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research paper

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**EUROPEAN DEFENCE UNION ASAP:
THE ACT IN SUPPORT OF
AMMUNITION PRODUCTION AND
THE DEVELOPMENT OF EU DEFENCE
CAPABILITIES IN RESPONSE
TO THE WAR IN UKRAINE**

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ABSTRACT

This paper examines the Act in Support of Ammunition Production (ASAP) – a regulation adopted by the European Union (EU) in July 2023 to boost the production capabilities of the EU defence industry with a view to supporting Ukraine in the war against Russia. The article explains the context in which the regulation was adopted, examines its content, and discusses its consequences for EU integration in the field of defence. At the same time, however, it also considers some critical aspects of ASAP, highlighting the limitations of the regulation approved by the European Parliament and the Council – particularly when compared with the original proposal of the European Commission. As the paper argues, the ASAP regulation endeavours to support the capacity of the EU defence industry to live up to the challenges posed by the war in Ukraine, funding with EU money ammunitions' production and procurement. At the same time, ASAP also positions the EU to address in a supranational way a more threatening geo-strategic environment. From this point of view, therefore, the ASAP is a step in the direction of establishing a European defence union, seen both as a combination of military capability and industrial capacity. Nevertheless, ASAP falls well short of an EU equivalent of the United States' Defence Production Act, which suggests that further steps are needed towards the establishment of a real EU defence union. Yet, as the war in Ukraine turns into an ongoing conflict of attrition, the article posits that such a union would be needed – asap.

Keywords: ammunition, ASAP, CFSP, CSDP, EU defence union, EU industrial policy, Ukraine.

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1. Introduction • 2. The Context • 3. The Content • 4. The Consequences • 5. The Critical Aspects • 6. Conclusion

1. Introduction

In early summer 2023 the European Parliament (EP) and the Council of the European Union (EU) have approved the Act on supporting ammunition production (ASAP), which was published on the EU official journal as Regulation (EU) 2023/1525 on 20 July 2023.¹ The ASAP is an important component of a wide-ranging EU response to the war in Ukraine, which began when Russia illegally invaded its sovereign neighbour in February 2022. The core purpose of the ASAP is to ramp up production capabilities of the EU defence industry. In a novel foray in the field of industrial defence, the EU will accelerate the delivery of ground-to-ground and artillery ammunitions, as well as missiles, which are needed by Ukraine on the battlefield, funding for the first time ever with EU money ammunitions' production and procurement. Given the amount of shells which are shot daily by Ukraine and its opponent, in the most high-intensity military conflict in the European continent since the end of World War II (WWII),² a particular urgency surrounds this new EU defence production effort. Hence the acronym of the new regulation, which reveals the EU's ambition to replenish the Ukrainian stockpiles -- as soon as possible.

The purpose of this article is to examine the ASAP, as adopted by the EU co-legislator, but also to reflect more broadly at its implications for the EU defence capabilities. The ASAP, in fact, is the latest piece of the puzzle of an ever more comprehensive EU response to the return of war on the European continent.³ As a growing body of literature has pointed out, the war in Ukraine has profoundly transformed the EU, leading to unprecedented advances in the field of Common Foreign and Security Policy (CFSP), Common Security and Defence Policy (CSDP) -- but also energy, with the phasing out of Russian fossil fuels, and asylum and migration, with the first ever deployment of the Temporary Protection Directive. Moreover, in response to the war the EU has rolled out several new financial instruments to provide support to the Ukrainian government and military, which largely tracked the use of common debt experimented in response to Covid-19.⁴ At the same time, the war in Ukraine, has also led the EU to revive its enlargement process, by granting to Ukraine (and to Moldova) the status of candidate country, and to set up a new forum -- the European Political Community -- to deepen relations with the wider Europe.⁵

Yet, the war in Ukraine has also impacted on the EU industrial policy strategy, leading to a rethink of the role of public intervention in the economy in pursuance of geo-strategic priorities.⁶ In fact, the ASAP is closely connected to a European Defence Industry Reinforcement through common

¹ Regulation (EU) 2023/1525 of the European Parliament and of the Council of 20 July 2023 on supporting ammunition production (ASAP), OJ 2023 L 185/7 [hereinafter ASAP regulation]

² See Erlanger, "Ukraine Needs Shells, and Arms Makers Want Money. Enter the E.U.", *The New York Times*, 8 March 2023 <https://www.nytimes.com/2023/03/08/world/europe/ukraine-eu-shells-ammunition.html>

³ See Blockmans, Editorial, "The Birth of a Geopolitical EU", 27 EFAR 155 (2022).

⁴ See Fabbrini, "Funding the War in Ukraine: the European Peace Facility, the Macro-Financial Assistance Instrument and the Slow Rise of an EU Fiscal Capacity", 10 *Politics & Governance* (2023)

⁵ See Petrov and Hillion, Guest Editorial, " 'Accession through War' -- Ukraine's road to the EU", 59 *CMLRev.* 1289 (2022)

⁶ See Editorial Comments, "Paying for the EU's Industry Policy", 60 *CMLRev.* 617 (2023)

Procurement Act (EDIRPA), which has also been approved by the EP and the Council of the EU in early summer 2023.⁷ Moreover, the ASAP relates to other recent legislative priorities of the European Commission, including the Chips Act, and the Critical Raw Materials Act, which have all been designed to increase the resilience of EU supply chains, to reduce foreign dependences, and to adjust to the reality of the new, selective, globalization.⁸ Along the lines of this new European economic security strategy,⁹ the ASAP regulation endeavours to support the capacity of the EU defence industry to live up to the challenges posed by the war in Ukraine, while also positioning the EU to address in a supranational way a more threatening geo-strategic environment. From this point of view, therefore, the ASAP is a step in the direction of establishing a European defence union, seen both as a combination of military capability and industrial capacity.

Nevertheless, as this article maintains, the ASAP cannot be equated to the EU equivalent of the United States (US) Defense Production Act.¹⁰ Admittedly, a comparison with the US military industrial complex may seem far-fetched. Yet, the Defense Production Act is not only the gold standard in the field, but also a model that arguably the Commission considered in its proposal. With that said, ASAP falls short of such comparison for several reasons. To begin with, the funding for ASAP charged on the EU budget is remarkably limited – only 500m€ for two years. Moreover, the final ASAP regulation has dropped some of the ambitions of the original Commission proposal, including the power to compel private companies to produce by priority specific defence equipment – a hallmark of the US Defence Production Act. Otherwise, the ASAP is affected by some broader structural limitations of the EU’s power in CFSP, CSDP, industry policy and fiscal resources. The war in Ukraine has reinvigorated the leading role of the North Atlantic Treaty Organization (NATO) as the primary security architecture for the European continent, a pattern visible in the decision of Finland and Sweden to join the transatlantic defence alliance.¹¹ In this framework therefore ASAP constitutes a step towards strengthening the EU defence union. However, if the EU wants to be serious about its defence, given the ongoing conflict and the uncertainties about future US commitment, new and more ambitious EU law and policy initiatives would be much needed.

As such, this paper is structured as follows. Section 2 lays out the context of the ASAP regulation, explaining the political and military background to its adoption. Section 3 examines the content of regulation (EU) 2023/1525 detailing its main features. Section 4 discusses the consequences of ASAP, assessing the choice of legal basis and its significance for the role of the EU in defence industrial policy. Section 5, however, critically considers a number of weaknesses of the ASAP, particularly compared to the original Commission proposal, and highlights the unsettled status of the EU defence union.

⁷ See European Parliament press release, “EU defence: deal on joint procurement of defence products”, 28 June 2023

⁸ See James, “The new globalization and the economic consequences of Brexit” in Fabbrini (ed), *The Law & Politics of Brexit. Volume V. The Trade & Cooperation Agreement* (Oxford University Press 2024)

⁹ See European Commission & High Representative, *European economic security strategy*, 20 June 2023, JOIN(2023) 20 final

¹⁰ *Defence Production Act of 1950* (Pub. L. 81–774)

¹¹ See Bildt, “NATO’s Nordic Expansion”, *Foreign Affairs*, 26 April 2022.

2. The Context

The outburst of the war in Ukraine on 24 February 2022 was a shock for the EU and its member states. The return of large-scale land warfare on the European continent for the first time since the end of WWII forced the EU to face the reality of hard power in ways in which the wars in the Balkans in the 1990s and Russia's invasion of Georgia and Crimea in 2008 and 2014 had not done.¹² Since 24 February 2022, when Russia launched a massive military invasion of Ukraine, however, the EU has responded in unprecedented ways – with European integration in security, defence and beyond advancing more in the months since 2022 than it had during the prior three decades. As leaders of the EU institutions and heads of state and government of the 27 member states acknowledged in a special summit organized by the French Presidency of the Council of the EU in Versailles on 11 March 2022, “Russia’s war of aggression constitutes a tectonic shift in European history.”¹³ To face this changing geo-political scenario, therefore, the EU “decided to take more responsibility for our security and take further more decisive steps towards building our European sovereignty”¹⁴ – along three key dimensions, namely: “a) bolstering our defence capabilities; b) reducing our energy dependencies; and c) building a more robust economic base.”¹⁵

In the field of CFSP/CSDP, in particular, the EU rolled out a series of ground-breaking measures. To begin with, the EU approved a strategic compass designed to outline a united foreign policy and security strategy,¹⁶ and deepened its partnership with NATO.¹⁷ Moreover, the EU approved a dozen sanctions packages (and counting) designed to financially target President Vladimir Putin and his inner circle of oligarchs, politically deter Russia, and economically weaken its ability to continue the illegal war of aggression. At the same time, the EU decided for the first time ever to mobilize the European Peace Facility (EPF)¹⁸ – a novel financial instrument established in connection with the new EU multi-annual budget – to provide financial support to the Ukrainian military, including funding for the purchase of lethal weapons. Furthermore, the EU also activated a Military Assistance Mission, with the aim to train Ukrainian army officers to use the advanced weapons provided by European countries.¹⁹

In particular, as the conflict in Ukraine continued, the EPF emerged as a leading tool in the EU defence strategy. In February 2022, the Council quickly approved a Decision on assistance

¹² Statement by the HR/VP Josep Borrell, EEAS, 27 February 2022.

¹³ Informal meeting of the Heads of State or Government, Versailles Declaration, 10-11 March 2022, para 6.

¹⁴ Ibid para 7

¹⁵ Ibid

¹⁶ See Council of the EU, ‘A strategic compass for security and defence - For a European Union that protects its citizens, values and interests and contributes to international peace and security’, 21 March 2022, Doc. 7371/22.

¹⁷ See also Joint Declaration on EU-NATO Cooperation, 10 January 2023.

¹⁸ Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility and repealing Decision (CFSP) 2015/528, OJ 2021 L 102/14 [hereinafter EPF Decision]

¹⁹ 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, OJ 2022 L 294/25

measure for the supply to the Ukrainian armed forces of military equipment.²⁰ The Decision empowered the High Representative of the EU for Foreign Affairs and Security (HR) to implement the measure,²¹ making arrangements with the beneficiary, including ensuring compliance with international human rights law and humanitarian law,²² and foresaw a disbursement of 450m€. ²³ This amount was subsequently doubled in March 2022,²⁴ and tripled in April 2022 to a total of 1.5bn€. ²⁵ Subsequently, EPF funding to support to the Ukrainian military were further tapped in May 2022,²⁶ and July 2022,²⁷ bringing the total size of support to 3.1bn€. This, combined with other EPF expenditures towards other third countries carried out in 2022, largely depleted in a single year a budget that had been designed for a seven-year timeframe. As a result, the Council decided in December 2022 for a 2bn€ increase in the EPF for 2023,²⁸ and in June 2023, the Council agreed to a further 3.5bn€ top-up of the EPF, increasing its size to 12bn€. ²⁹

Nevertheless, the war quickly exposed also the limited military capabilities and dwindling arsenals of the EU member states – a process caused by two interrelated factors. On the one hand, under the post-Cold War peace dividend, member states had consistently reduced their defence spending. In fact, this had long been a matter of complaint by the US: while in 2014, following Russia’s illegal invasion and annexation of Crimea, NATO had set a target of 2% of GDP national defence spending on the military,³⁰ European countries had largely failed to abide by this rule.³¹ On the other hand, uncoordinated national military expenditures had led to duplication and waste – a dynamic often called the cost of non-Europe in defence.³² As requested by the Versailles

²⁰ See Council Decision (CFSP) 2022/338 of 28 February 2022 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, OJ 2022 L 60/1.

²¹ Ibid., Article 4

²² Ibid., Article 3

²³ Ibid., Article 2

²⁴ See Council Decision (CFSP) 2022/471 of 23 March 2022 amending Decision (CFSP) 2022/338 of 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, OJ 2022 L 96/43.

²⁵ See 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, OJ 2022 L 117/34

²⁶ See Council Decision (CFSP) 2022/809 of 23 May 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, OJ 2022 L 145/40

²⁷ See Council Decision (CFSP) 2022/1285 of 21 July 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, OJ 2022 L 195/93

²⁸ Council Decision (CFSP) 2023/577 of 13 March 2023 amending Decision (CFSP) 2021/509 establishing a European Peace Facility, OJ 2023 L 75/23

²⁹ Council of the EU press release, “European Peace Facility: Council agrees on second top-up of the overall financial ceiling by 3.5 billion”, 26 June 2023

³⁰ See Summit Declaration Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Wales, 5 September 2014, para 14.

³¹ See Fabbrini, “Do NATO Obligations Trump European Budgetary Constraints?” 9 Harvard National Security Journal 121 (2018).

³² See Briani, “The Costs of Non-Europe in the Defence Field”, Centro Studi sul Federalismo and Istituto Affari Internazionali, April 2013; Ballester, “The Cost of Non-Europe in Common Security and Defence Policy”, European Parliament Research Service, December 2013; Del Monte et al., “Europe’s Two Trillion Euro Dividend: Mapping the Costs of Non-Europe 2019-2024”, European Parliament Research Service, April 2019.

Declaration,³³ on 18 May 2022 the European Commission and HR published a joint whitepaper on defence investment gap and way forward, where they outlined options to incentivize joint procurement of military equipment. The whitepaper was not intended in and of itself to redress the abovementioned investment gap. In fact, the Commission and the HR only proposed to set aside a dedicated 500m€ budget for the 2022-24 period.³⁴ Building on this policy document, on 19 July 2022 the Commission put forward a legislative proposal for an EDIRPA:³⁵ this short-term joint defence procurement instrument was designed to address the EU's most urgent and critical defence capability gaps and to incentivize the EU Member States to procure defence products jointly with a dedicated financial envelop of 500m€, to be drawn from the EU budget.

As the war increasingly turned into a high-intensity conflict of attrition, however, a specific need emerged to supply the Ukrainian army on the battlefield with ammunitions. On 20 March 2023, therefore, the Council of the EU approved a plan in three steps to secure the delivery and joint procurement of ammunition for Ukraine.³⁶ First, “[t]he Council call[ed] on Member States to urgently deliver ground-to-ground and artillery ammunition to Ukraine and, if requested, missiles”³⁷ Second, “The Council further call[ed] on Member States to jointly procure 155mm ammunition and, if requested, missiles for Ukraine in the fastest way possible before 30 September 2023”³⁸ Third, and finally, “The Council invite[d] the Commission to present concrete proposals to urgently support the ramp-up of manufacturing capacities of the European defence industry, secure supply chains, facilitate efficient procurement procedures, address shortfalls in production capacities and promote investments, including, where appropriate, mobilising the Union budget.”³⁹ On this basis, on 3 May 2023 the Commission put forward a proposal for an ASAP regulation,⁴⁰ as a complement to the EDIRPA. The ASAP was approved by the co-legislators at record speed, indeed much faster than the EDIRPA, and, as mentioned, entered into force on 20 July 2023.

3. The Content

The ASAP regulation is a relatively lean piece of EU legislation, comprising 24 articles, structured in five chapters. The preamble to the regulation recalls the historical setting in which ASAP was put forward, including the outburst of the war in Ukraine and the consequential decision taken by Heads of state and government in the Versailles summit of 11 March 2022 to “take further decisive steps towards building European sovereignty.”⁴¹ The preamble also explain the rationale for the

³³ Versailles Declaration (n _) para 11.

³⁴ See European Commission and High Representative Joint Communication on Defence Investment Gap Analysis and Way Forward, 18 May 2022, JOIN(2022)24 final, p 9-10.

³⁵ See European Commission proposal for a Regulation of the European Parliament and of the Council on establishing the European defence industry Reinforcement through common procurement Act, 19 July 2022, COM(2022) 349 final.

³⁶ Council of the EU, Doc. 7632/23, Annex: Speeding up the delivery and joint procurement of ammunition for Ukraine, 20 March 2023.

³⁷ Para 2

³⁸ Para 3

³⁹ Para 4

⁴⁰ European Commission proposal for a Regulation of the European Parliament and of the Council on establishing the Act in Support of Ammunition Production, 3 May 2023, COM(2023) 237 final

⁴¹ ASAP Regulation, Preamble, rec. 2

adoption of the ASAP, namely Ukraine’s pressing defence need of ground-to-ground and artillery ammunitions and missiles and the urgency to increase the production to replenish depleting national stocks.⁴² The preamble furthermore highlights “the specificities of the defence industry, where demand comes almost exclusively from Member States,”⁴³ clarifying that “the functioning of the defence industry sector does not follow the conventional rules and business models that govern more traditional markets.”⁴⁴ As such, the ASAP emphasizes how “additional [EU] industrial policy measures are necessary to ensure a rapid ramp-up of manufacturing capacities”⁴⁵ and stresses that EU “defence industry is a crucial contribution to the resilience and the security of the [EU].”⁴⁶

Article 1 of regulation states that the purpose of the ASAP is to “establish [...] a set of measures and [lay] down a budget aimed at urgently strengthening the responsiveness and ability of the European Defence Technological and Industrial Base (EDTIB) to ensure the timely availability and supply of [...] relevant defence products.” This overall purpose is further teased out in Article 4, which clarifies that “The objective of the Instrument is to foster the efficiency and competitiveness of the European Defence Technological and Industrial Base (EDTIB) to support the ramp-up of the production capacity and timely delivery of relevant defence products through industrial reinforcement.” To this end, Article 5 sets aside a budget of 500m€ in current prices, “for the period 25 July 2023 to 30 June 2025.” Indeed, as indicated in Article 24(2), “[t]his Regulation shall apply until 30 June 2025” – hence with a sunset. Nevertheless, pursuant to Articles 1(2) and 23, “[b]y 30 June 2024, the Commission shall draw up a report evaluating the implementation of the measures set out in this Regulation and their results, as well as the opportunity to extend their applicability and provide for their funding”⁴⁷ – hence leaving open the door to extend and expand the instrument’s funding. Moreover, as stated in Article 6, ASAP funding “shall be implemented in synergy with other [EU] programmes”, with the consequence that an action receiving funding under this regulation may also get support from other EU funding schemes, provided alternative contributions do not cover the same costs.

The substantive core of ASAP is enshrined in Article 8. This provision clarifies the eligible actions to be funded, and states that “[t]he Instrument shall provide financial support for actions addressing identified bottlenecks in production capacities and supply chains with a view to securing and accelerating the production of relevant defence products in order to ensure their effective supply and timely availability.”⁴⁸ The provision, in particular, lists a number of defence production activities, including the optimisation, expansion, modernisation, upgrading or repurposing of existing, or the establishment of new, production capacities, in relation to relevant defence products; the establishment of cross-border industrial partnerships; the testing and reconditioning of defence products; and the training, reskilling or upskilling of personnel. At the same time, Article 8(4) prohibits funder under ASAP for “actions related to the production of

⁴² Ibid rec. 4

⁴³ Ibid rec. 20

⁴⁴ Ibid

⁴⁵ Ibid rec. 6

⁴⁶ Ibid. rec. 34

⁴⁷ Article 23(1)

⁴⁸ Article 8(2)

goods or delivery of services which are prohibited by applicable international law; [and] actions related to the production of lethal autonomous weapons.” From this point of view, for example, the ASAP could not be used to produce cluster munitions, which the US controversially decided to provide to Ukraine at its request,⁴⁹ but which are banned by an international convention.⁵⁰

From a management viewpoint, the regulation empowers the Commission to lay out a work-program,⁵¹ and directly award ASAP funding to relevant defence industries, based on their applications. According to Article 11(2), “The Commission shall, by means of implementing acts, award the funding under this Regulation.” Pursuant to Article 10(1) eligible entities include “public or privately owned [companies], which are established and have their executive management structures in the [EU] or in an associated country.” In fact, as stated in Article 3, ASAP is open also to members of the European Economic Area. As clarified in Article 11 the award of funding depends on several criteria, including: increase in production capacity in the EU; reduction of lead production time; elimination of sourcing and production bottlenecks; and resilience through cross-border cooperation. As stated in Article 9, the financing rate offered by the EU can fund “up to 35 % of the eligible costs of an eligible action related to the production capacities of relevant defence products, and up to 40 % of the eligible costs of an eligible action related to the production capacities of components and raw materials insofar as they are intended or used wholly for the production of relevant defence products”. However, this percentage can increase further “where applicants demonstrate a contribution to the creation of new cross-border cooperation” or “where applicants commit to prioritising, for the duration of the action, orders stemming from [...] the common procurement of relevant defence products by at least three Member States; [or] the procurement of relevant defence products [...] for Ukraine.”⁵²

Moreover, the regulation introduces further special provision to secure the security of supply. To ensure the timely availability of relevant defence products, Article 13 encourages member states to accelerate the permit granting process related to the planning, construction and operation of production facilities, transfer of inputs within the EU as well as qualification and certification of end products. To facilitate common procurement during the ammunition supply crisis, Article 14 of the regulation introduces a derogation to Directive 2009/81/EC on defence procurement,⁵³ allowing at least two EU member states to modify existing framework agreements to increase production. At the same time, “to leverage, de-risk and speed-up investments needed to increase manufacturing capacities” Article 15 authorizes the establishment of a rump-up fund, which the Commission will manage.⁵⁴ The regulation then introduces final provisions on security of

⁴⁹ « Pourquoi la livraison d’armes à sous-munitions à l’Ukraine annoncée par Washington est controversée », *Le Monde*, 7 July 2023.

⁵⁰ Convention on Cluster Munitions (CCM)

⁵¹ ASAP regulation, Article 12

⁵² Article 9(2)

⁵³ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ 2009 L 216/76.

⁵⁴ ASAP regulation, Article 7(1)

information,⁵⁵ confidentiality,⁵⁶ data protection,⁵⁷ and publicity,⁵⁸ while also foreseeing standard audits mechanisms to protect the financial interests of the EU.⁵⁹

4. The Consequences

From an EU legal perspective, ASAP constitutes a significant development for CFSP/CSDP – both in formal and substantive terms. As Panos Koutrakos had explained in detail, the EU institutions, and especially the Commission, had long emphasized the structural and economic problems of the EU defence industries and endeavoured to enhance the capacity of the European defence technological and industrial base – but “for a long time, defence industries were considered to be entirely beyond the reach of EU law.”⁶⁰ In fact, a provision of the Treaties dating back to the early stages of European integration, now Article 346(1)(b) TFEU, seemed to exclude a role for the EU in this domain, by stating that “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.” However, through several important rulings, the Court of Justice of the EU (ECJ) eventually interpreted this provision strictly.⁶¹ This opened the door for greater EU involvement in the field of defence procurement, although legal commitments in the area of industrial integration proved difficult.⁶²

At the time of the Constitutional Treaty, EU member states agreed to set up an EU forum for coordinating their defence industrial policy and military procurement – going beyond purely international mechanisms such as the Organisation for Joint Armament Co-operation (OCCAR), established by a specific convention.⁶³ Nevertheless, member states did so in an intergovernmental fashion.⁶⁴ The centrepiece of this was the European Defence Agency (EDA), which was initially set up through a Council joint action,⁶⁵ and then kept by the Lisbon Treaty. According to Article 45 TEU, the EDA shall have as its task among others to “contribute to identifying the Member States military capability objectives [...to] support defence technology research [...and to] strengthening the industrial and technological base of the defence sector”. The EDA, in particular, launched in 2017 a process known as the Coordinated Annual Review on Defence (CARD), which allows member states to gain a better view of national investment in defence, to coordinate defence procurement, and develop opportunities for cooperation.

⁵⁵ Article 17

⁵⁶ Article 18

⁵⁷ Article 19

⁵⁸ Article 22

⁵⁹ Articles 20 and 21

⁶⁰ Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press 2013) 252

⁶¹ Case C-414/97 *Commission v. Spain* [1999] ECR I-5585; Case C-337/05 *Commission v. Italy* [2008] ECR I-2173; Case C-157/06 *Commission v. Italy* [2008] ECR I-7313.

⁶² Blockmans, “The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?”. 55 *CMLRev* 1785 (2018).

⁶³ Convention on the Establishment of the Organization for Joint Armament Cooperation

⁶⁴ Trybus, “The new European Defence Agency: A contribution to a common European security and defence policy or a challenge to the Community acquis?”, 43 *CMLRev* 667 (2006)

⁶⁵ Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ 2004 L 245/17

With the explosion of the war in Ukraine, however, the European Commission seems to be taking a much more influential role in the area of defence industry – also through a more expansive use of the ‘supranational’ legal bases available in the Treaties. The legal bases of ASAP in fact are Articles 114 and 173(3) TFEU. While the former is the well-known EU internal market legal basis, the latter is a provision dedicated to industrial policy. Specifically, Article 173(1) states that “The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist” and clarify that “in accordance with a system of open and competitive markets” they shall inter alia “speed[] up the adjustment of industry to structural changes; encourag[e] an environment favourable to initiative and to the development of undertakings [... and] foster[] better exploitation of the industrial potential of policies of innovation, research and technological development.” According to Article 173(3), then, “The Union shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties.” Nevertheless, pursuant to the same provision, the EP and the Council, acting in accordance with the ordinary legislative procedure, hence with a full involvement of the EP in law-making, “may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1.”

Traditionally, Article 173 TFEU – which is the sole provision of Title XVII of Part III of the TFEU, named “Industry” – had been regarded as a marginal legal basis for EU action. In fact, while the clause – which was originally introduced by the Treaty of Maastricht – brought industrial policy under EU competences, it clearly left the dominant role in this field to the member states. According to Article 173(2) “The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action.” The Commission can establish guidelines, and organize the exchange of best practices, in line with the open method of coordination. However, Article 6 point (b) TFEU explicitly indicates “industry” as a policy area where the EU “shall have competence to carry out actions to support, coordinate or supplement the action of the Member States”. This means, pursuant to Article 2(5) TFEU, that the EU shall thereby not “supersede[]” the member states’ competence in this area. Moreover, Article 173(3) specifically “exclude[s] any harmonisation of the laws and regulations of the Member States.” Finally, pursuant to Article 173(3), final paragraph, “[t]his Title shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition or contains tax provisions or provisions relating to the rights and interests of employed persons.”

Article 173(3) TFEU had been used by the EU, together with Article 175 TFEU on cohesion policy, as the legal basis for the adoption of several economic stimulus programmes, such as the 2015 European Fund for Strategic Investment,⁶⁶ and the 2021 InvestEU programme.⁶⁷ In the field of defence industrial development, Article 173 TFEU had also been used before the war in Ukraine for some early common initiatives – but these were essentially designed to fund defence-related research & development (R&D). In particular, Article 173(3) TFEU was the sole legal basis for the approval in 2018 of a regulation

⁶⁶ Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 — the European Fund for Strategic Investments OJ 2015 L 169/1

⁶⁷ Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017 OJ 2021 L 107/30

establishing the European Defence Industrial Development Programme (EDIDP) aiming at supporting the competitiveness and innovation capacity of the Union's defence industry with a two year budget of 500m€ for R&D.⁶⁸ Moreover, Article 173(3) was, jointly with other legal bases on research and technological development, the foundation to adopt in 2021 a regulation establishing the European Defence Fund (EDF),⁶⁹ as part of the EU Multi-Annual Financial Framework (MFF) 2021-2027. The EDF, repealed the EDIDP and set aside a seven-year budget of 7.9bn€ to “support collaborative research that could significantly boost the performance of future capabilities throughout the Union.”⁷⁰

Nevertheless, since the beginning of the war in Ukraine, Article 173(3) TFEU has arguably been used more frequently, and more aggressively. This provision is a legal basis for ASAP, as well as for EDIRPA, and the Chips Act. And ASAP goes beyond simple R&D by specifically funding with EU money ammunitions' production and procurement. This development mirrors to some extent what happened in the response to the pandemic: as Bruno de Witte pointed out, legal bases that “had originally (after their inclusion in the Treaty text) been dormant [...were] rediscovered” to tackle the socio-economic consequences of Covid-19 and legally engineer an economic policy shift like the establishment of the Next Generation EU (NGEU).⁷¹ Moreover, this confirms that the system of competences in the TFEU is less clear cut than what may prima facie emerge from reading Article 2 TFEU, which categorizes EU competences as either exclusive, shared, coordinating, supporting or supplementing.⁷² In fact, the TFEU system of allocation of competences is very complex, particularly in the economic domain.⁷³ While Article 114 TFEU, the EU internal market competence has conventionally been constructed as a flexible legal basis,⁷⁴ if one considers the entirety of the Treaties' provisions one can find support for the view that the EU has significant powers to take legislative action in the field of economic policy lato sensu.⁷⁵ As a result, the EU law making institutions have the ability – subject to the principles of subsidiarity and proportionality⁷⁶ – to adjust to changing circumstances and act when necessary.

From a substantive point of view, therefore, the adoption of ASAP aligns with the EU effort to enhance its strategic autonomy – a process which began before the war in Ukraine but was accelerated by it.⁷⁷ As Frank Hoffmeister has recently pointed out, strategic autonomy has driven the development of a number of new EU policy tools in the field of external trade relations, and CFSP⁷⁸ –

⁶⁸ 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, OJ 2020 L 200/30

⁶⁹ 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, OJ 2021 L 170/149

⁷⁰ Ibid Article 3(2)(a)

⁷¹ De Witte, ‘The European Union’s Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift’ 58 CMLRev 635, 653(2021)

⁷² See Tridimas, “Competence After Lisbon: The Elusive Search for Bright Lines” in Ashiagbor et al (eds), *The European Union after the Lisbon Treaty* (Cambridge University Press 2012) 47

⁷³ See Claes and De Witte, “Competences”, in Blockmans and Lazowski (eds), *Research Handbook of EU Institutional Law* (Elgar 2016), 9.

⁷⁴ See Nic Shuibhne, *Regulating the Internal Market* (Elgar 2006).

⁷⁵ See Bieber, “The Allocation of Economic Policy Competences in the European Union”, in Azoulay (ed), *The Question of Competence in the European Union* (Oxford University Press 2015), 86.

⁷⁶ See Article 5 TFEU

⁷⁷ Verellen & Hofer, “The Unilateral Turn in EU Trade and Investment Policy” 28 EFAR 1 (2023).

⁷⁸ Hoffmeister, “Strategic Autonomy in the European Union’s External Relations Law” 60 CMLRev 667 (2023)

and arguably ASAP further advances the trend in CSDP. Needless to say, there is much academic and policy debate about the significance, and success of the push towards EU strategic autonomy. As political scientists have pointed out, the goal to increase the EU strategic autonomy is in tension with the EU's attempt to deepen transatlantic relations in a more threatening geo-strategic environment, and ultimately "the war underline[d] the dependence on US security guarantees."⁷⁹ Yet, the action taken in response to the war in Ukraine, and ASAP, reveal the effort by the EU to enhance its autonomous capabilities to act.⁸⁰

In fact, the adoption of ASAP is all the more significant because, as is well known, Article 41(2) TEU states that "expenditure arising from operations having military or defence implications" cannot be charged to the EU budget. To be clear, ASAP does not conflict with Article 41(2) TEU, since regulation (EU) 2023/1525 is focused on defence production, which entails the development of the capabilities, not defence operations, which rather concerns the deployment of these capabilities. However, through its internal market and industrial policy competences the EU has taken an inroad into the domain of military capabilities – which so far remained essentially a purview of the member states, either separately or jointly. In fact, ASAP goes beyond the purely intergovernmental mechanisms experimented within the framework of the EDA by providing a truly supranational solution to the defence industrial challenges posed by the war in Ukraine. Moreover, while regulation (EU) 2023/1525, in line with Article 42(2) TEU, proclaims that ASAP "should apply without prejudice to the specific character of the security and defence policy of certain member states,"⁸¹ by leveraging the EU budget to procure weapons it effectively positions the whole EU in the conflict. As such, ASAP contributes to strengthen the EU's role in building common defence capabilities, and can be seen as a positive step towards developing a real EU defence union, as envisaged by Article 42(2) TEU.

5. The Critical Aspects

Despite the positive features of the ASAP discussed in the prior section, however, the regulation presents a number of weaknesses – which are worth eviscerating. To begin with, and most obviously, the ASAP budget is fairly negligible – only 500m€ for 2 years, which amounts to 0,04% of the 1074bn€ MFF 2021-2027 – or even less, 0.02% if one considers also the separate 750bn€ of the NGEU, which is on top of the MFF. Needless to say, this figure is very small – even when accounting also for additional EU expenditures on defence industrial production, including the 500m€ EDIRPA, and the 7.9bn€ EDF. Admittedly, the EU has spent a larger amount of resources to support Ukraine, including the 12bn€ EPF, and a 18bn€ Macro-Financial Assistance+ Facility for Ukraine 2023, which the Commission proposed to raise to a 50bn€ Ukraine Facility for 2024-7. However, these figures pale when compared – not only to the defence spending of the main European security provider, a.k.a. the US⁸² – but also

⁷⁹ Helwig, "EU Strategic Autonomy after the Russian Invasion of Ukraine: Europe's Capacity to Act in Times of War", 61 JCMS 1 (2023). See also Special Issue, 27 EFAR 1-137 (2022)

⁸⁰ See EFAR 28/4 (2023)

⁸¹ ASAP regulation, recital 44

⁸² See Edmonson, 'Congress Passed an \$858 Billion Military Bill. Here is what's in it', *The New York Times*, 16 December 2022.

to the defence spending of EU member states, including France,⁸³ or Germany – which has recently set up an 100bn€ special fund to invest in re-armament.⁸⁴

Yet, beyond the matter of sheer size, the ASAP suffers also of another relevant shortcoming, which becomes apparent when the final regulation is compared with the original Commission proposal of May 2023. The latter included a proposed Article 14, named “Priority Rated Orders”, that allowed the Commission to compel a private company to produce military materiel needed for European security. Specifically, according to the proposed Article 14(2) the Commission could, “after the consultation of the Member State of establishment of the concerned undertaking and with its agreement, notify the latter of its intent to impose a priority rated order.” Moreover, under the proposed Article 14(3), “[w]here the notified undertaking declines the request [...] the Commission may, in agreement with the Member State of establishment of that undertaking [...] adopt an Implementing Act obliging the concerned undertakings to accept or perform the priority rated order, at a fair and reasonable price.” At the same time, the proposed Article 14(5) clarified that a priority rated order shall “take precedence over any performance obligation under private or public law.” Furthermore, to increase the coerciveness of the orders, the proposed Article 15 introduced penalties, stating that “[w]here an undertaking, intentionally or through gross negligence, does not comply with an obligation to prioritise priority rated orders pursuant to Article 14, the Commission may, by decision, where deemed necessary and proportionate, impose periodic penalty payments.”

Admittedly, the possibility for the Commission to compel a specific economic undertaking to produce on demand a defence related goods needed for national security, trumping any other pre-existing obligation of contract, constituted a severe interference with private property and the right to freedom of enterprise, not to mention the right to due process and defence. As such, consistently with the legal principles enshrined in the EU Charter of Fundamental Rights,⁸⁵ the Commission proposal introduced several guarantees. Ex ante, the proposed Article 14 set up an administrative procedure that entitled the undertaking to a due process, with the possibility to make its views heard, and provide explanations to object to the Commission request. Moreover, the proposed Article 16 enshrined a right to be heard for the imposition of fines and periodic penalty payments. At the same time, ex post, the Commission proposal introduced an unlimited right of judicial review. Specifically, the proposed Article 15(5) stated that the ECJ “shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or a periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.” Finally, to further assuage worries, the Commission proposal explicitly limited in Article 15(7) the above-mentioned powers to a period of three years.

Yet, with the guarantees of judicial review, the Commission proposal to introduce priority rated orders would have rendered ASAP way more impactful. In fact, from a comparative law perspective, the executive authority to compel production by private companies to ensure the supply of materials and services necessary for national defence constitutes the hallmark of the US Defence Production Act. As

⁸³ Loi n° 2023-703 du 1er août 2023 relative à la programmation militaire pour les années 2024 à 2030 et portant diverses dispositions intéressant la défense, JORF n°0177 du 2 août 2023

⁸⁴ Gesetz zur Finanzierung der Bundeswehr und zur Errichtung eines „Sondervermögens Bundeswehr“, vom 1. Juli 2022 (BGBl. I S. 1030)

⁸⁵ See also Fabbrini, *Fundamental Rights in Europe* (Oxford University Press 2014)

is well known, this statute, which the US Congress approved at the dawn of the Korean War, empowers the US President to inter alia prioritize contracts and orders which are necessary for the national defence, designate scarce materials whose hoarding is prohibited, and ration energy resources. In the landmark 1952 Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*,⁸⁶ the US Supreme Court developed a tripartite scheme to evaluate executive powers and held that “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”⁸⁷ As a result, the Defence Production Act has remained a powerful instrument in the US President toolbox to deal with issues of industrial capacity, and has been used as recently as during the Covid-19 pandemic, and now the war in Ukraine.

As pointed out in section 3, however, the final text of the ASAP regulation does not include any provision on “priority rate orders”. The co-legislator, therefore, entirely killed this part of the Commission’s original proposal. Unsurprisingly, opposition to this coercive feature of the ASAP emerged in the intergovernmental Council. Most likely, the above-mentioned measure smacked too much of a sovereign empowerment of the EU institutions in an area which is still regarded as being at the core of national sovereignty. But would this not be precisely the end goal, if we take seriously the woe of the Versailles Declaration to “building our European sovereignty”?⁸⁸ And is the objective of bolstering the EU defence capabilities realistic if the Commission’s power to steer the defence industry is deprived of any teeth, exclusively relying on market operators’ good will and cooperation, without any authority to direct them?

In sum, the ASAP reflects how the EU foreign affairs and security policy remains a work-in-progress, and the challenges of developing a full-fledged EU defence union.⁸⁹ In the aftermath of the Brexit referendum, the EU had taken a number of important steps to deepen defence cooperation, including the launch of the Permanent Structured Cooperation on Defence (PESCO),⁹⁰ as allowed by Article 42(6) TEU; the authorization of PESCO operational projects;⁹¹ and the establishment of an operational planning and conduct capability infrastructure designed to oversee common security and defence policy missions and operations.⁹² Nevertheless, the EP had more ambitiously called for the creation of a real EU Defence Union, underpinned by strong and modern military capabilities.⁹³ In fact, in the aftermath of the Russian invasion of Ukraine, the EP has called for a reinforcement of the EU capacity to act in a more challenging geo-political context,⁹⁴ and underlined “the urgent need to establish a

⁸⁶ 343 U.S. 579 (1952)

⁸⁷ Ibid at 635 (Jackson, J., concurring)

⁸⁸ Versailles Declaration (n), para. 7

⁸⁹ See also Wessel, “Common Foreign, Security and Defence Policy”, in Wessel & Larik (eds), *EU External Relations Law* (Hart 2020)

⁹⁰ Council Decision (CFSP) 2017/2315 of 11 December 2017 Establishing Permanent Structured Cooperation (PESCO) and Determining the List of Participating Member States, OJ 2017 L 331/57.

⁹¹ Council Decision (CFSP) 2018/340 of 6 March 2018 establishing the list of projects to be developed under PESCO, OJ 2018 L65/24.

⁹² Council of the EU Conclusions, On Progress in Implementing the EU Global Strategy in the Area of Security and Defence, Annex – Concept Note: Operational Planning and Conduct Capabilities for CSDP Missions and Operations, 6 March 2017, Doc. 110/17.

⁹³ European Parliament Resolution of 22 November 2016 on the European Defence Union, P8_TA(2016)0435.

⁹⁴ See European Parliament resolution of 19 May 2022 on the social and economic consequences for the EU of the Russian war in Ukraine -- reinforcing the EU’s capacity to act, P9_TA(2022)0219.

truly European defence equipment market”, with increased financial support from the EU budget.⁹⁵ To get there, however, further steps are needed, including a significant increase in funding for single EU defence industrial production and procurement, and ultimately the creation of a real EU military force.⁹⁶

Indeed, while the pandemic pushed the EU to develop a centralized fiscal capacity,⁹⁷ in the form of NGEU, the war in Ukraine arguably has not yet led the EU to develop unified military capabilities. Rather, as mentioned, NATO has been strengthened as the preeminent organization for the security of Europe. From an international relations perspective, the decision by Finland and Sweden to abandon their military neutrality dwarfed in importance e.g. the decision by Denmark to renounce its output on CSDP. As a matter of fact, NATO is backed by the US military commitment – which makes the mutual defence clause of Article V NATO Treaty credible. At the moment, instead, no similar credibility underpins the EU’s mutual defence clause, Article 42(7) TEU – and this is precisely because of the lack of common EU military capabilities and deterrence. Yet, with the war in Ukraine showing no sign of abating, and with future uncertainties about the US commitment to European security,⁹⁸ especially in view of the elections of 2024, the EU should more confidently address the question of the defence of the European continent.

6. Conclusion

This article has examined ASAP – a new regulation adopted by the EP and the Council to boost the production and procurement of ammunitions and missiles with the aim to support Ukraine in the war against Russia. ASAP is the latest piece in a wide-ranging EU response to the war in Ukraine, and pushes the EU into a new terrain, that of industrial defence policy. In particular, through a constructive use of supranational legal bases in the Treaties, ASAP has attributed to the Commission the authority to use resources from the EU budget to fund the industrial production of ammunitions and missiles urgently needed by Ukraine, thus helping to strengthen the EU’s role in developing common defence capabilities. Yet, the EU’s involvement in the military industrial complex remains limited, as ASAP suffers from a number of weaknesses, including a very tiny 500m€ bi-annual budget. Moreover, contrary to the original Commission proposal, the co-legislator have ditched the power for the Commission to issue priority rated order, compelling defence industries to produce specific defence goods on demand. From this point of view, therefore, ASAP cannot be regarded as the EU’s equivalent of the US Defence Production Act, a landmark piece of legislation which gives wide authority to the US executive to command the production of materiel needed for the national defence. This state of affairs is hardly surprising, considering the constraints on the EU defence policy. Nevertheless, it challenges the declared EU aspirations to establish a form of European sovereignty, and may be insufficient in light of the ongoing war in Ukraine, and uncertainties about future US commitment. Beyond ASAP, the EU therefore needs a defence union – asap.

⁹⁵ European Parliament resolution of 18 January 2023 on the implementation of the common security and defence policy – annual report 2022, P9_TA(2023)0010, para 34

⁹⁶ See further on this Moro, *Verso la difesa europea* (Il Mulino 2018)

⁹⁷ Fabbrini, *EU Fiscal Capacity: Legal Integration after Covid-19 and the War in Ukraine* (Oxford University Press 2022).

⁹⁸ Engelbrekt, “Beyond Burdensharing and European Strategic Autonomy: Rebuilding Transatlantic Security after the Ukraine War”, 27 EFAR 383 (2022).

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