



ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

Edited by Juan Santos Vara and Ramses A. Wessel

A COMMON SECURITY AND DEFENCE POLICY: LIMITS TO DIFFERENTIATED INTEGRATION IN PESCO?

ANNEKE HOUDÉ* AND RAMSES A. WESSEL**

TABLE OF CONTENTS: I. Introduction. – II. CSDP: between a common and differentiated policy. – II.1. CSDP as a common policy of the EU. – II.2. Differentiated integration in CFSDP. – III. PESCO's microcosm of differentiated integration. – III.1. The awakening of the "Sleeping Beauty". – III.2. Participation in PESCO. – III.3. PESCO projects. – IV. PESCO: contributing to a common security and defence policy? – IV.1. General principles in EU CFSP and their enforcement. – IV.2. Consistency in relation to differentiated integration in PESCO. – IV.3. Sincere cooperation in relation to differentiated integration in PESCO. – V. Conclusion

ABSTRACT: The use of Permanent Structured Cooperation (PESCO) by the European Union to manage defence cooperation between its Member States is the most recent example of Differentiated Integration (DI) in the EU. Yet differentiation may come at a price. The main aim of the present *Article* is to assess to what extent defence cooperation under the umbrella of PESCO can be cut up in pieces and yet still be considered a *common* defence adhering to the EU's general principles of consistency and sincere cooperation. The question, therefore, is whether DI in PESCO is limited by these principles, and consequently, whether the CSDP, despite the differentiation, still contributes to a common policy. In short, the question is whether there is a tension between *commonness* and *differentiation* in EU security cooperation.

KEYWORDS: Common Foreign and Security Policy – Common Security and Defence Policy – differentiated integration – Permanent Structured Cooperation – principle of consistency – principle of loyal cooperation.

* Junior Researcher of European Law, University of Groningen, annekehoude@hotmail.com.

** Professor of European Law, University of Groningen, r.a.wessel@rug.nl.



I. INTRODUCTION

Post-Brexit, the political and academic debate about the future of the European Union has once again come to the fore, especially from the angle of differentiated integration (DI).¹ Differentiation, often referred to through metaphors² – such as variable geometry, multi-speed Europe, integration *à la carte* – functions as a mode of integration which attempts to harmonise heterogeneity within the EU by permitting Member States to join specific EU policies *ex proprio motu*.³ Accordingly, DI embodies those instances where not all Member States participate in a particular EU policy at the same time and to the same extent.⁴ Not only the European Commission,⁵ but also several Member States have officially endorsed the idea of embracing differentiation as a strategy to pursue integration at challenging times.⁶

In EU defence, the norm has always been differentiation.⁷ Traditionally, collaboration between a group of Member States in the area of EU defence has been considered “negative differentiation”: “a status quo that poses severe obstacles to integration –

¹ For a discussion of the theories of European integration, see FG Snyder, ‘European Integration’ in DS Clark (ed.), *Encyclopedia of Law and Society* (Sage 1994) 1 ff; AS Sweet, ‘Integration and the Europeanization of the Law’ in P Craig and R Rawlings (eds), *Law and Administration: Essays in Honour of Carol Harlow* (Oxford University Press 2003) 197 ff; see also F Fabbrini, ‘The Future of the EU27’ (2019) *European Journal of Legal Studies* 305; B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017); G Della Cananea, ‘Differentiated Integration in Europe After Brexit: A Legal Analysis’ (2019) *European Papers* www.europeanpapers.eu 447.

² Note that according to Groenendijk: “such metaphors are enlightening, but lack rigour”. See N Groenendijk, ‘Flexibility and Differentiated Integration in European Defence Policy’ (2019) *L’Europe en formation* 105, 107.

³ AC-G Stubb, ‘A Categorization of Differentiated Integration’ (1996) *JComMarSt* 283; D Thym, ‘Competing Models for Understanding Differentiated Integration’ in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* cit. 28.

⁴ Differentiated integration should therefore be distinguished from flexibility in a wider sense, which encompasses a wide range of derogations from uniformity such as minimum harmonisation or the leeway left to the member states in the implementation of directives. On this distinction, see F Tuyschaever, *Differentiation in European Union Law* (Hart 1999) 2 ff; For a similar definition, emphasising the link between differentiated integration and the willingness of individual Member States to participate in EU policies, see AC-G Stubb, ‘A Categorization of Differentiated Integration’ cit.: where he describes differentiated integration as “a model of integration strategies that try to reconcile heterogeneity within the European Union and different groupings of member states to pursue an array of public policies with different procedural and institutional arrangements”.

⁵ Communication COM (2017) 2025 final from the Commission of 1 March 2017, White paper on the future of Europe, Reflections and scenarios for the EU27 by 2025.

⁶ See ‘Déclaration de M. François Hollande, Président de la République, sur les Défis e Priorités de la Construction Européenne, à Versailles les 6 Mars 2017’ (6 March 2017) *Vie publique* www.vie-publique.fr.

⁷ S Blockmans, ‘Pesco’s Microcosm of Differentiated Integration’ in WT Douma and others (eds), *The Evolving Nature of EU External Relations Law* (Springer 2021) 163. Compare also the contribution by B Cózar-Murillo, ‘PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit’ (2022) *European Papers* www.europeanpapers.eu XX.

rather than a formula that allows for diverse experiences and approaches to facilitate integration ("positive integration").⁸ Moving beyond the "negative starting point" of DI has long been prevented by diversities among small and large states, non-nuclear/nuclear countries, territorial and expeditionary armed forces, neutrals and allies, conscript and professional armies, small and big spenders, land and naval army countries, and those without or with a defence industrial base.⁹ Integration in Common Security and Defence Policy (CSDP) was generally little appealing as there are low levels of interdependence between Member States in what is a tremendously politicized policy area.¹⁰

Yet, as a reaction to years of abstinence, geopolitical shifts around the globe, a fickle Trump administration, Brexit, and a growing unstable neighbourhood, great progress has been made to establish a defence structure for the EU.¹¹ Recent developments – including the establishment of an EU military headquarters, the creation of Permanent Structured Cooperation (PESCO) and the new position for the Commission in defence funding – affirm a transformation towards a more inclusive defence policy within the EU framework:¹² a "European Defence Union",¹³ instead of an "EU army".¹⁴

The creation of PESCO in 2017, by some referred to as "the sleeping beauty" of the Lisbon Treaty that has now been awoken from her slumber,¹⁵ is the most symbolic of these novelties and the most recent example of DI in the EU.¹⁶ The provisions on PESCO add up to "the most flexible template"¹⁷ of enhanced cooperation of all policy areas which

⁸ J Howorth, 'Differentiation in Security and Defence Policy' (2019) *Comparative European Politics* 261, 277.

⁹ S Blockmans and D Macchiarini Crosson, 'PESCO: A Force for Positive Integration in EU Defence' (2021) *European Foreign Affairs Review* 87 ff.

¹⁰ F Schimmelfennig, D Leuffen and B Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation' (2015) *Journal of European Public Policy* 764, 778 ff.

¹¹ S Blockmans and D Macchiarini Crosson, 'PESCO: A Force for Positive Integration in EU Defence' cit. 88.

¹² S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' (2018) *CMLRev* 1785, 1789.

¹³ See the proposals thereto in S Blockmans and G Faleg, 'More Union in European Defence' (CEPS Report 2015) www.ceps.eu.

¹⁴ See A Sparrow, 'Jean-Claude Juncker Calls for EU Army' (8 March 2015) *The Guardian* www.theguardian.com; and HP Bartels, AM Kellner and U Optenhoegel (eds), *Strategic Autonomy and the Defence of Europe. On the Road to a European Army?* (Dietz 2017).

¹⁵ Commission, 'Speech by President Juncker at the Defence and Security Conference Prague: In Defence of Europe' (9 June 2017) European Commission ec.europa.eu; see also Commission, 'European Commission Welcomes First Operational Steps Towards a European Defence Union' (11 December 2017) European Commission ec.europa.eu; and F Mauro, 'PESCO: European Defence's Last Frontier' (GRIP 1-2017) 40.

¹⁶ B Leruth, S Gänzle and J Trondal, 'Differentiated Integration and Disintegration in the EU After Brexit: Risks Versus Opportunities' (2019) *JComMarSt* 1383; S Gänzle, B Leruth and J Trondal (eds), *Differentiated Integration and Disintegration in a Post-Brexit Era* (Routledge 2020).

¹⁷ D Fiott, A Missiroli and T Tardy, 'Permanent Structured Cooperation: What's in a Name?' (ISS Chaillot Papers 142-2017) 18.

fall within the ambit of the EU's non-exclusive competences.¹⁸ PESCO has been advertised as the formula to bring about “positive differentiation”, or greater convergence in Europe's field of defence.¹⁹

The increasing calls for DI have injected new life into a never faded scholarly debate on its merits and pitfalls. From a legal perspective, it has prompted scholars to look at the limits that DI finds in the Treaties and in a number of general principles of the EU legal order.²⁰ This *Article* contributes to and complements this literature by discussing the implications of two of such principles, namely the principle of consistency²¹ and sincere cooperation,²² for DI in PESCO. Although many efforts have been made to distinguish constraints on DI,²³ it appears that the potential of the principles of consistency and sincere cooperation have not yet been fully explored in this regard.²⁴ While it is broadly recognized, for example, that sincere cooperation may function as a constraint to differentiation, loyalty-based limitations on DI are seldom assessed in detail or systematically,²⁵ let alone its constraints on DI in PESCO. The same holds true for the

¹⁸ Arts 329(2) and 331(2) of the Consolidated Version of the Treaty on the Functioning of the European Union [2012], requiring unanimity for enhanced cooperation in the field of CFSP, and art. 20 of the Consolidated Version of the Treaty on European Union [2008], requiring the participation of at least 9 Member States to further the objectives of the Union, protect its interests and reinforce its integration process.

¹⁹ S Blockmans and D Macchiarini Crosson, ‘Differentiated Integration Within PESCO: Clusters and Convergence in EU Defence’ (CEPS Research Report 04-2019) www.ceps.eu.

²⁰ A Miglio, ‘Differentiated Integration and the Principle of Loyalty’ (2018) *EuConst* 475.

²¹ Whereas the Treaties use the word “consistency”, the political and academic debates prefer “coherence”. See M Estrada Cañamares, ‘Building Coherent EU Responses: Coherence as a Structural Principle in EU External Relations’ in M Cremona (eds), *Structural Principles in EU External Relations Law* (Hart 2018) 243. Besides, in different language versions of the Treaties other than English (and sometimes in the English version as well) the term is often “coherence” (kohärenz, coherence, coerenza, sammenhang) instead of consistency. See CNK Franklin, ‘The Burgeoning Principle of Consistency in EU Law’ (2011) *Yearbook of European Law* 42; Therefore, the thesis uses the terms consistency and coherence interchangeably.

²² It is debatable whether loyalty and sincere cooperation are actually synonyms or whether sincere cooperation only covers one dimension of the principle of loyalty. In this thesis, however, which does not aim at a comprehensive analysis of loyalty, the two terms will be used interchangeably, even though this implies a certain degree of simplification.

²³ See, for instance, J Wouters, ‘Constitutional Limits to Differentiation: The Principle of Equality’ in B de Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 301; D Thym, *Ungleichzeitigkeit und Europäisches Verfassungsrecht* (Nomos 2004); A Ott, ‘EU Constitutional Boundaries to Differentiation: How to Reconcile Differentiation with Integration?’ in A Ott and E Vos (eds), *Fifty Years of European Integration: Foundations and Perspective* (T.M.C. Asser Press 2009) 113; E Pistoia, *Limiti all'Integrazione Differenziata dell'Unione Europea* (Cacucci 2018); D Curtin and M Patrin, ‘EU Constitutional Standards of Democracy in Differentiated Integration’ (EUI RSC Working Paper 80-2021); J Wouters and P Schmitt, ‘Equality Among Member States and Differentiated Integration in the EU’ in LS Rossi and F Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 43.

²⁴ A Miglio, ‘Differentiated Integration and the Principle of Loyalty’ cit.

²⁵ For an important exception, though only discussing the role of loyalty in constraining international agreements between member states, see A Dimopoulos, ‘Taming the Conclusion of *Inter Se* Agreements Between EU Member States: The Role of the Duty of Loyalty’ (2015) *Yearbook of European Law* 286.

principle of consistency. Early works on the topic considered coherence and consistency potentially jeopardized if too much differentiation was permitted in EU policymaking.²⁶ However, a detailed and systematic analysis of consistency-based limitations on differentiation seems to be lacking in the existing literature, with some minor exceptions.²⁷ Moreover, research on the role of general principles in Common Foreign and Security Policy (CFSP) law seems to be scarce,²⁸ and only a relatively small number of scholars have researched differentiation in EU CFSP.²⁹ Here, it is important to point out that the context in the policy domain of the CFSP is fundamentally different from the context in which most of the scholarly research on DI has been done. In this regard, most of the research take non-differentiation as a starting point,³⁰ while such uniformity has never been the main premise in the intergovernmentalist area of the CFSP.³¹ More specifically, according to most scholars,³² the default mode in the field of CFSP has actually been DI ever since the birth of the Communities. Recognition of this fundamental difference in reference point is key to any study of DI within the field of CFSP.³³

The main aim of the present *Article* is thus to assess to what extent defence cooperation under the umbrella of PESCO can be cut up in pieces and yet still be considered a *common* defence adhering to the EU's general principles of consistency and sincere cooperation, that are fundamental to any common policy. The question, therefore, is whether DI in PESCO is limited by these principles, and consequently, whether the CSDP, despite the differentiation, still contributes to a common policy. Section II will first of all address the notion of "common" in CSDP. This will be followed by an analysis of PESCO as the example *par excellence* of differentiation in that same policy area (section III). Section IV then aims to answer the question of to what extent the principles of consistency and sincere cooperation, that are key to any common policy, are

²⁶ RA Wessel, 'Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility' in M Trybus and N White (eds), *European Security Law* (Oxford University Press 2007) 225, 247.

²⁷ See, e.g., E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' in S Blockmans (ed.), 'Differentiated Integration in the EU. From the Inside Looking Out' (CEPS 2014) 26; E Herlin-Karnell and T Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' (2013) CYELS 139.

²⁸ See, RA Wessel, 'General Principles in EU Common Foreign and Security Policy' in V Moreno-Lax, PJ Neuvonen and KS Ziegler (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar 2022) 607.

²⁹ M Siddi, T Karjalainen and J Jokela, 'Differentiated Cooperation in the EU's Foreign and Security Policy: Effectiveness, Accountability, Legitimacy' (2022) *The International Spectator* 107.

³⁰ This yardstick is relevant mainly to the former first Maastricht pillar, with its supranationalist character and with the classical Community method as the main tool to guarantee proper functioning of the internal market.

³¹ N Groenendijk, 'Flexibility and Differentiated Integration in European Defence Policy' cit. 106 ff.

³² See for example P Koutrakos, 'Foreign Policy Between Opt-outs and Closer Cooperation' in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* cit. 405; S Biscop, 'Differentiated Integration in Defence: A Plea for PESCO' (7 February 2017) Istituto Affari Internazionali www.iai.it 2; J Howorth, 'Differentiation in Security and Defence Policy' cit.

³³ N Groenendijk, 'Flexibility and Differentiated Integration in European Defence Policy' cit. 107.

restraining factors to DI in PESCO. Section V, finally, will draw some conclusions on the possible tension between *commonness* and *differentiation*.

II. CSDP: BETWEEN A *COMMON* AND *DIFFERENTIATED* POLICY

II.1. CSDP AS A COMMON POLICY OF THE EU

The term *Common* Security and Defence Policy was only introduced by the Lisbon Treaty, and replaced the title *European* Security and Defence Policy (ESDP) under which the Union's security and defence policy was organised before. By using the term "Common", the drafters of the Treaty express commonality of purpose and the higher status of the policy within the EU's policy framework.³⁴ The significance of CSDP and its link with CFSP is illustrated in art. 42(1) Treaty on the European Union (TEU), which provides that "the common security and defence policy shall be an integral part of the common foreign and security policy".³⁵ The commonality of purpose of the CSDP can be found in the way CSDP operates: Member States supply the EU with "an operational capacity drawing on civilian and military assets", which may be used "on missions outside the Union".³⁶ CSDP is therefore intended to authorise the EU to play a separate role as a global and regional security actor, distinct from that of the Member States.³⁷

Since the first drafts of the TEU, the objectives encompassed the mentioning of the eventual construction of a defence policy. This idea is reflected in art. 24(1): "The *Union's competence* in matters of common foreign and security policy shall cover ... all questions relating to the Union's security, *including the progressive framing of a common defence policy* that might lead to a common defence".³⁸ This is recalled in art. 42(2) TEU, which defines the ambit of CSDP as follows: "The common security and defence policy shall include the progressive framing of a *common Union defence policy*. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements".³⁹

Both provisions clearly underline that the progressive framing of a common defence policy is a *Union* competence. While the Nice Treaty generally referred to a "common defence policy", now the Union nature of the new policy is emphasised. This indicates the increasing importance that the Member States place on the role of the policy and faith in

³⁴ P Koutrakos, *the EU Common Security and Defence Policy* (Oxford University Press 2013) 30.

³⁵ V Szép and others, 'The Current Legal Basis and Governance Structures of the EU's Defence Activities' (ENGAGE Working Paper 4-2021) 6.

³⁶ Art. 42(1) TEU.

³⁷ This is underlined by art. 43 TEU, which specifies the uses of CSDP.

³⁸ Art. 24(1) TEU (emphasis added).

³⁹ *Ibid.* art. 42(2) TEU (emphasis added).

its system.⁴⁰ However, this does not mean that the policy should be approached in isolation, or that Member States' policies will be disregarded. In this regard, the second subparagraph of art. 42(2) states that: "The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realized in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework".⁴¹

Since a common policy cannot replace distinct national interests in foreign policy (see also art. 32 TEU), the Treaty provides a mechanism within which the duty to consult would either bring about their convergence, or control their differences. Interestingly, it is "the convergence of their actions" which will make the EU "able to assert its interests and values on the international scene". Therefore, the Treaty recognizes that the definition of the Common Foreign, Security and Defence Policy (CFSDP) is the result of a constant, step-by-step developing process of creating a culture of cooperation between Member States with distinct, and therefore occasionally differing, foreign policy interests.⁴²

An additional element concerns the voting rules. In the wider picture of CFSDP, the initial requirement of unanimity for every decision was needed in order to persuade Member States that EU foreign policies would never set aside or disturb domestic foreign policies.⁴³ Accordingly, there has been a conflict between the EU's ambition to create and uphold a *common* policy and the frequently diverging opinions of the Member States from the beginning.⁴⁴ Although, the idea of a common policy is *inter alia* that it includes *all* Member States, in practice many difficulties exist to establish a common foreign policy by the EU, without resorting to the familiar apparatus of the ordinary legislative procedure and the usual role of the institutions.⁴⁵ Frequently, a shared commitment to a common strategic vision, values and norms based on the treaty, is a deficient basis for policy unanimity on what are still understood as divergent foreign policy interests and threat perceptions by Member States.⁴⁶ Therefore, the Treaty allows for exceptions on unanimity rather than

⁴⁰ P Koutrakos, *The EU Common Security and Defence Policy* cit. 57.

⁴¹ Art. 42(2) TEU, second sub-paragraph (emphasis added).

⁴² P Koutrakos, *the EU Common Security and Defence Policy* cit. 62.

⁴³ RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' in WT Douma and others (eds), *The Evolving Nature of EU External Relations Law* cit. 177, 178; this requirement is defined in art. 31(1) TEU, which provides that: "Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise".

⁴⁴ See RA Wessel, 'Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility' cit. 247 ff.

⁴⁵ RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 179.

⁴⁶ S Blockmans, 'Differentiation in CFSP' in S Blockmans (ed.), 'Differentiated Integration in the EU. From the Inside Looking Out' cit. 46.

qualified majority voting (QMV) as the default voting rule,⁴⁷ which again underlines the idea of an EU policy that is supported by most, but not necessarily all, Member States.

II.2. DIFFERENTIATED INTEGRATION IN CFSDP

The *common* nature of CFSDP has also not stopped Member States to establish initiatives in which not all of them take part.⁴⁸ This can be explained by the fact that Member States have different (geo-)political interests.⁴⁹ In the wider field of CFSDP, enhanced cooperation is a first example of closer cooperation introduced by the Lisbon Treaty,⁵⁰ and allows smaller groups of Member States to work together in certain policy or security fields.⁵¹ However, a number of criteria apply: a minimum number of nine participants, the requirement of unanimity in the Council for authorizing any kind of enhanced cooperation in CFSP, and the requirement of the consent of the European Parliament.⁵² Besides, enhanced cooperation shall function as a last resort, when the Council “has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as whole”.⁵³ These criteria imply that any decision on DI in CFSDP cannot be taken lightly.⁵⁴ While practice shows that Member States have not been able to agree on establishing any form of institutionalized enhanced cooperation in CFSP, coalitions of Member States working closer together have been created.⁵⁵

In the sphere of CSDP, differentiation in participation of Member States is far from new.⁵⁶ Membership differentiation in this area is even built into the Treaty.⁵⁷ The previous opt-out by Denmark in relation to defence matters was the most-far reaching form of

⁴⁷ See K Pomorska and RA Wessel, ‘Qualified Majority Voting in CFSP: A Solution to the Wrong Problem?’ (2021) *European Foreign Affairs Review* 351.

⁴⁸ RA Wessel, ‘The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy’ cit. 183.

⁴⁹ P Koutrakos, ‘Foreign Policy Between Opt-outs and Closer Cooperation’ cit. 405: “As foreign policy and security and defence lie at the core of national sovereignty, their conduct is in greater need of being attuned to the different interests which Member States have in the area of high politics. This is all the more so in the light of the wide range of diverse Member States – small and large, north and south, new and old, rich and poor”.

⁵⁰ Art. 20 TEU.

⁵¹ M Cremona, ‘Enhanced Cooperation and the European Foreign and Security and Defence Policy’ in JM Beneyto and others (eds), *Unity and Flexibility in the future of the European Union: The Challenge of Enhanced Cooperation* (CEU Ediciones 2009) 75.

⁵² JC Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2011) 89 ff.

⁵³ Art. 20(2) TEU.

⁵⁴ RA Wessel, ‘The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy’ cit. 185.

⁵⁵ S Blockmans, ‘Differentiation in CFSP’ cit. 53.

⁵⁶ A Missiroli, ‘CFSP, Defence, and Flexibility’ (ISS Chaillot Papers 38-2000).

⁵⁷ RA Wessel, ‘The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy’ cit. 187.

differentiation. Basically, this allows Member States not to participate in a common policy.⁵⁸ In addition, the Treaty also seems to explicitly allow all Member States' non-participation in case their EU commitments would hamper, especially, NATO obligations.⁵⁹ Besides, "less close cooperation" in CSDP is illustrated by ad hoc opt-outs and opt-ins in most EU military missions, since not every Member State participates in such a mission, and by the fact that not all Member States are required to implement CSDP decisions in the same way.⁶⁰ Furthermore, the Treaty expressly envisages a potential differentiation in security and defence policy by allowing the Council to "entrust the execution of a task, within the Union framework, to a group of Member States in order to protect the Union's values and serve its interests".⁶¹ Yet, a general responsibility for the Council remains.⁶² A more institutionalized form of closer cooperation in CSDP is PESCO, to which we will return later.⁶³ Finally, closer cooperation between EU members even exists *outside* the EU legal framework in practice.⁶⁴

It can be concluded that differentiation in membership participation has been common practice in CSDP.⁶⁵ Simultaneously, this has been regarded as contributing to a stronger EU rather than fragmentation.⁶⁶ As argued by Törö, the repeated examples of

⁵⁸ *Ibid.* 186.

⁵⁹ See art. 42(2) TEU.

⁶⁰ C Törö, 'The Latest Example of Enhanced Cooperation in the Constitutional Treaty: The Benefits of Flexibility and Differentiation in European Security and Defence Policy Decisions and their Implementation' (2005) *ELJ* 641, 650.

⁶¹ Art. 42(5) TEU.

⁶² *Ibid.* arts 42(5) and 44 TEU.

⁶³ See further below, section IV. See, also S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit.

⁶⁴ EUROCORPS, the Franco-German Brigade, with units from Spain, Belgium and Luxembourg as national contributions is the most prominent example. In addition, we have witnessed other institutionalised groups of EU members, such as the EUROMARFOR (naval forces bringing together France, Italy, Spain, Portugal), the European Air Group (Germany, Belgium, Spain, France, Italy, the UK) and the German-Netherlands First Corps (Germany, the Netherlands, the UK). Looser cooperation frameworks (lacking a joint HQ) also exist, as exemplified by the Spanish-Italian Amphibious Force. See RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 188; C Törö, 'The Latest Example of Enhanced Cooperation in the Constitutional Treaty: The Benefits of Flexibility and Differentiation in European Security and Defence Policy Decisions and their Implementation' cit. 642; however, this falls outside the scope of this *Article*.

⁶⁵ RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 189.

⁶⁶ Cf. the speech from Federica Mogherini, 2014 to 2019 High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission: "We have activated a Permanent Structured Cooperation on Defence – ambitious and inclusive. Member States have committed to join forces on a regular basis, to do things together, spend together, invest together, buy together, act together. The possibilities of the Permanent Structured Cooperation are immense", European External Action Service (EEAS), *Permanent Structured Cooperation – PESCO. Depending Defence Cooperation among EU Member States* www.eca.europa.eu.

CSDP missions by variable combinations of states from inside and outside the EU illustrate a *consolidated pattern of practice*. Acting in coalition by some or many of the Member States representing the entire EU continues to define the prevailing mode of execution of CSDP missions.⁶⁷

Finally, the term “common” in Common Foreign, Security and Defence Policy refers to the EU and its *Member States*.⁶⁸ The CFSDP provisions do not envisage the participation of third countries in the decision-making process,⁶⁹ and CFSDP Decisions shall only commit “*the Member States* in the positions they adopt and in the conduct of their activity”.⁷⁰ While participation of third states in EU decision-making is in principle excluded,⁷¹ in the specific context of CSDP, it has been demonstrated that participation of third countries is possible in military and civilian missions. About 45 third countries have provided troops to these missions and operations.⁷² Besides, four third countries have joined EU Battlegroups.⁷³ These modes of third country cooperation have been legally based on a treaty in the form of a Framework Participation Agreement (for more structural participation in CSDP missions), or a Participation Agreement (for *ad hoc* participation in a mission). They are concluded in the form of bilateral EU-only agreements on the basis of arts 37 TEU and 218 TFEU,⁷⁴ and guarantee the autonomy of the Union’s decision-making. Therefore, the operations keep being a true EU mission which are governed by the EU legal order and follow the specific procedures of CSDP.

⁶⁷ C Törö, ‘The Latest Example of Enhanced Cooperation in the Constitutional Treaty: The Benefits of Flexibility and Differentiation in European Security and Defence Policy Decisions and their Implementation’ cit. 648.

⁶⁸ RA Wessel, ‘The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy’ cit.

⁶⁹ See arts. 26(2) and 16(2) TEU: which entail a general competence for the Council to “frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council”. The Council, in turn, “shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote”.

⁷⁰ Art. 28(2) TEU (emphasis added).

⁷¹ RA Wessel, ‘Friends with Benefits? Possibilities for the UK’s Continued Participation in the EU’s Foreign and Security Policy’ (2019) European Papers www.europeanpapers.eu 427.

⁷² One could even argue that it seems to contribute to the objective in art. 21 TEU that “The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share [its] principles”. See RA Wessel, ‘The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy’ cit. 195.

⁷³ These are Turkey, Norway, Ukraine and Macedonia. See A Bakker, M Drent and D Zandee, ‘European Defence: How to Engage the UK after Brexit?’ (2017) Clingendael Netherlands Institute of International Relations. This report also provides a good overview of the current and past participation of the UK in CSDP missions.

⁷⁴ See also L Lonardo, ‘Common Foreign and Security Policy and the EU’s external Action Objectives: An Analysis of Article 21 of the Treaty on the European Union’ (2018) *EuConst* 584, 601; A Bakker, M Drent and D Zandee, ‘European Defence: How to Engage the UK after Brexit?’ cit.

III. PESCO'S MICROCOSM OF DIFFERENTIATED INTEGRATION

The previous section has shown that the *commonness* of CSDP is not mainly the result of having all Member States participate in the policy and involving Member States only, but is more likely to be the result of *a process of cooperation* between Member States, at times involving cooperation with third countries. As a consequence, DI is part and parcel of the CSDP. In this regard, cooperation in PESCO (Permanent Structured Cooperation) is the example *par excellence* of which its differentiation is claimed to strengthen the CSDP. The main objective of the present section is to ascertain the articulation of the categories of DI within the PESCO framework.⁷⁵

III.1. THE AWAKENING OF THE "SLEEPING BEAUTY"

In the field of defence, DI outside the EU Treaty framework has been the norm for decades.⁷⁶ Initially, cooperation between groups of Member States in the area of European defence has been regarded as "negative differentiation": "a status quo that poses severe obstacles to integration – rather than a formula that allows for diverse experiences and approaches to facilitate integration ('positive integration')".⁷⁷ In general, the interest in integration in CSDP has been low, since there are low levels of interdependence between Member States in the highly politicized field of defence.⁷⁸ It was only in 2016 that the Parliament called for the establishment of a European Defence Union.⁷⁹ This is taking concrete shape by *inter alia* the establishment of PESCO.⁸⁰ PESCO has been referred to as the sleeping beauty of the Lisbon Treaty,⁸¹ as it has not been used

⁷⁵ Nevertheless, the aim of this Chapter is not to evaluate or discuss at a theoretical level the possible notions of *horizontal* and *vertical*, or *internal* and *external*, DI, but rather their practical translation. See F Schimmelfennig, D Leuffen and B Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation' cit.; C Hoeffler, 'Differentiated Integration in CSDP Through Defence Market Integration' (2019) *European Review of International Studies* 43.

⁷⁶ See S Biscop, 'Differentiated Integration in Defence: A Plea for PESCO?' cit.

⁷⁷ J Howorth, 'Differentiation in Security and Defence Policy' cit.

⁷⁸ F Schimmelfennig, D Leuffen and B Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation' cit. 778 ff.

⁷⁹ Resolution 2016/2052(INI) of the European Parliament of 22 November 2016 on the European Defence Union; this is foreseen in art. 42(2) TEU, as part of the CSDP.

⁸⁰ Decision (CFSP) 2017/2315 of the Council of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States; it should be noted that PESCO is by no means the only possible option to serve as a legal basis for a common European Defence, see L Onardo, 'Integration in European Defence: Some Legal Considerations' (2017) *European Papers* www.europeanpapers.eu 887, 892.

⁸¹ F Mauro, 'Permanent Structured Cooperation. The Sleeping Beauty of European Defence' (27 May 2015) GRIP www.grip.org; Commission, 'Speech by President Juncker at the Defence and Security Conference Prague: In defence of Europe' cit.; see also Commission, 'European Commission Welcomes First Operational Steps Towards a European Defence Union' cit.; and F Mauro, 'PESCO: European Defence's Last Frontier' cit. 40.

since its incorporation in the Treaty of Lisbon in 2009, in spite of its perceived potential to make the CSDP more effective.⁸²

Yet, the establishment of PESCO was in fact much longer in the making. The Maastricht Treaty of 1991 and the rise of an EU of “bits and pieces”, containing an intergovernmentally operated CFSP, sowed the seeds for this form of DI.⁸³ The brutal disintegration of the former Yugoslavia did not only reveal the deficiencies of decision-making by unanimity, but also that the Union needed to transcend paper security structures, because of an absence of a comprehensive set of tools to deal with violent conflict on its frontiers.⁸⁴ The urge to insert more flexibility in the Treaties became more apparent as a result of Denmark’s fruitful demand for an opt-out from, amongst others, security and defence policy⁸⁵ and when three non-NATO members becoming a member of the EU in 1995 sided with neutral-Ireland.⁸⁶ The Treaty of Amsterdam of 1997 initiated the mechanism of “constructive abstention”, a greatly symbolic safety net for the unanimity requirement of decision-making in CFSP.⁸⁷ In the Treaty of Nice of 2001, “closer cooperation”⁸⁸ became the slightly less confining “enhanced cooperation”.⁸⁹ The 2004 Treaty creating a Constitution for Europe put this generic type of DI on a distinct basis for the legally “unique” field of CFSP.⁹⁰ It also established wide accession

⁸² Commission, ‘Speech by President Juncker at the Defence and Security Conference Prague: In defence of Europe’ cit.

⁸³ D Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’ (1993) CMLRev 17.

⁸⁴ S Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?’ cit. 1805.

⁸⁵ Denmark secured its opt-outs under the “Edinburgh Agreement” of 1992, after a referendum for the ratification of the Maastricht Treaty was rejected by a majority of voters. See European Council Conclusions of 11 - 12 December 1992, Conclusion of the Presidency; the opt-out was codified in Protocol n. 22 TFEU on the position of Denmark, art 5; the opt-out has recently been withdrawn.

⁸⁶ S Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?’ cit. 1805 ff.

⁸⁷ See S Blockmans, ‘Differentiation in CFSP’ (2013) *Studia Diplomatica* 53.

⁸⁸ Arts 43–45 TEU.

⁸⁹ As we have seen in the previous chapter, this is a “last resort” opportunity demanding at least one third of the Member States to be established: minimum nine in an EU of 27+ Member States. So far, this general instrument of enhanced cooperation has been triggered only four times. See Regulation (EU) 2017/1939 of the Council of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (the EPPO); Decision 2010/405/EU of the Council of 12 July 2010 authorizing enhanced cooperation in the areas of the law applicable to divorce and legal separation; Decision 2011/167/EU of the Council of 10 March 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection; and Communication COM(2013) 71 final from the Commission of 14 February 2013, Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, (currently at a standstill); in all these cases, legislative proposals failed to obtain unanimous support for EU-wide implementation, with individual countries blocking the adoption of secondary legislation and sub-groups of Member States forging ahead by way of enhanced cooperation.

⁹⁰ Art. III-214 of the Treaty establishing a Constitution for Europe [2004].

norms⁹¹ and QMV⁹² to produce a new PESCO provision in the field of defence. The provisions on PESCO in the Constitutional Treaty followed the shared willingness to improve the EU's capacity to act united in the international system as a Union.⁹³ Practically unaltered, these provisions were converted in the Treaty of Lisbon.⁹⁴ Art. 42(6) TEU now reads: "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".⁹⁵

This provision provides the unique possibility to create a permanent structured cooperation between prone 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". It contains the *raison d'être* of PESCO: members of PESCO pledge to spend more, and more cleverly, equipment, capabilities and defence training so that they are better capable to run operations at the higher end of the military spectrum.⁹⁶ It has the objective of generating a coordinating framework for increased defence cooperation and individual- and collective Member State driven capability development and innovation in the field of defence.⁹⁷ Interestingly, the Treaty of Lisbon does not simply allow this model of DI, but seems to stimulate Member States to participate in it.⁹⁸

Despite earlier attempts of certain Member States to outline PESCO and to put it on the agenda,⁹⁹ Council Decision (CFSP) 2017/2315 establishing PESCO was adopted on 11 December 2017.¹⁰⁰ Although PESCO was adopted by the Council unanimously, it is striking that QMV¹⁰¹ would have been enough to launch the mechanism while this form of decision-making is explicitly ruled out in CSDP.¹⁰²

⁹¹ E.g. no minimum number of pMS.

⁹² Rather than unanimity for CFSP writ large.

⁹³ L Lonardo, 'Integration in European Defence: Some Legal Considerations' cit. 890.

⁹⁴ S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1806.

⁹⁵ Art. 42(6) TEU (emphasis added).

⁹⁶ S Blockmans, 'PESCO's Microcosm of Differentiated Integration' cit. 166.

⁹⁷ J Bátorá, 'Dynamics of Differentiated Integration in EU Defence: Organizational Field Formation and Segmentation' (2021) *European Foreign Affairs Review* 63, 72.

⁹⁸ RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 188.

⁹⁹ See S Biscop and J Coelmont, 'CSDP and the Ghent framework: The Indirect Approach to Permanent Structured Cooperation' (2011) *European Foreign Affairs Review* 149.

¹⁰⁰ Decision (CFSP) 2017/2315 cit.; See also L Lonardo, 'Integration in European Defence: Some Legal Considerations' cit. 887; A first attempt to start a discussion on permanent structured cooperation was made by the Belgians in 2010, but it fell on deaf ears. See S Biscop and J Coelmont, 'CSDP and the Ghent framework: The Indirect Approach to Permanent Structured Cooperation' cit.

¹⁰¹ QMV as defined in art. 238(3)(a) TFEU.

¹⁰² RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 181; art. 42(4) TEU.

Most importantly in the context of the present *Article*, PESCO is seen as “a crucial step towards strengthening the common defence policy”.¹⁰³ It is, however, conditioned by Protocol No. 10 attached to the Lisbon Treaty,¹⁰⁴ which addresses individual Member States’ concerns by immediately citing the special character of their security and defence policy.¹⁰⁵ Consequently, the fundamental aspect of the character of the CSDP that Member States make the principal decisions about their defence is also preserved in the specific framework of PESCO. Besides, the sovereignty of the Member States seems to be partially guaranteed by the fact that governance of PESCO shall not be organised only at the level of the Council, but also “in the framework of projects implemented by groups of those participating Member States which have agreed among themselves to undertake such projects”.¹⁰⁶ However, cooperation in PESCO has the advantage of being able to rely on the EU’s institutional infrastructure¹⁰⁷ and provides an incentive for incorporating such cooperation into the EU system and not establishing cooperation outside the Treaty regime.¹⁰⁸ Importantly, decisions and recommendations taken within the PESCO framework have to be adopted by unanimity in the Council, which shall be constituted by the votes of the representatives of the participating Member States (pMS).¹⁰⁹ The fact that all pMS need to be on board points to the “commonness” of PESCO. Therefore, PESCO is a “hub and spoke” model, whereby decision-making by consensus at the level of the Council (the hub) preserves inclusivity, while simultaneously permitting different groups of pMS to initiate projects (the spokes) increases the level of ambition in general.¹¹⁰ To a great extent, this is the product of a German push for inclusivity, which predominated over a French aim for a higher level of ambition. However, Germany and France agreed to apply a “modular approach”¹¹¹ to enhanced cooperation in the area of defence.¹¹²

¹⁰³ Annex I Decision (CFSP) 2017/2315 cit.

¹⁰⁴ Protocol n. 10 on permanent structured cooperation established by art. 42 of the Treaty on European Union annexed to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008].

¹⁰⁵ S Blockmans and D Macchiarini Crosson, ‘PESCO: A Force for Positive Integration in EU Defence’ cit. 88.

¹⁰⁶ Art. 4(1) Decision (CFSP) 2017/2315 cit.

¹⁰⁷ PESCO involves EU-level institutions such as the EEAS, the Commission (running EDF), the Council, the EDA, and the European Parliament. See J Batora, ‘Dynamics of Differentiated Integration in EU Defence: Organizational Field Formation and Segmentation’ cit. 73 ff; The EDF is a funding framework aimed at support most (if not all) of projects within the PESCO framework, see L Béraud-Sudreau, YS Efstathiou and C Hannigan, ‘Keeping the Momentum in European Defence Collaboration: An Early Assessment of PESCO Implementation’ (14 May 2019) IISS, The International Institute for Strategic Studies www.iiss.org.

¹⁰⁸ LM Wolfstädter and V Kreiling, ‘European Integration via Flexibility Tools: The Cases of EPPO and PESCO’ (Jacques Delors Institut Berlin Policy Paper 209/2017) 14.

¹⁰⁹ Art. 46(6) TEU.

¹¹⁰ See D Fiott, A Missiroli and T Tardy, ‘Permanent Structured Cooperation: What’s in a Name?’ cit. 21.

¹¹¹ European Council Conclusions EUCO 34/16 of 15 December 2016, European Council meeting, 4.

¹¹² S Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?’ cit. 1785.

Contradictorily, this approach may also allow for informal opt-outs and exemptions at downstream levels of PESCO.¹¹³

As Cremona noted, “in a number of ways permanent structured cooperation resembles enhanced cooperation, but agreed in advance by way of a specific Protocol”.¹¹⁴ The drafters of the Constitutional Treaty and the Lisbon Treaty made sure to describe in a rather detailed manner the institutional and substantial format of PESCO, making it into an “off-the shelf form of cooperation” which may have eased the launch once the political momentum was there. PESCO’s principal institutional feature is the fact that decision-making is completely situated *within* the EU legal order, that is to say with the Council and its preparatory bodies.¹¹⁵ In the same vein, Cózar-Murillo noted that the numerous business-government collaboration programmes that were launched long before the most important CSDP milestones were reached, differ little from those which currently fall under the umbrella of PESCO. What distinguishes the former from the latter, however, is the lack of a legislative framework at the level of the EU that would allow to systematize these efforts, setting up rules of governance, albeit minimal, that would facilitate DI in defence. This is what PESCO has enabled.¹¹⁶

III.2. PARTICIPATION IN PESCO

The objectives of PESCO are set out in art. 1 of Protocol No. 10,¹¹⁷ which provides that PESCO “shall be open to any Member State” able and willing to develop its defence capacities.¹¹⁸ Thus, it requires pMS to proceed more intensively to develop defence capacities and to supply troops and kit. Besides the entry criteria in art. 1 and art. 2 of this Protocol includes a number of standard commitments for pMS.¹¹⁹ Accordingly, the tasks of the pMS seem an attempt to harmonise the distinct national defence policies.¹²⁰

In addition, the Treaty provides the possibility for Member States to join PESCO at a later stage,¹²¹ or to suspend a pMS.¹²² These decisions are again adopted by the Council

¹¹³ S Blockmans and D Macchiarini Crosson, ‘PESCO: A Force for Positive Integration in EU Defence’ cit. 91.

¹¹⁴ M Cremona, ‘Enhanced Cooperation and the European Foreign and Security and Defence Policy’ (EUI Working Papers 21-2009) 14.

¹¹⁵ B de Witte, ‘The Law as Tool and Constraint of Differentiated Integration’ (EUI Working Papers RSCAS 47-2019) 7.

¹¹⁶ B Cózar-Murillo, ‘PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit’ cit.

¹¹⁷ N Nováky, ‘The EU’s Permanent Structured Cooperation in Defence: Keeping Sleeping Beauty from Snoozing’ (2018) *European View* 97, 98.

¹¹⁸ Protocol n. 10, art 1.

¹¹⁹ *Ibid.* art 2.

¹²⁰ RA Wessel, ‘Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility’ cit. 235.

¹²¹ Art. 46(3) TEU.

¹²² Art. 46(4) TEU.

acting by QMV rather than anonymity,¹²³ constituted by the votes of the representatives of the pMS.¹²⁴ If, however, a pMS wishes to withdraw from PESCO unilaterally, this can simply be done on the basis of a notification.¹²⁵

So far, PESCO has proven to be the most inclusive form of enhanced cooperation.¹²⁶ In total, 25 Member States have opted to become members of the mechanism.¹²⁷ The commitments undertaken by pMS in the five areas are set out by art. 2 of Protocol 10, and aim to harmonise the different national defence policies.¹²⁸ Furthermore, these legally binding commitments aim to prepare the EU to be ready to carry out all crisis management tasks defined in art. 43 TEU.¹²⁹ pMS must “review annually, and shall update as appropriate, their National Implementation Plans, in which they are to outline how they will meet the more binding commitments, specifying how they will fulfil the more precise objectives that are to be set at each phase”. These National Implementation Plans shall annually be communicated to the European External Action Service (EEAS) and the European Defence Agency (EDA), and shall be made available to all pMS.¹³⁰ An underlying aspect of these binding commitments is the pursuance of alignment in strategic cultures at the level of the EU to redress what is considered as a weakness of the EU’s external action in the field of defence.¹³¹ These commitments add up to a move from mere cooperation towards the integration of Member States’ defence efforts.¹³² However,

¹²³ RA Wessel, ‘The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy’ cit. 182.

¹²⁴ See art. 46(3) and (4) TEU.

¹²⁵ Art. 46(5) TEU.

¹²⁶ Prior to PESCO, the most inclusive of enhanced cooperative frameworks was the establishment of the EPPO by 16 member states, joined later by four more. See LM Wolfstädter and V Kreifinger, ‘European Integraion via Flexibility Tools: The Cases of EPPO and PESCO’ cit.

¹²⁷ Art 2 Decision (CFSP) 2017/2315; The pMS are: Belgium, Bulgaria, Czech Republic, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden; However, it must be noted that only a few months before its launch it was estimated that only 10 to 15 Member States would be able and willing to participate in PESCO. See B de Witte, ‘The Law as Tool and Constraint of Differentiated Integration’ cit. 7.

¹²⁸ RA Wessel, ‘Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility’ cit. 235.

¹²⁹ Art. 43 TEU, first sub-paragraph provides: “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”; see also RA Wessel, ‘The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy’ cit. 188.

¹³⁰ Art 3(2) Decision 2017/2315 cit.

¹³¹ J Howorth and A Menon, ‘Still Not Pushing Back: Why the European Union Is Not Balancing the United States’ (2009) *The Journal of Conflict Resolution* 727, 738.

¹³² S Biscop, ‘European Defence and PESCO: Don’t Waste the Chance’ (EU IDEA Policy Papers 1-2020) 5.

although these commitments are politically binding in nature, they are difficult to enforce in legal terms.¹³³ Moreover, as Pannier and Schmitt argue, “contrary to the arguments of many discussions, think-tank reports and political actors, there is no evidence that institutionalised cooperation leads to policy convergence as far as defence is concerned”.¹³⁴ The commitments will thus not be ensured by legal or judicial enforcement mechanisms, but rather by an annual assessment administered by the HR and supported by the EDA and the EEAS.¹³⁵ Accordingly, the HR shall present an annual report on PESCO to the Council, in which it describes “the status of PESCO implementation, including the fulfilment, by each participating Member State, of its commitments, in accordance with its National Implementation Plan”. On the basis of this report, the Council “shall review once a year whether the participating Member States continue to fulfil the more binding commitments”.¹³⁶ Consequently, compliance with the commitments thus depends on increased transparency and annual naming of pMS that meet their commitments and possibly shaming of those pMS that don’t. Therefore, pMS that fail to meet the more binding commitments will face peer pressure rather than penalties,¹³⁷ or suspension from PESCO.¹³⁸ Yet, although QMV is enough to suspend a pMS, it is unlikely that underperforming pMS will be kicked out of a mechanism in which inclusivity prevails.¹³⁹

III.3. PESCO PROJECTS

DI also occurs to a great extent through the ways in which the pMS participate in the (currently) 60 “PESCO projects” that have been adopted by the Council in a series of waves.¹⁴⁰ Interestingly, however, the procedure for establishing new projects starts at the

¹³³ S Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?’ cit. 1826.

¹³⁴ A Pannier and O Schmitt, ‘Institutionalised Cooperation and Policy Convergence in European Defence: Lessons from the Relations Between France, Germany and the UK’ (2014) *European Security* 270.

¹³⁵ Annex I Decision 2017/2315 cit.

¹³⁶ Decision (CFSP) 2017/2315 cit. art 6(3).

¹³⁷ S Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?’ cit. 1821.

¹³⁸ Art. 46(4) TEU.

¹³⁹ S Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?’ cit. 1821.

¹⁴⁰ In this regard, art 4(2)(e) Decision 2017/2315 cit. provides that the Council is to establish the list of projects to be developed under PESCO; Decision 2021/2008/CFSP of the Council of 16 November 2021 amending and updating Decision (CFSP) 2018/340 establishing the list of projects to be developed under PESCO; see, also, RA Wessel, ‘The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy’ cit. 188; it has been noted that DI also occurs regarding the thematic scope of the PESCO projects and financing, which provides an additional layer to secondary-level DI in EU defence. However, this is not relevant to the thesis. See S Blockmans and D Macchiarini Crosson, ‘Differentiated Integration Within PESCO: Clusters and Convergence in EU Defence’ cit.

level of the pMS.¹⁴¹ In this regard, “Participating Member States which intend to propose an individual project shall inform the other participating Member States in due time before presenting their proposal, in order to gather support and give them the opportunity to join in collectively submitting the proposal. The project members shall be the participating Member States which submitted the proposal”.¹⁴² Consequently, Council Decisions (CFSP) 2018/340,¹⁴³ 2018/1797¹⁴⁴ and 2019/1909¹⁴⁵ defined the first, second, and third waves of PESCO projects. Most recently, the Council has adopted a fourth wave of joint projects within PESCO on 16 November 2021.¹⁴⁶ This new wave contains 14 new projects, taking the total number of projects established under PESCO to 60.¹⁴⁷ Consequently, synergies have emerged in the form of 60 projects despite of different national positions and interests, ambition, funding, geography and strategic culture.¹⁴⁸

In spite of being inclusive in terms of the number of pMS, PESCO turns out to be an exclusive mechanism if one looks at the countries’ individual contributions to projects and the ambition shown by each of them combined with their own strategic culture.¹⁴⁹ This can be explained by the fact that a commitment to inclusivity unavoidably causes differences in the level of DI in practice.¹⁵⁰ The average number of participants in PESCO projects is five. Most projects reach a figure of between four and seven pMS,¹⁵¹ and in many cases the same pMS are grouped together in a bi- or trilateral manner, in many cases copying the dynamics before PESCO.¹⁵² Yet, if the objective of PESCO is upward

¹⁴¹ Art 5(1) Decision 2017/2315 cit. provides: “*Following proposals by the participating Member States which intend to take part in an individual project, the High Representative may make a recommendation concerning the identification and evaluation of PESCO projects, on the basis of assessments provided in accordance with Article 7, for Council decisions and recommendations to be adopted in accordance with Article 4(2)(e), following military advice by the Military Committee of the European Union (EUMC)*” (emphasis added).

¹⁴² Art 5(2) Decision 2017/2315 cit.

¹⁴³ Decision 2018/340/CFSP of the Council of 19 November 2018 establishing the list of projects to be developed under PESCO.

¹⁴⁴ Decision 2018/1797/CFSP of the Council of 19 November 2018 amending and updating Decision (CFSP) 2018/340 establishing the list of projects to be developed under PESCO.

¹⁴⁵ Decision 2019/1909/CFSP of the Council of 12 November 2019 amending and updating Decision (CFSP) 2018/340 establishing the list of projects to be developed under PESCO.

¹⁴⁶ Decision 2021/2008 cit.

¹⁴⁷ See European Defence Agency (EDA), ‘14 New PESCO Projects Launched in Boost for European Defence Cooperation’ (16 November 2021) eda.europa.eu.

¹⁴⁸ B Cózar-Murillo, ‘PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit’ cit. 21 ff.

¹⁴⁹ See J Howorth, *Security and Defence Policy in the European Union* (Palgrave Macmillan 2007) 178 ff; HP Bartels, AM Kellner and U Optenhögel (eds), *Strategic Autonomy and the Defence of Europe. On the Road to a European Army?* cit. 16.

¹⁵⁰ B Cózar-Murillo, ‘PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit’ cit. 10.

¹⁵¹ N Groenendijk, ‘Flexibility and Differentiated Integration in European Defence Policy’ cit. 114 ff.

¹⁵² B Cózar-Murillo, ‘PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit’ cit. 10.

convergence, projects should gradually fill up.¹⁵³ Finally, while the first wave of projects included all twenty-five pMS, this number decreased to twenty-one in the second wave and to just fifteen in the third round. The tendency, therefore, was more exclusive project selection.¹⁵⁴ However, in the recently launched fourth wave, the number of partaking pMS has again increased to twenty-one.¹⁵⁵

It is striking that PESCO does not require a minimum number of participants per project, which is, for example, the case for enhanced cooperation.¹⁵⁶ This minimum requirement can be interpreted as a provision to prevent small *avant-garde* groups that could provoke fragmentation within the EU. Therefore, PESCO projects do not emphasise the priority of unitary integration, which is the general idea of developing CSDP defined in art. 42(2) subparagraph 1 TEU.¹⁵⁷

Another form of DI is related to the individual project arrangements.¹⁵⁸ In this regard, art. 5(3) of Council Decision (CFSP) 2017/2315 provides: "The participating Member States taking part in a project shall agree among themselves on the arrangements for, and the scope of, their cooperation, and the management of that project. The participating Member States taking part in a project shall regularly inform the Council about the development of the project, as appropriate".¹⁵⁹

Council Decision (CFSP) 2018/909 establishing a common set of governance rules for PESCO projects further specifies the rules on the project arrangements. First of all, they need to be decided by unanimity among the project members.¹⁶⁰ Furthermore, art. 7 dictates the areas these arrangements may, *inter alia*, include.¹⁶¹

Subsequently, art. 4(4) stipulates: "The project members may agree among themselves by unanimity that certain decisions, such as those relating to administrative matters, will be taken according to different voting rules".¹⁶²

Taking these provisions into account, the most notable modes of deep DI in PESCO could manifest themselves in the form of a change to decision-making procedures.¹⁶³ Despite the low threshold for the establishment of PESCO (by QMV), decisions and

¹⁵³ S Blockmans and D Macchiarini Crosson, 'Differentiated Integration Within PESCO: Clusters and Convergence in EU Defence' cit. 8.

¹⁵⁴ S Blockmans and D Macchiarini Crosson, 'PESCO: A Force for Positive Integration in EU Defence' cit. 94.

¹⁵⁵ European Defence Agency (EDA), '14 New PESCO Projects Launched in Boost for European Defence Cooperation' cit.

¹⁵⁶ A minimum number of nine participants, as we have seen in the previous Section.

¹⁵⁷ LM Wolfstädter and V Kreiling, 'European Integration via Flexibility Tools: The Cases of EPPO and PESCO' cit 13.

¹⁵⁸ S Blockmans, 'PESCO's Microcosm of Differentiated Integration' cit. 173.

¹⁵⁹ Art. 5(3) Decision 2017/2315 cit.

¹⁶⁰ Art. 4(1) Decision 2018/909 cit.

¹⁶¹ *Ibid.* arts 7(1) and (2).

¹⁶² Art. 4(4) Decision 2018/909 cit.

¹⁶³ S Blockmans, 'PESCO's Microcosm of Differentiated Integration' cit. 173.

recommendations adopted within the framework of PESCO are taken by unanimity, comprised by the votes of the representatives of all pMS.¹⁶⁴ Yet, art. 4(4) of the governance rules for PESCO projects allows different voting rules, such as QMV. Blockmans argues, however, that the prospect that states joining individual PESCO projects would change the governance rules for those projects in order to take decisions by QMV is low. Therefore, decision-making by unanimity will perpetuate consensus politics.¹⁶⁵ Furthermore, DI in the PESCO framework could also take place through implementation of art. 7(1) of the governance rules for PESCO projects, with regard to the invitation to the Commission to be involved in the proceedings of the project. Up to now, this has not happened.¹⁶⁶ Moreover, it must be noted that some projects have thus far failed to agree upon any project arrangements.¹⁶⁷ Therefore, Council Decision 2020/1639 (as will be discussed in the next section) also inserted a template for project arrangements.¹⁶⁸

IV. PESCO: CONTRIBUTING TO A *COMMON* SECURITY AND DEFENCE POLICY?

The previous sections have shown that DI and the pursuit of a common policy do not necessarily exclude one another, PESCO being the example par excellence. However, the question remains whether there are limits to DI in order for a policy to still be considered *common*. More specifically, the question that arises is to what extent the principles of consistency and sincere cooperation, that are key to any common policy, are restraining factors to DI in PESCO. As fragmentation in PESCO may make it more difficult to live up to these principles, a balance needs to be sought between the need to uphold them and the advantages of working in smaller groups of both EU and non-EU members.¹⁶⁹

IV.1. GENERAL PRINCIPLES IN EU CFSP AND THEIR ENFORCEMENT

Despite of what is occasionally still exclaimed, the CFSDP, and thus PESCO, is not a sheer intergovernmental process among the Member States. CFSP is first of all based on a Union competence and a *common* policy which is independent from the national foreign policies

¹⁶⁴ Art. 46(6) TEU.

¹⁶⁵ S Blockmans, 'Pesco's Microcosm of Differentiated Integration' cit. 173.

¹⁶⁶ *Ibid.* 173 ff.

¹⁶⁷ In this regard, the Council recommended that pMS are "encouraged to enhance and accelerate the processes leading to the adoption of Project Arrangements". See Recommendation 2020/C of the Council of 15 June 2020 assessing the progress made by the participating Member States to fulfil commitments undertaken in the framework of permanent structured cooperation (PESCO), para 12.

¹⁶⁸ S Blockmans and D Macchiarini Crosson, 'Differentiated Integration Within PESCO: Clusters and Convergence in EU Defence' cit. 102.

¹⁶⁹ RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 197 ff.

that are based upon parallel competences of the Member States.¹⁷⁰ Consequently, it should be kept in mind that Member States remain bound by the principles underlying all EU external action both in their internal cooperation as in dealing with third countries. This includes the principles of consistency and sincere cooperation.¹⁷¹ Although, admittedly, the CFSP is an area which is still “subject to specific rules and procedures”,¹⁷² there seems to be no reason not to apply the general principles of EU external action to this specific field of EU law.¹⁷³ To the contrary, the very first provision in the CFSP Chapter unambiguously refers to the general provisions on the EU’s external action: “The Union’s action on the international scene, pursuant to this Chapter, *shall be guided by the principles*, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1”.¹⁷⁴ This seems to be confirmed by art. 24(2) TEU, which states that the Union shall conduct, define and implement a common foreign and security policy “[w]ithin the framework of the principles and objectives of its external action”.¹⁷⁵

The principle of consistency has developed as one of the main principles of the EU’s external relations.¹⁷⁶ It is not named a principle in the Treaties as such,¹⁷⁷ but nonetheless governs the EU’s external action more generally and serves as a principle to pursue the realization of its objectives.¹⁷⁸ Particularly because of the case-law of the Court of Justice of the European Union (CJEU), the requirement of loyalty has become directly linked to the principle of consistency. It held that art. 4(3) TEU imposed at the very least a duty of close cooperation between the Member States and the Union institutions – not only in order to facilitate the achievement of European Community (EC) tasks, but also to “ensur[ing] the coherence and consistency of the action and its [the Union’s] international

¹⁷⁰ S Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?’ cit. 1816.

¹⁷¹ RA Wessel, ‘General Principles in EU Common Foreign and Security Policy’ cit. 624: the above analysis not only reveals that a valid presumption exists that all structural as well as more substantive principles apply to the CFSP, which is not easily rebuttable.

¹⁷² Compare art. 24(1) TEU.

¹⁷³ See also P Craig, ‘General principles of law: treaty, historical and normative foundations’ in V Moreno-Lax, PJ Neuvonen and KS Ziegler (eds), *Research Handbook on General Principles of EU Law* cit.

¹⁷⁴ Art. 23(1) TEU. (Emphasis added).

¹⁷⁵ Art. 24(1) TEU.

¹⁷⁶ P Koutrakos, *the EU Common Security and Defence Policy* cit. 96.

¹⁷⁷ Yet, art. 22 TEU refers to “the principles and objectives set out in Article 21”.

¹⁷⁸ See also M Estrada Cañamares, ‘Building Coherent EU Responses: Coherence as a Structural Principle in EU External Relations’ cit. 256: “Because of its location under Article 7 TFEU, coherence can be considered a ‘Principle’ of ‘General Application’ to the Union”; J Larik, ‘From Speciality to the Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union’ (2014) ICLQ 935, 962: who suggests that the EU objectives “provide a sense of purpose as to the exercise of powers through the structures of the constitutionalised legal order”.

representation".¹⁷⁹ The requirement of sincere cooperation obliges Member States to "support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity".¹⁸⁰ Both principles push EU law forwards by requiring uniformity of outcomes from the view of EU law.¹⁸¹ Therefore, these principles must be kept in mind when examining DI in CFSDP.¹⁸² Moreover, they form an appealing solution to reconcile DI in the EU with the basic constitutional framework of European integration.¹⁸³

However, equal application of the general principles in CFSP does not necessarily result in equal enforcement prospects.¹⁸⁴ In principle, jurisdiction of the EU judicature is largely excluded in CFSDP.¹⁸⁵ Therefore, Member States which are reluctant to cede their autonomy in defence and wish to bring an action for annulment under art. 263 TFEU against PESCO decisions would have to face the peculiarity of the CFSDP.¹⁸⁶ Vice versa, this also means that if a Member State fails to fulfil an obligation under the Treaties, it cannot be held responsible in front of the Court.¹⁸⁷ Nevertheless, this does not mean that these principles are superfluous in the field of CSDP and should not be taken into account, as CFSP is now "part and parcel of the EU legal order, even if it retains certain particular features".¹⁸⁸ Indeed, the Court has used EU principles to extend its jurisdiction to the field of CFSP to protect, for example, the rule of law.¹⁸⁹ However, the still relatively

¹⁷⁹ Case C-266/03 *Commission v Luxembourg* ECLI:EU:C:2005:341 para 60; case C-433/03 *Commission v Germany* ECLI:EU:C:2005:462 para 66; reiterated in case C-246/07 *Commission v Sweden* ECLI:EU:C:2010:203 para 75; see more extensively on the role of the Court in CFSP: C Hillion and RA Wessel, 'The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP' in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar 2018) 6; see on the role of loyalty in mixed external relations: PJ Kuijper, 'Union Loyalty in Mixed External Relations and the Weight of Informal Preparatory Acts: *Commission v Sweden* (PFOS)' in G Butler and RA Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart 2022) 619.

¹⁸⁰ Art. 24(3) TEU.

¹⁸¹ E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' cit. 30.

¹⁸² RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 185.

¹⁸³ E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' cit. 26.

¹⁸⁴ RA Wessel, 'General Principles in EU Common Foreign and Security Policy' cit.

¹⁸⁵ Art. 24 TEU and art. 275 TFEU: 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; see also the decision of the Court in *Grau Gomis*, case C-167/94 *Grau Gomis and Others* ECLI:EU:C:1995:113.

¹⁸⁶ E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' cit. 35 ff.

¹⁸⁷ Arts. 258, 259 and 260 in conjunction with art. 275 TFEU.

¹⁸⁸ Case C-455/14P *H v Council and Commission* ECLI:EU:C:2016:212, Opinion of AG Wahl, para. 46.

¹⁸⁹ It could be deduced that the Court simply emphasizes a Union-wide application of, *inter alia*, principles on the role of the European Parliament in the procedure to conclude international agreements (case C-130/10 *Parliament v Council* ECLI:EU:C:2012:472; case C-658/11 *European Parliament v Council* ECLI:EU:C:2014:2025; case

restricted role of the Court in CFSP limits its possibilities to enforce certain EU principles in this field.¹⁹⁰ Nevertheless, monitoring and enforcement of principles in CFSP is not only the task of the Court, but also the task of other institutions.¹⁹¹ Besides, “as enforcement mechanisms, both administrative control and judicial review may be used to directly enforce a structural principle”.¹⁹²

IV.2. CONSISTENCY IN RELATION TO DIFFERENTIATED INTEGRATION IN PESCO

The requirement of consistency can be utilized as a tool in managing the outcomes in DI.¹⁹³ In case that consistency is considered as a one-size-fits-all principle, the question rises whether it is weakened by the different forms of differentiation in which not all Member States take part.¹⁹⁴ At first glance, it seems impossible to reconcile differentiation with the requirement of consistency because differentiation seems contradictory to the traditional view of consistency as symmetry of the components of the particular legal system. Yet, constitutional asymmetry, is a long-standing aspect of European integration. The point can even be made that differentiation simply reflects a touchstone of subsidiarity.¹⁹⁵ Therefore, although at face value certain characteristics of consistency as a legal principle may be impaired by differentiation, the principle may be able to transferring the classic integrative values to newly created sub-systems designed to promote individualization.¹⁹⁶ For example, under art. 21(3) TEU, consistency can mandate

C-263/14 *Parliament v Council* ECLI:EU:C:2016:435), legal protection by the different EU and/or national courts (case C-72/15 *Rosneft* ECLI:EU:C:2017:236, para 75: ‘[s]ince the purpose of the procedure that enables the Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under art. 19(1) TEU, it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of art. 275 TFEU, to which reference is made by art. 24(1) TEU.’), regulations for (seconded) staff to EU bodies and missions (case C-455/14P *H v Council and Commission* ECLI:EU:C:2016:569), or of rules on public procurement (case C-439/13P *Elitaliana v Eulex Kosovo* ECLI:EU:C:2015:753). See RA Wessel, ‘General Principles in EU Common Foreign and Security Policy’ cit.

¹⁹⁰ Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para 252: “certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice”. See in more detail on the judicial gaps: C Hillion and RA Wessel, ‘The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP’ cit.

¹⁹¹ Arts 24(3) and 26(2) TEU.

¹⁹² See E Chiti, ‘Enforcement of and Compliance with Structural Principles’ in M Cremona (ed.), *Structural Principles in EU External Relations Law* cit. 47, 52.

¹⁹³ *Ibid.* 27.

¹⁹⁴ E Herlin-Karnell and T Konstadinides, ‘EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry’ cit. 155.

¹⁹⁵ S Weatherill, ‘If I’d Wanted You to Understand I Would Have Explained It Better: What is the Purpose of the Provisions on Closer Co-operation Introduced by the Treaty of Amsterdam?’ in D O’Keeffe and PM Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart 1999) 21 ff.

¹⁹⁶ T Konstadinides, *Division of Powers in the European Union: The Delimitation of Internal Competence Between the EU and the Member States* (Kluwer Law International 2009) 256 ff.

a certain pattern of behaviour *vis-à-vis* the conduct of Union institutions and the uniformity of their activities with the wider policies of the EU.¹⁹⁷

However, DI may cause problems of vertical consistency between the EU's CFSP and the foreign policies of Member States, and problems of horizontal consistency between the different national foreign policies.¹⁹⁸ With regard to vertical consistency, what counts is proper consultation and coordination between the Member States and the central EU actors. With the creation of the HR and EEAS, the Treaty of Lisbon has provided the necessary mechanisms to ensure and support this vertical consistency between the EU and varying sets of Member States.¹⁹⁹ Besides, the principle of consistency may cause problems when third countries are involved. This is because rules and principles flowing from other external policies of the EU where CFSP is connected to will not be easy to uphold when participating third countries are not equally bound by them.²⁰⁰

As art. 21(3) TEU aims to eliminate contradiction,²⁰¹ it makes sense that such desire for consistency accompanies the specific forms of DI under the Treaties.²⁰² Hence, also the ubiquitous references in the policy documents of PESCO that the mechanism "will be undertaken in full compliance with the provisions of the TEU and the protocols attached thereto".²⁰³ Besides, the Council invited the HR to explore the potential connections between the distinct building blocks of the EU's new defence architecture. Accordingly, the notions of inclusivity, coherence, continuity, coordination and collaborations are inserted all over the founding documents of PESCO. Indeed, PESCO is the binding component in the "EU's alphabet soup" on defence integration.²⁰⁴ Interestingly, PESCO is seen "as the most important instrument to foster common security and defence in an area where more coherence, continuity, coordination and collaboration are needed. European efforts to this end must be united, coordinated, and meaningful and must be based on commonly agreed political guidelines".²⁰⁵ Thus, PESCO is considered as contributing to coherence in the field of CSDP.

¹⁹⁷ E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' cit. 29.

¹⁹⁸ See E Herlin-Karnell and T Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' cit. 139.

¹⁹⁹ S Blockmans, 'Differentiation in CFSP' cit. 56.

²⁰⁰ RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 189 ff.

²⁰¹ G De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press 2008) 251.

²⁰² E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' cit. 29.

²⁰³ Annex I Decision 2017/2315 cit., fifth bullet point; S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1817.

²⁰⁴ S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1822.

²⁰⁵ Annex I Decision 2017/2315 cit., fourth bullet point.

If we look at the specific provisions applicable to PESCO, art. 21(3) obliges the Council and the Commission, assisted by the HR, to ensure consistency. However, art. 26(2) TEU delegates this obligation to ensure consistency only to the Council and the HR. This confusion is also visible in the specific secondary legislation on PESCO. According to the preamble of Council Decision 2017/2315, the task to ensure consistency rests upon all three as it provides that “there should be consistency between actions undertaken within the framework of PESCO and other CFSP actions and other Union policies. The Council and, within their respective areas of responsibility, the HR and the Commission, should cooperate in order to maximise synergies where applicable”.²⁰⁶ However, art. 6 of the same Council Decision ascribes this role only to the Council, with the help of the HR.²⁰⁷ Accordingly, coordination between the different PESCO projects is overseen by the Council, assisted by the HR.²⁰⁸ Although coordination across institutions and policy areas might be challenging for the HR and her supporting structures, the above looks familiar to trained EU external relations observers.²⁰⁹ Nevertheless, considering that European Defence Fund (EDF) funding will be distributed by the Commission’s DG DEFIS and that certain aspects of PESCO have implications for the EU single market, it could be argued that Commission participation in project proceedings should be mandatory. This could raise the potential for upward convergence among projects.²¹⁰

Furthermore, consistency in the PESCO framework is ensured by the fact that the implementation of all PESCO projects will be based on the common set of governance rules for projects.²¹¹ In this regard, art. 4 of Council Decision 2018/909 provides that “the project members shall strive to design each project in order to ensure the coherence of output and timelines with other PESCO projects, and for the project be coherent with initiatives developed in other relevant institutional frameworks, while ensuring transparency and inclusiveness and avoiding unnecessary duplication”. Thus, whilst there are 60 different projects, with different project members and different individual project

²⁰⁶ *Ibid.* tenth bullet point.

²⁰⁷ Art. 6(1) Decision 2017/2315 cit., provides: “The Council, within the framework of Article 46(6) TEU, shall ensure the unity, consistency and effectiveness of PESCO. The High Representative shall also contribute to those objectives”.

²⁰⁸ Arts. 18(2), 26(2) and 27 TEU.

²⁰⁹ Ultimately, what is needed is a transparent selection process which respects EU (public procurement) rules and prioritizes PESCO projects that have a structuring impact on the technological and industrial base while raising the EU’s strategic autonomy in the operational realm. Real obstacles arise in pursuing coherence beyond the outer limits of the EU regime, however, this falls outside the scope of the thesis. See S Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?’ cit. 1823.

²¹⁰ S Blockmans and D Macchiarini Crosson, ‘Differentiated Integration Within PESCO: Clusters and Convergence in EU Defence’ cit. 102.

²¹¹ See in this regard, Decision 2018/340 cit., point 5 of the preamble, and Decision 2018/909 cit., point 3 of the preamble.

arrangements, an attempt to ensure coherence of output is made. However, this is not a hard obligation, as project members only shall “strive” to design projects in such a way to ensure coherence of output. Moreover, Biscop has stated that although none of the projects are useless, “it is such a disparate and incoherent set” that even if Member States were to realise all 60, “they would still not be much more capable than they are today”.²¹²

In addition, the requirement of consistency is once again stressed in relation to the participation of third countries, as Council Decision 2020/1639 provides that “there should be consistency between actions undertaken within the framework of PESCO and other CFSP actions and other Union policies”.²¹³ In other words, this is a duplication of art. 21(3) TEU. However, it is striking that not all objectives of art. 21(2) TEU have to be shared by the third countries, only those mentioned in points (a), (b), (c) and (h).²¹⁴ Accordingly, the question that arises is how this distinction between participating third countries and pMS, for whom all points of art. 21(2) TEU apply, impacts the required consistency between the different areas of external action and between these and the EU’s other policies. Besides, the fact that the administrative arrangements entered into by the project members and the third State are not based on art. 218 TFEU, does not contribute to the consistency of the role of the CJEU and the Parliament. However, it does not mean that the Council or the Member States can evade the EU’s general principles.²¹⁵ In this regard, the administrative arrangements “shall ensure consistency with provisions of Decision (CFSP) 2017/2315 and Decision (CFSP) 2018/909”²¹⁶ and the participation of the third State must be “consistent with the more binding PESCO commitments (...), in particular those commitments which that PESCO project is helping to fulfil”.²¹⁷ Thus, these requirements serve to ensure a common output in both pMS and participating third countries, and therefore contribute to CSDP as a *common* policy to the outside world. However, it was asked in the parliamentary questions of 8 April 2021 how these third countries, particularly the US, fit in with the declared objective of European

²¹² S Biscop, ‘European Defence and PESCO: Don’t Waste the Chance’ cit. 5 ff.

²¹³ Decision 2020/1639/CFSP of the Council of 5 November 2020 establishing the general conditions under which third States could exceptionally be invited to participate in individual PESCO projects, point 10 of the preamble.

²¹⁴ *Ibid.* art 3(a).

²¹⁵ Case C-370/12 *Pringle* ECLI:EU:C:2012:756; B de Witte and T Beukers, ‘The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle’ (2013) CMLRev 805; P García Andrade, ‘The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments’ (2016) European Papers www.europeanpapers.eu 115, 115; P García Andrade, ‘The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries’ in J Santos Vara and SR Sánchez-Taberner (eds), *The Democratization of EU International Relations Through EU Law* (Routledge 2018) 115; RA Wessel, ‘Normative Transformations in EU External Relations: The Phenomenon of “Soft” International Agreements’ (2020) West European Politics 72.

²¹⁶ Art. 2(6) TEU.

²¹⁷ Art. 3 TEU.

empowerment and autonomy.²¹⁸ Indeed, in light of art. 42 TEU the aim of PESCO is to bolster the industrial base of the European defence sector while fostering the EU's strategic autonomy. The question would then be whether the involvement of third countries would contribute to this aim and thus be consistent with it or not.

IV.3. SINCERE COOPERATION IN RELATION TO DIFFERENTIATED INTEGRATION IN PESCO

Although the principle of loyalty has existed in the EU's legal regime from the beginning, it has gradually become a main aspect in shaping the relationship between the EU and its Member States.²¹⁹ Importantly, the Treaty rule on loyalty was referred to as "the single most dynamic provision in the Treaty",²²⁰ and has always played a central role in shaping the contours of the effectiveness of EU law.²²¹ It is reproduced in art. 4(3) TEU and specified for the CFSDP context in art. 24(3) TEU as the "loyalty principle".

Some features of these principles suggest that it is of relevance to DI.²²² First of all, sincere cooperation is contributory to achieving the EU's objectives. By emphasizing that the Member States must cooperate for their accomplishment, the Treaty creates a strong connection between sincere cooperation and the effectiveness and uniform application of EU law.²²³ Secondly, there is a connection between sincere cooperation and unity.²²⁴

²¹⁸ European Parliament, *Legitimacy of Participation of Three Third-country NATO Members in the Permanent Structured Cooperation Project on Military Mobility* www.europarl.europa.eu; see also the reaction to it: European Parliament, *Reply* www.europarl.europa.eu: "Those Council Decisions take into account three Political and Security Committee (PSC) opinions regarding the requests by Norway, Canada and the US to participate in the PESCO project and state that their participation will contribute to strengthening the Common Security and Defence Policy (CSDP) and the Union level of ambition, including in support of CSDP missions and operations. They also state that these countries will bring substantial added value to the PESCO project".

²¹⁹ See J Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC' (2007) 31(5) *FordhamIntLJ* 1483; O Porchia, *Principi dell'ordinamento europeo* (Zanichelli 2008).

²²⁰ LW Gormley, 'Some Further Reflections on the Development of General Principles of Law within Article 10 EC' in U Bernitz and J Nergelius (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 303.

²²¹ J Temple Lang (n 349), 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC' cit.; for a recent analysis on loyalty see also E Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' (2010) *CMLRev* 323; C Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"' (CLEER Working Papers 2009-2).

²²² A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. 482.

²²³ This link is also clear from cases such as *Von Colsen and Francovich*, where the CJEU relied on loyalty to justify a duty of consistent interpretation and the liability of Member States for breaches of EU law. See case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153 para. 26 and joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* ECLI:EU:C:1991:428, para. 36.

²²⁴ A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. 482; In the field of external relations, the CJEU has extensively relied on loyalty as a legal tool to ensure the unity of EU action, see, for instance, in its Opinion 1/78 *Accord international sur le caoutchouc naturel* ECLI:EU:C:1979:224, para 33, the

Because DI is by nature a derogation from unity, loyalty could then be able to operate as a source of limitations on differentiation.²²⁵ Thirdly, loyalty also represents an autonomous source of constraints.²²⁶ Consequently, these characteristics imply that sincere cooperation may play a considerable role in regulating DI in PESCO, by acting as a restraint to fragmentation that could arise from the Member States both participating and not participating in this policy field.²²⁷

In every situation of internal differentiation, Member States and the EU institutions are restricted by loyalty obligations under art 4(3) TEU.²²⁸ Indeed, PESCO is entirely embedded in the EU framework. Therefore, all the loyalty obligations art 4(3) TEU refers to are fully applicable. In particular, pMS are obliged to guarantee the full effectiveness of EU measures notwithstanding limitations in geographic scope that may derive from PESCO and especially from its projects. Furthermore, all pMS must refrain from taking measures that could jeopardise the attainment of the EU's objectives, including those pursued through differentiation in PESCO. This requirement not only applies to the pMS, but necessarily also to those Member States not participating in PESCO, who should not hamper the effective implementation of actions they do not engage in. Lastly, duties of mutual assistance and cooperation between the EU institutions and the Member States are of particular importance in the context of DI, in order to curb fragmentation and guarantee the coherence of the EU acquis.²²⁹

CJEU held that under art. 192 of the Euratom Treaty member states were prevented from taking "unilateral action [...], even if it were collective and concerted action, [which] would have the effect of calling in question certain of the essential functions of the Community and in addition of affecting detrimentally its independent action in external relations"; similarly, in Opinion 2/91 *Convention no. 170 de l'OIT* ECLI:EU:C:1993:106, para. 36 it stated that a "duty of cooperation [...] results from the requirement of unity in the international representation of the Community"; see also joined cases 3, 4 and 6/76 *Cornelis Kramer and Others* ECLI:EU:C:1976:114, paras 42-44; Opinion 1/94 *Accords annexés à l'accord OMC* ECLI:EU:C:1994:384, para. 108; Opinion 2/00 *Protocole de Cartagena sur la prévention des risques biotechniques* ECLI:EU:C:2001:664, para. 18; for a comprehensive overview of the case law on loyalty in the context of external relations, see C Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World* (Hart Publishing 2010) 87; E Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' cit. 323; F Casolari, 'The Principle of Loyal Cooperation: A "Master Key" for EU External Representation?' in S Blockmans and RA Wessel (eds), 'Principles and Practice of EU External Representation' (CLEER Working Papers 2012-5) 11; S Saluzzo, *Accordi Internazionali degli Stati Membri dell'Unione Europea e Stati Terzi* (Ledizioni 2018) 274 ff; A Thies, 'The Search for Effectiveness and the Need for Loyalty in EU External Action' in M Cremona (eds), *Structural Principles in EU External Relations Law* cit. 263.

²²⁵ A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. 483.

²²⁶ M Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 234 ff.

²²⁷ See by analogy, A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. 483.

²²⁸ Art. 4(3) TEU.

²²⁹ A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. 483.

To start with, art. 46 TEU promotes the participation of Member States in PESCO,²³⁰ and reflects the principle of openness. This principle is closely linked to loyalty,²³¹ and means to ensure that PESCO remains a tool for the advancement of integration and to prevent it from being abused by discriminating a minority of Member States.²³²

However, although art. 24(3) TEU stresses the general duty of sincere cooperation in CFSDP, the culture of non-compliance in the area of CSDP influences PESCO as well. Unfortunately, pMS use PESCO to pursue national goals instead of a common EU objective.²³³ To illustrate, a main barrier in many PESCO projects is the absence of multilateral commitment on behalf of the pMS.²³⁴ Yet, while pMS are at least proposing projects, they are paying far less attention to the binding commitments.²³⁵ The fact is that compliance with these commitments is still dependent on the will of the pMS.²³⁶ First of all, they are entered into voluntarily. This results from the open framework provided by the Treaties, which enables Member States to accede or withdraw after the launch of PESCO. This is reiterated in the notification on PESCO, which provides that “participation in PESCO is voluntary and leaves national sovereignty untouched”.²³⁷ This voluntary nature of the mechanism presumes that there is no legal way of having pMS comply with their commitments against their will.²³⁸ A legitimate question that arises is how many pMS actually intended to meet the more binding commitments when they joined PESCO. As Biscop noted, the defence establishment in some countries saw PESCO as a useful tool to emphasize the importance of a serious defence attempt upon their national political authorities. However, he suggests that many governments probably signed up for PESCO out of fear being left out than from a genuine ambition to join in the mechanism.²³⁹ On top of this, when a pMS does not comply with the commitments, it is unlikely that the nuclear option of suspending a pMS is ever to be used.²⁴⁰ However, the duty of sincere cooperation is reflected in the fact that a suspension decision will be taken only after the

²³⁰ Art. 46 TEU.

²³¹ D Thym, ‘*Ungleichzeitigkeit und Europäisches Verfassungsrecht?*’ cit.; A Ott, ‘EU Constitutional Boundaries to Differentiation: How to Reconcile Differentiation with Integration?’ cit., 113; E Pistoia, *Limiti all’Integrazione Differenziata dell’Unione Europea* cit. 247.

²³² See by analogy A Miglio, ‘Differentiated Integration and the Principle of Loyalty’ cit. 484.

²³³ S Biscop, ‘European Defence and PESCO: Don’t Waste the Chance’ cit. 3.

²³⁴ L Béraud-Sudreau, YS Efstathiou and C Hannigan, ‘Keeping the Momentum in European Defence Collaboration: An Early Assessment of PESCO Implementation’ cit.

²³⁵ S Biscop, ‘European Defence and PESCO: Don’t Waste the Chance’ cit. 5.

²³⁶ B Cózar-Murillo, ‘PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit’ cit. 19 ff.

²³⁷ Annex I Decision 2017/2315 cit., seventh bullet point.

²³⁸ S Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?’ cit. 1819.

²³⁹ S Biscop, ‘European Defence and PESCO: Don’t Waste the Chance’ cit. 7.

²⁴⁰ Art 6(3) Decision 2017/2315 cit. provides that once a year the Council must review whether the pMS are fulfilling their commitments on the basis of the HR’s annual PESCO report. If a pMS systematically fails to meet its commitments, its membership of PESCO should be suspended.

pMS in question “has been given a clearly defined timeframe for individual consultation and reaction measures”.²⁴¹ But, as Nováky states, the reaction measures should be presented as a list of steps that the pMS in question has to perform in order to stay in PESCO. These steps should be phrased clearly and explicitly, and their realization should be monitored. The “clearly defined timeframe” should be an exact deadline by which the pMS in question has to show that it has performed the requisite steps to fulfil its commitments. When it fails or is reluctant to do so, the Council should suspend that pMS without any doubt, notwithstanding how “diplomatically unfriendly” that might be.²⁴² PESCO should not become a mechanism where members who violate the rules cannot be kicked out for the sake of inclusivity.²⁴³ Yet, many commitments are so broadly and vaguely formulated, that it leaves considerable room for interpretation and makes it possible to formally adhere without in practice doing very much that one wasn’t doing already. Thus, the minimum threshold for fulfilling the commitments will be low.²⁴⁴ As a result, if we look at cases such as Spain, which is not able of adhering to its commitment to allocate two per cent of its GDP to defence, there is no punitive tool in the hands of the European institutions. This is a major handicap for the creation of a Europe of defence.²⁴⁵ Therefore, little prevents pMS from pursuing their individual national projects instead of using PESCO as an instrument to reach a common EU objective. Precisely, what PESCO can do for them is providing money via the EDF. Vice versa, pMS have not been very eager to convert the PESCO commitments into more precise goals and set deadlines, which would involve firm budgetary commitments, and possibly more naming-and-shaming of the laggards. Furthermore, if PESCO would be more integrative, this would result in more consolidation of the defence industry. However, most pMS remain very protective of their national defence industry. This was illustrated by the debate on third-State participation in PESCO projects. pMS want to decide on third country participation on a project-by-project basis, without automatic, and without them benefitting from EU funding. Some pMS prefer a restrictive approach, seeing it as a chance to push British and American competitors out of the EU market. However, the advantage of participation of third countries is that it can help projects to become economically viable.²⁴⁶

²⁴¹ *Ibid.* art 6(4).

²⁴² S Blockmans, ‘Europe’s Defence Train Has Left the Station—Speed and Destination Unknown’ (CEPS Commentary 2017) 3 aei.pitt.edu.

²⁴³ N Nováky, ‘The EU’s Permanent Structured Cooperation in Defence: Keeping Sleeping Beauty from Snoozing’ cit. 102.

²⁴⁴ *Ibid.* 100 ff.

²⁴⁵ B Cózar-Murillo, ‘PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit’ cit. 19 ff.

²⁴⁶ S Biscop, ‘European Defence and PESCO: Don’t Waste the Chance’ cit. 7 ff

V. CONCLUSION

This *Article* has investigated DI in PESCO in light of the EU's general principles of consistency and sincere cooperation. Although differentiation seems to be at odds with the idea of a common policy (a policy in which all Member States take part and involves Member States only), DI has become part and parcel of the EU's legal framework, with PESCO as the example par excellence. To reconcile DI with integration, general principles of EU law, among which the principles of consistency and sincere cooperation, may play a prominent role.

Our analysis revealed that the nature of the CSDP within the wider framework of the CFSP is not as *common* as the word would suggest. Although it is called a *Union* policy, the Treaty acknowledges that a *Common* Foreign, Security and Defence Policy is the result of *a process of cooperation* between the Union and its Member States. Besides, differentiation has been a solution to circumvent the unanimity rule, and thus to accommodate differences and be able to move forward when certain Member States are not on board. Thus, DI in CSDP exemplifies that differentiation does not necessarily stand in the way of pursuing a common policy, as it might be the only way to build a common policy where otherwise consensus would never be reached due to different national interests.

Secondly, it was demonstrated that PESCO is the most recent and far-going example of institutionalised DI within EU defence and functions as a standing platform for the accommodation of diverse commitments and capabilities in CSDP.²⁴⁷ PESCO serves as a "hub and spoke" model, whereby decision-making by consensus at the level of the Council (the hub) preserves inclusivity, while simultaneously permitting different groups of Member States to initiate projects (the spokes) increases the level of ambition in general. However, the average number of project participants is only five, which means that the total of 60 projects arguably does not change the situation of fragmentation in the field of defense. The only difference with the pre-PESCO situation is that cooperation between pMS is now able to rely on the EU's institutional infrastructure, with the associated benefits.

Thirdly, we revealed that the possibility of DI as a means to pursue a common policy is definitely not unlimited: general principles of EU law require a certain pattern of behaviour of the pMS, institutions and third countries. In the end, the question that needs to be asked is this: *Does this particular form of DI strengthen the EU's performance as a global actor?* As long as consistency between the EU's internal and external policies is preserved and all actors involved work together in a spirit of loyalty, the answer to this question is *yes*. However, several shortcomings in the PESCO mechanism related to the principles of consistency and sincere cooperation came to the fore, especially on the part of the pMS. To uphold these general principles in the future and for PESCO to genuinely contribute to a *common* defence policy, pMS should be required to help the EU achieve its strategic

²⁴⁷ See C Törö, 'Accommodating Differences within the CSDP: Leeway in the Treaty Framework?' in S Blockmans (ed.), 'Differentiated Integration in the EU. From the Inside Looking Out' (CEPS 2014) 70.

autonomy by doing more than the minimum required to fulfil the binding commitments. In this regard, more detailed and clearly formulated guidelines are needed. Besides, the implementation of PESCO should be monitored rigorously at national and EU level, and real consequences should be in place for pMS that fail to meet their commitments. When the requirements of consistency and sincere cooperation are fulfilled, however, the CSDP sets to gain from the support of PESCO's microcosm of DI, be that in terms of legitimacy, visibility and effectiveness of the EU as a global actor.²⁴⁸

In conclusion, the extent to which DI in PESCO affects the common nature in CSDP seems relatively small at first sight, as DI in the wider policy sphere of CFSDP is far from new. Yet, while enhanced cooperation, for example, has built in a limitation regarding the number of participants in order to uphold a certain *commonness*, this is not the case for PESCO. This lack of prioritisation of unitary integration creates a risk of fragmentation, which might possibly lead to inconsistencies. In this regard, the general principles of consistency and sincere cooperation should serve as a benchmark to DI in PESCO, thus "putting the C back into the CSDP".²⁴⁹ However, the Treaties and subsequent secondary legislation on PESCO lack clear guidelines to measure adherence to these principles and therefore fail to establish clear limits to DI in this regard. Moreover, without the jurisdiction of the CJEU, a risk appears that the EU institutions responsible for monitoring consistency and sincere cooperation in the PESCO framework will base their examination on political-rather than legal considerations. Consequently, considering the flexibility in PESCO, PESCO runs the risk of creating too much fragmentation instead of contributing to the *commonness* the Treaties actually envisaged for the *Common Security and Defence Policy*.

²⁴⁸ See, by analogy, S Blockmans, 'Differentiation in CFSP' cit. 56.

²⁴⁹ *Ibid.* 55.