

# Main points of the March 1<sup>st</sup> provisional agreement on the draft Regulation creating the European Defence Fund 2021-2027

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## 1. What is NOT covered by this provisional agreement and why?

- **The overall budget of the Fund**

the exact amount to be allocated to the EU Defence Fund will be discussed and agreed in the autumn, together with the other EU main funding programmes of the next EU Multi-Financial framework (MFF), the EU envelope for the 2021-2027 budgetary cycle. The Fund could be kept at €13 billion, or be increased/decreased.

Most Member States are not willing to increase their contribution to the global EU budget, and the Brexit is estimated to a net loss of 10 billion/year for the EU. Thus the €13 billion of the Defence Fund will necessarily affect other civilian EU priorities even if it will not possible to identify actual transfers under the new budgetary architecture.

- **The definition of associated countries to take part in the Fund**

In the legislative proposal, EU Member States and associated countries are put on equal footing for full access to the EU Defence Fund. Initially associated countries were defined as countries members of both the European Economic area and the European Free Trade Area, namely Norway, Iceland and Lichtenstein. With the pending Brexit, EU Member States requested to postpone the discussion on associated countries until after the elections of the new EP, most probably in order to find a definition that would allow full access to the Fund for UK companies. But a new definition may also open the door to other non-EU countries.

## 2. What has been agreed on?

- **Legal basis and objectives: focus on industrial competitiveness**

The legal basis remains unchanged, that is EU competences in Industry, Space and in Research & Development. The general objective remain to “*foster the competitiveness, efficiency and innovation capacity*” of the European military industry.

In the specific objective and in many introductory recitals the words ‘European’ and ‘cooperation’ have been integrated as much as possible, probably as an attempt to counter critical voices considering that the Fund is not preventing overcapacity, overproduction or dependency upon non-EU sources. However the main functioning of the Fund remains unchanged under close control of Member States, so this rather looks like a semantic exercise to please the Parliament but not changing the very nature of the Fund.

- **Funding levels: advantageous EU subsidies for the industry with limited MS co-funding**

The general rule is that the Fund may finance up to 100% of the projects’ eligible costs, with 2 exceptions:

- development of system prototypes: EU funding shall not exceed 20% of the eligible costs
- activities relating to testing, qualification and certification: EU funding shall not exceed 80% of the eligible costs

However, through a number of bonuses, in particular for the participation of SMEs and Mid-Caps (see annex 1), prototype activities can get up to 55% of EU funding, and testing/ qualification/ certification up to 100%. Thus the level of co-funding by Member States may be much lower than claimed, with no concrete engagement at this stage.

The use of single lump sums or contributions not linked to costs is encouraged, to “reduce implementing costs”. But this also means less control over the use of the funds. Indirect costs will be covered either by a 25% flat-rate, or using national accounting practices in the same area, with no ceiling defined.

As a comparison, non-profit entities for human rights projects in non-EU countries usually get up to 80% co-funding and a 5% rate for indirect costs.

- **who can participate in projects? potentially any company**

Projects should be submitted by a consortium of at least 3 eligible entities established in at least 3 different EU or associated countries (with at least 3 entities from 2 different countries being independent from each other). As a general rule, only entities established in the EU or an associated country and NOT controlled by a non-EU/non-associated country or entity are eligible (see definition of control in annex 2), and the activities should be located in the EU/associated countries. To note that associated countries are on equal footing with EU Member States.

However there is a number of derogations:

- a legal entity established in the EU/associated country but controlled by another country/entity can still receive EU funding provided that guarantees are given that this does not contravene the security and defence interests of the EU, nor prevents the entity to deliver the expected results. Those guarantees are mainly given by the Member State/associated country where the entity is established.

It is worth noting that the initial condition that such derogation should happen only *"if it is necessary for achieving the objectives of the action"* has been removed from the compromise text.

- Participation of entities based in or controlled by a non-EU/non-associated country or entity is still possible provided this does not contravene the security and defence interests of the EU, and access to sensitive information is limited. The related costs are not eligible for funding.
- Activities can also be located outside the EU/associated country *"where no competitive substitutes are readily available"* and provided this does *"not contravene the security and defence interest of the EU"*. Those costs are not eligible either for support.
- projects on disruptive technologies can be submitted by only one entity

- **eligible actions & priorities, excluded technologies: a number of controversial weapons still in the air**

The compromise text remains very vague on the type of military technology to be developed:

- focus on innovative/ground-breaking/novel defence products and technologies *"presenting a significant advantage"* and *"contributing to competitiveness"*.
- in line with the Defence capability priorities commonly agreed by Member States within the framework of the Common Foreign and Security Policy (including the Capability Development Plan) and *"common defence research objectives"* identified in the Overarching Strategic Research Agenda
- reference to *"regional and international priority including those in the NATO context"*
- *"disruptive technologies for defence"* should receive 4 to 8% of the overall envelope (see definition in annex 2).
- main research topics and categories of actions should be:
  - (a) *preparation, protection, deployment and sustainability;*
  - (b) *information management and superiority and command, control, communication, computers, intelligence, surveillance and reconnaissance (C4ISR), cyber defence and cybersecurity;*
  - (c) *engagement and effectors."*

These 3 last categories were "won" by the EP as a compensation for its exclusion from the implementation phase (see below); it is a copy-paste of what was reached under the EDIDP compromise in 2018.

A number of military technologies are excluded, in particular 'killer-robots':

- a) R&D for products and technologies which use, development or production is prohibited under international law is excluded
- b) R&D *"for the development of lethal autonomous weapons without the possibility for meaningful human control over the selection and engagement decisions when carrying out strikes against humans shall also not be eligible for financial support by the Fund, without prejudice to the possibility to provide funding for actions for the development of early warning systems and countermeasures for defensive purposes."*

According to the GREENS the first paragraph is not strict enough to prohibit all forms of weapons of mass destruction like white phosphorus, nor nuclear weapons and technology like depleted uranium ammunition.

Moreover the EP amendments to prohibit Small Arms and Light Weapons when only for export purposes was dropped too in the final compromise.

The exclusion of fully-autonomous weapons is to be welcomed of course, and compared with the difficulties at international level this move is considered globally positive by those working on the killer-robots issue. However there are potential loopholes to be watched upon: first the article opens the door to fully autonomous systems for “defensive purposes”, where is the red line? Moreover the definition excludes the development of lethal autonomous weapons *“without the possibility for meaningful human control (...) when carrying out strikes against humans”*, does that mean that provided there is an option to activate or de-activate this ‘meaningful human control’ then it can be funded? This would make it a de-facto ‘fake’ exclusion... The distinction between strikes against humans and other types of strikes is similarly problematic.

- **Ownership and transfer of results, exports of EU-funded military equipment will exacerbate global arms race**

The rules regarding the ownership of results for research activities and for development activities have been largely harmonised and are quite similar to the PADR and EDIDP rules. The general rule is one of full ownership by the funded entities generating the results, with limited exceptions for royalty free access in specific cases for Research activities (see details in annex 1).

The export of ownership or results generated by EU-funded actions shall be approved by an EU Member State or associated country. The EC shall also be notified ex-ante of any such transfer, or granting of an exclusive licence under research actions, and the EU funding shall be reimbursed if this contravenes the security and defence interests of the EU and its Member States. This is unlikely to be deterrent enough for lucrative transfers, and nothing is said about how to check this provision is respected.

Regarding the export of EU-funded goods, the text now states twice that the Fund does not affect Member States full sovereignty on arms exports (only once in recital in the EC initial proposal). *“Creating new market opportunities across the Union and beyond”* has been emphasised in the award criteria.

- **Governance and ethical review falling short of democratic standards**

The normal practice so far is that the EP has a say at least on the annual and multi-annual work programmes to implement EU funding programmes.

Under the EDIDP the Commission introduced derogatory rules to exclude the Parliament from this phase in 2019-2020; this was supposed to be an exception to respond to specific time constraints (the EC had less than a year to produce the EDIDP work programme). Now the same precedent is being applied under the Defence Fund for 2021-2027 despite no time constraint. In parallel another derogatory rule provides a de facto veto power to MS (in case the Programme Committee delivers no opinion on a given implementing act, the EC cannot adopt it).

This is highly worrying in terms of democratic scrutiny and also a dangerous precedent against EU community rules: now Member States can dig into the EU pot without having to play the democratic game. This derogatory practice is apparently also being extended to other EU funds for 2021-2027, paving the way for the next EU Parliament to become a mere rubber-stamping body.

Regarding the ethical review, allegedly an answer to civil society concerns, its concrete implementation rather looks like a farce, giving a central role to the industry and falling short of being credible and transparent.

If §1 of this article 7 is being reinforced with a reference to the Charter of fundamental rights, on the other hand implementation is being seriously weakened compared to the initial proposal of the Commission and the EP amendments:

1<sup>st</sup>, ethical screenings will happen only before the signature of the grant contract (and not *“all proposals systematically”* as stated in the initial proposal);

2<sup>nd</sup>, this will happen on the basis of prior ethical self-assessments by the industry itself and only *“where appropriate”* (a new provision probably coming from Member States)

3<sup>rd</sup>, Activities raising ethically sensitive issues will not be discarded but conditions for their implementation shall be specified in the funding agreement.

4<sup>th</sup>, The possibility to carry out ethical checks during the implementation of a project has been removed, as well as the possibility to terminate an on-going project on ethical grounds

5<sup>th</sup>, Experts to assist the EC shall be independent with various backgrounds, but in particular with expertise on 'defence ethics'; thus favouring officials and industry experts. And the list of experts shall not be made public, making external scrutiny on possible conflicts of interest impossible.

### 3. What are the next steps?

On March 25, the Industry and Research Committee of the EP adopted the compromise text with 34 votes in favour, 7 against and 1 abstention. The text will now be submitted to all MEPs on April 17, during the last Plenary session before EU elections.

As for Member States, there is no formal adoption at Council level, but Member States produced a letter stating that *"the common understandings have been confirmed by the Council"* and that it expects the negotiations to be finalised on the basis of those common understandings.

Indeed, if adopted in Plenary on 17 April, the text will then go to the new Parliament to negotiate the budget allocated to the Fund (€13 billion or more or less) as well as the exact definition of associated countries with full access to the Fund. This process should resume in the last quarter of the year.

The 'gentleman agreement' is that neither the new EP nor the Member States will re-open discussions on what was agreed under the common understandings. However from a procedural point of view, the legislative text has only passed the 1<sup>st</sup> reading stage, which means that the new EP will still be allowed to amend the text if it so wishes. This is quite unlikely for political reasons, but legally not impossible.

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**Annex 1:** detailed summary of the main articles

**Annex 2:** official definitions

#### Links to official texts:

Initial Legislative Proposal [COM\(2018\)476 final](#), 13 June 2018

[EP Report on EU Defence Fund proposal](#), 12 December 2018

[EU Council general approach on EU Defence Fund Proposal](#), 19 November 2018

[Provisional agreement \(consolidated version\)](#), 01 March 2019

[EU Council letter on MFF negotiations](#), 19 March 2019