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European Defence Union: Some Legal Considerations

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European Defence Union: Some Legal Considerations

by

Luigi Lonardo*

Abstract

The perceived surge in external threats such as hybrid and cyber warfare, the instability in EU neighbourhood, and deadly attacks on the very EU territory, jointly with the pending process of the UK leaving the European Union, recently renewed political and academic interest in the establishment of a European Defence Union (EDU). EDU is foreseen in Article 42(2) Treaty on the European Union (TEU), as part of Common Security and Defence Policy, but only with Resolution of 22 November 2016 the European Parliament called for its establishment.

While the project is still at its embryonal stage, in the view of the European Parliament the EDU is likely to encompass a permanent structured cooperation and an own fund. The permanent structured cooperation is a mechanism for MSs to combine their military efforts provided for in the TEU, but never implemented or used until now. The opportunity to use a start-up fund is also foreseen in the TEU, Article 41(3). This article devotes attention to the legal foundations of EDU. It discusses issues related to its establishment, functioning, aims, and funding; in addition, it explores the relationship between EDU and other options available to policy-makers for providing a European defence: the mutual defence clause of Article 42(7) TEU and the mutual assistance clause of Article 222 Treaty on the Functioning of the European Union.

Keywords: European Defence Union – European Army – Common Foreign and Security Policy – Common Security and Defence Policy – EU External Relations Law – International Relations

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European Defence Union: Some Legal Considerations

I. Introduction

The framing of a European Defence Union (EDU) is foreseen in Article 42(2) Treaty on the European Union (TEU), but it has not yet taken place. The perceived surge in threats to the European Union, such as hybrid and cyber warfare, instability in its neighbourhood, and deadly attacks on its very territory are the concern that recently¹ triggered the proposal to set up a common Union defence policy.² Moreover, given the traditional reticence of the UK to pursue more integration in the defence sector, its decision to leave the EU, together with a more permissive US attitude toward European autonomous defence, have also renewed the political viability of the Franco-German effort to increase cooperation in this area.³

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

While the project is still at its embryonal stage, in the view of the European Parliament the EDU is likely to encompass a permanent structured cooperation and an own fund. The permanent structured cooperation is a mechanism, envisaged in the TEU, for Member

¹ Defence has figured quite prominently in the EU agenda since the *European Council Conclusions adopted by the Brussels European Council of December 2013*, [2013] EUCO 217/13. In those Council conclusions, the High Representative (HR) was asked 'in close cooperation with the Commission, to assess the impact of changes in the global environment, and to report to the Council in the course of 2015 on the challenges and opportunities arising for the Union, following consultations with the Member States' (TOCCI Nathalie, *Towards an EU Global Strategy*, in MISSIROLI Antonio (ed), "Towards an EU Global Strategy. Background, Process, References", Paris, European Union Institute for Security Studies (2015), pp. 113-128, p. 115). Between December 2013 and the time of writing, tension with Russia over eastern Ukraine; the rise of the Islamic State; terrorist attacks for example in Paris, Nice, Berlin, London and Barcelona; the Brexit Referendum; the election of Donald Trump at the US Presidency all contributed, for EU policy-makers, to the necessity to establish a Defence Union.

² *European Parliament resolution of 22 November 2016 on the European Defence Union* (2016/2052(INI) discussed below ; 'Germany, France drafting details of defense fund: German minister' (Reuters, 10 June 2017).

³ *Joint Position by Defence Ministers VON DER LEYEN Ursula and LE DRIAN Jean Yves - Revitalizing CSDP. Towards a comprehensive, realistic and credible Defence in the EU* [2016] https://www.senato.it/japp/bgt/showdoc/17/DOSSIER/990802/3_propositions-franco-allemandes-sur-la-defense.pdf; *European Commission - White Paper of the Future of Europe* [2017] COM/2017/2025 proposed three scenarios of increased cooperation in defence : a group of Member States (MSs) decide to cooperate much closer on defence matters ; joint defence capacities are established ; or, finally, a European Defence Union is established. T Barber, 'EU comes together over Brexit' (Financial Times, 7 June 2017).

⁴ *Supra*, n 2.

⁵ *European Commission - Reflection Paper on the Future of European Defence* [2017] COM/2017/315.

States (MSs) to combine their military efforts: however, it was never implemented nor used.⁶ The opportunity to use a start-up fund is also foreseen in the TEU, Article 41(3).

From a practical perspective, the study of the law of the European Defence Union is necessary for the implementation of the EU Global Strategy of 2016 and of the official EU documents referring to EDU mentioned above. Indeed, since one of the Global Strategy's objectives is the protection of European citizens, the High Representative (HR) and the Foreign Affairs Council will have to consider, among other options, the establishment of EDU. With the aim of providing decision makers and scholars with a clear picture of the legal options offered by the Treaties, this article is devoted to the largely unexplored legal foundations of EDU.⁷

From an academic perspective, EDU raises both legal and political questions. In the first category, there are issues related to establishment, functioning, aims, and funding of the permanent structured cooperation, which this article explore together with the relationship between the permanent structured cooperation and other legal options available to policy-makers: the mutual defence clause,⁸ and the mutual assistance clause.⁹ To the second category, which this article does not discuss, pertain issues related to EDU relationship with the North Atlantic Treaty Organization (NATO) ; to the desirability of the project itself ; to the relationship between EDU and other areas of EU law-making ; and to the repercussion of EDU for the integration paradigm of the EU.

Finally, a broader issue underlies the discussion on the law of European defence: even more than in other areas, in the field of international security the drafting and implementation of law is inextricably linked to historical and political interests.¹⁰ For example, EDU would be

⁶ A first attempt to start a discussion on permanent structured cooperation was made by the Belgians in 2010, but it fell on deaf years. BISCOP Sven and COELMONT Jo, *CSDP and the Ghent Framework: The Indirect Approach to Permanent Structured Cooperation?*, *European Foreign Affairs Review* (2011), pp. 149-167, p. 151.

⁷ A major exception is KOUTRAKOS Panos, *The Common Security and Defence Policy*, Oxford, Oxford University Press (2013), pp. 368. Other contributions are acknowledged in the footnotes of this article whenever reference is made to them.

⁸ Art. 42(7) TEU: 'If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.' Art. 51 UN Charter, binding on all EU MSs, states that: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

⁹ Art. 222 TFEU: '1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) — prevent the terrorist threat in the territory of the Member States;
— protect democratic institutions and the civilian population from any terrorist attack;
— assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.'

¹⁰ KOUTRAKOS Panos, (*supra* n 7), p. 79.

inextricably linked to coordination with NATO:¹¹ 21 EU MSs are NATO members; there are six non-NATO EU MSs: Austria, Cyprus, Malta, Ireland, Sweden, and Finland. Some European non-EU States are also NATO members (Turkey, Norway and, in the future, the UK). Aside from these alliances, some EU MSs have between themselves both multilateral¹² and bilateral¹³ defence treaties. In a domain that states perceive as power-driven more than law driven,¹⁴ the stimulating and fundamental question as to what role law can play is left open for discussion.

II. Reasons for the inclusion of EDU provisions in the Lisbon Treaty and their rationale

The Lisbon Treaty introduced the permanent structured cooperation in EU law,¹⁵ along with the mutual defence clause (Article 42(7) TEU). These two mechanisms were discussed at the Convention for the Future of Europe and inserted in the Constitutional Treaty of 2004. While that Treaty was never adopted, the rules flew, substantially unchanged, in the Lisbon Treaty of 2009.

The provisions on a permanent cooperation were a significant innovation, in the Constitutional Treaty, of EU defence framework. They followed the shared willingness to improve EU's capacity to act united in the international system as a Union – something which had not happened successfully during the wars in the Balkan in the previous decade, and after 9/11 in Afghanistan and Iraq. With a pattern that in this field still endures fifteen years later, British scepticism was contraposed to Franco-German initiatives. Since some Member States had already bilateral agreements in some defence areas, and with a view to strengthen EU's efficiency and coherence, following a Franco-German proposal, the Working Group on Defence at the Convention for the Future of Europe recommended to increase the role of the HR, that those Member States wishing to undertake firmer commitments than others should be enabled to do so with the Union's framework, and that a CFSP emergency budget should be set up.¹⁶ The second of these items – later to become the permanent structured cooperation – was conceived also with the view to allow Member States to transfer their obligations under the Western European Union (WEU) Treaty into EU law.¹⁷ The UK government's initial reaction was very cautious. As it reminded at a

¹¹ EP Resolution (n 4) point 4.

¹² The Nordic Defence Cooperation, which acquired this name in 1997, includes Sweden, Finland, Denmark and also Norway.

¹³ Dutch-Belgian navies cooperation, formalised in 1996 <https://www.defensie.nl/english/topics/international-cooperation/contracts/other-countries/the-belgian-and-netherlands-navies-under-1-command>.

¹⁴ KOSKENNIEMI Martti, *International Law Aspects of the Common Foreign and Security Policy*, in id (ed), "International Law Aspects of the European Union", Leiden, Brill (1998), pp. 26-49, p. 27.

¹⁵ *European Parliament, Policy Department External Policies Briefing Paper - The Lisbon Treaty and its Implications for CFSP/ESDP* [2008] 7, available at <http://www.europarl.europa.eu/document/activities/cont/200805/20080513ATT28796/20080513ATT28796EN.pdf>.

¹⁶ Working Group VIII 'Defence', 'Franco-German comments on the preliminary draft final report of Working Group VIII "Defence"' 4 December 2002.

¹⁷ This happened with the Lisbon Treaty, and the WEU officially came to an end in 2010.

hearing in the UK Parliament, ‘none of these structures pretends to provide an operational EU military command structure either at the strategic or the tactical levels. There are no standing EU headquarters (just as there is no EU standing force). Any such EU operational command structure would duplicate existing NATO and national assets’¹⁸ In particular, the UK government made clear its intention to resist the inclusion of any security guarantee in the new treaty which could rival or come to replace the security guarantee established through NATO.¹⁹

At the Convention for the Future of Europe, the mutual defence clause, which would become Article 42(7) TEU, followed from a recommendation by the Defence Working Group that Member States should commit to mobilising all instruments to prevent or respond to a terrorist attack or natural disaster within the EU.²⁰ The recommendation, phrased in those broad terms, proved unacceptable for the UK and other Member States which wanted to preserve. The mutual defence clause was instead phrased so as to provide obligation to assist a Member State victim of an ‘armed aggression’,²¹ and it was meant to accommodate three groups of states:²² those seeking a mutual defence commitment which could be satisfied with the part of the article stating that ‘the other Member States shall have (...) an obligation of aid and assistance by all the means in their power’; those seeking to protect their traditional neutral status (such as Ireland, Austria and Sweden) which could be satisfied with the clause ‘This shall not prejudice the specific character of the security and defence policy of certain Member States’; and those wanting to ensure that the article would not undermine NATO which could be satisfied with the reminder that ‘Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation’. In addition to the mutual defence clause, and prompted by deadly attacks in Madrid (2004) and in London (2005), Member States later decided to introduce a ‘solidarity clause’ in the event of a man-made or natural disaster, at the request of the political authority of the concerned Member State. This would later become Article 222 TFEU, and the relationship between this clause and the mutual defence of Article 42(7) TEU is explored later in the article.

III. Legal considerations

The EP envisaged that an EDU should encompass a permanent structured cooperation, a mechanism never used before that lies, like a sleeping giant, among the provisions of Title V

¹⁸ Response to the Committee’s 11th Report, Session 2001–02 on ESDP, para. 20.

¹⁹ *IGC A Constitutional Treaty for the EU – The British approach to the EU* [2003] Cm 5934, para. 95.

²⁰ *Select Committee on the European Union – The Future of Europe – The Convention’s Draft Constitutional Treaty* [2003] available at <https://www.publications.parliament.uk/pa/ld200203/ldselect/lddeucom/169/169.pdf> 46.

²¹ This is discussed more at length later in the article.

²² BLANKE, Hermann-Josef and MANGIAMELI, Stelio (eds), *The Treaty on European Union (TEU) a commentary*, Heidelberg, Springer (2013), pp. 1201-1235, p. 1219.

TEU.²³ Following the Parliament's proposal, some authors have commented on the permanent structured cooperation,²⁴ a subject which gets at best a mention in mainstream legal scholarship.²⁵

The permanent structured cooperation is characterised by flexibility in its establishment, management, and purpose; by continuity in its functioning; and its effectiveness depends to a large extent on its funding.²⁶

A. The options

The analysis will focus on the permanent structured cooperation, but this is by no means the only possible option to serve as legal basis for a common European defence. As a first option, in theory, the creation of a European army could be achieved through a super-governmental, integrationist, pro-federal project.²⁷ This, however, would require Treaty amendments as well as major restructuring of MSs defence policies, and it is not a reasonable option at the moment of writing: it is a lengthy and costly procedure which requires MSs' unanimity.

A second, more politically viable option – despite staunch criticism²⁸ – is to have recourse to other provisions on the Common Security and Defence Policy. This option would not encompass any further relinquishment of sovereignty from MSs to the EU. The management of the Defence Union would be done at an intergovernmental level, much as it happens, as a rule, in the whole area of Common Foreign and Security Policy. This second option would permit to choose between several legal bases. Article 42(7), for example, is an important 'mutual defence clause'. Pursuant to it, MSs have an obligation to assist another MS victim of an 'armed aggression' on its territory.²⁹ Apart from the ambiguity of the phrase armed aggression, which does not recur elsewhere in legal documents,³⁰ the Article

²³ MAURO Frederic, *Permanent Structured Cooperation. The Sleeping Beauty of European Defence*, GRIP Analysis, 27 May 2015, available at <https://www.grip.org/en/node/1751> (consulted on 1 July 2017), refers to the classic fairy tale, but I prefer to use the image of a giant because I do not derive any aesthetic pleasure from the contemplation of the Permanent Structured Cooperation.

²⁴ BISCOP Sven, *Oratio pro Pesco*, Egmont Paper 2017, available at bit.ly/2jSiyo5 (consulted on 1 July 2017); BAKKER Anne, DRENT Margriet & ZANDEE Dick, *European defence core groups. The why, what & how of permanent structured cooperation*, Clingendael Policy Brief November 2016, available at https://www.clingendael.org/sites/default/files/pdfs/PB_European_defence_core_groups_0.pdf (accessed 1 July 2017); and other contribution cited in footnotes of my paper where relevant.

²⁵ The only notable exception is KOUTRAKOS Panos, recalled *supra*. Authors from other disciplines, instead, had written on the Permanent Structured Cooperation already before. BISCOP Sven, *From ESDP to CSDP: The Search for Added Value through Permanent Structured Cooperation*, UACES Conference Paper, 2008, p. 2.

²⁶ KOUTRAKOS Panos (*supra* n 7), p. 76.

²⁷ Similar to the failed European Defence Community, which in the 50s would have replaced Member States armies with an EU standing one.

²⁸ RANKIN Jennifer, 'Is there a secret plan to create an EU army?', *The Guardian*, 27th May 2016, available at <https://www.theguardian.com/politics/2016/may/27/is-there-a-secret-plan-to-create-an-eu-army> (accessed 1 July 2017).

²⁹ The obligation is similar, in substance, to that deriving from Article 222 TFEU. The events triggering each article, as well as the procedure, however, differ.

³⁰ Art. 1 of the UN General Assembly Resolution on the Definition of Aggression A/RES/29/3314 states: 'Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.' The Resolution is not binding on the EU if not to the extent it reflects customary law.

is phrased similarly to other clauses of collective defence, such as Article 5 NATO Charter or Article 4 of the 1948 Brussels Treaty, whereby Western European States agreed to make an alliance for the security of the continent.³¹ EU Treaties heavily rely on UN obligations, on paper:³² the very Article 42(7) makes reference to Article 51 of the UN Charter.³³ However, there are two reasonable and opposite interpretations of Article 51 UN Charter: a permissive and a restrictive interpretation. The permissive one disregards the requirement that the armed attack must have occurred and allows, for example, for anticipatory self-defence. A permissive interpretation also relinquishes the requirement that the armed attack is committed by a State – even though state practice points to the opposite direction.³⁴ It is therefore debatable whether Article 51 UN Charter – and consequently Article 42(7) TEU – extends the right to self-defence to a case of attack by non-state actors. In practice, Article 42(7) TEU was only used once in the history of the EU, when President Hollande called for its application after November 2015. The trigger of France's request were simultaneous shootings and killings in Paris, carried out by operatives of the Islamic State (IS), which later claimed responsibility for the attack. At present, no state recognises IS as a state within the meaning, for example, of the Montevideo Convention. The application of Article 42(7) in case of an attack by an entity that France considers a terrorist organisation is evidence, therefore, that the notion of 'aggression' in Article 42(7) and of Article 51 UN Charter is interpreted broadly. In that case, the concrete use of that clause consisted in France concluding bilateral agreements with some other EU countries, with the aim of receiving troops for France's missions abroad and focus their soldiers on patrolling the country's territory.³⁵

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

³¹ Respectively: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

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

³² EECKHOUT Piet and LOPEZ-ESCUERO Manuel (eds), *The European Union's External Action in Times of Crisis*, Oxford, Hart (2016), pp. 624.

³³ 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'.

³⁴ MILANOVIC Marko, 'Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum', EJIL Talk!, 21 February 2010, available at <https://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/> (accessed 1 July 2017).

³⁵ MERCHET Jean Dominique, *Article 42-7 : où en est l'assistance des Européens demandée par la France ?*, L'Opinion, available at <http://www.lopinion.fr/blog/secret-defense/article-42-7-en-est-l-assistance-europeens-demandee-france-102052> (accessed 1 July 2017).

In *Anagnostakis*, the General Court held that Article 222 TFEU ‘clearly does not relate to economic and monetary policy, or economic circumstances or the budgetary difficulties of the Member States’ – thus implying that it might refer, instead, to the CFSP, or at least to EU’s external action in general.³⁶ This was the opinion of AG Jääskinen in *Elitaliana*: EU’s external action covers Article 222 TFEU.³⁷ Even more explicit was the Opinion of AG Bot in Case C-130/10, that the Article relates to the CFSP, in particular in so far as concerns CSDP.³⁸ Finally, the Council Decision implementing Article 222 refers, in its 5th recital, to the structures developed under the Common Security and Defence Policy as instruments developed pursuant to the solidarity clause.³⁹ However, the Council Decision implementing the solidarity clause does not provide a general framework for dealing with actions having military defence implications, because the joint proposal⁴⁰ excluded ‘defence implications’.

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

While the mutual defence clause requires an armed aggression to trigger it, the mutual assistance clause requires a terrorist attack, a man-made, or natural disaster. While, as we saw, ‘armed aggression’ was interpreted so as to encompass a terrorist attack, the scope of application of the solidarity clause is wider. This was due to the initiative of Michel Barnier, chairman of the Working Group VIII on Defence for the drafting of a Constitutional Treaty in 2003.⁴¹

Moreover, the mutual defence obligation is only incumbent upon other Member States, while Article 222 TFEU imposes an obligation on the EU as well. This means the opportunity to mobilise Union’s own resources such as police, funds, etc.⁴² It is also important to recall that Article 42(7) TEU is subject to the exception that the provision ‘shall not prejudice the specific character of the security and defence policy of certain Member States’, even though what the exception exactly means is object of debate.⁴³

³⁶ ECJ, Case T 450/12, *Anagnostakis v Commission*, EU:T:2015:739, para. 60.

³⁷ ECJ, Case C-493/13, P *Elitaliana v EULEX Kosovo*, EU:C:2014:2416, AG Opinion para. 17.

³⁸ ECJ, Case C-130/10, *European Parliament v Council of the European Union*, EU:C:2012:50, AG Opinion para. 65.

³⁹ Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, [2014] OJ L 192.

⁴⁰ *Joint proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause* [2012] presented, pursuant to Article 222(3) TFEU, by the High Representative of the EU for Foreign Affairs and Security Policy and the European Commission.

⁴¹ VILLANI Susanna, *The EU Civil Protection Mechanism: instrument of response in the event of a disaster*, *Revista Universitaria Europea* (2017), pp. 121-140, p. 129.

⁴² FUCHS-DRAPIER Marie, *The European Union’s Solidarity Clause in the Event of a Terrorist Attack: Towards Solidarity or Maintaining Sovereignty?*, *Journal of Contingencies and Crisis Management* (2011), pp. 183-205, p. 185.

⁴³ HILPOLD Peter, *Filling a Buzzword with Life: The Implementation of the Solidarity Clause in Article 222 TFEU*, *Legal Issues of Economic Integration* (2015) pp. 209-218, p. 217.

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

Finally, Article 44(1) TEU, allows for a form of enhanced cooperation by some MSs to carry out, on a voluntary basis, specific tasks entrusted to them by the Council. The reasons why the European Parliament and other authors have not called for these legal bases is that the permanent structured cooperation, in the eyes of its supporters, offers two distinctive advantages: it can be used for external action, and, as the name suggests, it is permanent.

B. Establishment of Permanent Structured Cooperation

The legal basis for a permanent structured cooperation is provided for in Article 42(6) TEU: ‘Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. Such cooperation shall be governed by Article 46. It shall not affect the provisions of Article 43.’

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

Development of capacities includes but is not limited to a ‘medical command; advanced training; remotely piloted aircraft systems capability; combat search and rescue; military capacity to counter nuclear, biological, chemical and radiological threats; strategic surveillance of EU borders; and shared access to satellite imagery.’⁴⁴ It might also involve creating or sharing military facilities for the supervision or training of military personnel:⁴⁵ at the moment, the EU does not have military headquarters.⁴⁶ Pursuant to Article 3 Additional Protocol 10, the European Defence Agency shall contribute to the regular assessment of participating Member States’ contributions with regard to capabilities.

⁴⁴ MARRONE Alessandro, PIROZZI Nicoletta, SARTORI Paola, PESCO: An Ace in the Hand for European Defence, Istituto Affari Internazionali 2017, p. 4, available at www.iai.it/sites/default/files/eu60_9.pdf (accessed 1 July 2017).

⁴⁵ Similarly MARRONE Alessandro (*supra* n 44), p. 6.

⁴⁶ KOUTRAKOS Panos (n 7), p. 101.

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

The Council which would proceed, within three months, to adopt a decision establishing the permanent structured cooperation, acting by qualified majority.

C. Functioning

1. Principles

The functioning of the permanent structured cooperation is inspired by three principles: willingness, continuity, and flexibility. These principles clearly show a preference for leaving MSs in power at all time during the cooperation, while at the same time providing a framework that encompassed rigorous rules, compliance with which is realistic. The preference for the reliance on political bargain and unanimity follows, for the Common Security and Defence Policy, the precise recommendation that was formulated already in 2002 by Working Group VIII of the European Convention.⁴⁷

a. Willingness

This requirement explains why the mechanism is called a permanent structured ‘cooperation’.

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

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

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

⁴⁷ CRAIG Paul, *The Lisbon Treaty. Law, Politics, and Treaty Reform*, Oxford, Oxford University Press (2010), pp, 777, p. 419. The final report of the Working Group is available at <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00461.en02.pdf>.

b. Continuity

This requirement accounts for the qualification of the structured cooperation as ‘permanent’. Continuity ensured guaranteed by Article 46(4) TEU: a MS which no longer fulfils the criteria or is no longer able to meet the commitments it made prior to entering the cooperation, may be suspended from participating in it. The decision is taken by the Council voting by unanimity.

c. Flexibility

The permanent cooperation is only ‘structured’, and its functioning is not otherwise defined in detail.

While some authors read in the rules on this cooperation an inevitable evolution and therefore an unstoppable incremental collaboration,⁴⁸ this is not necessarily the case. The rules of Article 46 are instead fashioned in a way as to allow MSs not only to withdraw at any point, but also as to pick to what missions and operations it want to participate.⁴⁹

An important aspect of the flexibility constitutional to the permanent cooperation is that there are no times constraints at to when it will be set up,⁵⁰ nor when and how often it should act. This makes eminent sense, given that the cooperation is permanent precisely in order to ensure a timely reaction to unforeseen events. A time-schedule or any other kind of temporal planning would be detrimental to the rationale of the cooperation.

2. Jurisdiction of the Court of Justice of the European Union

A source of potential concern looming over the whole set of provisions on the Common Security and Defence Policy is the absence of jurisdiction of the Court of Justice of the European Union (CJEU). Article 24 TEU provides that the Court shall not have jurisdiction on the provisions of Title V TEU and acts implementing them, ie on Common Foreign and Security Policy, thus including CSDP.⁵¹

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

⁴⁸ KOUTRAKOS Panos (n 7).

⁴⁹ MARRONE Alessandro (n 44) 4.

⁵⁰ Protocol 10 spoke of 2010 as deadline.

⁵¹ See ECJ, *Opinion 2/13*, EU:C:2014:2454, para. 252; ECJ, C-72/15, *Rosneft*, EU:C:2017:236, para. 99.

A first scenario where the Court has jurisdiction would therefore be to ensure that nothing in CSDP encroaches on TFEU competence, for example trade or humanitarian assistance acts which fall under the TFEU competence of EU external relations.⁵²

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

Article 222 TFEU, indeed, could act as a ‘bridge’ between CSDP and TFEU competences, thus conferring jurisdiction to the Court, in the same way as Article 215 TFEU does. By Article 215 the Union implements sanctions against individuals. In *Rosneft*, the Court ruled that Article 215 acts as a ‘bridge’ between CFSP and TFEU,⁵³ and thus it appears that CFSP decisions which need implementation via Article 215 are also subject to the Court’s jurisdiction, because they have ‘crossed the bridge’ – which is Advocate General Whatelet’s expression.⁵⁴

Finally, even though I believe that the EU Charter of Fundamental Rights is applicable to CFSP, there are good grounds for concern over the accountability mechanisms of CSDP missions.⁵⁵

3. Institutional Involvement

The High Representative puts into effect European foreign policy and, therefore, also EDU (Article 24 TEU). To the HR pertain the right to propose decisions (Article 42(4) TEU), and coordination of the tasks which are the purpose of CSDP. This might appear to be at issue with Article 15(6), which provides that ‘The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.’ The issue of

⁵² DASHWOOD Alan, *The Continuing Bipolarity of the EU External Action* in GOVAERE Inge (ed), ‘The European Union in the World: Essays in Honour of Marc Maresceau’, Leiden, Nijhoff (2013), pp. 1-16, p. 3; KOUTRAKOS Panos (n 7) Chapter 8.

⁵³ ECJ, case C-72/15 *Rosneft* EU:C:2017:236, par 89; see also case C-310/10 para. 59.

⁵⁴ ECJ, case C-72/15 *Rosneft*, EU:C:2016:381AG opinion, footnote 56.

⁵⁵ OBI JOHANEN Stian, *Accountability Mechanisms for Human Rights Violations by CSDP Missions: Available and Sufficient?* International and Comparative Law Quarterly, 2017, pp. 172-199, p. 181.

representation of the EU should be resolved in the sense of granting the President of European Council representation at government level, and to HR representation at anything below that level (that is, exchanges between diplomats).⁵⁶

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

D. Purpose

The tasks of EU missions in CSDP are established in Article 42(1) and specified in Article 43(1) TEU as a non-exhaustive list. These draw from, but are broader than, the so-called 'Petersberg tasks', which defined the military objectives of the European Union in 1992. Drawing on the Franco-British St Malo declaration of 1998,⁵⁷ the Cologne⁵⁸ and Helsinki⁵⁹ European Council meeting of 1999, the TEU assigns to CSDP missions purely defensive and peace-keeping tasks, namely: 'peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.'⁶⁰

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

The autonomy of the Council would encounter clear constitutional limits: those of Article 21(2) (a), (b), and (c),⁶¹ and 42 TEU. EDU would be used exclusively for defence and to safeguard EU security, integrity, and independence – or, outside the Union, to preserve

⁵⁶ KUIJPER Pieter, *The Law of EU External Relations. Cases, Materials, and Commentary on the EU as an International Legal Actor*, Oxford, Oxford University Press (2015), pp. 912, p. 26.

⁵⁷ <https://www.consilium.europa.eu/uedocs/cmsUpload/French-British%20Summit%20Declaration,%20Saint-Malo,%201998%20%20EN.pdf>.

⁵⁸ European Council - Conclusions adopted by the Cologne European Council meeting on June 1999 http://www.europarl.europa.eu/summits/kol1_en.htm

⁵⁹ European Council – Conclusions adopted by the Helsinki European Council meeting on December 1999 http://www.europarl.europa.eu/summits/hel1_en.htm

⁶⁰ Art. 43 TEU specifies: "The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories."

⁶¹ The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;
 (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
 (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders.

peace and prevent conflicts. This shall also be in line with the values of Article 3(5) TEU.⁶² But these are only external boundaries. One thing is to state the obvious – the EDU could not be used to expand EU's territory – quite another thing is to interpret the reference in the TEU to the 'respect for the principles of the UN Charter'. Would it be possible to use an EU army for 'humanitarian intervention', eg without UN Security Council authorisation but for the aim of stopping most serious violations of human rights? Would anticipatory or pre-emptive self-defence be considered in line with the principles of the Charter? Would an armed-attack by a non-state actor trigger the 'inherent right to self-defence' enshrined in Article 51 UN Charter? Aside from issues of compliance with the UN Charter, could EDU be used for internal security purposes?

There is, at present, no clear answer to these questions. The CJEU seems willing to leave the Council a broad scope for discretion when it comes to decisions of CFSP.⁶³ At this stage, therefore, the only possible answer is that the precise purpose of EDU will depend on how the Council interprets its role.

Moreover, the EU could conclude – as indeed it does⁶⁴ – international agreements to facilitate or regulate its CSDP missions, pursuant to Articles 37 TEU and 218 TFEU. These would also be necessary for EDU, and the CJEU shall have jurisdiction to give opinions on their conclusion, pursuant to Article 218(11) TFEU.

While the competence of the Union to conclude these treaties is not debatable, the nature of such competence is unclear. In particular, as far as the conclusion of the agreements is concerned, it is not clear whether it is subject to the rule of Article 3(2) TFEU, which states that the Union shall have exclusive competence for the conclusion of international treaties 'when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope'.⁶⁵ The first two requirements hardly apply to CSDP. There can be no legislative acts in CFSP, and it is hard to see what internal aspect is *not* conditional to external security, thus making it difficult to take this requirement seriously.⁶⁶

⁶² 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

⁶³ ECJ, Case C-72/15, *Rosneft*, EU:C:2017:236, para. 146; ECJ, Case C-72/15, *Rosneft*, AG opinion, para. 105; ECJ, Case C-266/05 P, *Sison v Council*, EU:C:2007:75, para. 33; ECJ, Case C-348/12 P *Council v Manufacturing Support & Procurement Kala Naft*, EU:C:2013:776, para. 120; ECJ, Case C-193/15, *Akbras*, EU:C:2016:219, para. 51; ECJ, Case C-358/15, *Bank of Industry and Mine v Council*, EU:C:2016:338 para. 57.

⁶⁴ KUIJPERS (n 56) p. 673 describes the three kinds of international agreements the EU concludes with regard to CSDP missions.

⁶⁵ I will not discuss the extent to which this Article intends to codify the previous case law of the Court. ECJ, Case C-137/12, *Commission v Council (European Convention on conditional access services)*, EU:C:2013:441, AG opinion para. 111.

⁶⁶ This would be even more true if the Article intended to codify ECJ, *Opinion 1/76, Draft Agreement Establishing a European laying-up fund for inland waterway vessels*, EU:C:1977:446, para. 7 on the 'complementarity principle', that the Union enjoys exclusive competence when internal and external action are so 'inextricably linked' that it does not make sense to have one without the other.

It might instead happen that a CSDP-related treaty affect common rules or alter their scope – for example rules on defence products.⁶⁷

E. Funding

The rule for EU budget is that military expenses are paid by MSs, unless they are administrative costs. In this category fall civilian missions with defence implications as well. At present, these costs are financed by a mechanism called ATHENA,⁶⁸ whereby MSs who have decided not to abstain (Article 31(1)2 TEU) contribute in proportion to their GNP.

The TEU, however, also provides for a specific start-up fund in Article 41(3). This should pay for preparatory activities to the tasks of CSDP missions – thus including EDU ones – which are not financed by MSs. At the moment, such a fund does not exist, but it is a kind of instrument not new to the EU experience. It is conceivable that it could be fashioned, if not in its form and least in its substance,⁶⁹ like an international agreement not dissimilar from the European Stability Mechanism or to the Single Resolution Fund for Banking Union.

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

Commentators have noticed the uncertainty over the purpose of the financing, which accounts for MSs reluctance to establish this fund;⁷⁰ or the potential for inter-institutional disputes on the budgetary procedure.⁷¹

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

In addition to this, the Commission, following the State of the Union Speech of President Juncker, proposed a Defence Plan in November 2016.⁷²

⁶⁷ On which see TRYBUS Martin, BUTLER Luke, *The internal market and national security: Transposition, impact and reform of the EU Directive on Intra-Community Transfers of Defence Products* Common Market Law Review (2017), pp. 403-441, p. 403.

⁶⁸ Council Decision (CFSP) 2015/528 of 27 March 2015 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena) and repealing Decision 2011/871/CFSP [2015] OJ L 89/39.

⁶⁹ It has to be a Council decision.

⁷⁰ BLANKE and MANGIAMELLI, *supra*, p. 1197.

⁷¹ KOUTRAKOS (n 7), p. 76.

⁷² European Commission, *European Defence Action Plan* [2016] COM/2016/950.

IV. Conclusions

The prospect of EDU is a powerful reminder that the EU is an unfinished project. Uncertainty over EDU's aims casts doubt over its practical significance. At present, since it is impossible to determine with legal certainty what the duties and tasks of the EDU will be, proponents of the EDU are having a hard time 'selling' it to the public and to MSs government.⁷³

EU military policies are and remain voluntary, that is, subject to the preferences of each individual MS. In EDU, the balance of politics and law is overwhelmingly in favour of the former. But contrary to what Koutrakos suggests,⁷⁴ the strength of the rules on permanent structured lies precisely in this. The norms are rigorous to a sufficient degree, while leaving MSs enough flexibility to pursue their own policies. Ultimately, it is precisely the reliance on policies rather than on legal factors the element that may guarantee the permanent structured cooperation's success. Further research should explore if there are aspects of legal distinctiveness about the EDU; whether it is even 'softer' and more intergovernmental than CFSP; how and to what extent EDU links with EU law proper; and, more theoretically, where it fits into the model of EU integration.

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

* * *

⁷³ KEOHANE Daniel, *Samuel Beckett's EU Army*, Carnegie Europe, 16 December 2016, available at <http://carnegieeurope.eu/strategiceurope/66456> (accessed 1 July 2017).

⁷⁴ KOUTRAKOS (n 7), p. 78.

List of abbreviations

CSDP	Common Security and Defence Policy
CFSP	Common Foreign and Security Policy
EDA	European Defence Agency
EDU	European Defence Union
HR	High Representative for the Union's Foreign Affairs and Security Policy
MS	Member State
NATO	North Atlantic Treaty Organisation
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
WEU	Western European Union

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