financial Framework 2021-2027'), the Commission proposes a new allocation of 1.5 billion euros to the EDF, which could result in up to 2 billion euros of investments.

⁸⁸ With two series of exemptions: a maximum of 20 per cent for prototyping and a maximum of 80 per cent for testing/qualification/certification.

⁸⁹ See the list of 61 projects annexed to the Commission's press release IP/22/4595 of 20 July 2022. Examples include the EDOCC (military cloud), EDINAF (naval combat), HYDEF (hypersonic defence interceptor) and NEUMANN (air power and propulsion) projects. Since then, the Commission has adopted the 3ème work programme: Commission implementing decision C(2023) 2296 final of 29 March 2023 on the financing of the European Defence Fund established by Regulation (EU) No 2021/697 of the European Parliament and the Council and the adoption of the work programme for 2023.

⁹⁰ See Commission, Press Release IP/23/3481 of 26 June 2023, 'European Defence Fund: EU to invest €832 million in 41 ambitious defence industrial projects' ec.europa.eu.

⁹¹ Joint Communication JOIN (2022) 24 final from the Commission and the High Representative of 18 May 2022 on the Defence Investment Gaps Analysis and Way Forward.

⁹² Proposal for a Regulation of the European Parliament and the Council on establishing the European defence industry Reinforcement through common Procurement Act, COM (2022) 349 final of 19 July 2022.

⁹³ Regulation (EU) 2023/2418 of the European Parliament and of the Council of 18 October 2023 on establishing an instrument for the reinforcement of the European defence industry through common procurement (EDIRPA).

⁹⁴ A budget of 500 million euros was suggested by the Commission.

resilient Union, in particular by accelerating, in a collaborative manner, the adaptation of the industry to structural changes, including the strengthening of its manufacturing capabilities", and, to "encourage cooperation between participating Member States in defence procurement procedures, contributing to solidarity, interoperability, avoiding crowding-out, avoiding fragmentation and increasing the efficiency of public spending" (cf. draft art. 3(1)).

In terms of forms of financing (see art. 6 of the Regulation 2023/2418), the preferred method is a grant managed directly by the Commission,⁹⁵ with the payment arrangements remaining a priori similar to those for the EDIDP and EDF, *i.e.* three payments for each grant (including at least one pre-financing payment). The level of support will depend on the collaborative nature of the joint acquisition, will be increased by an appropriate amount to "create the necessary incentive effect to encourage cooperation" and may be backdated to 24 February 2022 at the latest, the date on which the Russian-Ukrainian war broke out.

On 3 May 2023, at the Council's request, the Commission presented a proposal for a regulation on the establishment of an Act in Support of Ammunition Production (ASAP).⁹⁶ Three pillars have been suggested (see art. 1 of the proposal): on the one hand, an instrument providing financial support for the industrial reinforcement of the production of certain defence products in the EU, including through the supply of their components (ground-to-ground ammunition, artillery ammunition and missiles are restrictively concerned); secondly, the identification, mapping and continuous monitoring of the availability of the defence products concerned, their components and the corresponding inputs (raw materials); and, finally, the establishment of temporary mechanisms, principles and rules designed to ensure the timely and sustainable availability of the defence products concerned to their buyers in the EU. As the last two of these pillars require harmonisation of the laws and regulations of the Member States, art. 114 TFEU, on measures for the approximation of national regulations "which have as their object the establishment and functioning of the internal market", has been introduced as a legal basis, in addition to art. 173(3) TFEU, which underpins the first pillar and on which we will focus. However, several Member States (including France and Germany) opposed the second pillar, which has been withdrawn in the final text, adopted in record time, on 20 July 2023.⁹⁷

With a budget of 500 million euros for 2023-2025,⁹⁸ this new financial instrument has a number of original features. Firstly, it will be implemented on a "cumulative and

⁹⁵ The financial statement annexed to the proposal specifies (see point 2.2.1) that the Commission will be able to "make use of non-cost related financing, reduce the administrative burden on beneficiaries and focus on the achievement of objectives, so as to increase the effectiveness and efficiency of EU support".

⁹⁶ Commission Proposal for a Regulation of the European Parliament and the Council on establishing the Act in Support of Ammunition Production, COM(2023) 237 final of 3 May 2023.

⁹⁷ Regulation (EU) 2023/1525 of the European Parliament and of the Council of 20 July 2023 on supporting ammunition production (ASAP).

⁹⁸ With redeployments of 260 million euros from the EDF for 2024 and of 240 million euros initially foreseen for the EDIRPA in 2023 – 2024.

alternative" basis, *i.e.* in synergy with other EU programmes, provided that the contributions do not cover the same costs (see art. 6 of Regulation 2023/1525). Secondly, the maximum rate of co-financing will be limited to 35 per cent or 40 per cent of the eligible costs of an eligible action, except for a bonus (of 10 per cent) for projects based on new cross-border cooperation or giving priority to the supply of three Member States or to a transfer to Ukraine (see art. 9 of Regulation 2023/1525).⁹⁹ Thirdly and lastly, a blending mechanism, named "Ramp-up Fund" could be set up and offer loan solutions, "in order to mobilise, reduce the risk of and accelerate the investment needed to increase production capacity" (see art. 15 of Regulation 2023/1525).¹⁰⁰ Unlike the instrument itself, which will be managed directly by the Commission, the Ramp-up Fund will be managed indirectly by other EU bodies (such as the European Investment Bank, see below) or bodies outside the EU (see art. 7(1) of Regulation 2023/1525).¹⁰¹ The first Working Program has been adopted on 18 October 2023 and the first five calls for proposals published the same day.¹⁰²

The presentation of the Commission's latest initiatives can make you dizzy, even more so when the European Council of June 2023 has called on the Commission to present "a proposal for a European Defence Investment Programme (EDIP) to reinforce the capacity and resilience of the European defence technological and industrial base, including SMEs".¹⁰³ All this reveals the most mediatic and spectacular part of the EU's turnaround in financing its defence. However, this should not overshadow other, more discreet, and ad hoc avenues of funding that are just as novel.

⁹⁹ By way of derogation, the financing rate may be of 100 per cent of the costs of an action to improve access to finance for the economic operators involved in the production or supply of the defence products concerned.

¹⁰⁰ It sets out in detail the specific objectives pursued: to improve the leverage effect of spending from the EU budget and strengthen the multiplier effect to attract private sector funding; to provide support to companies facing difficulties in accessing finance and to address the need to support the resilience of the EU defence sector; accelerate investment in the manufacturing of the defence products concerned and mobilise both public and private sector funding, while enhancing security of supply for the whole value chain of the EU defence sector and improving access to finance for investments related to activities in support of the production capabilities of the defence products concerned.

¹⁰¹ Pursuant to art. 62(1)(c) of Regulation (EU, Euratom) 2018/1046 *cit.*, which covers international organisations, public-law establishments, but also private-law entities entrusted with a public-service mission or entrusted with the implementation of a public-private partnership (on condition that they have sufficient financial guarantees, etc.), the Commission may, in accordance with the provisions of art. 62(1)(c) of Regulation (EU, Euratom) 2018/1046, decide to exclude from the scope of the Regulation the entities entrusted with a public-service mission or entrusted with the implementation of a public-private partnership.

¹⁰² See Commission Implementing Decision C(2023) 7320 final of 18 October 2023 on the financing of the instrument on supporting ammunition production (ASAP) established by Regulation (EU) 2023/1525 of the European Parliament and of the Council and the adoption of the work programme for 2023-2025. Those 5 calls for proposals have the following indicative budgets: Explosives (190 million euros); Powder (144 million euros); Shells (90 million euros); Missiles (40 million euros) and Testing and Reconditioning certification (4.35 million euros). For more information: defence-industry-space.ec.europa.eu.

¹⁰³ See Point 26 (c) of the European Council conclusions of 29-30 June 2023; as already suggested in Joint Communication JOIN(2022) 24 final *cit.*

III.2. A MORE MODEST BUDGETARY CONTRIBUTION THROUGH THE MULTIPLICATION OF TARGETED ACTIONS.

Regarding those more discreet financing actions, one may insist only on the two following references: the first relates to a financial instrument deployed as part of the Union's action to promote trans-European networks, under the heading of military mobility (a); the second reference highlights a potential emerging financial player in the defence sector, the European Investment Bank (b).

a) The Connecting Europe Facility and military mobility

Since the entry into force of the 1992 Maastricht Treaty, the Union has been promoting trans-European networks (TENs).¹⁰⁴ Recognised as a shared competence of the Union (see art. 4(2)(h) of the TFEU) and implemented under Title XVI of Part Three of the TFEU (see arts 170 to 172 TFEU), the TENs contribute to the development of transport infrastructure in particular. Specific projects carried out in this area in the Member States may therefore be co-financed by the Union (these are known as "TEN-T" projects).

In 1995, the first general rules for granting Community financial aid in the field of TENs were established.¹⁰⁵ Since then, they have been amended and enriched many times, culminating in the creation in 2013 of a dedicated instrument: the Connecting Europe Facility (known as the "CEF"),¹⁰⁶ based on arts 172 and 194 of the TFEU¹⁰⁷ and aligned with the EU's 2014-2020 multiannual financial framework. It has been recast to adapt it to the 2021-2027 MFF.¹⁰⁸

It was on this occasion that the projects eligible for CEF funding included those implementing the objective of "adapting parts of the TEN-T for the dual use of transport infrastructure in order to improve both civil and military mobility".¹⁰⁹ Stated in this way, this objective appears to be one of a number of variations on the EU's Global Security Strategy for the CFSP, adopted in June 2016. This emphasised the need, in the event of a crisis, to allow the free and rapid movement of troops and civilian personnel, as well as material and equipment, across the territory of each Member State. This was the birth of the action in favour of military mobility, the content of which was subsequently specified

¹⁰⁴ On the genesis of this policy: O Dubos, 'La révision des réseaux transeuropéens de transport: vers une action administrative intégrée de l'Union européenne', in L Grard (ed.), *L'Europe des transports* (La documentation française 2005) 391.

¹⁰⁵ Council Regulation (EC) 2236/95 of 18 September 1995 laying down general rules for the granting of Community financial aid in the field of trans-European networks.

¹⁰⁶ Regulation (EU) 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010.

¹⁰⁷ It also covers TENs in energy infrastructures.

¹⁰⁸ Regulation (EU) 2021/1153 of the European Parliament and of the Council of 7 July 2021 establishing the Connecting Europe Facility and repealing Regulations (EU) No 1306/2013 and (EU) No 283/2014.

¹⁰⁹ See art. 3(2)(a)(ii) of Regulation (EU) 2021/1153 cit.

in several joint communications from the Commission and the EU High Representative¹¹⁰ and which was to become both a draft PSC¹¹¹ and "one of the flagships of EU-NATO co-operation".¹¹²

Within a total budget of 33.71 billion euros for 2021-2027, the CEF is devoting 1.691 billion euros to actions relating to the adaptation of the TEN-T to dual civil and military (and not exclusively military) use.¹¹³ By 2022, twenty-two projects will have been co-financed to the tune of 339 million euros.¹¹⁴

On 6 June 2023, the Commission signed an agreement in Lviv, associating Ukraine to the Connecting Europe Facility. As pinpointed by the Commission, this agreement "will enable Ukrainian project promoters to apply for EU funding for projects of common interest in the transport, energy and digital realms, further improving Ukraine's connectivity with its EU neighbours".¹¹⁵ However, the last call for proposals (published on 26 September 2023) seems not to include new military mobility projects.¹¹⁶

b) The European Investment Bank: another effort?

Established in 1957 by the Treaty of Rome, the European Investment Bank (hereinafter the "EIB")¹¹⁷ suffers from a lack of recognition, in the shadow of the EU's other major financial institution, the much more recent European Central Bank (ECB).

¹¹⁰ See Joint Communication JOIN(2017) 41 final from the Commission and the High Representative of 10 November 2017, 'Improving military mobility in the European Union'; Joint Communication JOIN(2018) 5 final from the Commission and the High Representative of 28 March 2018 on the Action Plan on Military Mobility and, most recently, Joint Communication JOIN(2022) 48 final from the Commission and the High Representative of 10 November 2022, 'Action plan on military mobility 2.0'. See also several joint reports on the implementation of the action plan: JOIN(2019) 11 final of 3 June 2019, JOIN(2020) 16 final of 19 October 2020, JOIN(2021) 26 final of 24 September 2021 and JOIN(2023) 37 final of 13 November 2023.

¹¹¹ See art. 1(4) of Council Decision (CFSP) 2018/340 of 6 March 2018 establishing the list of projects to be set up in the framework of the PESCO. Also note: Council Decision (CFSP) 2022/2244 of 14.11.2022 on the participation of the United Kingdom in the PESCO 'military mobility' project.

¹¹² See page 8 of the 6ème NATO-EU progress report of 3 June 2021 on the follow-up to the joint proposals endorsed on 6 December 2016 and 5 December 2017 by the Council of the European Union and the North Atlantic Council and Council Recommendation of 13 November 2023 assessing the progress made by the participating Member States to fulfil commitments undertaken in the framework of the permanent structured cooperation (PESCO).

¹¹³ See Commission Implementing Regulation (EU) 2021/1328 of 10 August 2021 specifying the infrastructure requirements applicable to certain categories of dual-use infrastructure actions pursuant to Regulation (EU) 2021/1153 of the European Parliament and of the Council.

¹¹⁴ These include one on the Mussuguet tunnel in France (between Aubagne and Cassis), entitled "Mus-suguet Tunnel - Clearance of the military and civil gauge", coordinated by SNCF Réseau. The 2023 call for Military Mobility was open until 21 September 2023.

¹¹⁵ See Commission, Press release IP/23/3061 of 6 June 2023, 'Commission further integrates Ukraine into EU Single Market through the Connecting Europe Facility for infrastructure funding' ec.europa.eu.

¹¹⁶ See cinea.ec.europa.eu.

¹¹⁷ On this EU body: F Peraldi Leneuf, 'Banque européenne d'investissement (BEI)', in F Picod (ed.), *JurisClasseur Europe Traité* (Lexis Nexis 2012, Vol. 24).

Under art. 309 of the TFEU,¹¹⁸ the EIB's general task is "to contribute, by having recourse to the capital markets and utilising its own resources, to the balanced and steady development of the internal market in the Union's interest". It has two financial instruments at its disposal: loans and guarantees. Three categories of projects are eligible, defined relatively broadly: firstly, projects aimed at "developing the less-developed regions"; secondly, projects aimed at modernising or converting businesses or creating new activities induced by the internal market, which, by their scale or nature, cannot be fully covered by the various means of financing available in each of the Member States; finally, "projects of common interest" for several Member States, which again, by their scale or nature, cannot be fully covered by the various means of financing available in each of the Member States.

With capital subscribed by the Member States to the tune of 248.79 billion euros (since July 2019, post-Brexit) and a compulsory reserve fund of at least 10 per cent of its capital, the EIB Group (including the European Investment Fund) is proving to be a powerful financial player in the EU: in 2022, total signed financing amounted to 72.45 billion euros, of which 62.9 billion euros within the EU, 9.5 billion euros outside the EU, and an additional 1.7 billion euros in loans reallocated to Ukraine.¹¹⁹

It is not surprising, therefore, that the EIB is regularly called upon to provide support well beyond the scope of economic, social and territorial cohesion policy, which is its primary frame of reference¹²⁰ and, for some, should be its only one.¹²¹

In this context, the EIB has been called upon several times by the European Council. The Presidency Conclusions of the European Council of 22-23 June 2017 invite the EIB "to examine measures to support investment in defence research and development".¹²² The European Council was thus echoing the European Commission which, in its communication of 7 June 2017 on the launch of the European Defence Fund, announced increased

¹¹⁸ See also the Protocol No. 11 annexed to the TEU and TFEU on the Statute of the EIB.

¹¹⁹ See also the "EU for Ukraine (EU4U)" initiative, approved by the EIB in March 2023. Since the outbreak of the war in 2022, the EIB has provided 2.4 billion euros in emergency relief to Ukraine, including a contribution from the European Commission to the EIB's EU for Ukraine initiative to enable new lending of 100 million euros. An additional 4 billion euros along with access to the EMBRACE Advisory Platform was provided to communities within the EU Member States that took in Ukrainian war refugees. See European Investment Bank, Press release of 21 June 2023, 'EIB and Ukraine strengthen cooperation to support country's reconstruction projects with €840 million' www.eib.org.

¹²⁰ See Protocol No. 28 annexed to the TEU and TFEU on economic, social and territorial cohesion.

¹²¹ One thinks of the European Economic and Social Committee, which has expressed its views on the subject by considering that EIB investments could only be made "with a non-military perspective": see European Economic and Social Committee, Opinion on the 'European Defence Action Plan (COM(2016) 950 final), of 31 May 2017, 2017 C 288/08, point 1.8 in which the EESC "rejects the opening up of existing funds that serve economic or social objectives for defence purposes *sensu stricto* [...] the EIB investments serve non-military purposes".

¹²² The same formula has been used in point 14 of the Presidency Conclusions of the European Council of 19 October 2017.

EIB support but only for "dual-use technologies" and investments "ancillary" to security and defence activities.¹²³

It is therefore easy to understand why the Commission tried to go further in its proposal establishing the EDIDP, which aimed to open up the field of financial instruments that could be mobilised, such as equity investments in companies, loans, guarantees or risk-sharing instruments, all of which are familiar financing vectors for the EIB Group, even if it was not explicitly targeted.¹²⁴ Regulation (EU) 2021/1092 will not take up this appeal.¹²⁵

Here again, the Russian-Ukrainian conflict will be the occasion for a new harangue from the European Council, in two stages: firstly, at the end of the European Council of 24-25 March 2022, the Presidency conclusions call for measures to be taken, by the end of 2022, "to promote and facilitate the defence industry's access to private finance, in particular by making the best possible use of the possibilities offered by the European Investment Bank...". (point 14); then the Presidency Conclusions of the European Council of 30-31 May 2022 state the following: "Taking into account the analysis of defence investment shortfalls carried out by the Commission and the High Representative, in coordination with the European Defence Agency, as well as the various recommendations made to strengthen the European industrial and technological base, the European Council invites the Council to examine the following issues, in accordance with the respective competences conferred by the Treaties: (...) e) strengthening the role of the European Investment Bank in support of European security and defence, in line with its recent Strategic Initiative for European Security" (point 24). See also, in the same vein, European Council Conclusions of 15 December 2023, para. 26(e).

A last "call" has been made by the ASAP Regulation recital 35 of which reads as follows: " While pursuing in full its other economic development and public policy financing missions, including the twin green and digital transitions and in line with art. 309 TFEU as well as its statute, the European Investment Bank should enhance its support to the European defence industry and joint procurement beyond its ongoing support for dual use, where such investments would clearly serve to implement the Strategic Compass priorities".¹²⁶

¹²³ See Communication COM(2017) 295 final from the Commission of 7 June 2017 launching the European Defence Fund, 18-19.

¹²⁴ See art. 5 of the proposal COM(2017) 294 final cit. On the increasing use of financial instruments under the EU budget: J Núñez Ferrer and others, *Financial instruments: defining the rationale for triggering their use* (European Union 2017) www.europarl.europa.eu.

¹²⁵ Its recital (6) explains in particular that "as the duration of the programme is two years, the use of financial instruments is likely to pose practical problems" but that they could "constitute an appropriate tool to be used in the post-2020 Fund".

¹²⁶ It is interesting to note that a debate took place within the Council on that reference leading several Member States (Austria, Ireland, Luxembourg, and Malta) to issue a statement to express their concerns about any further implication of the EIB: see EU Council document 11787/23 ADD 2 REV 1 of 19 July 2023.

How much longer will the European Investment Bank resist this political and institutional pressure?¹²⁷

IV. CONCLUSION

As underlined by MEP Sikorski, if “the EU has the legal and institutional basis for a common defense and security policy”, the main limiting factor remains money.¹²⁸ However, significant barriers have been crossed in terms of financial resources, both out of the EU Budget with new players (notably the EDA) and new instruments (especially the EPF) and within the EU Budget, with a multiplication of initiatives to reinforce the European defence industry (from the PADR program in 2017 to the ASAP Regulation in 2023). The Ukrainian war was and is still a decisive factor to contribute to and to accelerate that evolution.

But what Defence for Europe after Ukraine? Who will set the strategy and who will pay?

In her State of the Union speech of 13 September 2023, the President of the European Commission, Ms Ursula Van der Leyen, declared that “[w]e have seen the birth of a geopolitical Union – supporting Ukraine, standing up to Russia’s aggression (...)” and that “[w]e have started to build European Defence Union at 27”, before announcing the adoption of a European Defence industrial strategy,¹²⁹ as confirmed in the Commission working program for 2024 in view to giving “further impulse to developing Member States’ defence capabilities, underpinned by a modern and resilient European defence technological and industrial base”.¹³⁰

The details of such a strategy are not yet known in detail.¹³¹ However, it may be useful to read again the Commission discussion paper on the future of European defence, adopted in June 2017,¹³² in which three scenarios have been identified: the first, which was

¹²⁷ Maybe not so much, since the European Commission and the European Investment Fund (which is a subsidiary of the EIB) have announced on 12 January 2024 the launch of the Defence Equity Facility (DEF), consisting of €100 million from the European Defence Fund and an additional €75 million from the European Investment Fund, in view to expand EIF’s investment capacity to support, in the next four years, private equity and venture capital funds with strategies covering technologies relevant to defence. See: ec.europa.eu.

¹²⁸ R Sikorski, ‘Europe’s Real Test Is Yet to Come. Will the Continent Ever Get Serious About Its Own Security?’ (2023) *Foreign Affairs* 66, specifically pages 70 and 73; the author also regrets the lack of political will “to act in unison”.

¹²⁹ See Letter of Intent sent to the President of the European Parliament and to the Prime Minister of Spain: state-of-the-union.ec.europa.eu

¹³⁰ See Communication COM(2023) 638 final from the Commission of 17 October 2023, ‘Commission work programme 2024 Delivering today and preparing for tomorrow’, 11.

¹³¹ For the main trends, see a LinkedIn post, dated on 13 September 2023, from Mr Thierry Breton, Member of the Commission in charge of Internal Market and Defence Industrial Policy: www.linkedin.com. See also: European Commission, ‘Commission launches comprehensive consultation process with stakeholders aiming to deliver a European Defence Industrial Strategy’, Press Release IP/23/5364 of 27 October 2023 ec.europa.eu.

¹³² See Commission, ‘Reflection Paper on the future of European defence’, COM (2017) 315 final of 7 June 2017. On that communication: N Clinchamps, ‘Trois scénarios pour l’avenir de l’Europe de la défense’, (2017) *Revue du droit de l’Union européenne* 163.

the least exciting and engaging, was cooperation on a voluntary basis; the second was "shared" defence on the basis of "greater financial and operational solidarity": the progress made to date on options for funding European defence and its industry seems to correspond to this scenario. The decisive step remains to be taken: the third scenario of a "common" defence. With or without war in Ukraine, this is the only way forward today.

