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# **The Current Legal Basis and Governance Structures of the EU's Defence Activities**

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**ENVISIONING A NEW  
GOVERNANCE ARCHITECTURE  
FOR A GLOBAL EUROPE**



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## Executive Summary

This Working Paper explores the current legal basis and governance structures of the EU's Common Security and Defence Policy (CSDP) and other areas with defence implications. It provides a summary of ground rules to address the boundaries of enhancing the functioning of the CSDP and reveal the possibilities that are offered by the existing legal framework. The paper emphasises that the current Treaty framework allows the use of the so-called "sleeping beauties", including the potential use of Article 44 of the Treaty on European Union. The latter may contribute to achieving the EU's strategic objectives by allowing a group of Member States to perform a task in the EU's interest. The paper also highlights recent actions taken to increase defence collaborations and industrial activities, which are expected to boost the coordination and effectiveness of EU defence policy and to foster the competitiveness of the European defence industry.

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# Table of Contents

Executive Summary.....	2
1 Introduction.....	4
2 The EU Legal Framework for CSDP.....	6
2.1 Common Defence Policy vs. Common Defence.....	7
2.2 Protecting Each Other.....	8
2.3 Missions and Operations .....	11
2.4 Decision-Making Procedures and Actors in CSDP .....	15
2.5 Treaty Provisions for Flexible Integration .....	21
3 Capability- and Industry-Related Aspects of the CSDP.....	27
3.1 Capability Development Processes.....	27
3.2 Article 346 TFEU and Defence Package.....	31
3.3 The European Defence Fund (EDF) and its Precursor Programmes.....	35
3.4 Action Plan on Synergies .....	40
3.5 Technology Roadmaps.....	42
4 Conclusion .....	44
Reference List.....	45



# 1 Introduction<sup>1</sup>

This Working Paper is part of a set of three papers aiming to provide a summary of the current legal and governance structure for the European Union's (EU) external relations.<sup>2</sup> By addressing the ground rules, the three papers aim not merely to address the boundaries for proposals to enhance the functioning of the EU as a global actor, but also – or perhaps mainly – to reveal the possibilities that are offered by the existing legal framework. Specifically, this paper, as part of Work Package 4 of the H2020 ENGAGE project (“Envisioning a New Governance Architecture for a Global Europe”), provides an overview of the existing legal basis and governance structures for the Common Security and Defence Policy (CSDP) and other areas with defence implications. As the first paper in Work Package 4 of the H2020 ENGAGE project, it aims to provide the basis for further analysis which will include the development of assessment criteria for a wide range of CSDP activities that address the effectiveness, efficiency, coherence and sustainability of EU defence cooperation.

The Working Paper is divided into two main parts. In the first part, it provides the legal framework for CSDP and discusses the substantive Treaty provisions in this area. This legal and governance structure, and in particular the requirement of unanimity, is often believed to prevent the EU from taking bold actions at the international level. Although EU Member States have accepted significant forms of institutionalisation and legalisation in the area of foreign, security and defence policy,<sup>3</sup> the Treaty drafters have always sought to retain their identity and, more importantly, their potential to act unilaterally in this area. This part of the Working Paper, therefore, analyses what can or cannot be achieved under the current legal framework, including the potential establishment of a ‘common defence’; the application of (and the differences between) Articles 42(7) of the Treaty on European Union (TEU) and Article 222 of the Treaty on the Functioning of the European Union (TFEU); the launch of missions and operations as well as cooperation with third States and international organisations in that regard; decision-making procedures and institutional actors in CSDP; and finally, the potential use of flexible integration in the area of security and defence policy, including Article 44 TEU and Permanent Structured Cooperation (PESCO).

In the second part, the Working Paper examines the recent actions taken to increase defence collaborations and industrial activities, both expected to increase the coordination and effectiveness of the EU's defence policy and to foster competitiveness of the European

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<sup>2</sup> See the other two, related works: Working Paper 5.1 on the legal base and governance structures of the EU's CFSP and Working Paper 6.1 on the legal base and governance structures of the EU's ‘External Action Plus’.

<sup>3</sup> See more details on this question in D5.1 on the legal and governance structure of the CFSP.



defence industry. In fact, the credibility of the CSDP depends, on the one hand, on the common understanding of threats and on an effective common approach towards countering the identified threats. On the other hand, its credibility is dependent on the competitiveness of the European defence industry. Work towards this latter aspect can be enhanced through increased coordination among Member States and the phasing out of individual practices that prevent this area from being more effective. Although defence and national security remains the primary responsibility of the Member States, the EU is increasingly expected to promote cooperation in defence and at the industrial level, the latter to be performed to develop technology and critical capabilities needed to face various types of security challenges. Such an effort should be done by ensuring synergy among the different EU policies with defence implications, by taking also into consideration the main capability shortfalls and requirements of the national armed forces.



## 2 The EU Legal Framework for CSDP<sup>4</sup>

The Lisbon Treaty put greater emphasis on security and defence than previous treaties, which can be seen both in the new name of this policy area as well as its placement in the wider scheme of external relations provisions. Lisbon has introduced the *Common Security and Defence Policy*, bringing it in line with the Common Foreign and Security Policy (CFSP), albeit the latter has had a longer institutionalisation history within the EU Treaty framework. The significance of the CSDP, as well as its link with CFSP, is also illustrated by Article 42(1) TEU, which states that “[t]he common security and defence policy shall be an integral part of the common foreign and security policy”. It is now deeply integrated into the CFSP framework: CSDP and CFSP provisions are grouped together under the chapter on “specific provisions on the common foreign and security policy” (Articles 23-46 TEU), albeit CFSP and CSDP are separated by different sections (section 1 CFSP, section 2 CSDP), and preceded by a chapter on general provisions on the Union’s external action (Articles 21-22 TEU). Specific CSDP provisions are now contained in five articles (Articles 42-46 TEU) (see also Koutrakos, 2013, pp. 30–31).

### Article 42(1) TEU

The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.

Title V, Chapter 2, Section 2 of the TEU lists the “Provisions on the Common Security and Defence Policy”. Article 42 TEU provides the general principles of the CSDP, while Articles 43-46 TEU give further specifications. CSDP objectives are outlined in Article 42(1) TEU in which the external nature of this policy area is underlined (Wessel, 2020, p. 314). This provision refers specifically to “missions outside the Union” which makes clear that operations are carried out outside EU territories and implicitly also that the protection of EU territories remains the primary responsibility of each EU Member State and the North Atlantic Treaty Organization (NATO) for those members being part of both organisations.

This section continues with an overview and analysis of CSDP through five main issues:

- the possibility to create a common defence in the Union;
- the use of the mutual assistance clause and the solidarity clause;
- the launch of missions and operations;

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<sup>4</sup> For a general overview on the architecture of EU external relations law see D5.1 and D6.1. This Working Paper 4.1 focuses on substantive CSDP provisions and other areas with defence implications.



- the decision-making procedures and the main actors in CSDP; and
- the possibility to use flexible cooperation in CSDP matters, including Article 44 TEU or PESCO.

## 2.1 Common Defence Policy vs. Common Defence

The Treaties seemingly differentiate between ‘common defence policy’ and ‘common defence’. The former has already been established with the CSDP. The latter, however, apparently falls outside the Union’s areas of competence because it can only be realised, based on Article 42(2) TEU, if the European Council unanimously decides to create one. The former already exists but Article 4(2) TFEU provides that “national security remains the sole responsibility of each Member State”. Altogether, it seems that the Treaty has created the possibility for a ‘common defence’ (once again: if approved unanimously by the Heads of State and Government), while it has also guaranteed the neutral or non-aligned position of some Member States, especially the position of non-NATO members Austria, Finland, Sweden, Ireland, Malta and Cyprus. The latter group is, in fact, protected by the second indent of Article 42(2) TEU which provides that “[t]he policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States”. However, as the second indent of Article 42(2) TEU specifies, for some Member States ‘common defence’ has been established by NATO.

### Article 42(2) TEU

The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.

The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

Despite the different levels of Member State engagement in the area of security and defence policy, common defence has already been established, to some extent, within the EU, especially if one looks at the so-called ‘mutual defence clause’ of Article 42(7) TEU: it comes quite close to common defence, which eventually renders Article 42(2) TEU a bit unclear about what the European Council is supposed to vote on when Heads of State and Government decide on ‘common defence’ (Wessel, 2020, p. 315). Common defence could entail the transfer of sovereignty in the area of military security, including the use of majority voting in military operations or the obligation of Member States to participate in joint missions (Fischer & Thym, 2013, p. 1214). The requirement of evolution towards ‘common defence’ remains unchanged



after Lisbon: Treaties are to be amended by a simplified procedure which boils down to a unanimous decision of the European Council. Although an Intergovernmental Conference should not be convened, EU Member States must adopt a decision in accordance with their constitutional rules and ratify the amendment. The ratification is, however, not an obligation given that Article 42(2) only *recommends* such acts (Fischer & Thym, 2013, pp. 1214–1215).

## 2.2 Protecting Each Other

With the introduction of Article 42(7) TEU and Article 222 TFEU, the Lisbon Treaty has strengthened solidarity between EU Member States in cases when they need to deal with immediate threats of a different nature. As the case of the 2015 terrorist attacks in France demonstrated, the choice between the two provisions is not necessarily easy but the activation of one of these provisions may prove valuable in coordinating Member States' actions of a different nature.

### 2.2.1 Article 42(7) TEU

The mutual assistance clause, laid down in Article 42(7) TEU, has its origin in Article 5 of the 1954 modified Brussels Treaty instituting the Western European Union (WEU). One of the main questions in the area of EU external action was whether the EU should develop a 'mutual defence clause', similar to NATO's or the WEU's practice. The dissolution of the WEU and its integration into the EU paved the path towards the mutual defence clause in the EU Treaty (Wessel, 2001). Yet, the introduction of such a clause was not without challenge given that it was supposed to represent and reconcile different Member State interests, which required mediating between those seeking a mutual defence commitment, those seeking to protect their neutral status, and those wanting to ensure that the article would not undermine NATO (Quille, 2008). One way to alleviate the opposition of neutral and non-aligned Member States was to delete any references to military aspects from the original proposal. Despite changing the wording, Article 42(7) TEU covers collective defence by military means, which is best demonstrated by its position amongst other CSDP provisions and the explicit reference to Article 51 UN Charter and to NATO. In principle, every Member State (except Denmark) is bound by the obligation of mutual assistance but the second sentence of Article 42(7) TEU adds that this obligation "shall not prejudice the specific character of the security and defence policy of certain Member States". While the term "certain" is not further defined, it is commonly read as referring to the above-mentioned 'neutral' states. However, this immunity is not absolute – if an act does not compromise their national security, these Member States will also be under legal obligation to render aid and assistance to the Member State concerned (Fischer & Thym, 2013, pp. 1227–1229; Ramopoulos, 2019), to an extent and with the means considered appropriate and in line with their national defence policy.

#### Article 42(7) TEU

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 Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.

The provision covers self-defence, as the reference to Article 51 of the UN Charter also illustrates, although its wording is different: EU Treaties refer to “armed aggression” instead of “armed attack” under the UN Charter, but both ultimately refer to self-defence. Article 42(7) TEU is also different from other collective defence clauses: compared to Article V of the WEU Treaty, it does not foresee any automatism and gives Member States large discretion to comply with their duties to aid and assist. The mutual defence clause is closer to the widely known Article 5 of the North Atlantic Treaty which allows States to assist the State concerned by “such action as it deems necessary” (Moser, 2015; see also Lonardo, 2017). Another reading can be that the reference in Article 42(7) TEU to “by all the means in their power” seems to be more demanding than NATO’s Article 5. The framework of application of Article 42(7) should, however, be adapted to the widened range of threats the EU and its Member States face and take into consideration an eventual use of the mutual assistance clause in case of hybrid attacks.

For the first time in EU history, French President François Hollande invoked the mutual assistance clause after the terrorist attacks in mid-November 2015 (Hollande, 2015). Interestingly, France did not choose to invoke the so-called ‘solidarity clause’ under Article 222 TFEU, which could have been more appropriate. This clause flowed from the “Declaration on Solidarity Against Terrorism”, issued by the European Council after the Madrid terrorist attacks in March 2004, although the Declaration does not refer to a role for the Union as such, but to the “Member States acting jointly” and under the coordination of the Council (Wessel, 2020, p. 316). The day after the 2015 terrorist attacks, Defence Ministers unanimously agreed to support France and indicated “their readiness to provide all the necessary aid and assistance” under Article 42(7) TEU. The Council Conclusion also noted that “offers of material assistance or of support in theatres of operation where France is engaged may be made” and that “[n]o formal decision or conclusion by the Council will be required to implement article 42(7)” (Council of the EU, 2015). France sought support and assistance in different forms from its EU partners (Le Drian, 2015). Invoking Article 42(7) TEU was more than symbolic: EU Member States were under a legal obligation to aid and assist “by all the means in their power”, including diplomatic, financial or military means. Given that France could no longer continue alone with its responsibilities in the Sahel, the Central African Republic, Lebanon and the Levant while ensuring the security of its own territory, EU partners were expected to contribute to French military engagements. The fact that the clause was invoked in a meeting of EU Defence ministers also explains the military focus of the French request (Hillion & Blockmans, 2015). Indeed, some of the Member States were expected to join French military action against the so-called Islamic State in Syria and Iraq (IS), especially because at the time France was the only EU Member State participating in military strikes against IS over Syria. Other EU Member



States were expected to help reduce the load of French military forces elsewhere, especially in sub-Saharan Africa. The UK, for instance, raised the possibility to expand British military involvement against IS in Syria; Germany sought to increase its contribution to the EU training mission (EUTM) in Mali and would further contribute to the UN peacekeeping mission in Mali (MINUSMA) (Cîrlig, 2015); Spain and Poland offered to help in the sub-Saharan African region; and Italy sought to avoid its involvement in armed attacks in Syria but was willing to provide logistic and military support (ECFR, 2015).

## 2.2.2 Article 222 TFEU

Although not a substantive CSDP provision, Article 222 TFEU merits attention here due to its overlap with Article 42(7) TEU. In fact, the 2015 terrorist attacks in Paris raised the possibility to invoke Article 222 TFEU, the so-called ‘solidarity clause’. This provision imposes an explicit obligation on the “Union and its Member States [to] 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 first sentence of paragraph 1 defines the types of events that fall within the scope of Article 222 TFEU: terrorist attacks, and natural and man-made disasters. Its broad scope allows the article to be invoked in different types of attacks or disasters, including possible cyber or space attacks, pandemics or energy shortages. However, a literal reading of the first paragraph gives the impression that the prevention and protection provisions may apply only to counterterrorism. The Union’s instruments to be mobilised (within the meaning of the second sentence of paragraph 1) may include assistance to strengthen the capacity of law enforcement or judicial authorities or the support of measures to address threats to international transport or critical infrastructure (Blockmans, 2014; Myrdal & Rhinard, 2010). It is noteworthy that the protocol annexed to the Lisbon Treaty “on the concerns of the Irish people” provides that “it will be for Member States [...] to determine the nature of aid or assistance to be provided to a Member State which is the object of a terrorist attack or the victim of armed aggression on its territory”.

Article 222(2) TFEU addresses the Member States instead of focusing on EU-level measures. EU Member States are obliged to make assistance available, but this obligation is pre-conditioned on an express invitation from the political authorities of the Member State concerned. This assistance should be read as a “duty to be prepared to assist”, otherwise Member State assistance may not be delivered upon a terrorist attack or disaster. Declaration No. 37 attached to the Treaties, however, provides that a Member State has the right to “choose the most appropriate means to comply with its own solidarity obligation towards [an affected] Member State” (Blockmans, 2014).

Article 222(3) TFEU is a procedural provision that is supposed to define the arrangements for the implementation of the solidarity clause. With an implementing decision based on this provision, EU Member States sought to enhance their abilities to respond to new (internal) security challenges but also sought to clarify the extent to which they should support other Member States in crisis situations (Parkes, 2015). To address misunderstandings on the application of Article 222 TFEU, the Commission and the High Representative put forward a joint proposal in 2012 to decide how the Union was to implement the solidarity clause



(European Commission & High Representative, 2012). Subsequently, the Council adopted a decision on the arrangements for the implementation of the solidarity clause in 2014 (Council of the EU, 2014a).

First, according to Article 2 of the Council Decision, the territorial scope is limited to the territory of EU Member States (Parkes, 2015). It is thus restrictive in the sense that the Council decision excludes any measure outside the territory of the Union, except for the protection of certain kinds of infrastructure (e.g., off-shore oil and gas installations) (Hilpold, 2015). This is exactly one of the reasons why France invoked Article 42(7) TEU and not Article 222 TFEU: France sought to increase support outside of its territory (Moser, 2015).

#### Article 2 of the Implementing Decision

(a) within the territory of Member States to which the Treaties apply, meaning land area, internal waters, territorial sea and airspace;

(b) when affecting infrastructure (such as off-shore oil and gas installations) situated in the territorial sea, the exclusive economic zone or the continental shelf of a Member State.

The sentence “[mobilising] all the instruments at [the Union’s] disposal” by Article 222(1) TFEU was limited by the Council to instruments already available, each of which should be used and coordinated in the most effective way, including the Integrated Political Crisis Response, EU Internal Security Strategy, the EU Civil Protection Mechanism and the structures developed in the framework of both CFSP and CSDP. These tools can be used after the crisis-hit Member States exhausted all resources available, including national tools and the EU’s usual civilian protection apparatus (Parkes, 2015). The Council decision also foresees the use of certain military resources, including, for example, assets that have already been registered for use in civilian disasters. Altogether, however, the Council’s decision limited the financial implications possibly resulting from the solidarity clause and the potential obligations of the Union. The added value, therefore, is ‘reduced’ to the predisposition of procedures for a better coordination of instruments and measures already available (Hilpold, 2015). The Implementing Decision has also laid down the procedure for invoking the solidarity clause: it requires a disaster-hit Member State’s political authority to declare its intention to invoke Article 222 TFEU to the rotating Presidency and to the Commission’s Emergency Response Coordination Centre. The Council’s role is then to coordinate the political and practical responses. During the 2015 Paris attack, France considered invoking Article 222 TFEU but it wanted a form of support outside the scope of the article, namely military intervention outside the EU (Parkes, 2015).

## 2.3 Missions and Operations

From a more general perspective, the way CSDP functions is that Member States provide the Union with certain civilian and military capabilities, which may then be used for missions outside the Union territory. CSDP is thus intended to allow the Union to play a distinct role as



a regional and global security actor, separate from that of the Member States. This is underlined by Article 43 TEU, which specifies the uses of CSDP (Wessel, 2020, p. 314). Article 43 TEU is related to Article 42(1) TEU the aim of which is to give more details on the scope of EU missions. The tasks referred to in Article 43(1) TEU, also known as the 1992 Petersberg Tasks, determine the scope of CSDP. With Lisbon amendments, Art. 43(1) TEU provides (an extended) list of CSDP activities, including:

- joint disarmament operations;
- humanitarian and rescue tasks;
- military advice and assistance tasks;
- conflict prevention and peace-keeping tasks;
- tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.

According to Article 43(1), all these tasks may contribute to the fight against terrorism, including supporting third countries in combating terrorism in their territories. The fight against terrorism further broadens the scope of CSDP although, from a policy perspective, it has been integral part of EU external relations since 2001 and, particularly in the European Security Strategy (Koutrakos, 2013).

**Table 1: Ongoing Civilian Missions**

Name of mission	Location	First mandate	Objectives
EUBAM Rafah	Palestinian Territories	2005	Ensure a neutral presence at the Rafah crossing point; training for Palestinian border guards.
EUPOL COPPS	Palestinian Territories	2006	Provide support to police and strategic advisory services.
EUMM Georgia	Georgia	2008	Monitor ceasefire and facilitate a return to “normal” life for communities.
EUCAP Sahel Niger	Niger	2012	Strengthen internal security capabilities (advice and training).
EUCAP Somalia	Somalia	2012	Strengthen local maritime police capabilities.
EUBAM Libya	Libya	2013	Support border management.
EUCAP Sahel Mali	Mali	2014	Strengthen internal security capabilities (advice and training).



EUAM Ukraine	Ukraine	2014	Assist the Ukrainian authorities in the reform of the civil security sector.
EULEX Kosovo	Kosovo	2014	Assist and support the Kosovo authorities in areas related to the rule of law, in particular police, justice and customs.
EUAM Iraq	Iraq	2017	Assist Iraqi authorities in the reform of the civil security sector.
EUAM RCA	Central African Republic	2020	Support the reform of the internal security forces.

Source: Sénat (2019). See also EEAS (2019)

**Table 2: Ongoing Military Missions**

Name of mission	Location	First mandate	Objectives
EUTM Mali	Mali	2013	Provide training and advice to the Malian Armed Forces.
EUTM Somalia	Somalia	2010	Provide training and advice to the Somalian Armed Forces.
EUTM RCA	Central African Republic	2016	Provide training and advice to Central African armed forces.
EUTM Mozambique	Mozambique	2021	Support Mozambican armed forces through a training and capacity building mission.
EUNAVFOR Med Irini	Libya	2020	Implement UN Security Council Resolutions on the arms embargo on Libya.
EUNARVOR Atalanta	Indian Ocean - Horn of Africa	2008	Fight against piracy in the Indian Ocean; protect World Food Programme vessels.
EUFOR Althea	Bosnia and Herzegovina	2004	Assist the authorities of Bosnia and Herzegovina (training) and contribute to the maintenance of a safe environment; ensure compliance with the military component of the Dayton Agreements.

Source: Sénat (2019). See also EEAS (2019)

In 2018, the Council adopted the civilian CSDP compact to strengthen the EU's capacity to deploy and sustain civilian crisis management missions (Council of the EU, 2020). In the



preceding years, Member States demonstrated diminishing interest and contributed less to civilian CSDP missions which negatively affected the EU's credibility and effectiveness. In 2018, Member States agreed to 22 political commitments, including the strengthening of civilian capabilities or fostering effectiveness and responsiveness of civilian missions. In order to achieve these objectives by mid-2023, collaboration between the European External Action Service (EEAS) and Member States is required, although most actions need to be implemented at national level (recruitment, training, provision of personnel, etc.) (Böttcher, 2019, p.1). Three years after the creation of the Civilian CSDP Compact, EU Member States and the EEAS have achieved significant progress on several of the compact's 10 strategic guidelines and 22 political commitments. However, some commitments, such as the increase of secondments to missions or the promotion of women's representation, still need to be improved (Smit, 2021). Regarding the former, the provision of seconded personnel has been considerably low, mainly due to the necessity to cover their costs and the reluctance of Member States to provide professionals that are needed at national level (i.e. police and judiciary personnel). In fact, costs for civilian missions are covered by the CFSP budget, but the cost for seconded personnel must be borne by the country sending the personnel. Military operations and missions, instead, are principally financed by the Member States commensurate with their gross national income and actual contribution, whilst only common costs of military actions can be covered with EU financial instruments (Cîrlig, 2016).

Until recently, the operational costs of EU military missions and operations were shared among Member States via the Athena mechanism, which has been replaced, together with the African Peace Facility, by the European Peace Facility (EPF) established in March 2021.<sup>5</sup> This fund is worth €5.692 billion and is financed through off-budget contributions from EU Member States for a period between 2021 and 2027. The overall objective of the EPF is to increase the EU's potential to prevent conflict, preserve peace, and strengthen international stability and security. Different from the mechanisms it replaces, the EPF allows the EU to support partners on a global level and on a range of activities, including supporting peace-keeping operations or enhancing the capability of partners' armed forces to ensure peace and security on their own territory (Council of the EU, 2021). The decision to finance a certain action under the Facility requires unanimity in the Council. Nevertheless, the decision establishing the EPF takes into consideration the exceptions included in Articles 41(2) and 31(1) TEU, and Article 5 of Protocol No. 22, by allowing Member States to abstain in the decision-making process of the EPF, should the action to be financed not be in line with their defence and security policies and traditions. The first assistance measures, agreed until November 2021, included a general support programme to the African Union, a capacity building contribution to the armed forces of Bosnia and Herzegovina, and an urgent measure to provide equipment and supplies to the Mozambican armed forces receiving training under the EUTM Mozambique framework. Nonetheless, to ensure the global geographical scope of the Facility, EU Member States will

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<sup>5</sup> Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528.



determine priority regions in line with existing EU strategies. These allocations are implemented by the High Representative of the Union for Foreign Affairs and Security Policy (HR), assisted by the Commission's Service for Foreign Policy responsible for financial administration and the General Secretariat of the Council responsible for the administration of common costs of military CSDP missions or operations (EEAS, 2021).

To increase the EU's effective actions, CSDP missions and operations are usually joined by non-EU states or partners, like NATO, UN or OSCE. The closest cooperation has been established with non-EU NATO allies and candidate countries. Between 2003 and 2017, approximately 45 non-EU states participated in CSDP operations. However, the levels of contribution vary to a great extent: for instance, fifteen third states joined the EU Police Mission in Bosnia-Herzegovina, while only five third states contributed to the first military operation in Africa (Artemis) (Tardy, 2014). In terms of personnel, third countries usually provided less than 20 personnel to military missions and operations. Other examples of cooperation include Serbia's support to three EUTMs; Turkey's contribution to EUFOR Althea in Bosnia and Herzegovina; or Canada's, Georgia's, Norway's, and Switzerland's participation in European Union Advisory Mission (EUAM) Ukraine. The EU has so far concluded 20 Framework Participation Agreements (FPAs) with third states to facilitate their participation in CSDP missions and operations, including countries from Asia, Latin America but also all EU candidate countries and all non-EU NATO member countries (Ganslandt, 2017, pp. 174–175; Weston & Maduraud, 2021, p. 173). For instance, the EU signed an FPA with the US in 2011 to enable US participation in EU crisis management operations. The two sides also had an ad hoc agreement in 2008 that facilitated US participation in the EU's Rule of Law mission in Kosovo (White House, 2014). Participation Agreements (PAs) can also be concluded in order to relate to a specific mission or operation. Such a PA was concluded with Switzerland in 2016 to delineate the country's contribution to mission EUCAP Sahel Mali. These agreements are concluded in the form of bilateral EU-only agreements based on Articles 37 TEU and 218 TFEU (Wessel, 2021). FPAs and PAs establish baseline arrangements and can include financial commitment of third states or different procedures. After signing an FPA or PA, a few technical agreements follow which specify related subjects, including information exchange, planning documents, and sharing confidential information (UK Parliament, 2018). Third countries are not involved in drafting the operations: they are merely given access to some documents after their participation has been endorsed by the Political and Security Committee (PSC) (Wessel, 2021). After signing the FPA or PA, a Committee of the Contributors (CoC) is established which is expected to give impetus and guidance on how missions should be conducted (UK Parliament, 2018). Third states, however, are expected to accept the EU's schedule procedures, practices and a degree of subordination (Wessel, 2021).

## 2.4 Decision-Making Procedures and Actors in CSDP

Just like in CFSP, the Council is the main actor in CSDP, but a significant difference to CFSP is that, based on Article 42(4) TEU, joint proposals cannot be submitted by the Commission and the HR. Only the latter is allowed, alongside any Member State, to submit proposals within the context of the CSDP, including the initiation of CSDP missions. Moreover, the requirement of



unanimity is not only underlined by Article 42(4) TEU but also by Article 31(4) TEU that provides that Qualified Majority Voting under Article 31(2) TEU and the '*passerelle clause*' under Article 31(3) TEU cannot be applied "to decisions having military or defence implications". The requirement of unanimity also follows from Article 24(1) TEU and 31(1) TEU, according to which the European Council and the Council act unanimously in the area of CFSP, including CSDP. Apart from the HR, the PSC has been granted a pivotal role in CSDP. Irrespective of the fact that it is hardly mentioned in the CSDP section, the PSC has developed into the centre around which all CSDP actions converge. It meets at the ambassadorial level as the preparatory body for the Council to keep track of the international situation, helps to define policies within CSDP and CFSP, and prepares a coherent EU response to a crisis.

#### Article 42(4) TEU

Decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State. The High Representative may propose the use of both national resources and Union instruments, together with the Commission where appropriate.

Unanimity in the Council is reached without Denmark. Based on Article 5 of Protocol 22 attached to the Lisbon Treaty, Denmark does not participate in the elaboration and implementation of decisions and actions which have defence implications. Therefore, Denmark does not participate in decision-making procedures within the CSDP context and cannot prevent the development of EU cooperation in this area. It is also under no legal obligation to make financial or military contributions in that regard. Constructive abstention under Article 31(1) TEU can also be used to 'relax' the requirement of unanimity. Yet, it has rarely been used: in fact, the only time when it was invoked, it concerned an EU Rule of Law Mission in Kosovo (EURLEX Kosovo).<sup>6</sup> The draft Strategic Compass also calls for "more flexible decision-making arrangements" which could include the use of constructive abstention "to enable willing and capable European-led coalitions" (Brzozowski, 2021).

In contrast to other EU policies, but in line with CFSP rules, the European Parliament has no legislative role, although it has a sub-committee on Security and Defence and, on the basis of Article 36 TEU, is regularly consulted on the main aspects and basic choices of the CSDP. It also assesses progress in the realm of security and defence policy and submits recommendations to the Council and/or the HR/VP. The European Parliament is also indirectly involved as a co-legislator. Although it scrutinises defence capability and research programmes funded by the EU budget, such as the European Defence Fund (EDF) (European Court of Auditors, 2019), its influential power over the management of the Fund is considerably limited. The European Parliament, as part of exercising its scrutinising role, may also provide

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<sup>6</sup> See further information on constructive abstention in WP5.1 on CFSP.



recommendations on CSDP issues, e.g., the recommendation sent to the Council and the HR/VP concerning the implementation and governance of PESCO (European Parliament, 2020).

The creation of a Directorate-General for Defence Industry and Space (DG DEFIS) in the Commission as of 2019 revealed the latter's ambition to increase its competences in research and development investments on defence and defence-related materials. DG DEFIS was expected to become significant as an agenda-setter in this domain: after all, one of the major policy objectives is to support joint investment schemes in research and innovation in defence technologies (Csernaton, 2020). Indeed, DG DEFIS aims to promote defence research and capability developments and supports the EDF's overall goals to strengthen the European Defence Industrial and Technological Base (EDTIB). The institutionalisation of CSDP included the creation of several specific organs, some of which do not have an explicit Treaty basis. The European Council (Nice, December 2000) decided to establish permanent political and military structures. Apart from the PSC, CSDP is implemented by several other bodies, which are partly embedded in the EEAS. The European Union Military Committee (EUMC) is the highest military body set up within the Council. It is composed of the Chiefs of Defence of the Member States, who are regularly represented by their permanent military representatives. The EUMC provides the PSC with advice and recommendations on all military matters within the EU.

In parallel with the EUMC, the PSC is advised by a Committee for Civilian Aspects of Crisis Management (CIVCOM) which provides information, drafts recommendations and gives its opinion to the PSC on civilian aspects of crisis management. The Crisis Management and Planning Directorate (CMPD) contributes to the objectives of the EEAS, the CSDP and a more secure international environment by the political-strategic planning of CSDP civilian missions and military operations. It ensures coherence and effectiveness of those actions as part of the EU comprehensive approach to crisis management and develops CSDP partnerships, policies, concepts, and capabilities. Coordination of conflict prevention activities and crisis response tools is further ensured by the Integrated Approach for Security and Peace (ISP) Directorate, whose main goal is to provide expertise and knowledge management to secure an inclusive approach and response to crisis (EEAS, 2021).

The European Union Military Staff (EUMS) is a Directorate-General at the EEAS and composed of both military and civilian experts seconded to the EEAS by the Member States and officials of the EEAS. The EUMS is the source of military expertise within the EEAS and works under the direction of the Military Committee and Member States' Chiefs of Defence as well as under the direct authority of the HR. In mid-2017, the Council established the Military Planning and Conduct Capability (MPCC) within the EUMS which contributes to making non-executive missions more effective and improving the training of partner states' militaries. Considering the first draft of the Strategic compass for security and defence, the MPCC is going to play an increasingly important role in the command and control and management of non-executive and executive tasks and operations. Once full operational capacity is reached, the MPCC shall be able to plan and conduct all non-executive military missions and two small-scale or one



medium-scale executive operation(s), as well as live exercises. A combination of tasks that should be increased in number as the operational capacity of the MPCC increases. The draft of the strategic compass also calls for the establishment of a flexible, interoperable, and multidomain Rapid Deployment Capacity of 5.000 troops that should fall under the command and control structure of the MPCC.

The Civilian Planning and Conduct Capability (CPCC) under the EEAS, is the permanent structure responsible for an autonomous operational conduct of civilian CSDP operations. Under the political control and strategic direction of the PSC and the overall authority of the HR, CPCC ensures the effective planning and conduct of civilian CSDP crisis management operations, as well as the proper implementation of all mission-related tasks. In case of operations or missions requiring both civilian and military components, cooperation and coordination is performed by the Joint Support Coordination Cell (JSCC) composed of members of the MPCC and CPCC.

Apart from these bodies, the Satellite Centre and the Institute for Security Studies were taken over from the WEU by assuming the personnel contracts and the agreements with other organisations. The Satellite Centre supports the CSDP by supplying geospatial intelligence; the Institute for Security Studies (EUISS in Paris) conducts research on topics relevant for the development of CSDP (Wessel, 2020, pp. 318–319). In addition, the EU Single Intelligence Analysis Capacity (SIAC), which gains intelligence contributions from the Member States, provides intelligence analyses, early warning, and situational awareness to the HR and to the EEAS (Council of the EU, 2019, p. 6.).

Among the different bodies and agencies involved in the performance of CSDP, one is explicitly mentioned in the Treaty, namely the European Defence Agency (EDA). Its role is defined as follows in Article 42(3) TEU:

#### Article 42(3) TEU

Member States shall undertake progressively to improve their military capabilities. The Agency in the field of defence capabilities development, research, acquisition and armaments (hereinafter referred to as ‘the European Defence Agency’) shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, shall participate in defining a European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities.

While Article 42(3) TEU generally provides that the EDA is competent for issues related to armaments and capabilities, Article 45 TEU details the functioning of the EDA. The Article’s first sentence suggests some flexibility in terms of participation, as it provides that the EDA “shall be open to all Member States wishing to be part of it”. Indeed, Denmark opted not to participate in the EDA, yet its non-participation was no surprise given its disengage with CFSP decisions with defence implications. Participation is flexible as it is about participation in



EDA's programmes and projects: there is a difference between *participating States* in the EDA and *contributing States* in a particular programme or project. Thus, there is a distinction between 'category A' projects and programmes in which all participating States contribute and 'category B' projects and programmes in which only a group of participating States contribute. Moreover, through the so-called Administrative Arrangements, the EDA has concluded several bilateral agreements with selected third states and organisations. Selected third States include Norway (2006), Switzerland (2012), Serbia (2013), and Ukraine (2015). The EDA has also concluded Administrative Arrangements with the European Space Agency and the Organisation for Joint Armament Cooperation (OCCAR).

#### Article 45 TEU

1. The European Defence Agency referred to in Article 42(3), subject to the authority of the Council, shall have as its task to:

(a) contribute to identifying the Member States' military capability objectives and evaluating observance of the capability commitments given by the Member States;

(b) promote harmonisation of operational needs and adoption of effective, compatible procurement methods;

(c) propose multilateral projects to fulfil the objectives in terms of military capabilities, ensure coordination of the programmes implemented by the Member States and management of specific cooperation programmes;

(d) support defence technology research, and coordinate and plan joint research activities and the study of technical solutions meeting future operational needs;

(e) contribute to identifying and, if necessary, implementing any useful measure for strengthening the industrial and technological base of the defence sector and for improving the effectiveness of military expenditure.

2. The European Defence Agency shall be open to all Member States wishing to be part of it. The Council, acting by a qualified majority, shall adopt a decision defining the Agency's statute, seat and operational rules. That decision should take account of the level of effective participation in the Agency's activities. Specific groups shall be set up within the Agency bringing together Member States engaged in joint projects. The Agency shall carry out its tasks in liaison with the Commission where necessary.

In fact, the EDA was established in 2004, and since then, several amendments have been made regarding its statute, seat, and operational rules. The latest in this series is Council Decision



2015/1835 which outlines the rules on the functioning of the EDA.<sup>7</sup> The EDA is headquartered in Brussels and acts under the authority of the Council.<sup>8</sup> It provides reports to the Council and receives guidelines or guidance from the latter.<sup>9</sup> The Steering Board, the main decision-making body of the EDA, is composed of one representative from each participating Member State and a representative of the Commission. The Steering Board meets at the level of Defence Ministers and holds at least two meetings each year.<sup>10</sup> The Head of the EDA is the HR/VP who, at the same time, leads the Steering Board and represents the bridge between the EDA and the Council.<sup>11</sup> The Chief Executive and the Deputy are selected and appointed for a three-year-period by the Steering Board on a recommendation from the Head of the Agency. The Chief Executive takes all necessary measures to ensure the efficiency and effectiveness of the EDA's work and is further responsible for the oversight and coordination of the functional units.<sup>12</sup>

In mid-2017, Defence ministers endorsed the conclusions and recommendations of the EDA's Long-Term Review (LTR). The LTR has strengthened the EDA as the main intergovernmental prioritisation instrument and supports management structure for the preparation of activities affecting the entire lifecycle of capability development. This is pursued by a more output-oriented Capability Development Plan (CDP) that also considers the Overarching Strategic Research Agenda (OSRA) and the Key Strategic Activities (KSA) processes results, as well as the conduction of the Coordinated Annual Review on Defence (CARD). EDA was also found to be the preferred cooperation forum and management support structure at EU level to engage in technology and capability development activities (European Defence Agency, 2017a). Ministers also approved the Cooperative Financial Mechanism (CFM), the main objective of which is to boost defence cooperation even in the absence of budgetary synchronisation among the Member States. The CFM allows the Member States to support each other with reimbursable advances and deferred payments (European Defence Agency, 2017b).

Today, the EDA remains a relatively small Agency in terms of budget, but it has grown over time: in its first full year, the EDA's budget was €21.2 million which increased to €32.5 million in 2019 (Zandee, 2018). Further, the EDA has enlarged its portfolio over time. For instance, it facilitates and supports PESCO projects' implementation, guarantees that efforts are not duplicated, and takes part in the annual assessment of PESCO Member States' contributions. Furthermore, the EDA seeks to enhance Armed Forces' interoperability for joint operations (EDA, 2021b), provides joint training and exercises, as well as support to CSDP operations. The Agency is involved in activities related to industrial engagement, and participated in the management of the EDF precursor programmes: in the research dimension, the EDA manages

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<sup>7</sup> Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency.

<sup>8</sup> Article 1 of Council Decision (CFSP) 2015/1835.

<sup>9</sup> Article 4 of Council Decision (CFSP) 2015/1835.

<sup>10</sup> Article 8 of Council Decision (CFSP) 2015/1835.

<sup>11</sup> Article 7 of Council Decision (CFSP) 2015/1835.

<sup>12</sup> Article 10 of Council Decision (CFSP) 2015/1835.



and implements the Preparatory Action on Defence Research (PADR) while in the capability dimension, it contributes to the EDIDP work programme and supports Member States in the preparation of projects (EDA, 2021a). Moreover, according to the EDF regulation, the EDA is granted an observer status to the Committee advising the European Commission and should be able to provide its views and expertise to the work of the Committee.

Should the Strategic Compass be adopted with minor or no modifications to the November 2021 version, the EDA will host a Defence Innovation Hub to increase cooperation on defence innovation. The establishment of the tool should ensure synergies with the EDF and the European Innovation Council and work towards the reduction of dependencies in critical technologies and value chains. Nevertheless, it remains to be seen how activities related to the implementation of the Hub will be further delineated and managed.

## 2.5 Treaty Provisions for Flexible Integration

### 2.5.1 Article 44 TEU

The Lisbon Treaty introduced a new opportunity to use flexibility in the framework of the CSDP. The reference to “the framework of the decisions adopted in accordance with Article 43” makes explicit that Article 44 TEU is another possibility to implement the so-called Petersberg Tasks and that the scope of action is limited to tasks enumerated by Article 43(1) TEU. Compared to enhanced cooperation, which now extends to security and defence policy, the procedure laid down in Article 44 TEU is more relaxed due to the lack of a rule on the minimum number of Member States. There are two criteria to participate: the willingness of Member States and their capability to deliver such tasks. The management of this ad-hoc cooperation may, in certain circumstances, threaten the unity and consistency of EU external actions. However, “[a]s long as operations are fully embedded in the Union’s institutional framework and non-participating states refrain from actions that would harm their character as Union operations, they do not seem to be a threat to consistent external action” (Wessel, 2007, p. 248). Although the precise role of the HR is not defined (Koutrakos, 2013, p. 72), he/she is expected to make a link between the participating and non-participating States and to ensure the consistency of EU external actions. Under Article 44(2) TEU, participating states are under legal obligation to inform the Council regularly which allows the latter to exert control, including control of the objectives of the ad-hoc cooperation (Terpan, 2013).

#### Article 44 TEU

1. Within the framework of the decisions adopted in accordance with Article 43, the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task. Those Member States, in association with the High Representative of the Union for Foreign Affairs and Security Policy, shall agree among themselves on the management of the task.
2. Member States participating in the task shall keep the Council regularly informed of its progress on their own initiative or at the request of another Member State. Those States shall inform the Council



immediately should the completion of the task entail major consequences or require amendment of the objective, scope and conditions determined for the task in the decisions referred to in paragraph 1. In such cases, the Council shall adopt the necessary decisions.

Article 44(2) TEU defines two safeguards. There is either the possibility that the completion of a task entails a major, although undefined, consequence, or the implementation of a task requires the amendment of the objective, scope, and conditions. The mandate determined by the Council may become irrelevant in cases of change in the – local or international – situation. In that case, the Member States concerned are required to wait for a new Council decision (Terpan, 2013). With the new Strategic Compass, there is also the idea to specify by the end of 2023, how Article 44 TEU would allow a group of EU Member States to conduct missions or operations within the EU framework (Brzozowski, 2021).

## 2.5.2 PESCO

The Lisbon Treaty introduced a mechanism for PESCO in military matters in Article 42(6) TEU as a form of enhanced cooperation. Although PESCO was one of the “sleeping beauties of the Lisbon Treaty” (Juncker 2017), it quickly became a crucial element in the gradual implementation of CSDP since its activation in 2017. Its legal basis in Article 42(6) TEU contains a reference to Article 43 TEU, precluding any direct impact of PESCO on the provisions regarding the general use of civilian and military means.

### Article 42(6) TEU

Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. Such cooperation shall be governed by Article 46. It shall not affect the provisions of Article 43.

Despite this element of caution at the outset, PESCO has become an inclusive framework for cooperation involving nearly all Member States. While some aspects of the wording in the Lisbon Treaty still appeared focused on marking its distinctiveness from the general CSDP, PESCO is now much more closely intertwined with the wider policy area than what might have been expected at the point of its inception, following a broad agreement among EU defence ministers.

Although Article 42(6) TEU points to the potential involvement and contribution of participating Member States “to the most demanding missions”, the access criteria for PESCO are very inclusive. These were first specified in Protocol 10 of the Treaty and were mainly to revolve around:

- a) Member State *readiness to commit* to a higher level of ambition in force development, their contribution to European military equipment programmes and to several areas of activity of the EDA, including capability development, research and procurement;



- b) participation is open to any member state with the *capacity* to supply at short notice (within 5-30 days) one of the so-called battle groups or at least a component of it, including transport and logistics support that can be sustained for at least 30 days initially, and extended up to 120 days. As a particular area of deployment for such forces, the protocol explicitly mentioned requests from the United Nations Organisation, and it defined the scope of deployment that national contributions to these forces needed to be capable of providing as the familiar range of CSDP missions (see section above on Article 43 TEU).

The requirements for participation in PESCO as defined in the Protocol were regarded as relatively moderate, if not generous, considering they did not specify any minimum strength for these force contributions or benchmarks for the levels of ambition in capability development. Nonetheless, the Protocol further specified the range of specific duties participating Member States have to commit to. These include: a commitment to collaboratively achieving agreed and reviewed investment targets, working towards interoperability including through pooling, the harmonisation of capability assessment, planning and training, and logistics collaboration; to enhancing force readiness and adaptability according to common objectives, which may include the review of national procedures; working to close identified capability gaps including through the participation in and contribution to major EDA capability development programmes.

The Protocol established that capability development targets and collaborative efforts by PESCO participants should not affect similar undertakings within NATO. This is a nod into the direction of existing EU-NATO arrangements that preclude any encroachments on parallel endeavours by EU members that are also NATO members. While such references to NATO are often subsumed as being part of an effort to “avoid duplication”, they are very often politically necessary additions to find compromises with Atlanticist Member States like the Netherlands or Denmark (and importantly, pre-Brexit: the UK). In practical terms, the risk of genuine duplication between NATO and EU frameworks is much less pronounced, not least because both processes are based on bilateral dialogues with the same institutional entities – strategic planning and capability development units within national defence ministries and relevant organisations in the military (further aspects in section 3).<sup>13</sup> Article 46 TEU lays out the procedures for joining PESCO as well as the general governance mechanisms for this area of collaboration: the Council – based on qualified majority among participating Member States and the HR in a consultative role – take on key positions in the process of admitting Member States to PESCO but any decisions on suspensions and withdrawals lie with the Council representatives of participating member states alone.

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<sup>13</sup> One of the areas where EU-NATO overlap and related reservations by Member States of both organisations do pose some problems is the involvement of third countries: predominantly the UK, but especially also the USA and Turkey (see Fiott, 2019).



#### Article 46 TEU

1. Those Member States which wish to participate in the permanent structured cooperation referred to in Article 42(6), which fulfil the criteria and have made the commitments on military capabilities set out in the Protocol on permanent structured cooperation, shall notify their intention to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy.
2. Within three months following the notification referred to in paragraph 1 the Council shall adopt a decision establishing permanent structured cooperation and determining the list of participating Member States. The Council shall act by a qualified majority after consulting the High Representative.
3. Any Member State which, at a later stage, wishes to participate in the permanent structured cooperation shall notify its intention to the Council and to the High Representative. The Council shall adopt a decision confirming the participation of the Member State concerned which fulfils the criteria and makes the commitments referred to in Articles 1 and 2 of the Protocol on permanent structured cooperation. The Council shall act by a qualified majority after consulting the High Representative. Only members of the Council representing the participating Member States shall take part in the vote. A qualified majority shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union.
4. If a participating Member State no longer fulfils the criteria or is no longer able to meet the commitments referred to in Articles 1 and 2 of the Protocol on permanent structured cooperation, the Council may adopt a decision suspending the participation of the Member State concerned. The Council shall act by a qualified majority. Only members of the Council representing the participating Member States, with the exception of the Member State in question, shall take part in the vote. A qualified majority shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union.
5. Any participating Member State which wishes to withdraw from permanent structured cooperation shall notify its intention to the Council, which shall take note that the Member State in question has ceased to participate.
6. The decisions and recommendations of the Council within the framework of permanent structured cooperation, other than those provided for in paragraphs 2 to 5, shall be adopted by unanimity. For the purposes of this paragraph, unanimity shall be constituted by the votes of the representatives of the participating Member States only.

Similar to the accession criteria, the governance of access to PESCO is designed to be open and inclusive. The Treaty neither sets a timeline for expressions of interests to participate in PESCO, nor does it add additional hurdles or caveats for joining at a later point. That said, apart from decisions on active withdrawals of a participating Member State, or for suspension in cases where a Member State no longer fulfils participation criteria, PESCO decisions and



recommendations are made exclusively by unanimity among participating Member States, seemingly making PESCO a somewhat exclusive club. However, since PESCO was activated,<sup>14</sup> all Member States except Malta and Denmark have been involved in PESCO activities and projects, which not only limits the effect of the unanimity requirement on non-participating Member States but also leads to a situation where Member States that make a comparatively small contribution could technically block decisions within PESCO. This makes PESCO both the most flexible mechanism for differentiated integration provided for in the treaties, but also one that is potentially very easily politicised and get exposed to disagreements among member states should, for instance, the strategic landscape in Europe change dramatically (Blockmans & Crosson, 2021).

In 2017, participating Member States agreed to abide to more binding commitments towards increasing joint and collaborative defence capability development projects. They also decided on the way PESCO would be governed by the Council and on the procedure for proposing new projects. The HR was confirmed in their key role in supervising, assessing and reporting on PESCO progress with the EEAS and the EDA providing support and expertise. The binding nature of PESCO commitments should be understood in a way that while 'PESCO-only rules' cannot be declared admissible by the Court,<sup>15</sup> PESCO's nexus with sectoral policies governed by the 'Community method' (e.g., research, industrial cooperation or investment) may constitute a growth area in the Court's jurisprudence (Blockmans, 2018, p. 1819).

To make PESCO even more inclusive, in November 2020, the participating Members of the Council defined the conditions under which third states could be invited to participate.<sup>16</sup> However, any non-EU Member State's involvement would only be granted in exceptional cases, temporarily, for individual PESCO projects, and based on political (endorsement of EU/CSDP principles and values, ongoing dialogue on security and defence), substantive (provide substantive added value to the project without ability to hamper progress to date) and legal conditions (requirement of a Freedom of Information Agreement and a bespoke Administrative Arrangement), compliance with which is regularly reviewed during the period of involvement. In line with these provisions, PESCO participation would also not furnish the respective non-EU state with any decision-making powers within the club. To improve cooperation modalities, in November 2020 the Council also approved the first PESCO strategic review, that highlighted the need to better, and fully, comply with the commitments at the basis of the cooperation, as well as to make better use of PESCO to increase its coordination with the CDP and CARD, and to work on projects that would provide an increased operational

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<sup>14</sup> Council decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States. Official Journal of the European Union. L331/57.

<sup>15</sup> On the role of the Court in CFSP/CSDP matters, see more in D5.1.

<sup>16</sup> Council decision (CFSP) 2020/1639 of 11 December 2017 establishing the general conditions under which third States could exceptionally be invited to participate in individual PESCO projects. Official Journal of the European Union. L331/57.



capacity to Member States' armed forces. A complete adherence to the binding commitments and an increased coordination among the available initiatives and tools at the EU level is of paramount importance to deliver meaningful results and complete a third of the ongoing 60 PESCO projects by 2025, as also highlighted in the draft of the forthcoming Strategic Compass. Although the US and the UK criticised PESCO (and the EDF) along similar lines, the Biden administration is not actively campaigning against the EU's defence activities which might also influence the UK's attitude. The US has now joined PESCO's 'military mobility' project and announced that it is considering joining other PESCO projects (Besch, 2021).

The political, institutional and sectoral dynamism produced by the initiation of PESCO has led some to re-engage the long-standing idea of CSDP heading towards having a 'European Army' in the not-too-distant future. PESCO does constitute an important step towards further harmonisation of industrial-material capability development and force transformation across Member States. However, if one defined such a 'European Army' as a standing EU force under one flag (and not an ad hoc multi-national compound of expeditionary forces provided by the member states, i.e. battle groups), then several major political decisions are still to be made, and to be enshrined in the treaties to account for the requirements mentioned above for the creation of a 'common defence' (Article 42(2) TEU). A unanimous decision by the European Council would be necessary, and one that carefully considers the role of the European Parliament to ensure democratic accountability for when such a common European army would use force under the EU flag (Frau & Tira, 2020). Even the weakly institutionalised battle groups, which are deployable at short notice but are not as such "standing" nor effectively "European", have yet to be brought to life in a concrete mission. Meanwhile, it remains to be seen how more recent plans of a modular "EU Rapid Development Capacity" (RDP) will develop in the medium term (Emott, 2021).



## 3 Capability- and Industry-Related Aspects of the CSDP

### 3.1 Capability Development Processes

Defence planning encompasses three key purposes: (1) force planning; (2) operational planning; and (3) capability development planning (including R&D and procurement aspects). While short to medium term perspectives often dominate the first two strands, long-term perspectives are applied to the planning for defence material (Engberg, 2021). As will be explained below, several elements of defence planning exist in the EU, but these are scattered and often tend to overlap rather than complement one another (Mauro, 2018). These initiatives have never been designed to form a consistent and integrated capability development planning process at EU level for various reasons (risk of duplication with the NATO defence planning process (NDPP), reluctance from Member States, sheer pragmatic nature of the development of EU defence cooperation through a trial-and-error process). These initiatives rather intend to frame national processes and to incentivise cooperation at EU level (Engberg, 2021). So, although elements of EU defence planning have been set up despite hurdles, they lack a framework that would synchronise the different pieces and instil more discipline in a process that is inter-governmental and ultimately voluntary at its core.

Defence capability development planning in the EU consists of mainly three main instruments: the Headline Goal Process (HLGP), the Capability Development Mechanism (CDM) and the Capability Development Plan (CDP).

#### 3.1.1 The Headline Goal Process (HLGP)

The definition of European defence objectives finds its roots in five founding texts:

- The first text is set in the conclusions of the Helsinki summit of December 1999, which defines a Capability Headline Goal. The latter consists of the ability of “Member States, by 2003, to deploy within 60 days and sustain for at least one-year military forces of up to 50 000-60 000 persons capable of the full range of Petersberg tasks” (European Council, 1999).
- The second key text, better known as the Headline Goal 2010, is the redefinition of the Capability Headline Goal by the Council of the EU on 4 May 2004 (Council of the EU, 2004) and its validation by the European Council of 17 and 18 June 2004 (European Council, 2004). This document sets out the objectives of being ‘able by 2010 to respond with rapid and decisive action applying a fully coherent approach to the whole spectrum of crisis management operations covered by the Treaty on the European Union’. The main innovation in the Headline Goal 2010 is the creation of battlegroups.
- While the third crucial text, rooted in the European Council Conclusions of 11 and 12 December 2008 (European Council, 2008), endorses the updated ‘European Security strategy’ and its ‘operational ambition’, the fourth founding text is represented by the



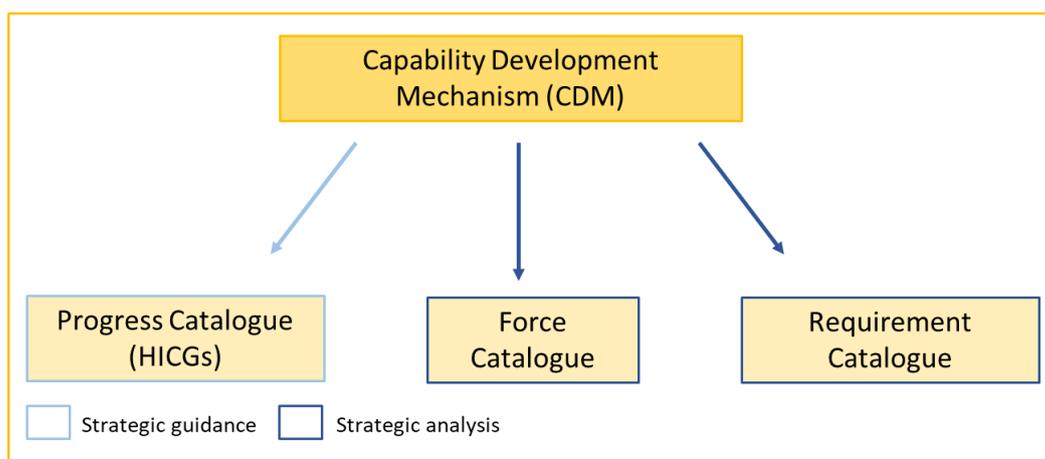
Lisbon Treaty, and particularly by Articles 42 and 43 TEU, which entered into force on 1 December 2009.

- The fifth and most recent text is the 2016 EU Global Strategy (EUGS). While it is not a proper defence strategy, it has allowed for the creation of an 'Implementation Plan on Security and Defence' (IPSD) in November 2016 defining a 'Level of Ambition' (LoA). This LoA assigns the Union three broad objectives: 'responding to external conflicts and crises' covering the full range of CSDP tasks in civilian and military crisis management outside the Union; 'Capacity building of partners' corresponding to CSDP missions or operations with tasks in training, advice and/or mentoring within the security sector; and finally, 'Protecting the Union and its citizens' which covers a broad range of challenges and threats having an impact along with the 'nexus of internal and external security'.

### 3.1.2 The Capability Development Mechanism (CDM)

Prior to the creation of the EDA in 2004, the Capability Development Mechanism (CDM) was the Union's sole capability process. Adopted by the EU in 2003 under Berlin Plus, the CDM is often referred to as the 'military capability development mechanism of the European Union' (MCDM-EU) as it only covers military and not civilian planning. The CDM is placed under the exclusive responsibility of the experts of the Headline Goal Task Force Working Group (HTF/WG) and the EU Military Committee (EUMC) with the support of the EU Military Staff (EUMS). The CDM takes the form of the approval of the various catalogues of requirements, forces and progress (see figures 1 and 2). The overall objective of the CDM is to identify military requirements necessary to meet the Petersberg Tasks and highlight any shortfalls. It may also help evaluate and, if necessary, revise the EU's capability objectives.

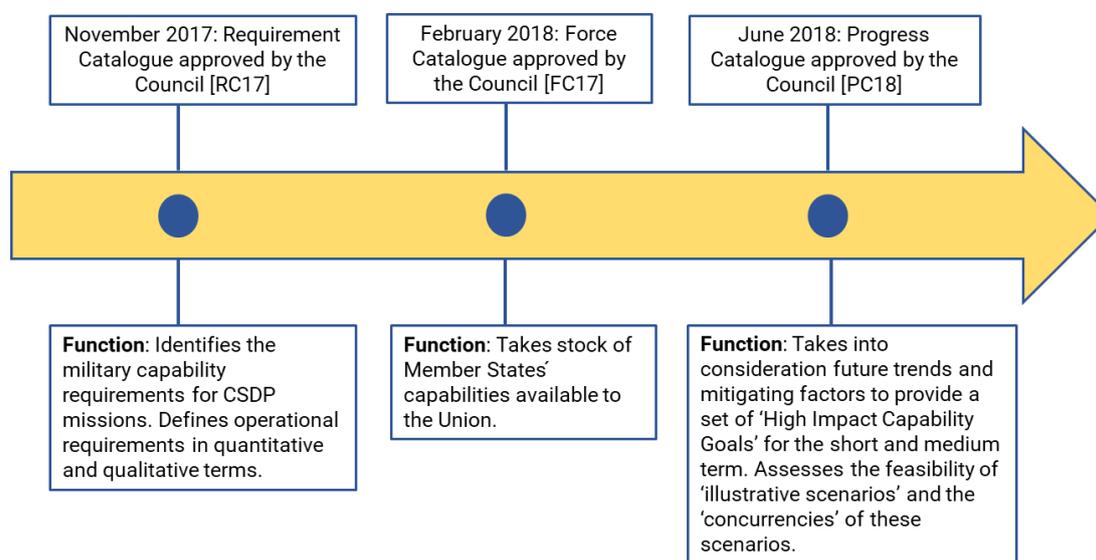
**Figure 1: The Capability Development Mechanism (CDM)**



Source: own elaboration, based on Fiott (2018)



**Figure 2: Function of CDM Catalogues of Requirements, Forces and Progress**



Source: own elaboration, based on Mauro (2018, pp. 24-25)

### 3.1.3 The Capability Development Plan (CDP)

Since 2008, a core task of the EDA consists in jointly producing the CDP with the EUMS. The first CDP was published in 2008 and updated in 2010, while a second revision occurred in 2014. Seeking to address long-term security and defence challenges, the CDP draws on the CDM and details the EU's defence capability priorities and shortfalls. The Plan aims to meet four objectives:

1. Provide a picture of European military capabilities over time;
2. Help Member States' defence planners identify priorities and opportunities for cooperation;
3. Look at the long-term trends affecting European Defence;
4. Identify a list of priority actions detailed to work on capability development.

CDP guidance to the Council is based on four different working 'Strands': 'Strand A' identifies existing capability shortfalls building off the 'Scrutiny, Assessment, Evaluation and Prioritisation' (SAEP) of the CDM; 'Strand B' concentrates on capability trends until 2035; 'Strand C' looks at the potential for European cooperative activities, and 'Strand D' assesses the lessons learned from CSDP military missions and operations. Strands A and D focus on short term perspectives, while Strand C and B deals respectively with medium-term and long-term perspectives. All four strands are brought together under the 'EU Capability Development Priorities'.

The CDP is not established on a cyclical basis, unlike the NDPP, but its update must be demanded by the Council. The latest version of the CDP was updated in 2018 (CDP18) in close cooperation with EU Member States and with the active contributions of the EUMC and the EUMS. This Plan is of key significance as it serves as a baseline and reference for the



implementation of the major EU defence initiatives launched following the 2016 EUSG: the Coordinated Annual Review on Defence (CARD), the Permanent Structured Cooperation (PESCO), and the EDF (EDA, 2021c).

The most tangible output of the 2018 CDP revision is the 11 new EU Capability Development Priority Areas:

1. Cyber Responsive Operations
2. Ground Combat Capabilities
3. Space-based Information & Communication Services
4. Enhanced Logistic & Medical Supporting Capabilities
5. Information Superiority
6. Naval Manoeuvrability
7. Underwater Control Contributing to Resilience at Sea
8. Integration of Military Air Capabilities in a Changing Aviation Sector
9. Air Superiority
10. Cross-Domain Capabilities Contributing to Achieve EU's Level of Ambition
11. Air Mobility

The 2018 Plan is broader in scope compared to previous ones as it does not only incorporate shortfalls based on CSDP military operations and missions but also capability shortfalls to match the broadened EU's LoA on security and defence. Indeed, CDP18 expands to capability needs and shortfalls in crisis management, stabilisation operations, military rapid response operations, air security operations, maritime security and surveillance and security sector reform, along with the need to protect the Union and its citizens.

The CDP implementation is done through Strategic Context Cases (SCCs) prepared by the EDA with the support of multiple actors including Member States, EU, NATO, other stakeholders and industry. For each of the 11 defined priorities, the SCCs give an overview of the capability landscape and the reference for generating collaborative capability development projects (including roadmaps for each capability priority with dedicated objectives and milestones). The SCCs are regularly updated to guarantee they constantly reflect the latest developments in the implementation of each priority (EDA, 2019).

At national level, Member states can draw on the CDP to inform their own planning processes, and importantly, it also serves as a key reference to the more detailed and member-state focused CARD process, that was established in late 2017 as part of the overall effort of implementing the EUGS in the area of Security and Defence. PESCO and EDF projects should ensure they produce better capabilities available to Member States for national and multinational missions and operations. With the introduction of the EDF, the CDP is taking on a new purpose as it does not only have to deal with capability shortfalls but also future technology and industrial needs (Fiott, 2018). The EDA is effectively the guardian of coherence among all these initiatives as it coordinates the CDP revision, acts as the secretariat for CARD and PESCO (together with the EEAS, including EUMS) and plays key roles in the EDF (EDA, 2019).



According to the first draft of the Strategic Compass, Member States would commit to “review [the EU’s] *capability development and planning processes to develop capabilities to deal with operational realities and new threats and challenges*” (B2, 2021). If adopted as it is, the Compass would lead to more than just an update of the CDP.

### 3.2 Article 346 TFEU and Defence Package

Coming to the industrial aspects related to CSDP, it is necessary to recall that Member States have always been protective of their autonomy in developing, producing and procuring military goods and services (Uttley & Wilkinson, 2016, p. 571). This attitude was well reflected at EU level. For long time, defence and security matters, including defence markets were considered as being outside the Treaty framework and were treated as the prerogatives of the Member States. Article 346 TFEU, in particular, enabled Member States to disregard EU law obligations on grounds of national security, including ‘protection of the essential interests of [their] security in relation to the production of or trade in arms, munitions, and war material’ (Hanzalik & Šváb, 2013, p. 13). For a long time and according to a rather liberal interpretation that has not been legally challenged until the mid-1990’s, this Treaty provision has allowed EU Member States to “set their own rules” notably for the tendering of defence-related contracts (Uttley & Wilkinson, 2016, p. 572). As argued by Jay Edwards, this led to arrangements whereby “each Member State with indigenous industrial capability ensures that it spends the majority of any investment in defence domestically to protect the industry from any competition and to sustain what has long been seen as a manufacturing sector of strategic significance nationally” (Edwards, 2011, p. 4). The introduction by the Rome Treaty of this provision was directly inspired by Article XXI of the General Agreement on Tariffs and Trade (GATT) but with a more limited scope given that EU dual-use goods were regulated under (current) Article 207 TFEU (Maulny et al., 2020, p. 74).

More importantly, with the deepening of the internal market, notably in the field of public procurement, the implementation of Article 346 TFEU created tensions. Contradictions appeared between the strengthening of the internal market and the willingness to keep defence procurement outside of the scope of market liberalisation (Uttley & Wilkinson, 2016, p. 571). Since the mid-90’s, however, the activism of the Commission and the interpretation of the Court sought to clarify the scope of Article 346 TFEU and eventually led to the limitation of Member States’ freedom in the area of arms production and trade. Two conditions were set as necessary to invoke Article 346 TFEU. First, the scope of the provision is limited to the list materials adopted by the Council in 1958 (and which has been regularly updated ever since) (Trybus, 2014, p. 94). Such restrictive reading was confirmed in *Fiocchi munizioni* and *Finnish turntable*.<sup>17</sup> The second condition is related to *necessity* and *proportionality*: the Court in *Community Customs Code*<sup>18</sup> clarified, as opposed to the claim of some Member States arguing in favour of significant discretion, that the reference to “measures as [Member States] consider

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<sup>17</sup> Case T-26/01, *Fiocchi Munizioni v. Commission*; Case C-615/10 *Finnish Turntables*.

<sup>18</sup> Case C-461/05 *European Commission v Kingdom of Denmark*.



necessary” is limited to cases when they seek to protect their essential security interests. When relying on Article 346 TFEU, Member States must prove that measures on the basis of that article are *necessary* for the protection of vital security interests. Moreover, they also need to prove that measures adopted on the basis of Article 346 TFEU are proportional in the sense that vital security interests cannot be defended otherwise (Randazzo, 2014, p. 2). In this way, there is at least a partial alignment of the regime of Article 346 TFEU with other exceptions (e.g., Article 36 TFEU, Articles 51 & 52(1) TFEU, Articles 64 & 65 TFEU), which cannot be considered as a general exclusion for defence activities (initial reading by Member States) but as a case-by-case exception. However, it is the sole responsibility of Member States to define where their “essential security interests” lie. The CJEU limits its review to manifest error as in Community Customs Code.

#### Article 346 TFEU

1. The provisions of the Treaties shall not preclude the application of the following rules:
  - (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
  - (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.
2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

However, despite the Court’s and the Commission’s assessment that Article 346 TFEU should be interpreted narrowly, “Member States continued to interpret [this provision] as a categorical or automatic exclusion of armaments from the application of EU law” (Hanzalik & Šváb, 2013, p. 11). Indeed, Member States routinely invoked Article 346 TFEU due to the fact that “ordinary EU public procurement rules were not suited for the specificities of the defence market” (Randazzo, 2014, p. 3) and that “Member States have used [current Article 346 TFEU] extensively [...]. [W]hat should be the exception is, de facto, often the rule” (European Commission, 2007a). Given that Member States relied on Article 346 TFEU extensively, the Commission sought to regulate the procurement of military equipment in the 2000s to prevent the Member States from automatically exempting themselves from EU public procurement rules. In order to ensure an open market for public procurement, the EU has adopted Directive 2004/18/EC to foster coordination of procedures regarding public procurement. However, even if defence public contracts had been regulated under Directive 2004/18/EC, the Commission concluded that the Directive “was generally considered ill-suited to many defence contracts” (Ioannides et al., 2020). In its proposal for a new Directive for coordination of procedures for the award of certain public contracts in the fields of defence and security, the Commission assessed that the 2004 Directive was rarely applied by Member States and



instead they either invoked (current) Article 346 TFEU or relied on Article 14 of the 2004 Directive for public security contracts on secret contracts and contracts requiring special security measures (European Commission, 2007b). As a direct result, the overwhelming majority of defence procurements were not following EU rules (Maulny et al., 2020, p. 77). In 2009 a new Directive sought to limit and regulate the use of exemptions both in primary and secondary EU law in the fields of defence and security procurements. Directive 2009/81/EC requires Member States to publish defence tenders and contracts just as other public procurement projects (Besch, 2016), reportedly reducing the scope of Article 346 TFEU, although it remains largely used by Member States, (Maulny et al., 2020, p. 104). A 2015 Commission report also stressed that while “the number of contract notices and contract award notices published in the Official Journal of the EU has been steadily increasing, [...] Member States conduct significant procurements of defence equipment without applying the Directive” (European Commission, 2015, p. 2). There has been, however, so far, little willingness to take Member States to the Court for non-compliance with the Directive given the sensitive nature of procurement decisions (Besch, 2016).

Strengthening the internal market in defence was seen as a precondition to establish a competitive and sustainable defence industrial base in the EU. The absence of competition combined with strong protectionist attitudes resulted in inefficient spending and duplication of capabilities. The definition of the European Defence and Technological Industrial Base (EDTIB) strategy in 2007 was a response to ramp up the EU’s efforts to develop military capabilities and to deepen European defence cooperation. The EU has been increasingly faced with the rise of competitors and its inability to react to these developments: strengthening the EDTIB was not only due to security and strategic considerations but also economic reasons: defence expenditure was on decline in many EU Member States.

For a long time, there has been a significant duplication of effort in the development of new weapons systems. The fundamental reason why national – instead of EU – solutions prevailed was that Member States consider defence and strategic autonomy as their national responsibility (Wilkinson, 2020, p. 4). For a long time, therefore, defence science and technology policy were dominated by the Member States that had engaged with one another outside the EU Treaty framework, bilaterally or multilaterally primarily through NATO or the ad hoc created OCCAR. However, overreliance on 346 TFEU implied that “the existence of 28 compartmentalised national markets, each with its own administrative burden and regulated separately, hinders competition and results in a missed opportunity for economies of scale for industry and production” (Dunne, 2014, p. 28). This *status quo* slightly changed with the establishment of the EDA in 2004 which provided some EU-level cooperative defence research projects but with budgets coming directly from the Member States. The EU’s Framework Programme primarily funded projects with civilian in focus: Member States continued to reject Commissions’ proposal – also known as the Bangemann initiative – to explicitly include a dual-use dimension in the Framework Programme (James, 2018). A second attempt was the establishment of the European Security Research Program (ESPR) in the early 2000s, but the Commission’s role was limited to civilian security research (Edler & James, 2015, pp. 1261–



1262). Instead of supranational actors, the intergovernmental EDA was trusted with defence research (Fiott, 2015, p. 549).

A significant change was brought with the EU's 7<sup>th</sup> Framework Programme for Research and Technological Development (2007-2013), which included civil security and allowed the Commission to formally engage with the EDA on dual-use matters. EU defence research was still missing but the 2009 Lisbon Treaty opened a new opportunity: Article 179 TFEU now provides that the EU shall promote "all the research activities deemed necessary by virtue of other Chapters of the Treaties". This gave the Commission the necessary legal support for EU defence research (Mauro & Thoma, 2016). In 2013, the Commission proposed "to consider the support [of] CSDP-related Research [...]". The focus would be on those areas where EU defence capabilities would be most needed, seeking synergies with national research programmes where possible" (European Commission, 2013). The European Parliament welcomed this development and, in December 2013, EU Heads of State and Government endorsed this idea and "invite[d] the Member States to increase investment in cooperative research programmes, in particular collaborative investments, and to maximise synergies between national and EU research. Civilian and defence research reinforce each other, including in key enabling technologies and on energy efficiency technology" (European Council, 2013, p. 20).

In mid-2014, the Commission published "a New Deal for European Defence" report in which it argued that without investment in research and innovation there is a "threat for the long-term competitiveness of the European defence industry and Europe's defence capabilities" (European Commission, 2014). This New Deal articulated a series of actions for a more competitive and efficient defence and security sector:

- A free and non-discriminatory EU internal market for European defence companies; an EU-wide 'security of supply' regime where armed forces are sufficiently supplied in all circumstances, no matter in which Member State their suppliers are established;
- a preparatory action on CSDP-related research to explore the potential of a European research programme which, in the future, may cover both security and defence and all possible synergies between existing civil and defence research; and
- an industrial policy that fosters the competitiveness of European defence industries and helps to deliver all the capabilities Europe needs to guarantee its security at affordable prices (Wilkinson, 2020, p. 6).

Based on the proposal of the HR and the EDA, the Council adopted the "Policy Framework" of 2014 in which it recognized that "defence cooperation is underpinned by convergence of planning processes and exchanges of information at all levels" (Council of the EU, 2014b). Based on these, the first concrete steps were: (1) the Horizon 2020 calls for proposals in dual-use research; (2) the Pilot Project on CSDP research; and (3) the Preparatory Action for CSDP-related research (Mauro & Thoma, 2016) to which has been added, in 2017, (4) the European Defence Industrial Development Programme.

The implementation of the Defence Procurement Directive has overall resulted in more transparent competition and EU Member States nowadays tend to rely on Article 346 TFEU



less frequently. However, the same Directive has not necessarily resulted in more cross-border procurement: still today, approximately 75 percent of the contracts are awarded to domestic suppliers (Béraud-Sudreau, 2020, p. 72).

### 3.3 The European Defence Fund (EDF) and its Precursor Programmes

In view of the low spending on defence R&D (€7.5 billion per year in the EU compared with €64.3 billion in the US in 2017) and given the continued fragmentation of markets and duplication of resources at national level, the Commission, for the first time, submitted an initiative in 2016 on the possibility to form a defence-specific EU research fund (Besch, 2016). There was also a recognition that the lack of cooperation in defence was estimated to cost annually between €25 billion and €100 billion (Jean-Claude Juncker, 2016) and that only 16% of defence equipment was procured through European collaboration (European Commission, 2018). The idea of establishing the EDF can also be traced back to former Commission President Jean-Claude Juncker's State of the Union Speech of 2016 in which defence was indicated as an area to be improved significantly. In mid-2016, Commissioner for Internal Market, Elżbieta Bieńkowska, was asked to submit new ideas on the basis of Juncker's speech within the context of becoming a 'more political' Commission. Based on this, Commissioner Bieńkowska suggested the idea of establishing a Defence Fund. Under the European Defence Action Plan, the Commission proposed, among other things, to launch the EDF consisting of two windows: a 'research window' to fund collaborative defence research projects at EU level (with a budget up to €90 million until 2020; €500 million post-2020) and a 'capability window' to support the joint development of defence capabilities commonly agreed by the Member States (European Commission, 2016). The European Council, in its December 2016 meeting, endorsed the Commission's idea of establishing the EDF (European Council, 2016).

In order to prepare the establishment of the European Defence Fund, the EU introduced two precursor programmes:

- The Preparatory Action on Defence Research (PADR);
- The European Defence Industrial Development Programme (EDIDP).

#### 3.3.1 The Preparatory Action on Defence Research

Preparatory Actions find their legal roots in article 58 of the EU Financial Regulation<sup>19</sup> which provides that "*appropriations for preparatory actions in the field of application of the TFEU and the Euratom Treaty, designed to prepare proposals with a view to the adoption of future actions*"

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<sup>19</sup> Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, OJ L 193, 30.7.2018, p. 1–222.



may be implemented without a basic act. As a consequence, PADR did not require the adoption of a specific basic act but was founded by simple decisions of the Commission<sup>20</sup>.

As a small-scale research programme, PADR ran from 2017 to 2019, and had a limited budget (€90 million) which was broken down into three annual calls for proposals. These calls mainly targeted activities with low Technology Readiness Levels (TRL). Its management was entrusted to the EDA.

As a track record, PADR attracted 127 proposals involving 887 entities from 26 Member States and Norway. Overall, 202 entities from 22 Member States and Norway benefited from PADR funding. A significant part of these entities were SMEs (22%) and Research & Technology Organisations (RTOs – approx. 25%). Regarding eligibility, consortia had to be composed of at least three legal entities from three different countries. This was well achieved with the median number of participants per consortium of eight (Mauro et al., 2021).

According to the decisions that governed PADR,<sup>21</sup> proposals had to be chosen for their: (a) contribution to excellence; (b) envisioned impact; (c) quality and efficiency of implementation. For the disruptive technologies' category (PADR-FDDT-OPEN-03-2019 Challenging the future), an additional criterion was used: the impact of the project in a military context.

Funded projects were rather small with a median size of funded project at €1.5 million, with a significant exception. The project OCEAN 2020 (which gathered 43 partners) got €35.4 million over three calls, i.e., approximately 40% of the total PADR budget (Mauro et al., 2021).

### 3.3.2 The European Defence Industrial Development Programme

The EDIDP was a €500 million two-year (2019-2020) programme aimed at co-financing, through grants, the joint development of defence products and technologies in all domains (air, land, sea, cyber and space). Unlike PADR, the EDIDP budget was directly managed by the Commission.

Focusing on higher TRLs, EDIDP differed from the traditional EU R&D policy and instrument (Horizon 2020). It thus needed a specific basic act. This basic act was adopted in July 2018 in

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<sup>20</sup> Commission Decision on the financing of the 'Preparatory action on Defence research' and the use of unit costs for the year 2017, C(2017) 2262, April 11th, 2017 ; Commission Decision on the adoption of the work programme for 2018 and on the financing of the 'Preparatory action on Defence research', and authorising the use of unit costs under the preparatory action, C(2018) 1383, March 9th, 2018; Commission Decision on the financing of the 'Preparatory action on Defence research' and the adoption of the work programme for 2019, C(2019) 1873, March 19th, 2019.

<sup>21</sup> Idem.



the form of a Regulation<sup>22</sup>. It is based on article 169 (research policy) and 173 TFEU (industrial policy). Its objectives were to:

- Foster the competitiveness, efficiency and innovation capacity of the defence industry throughout the Union, thus contributing to the Union's strategic autonomy;
- Support and leverage industrial cooperation throughout the Union, with special incentives for SMEs and mid-caps, and collaboration between Member States, in the development of defence products or technologies, while strengthening and improving the agility of defence supply and value chains, and fostering the standardisation of defence systems and their interoperability;
- Foster better exploitation of the results of defence research and contribute to development after the research phase, thereby supporting the competitiveness of the European defence industry on the internal market and the global marketplace, including by consolidation, where appropriate.

Regarding its results, the EDIDP funded a total 44 projects. Out of these, 2 were funded through 'direct awards' (i.e. without any competition for the award of the grants). More precisely, €100 million (which represents 20% of the volume of EDIDP) has been granted to the 'MALE RPAS' (Eurodrone) project and €37 million to the 'ESSOR' project. The 42 other projects have been selected through competitive calls for projects.

As PADR, EDIDP intended to increase cross-border cooperation. As a consequence, only collaborative projects, involving at least three eligible entities from at least three Member States could receive funding. Similarly to PARD, results were quite positive as EDIDP projects involved 643 entities out of which more approx. 35% were SMEs. The biggest project (GEODE) gathered 18 participants. Furthermore, the participation of entities from third countries was subject to conditions defined to ensure the security and defence interests of the EU and its Member States. These conditions also guaranteed the freedom of action of Member States in the use and export of resulting defence equipment (Mauro et al., 2021).

An important takeaway from the EDIDP is their capability-driven intent, with projects aimed at tackling direct and identified military needs. In particular, it shall be noted that 26 funded projects (out of which ESSOR and Eurodrone) are directly related to a PESCO project. (Mauro et al., 2021). If the number of projects and entities participating can be understood as a good reflection of the propensity to engage in cooperative opportunities, it remains to be seen if the cooperative framework can be judged as being effective once projects will deliver their outputs.

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<sup>22</sup> Regulation (EU) 2018/1092 of the European Parliament and the Council of 18 July 2018 establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovation capacity of the Union's defence industry.



### 3.3.3 The European Defence Fund

Building on the experience of PADR and EDIDP, the Regulation establishing the European Defence Fund was adopted in April 2021. As for EDIDP, its legal bases are articles 169 and 173 TFEU (Simon & Marrone, 2021). Objectives of the Fund are defined by article 3. They are numerous and result from '*intense negotiations between diverging visions and interests of EU institutions and EU Member States*' (Mauro et al., 2021). With a budget of €7.953 billion over the current Multiannual Financial Framework, the European Defence Fund cannot be expected to fund Member States' investment gap (Mauro et al., 2021). It represents a tenth of Horizon Europe (the EU Framework Programme for R&D and innovation – €86.1 billion) but twice as much as InvestEU (the EU investment fund – €3.1 billion).

Given the very sensitive nature of defence research, the control of Member States on the allocation of EDF's funds has been reinforced in comparison with Horizon 2020, the EU Framework Programme for R&D. This control takes place at two level ('double comitology'):

- *The adoption of the annual work programme:* The EDF is legally required to be implemented through annual work programmes. Governed by Article 24 of the EDF regulation, the programme must be adopted through implementing acts by the Commission. The formal adoption of the Work Programme requires a favourable opinion of the Work Programme Committee, composed of experts representing the 27 EU Member and voting according to the qualified majority rule. Should the Committee not reach a qualified majority (either favourable or not), the Commission cannot adopt the Work Programme. This is a distinct specificity of the EDF which gives increased weight to the Work Programme Committee and ultimately to Member States.
- *The award of EDF grants:* When granting awards, the Commission needs a second favourable opinion of the Committee: According to articles 12 and 29 of the EDF regulation, proposals must be evaluated by the Commission with the help of independent experts. Once the technical evaluation process is completed, ex Article 12 of the EDF regulation, decisions shall be adopted by the Commission through implementing acts, on the model of work programmes. Therefore, the Commission presents its award decisions to the Work Programme Committee. Should the Committee not reach a favourable opinion by a qualified majority, the Commission cannot adopt the award decision and must revise its award decision. Also, in the second layer of the comitology system, an important weight is conferred to Member States through the Committee.

Of the total EDF budget, one third (€2.651 billion) will fund R&T projects through grants, while two-thirds (€5.302 billion) will complement Member States' investments by co-financing the costs of defence capabilities development following the research stage (R&D). Furthermore, 4 to 8% (between €45 million and €90 million per year) of the budget per year will be set aside to support innovative disruptive technologies (IDTs) for defence (Article 4 (4)) to boost Europe's long-term technological leadership and contribute to high-end defence products. For 2021,



with a total budget of €1.2 billion, the first EDF work programme is organised around 23 calls - 11 calls for research actions, 12 for development actions.

Similarly to the EDIDP, the EDF must comply with co-financing principles, meaning that Member States or industrial entities may jointly provide funds for a said project. Specifically, according to article 13, the direct eligible costs of research and design activities can be funded up to 100% while activities related to the development of prototypes can be only funded up to 20% and testing, qualification and certification activities up to 80%. These rates can be complemented by “bonuses” if a project is related to a PESCO project (+10 %), or if it involves SMEs or mid-caps at significant levels. The bonuses ceiling is 35% of direct costs and the EDF can never fund more than 100% of them. Regarding eligible indirect costs, these can either be calculated at a 25% flat rate of direct costs or based on ‘actual indirect costs provided that the cost accounting practices are accepted by national authorities for comparable activities in the defence domain’ (Article 15(2)).

According to the EDF regulation, access to the Fund can only be granted to companies based in the Union or in an associated country territory and not controlled by a third party (Article 9.1 and 9.3). Associated countries enjoy more flexible participation in the EDF and can benefit from EU funds, access classified information and make use of the intellectual property (IP) resulting from EDF-financed projects. Associated countries do not, however, have voting rights in the programme committees/expert groups, retaining an observer status. While the Regulation limits third state participation, it does, however, state that “When carrying out an eligible action, recipients and subcontractors involved in an action may also cooperate with legal entities established outside the territory of the Member States or of associated countries, or controlled by a non-associated third country or by a non-associated third-country entity, including by using the assets, infrastructure, facilities and resources of such legal entities” (Article 9.6). A ‘non-associated third-country entity’ is a legal entity established in a non-associated third country or established in the Union or an associated country with the executive management structures in a non-associated third country. In the event of cooperation, there shall be no unauthorised access by a non-associated third country or other non-associated third-country entity to classified information relating to the carrying out of the action. Moreover, potential negative effects over the security of supply of inputs critical to the action shall be avoided. Additionally, the costs related to those activities shall not be eligible for support from the Fund. This cooperation, furthermore, has to comply with Articles 20 and 23 of the regulation, attaining to the ownership of results of research and development actions: they shall not be subject to any control or restriction by a non-associated third country or by a non-associated third-country entity, directly, or indirectly through one or more intermediate legal entities, including in terms of technology transfer (Article 20.3 and 23.2). Considering the restrictions set out in the EDF regulation, while there is a formal inclusion of third-country companies based in the EU or associated countries, under the current context, they have little incentive in doing so. Indeed, cooperation would mean no access to EDF funds and classified information, nor would the third-country companies retain control of research and development actions.



Despite a certain commonality of objectives, the linkage of the EDF to PESCO is far from being obvious. This is partly linked to the different institutional and legal frameworks each initiative pertains to. PESCO is part of CSDP while the EDF legal basis is the EU research and industrial policies. Article 40 TEU organises a mutual imperviousness between the CFSP and the other EU policies. It states that CFSP “*shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties*” for the exercise of other EU policies. And “*similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties*” for the exercise of CFSP. Concretely, it means that the PESCO rules and governance can have no direct influence on the award of EDF funds. In addition, PESCO and EDF aims at different specific objectives. For instance, the EDF is expected to increase cross-border cooperation of defence industries, while PESCO is not. However, it does not mean that a certain level of consistency is not aimed at as a ‘PESCO bonus’ is provided by the EDF Regulation (article 13 (3)) and as it is epitomised by the frequent existing links between projects funded through EDIDP and PESCO projects.

### 3.4 Action Plan on Synergies

Given the limited budget of the EDF, quest for more funding, synergies with other EU programmes and instruments and blending of funding from different sources has been promoted at the EU level, as also stated in the draft of the Strategic Compass.

To increase synergies, on 22<sup>nd</sup> February 2021, the Commission published its “Action Plan on synergies between civil, defence and space industries” (European Commission, 2021a). The aim of this strategy is to ensure cross-fertilisation between these three spheres and focuses on improving the crucial link between space, defence and security. Cross-fertilisation between defence and civil research is not a new phenomenon. These have more generally been spin-offs, that is successful by-products of defence research adopted into the civil market. Well-known examples, among others, consist of the seat belt, duct tape and the GPS. More recently, digital technologies developed in the civilian sector have been applied to military products in order to increase the performance and precision of weapons systems, a phenomenon known as spin-ins. In the future, the increase of emerging and disruptive technologies across civil, defence and space industries will create new opportunities for synergies among EU programmes and instruments. In particular, the space, defence and security sectors have the potential for synergies and cross-fertilisation between themselves and with other civil sectors.

Consequently, the EU now intends to scale up its support to critical technologies across civil, defence and space applications by creating synergies among its programmes, such as the DF,



the EU Space programme,<sup>23</sup> Horizon Europe,<sup>24</sup> Digital Europe,<sup>25</sup> the Connecting Europe Facility,<sup>26</sup> and the Internal Security Fund,<sup>27</sup> among others. Setting up a coherent and strategic framework through this action plan will furthermore help to decrease the risk of duplication and boost innovation across the EU. Ultimately, increasing synergies should bring better value for EU money by maximising the exploitation of EU funded R&D projects across sectors. The Action Plan is also expected to contribute to strengthening Europe's technological sovereignty, along with its industrial base.

This Action Plan lays the groundwork to deliver concrete policy actions under three headline objectives:

1. Enhancing complementarity between relevant EU programmes and instruments to increase the efficiency of investments and effectiveness of results (the 'synergies');
2. Promoting that EU funding for research and development, including on defence and space, has economic and technological dividends for EU citizens (the 'spin-offs'); and
3. Facilitating the use of civil industry research achievements and civil-driven innovation in European defence cooperation projects (the 'spin-ins').

To achieve these goals, the Commission announced 11 specific actions, among which the most significant are the:

- Promotion and streamlining of capability-driven approaches at the EU level, which are quite common in the space and defence sectors. Following such an approach, end-users define, in the first instance, common needs in the long run and, then as a second step, formalise their intent to procure a solution that will meet their needs;
- Creation of a framework to enhance cross-fertilisation among relevant EU programmes (EDF, European Space programme, Horizon Europe, etc.); and
- Launch of three "flagship" projects on drone technologies, space-based secure connectivity and space traffic management.

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<sup>23</sup> Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme.

<sup>24</sup> Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination.

<sup>25</sup> Regulation (EU) 2021/694 of the European Parliament and of the Council of 29 April 2021 establishing the Digital Europe Programme.

<sup>26</sup> Regulation (EU) 2021/1153 of the European Parliament and of the Council of 7 July 2021 establishing the Connecting Europe Facility.

<sup>27</sup> Regulation (EU) 2021/1149 of the European Parliament and of the Council of 7 July 2021 establishing the Internal Security Fund.



## 3.5 Technology Roadmaps

The COVID-19 pandemic has put the question of European dependencies to third states in 'critical' domains, including defence, on the table. The health crisis has highlighted that while the EU gains resilience from world markets being open and integrated in global value chains, disruptions in these global value chains can severely impact essential products and inputs that are critical for society and the EU economy. As a result, while some Member States had previously not been convinced that the EU should deal with industrial matters, there is now an understanding of the negative impacts of a non-controlled internationalisation of value chains and therefore of the need to get a better grip of where Europe's current and possible future strategic dependencies lie.

An example in this regard is that of semiconductors, or chips. They are at the centre of strong geostrategic interests and at the core of the global technological race. Europe's share across the entire value chain of semiconductors, from design to manufacturing capacity, has shrunk throughout the years (Breton, 2021). Consequently, the EU is now dependent on state-of-the-art chips manufactured in Asia, especially in Taiwan. Today, the world is short of semiconductors. While the cause of the global chip crisis is a combination of different events, this shortage has very concrete consequences on the EU economy, jobs and its defence initiatives. The case of semiconductors is one example out of many which illustrates the EU's industrial dependencies in fields that have consequences including on EU defence initiatives.

Consequently, the COVID-19 pandemic is viewed as a wake-up call (European Commission, 2021b) for the EU to reduce its strategic dependencies on critical technologies and value chains, and more generally to strengthen its EDTIB. Critical technologies are here understood as current and emerging technologies with the capacity to significantly enhance, or pose risk to the EU's national interests, notably its economic prosperity, social cohesion and/or national security.

Against this background, several initiatives have been implemented to address the EU's dependencies in key strategic areas such as:

- In-depth reviews on key strategic areas (raw materials, hydrogen, batteries, semiconductors, etc.); and
- An initial bottom-up analysis based on trade data to identify products in sensitive ecosystems for which the EU is highly dependent.

Determining the mapping perimeter of such strategic industrial dependencies is a prerequisite. To do so, the creation of an EU Observatory of Critical Technologies has been announced by the Commission in its Action Plan on synergies between civil, defence and space industries (European Commission, 2021a). While this initiative is not specific to the defence value chains, it does include them. Furthermore, the EDF Work Programme will also focus on the issue of resilience of defence value chains and on the reduction of dependencies towards third countries.



Most importantly, perhaps, a Technology Roadmap solely focusing on defence and security value chains for boosting research, technological development and innovation and reducing strategic dependencies in critical technologies and value chains is expected by March 2022 (European Council, 2021). The European Council, by tasking the Commission to elaborate such a roadmap, highlights the importance of this issue. Additionally, as defence remains a small part of the Internal Market, there is a risk for defence industries and value chains to be overlooked among the large number of strategic industrial sectors, thus highlighting the crucial need for such a Technology Roadmap.

It remains to be seen how the Technology Roadmap plans to map the EDTIB's critical dependencies and how the distinction between critical technologies and technical technologies are made. If left unaddressed, dependencies in these areas could further materialise and possibly new ones might emerge, therefore an important part of the Roadmap will be to tackle what policy responses and instruments are needed to address these strategic dependencies.



## 4 Conclusion

As the first Working Paper of Work Package 4 of the ENGAGE project, this paper provides the basis for further discussion on how to improve the effectiveness of the CSDP. Specifically, this Working Paper explores the current legal basis and governance structures of the CSDP and other areas with defence implications. It aims to provide a summary of the ground rules to address the boundaries of enhancing the functioning of the CSDP and reveal the possibilities that are offered by the existing legal framework.

In the first part, it overviews the legal framework of the CSDP principally through five themes, including the potential shift to 'common defence', the use of 'solidarity provisions' (Article 42(7) TEU and Article 222 TFEU), the launch of operations and missions, the operation of CSDP actors and the use of Treaty provisions for flexible integration. The paper highlights the presence of sleeping beauties in the EU treaties and recalls the necessity to better exploit the potentiality of these provisions. A positive step towards this end is represented by the activation, in 2017, of the PESCO framework. Nevertheless, Article 44 provisions, if activated, could help enable the achievement of the EU's strategic objectives. As hoped for in the draft of the Strategic Compass, the use of this instrument could help reach a higher level of missions and operations outputs, by allowing a group of able and capable Member States to perform a task in the interest of the EU. This way, the track record of more than 30 missions and operations could be supported by specific tasks that, if outside of the EU framework, might be difficult to perform.

The second part of the Working Paper overviews the capability development and industry-related aspects of CSDP. It addresses the question of how EU Member States and institutions committed themselves to creating an integrated defence market. The introduction of the EU Defence Package, if aiming at a more transparent and organic European defence market, did not reach the expected results, mainly due to Member States' reluctance to give up national control over such a strategic industrial sector. The changing geopolitical landscape, the low level of budget allocation to R&D and R&T in the defence sector, and the dependency on value-chains and raw materials from third States made more urgent the necessity to take a more unified approach that should also look at more flexible ways to incorporate technological changes into defence capability and industrial development. In this process the Commission played a pivotal role in advancing integration in the defence industry – through the EDF and other initiatives - but there is the need to find the right balance between wanting to have access to third party assets, skills, and defence industrial capacity, while also protecting EU investments and IPs. A proper coordination of all initiatives and tools available, would allow CSDP to be more effective and efficient.



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