EARTO Analysis of EC Regulation Proposal establishing the European Defence Fund

5 July 2018

EARTO welcomes the European Commission (EC) Proposal for a Regulation establishing the European Defence Fund with a €13 billion budget for defence-oriented research and capability development. The willingness to reach synergies with other EU funding Programmes such as Horizon Europe or the Space Programme is welcomed.

In its proposal, the EC recognizes that despite recent positive indications, the defence budget in EU Member States has decreased over the last 10 years. At the same time, the costs of defence equipment and R&D have increased while cooperation between Member States has remained limited in terms of R&D and defence equipment investments. The European Defence Fund should aim at fostering the competitiveness, efficiency and innovation capacity of the European defence industry. To do so it will need to support collaborative actions and cross-border cooperation between various actors throughout the European Union. While defence research falls under the scope of Horizon Europe, the corresponding specific provisions for defence research such as objectives, rules for participation, delivery mechanisms are specified in the proposal for a Regulation establishing the EDF. To strengthen such proposal even further, EARTO has hereby made a detailed analysis of the European Commission's proposal for this Regulation.

Topic	EDF Article	Analysis	Text Changes (if needed)
Use of lump sums	**Recital 30** The types of financing and the methods of implementation under this Regulation should be chosen on the basis of their ability to achieve the specific objectives of the actions and to deliver results, taking into account, in particular, the costs of controls, the administrative burden, and the expected risk of non-compliance. This should include consideration of the use of lump sums, flat rates and unit costs, as well as financing not linked to costs as referred to in Article [125(1)] of the Financial Regulation.	Prior to any use of the lump-sum approach, a thorough evaluation of the returns on experience on the H2020 pilots needs to be carried out by the EC and FP beneficiaries. This evaluation needs to analyse the financial and operational impact of the lump-sum approach, in a representative manner. See **EARTO Inputs - Towards Lump-Sums within FP9** - 15 September 2017 - link	**Add text at the end of recital 30:** **Lump sums shall only be used after a positive evaluation of the pilots under Horizon 2020 [*optional additional text to ensure pilots post 2020 can also be considered*: 'or in other grant-based collaborative European programmes involving public research organisations'].**
Background IP	**None**	There is no definition of 'background' nor is there any regulation on what happens to background IP in and after a project is completed. Particularly for organisations that do early stage research, it is crucial to be able to protect their background IP. The proposed text is based on the background articles in the Grant Agreements signed within the framework of the Preparatory Action on Defence	**Add text to Article 2 (all suggestions to be streamlined with the final version of the HEU RfP clauses on the same subject which may still change, see EARTO suggestions):** **(18) 'Background' means any data, know-how or information – whatever its form or nature (tangible or intangible) including any rights such as intellectual property rights – that:**

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		Research. They therefore combine the experience of EDA in dealing with IP in the domain of defence and the particularities of a Union action. As reminded in the Regulation's Memorandum, article 1, *« the European Council, the European Parliament and the European Commission stated the Union will strengthen its common security and defence and foster a more competitive and integrated defence industry ».* This can only be achieved if the Background IP is exploited mandatorily in the European Union or associated countries.	**a. is held by the beneficiaries before acceding to the (grant) agreement which regulates the action.** **b. is needed to implement the action or exploit the results.** **(19) 'Access rights' means rights to use results or background under the terms and conditions laid down in the contractual grant agreement which regulates the action.** **(20) 'Affiliated entity' means any legal entity that is under the control of a beneficiary, or under the same control as a beneficiary, or controlling a beneficiary.** **<u>Add new Article under Title I, Chapter III:</u>** **(1) The beneficiaries must identify and agree (in writing) on the background for the action before the start of the action.** **(2) The beneficiaries must up on request give each other access – on a royalty-free basis – to background needed to implement their own tasks under the action, unless the beneficiary that holds the background has – before acceding to the grant agreement –** **a. Informed the other beneficiaries that access to its background is subject to legal restrictions or limits, including those imposed by the rights of third parties (including personnel), or** **b. Agreed with the other beneficiaries that access would not be on a royalty-free basis.** **(3) The beneficiaries must up on request give each other access – under fair, reasonable and non-discriminatory conditions – to background needed for exploiting their own results, unless the beneficiaries that holds the background has – before acceding to the grant agreement – informed the other beneficiaries that access to its background is subject to legal restrictions or limits, including those imposed by the rights of third parties (including personnel). Requests for access may be made – unless agreed otherwise – up to one year after the closing of the action.** **(4) Unless otherwise agreed in the consortium agreement and up on request, access to background must also be given – under fair, reasonable and non-discriminatory conditions and unless it is subject to legal restrictions or**

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			limits, including those imposed by the rights of third parties (including personnel) – to affiliated entities established in a Member State or an associated country (subject to Article 5), if this is needed to exploit the results generated by the beneficiaries to which they are affiliated. Requests for access may be made – unless agreed otherwise – up to one year after the closing of the action. **<u>Add New Article under Title I, Chapter IV:</u>** **Conditions for the access to the background needed for the implementation of the action and the exploitation of the results of the action will be laid down in a written agreement between the contracting parties.** **In any case, background IP must be exploited on the European soil or associated countries soil.**
Existing products	**Article 11 (2) - Eligible actions** The Fund shall provide support for actions covering both new and upgrade of existing products and technologies where the use of pre-existing information needed to perform the upgrade is not subject, directly or indirectly to a restriction by non-associated third countries or non-associated third country entities.	The programme should be dedicated to RD&I, so if existing products are being upgraded more safeguards are needed. For example, by giving award criterium in Article 13 (1b) extra weight.	**Add text to Article 11 (2):** The Fund shall provide support for actions covering both new and upgrade of existing products and technologies**.** **An action to upgrade existing products is only permitted when the proposal received a perfect score on the evaluation criterium under Article 13(1b) and** where the use of pre-existing information needed to perform the upgrade is not subject, directly or indirectly to a restriction by non-associated third countries or non-associated third country entities.
Collaboration	**Article 11 (5) - Eligible actions** Paragraph 4 shall not apply to for actions referred to in points c) and j) of paragraph 3 and to actions referred to in Article 6.	This exempts projects deemed to involve 'disruptive technologies' from the requirement of collaboration. This is not desirable for three reasons: 1. Because 'disruptive technology' is not defined at all (and is almost impossible to define) this makes the programme vulnerable to misuse of this article by organisations to get their individual technology development funded. This goes completely against all the efforts made in the development of this programme to ensure collaboration would be encouraged as much as possible. 2. As established in the EIC concept in Horizon Europe, the development of disruptive technology requires more rather than less collaboration because it usually happens on the intersection between different technologies and disciplines. The principle goal of the programme is industrial development and single beneficiary projects do not contribute to the structural development of	**Delete text in Article 11 (5)** Paragraph 4 shall not apply to for actions referred to in points c) and j) of paragraph 3 ~~**and to actions referred to in Article 6**~~.

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		the industry. The EU Added Value of this programme is in collaboration so it should not be undermined.	
Indirect costs	**Article 16 – Indirect Costs** 1. Indirect eligible costs shall be determined by applying a flat rate of 25 % of the total direct eligible costs, excluding direct eligible costs for subcontracting, financial support to third parties and any unit costs or lump sums which include indirect costs. 2. Where appropriate, indirect eligible costs beyond the flat rate of 25% may be determined in accordance with the beneficiary's usual cost accounting practices on the basis of actual indirect costs provided that these cost accounting practices are accepted by national authorities under comparable funding schemes in accordance with Article [185] of the Financial Regulation and communicated to the Commission.	RTOs appreciate the simplification of the flat rate approach for indirect costs. However, such flat rates do not reflect the real costs of RTOs, for instance for their infrastructures, which are the backbone of dynamic RD&I ecosystems and key for EU cross-border collaborative research. See **EARTO Recommendations for FP9 Rules for Participation: Funding Rules** - 19 March 2018 - link	
	Recital 21 Stakeholders in the defence sector are facing specific indirect costs, such as costs for security. Furthermore, stakeholders are working in a specific market where they – without any demand on the buyers' side – cannot recover the research and development costs like in the civilian sector. Therefore, it is justified to allow a flat rate of 25 % as well as the possibility, on a project base, to charge indirect costs calculated in accordance with the usual accounting practises of beneficiaries if these practises are accepted by their national authorities under comparable national funding schemes, which have been communicated to the Commission. The authorising officer responsible should justify its decision to accept indirect eligible costs beyond the flat rate of 25 % in the work programme or in the call for proposals.	Large research infrastructures such as clean rooms are the one of the main factors for high indirect costs at research organisations. As defence research often requires high confidentiality these infrastructures cannot be used by other projects at the same time and the indirect costs for the defence project increases. Note: If it is acknowledged as a general principle that a lack of opportunity to make up for incomplete funding due to a non cost-covering overhead flat rate in other projects justifies accounting of actual full overhead costs, then RTOS, who by definition due to their non-profit nature never have the possibility to recover such deficits in other projects, should always be eligible to account on full overhead cost basis.	Stakeholders in the defence sector are facing specific indirect costs, such as costs for security **or particular research infrastructure needs**. Furthermore, stakeholders are working in a specific market where they – without any demand on the buyers' side – cannot recover the research and development costs like in the civilian sector. Therefore, it is justified to allow a flat rate of 25 % as well as the possibility, on a project base, to charge indirect costs calculated in accordance with the usual accounting practices of beneficiaries if these practices are accepted by their national authorities under comparable national funding schemes, which have been communicated to the Commission. The authorizing officer responsible should justify its decision to accept indirect eligible costs beyond the flat rate of 25 % in the work programme or in the call for proposals.
		On the point above: if there is a need for more control on where co-financing comes from (argument 3), it is more productive to clearly define which sources of co-financing are not allowed automatically and therefore have to be reported on. This will in practice minimise the administrative burden.	**Change text in Article 23 (1):** Where applicable, the consortium shall demonstrate that **the financing of** the remaining costs of an eligible action, which are not covered by the Union support **and** will be covered by other means of financing ~~**such as Member States' and/or associated countries' contributions or**~~ **from third countries or by** co-financing from legal entities **which are not eligible under Article 10, shall not lead to access to the results for the co-financing entities.**

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IP	**Article 22 (2) - Ownership of results** If Union assistance is provided in the form of public procurement**,** results shall be owned by the Union. Member States and associated countries shall enjoy access rights to the results, free of charge, upon their explicit request.	The "principle of Union ownership" in Art 22 is a problem. The IPR policy of many EARTO members is based on developing IP in publicly funded projects and maintaining ownership of them. They must be able to the greatest possible extent to use the results for further projects in the future. Having a full and up-to-date IP pool is key for them to successfully fulfil their public tasks. Experience shows that in reality, a customer (here: the EU) does oftentimes not need full ownership of all results of a project (even in procurement projects!). The starting point should not be a general Union ownership principle, but to the contrary, the ownership of the beneficiaries. Same applies in in other programmes as well. From that, tailor-made exceptions can be made where they are duly justified in individual projects, or calls. Deletion of the principle in Art 22 seems the appropriate action. Moreover, EARTO had justified the abovementioned principles on pre-commercial procurement in three public papers: • **EARTO Answer to EC Consultation on Public Procurement of R&I** - 22 December 2017 - link • **EARTO Paper on How to Boost Pre-Commercial Procurement in Horizon 2020** - 14 April 2016 - link • **EARTO Response to the European Commission Public Consultation on the EU State Aid Framework for R&D&I** - February 2014 - link As reminded in the Regulation's Memorandum, article 1, *« the European Council, the European Parliament and the European Commission stated the Union will strengthen its common security and defence and foster a more competitive and integrated defence industry ».* For pre-commercial procurement, beneficiaries owning the IP they generated, this can only be achieved if the products and services resulting from a pre-commercial procurement are mandatorily manufactured in the European Union or associated countries.	**Delete text in Article 22 (2) and replace it by:** **If Union assistance is provided in the form of public procurement, results shall be owned by the beneficiaries who must mandatorily exploit and manufacture on the Union soil (or associated countries).**

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	Article 22 (5) (6) - Ownership of results 5. The national authorities of Member States and associated countries shall enjoy access rights to the special report of a project that has received Union funding. Such access rights shall be granted on a royalty-free basis and transferred by the Commission to the Member States and associated countries after ensuring that appropriate confidentiality obligations are in place. 6. The national authorities of Member States and associated countries shall use the special report solely for purposes related to the use by or for their armed forces, or security or intelligence forces, including within the framework of their cooperative programmes. Such usage shall include, but not be limited to, the study, evaluation, assessment, research, design, development, manufacture, improvement, modification, maintenance, repair, refurbishment, and product acceptance and certification, operation, training, disposal and other design services and product deployment, as well as the assessment and drafting of technical requirements for procurement.	For grants, in differentiation from procurement, a general principle is that beneficiaries enjoy the benefits of the grant – i.e. they shall own and exploit the results. If the funding authority or other third parties are to enjoy user rights or ownership in results, then procurement is the right approach. As chapter III implies that Grants are the main funding instrument for the program, the basic principle cannot be that substantial rights are to be granted.	**This principle must be deleted.**
	Article 22 (8) - Ownership of results Specific provisions regarding ownership, access rights and licensing shall be laid down in the grant agreements and contracts regarding pre-commercial procurement to ensure maximum uptake of the results and to avoid any unfair advantage. The contracting authorities shall enjoy at least royalty-free access rights to the results for their own use and the right to grant, or require the recipients to grant, non-exclusive licences to third parties to exploit the results under fair and reasonable conditions without any right to sub-license. All Member States and associated countries shall have royalty-free access to the special report. If a contractor fails to commercially exploit the results within a given period after the pre-commercial procurement as identified in the contract, it shall transfer any ownership of the results to the contracting authorities.	See comments above: Delete or limit to procurement only. As reminded in the Regulation's Memorandum, article 1, *« the European Council, the European Parliament and the European Commission stated the Union will strengthen its common security and defence and foster a more competitive and integrated defence industry ».* This can only be achieved if the results are exploited mandatorily in the European Union or associated countries.	**Either, this principle must be deleted, or it must be limited to procurement actions only by deleting following text and adding extra text:** Specific provisions regarding ownership, access rights and licensing shall be laid down in the grant agreements and contracts regarding pre-commercial procurement to ensure maximum uptake of the results and to avoid any unfair advantage. ~~**The contracting authorities shall enjoy at least royalty-free access rights to the results for their own use and the right to grant, or require the recipients to grant, non-exclusive licences to third parties to exploit the results under fair and reasonable conditions without any right to sub-license.**~~ All Member States and associated countries shall have royalty-free access to the special report. If a contractor fails to commercially exploit the results within a given period after the pre-commercial procurement as identified in the contract, it shall transfer any ownership of the results to the contracting authorities. **Beneficiaries must mandatorily exploit and manufacture the results on the Union soil (or associated countries soil).**

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	Article 25 (1) (4) - Ownership of results 1. The Union shall not own the products or technologies resulting from development actions, nor shall it have any intellectual property rights regarding the results of the actions. 1. By derogation from paragraph 1, where the Union assistance is provided in the form of public procurement, the Union shall own the results and Member States and/or associated countries shall have the right, free of charge, to a non-exclusive licence for the use of the results upon their written request.	The principle of 25.1 with 25.4 as an exception is ok. Also, the intensity of rights due is ok (non-exclusive license). Assuming that for procurement activities, full costs will be covered in return for the provision of services, Art. 25 is ok and should as a principle apply not only for development, but also for research activities (Art 22).	
	Article 25 (2) - Ownership of results The results of actions receiving support from the Fund shall not be subject to any control or restriction by non-associated third countries or by non-associated third country entities, directly or indirectly through one or more intermediate legal entities, including in terms of technology transfer.	The original clause seems worded too wide in relation to its intent. It should be made clearer what restrictions are addressed, to avoid an excessive interpretation. Under the present wording, "restrictions" by third countries could mean any of such countries laws affecting use of items, which would probably apply in principle, but likely not practically affect the project or the use of its results by the beneficiaries, the EU or member states, in an inappropriate way. Assuming that the relevant "control or restrictions" targets the use of background owned or controlled by third countries, the suggested text amendment adds wording to clarify that. The term "background" is not used or defined elsewhere in the document, so it is put in brackets in the text amendment suggestion.	**Replace text Article 25 (2) with**: **The beneficiaries shall not use (background) IP owned or controlled by non-associated third countries or by non-associated third country entities, directly or indirectly through one or more intermediate legal entities, including in terms of technology transfer, in a way that the results of actions receiving support from the Fund would become subject to any control or restriction by such non-associated third countries or by non-associated third country entities. Beneficiaries must mandatorily exploit and manufacture the results on the Union soil (or associated countries soil).**
Additional criteria on development	**Article 23 (1) - Additional eligibility criteria** Where applicable, the consortium shall demonstrate that the remaining costs of an eligible action which are not covered by the Union support will be covered by other means of financing such as Member States' and/or associated countries' contributions or co-financing from legal entities.	This is an unnecessary administrative burden because all three arguments (that we could think of) for this requirement are (or should be) covered by other articles. 1. Financial capacity: covered by article 15. 2. Ensuring support of MS by checking if they dedicate funds: covered by the other two paragraphs of this article (23). 3. Ensuring no third country control is established over the results by co-financing the project: if extra insurance is needed, this should be provided in article 10 or article 11 (4). Particularly for public research institutes this is an unnecessary extra administrative burden, because we are under public control anyhow.	**Delete text.**

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Expert Group to inform WP development	**Article 28 - Committee** 1. The Commission shall be assisted by a committee within the meaning of Regulation (EU) No 182/2011. The European Defence Agency shall be invited as an observer to provide its views and expertise. The European External Action Service shall also be invited to assist. 2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.	If the committee is the only advisory body on the work programmes, the industry will get too much of a say on the content of the programme. During the Preparatory Action WP process we have seen that the industrial lobby is very strong, both through the MS and through EDA. As counter balance an Expert Group of public experts should be set up, as was planned for the Preparatory Action but it never materialized, to ensure that it truly stays a public programme.	**Add to Article 27 'Work Programmes'**: **3. For the preparation of the work programmes, the Commission will be advised by the Expert Group, as referred to in Article X.** **Adjusted text Article 28 'Committee':** 1. The Commission shall be assisted by a committee within the meaning of Regulation (EU) No 182/2011. The European Defence Agency **and Expert Group** shall be invited as ~~an~~ observer**s** to provide ~~its~~ **their** views and expertise. The European External Action Service shall also be invited to assist. **Add New article to be called 'Expert Group for the European Defence Fund':** **2. The Expert Group will consist of 15 experts from public bodies, appointed by the Commission after an open call for expression of interest.** **3. The members of the Expert Group will be appointed for the whole period covering the development and implementation of two consecutive work programmes.** 4. **The establishment and operation of the Expert Group will be in accordance with the Commission Decision establishing horizontal rules on the creation and operation of Commission expert groups C(2016)3301.**
Nationality independent experts	**Article 29 (2) - Independent experts** Independent experts shall be Union's citizens identified and selected on the basis of calls for expressions of interest addressed to relevant organisations such as Ministries of Defence and subordinated agencies, research institutes, universities, business associations or enterprises of the defence sector with a view to establishing a list of experts. By derogation from Article [237] of the Financial Regulation, this list shall not be made public.	The nationality requirement is unnecessary because the security risk people pose is assessed when they get the security clearance stipulated in paragraph 3 of this article. It is an unnecessary restriction on the Member States for selecting experts. As internationally competitive organisations, RTOs have experts with different nationalities. Shutting them out could negatively impact the quality of the independent expert pool.	**Delete text in Article 29 (2)** Independent experts shall be ~~**Union's citizens**~~ identified and selected on the basis of calls for expressions of interest addressed to relevant organisations such as Ministries of Defence and subordinated agencies, research institutes, universities, business associations or enterprises of the defence sector with a view to establishing a list of experts. By derogation from Article [237] of the Financial Regulation, this list shall not be made public.

EARTO and its experts remain of course ready to further discuss these recommendations with the European Institutions' representatives.

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Founded in 1999, EARTO promotes RTOs and represents their interest in Europe. EARTO network counts over 350 RTOs in more than 20 countries. EARTO members represent 150.000 highly-skilled researchers and engineers managing a wide range of innovation infrastructures.

***EARTO Working Group Security and Defence Research** is composed of 20 EU Affairs Specialists working within our membership to elaborate and to voice consolidated positions of RTOs and address them to the EC and other bodies.*

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