

# Contesting Defence Grants

## Legal Pathways Explained

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As announced in January, BLOMSTEIN is publishing a series of briefings introducing into European and German legal defence matters. In our last briefing, we gave an overview over the legal framework for joint procurements in the fields of defence and security.

This edition EU funding opportunities for defence and security projects and focuses specifically on the legal remedies available against grant allocation decisions in the context of EU defence funding.

The European Commission (*Commission*) just freed over €1 billion in 54 joint defence industrial projects through the European Defence Fund (*EDF*), supporting technological excellence in critical areas like cyber defence, air and naval combat, and CBRN defence. This funding round emphasizes the EU's commitment to enhancing strategic capabilities and fostering innovation across the European defence sector. The EDF is designed to provide the European defence sector with funds totaling EUR 8 billion for R&D projects for a seven-year period. In addition, the EU adopted the Act in Support of Ammunition Production (*ASAP*) in 2023 with the aim of increasing the production capability of the European defence industry (see also our briefing on the details of the ASAP). To achieve this, EUR 500 million of the EDF budget is being reallocated to fund capability building projects mostly through lump sum grants (*ASAP Grants*). The European Commission awards EDF and ASAP Grants by means of implementing acts following an examination procedure as set out in Regulation (EU) 2021/697 (EDF Regulation) and in Regulation (EU) 2023/1525 (ASAP Regulation) respectively. The Commission's decision to award EDF or ASAP Grants is informed by the guidance of a committee comprising representatives from the 27 Member States.

Companies securing an EDF or ASAP Grants may gain competitive advantages with the potential to significantly influence market dynamics in the sector. This raises important legal questions regarding potential remedies and recourse available to those who may be adversely affected or wish to challenge the grant allocation process. Complainants can challenge a decision by the Commission on the distribution of EU funds before the EU Courts. They may also seek recourse by way of an administrative review procedure with the Commission.

## Judicial redress

A company can challenge the Commission's decision to grant an award by filing an action for annulment at the General Court under Article 263(4), in conjunction with Article 256 (1) of the Treaty on the Functioning of the European Union (*TFEU*). This action must be initiated within two months following the Commission's decision. The hurdles for a successful appeal vary depending on whether the plaintiff is challenging a negative decision against him (refusal of funding), or a positive decision granted to a competitor.

- First, a company bringing an action for annulment must have **legal standing**. According to Article 263 (4) TFEU, the addressee of a legal act of the EU inherently possesses the right to legal action. Consequently, applicants for EDF or ASAP Grants who have been issued a refusal decision by the Commission are automatically granted legal standing. Conversely, a company seeking to challenge a Commission's award decision in favor of another company must prove that it is directly and individually affected by that decision (Article 263 (4) TFEU). This requires the plaintiff to demonstrate that due to certain personal characteristics or unique circumstances distinguishing it from others, it is individualized in a similar way to the direct addressee of the decision. The Court will likely find this requirement to be fulfilled for all applicants who apply for an EDF or ASAP Grant prior to the expiration of the respective deadline. This is because these applicants constitute a well-defined group that is distinct from the general public.
- Second, plaintiffs need to show that the Commission's decision is flawed based on the criteria in Article 263 (2) TFEU. This involves showing that the decision violates EU law including EU secondary law, such as regulations and directives. EU institutions granting awards from the EU budget, including ASAP and EDF grants, are held to respect Regulation 2018/1046 (Financial Regulation). According to the Financial Regulation, any decision to award a grant from the EU budget must be guided by general principles of EU law, such as the principles of equal treatment and transparency and follow certain procedural requirements. The EU institution issuing the grant must, for instance, publish a call for proposals specifying inter alia the eligibility, exclusion, selection and award criteria and the relevant supporting documents (Article 194 (1) Financial Regulation). In the case of ASAP Grants, the eligibility and award criteria are listed in Articles 10-11 of the ASAP Regulation. The award criteria along with their ranking are described in more detail in the ASAP Work Programme 2023-2025 published by the EU Commission on 18 October 2023. Failure to base the award decision on these criteria would constitute a violation of EU law within the meaning of Article 263 (2) TFEU.

If a plaintiff successfully proves an infringement of EU law, the **General Court will annul the Commission's decision to grant / refuse the award**, as per Article 264 TFEU. However, this does not lead to the plaintiff automatically receiving the respective grant as

the General Court does not have the authority to replace the Commission's decision with its own decision to award the grant to the plaintiff. Rather, the Commission, after the annulment, must reassess the case, taking into account the grounds for annulment pointed out by the Court. This involves adopting a new decision that remedies the errors identified by the Court. In the case of a previous rejection of the application this may – in exceptional cases – result in the new Commission's decision having to grant the award.

## **Administrative redress**

Before turning to the General Court, an applicant who has been refused EDF or ASAP funding may request the Commission to review and reconsider its decision within 30 days of receiving the rejection. This form of administrative redress is not expressly mentioned in the EU treaties but follows from the general principles of good administration, fairness, and transparency, as recognized in EU law and is regularly foreseen in EU funding programs. According to the Financial Regulation, the Commission as the issuing body is required to inform the addressees of a refusal decision about the conditions under which administrative redress is available. A review request with the Commission should clearly state the reasons why the applicant believes the Commission decision was incorrect, including any procedural irregularities, factual errors, manifest errors of assessment or abuse of powers. The Commission may then reconsider its decision or provide a more detailed explanation of its reasoning. Administrative and judicial procedures run in parallel, and complainants are generally free to choose the means of redress. It must be noted, however, that the two-month deadline for bringing an action before the Court is not suspended by lodging a complaint with the Commission.

EU funding is becoming increasingly important due to the considerable funding volumes involved. BLOMSTEIN's Defence Team will gladly advise you on the possibilities and procedures for applications and legal protection.

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