

# The New German Vision of the EU as a Geopolitical Power: Implications of the "zeitendwende" Doctrine for the EU's Security and Defence (Part II).

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**The New German Vision of the EU as a Geopolitical Power: Implications of the "zeitendwende" Doctrine for the EU's Security and Defence (Part II)**

*By Briane Mezouar*

On Monday 29th August 2022, the German Chancellor gives one of the founding speeches of the future Germany's EU policy. Four years after Emmanuel Macron's Sorbonne speech, Olaf Scholz drew in sand 4 pillars of upcoming changes for the EU as a geopolitical creature and global power. But just "noting a change of era does not yet make a programme" (Mennerat, 2022) and since EU already operate deep change at its levels. In this second part, this paper will intents to explore from a legal point of view what such a doctrine could implies for EU's defence and security future but also for it bilateral and multilateral cooperation, regarding the most substantial proposals made the German Chancellor to build a new German's impulsed EU policy.

### **Zeitenwende's doctrine implication for the EU**

Sovereignty of Europe: Defense and security policy changes, interoperability and the Futur of French-German cooperation

One of the most interesting points in Scholz's speech, are about the EU's defence and security capacities, interoperability, industrial cooperation and decision-making in foreign policy and CDSP. Scholz stressed the need to improve interoperability because, in the EU, there would be too many different arms systems which imply duplication of efforts, investment, and increasing costs for maintenance and repairs. Following the European Commission footstep, that calls for a coordinated investment increase to fill up the gap.

The future of Franco-German cooperation

Considering the current failures in the Franco-German program and the total absence of France as a "partner" in Scholz's speech, those call for more interoperability remains vague and unclear as they don't "do a program" moreover if we consider recent failures in German-France cooperation. Before Scholz election, the perspectives opened during the last campaign were encouraging. A consensus among political parties emerges that the EU's CFSP policy should be strengthened and relies on more cooperation in the armament, and effort to cut duplication of defence spending (Lagneau, 2021). But in June 2021, SPD Member of Parliament blocked the phase 1B of SCAF program (Lagneau, 2021) and since then, Dassault's Spanish and German subsidies contest the industrial distribution of task and costs (Lagneau 2022). Then, the cooperation is still frozen and compromise on others keys partnerships. On the Main Ground Combat System (MGCS) due to Berlin request to introduce a third actor (Rheinmetall) and it wish to have a 130 mm L/51 gun associated with an automatic loader rather than a 140 mm gun based on the ASCALON [Autoloaded and SCALable Outperforming guN] pushed by the French (Lagneau, 2022). Moreover, the Maritime Airborne Warfare System [MAWS] is still uncertain since Berlin choose to acquire some P-8A Poseidon. The French Chef of Army Staff, Gen. Pierre Schill, pointed at the high risk of failure considering that "in Germany, where, as in France, there is no defence industrial and technological base organisation under the leadership of the Directorate General of Armaments (DGA), it is difficult to have a grip on industry".

He then called for " political choice " as " the political decision must be transformed into an operational decision " (Assemblée Nationale, 2022). The recent comments of Germany's Chief of staff (Eberhard Zorn) during the Keynote speech by the Federal Minister of Defence could announce a bad end for Franco-German current cooperation ("We want material that flies, that runs and that is available on the market. Not a European development solution that doesn't work in the end. ") (Bundeswehr, 2022).

Finally, when addressing Berlin's future efforts in space and hypersonic missile threat, German Chancellor refers to the future collaborative project of anti-rocket European shield and as France (which is not mentioned) seems to be ousted. But NATO's members and German's European neighbours ("Poland, the Netherlands, the Czech Republic, Slovakia " and its " Scandinavian partners " were praised.

Such repeated gridlock also raises concern regarding the implementation of the Aachen Treaty objectives, whose main goal was to fill up the diverging " strategic dimension", notably by leading to a reexamination of existing formats and instruments of cooperation, and by letting standardization of rules, materiel, administrative processes and legal frameworks. By signing it, both states have settled out 15 priorities; among which the Cooperation in the space sector focusing on priority areas, notably a "cooperation boosting competitiveness of the space industry". The treaty also set out a series of strong political commitments (developing joint strategies to strengthen the European Defense Union, reinforce armed forces cooperation to improve common security culture, come up with common defence programs,...). This recent speech and the recent gridlock on industrial partnerships, seems insufficient to make this goals and political initiatives a concrete reality, and somehow confirm one's view that structures and strategic culture gaps prevent France and Germany to go " beyond what is currently done " and thus beyond declaratory politics on the sole basis of a such treaty (Kunz, Kempin, 2019).

In light of Scholz's speech, *zeitenwende* may be manifesting a change for Europe of defence in German eyes without implying a substantial change or improvement in the German-French cooperation. Then, in a post-Brexit era where France and Germany are the " leading couple " in Europe on many matter including security, how reasonably guarantee and achieve the former while constraining or ignoring the latter ....?

Strategic pivot towards OCCAR: a partial solution to circumvent institutional cul-de-sac in the EU defence?

Olaf Scholz stressed the idea of trying to go further than the European Defense Agency, and the European Defense Fund framework and move the gravity center of defense industrial cooperation closer to the Bonn based Organisation for Joint Armament Co-operation (OCCAR/OJAC) framework which could become the "hardcore" of Europe and common defence and armament.

This could be a political manifestation of an endorsement of the European Commission proposal suggesting OCCAR could be appointed as a "procurement agent to conduct a common procurement [policy] on [Members states]" (e.g. whereas 22, Proposal for a Regulation of the European Parliament and the Council on establishing the European defence industry Reinforcement through common Procurement Act COM/2022/349 final). In this way, Scholz is supported by Defense Minister, Christine Lambrecht (Bundeswehr, 2022) who praise interoperability through joint procurement and financing (as the Commission with its EDIRPA). Also, one may think that the opportunity to move the gravity centre of EU members states' cooperation towards the OCCAR's framework, could be because considering its prerogative, powers (e.g. art 7, art 8, OCCAR Convention), and its internal organisation and functioning (art 9 to 18) that whose relative flexibility slices the Treaties relevant provision. It could be a wise political move allowing Germany to regain power in a third-party international organisation implanted within EU borders and ruled by its own primary and secondary law (while within the PESCO or the EDF, all the projects are still EU made in as they grow within pan-European industrial partnerships closely shaped, conducted, directed and funded in accordance with EU Law framework provisions and closely related to EU agency). Finally, note that out of the 7 member states and the 6 non-members participating states (14 states), OCCAR has at least 6 states labelled by Scholz in his speech, as key partners and neighbours, which could give Germany an informal leading statute to conduct an impulse the *Zeitenwende* of EU's defence through this international organisation.

One would note paradoxical German propensity to seek for a reformed EU while affirming several times that a solution to its problems could (sometimes should) come from its distance from proper EU law and framework. If it's the case here with OCCAR, it's also the idea defended by Christine Lambrecht while addressing in details the *Tagesbefehl* (agenda) for the Bundeswehr special funds ("We take the opportunity to deviate from European public procurement law when national security is an urgent matter").

One of the first *Zeitenwende* doctrine implications is the birth of a solution-oriented political action to somehow recast EU policy since even the "EU Treaties are not engraved in marble" (Mennerat, 2022). The fundamental implication of such doctrine is a change in some funding rules and principles of EU. Following the principle of design enhancing Viollet-le-Duc's theory about the prominent importance of rationality in design ("function follows form") he calls for an in-depth initiative to amend EU law and impulse changes in its policy.

## **Unanimity rule issue and foreign policy: Overriding the quorum constrains in EU CFSP/CSDP policy making and implementation.**

Full-scale exercises such as the one the author had the opportunity to witness, hold immense value also for the Command-and-Control units. They experience similar levels of stress and pace as they would in actual operation. The trainers that prepare the exercise may, in fact, make them work with less information or wrong information, as it can happen in real life when the data collected is imprecise, lacking, or incorrect.

### On enlargement

Repeating the phrasing of the Strategic Compass ("strive for greater flexibility in our decision-making process [...] Strategic Compass, §3, p.14), Scholz pushed to "more flexible policy-making processes, especially in times of crisis" (Mennerat, 2022), reminding that "even the treaties are not engrave in marble". And the recent State of the Union speech (SOTUE) (Ursula Von der Leyen, 2022) seems to reveal that the Treaties amendment dynamic is also shared and endorsed by the Commission ("I believe that it is time to enshrine solidarity between generations in our Treaties [...] we also need to improve the way we do things and the way we decide things [...] we must be able to act on the things that matter the most to people and as we are serious about a larger union, we also have to be serious about reform"). It echoed the Final Report of the Conference on the Future of Europe (Conference on the Future of Europe, 2022).

But either for CSDP/CFSD decision making reform or enlargement, solutions are more likely to come from an improvement of the treaty implementation rather than deep, substantial and abruptly amendments.

### Perspective for treaties amendments

Scholz's main concerns about enlargement are that in a near future it will be probably made harder due to the unanimity rule set by numerous key articles notably for the future enlargement process (e.g. article 49 TEU) (Treaty of the European Union, 2016). He clearly established a link between welcoming new members from Balkans, Eastern and Oriental Europe as a sine qua non condition to EU geopolitical strengthening that would insure its consolidation, notably regarding security and defense matters ("the gravity center of Europe will move to the East"). He then suggested reforming the unanimity rule. But beyond and before tackling the rule of unanimity for enlargement, several remaining issues that Scholz (but also the French President before him during his closing speech Conference on future of Europe) didn't seem to address.

Regardless of the unanimity rule, relevant tools from the EU's legal framework could already provide a temporary solution to strengthen the EU Common Defence and Security Policy by extending it quicker, notably while enlargement issues are still debated (and so the unanimity rule must be used): The solution would be to enhance the cooperation through the association of third-states, notably thought three paths: the European Defense Agency's administrative agreement; the use of third State association to PESCO in response to EU perspectives of enlargement or (but less likely) the use of the European Defense Fund to associate third countries with European security and defence projects (Finabel 2022). Still, article 24 of the OCCAR convention IS NOT still " hostile " to third-party cooperation as it " does not preclude the involvement of the industries of non OCCAR Member States participating in the OCCAR managed programme concerned (e.g Interpretation of articles of the Convention). Scholz's grand vision for a reformed Europe could so far stay restrained by remaining institutional constraints. Even if the Lisbon Treaty democratized the revision process (Karagiannis, 2019), the question about the feasibility of such Treaty amendment can't be as simple as it looks in Scholz speech.

Concerning the ordinary procedure, many obstacles would remain. Even if the European Parliament triggered article 48 TEU (European Parliament 2022), it would hurt the current opposition of many states as some of them opposed recent finding of the Conference on the future of Europe which call for a treaty revision, (14 member states were opposed to a treaty amendments and 5 didn't have an explicit position) (Le Grand Continent 2022, see also, Non paper from Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia, and Sweden on the outcome of and follow-up to the Conference on the Future of Europe). And article 48 TEU foresaw simplified majority.

Such division will make the obtention of a qualified majority harder requires for enlargement. And what about the consensus required by article 48.2 in the Convention (composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission) which then shall examine the proposals for amendments, adopt (by consensus) and then produce a recommendation to a conference which will finally determine (by common agreement) the amendments to be made to the Treaties? And can the proposal for a Treaty amendment about such an important issue as the enlargement process could be decided by overriding a consensus within this Convention (and being decided by the European Council), as it would be justified by the " by the extent of the proposed amendments "? (e.g article 48.3§2 TEU). However, even if in last resort the qualified majority will be applied, they're still institutional obstacle (see below).

Scholz stressed that the EU must be ready now and the changing process " to start this process now " to have a " quick and pragmatic action " within the European Council (Mennerat 2022) but can't count on the simplified revision procedures from article 48.6 TEU (which only applies for amendments of the third part of the TFEU in which fundamental CSDP/CFSP related decision-making aren't and can't lead to an increase of EU's competencies). In his Pringle case (European Court of Justice, 2012), the European Court of Justice specified that it " verify, first, that the procedural rules laid down in Article 48(6) TEU were followed and, secondly, that the amendments decided upon concern only Part Three of the FEU Treaty, which implies that they do not entail any amendment of provisions of another part of the Treaties on which the European Union is founded " (§37) which compromise the possibility to sneak through simplified procedure to change third provisions in the Part III TFEU which could possibly have a practical unsuspected impact on relevant provision in TEU about CFSP/CSDP.

That's why (through relevant provisions of PESCO, EDF or EDA's administrative agreement) a cooperation could start way before candidates were granted membership (avoiding a sudden and intense reflexion on the opportunity to amend treaty provision related to enlargement) 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 enter in the EU and then, take part in the EU's destiny, especially on CSDP issues.

Where we see that a European Political Community, even supported some German commentators (Anastasia Pociumban Milan Nič, 2022) could also have its interest, especially on security matters.

CSFP/CSDP decision-making process: Perspectives of rationalisation

Contrary to enlargement, unanimity regarding CFSP provision is contained in several provisions related to a wide domain structured around several institutional provisions and regime.

By pushing qualified majority and reach an " abstention constructive ", Scholz believe in a " Geopolitical Europe capable of imposing itself on the international scene ". Even if he paid attention to not mention explicitly CSDP'S actions and projects related, he introduce the reference between a development on European Rapid Deployment Capacities and collaborative partnership with NATO and other EU members states armies to collaborated further. Thus, Scholz idea would be to cut off unanimity constrains in CFSP by passing through the " coalitions of the willing " (e.g article 20 TEU). But he also refers to a " a gradual shift to majority voting in the common foreign policy ", referring implicitly to article 48.7 TEU and article 31.1§2 TEU. This inclination mostly rooted in federalism experience. The examination of different federal models applied in EU Member States (as well as in federations outside the EU) has revealed that flexible cooperation mechanisms are often used by sub-federal entities in areas of common sub-federal entities in areas of common interest (European Parliament, 2019, point K ).

Use of article 48.7 and 31§2 and §3 TEU

His call to better exploiting treaty possibility echoes and take support existing call from institution (e.g the European Parliament, 2018 points 27, 35 and 102) which call for a generalization of the article 48.7 and the " clause passerelle " TEU options (point 79). The main vertus of the generalization of the " clause passerelle " (either with article 48.7 or 31§2 and 3 TEU) would be a improvement of democratic legitimacy and effective governance (points 79). It recalls that Article 20.2 TEU, which " offers additional possibilities for Member States to take the CFSP forward and should therefore be used " (point 102). But the less constraining rule of vote, (qualified majority) Scholz could struggle to obtain with article 31§2 and §3 TEU, he could try to find it in article 20 to circumvent the overall rigidity of articles 31 TEU (and 49 also), could be counterbalanced by more substantial and procedural obstacles.

Firstly, how could article 48.7 could be used (as Scholz suggest) to " progressively switch to qualified majority " in CFSP while the article 48.7 TEU " subparagraph shall not apply to decisions with military implications or those in the area of defence " ?. Moreover, even if the European Council may adopt a decision authorizing the Council to act by a qualified majority, article 48.7§3 TEU still foresee that even all the decisions requires to ended-up switching to majority qualified rule needs to " be taken by unanimity "... Such unity could be no that easily reachable in the context of the Ukraine war that exacerbate fundamental divergence on the conduct of EU CDSP, in the context of illiberalism democracies rising that challenge the rule of law, EU institutional and democratic equilibrium. Still, the " clause passerelle " of article 48§7 TEU could not be useful for amend article 49 TEU, but change the rule of vote within this article.

For the specific " clause passerelle " of article 31§2 and §3, the European Commission pushed years ago for "a better use " (Commission, 2018). But once again, such mobilisation would pass through an unanimity decision from the Council or the European Council (Rappoport, 2019). However, such move could help EU to get rid of of foreign state pressure on certains states. Also, to have a full effect of the passerelle clause, the Council should get rid of his current practice consisting in reaching a common accord within conclusion even when the qualified majority rule works (which compromise it efficiency). The European Court of Justice (ECJ) recently sanctioned " hybrid acts " of the Council which consider that such common accord was necessary regarding political and institutional consideration (European Cour of Justice, 2021). For the ECJ the terms and conditions laid down in relevant Treaties articles frosting the voting procedure, cannot be overturned by adding or removing conditions, procedures and terms not provided for in those provisions, and thus constitute a prerequisites, in the context of the adoption of the decision by the Council (see paragraph 245). Finally nor Scholz or the Commission (in its 2018 communication) seems to indicate which entities should be at the initiative of such rule of voting shift (Rappoport, 2019).

## Strategic use of article 20 TEU

Scholz sees decision-making improvement and enhancement as a response to the need for rationalisation and "flexibility" of the decision-making process. But he clearly referred to article 20 TEU within the part of his speech related to CSDP/CFSP policy while this article is in Title IV "Provisions on enhanced cooperation" and not in Title V "General provisions on the Union's external action specific provisions on the common foreign and security security policy" that already contain art 46 about PESCO. While article 25 and 31 clearly impose unanimity (unless chapter 2 provide otherwise), could a pass by article 20 (implicitly presented as a circumvent tools) works? Two set of non-easily feasible conditions should be filled-up; substantial (for non exclusives competencies, to serve objectives of the Union, protect its interests and reinforce its integration process) and more procedural one (article 326 to 334 TFEU). It still should be in last resort approved by the Council, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole without any further indications about the quorum. Advantage of article 20 TEU would be the qualified majority article 16.3 and 20.2 TEU foresaw. But again, since article 326 stated that "enhanced cooperation respect EU treaties", Scholz's potential hidden idea to use article 20 TEU (and 326 to 334 TFEU) as a manoeuvre to override the unanimity rule in CSDP seems to have poor chance to succeed. Also, as the European Parliament reminds in its 12 February 2019 Resolution (European Parliament 2019), such option rise the risk, as "even if enhanced cooperation offers a solution to a common problem, by taking advantage of the institutional structure of the Union and thus reducing reducing administrative costs for the participating Member States, it has not completely eliminated the need for solutions in the form of intergovernmental subgroups outside the framework of the Treaties, with negative consequences for the coherence of the legal framework of the Union. consequences for the coherence of the Union's legal framework, and therefore prevents the exercise of proper democratic control".

Another solution could be to incite member states to increase actively their "abstention constructive" practice, as the recent Council decision about EU's military aid to Ukraine were a significant occasion for some countries to refrain without impeach the more willing ones to act and help Ukraine (engaging the Union). Finally, Scholz's call for the use of the OCCAR framework as a partial response to a too slow decision-making process seems a bit endangered. Article 18 of the OCCAR's convention foresaw unanimity for all decisions the convention referred to (OCCAR Convention). Although Annexe IV introduce a qualified majority and simple majority for certain decisions (e.g assignment of a programme to OCCAR and incorporation of existing collaborative programmes) unanimity is still the principle, even to amend the Annexe (e.g OCCAR Convention Amendment to Annex IV to the OCCAR Convention points 3, 4, 5). And since unanimity is applied when the convention makes no provision for how a decision shall be taken (OCCAR Convention) as it the case for important decisions concerning any financial questions affecting OCCAR (approval of the administrative and operational budgets and the annual financial reports, regulations, management of the organisation) or concerning the awarding of contracts. Such functioning could be more clear and helps to provide and deliver quicker and more efficient responses for the EU's defence. Nothing is less certain.

One would notice that Scholz's comments on the EU Rapid Deployment Capacities and decision-making, are almost the same as the EU strategic compass document (e.g, Council of the European Union, 2022, page 14, §22, §3)

EU Rapid Deployment Capacities (ERDC) readiness and interoperability: Still a chimaera?

In the " Act " chapter of its Strategic Compass, the EU planned to develop an EU Rapid Deployment Capacity with land, maritime and air components as a substantially modified EU Battlegroups plus Member States' military forces and capabilities, and strengthen its command, control structures, readiness and cooperation. Scholz stated that Germany will actively work to ensure that the EU's rapid reaction force is ready to be deployed in 2025 and provide " the troops needed to deploy it " and give it a " clear command and control structure "; " equip the EU's military planning and conduct capability " and a " fully-fledged EU headquarters " with " all the necessary financial, personnel and technological means ". It directly responds to the European Council planification to "providing associated assets and the necessary strategic enablers " and developing this capacity to make it reach a fully operational capability (e.g, Council of the European Union 2022, page 14, §2, §3). As the European External Action Services stated the exact parameters of this Capacity will be further detailed by the end of 2022 (European External Action Services, 2022) it still complicated so far to go beyond the political wish and it will take another concrete practical step to build this capacity.

Once again, "noting a change of era does not yet make a programme" (Mennerat, 2022) and despite numerous public proclamations (From German's Chancellor and Defense Minister, or European Commission President) more concret actions are still needed.



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