

Different Path to Cooperation through Association: Legal Implications within the Common Defence and Security Policy for Potential EU's Membership Candidates.

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**Different Path to Cooperation through Association:
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Candidates.**

By Briane Mezouar

On the 23rd and 24th of June, EU leaders gathered at the European Council to discuss, among others, newly formulated membership requests from Ukraine, Moldavia and Georgia. While still considered as third countries, states that fill up a membership request or obtain candidate status (as well as non-candidate third States) cannot - and should - not be entirely ousted or dismissed of hand from various EU legal frameworks and tools related to common security and defence policy (CSDP). Since the Lisbon Treaty, many provisions in the treaty or secondary law could offer the EU and its Member states room for manoeuvre vis-a-vis candidate (but third) states for CSDP-related projects and operations. The recent Strategic Compass emphasises the importance of partnering between EU and various actors. The « Act » chapter emphasises the need to strengthen CSDP's military and civil mission, through closer cooperation made possible by the recent Council's Decision improve conditions for the association of third states to PESCO. The « invest » chapter, points out the need to broaden the EU's approach and intensify cooperation around strategic capacity projects while intensifying partnership within the PESCO and operating through EDF and EDA joint programs, to enhance innovation and research in the defence field.

A few days before, the European Council granted Ukraine and Moldavia the candidate statute, the European Parliament led the way and voted in favour of such a statute for both Ukraine and Moldavia (European Parliament, June 2022). While taking into account the European Commission Opinion (European Commission, June 2022) on Georgia's application, Members of Parliament (MP) endorsed Commission's request asking for Georgia to accomplish further keys and substantial reforms (merely related to the country's administrative capacity) to make Georgian political and judicial systems comply with EU's values and minimum standard on sensitive (but vital) issues like the Rule of Law or human rights. On the ground of the sole article 49 of the Treaty on European Union (TEU), MP's passed a resolution with a crushing majority of 529 votes in favour (European Parliament Resolution June 2022) paving the way for the EU Council. In the aftermath, the latter quickly follows the pattern.

Recent technological advances offer new perspectives for armies to imagine the augmented soldier of the future. Nonetheless, this technological development is accompanied by legal, strategic and ethical issues. This raises concerns for the future relationship between democratic powers and military technologies. Hence, if the proliferation of biological optimisation techniques in a military context is probable, a framework to prevent abuse and promote respect for human dignity needs to be established. In France, the enhancement of soldiers is allowed only if the techniques are non-invasive. Nonetheless, some invasive methods such as pharmacological substances are injections for recovery are permitted.

In his conclusions EUCO 24/22 (European Council, June 2022), it reiterates EU's full support to bring stronger support to Ukraine's economic, military, social, financial and humanitarian resilience. Through those conclusions, EU leaders took the opportunity to extend EU « military support » to help Ukraine practice its right to self-defence [as stated in article 51 of the UN Charter].

This historical step for the EU's viability is deeply rooted in a consistent approach. From the European Council of Copenhagen in 1993 to last month's European Parliament's latest resolution on EU enlargement, EU's institutions always recognise the Union's capacity to absorb new members (Copenhagen European Council, June 1993), while maintaining the momentum of the European integration, considered as an essential element in the general interest of both the EU and the candidate countries (European Commission, June 2022; European Parliament's President Roberta Metsola, Press Statement, June 2022). In the light of the CSDP, this potential enlargement will for sure have an impact when candidate states will become proper members. But the cooperation could start way before candidates were granted membership and EU Law could outstep frontiers of the membership within EU member states' territory, way before it properly extends to new members' legal systems when they properly entering in the EU. But a perspective for the end of the war in Ukraine, a stabilisation and elevation of standards in current candidate (or want to be a candidate) countries remains unclear and prevents every substantial participation to the EU. Nevertheless, we will demonstrate that the EU legal framework contains a provision that shaped it in a way third states (like Ukraine, Moldavia, or other partners) could take part in the EU's destiny through a security and defence cooperation project. However, many legal implications arise for the EU and its member states. Two main perspectives could be explored, while another should be excluded.

The cooperation on security and defence project within the EDA's) European Defense Agency) Administrative Agreements framework, the potential association of third states to PESCO projects despite their status, and the possibility to use of the new European Defense Fund (EDF) to launch operations and projects with third states on security and defence matters shall be examined.

Cooperation with the European Defense Agency via administrative agreement.

For many years after its creation, EDA's administrative agreements used to be a framework allowing NATO members who weren't EU member states, like Norway or Türkiye (Sánchez-Barrueco María, 2008) to take part in EU defense and security projects. At first sight, EDA's role stated in article 42 (3§1) TEU did not seem to include cooperation with the third country (neither as an objective nor a means). But multiplying Administrative Agreements or triggering those existing, could be a way to start moving the gravity centre of some aspects of third states' defence and security policies from an « exclusively national by design » based approach to a « pan-European based approach » including cooperation and partnering oriented dynamics the EDA and member states initiated, not only on innovation for breakthrough equipment and technologies but also, on capabilities interoperability, joint procurements, joint investment, joint capabilities conception and development or implementation of the Strategic Compass. In short, it could be a way for the EU to gain political power and strategic capabilities, by attracting potential member states or close partners through partnership-based diplomacy on the ground of CSDP.

It would also contribute to familiarizing those candidate states with the EU's method and procedures and gives relevant partners a pan-European destiny without immediately making them candidate states. Among other CFSP tools (association agreement, cooperation agreement, free-trade agreement, political dialogue) those administrative agreements could anchor candidate states to part of the EU legal framework and make them already share the EU's legal destiny, especially on key security and defense-related topics. As the EDA was created as a « flexible by design » entity, the flexibility given by its statutes should be operated to start a reconciliation while avoiding significant political gridlock and polemics.

EDA's Head, Jiří Šedivý recently expressed the possibility of triggering EDA-Ukraine Administrative agreement once the war is over (Sprenger, 2022). Operating in the defence capabilities development, research and acquisition of armaments and technologies, EDA's first role appears to concern military and industrial capacities building (improving, developing and strengthening them) while contributing to joint procreation, innovation and development of capacities. However, its statute, seat and operational rules are defined in secondary law, the Council Decision (CFSP)2015/1835 (Council of European Union, 2015) and its article 26(1) set out a way to cooperate with third entities through Administrative Agreement on « security issues » (art 26.1 §c) to establish working relations to facilitating their possible participation in specific projects and programmes. If Ukraine already sign-on in 2015 (EDA-Ukraine's Ministry of Defence Administrative Agreement, 2015), the Agreement is still waiting to be implemented.

The current cyber warfare that comes with kinetic warfare Ukraine must face, could be an opportunity to implement EDA-Ukraine MoD (Ministry of Defence) agreement's second point, allowing the MoD to participate in EDA's projects. The Cyber Ranges Federation project could be a relevant program. It aims to pool and share existing cyber ranges capabilities between the Member States, contributing to interoperability and by developing a sophisticated and powerful platform at the European level, interconnecting Member States' national cyber defence communities. As the USAID program does, the past administrative agreement could help Ukraine strengthen its cyber range capabilities (USAID, 2022) as long as the agreement is triggered.

The perspective of third State association to PESCO in response to EU perspectives of enlargement

Since the adoption of the Council Decision (CFSP) 2017/2315 (Council, 2017) many new decisions have been produced to clarify terms and conditions and allow third countries to participate in PESCO. Far from just being a tool for domestic activities, PESCO appears to be a tool for expanding EU influence and activities towards the legal boundaries of « membership » as it seems to be conceived to be « inclusive and ambitious » (Hamon, 2019). According to article 9 and article 4(2§G), Council (following art 46§6 procedure) can adopt recommendations establishing general conditions under which third states could exceptionally be invited to participate in individual projects and determine, in accordance with Article 9(2), whether a given third State satisfies these conditions.

Following the first recommendation, Council adopts a decision (Council, 2020) in which it states two set of conditions to allow third states to join PESCO. Among conditions related to industrial and economic requirements, a group of terms appears to be more substantial (i.e art 3.a of Council Decision Council Decision (CFSP) 2020/1639). What's interesting, is the proximity of those conditions, with terms and conditions required for being able to ask to be candidates states and then, became members. This proximity of those core and primary conditions could facilitate the integration of new candidate states into PESCO under partial -but substantial- similar terms within what we could define as « mirror » provisions. Those terms and conditions are pretty identical to the set of obligations weighing upon candidate states within article 49 TEU, 1993 Copenhagen the European Council and 1995 Madrid European Council criteria (i.e respect of EU values of article 2 TEU, stability of institutions, guaranty democracy, rule of law, human rights, care and protection of minorities, development of the market economy, adjustment of their administrative structures and the creation of a stable economic and financial environment, respect of EU principles and objectives, respect of EU interest,...).

Of course, there will be other technical conditions to fill up (added value brought by the participant, participation must strengthen the CSDP, participation must guarantee non-unilateral risk dependency to the third participant and levels playing field about most binding commitments between member states/participants states and third-country). Still, this partial but substantial alignment of terms and conditions for both application to EU membership and cooperation within the PESCO should ease the process of partnering with candidates state, since requirements they must comply with for membership, meet conditions they must comply with to enter PESCO. To conclude, an inclusive PSC has led to a certain restraint in defining the level of requirements.

The necessary « commitments » have been understood in a somewhat flexible way. PESCO was designed to be flexible and allows an increasing number of states to participate in projects (Hamon, 2019). For instance, such cooperation could allow, among others to substitute EU strong military support to Ukraine, with win-win cooperation on a joint program for equipment and military capabilities. In the current situation, candidate states like partners that shared or want to embrace a European destiny should be able to take part in PESCO fully. After the Council welcome the U.S, Norway, and Canada in May 2021 (Lazarou, 2022), the EU could strongly consider developing a new project with new partners like the EU's membership candidate or include them in existing projects. Maybe the highest step will be the vote for acceptance. Considering Article 46(6) stated the Council should vote unanimously to accept the third state into the PESCO.

Unclear perspectives for sustainable use of the European Defense Fund to associate third countries with European security and defence projects

This fund aims to enhance the competitiveness, innovation, efficiency and technological autonomy of the Union's defence industry while contributing to the Union's strategic autonomy by supporting and facilitating cross-border cooperation. The preamble of the EDF states that this cooperation could lead to financing projects between the EU Member states and/or their entities and associated third-member states and/or such entities. But articles 5 and 9 restraint fund and participation to associated states and eligibles legal entities Members of the EEA or located in (European economic area). The recipients and subcontractors involved in an action shall not be subject to control by a non-associated third country or by a non-associated third-country entity. However, it is still possible for a non-associated third country or a non-associated third-country entity to take part in EDF funded project as long as the controlled entity is located in the Union or an associated country only if guarantees are approved by the member state or the associated country and are made available to the Commission.

It means Ukrainian's or Moldavian's subsidiary defence and security companies on EU member state territory could join a project as long as they provide the host Members states with the exhaustive list of conditions set by article 4(1) a).b).c). However, this perspective remains less sure than the two others, mainly due to the much more restricted scope of application of the EDF. None of the actual candidate states is a Member of the EEA nor it seem to have a subsidiary on EEA's territory. The « Ukrainian shield strategy » developed by UkrOboronProm in 2016 operates a transition to West's and NATO's standard for armament and industrial and technological defence base. Collaboration with West partners and existing industrial partnerships within this strategy could be pushed to another level through EDF, if Ukrainian operators are established on EU or EEA territory.

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