

# DEVELOPING THE EU LEGAL FRAMEWORK FOR THE DEFENCE INDUSTRY



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In the wake of a changing global security environment and recent conflicts in Europe, it has become imperative to establish a comprehensive and ambitious strategy for developing defence capacities and defence industries within the European Union (EU) and its Member States. In the recent decades, global military powers have augmented their defence budgets at a much higher rate than Europe. For example, between 1999 and 2021, EU's combined defence spending increased by 19.7%, compared to 65.7%, 292% and 592% in the United States, Russia and China, respectively.<sup>1</sup> Faced with new security threats, EU Heads of State or Government reinforced their commitment to bolstering European defence capabilities.<sup>2</sup> This includes closer cooperation at the EU level and developing domestic defence capabilities. By increasing their military capacities and building a robust domestic defence industry, EU Member States can strengthen their overall level of security, resilience, and defence capabilities, aiming for greater self-sufficiency and independence from external security providers.

1 Data from the European Commission, citing the Stockholm International Peace Research Institute (SIPRI), see: European Commission, High Representative of the EU for Foreign Affairs and Security Policy, Joint Communication on the Defence Investment Gaps Analysis and Way Forward, 18 May 2022, JOIN (2022) 24, para. 2.

2 The EU Heads of State or Government during the meeting in Versailles in March 2022 committed to bolstering European defence capabilities by 1) increasing defence expenditures; 2) enhancing cooperation through joint projects; 3) addressing shortfalls and meeting capability objectives; 4) boosting innovation, including through civil/military synergies; and 5) strengthening and developing the EU defence industry, including SMEs, see: European Commission, High Representative of the EU for Foreign Affairs and Security Policy, Joint Communication on the Defence Investment Gaps Analysis and Way Forward, 18 May 2022, JOIN (2022) 24.

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From the outset, the legal framework of European integration, which led to the creation of the EU, has been founded on pacifist premises, aiming to prevent future full-scale armed conflict through economic cooperation among *peace-loving states*.<sup>3</sup> Nevertheless, global security challenges in the second and third decades of the 21<sup>st</sup> century have intensified the need for a careful review of the *acquis unionaire* and its adaptation to new circumstances, so that the EU legal framework and its integration model can create conditions conducive to the development of European and national military industries. However, developing the arms industry raises several legal concerns across various areas of law. Some of these concerns will be explored in this book, focusing specifically on international and EU laws and, to a lesser extent, the domestic legal frameworks of Member States. The scope of legal analysis associated with defence industrial development and the strengthening of the EU's defence dimension extends beyond the legal framework of the Common Security and Defence Policy (CSDP). It involves the legal regime governing international trade and investment and includes legal regulations concerning a wide range of innovative military technologies.

This book has a two-fold objective. First, the authors aim to identify and explore applicable legal framework; second, they seek to identify the uncharted areas and legal challenges that need to be addressed to enable the development of the European defence industry. Several authors have attempted to suggest potential improvement directions for European and domestic lawmakers alike (*de lege ferenda* proposals). However, at the current stage of research, these proposals can only be considered as a springboard for further debate.

This book is a collaboration between scholars representing various areas of science, such as law, military, security studies and engineering. The editors operated under the assumption that the research topic requires an interdisciplinary approach. While drafting the research concept, the editors faced the challenge of harmonising various methodological approaches employed by scholars from diverse fields of science. They accomplished this task with varying results in different parts of the book, and it is left to the reader to evaluate the final outcome.

The book is divided into five parts, and its structure is as follows. Part I (*Policy and Technological Background*) provides insights into the following policy issues: the EU's common defence and security policy in light of national defence policies; challenges and perspectives for the development of the defence industry in EU and Member States; and challenges and breakthroughs in military innovation. Part II (*The CSDP and Law*) presents an overview of the legal environment surrounding the CSDP, while Part III (*Legal Aspects of Investment and Financing*) outlines the legal

<sup>3</sup> The authors refer to the term used in the Preamble of the Charter of the United Nations, signed on 26 June 1945 in San Francisco. The EU has become a defence alliance, in addition to an organisation of economic and social integration with the adoption of the Lisbon Treaty, an expression of which was the inclusion of the mutual defence clause in the new Article 42, para. 7 of the Treaty on European Union.

framework governing defence industrial development, as well as investment and financing aspects. Part IV (*Fields of Innovations and their Legal Regimes*) offers a balanced overview of, on the one hand, the legal aspects associated with certain military innovation areas of crucial importance to the defence industry, and on the other hand, insights from their practical application. Part V (*Critical Infrastructure Protection*) addresses issues related to the protection of critical infrastructure in the EU.

In her contribution, *Anna Molnár*<sup>4</sup> discusses the institutional framework of the CSDP, one of the EU's youngest policy areas, considering the historical background of European integration in the fields of foreign, security, and defence policies. Molnár focuses on European strategic autonomy and European Defence Union, while exploring how this is reflected (or not) in the domestic defence policies of EU Member States.

*Tamás Csiki Varga*<sup>5</sup> presents the dynamics of the changing European security environment and threat perceptions, and provides an assessment of European military and defence industrial capabilities. Varga identifies capacity gaps and evaluates EU policy responses, including improved defence investments, to elucidate the demand–supply equation of the EU defence industry in 2024. He summarises his evaluation through an illustrative SWOT analysis of the EU's Defence Technological and Industrial Base (EDTIB).

*Andrzej Pawlikowski*<sup>6</sup> explores the evolving landscape of military technologies in EU Member States and compares these with recent military developments in the United States, China and Russia. Pawlikowski examines the potential implications of emerging military technologies for warfare, from the tactical intricacies of military operations to ethical considerations. He formulates recommendations for policymakers and defence experts in EU Member States to ensure that emerging military technologies contribute to global peace, stability and shared prosperity.

*Krzysztof Masło*<sup>7</sup> outlines the legal framework of the Common Foreign and Security Policy (CFSP), anchored in both primary and secondary EU law. Masło comprehensively examines EU competence in the field of CFSP, including civilian and military crisis management, CFSP's institutional structure, and decision-making processes. He addresses the issue of sovereignty of EU Member States within the CFSP context, and examines the legal foundations and historical background of the strategic partnership between the CFSP and the North Atlantic Treaty Organization.

*Bálint Kovács*<sup>8</sup> analyses EU laws relevant to improving common defence capabilities by encouraging industrial development. Kovács assesses their practical application and implementation by EU Member States and highlights the challenges

4 Molnár, 2024.

5 Csiki Varga, 2024.

6 Pawlikowski, 2024.

7 Masło, 2024.

8 Kovács, 2024.

facing the European Defence Equipment Market. He evaluates whether classic principles of competition and market logic are conducive to creating an improved EDTIB, a suitable defence industry, and a strong defence force in the EU.

*Jan Mazal* and *János Székely* focus on dual-use technologies on contemporary battlefields. Mazal<sup>9</sup> explores state-of-the-art dual-use innovations and addresses the complex relationship between cutting-edge military technologies and their dual-use potential. Driven by the assumption that future conflicts will increasingly become hybrid and integrated with the civilian domain, he explores the benefits and potential future trajectories of interconnected technological developments and their various (social, psychological, cultural, ethical, political, and environmental) implications for military and civilian domains alike. Székely<sup>10</sup> analyses major regulatory frameworks applicable to dual-use technologies, and selected emerging and disruptive technologies, primarily under the Wassenaar Arrangement, as well as export control regimes of the EU, United States and China. Székely explores the implications of regulations on dual-use technology transfer for international trade and business in the context of economic policy securitisation. He highlights the risks and challenging legislative gaps associated with dual-use governance in a field dominated by economic and military rivalry between global technological powers.

*Iztok Prezelj* and *Marko Jurić* focus on the use of Artificial Intelligence (AI) in contemporary military conflicts. Prezelj<sup>11</sup> demonstrates the broad spectrum of potential or actual use of AI by the armed forces and addresses related challenges and risks. He identifies the main geopolitical and strategic concerns surrounding the development and use of AI systems, particularly regarding implications for the balance of global power, and examines the approach of EU Member States to AI-enabled defence innovation. Jurić<sup>12</sup> analyses whether the existing EU legal framework covers the use of AI in military and defence sectors. He discusses general legal regulations on AI, with a closer analysis of the EU Artificial Intelligence Act, and examines the case law of the Court of Justice of the European Union (CJEU) to unveil its position on the applicability of EU law in the military context. He also explores the impact of EU data protection rules, primarily the General Data Protection Regulation (GDPR), on the use of data in AI activities within military and defence contexts, and identifies the challenges in the development and use of AI within the existing legal environment.

*Attila Horváth* and *Katarzyna Malinowska* examine the evolving landscape of military activities in outer space and the practical legal implications of rapid technological advancements in this area. Horváth<sup>13</sup> demonstrates that advances in technology and operations have outpaced the legal regime, endangering the peaceful and

9 Mazal, 2024.

10 Székely, 2024.

11 Prezelj, 2024.

12 Jurić, 2024.

13 Horváth, 2024.

sustainable long-term use of outer space. He raises several legal and sustainability concerns, connected but not limited to the delimitation of airspace and outer space, operations in the border region, sovereignty, and zoning of outer space related to spacecraft, as well as the operations of active spacecraft, the removal of inactive spacecraft and space debris. Malinowska<sup>14</sup> outlines the legal framework governing the military and defence use of outer space at international and national levels and explores the possible application of space law principles. She addresses the idealised vision of outer space as the common heritage of mankind for peaceful purposes in the wake of militarisation and weaponisation of space, as well as such critical issues as close-proximity operations, cyberattacks on space infrastructure, and anti-satellite weapons (ASAT) tests.

*Zvonko Trzun* and *Kaja Kowalczevska* address different aspects of the military's use of unmanned warfare. Trzun<sup>15</sup> provides an overview of the development and current capabilities of unmanned aerial vehicles (UAVs) and unmanned ground vehicles (UGVs) while elucidating the technical limitations and risks associated with their deployment, particularly in terms of reliability, targeting process, and excessive lethality. He highlights the lessons drawn from the 2022 Russo-Ukrainian War, and explores current trends in Europe for the acquisition of drones and robots. Kowalczevska<sup>16</sup> outlines the relevant legal regime and addresses the legal complexities surrounding the use of unmanned platforms under the UN Charter, the law of armed conflicts, international human rights, and international criminal laws. She particularly focuses on the legal review of weapons before deployment, the use of unmanned platforms beyond the theatre of active armed conflict, and contentious combat methods such as targeted killings and signature strikes.

*Barbara Kaczmarczyk* and *Miha Šepec* explore various aspects of cyberwarfare, indicating the pressing need for EU cooperation in cybersecurity. Kaczmarczyk<sup>17</sup> demonstrates the evolution of cyber threats, illustrating them with several case studies, such as the 2007 cyber-attack in Estonia and the 2010 Stuxnet attack. She examines the causes and effects of cyber-attacks, and presents their implications for national security, demonstrating how cyberspace has become a genuine battlefield. Meanwhile, Šepec<sup>18</sup> analyses international and EU legal frameworks relevant to cyberwarfare attacks and procedural measures of cooperation in criminal matters for the purpose of prosecuting cybercrimes. He assesses whether there is a need to amend existing EU legislation or adopt new EU instruments at the criminal material level to cyberwarfare.

*Stjepan Groš* and *Katarzyna Zombory* address hybrid threats and warfare and their inherent element: information warfare. Groš<sup>19</sup> explores the anatomy of infor-

<sup>14</sup> Malinowska, 2024.

<sup>15</sup> Trzun, 2024.

<sup>16</sup> Kowalczevska, 2024.

<sup>17</sup> Kaczmarczyk, 2024.

<sup>18</sup> Šepec, 2024.

<sup>19</sup> Groš, 2024.

mation operations and presents the tactics and techniques used by hybrid adversaries in military domains and information spaces. His analysis assumes that countering disinformation requires deep insight into the characteristics and dynamics of information operations; therefore, he also attempts to define parameters to identify different types of threat sources and threat actors. Zombory<sup>20</sup> performs a legal analysis of hybrid threats and warfare under international law and questions whether the use of hybrid hostilities is tantamount to the use of force and whether it triggers legal consequences related to the existence of armed conflict. She aims to establish the scope of lawful countermeasures available to affected states and outlines the EU policy and legal framework relevant to countering hybrid threats.

*Grzegorz Ociecek*<sup>21</sup> addresses the issue of critical infrastructure protection and demonstrates that it requires an interdisciplinary approach, combining perspectives from various disciplines, such as law, security studies, and social and public policy. He explores the concept of critical infrastructure and outlines the relevant international and EU legal frameworks, underpinned by the assumption that the protection of critical infrastructure is closely linked to public safety and counterterrorism.

The findings suggest that introducing a coherent, common legal framework conducive to the development of the EU defence industry may be challenging for several reasons. Years of underspending on defence have resulting in an accumulation of shortfalls in collective military inventories, reducing the industrial production capacity of EU Member States.<sup>22</sup> The varying economic interests and differing defence priorities of Member States do not create a favourable environment for adopting a common legal framework for military industrial development. This is especially true given the complexities in determining the nature and scope of the EU's competences in the areas of CFSP and CSDP, where the dynamics of European integration are shaped by the duality of intergovernmentalism and supranationalism.<sup>23</sup>

Regarding the research and development of new military technologies, it has been demonstrated that, technological innovations often outpace legal regulations.<sup>24</sup> Divergent state approaches and distinct combat strategies have resulted in a lack of unified, binding positions on the acquisition or development of certain military technologies, such as unmanned warfare, which hampers legislative processes within the EU.<sup>25</sup> Significant challenges in the development and use of new technologies in the military domain may arise from existing EU regulations, as in the case of AI and the EU legal regime governing the use of personal data. Current EU rules on data processing also apply to the military sector, and can seriously affect the ability of national military forces to process certain types of data.<sup>26</sup> Any proposed regulatory

20 Zombory, 2024.

21 Ociecek, 2024.

22 Csiki Varga, 2024; Balint Kovács, 2024.

23 Masło, 2024; Molnár, 2024.

24 See eg. Jurić, 2024; Székely, 2024; Malinowska, 2024; Kowalczevska, 2024.

25 Kowalczevska, 2024.

26 Jurić, 2024.

framework should be integrated into existing legal regimes.<sup>27</sup> While creating a legal regime governing military innovations, especially dual-use technologies, legislators must balance overly permissive and restrictive norms, even if this is likely to impact economic securitisation.<sup>28</sup> It is crucial to consider that new military technologies may raise not only legal but also serious ethical concerns; therefore, it is suggested that legal governance should be complemented by voluntary compliance and ethical standards.<sup>29</sup>

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<sup>27</sup> Prezelj, 2024.

<sup>28</sup> Székely, 2024.

<sup>29</sup> See e.g. Mazal, 2024; Prezelj, 2024; Trzun, 2024.



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