



HIGHLIGHT

FIRST-EVER EU FUNDING OF LETHAL WEAPONS: 'ANOTHER TABOO HAS (LAWFULLY) FALLEN'

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By decision of 28 February 2022,¹ the Council of the EU unanimously decided to fund (in the amount of euro 1 840 000 000, as last increased by Council Decision (CFSP) 2022/809 of 23 May 2022)² “the provision of military equipment, and platforms, designed to deliver lethal force to the Ukrainian Armed Forces”.³ The assistance decision, which is aimed “to contribute to strengthening the capabilities and resilience of the Ukrainian Armed Forces to defend the territorial integrity and sovereignty of Ukraine and protect the civilian population”,⁴ is part of a wide range of measures taken by the European Union in response to the armed aggression launched by the Russian Federation on Ukrainian territory.

Even if the supply of arms to a State under aggression is a lawful measure under international law,⁵ its unprecedented character for the EU and its significant implications on the political level make it highly controversial.⁶ Emblematic are the words of the High Representative of the Union for Foreign Affairs and Security Policy: “[a]nother taboo has

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¹ Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force.

² Council Decision (CFSP) 2022/809 of 23 May 2022 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force.

³ Art. 1(3) Council Decision (CFSP) 2022/338 cit.

⁴ *Ibid.* art. 1(2).

⁵ Editorial, ‘Europe at War’ (2021) European Papers www.europeanpapers.eu 1523-1525.

⁶ On the different issue of illegal arms exports, in particular on the problem of illegal arms exports in the context of the European Defence Fund (Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092) see B Vroege, ‘Exporting Arms over Values: The Humanitarian Cost of the European Defence Fund’ (2021) European Papers www.europeanpapers.eu 1575-1601.



fallen. The taboo that the European Union was not providing arms in a war. Yes, we are doing it. Because this war requires our engagement to support the Ukrainian army”.⁷

To establish whether this taboo has lawfully fallen, it is appropriate to assess whether Decision 2022/338 and, especially, the European Peace Facility (EPF)⁸ – which is its legal prerequisite – are compatible with the EU Treaties. In addition, it is important to ascertain whether the Council has indeed the power to decide on the supply of weapons. Since both decisions fall within the framework of the Common Foreign and Security Policy (CFSP), it is worthwhile to first examine the scope of this domain.

Notoriously, to outline the precise contours of “common foreign and security policy” is not an easy task. Not only does the CFSP retain a purely intergovernmental character and a specific discipline (albeit integrated “within the general framework of Union law”)⁹ but, unlike the other Union policies, it is not defined in relation to any of the criteria normally used to establish an allocation of competences. Resorting to a definition of a markedly tautological character, art. 24(1) TEU states that the Union’s competence in CFSP matters “shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.” Thus, there is no indication as to the extent of the competence in the field of the CFSP, except that it is, according to art. 24(2) TEU, “based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States’ actions.” From this perspective, any act could be based on CFSP provisions if it concerns an issue of general interest for the Union and the Member States, and it does not fall within the preclusion established by art. 40(1) TEU. However, since the application of the first rule is ultimately left to the discretion of the Member States, the reference to the general interest does not seem to constitute a real limitation on foreign policy actions. The same argument applies to the requirement that the CFSP be conducted and implemented “within the framework of the principles and objectives of external action”. Objectives such as preserving peace, preventing conflicts, and strengthening international security, under art. 21(2)(c) TEU, while imposing a functional constraint on the EU’s foreign policy activities,¹⁰ have a “wide scope”¹¹ and, therefore, attribute to the Council a broad margin of discretion.

Even the case-law does not appear decisive for the purpose of circumscribing the scope of the CFSP. On the one hand, the Court has indicated that this competence can

⁷ High Representative/Vice-President Josep Borrell, Press statement, 27 February 2022 ec.europa.eu.

⁸ Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility (EPF), and repealing Decision (CFSP) 2015/528. The EPF, a so-called off-budget financing instrument, is a 5.6 billion euro fund to be spent on support to conflict management and international security over a seven-year period.

⁹ Case C-134/19 P *Bank Refah* ECLI:EU:C:2020:793 para. 47.

¹⁰ Case C-72/15 *Rosneft* ECLI:EU:C:2017:236 para. 88.

¹¹ *Ibid.*

be exercised for the adoption of specific measures which, due to their intrinsically political connotation, fall *in re ipsa* within the scope of the CFSP. The Court has referred to measures such as the granting “of political support for a moratorium or even the collection and destruction of weapons which fall [...] within action to preserve peace and strengthen international security or to promote international cooperation”.¹² These are complemented by measures designed to ensure the non-proliferation of weapons of mass destruction, disarmament and arms control, the fight against the illicit trade in small arms and light weapons, nuclear safety, and the export control of dual-use goods and arms.¹³ On the other hand, the Court has indicated that the objective of preserving peace and strengthening international security also includes the “protection of the territorial integrity, sovereignty and independence” of a third State, as well as the “promotion of a peaceful settlement of the crisis”.¹⁴

It is therefore not surprising that the broad scope of actions that the Court links to the ultimate goal of maintaining international peace and security grants the institutions a significant margin of leeway in determining the concrete aims of their action rather than circumscribing the scope of the CFSP. Nor is it surprising that the Court of Justice expressly recognises the Council’s wide discretionary power when it is called upon to adjudicate on CFSP matters, which involve choices of a genuinely political nature and call for politically sensitive assessments. As is clear from settled case-law, only the manifest unsuitability of a measure to attain the objective pursued can affect its legitimacy.¹⁵

Against this background, the European Peace Facility, insofar as it constitutes the legal prerequisite of Decision 2022/338, appears to be fully in line with the CFSP provisions and their broad scope. Among other actions, the EPF finances assistance measures for the strengthening of the military and defence capabilities of third States with the objective, in particular, of contributing “rapidly and effectively to the military response of third States and regional and international organisations in a crisis situation”.¹⁶ As to its content, the financial assistance in the military and defence field – like the granting “of political support for a moratorium” or the “collection and destruction of weapons” – is a measure with an objectively characterised content that is by itself attributable to CFSP as a result of its inherent political characterisation (see *supra*). As to the objectives pursued by the EPF, insofar as the measures of assistance in the military and defence field contribute to the military response of third States in a crisis situation, they aim to preserve peace, prevent conflicts and strengthen international security, in accordance with art. 21(2)(c) TEU as broadly construed by the Court in its case-law (see *supra*).

¹² Case C-91/05 *Commission v. Council (ECOWAS)* ECLI:EU:C:2008:288 para. 105.

¹³ Case C-244/17 *Commission v. Council* ECLI:EU:C:2018:662 para. 42; see, also, case C-180/20 *Commission v. Council* ECLI:EU:C:2021:658 para. 41 ff.

¹⁴ *Rosneft* cit. para. 150.

¹⁵ *Ibid.* para. 146 ff.

¹⁶ Art. 56 Council Decision (CFSP) 2021/509 (EPF) cit.

Turning to Decision 2022/338, it was adopted, as already mentioned, under the EPF, which is therefore its legal framework. Through Decision 2022/338 the Council decided to provide for financial assistance for the supply of war material to help strengthen the capabilities of the Ukrainian armed forces to defend the territorial integrity and sovereignty of Ukraine and protect the civilian population from military aggression. In terms of both object and purposes, the decision appears to comply with the EPF and, by extension, with the provisions in the CFSP sector. In terms of content, the supply of arms is an assistance measure aimed at strengthening the military and defence capability of third States within the meaning of art. 1 of the EPF. Its objectives – *i.e.*, the defence of the territorial integrity and sovereignty of a third state – are among the objectives relating to the maintenance of peace and the strengthening of international security under art. 21(2)(c) TEU.

While Decision 2022/338 belongs to those measures that the EU may legitimately adopt on the basis of CFSP provisions, it nevertheless raises some concerns as regards the respect of the procedural requirements set out in the EPF. The latter decision is based on an integrated approach that implies an assessment of both the risks involved in the measure to be adopted and the accompanying safeguards. This means that the proposal for an assistance measure must be accompanied, pursuant to art. 9(5) of the EPF, by a preliminary assessment that includes “possible mitigating and flanking elements, arrangements for monitoring and evaluation, and controls and safeguards.” In Decision 2022/338, presumably as a consequence of the emergency situation in which the assistance measures were decided, there is no mention of a risk assessment and possible safeguards. The absence of such an assessment is particularly significant in light of the prohibition to use the emergency procedure under art. 58(2) EPF for the adoption of assistance measures involving the supply of war material.¹⁷

Apart this procedural deviation, which does not help unravel all the shadows on the legality of Decision 2022/338, the most significant doubt – that of its conformity with the Treaties – can be positively dispelled: the Council has the necessary discretion to deliberate on the supply of weapons. Two concomitant and intimately connected factors contribute to this conclusion. On the one hand, the broad discretion is the consequence of the fact that the principle of attribution, within the CFSP, is applied in a mitigated and incomplete manner. Indeed, the CFSP, unlike other Union policies, only partly follows the criteria normally used to establish an allocation of competences. It is, as noted, a tendentially dematerialised policy, *i.e.*, without reference to a defined object (except for objectively characterised measures); according to art. 24 TEU, it is limited only by a reference to a functional constraint. Moreover, the CFSP objectives are broad in scope, as explicitly stated by the Court of Justice, and do not constitute an effective limit to the exercise of decision-making powers. On the other hand, the Council’s wide discretion stems from the

¹⁷ According to art. 58(2) EPF “[U]rgent measures shall not include any provision of equipment referred to in Article 5(3).” Art. 5(3) EPF refers to “an assistance measure which allows for the supply of military equipment, or platforms, designed to deliver lethal force”.

complex assessments that the Court recognises in the hands of the EU legislator where it is called upon to make choices of a political nature. Taken together, these elements justify the impression that, in the absence of a clear indication of competence and regulatory mechanisms, the application of the CFSP is ultimately left to the Council’s discretion, extending as far as the Member States allow the Union to exercise it. In case of the unanimous agreement of the Member States, the supply of arms cannot therefore be considered precluded on the basis of CFSP provisions. To paraphrase Mr. Borrell, “another taboo has (lawfully) fallen”!

