

# French Procurement Rules and War in Ukraine: A Subtle Evolution

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## Abstract

*This article examines the effect of war in Ukraine on French defence procurement. In one sense, it finds that little has changed, at least not yet. Legal and regulatory reforms are underway, but so far the legal framework remains largely unchanged from that which was transposed from the 2009 Defence Directive. On closer inspection, however, France's defence procurement has already begun changing in practice and is remaking the system at a pace that is unusual for a legal system that is notoriously conservative in nature. This war, then, has the potential to unsettle the status quo and to substantially reshape French defence purchasing.*

The war in Ukraine that Russia launched in February 2022 has led States across Europe to commence the mobilisation of a wartime economic model. This is certainly the case in France, where a national strategic review prefigured a new military programming law (*la loi de programmation militaire*—LPM) which will entail massive increases in France's already formidable defence budget that will be implemented in 2024–30.<sup>1</sup>

But increased defence spending is not the only change precipitated by the war; some notable adaptations of French defence procurement laws and regulations are also underway. These changes could be lost on non-French practitioners unfamiliar with the unique structure of France's existing public procurement system.<sup>2</sup> This article will therefore commence with (I.) an explanation of this enduring legal framework, which will help the reader to appreciate the significance of the subtle evolution of French public procurement in response to the Russo-Ukrainian War, with adaptations that have perhaps escaped notice in foreign media coverage. More importantly, there have been (II.) extensive changes to the European Union's (EU) defence procurement system, to which (III.) France is actively contributing in order to bring about new

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<sup>1</sup> "Loi" N° 2023-703, 1 August 2023 "relative à la programmation militaire pour les années 2024 à 2030 et portant diverses dispositions intéressant la défense", in the Official Journal of the French Republic (OJFR), No.177, of 2 August 2023.

<sup>2</sup> For a basic (if somewhat dated) overview of the entire French legal system, we recommend N.M. Kublicki, "An Overview of the French Legal System from an American Perspective" (1994) 12 *Boston University International Law Journal* 57. And for a good introduction to the French public procurement system for our francophone readers, we would recommend R. Noguellou, "France" in J.-B. Auby, R. Noguellou, U. Stelkens and H. Schroder (eds), *Droit Comparé des Contrats Publics* (Brussels: Bruylant, 2010), pp.675–699; for our anglophone readers we recommend these three sources: R. Lazerges, "France" in J. Davey and J. Falle (eds), *The Government Procurement Review* (London: Law Business Research, 2015), pp.95–110; C. Lecuyer-Thieffry, "France" in D. Campbell (ed.), *International Public Procurement* (Los Angeles: Thomson Reuters, 2016), paras 16-1–16-54; and V. Brenot, "Public Procurement in France: Overview" (2014) *Practical Law*, Westlaw 1-520-8570.

legal instruments. These changes at the EU level will enable Member States to design, procure, and maintain even better defence capabilities.

## I. The current legislative framework on defence procurement

Public procurement in France is currently governed by the most recent iteration of the Public Procurement Code (Code de la commande publique—PPC), which entered into force on 1 April 2019.<sup>3</sup> The recent date of this code may be deceptive. Notwithstanding the recent date of this code and France’s reputation abroad for a progressive, even revolutionary, sociopolitical environment, public procurement law in France,<sup>4</sup> like French law generally, is in fact historically rooted and resistant to change.<sup>5</sup> Understanding this larger context—that legal reforms in France are usually gradual—renders the recent changes to its defence procurement system especially significant. This much change in a such short time is unheard of. Hence our emphasis on and lengthy explanation of the existing defence procurement regime in France.

Article L.1113-1 of the PPC defines a defence or security contract as a contract concluded by the State or one of its public entities and having as its object:

1. The supply of equipment, including their spare parts, components, or sub-assemblies, which are intended to be used as arms, munitions, or war material, whether they have been specifically designed for military purposes or whether they were originally designed for civilian use and later adapted for military purposes;
2. The supply of equipment intended for security, including their spare parts, components, or sub-assemblies, and which involve, require, or include protected or classified media or information in the interest of national security;
3. Works, supplies and services directly related to equipment mentioned in 1 or 2, including the supply of tools, test means or specific support, for all or part of the life cycle of the equipment. For purposes of this paragraph, the life cycle of the equipment includes all the successive states it may experience, in particular research and development, industrial development, production, repair, modernization, modification, maintenance, logistics, training, testing, retirement, dismantling and disposal;
4. Works and services having specifically military purposes or works and services intended for security and which involve, require, or include protected or classified media or information in the interest of national security.<sup>6</sup>

In addition, the principles set out in PPC art.L.3 (i.e. the principles of equal treatment, freedom of access, and transparency of procedures), when applied to defence or security contracts, “are also intended to ensure the strengthening of the European defence technological and industrial base.”<sup>7</sup> The PPC thus

<sup>3</sup> See Order N° 2018-1074 of 26 November 2018 in OJFR, No.281 of 5 December 2018.

<sup>4</sup> See, e.g. F. Lichère, “Qualification, Selection, and Exclusion of Economic Operators Under French Procurement Law” in M. Burgi, M. Trybus and S. Treumer (eds), *Qualification, Selection, and Exclusion in EU Procurement* (Copenhagen: Djof, 2016), pp.41 and 43–44 explaining that elements of France’s current qualification and exclusion procedures can be traced to the 17th century and the construction of Versailles under Louis XIV.

<sup>5</sup> There is a myth about the French legal system that was invented by the young Republic’s 19th century jurists: namely that French judges are an expert bureaucracy trained to use cool reason, uninfluenced by legal tradition. Yet French jurists continued to be heavily steeped in historical jurisprudence, reflecting their conservative bent and a certain resistance to change. See A.D. Kessler, “Marginalization and Myth: The Corporatist Roots of France’s Forgotten Elective Judiciary” (2010) 58:3 *American Journal of Comparative Law* 679, 718–19. In other quarters, France is often cited as an example of “extreme” resistance to change. See, e.g. B. Palier, “French Welfare Reform in Comparative Perspective” (2005) 45 *Revue Française de Sociologie* 93, 99; R. Balme “France, Europe and the World Foreign Policy and the Political Regime of the Fifth Republic” in A.G. Mazur, A.M. Appleton and S. Brouard (eds), *The French Republic at Fifty: Beyond Stereotypes* (London: Palgrave Macmillan, 2009), pp.136 and 142; F. Einbinder, “Mass Torts: Dispute Resolution in France and the United States—the Vioxx and Mediator Cases Compared” (2020) 29 *Washington International Law Journal*, 575, 581–82, fn.14; J.Q. Whitman, “Consumerism Versus Producerism: A Study in Comparative Law” (2007) 117 *Yale Law Journal* 340, 389–90. But see D. Weiner et al., “Book Notes: Ethnicity, Law and Human Rights: The English Experience. by Sebastian Poulter, Oxford: Clarendon Press, 1998” (1998) 35 *Stanford Journal of International Law*, 205, 211, contrasting French public and private law and arguing that “[t]he true dynamism of the French legal system shines in the area of private law.”

<sup>6</sup> Translation ours.

<sup>7</sup> Translation ours.

connects French defence procurement law with both the EU's broader legal framework and with the French public procurement rules applicable to this type of procurement.<sup>8</sup>

The EU legal framework for defence procurement in its current form is mainly found in Directive 2009/81, better known as the Defence and Security Procurement Directive, which was passed on 13 July 2009 (hereinafter "Defence Directive").<sup>9</sup> The transposition of this directive into French procurement law was made by a legislative act and a decree in 2011,<sup>10</sup> and these were supplemented by another decree in 2016.<sup>11</sup>

This specialised legal regime makes certain adaptations to accommodate requirements unique to defence or security procurement. This is the reason why some contracting methods are entirely exempted from award procedures, such as research and development,<sup>12</sup> protection of essential national security interests,<sup>13</sup> contracts awarded pursuant to international rules,<sup>14</sup> and intelligence activities.<sup>15</sup> For each exclusion, there was a rationale related to defence or security procurement for which, it was thought, justified deviating from the standard rules for public procurement. Similarly, use of the negotiated procedure without advertising or competition is more widely permissible than for other public contracts.

An interministerial instruction establishes the conditions under which secrecy and information concerning national defence and State security are protected. This instruction was the subject of a reform, which came into force on 1 July 2021,<sup>16</sup> which on the one hand enshrined the principle of strict necessity for recourse to national defence secrecy, and on the other noted the growing challenges with the management of classified information in a context where exchanges with private operators and foreign partners are rapidly increasing.

The competitive bidding procedures under the defence procurement regime are all restricted,<sup>17</sup> enabling the purchaser to select the applications that will, at a later stage, be authorised to submit a bid. In addition, the defence purchaser may adapt the way in which the procedure is conducted if the need to protect information seems to require it, in particular by waiving the use of paperless procedures, where such procedures are normally compulsory.

The role of subcontractors is also taken into account in order to implement industrial policy in the defence sector, in line with the specific objective assigned to defence purchasers<sup>18</sup>—which is, in accordance with the recitals of the Defence Directive,<sup>19</sup> "to ensure the strengthening of the European defence technological and industrial base."<sup>20</sup> To this end, the Defence Directive authorises Member States to require contract holders to put their subcontractors out to tender,<sup>21</sup> or to subcontract up to 30% of the contract

<sup>8</sup> PPC Book III, arts L.2300-1-L.2397-3, arts R.2300-1-R.2397-4. Notably, these rules not applicable to local authorities or local public entities.

<sup>9</sup> For an overview, see S. Rodrigues, "La directive sur les marchés publics dans les domaines de la défense et de la sécurité. Ou de l'art difficile de rentrer dans le rang (du marché intérieur)" (2009) 10 *Europe, Lexis-Nexis* 4–8. See also Report from the European Commission to the European Parliament and the Council on the implementation of Directive 2009/81 on public procurement in the fields of defence and security, to comply with art.73(2) of that Directive COM(2016)762.

<sup>10</sup> "Loi" N° 2011-702, 22 June 2011 "relative au contrôle des importations et des exportations de matériels de guerre et de matériels assimilés, à la simplification des transferts des produits liés à la défense dans l'Union européenne et aux marchés de défense et de sécurité", OJFR No.144, 23 June 2011 and "Décret" N° 2011-1104, Sept. 14, 2011 "relatif à la passation et à l'exécution des marchés publics de défense ou de sécurité", JORF No.214 of 15 September 2011. For an overview of those two texts, see C. Chardigny and S. Rodrigues, "La transposition de la directive européenne sur les marchés publics de défense. A propos de la loi n°2011-702 du 22 juin 2011 et du décret n°2011-1104 du 14 septembre 2011" (2011) 79 *Bulletin juridique des contrats publics* 407–13.

<sup>11</sup> "Décret" N° 2016-361, 25 March 2016 "Relatif aux marchés publics de défense ou de sécurité", OJFR No.74, 27 March 2016.

<sup>12</sup> Directive 2009/81 art.13(c).

<sup>13</sup> Directive 2009/81 art.13(a).

<sup>14</sup> Directive 2009/81 art.12.

<sup>15</sup> Directive 2009/81 art.13(b).

<sup>16</sup> General interministerial instruction No.1300 "sur la protection du secret de la défense nationale" approved by the "arrêté" of 9 August 2021, in OJFR No.185 of 11 August 2021 (NOR: PRMD2123775A).

<sup>17</sup> PPC arts L.2324-1 and R.2324-1–R.2324-4.

<sup>18</sup> PCC arts L.2393-1–L.2393-15.

<sup>19</sup> Directive 2009/81 Recital 3.

<sup>20</sup> PPC art.L.1113-1.

<sup>21</sup> PPC art.R.2393-4–R.2393-6.

value, in which case subcontractors are also put out to tender.<sup>22</sup> To ensure its effectiveness, the system has been extended to all subcontractors, whether service providers or suppliers, so as to reach the entire second-tier industrial fabric, including equipment and munitions manufacturers. The objective here is to disseminate technical expertise and multiply partnerships, to protect the security of his supplies beyond the contract horizon. Conversely, the purchaser may require certain essential tasks to be conducted directly by the contractor for reasons of security of supply or of security of information.<sup>23</sup>

Last, the French legal framework is also focused on a kind of EU preference, on the basis of a liberal interpretation of Recital 18 of the Defence Directive, according to which Member States may “retain the power to decide whether or not their contracting authority/entity may allow economic operators from third countries to participate in contract award procedures.”<sup>24</sup>

France, which initiated and supported the introduction of this principle during the process of drafting the Defence Directive, envisioned what it calls the principle of European preference for defence or security procurement as a strategic objective.<sup>25</sup> In general, contracts are awarded to economic operators from the EU.<sup>26</sup> Operators from countries outside the EU or the European Economic Area may not be allowed to submit applications.<sup>27</sup> These are economic operators who, particularly in view of their location outside lack the “technical” capacity to perform the contract, to cope with any increases in requirements as a result of a crisis, or to ensure the maintenance, modernisation, or adaptation of the covered supplies.<sup>28</sup>

However, purchasing governments may authorise non-EU operators to compete for defence contracts on a case-by-case basis. To do so, it must justify its decision and state in the contract notice the eligibility criteria. These criteria relate, in particular, to the imperatives of security of information and supply, the preservation of defence and state security interests, the interest of developing the European defence industrial and technological base, sustainable development objectives, mutual benefits, and reciprocity requirements.<sup>29</sup>

The last significant reform of those rules was enacted due to the international commitments to address climate change.<sup>30</sup> The fact is that they have not been subject to modification since the beginning of the war in Ukraine. However, the impact of war on some national practices is more tangible, while legislative changes are in the pipeline. These are addressed in the next two sections in turn.

## II. Evolution in national practices and the defence procurement regime

As noted, the economic impact of the war in Ukraine led to an evolution in the legal doctrine concerning the adaptation of contracts in progress. Chronologically, the consequences of the war exacerbated the changes resulting from the COVID-19 and semiconductor shortage crises. As a result, inflation and supply chain instability increased, particularly in business sectors that are essential to the defence industry.

The French Prime Minister issued a circular on 16 July 2021,<sup>31</sup> in which he invited buyers to adapt the performance conditions of current contracts by extending lead times; modifying the quality of materials, the quantities required, or the scope of the contract in the light of the impact of rising market prices for

<sup>22</sup> PCC art.R.2393-7–R.2393-12.

<sup>23</sup> PCC art.L.2393-7.

<sup>24</sup> Directive 2009/81 Recital 18.

<sup>25</sup> Report appended to the Military Programming Law 2019–24 (“Loi” N° 2018-607 of 13 July 2018 “relative à la programmation militaire pour les années 2019 à 2025 et portant diverses dispositions intéressant la défense”), s.3.3.2. OJRF No.161, 14 July 2018, developing a proactive policy of European and international cooperation.

<sup>26</sup> PPC art.L.2353-1.

<sup>27</sup> PCC art.L.2342-2.

<sup>28</sup> PCC art.L.2353-1.

<sup>29</sup> PCC art.L.2353-1.

<sup>30</sup> “Loi” N° 2021-1104 of 22 August 2021 “portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets”, OJRF No.196 of 24 August 2021.

<sup>31</sup> “Circulaire” of Prime Minister N.6293/SG of 16 July 2021 “relative à l’aménagement des conditions d’exécution des marchés publics de l’État face aux difficultés d’approvisionnement”.

raw materials prices; waiving penalties for late delivery; and compensating or terminating the contract when a situation of unforeseeability was identified. In addition, for future contracts, purchasers were invited to reconsider price evolution clauses and those relating to the management of lead times and advances.

The Government then took regulatory action to extend the scope of existing measures, such as maintaining for a further two years a provisional procedural exemption threshold of €100,000 (excluding VAT) for works contracts, or raising from 20 to 30% the minimum advance paid to SMEs (small and medium enterprises) in the performance of public contracts concluded by the State.<sup>32</sup>

Above all, in an opinion issued on 15 September 2022,<sup>33</sup> following a referral from the Government, the *Conseil d'État*<sup>34</sup> considerably relaxed this doctrine, admitting the possibility of modifying prices and price evolution procedures in public contracts by means of an amendment. In such cases, the *Conseil d'État* recognises that a modification of the economic terms of the contract, limited to correcting the exceptional situation that had caused the price rise, was subject to a dual framework. Firstly, such an option is framed by the contract amendment regime stemming from the European directives of 26 February 2014.<sup>35</sup> It is forbidden to modify the contract outside this framework. Secondly, the unforeseeable event regime, which traditionally makes it possible to re-establish the economic equilibrium of the contract in the event of the occurrence of an unforeseeable event, external to the parties and having the effect of upsetting this economic equilibrium, makes it possible to compensate the holder of the contract who has continued to ensure its performance despite the circumstances.

Finally, French authorities have ensured the effective application of the European regulation of 8 April 2022 prohibiting the award of public contracts to Russian or Russian-controlled economic operators.<sup>36</sup>

What the foregoing discussion demonstrates is that, though France's response to the upheaval caused by the Ukraine war might have seemed muted, some significant reforms have already been enacted: most importantly, the administrative doctrine as to the modification of contracts in progress was revised, which affords the flexibility necessary under exigent circumstances (such as a time of war). This requirement seems to contradict the direction adopted by European legislators and the Court of Justice over the last 10 years.

Thus, the regime now framing contract modification, which is one of the new features of the 26 February 2014 Directives, is designed to guarantee respect for the initial scope of the contract, and a *posteriori* for fair competition. Except where it responds to specific situations, substantial modifications to contracts are prohibited.

The Court of Justice's holdings have reached similar conclusions—especially as to transactional protocols. The purpose of such protocols was to end contract performance litigation, even if the term of the contract has expired.<sup>37</sup> As a result, transactions cannot be authorised to provide compensation equivalent to a substantial amendment to the contract. In other words, a transaction cannot upset the balance of the contract, notwithstanding the fact that it may have expired. However, the application of the theory of unforeseeability,

<sup>32</sup> Applicable to defence procurement : “Décret” N° 2022-1683 of 28 December 2022 “portant diverses modifications du code de la commande publique”, OJRF N.301 of 29 December 2022. Notably, a decree dated 23 August 2021 had already simplified the system defence contracts by raising the procedural exemption threshold to €100,000 (excluding VAT). But the effect was very limited, as defence contracts are generally much larger than this threshold.

<sup>33</sup> Conseil d'État, advice of 15 September 2022 “relatif aux possibilités de modification du prix ou des tarifs des contrats de la commande publique et aux conditions d'application de la théorie de l'imprévision”, No.405540.

<sup>34</sup> The *Conseil d'État* is of course France's highest administrative court. But the qualifier “administrative” may understate the importance of this tribunal for non-French readers. Given its key role in the French legal system, the *Conseil d'État* is perhaps something more akin to a “supreme court” in the Anglo-American legal tradition.

<sup>35</sup> See Directive 2014/24 art.72; PPC arts L.2394-1 and R.3494-1–R.2394-9.

<sup>36</sup> Regulation 2022/576 of 8 April 2022. See also Ministry of the Economy, Legal Affairs Department, “Fiche technique relative à la mise en œuvre de l'interdiction d'attribuer ou d'exécuter des contrats de la commande publique avec la Russie” (15 April 2022), [https://www.economie.gouv.fr/files/directions\\_services/daj/marches\\_publics/conseil\\_acheteurs/fiches-techniques/crise/FT-Sanctions-Russie-Commande-publique150422.pdf?v=1686924840](https://www.economie.gouv.fr/files/directions_services/daj/marches_publics/conseil_acheteurs/fiches-techniques/crise/FT-Sanctions-Russie-Commande-publique150422.pdf?v=1686924840).

<sup>37</sup> *Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation* (C-549/14) EU:C:2016:634; [2016] P.T.S.R. 1569.

which is precisely designed to compensate for the additional costs resulting from a crisis situation that has upset the economic equilibrium of the contract, most often involves the conclusion of a transaction protocol.

This rather orthodox approach complicates contracts affected by the war in Ukraine, and in any case undermines the need to guarantee the scope of the initial competitive bidding process. This concern is particularly acute for defence contracts concluded after competitive bidding, as these are financially significant and often involve long-term contracts. Firstly, they need to be adaptable in the event of a change in economic conditions. Secondly, they are concluded in the industrial sector, which is particularly exposed to rising energy, raw material, and manufactured goods costs, as well as to substantial supply shortages and difficulties. Thirdly, the manufacturers who hold these contracts have been exposed to sharp increases in demand, particularly in the quantities ordered (ammunition, weapon systems, etc.) linked to deliveries to Ukraine or to the reconstitution of strategic stocks made necessary by the war. In practice, requests for price changes have multiplied since 2022, and require pragmatic support from contract managers within the Ministry of the Armed Forces. In practice, they give rise to negotiations that are often lengthy and further complicated by the production of supporting documents required to establish the link between the additional cost and the event that has upset the contractual balance.

However, we must not overestimate the importance of protecting the scope of competitive bidding in defence procurement. Certain constraints exist, but normally these would only apply to contracts concluded after competitive bidding. The largest and most sensitive procurement contracts are excluded from the application of the Defence Directive,<sup>38</sup> often based on the derogations under art.346 of the Treaty on the Functioning of the European Union (TFEU).<sup>39</sup> In that regard, the ECJ has continuously insisted on the strict conditions for the use of that provision as a derogation. Pursuant to established case law, “balancing Member States’ interests in the field of defence and security against the fundamental principles and objectives of the [EU]”, as far as, “the aim of these conditions is to prevent possible misuse and to ensure that the derogation remains an exception limited to cases where Member States have no other choice than to protect their security interests nationally”.<sup>40</sup> Therefore, art.346 TFEU must “be interpreted strictly”, regarding both its field and its conditions of application.<sup>41</sup>

Furthermore, half, or even more of the contracts concluded under this directive are maintenance contracts, for which operators often hold intellectual property rights. In such cases, contracts are concluded following negotiations without competitive bidding.<sup>42</sup> Defence contracts concluded without competitive bidding thus account for around a third of all contracts awarded under the Defence Directive. For these contracts, the contract manager, who is not bound by the principles of competitive bidding, can more easily modify the contract to correct any consequences of the war in Ukraine on the contract’s equilibrium.

Secondly, beyond the question of the adaptation of contracts in progress, a shift in the contract amendment regime is not enough to secure supplies whose shortcomings have been revealed by the war. It soon became clear that we would need to reorient the French industrial base towards what was more akin to a war economy. The war in Ukraine prompted an acceleration of the legislative timetable, justifying the introduction in Parliament in 2023 of the military programming law for 2024–2030,<sup>43</sup> which was one year before the previous programming law was set to expire.<sup>44</sup>

<sup>38</sup> PPC Book V, Pt II.

<sup>39</sup> See TFEU art.346(1)(b), which states: “any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.”

<sup>40</sup> European Commission, 2006 Interpretative Communication COM(2006) 779 s.2, p.5.

<sup>41</sup> *Commission of the European Communities v Italy* (C-387/05) EU:C:2009:781 at [46].

<sup>42</sup> PPC art.L.2322-5.

<sup>43</sup> This was the LPM mentioned in the introduction.

<sup>44</sup> The initial 2024–30 military programming bill was submitted to the French National Assembly on 4 April 2023 and finally adopted on 1 August 2023. See introduction, above.

The law's budgetary measures are ambitious.<sup>45</sup> While the previous military programming law (2019–24) was intended to repair the investment backlog accumulated over previous decades and featured an already impressive budget of €295 billion, the 2023 LPM was presented as “transformational”. It entails €400 billion in appropriations over the next seven years, so as to cover a military requirement of €413 billion. And from 2024, the armed forces standard operating budget is set to increase by another €3.1 billion annually.

Among the various measures relating to national defence that make up Title II of the law, we will focus on three articles in Ch.3 on defence economics.

Article 47 of the law modernises and adapts the requisitioning regime. This new regime is both broadened and clarified, and it provides guarantees as to war materiel subject to requisition, which is consolidated by the principle of necessity: requisitions are authorised only when it is impossible for the State to achieve its objectives by any other means. Such requisitions must be strictly proportionate and limited in time. They also must be preceded by the search for an amicable agreement. Compensation is simplified: in the case of requisitioned services, it is determined on the basis of the normal commercial price of the service.<sup>46</sup>

Article 49 of the law organises the possibility of building up strategic stocks of materials or components of strategic interest to the armed forces, as well as prioritising the delivery of goods and services to the armed forces. This measure draws on the lessons learned from the first year of the war in Ukraine, which suggested the inadequacy of existing stocks, particularly of ammunition, in the dual context of the return of a high-intensity conflict on the European continent and the risk of a shortage of raw materials.<sup>47</sup>

On the one hand, government authorities will be able to require companies holding an authorisation to manufacture and trade in arms and war materiel to build up strategic stocks of materials or components of strategic interest, irrespective of the existence of current contracts. On the other, the measure authorises the State to prioritise fulfilment of orders it has placed with a company as part of a defence and security contract, in order to guarantee both the continuity of armed forces missions and to honour France's international commitments, as well as to prioritize the fulfilment of arms contracts signed by a French company with an international organization or a third country. Priority will also apply to sub-contractors whose participation is essential to the performance of the contract in question.

Article 51 modifies the system of cost investigations in public procurement contracts, which guarantees the possibility of controlling the accuracy of costs, particularly when competition has not naturally regulated prices. The measure clarifies the technical and accounting arrangements for cost investigations, and extends the system to contracts which, being excluded from the scope of application of European directives, are not subject to any competitive tendering requirements.<sup>48</sup>

### III. The French active contribution to new EU tools for defence procurement

The war in Ukraine has been a real game changer for the EU legal rules applicable to the defence industrial sector. The decisions were made with unprecedented alacrity. Within four days from the beginning of hostilities, it was decided to finance the provision of military equipment and platforms designed to deliver lethal force in order to “contribute to strengthening the capabilities and resilience of the Ukrainian Armed Forces to defend the territorial integrity and sovereignty of Ukraine and protect the civilian population against the ongoing military aggression.”<sup>49</sup>

<sup>45</sup> See, e.g. LPM Title I.

<sup>46</sup> LPM Title II, art.23.

<sup>47</sup> LPM Title II, art.24.

<sup>48</sup> LPM Title II, art.25.

<sup>49</sup> See art.1 of Council Decision (CFSP) 2022/338, 28 February 2022, which decided to provide Ukraine with military equipment and platforms designed to deliver lethal force. The initial budget was €450 million, and this was increased since then several times; to date more than €4.12 billion have been provided. See Council Decision (CFSP) 2023/810, 13 April 2023; Council Decision (CFSP) 2023/927, 5 May 2023.

But this was not the first barrier to be broken. Other wider policy initiatives had also an implicit but important impact on contract awards in the defence field. Following the adoption by the European Commission of a European Defence Action Plan in 2016,<sup>50</sup> announcing the new impetus for financing R&D (research and development) in the defence sector by the EU Budget, a European Defence Industrial Development Program (EDIDP) has been established in 2018, “aiming at supporting the competitiveness and innovation capacity of the EU’s defence industry.”<sup>51</sup>

With a financial envelope of €500 million for 2019–21, the EDIDP does not cover the production or procurement of defence products, but finances their development phase after the research phase, in order to encourage collaboration between Member States,<sup>52</sup> in such development, “while strengthening and improving the agility of defence supply and value chains and fostering the standardization of defence systems and their interoperability.”<sup>53</sup>

The first results of EDIP are promising. In 2019–20, more than 440 entities from 24 Member States applied to EDIDP calls. Among the selected projects, focus was on drones and related technologies (e.g. detecting and avoiding systems), space technologies (e.g. Galileo military-grade encrypted receivers), unmanned ground vehicles, and high precision missile systems (“BLOS” anti-tank missiles). In addition, direct support (€137 million) has been given to two large-scale projects: EURODRONE<sup>54</sup> and ESSOR.<sup>55</sup> France was directly involved with both, contributing to 23% to the first, with the ambition to acquire eight systems by 2030. It should be noted that those two projects are part of the so-called PESCO (“permanent structured cooperation”) launched in 2017 per pursuant to arts 42(6) and 46 of the Treaty on the EU (TEU).<sup>56</sup> France is indeed committed in 42 projects and leads 14, making it the leader in PESCO.<sup>57</sup>

EDIDP was designed as a precursor program for the European Defence Fund (EDF),<sup>58</sup> established in 2021.<sup>59</sup> So, directly inspired by the EDIDP legal framework, the EDF is conditioned to Member States meeting specific criteria such as a minimum of three Member States participating in the joint procurement. However, the EDF is financially more ambitious with a budget of €7,953,000,000 for 2021–27. A first series of 23 calls for proposals (11 research actions and 12 development actions) was launched in 2021. In addition, the European Commission has received 142 proposals, and 61 of them were selected in July 2022, including, notably, cloud projects (EDOCC), maritime fighting (EDINAF), hypersonic interceptors (HYDEF), and air power and propulsion (NEUMANN).<sup>60</sup>

The EDF is paying particular attention to the involvement of small and medium enterprises (SMEs). In France, they are approximately 4,000 SMEs in the defence sector. The Directorate General for Armament from the French Defence Ministry has established a partnership (called “Diagnostic Defence

<sup>50</sup> See COM(2016) 950 final.

<sup>51</sup> See EU Regulation 2018/1092, 13 July 2018, repealing the EDIDP and establishing the EDIP. Notably, a preparatory action on defence research (PADR) was established in 2017, paving the way to the EDIP, with a budget of €90 million for 2017–19. See D. Fiott and R. Bellais, “A ‘Game Changer’? The EU’s preparatory action on defence research”, Policy Paper, Armament Industry European Research (ARES, 2016), <https://www.iris-france.org/wp-content/uploads/2016/04/ARES-Group-Policy-Paper-Fiott-and-Bellais-04-16-OK.pdf>.

<sup>52</sup> To that end, actions shall be conducted by undertakings cooperating within a consortium of at least three eligible entities which are established in at least three different Member States. At least three of those eligible entities established in at least two different Member States shall not be controlled, directly or indirectly, by the same entity or shall not control each other. See EU Regulation 2018/1092 art.6.

<sup>53</sup> EU Regulation 2018/1092 art.3.

<sup>54</sup> “EURODRONE” or Medium Altitude Long Endurance (MALE) Remotely Piloted Aircraft (RPA) systems.

<sup>55</sup> “ESSOR” signifies European secure software defined radio.

<sup>56</sup> TEU Protocol No.10, art.2, attached to EU Council Decision (CFSP) 2017/2315, 11 December 2017, which created the permanent structured cooperation (PESCO) and established the list of participating Member States. Notably, PESCO is open to third countries such as the United States. See EU Council Decision (CFSP) 2021/750, 6 May 2021, “On the participation of the United States of America in the PESCO project Military Mobility”.

<sup>57</sup> See EU Council Decision (CFSP) 2021/2008, 16 November 2021, updating EU Council Decision (CFSP) 2018/340 and naming the projects to be developed under PESCO.

<sup>58</sup> F. Mauro and E. Simon, “Review of the Preparatory Action on Defence Industrial Development Programme (EDIDP): lessons for the implementation of the European Defence Fund (EDF)” (European Parliament, 2021), [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653638/EXPO\\_STU\(2021\)653638\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653638/EXPO_STU(2021)653638_EN.pdf).

<sup>59</sup> EU Regulation 2021/697 [2021] OJ L170/149, establishing the European Defence Fund and repealing its precursor.

<sup>60</sup> European Commission, Defence Industry and Space, “European Defence Fund 2021 Calls for Proposals—Results” (20 July 2022), [https://defence-industry-space.ec.europa.eu/funding-and-grants/calls-proposals/european-defence-fund-2021-calls-proposals-results\\_en](https://defence-industry-space.ec.europa.eu/funding-and-grants/calls-proposals/european-defence-fund-2021-calls-proposals-results_en), providing the complete list of research and development projects that were selected.



Europe”) with the Investment Public Bank (BPI) to encourage SMEs to participate to EDF calls, by providing them advice and auditing. It will be interesting to see if, within the context of the second set of calls launched in May 2022, the war in Ukraine will have a direct impact on the projects to be selected in July 2023.

At this stage, another direct impact of the war can be clearly identified with the proposal, adopted by the Commission in July 2022, for a regulation establishing the European Defence Industry Reinforcement through Common Procurement Act (EDIRPA).<sup>61</sup> Such an initiative is a direct consequence of the war in Ukraine, since the European Council in its Versailles declaration of March 2022, invited the Commission, in coordination with the European Defence Agency (EDA), to put forward an analysis of the defence investment gaps and to propose any further initiative necessary to strengthen the EU’s defence industrial and technological base.

In their joint communication of May 2022 on “the Defence Investment Gaps Analysis and Way Forward”,<sup>62</sup> the European Commission and the High Representative for Foreign Affairs and Security Policy propose several initiatives to coordinate and incentivise joint procurement of defence equipment, starting with replenishment of stock, especially ammunition. To this end, a “Defence Joint Procurement Task Force” has been already established to collaborate with Member States to support the coordination of their very short-term procurement needs.<sup>63</sup>

However, this is not the end of the story. As specified in a separate Joint Communication:

Beyond the tools and instrument to incentivize cooperation “downstream”, it is paramount that a more ambitious upstream coordination is put forward. Coordinated action at EU level is needed to prevent 27 uncoordinated national approaches. Today’s processes and approach are not all-encompassing and do not allow for enough prioritization. As Member States will start adapting their planning processes to take into account the new security landscape, it is paramount to set-up a more structured approach—a joint EU strategic defence programming and procurement—to deliver on this new ambition in a coordinated way.<sup>64</sup>

The objective is clear: to ensure joint comprehensive multiannual programming—building on the EDF multiannual perspective, refinement of needs and specifications—and to function as a central purchasing body for EU joint procurement and support Member States in their joint procurements, including downstream from the EDF-funded projects.

These new EU initiatives will not necessarily require adaptations of France’s legal framework on public procurement in the defence sector. However, they will certainly imply new practices and new habits in terms of cooperation between EU Member States and may also imply changes to policies, procedures, and regulations in order to bring French law in line with the massive changes happening at the EU level. A first step has already been made toward joint procurement. On 20 March 2023, 22 EU Member States and Norway signed a project arrangement, under the supervision of the European Defence Agency, for the collaborative procurement of ammunition to aid Ukraine and replenish Member States’ national stockpiles. They will proceed along two paths: first a two-year, fast-track procedure for 155mm artillery rounds and then a seven-year project to acquire multiple ammunition types.<sup>65</sup>

However, under the political pressure of the European Council,<sup>66</sup> on 3 May 2023 the European Commission adopted a proposal for European Parliament and European Council regulation, the Act in

<sup>61</sup> COM(2022)349 final.

<sup>62</sup> JOIN(2022)24 final.

<sup>63</sup> JOIN(2022)24 final, pp.8–9.

<sup>64</sup> JOIN(2022)24 final, p.10.

<sup>65</sup> See EDA Press Release, “EDA brings together 25 countries for Common Procurement of Ammunition”, Mar. 20, 2023. See also EU Council Decision 7632/23, “Delivery and joint procurement of ammunition for Ukraine”, 20 March 2023.

<sup>66</sup> European Council, Presidency Conclusions, EUCO 4/23, 23 March 2023.

Support of Ammunition Production (ASAP).<sup>67</sup> In record time, the ASAP Regulation—Regulation 2023/1525—has been adopted on 20 July 2023.<sup>68</sup> There is insufficient space to assess this new legislation in detail. But its main purpose is “to ensure the timely availability and supply of ground-to-ground and artillery ammunition as well as missiles.”<sup>69</sup> And, notably, one of the main sets of measures that are on the table seek to establish mechanisms, principles, and temporary rules to secure the timely and lasting availability of the relevant defence products (ammunition and missiles).<sup>70</sup>

To that end, the ASAP Regulation introduces “facilitation of common procurement during the current ammunition supply crisis.”<sup>71</sup> Where at least three Member States enter into an agreement to commonly procure ammunition and/or missiles and where the extreme urgency deriving from the current crisis resulting from the Russian aggression of Ukraine prevents to use any of the procedures provided for by the Defence Directive for the award of a framework agreement, two derogations from that directive may be authorised, provided that they are in compliance with the principle of non-discrimination: first, by allowing a contracting authority to modify an existing framework agreement which has been awarded through one of the procedures provided for by art.21 of the Defence Directive, so that its provisions may apply to contracting authorities/entities which are not originally party to the framework agreement;<sup>72</sup> and, second, a contracting authority may make substantial amendments to the quantities laid down in an existing framework agreement insofar as it is strictly necessary.<sup>73</sup> Even if the Commission insists on the duty of the contracting authorities/entities for not using such derogations “improperly or in such a way as to prevent, restrict or distort competition”<sup>74</sup> and if this new regime is limited in time,<sup>75</sup> the fact is that the way is now open to a system that derogates from the ordinary law of public procurement, because of war, and could therefore inspire other relaxations in times of crisis.

One may conclude that the crisis in Ukraine has had negligible impact on the French defence procurement system, even if there have been some substantial changes at the EU level. But on closer examination the French defence procurement system has undergone changes—both under the auspices of the EU and in its own right. These changes are especially significant in light of the French legal system’s historic resistance to change. By French standards, then, what has happened in the last two years has been remarkable.

Further, apart from the changes already underway, the war also provides an opportunity to relaunch procedures authorising joint purchasing or centralised purchasing bodies. If the Member States can unite around a common defence and security policy (including defence and security procurement) and pool their resources in a more coordinated fashion, their common security and stability would be enhanced. We would submit that this paves the way to relaunch a European defence industry—in which, we believe, France would have a key role.

*Update: The instrument for the reinforcement of the European defence industry through common procurement, referred to in this article as EDIRPA, has been finally established by Regulation (EU)*

<sup>67</sup> See COM(2023) 237 final.

<sup>68</sup> Regulation 2023/1525 on supporting ammunition production (ASAP) [2023] OJ L185/7.

<sup>69</sup> Regulation 2023/1525 art.1.

<sup>70</sup> Regulation 2023/1525 art.1(b). The other set of measures is “an instrument financially supporting industrial reinforcement for the production of [artillery ammunition/missiles] in the Union” under art.1(a). A third objective was proposed by the Commission with “the identification, mapping and continuous monitoring of the availability of that defence products, their components, and the corresponding inputs (raw materials)”, but it was not adopted due to the opposition of several Member States, including France and Germany.

<sup>71</sup> Regulation 2023/1525 art.14.

<sup>72</sup> See Directive 2009/81 art.29(2), para.2.

<sup>73</sup> By way of derogation from art.29(2), para.3 of the Defence Directive. However, art.14(3) of the ASAP Regulation states: “Where quantities laid down in an existing framework agreement are substantially modified pursuant to this paragraph, any economic operator that meets the contracting authority’s/entity’s conditions initially laid down in the public procurement procedure for the framework agreement, including requirements for qualitative selection as referred to in Articles 39 to 46 of Directive 2009/81/EC, shall be given the opportunity to join that framework agreement. The contracting authority/entity shall open that possibility by means of an ad hoc notice published in the Official Journal of the European Union.”

<sup>74</sup> Article 14, para.6 of the ASAP Regulation.

<sup>75</sup> “Modifications introduced in the framework agreements shall not be concluded after 30 Jun. 30, 2025.” ASAP Regulation art.14, para.7.

*2023/2418 of the European Parliament and of the Council of 18 October 2023 published in the Official Journal of the EU on 26 October 2023.*