

THE EU'S MODULAR APPROACH TO DEFENCE INTEGRATION: AN INCLUSIVE, AMBITIOUS AND LEGALLY BINDING PESCO?

STEVEN BLOCKMANS*

Abstract

In response to the need expressed by European leaders to protect their citizens better against security threats emanating from within and outside the EU's borders, a package of defensive measures has been developed with remarkable speed. Permanent Structured Cooperation (PESCO) in the area of defence is the most emblematic innovation in this regard. This unique form of enhanced cooperation was triggered under Article 46 TEU. Yet the political rhetoric surrounding its launch has raised expectations that the EU may not be able to meet. This is mainly due to misperceptions about the legal nature and enforceability of the so-called "binding" commitments agreed to. PESCO will need to overcome at least three key challenges: raising the level of ambition while ensuring inclusivity; maintaining credibility in case participating States do not comply with their commitments; and ensuring coherence with the many other building blocks in Europe's defence architecture. Arguably, legal commitments are the hardest in the area of industrial integration. With moves to incentivize capability development and create a single market for defence, the Community method will be applied to a field hitherto jealously shielded off by the Member States. This dimension of the incipient European Defence Union represents a game-changer in the integration process.

*"If you need a helping hand, you will find one at the end of your arm",
Donald Tusk, President of the European Council, 16 May 2018.¹*

* Professor of EU External Relations Law and Governance at the University of Amsterdam and Head of EU Foreign Policy at CEPS.

1. The quote is taken from a tweet sent in response to President Trump's announcements to move the US Embassy in Israel to Jerusalem and to withdraw the US from the nuclear deal with Iran: "Looking at (the) latest decisions of @realDonaldTrump someone could even think: with friends like that who needs enemies. But frankly, (the) EU should be grateful. Thanks to him we got rid of all illusions. We realize that if you need a helping hand, you will find one at the end of your arm."

1. In search of strategic autonomy

Lack of political will and mutual trust among EU Member States has long been an obstacle to cooperation in security and defence. In the years of austerity that followed the financial crisis, defence budgets all over Europe were slashed in an uncoordinated manner, hollowing out most Member States' armies.² Facing a fraught security climate in the Middle East and North Africa, the heads of State or government meeting at the December 2013 European Council decided to buck the trend. For the first time since the entry into force of the Lisbon Treaty, they held a thematic debate on defence in which they declared that "defence matters":

"Today, the European Council is making a strong commitment to the further development of a credible and effective CSDP, in accordance with the Lisbon Treaty and the opportunities it offers. The European Council calls on the Member States to deepen defence cooperation by improving the capacity to conduct missions and operations and by making full use of synergies in order to improve the development and availability of the required civilian and military capabilities, supported by a more integrated, sustainable, innovative and competitive European Defence Technological and Industrial Base (EDTIB). This will also bring benefits in terms of growth, jobs and innovation to the broader European industrial sector."³

Committed to assessing concrete progress on all issues in the years ahead, the European Council invited the Commission, the High Representative (HR), the European Defence Agency (EDA) and the Member States in the Council, each within their respective spheres of competence, to take "determined and verifiable steps to implement the orientations set out above".⁴

Tapping into the political momentum generated by Russia's assault on Ukraine, the rise of hybrid warfare and cyber-attacks, a spate of terrorist attacks on European soil,⁵ citizens' concerns over the refugee and migrant

2. According to figures drawn from SIPRI Military Expenditure Database 2014, Military Balance 2015 and IISS' Military Balance 2015, the change in military spending by the EU28 between 2005 and 2014 represented a drop of 9%, to EUR 210 billion. See Bockel, "General report: The state of Europe's defence industrial base", NATO Parliamentary Assembly, Economics and Security Committee, Doc. 166 ESC 17 E bis, 7 Oct. 2017, 2.

3. European Council Conclusions, EUCO 217/13, 20 Dec. 2013, para 1.

4. *Ibid.*, para 22.

5. One of which led France to invoke the mutual defence clause of Art. 42(7) TEU for the first time, albeit in a manner bypassing the support that the EU (institutional) framework could have provided. See Hillion and Blockmans, "Europe's self-defence: Tous pour un et un pour tous?", *CEPS Commentary*, 20 Nov. 2015.

crisis, the prospect of Brexit,⁶ and the unpredictability injected into US foreign policy by Donald Trump, the EU has made greater strides in strengthening defence integration in the last five years than in the 50+ years before that.⁷ A permanent EU headquarters for non-executive (i.e. non-combat) military operations has been created and located within the European External Action Service (EEAS) in Brussels.⁸ The 22 Member States that are also NATO allies pledged to increase defence spending to 2 percent of their GDP and to earmark 20 percent of that sum for investment in defence capabilities.⁹ A Coordinated Annual Review on Defence (CARD) mechanism will monitor the implementation of commitments on defence spending and capability development of all EU Member States. The European Council has formally launched Permanent Structured Cooperation (PESCO) for the development and deployment of defence capabilities. A European Defence Fund (EDF) has been proposed to stimulate the development of military capabilities. And the defence ministers of nine Member States signed a letter of intent to establish a European Intervention Initiative (so-called: EI2).

This article tries to make soup of the EU's new alphabet in defence cooperation and structures the rapid developments along three strands of implementation: EU-NATO cooperation, the EU Global Strategy, and the Commission's European Defence Action Plan (section 2). In deconstructing the new elements of defence cooperation in Europe, PESCO will appear as the central cog in the EU's new defence machinery. This unique form of enhanced cooperation between 25 Member States has been triggered by invoking Article 46 TEU (section 3.1). Yet the political rhetoric surrounding its launch has raised expectations that the EU may not be able to meet. This article argues that for PESCO to succeed, it will need to overcome at least three key challenges: raising the level of ambition while ensuring inclusivity (section

6. See the monograph by the late Simon Duke, *Will Brexit Damage our Security and Defence? The Impact on the UK and EU* (Palgrave Macmillan, forthcoming).

7. 60 years since the demise of the European Defence Community Treaty in a French parliament reluctant to pool and share the execution of hard-core sovereign powers with post-war Germany; 15 years since the operationalization of the CSDP.

8. Council, "EU defence cooperation: Council establishes a Military Planning and Conduct Capability (MPCC)", Press Release 338/17, 8 June 2017. See also Council Decision (EU) 2017/971 of 8 June 2017 determining the planning and conduct arrangements for EU non-executive military CSDP missions and amending Decisions 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces, 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian armed forces (EUTM Mali) and (CFSP) 2016/610 on a European Union CSDP military training mission in the Central African Republic (EUTM RCA), O.J. 2017, L 146/133.

9. Wales Summit Declaration issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales, NATO Press release (2014) 120, 5 Sept. 2014, para 14.

3.2); maintaining credibility in case participating States do not comply with their commitments (section 3.3); and ensuring coherence with the many other building blocks in Europe's defence architecture (section 3.4). It is the area of industrial integration where legal commitments are the hardest. With moves to incentivize capability development and create a single market for defence, the Community method will be applied to a field hitherto jealously shielded off by the Member States. It is this dimension of the incipient European Defence Union which represents a game-changer in the European integration process.

2. Winter package

Since the operationalization of the CSDP with the deployment of the first peace support missions in 2003, the CSDP had grown predominantly as a security rather than a defence policy.¹⁰ In defence proper, differentiated integration – outside the EU treaty framework – has been a fact of life for decades.¹¹ Both in the realm of capabilities generation and in the planning and conduct of operations, all kinds of unilateral silos of cooperation exist across loosely connected regional or geopolitical clusters. With a view to improving joint capability development and supporting the European industrial base, Member States created the European Defence Agency in 2004 and adopted two procurement directives in 2009. But they never delegated real responsibility or funds to the EDA, and continued to procure domestically by

10. See Tardy, "Does European defence really matter? Fortunes and misfortunes of the Common Security and Defence Policy", 27 *European Security* (2018), 119–137, available at <www.doi.org/10.1080/09662839.2018.1454434>, (all websites last visited 21 Oct. 2018). On the semantic differences between "security" and "defence", see Duke, "Capabilities and CSDP: Resourcing political will or paper armies" in Blockmans and Koutrakos (Eds.), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar, 2018): "The difference between 'security' and 'defence' could be dismissed as semantic quibbling, but in capability terms the importance is crucial. Currently the types of capabilities required for missions outside the EU will tend to emphasize 'expeditionary force' military structures for low-intensity operations; in other words, forces that put more emphasis on the ability to move forces and their associated hardware from A to B, that are sustainable, networked and nimble. Those tasks, however, that are more associated with *defence* are likely to emphasize less mobility, more emphasis on air, land and sea (where applicable) interdiction, static defence installations, as well as quite different implications for logistics and intelligence support. As Simón has observed, if the EU and its members are to rely less upon NATO, or the U.S. specifically, it will imply serious thought and investment into anti-access and area denial (A2/AD) capabilities, including precision-guided munitions, short-range guided rockets, guided artillery and mortars, direct-energy or rail guns, stealth aircraft and greater numbers of submarines." See Simón, "The 'third' offset strategy and Europe's 'anti-access' challenge", 39 *Journal of Strategic Studies* (2016), 417–445.

11. See Biscop, "Differentiated integration in defence: A plea for PESCO" in IAI, *EU60: Re-founding Europe. The Responsibility to Propose* (IAI, 2017).

using all the loopholes the legislative package provides. The recent developments – which include the creation of an EU military headquarters, the launching of PESCO and the new role for the European Commission in defence funding – attest to an evolution towards a more inclusive defence policy within the EU framework: a European Defence Union,¹² like the currency and energy unions that have gone before, rather than an “EU army”¹³ that supersedes, let alone replaces, the national ones. This is remarkable if one considers that the natural locus for Member States’ defence cooperation remains within NATO.

2.1. *Deepening EU-NATO cooperation*

Due to long-standing political blockages, EU-NATO relations have traditionally been described in terms of lethargy.¹⁴ Until the creation of the European Security and Defence Policy (ESDP) at the Helsinki European Council in December 1999, the only active framework for handling specifically European security questions was the Western European Union (WEU) and the special partnership of the WEU under the NATO-defined concept of European Security and Defence Identity (ESDI).¹⁵ As NATO was hampered by presumed restrictions on out-of-area operations, the WEU became the main enforcer of embargoes imposed by the UN Security Council during the first Iraq war (1990) and the war in ex-Yugoslavia (1991–5). For a number of years the WEU acted as a bridge between the European Union and NATO.¹⁶ It was particularly successful in drawing in the non-EU members of NATO by allowing them full participation in military activities.¹⁷

At NATO’s Berlin ministerial meeting of 3–4 June 1996, the Alliance adopted a major document on the development of ESDI and specifically on

12. See the proposals thereto in Blockmans and Faleg, “More Union in European defence”, Report of the CEPS Task Force on European Security and Defence Chaired by Solana, March 2015.

13. See Sparrow, “Jean-Claude Juncker calls for EU army”, *The Guardian*, 5 March 2015; and Bartels, Kellner and Optenhögel (Eds.), *Strategic Autonomy and the Defence of Europe: On the Road to a European Army?* (Dietz Verlag, 2017).

14. See e.g. Duke, “The future of EU-NATO relations: A case of mutual irrelevance through competition?”, 30 *Journal Eur. Int.* (2008), 27–43; and Smith, “EU-NATO cooperation: A case of institutional fatigue?”, 20 *European Security* (2011), 243–264.

15. See van Eekelen, *From Words to Deeds: The Continuing Debate on European Security* (CEPS, 2006).

16. See van Eekelen and Blockmans, “European crisis management avant la lettre” in Blockmans (Ed.), *The European Union and Crisis Management: Policy and Legal Aspects* (Asser Press, 2008), pp. 21–36.

17. See Blockmans, “Participation of Turkey in the EU’s Common Security and Defence Policy: Kingmaker or trojan horse?”, Leuven GGS Working Paper No. 41, March 2010.

the NATO-WEU relationship.¹⁸ The Berlin communiqué elaborated the notion of NATO assets being provided in support of possible European defence operations led by the WEU and foresaw ongoing support by NATO for defence planning (i.e. capabilities) and operational planning in the WEU framework. In the following years, a number of NATO-WEU agreements were drawn up to regulate the details of these different aspects of the ESDI partnership. Against this background NATO held out the prospect of further enhancing, and in particular making more automatic, the various kinds of support developed for the WEU since the Berlin Summit of 1996 when the WEU's relevant roles were transferred to the EU.¹⁹ This was the proposition that became known as "Berlin Plus". It took four years of intense negotiations, increasing pressure from NATO on the EU to take over peace operations in the Balkans, and a shift of focus towards new operations outside the European arena (notably in Iraq and Afghanistan) for a breakthrough to be reached. The EU's Copenhagen European Council of 12–13 December 2002 played a crucial part, not just by virtue of its decisions on the timing of the move towards Turkish EU accession negotiations, but also for its endorsement of detailed understandings to accommodate concerns expressed by Ankara: the fact that under no circumstances the ESDP would be used against an Ally; and that Cyprus and Malta, which did not belong to NATO and its pre-membership Partnership for Peace programme, would not receive classified information from NATO or take part in any ESDP operations using NATO assets.²⁰ The signature of an EU-NATO Declaration at Brussels on 16 December 2002 opened the way for the detailed development of "Berlin Plus" arrangements.²¹

18. Final Communiqué of the Ministerial Meeting of the North Atlantic Council, Press Communiqué M- NAC-1(96)63, 3 June 1996, para 7.

19. For more details on the changing relationship between the two international organizations, see Wessel, "The EU as a black widow: Devouring the WEU to give birth to a European security and defence policy" in Kronenberger (Ed.), *The European Union and the International Legal Order: Discord or Harmony?* (T.M.C. Asser Press, 2001), pp. 405–434.

20. See Bull. EU 12-2002, points I.6, I.9 and I.17.3 (Annex II). Malta, which enjoys constitutional neutrality, had joined NATO's PfP programme in 1995 but, following popular sentiment, Labour suspended that membership in 1996. The country got caught up in Ankara's retaliation against Cyprus for the isolation of Turkish Cypriots after the rejection of the Annan Plan for reunification by Greek Cypriots. The Nationalist Party took Malta back into the PfP in 2008.

21. The finalization of the "Berlin Plus" arrangements was concluded with the signing of a Security of Information Agreement between the EU and NATO on 14 March 2003. See Council Decision 2003/211/CFSP of 24 Feb. 2003 concerning the conclusion of the Agreement between the European Union and the North Atlantic Treaty Organization on the Security of Information, O.J. 2003, L 80/35. The agreement itself is not publicly accessible. For background and analysis, see Reichard, "Some legal issues concerning the EU-NATO Berlin Plus Agreement", 73 *Nordic JIL* (2004), 37–67. After a more thorough examination of the characteristics of "Berlin Plus", one cannot escape the conclusion that the document

The specifics were agreed to in March 2003 and were intended to give the EU permanent access to the planning assets of NATO, while provision of other assets would be on a case-by-case basis. The two organizations moved swiftly to open the way for the EU to take over NATO's mission Allied Harmony in the Former Yugoslav Republic of Macedonia, and similar arrangements were negotiated for the takeover of the SFOR operation in Bosnia-Herzegovina by EUFOR Althea. Since then, the Berlin Plus arrangements have not been mobilized, as a result of a stand-off between Turkey and the EU over Cyprus.

Fifteen years on, it might be argued that the Berlin Plus framework is increasingly superfluous to address today's security challenges. In the face of rising conventional and hybrid threats and risks emanating from the eastern and southern flanks, the EU and NATO have recently vowed to strengthen cooperation to bolster resilience to hybrid threats, disinformation campaigns and cyber-attacks; ensure coherence in conventional defence planning, coordination of exercises, research and development of capabilities; support partners' capacity-building; and cooperate in operations in the Western Balkans, Afghanistan and the maritime realm (Mediterranean, Indian Ocean).²² Whereas the Joint Declaration of July 2018 in Brussels does not seem to add much new to what the EU and NATO had already agreed to at Warsaw in 2016,²³ the diplomatic reaffirmation masks a slow but steady dynamic which has mostly developed below the radar.

In December 2016 the Council of the EU and the North Atlantic Council endorsed a common set of 42 actions for the implementation of the Warsaw Declaration in all above-mentioned areas of cooperation and introduced a monitoring mechanism to review progress on a biannual basis.²⁴ So far, three progress reports have been issued. The first, of June 2017, highlighted the overall expanded bilateral dialogue in defined areas.²⁵ Following the second

underpinning the arrangements does not meet the necessary requirements to qualify as an international treaty under the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations. See Reichard, *The EU-NATO Relationship: A Legal and Political Perspective* (Ashgate, 2006), pp. 288–300.

22. See the Joint declaration on EU-NATO cooperation by President of the European Council Tusk, President of the European Commission Juncker, and Secretary General of NATO Stoltenberg, Council Press Release 447/18, 10 July 2018.

23. Joint declaration by the President of the European Council, Tusk, the President of the European Commission, Juncker, and the Secretary General of NATO, Stoltenberg, Council Press Release 419/16, 8 July 2016.

24. Council Conclusions on the Implementation of the Joint Declaration by the President of the European Council, the President of the European Commission and the Secretary General of the North Atlantic Treaty Organization, Council Doc. 15283/16, 6 Dec. 2016.

25. Progress report on the implementation of the common set of proposals endorsed by NATO and EU Councils on 6 Dec. 2016, 14 June 2017, available at <ceas.europa.eu/sites/ceas/files/170614-joint-progress-report-eu-nato-en-1.pdf>.

progress report,²⁶ a new set of 34 actions was endorsed by both councils, including topics such as “women, peace and security”, counter-terrorism, and military mobility.²⁷ The third progress report of May 2018 elaborated on the main achievements in improving the military mobility of troops and equipment, common preparedness for cyber and hybrid attacks, fighting terrorism and fighting migrant smuggling and trafficking in the Mediterranean.²⁸ Modest progress has therefore been achieved at headquarters level (bureaucratic coordination) and in the field (capabilities and operational cooperation). For the moment though, these projects constitute low-hanging fruit. The 76 actions are an attempt to banish ghosts from the past in coordination between the two Brussels-based organizations. Of course, every small step to move EU-NATO cooperation up a notch is to be welcomed. Given the EU’s commitment not to duplicate structures, this is important. Member States operate a single set of forces, so by using instruments and developing Member States’ capabilities, the EU will in fact strengthen capabilities that are also available to NATO and the United Nations.

As the EU’s own defence integration advances, the classic American bugbears of “no discrimination, no duplication and no decoupling” (US Secretary of State Madeleine Albright’s famous 3Ds that the EU ought to avoid in its relations with NATO) will again come into sharper focus.²⁹ Obscured by US President Trump’s theatrics at the first summit held at NATO’s new headquarters in Brussels, and his outlandish claims that allies should increase defence spending to 4 percent of their GDP, the EU-NATO Joint Declaration of 10 July 2018 reiterated “coherent, complementary and interoperable” capability development and encouraged the fullest possible involvement of non-EU Allies in the European Union’s new initiatives in the field of defence.³⁰ We shall return to the latter specific issue below.

26. Second progress report on the implementation of the common set of proposals endorsed by NATO and EU Councils on 6 Dec. 2016 and 29 Nov. 2017, available at <www.nato.int/nato_static_fl2014/assets/pdf/pdf_2017_11/171129-2nd-Joint-progress-report-EU-NATO-eng.pdf>.

27. Council Conclusions on the Implementation of the Joint Declaration by the President of the European Council, the President of the European Commission and the Secretary General of the North Atlantic Treaty Organization, Council Doc. 14802/17, 5 Dec. 2017.

28. Third progress report on the implementation of the common set of proposals endorsed by NATO and EU Councils on 6 Dec. 2016 and 5 Dec. 2017, 31 May 2018, available at <www.consilium.europa.eu/media/35578/third-report-ue-nato-layout-en.pdf>. Both councils agreed to reduce the frequency of stock-taking by turning to an annual cycle of reporting.

29. See the text of Secretary Albright’s remarks to the North Atlantic Council ministerial meeting, Brussels, 8 Dec. 1998: “Any initiative must avoid pre-empting Alliance decision-making by *de-linking* ESDI from NATO, avoid *duplicating* existing efforts, and avoid *discriminating* against non-EU members [emphases added].”

30. See Council Press Release 447/18. The final communiqué of the NATO Summit itself pointed to “tangible results (achieved so far) in a range of areas, including countering hybrid threats, operational cooperation including maritime issues, cyber security and defence, defence

2.2. *Implementing the EU Global Strategy: Level of ambition, capability development and coordinated review*

The Union's mixed performance in external action in the five years following the entry into force of the Lisbon Treaty was a vivid reminder of the importance to endow the Treaty's sanguine worldview of yesteryear³¹ with a new vision for the increasingly complex, connected and contested world of tomorrow. The EU Global Strategy of June 2016 did just that.³² As a sign of the times, the tone of the document is defensive; the first priority ("The security of our Union") is fleshed out in most detail; and the High Representative was immediately tasked to draw up an Implementation Plan on Security and Defence (IPSD).³³ This plan formed part of a wider "winter package"³⁴ which was adopted in November/December 2016 and included the follow-up to the EU-NATO Warsaw Declaration (see previous section) and the Commission's European Defence Action Plan (see next section).

The IPSD proposes a new "level of ambition" for a stronger union in security and defence that centres around three mutually reinforcing priorities: raising CSDP's awareness and response capacities to external conflicts and crises in an integrated manner; strengthening CSDP's ability to build capacities of partners and thus systematically increase their resilience; and

capabilities, defence industry and research, exercises, and defence and security capacity building". See Brussels Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels 11–12 July 2018, para 70.

31. I.e. the relatively peaceful and prosperous 25 years after the end of the Cold War when the treaties were revised. See Larik, "Entrenching global governance: The EU's constitutional objectives caught between a sanguine world view and a daunting reality" in Van Vooren, Blockmans and Wouters (Eds.), *The EU's Role in Global Governance: The Legal Dimension* (OUP, 2013), pp. 7–22.

32. Compare the 2003 European Security Strategy, "A secure Europe in a better world", adopted by the European Council on 12 Dec. 2003, which opens with "Europe has never been so prosperous, so secure nor so free" and the 2016 EU Global Strategy, "Shared vision, common action: A stronger Europe", the presentation of which was welcomed by the European Council on 28 June 2016. The preface to the EUGS starts with: "We need a stronger Europe. This is what our citizens deserve, this is what the wider world expects. We live in times of existential crisis, within and beyond the European Union. Our Union is under threat. Our European project, which has brought unprecedented peace, prosperity and democracy, is being questioned." For the "making-of" story, see Tocci, *Framing the EU Global Strategy: A Stronger Europe in a Fragile World* (Palgrave, 2017).

33. Proposal from the High Representative of the Union for Foreign Affairs and Security Policy, Vice President of the European Commission, and Head of the European Defence Agency to the Council, "Implementation plan on security and defence", Council Doc. 14392/16, 14 Nov. 2016.

34. See Solana and Blockmans, "The EU's winter package for security and defence", *CEPS Commentary*, 16 Dec. 2016.

protecting the EU and its citizens by tackling threats and challenges through CSDP, in line with the Treaty, along the nexus of internal and external security.

Reinforcing partnerships is the first leg on which the implementation plan rests. Apart from deepening the partnership with NATO, the EU has in the past two years strengthened its cooperation with the United Nations in peace support operations in the Central African Republic, Mali (including with the G5 Sahel Joint Force), Libya and Somalia. And non-EU countries continue to participate in civilian and military CSDP missions and operations.³⁵

The second leg of the IPSD is the deepening of defence cooperation among Member States in order to deliver the required capabilities. This ambition, it is argued, adds to the EU's credibility *vis-à-vis* partners:

“Europe’s *strategic autonomy* entails the ability to act and cooperate with international and regional partners wherever possible, while being able to operate autonomously when and where necessary ... There is no contradiction between the two. Member States have a ‘single set of forces’ which they can use nationally or in multilateral frameworks. The development of Member States’ capabilities through CSDP and using EU instruments will thus also help to strengthen capabilities potentially available to the United Nations and NATO.”³⁶

Reinforcing this drive towards strategic autonomy and higher levels of complementarity with international partners, the European Council of December 2016 called for deeper intra-EU cooperation in the development of the required capabilities as well as committing sufficient additional resources; all in keeping with national circumstances and legal commitments.³⁷ For the 22 EU members belonging to NATO this endeavour supports the commitments on defence expenditure made at Warsaw.

Thus, the heads of State or government agreed to take forward work in the European Defence Agency to translate the new level of ambition into military

35. See Tardy, “CSDP: Getting third States on board”, *EUISS Brief*, March 2014. Third countries’ participation in EU crisis management operations can be formalized through the establishment of a Framework Participation Agreement (FPA). As of 31 Dec. 2016, 18 such agreements had been signed, of which 17 were in force. The FPA with Colombia signed in 2014 had not yet entered into force. Although the US signed an FPA with the EU in March 2011, due to the country’s reluctance to place its troops under non-US command, the agreement only covers “contributions of civilian personnel, units, and assets by the United States to EU crisis management operations.” If and when the UK leaves the EU, a bilateral FPA could be concluded or the substance of it could be included in a wider agreement covering security and defence cooperation. Information compiled from Tardy (Ed.), *Yearbook on European Security 2017* (EUISS, 2017).

36. See Council Doc. 14392/16 (emphasis added).

37. European Council Conclusions, EUCO 34/16, 15 Dec. 2016, paras. 10–15. See below for the opt-out which Denmark has from CSDP.

capability needs, revise the Capability Development Plan (CDP) accordingly, and outline capability development priorities for Member States to jointly invest in.³⁸ On 28 June 2018, the EDA Steering Board (in the composition of Capability Directors) endorsed the 2018 CDP and approved the associated EU capability development priorities.³⁹ The latter aim to contribute to increased coherence between Member States' defence planning by identifying future cooperative activities irrespective of the chosen cooperation framework,⁴⁰ including under PESCO and the European Defence Fund (see next sections).⁴¹

To help operationalize the CDP, the European External Action Service and the European Defence Agency developed proposals on the scope, modalities and content of a Member State driven Coordinated Annual Review on Defence (CARD). The Foreign Affairs Council of May 2017 endorsed the establishment of the CARD, starting with a "trial run" (from autumn 2017 to autumn 2018) in order to test, adapt and validate Member States' approaches as necessary ahead of the first full CARD implementation in autumn 2019.⁴² At the moment of writing, there was no Council Decision to go by, only the evolving content of Council conclusions on the issue. The contours of the CARD mechanism are nevertheless clear: the EDA will act as CARD secretariat and present a report to the EDA Steering Board (at ministerial level). This report, which is forwarded to the Council, will provide an overview of:

"(i) Member States' aggregated defence plans, including in terms of defence spending plans taking into account the commitments made by the European Council in December 2016, (ii) the implementation of the EU capability development priorities resulting from the CDP while

38. The Commission has signed a delegation agreement with the European Defence Agency to manage the CDPs. For details, see EDA Press Release, 31 May 2017.

39. EDA, "New 2018 EU Capability Development Priorities approved", Brussels, 28 June 2018: "The 2018 EU Capability Development Priorities cover the following lines of action: enabling capabilities for cyber responsive operations; space-based information and communication services; information superiority; ground combat capabilities; enhanced logistic and medical supporting capabilities; naval manoeuvrability; underwater control contributing to resilience at sea; air superiority; air mobility; integration of military air capabilities in a changing aviation sector; cross-domain capabilities contributing to achieve the EU's level of ambition."

40. Coherent also with NATO's Defence Planning Process (NDPP) and defence investment pledge.

41. As such, the CDP priorities also serve as the benchmark to ensure that the combined outcome of capabilities development will be a more coherent set of deployable, interoperable, sustainable assets and forces. But without a common agreement on which (nationally produced) capabilities can be scrapped, the ulterior aim of rationalizing the European defence market is unlikely to be reached any time soon.

42. Council conclusions on Security and Defence in the context of the EU Global Strategy, Doc. 9178/17, 18 May 2017.

considering also prioritization in the area of Research & Technology and Key Strategic Activities, and (iii) the development of European cooperation; providing over time a comprehensive picture of the European capability landscape in view of Member States identifying the potential for additional capability development.”⁴³

Such a review of Member States’ implementation of CDP priorities should help “foster capability development addressing shortfalls, deepen defence cooperation and ensure more optimal use, including coherence, of defence spending plans.”⁴⁴ For those Member States participating in PESCO, an annual assessment of progress towards attainment of their commitments should draw to the maximum extent possible on information provided under the CARD exercise.

The CARD system is thus designed to encourage EU Member States to synchronize their defence budgets and capability development plans. Greater transparency, visibility and political commitment should allow the EDA and the Council to identify opportunities for joint projects in capability development and deployment, and to create peer pressure to spend more on defence – for NATO Allies up to the level of 2 percent of GDP agreed at Wales.

Yet, the CARD would be implemented on an entirely “voluntary basis and in full respect of Member States prerogatives and commitments in defence including, where it applies, in collective defence and their defence planning processes and taking into account external threats and security challenges across the EU.”⁴⁵ For the CARD to provide real added value, it needs to rely on the collection of the most up-to-date and detailed information possible of Member States’ defence (spending) plans and implementation of the capability development priorities.⁴⁶ The CARD system therefore depends on trust among the Member States, which historically has been in short supply. As in the early days of the operation of the semester system in the Eurozone, it is not entirely clear how, short of the diplomatically unfriendly act of suspending a Member State, compliance with the commitments will be ensured, let alone enforced in cases when peer pressure does not suffice. We will return to this issue when analysing PESCO.⁴⁷

43. *Ibid.*, para 20.

44. Council conclusions on Security and Defence in the context of the EU Global Strategy, Doc. 7019/17, 6 March 2017, para 10. The coherence between capability development, R&T and industrial cooperation should be reinforced by the interaction between the CDP, the overarching strategic research agenda, key strategic activities and engagement with industry.

45. *Ibid.*, para 11.

46. EDA brochure on the CARD.

47. See section 3 *infra*.

What is clear though is that the future European Defence Union will require Member States' joint development, acquisition and retention of the full spectrum of land, air, space and maritime capabilities. In this respect, the EU Global Strategy identifies a number of priority areas for joint investment and development: intelligence-surveillance reconnaissance, remotely piloted aircraft systems, satellite communications and autonomous access to space and permanent earth observation; high end military capabilities including strategic enablers, as well as capabilities to ensure cyber and maritime security.⁴⁸ But for the Union to be able to deliver on these capability priorities and enhance its strategic autonomy, it needs to create the conditions for more efficient and output-driven defence cooperation. This implies a more innovative and competitive industrial base. These are the main drivers of the Commission's European Defence Action Plan.

2.3. *European Defence Action Plan: Market, industry and funding*

The European defence market has traditionally suffered from fragmentation and low levels of industrial collaboration.⁴⁹ Years of austerity have exacerbated this trend, thereby jeopardizing not just the sustainability and competitiveness of the EU's defence industry but also the EU's strategic autonomy.⁵⁰ Studies have shown that, especially at a time of budgetary constraints, a more efficient use of public money could be achieved by reducing unnecessary duplications, targeting projects that surpass individual Member States' capacities, and improving the competitiveness and functioning of the single market for defence.⁵¹

48. See EUGS, 48.

49. For legal background and analysis see e.g. Koutrakos, *Trade, Foreign Policy & Defence* (Hart Publishing, 2001), Ch. 8 (about the regulation of defence products under EU law) and Ch. 9 (on the EU code of conduct on arms exports and the Commission's 1997 proposal on defence-related industries); Georgopoulos, "The European armaments policy: A *conditio sine qua non* for the European Security and Defence Policy?" in Trybus and White (Eds.), *European Security Law* (OUP, 2007), pp. 198–222; and Koutrakos, *The EU Common Security and Defence Policy* (OUP, 2013), Ch. 9 (on defence industries).

50. See European Council conclusions of Dec. 2013, para 1.

51. European Parliament, "The cost of non-Europe in Common Security and Defence Policy", Brussels 2013: "the spread for the cost of non-Europe in defence is thought to range from EUR 130 billion, at the higher end, to at least EUR 26 billion, on a more conservative calculation". EUR 26 billion per year corresponds to the combined defence budget of 15 EU Member States: Belgium, Bulgaria, Croatia, Czechia, Denmark, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia and Slovenia. The Commission made the business case for more efficient spending on defence in the Annex to its announcement of the EDAP. See Commission, "European defence action plan: Towards a European defence fund", Press Release IP/16/4088, 30 Nov. 2016: "Over the last decade EU Member States have decreased defence spending by nearly 12% in real terms, but this has not

In an effort to support Europe's defence industry and the entire cycle of capability generation, from research and development to production and acquisition, the Commission launched its European Defence Action Plan (EDAP) at the end of November 2016.⁵² The emphasis of the EDAP is on "support" action (see Art. 6 TFEU). Given that the decision to sustain investments and launch capabilities development programmes in the realm of defence remains the prerogative of the Member States, the Commission considers that it can, within the limits of the Treaties (in particular the TFEU's Titles on "Industry" and "Research and technological development and space"), only "complement, leverage and consolidate" Member States' joint efforts in this field.⁵³

As noted earlier, this is not the first time that the Commission launches a strategy to support competitiveness of the European defence industry and the creation of a more integrated defence market. Yet, the adoption in 2009 of two directives, one simplifying the terms and conditions of transfers of defence-related products,⁵⁴ and the other on the coordination of procedures for the award of certain works contracts, supply and service contracts by contracting authorities or entities in the fields of defence and security,⁵⁵ have not contributed much to the progressive establishment of a European defence market. Intended to manipulate the supply side of the defence market, they contain loopholes that allow Member States to invoke "essential interests of [their] security" (Art. 346(1)(b) TFEU) to continue their protectionist practices of licensing and procuring domestically.⁵⁶ Government-to-government sales and 100 percent R&D contracts are also excluded from the directives' provisions. The EDA calculated that in 2014, 77.9 percent of all equipment procurement took place at the national level,

been compensated by more European cooperation. The lack of cooperation between Member States in the field of defence and security is estimated to cost annually between EUR 25 billion and EUR 100 billion."

52. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, "European defence action plan", COM(2016)950 final, 30 Nov. 2016. As such, the EDAP follows up on the EU Global Strategy's ambition to strengthen the Union in defence, and ultimately also NATO.

53. *Ibid.*: "This would avoid duplication, allow for a more efficient use of taxpayers' money, improve the interoperability of defence equipment, minimize fragmentation and boost competitiveness and innovation in the European defence technological industrial base."

54. Directive 2009/43/EC, O.J. 2009, L 146/1.

55. Directive 2009/81/EC, O.J. 2009, L 216/76.

56. See Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Directive in Context* (Cambridge University Press, 2014); and Trybus and Butler, "The internal market and national security: Transposition, impact and reform of the EU Directive on intra-Community transfers of defence products", 54 CML Rev. (2017), 403–442.

thereby depriving countries of the cost savings that come with scale.⁵⁷ In a report issued in 2015, the European Parliament concluded that:

“The Directive 2009/81/EC is today favoured for contracts dealing with services, the acquisition of equipment deemed to be of a low strategic value, and sub-systems. Over the past three years, all of the major military contracts, thus those that have had a structural effect on the EDTIB, were notified without going via the Directive. Previous practices have continued, notably the use of Article 346 ...”.⁵⁸

In its own evaluation, the Commission declared the two directives “broadly fit for purpose” and therefore not in need of legislative amendment.⁵⁹ But acknowledging the untapped potential of the EU procurement rules, the Commission proposed to push ahead with what it calls an “effective application” of the two directives, “including through enforcement.” The first step in this direction, i.e. the intention of clarifying the interpretation of specific derogations under the directives, is long overdue. Stricter control should lead to the initiation of infringement procedures against Member States that continue to flout the directives’ provisions.

Apart from announcing a proper implementation of the two directives regulating the intra-EU procurement and transfers of defence-related products, the Commission has presented a legislative proposal for a framework for the screening of foreign direct investment (FDI) in the EU.⁶⁰ The mechanism is intended to protect critical technologies related to the fifth industrial revolution (cyber, artificial intelligence, etc.) from foreign acquisitions on grounds of security and public order. The proposal is a response to several EU Member States’ rejections of Chinese investments or acquisitions in strategic sectors, such as nuclear energy (the modernization of 2 nuclear reactors at Dukovany in the Czech Republic), semi-conductors with dual-use potential (take-over of German chip maker Aixtron) and other hi-tech fields (take-over of German robotics firm Kuka). In this respect, EU

57. EDA, *Defence Data 2014* (EDA, 2016), p. 6.

58. European Parliament, Directorate General for External Policies, “The impact of the ‘defence package’ Directives on European defence”, June 2015.

59. Commission Staff Working Document, “Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security”, SWD(2016)407 final, 30 Nov. 2016; and Commission Staff Working Document, “Evaluation of the Transfers Directive”, SWD(2016)398 final/2, 7 Dec. 2016. This is after the Commission amended Directive 2009/43/EC with Directive 2016/97 on 27 May 2016.

60. European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union, COM(2017)487 final, 13 Sept. 2017. The proposal was referred to the EP’s International Trade Committee on 18 Jan. 2018.

competition law and rules on State aid and public procurement suffer from a major deficiency, i.e. that they do not consider the source of funding for transactions. At national level, screening is mostly mandatory for the defence sector, while it is run case-by-case for other sectors. As a result, there has been a growing perception among Member States that the existing EU-level mechanisms are not suitable for tackling concerns about alleged “unfair competition” with a cross-border dimension. In its legislative proposal, the Commission has suggested provisions that would allow for the screening mechanism to be activated if foreign investments in one Member State could adversely affect the security or public order of another. In the same vein, it is worth noting that the proposal also envisions FDI screenings directed to projects of “Union interest”. Examples include research conducted under Horizon 2020 and technologies related to space (Galileo), transport (Trans-European Networks for Transport, TEN-T), energy (TEN-E) and telecommunications.⁶¹

With regard to the ongoing reform of the regulation governing trade in dual use goods, the Commission has also issued a proposal to modernize EU export controls, including the introduction of controls on the export on critical cyber-surveillance technologies that could cause violations of human rights or be misused against the EU’s own security.⁶² A review of the EU Code of Conduct for Arms Exports is indeed the logical corollary of the envisaged capability build-up and creation of a single market of defence.

Taken together with the Commission’s intention to support the development of industry standards,⁶³ promote the contribution that sectoral policies can make to CSDP priorities,⁶⁴ and support the European Investment Bank to improve access of SMEs, start-ups and other suppliers to funding for the development of dual-use goods and technologies, including physical infrastructures (e.g. surveillance, and admission control in the energy,

61. See further Fiott and Bund, *YES 2018: EUISS Yearbook of European Security* (EUISS, 2018), p. 175.

62. European Commission, Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast), COM(2016)616 final, 28 Sept. 2016.

63. Standardization and certification are critical enablers for defence cooperation. In 2007, the EDA established the European Defence Standards Information System (EDSIS) and in 2011 followed the European Defence Standards Reference System (EDSTAR) to support the objective of a harmonized standardization for defence procurement. A new mechanism to initiate and monitor the development of “hybrid standards” for dual-use goods was agreed between the Commission, EDA and the Council and has been operational since 2015. See EDA, “European Defence Standardization”, 18 June 2015, available at <www.eda.europa.eu/what-we-do/activities/activities-search/materiel-standardization>.

64. See e.g. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Space Strategy for Europe”, COM(2016)705 final, 26 Oct. 2016.

transport and urban sectors), cybersecurity (e.g. fixed, mobile and satellite broadband networks, data centres and computer systems)⁶⁵ and biodefence (i.e. vaccines) infrastructures,⁶⁶ a more innovative approach to the creation of conditions for an open and competitive defence market emerges;⁶⁷ one that does not just favour the biggest defence suppliers to consolidate the market around them but also helps smaller companies in the supply chain to operate across borders and Member States get best value for money in their defence procurement.

The big bazooka, proverbially speaking, is the launch of a European Defence Fund (EDF) through which the Commission plans to bring adult money online to support capability development and the European defence industry.⁶⁸ The EDF introduces a specific line through which the Commission can tap into the EU's general budget to finance initiatives in the field of defence. Generally speaking, budget is policy. The plan to earmark more than €1.5 billion per year after 2020 to spend on military R&D is ground-breaking.⁶⁹ However, the final sum is conditional on a future agreement on the EU's post-Brexit multiannual financial framework (MFF).

65. See Fiott and Bund, *op. cit. supra* note 61, pp. 172–176.

66. As far as these investments can be motivated by their commercialization in civilian applications. As Bendiek, “The new ‘Europe of security’”, SWP Comments No. 20, June 2017 reports: “A series of current projects by the EDA deal with the question of how research findings can be applied equally to internal and external security. The first two research assignments were awarded to unmanned aviation systems and mobile reconnaissance robots for urban warfare. A third consortium was commissioned to develop an autonomous monitoring platform for both external and internal security. Autonomous reconnaissance systems, such as drones and sensors, are to be fitted with lasers and jamming transmitters in a ‘swarm’ system (EuroSWARM) and be placed under central command. The EDA believes the technology will be particularly important for border control and surveillance security.”

67. To that end, the Commission will promote EU co-financing of investment projects and the modernization of the defence supply chains. See COM(2016)950 final. The Commission will also support cooperation in the defence sector to ensure people have the right skills and technological ability to generate innovation. See Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, “A new skills agenda for Europe”, COM(2016)381 final, 10 June 2016.

68. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Launching the European Defence Fund”, COM(2017)295 final, 7 June 2017. The phrase “big bazooka” is a reference to the troubleshooting tactics by the European Central Bank at the peak of the Eurozone crisis in Jan. 2015, when ECB President Draghi announced a bigger than expected and credible programme of quantitative easing.

69. One year on from the launch of the EDF, the Commission proposed an even more ambitious envelope under the next MFF (2021–2027): EUR 13 billion to finance collaborative research projects (EUR 4.1 billion) and co-fund capability development (EUR 8.9 billion). See European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Fund, COM(2018)476 final, 13 June 2018.

If the proposal passes all negotiations unscathed then approximately €500 million of taxpayers' money will be made available each year through the fund's "research window". This would make the EU the fourth biggest investor in defence research in Europe, after the UK, France and Germany.⁷⁰ Through the "capability window" around €1 billion would be spent annually on development and acquisition.

Extra EU funds are not intended to substitute for low levels of investment in defence by Member States. The Commission has opted for a co-financing mechanism, generally taking on 20 percent (with a 10% bonus for applicants hailing from the 25 Member States participating in PESCO) of the financial burden of legal entities (i.e. research institutes and companies) in the R&D phase.⁷¹ The Commission hopes that by providing such a top-up, it will incentivize Member States to invest larger sums.⁷² However, States participating in the first batch of PESCO projects (see section 3 below) have budgeted them without counting on the bonus. Also, the potential to "turbo boost"⁷³ defence spending, i.e. the Commission's proposals in the context of the MFF to allocate a substantial part of the general budget of the EU to defence, is likely to be restricted to EU-level initiatives that do not threaten national industries or local jobs, where transnational responses are required to meet current and future challenges, and where shortfalls are, relatively speaking, the biggest. The training, capability development and operational readiness of military prototypes, such as a European drone, a European cyber shield,⁷⁴ and medical command come to mind.⁷⁵

With a view to drafting proposals for an EU defence research programme under the next MFF, the Commission in March 2018 launched a preparatory action on defence research to spend a total of €90 million for the three years remaining under the current EU budget.⁷⁶ Under the capability window, an

70. See SIPRI Military Expenditure Database (2017).

71. See COM(2018)476 final, Art. 14: "The Fund may finance up to 100% of the eligible costs of an action without prejudice to the co-financing principle."

72. Commission Vice-President for Jobs, Growth, Investment and Competitiveness Katainen has said that he expects each euro of EU investment to bring in five euros from national governments for new joint projects. Press conference, "A European Defence Fund: EUR 5.5 billion per year to boost Europe's defence capabilities", Commission Press Release IP/17/1508, 7 June 2017.

73. Juncker, State of the Union Address 2016, "Towards a better Europe – A Europe that protects, empowers and defends", Press Release SPEECH-16-3043, 16 Sept. 2016.

74. See Pupillo, Griffiths, Blockmans and Renda, "Strengthening the EU's cyber defence capabilities", Report of a CEPS Task Force chaired by de Hoop Scheffer, Nov. 2018.

75. For more on this, see section 3 *infra*.

76. Commission Decision on the adoption of the work programme for 2018 and on the financing of the "Preparatory action on Defence research", and authorizing the use of unit costs under the preparatory action, C(2018)1383 final, 9 March 2018. The decision is based on point (b) of Art. 54(2)(1), Art. 84(2) and Art. 124(1)(1) of Regulation (EU, Euratom) 966/2012 of the

additional €500 million has been made available for a new European Defence Industrial Development Programme (EDIDP) for 2019–2020.⁷⁷ On the basis of the lessons learnt and an assessment of the extent to which the set-up of the two programmes are aligned, a single integrated European Defence Fund starting in 2021 should allow for streamlining and simplification.⁷⁸ Subject to confirmation of efficiency through a cost-benefit analysis, the Fund will be managed by the Commission, assisted by the EDA and the EEAS.⁷⁹

Based on Articles 173, 182, 183 and 188 TFEU (Titles “Industry” and “Research and technological development and space”), the EDF thus tries to address some of the underlying problems that weaken the European defence technological and industrial base. For it to succeed, it is crucial that the collaborative projects developed in the experimental phase add real value at EU level.⁸⁰ In view of global supply chains in defence, the eligibility for EDF grants should probably go beyond the EU. There exists a legal opening for this. Already now projects need to be developed by at least three legal entities from two Member States or one plus Norway.⁸¹ From 1 January 2021 onwards, the eligibility criteria will be scaled up to broaden cooperation across Europe and overseas countries and territories. Article 11(4) of the draft Regulation establishing the EDF prescribes that funding will only be made available if the action is undertaken in a consortium of “at least three legal entities which are

European Parliament and of the Council of 25 Oct. 2012 on the financial rules applicable to the general budget of the Union, O.J. 2002, L 248/1 and Art. 94 of the Commission Delegated Regulation (EU) 1268/2012 of 29 Oct. 2012 on the rules of application of Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, O.J. 2012, L 362/1.

77. The first Communication on the EDF was accompanied by a legislative proposal for a Regulation establishing the EDIDP. The co-legislators reached a compromise agreement on 22 May 2018 and the programme should be operational from 1 Jan. 2019.

78. See COM(2018)476 final. The EDIDP Regulation will therefore be repealed with effect of 1 Jan. 2021.

79. *Ibid.*, Title IV. The European Court of Auditors will examine the accounts of all revenue and expenditure of the Union according to Art. 287 TFEU. But stakeholders still disagree about the future role of the EDA in handling the massive increase of funds. It is also still unclear how Member States will finance joint capability development after 2020. At one point the Commission proposed to exclude such government spending from calculations of national budget deficits so as not to penalize Eurozone countries by the rules of the Stability and Growth Pact. The Commission also proposed to introduce European defence bonds and create a European Stability Mechanism (ESM) to pool capital, raise money on private markets and help align defence spending plans, but the German finance ministry has opposed such mechanisms. See Besch, “What future for the European Defence Fund?”, *CER Insight*, 28 June 2017.

80. See PESCO projects in section 3 *infra*.

81. See COM(2017)295 final, 10. Legal entities established in Norway are eligible for funding provided that Protocol 31 to the EEA agreement authorizes the participation and the financial contribution of Norway in the preparatory action on defence research. Norway has signed an administrative agreement with the EDA which allows it to participate in the agency’s R&D projects. Switzerland has a similar cooperation agreement.

established in at least three different Member States and/or associated countries.”⁸² Article 5 identifies those associated countries as members of the European Free Trade Association which are members of the European Economic Area (EEA), in accordance with the conditions laid down in the EEA agreement. Legal entities which are physically located on the territory of or subject to control by non-associated third countries or non-associated third country entities are in principle excluded from European defence funding (Art. 10(1) and (3)). Given the UK’s notified intention to withdraw from the EU and Euratom ex Article 50 TEU, the Regulation was drafted for a Union of 27 Member States. Companies and research institutes from the UK would thus in principle not be eligible for EDF grants. The latter also applies to the United States and other NATO Allies. Yet, in view of the specificities of cross-border defence markets and integrated supply chains, the desire to continue industrial cooperation with UK entities after Brexit, and heavy pressure exerted by the United States,⁸³ the Commission introduced a narrow derogation from the rule of Article 10(1) and (3), stating that funding may be awarded to a non-associated country applicant “...if this is necessary for achieving the objectives of the action and provided that its participation will not put at risk the security interests of the Union and its Member States” (Art. 10(2) and (4)).⁸⁴ Applications for EDF grants will be assessed on the basis of award

82. See COM(2018)476 final. The proposed regulation is presented as “a text with EEA relevance”, meaning that it is likely to apply to Iceland, Liechtenstein and Norway too. The provision continues by saying that “at least three of these eligible entities established in at least two Member States and/or associated countries shall not, during the whole implementation of the action, be effectively controlled, directly or indirectly, by the same entity, and shall not control each other.” Art. 23(3) sets additional eligibility criteria: “For actions referred to in points (e) to (h) of Art. 11 paragraph 3, the consortium shall demonstrate by means of documents issued by national authorities that: (a) at least two Member States and/or associated countries intend to procure the final product or use the technology in a coordinated way, including joint procurement; (b) the action is based on common technical specifications jointly agreed by the Member States and/or associated countries which co-finance the action.” Points (e) to (h) of Art. 11(3) refer to system prototypes; the testing, qualification and certification of a defence product, tangible or intangible component or technology.

83. In a blast from the past (see Madeleine Albright’s “3Ds” in section 2.1), US Permanent Representative to NATO Bailey Hutchinson warned that Washington did not want the EDF “to be a protectionist vehicle for the E.U.”, cut out US military manufacturers from bidding on certain European projects, and “splinter the strong security alliance that we have”. See Erlanger, “U.S. revives concerns about European defence plans, rattling NATO allies”, *New York Times*, 18 Feb. 2018. Against the backdrop of President Trump’s unprovoked opening shot in what has become a wider transatlantic trade conflict, the Ambassador’s call that entities from non-EU States should be able to compete for capacity build-up sounded rather hollow, but was nevertheless heeded.

84. Moreover, the participation of such legal entities should not contravene the objectives of the Fund and applicants should provide all relevant information about the infrastructure, facilities, assets and resources to be used in the action.

criteria which put fostering excellence, innovation and the competitiveness of the European defence technological and industrial base front and centre (Art. 13). By incentivizing joint R&D of products and technologies in the area of defence, the EDF is therefore expected to increase the efficiency of public expenditure and contribute to the overriding aim of enhancing the Union's strategic autonomy.

3. PESCO: Deep differentiation

3.1. *A unique form of enhanced cooperation*

The final and binding element of the EU's new alphabet soup is PESCO – permanent structured cooperation. While the Coordinated Annual Review on Defence identifies opportunities to plug shortfalls, and the European Defence Fund stimulates the European defence technological and industrial base by investing in cross-border capability development, PESCO facilitates the build-up and operationalization thereof.

Oddly referred to by Commission President Juncker and EU spin-doctors as the “sleeping beauty” of the Lisbon Treaty that has now been awoken from her slumber,⁸⁵ the launch of PESCO in December 2017 was in fact much longer in the making. The seeds for this form of differentiated integration were sown by the Maastricht Treaty (1991) and the emergence of a European Union of “bits and pieces”, including an intergovernmentally run Common Foreign and Security Policy (CFSP).⁸⁶ The CFSP underwent a baptism of fire with the violent disintegration of Yugoslavia. Not only did the crisis expose the shortcomings of decision-making by unanimity; the lack of a comprehensive set of instruments to address violent conflict on its borders also made it painfully clear that the Union needed to move beyond paper security structures. The call to introduce more flexibility in the treaties became louder as a result of Denmark's successful demand for an opt-out from, *inter alia*, security and defence policy⁸⁷ and when neutral Ireland was joined by three

85. Speech by President Juncker at the Defence and Security Conference Prague, “In defence of Europe”, SPEECH/17/1581, 9 June 2017. See also “European Commission welcomes first operational steps towards a European Defence Union”, Press Release IP/17/5205, 11 Dec. 2017; and Mauro, “PESCO: European defence's last frontier”, GRIP Report 2017/1, 23 Feb. 2017, 40.

86. Curtin, “The constitutional structure of the Union: A Europe of bits and pieces”, 30 CML Rev. (1993), 17–69.

87. Denmark secured its opt-outs under the “Edinburgh Agreement” of 1992, after a referendum for the ratification of the Maastricht Treaty was rejected by a majority of voters. See European Council conclusions, Doc. SN 456/1/92 REV 1, 12 Dec. 1992. The opt-out has been codified in Art. 5 of Protocol No. 22 annexed to the TEU and the TFEU. The opt-out has

non-NATO members entering the EU in 1995. The Treaty of Amsterdam (1997) introduced the mechanism of “constructive abstention”, a largely symbolic safety valve for the unanimity rule of CFSP decision-making.⁸⁸ “Closer cooperation” (then Arts. 43–45 TEU) turned into the slightly less restrictive “enhanced cooperation” in the Treaty of Nice (2001): a “last resort” option requiring at least one third of the Member States to launch: minimum nine in an EU of 27+.⁸⁹ The 2004 Treaty establishing a Constitution for Europe fitted this general form of differentiated integration on a separate basis for the legally “specific” area of CFSP (Art. III-402(2) TCE).⁹⁰ It also introduced broad accession criteria (e.g. no minimum number of participating Member States) and qualified majority voting (QMV, rather than unanimity for CFSP writ large) to trigger a brand-new PESCO provision in the area of defence (Arts. I-41(6), III-312 and Protocol 23). Virtually unchanged, these provisions were recycled in the Lisbon Treaty. Of all policy fields which fall within the framework of the Union’s non-exclusive competences, the provisions on PESCO amount to “the most flexible template”⁹¹ of enhanced cooperation.⁹²

Article 42(6) TEU foresees the creation of a permanent structured cooperation between willing 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”.⁹³ This

recently become the object of discussion as a consequence of changing transatlantic relations. See “Denmark reconsidering EU defence opt-out after meeting with Macron”, *Deutsche Welle*, 28 Aug. 2018.

88. See Blockmans, “Differentiation in CFSP”, *LXVI-3 Studia Diplomatica* (2013), 53–67.

89. So far, this general instrument of enhanced cooperation has been triggered only four times. See Council Regulation (EU) 2017/1939 of 12 Oct. 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (“the EPPO”), O.J. 2017, L 283/1; Council Decision of 12 July 2010 authorizing enhanced cooperation in the areas of the law applicable to divorce and legal separation, O.J. 2010, L 189/12; Council Decision of 10 March 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection, O.J. 2011, L 76/53; and Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013)71 final (currently at a standstill). In all these cases, legislative proposals failed to obtain unanimous support for EU-wide implementation, with individual countries blocking the adoption of secondary legislation and sub-groups of Member States forging ahead by way of enhanced cooperation.

90. See section 3.3 *infra*.

91. See Fiott, Missiroli and Tardy, “Permanent structured cooperation: What’s in a name?”, Chaillot Paper No. 142, Nov. 2017, 18.

92. Compare Arts. 329(2) and 331(2) TFEU, requiring unanimity for enhanced cooperation in the field of CFSP, and Art. 20 TEU, requiring the participation of at least 9 Member States to further the objectives of the Union, protect its interests and reinforce its integration process.

93. See Santopinto, “Bataille diplomatique sur fond de coopération structurée permanente”, *GRIP Analysis*, 4 Nov. 2009.

provision encapsulates the *raison d'être* of PESCO: participating States commit to spend more, and more intelligently, on better defence equipment so that they are better able to conduct operations at the higher end of the military spectrum. The Treaty gives no clear answer whether PESCO will therefore prepare the EU Member States to engage in kinetic, i.e. war-like, operations against an identified enemy.⁹⁴ Article 1 of Protocol No. 10 does spell out that any Member State wishing to participate in PESCO should:

“(a) proceed more intensively to develop its defence capacities ...; and
 (b) have the capacity to supply ... targeted combat units for the missions planned, structured at a tactical level as a battle group, with support elements, including transport and logistics, capable of carrying out the tasks referred to in Article 43 (TEU), within a period of five to 30 days, in particular in response to requests from the (UN), and which can be sustained for an initial period of 30 days and be extended up to at least 120 days.”

As such, the Protocol codifies the “2010 Helsinki Headline Goal”, which set up a rotating system of multinational force packages of at least 1,500 military personnel capable of responding rapidly to conflicts across the entire spectrum of crisis management.⁹⁵ PESCO may thus breathe new life into the fledgling concept of “EU battlegroups”, which reached full operational capability on 1 January 2007, but have never been deployed. Arguably, this is not due to a lack of crises to respond to but primarily because the bulk of the costs of deployment (both human and financial resources) would fall on those governments who happened to be on rotation – something which Member States “on standby” could veto in the Council.⁹⁶ Article 2 of Protocol No. 10 tries to tackle this issue by requiring PESCO States to:

“(c) take concrete measures to enhance the availability, interoperability, flexibility and deployability of their forces, in particular by identifying

94. See Tardy, “PeSCo: The operations” in Fiott, Missiroli and Tardy, *op. cit. supra* note 91: “PeSCo would be unlikely to be the tool through which the EU ventures much beyond traditional crisis management activities, no matter how robust it might become”, 37. A word of caution may nevertheless be in place: when you carry a hammer, everything looks like a nail.

95. Council, “Headline goal 2010”, doc. 6309/6/04 Rev 6, 4 May 2004.

96. As the name suggest, “battlegroups” would engage in forward leaning armed combat to “make”, i.e. enforce peace. Until now, Member States have only been willing to contribute to military CSDP operations for the purpose of training or stabilization, with a mandate to use armed force only as a last resort in self-defence. For backgrounds and comparisons, see e.g. Lindstrom, “Enter the EU battlegroups”, Chaillot Paper No. 97, 1 Feb. 2007; Barcikowska, “EU battlegroups – Ready to go?”, *EUISS Alert*, Nov. 2013; and Anderson, “Adapting the battlegroups”, *EUISS Alert*, 31 Jan. 2017.

common objectives regarding the commitment of forces, including possibly reviewing their national decision-making procedures”.⁹⁷

In this context, the European Council of December 2013 already called for the “rapid” re-examination of the “Athena mechanism” for financing common costs of EU military missions and operations.⁹⁸ Four years later, the European Council reiterated its request for a revision, which had been scheduled for the end of 2017. An ambitious expansion of the financing of such operations would, indeed, make sense: “countries contributing to EU battlegroups should not face crippling bills just because they happen to be on duty.”⁹⁹

On top of the entry criteria for PESCO laid down in Article 1 of Protocol No. 10, i.e. *proceeding* more intensively to develop defence capacities and *having* the capacity to supply troops and kit, Article 2 adds the following baseline commitments for continued participation in the structured framework: (a) *cooperating* with a view to achieving higher levels of investment expenditure on defence equipment in the light of, *inter alia*, international (esp. NATO) responsibilities; (b) *aligning* the defence apparatus by identifying military needs, pooling and specializing capabilities, and encouraging cooperation in training and logistics; (c) *taking* concrete measures to mobilize forces; (d) *reducing* capability shortfalls and gaps; and (e) *participating* in major joint or European equipment programmes in the framework of the EDA.

Despite early attempts by Belgium, Hungary and Poland in a 2010 non-paper of their Trio Presidency to outline some thoughts on how cooperation might be made inclusive and effective,¹⁰⁰ and a written request by

97. In some Member States (e.g. Bulgaria, Ireland, Portugal, Slovakia, Romania), national parliaments serve as important gatekeepers for decisions in the military realm. The German *Parlamentsbeteiligungsgesetz* (parliamentary participation act) for instance, requires that every deployment of the *Bundeswehr* has to be approved by the *Bundestag*. This obviously slows down the process for expeditionary actions. The semi-presidential system in France, on the other hand, allows for an executive decision to deploy a rapid reaction force, with only *ex post* control exerted by the *Assemblée Nationale*. On these issues and the “strategic culture” concept, from where these national procedures are derived, see Lazarou and Friede, “Permanent Structured Cooperation (PESCO): Beyond establishment”, *EPRS Briefing*, March 2018, 5.

98. Council Decision (CFSP) 2015/528 of 27 March 2015 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena) and repealing Decision 2011/871/CFSP, O.J. 2015, L 84/39.

99. Valášek, “The EU’s new defence pact: Marginal gains”, *Carnegie Europe*, 30 Nov. 2017.

100. For a review of the 2010 debate, see Biscop and Coelmont, “CSDP and the Ghent framework: The indirect approach to Permanent Structured Cooperation”, 16 *EFA Rev.* (2011), 149–167.

Italy and Spain to HR/VP Ashton in May 2011 to put PESCO on the agenda of the Foreign Affairs Council, it took until June 2016 for a High Representative to suggest in the EU Global Strategy that “(e)nhanced cooperation between Member States should be explored, and might lead to a more structured form of cooperation, making full use of the Lisbon Treaty’s potential.”¹⁰¹ The December 2016 European Council responded by tasking the HR and the Member States to present “elements and options for an inclusive Permanent Structured Cooperation based on a modular approach and outlining possible projects.”¹⁰² Throughout 2017, the EEAS and EDA worked with Member States to hammer out the principles, commitments and governance of PESCO.

As a first formal step under Article 46(1) TEU, 23 willing and able Member States signalled their intention to the Council and the High Representative to participate in PESCO by signing a joint notification on 13 November 2017.¹⁰³ The 10-page notification outlines:

- the principles of PESCO, in particular that “PESCO is an ambitious, binding and inclusive European legal framework for investments in the security and defence of the EU’s territory and its citizens”;
- a list of 20 “ambitious and more binding common commitments” that the Member States have agreed to undertake, including “regularly increasing defence budgets in real terms in order to reach agreed objectives”; and
- proposals on PESCO governance, with an overarching level maintaining the coherence and the ambition of PESCO, complemented by specific governance procedures at projects level.

We shall return to each of these issues in the sub-sections below.

After having consulted the HR, a list of 25 Member States participating in PESCO was adopted by the Foreign Affairs Council within the statutory limit of three months prescribed by Article 46(2) TEU.¹⁰⁴ Ireland and Portugal joined the initial group of 23 countries after their respective parliaments gave their consent, while Denmark (which has an opt-out from CSDP), Malta (which invoked a constitutional commitment to neutrality and non-alignment but kept the door open for future participation depending on the course of

101. EUGS, 11 and 48.

102. European Council Conclusions, EUCO 34/16, 15 Dec. 2016, para 11.

103. The notification is available at <www.consilium.europa.eu/media/31511/171113-pesco-notification.pdf>.

104. Council Decision (CFSP) 2017/2315 of 11 Dec. 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, O.J. 2017, L 331/57.

implementation)¹⁰⁵ and the UK (which is leaving the EU)¹⁰⁶ chose to stand aside. In their capacity as “Member States”, these countries could still notify their intention of joining PESCO, but only if and when they fulfil the entry criteria and make the required commitments (Art. 46(3) TEU).¹⁰⁷ As a third State,¹⁰⁸ the UK could become involved in PESCO projects (cf. next sub-section) if it provides “substantial added value” and contributes financially.¹⁰⁹ Depending on the terms of Brexit, the UK might be eligible to receive European defence funding if it qualifies as a (non-)associated country (see previous section).¹¹⁰

Council Decision (CFSP) 2017/2315 establishing PESCO was adopted by consensus, even if QMV¹¹¹ would have sufficed. Crowning this “swift and simple procedure”¹¹² the European Council “welcome(d) the establishment of ambitious and inclusive permanent structured cooperation.”¹¹³ Those with vested interests ratcheted up the language in an attempt to claim ownership of the “historic”¹¹⁴ “first operational steps towards a European Defence

105. See Lazarou and Friede, op. cit. *supra* note 97, 6.

106. Ibid.: “The UK welcomed the launch of PESCO and ‘its ambition to develop military capabilities that address the shortfalls in EU and NATO contexts’, as stated by the British Minister of State for Europe, Alain Duncan, in his answer to the House of Commons.”

107. Conversely, any participating Member State wishing to withdraw from PESCO can do so by notifying its intention to the Council, “which shall take note that the Member State in question has ceased to participate” (Art. 46(5) TEU).

108. In accordance with Arts. 4(2)(g) and 9(1) of Decision (CFSP) 2017/2315, the Council will adopt a decision establishing, in due time, the general conditions under which third States could exceptionally be invited to participate in individual projects; and it will determine in accordance with Art. 9(2) of Decision (CFSP) 2017/2315 whether a given third State satisfies these conditions. Subject to a further assessment by the Council, a Decision should in principle be adopted before the end of 2018.

109. See e.g. Besch, “PESCO: Paper tiger, paper tanks?”, *CER Bulletin*, 29 Nov. 2017; and Aydın-Düzgüt, “PESCO and third countries: Breaking the deadlock in European Security”, *IPC Policy Brief*, Jan. 2018.

110. In the future though, any joint platform development that includes the UK might instead take place through inter-governmental organizations such as OCCAR, the Organization for Joint Armament Cooperation.

111. QMV as defined in Art. 238(3)(a) TFEU.

112. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press, 2010), p. 277.

113. See European Council Conclusions, EUCO 19/1/17 Rev 1, 14 Dec. 2017.

114. Mogherini, “A historic day for the European Union”, *Federica Mogherini blog*, 13 Nov. 2017, available at <www.federicamogherini.net/historic-day-pesco/?lang=en>: “When I received the formal notification letter, signed by 23 Ministers, it was an emotional moment. The doors of change had opened a year and a half ago already, when for the first time I proposed Member States to start building a Europe of defence, as originally envisaged sixty years ago by the founding fathers of the European Union. We bet on the European Union’s ability to leave the ghosts of the past behind, as we face a fast-changing world. And today we made it. We have shown that the Union can serve Member States’ priorities – and I hope this path can be followed also in other fields.”

Union.”¹¹⁵ Yet the political rhetoric surrounding its launch has raised expectations that the EU may not be able to meet. This is mainly due to misperceptions about the enforceability of the “legally binding framework” of PESCO, with 20 so-called “legally binding commitments” aimed at taking the participating States by 2025 to a higher level, to perform all crisis management tasks listed in Article 43 TEU. For PESCO to be successful, it will need to overcome at least three key challenges, which will be dealt with in turn below: raising the level of ambition while ensuring inclusivity; maintaining credibility in case Member States do not comply with their commitments; and ensuring coherence with the many other building blocks in Europe’s defence architecture.

3.2. *Inclusivity vs. level of ambition*

Partly as a corollary of the introduction of several mechanisms of differentiated integration along the way, the Treaties put great emphasis on inclusivity. With regard to the generic type of enhanced cooperation, as many Member States as possible should be included and at any point should it be open for the accession of the remaining Member States (Art. 328 TFEU); overall unity and stability should be safeguarded; cooperation should never create discrimination or do harm to Member States which have decided not to join; and non-participating Member States are invited to participate in the deliberations, albeit without the right vote (Art. 330 TFEU), or the duty to co-finance the group’s activities for that matter (Art. 332 TFEU). As much as observers like to depict enhanced cooperation as being driven by “*avant gardes*” of able and willing Member States taking the integration process forward, reality shows that it is rather different “*arrière gardes*” of a small number of Member States invoking sovereign limitations that force the others to opt for (temporary) differentiated integration.¹¹⁶

Counterintuitively, PESCO has so far produced the most inclusive expression of enhanced cooperation, even if it is the most flexible of

115. Juncker: “In June I said it was time to wake up the Sleeping Beauty of the Lisbon Treaty: permanent structured cooperation. Six months later, it is happening.” See European Commission, Press Release IP/17/5205, 11 Dec. 2017, which keenly points out that “President Juncker has been calling for a stronger Europe on security and defence since his election campaign ... in April 2014” and that “this same ambition was set out in his three-point plan for foreign policy, which was incorporated in the Political Guidelines – the Juncker Commission’s political contract with the European Parliament and the European Council.”

116. See Corbett, “Two-tier Europe – Really?” in Blockmans (Ed.), *Differentiated Integration in the EU: From the Inside Looking Out* (CEPS e-book, 2014), pp. 8–11, p. 8, and note 89 *supra*.

differentiated integration mechanisms provided by the Treaties.¹¹⁷ This is largely the result of a German push for inclusivity which prevailed over a French desire for a higher level of ambition.¹¹⁸ But rather than presenting this as a binary choice to the other Member States, Berlin and Paris agreed to a compromise by applying a “modular approach”¹¹⁹ to enhanced cooperation in the field of defence.¹²⁰ Instead of creating a two-speed Europe at the level of the Common Security and Defence Policy, a “hub-and-spoke” model has been agreed for the PESCO mechanism within CSDP; one whereby decision-making by unanimity at the level of the Council (the hub) guarantees inclusivity, while at the same time allowing different consortia of Member States to pioneer projects (the spokes) in order to raise the level of ambition overall.¹²¹ Paradoxically, the modular approach to structured cooperation also serves as a permanent vehicle for opt-outs and exemptions in the area of defence. For PESCO to succeed, the key challenge, therefore, is “to develop a *modus operandi* (which is) flexible (enough) to manage diversity (and) solid (enough) to generate tangible collective gains.”¹²² There are two reasons for concern, however.

First, in spite of the low threshold for launching PESCO (by QMV), decisions and recommendations taken within the framework are adopted by unanimity, constituted by the votes of the representatives of all participating Member States (Art. 46(6) TEU). The likelihood that the participating States would adapt the governance rules for individual PESCO projects so as to take decisions by QMV is close to zero.¹²³ As a result, decision-making by

117. Prior to PESCO, the most inclusive of enhanced cooperative frameworks was the establishment of the European Public Prosecutor’s Office by 16 Member States, joined later by 4 more. See Wolfstädter and Kreiling, “European integration via flexibility tools: The cases of EPPO and PESCO”, Policy Paper No. 209, (Jacques Delors Institut Berlin, 29 Nov. 2017).

118. For background analysis, see Gotkowska, “The trouble with PESCO: The mirages of European defence”, OSW Point of View No. 69, Feb. 2018; and Lazarou and Friede, *op. cit. supra* note 97, 7–9. Paris wanted high (NATO-level) entry criteria that would allow a military vanguard of only the top European military powers with the same strategic culture to join in carrying out operations at the upper end of the military spectrum. In line with its post-WW2 culture of military restraint Germany did not want to create any binding formats that would force expeditionary warfare upon the *Bundeswehr*. Berlin was also opposed to creating additional divisions with Central and Eastern European Member States.

119. European Council Conclusions, EUCO 34/16, 15 Dec. 2016, para 11.

120. The 19th Franco-German defence and security council held on 13 July 2017 in Paris also agreed to several long-term bilateral defence projects, such as merging systems for land forces (KMW and Nexter), developing a new fighter jet and a joint successor model for the countries’ main battle tanks (Leopard 2 and Leclerc).

121. See Fiott, Missiroli and Tardy, *op. cit. supra* note 91, 21.

122. *Ibid.*, 53.

123. See Art. 4 of Council Decision (CFSP) 2018/909 of 25 June 2018 establishing a common set of governance rules for PESCO projects, O.J. 2018, L 161/37, analysed in the next sub-section.

unanimity will prolong consensus politics, so the speed of European defence cooperation and integration is determined by the slowest wagon in the train. Poland may well replace the UK as the Member State that most frequently slams on the brakes. In the face of Russian aggression, the country relies on the hard security guarantees provided by the US. Warsaw has long resisted the idea of EU defence integration for fear of undermining NATO's resolve to come to the rescue in the hour of need. Political market forces unleashed by the prospect of Brexit and the election of Donald Trump have ultimately led the Polish government to sign up to PESCO, no doubt driven by the thinking that "if you can't beat 'em, join 'em".¹²⁴ Rather than being left at the station, Poland jumped on Europe's defence train, expecting that, once aboard, it would be able to slow it down and even change the direction of travel.

A second reason for concern is that, while the level of ambition described in the initial policy documents has indeed been maintained,¹²⁵ one cannot help but note that the first batch of 17 PESCO-branded projects concern mostly the implementation of off-the-shelf plans, i.e. existing EDA and NATO projects such as cooperation on a European secure software defined radio, upgrading maritime surveillance, creating a "deployable military disaster relief capability package" and setting up a "network of logistic hubs in Europe and support to operations".¹²⁶ Military mobility, the most populated project (all PESCO States minus Ireland), is another example. Developed within NATO and incorporated in the PESCO framework, the project has been referred to as the "Schengen of defence".¹²⁷ Yet, rather than creating a free-travel zone for European armies (or a visa-free travel area for third country troops for that matter), the project merely aims to facilitate the cross-border movement of

124. In a joint letter of 13 Nov. 2017 addressed to the HR, the Ministers of Foreign Affairs and National Defence of Poland set out three conditions for Poland's participation in PESCO: primacy of NATO's defence planning process; competitive, innovative and balanced development of the European defence industry in order to suit the needs of all the Member States involved; and a "360-degree approach" to security threats with particular attention paid to the eastern flank.

125. The Notification mentions that the 20 commitments to which the PESCO States have agreed are based on "collective benchmarks identified in 2007". As such, not the double pledge made at NATO's Wales summit but a different 2%/20% formula is included. See Annex II, commitments No. 2: "Successive medium-term increase in defence investment expenditure to 20% of total defence spending (collective benchmark) in order to fill strategic capability gaps by participating in defence capabilities projects in accordance with CDP and Coordinated Annual Review (CARD)" and No. 4: "Increasing the share of expenditure allocated to defence research and technology with a view to nearing the 2% of total defence spending (collective benchmark)."

126. Council Decision (CFSP) 2018/340 of 6 March 2018 establishing the list of projects to be developed under PESCO, O.J. 2018, L 65/24.

127. See Rettman, "France and Germany propose EU 'defence union'", *EU Observer*, 12 Sept. 2016.

troops, services and goods (e.g. for military exercises) by harmonizing rules (e.g. customs, dangerous goods, trans-European transport networks) and procedures between participating states.¹²⁸ Whereas the upward convergence of legal standards and requirements in the areas where projects are developed is certainly welcome, critics have argued that the 17 PESCO projects stop short of developing the defence capabilities that would endow the EU with the strategic autonomy aspired to, for instance a European military transport helicopter, a maritime patrol aircraft, air-to-air refuelling capacities, the next generation of satellite communications, and a high-altitude long endurance drone.¹²⁹ Similarly, the EU Global Strategy's Implementation Plan on Security and Defence currently does not specify how many operations the EU has to be able to conduct simultaneously, only that "a number of [these] may be executed concurrently".¹³⁰ Nor does it give any indication of the envisaged scale of these operations. In fact, the plan limits the scale by stating that the EU should be capable of these operations based on "previously agreed goals and commitments", i.e. a rotating system of multinational force packages of at least 1,500 military personnel capable of responding rapidly to conflicts across the entire spectrum of crisis management – the existing Headline Goal. An update by the EU Military Staff of five illustrative scenarios that drive the identification of military requirements have fed into the June 2018 update of the Capability Development Plan by the European Defence Agency without, however, going beyond the 2010 Headline Goal.

This raises the question of whether projecting unity was more important to the architects of PESCO than using up the single opportunity to activate a unique Treaty basis that would have allowed for a greater level ambition with a smaller group of States whose military capabilities fulfil higher criteria. In a move widely seen to be a response to an overly inclusive and underambitious PESCO, France – after Brexit the only EU Member State with a nuclear and expeditionary force capacity – has been actively preparing the European Intervention Initiative (EI2) proposed by Emmanuel Macron in his Sorbonne speech in September 2017.¹³¹ Beyond the facade of creating a common

128. See the joint communications of the Commission and the High Representative to the European Parliament and the Council, "Improving military mobility in the European Union", JOIN(2017)41 final, 10 Nov. 2017, and "Action Plan on military mobility", JOIN(2018)5 final, 28 March 2018.

129. See European Council Conclusions, EUCO 217/13, 20 Dec. 2013, para 11; and further Gotkowska, *op. cit. supra* note 118.

130. Council Doc. 14392/16, 14 Nov. 2016.

131. For an English version of the speech, see <www.diplomatie.gouv.fr/en/french-foreign-policy/european-union/events/article/president-macron-s-initiative-for-europe-a-sovereign-union-democratic-europe>.

strategic culture and European strategic autonomy, the EI2 is primarily about preparing a group of able and willing countries for joint military interventions in the EU's neighbourhood without prejudice to the EU, NATO or any other institutional framework.¹³² The latter is underlined by the fact that the UK (which is leaving the EU) and Denmark (which has an opt-out of CSDP) have joined the initiative,¹³³ and that EI2 will be "resource-neutral".¹³⁴ However, the potential for duplication, in particular with PESCO's German-led "EUFOR Crisis Response Operation Core (EUFOR CROC)" project, is real. While stressing the "need to further develop the emergence of a shared strategic culture through the European Intervention Initiative" in their Meseberg Declaration of 19 June 2018, Macron and Chancellor Merkel agreed to link EI2 "as closely as possible with PESCO."¹³⁵ For that to happen, the associate status for the respective non-members is essential, as well as the need to fill PESCO with real substance. For the EU to attain strategic autonomy, the second batch of PESCO projects (to be identified in November 2018) ought to substantially raise the level of ambition.¹³⁶

132. See e.g. Major and Mölling, "France moves from EU defence to European defence", *Carnegie Europe*, 7 Dec. 2017; and Koenig, "The European intervention initiative: A look behind the scenes", *Jacques Delors Institut Berlin*, Blog post, 27 June 2018.

133. The "Letter of intent concerning the development of the European Intervention Initiative (EI2)" was signed at the margins of the Foreign Affairs Council of 25 June 2018, available at <club.bruxelles2.eu/wp-content/uploads/2018/06/let-intention-initiativeeurop intervention@fr180625.pdf>. Belgium, Denmark, Estonia, Germany, Italy, Netherlands, Portugal, Spain and the UK were invited to join. All, except for Italy (whose new government needed time to assess the initiative), signed the Letter of Intent. Finland expressed a belated interest to join the initiative in Aug. 2018. Apart from Estonia, central and eastern European Member States were not invited. This has led German officials to describe EI2 as a divisive project which risks fragmenting PESCO and the EU.

134. *Ibid.* It will be steered by a "light" permanent secretariat in Paris based on the existing network of national liaison officers in the French Ministry of Defence. See Billion-Galland, "European Intervention Initiative: The big easy", *Berlin Policy Journal*, 15 oct. 2018.

135. "Meseberg Declaration – Renewing Europe's promises of security and prosperity", The Press and Information Office of the Federal Government, No. 214, 19 June 2018, available at <www.bundeskanzlerin.de/Content/EN/Pressemitteilungen/BPA/2018/2018-06-19-meseberg-declaration.html>.

136. See Leonard, "Defence first: Time for a real European security initiative", *The Security Times*, Feb. 2018, 7. See also Besch, "PESCO unlikely to deliver much in the short term", *Progressive Post*, 9 Feb. 2018: "PESCO is a political and integrationist success and a strong symbol of a new willingness to invest in European defence, and it could still develop into a more ambitious and effective framework. But the 2017 version of PESCO does not offer the EU the opportunity to solve its defence problems at a stroke." Others, hardened by the first iteration of PESCO in 2010, which pivoted into "pooling and sharing" because Member States failed to back up with ambitious implementation projects, are more hopeful. See Biscop, "European defence: Give PESCO a chance", 60 *Survival* (2018), 161–180.

3.3. *Ensuring compliance*

There exists a lot of confusion in policy circles about the legal character of PESCO. Generally speaking, statements made by key government officials¹³⁷ and opinions expressed by think tank analysts¹³⁸ seem to conflate the legal character of the PESCO framework as a whole, which certainly exists even if a judicial back-stop is quasi non-existent, and the supposedly legally binding nature of the common commitments referred to in Articles 1 and 2 of Protocol No. 10, which is pie in the sky.

In spite of what is sometimes still proclaimed, the CFSP (which includes the CSDP and thus PESCO) is not a mere intergovernmental process between the Member States. The CFSP rests on parallel competences to those of the Member States to conduct their own foreign policies. It is a “common” policy of the EU which is separate from the national foreign policies. This is confirmed, *inter alia*, by the obligation of loyal cooperation on the part of the Member States, which must “support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity” (Art. 24(3)(1) TEU). The application to the CFSP of the general Treaty principles and objectives is further evidence that with the entry into force of the Lisbon Treaty the CFSP has been integrated into the overall constitutional structure of the Union.

PESCO’s specific legal basis (Arts. 42(6) and 46 TEU and Protocol No. 10) provides the EU with the competence to establish permanent structured cooperation in the field of defence. Council Decision (CFSP) 2017/2315 elaborates the Treaty’s specific institutional arrangements applied to PESCO, with the Council maintaining the coherence and ambition of the framework and decision-making following the unanimity rule. The roles and responsibilities of the participating Member States, the observers (as appropriate), as well as the EEAS and the European Defence Agency (in its capacity as PESCO secretariat) are also further specified therein. In accordance with Article 4(2)(f) of the Council Decision and the roadmap for the implementation of PESCO of March 2018,¹³⁹ these overarching rules have

137. See e.g. speeches by Suran, Permanent Representative of France to the PSC, and Silberhorn, Parliamentary State Secretary, Ministry of Defence of Germany at the Egmont/Clingendael conference, “Give PESCO a chance”, Brussels, 29 May 2018.

138. See e.g. Fiott, Missiroli and Tardy, *op. cit. supra* note 91, 38: “PeSCo will not be legally binding”; Besch, *op. cit. supra* note 136: “PESCO is not legally binding. There is no guarantee that PESCO Member States will commit forces in a crisis.”

139. Council Recommendation of 6 March 2018 concerning a roadmap for the implementation of PESCO, O.J. 2018, C 88/1. The roadmap foresees the sequencing of the fulfilment of PESCO commitments in two phases: 2018–2020 and 2021–2025.

been complemented by a common set of governance rules for PESCO projects, which the participating Member States taking part in an individual project “could adapt as necessary for that project”. Laid down in Council Decision (CFSP) 2018/909,¹⁴⁰ this second layer of PESCO governance rules includes modalities to regularly inform the Council about the development of individual projects and to allow the necessary oversight by the Council (Art. 2). It also provides general guidance to participants in designing the suitable arrangements for the management of each project (Art. 4). In this context, the Council has reverted to the issue of coordination functions of the participating Member States within the projects (Art. 5).

Although the “specific” rules, procedures and institutional arrangements applied to PESCO, are significant, they only apply within the confines of permanent structured cooperation and are to be interpreted strictly. Applying Cremona’s analysis with regard to the CFSP/CSDP writ large (see Art. 24(1) TEU), PESCO’s specificity does not take it out of the single legal order of the EU.¹⁴¹ PESCO is neither residual (to be used only when other competences do not apply) nor exceptional. It has two different functions. On the one hand, it is a structured form of CSDP in its own right with its own specific actions,¹⁴² such as capability development and the deployment of battlegroups – actions which need to be coherent with the CSDP and other elements of EU external action.¹⁴³ On the other hand, PESCO also represents the means by which the EU defines its overall strategic autonomy, bringing different sectoral policies such as research, industrial cooperation, investment, procurement and trade under one roof. As Cremona explains, “this dual function was made possible

140. Council Decision (CFSP) 2018/909 of 25 June 2018 establishing a common set of governance rules for PESCO projects, O.J. 2018, L 161/37, preambular para 2, in accordance with Art. 5(3) of Decision (CFSP) 2017/2315. See also Art. 4(2): “These arrangements may include the necessary contributions needed to participate in the project and its requirements, the decision-making process within the project, conditions for leaving the project or for other participating Member States to join the project, and provisions relating to the observer status” and Art. 4(4): “The project members may agree among themselves by unanimity that certain decisions, such as those relating to administrative matters, will be taken according to different voting rules.”

141. See Cremona, “The position of CFSP/CSDP in the constitutional architecture of the EU” in Blockmans and Koutrakos, *op. cit. supra* note 10.

142. For a different view see Tardy in Fiott, Missiroli and Tardy, *op. cit. supra* note 91, 33: “PeSCO is intimately linked to CSDP but shall not be conflated with it; the former is an instrument in support of the latter, which is a policy.” Yet, because of its inclusive character, the Council “in PESCO format” will *de facto* define the future thrust of CSDP.

143. Hence the ubiquitous references in the policy documents that PESCO “will be undertaken in full compliance with the provisions of the TEU and the protocols attached thereto”. See e.g. the Notification on PESCO of 13 Nov. 2017, Annex I, fifth bullet point.

by the revision of Article 40 TEU, recast in terms of institutional balance and procedural specificity rather than CFSP/CSDP ‘encroachment’.”¹⁴⁴

As a result of the Member States’ decision in the Lisbon Treaty to partially lift the “judicial immunity” from which the CFSP has traditionally benefited, the role of the Court of Justice has indeed become more prominent, especially against the backdrop of the incremental integration of the CFSP/CSDP in an increasingly constitutionalized EU legal order.¹⁴⁵ That said, there is no reason to overstate the point. While “there are no signs that the Court is attempting to limit the scope of the CFSP^[146], defining it is not straightforward and, as a result, a legal challenge to the choice of a CFSP legal basis, once made, is not easy.”¹⁴⁷ The implications of the rapidly expanding case law are also unclear with respect to the question whether the integrated nature of the Union’s external action requires the Court to exercise its powers on substantive issues with a CFSP/CSDP policy dimension too. If anything, the case law of the Court has consistently underlined that, in the absence of rules and procedures specific to the CFSP, the general rules apply.¹⁴⁸ The Court’s jurisdiction is, therefore, excluded for acts that are of a “pure” CFSP nature,¹⁴⁹ i.e. based on

144. Cremona, *op. cit. supra* note 141, with reference to Case C-91/05, *Commission v. Council*, EU:C:2008:288.

145. See e.g. Hillion, “A powerless court? The European Court of Justice and the Common Foreign and Security Policy” in Cremona and Thies (Eds.), *The European Court of Justice and External Relations Law* (Hart Publishing, 2014); Eckes, “Common Foreign and Security Policy: The consequences of the Court’s extended jurisdiction”, 22 *ELJ* (2016), 492–518; and Wessel, “Integration and constitutionalization in EU Foreign and Security Policy” in Schütze and Gehring (Eds.), *Governance and Globalization: International and European Perspectives* (Cambridge University Press, 2018).

146. See e.g. Case C-455/14 P, *H v. Council et al*, EU:C:2016:569; Case C-439/13 P, *Elitaliana SpA v. Eulex Kosovo*, EU:C:2015:753; and Opinion 2/13, *EU Accession to the ECHR*, EU:C:2014:2454. Breaking with its traditional approach of reviewing regulations adopted under the TFEU to give effect to CFSP sanctions, the ECJ has recently opened the door to directly review the underlying CFSP decisions. See Case C-72/15, *Rosneft Oil Company OJSC v. Her Majesty’s Treasury*, EU:C:2017:236, paras. 62–63. Absent any express limitation, the Court found that its jurisdiction to review compliance with Art. 40 TEU extended to the preliminary ruling procedure, and that this interpretation is applicable across the entire CFSP. Its jurisdiction under Art. 275(2) TFEU should therefore be interpreted not only to cover the specific measures against targeted persons, but also measures of general application to the extent that they prohibit everyone to economically support or interact with the persons on the list. To be sure, the Court did not extend its jurisdiction under Art. 275(2) TFEU to cover measures of general application unrelated to the list of targeted individuals, such as embargoes and trade restrictions on categories of products.

147. Cremona, *op. cit. supra* note 141.

148. See Eeckhout, “The constitutionalization of European Foreign Policy” in ASIL Proceedings of the Annual Meeting, 107 *International Law in a Multipolar World* (2013), 171.

149. See the Opinion of A.G. Wathelet in Case C-72/15, *Rosneft*, EU:C:2016:381, paras. 42–46: “[A]ctions for damages which relate to a CFSP act are covered by the ‘carve-out’ provision in the last sentence of the second subparagraph of Art. 24(1) TEU and the first

Title V, Chapter 2 TEU – including Articles 42(6) and 46. Any appeal on PESCO-only rules will therefore be declared inadmissible by the ECJ. The remaining limits to judicial review and – especially – the absence of judicial enforcement of Member State compliance leave a systemic gap in the EU-level system of judicial remedies unplugged, as noted by the ECJ itself.¹⁵⁰ However, these limitations need not apply in areas where PESCO makes inroads into sectoral policies governed by the “Community method”. On the contrary, the nexus between CSDP, on the one hand, and research, industrial cooperation, investment, procurement and/or trade, on the other, may well constitute a growth area in the Court’s jurisprudence.

With regard to the supposedly legal nature of the “20 ambitious more binding common commitments” undertaken by the participating States,¹⁵¹ however, the earlier finding about limited judicial enforceability is reinforced, considering the following three aspects.

Firstly, these commitments are entered into on a voluntary basis. This flows from the open framework of enhanced cooperation provided by the Treaties, which allows Member States to accede or withdraw after the establishment of PESCO. This key principle is embedded in the notification on PESCO too: “Participation in PESCO is voluntary and leaves national sovereignty untouched.”¹⁵² The same applies to the Coordinated Annual Review on Defence: “Commitment to support the CARD to the maximum extent possible acknowledging the voluntary nature of the review and individual constraints of participating Member States.”¹⁵³ The voluntary nature of the permanent structured cooperation presupposes that, ultimately, there is no legal way of keeping participating States wedded to their commitments against their will.

paragraph of Art. 275 TFEU, but not by the ‘claw-back’ provision in the last sentence of the second subparagraph of Art. 24(1) TEU and the second paragraph of Art. 275 TFEU.” As pointed out by Eckes, “The law and practice of EU sanctions” in Blockmans and Koutrakos, *op. cit. supra* note 10: “in practical terms the denial of damages for harm caused by CFSP decisions could leave individuals without compensation even if their listing was found to be illegal by the Court within its exceptional jurisdiction under Art. 275(2) TFEU. This would be the case in a situation where the applicants challenged the CFSP decision, rather than also the regulation, or if they were only listed in the CFSP decision but not in the regulation.”

150. Opinion 2/13, *EU Accession to the ECHR*, para 252: “as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice”. For ideas how to plug the gap in a multi-layered system of legal remedies, see Hillion and Wessel, “The good, the bad and the ugly: Three levels of judicial control over the CFSP” in Blockmans and Koutrakos, *op. cit. supra* note 10.

151. Notification on PESCO of 13 Nov. 2017, available at <www.consilium.europa.eu/media/31511/171113-pesco-notification.pdf>.

152. *Ibid.*, Annex I, seventh bullet point. See also note 107 *supra* and accompanying text.

153. *Ibid.*, Annex II, commitment no. 7.

Secondly, most of the 20 commitments developed in the five areas set out by Article 2(a-e) of Protocol No. 10 contain insufficiently clear and unconditional language to be interpreted beyond reasonable doubt, applied and enforced by the ECJ. Examples include:

“6. Playing a substantial role in capability development within the EU, including within the framework of CARD, in order to ensure the availability of the necessary capabilities for achieving the level of ambition in Europe”;

“10. Commitment to considering the joint use of existing capabilities in order to optimize the available resources and improve their overall effectiveness”; and

“12. With regard to availability and deployability of the forces, the participating Member States are committed to: ... Aiming for fast-tracked political commitment at national level, including possibly reviewing their national decision-making procedures.”

It is an illusion to think that breach of these commitments would provide sufficient legal grounds for the Court to hold Member States accountable. They are political declarations of intent which have been laid down in a “notification” of the participating States to the Council and High Representative, which will be reviewed in 2025. While the notification constitutes a formal step to establish PESCO under Article 46(1) TEU, this instrument neither fits the categories of CFSP acts laid down in Article 25 TEU, nor does it meet the formal requirements to be considered as the final expression of being bound by the participating States.¹⁵⁴ It is rather a notification of a political intention to adopt a Council Decision. The latter is, for reasons explained above, difficult for the Court to review, let alone enforce.

Thirdly, the politically “more binding” nature of PESCO commitments will be ensured not by legal or judicial enforcement mechanisms but by an annual regular assessment conducted by the High Representative and supported, in particular, by the EDA, for the capability development aspects (see Art. 3 of Protocol No. 10), and the EEAS (i.e. the EU Military Staff together with the Crisis Management and Planning Directorate, under the authority of the Deputy Secretary General for CSDP), for the operational aspects of PESCO.¹⁵⁵ The key instrument used in this context is the national

154. On CFSP soft law, see e.g. Wessel, “Resisting legal facts: Are CFSP norms as soft as they seem?”, 20 *EFA Rev.* (2015), 123–145; and Wessel, “*Lex imperfecta*: Law and integration in European Foreign and Security Policy”, 2 *EP* (2016), 439–468.

155. Notification, Annex I, sixth bullet point.

implementation plan (NIP). Based on an electronic template provided by the EDA, the NIP should be handed in every year by each participating State. The NIPs should focus on the concrete actions and provisions undertaken by the participating States to fulfil their commitments (data which should also be provided to NATO), including information on contributions to PESCO projects. Informal consultations with the EDA/EEAS may help clarify the information provided therein. The first NIPs formed the basis for participation in PESCO and will provide the benchmark against which the first assessment will be made in 2019. Pursuant to Article 6(3) of Decision (CFSP) 2017/2315, the HR will present an annual report to the Council, describing the status of PESCO implementation, and including the fulfilment, by each participating Member State, of its commitments, in accordance with its NIP.¹⁵⁶ Compliance with the commitments thus relies on increased transparency and annual naming of Member States that meet their targets and (perhaps) shaming of those that don't. Under these rules, participating States that no longer fulfil their entry criteria, do not meet their defence spending targets (in "real terms"),¹⁵⁷ or fail to honour their other commitments referred to in Articles 1 and 2 of Protocol No. 10 will therefore not face any penalties but peer pressure or, in the worst case, suspension from PESCO. This "nuclear option" – for want of a better phrase – is foreseen in Article 46(4) TEU. Yet it is unlikely that underperforming countries will be kicked out of a club in which inclusivity prevails, even if a qualified majority among participating States (with the exception of the Member State in question) is enough to suspend a PESCO member. In a system which was initially referred to as a "Eurozone of defence",¹⁵⁸ accountability will be difficult to achieve if unanimity remains

156. HR Mogherini should present the first annual report in April 2019 or at least prior to the relevant Foreign Affairs Council in the first semester of the year, so as to take into account updated NIPs presented by PESCO States by 10 Jan. 2019. As of 2020, the annual report should be presented in March or April, taking into account the revised and updated NIPs presented in January of the same year. On the basis of the report provided by the HR, the EU Military Committee should provide the Political and Security Committee with military advice and recommendations to enable it to prepare the Council's review on whether the participating Member States continue to fulfil the more binding commitments, by May each year. In this context, the Council should also review the progress made towards the fulfilment of the EU's level of ambition, thus enhancing the Union's capacity to act as a security provider and its strategic autonomy, and strengthening its ability to cooperate with partners and to protect its citizens.

157. See Notification, Annex II, commitment no. 1. See Valášek, op. cit. *supra* note 99: "The wording allows governments the wiggle room for occasional cuts and commits participating States to increases in 'real terms,' meaning that spending as a percentage of GDP – NATO's preferred measure – could actually fall (if economies grow faster than defense outlays)."

158. See Final report of Working Group VIII on Defence of the Convention on the Future of Europe, CONV 461/02, 16 Dec. 2002, para 54: "Several members of the Group have

the general rule in decision-making,¹⁵⁹ if the semester-like CARD is not made compulsory, and if the EDA (unlike the European Central Bank) is not granted any sanctioning powers.¹⁶⁰ If the lessons learned from the Eurozone crisis are anything to go by, then the credibility of PESCO is at risk in the medium to longer term, especially if a sizeable group of (6 or 7) States falls behind on its commitments. Worse, it may leave the EU collective (i.e. Member States and institutions) unprepared to defend itself and protect the security of its citizens in the face of tomorrow's geopolitical (armed) conflict.

3.4. *Maintaining coherence*

Acknowledging early on that PESCO, CARD and the EDF are to a large extent stand-alone initiatives which are based on different Treaty provisions, the Council invited the High Representative, also in her capacity as Vice-President of the Commission and President of the European Defence Agency to explore the potential links between the different building blocks of the EU's new defence architecture. As a result, the notions of inclusivity, coherence, continuity, coordination and collaboration are littered all over PESCO's founding documents. PESCO is indeed the binding element in the EU's alphabet soup on defence integration.¹⁶¹ It uses CARD as a monitoring system to evaluate progress against the benchmarks of the capability development priorities and the annual national implementation plans. And it links up to the European Defence Fund, which projects a 10 percent bonus for the development and deployment of projects undertaken by the PESCO States. Pursuant to Article 18(4) TEU, the High Representative can, in her capacity as Vice President and chair of the Commissioners' Group on External Action, infuse strategic considerations in the identification of projects for European

proposed that as the Maastricht Treaty set up a specific form of cooperation for the introduction and management of the euro, the new treaty should consequently provide for a form of closer cooperation between Member States, open to all Member States wishing to carry out the most demanding tasks and fulfilling the requirements for such a commitment to be credible. One of the conditions for taking part in this 'defence Euro-zone' would have to be a form of presumption that pre-identified forces and command and control capabilities would be available. Another condition might be participation in multinational forces with integrated command and control capabilities. Other factors are also important, such as force preparedness, interoperability and deployment capabilities." See also Besch, who says "PESCO – A kind of 'defence Eurozone'", Besch, *op. cit. supra* note 79.

159. Not just in PESCO, but also in CFSP/CSDP. See Blockmans, "EU global strategy expert opinion no. 25" in Missiroli (Ed.), *Towards an EU Global Strategy – Consulting the Experts* (EUISS, 2016), pp. 57–58.

160. See Council Decision (CFSP) 2015/1835 of 12 Oct. 2015 defining the statute, seat and operational rules of the European Defence Agency (recast), O.J. 2015, L 266/55.

161. See also the Notification of 13 Nov. 2017, Annex I, fourth bullet point.

defence funding.¹⁶² Intra-PESCO coordination between the different project consortia is overseen by the Council, which is also assisted by the High Representative (Arts. 18(2), 26(2) and 27 TEU). Even if coordination across institutions and policy fields is challenging for the HR and the structures that support her,¹⁶³ all of the above looks familiar to the trained eye of an EU external relations observer.

Real difficulties arise in ensuring coherence beyond the outer limits of the EU framework. Here, the mantra is that Member States operate a single set of forces. By increasing defence expenditures, developing and using joint instruments the EU is thus expected to strengthen capabilities that are also available to the United Nations and, in particular, NATO.¹⁶⁴ The good news is that NATO Secretary General Jens Stoltenberg has given his seal of approval to the EU's initiatives in the realm of defence, provided that the two organizations act in full complementarity.¹⁶⁵ To that end, a whole raft of concrete proposals for closer cooperation in areas such as cyber security, countering hybrid threats, and operational cooperation in the Mediterranean are being implemented (section 2.1 above). Yet, PESCO also commits participating States to give preference to European suppliers. This is a nod to those companies' concerns that the US market is not fully open to European enterprises, while their American competitors are able to sell freely in the EU. However, as Valášek has observed: "The urge to level the playing field is understandable, but if U.S. sellers are prevented from competing on equal grounds, the number of possible suppliers to European governments goes down. The defence market becomes a seller's market, with remaining suppliers able to command a higher price."¹⁶⁶

Counterintuitively, it would therefore be in the EU's long-term strategic interest not to reciprocate in kind to US protectionism. Moreover, the EU's and NATO's "shopping lists" do not fully overlap, which means that the 22 States that belong to both organizations have to choose between competing

162. See Blockmans and Russack, "The Commissioners' Group on External Action – Key political facilitator", CEPS Special Report No. 125, 17 Dec. 2015.

163. Ultimately, what is needed is a transparent selection process which respects EU (public procurement) rules and prioritizes PESCO projects that have a structuring impact on the technological and industrial base while raising the EU's strategic autonomy in the operational realm.

164. Council Doc. 14392/16.

165. NATO, "NATO Secretary General welcomes PESCO, stresses need for complementarity", Press Release, 13 Nov. 2017. More cautiously, Stoltenberg's remarks at the opening of the Munich Security Conference, 16 Feb. 2018.

166. See Valášek, *op. cit. supra* note 99.

expectations.¹⁶⁷ The EU and NATO will therefore need to start coordinating their capability planning more tightly.¹⁶⁸ The key to success is greater strategic convergence, whereby Member States and key partners on the EU's borders fully recognize the link between the inevitable restructuring of their armed forces in the short term and the long-term added value of pooling and sharing military capabilities for sustainability and effectiveness. Seen in this light, the UK government's plans to forge a strong military partnership with the EU post-Brexit is a little ironic, given that it always tried to block such progress as a Member State. But such a strong partnership would be a qualitative leap towards meeting the challenges posed by a rapidly shifting security environment.

4. Concluding remarks

The dramatic changes that are affecting the European Union and its position in the world have generated an "integration dividend"¹⁶⁹ in the field of EU defence policy. A new coordinated annual review of Member States' defence capability development plans should embolden the European Defence Agency in identifying opportunities to plug shortfalls. The Commission is expected to stimulate the defence technological and industrial base by investing in cross-border capability development through a new European Defence Fund. And PESCO's governance system and modular approach to defence integration should facilitate the research, development and operationalization of new capabilities pioneered by different consortia among the 25 participating States.

Given that PESCO's membership is virtually identical to that of the EDA and that the first few projects have achieved nothing of substance yet, it would be easy to dismiss the new architecture as "a laborious exercise in reinventing the wheel."¹⁷⁰ Yet the new political momentum and the definition of higher

167. *Ibid.* Beyond the investments in air-to-ground surveillance aircraft, transport ships and planes, and cyber defence, NATO also stresses the need for heavy armour, missile defence, anti-submarine warfare, and air command and control systems. Cf. *supra* notes 39 and 66.

168. See Raik and Järvenpää, "A new era of EU-NATO cooperation: How to make the best of a marriage of necessity", ICDS Report, May 2017.

169. Hillion, Prague European Summit, 21 June 2018, in reference to May's doubtful claims of a "Brexit dividend" when the UK stops paying its "subscription" to the EU, made on BBC One's Andrew Marr show of 17 June 2018.

170. Witney, "European defence: Old wine in new bottles?", *Progressive Post*, 13 Feb. 2018: "But perhaps the truth is that wheels sometimes need reinventing. Defence ministries have little or no corporate memory. Defence ministers are usually birds of passage, staging through en route to more exciting portfolios, or gracefully declining towards retirement. Military 'tours' in staff jobs seldom exceed two or three years. So there is constant generational

criteria should be welcomed for what they are: functional collaborative steps towards a European Defence Union. In light of the generally *ad hoc* nature of the CFSP/CSDP, the EU's efficiency as an international actor in security and defence matters is being increased in function of the objective to contribute to the maintenance of international peace and security (Art. 21(2)(c) TEU).¹⁷¹ At the same time, politicians and policy-makers should not promise to the public what PESCO cannot deliver: an *avant garde* able to carry out the most demanding missions. Both concepts have been diluted in the inception phase as a result of the drive to launch this unique form of differentiated integration in as inclusive a format as possible. In fact, the modular approach to structured cooperation may end up serving as a permanent vehicle for opt-outs and exemptions in the area of defence. Going by Member States' past experience in other EU policy fields, the "Just do it!" attitude that many stakeholders and observers seem to rely on will simply not do, especially if the big Member States that should lead by example persist in their bad habits. The absence of legally binding commitments and supranational enforcement mechanisms imply that national sovereign decisions will remain the norm. And structural differences between Member States' strategic cultures (threat assessments, national postures to taking risks, operational experiences) and institutional preferences (NATO) are likely to impede the emergence of a "common defence" in the sense of Article 24(1) TEU for some time to come.

If the EU collective (i.e. Member States and institutions) wants to be able to defend itself and be more than just a bystander in its volatile neighbourhood and an increasingly conflictual world, then the leaders of the Member States need to put more backbone into the Union's strategic autonomy. To be an actor on the world stage requires a stronger Common Security and Defence Policy. This, in turn, requires a strong culture of implementation and compliance within the PESCO framework. As noted by Tardy:

“(H)ope lies in the merits of a structured and long-term *rapprochement* of defence policies that commit participating Member States in an unprecedented way. This could make cooperation and collective action part of an emerging European strategic culture which in turn may lead to more ambitious and effective military operations.”¹⁷²

change – and perhaps even long-established truths need to be regularly relearned ... So maybe one should not be too critical of a bit of redundant bureaucratic process-building and a dash of premature political self-congratulation. If the upshot is a renewed understanding of the need for Europeans to pool their defence efforts and resources and a renewed determination to make it happen, then it ultimately equates to progress.”

171. See Marquardt, “The institutional framework, legal instruments and decision-making procedures of CFSP” in Blockmans and Koutrakos, op. cit. *supra* note 10.

172. Fiott, Missiroli and Tardy, op. cit. *supra* note 91, 39.

A long-term vision of PESCO could be to arrive at a coherent full spectrum force package – in complementarity with NATO, which will continue to be the cornerstone of collective defence for its members. Seen through this prism, PESCO, CARD and the EDF are elements of a common defence policy that could lead to a common defence, should the Council so decide unanimously.¹⁷³

173. Art. 42(2) TEU.