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WORKING PAPER

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From:	Presidency
To:	Friends of the Presidency Group on the European Defence Fund (EDF)
N° prev. doc.:	WK 10198 2018 INIT
Subject:	Presidency proposal for Article 10 (Eligible entities)

With a view to the FoP EDF meeting on 17 September, Delegations will find attached the updated Presidency proposal for Article 10 (Eligible entities).

The first column of the attached table reflects EDIDP text, whereas the second presents the updated Presidency proposal with all relevant changes with respect to the original EDIDP text marked in red for ease of reference.

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EDIDP text

1. Beneficiaries and subcontractors involved in the action shall be public or private undertakings established in the Union.
2. The infrastructure, facilities, assets and resources of the beneficiaries and subcontractors involved in the action which are used for the purposes of the actions funded under the Programme shall be located on the territory of the Union for the entire duration of the action, and their executive management structures shall be established in the Union.
3. For the purposes of the actions funded under the Programme, the beneficiaries and subcontractors involved in the action shall not be subject to control by a third country or by a third-country entity.
4. By derogation from paragraph 3 of this Article, and subject to Article 15(2), an undertaking established in the Union and controlled by a third country or by a third-country entity shall be eligible as a beneficiary or subcontractor involved in the action only if guarantees approved by the Member State in which it is established in accordance with its national procedures are made available to the Commission. Those guarantees may refer to the undertaking's executive management structure established in the Union. If deemed to be appropriate by the Member State in which the undertaking is established, those guarantees may also refer to specific governmental rights in the control over the undertaking.

The guarantees shall provide the assurances that the involvement in an action of such an undertaking would not contravene the security and defence interests of the Union and its Member States as established in the framework of the Common Foreign and Security Policy pursuant to Title V of the TEU, or the objectives set out in Article 3. The guarantees shall also comply with the provisions of Article 12. The guarantees shall in particular substantiate that, for the purpose of the action, measures are in place to ensure that:

- (a) control over the undertaking is not exercised in a manner that restrains or restricts its ability to carry out the action and to deliver results, that imposes restrictions concerning its infrastructure, facilities, assets, resources, intellectual property or know-how needed for the purpose of the action, or that undermines its capabilities and standards necessary to carry out the action;
- (b) access by a third country or by a third-country entity to sensitive information relating to the action is prevented and the employees or other persons involved in the action have national security clearances, where appropriate;
- (c) ownership of the intellectual property arising from, and the results of, the action remain within the beneficiary during and after completion of the action, are not subject to control or restriction by a third country or by a third-country entity, and are not exported outside the Union nor is access to them from outside the Union granted without the approval of the Member State in which the undertaking is established and in accordance with the objectives set out in Article 3.

If deemed to be appropriate by the Member State in which the undertaking is established, additional guarantees may be provided.

The Commission shall inform the committee referred to in Article 13 of any undertaking deemed to be eligible in accordance with this paragraph.

5. Where no competitive substitutes are readily available in the Union, beneficiaries and subcontractors involved in the action may use their assets, infrastructure, facilities and resources located or held outside the territory of Member States provided that that usage does not contravene the security and defence interests of the Union and its Member States, is consistent with the objectives of the Programme and is fully in line with Article 12.

The costs related to those activities shall not be eligible for funding under the Programme.

6. When carrying out an eligible action, beneficiaries and subcontractors involved in the action may also cooperate with undertakings established outside the territory of Member States or controlled by a third country or by a third-country entity, including by using the assets, infrastructure, facilities and resources of such undertakings, provided that this does not contravene the security and defence interests of the Union and its Member States. Such cooperation shall be consistent with the objectives set out in Article 3 and shall be fully in line with Article 12.

There shall be no unauthorised access by a third country or other third-country entity to classified information relating to the carrying out of the action and potential negative effects over security of supply of inputs critical to the action shall be avoided.

The costs related to those activities shall not be eligible for funding under the Programme.

7. Beneficiaries shall provide all relevant information necessary for the assessment of the eligibility criteria. In the event of a change during the carrying out of the action which might put into question the fulfilment of the eligibility criteria, the undertaking shall inform the Commission, which shall assess whether the eligibility criteria continue to be met and shall address the potential impact on the funding of the action.

8. For the purposes of this Article, subcontractors involved in the action refers to subcontractors with a direct contractual relationship to a beneficiary, other subcontractors to which at least 10 % of the total eligible cost of the action is allocated, as well as subcontractors which may require access to classified information in order to carry out the contract.

Proposed EDF text

1. Beneficiaries and subcontractors involved in the action shall be **legal entities** established in the Union **or in an associated country**.
2. The infrastructure, facilities, assets and resources of the beneficiaries and subcontractors involved in the action which are used for the purposes of the actions supported by the Fund shall be located on the territory of **a Member State or of an associated country** for the entire duration of the action, and their executive management structures shall be established in the Union **or in an associated country**.
3. For the purposes of the actions **supported by the Fund**, the beneficiaries and subcontractors involved in the action shall not be subject to control by a **non-associated** third country or by a **non-associated** third country entity.
4. By derogation from paragraph 3 of this Article, ~~and subject to Article 15(2)~~, a legal entity established in the Union **or in an associated country** and controlled by a **non-associated** third country or a **non-associated** third country entity shall be eligible as a beneficiary or subcontractor involved in the action only if guarantees approved **[where appropriate]** by the Member State **or the associated country** in which it is established, in accordance with its national procedures, are made available to the Commission. Those guarantees may refer to the **legal entity's** executive management structure established in the Union **or in an associated country**. If deemed to be appropriate by the Member State **or associated country** in which the **legal entity** is established, those guarantees may also refer to specific governmental rights in the control over the **legal entity**.

The guarantees shall provide the assurances that the involvement in an action of such a **legal entity** would not contravene the security and defence interests of the Union and its Member States as established in the framework of the Common Foreign and Security Policy pursuant to Title V of the TEU, or the objectives set out in Article 3. The guarantees shall also comply with the provisions of **Articles 22 and 25**. The guarantees shall in particular substantiate that, for the purpose of the action, measures are in place to ensure that:

- (a) control over the **legal entity** is not exercised in a manner that restrains or restricts its ability to carry out the action and to deliver results, that imposes restrictions concerning its infrastructure, facilities, assets, resources, intellectual property or know-how needed for the purpose of the action, or that undermines its capabilities and standards necessary to carry out the action;
- (b) access by a **non-associated** third country or by a non-associated third country entity to sensitive information relating to the action is prevented and the employees or other persons involved in the action have a national security clearances **issued by a Member State or an associated country**, where appropriate;
- (c) ownership of the intellectual property arising from, and the results of, the action remain within the beneficiary during and after completion of the action, are not subject to control or restriction by a **non-associated** third country or by a **non-associated** third country entity, and are not exported outside the Union or **outside associated countries**, nor is access to them from outside the Union or **outside associated countries** granted without the approval of the Member State or the **associated country** in which the **legal entity** is established and in accordance with the objectives set out in Article 3.

If deemed to be appropriate by the Member State **or the associated country** in which the **legal entity** is established, additional guarantees may be provided.

The Commission shall inform the committee referred to in **Article 28** of any **legal entity** deemed to be eligible in accordance with this paragraph.

5. Where no competitive substitutes are readily available in the Union **or in an associated country**, beneficiaries and subcontractors involved in the action may use their assets, infrastructure, facilities and resources located or held outside the territory of the **Union's** Member States **or associated countries** provided that that usage does not contravene the security and defence interests of the Union and its Member States, is consistent with the objectives **set out in Article 3** and is fully in line with **Article 28**.

The costs related to those activities shall not be eligible for **support by the Fund**.

6. When carrying out an eligible action, beneficiaries and subcontractors involved in the action may also cooperate with **legal entities** established outside the territory of the Member States **or of associated countries**, or controlled by a **non-associated** third country or by a **non-associated** third country entity, including by using the assets, infrastructure, facilities and resources of such **legal entities**, provided that this does not contravene the security and defence interests of the Union and its Member States. Such cooperation shall be consistent with the objectives set out in Article 3 and shall be fully in line with **Article 28**.

There shall be no unauthorised access by a **non-associated** third country or other **non-associated** third country entity to classified information relating to the carrying out of the action and potential negative effects over security of supply of inputs critical to the action shall be avoided.

The costs related to those activities shall not be eligible for **support by the Fund**.

7. Beneficiaries shall provide all relevant information necessary for the assessment of the eligibility criteria. In the event of a change during the carrying out of the action which might put into question the fulfilment of the eligibility criteria, the **[relevant] legal entity** shall inform the Commission, which shall assess whether these eligibility criteria and conditions continue to be met and shall address the potential impact on the funding of the action.

8. For the purposes of this Article, subcontractors involved in the action refers to subcontractors with a direct contractual relationship to a beneficiary, other subcontractors to which at least 10 % of the total eligible cost of the action is allocated, as well as subcontractors which may require access to classified information in order to carry out the contract, **[and which are not members of the consortium]**.