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**The 2016 "Winter Package"  
on European Security and  
Defence: Constitutional,  
Legal and Institutional  
Implications**

IN -DEPTH ANALYSIS





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**The 2016 “Winter Package” on  
European Security and Defence:  
Constitutional, Legal and Institutional  
Implications**

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**Abstract**

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Constitutional Affairs of the European Parliament. It examines a series of constitutional, legal and institutional implications of the proposals endorsed by the December 2016 European Council for the further development of the Common Security and Defence Policy in the framework of the current Treaties.

## **ABOUT THE PUBLICATION**

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## LIST OF ABBREVIATIONS

<b>AFCO</b>	Committee on Constitutional Affairs
<b>AFET</b>	Committee on Foreign Affairs
<b>AFSJ</b>	Area of Freedom, Security and Justice
<b>CDP</b>	Capability Development Plan
<b>CEDC</b>	Central European Defence Cooperation
<b>CFSP</b>	Common Foreign and Security Policy
<b>CGEA</b>	Commissioners' Group on External Action
<b>CSDP</b>	Common Security and Defence Policy
<b>EDA</b>	European Defence Agency
<b>EDTIB</b>	European Defence Technological and Industrial Base
<b>EDU</b>	European Defence Union
<b>EIB</b>	European Investment Bank
<b>EUGS</b>	Global Strategy for the European Union's Foreign and Security Policy
<b>HR/VP</b>	High Representative of the Union for Foreign Affairs and Security Policy / Vice-President of the European Commission
<b>MFF</b>	Multi-annual financial framework
<b>NORDEF</b>	Nordic Defence Cooperation
<b>PESCO</b>	Permanent Structured Cooperation
<b>QMV</b>	Qualified majority voting
<b>R&amp;T</b>	Research and technology
<b>SEDE</b>	Subcommittee for Security and Defence
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union

## **EXECUTIVE SUMMARY**

Recent practice in the field of EU external action shows the convergence of strategic objectives, mandates and operation plans pursued by EU actors hitherto confined to either internal or external security. This is testament to the idea that a comprehensive understanding of “security” not only includes the recognition of the multidimensional nature of security issues, the widening of actors as objects and subjects of security, but also the broadened scope of security responses across the spectrum, including “defence”. However, legal bases, decision-making procedures, budgetary modalities and staffing arrangements remain distinct and will most likely continue to lead to interinstitutional squabbles over the delimitation of competences before the Court of Justice.

The “winter package” on European security and defence endorsed by the European Council on 15 December 2016 is not a game-changer but part of a longer trend. It clarifies the stated ambition of the EU Global Strategy but does not pitch it at a new level. That said, the lists of concrete proposals and detailed timelines contained therein, in particular in the European Commission’s Defence Action Plan, are most welcome. The initiatives to create a permanent operational headquarters, a European semester for defence, a European Defence Fund, and to start harmonising standards and requirements for a European defence industrial market are all actions that deserve to be supported. However, talk about “turbo-boosting” defence spending is exaggerated.

The untapped potential of the Lisbon Treaty lies primarily in the possibility to create a framework for permanent structured cooperation (PESCO); institutional adaptations at the level of the Council, the European Parliament and the European Defence Agency; and the *modus operandi* of the mutual assistance clause.

## 1. INTRODUCTION

The Common Security and Defence Policy (CSDP) is an area that touches on the core of national sovereignty. A lack of political will and of mutual trust between Member States has long been among the obstacles to the achievement of the Treaty objectives provided for in Article 24(1) TEU, including that of the progressive framing of a common defence policy that might lead to a common defence. But the political momentum generated by a deteriorated security context in and around Europe, the outcome of the 'Brexit' referendum in the United Kingdom and the unpredictability injected in US foreign policy with the election of Donald Trump, has led the EU at the end of 2016 to take a number of practical steps forward in the development of CSDP.

This paper supports the work of the Committee on Constitutional Affairs of the European Parliament (AFCO), which is currently drafting a report entitled "Constitutional, legal and institutional implications of a Common Security and Defence Policy: possibilities offered by the Lisbon Treaty", together with the Subcommittee on Security and Defence (SEDE).

The paper first tries to clarify the scope of both elements of "security" and of "defence" within the CSDP (Chapter 2). It then takes stock of the proposals made in the "winter package" on European security and defence endorsed by the December 2016 European Council (Chapter 3), before reviewing the untapped potential and the challenges in the future development of the CSDP, both in institutional and constitutional terms and within the Treaty framework (Chapter 4). A number of concluding remarks will wrap up this paper (Chapter 5).



## 2. SCOPE OF “SECURITY” AND “DEFENCE” IN CSDP

### KEY FINDINGS

- Recent practice shows the convergence of strategic objectives, legal mandates and operation plans pursued by EU actors hitherto confined to either internal or external security. This is testament to the idea that a comprehensive understanding of “security” not only includes the recognition of the multidimensional nature of security issues, the widening of actors as objects and subjects of security, but also the broadened scope of security responses across the spectrum, including “defence”.
- However, legal bases, decision-making procedures, budgetary modalities and staffing arrangements remain distinct. As a result, we will most likely continue to witness interinstitutional battles being fought out before the Court of Justice over the delimitation of competences.

In EU circles, the term “comprehensive approach” to external conflicts and crises is notorious for being a catch-all phrase. It is telling for the terminological inflation from which the European Union suffers that even this omnibus concept should be conflated with the term “**integrated approach**” introduced by the June 2016 Global Strategy for the European Union’s Foreign and Security Policy (EUGS).<sup>1</sup> Then again, most national and international administrations dealing with security challenges have at a least a reference to ‘comprehensiveness’ in the policy documents that guide their crisis management operations.

To date, the EU has conducted 35 CSDP missions and operations. The vast majority of these have been of a civilian or of a mixed civilian-military (civ-mil) nature. Contrary to the image of the EU as a benign civilian power, it is the military side of its international persona that has attracted most attention. This is not surprising if one considers that, with the operationalisation of the then ‘European’ Security and Defence Policy (ESDP) and the launch of Operation Concordia in FYROM in 2003, the EU was completely new to conducting military operations and thus needed to build up its military — aka “defence”— institutions and capabilities. These efforts have eclipsed the attention for the civilian — aka “security”— part of the CSDP.

As a result of the changing security landscape in and around Europe, it is now widely recognised that the boundaries between what is “internal” and what is “external” security are blurring. The corollary of this has been that the military is increasingly entrusted with civilian tasks at home (e.g. policing) whereas civilian border guards are being lured ‘out of area’ in their cooperation with the military. The crisis response to the foreign fighter phenomenon, as well as the instruments deployed to disrupt smuggling networks across the Mediterranean serve to illustrate these points.

In order to address the challenges posed by foreign fighters returning to launch terrorist attacks against the European homeland, it is widely accepted that the root causes of external conflicts need to be addressed. This chimes with the traditional notion of comprehensive security, which refers to an understanding that peace and development are fundamentally intertwined. In the EU context, this nexus between security and development was elaborated in the first post-Lisbon document laying down a

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<sup>1</sup> The EEAS is expected to present its plans for the implementation of the concepts of “integrated approach” and “resilience” (another EUGS buzzword) in spring 2017.

'comprehensive approach to external conflicts and crises' (December 2013).<sup>2</sup> The measures taken in response to the refugee and migrant crisis are proof of a further nexus, this time between the (internal) Area of Freedom, Security and Justice (AFSJ) and the (external) CSDP: both the civilian external border management agency Frontex and the military operation EUNAVFOR MED Sophia cooperate with NATO and engage in similar search and rescue tasks. Furthermore, the development of capabilities of the (civilian) European Border and Coast Guard relies partially on cooperation with military structures like the European Defence Agency (EDA).<sup>3</sup>

Thus, we witness the convergence of strategic objectives, legal mandates and operation plans pursued by EU actors hitherto confined to either internal or external security, whereas their legal bases, decision-making procedures, budgetary modalities and staffing arrangements remain distinct.

The good news is that this evolution shows the propensity of the EU collectively, i.e. institutions and Member States, to adapt to new circumstances rather than getting stuck in old paradigms.<sup>4</sup> It is testament to the idea that a **comprehensive understanding of "security"** not only includes the recognition of the multidimensional nature of security issues, the widening of actors as objects and subjects of security, but also the **broadened scope of security responses** (across the entire spectrum of the Treaties), **including "defence"** (largely confined to Title V, Chapter 2, Section 2 of the TEU).<sup>5</sup> The different types of responses to France's invocation of the mutual assistance clause of Article 42(7) TEU are a case in point (cf. Chapter 4).

The bad news is that because of the split in legal regimes applied to the Common Foreign and Security Policy (CFSP) in Title V, Chapter 2 TEU (including CSDP) and all other (internal and external) policies laid down in the Treaty on the Functioning of the EU (TFEU), we will most likely continue to see **interinstitutional battles** being fought out before the Court of Justice over the delimitation of competences.<sup>6</sup>

As mentioned at the outset, the June 2016 EUGS has lifted the comprehensive approach to external conflicts and crises up to a new level, mainstreaming it to EU external action writ large. At the same time, the EUGS is at its most specific when dealing with the further development of security and defence. The Foreign Affairs Council of October 2016 discussed the **follow-up to the EUGS** and expressed the expectation that the work on its implementation would focus on five priority areas for 2016–2017:

- Resilience building and integrated approach to conflicts and crises;
- **Security and defence**;
- Strengthening the nexus between internal and external policies;
- Updating existing or preparing new regional and thematic strategies;
- Stepping up public diplomacy efforts.

In line with the European Council Conclusions of December 2013 on security and defence, and on the back of a host of proposals by think tanks (e.g. the 2015 CEPS Report of the

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<sup>2</sup> The EU's comprehensive approach to external conflict and crises, JOIN(2013) 30 final, Brussels, 11 December 2013, available at [http://www.eeas.europa.eu/statements/docs/2013/131211\\_03\\_en.pdf](http://www.eeas.europa.eu/statements/docs/2013/131211_03_en.pdf).

<sup>3</sup> See S. Blockmans, 'New Thrust for the CSDP from the Refugee and Migrant Crisis', CEPS Special Report No. 142, July 2016, available at <https://www.ceps.eu/publications/new-thrust-csdp-refugee-and-migrant-crisis>.

<sup>4</sup> See T. Tardy, 'Civilian Crisis Management: Towards a new paradigm', EUISS Brief No. 23, July 2016.

<sup>5</sup> The current legal framework for the CSDP is laid down in Articles 42-46 TEU, as well as in Protocols 10 (on PESCO) and 11 (on Article 42 TEU) and Declarations 13 and 14 (on the non-affectation of the CFSP/CSDP and its structures on the responsibilities of Member States to formulate and conduct their own foreign and security policies). The Common Foreign and Security Policy is the only policy area which, because of its 'specificity', remains relegated to the more 'constitutional' Treaty on European Union.

<sup>6</sup> See P. Koutrakos, *The EU Common Security and Defence Policy* (Oxford: Oxford University Press 2013), at 44. For recent case-law of the Court see, e.g., Case C-263/14 (Tanzania) and Case C- 455/14 P (H v. Council) which address different questions about the jurisdiction of the Court in determining the scope of the CFSP/CSDP.

Task Force chaired by Javier Solana<sup>7</sup>), EU institutions (e.g. the EPSC’s Strategic Note #4<sup>8</sup>) and changing combinations of Member States (e.g. by Germany, France, Italy and Spain), the November 2016 Foreign Affairs Council (in the composition of defence ministers) reiterated “the need to enhance the effectiveness of CSDP and the development and maintenance of Member States’ capabilities, supported by a more integrated, sustainable, innovative and competitive European Defence Technological and Industrial Base (EDTIB), which also contributes to jobs, growth and innovation across the EU and can enhance Europe’s strategic autonomy, strengthening its ability to act with partners”. The Council also recalled that “these efforts should be inclusive, with equal opportunities for defence industry in the EU, balanced and in full compliance with EU law”. As such, it framed the set of proposals intended to further develop the CSDP. It is useful to review these proposals before gauging the stretch still provided for in the Lisbon Treaty to develop the CSDP in constitutional and institutional terms.

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<sup>7</sup> See S. Blockmans and G. Faleg, ‘More Union in European Defence’, Report of the CEPS Task Force chaired by Javier Solana, February 2015, available at <https://www.ceps.eu/publications/more-union-european-defence>.

<sup>8</sup> See EPSC, ‘In Defence of Europe’, Strategic Note #4, June 2015, available at [https://ec.europa.eu/epsc/sites/epsc/files/strategic\\_note\\_issue\\_4\\_en.pdf](https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_4_en.pdf).

### 3. THE 2016 “WINTER PACKAGE” ON CSDP

#### KEY FINDINGS

- The “winter package” on European security and defence is not a game-changer but part of a longer trend.
- The Implementation Plan on Security and Defence clarifies the stated ambition of the EU Global Strategy but does not pitch it at a new level.
- The lists of concrete proposals and detailed timelines contained in the package, in particular in the Commission’s Defence Action Plan, are most welcome. The initiatives to create a permanent operational headquarters, a European semester for defence, a European Defence Fund, and to start harmonising standards and requirements for a European defence industrial market are all actions that deserve to be supported. Talk about “turbo-boosting” defence spending is exaggerated.

This chapter takes stock of the “winter package”<sup>9</sup> on European security and defence which was firmly endorsed by the European Council of 15 December 2016, when the Heads of State and Government took stock of this work and urged speedy implementation.<sup>10</sup>

The three elements of the package have been said to constitute an integrated package to strengthen the EU’s work on security and defence, in full complementarity with NATO:

1) **An Implementation Plan on Security and Defence**,<sup>11</sup> in which Federica Mogherini — in her triple-hatted capacity as HR/VP and Head of the European Defence Agency— set out proposals to implement the EUGS, which provides a “shared vision” and proposes “common action” in the area of security and defence;

2) An **Action Plan on Defence** prepared by European Commissioner for Internal Market, Industry, Entrepreneurship and SMEs Elzbieta Bieńkowska.<sup>12</sup> This Plan was adopted in the College at the end of November and looks at the industrial base, the capabilities developments and the research incentives that the Commission is planning to put in place;

3) **A Common Set of Proposals for the Implementation of the EU-NATO Joint Declaration** signed by the President of the European Council, the President of the European Commission and the Secretary General of NATO on 8 July 2016 in the margins of the NATO Summit in Warsaw. The joint document on implementation was endorsed by the Councils of both organisations on 6 December 2016.<sup>13</sup>

<sup>9</sup> The term was used in a speech by HR/VP Federica Mogherini at the Future of EU-NATO Cooperation conference in Brussels on 21 November 2016, available at [https://eeas.europa.eu/node/15446\\_en](https://eeas.europa.eu/node/15446_en).

<sup>10</sup> European Council conclusions, EUCO doc. 34/16, Brussels, 15 December 2016, available at [file:///C:/Users/steven/Downloads/15-euco-conclusions-final%20\(1\).pdf](file:///C:/Users/steven/Downloads/15-euco-conclusions-final%20(1).pdf).

<sup>11</sup> Implementation Plan on Security and Defence, Council doc. 14392/16, Brussels, 14 November 2016, available at <http://www.consilium.europa.eu/en/press/press-releases/2016/11/14-conclusions-eu-global-strategy-security-defence/>.

<sup>12</sup> Defence Action Plan, Brussels, COM(2016) 950 final, 30 November 2016, available at <http://ec.europa.eu/DocsRoom/documents/20372>.

<sup>13</sup> Council Conclusions on the Implementation of the Joint Declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization, Council doc. 15283/16, Brussels, 6 December 2016, available at [http://www.consilium.europa.eu/en/press/press-releases/2016/12/06-eu-nato-joint-declaration/?utm\\_source=dsms-auto&utm\\_medium=email&utm\\_campaign=EU-NATO+cooperation%3a+Council+adopt+conclusions+to+implement+Joint+Declaration](http://www.consilium.europa.eu/en/press/press-releases/2016/12/06-eu-nato-joint-declaration/?utm_source=dsms-auto&utm_medium=email&utm_campaign=EU-NATO+cooperation%3a+Council+adopt+conclusions+to+implement+Joint+Declaration). The common set of proposals was endorsed on the same day by the NATO Meeting of Foreign Ministers; see [http://www.nato.int/cps/en/natohq/official\\_texts\\_138829.htm](http://www.nato.int/cps/en/natohq/official_texts_138829.htm). The Joint Declaration signed at Warsaw is available at <http://www.consilium.europa.eu/en/press/press-releases/2016/07/08-eu-nato-joint-declaration/>.

### 3.1 Implementation Plan on Security and Defence: Qualitative leap

Drawing on the proposal in the Implementation Plan, which was based on a process of broad consultation among the Member States in the wake of the presentation of the EUGS, the Council determined the “level of ambition” for security and defence of the EU, the operational implications of such ambition and tasked the HR/VP to put forward a number of actionable proposals.

The EU’s **level of ambition** for security and defence revolves around three core tasks:

- responding to external conflicts and crisis;
- working with partners in building their security and defence capacities; and
- protecting the Union and its citizens.

**Responding to external conflicts and crises:** The EU’s ambition remains to be able to respond with rapid and decisive action through the whole spectrum of civilian and military crisis management tasks covered by Article 43 TEU. The aim expressed by the Council is to enhance the EU’s awareness and responsiveness in all phases of the conflict cycle (from conflict prevention to crisis management and peacebuilding), in order “to promote peace and security within a rules-based global order underpinned by the United Nations”.

**Capacity building of partners:** This is the objective of CSDP missions or operations with tasks in training, advice and/or mentoring within the security sector. The aim is to strengthen the CSDP’s ability to contribute more systematically to the “resilience” and stabilisation of partner countries recovering from or threatened by conflict or instability, in synergy with other EU instruments and actors, for instance in the sphere of development cooperation.<sup>14</sup> This could include the areas of strategic communication, cyber security and border security, for instance to counter hybrid threats.

**Protecting the Union and its citizens:** In keeping with the Treaty-based philosophy that CSDP missions and operations are deployed outside the Union and that NATO remains the foundation for the collective defence for those states which are members of it, the CSDP can nevertheless contribute to homeland security. The aim is that existing EU policies along the nexus between internal and external security should be taken forward by CSDP and AFSJ actors in a comprehensive manner. The operational principles of ‘mutual assistance’ and ‘solidarity’ espoused in Articles 42(7) TEU and 222 TFEU respectively serve to highlight this point. Such cooperation can take many forms. The Implementation Plan mentions “strengthening the protection and resilience of [the EU’s] networks and critical infrastructure; the security of its external borders as well as building partners’ capacity to manage their borders; civil protection and disaster response; ensuring stable access to and use of the global commons, including the high seas and space; countering hybrid threats; cyber security; preventing and countering terrorism and radicalisation; combatting people smuggling and trafficking; complementing, within the scope of CSDP, other EU efforts concerning irregular migration flows (...); promoting compliance with non-proliferation regimes and countering arms trafficking and organised crime”.<sup>15</sup>

The **rationale** behind the Implementation Plan is therefore that the EU needs credible, deployable, interoperable, sustainable and multifunctional civilian and military capabilities to support its own security needs by fostering “human security”, tackling root causes of conflict and thus resolving crises and their spill-over effects into the Union. As such, the level of ambition defined in the plan is neither new nor high. It is rather about prioritising

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<sup>14</sup> Promoting respect for international law, in particular international humanitarian and human rights law, as well as gender sensitivity, UN Security Council Resolution 1325 and subsequent resolutions, protection of civilians, and principles of democracy and good governance is integral to resilience-building efforts.

<sup>15</sup> Council conclusions on implementing the EU Global Strategy in the area of Security and Defence, Council doc. 14149/16, Brussels, 14 November 2016, para. 7(c).

Treaty-based security and defence objectives and activities in a principled but above all pragmatic way (to paraphrase a key concept put forward in the EUGS).

As a security provider, the **geographical focus** of the EU's attention is on its surrounding regions, i.e. neighbouring countries and the neighbours of its neighbours. That does not, however, exclude EU action elsewhere. As stressed in the EUGS, the EU's interests are global. The need to protect them thus requires a wide reach to EU security action.

The Council has defined the **principles and requirements for implementation**, including the types of possible CSDP civilian and military operations (see Box 1, below), to flesh out the level of ambition in the three core areas. In doing so, the Council presupposes an "integrated approach", linking up different EU instruments in a coordinated way, building on the EU's "comprehensive approach" to the nexus between security and development,<sup>16</sup> promoting civ-mil cooperation and working closely with partners (esp. UN, NATO, OSCE and African Union), while respecting the autonomy of the EU's decision-making processes and the principle of inclusiveness. The latter is a reference to the "**single set of forces**" which Member States have at their disposal and can use in different frameworks.

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<sup>16</sup> JOIN(2013) 30 final, supra note 2.

### **BOX 1: Types of possible CSDP civilian missions and military operations derived from the EU level of ambition**

Based on previously agreed goals and commitments (incl. the Headline Goal 2010, the Civilian Headline Goal 2010 as well as the ambition agreed by the European Council in December 2008), the EU should be capable to undertake the following types of CSDP civilian missions and military operations outside the Union, a number of which may be executed concurrently, in different scenarios (as appropriate, some of these missions and operations may also be deployed to provide assistance in the context of a global response to natural disasters and pandemics outside the EU, in particular when such situations can lead to large scale destabilisation), including in situations of higher security risk and underdeveloped local infrastructure:

- Joint crisis management operations in situations of high security risk in the regions surrounding the EU;
- Joint stabilisation operations, including air and special operations;
- Civilian and military rapid response, including military rapid response operations inter alia using the EU Battlegroups as a whole or within a mission-tailored Force package;
- Substitution/executive civilian missions;
- Air security operations including close air support and air surveillance;
- Maritime security or surveillance operations, including longer term in the vicinity of Europe);
- Civilian capacity building and security sector reform missions (monitoring, mentoring and advising, training) inter alia on police, rule of law, border management, counter-terrorism, resilience, response to hybrid threats, and civil administration as well as civilian monitoring missions;
- Military capacity building through advisory, training, and mentoring missions including robust force protection if necessary, as well as military monitoring/observation missions.

This non-exhaustive list provides input for the follow-on work to derive requirements based on a review of the Illustrative Scenarios, in line with agreed procedures under the Capability Development Mechanism, under the control of the Political and Security Committee.

**Source:** Annex of the Council Conclusions of 14 November 2016 on implementing the EU Global Strategy in the area of Security and Defence, available at <http://www.consilium.europa.eu/en/press/press-releases/2016/11/14-conclusions-eu-global-strategy-security-defence/>.

The **substance** of the Implementation Plan on Security and Defence is all about providing the European Union with the capabilities, structures, tools and financial resources needed to fulfil the level of ambition identified by the Council. As has been stressed time and again in speeches and doorstep remarks by the HR/VP, such efforts are not intended to duplicate or compete with the big structures and headquarters sported by NATO, but rather aimed at streamlining and improving the functioning of the existing structures of the EU (e.g. the headquarters in the UK (which is leaving the EU), France, Germany, Greece and Italy from where CSDP operations are currently run). The two organisations should act in full complementarity. In fact, by using EU instruments and developing Member States’ capabilities through the CSDP, the EU should also help to strengthen capabilities which are available to NATO and other international organisations of which EU states are members.



The plan's **actionable recommendations** are therefore primarily intended to set capability development priorities, deepen defence cooperation and adjust the existing EU institutional structures, tools and (financial) instruments, both for situational awareness, planning and conduct of missions and operations, as well as for rapid response (incl. reinforcing the usability and deployability of EU battlegroups, for instance in bridging the time needed to deploy a UN peacekeeping force).

Sufficient **financial coverage** is key to attaining the new level of ambition in security and defence. This not only requires Member States to put their money where their mouths are (only Estonia, Greece, Poland and the UK currently meet the pledge made at NATO's Wales Summit in 2014 to spend 2% of their GDP on defence) but also to enhance financial solidarity, flexibility and effectiveness in funding the EU's security and defence activities. As part of this, a long overdue revision of the Athena mechanism will be undertaken by the end of 2017. Further proposals on the financing of CSDP have been made by the European Commission in its Defence Action Plan (see below).

Finally, the Implementation Plan proposes to draw on the full potential of the mechanism of **permanent structured cooperation (PESCO)** provided for in Articles 42(6) and 46 TEU by exploring the consideration of a "modular approach" to concrete projects and initiatives that could strengthen the CSDP. The High Representative has been invited to present a reflection paper that provides options to which Member States could commit themselves.

In fact, the HR/VP was tasked to **follow up** with a whole raft of concrete proposals (to be presented in early 2017), with an aim to:

1. **developing the required defence capabilities** for the future, with adequate investments and collaborative approaches in priority areas such as intelligence, surveillance and reconnaissance, drones, satellite communications, and autonomous access to space and permanent earth observation; high-end military capabilities including strategic enablers; response to hybrid threats; as well as other capabilities, in particular those needed to ensure cyber and maritime security, and force protection;<sup>17</sup>
2. **deepening defence cooperation** by considering the setting up of a Member States-driven "**Coordinated Annual Review on Defence**". Proposals on the scope, methods and content of this Annual Review should foster transparency in defence spending plans and address capability development shortfalls in a more structured, coherent and complementary way. The **European Defence Agency** is deemed central to translating defence capability priorities into concrete collaborative programmes and supporting Member States on the coherent and complementary use of R&T resources;
3. **improving the development of civilian crisis management capabilities** so as to enable the EU to rapidly deploy well-trained civilian response teams that can address the various (and new) types of challenges and threats that the Union is facing —all as part of an integrated approach to dealing with external conflicts and crises;
4. **adapting the existing structures** of the EEAS to create a permanent operational planning and conduct capability (i.e. 'headquarters') for CSDP missions and operations, with distinct but coordinated civilian and military

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<sup>17</sup> The Council has invited Member States, working through the EDA and in close coordination with the EU Military Committee, to specify and complement the identified preliminary capability priorities on the basis of the level of ambition and in the framework of the forthcoming review of the Capability Development Plan (CDP) by spring 2018. In the review of military requirements for the next CDP, illustrative scenarios should be developed so as ensure coherence of outcomes and timelines with the NATO Defence Planning Process.



chains of command, and in accordance with the principle of avoiding unnecessary duplication with NATO. As a short-term objective, the gap on the operational planning and conduct of 'non-executive military missions' (e.g. training of Libyan or Iraqi army personnel, not combat operations) should be addressed. Similarly, the existing network of EU and Member States' structures contributing to autonomous situational awareness should be improved in order to better inform the EU's prevention and decision-making capacities, as well as to make optimal use of lessons learnt processes.

By way of **sub-conclusion** it is worth observing that, until recently, Member States had shown reluctance to coordinate, let alone harmonise, their defence planning efforts. In recent years, defence budgets have been slashed in an uneven manner, hollowing out most Member States' security and defence capabilities.<sup>18</sup> This led to efforts by the European Council of December 2013 to buck the trend. Multiple emergencies in Europe's geographical neighbourhood and rapidly evolving global trends have further undermined the European Union's role as a security actor and raised a general awareness that Member States were approaching a watershed.

The public grief and inter-state solidarity in reaction to a spike in terrorist activity, starting with the November 2015 attacks on Paris, have helped to galvanise efforts to develop concrete plans to beef up the EU's security and defence dimension. Member States have become acutely aware that deeper defence integration will not happen unless at least a number of them are prepared to give each other greater visibility of what they plan to spend on defence and how they plan to spend it – a process of 'mutual accountability' without which big cooperative opportunities will be missed.

Seen against this background, the Implementation Plan on Security and Defence can be characterised as rather pragmatic in the definition of both the EU's level of ambition and the means to achieve it. With the plan, the EU takes the next step on the long path towards a 'European Defence Union'<sup>19</sup>: a "**qualitative leap**",<sup>20</sup> rather than a revolutionary one. The strategic orientation was already clear for months, if not years. The Implementation Plan clarifies the EU's ambition on security and defence but does not pitch it at a higher level. It does, however, list concrete tasks and a detailed timetable for implementation. The first annual review of the entire EUGS scheduled for June 2017 will provide an opportunity to gauge the level of progress made in the actual implementation of aspirations.

### 3.2 Defence Action Plan: Ground-breaking but no big bazooka

Shared capability generation efforts needed to sustain the above-mentioned tasks are obviously subject to overriding financial, technological, and industrial challenges. From a financial standpoint, the generation of the full range of capabilities listed in the Implementation Plan would entail, for most Member States, a sharp rise in military spending, even going beyond NATO's Wales Summit pledge of moving towards 2% of GDP by 2024, which would be politically unacceptable due to the dire state of their economies.

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<sup>18</sup> Member States currently have 19 types of armoured infantry fighting vehicle, compared with 1 in the US. France and Germany rely on ageing military transport planes. Some navy helicopters are grounded due to technical faults. A recent report by the German military showed that its Tornado jets had a readiness rate of 44% and that its Eurofighters were ready 52% of the time.

<sup>19</sup> Cf. S. Blockmans and G. Faleg, 'More Union in European Defence', Report of the CEPS Task Force chaired by Javier Solana, February 2015. This report introduces the term 'European Defence Union'. The concept has been actively employed by the German Defence Minister and was recently embraced in the European Parliament resolution of 22 November 2016 on the European Defence Union (2016/2052(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0435+0+DOC+PDF+V0//EN>.

<sup>20</sup> Remarks by High Representative/Vice-President Federica Mogherini at the press conference following the Foreign Affairs Council, Brussels, 14 November 2016, available at [https://eeas.europa.eu/node/14821\\_en](https://eeas.europa.eu/node/14821_en).

Instead of increasing funding to perpetuate existing inefficiencies, Member States have come to recognise that they need to cut duplications of capacities, platforms and systems with low levels of interoperability. Technology is part of the problem. Despite the obvious advantages of combined R&D programmes in terms of reducing costs per Member State, innovation and enhancement of military technology tend to remain national prerogatives as long as states, especially those with a big industrial base, are unwilling to lose know-how and their technological advantage. Moreover, governments are often unwilling to accept the political risk of engaging in ambitious and expensive cooperative programmes with other states, as implications in terms of loss of sovereignty and limitations to their strategic interests or cultures (i.e. when deciding to use military force) may be politically unacceptable.<sup>21</sup>

As a result, the Commission estimates that “around 80% of defence procurement is run on a purely national basis, leading to a costly duplication of military capabilities” and that the lack of cooperation between Member States in the field of defence and security comes at a cost of EUR 25 to 100 billion per year.<sup>22</sup> That leads it to the logical conclusion that “[w]ithout a sustained investment in defence, the European industry risks lacking the technological ability to build the next generation of critical defence capabilities”. This will ultimately “affect the strategic autonomy of the Union and its ability to act as a security provider”.<sup>23</sup>

As part of its 2014 ‘A New Deal for European Defence’,<sup>24</sup> the Commission had been exploring possible synergies between civil and military research by using the general budget to fund dual-use projects. In the wake of the definition of a higher level of ambition to create a more integrated framework for EU defence cooperation (cf. Implementation Plan on Security and Defence), the Commission’s Defence Action Plan breaks new ground in trying to create the conditions for positive spill-over effects of new investments in European defence – in particular in skilled labour, research and technology (R&T) and exports (see Box 2, below).

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<sup>21</sup> At the Future of EU-NATO Cooperation conference in Brussels on 21 November 2016, the Polish Minister of Foreign Affairs Witold Waszczykowski emphasised this point by saying that plans to reform EU defence procurement should not lead to takeovers of Eastern European arms firms by their Western competitors.

<sup>22</sup> European Commission, ‘European Defence Action Plan: Towards a European Defence Fund’, Press release IP/16/4088, Brussels, 30 November 2016, available at [http://europa.eu/rapid/press-release\\_IP-16-4088\\_en.htm](http://europa.eu/rapid/press-release_IP-16-4088_en.htm).

<sup>23</sup> Cf. Defence Action Plan, page 3, supra note 11.

<sup>24</sup> A New Deal for European Defence, Brussels, 24 June 2014, available at [http://europa.eu/rapid/press-release\\_IP-14-718\\_en.htm](http://europa.eu/rapid/press-release_IP-14-718_en.htm).

## BOX 2: Proposals contained in the European Defence Action Plan

1. Set up a **European Defence Fund** to support investment in joint research and the joint development of defence equipment and technologies: the proposed Fund would include two "windows" which are complementary but different in their legal structure and budget sourcing.

- A "research window" to fund collaborative research in innovative defence technologies such as electronics, metamaterials, encrypted software or robotics. The Commission has already proposed EUR 25 million for defence research as part of the 2017 EU budget, and expects that this budget allocation could grow to a total of EUR 90 million until 2020. Under the post-2020 EU multi-annual financial framework, the Commission intends to propose a dedicated defence research programme with an estimated amount of EUR 500 million per year.

- A "**capability window**" which would act as a financial tool allowing participating Member States to purchase certain assets together to reduce their costs. The capabilities would be agreed by the Member States, who would own the technology and equipment. For example, Member States may jointly invest in drone technology or bulk buy helicopters to reduce costs. As an order of magnitude, this window should be able to mobilise about EUR 5 billion per year. The Commission will launch a scoping study to refine this estimate.

2. **Foster investments in SMEs, start-ups, mid-caps and other suppliers to the defence industry:** The European Structural and Investment Funds and European Investment Bank (EIB) group already provide financial support for the development of a number of dual-use activities. The Commission will support EIB efforts to improve access to funding by the defence supply chains. It will promote EU co-financing of productive investment projects and the modernisation of the defence supply chains. Under the 'Blueprint for Sectoral Co-operation on Skills' the Commission will support cooperation in the defence sector to ensure people have the right skills and technological ability to generate innovation.

3. **Strengthen the Single Market for defence:** The Commission will strengthen the conditions for an open and competitive defence market in Europe to help companies operate across borders and help Member States get best value for money in their defence procurement. To do so, the Commission will push ahead with the effective application of the two Directives on defence and security procurement and on EU transfers, facilitate the cross-border participation in defence procurement, support the development of industry standards, and promote the contribution of sectoral policies, such as EU space programmes, to common security and defence priorities.

**Source:** European Commission, 'European Defence Action Plan: Towards a European Defence Fund', Press release IP/16/4088, Brussels, 30 November 2016, available at [http://europa.eu/rapid/press-release\\_IP-16-4088\\_en.htm](http://europa.eu/rapid/press-release_IP-16-4088_en.htm).

These proposals should indeed contribute to developing an open, competitive, innovative and inclusive European Defence Technological and Industrial Base (EDTIB). But success will ultimately be determined by the Member States' level of "buy in", i.e. their willingness to borrow from the new fund to buy assets for their national militaries. The carrot offered by the Commission is attractive: "National capital contributions to the "capability window" will be treated as "one-offs" under the Stability and Growth Pact, which means that they will be discounted from the structural fiscal effort expected to be accomplished by Member States. The same treatment will apply to guarantees to the extent that they have an impact on deficit and/or debt."<sup>25</sup> In other words, participating Member States will be able to offset their contributions from their EU budget targets.

<sup>25</sup> Cf. Defence Action Plan, page 10, supra note 11.

To this end, concrete proposals are expected for a possible future EU-funded Defence Research Programme, to be examined under the next multi-annual financial framework (MFF), as well as the harmonisation of rules underpinning an emerging European defence industrial market. Under the current MFF, the EU could allocate €90 million between 2017 and 2019.<sup>26</sup> Arguably, this is not the 'big bazooka' required for the European defence industry to retain "its leading edge, competencies and ability to meet Europe's current and future security and defence needs while stimulating jobs, growth and innovation across the EU".<sup>27</sup> We will have to wait and see whether the next MFF will indeed allocate up to €3.5 billion between 2021 and 2027 from the joint budget for the research fund. Half a billion per year could make a difference. But one should not lose sight of the fact that, whatever the amount agreed to, efficiencies resulting from a rationalisation of national capabilities and new savings are the precondition for engaging in ambitious and new collaborative programmes through the EU.

### **3.3 Implementing the EU-NATO Joint Declaration: Small steps forward**

The "third pillar" of the EU's security and defence package is the common set of proposals for the implementation of the July 2016 EU-NATO Joint Declaration. A joint document with a set of **42 concrete proposals for implementation in seven areas** was approved by the respective Councils on 6 December 2016, i.e. in full respect of the decision-making autonomy and procedures of both organisations, based on the principles of transparency, inclusiveness and reciprocity.<sup>28</sup>

The seven areas of strengthened practical cooperation between the EU and NATO are: countering hybrid threats; operational cooperation including at sea and on irregular migration; cyber security and defence; defence capabilities; defence industry and research; exercises; and supporting defence capacity building efforts of partners in the Western Balkans, the Eastern and Southern neighbourhoods and strengthening their resilience.

**Countering hybrid threats**, in particular, is a field where the added-value of EU-NATO cooperation is already evident. Since spring 2016, the staffs of both organisations have been operationalising parallel procedures and playbooks for EU-NATO interaction in the areas of situational awareness, cyber security, crisis prevention and response, and strategic communications. The common set of proposals endorsed at the end of 2016 develops this joint framework further and focuses in particular on ways to enhance staff-to-staff interaction to share critical information and analysis of potential hybrid threats (e.g. between the EU Hybrid Fusion Cell and the relevant NATO counterpart; participation in a European Centre for Countering Hybrid Threats to be created in 2017; and joint trainings); to intensify cooperation and undertake shared trend analysis of misinformation by the NATO Strategic Communications Centre of Excellence and the EEAS Stratcom division; to seek ways to synchronise the organisations' parallel crisis response activities with the goals of providing coherent support in response to hybrid threats; and to deploy, by mid-2017 in a parallel and coordinated manner, experts to support EU Member States/Allies, upon request, either in the pre-crisis phase or in response to a crisis.

**Maritime cooperation** has been a growth area for the EU and NATO in recent months. Through a light coordination mechanism involving, the EU's external border management agency Frontex is cooperating with NATO's Standing NATO Maritime Group 2 (SNMG2) in

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<sup>26</sup> This would come on top of European Defence Agency in October 2016 already allocated €1.4 million for a pilot project due to run until 2018. The project is to fund Portuguese-led research into new sensors to help soldiers detect enemy troops inside buildings in urban conflict. It will also pay for Dutch and German-led research into using drones for border surveillance, including by "swarms" of small, autonomous aircraft.

<sup>27</sup> Council conclusions on implementing the EU Global Strategy in the area of Security and Defence, Council doc. 14149/16, Brussels, 14 November 2016, para. 14.

<sup>28</sup> Supra note 12.

the Aegean Sea to exchange information on the management of the human migration flows. NATO is tasked to conduct reconnaissance and “to find the intelligence to cue” the Turkish and Greek coastguards and Frontex assets to be able “to intercept the migrant boats and bring them back onshore into Turkey”.<sup>29</sup> In a similar vein, NATO ships and planes (through Operation Sea Guardian) are since November 2016 supporting the EU’s Operation Sophia in the Central Mediterranean with situational awareness and logistical assistance. The joint document endorsed at the end of December 2016 merely proposes to use 2017 for a lessons learnt exercise and to study opportunities for further operational cooperation at sea. It also commits to further develop EU-NATO staff cooperation on aviation in the Balkans.

On **cyber security and defence**, the EU and NATO Councils decided to immediately start exchanging concepts on the integration of cyber defence aspects into the planning and conduct of respective missions and operations with an aim of enhancing interoperability in requirements and standards. R&T innovation in the ‘dual use’ domain of cyber defence has also been earmarked as an area for further cooperation.

Similarly, the aim is to pursue coherence in the R&D of **defence capabilities** and technologies by increasing staff contacts between NATO and EU/EDA experts involved in the NATO Defence Planning Process and the EU Capability Development Plan and the search for complementarity of multinational projects. In this context, no new programmes are mentioned. Reference is only made to the existing projects on air-to-air refuelling, air transport, satellite communications, cyber defence, and drones.

As with the other two pillars of the “winter package”, the proposals to implement the Joint Declaration from July 2016 represents **no sea-change** in the modus operandi of the EU’s security and defence, but rather a firmer commitment to move EU-NATO cooperation up a notch. In view of past malpractices in coordinating between the two Brussels-based organisations, every little step forward is to be welcomed though. This is especially important in view of the EU’s commitment not to duplicate structures.

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<sup>29</sup> See the evidence provided to the House of Lords, ‘Operation Sophia, the EU’s Naval Mission in the Mediterranean: An Impossible Challenge’, HL Paper No. 144, May 2016, point 86.

## 4. UNTAPPED POTENTIAL AND CHALLENGES

### KEY FINDINGS

- Strengthen the ambitions-capabilities nexus by using the permanent structured cooperation (PESCO) mechanism provided by Articles 42(6) and 46 TEU. Enhance the role of the European Defence Agency in this respect.
- Adapt the organization and functioning of the institutions: increase the regularity of the defence debate in the European Council; create a standing Council of Defence Ministers; upgrade the Subcommittee for Security and Defence (SEDE) to a fully-fledged Committee; strengthen the consultation procedures between the European Parliament and national parliaments on defence matters; invite the Commission as a full member to the permanent structured cooperation to be; more actively use the Commissioners' Group on External Action to ensure a comprehensive approach to EU civilian-military action.
- The activation of the mutual assistance clause of Article 42(7) TEU creates inter-state obligations but does not tap into the shared responsibility with EU institutions under Article 222 TFEU. The latter provision should be invoked in case of a terrorist attack (as indeed natural disasters) in Member States in order to unlock the potential of the EU's rich toolbox.

Although the "winter package" on European security and defence is pushing the development of the CSDP forward, progress on matters related to the CSDP has so far been limited in terms of actual implementation. A number of constitutional and institutional innovations introduced by the Lisbon Treaty have not been used so far. The **untapped potential** of the current Treaty framework in the area of defence relates mainly to:

- 1) the possibility to create a framework for permanent structured cooperation (PESCO);
- 2) institutional adaptations at the level of the Council, the European Parliament and the European Defence Agency; and
- 3) the operation of the mutual assistance clause.

Apart from these innovations, able and willing Member States could also use the full potential of Article 44 TEU (*ad hoc* enhanced cooperation) to give more flexibility to EU operations in the external field.

Also, as an integral part of the CFSP, the CSDP continues to be conducted within an intergovernmental framework: decisions in the European Council and the Council are taken by unanimity (in practice: consensus). Qualified majority voting (QMV) is limited to specific cases (Articles 45(2) and 46 TEU). The Parliament is merely consulted on and informed of CSDP developments, with its views "duly taken into consideration" by the High Representative (Article 36 TEU) who conducts the CSDP (Article 18(2) TEU). Short of treaty change, the **widening of QMV in decision-making procedures** should be investigated.<sup>30</sup>

### 4.1. Permanent structured cooperation

The absence of a core group of Member States has resulted in silos of security and defence cooperation in the EU. France's unilateral intervention in Mali in 2013 is a case in point.

<sup>30</sup> This goes beyond the scope of the current paper. Cf. Blockmans, 'Expert Opinion No. 25', in A. Missiroli (ed.), *Towards an EU Global Strategy – Consulting the Experts* (Paris, EUISS 2016), 57-58, available at [http://www.iss.europa.eu/uploads/media/EUGS\\_Expert\\_Opinions.pdf](http://www.iss.europa.eu/uploads/media/EUGS_Expert_Opinions.pdf).



This operation was borne out of the need to bypass complex and slow decision-making procedures in the CSDP. In the realm of capabilities generation similar behaviour has been observed, for instance with the decision of the Netherlands to give up its heavy armour. It is more common, however, to witness Member States deepening their defence cooperation—both in capabilities generation and the planning and conduct of operations—in pairs (e.g. Belgian-Dutch naval cooperation; and the Franco-British 2010 Lancaster House Treaties) or regional groupings (e.g. NORDEFECO, CEDC). Whichever the formats and the intentions behind them, these behavioural patterns affect the CSDP in strategic and operational terms.

The variable geometry of European defence cooperation should be streamlined in order to strengthen the ambitions-capabilities nexus, all the while respecting Member States’ decisions about the appropriate level of execution of national sovereignty. The PESCO mechanism provided by Articles 42(6) and 46 TEU and Protocol No. 10 would have the ability to boost defence cooperation between a grouping of Member States. Whilst this possibility extends to operational cooperation pursuant to Article 43 TEU (e.g. as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group), the emphasis lies in practice much more on the preparation of the technical dimension of defence cooperation (i.e. financing, capability generation and industrial harmonization) based on a ‘modular approach’.<sup>31</sup>

In this respect, establishing PESCO within the mandate of the EDA<sup>32</sup> would be crucial to support a coherent and effective process of shared capability generation between an initial group of Member States. Any Member State that wishes to participate in the permanent structured cooperation at a later stage should of course be welcome to join, provided it fulfils the criteria and has made the commitments on military capabilities.

In order to meet a higher level of ambition than that expressed in the winter package, PESCO would have to be defined by a set of criteria that distinguish themselves from those included in Protocol No. 10 to the Lisbon Treaty. The Report produced by the CEPS Task Force chaired by Javier Solana presents a prescriptive guide in this respect.<sup>33</sup>

## 4.2. Institutional adaptations

Permanent structured cooperation would require an improvement of the decision-making process and not just, as agreed to by the November 2016 Foreign Affairs Council, by increasing the regularity of the defence debate in the Council and the European Council. A standing Council of Defence Ministers should be created to foster monthly dialogue on the development of CSDP. As a corollary, the Subcommittee for Security and Defence (SEDE) in the European Parliament, currently under the Committee on Foreign Affairs (AFET), should be upgraded to a fully-fledged Committee to enhance transparency and accountability of Council decision-making. Strengthening the consultation procedures between the European Parliament and national parliaments on defence matters should also be contemplated. The Commission, having responsibility for internal security matters within the Union and having requirements for dual-use capabilities, should be invited as a full member to this structured cooperation.

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<sup>31</sup> See European Council conclusions, EUCO 34/16, 15 December 2016, point 11.

<sup>32</sup> See Article 5(3)f of Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency, Official Journal of the EU, 13 October 2015, L 266/55: “The Agency, subject to the authority of the Council, shall: (...) (f) subject to a Council decision on the establishment of permanent structured cooperation, support that cooperation in particular by: (i) facilitating major joint or European capability development initiatives; (ii) contributing to the regular assessment of participating Member States’ contributions with regard to capabilities, in particular contributions made in accordance with the criteria to be established, inter alia, on the basis of Article 2 of Protocol No 10, and reporting thereon at least once a year.”

<sup>33</sup> Cf. Appendix of the Report of the CEPS Task Force chaired by Javier Solana, supra note 7.

Within the framework of the European Defence Agency, a permanent structured cooperation on defence capabilities should be established to ensure that participating Member States joining PESCO will be able to make full use of the potential granted by the Treaty to the EDA and, via the EDA, will be able to mobilise all other relevant stakeholders and instruments within the Union. The reference here is to the stipulation that the EDA shall contribute to a regular assessment of Member States' contributions (Articles 42(3) and 45(1)a TEU). A proper elaboration of the ambition in the Global Strategy's Implementation Plan on Security and Defence to create a 'European Semester' (officially: a "Coordinated Annual Review on Defence") for Member States' defence budget and capability development plans is key in this respect. Whilst no Member State will agree to submit such plans for 'approval', full transparency and openness to the comments and suggestions of partners are vital for more effective defence cooperation and addressing capability development shortfalls in a more structured, coherent and complementary way. Indeed, the EDA should not only do an *ex-post* translation of Member States' defence capability priorities into concrete collaborative programmes and support them on the coherent and complementary use of R&T resources through pooled procurement. A Steering Board of Defence Ministers of Member States participating in the permanent structured cooperation should be established. Much like the Economic and Monetary Union (EMU), defence ministers should elect among peers a permanent chairman to co-preside the Steering Board together with the High Representative. In addition, a specific board at the level of national authorities responsible for defence/capability planning and procurement should be established to ensure preparatory works for the Semester system. As such, a proper *ex ante* scrutiny process would be operated through the EDA, not just on the voluntary basis as currently proposed in the winter package. The Agency would then be in a much better position to help standardise methodologies and costing frameworks for all Member States' defence planning and capability inputs, in full coherence with NATO. The full harmonisation and integration of defence planning will ultimately be necessary to establish a coherent framework for pooling & sharing and ensure deployability and interoperability for future EU operations.

### 4.3. Mutual assistance clause

The introduction of a mutual assistance clause (Article 42(7) TEU) into the Lisbon Treaty constituted a major innovation in the development of the European Union.<sup>34</sup> For the first time the EU was bestowed with a sense of military solidarity otherwise reserved for self-defence alliances: in the case of "armed aggression on [the] territory" of one (or more) of the Member States, the others are obliged to assist. At the same time, the provision implies that the neutrality of some Member States will be respected, as will the fundamental choices about security and defence made by other Member States in relation to NATO. Indeed, for the 22 EU countries that are members of NATO, the Alliance remains the keystone for their collective defence and the forum for its implementation.

Article 42(7) TEU was invoked for the first time by France on 17 November 2015, following the terrorist attacks in Paris. By choosing the EU route instead of triggering NATO's famous Article 5, France appealed for help from what is general perceived a civilian rather than a hard military power. During the regular Foreign Affairs Council meeting (in the composition defence ministers) which followed, France's request for assistance received the unanimous support and commitment of all EU Member States.

It is striking that France chose not to invoke Article 222 TFEU, which requires that "the Union and its Members States shall act jointly in a spirit of solidarity" when a Member State is hit by, *inter alia*, a terrorist attack. After all, this 'solidarity clause' also obliges the Union "to mobilise all the instruments at its disposal, including the military resources made

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<sup>34</sup> This chapter draws on C. Hillion and S. Blockmans, 'Europe's self-defence: Tous pour un et un pour tous?', CEPS Commentary, 20 November 2015.



available by the Member States”. This mandatory language emphasises the shared responsibility of the Member States *and* the EU institutions alike, and thereby gives the solidarity clause a character that supersedes the merely inter-state obligation of Article 42(7) TEU. It is clear, however, that by invoking Article 42(7) TEU France opted for the most sovereign and least institutionalised form of cooperation, thus implying that it is up to the Member States to decide between the EU’s assistance mechanisms.

However, invoking Article 42(7) TEU holds more than just symbolic value. While activating the mutual assistance clause does not in itself imply the launch of a civilian mission or military operation in the sense of Article 43(1) TEU, this should not be interpreted as a circumvention of a possible EU dimension to the operational response to terrorist attacks. Given the legal landscape within which the clause is to operate, i.e. the part on CSDP of the Treaty (Title V, Chapter 2, Section 2 of the TEU), a more contextual reading of Article 42(7) could indeed provide for a more significant EU involvement. After all, it is not unthinkable that Member States in the Council respond to a request by one of theirs by deciding to launch an Article 43(1) ‘peace-making’ (i.e. peace enforcement) operation to bomb Daesh in Iraq and Syria.

Moreover, invoking Article 42(7) TEU triggers an obligation of conduct rather than outcome. The provision reminds EU Member States of their unequivocal obligation of aid and assistance “by all the means in their power”. This formulation allows for various forms of assistance: diplomatic, financial or in kind. It is true that the article’s explicit reference to “armed aggression” points most specifically to Member State assistance by military means. Support for such an interpretation can again be found in the legal geography of Article 42(7), which is set in the CSDP part of the Treaty, and in the prioritisation of means enshrined in Article V of the 1954 Modified Treaty of Brussels underpinning the Western European Union, from which the EU’s mutual assistance clause hails: all members “will (...) afford the Party so attacked all the military and other aid and assistance in their power”. Based on the observation that France can no longer do everything alone, namely be both in the Sahel, the Central African Republic, Lebanon and in the Levant while ensuring the security of its own territory, Minister Le Drian specifically requested that the assistance from ‘partners’ shoulder France’s military engagement in external theatres like Syria and Iraq.<sup>35</sup>

That said, Article 42(7) TEU also acknowledges the differentiated character of the security and defence policy of certain Member States, and thus implicitly recognises the possibility of non-military assistance, in the form of civilian and/or financial support. Article 42(3) TEU indeed talks of Member States making civilian and military capabilities available for the implementation of the CSDP. It is notable that President Hollande’s allocution to the French Parliament referred to Article 42(7) and called for various European policy initiatives, such as combating arms trafficking, protecting the EU’s external borders, managing refugee issues in the EU and in neighbouring states. Indeed, Hollande’s speech could be considered as a more general call to the EU and its Member States to close ranks and engage more constructively with these inter-related issues, in line with the purpose of Article 222 TFEU, and an appeal to forge a more comprehensive and longer-term EU approach to security.

Whereas the Article 42(7) TEU is replete with symbolic significance, the first-ever activation of the clause had little to do with *l’Europe de la défense* in any unitary sense and in fact missed an opportunity to mobilise all the instruments which are at the EU institutions’ disposal. In the future, the High Representative should more actively use his/her hat as Vice-President and coordinate a response within the Commissioners’ Group on External

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<sup>35</sup> When providing such assistance, Member States should be reminded of the fact that Article 42(7) TEU imposes a duty to comply with Article 51 of the UN Charter, i.e. to immediately report to the Security Council any measures taken in the exercise of their right of (collective) self-defence and to halt such actions as soon as the Security Council itself takes measures that are necessary to maintain international peace and security. Arguably, the French decision to bomb Da’esh in response to the Paris attacks falls within the scope of the mandate given by the Security Council to states in Resolution 2170 (2014).

Action (CGEA).<sup>36</sup> The CGEA has become the logical counterpart to the Foreign Affairs Council, which allows the HR/VP to deliver on her/his duty to assist the Council and the Commission in ensuring a comprehensive approach to EU action, as indeed consistency in its implementation.

#### 4.4. Challenges

As alluded to before in this paper, the establishment of a European Defence Union (EDU) also faces **important challenges**.

**The political willingness** among the Member States to move forward is the obvious factor of uncertainty. Whereas terrorist attacks on European soil, the ongoing turmoil on the outer periphery of the European Union, the outcome of the Brexit referendum and comments by US President-elect Trump on the viability of NATO have contributed to a political momentum among Member States to make headway on long-cherished ideas of a stronger military arm for the EU, that window of opportunity may close rather quickly as a result of current governments being replaced in national plebiscites won by eurosceptic or anti-EU forces. After all, the pervasive mood of insecurity that seems to inform voters to opt for parties on the extremities of the political spectrum does not automatically translate in transnational, let alone supranational, solutions. The shock result of the UK referendum has led to a modest rally around the European flag, but the Bratislava Process initiated by the EU27 to galvanise that feeling into a vision for the EU post-Brexit is facing difficulties in papering over the political cracks that have appeared between Member States. While security and defence have so far proved to be areas to present a common stance, the publication in the second half of 2016 of a whole raft of own-initiative, bilateral and plurilateral non-papers, as indeed the invitation by the Council to the High Representative to explore the possibilities for PESCO, suggest that increased differentiation may well be the future for the CSDP.

The **prospect of Brexit** means uncertainty for the CSDP, since the UK was both a mover and an obstacle to its development. As one of the just two EU Member States with a nuclear capacity, autonomous force projection capability, formidable diplomatic and intelligence networks and a permanent seat on the UN Security Council, the absence of the UK from the CSDP would be felt, especially in operational terms. That said, the UK has been a constant objector to measures which it perceived as constituting EU competence and representation creep in an area close to its sovereign heart. Ironically, the UK may adopt a more constructive approach to the development of the CSDP once it has left the EU. After all, it would be in Westminster's strategic interest to cooperate with a capable and effective EU security provider on the continent and in the neighbourhood. But we cannot be sure of this close bilateral cooperation until we know what the future governance model of the CSDP and the partnership framework with the UK as a third country will be.

Finally, more than the conceptual ambivalences about security and defence (cf. Chapter 2 of this study), the **constitutional disconnection** between the CSDP, as an integral part of the CFSP (relegated to the TEU), and the EU's other policies (embedded in the TFEU) will continue to haunt the quest for a truly comprehensive approach to EU security action. The separation of decision-making processes, instruments and financial arrangements are the surviving elements of a half-baked "de-pillarization" attempt by the Lisbon Treaty; a legal divide which neither the merger of all EU external action objectives in Article 21 TEU nor the creation of hybrid structures like the EEAS and the integrated approach proposed by the High Representative in the EU Global Strategy will be able to fully overcome. In this respect, only treaty change can offer a solution.

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<sup>36</sup> See S. Blockmans and S. Russack, 'The Commissioners' Group on External Action – Key political facilitator', CEPS Special Report No. 125 / December 2015, available at <https://www.ceps.eu/publications/commissioners'-group-external-action---key-political-facilitator>.

## 5. CONCLUSIONS

### KEY FINDINGS

- **Constitutional limits to an integrated approach.** Recent practice shows the convergence of strategic objectives, legal mandates and operation plans pursued by EU actors hitherto confined to either internal or external security. This is testament to the idea that a comprehensive understanding of “security” not only includes the recognition of the multidimensional nature of security issues, the widening of actors as objects and subjects of security, but also the broadened scope of security responses across the spectrum, including “defence”. However, legal bases, decision-making procedures, budgetary modalities and staffing arrangements remain distinct.
- **The “winter package” on European security and defence is not a game-changer** but part of a longer trend. It clarifies the stated ambition of the EU Global Strategy but does not pitch it at a new level. That said, the lists of concrete proposals and detailed timelines contained therein, as well as in the Commission’s Defence Action Plan, are most welcome. The initiatives to create a permanent operational headquarters, a European semester for defence, a European Defence Fund, and to start harmonising standards and requirements for a European defence industrial market are all actions that deserve to be supported. However, talk about “turbo-boosting” defence spending is exaggerated.
- **The untapped potential of the Lisbon Treaty** lies primarily in the possibility to create a framework for permanent structured cooperation (PESCO); institutional adaptations at the level of the Council, the European Parliament and the European Defence Agency; and the modus operandi of the mutual assistance clause.

Tapping into the political momentum generated by a worsened security climate in and around Europe and the prospect of Brexit, the 2016 “winter package” on security and defence has been hailed as an ambitious set of proposals that will push the CSDP forward. Whereas the three pillars of the package were indeed developed and endorsed with remarkable speed, both by the EU28 (!) and NATO, one cannot help wondering whether everything has changed while everything has remained the same.

Arguably, the 2016 revival of CSDP is not a game-changer but part of a longer trend. The strategic direction had already been determined in a more *Realist* fashion, first in the 2015 Review of the European Neighbourhood Policy and then in the June 2016 EU Global Strategy. The Implementation Plan which gives hands and feet to the security and defence part of the EUGS clarifies the stated ambition but does not pitch it at a new level. That said, the lists of concrete proposals and detailed timelines contained therein, as well as in the Commission’s Defence Action Plan, are most welcome. The initiatives to create a “permanent operational planning and conduct capability” (i.e. headquarters) for CSDP missions and “non-executive military operations” (i.e. non-combat missions), to set up a “Coordinated Annual Review on Defence” (i.e. a European semester), to establish a European Defence Fund, and to start harmonising standards and requirements for a European defence industrial market are all actions that deserve to be supported.

The *langue de bois* used in the documents is the same as before though — still useful, it seems, to paper over the different views espoused by Member States. As always, the devil is in the detail. Two examples serve to illustrate this point. Firstly, PESCO, as proposed in the winter package is a place-holder: the proposals are all about capabilities, without dealing with the institutional consequences. Secondly, the prospect of earmarking EUR 500

Million per year to spend on R&D may look groundbreaking — if indeed agreed to under the next MFF, but its potential to “turbo-boost”<sup>37</sup> defence spending is limited as it will probably only be able to fill existing shortfalls.

The key to success is greater **strategic convergence**, leading EU Member States to fully recognise the link between the inevitable restructuring of their armed forces in the short term (which is already happening through defence spending reviews carried out in most Member States) and the long-term added value of pooling and sharing military capabilities in terms of sustainability and effectiveness. Without a common agreement on which capabilities can be scrapped, which new ones should be developed together and for what purpose, the suggested targets are unlikely to be attained any time soon.

While the 2016 winter package hints at promising developments for the future of European security and defence, the initiatives are still in the experimental phase and, in and of themselves, fail to provide the CSDP with the level of input needed to effectively meet current and future challenges. Progress in the three pillars will be evaluated by the European Council in June 2017 and will be a real credibility test. Assurances that ‘work is in hand’ must not suffice. EU leaders should seize the opportunity to go beyond the modest agenda set out so far, agree on a higher level of ambition to create a more integrated framework for their defence cooperation, and be even more specific and demanding in its reporting requirements, for instance by asking for costed plans to achieve these ambitions within strict timeframes.

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<sup>37</sup> ‘Brussels plans to ‘turbo boost’ defence spending’, Financial Times, 28 November 2016.

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