

## Commission proposes specific measures to strengthen the European Union's Defence Industrial policy

On 5 March 2024, the Commission presented the long-awaited European Defence Industrial Strategy, which represents a paradigm shift for the sector and proposes that new initiatives should seek to invest “more, better, together and European”, in its Communication “*A new European Defence Industrial Strategy: Achieving EU readiness through a responsive and resilient European Defence Industry*”.

This Strategy aims to strengthen the European Defence Technological and Industrial Base (“EDTIB”) through greater and more collaborative investment by the Member States in order to substantially improve the European defence industry's capacity to respond to the needs of the armed forces in all circumstances and at all times. In addition, the goal is to build a European culture of preparedness for possible threats beyond the national level, through an integrated, resilient and competitive defence industry.

The Strategy is accompanied by a proposal for a Regulation establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products (EDIP).

### 1. The Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *A new European Defence Industrial Strategy: Achieving EU readiness through a responsive and resilient European Defence Industry*

This Communication follows a public consultation of the different stakeholders, with the idea of achieving a more in-depth common defence strategy in the face of the new military challenges, following Russia's aggression towards Ukraine. The Strategy seeks to increase security of supply and establish the financial means to be more responsive to today's geopolitical challenges. The Communication is divided into six sections: (i) *Achieving defence readiness through a more responsive and resilient European Defence Industry*; (ii) *Leveraging readiness through investment: More, better, together, European*; (iii) *Securing availability: A responsive EDTIB under any circumstances and time horizon*; (iv) *Financing the Union's ambition for defence industrial readiness*; (v) *Mainstreaming a defence readiness culture, including across EU policies*; and (vi) *Achieving readiness and resilience through partnerships*.

The Communication highlights:

- The sector's difficulties in investing at adequate levels, even in Member States with the largest defence budgets, which compromises EU security, as there are increased dependencies and gaps: currently 78% of the defence acquisitions by Member States (between the start of Russia's war of aggression and June 2023) come from outside the EU.
- The need for a competitive EDTIB to maintain technological excellence in order to deliver what is needed at the right time, without excessive external dependencies and bottlenecks. EDIP will be the basic instrument to achieve this.
- In order to guarantee this joint approach, a new programming and procurement function is proposed, through the creation of a Defence Industrial Readiness Board which will, among other things, be responsible for identifying Projects of Common Interest; and a European Defence Industry Group. The EDIRPA (“European Defence Industry Reinforcement through common Procurement Act”) approach is extended, with the idea that common procurement should be the general rule, and emphasis is placed on the interoperability of technologies, seeking to establish common standards in order to gain in efficiency and effectiveness. The creation of Structures for European Armament Programmes (“SEAP”) is proposed to facilitate the availability of defence products.
- Funding is the essential element for this Strategy to be implemented. Thus, in addition to the EDIP, it is proposed (i) to create a Fund to Accelerate Defence Supply Chain Transformation (“FAST”) to support SMEs; (ii) to create the SEAP, which reinforce cooperation in part through a VAT exemption; and (iii) to create the European Military Sales Mechanism.
- It emphasises the need to ensure adequate public and private financing and to build a favourable regulatory environment, in which the EIB should be involved, but also points to the need for the EDTIB to benefit fully from EU funding for technological and industrial development, including the Cohesion Policy Funds and the InvestEU Programme.

- Strengthening ties with two strategic partners - Ukraine and NATO - is essential. With regard to Ukraine, additional support through joint procurement and the possibility of financing military equipment with EU funds will be explored. EU-NATO cooperation will be intensified in areas such as the circular economy, interoperability and supply chain security.

## 2. The Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products (EDIP)

The EDIP proposal aims to establish a set of measures and a budget to support the EU's Defence Industry and its Member States by strengthening the competitiveness, responsiveness and capability of the EDTIB, as well as to contribute to the recovery, reconstruction and modernisation of the Ukrainian Defence Technological and Industrial Base (the "Ukrainian DTIB").

It has the following legal bases: Article 173 TFEU in relation to the competitiveness of the EDTIB, Article 114 TFEU in relation to the European defence equipment market, Article 212 TFEU in relation to the reinforcement of the Ukrainian DTIB, and Article 322 TFEU in relation to the financial provisions.

The subject matter of the proposal includes:

- 1) the establishment of the European Defence Industrial Programme (the "Programme"), which comprises measures to strengthen the competitiveness, responsiveness and capabilities of the EDTIB, which may include the creation of the FAST;
- 2) the establishment of a cooperation programme with Ukraine with a view to the recovery, reconstruction and modernisation of the Ukrainian DTIB ("the Ukraine Support Instrument");
- 3) a legal framework setting out the requirements, procedures and effects of the creation of the SEAP;
- 4) a legal framework aimed at ensuring security of supply, removing obstacles and bottlenecks and supporting the production of defence products;
- 5) the establishment of a Defence Industrial Readiness Board.

The EDIP proposal foresees a budget of EUR 1.5 billion, to be complemented by additional amounts for the development of the Ukrainian DTIB and its further integration with the EDTIB and the Union defence equipment market.

The proposal includes the different measures to implement the Programme, ranging from general provisions, budget, eligible entities, actions eligible for funding, and specific provisions for common procurement.

With regard to measures to ensure security of supply, a series of measures are established, both for normal circumstances and for the event of a crisis, including surveillance measures that allow for an effective response when necessary.

This Regulation should apply without prejudice to the Union competition rules, in particular Articles 101 to 109 TFEU and the legal acts giving effect to those Articles.

Finally, a number of governance provisions are set out, including the need to respect the European Union's competition rules, and without prejudice to the specific nature of the security and defence policy of certain Member States.

★ **ASSESSMENT** The new European Defence Strategy is part of the European Commission's general policy aimed at guaranteeing an open strategic autonomy and represents a paradigm shift, leading towards an industrial cooperation between the Member States using the legal basis of Article 173 TFEU. The EDIP proposal is thus an ambitious proposal, necessary in view of the current situation, and whose success will depend in part on funding, and whether Member States are convinced that the national interests require a common European approach to achieve the necessary scale to ensure security in the current context. The proposal will still have to be negotiated by the Council and the European Parliament, a negotiation that will not be easy in view of the prevailing national interests in this area, and its content may still vary considerably.

### Further information of interest:

- Communication from the Commission on the European Defence Industrial Strategy (EDIS), [JOIN (2024) 10 final], 5.3.2024.
- Proposal for an EDIP Regulation, [COM (2024) 150 final], 5.3.2024.
- Questions and answers from the Commission on the EDIS of 5.3.2024.

## State aid in the latest Scoreboard and the Letta report

The European Commission's State Aid Scoreboard 2023 was published on 9 April. Although it sheds light on certain figures, it does not make it easy to draw conclusions on the effectiveness of the European Commission's aid control policy and its real impact on the internal market.

According to the Scoreboard, total State aid expenditure in 2022 was EUR 227.98 billion, representing 1.4% of the EU's GDP in 2022. In nominal terms, the Member States which spent the most in 2022 were: (i) Germany, with EUR 73.67 billion (representing 32.3% of total spending in the EU); (ii) France, with EUR 44.79 billion (representing 19.6% of total spending in the EU); (iii) Italy, with EUR 26.61 billion (representing 12.1% of total spending in the EU); and (iv) Spain, with EUR 17.12 billion (representing 7.5% of total spending in the EU).

Therefore, beyond being able to identify the type of aid granted by the Member States, the differences in capacity and spending levels between Member States, or in which particular area Member States invested more, **the Scoreboard is an insufficient instrument for obtaining a complete "picture" of public spending by the Member States, and for determining whether the legal framework for controlling State aid is sufficient.**

In this regard, one of the key elements of Enrico Letta's report, "*Much more than a market. Speed, security, solidarity: Empowering the Single Market to deliver a sustainable future and prosperity for all EU citizens*", commissioned by the Council, is the State aid control policy.

Letta highlights how the progressive relaxation of State aid control in response to crises has had a negative effect on competition and highlights the problem of this being exacerbated by the unequal fiscal capacity of Member States. **As a novel solution, Letta proposes a contribution mechanism for Member States that grant State aid, obliging them to allocate part of their national funding to financing pan-European initiatives and investments.**

The report insists on the need to make progress on the EU's own funding mechanisms, as was the case with the NextGen Funds. In this regard, Letta considers a European industrial approach with common objectives to be necessary and advocates for global governance to reduce disparities and increase efficiency. The report points to Important Projects of Common European Interest (IPCEIs) as a model for achieving this European industrial policy. Also, Letta indicates that, in

the long term, it is crucial to address the political divisions around the EU's central fiscal capacity as a necessary tool to develop a genuine EU industrial strategy capable of competing with the strategies recently adopted by other global powers, such as the IRA of the United States.

However, **Letta believes that to ensure adequate control, it is necessary for the European Commission's control to be supplemented by controls carried out by the national authorities.** In particular, he emphasises that the EU and its Member States should work together to streamline procedures, simplifying the current legal framework and reducing administrative burdens. Finally, he stresses the need to invest in training and the creation of forums to share best practices and identify promising projects across the Union.

In short, it is a legitimate and necessary reflection, with some novel ideas, but its usefulness will depend on the specific initiatives that the European Commission can propose and on the interest of Member States in making progress on this common approach, particularly when it comes to financing.

★ **ASSESSMENT** The need for a serious debate on State aid control is imperative in view of the imbalances generated by the recent crises, with the change in the legislative cycle providing the opportunity to open this debate. However, these reflections need to be translated into specific measures and the Commission needs to use sufficient resources to ensure an efficient aid monitoring policy.

### Further information of interest:

➤ [European Commission - State Aid Scoreboard 2023, 9.4.2024.](#)

➤ [Report by Enrico Letta - \*Much more than a market. Speed, security, solidarity. Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens. April 2024.\*](#)

## New CJEU ruling on the limitation period of actions for damages for infringements of competition law

On 18 April 2024, the CJEU (Grand Chamber) delivered a new judgment in [Case C-605/21, Heureka Group \(Compareurs de prix en ligne\)](#) in the field of private enforcement of competition law.

The judgment was delivered in the context of a reference for a preliminary ruling from the Prague City Court in proceedings between Heureka Group a.s. (a Czech company operating in the market for sales price comparison services) and Google LLC, in which Heureka is seeking compensation from Google for the harm allegedly suffered as a result of an infringement of Article 102 TFEU (prohibition of abuse of a dominant position within the internal market) committed by Google and its parent company, Alphabet Inc.

The infringement was found in the [Commission decision](#) that was the subject of appeal in the Judgment of the General Court ("GC") of 10 November 2021, [Case T-612/17, Google Shopping](#), currently pending appeal before the CJEU ([Case C-48/22 P](#)) after the GC partially upheld the appeal, annulling part of the Commission's decision and confirming the fine imposed by the Commission on Google in the contested decision.

In the *Heureka Group* case, the CJEU ruled on the following questions:

- **Commencement of the limitation period for actions for damages for infringements of competition law.** The CJEU built on its Judgment of 22 June 2022, [Case C-267/20, Volvo and DAF Trucks](#) (which, unlike the present case, referred to an infringement of Article 101 TFEU and not Article 102 TFEU), stating that for the limitation period to start to run, the following conditions must be met: (a) the infringement of competition law must have come to an end; and (b) the injured party must know or be reasonably expected to know the information necessary to bring the action, which includes: the existence of an infringement, that harm has been suffered as a result of that infringement, and the identity of the infringer. As in *Volvo and DAF Trucks*, the CJEU considered that the publication in the OJEU of the summary of the Commission's decision finding an infringement of competition law, whether or not that decision has become final, is the appropriate moment, without prejudice to the possibility of national courts finding that the injured party was aware of the information necessary to bring proceedings before the publication of the summary in the OJEU.

- **The CJEU made clear that the Commission's decision does not need to become final before the limitation period for actions for damages for infringements of competition law begins to run.** It stated that a Commission decision that has not become final, in which the Commission finds an infringement of competition law, produces binding effects as long as it has not been annulled and, therefore, an injured party may rely on the findings contained in such a decision in order to bring an action for damages. However, it pointed out that national courts have the power to stay the proceedings pending before them until the decision in question has become final, but they are not required to do so as long as they do not depart from such decision.
- **The application of Directive 2014/104/EU when it has not yet been transposed.** The CJEU considered that its provisions are applicable *ratione temporis* to situations where the competition infringement in question did not cease before the expiry of the deadline for transposition of Directive 2014/104/EU (27 December 2016). Conversely, in situations where an infringement did cease before the expiry of the deadline for transposition of Directive 2014/104/EU, its provisions will not be applicable, but the rules must in any event respect the essential content of Articles 101 and 102 TFEU, as well as the principles of effectiveness and equivalence. The only limit lies in the impossibility of interpreting *contra legem*. In this case, the Directive was considered applicable for temporary reasons.

In the light of the above, the CJEU held:

- that Article 10 of Directive 2014/104/EU, Article 102 TFEU, and the principle of effectiveness preclude national legislation which lays down a limitation period which starts to run individually for each source of damage resulting from a competition infringement and which may not be suspended or interrupted while the European Commission investigates the infringement in question; and
- that Article 10 of Directive 2014/104/EU precludes that national legislation, in so far as it does not provide for the suspension of the limitation period for at least one year after the decision finding that infringement has become final.

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## Pérez-Llorca's Brussels Insights

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Finally, the new question referred for a preliminary ruling by **Commercial Court no. 1 of Zaragoza (Spain) on 12 January 2024, Case C-21/24, Nissan Iberia**, should be highlighted in this area. The question has been raised in the context of main proceedings between an individual, CP, and Nissan Iberia SA, concerning a claim for damages for the purchase of a vehicle based on a decision of the Spanish National Markets and Competition Commission (CNMC) of 23 July 2015 in **Case S/0482/13: Car Manufacturers**. By means of its Resolution, the CNMC imposed a fine of EUR 171 million on twenty-one car manufacturing and distribution companies in Spain and two consultancy firms for practices contrary to Article 1 of the Spanish Law on the Defence of Competition (prohibition of collusive conducts) and Article 101 TFEU.

The referring court asks the CJEU in essence whether:

- a party which has been harmed by a competition infringement must or may bring an action for damages from the moment he or she knows or can reasonably be expected to know that he or she has suffered damage resulting from the infringement, and the identity of the infringer, because the limitation period starts to run;
- the limitation period starts to run from the date on which a penalty for infringement of competition law becomes final before the court or from the date of publication of the CNMC's full decision clearly identifying the infringement in question and its perpetrators;
- the publication on the CNMC's website of the penalty in question is equivalent to the publication in the OJEU of the summary of a Commission's decision for the purposes of determining the moment in which the limitation period begins to run.

★ **ASSESSMENT** The CJEU builds on its previous case law with the novel element relating to the final nature of the Commission's decision, leaving the national court with the power to stay the national proceedings while the CJEU rules on the pending appeal against the decision giving rise to the national proceedings.

#### Further information of interest:

- Judgment of the CJEU of 20 April 2023, Case C-25/21, *Repsol Comercial de Productos Petrolíferos*.
- Judgment of the CJEU of 16 February 2023, Case C-312/21, *Tráficos Manuel Ferrer*.
- Judgment of the CJEU of 12 January 2023, Case C-57/21, *RegioJet*.
- Judgment of the CJEU of 10 November 2022, Case C-163/21, *PACCAR and others*.
- Judgment of the CJEU of 6 October 2021, Case C-882/19, *Sumal*.
- Judgment of the CJEU of 28 March 2019, Case C-637/17, *Cogeco Communications*.
- Judgment of the CJEU of 14 March 2019, Case C-724/17, *Skanska Industrial Solutions and others*.
- Judgment of the CJEU of 24 October 2018, Case C-595/17, *Apple Sales International and others*.

