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**EXTRAPOLATING EU'S
POTENTIAL IN MUTUAL DEFENCE
FROM ITS FOUNDING TREATIES:
THE ADDED VALUE OF ART.
42(7) TEU AND ART. 222 TFEU**

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Abstract

The EU founding treaties enshrine two clauses in the Common Security and Defence Policy (CSDP). These clauses oblige Member States to coordinate their efforts through the Council of the EU to support a Member State suffering from armed aggression, terrorist attacks and natural or man-made disasters. Over time, they have come to be referred to as the mutual assistance clause (Art. 42(7) of the Treaty on the European Union, TEU) and the solidarity clause (Art. 222 of the Treaty on the Functioning of the European Union, TFEU). Recourse to them has been almost negligible, as Art. 42(7) has been invoked only by France after the Paris terrorist attacks on 13 November 2015. On the one hand, this should remind us of national governments' reluctance to surrender their competences in defence matters and of the dangers of overlap with NATO's core mission, thus making political consensus difficult to reach the EU level. On the other hand, given the relatively recent entry into force of the Lisbon Treaty, Member States still lack familiarity with such provisions, which arguably have a hidden potential which, if exploited, might help the EU establish itself as a credible crisis management actor.

This info flash contributes to unpack such hidden potential by outlining the cumbersome gestation of the two clauses over the last few decades (section I). It then analyses their content and the relative member states' legal obligations (section II) to compare between the instances where they can be invoked and the role EU institutions play in their implementation (section IV). Some brief reflections between these two sections, clarify the absence of overlap with NATO collective defence commitments (section III). The info flash concludes with some recommendations to shed light on the wording of the two articles and alternative arrangements for their smoother implementation.

I. The cumbersome road towards Lisbon

Art. 42(7) TEU dates back to 1954, when the Brussels Treaty was amended to establish the Western European Union (WEU), i.e., the military alliance comprising the Benelux countries, France and the UK in the early stages of the Cold War (Council of Europe, n.d.; Perot, 2023, p. 5). The document enshrined Art. V member states' duty to provide 'all the military and other aid and assistance in their power' if one of them suffered from armed aggression (CVCE, n.d.). In the 1990s, the WEU's experiment failed and its functions were transferred to the EU (Wessel, 2001). Nonetheless, the Maastricht Treaty did not provide any insight into framing of a common defence policy and the EU's relation with the WEU (Perot, 2023, p. 5). Even the 1998 Franco-British summit at Saint-Malo, which laid the foundations for the Union's security and defence policy, could not solve the dilemma and reiterated the relevance of Art. V (French Republic & HM Government, 1998).

Matters came to a head at the European Convention tasked with drafting the Treaty Establishing a Constitution for Europe (TEC), where negotiators discussed a joint-response mechanism to terrorist acts (Myrdal & Rhinard, 2010, pp. 2-5). This mechanism became the ‘solidarity clause’ (now Art. 222 TFEU), which requires member states to mobilise collectively in case one is targeted by a terrorist attack or suffers a man-made disaster (Eur-Lex, n.d.). Conversely, no consensus was reached on a genuine collective defence clause due to the opposition from Atlanticist, non-aligned and neutral countries (Howorth, 2004, pp. 492-496). Firstly, they opposed the Franco-German proposal to incorporate the WEU mutual defence clause through enhanced cooperation and, secondly, to have a general solidarity and security clause to respond to any risk threatening the EU’s integrity (Cirlig, 2015, p. 2).

In other words, through a clause with PESCO characteristics, Paris and Berlin envisioned a European Defence and Security Union to facilitate a collective defence à la carte (Bakker et al., 2016, p. 23). Two lines of thought emerged during negotiations: with the 9/11 attacks in mind, some states argued that the clause would have to overcome the ‘armed aggression’ approach, while others maintained that it would not leverage the EU’s range of crisis and disaster response capabilities (Myrdal & Rhinard, 2010, p. 3). Member states eventually agreed on a compromise which, after being codified in the rejected TEC (Art. I-41(7)), was incorporated verbatim in the Lisbon Treaty under Art. 42(7) TEU (Perot, 2023, p. 6).

II. Delving into the legal provisions’ open-ended wording to understand their rationale and EU member states’ obligations

In line with art. 51 of the UN Charter, Art. 42(7) TEU imposes a legal obligation on EU member states to provide aid by all the means in their power if one suffers armed aggression on its territory (Eur-Lex, n.d.). However, such collective assistance obligation must respect the ‘specific character’ of certain countries’ security and defence policies (Cirlig, 2015, p. 4). As clarified by Declarations 13 and 14 annexed to the Lisbon Treaty, this expression entails instances from military neutrality to reservations to consent to deploy armed forces (European Union, 2012c, C 326/345).

Art. 42(7) has a purely intergovernmental connotation since it binds member states without conferring competencies upon EU institutions or requiring supranational coordination (Myrdal & Rhinard, 2010, p. 10). More relevantly, it does not specify the type of assistance to the state victim of armed aggression: although such reference might point towards military means, member states have *carte blanche* concerning the kind and scope of support measures, which might even stop at a sympathy telegram (Myrdal & Rhinard, 2010, p. 10; Puglierin, 2016, p. 2). Still, to avoid triggering the clause without bringing the matter to the Council’s attention, states are incentivized to first consult with each other, including within the Political and Security Committee (Deen et al., 2022, p. 30). Additionally, Art. 42(7) could be interpreted in conjunction with arts. 44 and 42(5) TEU, according to which the Council may entrust a coalition of the willing to implement missions or operations and Art. 43(1) TEU, if such operations may contribute to counter-terrorism efforts (Cirlig, 2015, p. 4).

Art. 222 TFEU distinguishes itself for its supranational intent, as it calls upon the EU to ‘mobilise all the instruments at its disposal, including the military resources made available by the Member States’ (European Union, 2012b, C 326/148). The article provides for two-fold assistance: on the EU side, ‘instruments’ can encapsulate institutional tools, mechanisms and resources related to terrorist attacks and man-made disasters, while states’ military resources can range from military assets to equipment for disaster clean-up (Cirlig, 2015, p. 6; Myrdal & Rhinard, 2010, p. 6). Paragraph 2 obliges member states to assist the stricken one by choosing, as clarified by Declaration No. 37 to the Lisbon Treaty, the most appropriate means to comply with their solidarity duties towards it (European Union, 2012c, C 326/351; Myrdan & Rhinard, 2010, p. 6).

On balance, the two articles differ regarding levels of responsibility, scope and assistance tools: first, the mutual assistance clause is entirely state-driven, while the solidarity clause mirrors the Union’s pivotal role (Rehrl, 2015). Secondly, unlike Art. 42(7), Art. 222’s applicability is confined to the EU territory (Rehrl, 2015). Thirdly, although both provisions call for recourse to all available and appropriate means (Myrdan & Rhinard, 2010, p. 9), only the solidarity clause hints at those at the Union’s disposal (Rehrl, 2015). There is also a difference in the affected state’s agency: if, under Art. 222, it acknowledges the inability to cope with the attack or disaster that is overwhelming it, Art. 42(7) puts it in the position to coordinate the provision of assistance (Deen et al., 2022, p. 11).

III. Averting overlaps between Art. 42(7) TEU and NATO’s Art. V

The wording and the scope of Art. 42(7) are often compared to Art. V of the Washington Treaty (Rehrl, 2015). As previously discussed, some EU member states had raised concerns about their alleged ‘overlap’ during the negotiations leading to the TCE. These concerns, however, are unfounded as the two provisions starkly differ in four aspects: first, the EU’s mutual assistance clause is triggered by armed aggression, which does not require the ‘imminent threat’ of an armed attack but does not necessarily amount to an armed attack (Rehrl, 2015). Secondly, Art. V’s territorial scope is limited to the Euro-Atlantic area, while Art. 42(7) includes member states’ overseas territories (Rehrl, 2015). Thirdly, while Art. V applies to all NATO members, Art. 42(7) accommodates neutrality or opt-out arrangements from the CSDP (Deen et al., 2022, p. 12).

Lastly, the Washington Treaty mentions assistance to the stricken parties through the actions deemed appropriate and necessary upon Allied powers’ discretion, from using armed force to diplomatic measures (Deen et al., 2022, p. 12; NATO, 1949; Rehrl, 2015). By contrast, the mutual assistance clause enshrines member states’ obligation to provide ‘all the means in their power’ (European Union, 2012a, C 326/39; Rehrl, 2015). Very importantly, Art. 42(7) upholds NATO as the foundational collective defence forum for EU countries that are members of it. In other words, the North-Atlantic alliance preserves a collective defence strategy and capability (e.g., nuclear forces and reliance on US support) which the EU lacks or does not intend to acquire, making it unfit to operate as a military alliance (Myrdal & Rhinard, 2010, p. 12; Deen et al., 2022, p. 1).

IV. Implementation and EU institutions' role

Art. 42(7) TEU requires no Council decision or conclusion: the condition for the victim state to trigger other states' duty to provide civilian or military assistance is the occurrence of armed aggression, albeit leaving them free to define the scope of their support (Cirlig, 2015, p. 4). Moreover, although the provision does not explicitly mention EU institutions' involvement, the latter should not be precluded for two reasons: first, the cross-sectoral nature of contemporary security threats may demand consultation with EU actors and mechanisms and, secondly, small states might be unable to coordinate the response while dealing with the aggression (Bakker et al., 2016, p. 26).

The implementation of art. 222 TFEU is regulated by Council Decision 2014/415: despite the military nature of member states' assistance resources and the involvement of CSDP structures, such piece of legislation lacks defence implications (Council of the EU, 2014). The Council must define implementation arrangements, and, should these have defence implications, they should be voted unanimously (Myrdal & Rhinard, 2010, pp. 6-7). Before implementation unfolds, the Council will also benefit from recommendations by the Political and Security Committee and the Committee on Internal Security to iron out scope-related and administrative uncertainties (Myrdal & Rhinard, 2010, p. 14). The European Council shall periodically assess the threats faced by the Union (European Union, 2012b, C 326/148), thus potentially encouraging policy-making and funding efforts (Myrdal & Rhinard, 2010, p. 18). The EU Court of Justice also steps in if one member state does not fulfil its pledge to assist the stricken country (Cirlig, 2015, p. 7).

To date, the only scenario in which one of the two provisions has been activated was four days after the Paris terrorist attacks on 13 November 2015, when French Foreign Minister Le Drian invoked Art. 42(7) during the Foreign Affairs Council Meeting (Cirlig, 2015, p. 5). France chose to refrain from invoking Art. 222 to have free rein in the implementation arrangements and avoid fulfilling the perception that its response capabilities had been overwhelmed (Puglierin, 2016, p. 2). Most relevantly, France wanted to send a strong signal of unity against ISIL/Da'esh, which would be translated into 'capability collaboration' for interventions in Syria and Iraq (Cirlig, 2015, p. 8; Bakker et al., 2016, p. 24).

Moreover, France sought civilian support as it did not want to compromise its diplomatic efforts with Arab partners and Russia (European Council of Foreign Relations, 2015). This approach was reflected by the nature of the assistance, which amounted to bilateral aid rather than a fully-fledged CSDP operation (Deen et al., 2022, p. 30). Without binding implementation arrangements, member states provided fragmented and limited support: apart from Germany and the UK's significant contributions in Iraq and Syria, French forces received little relief in other regions like the Sahel (Bakker et al., 2016, p. 24). In parallel, the decision to sideline EU institutions did not ultimately make the Union's response 'common' or 'solidarity-driven' (Bakker et al., 2016, pp. 24-25).

Conclusion: making the EU a more credible crisis management actor

Although Art. 42(7) remains a purely state-driven provision, its implementation would benefit from the involvement of EU institutions/bodies: response to armed aggression could be strengthened by a European Council declaration and by coordinated assistance between EU actors and the stricken state, the use of the Integrated Political Crisis Response mechanism upon the Council Presidency's initiative or the invocation of Art. 222 by a member state (Deen et al., 2022, p. 31). Such an arrangement would allow EU ministers to identify the available (supra)national instruments and tailor the response to the crisis (Bakker et al., 2016, p. 27). Alternatively, a Mutual Assistance Task Force could be established under EEAS' leadership involving, depending on the nature of the threat, specialised EU agencies like Frontex and ENISA, as well as the EU Military Staff (Deen et al., 2022, pp. 2 & 31).

EU member states should regularly hold scenario-based exercises and foster political dialogue to reach a common perspective on potential threats. In this sense, they could revive the 2020 joint proposal by France, Germany, Italy and Spain to emphasise the relevance of European solidarity to (re)act to crises (Parly et al., 2020; Perot, 2023, p. 13). Such initiatives can shed light on the rationale behind the two articles vis-à-vis contemporary unconventional threats: to do so, EU institutions should reconsider and broaden the scope of former High Representative Mogherini's call for a common operational protocol against hybrid threats (European Commission, 2016; Deen et al., 2022, pp. 20-21).

References

- Bakker, A., Biscop, S., Drent, M. & Landman, L. (2016). The EU's mutual assistance clause, Clingendael Institute. In Spearheading European Defence: Employing the Lisbon Treaty for a Stronger CSDP (pp. 22-29). <http://www.jstor.com/stable/resrep05543.8>.
- Cirlig, C. (2015, November). The EU's mutual assistance clause. First ever activation of Article 42(7) TEU, European Parliament Research Service. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572799/EPRS_BRI\(2015\)572799_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572799/EPRS_BRI(2015)572799_EN.pdf).
- Council of Europe. (n.d.). 1948. Council of Europe Portal. <https://www.coe.int/en/web/documents-records-archives-information/timeline-1948>.
- Council of the EU. (2014, 24 June). Council Decision 2014/415/EU on the arrangements for the implementation by the Union of the solidarity clause. Council of the EU. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0415>.
- CVCE. (n.d.). Modified Brussels Treaty (Paris, 23 October 1954). CVCE. <https://www.cvce.eu/en/obj/modified-brussels-treaty-paris-23-october-1954-en-7d182408-0ff6-432e-b793-0d1065ebe695.html>.
- Deen, B., Zandee, D. & Stoetman, A. (2022, January 27). Uncharted and uncomfortable in European defence [Report]. Clingendael Institute <https://www.clingendael.org/sites/default/files/2022-01/uncharted-and-uncomfortable.pdf>.
- EUR-Lex. (n.d.). Mutual defence clause. EUR Lex. <https://eur-lex.europa.eu/EN/legal-content/glossary/mutual-defence-clause.html>.
- European Commission. (2016, April 6). Joint Framework on Countering Hybrid Threats: A European Union Response [JOIN(2016) 18 final] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016JC0018>.
- European Council on Foreign Relations. (2015, 19 November). Article 42.7: An explainer. https://ecfr.eu/article/commentary_article_427_an_explainer5019/.
- French Republic & HM Government. (1998, December 4). Saint-Malo Declaration on European Defence. CVCE. https://www.cvce.eu/content/publication/2008/3/31/f3cd16fb-fc37-4d52-936f-c8e9bc80f24f/publishable_en.pdf.
- Howorth, J. 2004. The European Draft Constitutional Treaty and the Future of the European Defence Initiative: A Question of Flexibility,. European Foreign Affairs Review 9 (4), pp. 483-508. <https://doi.org/10.54648/EEERR2004039>.

References

Myrdal, S. & Rhinard, M. (2010). The European Union's Solidarity Clause: Empty Letter or Effective Tool? Swedish Institute of International Affairs, 2, pp. 1-23. <https://www.ui.se/globalassets/ui.se-eng/publications/ui-publications/the-european-unions-solidarity-clause-empty-letter-or-effective-tool-min.pdf>.

NATO. (1949, 4 April). The North Atlantic Treaty. NATO. https://www.nato.int/cps/en/natohq/official_texts_17120.htm.

European Union. (2012a, 26 October). Consolidated version of the Treaty on the European Union [C 326/13-45]. Official Journal of the European Union. https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF.

European Union. (2012b, 26 October). Consolidated version of the Treaty on the Functioning of the European Union. [C 326/49-390]. Official Journal of the European Union. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>.

European Union. (2012c, 26 October). Declarations annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, C 326/337-361. Official Journal of the European Union. https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_5&format=PDF

Parly, F., Kramp-Karrenbauer, A., Robles Fernández, M. & Guerini, L. (2020, May 29). At the Heart of Our European Union – Letter of Defence Ministers, German Defence Ministry. <https://www.bmvg.de/resource/blob/261184/4f63d2a54ee7f96476156796f00874ed/20200528-download-brief-pesco-englisch-data.pdf>.

Perot, E. (2023, 24 July). The European Union's nascent role in the field of collective defense: between deliberate and emergent strategy. Journal of European Integration, 1-23. <https://doi.org/10.1080/07036337.2023.2237653>.

Puglierin, J. (2016, December). 'Aid and Assistance by All Means in their Power' The EU Mutual Assistance Clause as a Test Case for European Defense. DGAPkompakt, 22,1-6. https://dgap.org/system/files/article_pdfs/2016-22-dgapkompakt-puglierin.pdf.

Rehrl, J. (2015, 20 November). Invoking the EU's Mutual Assistance Clause. What it says, what it means. Egmont Institute. <https://www.egmontinstitute.be/invoking-the-eus-mutual-assistance-clause-what-it-says-what-it-means/>.

Wessel, R. A. (2001). The EU as a Black Widow: Devouring the WEU to Give Birth to a European Security and Defence Policy. In Kronenberger, V. (Ed.) The European Union and the International Legal Order: Discord or Harmon, (pp. 405-434). The Hague: T.M.C. Asser Press. https://doi.org/10.1007/978-90-6704-409-7_19.