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**CONTRIBUTION**

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From:	German Delegation
To:	Friends of the Presidency Group on the European Defence Fund (EDF)
Subject:	DE comments on the Commission proposal for a Regulation establishing the European Defence Fund

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Delegations will find attached Germany's comments on the Commission proposal for a Regulation establishing the European Defence Fund.

## **Friends of the Presidency meeting on 20 July 2018**

### **Preliminary DEU comments on the proposal for a regulation establishing the European Defence Fund COM (2018) 476 final**

Following the meeting of the FoP on EDF on 20 July 2018 Germany hereby provides its comments and a first input in order to facilitate the necessary discussion:

#### Legal basis (page 4)

Referring to the legal basis mentioned Germany asks for an examination whether defence research might be implemented entirely outside Horizon Europe, implying that the proposal would not have to be based on Art 182 183, 184 and 188 TFEU, but only on Art. 173(3) TFEU.

#### **Proposal**

##### Art. 4 (Budget)

Scrutiny reservation. Decisions on the financial envelope of EDF can only be taken in the overall context of the next Multiannual Financial Framework.

##### Art. 7 (Ethics)

This provision should refer specifically to military ethics (this term is preferred to the term "defence ethics" since it is used more widely). It should ensure the protection of classified information involved in ethics procedures, and aim at transparency of the outcome of these procedures rather than the procedures as such. Moreover, this provision should expressly acknowledge that it is without prejudice to Member States' responsibility to review new weapon, means or method of warfare in accordance with Article 36 of Additional Protocol I to the Geneva Conventions of 1949.

### Art. 8(1) (Implementation)

With regard to the foreseen “implementation mode” we do face a significant change in wording: According to Art. 8(1), the Fund shall be implemented in direct management in accordance with the Financial regulation.

In the case of EDIDP regulation there was still a reference included, that “the Commission may entrust part of the implementation of the programme to entities referred to in Art 58 (1)© of Regulation (EU, Euratom) N° 966/2012.” (Art. 5(3) and recital 7).

This change is worth to be questioned and to be discussed. It has not been proven that indirect management or a mix of management modes are less effective and therefore should be avoided.

With PADR (Preparatory Action on Defense Research) managed by EDA we have a good and so far unchallenged example that indirect programme management does work, can be effective, and therefore still is a valuable option to be maintained.

### Art. 8(2) (Financial instruments), Art. 21 (Blending Operations) and Art. 27(1) (Work programmes)

Scrutiny reservation with regard to Art. 8(2), Art. 21 and Art. 27(1)

We would be grateful for a written note and analysis in preparation of the discussion of Articles 8 and 21. This written note should address the following issues on the need, the specific type and impact of envisaged financial instruments and their scope of application, as well as the questions with regard to the interplay with InvestEU as listed below:

- Article 8(2) foresees that EDF may use financial instruments. As you already know from our discussions on EDIDP, we are generally not convinced that there is a need of financial instruments in the very specific market context of the defense industry.
- We are also very critical on blank provisions allowing the use of financial instruments. A general authorization of financial instruments in this programme without any further details is not acceptable and not in line with other basic acts that provide for the use of financial instruments,

like for example the Regulation 1316/2016 (on CEF) and Decision 2013/743 (on Horizon 2020) which both provide for the use of financial instruments, but contain a detailed annex on the use of each of the financial instruments including the risk levels taken and the leverage expected.

- We need further clarification on Art. 8(2), second sentence: What is the added value of the second sentence in relation to the financial instruments already covered by the reference to the financial regulation in the first sentence? And what kind of instruments are exactly meant by „financial instruments within blending operations“?
- Furthermore, according to Art. 21, blending operation under this Fund shall be implemented in accordance with the InvestEU regulation and Title X of the Financial regulation. Could the Commission elaborate on the proposed interplay between the EDF-regulation and the InvestEU regulation and the Financial regulation?
- In particular, we need detailed information on the envisaged mechanism with Invest EU. What kind of financial instruments are covered by the reference to the InvestEU regulation?
- We underline again that we are very sceptical as regards the need of blending operations in the very specific market context of the defense industry (see above).
- It also applies to Art. 21 that we are opposed to any blank provision allowing the use of financial instruments. We could therefore not agree to a simple reference to InvestEU without further specification of the intended type of financial instruments and their scope of application.
- As a consequence, DE also enters a scrutiny reservation with regard to Art. 27(1) sentence 2 (“Work programmes shall set out, where applicable, the overall amount reserved for blending operations.”)

#### Art. 9 (Cumulative, complementary and combined funding)

Scrutiny reservation. We need further clarification on Article 9. We see the risk that the provision undermines the co-financing principles and the prohibition of double financing of the same cost by the general budget, as stipulated in the financial regulation.

### Art. 10 (Eligible entities)

In Art.10(2) a change in wording has been introduced. While the comparable EDIDP clause (Art.7(4)) stated that an applicant “is eligible” it now reads that “an applicant” only “may be eligible”

The wording should be consistent with the conditions set up in the EDIDP regulation. Defence projects have long life cycles and partners put in place long-term cooperation agreements. Changing conditions in the middle of programs would substantially impact the potential set up of industrial partnerships and reduce collaborative nature of projects.

DEU suggests to re-introduce the wording as convened in EDIDP.

### Art. 12 (Selection and award procedure)

This is a very sensible area. The proposal lacks in our view clarity and homogeneity. The award of funding should therefore be coordinated with the MS. This is actually foreseen only in the case of development actions (art. 12 (3)) where reference is made to Art. 28(2) which evokes the application of Art. 5 of Regulation (EU) no 182/2011.

In our view the application of Art. 5 of Regulation (EU) no 182/2011 should be extended to all other actions including the “research window” too. For the EDF the same principles should apply and be used as in similar programmes. An example is the European security research programme where all the eligible actions need the agreement of the MS.

### Art. 13 and 24 (Additional award criterion – Joined Maintenance/Ownership)

As in the case of EDIDP, DE considers it worth that the intention of procuring parties to jointly use, maintain or own the product in question should be taken into account positively as award criterion, meaning that projects fulfilling this criterion would benefit from a higher rating in the evaluation process.

Joint maintenance or ownership of commonly procured equipment and infrastructure should be our ultimate goal, laying the foundation for a future European Defence Union and lifting considerable synergies for Member States. Joint maintenance and use would benefit a broad number of Member States

and also grant broader opportunities for SMEs for the maintenance of the product throughout the life cycle.

DEU therefore proposes to add “joint use, maintenance or ownership” as an additional award criterion to Article 13 or 24 – as we have already agreed on with EDIDP (Art. 10 f). In our view, Articles 13 and 24 – both dealing with award criteria - should be merged and an additional letter (g) should be added to Article 13 which reads as follows:

“(g) for actions referred to in points (d) to (h) of Article 11(3), contribution to the further integration of the European defence industry through the demonstration by the beneficiaries that Member States have committed to jointly use, own or maintain the final product or technology in a coordinated way.”

#### Article 16 (Indirect costs)

Scrutiny reservation. We are sceptical as regards the new possibility of beneficiaries to claim actual indirect costs, as it is now provided for in Art.16 (2). We see the risk that the possibility of beneficiaries to choose between a flat rate for indirect costs (provided for in para. 1) and actual cost accounting (provided for in para 2) could inflate costs for the EU budget. Beneficiaries with low indirect costs would choose the flat rate and beneficiaries with high indirect costs would choose actual cost accounting. Consequently, there would be fewer resources left to finance other projects.

#### Article 18 (Pre-commercial procurement)

Scrutiny reservation. We need further clarification on Art. 18 from a legal point of view. Does the legal base of Articles 173 (3), 182(4), 183 and 188 TFEU cover the award of grants from the EU budget to contracting authorities or contracting entities in order to support pre-commercial procurement? Is this in line with Article 41(2) TEU which prohibits the funding of operations having military or defence implications from the EU budget?

### Art. 28.1 (Committee)

In order to implement and manage research and development inside EDF effectively we will need separate configurations of the Program Committee, one configuration for the Research Window and one configuration for the Capability Window / Development. These two configurations should be fixed in the Annex to this regulation like it is usual in other areas as well (for example Horizon 2020).

### Art. 29.3 (Independent Experts)

“All candidates included in the database shall be required to be validated by the Member State that has issued their security clearance”. This was the text used in Art. 34 of the Rules for Participation of PADR and we propose to use this as well in the regulation for the EDF.

### Art. 22 (Ownership of results)

The determination and reimbursement of indirect costs has been adapted and widened in the research area (see Art. 16.2) compared to the PADR regulation. Regarding IPR the proposed regulation falls back behind the access rights of the MS to research results in the PADR regulation.

It is crucial to find the right balance between funding quotas and access rights of MS and introduce an appropriate wording.

Another area of concern should be the handling of background rights for which the actual proposal does not cover.