

# The European Defence Fund (EDF)

## Policy-makers secure a balanced approach, but questions and challenges remain

The American Chamber of Commerce to the European Union (AmCham EU) is pleased with the outcome of the EDF negotiations as policy-makers found a balance between inclusive investments for the EU defence sector and ensuring that the security and defence interests of the EU and its Member States are protected. Not only will the framework, largely based on the outcome of the European Defence Industrial Development Programme (EDIDP) ensure policy coherence, but it will allow European entities with third country ownership to continue to play their part in strengthening the European Defence Technological and Industrial Base (EDTIB).

AmCham EU is supportive of the third country participation approach established in the EDIDP and which has now been transcribed into the EDF. Article 10 in the EDF regulation will ensure that EU funding remains within the EU and is available to all contributors to the EDTIB. As it stands no hurdles are being introduced that are not already common practice in the sector, such as ensuring the security of supply or information.

While policy-makers have given recognition to the global nature of the sector with this outcome, there is still uncertainty with regards to some aspects pertaining to the role of Member States, third country entity participation and restrictions on Intellectual Property Rights (IPR). AmCham EU recommends that in order to provide clarity and facilitate the smooth implementation of the EDF, a comprehensive guide for both applicants and national authorities needs to be created.

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### National sensitivities and implementation

#### Ensuring alignment between Member States

In order to ensure that industry has clarity on the obligations and conditions tied to being an EDF participant, there should be guidance on how national authorities carry out their responsibilities. A certain amount of alignment on how national actors implement the EDF (eg, in providing guarantees for third country entities) will ensure a level playing field, where similar rules are applied across the EU, limit cherry picking for the most favourable conditions and help demonstrate the EU's added value in fostering collaborative defence research and development (R&D).

#### Discretion of national export control regimes

With increasing interest by Member States in jointly developing defence capabilities, it will be increasingly difficult to find consensus on competing national export regimes that often embody different approaches. Pre-defined export control frameworks that are established at the beginning of an action, for the duration of the capability, will not only ensure clarity for industry and limit business disruptions, but will also reduce potential strains on political partnerships. As the EDF promotes a collaborative approach in defence

capability development, it will become increasingly important that these issues are addressed before any work is started. A bilateral agreement between the involved Member States that clearly defines the export control conditions during the duration of the project, will provide vital investment and regulatory certainty.

#### Ensuring a level playing field

Requirements to demonstrate the intent of at least two Member States to procure the final product or use the technology of an EDF action could stifle competition in the EU and exclude vital contributors to the EDTIB that are not part of the action from future procurement competitions. In order to strengthen the EDTIB and enhance the competitiveness of the sector, national authorities should continue to act on comprehensive and effective procurement strategies that build on the full knowledge of the market. Only by being open to and considering all potential bids, will contracting authorities be able to leverage the benefits of a competitive defence market.

## Participation to the EDF

### Understanding the complex governance structure

According to article 10(1a) of the EDF regulation, eligible entities must be located and have their executive management structures in the EU. While the regulation provides a definition for executive management structures, it fails to clarify which will be the decision-making body that arbitrates or determines whether the conditions for eligibility are fulfilled. Greater clarity on which regulatory bodies are involved and which procedures apply, will ensure that entities understand the procedures for participation. In order to sustain continued industry engagement, once an entity is found to be eligible, it should be able to maintain its status for the remainder of the programme, unless there are fundamental changes to its structure or way of operating, such as in the case of mergers and acquisitions.

### Enforcing no third country control

The defence sector thrives on truly global supply chains in order to offer high quality products at competitive costs. While the final result of an EDF action must be completely free of control or restrictions from a third country entity, eligibility conditions and controls under the fund only apply to direct beneficiaries and certain subcontractors. This means that third country control or 'contamination' may actually take place at very low tier subcontractors or suppliers and therefore make oversight and/or enforcement difficult. In order to ensure that the complex and long supply chains of the sectors are supervised, industry will require support to ensure effective communication with its subcontractors and suppliers.

## IPR restrictions

### Use of third country controlled IPR

The EDF framework ensures that beneficiaries are able to make use of their non-EU assets and cooperate with non-EU entities to achieve the highest technical value. A too restrictive approach to IPR could however easily negate these benefits. Under the current restrictions, the use of third country IPR will only be practical in cases where the component that includes non-EU IP can be removed from the final EDF result. This would be the only way to ensure that article 25(2) of the regulation – *The results of actions shall not be subject to any*

*control or restrictions* – is upheld. While this might be possible in some instances, such an approach will not be possible where the third country IP is an integral part of the system and cannot be separated from the final result. In cases where non-EU IPR is removable from the final EDF result and did not benefit from funding, uses should be regulated through licencing systems.

### Use of EDF in bilateral capability development projects

In an effort to increase efficiencies and decrease the risks associated with developing defence capabilities, governments are increasingly turning towards joint development and procurements models. The EDF is a clear catalyst for such activities. While some joint capability development projects might still be completed outside of the remit of the EDF, the fund could be utilised to carry out specific tasks within such national or bilateral programmes. This will be key for the uptake of EDF funding, reducing liability and supporting industry across the EU. Such uses would however, raise the question of how the EDF interacts with such national or bilateral programmes. Will the use of the fund for a specific task mean that EDF obligations become attached to the entire programme? If so, this could reduce the likelihood of the fund being used in this capacity, as some Member States may wish to be more directly involved than would be the case in an EDF action.