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Towards a Defence Union?

The future of the ESDP after the Constitutional Treaty failure

The European Security and Defence Policy is the least institutionalized area of the cooperation within EU framework, which makes it also the least flawed one in the wake of the constitutional treaty failure. It still remains the exclusive domain of the Member States who manage the national military and police capabilities. The main controversy regarding ESDP is not concerned with the dispute over the competence within the Union but that over the relationship with NATO.

Hence the most important amendments accepted during the Convention debates and Inter-Governmental Conference can be introduced even if there is no constitutional treaty ratified. One example could be the European Defence Agency, brought into being by the instrument of common action in July 2004, or the permanent structured cooperation that resulted from creation of the Battlegroups.

It does not mean, however, that the lack of a Constitutional Treaty has no impact on the way ESDP operates. According to the official record (23) attached to the treaty, the condition allowing membership of the permanent structured cooperation is participation in EDA operations as well as in creating Battlegroups. The lack of this regulation can encourage the growing distance between the countries that differ in terms of their defence capabilities (the big countries may begin to tighten the criteria

of participation in the cooperation) and weaken the enthusiasm for the military forces reform. EDA operating outside the treaty framework means that achieving the aims depends exclusively on the goodwill of the Agency members in meeting the commitments once given. ¹

The crucial question about the future of ESDP, though, concerns the direction in which this area of cooperation will be evolving rather than its constitutional shape. The constitutional treaty regulations suggested the possibility of gaining through the Union the features of a NATO-resembling organization of collective defence. ² The treaty collapse annihilates such a possibility, at the same time creating a solid basis for the development of the European defence on a national basis by consolidation of the member countries' particular military capabilities, and on the basis of the solidarity clause.

I. Interpretation No 1 – rejecting the common defence concept

In the focus of the discussion about ESDP from the beginning of the 90s a question dominates as to whether the EU should confine itself to developing its civilian and military capabilities of managing crisis situations, or tend towards a defence union having a mutual help clause in case of an armed aggression on a territory of any Member State. What the constitutional treaty suggests is the second option. It is, however, suggested in a rather vague and dangerous way.

According to Article I-16 of the Constitutional Treaty, "*The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.*" Article I-41 makes this principle more precise, adding: "(...) *when the European Council, acting unanimously, so decides.*" There are two issues that need a closer look: the distinction between 'defence policy' and 'common defence' as well as the assumption that defence policy shall result in common defence.

Both phrases reflect the dispute that has been going on for years between the supporters of 'European' option and those of 'Atlantic' option within the Union. The first option would see the EU as an organization that gradually turns into a defence union, while the second one in this very process sees a threat to the NATO mission. The additional factor that supports the position of the Atlantic option is the role of the neu-

tral countries. This is why from the beginning of the 90s the EU has developed only 'defence policy', understood as a concept of, and structures and resources for, the needs of the crisis operations (the so-called 'Petersberg Missions'). The issue of common defence remains in the domain of NATO.

In fact, today, this distinction has first of all a political character. The traditional concept of NATO as the institution of common defence of the state territory against armed aggression practically lost its meaning after the changes of security situation in Europe after 1989. The notion of 'defence' has been separated from the borders of the country and relocated into the realm of defence of 'citizens and state affairs security'. In this sense, 'defence' is realized through the 'defence policy', i.e. the actions outside the NATO territory, in the form of tasks that bring and keep peace in the trouble-spots or abolish the regimes that pose a threat to NATO members' security. The notion of 'armed aggression' has also been interpreted in a more flexible way, which caused the shift in the meaning of the whole mutual defence clause. A huge role, by some judged as negative, was played here by the reference to Article 5 of the Washington Treaty as a response to the terrorist attacks on New York and Washington.

In the context of NATO, the process of blurring the distinctive features of the defence policy and common defence means that so-called 'out-of-area' missions or 'non-article-5' missions are more important today for the security of NATO members, the defence of their societies and affairs, than the traditional mission of defence against armed aggression. As for the development of ESDP, it results in the opposite process: increasing engagement in crisis management out of the EU territory makes the problem of common defence from a practical point of view of minor importance.

The result of this situation is the increasing rivalry between the EU and NATO, which – contrary to common belief – does not concern the right to implement the mutual defence clause that Article 5 of the Washington Treaty talks about, but the right to act in the name of Europe while performing the contingency tasks and defending its security (not the territory).

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Both the Convention and the Intergovernmental Conference sustained the vision of European defence as the one defined by the dispute over the NATO role. That is why the draft of Article 40 prepared by the Convention aroused controversy.

“Until such time as the European Council has acted in accordance with paragraph 2 of this Article, closer cooperation shall be established, in the Union framework, as regards mutual defence. Under this cooperation, if one of the Member States participating in such cooperation is the victim of armed aggression on its territory, the other participating States shall give it aid and assistance by all the means in their power, military or other, in accordance with Article 51 of the United Nations Charter. In the execution of closer cooperation on mutual defence, the participating Member States shall work in close cooperation with the North Atlantic Treaty Organisation.”

Following negotiations held during the Intergovernmental Conference the above article was totally changed, but, interestingly, only in terms of making a closer cooperation in this area impossible. The mutual defence clause, though, was left. The new version of the article I-40 (7), superseding I-41(7), states:

“If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organization, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation”.

In the context of the discussion of the 90s this change comes as a surprise, as most of the states then were opposed to including in the treaties the clause of mutual defence in case of aggression. The first paragraph of the article is, though, a copy of Article 5 of the modified Brussels Treaty of 1954 about Western European Union. What is essential, and at the same time peculiar, about this change is the fact that although all the member states (and not only those participating in a closer cooperation) are obliged to supply aid to one another, it does not imply that the EU becomes a defence alliance. This shall be decided only by the European Council (in accordance with Article I-41 (2)). In other words, article I-41(7) of the Constitutional Treaty implements

the clause of mutual defence in case of aggression without a formal consent, or even despite the political resistance towards creating the alliance.

Such a solution is an obvious absurdity and serves as an example of a superficial change which aims at satisfying the parties in this conflict rather than enhancing the integration. In this way the debate over one of the most important issues of European politics is being undermined. What comes out instead is a dangerous illusion of “quasi-warranty” that in this area of cooperation above all should not exist.

II. Interperation No 2 – the emergence of a defence union

The idea of European defence as the third pillar of the Unions – including European Economic Community and European Political Cooperation – from the very beginning was oriented towards building a political union rather than a military alliance whose aim would be to repel and defend Europe against armed aggression. The Pleven Plan that predicted the creation of a European Defence Community, was created with no military staff assistance. It was the result of Jean Monnet’s belief that the European defence is “essentially a political issue.”³ This idea was present also in the early 90s when France and Germany were creating the Eurocorpus and discussing the shape of CFSP in the Maastricht Treaty. This issue reappeared also during the Iraq crisis and the European Convention debates. The French-German-Belgian-Luxembourg summit in Tervuren in April 2003, when its participants announced creation of the European Security and Defence Union, was the next attempt to create a defence union on the basis of a few top members’ decision. The attempt ended in failure.

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This, however, did not result in the failure of the general project of the defence union. It only undermined the method of its implementation, the Constitutional Treaty having introduced a solid basis to create a defence union using another idea that can be realized even without a constitution.

Firstly, this idea assumes setting up a nationally-based process of building the defence union, the process that is close to the assumptions of the functional theory of the

European integration. In other words, according to the supporters of this approach, the process of political integration was preceded by the tightening of the economic union. Over the span of years it had a so-called “spillover effect”, spreading over vast areas. In terms of defence cooperation, the tool to create the defence union is integration on the military level, i.e. the industrial base, command units and structures.

Secondly, this concept is based on a solidarity clause (solidarity in the event of terrorist attack), so the aim of the military union in this version is to protect European security and affairs rather than its territory.

From this point of view, the key institution for the integration of military capabilities of Member States is the European Defence Agency. Its main mission is to support the Council and the Member States in developing military capabilities in the field of crisis management and to sustain the development of ESDP. The mandate includes coordinating and implementing the European Capabilities Action Plan (ECAP), coordinating armament projects and actions aimed at establishing the European military base. In this way the EDA potentially becomes a powerful political tool for uniting the economic foundations of the European defence.⁴ It is also a natural institutional support for the Council debating in the format of Ministers of National Defence.

The political basis on which the integration of military capabilities is going to be achieved, along with the establishment of the Battlegroups, is the so-called Petersberg Missions that stand for the kind of crisis tasks which the Union is going to be capable of undertaking. The Constitutional Treaty increased its number and included also disarmament operations, military advice and assistance missions, peace-keeping and anti-terrorist missions. As a result, in the area of ESDP interest there can be found all the operations except the large-scale military actions. The lack of the constitutional treaty does not have any particular meaning as the missions undertaken depend only on the threat assessment and development of existing capabilities.

The rule for creating the defence union and selecting its members according to their activity on the EDA and Battlegroups forum is the above-mentioned permanent structured cooperation. The initial version of Article 40(7) of the Convention project assumed that the defence union would be created in the course of *closer cooperation* and to some extent it was introduced via the back door; all that is different is the context that results from different methods of integration.

The power of the three components necessary for the process of nationally-based integration of part of the military capabilities of the Member States comes out of the cooperation that is taking place. It concerns not only industrial cooperation within consortium EADS, OCCAR or LoI, but also the military cooperation between staffs and Member States units. The meaning of this kind of cooperation increases as the EU engagement in the Petersberg Missions grows. What is worth mentioning is that the Battlegroups are the first military project realized within the political structure of the EU that includes the participation of the new member states.

The process described above has broad autonomy within treaty regulations that do more to sanction its character than to set the limits for actions. It can have consequences for the foreign policy of the EU towards the areas of possible operational interest.

Using the units under the EU banner requires the unanimous decision of the Council (Article I-41(4)). The treaty, however, enables entrusting the execution of a certain task to a group of Member States that have the necessary capability (Article III-310(1)) in order to protect the Union's values and serve its interests (Article I-41(5)). This decision must be passed unanimously. There is thus no possibility for a group of Member States to act arbitrarily, entrusting the task to themselves. What is more, the group has to give an account of the ongoing operation at the request of another Member State, and in case the task entails "major consequences" or needs the amendment of the objective, scope or conditions determined for a task, the Council adopts the necessary European decisions (Article III-310(2)). Although the lack of the Constitutional Treaty formally dismisses such a possibility, the content of Article III-310 reflects the actual trend in thinking about the ESDP. Creating a separate legal regime for the political aspect of the task that is bound to the decision-making, and also for the operational aspect that is connected with its execution, corresponds to the need for flexibility in the Union's actions. This regulation seems obsolete, however, as in practice there are not so many countries willing to take part in the tasks, and creating the coalition of the willing is to some extent included in the operational activity logic of the ESDP. Sanctioning of this custom entails, though, the question about its long-term consequences. Frequent taking of responsibility for tasks by the same group of states may result in the real takeover of the responsibility for ESDP, not only in the operational sense, but also in the strategic one, laying foundation un-

der a ‘European concert’ of powers. This pattern seems enhanced by separating the European strategic staffs that presently include the staffs of France, Germany, Great Britain, Greece and Italy, instead of creating an EU-operational HQ, due to the resistance of the NATO-oriented EU members. Another favourable, but rather unlikely today, factor for institutionalization of ‘the concert’ would be a change of ESDP financing scheme. If the Athena mechanism would be replaced by a special ESDP budget established outside the EU budget, using a different principle of sharing the costs among the Member states, such an institutionalized cooperation would have vital consequences, both politically and strategically for the Union’s defence policy.⁵

The nationally-based integration method within the ESDP area meets, though, with one significant obstacle. Developing capability regarding Petersberg Missions and the progressive integration of the military capabilities will not spontaneously create a defence union. What is needed is a broader political plan and/or a common threat. The superficiality of the mutual defence clause in the event of armed aggression (Article I-41(7)) means that the legal and institutional basis of creating a defence union can be the only clause of solidarity in the event of a terrorist attack. Such an interpretation at first glance may seem far-fetched, as this clause belongs to the domestic affairs and justice domain of cooperation rather than to defence policy (despite the fact that ESDP bodies are engaged in its implementation). Viewed from the conceptual side, however, it fits well as the model of the only *defence* that is important for many Union members. As Article I-43 states:

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solidarity within a European defence Union will be the derivative of the political integration degree of the states rather than the fear of common threat.

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

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

The procedure for the solidarity clause implementation is regulated by Article III-329 that states, *inter alia*, that the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy.

In fact, it is not so important that the failure of the Constitutional Treaty deprives the clause on mutual defence in the event of armed aggression of any particular meaning for the ESDP development, as it is significant that it brings into prominence the solidarity clause. Although both Articles, i.e. I-41(7) and I-43, will not be in force, the solidarity clause has already found its practical application after the terrorist attack in Madrid. ⁶ Referred to in Article I-41(7), the threat of armed aggression to a territory and the lack of procedures for the execution of such a rule make the clause a dead letter. On the other hand, the way Article I-43 defines the threats, as well as its implementation procedure (decision of the Council on the basis of Political and Security Committee guidelines), makes it a sound formal and legal foundation for the future existence of the defence union. The lack of an anchoring treaty may even encourage the flexible interpretation of the clause regulations and be used as a starting-point to undertake military operations out of the EU territory. The scale of the threat and political will of the states would be the only limitation factors of the clause execution.

The defence union project described above is essentially different from a formulaic defence alliance, which the EU will never become. There is also no need that it should, because of the fact of NATO existence and the modified perception of threats. The basic principle of such a Union is seeing security in terms of a policy and the resources vital for its implementation rather than in terms of a strategy (as takes place in NATO). The allied solidarity will then be the derivative of the political integration degree of the states rather than the fear of common threat.

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¹ Cf. M. TRYBUS, the New European Defence Agency: A contribution to a common European security and defence policy and a challenge to community *aquis*?, *Common Market Law Review* 43, 2006, s. 693-695.

² Cf. C. TORO, The latest example of enhanced co-operation In the constitutional treaty: the benefits of flexibility and differentiation in European security and defence policy decisions and their implementation, *European Law Journal*, vol. 11 no. 5, September 2005, pp. 641-656.

³ S. DUKE, *The Elusive Quest for European Security. From EDC to CFSP*, Macmillan Press, 2000, p. 18.

⁴ COUNCIL JOINT ACTION 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency

⁵ V. PERTHES, S. MAIR (red), *Europäische Aussen- und Sicherheitspolitik. Aufgaben und Chancen der deutschen Ratspraesidentschaft*, SWP, Berlin, September 2006, s. 17.

⁶ A. MAURER, *Nachsitzen, Sitzenbleiben oder Klassenverweis? Realisierungsperspektiven fuer den Europaeischen Vertrag*, SWP-Studie 4, Februar 2006, Berlin.