

Our position

Like-minded third-country entity participation in EU PESCO Projects

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3 trillion in 2020, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Introduction

The American Chamber of Commerce to the EU (AmCham EU) welcomes the Council of the EU's completion of the general conditions under which non-EU countries can exceptionally be invited to participate in individual Permanent Structured Cooperation (PESCO) projects, thereby paving the way for cooperation and greater like-minded third-country participation in EU defence initiatives¹. AmCham EU also welcomes the Council of the EU's positive decisions authorising the coordinator of the PESCO project 'Military Mobility' – the Netherlands – to invite the three countries, Canada, Norway and the US to participate in this PESCO project². AmCham EU member companies look forward to the opportunity to join PESCO projects in contribution to a stronger and more secure Europe. EU-based companies with US-parentage make considerable contributions to the European Defence Technological and Industrial Base (EDTIB) through the creation of high-skilled jobs and innovation. With this in mind, policy-makers should come to an agreement that facilitates the participation of EU-based companies owned by like-minded third-country entities. This would be to the benefit of a stronger transatlantic defence technological and industrial cooperation (TADIC) and ultimately a reinforced EDTIB, while limiting duplication or detracting from NATO efforts. Ahead of the upcoming revision of the Council Decision (CFSP) 2018/909 of 25 June 2018³ establishing a common set of governance rules for PESCO projects, significant concerns still remain regarding the conditions and procedures on the involvement of EU-based entities with third-country parentage in the implementation of PESCO projects and the potential indirect restrictions that could make participation practically unworkable.

PESCO – state of play

The Permanent Structured Cooperation (PESCO) in Security and Defence is an intergovernmental defence initiative led by the 25 participating EU Member States, which are also responsible for the initiation and implementation of the projects developed under PESCO⁴.

While membership of the PESCO is only for those EU Member States who have undertaken the more binding commitments, third states may exceptionally be invited to participate in PESCO projects upon certain general conditions. It is first up to members of individual PESCO projects to consider inviting a third state to participate in a specific PESCO project. If they agree, then the project coordinator would submit that request to the Council of the EU. Decisions regarding third states' participation will be taken by unanimity by the 25 PESCO participating Member States, in accordance with article 46(6) of the Treaty on the Functioning of the European Union (TFEU). Following the requests from Canada, Norway and the US to participate in the PESCO project 'Military Mobility', the Council of the EU adopted three decisions confirming that their participation in that project meets the general conditions. They will join the project once the administrative arrangements with the project members are signed.

The governance of PESCO, as well as the roles of the participating Member States in the EU and the responsibilities of the PESCO Secretariat are described in the Council Decision establishing PESCO (Decision (CFSP) 2017/2315⁵) and in the Council Decision establishing a common set of governance rules for PESCO projects (Decision (CFSP)2018/909⁶). The latter decision foresees in article 7 that the project arrangements,

¹ <https://www.consilium.europa.eu/en/press/press-releases/2020/11/05/eu-defence-cooperation-council-sets-conditions-for-third-state-participation-in-pesco-projects/>

² <https://www.consilium.europa.eu/en/press/press-releases/2021/05/06/pesco-canada-norway-and-the-united-states-will-be-invited-to-participate-in-the-project-military-mobility/>

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018D0909&from=EN>

⁴ <https://pesco.europa.eu/>

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D2315&from=EN>

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018D0909&from=EN>

which the project members may agree upon within the project, may include among other things the selection of industrial companies.

In addition, on 5 November 2020 the Council of the adopted a decision establishing the general conditions under which third States could exceptionally be invited to participate in individual PESCO projects (Decision (CFSP) 2020/1639⁷), which also defined the procedures for the participation of third States in PESCO projects. article 2 thereof describes the consequent steps of the invitation process starting with a request for participation by the third state, agreement among the project members and authorisation by the Council to invite that third state in the respective PESCO project and finally - an administrative arrangement between the project and the third state.

The conditions and procedures for the involvement of third-country entities (companies) in the implementation of PESCO projects are yet to be defined, as stated in the article 7 (2) of the Decision (CFSP) 2020/1639. This will be done during the review of the Decision (CFSP)2018/909⁸, in particular with regard to the conditions and procedures under which entities may be involved in the implementation of PESCO projects.

Similar objectives, different instruments

While both PESCO and the European Defence Fund (EDF) share similar objectives, both instruments are inherently different in nature. As mentioned above, PESCO is a purely intergovernmental framework for cooperation on defence and security projects between EU Member States enshrined in articles 42 and 46 of the TFEU. Its legal basis is the EU's Common Foreign and Security Policy (CFSP) and therefore reserves an executive function for Member States participating to the CFSP (27 Member States), with decisions being taken unanimously. With the governance of PESCO being defined by Member States, so too, funding for PESCO projects is derived from national contributions.

The EDF differs in many aspects. Not only is its legal basis derived from articles 173 and 182 TFEU – industrial competitiveness, but its funding comes from the Union's general budget. The difference in legal basis and source of funding therefore requires the involvement of the European Commission as the programme manager and neutral arbitrator. Moreover, it creates the need for common conditions for participation in the EDF in order to ensure a level playing field for all. While the EDF does foresee a link with PESCO, intervening with a financial bonus as a support to PESCO cooperation, these inherent differences require entirely different approaches to their governance.

Partnerships built on trust

The success of PESCO and the projects that will be developed under this framework will require unwavering trust between the participating Member States. This will also need to extend to the partnering private entities that are invited to participate in a PESCO project. Member States participating in a PESCO project will build on existing national protocols to ensure that participating entities do not contravene the security and defence interests of the Union and its Member States. Given the involvement of national funding and selection processes based on national security protocols, entity participation in a PESCO project should not be a decision taken unanimously by the participating members or even all PESCO members. A Member State's decision to invite a company, including those with like-minded third-country entity ownership, to participate should therefore be accepted if it is located and has its executive management structures in the national territory.

⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D1639&from=EN>

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018D0909&from=EN>

AmCham EU recognises the sensitivity of this issue, however, urges Member States to reserve any conditions for participation for third-countries, entities not based in the EU or with third-country ownership. Since EU-based companies with third-country entity ownership are regarded as being European by many national governments and their security protocols/procedures, they should therefore enjoy equal treatment. This will allow PESCO to successfully achieve its objectives without being undermined by the intricacies of unanimity voting when involving private partners.

Discretion of national export control regimes

With increasing interest among EU 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 a PESCO project, 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 PESCO initiative 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 EU participating Member States that clearly defines the export control conditions for the duration of the project, will provide vital investment and regulatory certainty.

Conclusion

The strong relationship between the EU and the US is founded on shared values between like-minded nations across the Atlantic. A culture of strategic partnership, cooperation and trust has been built over the years in formal contexts such as NATO. Effective and efficient transatlantic cooperation has generated a large number of successful industrial cooperative projects contributing significant capabilities and interoperability to the US and the EU.

In their 8 July 2016 Joint declaration, the then-President of the European Council, the then-President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization clearly stated the following: *'We believe there is an urgent need to: [...] facilitate a stronger defence industry and greater defence research and industrial cooperation within Europe and across the Atlantic. [...] develop coherent, complementary and interoperable defence capabilities of EU Member States and NATO Allies, as well as multilateral projects.'*

Hence, the new EU defence initiatives such as EDF and PESCO represent an opportunity to deepen transatlantic defence technological and industrial cooperation (TADIC), to increase combat readiness, defence capabilities and interoperability, to innovate and to enhance the competitiveness of the EU's defence industry. This European industrial landscape includes American companies who employ over 45,000 high-skilled Europeans and develop local intellectual property for the industry.

Allowing EU-based companies with US-parentage to participate in PESCO projects will make the EDTIB stronger, more competent, competitive, innovative and affordable. These companies also contribute to the autonomy of the EDTIB and should not be considered as being non-EU sources. They also strengthen security of supply and protect the security and defence interests of the EU.