



ARTICLES

INTEGRATION IN EUROPEAN DEFENCE: SOME LEGAL CONSIDERATIONS

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ABSTRACT: The perceived surge in external threats such as hybrid and cyber warfare, the instability in EU neighbourhood, and deadly attacks on the very EU territory, jointly with the pending process of the UK leaving the European Union, recently renewed political and academic interest in the establishment of a European Defence Union (EDU). EDU is foreseen in Art. 42, para. 2, TEU, as part of Common Security and Defence Policy (CSDP), but only with Resolution of 22 November 2016 on the European Defence Union the European Parliament called for its establishment. This is now taking concrete shape: by Decision of 11 December 2011, the Council of the European Union has established a Permanent Structured Cooperation, and in June 2017 the Commission proposed the adoption of an *ad hoc* fund. The permanent structured cooperation is a mechanism for Member States to combine their military efforts provided for in the TEU, but never implemented or used until now. The opportunity to use a start-up fund is also foreseen in Art. 41, para. 3, TEU. This *Article* devotes attention to the legal foundations of EDU. It discusses issues related to its establishment, functioning, aims, and funding; in addition, it explores the relationship between EDU and other options available to policy-makers for providing a European defence: the mutual defence clause of Art. 42, para. 7, TEU and the mutual assistance clause of Art. 222 TFEU.

KEYWORDS: European Defence Union – European army – Common Foreign and Security Policy – Common Security and Defence Policy – EU external relations Law – international relations.

I. INTRODUCTION

The framing of a European Defence Union (EDU) is foreseen in Art. 42, para. 2, TEU, but it has not yet taken place. The perceived surge in threats to the European Union, such as hybrid and cyber warfare, instability in its neighbourhood, and deadly attacks on its very

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territory are the concern that recently¹ triggered the proposal to set up a common Union defence policy.² Moreover, given the traditional reticence of the UK to pursue more integration in the defence sector, its decision to leave the EU, together with a more permissive United States attitude toward European autonomous defence, have also renewed the political viability of the Franco-German effort to increase cooperation in this area.³

Against this background, by Resolution of 22 November 2016, the European Parliament called for the establishment of such a Defence Union.⁴ The Commission reflection paper of 7 June 2017 made reference to the Parliament's resolution,⁵ which was endorsed again by the European Council Conclusions of 22-23 June 2017.

By Decision of 11 December 2011,⁶ the Council of the European Union has established a Permanent Structured Cooperation, between 25 Member States (except Malta and UK). In June 2017 the Commission proposed the adoption of an *ad hoc* fund.⁷ The permanent structured cooperation is a mechanism, envisaged in the TEU, for Member States (MSs) to combine their military efforts: however, it was never implemented nor used until now.⁸ The opportunity to use a start-up fund is also foreseen in Art. 41, para. 3, TEU.

¹ Defence has figured quite prominently in the EU agenda since the European Council Conclusions of December 2013. In those Council conclusions, the High Representative (HR) was asked "in close cooperation with the Commission, to assess the impact of changes in the global environment, and to report to the Council in the course of 2015 on the challenges and opportunities arising for the Union, following consultations with the Member States"; See N. TOCCI, *Towards an EU Global Strategy*, in A. MISSIROLI (ed.), *Towards an EU Global Strategy. Background, Process, References*, Paris: European Union Institute for Security Studies, 2015, p. 115. Between December 2013 and the time of writing, tension with Russia over eastern Ukraine; the rise of the Islamic State; terrorist attacks for example in Paris, Nice, Berlin, London and Barcelona; the Brexit Referendum; the election of Donald Trump at the US Presidency all contributed, for EU policy-makers, to the necessity to establish a Defence Union.

² European Parliament Resolution 2016/2052(INI) of 22 November 2016 on the European Defence Union discussed below; Reuters Staff, *Germany, France Drafting Details of Defense Fund: German Minister*, in *Reuters*, 10 June 2017, www.reuters.com.

³ Joint Position of 11 September 2016 by Defence Ministers Ursula von der Leyen and Jean Yves le Drian, *Revitalizing CSDP. Towards a comprehensive, realistic and credible Defence in the EU*, www.senato.it; Commission White Paper COM(2017)2025 of 1 March 2017 on the Future of Europe proposed three scenarios of increased cooperation in defence: a group of Member States decide to cooperate much closer on defence matters; joint defence capacities are established; or, finally, a EDU is established. T. BARBER, *EU Comes Together Over Brexit*, in *Financial Times*, 7 June 2017, www.ft.com.

⁴ European Parliament Resolution (2016)2052.

⁵ Commission Reflection Paper COM(2017) 315 of 7 June 2017 on the Future of European Defence.

⁶ Decision 2017/1063/CFSP of the Council of 11 December 2017 establishing Permanent Structured Cooperation (PESCO) and determining the list of Participating Member States.

⁷ Communication COM(2017)295 of 7 June 2017 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Launching the European Defence Fund*.

⁸ A first attempt to start a discussion on permanent structured cooperation was made by the Belgians in 2010, but it fell on deaf ears. S. BISCOP, J. COELMONT, *CSDP and the Ghent Framework: The Indirect Approach to Permanent Structured Cooperation?*, in *European Foreign Affairs Review*, 2011, p. 149 *et seq.*

From a practical perspective, the study of the law of the European Defence Union is necessary for the implementation of the EU Global Strategy of 2016 and of the official EU documents referring to EDU mentioned above. Indeed, since one of the Global Strategy's objectives is the protection of European citizens, the High Representative (HR) and the Foreign Affairs Council will have to consider, among other options, the establishment of EDU. With the aim of providing decision makers and scholars with a clear picture of the legal options offered by the Treaties, this *Article* is devoted to the largely unexplored legal foundations of EDU.⁹

From an academic perspective, EDU raises both legal and political questions. In the first category, there are issues related to establishment, functioning, aims, and funding of the permanent structured cooperation, which this *Article* explore together with the relationship between the permanent structured cooperation and other legal options available to policy-makers: the mutual defence clause,¹⁰ and the mutual assistance clause.¹¹ To the second category, which this *Article* does not discuss, pertain issues related to EDU relationship with the NATO; to the desirability of the project itself; to the relationship between EDU and other areas of EU law-making; and to the repercussion of EDU for the integration paradigm of the EU.

Finally, a broader issue underlies the discussion on the law of European defence: even more than in other areas, in the field of international security the drafting and im-

⁹ A major exception is P. KOUTRAKOS, *The Common Security and Defence Policy*, Oxford: Oxford University Press, 2013. Other contributions are acknowledged in the footnotes of this *Article* whenever reference is made to them.

¹⁰ Art. 42, para. 7, TEU: "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States". Art. 51 UN Charter, binding on all EU MSs, states that: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the UN, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

¹¹ Art. 222 TFEU: "1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: (a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster. 2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council".

plementation of law is inextricably linked to historical and political interests.¹² For example, EDU would be inextricably linked to coordination with NATO:¹³ 21 EU MSs are NATO members; there are six non-NATO EU MSs: Austria, Cyprus, Malta, Ireland, Sweden, and Finland. Some European non-EU States are also NATO members (Turkey, Norway and, in the future, the United Kingdom). Aside from these alliances, some EU MSs have between themselves both multilateral¹⁴ and bilateral¹⁵ defence treaties. In a domain that States perceive as power-driven more than law driven,¹⁶ the stimulating and fundamental question as to what role law can play is left open for discussion.

II. REASONS FOR THE INCLUSION OF EDU PROVISIONS IN THE LISBON TREATY AND THEIR RATIONALE

The Lisbon Treaty introduced the permanent structured cooperation in EU law,¹⁷ along with the mutual defence clause (Art. 42, para. 7, TEU). These two mechanisms were discussed at the Convention for the Future of Europe and inserted in the Constitutional Treaty of 2004. While that Treaty was never adopted, the rules flew, substantially unchanged, in the Lisbon Treaty of 2009.

The provisions on a permanent cooperation were a significant innovation, in the Constitutional Treaty, of EU defence framework. They followed the shared willingness to improve EU's capacity to act united in the international system as a Union – something which had not happened successfully during the wars in the Balkan in the previous decade, and after 11 September 2001 in Afghanistan and Iraq. With a pattern that in this field still endures fifteen years later, British scepticism was contraposed to Franco-German initiatives. Since some MSs had already bilateral agreements in some defence areas, and with a view to strengthen EU's efficiency and coherence, following a Franco-German proposal, the Working Group on Defence at the Convention for the Future of Europe recommended to increase the role of the HR, that those MSs wishing to undertake firmer commitments than others should be enabled to do so with the Union's framework, and that a Common Foreign Security Policy (CFSP) emergency budget

¹² P. KOUTRAKOS, *The Common Security and Defence Policy*, cit., p. 79.

¹³ European Parliament Resolution (2016)2052, point 4.

¹⁴ The Nordic Defence Cooperation, which acquired this name in 1997, includes Sweden, Finland, Denmark and also Norway.

¹⁵ Dutch-Belgian navies cooperation, formalised in 1996, english.defensie.nl.

¹⁶ M. KOSKENNIEMI, *International Law Aspects of the Common Foreign and Security Policy*, in M. KOSKENNIEMI (ed.), *International Law Aspects of the European Union*, Leiden: Brill Nijhoff, 1998, p. 27.

¹⁷ European Parliament, Directorate-General for External policies of the Union, Policy Department, *The Lisbon Treaty and Its Implications for CFSP/ESDP*, Briefing Paper, Brussels: European Parliament, 2008, p. 7, www.europarl.europa.eu.

should be set up.¹⁸ The second of these items – later to become the permanent structured cooperation – was conceived also with the view to allow MSs to transfer their obligations under the 1954 Western European Union (WEU) Treaty into EU law.¹⁹ The United Kingdom (UK) government's initial reaction was very cautious. As it reminded at a hearing in the UK Parliament, "none of these structures pretends to provide an operational EU military command structure either at the strategic or the tactical levels. There are no standing EU headquarters (just as there is no EU standing force). Any such EU operational command structure would duplicate existing NATO and national assets".²⁰ In particular, the UK government made clear its intention to resist the inclusion of any security guarantee in the new treaty which could rival or come to replace the security guarantee established through NATO.²¹

At the Convention for the Future of Europe, the mutual defence clause, which would become Art. 42, para. 7, TEU, followed from a recommendation by the Defence Working Group that MSs should commit to mobilising all instruments to prevent or respond to a terrorist attack or natural disaster within the EU.²² The recommendation, phrased in those broad terms, proved unacceptable for the UK and other MSs which wanted to preserve. The mutual defence clause was instead phrased so as to provide obligation to assist a Member State victim of an "armed aggression",²³ and it was meant to accommodate three groups of States:²⁴ those seeking a mutual defence commitment which could be satisfied with the part of the article stating that "the other Member States shall have [...] an obligation of aid and assistance by all the means in their power"; those seeking to protect their traditional neutral status (such as Ireland, Austria and Sweden) which could be satisfied with the clause "[t]his shall not prejudice the specific character of the security and defence policy of certain Member States"; and those wanting to ensure that the article would not undermine NATO which could be satisfied with the reminder that "[c]ommitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation". In addition to the mutual defence clause, and prompted by deadly attacks in Madrid (2004) and in London (2005), MSs later decided to introduce a "solidarity clause" in the event of a man-made or natu-

¹⁸ Working Group VIII "Defence", *Franco-German comments on the preliminary draft final report of Working Group VIII "Defence"* of 4 December 2002.

¹⁹ This happened with the Lisbon Treaty, and the WEU officially came to an end in 2010.

²⁰ Select Committee on European Union Forty-First Report, Government Response to the Committee's 11th Report, *The EU, A Player on the Global Stage?*, www.publications.parliament.uk, para. 284.

²¹ UK Government White Paper Cm 5934 of 1 September 2003, *A Constitutional Treaty for the EU – The British approach to the European Union Intergovernmental Conference 2003*, para. 95.

²² House of Lords Select Committee on the European Union, Report of 21 October 2003, *The Future of Europe – The Convention's Draft Constitutional Treaty*, www.publications.parliament.uk, p. 46.

²³ This is discussed more at length later in the *Article*.

²⁴ H-J. BLANKE, S. MANGIAMELI, *The Treaty on European Union (TEU) A Commentary*, Heidelberg: Springer, 2013, p. 1201 *et seq.*

ral disaster, at the request of the political authority of the concerned Member State. This would later become Art. 222 TFEU, and the relationship between this clause and the mutual defence of Art. 42, para. 7, TEU is explored later in the *Article*.

III. LEGAL CONSIDERATIONS

The European Parliament envisaged that an EDU should encompass a permanent structured cooperation, a mechanism never used before its establishment on 11 December 2017, and which used to lie, like a sleeping giant, among the provisions of Title V TEU.²⁵ Following the Parliament's proposal, some authors have commented on the permanent structured cooperation,²⁶ a subject which gets at best a mention in mainstream legal scholarship.²⁷

The permanent structured cooperation is characterised by flexibility in its establishment, management, and purpose; by continuity in its functioning; and its effectiveness depends to a large extent on its funding.²⁸

III.1. THE OPTIONS

The analysis will focus on the permanent structured cooperation, but this is by no means the only possible option to serve as legal basis for a common European Defence. As a first option, in theory, the creation of a European army could be achieved through a super-governmental, integrationist, pro-federal project.²⁹ This, however, would require Treaty amendments as well as major restructuring of MSs defence policies, and it is not a reasonable option at the moment of writing: it is a lengthy and costly procedure which requires MSs' unanimity.

²⁵ F. MAURO, *Permanent Structured Cooperation. The Sleeping Beauty of European Defence*, in *Groupe de Recherche et d'Information sur la Paix et la Sécurité*, 27 May 2015, www.grip.org. Brussels refers to the classic fairy tale, but I prefer to use the image of a giant because I do not derive any aesthetic pleasure from the contemplation of the Permanent Structured Cooperation.

²⁶ S. BISCOP, *Oratio pro Pesca*, Brussels: Egmont Paper, 2017; A. BAKKER, M. DRENT, D. ZANDEE, *European Defence Core Groups. The Why, What & How of Permanent Structured Cooperation*, in *Egmont Institute*, 25 November 2016, www.egmontinstitute.be; and other contribution cited in footnotes of this *Article* where relevant.

²⁷ The only notable exception is P. KOUTRAKOS, *The Common Security and Defence Policy*, cit. Authors from other disciplines, instead, had written on the Permanent Structured Cooperation already before. S. BISCOP, *From ESDP to CSDP: The Search for Added Value through Permanent Structured Cooperation*, in *UACES*, 1-3 September 2008, www.uaces.org.

²⁸ P. KOUTRAKOS, *The Common Security and Defence Policy*, cit., p. 76.

²⁹ Similar to the failed European Defence Community, which in the Fifties would have replaced MSs armies with an EU standing one.

A second, more politically viable option – despite staunch criticism³⁰ – is to have recourse to other provisions on the Common Security and Defence Policy (CSDP). This option would not encompass any further relinquishment of sovereignty from MSs to the EU. The management of the Defence Union would be done at an intergovernmental level, much as it happens, as a rule, in the whole area of CFSP. This second option would permit to choose between several legal bases. Art. 42, para. 7, TEU, for example, is an important “mutual defence clause”. Pursuant to it, MSs have an obligation to assist another MS victim of an “armed aggression” on its territory.³¹ Apart from the ambiguity of the phrase armed aggression, which does not recur elsewhere in legal documents,³² the Article is phrased similarly to other clauses of collective defence, such as Art. 5 NATO Charter or Art. 4 of the 1948 Brussels Treaty, whereby Western European States agreed to make an alliance for the security of the continent.³³ EU Treaties heavily rely on United Nations obligations, on paper:³⁴ the very Art. 42, para. 7, TEU makes reference to Art. 51 of the UN Charter.³⁵ However, there are two reasonable and opposite interpretations of Art. 51 UN Charter: a permissive and a restrictive interpretation. The

³⁰ J. RANKIN, *Is There a Secret Plan to Create an EU Army?*, in *The Guardian*, 27 May 2016, www.theguardian.com.

³¹ The obligation is similar, in substance, to that deriving from Art. 222 TFEU. The events triggering each Article, as well as the procedure, however, differ.

³² General Assembly, Resolution A/RES/29/3314 of 14 December 1974 on the Definition of Aggression; its Art. 1 states: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter, as set out in this Definition”. The Resolution is not binding on the EU if not to the extent it reflects customary law.

³³ Respectively: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 UN Charter, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security’ and ‘If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 UN Charter, afford the Party so attacked all the military and other aid and assistance in their power”.

³⁴ P. EECKHOUT, M. LOPEZ-ESCUADERO (eds), *The European Union's External Action in Times of Crisis*, Oxford: Hart Publishing, 2016, p. 52.

³⁵ “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the UN, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”.

permissive one disregards the requirement that the armed attack must have occurred and allows, for example, for anticipatory self-defence. A permissive interpretation also relinquishes the requirement that the armed attack is committed by a State – even though State practice points to the opposite direction.³⁶ It is therefore debatable whether Art. 51 of the UN Charter – and consequently Art. 42, para. 7, TEU – extends the right to self-defence to a case of attack by non-State actors. In practice, Art. 42, para. 7, TEU was only used once in the history of the EU, when President Hollande called for its application after November 2015.³⁷ The trigger of France's request were simultaneous shootings and killings in Paris, carried out by operatives of the Islamic State (IS), which later claimed responsibility for the attack. At present, no State recognises IS as a State within the meaning, for example, of the Montevideo Convention. The application of Art. 42, para. 7, TEU in case of an attack by an entity that France considers a terrorist organisation is evidence, therefore, that the notion of "aggression" in Art. 42, para. 7, TEU and of Art. 51 UN Charter is interpreted broadly. In that case, the concrete use of that clause consisted in France concluding bilateral agreements with some other EU countries, with the aim of receiving troops for France's missions abroad and focus their soldiers on patrolling the country's territory.³⁸

Moreover, as a third option, the relationship of that CSDP provision with Art. 222 TFEU is worth of analysis. Even though the clause is in the TFEU, there are four grounds for considering it in relation to other CFSP instruments.

In *Anagnostakis*, the General Court held that Art. 222 TFEU "clearly does not relate to economic and monetary policy, or economic circumstances or the budgetary difficulties of the Member States" – thus implying that it might refer, instead, to the CFSP, or at least to EU's external action in general.³⁹ This was the opinion of AG Jääskinen in *Elitaliana*: EU's external action covers Art. 222 TFEU.⁴⁰ Even more explicit was the Opinion of AG Bot in case C-130/10, that the Article relates to the CFSP, in particular in so far as concerns CSDP.⁴¹ Finally, the Council Decision implementing Art. 222 refers, in its fifth recital, to the structures developed under the CSDP as instruments developed pursuant

³⁶ M. MILANOVIC, *Self-Defense and Non-State Actors: Indeterminacy and Jus ad Bellum*, in *EJIL Talk!*, 21 February 2010, www.ejiltalk.org.

³⁷ E. CIMIOTTA, *Le Implicazioni del Primo Ricorso alla c.d. 'Clausola di Mutua Assistenza' del Trattato sull'Unione Europea*, in *European Papers*, 2016, Vol. 1, No 1, www.europeanpapers.eu, p. 163 *et seq.*

³⁸ S.E. ANGHEL, C. CIRLIG, *Activation of Article 42(7) TEU France's Request for Assistance and Member States' Responses*, in *European Council Briefing*, July 2016, www.europarl.europa.eu, p. 3.

³⁹ General Court, judgment of 30 September 2015, case T-450/12, *Anagnostakis v. Commission*, para. 60.

⁴⁰ Opinion of AG Jääskinen delivered on 21 May 2015, case C-493/13, *P Elitaliana v. EULEX Kosovo*, para. 17.

⁴¹ Opinion of AG Bot delivered on 31 January 2012, case C-130/10, *European Parliament v. Council of the European Union*, para. 65.

to the solidarity clause.⁴² However, the Council Decision implementing the solidarity clause does not provide a general framework for dealing with actions having military defence implications, because the joint proposal⁴³ excluded “defence implications”.

Both Arts 42, para. 7, TEU and 222 TFEU require that the event takes place on a Member State’s territory. Both Articles shall be read in conjunction with Art. 196 TFEU, which imposes duties on the EU to encourage cooperation to prevent and assist civilians in case of natural or man-made disasters. But these are, on paper, the only overlap in the scope of the two Articles.

While the mutual defence clause requires an armed aggression to trigger it, the mutual assistance clause requires a terrorist attack, a man-made, or natural disaster. While, as we saw, “armed aggression” was interpreted so as to encompass a terrorist attack, the scope of application of the solidarity clause is wider. This was due to the initiative of Michel Barnier, chairman of the Working Group VIII on Defence for the drafting of a Constitutional Treaty in 2003.⁴⁴

Moreover, the mutual defence obligation is only incumbent upon other MSs, while Art. 222 TFEU imposes an obligation on the EU as well. This means the opportunity to mobilise Union’s own resources such as police, funds, etc.⁴⁵ It is also important to recall that Art. 42, para. 7, TEU is subject to the exception that the provision “shall not prejudice the specific character of the security and defence policy of certain Member States”, even though what the exception exactly means is object of debate.⁴⁶

The obligations of solidarity are wider than those stemming from mutual defence. Obligations involve the prevention, protection, and assistance in case of such an event. Moreover, it is debated whether Art. 222 TFEU could be used also to suppress social arrest (whether this is certainly not the case for Art. 42, para. 7, TEU).

Finally, Art. 44, para. 1, TEU, allows for a form of enhanced cooperation by some MSs to carry out, on a voluntary basis, specific tasks entrusted to them by the Council. The reasons why the European Parliament and other authors have not called for these legal bases is that the permanent structured cooperation, in the eyes of its supporters,

⁴² Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause.

⁴³ High Representative of the EU for Foreign Affairs and Security Policy and the European Commission, Joint proposal of 21 December 2012 for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause presented, pursuant to Article 222(3) TFEU.

⁴⁴ S. VILLANI, *The EU Civil Protection Mechanism: Instrument of Response in the Event of a Disaster*, in *Revista Universitaria Europea*, 2017, p. 129.

⁴⁵ M. FUCHS-DRAPIER, *The European Union’s Solidarity Clause in the Event of a Terrorist Attack: Towards Solidarity or Maintaining Sovereignty?*, in *Journal of Contingencies and Crisis Management*, 2011, p. 185 *et seq.*

⁴⁶ P. HILPOLD, *Filling a Buzzword with Life: The Implementation of the Solidarity Clause in Article 222 TFEU*, in *Legal Issues of Economic Integration*, 2015, p. 217.

offers two distinctive advantages: it can be used for external action, and, as the name suggests, it is permanent.

III.2. ESTABLISHMENT OF PERMANENT STRUCTURED COOPERATION

The legal basis for a permanent structured cooperation is provided for in Art. 42, para. 6, TEU:

“Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. Such cooperation shall be governed by Article 46. It shall not affect the provisions of Article 43”.

Art. 46 and Protocol 10 lay down detailed but flexible provisions. The establishment of the cooperation follows a two tier process. The first is of positive harmonisation in cooperation and in the development of defence capacities between MSs who wish to commit themselves to do so. The details of these are set out in Art. 1 of Protocol 10. More analytically, “cooperation” includes activities “from joint development or procurement to pooling, i.e. permanent multinational formations, either deepening integration in relevant existing ones (e.g. battle groups or Euro corps) or new initiatives”.⁴⁷

Development of capacities includes but is not limited to a “medical command; advanced training; remotely piloted aircraft systems capability; combat search and rescue; military capacity to counter nuclear, biological, chemical and radiological threats; strategic surveillance of EU borders; and shared access to satellite imagery.”⁴⁸ It might also involve creating or sharing military facilities for the supervision or training of military personnel:⁴⁹ at the moment, the EU does not have military headquarters.⁵⁰ Pursuant to Art. 3 of Protocol 10, the European Defence Agency shall contribute to the regular assessment of participating Member States' contributions with regard to capabilities.

Once this first phase is deemed completed, and MSs who have so decided between themselves have sufficiently harmonised their defence capabilities, the second phase involves a notification to the High Representative and the Council (Art. 46, para. 1, TEU).

⁴⁷ C. NISEEN, *European Defence Cooperation after the Lisbon Treaty. The Road is Paved for Increased Momentum*, Copenhagen: Danish Institute for International Studies, 2015, p. 15.

⁴⁸ A. MARRONE, N. PIROZZI, P. SARTORI, *PESCO: An Ace in the Hand for European Defence*, in *Istituto Affari Internazionali*, 22 March 2017, www.iai.it, p. 4.

⁴⁹ *Ibidem*, p. 6.

⁵⁰ P. KOUTRAKOS, *The Common Security and Defence Policy*, cit., p. 101.

The notification was given by 23 MSs on 13 November 2017, and by Ireland and Portugal on 7 December 2017.⁵¹

The Council then proceeded to adopt a decision establishing the permanent structured cooperation, acting by qualified majority.

III.3. FUNCTIONING

The functioning of the permanent structured cooperation is inspired by three principles: willingness, continuity, and flexibility. These principles clearly show a preference for leaving MSs in power at all time during the cooperation, while at the same time providing a framework that encompassed rigorous rules, compliance with which is realistic. The preference for the reliance on political bargain and unanimity follows, for the CSDP, the precise recommendation that was formulated already in 2002 by Working Group VIII of the European Convention.⁵²

The requirement of willingness explains why the mechanism is called a permanent structured “cooperation”.

Any Member State which has the sufficient capacities can join at any stage the permanent structured cooperation, and, most importantly, leave it (Art. 46, para. 5, TEU). This is what Professor Koutrakos named the principle of “openness”. The process of joining at a later stage after the establishment of the cooperation is identical to the one foreseen for the original set up of the mechanism: same requirements for the Member State, same procedure and voting rules; the only difference is that there is no time-limit of three months for the Council to act.

The procedure for leaving the cooperation seems to be fairly simple: a unilateral declaration of the MS who does not wish to take part in the operations any longer will suffice. The Council shall simply take notice of the withdrawal.

Moreover, the decision-making rule throughout the cooperation will be unanimity – obviously, unanimity of the participating MSs only (Art. 46, para. 6, TEU).

The requirement of continuity accounts for the qualification of the structured cooperation as “permanent”. Continuity ensured guaranteed by Art. 46, para. 4, TEU: a Member State which no longer fulfils the criteria or is no longer able to meet the commitments it made prior to entering the cooperation, may be suspended from participating in it. The decision is taken by the Council voting by unanimity.

The permanent cooperation is flexible in so far as it is only “structured”, and its functioning is not otherwise defined in detail.

⁵¹ European Council, Council of the European Union, Press Release 765/17 of 11 December 2017, *Defence cooperation: Council establishes Permanent Structured Cooperation (PESCO), with 25 member states participating in Council of the European Union*,.

⁵² P. CRAIG, *The Lisbon Treaty. Law, Politics, and Treaty Reform*, Oxford: Oxford University Press, 2010, p. 419. The final report of the Working Group is available at www.european-convention.europa.eu.

While some authors read in the rules on this cooperation an inevitable evolution and therefore an unstoppable incremental collaboration,⁵³ this is not necessarily the case. The rules of Art. 46 are instead fashioned in a way as to allow MSs not only to withdraw at any point, but also as to pick to what missions and operations it wants to participate.⁵⁴

An important aspect of the flexibility constitutional to the permanent cooperation is that there are no time constraints as to when it will be set up,⁵⁵ nor when and how often it should act. This makes eminent sense, given that the cooperation is permanent precisely in order to ensure a timely reaction to unforeseen events. A time-schedule or any other kind of temporal planning would be detrimental to the rationale of the cooperation.

A source of potential concern looming over the whole set of provisions on the CSDP is the absence of jurisdiction of the CJEU. Art. 24 TEU provides that the Court shall not have jurisdiction on the provisions of Title V TEU and acts implementing them, i.e. on CFSP, thus including CSDP.⁵⁶

The only cases on which the Court has jurisdiction is to monitor compliance with Art. 40 TEU and to review the legality of sanctions. Art. 40 TEU provides that CFSP and TFEU external competences shall not affect each other's powers and procedures.

A first scenario where the Court has jurisdiction would therefore be to ensure that nothing in CSDP encroaches on TFEU competence, for example trade or humanitarian assistance acts which fall under the TFEU competence of EU external relations.⁵⁷

A second scenario would be Art. 222 was invoked during one of the operations of the permanent structured cooperation or even in parallel with the mutual assistance clause. In its first paragraph, that Article provides that "[t]he Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster". In that case, if a measure was adopted on a dual legal basis, or, more simply, if an ongoing CSDP operation was, in the case of a terrorist attack, concretely carried out on EU territory pursuant to a Council Decision adopted under Arts 222, para. 3, TFEU and 31, para. 1, TEU, then the Court might find that it has jurisdiction to rule on the original CSDP act as well.

Art. 222 TFEU, indeed, could act as a "bridge" between CSDP and TFEU competences, thus conferring jurisdiction to the Court, in the same way as Art. 215 TFEU does. By Art. 215 the Union implements sanctions against individuals. In *Rosneft*, the Court ruled

⁵³ P. KOUTRAKOS, *The Common Security and Defence Policy*, cit.

⁵⁴ A. MARRONE, N. PIROZZI, P. SARTORI, *PESCO: An Ace in the Hand for European Defence*, cit., p. 4.

⁵⁵ Protocol 10 spoke of 2010 as deadline.

⁵⁶ See Court of Justice, opinion 2/13 of 18 December 2014, para. 252; Court of Justice, judgment of 28 March 2017, case C-72/15, *Rosneft*, para. 99.

⁵⁷ A. DASHWOOD, *The Continuing Bipolarity of the EU External Action*, in I. GOVAERE, E. LANNON, P. VAN ELSUWEGE, S. ADAM (eds), *The European Union in the World: Essays in Honour of Marc Maresceau*, Leiden: Brill Nijhoff, 2014, p. 3 *et seq.*; P. KOUTRAKOS, *The Common Security and Defence Policy*, cit., Chapter 8.

that Art. 215 acts as a “bridge” between CFSP and TFEU,⁵⁸ and thus it appears that CFSP decisions which need implementation via Art. 215 are also subject to the Court’s jurisdiction, because they have “crossed the bridge” – which is AG Whatelet’s expression.⁵⁹

Finally, even though I believe that the Charter of Fundamental Rights of the European Union is applicable to CFSP, there are good grounds for concern over the accountability mechanisms of CSDP missions.⁶⁰

As far as institutional involvement is concerned, the High Representative puts into effect European foreign policy and, therefore, also EDU (Art. 24 TEU). To the HR pertain the right to propose decisions (Art. 42, para. 4, TEU), and coordination of the tasks which are the purpose of CSDP. This might appear to be at issue with Art. 15, para. 6, TEU, which provides that “[t]he President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.” The issue of representation of the EU should be resolved in the sense of granting the President of European Council representation at government level, and to HR representation at anything below that level (that is, exchanges between diplomats).⁶¹

In EDU, the Political and Security Committee (PSC) plays a major role. PSC is the main deliberative and preparatory body for the CSDP, even though overview and coordination of the missions is the HR’s task.

III.4. PURPOSE

The tasks of EU missions in CSDP are established in Art. 42, para. 1, TEU and specified in Art. 43, para. 1, TEU as a non-exhaustive list. These draw from, but are broader than, the so-called “Petersberg tasks”, which defined the military objectives of the European Union in 1992. Drawing on the Franco-British St Malo declaration of 1998,⁶² the Cologne⁶³ and Helsinki⁶⁴ European Council meeting of 1999, the TEU assigns to CSDP missions purely defensive and peace-keeping tasks, namely: “peace-keeping, conflict pre-

⁵⁸ *Rosneft*, cit., para. 89; see also Court of Justice, judgment of 19 July 2012, case C-130/10, *European Parliament v. Council of the European Union*, para. 59.

⁵⁹ Opinion of AG Whatelet delivered on 31 May 2016, case C-72/15, *Rosneft*, footnote 56.

⁶⁰ S.O. JOHANSEN, *Accountability Mechanisms for Human Rights Violations by CSDP Missions: Available and Sufficient?*, in *International and Comparative Law Quarterly*, 2017, p. 181 *et seq.*

⁶¹ P.J. KUIJPER, J. WOUTERS, F. HOFFMEISTER, G. DE BAERE, T. RAMOPOULOS, *The Law of EU External Relations. Cases, Materials, and Commentary on the EU as an International Legal Actor*, Oxford: Oxford University Press, 2015, p. 26.

⁶² Franco-British St. Malo Declaration of 4 December 1998, www.cvce.eu.

⁶³ European Parliament, Conclusions of the Presidency of 3-4 June 1999, www.europarl.europa.eu.

⁶⁴ European Parliament, Conclusions of the Presidency of 10-11 December 1999, www.europarl.europa.eu.

vention and strengthening international security in accordance with the principles of the UN Charter".⁶⁵

The specification of the concrete objectives and scope of these tasks, however, is left to the Council (Art. 43, para. 2, TEU): this leaves open the question of how much discretion would the Council enjoy in making these decisions. The issue is of fundamental constitutional importance because it has repercussions for both the role of the EU in the international scene and for the discussion over the desirability of the EDU itself. Much of the debate surrounding the opportunity of an EDU clearly depends on what EU forces do or aim to.

The autonomy of the Council would encounter clear constitutional limits: those of Arts 21, para. 2, let. a), b), and c),⁶⁶ and 42 TEU. EDU would be used exclusively for defence and to safeguard EU security, integrity, and independence – or, outside the Union, to preserve peace and prevent conflicts. This shall also be in line with the values of Art. 3, para. 5, TEU.⁶⁷ But these are only external boundaries. One thing is to state the obvious – the EDU could not be used to expand EU's territory – quite another thing is to interpret the reference in the TEU to the "respect for the principles of the United Nations Charter". Would it be possible to use an EU army for "humanitarian intervention", e.g. without UN Security Council authorisation but for the aim of stopping most serious violations of human rights? Would anticipatory or pre-emptive self-defence be considered in line with the principles of the Charter? Would an armed-attack by a non-State actor trigger the "inherent right to self-defence" enshrined in Art. 51 UN Charter? Aside from issues of compliance with the UN Charter, could EDU be used for internal security purposes?

⁶⁵ Art. 43 TEU specifies: "The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories".

⁶⁶ Art. 21, para. 2, let. a), b), and c), TEU: "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders".

⁶⁷ Art. 3, para. 5, TEU: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".

There is, at present, no clear answer to these questions. The CJEU seems willing to leave the Council a broad scope for discretion when it comes to decisions of CFSP.⁶⁸ At this stage, therefore, the only possible answer is that the precise purpose of EDU will depend on how the Council interprets its role.

Moreover, the EU could conclude – as it does at present⁶⁹ – international agreements to facilitate or regulate its CSDP missions, pursuant to Arts 37 TEU and 218 TFEU. These would also be necessary for EDU, and the CJEU shall have jurisdiction to give opinions on their conclusion, pursuant to Art. 218, para. 11, TFEU.

While the competence of the Union to conclude these treaties is not debatable, the nature of such competence is unclear. In particular, as far as the conclusion of the agreements is concerned, it is not clear whether it is subject to the rule of Art. 3, para. 2, TFEU, which states that the Union shall have exclusive competence for the conclusion of international treaties “when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope”.⁷⁰ The first two requirements hardly apply to CSDP. There can be no legislative acts in CFSP, and it is hard to see what internal aspect is *not* conditional to external security, thus making it difficult to take this requirement seriously.⁷¹ It might instead happen that a CSDP-related treaty affect common rules or alter their scope – for example rules on defence products.⁷²

III.5. FUNDING

The rule for EU budget is that military expenses are paid by MSs, unless they are administrative costs. In this category fall civilian missions with defence implications as well. At present, these costs are financed by a mechanism called ATHENA,⁷³ whereby MSs who

⁶⁸ *Rosneft*, cit., para. 146; opinion of AG Whatelet, *Rosneft*, cit., para. 105; Court of Justice: judgment of 1 February 2007, case C-266/05, *P Sison v. Council of the European Union*, para. 33; judgment of 28 November 2013, case C-348/12, *P Council v. Manufacturing Support & Procurement Kala Naft*, para. 120; judgment of 7 April 2016, case C-193/15, *Akhras*, para. 51; judgment of 12 May 2016, case C-358/15, *Bank of Industry and Mine v. Council of the European Union*, para. 57.

⁶⁹ P.J. KUIJPER, J. WOUTERS, F. HOFFMEISTER, G. DE BAERE, T. RAMOPOULOS, *The Law of EU External Relations*, cit., p. 673 describes the three kinds of international agreements the EU concludes with regard to CSDP missions.

⁷⁰ I will not discuss the extent to which this Article intends to codify the previous case law of the Court. Opinion of AG Kokott delivered on 27 June 2013, case C-137/12, *Commission v. Council*, para. 111.

⁷¹ This would be even more true if the Article intended to codify Court of Justice, opinion 1/76 of 26 April 1977 on the “complementarity principle”, that the Union enjoys exclusive competence when internal and external action are so “inextricably linked” that it does not make sense to have one without the other.

⁷² On which see M. TRYBUS, L.R.A. BUTLER, *The Internal Market and National Security: Transposition, Impact and Reform of the EU Directive on Intra-Community Transfers of Defence Products*, in *Common Market Law Review*, 2017, p. 403 *et seq.*

⁷³ Council Decision (CFSP) 2015/528 of 27 March 2015 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (ATHENA) and repealing Decision 2011/871/CFSP.

have decided not to abstain (Art. 31, para. 1, TEU) contribute in proportion to their Gross national product.

The TEU, however, also provides for a specific start-up fund in Art. 41, para. 3. This should pay for preparatory activities to the tasks of CSDP missions – thus including EDU ones – which are not financed by MSs. At the moment, such a fund does not exist, but it is a kind of instrument not new to the EU experience. It is conceivable that it could be fashioned, if not in its form and least in its substance,⁷⁴ like an international agreement not dissimilar from the European Stability Mechanism or to the Single Resolution Fund for Banking Union.

The adoption of the fund shall follow a two-stages procedure: first, a Council decision should set up the fund (pursuant to Art. 41, para. 3, let. a), TEU – without involvement of the European Parliament). Second, after consultation with the European Parliament, the Council should establish a procedure for using the fund.

Commentators have noticed the uncertainty over the purpose of the financing, which accounts for MSs reluctance to establish this fund;⁷⁵ or the potential for inter-institutional disputes on the budgetary procedure.⁷⁶

There are also doubts as to the practical relevance thereof. For the fund to be useful, MSs would have to contribute hefty sums, especially since they already have ATHENA in place. Indeed, since this fund was conceived before ATHENA was created, it appears that MSs have already found a way to solve the issue, thus eliminating, in practice, the need for the start-up fund of Art. 41, para. 3, TEU.

In addition to this, the Commission, following the Speech of President Juncker on the state of the Union, proposed a Defence Plan in November 2016.⁷⁷

IV. CONCLUSION

The prospect of EDU is a powerful reminder that the EU is an unfinished project. Uncertainty over EDU's aims casts doubt over its practical significance. At present, since it is impossible to determine with legal certainty what the duties and tasks of the EDU will be, proponents of the EDU are having a hard time “selling” it to the public and to MSs government.⁷⁸

⁷⁴ It has to be a Council decision.

⁷⁵ H-J. BLANKE, S. MANGIAMELI, *The Treaty on European Union (TEU) A Commentary*, cit., p.1197.

⁷⁶ P. KOUTRAKOS, *The Common Security and Defence Policy*, cit., p. 76.

⁷⁷ Communication COM/2016/950 of 30 November 2016 Commission to the European Parliament, the European Council, the Council, the European Economic and social Committee and the Committee of the Regions, *European Defence Action Plan*. See, on it, S. BISCOP, *Differentiated Integration in Defence: A Plea for PeSco*, in *Istituto Affari Internazionali*, 6 February 2017, www.iai.it, p. 8.

⁷⁸ D. KEOHANE, *Samuel Beckett's EU Army*, in *Carnegie Europe*, 16 December 2016, www.carnegieeurope.eu.

EU military policies are and remain voluntary, that is, subject to the preferences of each individual MS. In EDU, the balance of politics and law is overwhelmingly in favour of the former. But contrary to what Koutrakos suggests,⁷⁹ the strength of the rules on permanent structured lies precisely in this. The norms are rigorous to a sufficient degree, while leaving MSs enough flexibility to pursue their own policies. Ultimately, it is precisely the reliance on policies rather than on legal factors the element that may guarantee the permanent structured cooperation's success. Further research should explore if there are aspects of legal distinctiveness about the EDU; whether it is even "softer" and more intergovernmental than CFSP; how and to what extent EDU links with EU law proper; and, more theoretically, where it fits into the model of EU integration.

However, given the overlap with existing CSDP mechanism, NATO, and other ad hoc coalitions, as well as the potential conflict between the purposes of EDU and some of EU's obligations under the UN Charter, the practical relevance of the EDU comprising the establishment permanent structured cooperation is at best questionable.

⁷⁹ P. KOUTRAKOS, *The Common Security and Defence Policy*, cit., p. 78.

