

Frédéric Mauro

PESCO

European defence's
last frontier





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Frédéric Mauro

PESCO :

**European defence's last
frontier**

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INTRODUCTION

When, a few years from now, observers take a look back at the year 2016, maybe it will look like the year of rebirth for European defence. But only maybe, because the end of the story has not yet been written.

But, for now, let us not deny ourselves our pleasure. Rarely have the proponents of European defence had such a successful year: June saw a new “European Union Global Strategy” (EUGS), outlining the EU’s strategic vision for the coming years; in September came the “Bratislava Declaration” of the European Council on the need to make better use of the options provided for by the treaties; in November, the “implementation plan” of the Global Strategy by the Council of the EU (*Implementing the EUGS*), which attaches a “level of ambition” to the EU’s actions in the field of defence and, lastly, again in November, the “European Defence Action Plan” of the European Commission (EDAP). Never again will it be possible to say that “Europe” does nothing.

In particular, this was also the year in which the Preparatory Action on defence research was definitively adopted in the EU budget for 2017. It follows on from a pilot project voted through in 2014, with the calls for tender awarded in 2016 by the European Defence Agency (EDA). Naysayers will point out that the amounts in question are derisory: €1.5 million over two years for the pilot project and €90 million over three years for the Preparatory Action. But these are just financial and legal tokens aiming to pave the way for a future European defence research programme, the principal of which is already agreed upon and the budget of which is expected to be €500 million a year for R&T¹, which corresponds to more than the effort made in 2014 by the United Kingdom or Germany.

Finally, collaboration between NATO and the EU is looking in better shape than ever. On 8 July last year, a joint NATO-EU declaration, signed by Jens Stoltenberg, Jean-Claude Juncker and Donald Tusk upstream of the Warsaw Summit, sought to give “new impetus and new content” to the strategic partnership between the institutions. This declaration in principle was followed on 6 December with a roadmap listing 40 measures adopted by the Council of the EU and the NATO Council of Foreign Affairs Ministers.

What should we take with us from these initiatives?

First and foremost, the willingness expressed by the European authorities, and not just a handful of Member States, to set in place a common defence has never been so strong. The Commission in particular declares that it is “ready to engage at an unprecedented level in defence to support Member States. It will exploit the EU instruments, including

1. Research & Technology.

EU funding”². In so doing, the Commission is not breaking away from its traditional approach on the supply side of the defence market, as it has pledged to take action against States failing to respect the defence package directives of 2009, in particular their obligations in the field of public defence procurement. This is clearly aimed at indirect industrial compensation (offsets) called for by the States when they issue calls for tender in the field of defence. But, in a radically new departure, the Commission is also committing in favour of action on the demand side, which will be reflected by substantial financing. It wants this financing to pay not only for defence research, but also the acquisition of common military capabilities with an envelope amounting to around €5 billion a year³.

Secondly, this intervention in the field of defence is being carried out in orderly fashion and comes as part of some sort of a defence planning process. Although embryonic, it is already possible to discern the various elements of this process: “global trends” in June 2015; “global strategy” in June 2016; “level of ambition” in November 2016. A new capability acquisition plan and a global defence research strategy are expected to be produced in the framework of the EDA by autumn 2017 and definitively adopted in spring 2018. It would appear that this time, the European authorities intend to concern themselves with ‘defence’, rather than just ‘defence industry’. This might be a watershed.

Thirdly and, in our view, most importantly, all the European authorities are now moving closer to each other in their willingness to prolong these measures by means of an institutional window that would bring them all together within a “structured” and “permanent” framework.

All last year and since its resolution of 21 January 2016 approving the invocation of the mutual defence clause of article 42 (7) [of the Treaty on the European Union – TEU] by France, the European Parliament has consistently argued that “article 42(6) TEU on permanent structure cooperation should be activated among those Member States that wish to cooperate closely with each other”⁴.

It made the same point in a report by Sandra Kalniete (EPP, Latvia) dated 29 March, which “urges willing Member States to establish a Permanent Structured Cooperation in Defence (PESCO)”⁵.

2. 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 – p. 22, paragraph 4.

3. The details for the constitution of these funds have still to be clarified, but they are expected to be constituted largely out of contributions from the Member States.

4. European Parliament resolution of 21 January 2016 “Mutual defence clause” P8 TA (2016) 0019 § 1.

5. European Parliament report on “the EU in a changing global environment – a more connected, contested and complex world” (2015/2272(INI)) § 26.

It made it again in the annual report on the implementation of the Common Security and Defence Policy by Ioan Mircea Pascu (S&D, Romania) dated 3 November 2016, which stresses that "the establishment of permanent structured cooperation will make it possible to develop self-defence or a permanent structured self-defence which can strengthen crisis management operations"⁶.

It made it once again in the report by Urmas Paet (ALDE, Estonia) on the "European Defence Union", which "urges the EU member states to unleash the full potential of the Lisbon Treaty with regard to the CSDP in particular, with special reference to permanent structured cooperation (...)"⁷.

Lastly, in early 2017, a report by Michael Gahler (EPP, Germany) and Esteban Gonzalez Pons (EPP, Spain) aimed to enlighten the Parliament on the "constitutional, legal and institutional implications of the common security and defence policy: possibilities offered by the Lisbon Treaty"⁸. The draft report provides for the Parliament to call on the "VP/HR, the Council and the Member States to use all the possibilities provided for in the Treaty, especially the mechanisms contained in Article 42(6) TEU (...)". It is itself based on an in-depth study carried out on behalf of the Parliament⁹.

Admittedly, there is nothing new in the European Parliament's calls for all provisions of the Lisbon Treaty on CSDP to be implemented, and the PESCO to be established in particular¹⁰. However, we cannot fail to note that the frequency of these calls is increasing.

As for the Commission, its President, Jean-Claude Juncker, said in his State of the Union Address on 14 September 2016 that "the Lisbon Treaty enables those Member States who wish, to pool their defence capabilities in the form of a permanent structured cooperation. I think the time to make use of this possibility is now"¹¹. In its Defence Action Plan of 30 November, the Commission states that it will "exploit the (...) full potential of the Treaties towards building a Defence Union"¹².

Lastly, the European Council, which proposed a "policy framework for defence cooperation" as long ago as November 2014, went one step further in its conclusions of 15 December 2016 by giving the High Representative a mandate to present proposals "in the coming

6. European Parliament report on "the implementation of the Common Security and Defence Policy (based on the Annual Report from the Council to the European Parliament on a Common Foreign and Security Policy) (2016/2017 (INI)) § 12.

7. European Parliament report on the "European Defence Union" (2016/2052 (INI)) of 31 October 2016 § 2.

8. Draft report before the European Parliament on "constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty" (2015/2343 (INI)) § 3.

9. Steven Blockmans: "the 2016 'Winter Package' on European Security and Defence: Constitutional, Legal and Institutional Implications".

10. See, amongst others, annual report on the implementation of the CSDP of 19 March 2015– Arnaud Danjean rapporteur- § 36

11. European Commission - Speech. State of the Union Address 2016: Towards a better Europe - a Europe that protects, empowers and defends. Strasbourg, 14 September 2016.

12. Above-mentioned European defence action plan p. 22 subparagraph four

months as regards (...) elements and options for an inclusive Permanent Structured Cooperation based on a modular approach and outlining possible projects (...)”¹³.

This stream of declarations and reports raises four different series of questions:

- What is the full potential of the European Treaties?
- Why has it not yet been exploited?
- Should it really be implemented?
- If not, what should be done?

13. European Council conclusions, 15 December 2016, CO EUR 10 CONCL 5 § 11. : /

I. WHAT IS THE POTENTIAL OF THE TREATIES IN COMMON SECURITY AND DEFENCE POLICY MATTERS?

It is worth noting that the dual promise of a “Common European Security and Defence Policy” (ESDP) and “common defence” dates back to the Maastricht Treaty of 1992¹⁴. However, this treaty did not go into detail about what this “policy” and “common defence” should be, or about the difference between the two concepts, which we will discuss below. At this point, let us bear in mind the fact that execution work began several times on the former promise, that of a defence policy, between 1992 and 2003¹⁵, but not on the latter.

It was only when the Lisbon Treaty entered into force on 1 December 2009 that the ESDP (renamed “Common Security and Defence Policy” – CSDP) took on a specific legal content. As the Lisbon Treaty only modified the previous treaties, we must look at the Maastricht Treaty, or “Treaty on European Union” (TEU) to describe the CSDP and come to any conclusions as to its unexploited potential.

Even so, a cursory reading of the TEU is not enough to understand what the CSDP is, particularly its provisions on PESCO. It is, indeed, a long and complex text (seven pages of the Official Journal of the European Union), which was the subject of hard-fought negotiations and a great many compromises at the Convention which, in 2003, led to the draft TECE (Treaty Establishing a Constitution for Europe)¹⁶. This text was then modified firstly by the authors of the inter-governmental conference which gave birth, in 2004, to the TECE (also known as Treaty of Rome II)¹⁷ and then, a second time, by the authors of the inter-governmental conference of Lisbon in 2007, which ultimately gave birth to the provisions in force. It is clear that the quality of the text suffered from this difficult labour and that some of its overall consistency has been lost. It is hard or even impossible to sum up and presenting it requires laborious reminders every time (see annex).

14. Article J-4 of the Treaty of Maastricht stipulated that “the common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of the common defence policy, which might in time lead to a common defence”.

15. We refer in particular to the creation, in 2001, of a Political and Security Committee (COPS), a European Union Military Committee (EUMC), Military Staff of the European Union (EUMS), the deployment, starting in 2003, a European Union missions in the framework defined at the Petersberg Summit of 1992 and, finally, the creation of a European Defence Agency (EDA), by decision of the European Council in 2004.

16. Draft Treaty Establishing a Constitution for Europe – 18 July 2003.

17. Treaty Establishing a Constitution for Europe – Official Journal of the European Union 16 December 2004.

A legal interpretation is absolutely necessary to capture the spirit and significance of CSDP. The interpretation we offer here is based on reiterating the intentions of the authors as expressed in the discourse of the heads of state or government at the time¹⁸ and in the preparatory work of the Convention on the Future of Europe. Only by revisiting all of these works and speeches is it possible to try to understand what CSDP is and to calculate how much potential remains untapped.

A. The intentions of the authors of the Treaty

A combined analysis of political speeches and the preparatory work shows three key ideas which, by no means mere grandstanding, guided the pens of the authors and were given a precise legal translation into the treaties.

1) The notion of an 'avant-garde'

At the time the TECE was being drawn up, there was a clash between two incompatible visions of the European project. One, supported by then British Prime Minister Tony Blair, consisted of highlighting the idea of a project arranged around the idea of a market or economic space, with top priority given to enlargement to the countries of the East, recently released from the communist yoke. The other, championed by the French President, Jacques Chirac, was instead one of a "European superpower", which favoured the "deepening" of the project over its enlargement.

CSDP is the result of a compromise between these two visions. It aimed not to hold back the countries that wished to deepen the European project by building the first stage of European defence from being able to do so without having to wait, avoiding the inevitable stalemate of countries that were unready or unwilling to do so or those which were already members of the EU but legally unable to do so under the principle of neutrality, such as Ireland, Austria, Finland and Sweden.

This notion of avant-garde was given voice for the first time by Joschka Fischer, then German Foreign Minister, in a speech on the end purpose of European integration made in Berlin on 12 May 2000¹⁹:

"So if the alternative for the EU in the face of the irrefutable challenge posed by Eastern enlargement is indeed either erosion or integration, and if clinging to a federation of States would mean standstill with all its negative repercussions, then, under pressure from the conditions and the crisis provoked by them, the EU will at some time within the next 10 years be confronted with this al

18. See the following, amongst others, for the preparatory work: Cahiers de Chaillot –October 2004 no. 71 La cohérence par la défense - une autre lecture de la PESD (Coherence through Defence – Another Reading of ESDP) – Philippe de Schoutheete – EU Institute for Security Studies (available in French only); for the section relating to the Intergovernmental Conference: *The Lisbon Treaty, a Legal and Political Analysis* – Jean-Claude Piris' Cambridge University Press 2010

19. Speech by Joschka Fischer on the ultimate objective of European integration (Berlin, 12 May 2000)

ternative: will a majority of Member States take the leap into full integration and agree on a European constitution? Or, if that doesn't happen, will a small group of Member States take this route as an **avant-garde**, i.e. will a **centre of gravity** emerge comprising a few Member States which are staunchly committed to the European ideal and are in a position to push ahead with political integration? The question then would simply be: when will be the right time? Who will be involved? And will this centre of gravity emerge within or outside the framework provided by the treaties? One thing at least is certain: no European project will succeed in future either without the closest Franco-German cooperation."

This speech was echoed by an address by Jacques Chirac before the Bundestag on 27 June 2000²⁰ :

"We must also ensure that in the enlarged Europe, we retain our momentum. We must constantly be able to open up new paths. In order to do so, and as we have done in the past, it is **necessary that the countries which wish to go further with integration**, on a voluntary basis and on specific projects, **are able to do so without being held back by those which, as is their right, do not wish to move forward as quickly.**

Finally, **the European superpower** we are calling for, this Europe that is a strong presence on the international stage, needs strong institutions and an effective and legitimate decision-making mechanism, i.e. in which majority voting takes its rightful place and reflecting the relative weight of the member states.

(...) It is also about deepening policies, by initiative of the countries I referred to earlier and which wish to go further or faster. Together with Germany and France, they could form a **'pioneer group'**. This group would pave the way for the others using the new reinforced cooperation procedure defined by the Inter-Governmental Conference [that would lead to the Treaty of Nice] and, if necessary, entering into cooperation outside the treaty, yet never calling into question the coherence and *acquis* of the Union.

"This, naturally, is how the composition of the **'pioneer group'** will emerge. Not on an arbitrary basis, but out of the will of the countries which decide to participate in all of the reinforced cooperations. I also hope that from next year onwards, the 'pioneer group' will be able to look at, for instance, a better coordination of the economic policies, reinforcing the defence and security policy and greater effectiveness in fighting crime." (Our translation.)

20. Address given by Jacques Chirac to the Bundestag (Berlin, 27 June 2000)

Finally, this notion of an avant-garde was introduced into the work of the Convention on the future of Europe in the decisive contribution of Dominique de Villepin and Joschka Fischer to working group VII on external action²¹:

“2- Flexibility in the field of the European security and defence policy

*“Our aim is to achieve greater **flexibility**, particularly in the field of decision-making processes. **In principle, it is desirable that all Member States of the Union participate. However, there will be situations in which not all Member States will be inclined to participate in cooperations or will not be able to do so.** In such scenarios, those that so wish must have the possibility to cooperate in smaller groups within the framework of the Treaty.*

*“This is **why it must also be possible to use the reinforced cooperation instrument for ESDP.** This will allow groups of Member States to develop the reinforced cooperation that would be open to the rest of the Member States or to the Union as a whole, whilst at the same time establishing a link to the existing institutions and policies of the EU.” (Our translation).*

The aim, then, was clear – to allow, before enlargement if possible and just afterwards if not, an avant-garde of countries wishing to engage more resolutely in building a common defence system to do so.

2) The idea of an autonomous capability based on credible military resources

The idea of an autonomous capability based on credible military resources was referred to the first time at the Franco-British summit of Saint-Malo in 1998:

“(…) The Council must be able to take decisions on an intergovernmental basis, covering the whole range of activity set out in Title V of the Treaty of European Union.

*“2. To this end, the Union must have **the capacity for autonomous action, backed up by credible military forces**, the means to decide to use them and a readiness to do so, in order to respond to international crises.*

*“In pursuing our objective, collective defence commitments to which member states subscribe (set out in Article 5 of the Washington Treaty, Article V of the Brussels Treaty) must be maintained. **In strengthening the solidarity between the Member States of the European Union, in order that Europe can make its voice heard in world affairs, while acting in***

21. Contribution by Mr Dominique de Villepin and Mr Joschka Fischer, members of the Convention, presenting joint Franco-German proposals for the European Convention in the field of European security and defence policy, 22 November 2002, CONV 422/02, CONTRIB 150.

conformity with our respective obligations in NATO, we are contributing to the vitality of a modernised Atlantic Alliance which is the foundation of the collective defence of its members."

Closer to the time when the TECE was being drafted, Jacques Chirac's dialogue with students of Humboldt University on 26 June 2000 left no room for any doubt as to the French leaders' wishes²² :

*"With regard to defence, it is not just France, Germany and Great Britain. It started with the Saint-Malo Declaration between France and England, and Germany very quickly got behind the Franco-British effort. And this was, of course, very greatly to our satisfaction. The group of three managed gradually to win over all of our partners to become involved with these efforts so that there is indeed, and I am not afraid of using the term, a **European superpower**. I believe that Europe must be **a Europe that has the means, as needed, to take care of its own defence if necessary**. Either in the framework of NATO, or, if the Americans are not concerned or not interested, by itself, on its own initiative, under its own command and under its own direction. And I believe that now, many things have been done in less than two years." (Our translation.)*

The aim was not, however, to fall within the framework of a federal entity²³:

"First of all, I would like to say that Joschka Fischer's speech was in all regards an excellent one. It was excellent because it was timely. It came at exactly the right time. It came at the time the Fifteen were starting to realise the need for all to make an effort if we do not want enlargement to lead to a Europe that may, in a way, come unstuck. And it expressed the problem very clearly. That was the speech's first merit.

"Its second is that it did not impose a solution. It did not say: we need a supranational government. It referred to a range of possibilities, all of which were highly intelligent, all of which were extremely interesting, but all of which raised questions. In other words, it showed a number of paths and it said: together, we have to choose the one that suits us the best. This is a good approach and it will certainly have made many Europeans aware of Europe's current issue.

22. Dialogue between Jacques Chirac and youngsters of the Humboldt université on 26 June 2000 à l'université Humboldt (in French only).

23. *Ibid.*

*“So, the final point, if I may repeat it. **I do not believe that a supranational government, which Mr Fischer furthermore referred to as a scenario for a later date, can be chosen as the solution today.** Quite simply because first of all, I do not think there are any countries that would accept it. And if I take the problem you have raised, that of education, do you really think that today, the German Länder, which have made enormous efforts in education, dynamically and intelligently, would agree to an external authority, external even to Germany, laying down identical rules for everybody? That would not work. And therefore it is by different paths, I believe, that we must move forward.” (Our translation.)*

We must bear in mind the fact that this idea of “autonomous capacity” is the tool that will allow Europe to “make its voice heard”, but that the handling of this tool will be carried out within a framework that will remain inter-governmental.

3) The concept of “Defence Eurozone”

When the TECE was drafted, the process of European integration used as a model was that of the Eurozone. In 1992, the aim was to realise a long-term objective – the creation of an integrated economic area – at the end of a process of converging the national economies.

Why would something that had worked once not work a second time? The members of the Convention therefore made **CSDP into a copy of the Eurozone** and took up the idea, *mutatis mutandis*, that it was possible to achieve the desired final state – common defence – by means of the prior, progressive and measurable convergence of the defence apparatus.

This is unambiguously shown by the Convention's preparatory work on the future of Europe²⁴:

*“§ 54. Several members of the Group have 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*

24. Final report of Working Group VIII “Defence” CONV 461/02 – Brussels, 16 December 2002.

forces with integrated command and control capabilities. Other factors are also important, such as force preparedness, interoperability and deployment capabilities (...).

“§ 66. Many members of the Group are of the opinion that the **development of the ESDP calls for the strengthening of military capabilities** available to the Union – with regard to both commitments entered into by Member States in order to fulfil the Petersberg tasks **and deeper commitments** which might be entered into by certain Member States among themselves under a **closer form of cooperation**. Some members of the Group suggested that these deeper commitments take the form of a protocol annexed to the Treaty, whereby those States that so wished would harmonise their military requirements, share their capabilities and resources and ensure some specialisation of their defence efforts.

“In that context, there is a proven need for a mechanism to evaluate and improve on the way in which Member States fulfil their commitments. A range of objectives might be considered, which would evaluate inter alia:

“ the proportion of the defence budget in relation to GNP, and in particular the proportion of equipment and research expenditure in the defence budget;

“force preparedness, including force deployment capabilities and their interoperability.

*“Several members of the Group proposed that **compliance with these commitments by the Member States should be the subject of an evaluation and monitoring exercise.***

*“**This function could be entrusted to the Armaments Agency**, which would thus become a true Capabilities Agency, with the role of encouraging Member States’ efforts to improve capabilities (...).”*

These three ideas shed light on the intricacies and subtleties of the CSDP and help to understand the part that PESCO is supposed to play in it.

B. Legal implications

In 2003, then, the long-term objective was that of “common defence”. There was, furthermore, no longer any question, as in the Maastricht Treaty, of expressing it in the conditional. It was written in a tense – the future indicative – which indicates certainty that the event will come to pass.

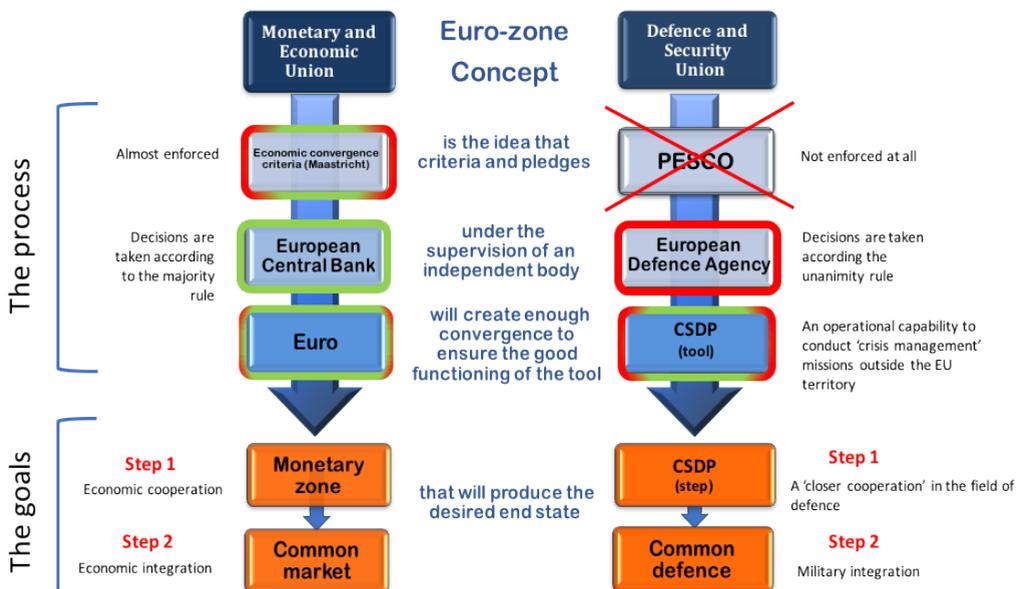
However, the authors of the Treaties, who were well aware of the inevitable difficulties, added an interim objective, which they referred to as the common security and defence “policy” (CSDP).

To achieve these two goals, one after the other, the TEU sets in place a process of convergence – the defence Euro-zone – made up of three indivisible elements:

- criteria to qualify for the avant-garde and binding commitments once admitted to it (PESCO);
- a body, independent of the States, responsible for monitoring compliance with the criteria and facilitating the implementation of the commitments (the European Defence Agency);
- finally, a tool, which also bears the name CSDP and which consists of an operational capability, allowing the Union to carry out crisis management missions outside its territory.

By its very nature, therefore, PESCO could not be an optional initiative of the CSDP that could be set in place *a posteriori*.

It was, instead, one of the essential components to be set in place *a priori* to bring about the CSDP, the first step on the road to “common defence”.



1) An objective in two stages

a) *The interim objective: CSDP (or “closer cooperation”)*

As an interim objective, the CSDP was supposed to be implemented as soon as the new treaty entered into force. What was it made up of? According to article 42 (1) of the TEU, CSDP is an integral part of the common foreign and security policy. It “shall provide” an operational capability, both civilian and military, based on resources fed in by the Member States. In particular, the Union “may use” it for missions outside the Union for peace-keeping, conflict prevention and strengthening international security.

The problem stems from the fact that the authors used the same term – CSDP – to refer both to the objective and the tool to be used to achieve it. This explains the falsely tautological sentence in article 42 (2) of the TEU: “the common security and defence policy (the objective) shall include the progressive framing of a common Union defence policy (the tool)”, a phrase which would otherwise make no sense.

A distinction, then, needs to be drawn between the CSDP as an interim objective, which is laid down in article 42 (2), and the CSDP as a tool, which is defined in article 42 (1). From that point of view, the authors of the draft TECE were clearer, as article 40 (7) of their draft stated:

“Until the European Council has ruled in line with paragraph 2 of the present article (i.e. until a decision has been made to move to the common defence phase), closer cooperation is brought in, in the framework of the Union, on mutual defence. Under this cooperation, should any of the Member States participating in this cooperation be the victim of armed aggression on its territory, other participating States shall provide it with aid and assistance by all means in their power, military and otherwise, in line with the provisions of article 51 of the United Nations Charter. In order to implement closer cooperation in mutual defence, the participating Member States shall work closely with the North Atlantic Treaty Organisation. The terms for participation and functioning, and the decision-making procedures specific to this cooperation, shall be governed by Article III-214.”

Unfortunately, this subparagraph, which allowed a clear distinction to be drawn between the CSDP as a stage (“closer cooperation in mutual defence matters”) and CSDP as a tool (missions outside the EU and the mutual defence clause) disappeared from the TECE and, *a fortiori*, from the TEU.

Even so, what can be deduced about the intentions of the authors of this first stage? Article III-214 of the draft TECE provides a few explanations:

*"1. **The closer cooperation in mutual defence matters** provided for by article I-40, paragraph 7, **is open to all Member States of the Union**. A list of Member States participating in the closer cooperation is included in the declaration (annexed). **If a Member State wishes to join at a later date, and accepts the obligations this imposes**, it shall notify the European Council and subscribe to the said declaration."*

It appears clear that its creation was intended to take place as soon as the treaty entered into force. It is the tool that would be set in place "gradually", in other words over the period of time during which common missions unfold "pragmatically"²⁵. And this is in fact what happened, as the first crisis management missions took place in 2003, on the basis of the Maastricht Treaty and the Petersberg Summit, without waiting for the TECE to enter into force, which in fact it never did.

Similarly, this closer cooperation was open "to all Member States of the Union". However, only those that were able to accept its "obligations", specifically the mutual defence clause and participation in crisis management missions, were able to join. Here, the notion of *avant-garde* crops up again. As we will see below regarding PESCO, the inclusive/exclusive debate quite simply makes no sense. The closer cooperation/CSDP is "inclusive" in that it is open to all. However, only those that wish to join and can accept the obligations are allowed in. It is, therefore, by its nature and at the same time, "exclusive". The degree of inclusivity/exclusivity would depend on the level of the criteria and commitments the Member States decide to lay down when they establish the PESCO.

Finally, this first stage of the CSDP remains within an inter-governmental framework. The evidence of this is that article 42 (4) of the TEU provides that "decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State"²⁶.

b) The final objective: common defence

What is the content of this common defence? The treaty remains silent on the subject and leaves it up to the European Council to define it once the time comes.

25. The term is used by Jacques Chirac in his dialogue with students of the Humboldt University in June 2000 referred to above: *"and so I said to myself that those people who, in 1945, had the idea of building an organised Europe had a great vision. They were visionaries. They said: what we want is to sow peace and democracy, as neither is possible without the other, in Europe. And as they were also **pragmatists**, they did not try to do it all at the same time. They were not men giving speeches, they started small, they started with six countries, the ones that agreed to trace out this path together, and they started with a small thing, coal and steel. It was therefore a vision, a great vision and a **pragmatic method** all at the same time. Everything has developed."* (Our translation)

26. The desire to remain within an inter-governmental framework also helps to explain the exception set in place by article 41 (2) of the TEU, whereby operational expenditure (in other words "operations-related") "with military implications or in the field of defence" (in other words related to reinforced missions and cooperations) would continue to be borne by the Member States, unlike all other CSDP expenditure, which is borne by the EU budget. The Member States called for this exception in order to keep control over these missions under the age-old principle of 'he who pays the piper calls the tune'.

However, let us note that the adjective “common” harks back to debates preceding the Maastricht Treaty on the difference between a “common currency” and a “single currency”.

Without going into complicated semantic considerations, we could, without great risk of getting it wrong, imagine that “single defence” would presuppose the existence of a federal state, with a chain of command that is also “single”, merging national chains. In other words, put simply and in just two words, a “European army”.

But this is not the aim of “common defence”, which aims more modestly to see Europe “capable of fully assuming its responsibilities within the international community”²⁷ on the basis of “operational capability drawing on civil and military assets”²⁸ provided by the Member States under the principle of the “single reservoir of force” and allowing it to “conduct missions outside the Union” (...).

This common defence should be carried out in the framework of the European treaties and not outside it. Hence the concession made to including these provisions in the treaty and to subject the triggering of it to a decision of the Council which would, furthermore, have to be made unanimously.

2) A convergence process made up of three indivisible parts

a) PESCO commitments

The first element in the convergence process is that of “permanent structured cooperation”. More specifically, the commitments of article 2 of protocol no. 10 of the TFEU, which are supposed to act as so many gears, in the specific order in which they are listed:

- a) Investment pledges, both on procurement and defence R&D: quantitative pledges to be defined by the participating members;
- b) Common defence planning: harmonising military needs;
- c) Operational capabilities: taking measures to enhance the availability, interoperability, flexibility and deployability of their forces, by identifying common objectives regarding the commitment of forces;
- d) Equipment capabilities: plugging gaps in capability;
- e) Defence industry cooperation: jointly developing major equipment programmes.

Permanent structured cooperation is therefore to the CSDP what the Maastricht criteria and commitments are to the euro. **Taken in isolation, PESCO is meaningless, just as the Maastricht criteria would be without the euro.** The term “cooperation” is highly misleading. It was used because it was the closest legal translation of the political concept of *avant-garde*, and had already been used for “reinforced cooperation”.

27. This is the seventh recital of protocol no. 10 of the TFEU..

28. Second recital of protocol no. 10 of the TFEU.

As has been stressed many times, including quite recently²⁹, the fact that PESCO may be launched by qualified majority, rather than unanimously, was a considerable relaxation compared to the reinforced cooperation that might have taken place in the field of ESDP³⁰. Once again, the aim is to allow the willing and the able to move forward more rapidly.

It bears reiterating that it was not the purpose of this intellectual construct to lead to a federal construct, to push defence cooperation between sovereign States as far as possible. The evidence of this is that within this *avant-garde*, decisions are made unanimously³¹.

Finally, let us note that in the letter and in the spirit of the authors of the treaty, PESCO was supposed to enter into force at the same time as the treaty or, at the very least, in the first few years of its application. Indeed, article 42 (6) of the TEU provides that:

*“Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions **shall establish** permanent structured cooperation within the Union framework.”*

In law, moreover, the use of the present indicative implies the imperative and consequently, PESCO is not an option, but an obligation.

This interpretation is corroborated by article 1 (b) of protocol no. 10 of the TFEU, which provides that the criterion of “more binding commitments [in military matters] with a view to the most demanding missions” must be assessed “**no later than in 2010**”. This clarification, which was missing from the TECE, confirms that when the Lisbon Treaty was drafted in 2007, PESCO was designed to enter into force along with the treaty itself. Otherwise, this provision would make no sense and, here again, the general principles of legal interpretation require us to interpret less clear provisions by giving them a meaning.

A similar interpretation is required for paragraph a) of article 2 of protocol no. 10 of the TFEU, which states:

*“Member States participating in permanent structured cooperation shall undertake to : a) cooperate, **as from the entry into force of the Treaty of Lisbon**, with a view to achieving approved objectives concerning the level of investment expenditure on defence equipment, and regularly review these objectives, in the light of the security environment and of the Union's international responsibilities;”*

29. See Fédérico Santopinto: “La défense européenne après le Brexit: mieux vaut tard que jamais” (European Defence Post-Brexit: Better Late Than Never) 27 September 2016 – GRIP: (available in French only)

30. The reinforced cooperations provided for by article 20 of the TEU may be decided upon also in the field of CFSP, but in such cases, they must, pursuant to article 329 (2) TFEU, be authorised by a unanimous decision of the Council.

31. Article 46 (6) TEU: “the decisions and recommendations of the Council within the framework of permanent structured cooperation (...) shall be adopted by unanimity. For the purposes of this paragraph, unanimity shall be constituted by the votes of the representatives of the participating Member States only”.

this obligation is, however, tempered somewhat by article 46, which provides that only:

*“Those Member States **which wish** to participate in the permanent structured cooperation referred to in article 42 (6), which fulfil the criteria and have made commitments on military capabilities set out in the Protocol on permanent structured cooperation, shall notify their intention to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy.”*

For reasons that we will go into at a later stage, no Member State wished to participate in establishing PESCO when the Treaty of Lisbon was ratified, thereby rendering the entire intellectual construct of a CSDP/CD (common defence) null and void.

b) The European Defence Agency

The EDA's mission is to oversee the application of the convergence criteria and to participate in implementing commitments. It thus fulfils two functions, along the lines of those fulfilled by the ECB, which monitors the evolution of the principal economic variables of the Eurozone, but above all, implements monetary policy.

The **function of monitoring criteria** is laid down in article 3 of protocol no. 10 of the TFEU, which provides that:

*“the European Defence Agency shall contribute to the **regular assessment of participating Member States' contributions with regard to capabilities**, in particular contributions made in accordance with the **criteria** to be established, inter alia, on the **basis of article 2** [the criteria for permanent structured cooperation], and shall report thereon at least once a year. The assessment may serve as a basis for Council recommendations and decisions adopted in accordance with article 46 of the Treaty on European Union [decisions on PESCO].”*

The function of implementing the commitments is laid down in article 45 (1) of the TEU and is the main operational function of the EDA. To extend the metaphor of mechanical processes, the EDA might be compared to a gearbox containing all the gears. These gears are defined in a specific order, describing the various stages of defence planning. This order is the one laid down in article 45 of the TEU. The objective of the EDA is to:

- a. contribute to identifying the Member States' military capability objectives and evaluating observance of the capability commitments given by the Member States;
- b. promote harmonisation of operational needs and adoption of effective, compatible procurement methods;
- c. propose multilateral projects to fulfil the objectives in terms of military capabilities, ensure coordination of the programmes implemented by the Member States and management of specific cooperation programmes;

- d. support defence technology research, and coordinate and plan joint research activities in the study of technical solutions meeting future operational needs;
- e. contribute to identifying and, if necessary, implementing any useful measure strengthening the industrial and technological base of the defence sector and for improving the effectiveness of military expenditure.

We know that defence planning within a military alliance such as NATO³² is sequenced in five successive stages that are sequentially linked: 1) defining the level of military ambition and the resulting capability objectives (generally classified), which comes under the sole competence of the political decision-makers; 2) defining the capability development plan, which is the joint responsibility of the chiefs of staff and armaments agencies; 3) dividing up the packages of capability objectives between participants ('apportionment phase'), politico-military phase; 4) acquiring these capabilities by means of a development plan ('procurement') and a defence research strategy, which go hand in hand, and finally 5) a phase of re-examining the objectives actually fulfilled. The order in which the PESCO commitments are listed is in fact that of a defence planning process.

Incidentally, the full name given to the EDA in the treaty, which is: "Agency in the field of defence capabilities development, research, acquisition and armaments"³³, makes clear that it was intended to play a key role in defence planning, of which the "Solana strategy" of 2003 and the 'Headline goals' (capability objectives) adopted at the Helsinki Summit the same year should have been the first two phases. The Agency should have been the link between the policy defined by the Council and, "as required, in liaison with the European Commission" (article 45 paragraph 2), the commitments and capabilities of the Member States.

To be in a position to play this role, the Agency must make its decisions by qualified majority and not unanimously, like the Governing Council of the ECB. This, moreover, is what is provided for by article 9-2 of the Agency's statute³⁴. And it is also for this reason that the statute, seat and operational rules of the Agency were adopted by the Council "ruling by qualified majority" and taking account of the "degree of actual participation in the activities of the Agency" (article 45 paragraph 2). It is worth noting in passing that the EDA is "open to all Member States which wish to participate in it", which *de jure* excludes States that are not, or no longer, part of the Union from the decision-making process.

32. Frédéric Mauro and Klaus Thoma: "The Future of European Defence Research" p. 32 and annex no. 3 p. 76

33. On this subject, it may be useful to revisit the statements of the British negotiator at the time, Nick Witney, who would go on to become the first Executive Director of the EDA, at his hearing before the House of Lords: Transcript of oral evidence taken by Sub-Committee C 9 October 2003 item 3.

34. Decision (CFSP) 2015/1835 of the Council of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency 9 (2): "Unless otherwise provided for in this Decision, the Steering Board shall take decisions by qualified majority. The votes of the participating Member States shall be weighted in accordance with Article 16(4) and (5) TEU. Only the representatives of the participating Member States shall take part in the vote."

The authors of the TECE intended the role of the EDA to be particularly important, as it was supposed to take on the activities carried out by the party States to the “framework agreement on the letter of intent” (LoI-FA), those carried out by the Western European Armaments Group (WEAG) of the Western European Union and, in particular, those of the Organisation of Joint Armament Cooperation (OCCAr)³⁵. Since its creation in 1996, OCCAr has steered, amongst other things, armament programmes for the military transport aircraft A400M, for the armoured transport vehicle BOXER, for FREMM multi-purpose frigates, for the ASTER anti-aircraft and missiles, for TIGER helicopters, etc. – or a total in excess of €50 billion, yet so far, the EDA has not carried out a single structuring programme and, in twelve years, has unfortunately only been able to pull together the sum of around €1 million divided between a multitude of small projects. And so it is OCCAr that has the technical experience of an armaments agency proper.

c) *The CSDP (or crisis management missions and the defence clause)*

Article 42(1) TEU defines the CSDP as a mechanism aiming to allow the Union to acquire an operational capability based on resources supplied by the Member States in order to be able to carry out crisis management missions. These missions are therefore the tool, the crucible in which the closest cooperation is to be forged in an entirely “pragmatic” way. They are supposed to constitute the face of this construct visible to the citizens, in the same way as the euro as currency is the visible instrument of Economic and Monetary Union.

As for the mutual defence clause set out in article 42(7), the inclusion of which in the Treaty was the subject of a great many debates at the Convention, it legally makes the CSDP a military alliance³⁶, otherwise its wording makes no sense.

In order to function correctly, this tool requires the Member States to comply with the two commitments laid down in article 42 (3) of the TEU, namely:

- to make civil and military capabilities available to the Union (...);
- progressively to improve their military capabilities.

These commitments apply to all Member States participating in the CSDP and constitute its common pillar. They do not prejudge whether the “military capabilities fulfil higher criteria” or the “more binding” nature of the “ commitments” of these Member States that wish to establish permanent structured cooperation amongst themselves in application of article 42(6).

35. Final report of Working Group VIII “Defence” CONV 461/02 - Brussels, 16 December 2002 § 64: “Development of capabilities is linked to development of armaments. In this context, the setting up on an intergovernmental basis of a European Armaments and Strategic Research Agency was supported by many in the Group. The Agency’s initial tasks would be to ensure the fulfilment of operational requirements by promoting a policy of harmonised procurement by the Member States, and to support research into defence technology, including military space systems. The Agency would incorporate, with the European label, closer forms of cooperation which already exist in the armaments field between certain Member States (OCCAR, LoI). The Agency should also be tasked with strengthening the industrial and technological base of the defence sector. It should also incorporate the appropriate elements of the cooperation that most Member States undertake within the WEAG”.

36. Spearheading European Defence: employing the Lisbon Treaty for a Stronger CSDP – Clingendael Report: Anne Bakker, Sven Biscop, Margriet Drent, Lennart Landman.

Following this rereading of the treaties, CSDP/CD emerges more clearly. We propose the summary definition:

The **CSDP** aims primarily to establish **closer defence cooperation between an avant-garde of Member States with high operational capabilities measured on the basis of objective criteria**. Through the assistance of the European Defence Agency, **this cooperation will allow the Union to carry out crisis management operations autonomously outside its territory**.

The CSDP is the first stage leading to **common defence** between the participating Member States, characterised by **deeper integration** that will, if necessary, materialise through force and capability specialisation and by bringing together the armaments industries.

The CSDP and common defence are conducted within an **inter-governmental framework**.

C. The political consequences to be drawn from potential remaining untapped

1) The CSDP is a bloc made up of indivisible elements

In order to produce convergence, all pieces of the defence Euro-zone are indispensable. Like gears, the gearbox and the transmission, PESCO, the EDA and the CSDP missions form an indivisible whole³⁷. Setting the elements in place in isolation, a few at a time, without integrating them, cannot produce effects.

In this way, the missions under article 42(3) were deployed from 2003 without waiting for the establishment of PESCO or the institution of the EDA. In all, 35 civil, military or joint missions have been launched³⁸.

37. One might question the fact that the most important provisions on CSDP in TEU are all contained in one and the same article. If the authors proceeded in this way, it may well be that they felt these provisions formed a whole and that it would be impossible to apply the individual paragraphs in isolation.

38. See table.

OPERATIONS CONCLUDED		
MILITARY	CIVILIAN	JOINT OPERATIONS
EUFOR CONCORDIA (2003) ARTEMIS (2003) EUFOR RD CONGO (2006) EUFOR TCHAD/RCA (2008-2009) EUFOR LIBYA (2011/never deployed) EUFOR RCA (2014-2015) EUFOR RCA (2014-2015) EUMMAN RCA (20105-2016)	EUPM BOSNIA (2003-2012) EUPOL PROXIMA (2003-2005) EUJUST THEMIS (2004-2005) EUPOL KINSHASA (2005-2007) EUJUST LEX-IRAK (2005-2013) ACEH AMM (2005-2006) EUPOL RDC (2007-2014) EUPAT MACEDONIA (2005)	EUSEC RD CONGO (2005-2016) AMIS II (2005-2007) SSR GUINEA BISAU (2008-2010)

OPERATIONS UNDERWAY	
MILITARY	CIVILIAN
EUFOR ALTHEA (since 2004) EUNVAFOR ATALANTA (since 2008) EUTM SOMALIA (since 2010) EUTM MALI (since 2013) EUNAFOR MED SOPHIA (since 2015)	EUBAM MOLDOVA/UKRAINE (since 2005) EUBAM RAFAH (since 2005) EUPOL COPPS/Palestinian territories (since 2006) EUPOL AFGHANISTAN (depuis 2006) EUPOL AFGHANISTAN (since 2007 - termination end 2016) EULEX KOSOVO (since 2008) EUMM GEORGIA (since 2008) EUCAP SAHEL/NIGER (since 2012) EUCAP NESTOR (since 2012) with became EUCAP SOMALIA (since 2015) EUBAM LIBYA (since 2013) EUCAP SAHEL MALI (since 2015) EUTM RCA (since 2016)

There are dozens of studies into the matter³⁹. It should be noted that in the most serious crises in Europe's neighbourhood, in particular in Libya, Ukraine and Syria, there has never been any question of deploying high-intensity missions in order to allow the CSDP to fulfil its crisis management function. And in fact, the capabilities underlying these missions are too weak and can be used only in situations in which the environment has already been secured. It is hardly surprising, under these conditions, that the external action of the Union has not taken on any consistency in the collective imagination of the European citizens. How many of them would be able to name even three interventions carried out under the CSDP? With the Union spending between €200 and €300 million on this every year⁴⁰, can we say that these missions have made a decisive contribution to closer cooperation between the Member States in mutual defence?

Similarly, the EDA was set up in 2004, without waiting for the launch of PESCO. How many genuinely structuring armament programmes for European defence has it contributed to so far? To take a rather more bald view of things, what would be the impact of getting rid of it on the European defence industries and on the States' procurement of war material? We can hope that things will change, but as things stand, proof of its usefulness is yet to emerge.

As PESCO is the missing piece of the mechanism, we could conclude that its establishment may help to develop the capabilities of the Member States and facilitate external missions.

In order to be useful, however, the setting in place of PESCO must meet two conditions:

- it must be done with the genuine intention of converging the national defence systems and not on an ad hoc and disconnected basis;

- it must go hand in hand with a reform of the European Defence Agency, to allow it to do its job as a link between EU policy and resources of the Member States.

2) We need to move away from the idea of an "inclusive" PESCO ...

PESCO is the legal transcription of the political idea of an avant-garde. We need to accept it as it is, or stop talking about it. The fatal debate over the idea of inclusivity was launched by the countries that did not meet the "most demanding criteria" but which were nonetheless unable to resign themselves to missing the train of CSDP.

39. See, amongst others, the enlightening study by Jolyon Howorth: "European Security post-Libya and Post-Ukraine: in search of Core Leadership". May 2014 Istituto Affari Internazionali.

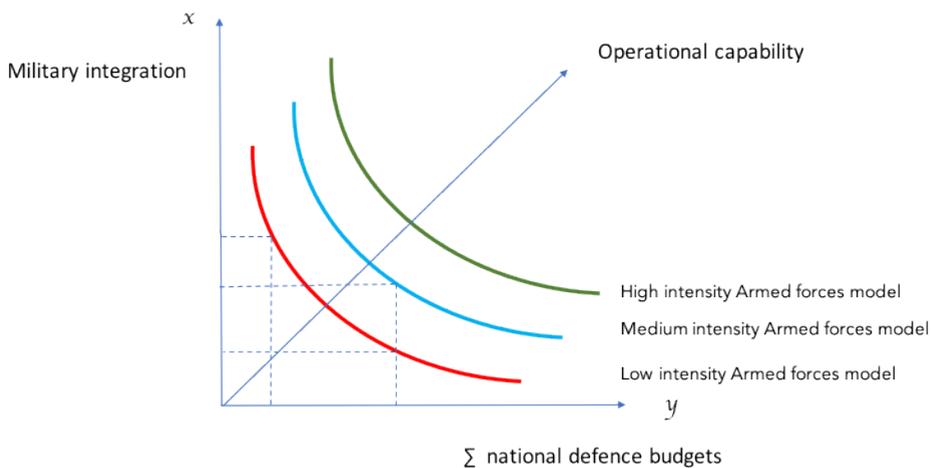
40. Gros-Verheyde Nicolas, "Le projet de budget de l'UE pour 2017. Volet extérieur et sécurité intérieure. Explications", Blog Bruxelles 2Pro, 12 October 2016.

This debate, which has unfortunately never stopped, is truly poisoning the triggering of PESCO and forcing the Member States into pointless intellectual contortions⁴¹.

The fact is that it is not possible, within an inter-governmental framework, to have loose commitments yet possess significant operational military capability. In order to be credible and to give the Union the strategic autonomy it seeks, the CSDP must be based on military capabilities which themselves are credible. Can you imagine how US defence would look if each State was free to decide on its contribution to the Armed Forces?

In the absence of a federal state, common budget and own resources, we will have to make do with “convergence”, which requires a measurable and comparable effort of the States, therefore criteria and commitments established by the Member States, but nonetheless binding.

Let us note that intuitively, for a given level of operational capacity, the greater the integration between the Member States, in other words the greater the specialisation of forces, capabilities and industries, the greater the economies of scale, which relieves the necessary increase in military budgets commensurately. This can be illustrated in the following graphic:



41. See Nicolas Gros-Verheyde: "Une coopération structure permanente à géométrie variable" (Permanent structured cooperation with variable geometry) blog B2Pro November 2016: (available in French only) and Joe Coelmont "Permanent Sovereign COoperation (PESCO) to underpin the EU Global Strategy" Egmont December 2016.

3) ... and from the idea of a modular PESCO

Once again, the term “cooperation” is misleading, as PESCO is a raft of criteria and binding commitments that would be better renamed the “Lisbon criteria” and simply applied, or stop talking about them.

What PESCO is not is a “basket” into which you might slip joint forces or capability projects in a “modular” fashion by initiative of the Member States. Moreover, is this kind of ‘modularity’ not exactly what the Member States have been doing for fifteen years? Have they not already piled up all manner of “modules”: between two Member States (Lancaster House), three (Weimar Triangle), four (Višegrad Group), five (Weimar plus, Nordic corporations)? Have they not carried out all sorts of programmes, between two, three and even seven? Has this “bottom-up”, “pragmatic” and one might even say “à la carte” approach led to an “autonomous capability based on credible military resources”? The obvious answer is no⁴².

This does not mean that within the avant-garde of countries establishing PESCO, they must all participate in the same capability programmes. That goes without saying. But it is not the purpose of PESCO or, more precisely, it is only one of its many benefits and not its *raison d’être*. Because, if the aim is to allow Member States to cooperate in a “modular” fashion, then there is no need to establish PESCO. They can do that just as easily in the existing framework.

If the anticipated institutional prolongations should go down this road once again, they would be nothing more than an entirely cosmetic patch-up job designed to give the illusion of movement rather than to create it. It will be another missed opportunity.

In order to implement the full potential of the treaties, we need to understand why the Member States have so far refused to do this.

42. See Anne Bakker, Margaret Drent, Dick Zandee: “European defence core groups – the why, what & how of permanent structured cooperation” – Clingendael – Egmont November 2016: and Sven Biscop: Oratio pro PESCO – Egmont Paper 91 January 2017.

II. WHY HAS THIS POTENTIAL NEVER BEEN TAPPED?

A. Circumstances had a lot to do with it ...

The double negative result in the referendums to adopt the Treaty establishing a Constitution for Europe (TECE) on 29 May 2005 in France and on 1 June 2005 in the Netherlands dealt a fatal blow to the idea of a CSDP/CD (common defence) as outlined in the provisions of the treaty.

This blow was all the more fatal as it was immediately followed by the disappearance from public life of two European leaders who had been strong proponents of the idea. In the course of September 2005, President Jacques Chirac suffered a serious cardiovascular incident and Chancellor Gerhard Schröder lost the general elections in Germany. With them went some of the memory of the complex mechanism that was aimed for in the TECE. But most of all, the idea became permanently lodged in the minds of the European leaders that it was better to leave well alone. Once the broken vessel of the TECE was stuck back together in the Treaty of Lisbon, any subsequent changes of the treaties became taboo.

The leaders who would take over from Jacques Chirac and Gerhard Schröder were initially absorbed by attempts to keep the TECE afloat. Nor were they made of the same pro-European fibre as their predecessors. Nicolas Sarkozy in particular held the opposite view to all options taken by Jacques Chirac. Where Chirac had promoted a multilateral approach, he would champion a bilateral one. Rather than action in favour of European defence, from 2007 he would choose instead to take France back to the integrated military structure of the Atlantic Alliance. Finally, he would seek an alliance with the United Kingdom instead of the traditional "Franco-German driving force" and, from a military point of view, this would translate into the Lancaster House agreements of November 2010. This policy was continued by François Hollande with the blessing of a section of the French military and administrative hierarchy, who saw the American aid to operations in Libya and then Mali as vindication of the choices made.

On a completely different level, we have to admit that even referring to the concept of "defence Euro-zone" to characterise the CSDP at a time when, in 2008-2010, Economic and Monetary Union was experiencing the worst crisis of its history, was not particularly promising, politically speaking.

Lastly, we cannot ignore the ideological intoxication of “pragmatism” as “moral principles of action” and its collateral damage: unwillingness to make institutional changes that could not be reversed, condemning any long-term vision and desperately looking for immediate “concrete” results. Against this backdrop, “structured” and “permanent” cooperation was always going to scare the horses. It constitutes the very prototype of a sophisticated intellectual construct clashing with ideas that have been prevalent since 2005.

Today, the prevalent ideas are changing. The fact that the High Representative of the Union/Vice-President of the Commission (HR/VP) lays claim to a “principled pragmatism” possibly marks a turning point. In particular, the planned exit of the United Kingdom from the Union will require long-term vision to be shown, which could once again support this kind of intellectual construction.

B. ... but it is mainly structural reasons that are continuing to block the launch of the European Defence Union

The first culprit in the sidelining of CSDP/CD is none other than the Treaty of Lisbon itself. The complexity of the instrument, the reservations laid down by the negotiations, pointless additions such as protocol no. 10 of the TFEU or the deletion of important subparagraphs, such as the one referring to “closer cooperation in the field of mutual defence”⁴³, rendered the treaty an absolute headache to lawyers and researchers, impenetrable to political decision-makers and, in particular, made it absolutely impossible for European citizens to take ownership of it.

Not only was the construction it envisaged far too subtle, but the choice of words has also proved disastrous. It is unfortunate that the term “European Defence Union”, used during the preparatory work⁴⁴ to refer to CSDP and common defence indifferently, was abandoned. Unlike abstruse acronyms, it would have helped to translate the actual intentions into vocabulary that anybody could understand. Similarly, drawing a distinction between common defence “policy” and “common defence” was not a judicious choice; nor was the decision to add “security” to it, adding to the confusion, even though it describes the reality of the continuum between internal security and external defence. Finally, the very term “permanent structured cooperation” is politically off-limits and cannot reasonably be used as a slogan for programmes intended to win over the hearts and minds of large numbers of people.

43. Article 40 (7), that immediately followed the one on PESCO, stated that: “Until the European Council has ruled in line with paragraph 2 of the present article (i.e. until a unanimous decision has been made to move to the common defence phase), **closer cooperation is brought in, in the framework of the Union, on mutual defence.**”

44. Cahiers de Chaillot – October 2004 no. 71 La cohérence par la défense - une autre lecture de la PESD (Coherence through Defence – Another Reading of ESDP) – Philippe de Schoutheete pages 28, 30 and 37 (available in French only).

But the most important factor that stripped the Treaty of Lisbon of its full potential was the concerns, of certain Member States, that they would lose some of their sovereignty in a gearing process similar to that of the Eurozone. In France in particular, this loss of sovereignty seemed particularly unacceptable, as the idea continues to prevail that all you have to do is stick to the commitment of making a defence effort of 2% of GDP to allow the country to go it alone, with the potential support of British and American allies, successful export activities and the financial support of Middle Eastern “strategic partners”⁴⁵. The future will judge whether this gamble is a realistic one.

In essence, the Member States are afraid of being obliged, similarly to what is happening within the euro, to accept decisions they initially agreed to, but which they have subsequently come to think better of. Achieving common defence presupposes a high degree of integration, to be achieved through a certain specialisation of forces or modification of their defence planning process⁴⁶. But specialisation implies interdependence, and interdependence implies inability to act alone.

45. It is, incidentally, symptomatic that in response to an open letter from the Chief of Staff of the Armed Forces, Pierre de Villiers, highlighting the urgent need to increase defence efforts at the level of the political ambitions called for of the French Armed Forces, neither the Head of State nor the Prime Minister saw fit to moot the possibility of European defence as a potential solution to this state of affairs.

46. Article 2 of protocol no. 10 TFEU expressly states that: “Member States participating in permanent structured cooperation shall undertake to (...) (b) bring their defence apparatus into line with each other as far as possible, particularly by harmonising the identification of their military needs, by pooling **and, where appropriate, specialising their defence means and capabilities** (...) (c) take concrete measures to enhance the availability, interoperability, flexibility and deployability of their forces, in particular by identifying common objectives regarding the commitment of forces, **including possibly reviewing their national decision-making procedures.**”

III. DO WE REALLY NEED TO IMPLEMENT THE FULL POTENTIAL OF THE TREATIES?

Exploiting the potential of the Treaty of Lisbon presents a major advantage: it does not require any changes to the existing treaties. It is “just” a matter of applying them.

It does present one major problem: it is in the hands of the Member States. All of the European authorities may jointly proclaim the need to establish structured cooperation, but if the Member States do not wish to, there is nothing to force them.

To make full use of the potential of the European treaties, the Member States locate that to be won over and shown that it is both possible and desirable, in the general interests of Europe.

A. Is it possible?

In order for the treaty to produce its effects, PESCO most definitely needs to be established. But this is not enough: the way in which the EDA works also needs to be changed, to allow it to bring in convergence between the national defence planning processes.

1) Establishing PESCO...

As readers will have noted, PESCO is a singular noun⁴⁷: there can only be one, just as there can only be one set of economic convergence criteria for the euro. This is why the greatest of care needs to be taken when defining the commitments to be made.

Yet this definition is entirely possible. This is evidenced by the fact that it has existed since November 2007, when the EDA's Ministerial Steering Board approved four collective benchmarks to measure the convergence of their defence apparatus:

- Defence equipment procurement (including R&D/R&T); as a percentage of defence expenditure, this effort should be at least 20%;
- Defence R&T; as a percentage of defence expenditure, this effort should be at least 2%;
- European collaborative equipment procurement; this effort should be at least 35% of total equipment spending;
- European collaborative defence R&T: this effort should be at least 20% of total R&T spending.

47. Article 46 TEU is unambiguous on this point: “Those Member States which wish to participate in **the** permanent structured cooperation referred to in article 42(6)(...)”

In 2014, the degree of compliance with these benchmarks by the various Member States was as follows:

EDA Member States 2014	Defence Expenditure	Defence investments *	in % of defence expenditure	Defence R&T	in % of defence expenditure	European defence collaborative equipment	in % of equipment spending	European collaborative R&T	in % of defence R&T
BENCHMARK			20,0		2,0		35,0		20,0
All EDA countries	194 783	34 687	17,8	1 898,8	1,0	5 121,2	19,8	170,2	9,0
Austria	2 491	289	11,6	1,5	0,1			0,2	13,3
Belgium	3 913	146	3,7	2,6	0,1	66,4	48,3	1,0	38,5
Bulgaria	563	6	1,0						
Croatia	606	45	7,3						
Cyprus	270	1	0,3						
Czech Rep.	1 493	148	9,9	6,6	0,4			0,5	7,6
Estonia	386	87	22,6	1,5	0,4	0,1	0,1	0,2	13,3
Finland	2 714	468	17,3	24,7	0,9			1,3	5,3
France	39 198	9 697	24,7	764,0	1,9	2 032,0	33,1	123,0	16,1
Germany	34 749	4 627	13,3	482,9	1,4				
Greece	4 001	322	8,0						
Hungary	912	71	7,8						
Ireland	893	87	9,7						
Italy	18 427	2 059	11,2	classifié		673,6	34,4	5,3	
Latvia	223	16	7,3						
Lithuania	322	66	20,3						
Luxembourg	190	55	28,9			29,3	53,3		
Malta	43	2	4,4						
Netherlands	7 788	796	10,2	59,4	0,8			5,5	9,3
Poland	7 565	2 028	26,8	10,3	0,1	44,2	2,4	1,9	18,4
Portugal	2 501	345	13,8	1,6	0,1			0,6	37,5
Romania	2 029	321	15,8	1,1	0,1				
Slovakia	749	84	11,2	0,1	0,0				
Slovenia	366	2	0,7						
Spain	9 508	1 333	14,0	42,0	0,4	611,3	48,6	20,8	49,5
Sweden	4 711	1 283	27,2	61,1	1,3	100,1	8,0	9,1	14,9
UK	48 172	10 306	21,4	439,4	0,9	1 564,2	23,9	0,8	0,2

Source: EDA

* investment includes equipment and R&D

Then, just seven countries met the criterion of 20% of defence expenditure on defence equipment. Within the framework of PESCO, however, there would be nothing to prevent Member States from setting a progressive ratio so as to allow countries to opt to set in place catch-up plans.

Particularly in view of the fact that this commitment to a ratio of 20% is the same as the one entered into by the NATO member states at the Wales summit of 2014.

Using slightly different methodology, compliance with quantitative criteria expressed in billions of dollars by the NATO member states is as follows for the year 2014:

2014	Defence expenditure		Defence equipment *		
	Current prices and exchange rates	USD Millions	In % of GDP	USD Millions	In % of defence expenditure
BENCHMARK		2,0		20,0	
Belgium		5 184	1,0	182	3,5
Bulgaria		747	1,3	8	1,0
Croatia		805	1,4	59	7,4
Czech Rep.		1 975	1,0	129	6,5
Estonia		513	1,9	114	22,2
France		52 006	1,8	12 866	24,7
Germany		46 102	1,2	5 966	12,9
Greece		5 226	2,2	427	8,2
Hungary		1 210	0,9	94	7,8
Italy		24 448	1,1	2 670	10,9
Latvia		293	0,9	22	7,6
Lithuania		427	0,9	60	14,1
Luxembourg		253	0,4	57	22,6
Netherlands		10 332	1,2	1 103	10,7
Poland		10 104	1,9	1 904	18,8
Portugal		3 003	1,3	253	8,4
Romania		2 692	1,4	425	15,8
Slovakia		997	1,0	111	11,1
Slovenia		486	1,0	3	0,7
Spain		12 614	0,9	1 702	13,5
UK		65 690	2,2	14 990	22,8
EDA Member States		245 107	1,5	43 145	17,6

Source: NATO July 2016

* Equipment expenditure includes major equipment expenditure and R&D devoted to major equipment.

For 2016, NATO published the following figures⁴⁸:

2016	Defence expenditure		Defence equipment *		
	Current prices and exchange rates	USD Millions	In % of GDP	USD Millions	In % of defence expenditure
BENCHMARK		2,0		20,0	
Belgium	4 023	0,9	87	2,2	
Bulgaria	663	1,4	83	12,6	
Croatia	607	1,2	50	8,3	
Czech Rep.	1 930	1,0	140	7,2	
Estonia	497	2,2	67	13,5	
France	43 620	1,8	10 691	24,5	
Germany	40 663	1,2	5 559	13,7	
Greece	4 550	2,4	678	14,9	
Hungary	1 243	1,0	162	13,0	
Italy	21 878	1,1	4 428	20,2	
Latvia	400	1,5	71	17,9	
Lithuania	630	1,5	174	27,7	
Luxembourg	263	0,4	86	32,8	
Netherlands	9 016	1,2	1 301	14,4	
Poland	9 349	2,0	2 411	25,8	
Portugal	2 783	1,4	262	9,4	
Romania	2 766	1,5	723	26,1	
Slovakia	1 024	1,2	196	19,1	
Slovenia	400	0,9	5	1,2	
Spain	11 064	0,9	1 685	15,2	
UK	60 347	2,2	14 127	23,4	
EDA Member States	217 716	1,5	42 987	19,7	

Source: NATO July 2016

* Equipment expenditure includes major equipment expenditure and R&D devoted to major equipment.

48. Due to the reluctance of certain Member States to report their figures to the EDA, it has been unable to publish the figures for the year underway. For this reason, the last published year is 2014.

At this stage in the reasoning, the question is simple: if the Member States of the Union, most of whom are also members of NATO, are prepared to make commitments over a ten-year period in the framework of the North Atlantic Treaty, what is stopping them from doing so in the framework of CSDP?

Admittedly, in one scenario, that of NATO, it is about political promises and in the other, that of the EU, it is about legal commitments. However, the argument is weak, unless we consider that promises made in the NATO framework have only a political value, in other words: no value. It is moreover striking to note how much PESCO and the 2% policy, with its classified qualitative criteria, are as similar as false twins⁴⁹.

2) ... reforming the EDA as well...

Again, this is entirely within the bounds of possibility. The rule of qualified majority for decision-making is already laid down in the Agency's statute. It just needs to be enforced, which has not been the case so far, except for a handful of minor decisions on staff regulations.

As for the merger with OCCAr, this is necessary in order to make the EDA into a true "Agency in the field of defence capabilities development, research, acquisition and armaments". This can be done without any hurry. It would bring greater readability to the European institutional landscape and would put an end to the idea that there is a serious institution that works and should be left untouched – OCCAr – and a second one, which is a pointless gadget – the EDA – as is too often said in the Member States. Admittedly, in the event of a merger, arrangements would have to be reached with the member countries of OCCAr which are not, or no longer, members of the Union. But again, not an insurmountable task.

The main thing is to make the Agency into **the interface between, on one side, the Member States and, on the other, the Union, represented by the HR/VP - President of the Agency**. It would, incidentally, be logical for the Agency to have more staff and for more of them to come from the national armaments agencies, as seems to have been the plan, sadly rejected, when the Agency was created in 2004.

If this interface cannot be found within the Agency and a merger with OCCAr were to be ruled out, then the Union may arguably need to adopt its own expertise capability within the Directorate General for CSDP to be created and the EDA may need to evolve to take on different missions, similar to those carried out by the American DARPA. However, such a change in role for the EDA would hardly be compatible with the spirit of the treaties.

49. Frédéric Mauro: "What shall we think about NATO's '2% policy' after the Brexit"? DSI (Défense & Sécurité Internationales) no. 49 – August in September 2016 (available in French only), <http://www.fredericmauro.net/publications-c1vw1>

3) ... and move defence planning closer together

In any case, both within the EDA and outside it, it will be necessary to move the defence planning processes of the Member States closer together. This is certainly the objective agreed upon by the European Council of 20 December 2013⁵⁰ :

*“12. Cooperation should be facilitated by increased transparency and information sharing in **defence planning**, allowing national planners and decision-makers to consider **greater convergence capability needs and timelines**. To foster more systematic and long-term cooperation, **the European Council invites the High Representative and the European Defence Agency to put forward an appropriate policy framework by the end of 2014, in full coherence with existing NATO planning processes.**”*

This task would be accomplished by the new HR/VP Federica Mogherini, in an ambitious document entitled **“Policy Framework for Systematic and Long-Term Defence Cooperation”**, which was adopted by the Council on 18 November 2014⁵¹. Amongst other things, this document provided that:

*“10. (...)Member States are committed to providing a stronger and more coherent basis for **defence cooperation in Europe, from defining requirements and priority-setting through in-service support to disposal/decommissioning** (...).”*

What looked like just a pious wish-list in 2014 took on greater consistency with the publication, in 2016, of a global strategy and, in particular, an implementation plan setting a level of ambition that laid the foundation stones for defence planning. There is, admittedly, still a long road between these documents and the coordination of national acquisition strategies and the implementation of a global European defence research strategy. But at least now there is light at the end of the tunnel.

However, getting there will necessarily require a document transcribing the political intentions (the “level of ambition”) regarding the desired military capability, whether this document be called “White Paper”, “headline goals” or “political guidances”. For the time being, the drafting of this missing link from the planning chain has been put aside; however, this casts serious doubts over the drafting of the forthcoming Capability Development Plan (CDP), which could once again end up being nothing more than a catalogue of everything the Member States do not want to do on their own. This again raises the question as to why the Member States balk at doing things within a Union framework that they agreed to do in the framework of the NATO Defence Planning Process (NDPP) in 2009.

50. Available online: <http://data.consilium.europa.eu/doc/document/ST-217-2013-INIT/fr/pdf>

51. Available online: <http://data.consilium.europa.eu/doc/document/ST-15562-2014-INIT/fr/pdf>

B. Is it desirable?

What would happen if all the potential of the TEU were actually put into place?

We might hope that the European Defence Union (EDU) would produce a considerable degree of convergence between the defence apparatus, just as the euro has produced convergence between the economies that adopted it.

As the EDU is a carbon copy of Economic and Monetary Union (EMU), it is afflicted by the same structural defects and may, *mutatis mutandis*, face difficulties of the same nature.

The first difficulty relates to the very little store the Member States seem, in practice, to set by keeping their promises.

The experience of the euro has shown that the States are not afraid to lie, cheat, demand extra time or exemptions, or even insist on tailor-made rules, such as the idea of not taking defence expenditure into account in the public deficit criteria, and so on.

If it comes down to a straight choice between keeping their promises at international level and their national election interests, the leaders of the European Member States would, if given the choice, generally opt to keep the latter happy at the expense of the former. Brexit even showed that a British Prime Minister was not afraid to stake his country's membership of the European Union for a few more seats in the House of Commons.

The second difficulty has to do with the fact that at some point, the convergence process will mean taking a leap into budgetary solidarity.

As can be seen from experience in the framework of the euro, in default of a strict application of the convergence rules, a bare minimum of solidarity is needed in the framework of a common budget, so that the whole can continue to work harmoniously. But establishing this common budget can be accepted only if the States participate in the decision-making process in proportion to the size of their contribution, which presupposes moving to the qualified majority rule. Yet no provision of the kind is made in the framework of CSDP, which remains an inter-governmental framework with equal votes.

Despite these difficulties, establishing PESCO would bring with it considerable advantages.

First and not least of these would be establishing a stable legal framework within the Union, without having to negotiate a new treaty. In the current scenario, this is actually its central advantage, as applying the treaties would be enough for those wishing to set it in place – although this should, theoretically, have been done a long time ago.

The second would be the ability to set in place convergence mechanisms that are truly efficient in industrial, capability and operational terms, between the countries of the avant-garde.

At industrial level, the participating countries could get together and establish the equivalent of a *Buy American Act* applicable to defence equipment. This would be a commitment to give preference to purchasing equipment from the European industry, albeit without ruling out the possibility of buying elsewhere if the EU industries were unable to supply. This would call for the concept of European defence operator to be defined, which could be done extensively enough to include European industries located in States outside PESCO, or even outside the Union, such as those located partly in the United Kingdom. It is no secret that creating a Community preference and defining a European defence economic operator were lines drawn in the sand by certain countries to allow them to continue to acquire American equipment. If this option were limited to countries participating in PESCO alone, it would allow some countries to choose to continue to buy American equipment if they so wish, under no obligations other than those laid down in the defence and security procurement directive, whilst allowing other countries to flesh out the concept of European industrial and technological defence base with specific content, if they so wish. An industrial policy on efficient armament (procurement) could be drawn up between the countries of this avant-garde, which could also allow consideration of drastic simplifications to the directive on the transfer of war materials (export and transit), possibly with a common authority responsible for issuing licences.

With regard to capability, it is clearly desirable for defence planning convergence to occur within the avant-garde. It is, moreover, one of the founding commitments of PESCO. Ideally, the endpoint would be common defence planning replacing national defence planning. This common planning would make it possible to create the conditions to harmonise specifications and timetables and, in so doing, to extend production runs for military equipment, share non-recurrent costs, for R&D in particular, and thereby dramatically reduce acquisition costs. The experience of twenty years has shown that industrial cooperation, with no upstream harmonisation of the defence planning processes, is not, on its own, enough to harmonise needs or reduce the amount of equipment or the costs of supporting it.

Lastly, **operationally**, it would be possible to create a joint headquarters within the avant-garde, which would allow for the planning of military operations and, more importantly, a joint financing of operations. It would also be possible to consider at least partially joint military training within this framework.

The advantages of this **genuinely closer cooperation** in defence matters are obvious. Firstly, it would lead to greater efficiency in defence spending: for the same expenditure, the participating States could acquire and support more military equipment. Secondly, it would allow greater efficiency of the European forces, as these would no longer have to cover the entire spectrum of missions.

It is precisely because cooperation brings with it its own reward that the CSDP/CD mechanism contains no other incentive, of either a financial or fiscal nature. In the same way as the incentive to set in place the euro was... the euro, the incentive to set in place the CSDP is... the CSDP.

Obviously, support from the Union would still be welcome. And if the European Defence Fund were to be put to good use, it would most certainly be to serve as a catalyst for this European defence avant-garde. Appropriate terms should of course be decided upon in order not to injure the non-member countries, but a contribution – financially and in kind – of the European structures (Commission, EEAS, EDA) would be an extremely good thing. It is by being the instrument of the implementation of authentic cooperation between the Member States that EU action can provide “added value” for European defence, not by being a substitute for the financial responsibilities of the Member States or by financing national industrial players on the side.

There can be no doubt that in this form, PESCO would change things for the better and help to move European defence from the sphere of words to the sphere of action.

IV. WHAT ELSE CAN BE DONE?

A. Fake it

Faking it, for the European institutions, would be to continue to call for the full potential of the treaties to be realised, whilst ignoring the fact that this depends on the will of the Member States alone.

For the Member States, faking it would mean ignoring the calls of the European institutions, looking instead to NATO.

Neither of these political stances will create common defence. But nor will they help to safeguard the national defence systems.

The national and inter-governmental nature of European defence is a 20th-century concept that became inoperative in the 21st century. Instead of trading in solitary illusions of a faded grandeur, the leaders of the Member States would be well advised to look to solidarity to take the measures needed to ward off the current threats: cyber-warfare, cyber-manipulation, terrorism, militarisation of space, the combined revolution of robotics and artificial intelligence.

It is obvious that none of the Member States is capable of autonomously conducting large-scale operations outside the EU. It would be folly to believe otherwise, particularly when all technological innovation in the military domain and all strategic concepts for the use of force come to us from elsewhere. Not only are our forces under-equipped and our industry lagging behind, but even the way of thinking about war escapes us. It is only together that we can maximise our chances. Without common defence, the Member States of the Union are condemned to bend to the will of their American ally. This might become more and more difficult as it looks like the days when the US looked on Europe with indulgence and agreed to pick up the tab with no return are over. If they cannot work together to ensure their strategic autonomy, the European countries are condemned to line themselves up, industrially and operationally, with decisions made in Washington. This is the military choice made consciously by London. If the other European States followed suit, this would be the end of the European political project.

We know that the Union has been shaped by powerful centrifugal forces that may end up smashing it apart. The countries of Central Europe are particularly prone to economic downturns, demographic depressions, all against a backdrop of identity crisis that have brought to power leaders whose success is built on rejecting the EU. These forces also affect countries of Western Europe, particularly France, the Netherlands and Italy.

Brexit is just one of the many dead ends in which the European project could die. European defence is undoubtedly the last chance we have to prove the benefits of an 'ever-closer union'.

B. Make it

To date, European integration in the field of defence has been achieved by prioritising the creation of cooperation instruments over the end purpose of the project; believing that it was enough to create tools so that the willingness to use them would follow naturally. This is what the Schumann method boils down to: "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity".

This method worked right up to the Maastricht treaty. Since 1992, however, it has found it a lot harder to move the European project forward. The creation of the Eurocorps, the Euromarfor or the European Air Transport Command (EATC), in spite of its success, or the launch of 35 CSDP missions, have none of them led to common defence or even a common defence policy. The implementation of all the potential of the TEU could only make a break if it could be achieved without any hidden agenda, with a sincere political will to bring about common defence.

The entire question of common defence is a question of governance. It is not about whether the Union should intervene in Yugoslavia, Mali or Syria, but how action should be decided upon. How to agree on what the Member States do, or do not do, but without taking any solidarity away.

The whole intellectual construct of the European Defence Union (CSDP/CD) was based on the observation that (economic or military) convergence creates (political) unity, whereas in reality, it is unity that creates convergence.

At the risk of revising the European project, then, it may be better to start by putting the horse before the cart. This is why, before demanding the immediate establishment of permanent structured cooperation, the European authorities and Member States would do well to look carefully at the decision-making details they plan to set in place, as there would be no point in waking Sleeping Beauty if she turns out to be a monster.

Common defence will not start by putting together European generals in a joint headquarters, or even common military capabilities in a port, base or airport. Common defence will start the day the political representatives of the Member States agree always to agree, even when they disagree. It is not a matter of number of participants, as even two can fall out whilst larger numbers can agree. It is a matter of direction: what kind of Europe do we want?

Of course, this may seem utopian, unrealistic or even, to some, unacceptable. But that is the way it is. Adopting the majority rule is the *sine qua non* condition for an authentic common defence. All the rest is literature and there is already a considerable amount of that on the subject.

The European authorities would therefore benefit from focusing on the political decision-making details rather than on the 'pragmatic modules'. This is the entire gist of the proposal put forward by a report of the French Senate in July 2013 on a "defence Euro-zone".⁵² The concept of a defence Euro-zone is an invitation to the Member States that are so inclined to set in place a new treaty in which everything would be to negotiate, including the abandonment of criteria and commitments, and the main advantage of which would be to allow the adoption of the qualified majority rule.

Today, this analysis seems to merit an extension. Indeed, it seems unlikely that even after the 2017 elections in France and Germany, the European leaders will have the stomach to launch themselves into negotiations for a new treaty. It may be possible to reach a solution combining the central advantage of PESCO (using an existing legal framework) and the central advantage of the Eurogroup approach (allowing the majority rule to be used).

This would require some sort of a *gentlemen's agreement* to be set in place at the same time as PESCO, allowing the participating states to waive the use of the unanimity rule. This tacit agreement could provide for a kind of "emergency brake" mechanism. All these possibilities could be negotiated within an informal framework.

The road is steep, but it does exist. Taking it is only a question of political will.

52. «Pour en finir avec l'Europe de la défense – vers une (authentique) défense européenne» (Putting an end to Defence Europe – towards an (authentic) European defence) Daniel Reiner, Jacques Gautier, André Vallini, Xavier Pintat : <https://www.senat.fr/rap/r12-713/r12-713.html> (available in French only)

CONCLUSION

European construction is in crisis. As long ago as 2005, it was brought to standstill with the negative referendums of the French and the Dutch. In 2016, with the planned withdrawal from the Union of one of its most important members, it is going backwards, for the first time in its history. With no project, Europe no longer offers a future and without a future, it will remain embroiled in crisis.

The European authorities fully understand this and this is why they have been making efforts since 2014 to favour a “political” approach, by focusing their actions on the most important projects, rather than harassing the Member States with excessive legislation. They are trying to be ‘big on the big things and small on the small ones’. Collective defence is assuredly one of the ‘big things’ since, to paraphrase General de Gaulle, defence and security are the first obligations of a political community and it cannot default on these without destroying itself.

From this point of view, the European authorities are expending all their energies on coming to the assistance of the Member States whose public finances no longer allow them to provide the necessary capabilities to face the threats surrounding them.

The construction of an authentic collective defence, however, cannot be done a little at a time, through increasing numbers of “concrete” achievements, outside a structured and long-term framework, the construction of which requires the Member States to be on board.

But at the moment, these are pretending not to hear the calls of the European bodies and continuing to act as if they can go it alone, with just a tiny extra budgetary effort. They are choosing to continue with lip service and to give up the bird in the hand of real independence in order to go after the two in the bush of virtual sovereignty.

This approach is suicidal. If pursued, it would condemn not only common defence, but just as certainly, national defences as well.

In 2016, the European authorities went as far as they could. The ball is now in the court of the Member States. How can they be convinced to grasp it with both hands and jointly exercise a sovereignty that they are no longer capable of exercising on their own?

Frédéric MAURO
Barrister at the bar of Paris,
established in Brussels

ANNEX

The provisions of the Treaty on European Union relating to CSDP (literal analysis)

I.-A complex legal mechanism

The CSDP is governed by five articles of the TEU to which an additional protocol would have to be added, protocol no. 10 of the Treaty on the Functioning of the European Union (TFEU) on “permanent structured cooperation”. It is possible to distinguish between two elements within this mechanism: firstly, a key article: article 42, which contains the entire CSDP on its own, what it is, its objectives and its main implementing details and, secondly, the four other articles plus protocol no. 10, which simply add to it and clarify its application.

A. The core of the mechanism: article 42

Article 42 is made up of seven paragraphs which, for the record, provide the following:

- (1) **what CSDP is:** it is an integral part of the common foreign and security policy (CFSP); it gives the Union operational capability based on civilian and military resources provided by the Member States; the Union may use these capabilities in missions outside the Union and, to simplify, for crisis management purposes.
- (2) **its aims:** a “common defence and security policy” of the Union, applicable immediately, to lead, once the European Council ruling unanimously so decides, to “common defence”. These two objectives will not affect the specific nature of the security and defence policies of certain Member States (this refers to States whose Constitutions require neutrality) or the obligations under the North Atlantic Treaty of States whose common defence is essentially in place through NATO (the United Kingdom in particular).
- (3) **its functioning conditions:** a dual commitment from the Member States:
 - a commitment to make civilian and military capabilities available to the Union to contribute to the objectives laid down by the Council, whether this is at national level or even in the framework of multinational forces (such as the Franco-German brigade or the Eurocorps);
 - a commitment to improve their military capabilities under the control of the European Defence Agency (EDA) which, amongst other missions, “shall participate in defining European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities”.
- (4) **its decision-making processes:** all decisions made in the framework of CSDP are made by unanimity of the Member States.
- (5) the possibility to delegate one of the CSDP **missions**, as defined in article 44, to a group of Member States.
- (6) the fact that Member States “whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions” shall establish **permanent structured cooperation**, as governed by the provisions of article 46.

(7) finally, paragraph 7, which lays down the principle of a **mutual defence clause**, providing that “if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all means in their power”, as long as it is an act of self defence (article 51 of the United Nations Charter) and without prejudice to the application of the North Atlantic Treaty (article 5 of which shall apply in the event of an “armed attack” on European soil).

B. The application articles

Article 43 grants the Union competence to conduct missions outside the Union for crisis management purposes. These missions are essentially those defined at the Petersberg Summit. To simplify, this refers to crisis management missions (thereby excluding missions aiming to secure the protection of the territory of the Union) outside the territory of the Union. The article also outlines the conditions under which these missions are to be decided upon.

Article 44 grants the Union competence to confer responsibility to conduct the mission decided upon under article 43 to a small group of Member States (and not all Member States).

Article 45 defines the missions of the European Defence Agency (EDA), its composition (limited to the Member States, but to all Member States which so choose). It is important to note that the Treaty provides for the status, seat and operational rules of the Agency be decided upon by decision of the Council ruling by qualified majority rather than by unanimity and that the Agency furthermore carries out its mission in liaison with the Commission as required.

Lastly, **article 46** defines the conditions under which PESCO is established and how decisions regarding it are made. The decision to “establish” structured cooperation shall be made by the Council of the EU by qualified majority rather than unanimously (article 46 paragraph 2) and following consultation of the High Representative. The decisions and recommendations of the Council in the framework of PESCO, however, are made by the participating states alone, but unanimously (article 46 paragraph 6).

II.-Only PESCO has still to be implemented

Since France invoked the mutual defence clause in 2015, and leaving aside the provisions of the second sentence of paragraph 2 on “common defence”, paragraph 6 of article 42 has still to see application.

Although this is a provision which is not fully clarified by a simple reading of the treaty, it is indeed this one. The treaty refers to two conditions, five commitments and specifically details the conditions for its specific implementation.

A. Two conditions

Permanent structured cooperation may be established only **by States**:

1. “whose military capabilities fulfil higher criteria”

These criteria are higher than those referred to in paragraph 3 of article 42, namely: “Member States shall undertake progressively to improve their military capabilities”.

In other words, all Member States undertake to make military capabilities available to the Union to contribute to the objectives of the CSDP, and to improve their military capabilities, but only those which do so most may establish PESCO.

This condition is stated in article 1(a) of protocol no. 10 of the TFEU on PESCO, which clarifies that it is a commitment, from the date on which the Treaty of Lisbon enters into force, to:

"proceed more intensively to develop its defence capabilities through the development of its national contributions and participation, where appropriate, in multinational forces, in the main European equipment programmes, and in the activity of the Agency in the field of defence capabilities development, research, acquisition and armaments (European Defence Agency)".

and

2. "Which have made more binding commitments to one another in this area with a view to the most demanding missions".

To find out what commitments these may be, one must refer to article 1(b) of protocol no. 10, which lays down the following condition:

"have the capacity to supply by 2010 at the latest, either national level or as a component of multinational force groups, targeted combat units for missions planned (this can only mean the missions of article 43), 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 of the Treaty on European Union within a period of five to 30 days, in particular in response to requests from the United Nations Organisation, and which can be sustained for an initial period of 30 days and be extended up to at least 120 days."

B. Five commitments

Once admitted to the PESCO, article 2 of protocol no. 10 provides for the participating Member States to undertake to:

- a) cooperate**, as from the entry into force of the Treaty of Lisbon, with a view to **achieving approved objectives concerning the level of investment expenditure on defence equipment**, and regularly review these objectives, in the light of the security environment and of the Union's international responsibilities;
- b) bring their defence apparatus into line with each other as far as possible**, particularly by **harmonising the identification of their military needs**, by pooling and, where appropriate, **specialising** their defence means and capabilities, and by encouraging **cooperation** in the fields of **training and logistics**;
- c) take concrete measures to enhance the availability, interoperability, flexibility and deployability of their forces**, in particular by identifying common objectives regarding the commitment of forces, including possibly reviewing their national decision-making procedures;
- d) work together** to ensure that they take the necessary measures **to make good**, including through multinational approaches, and without prejudice to undertakings in this regard within the North Atlantic Treaty Organisation, **the shortfalls perceived** in the framework of the "Capability Development Mechanism";
- e) take part**, where appropriate, in the development of major joint European equipment programmes in the framework of the European Defence Agency.

C. Precise application conditions

- a) the States which fulfil the criteria and make the commitments must notify their intention to the Council and the High Representative;**
- b) within the three months following the notification, the Council, ruling by qualified majority** (of all States, therefore also the ones not participating), following consultation of the High Representative,

will decide whether or not to establish permanent structured cooperation and lay down the list of participating States;

- c)** any Member State that subsequently wishes to participate in the permanent structured cooperation shall notify its intention to the Council and the High Representative; obviously, it must fulfil the criteria and make the commitments referred to above; the Council will rule by qualified majority, but only the participating Member States will take part in the vote;
- d)** if, subsequently, a participating Member State no longer fulfils the criteria or is no longer able to make good the commitments, its participation may be suspended by decision of the Council ruling under the same conditions, in other words by qualified majority, with only the participating states taking part in the vote;
- e)** finally, if a participating Member State decides to leave the PESCO, it shall notify the decision to the Council, which shall take note of it.

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PESCO : European defence's last frontier

2016 was a year in which the European Union authorities took many measures in favour of defense: global strategy, implementation plan, action plan, preparatory action for defense research and roadmap to increase cooperation with NATO.

The question that everyone is asking is whether these measures are just a flash of fire or whether they mark a genuine renewal. In other words, will they be followed by institutional prolongations and if so which ones?

In order to put these initiatives in a sustainable and structural framework, the simplest idea is to apply the Lisbon Treaty. But of all the Treaty's provisions relating to defense, the one relating to « permanent structured cooperation » is the last one that was not implemented.

That is why the institutions of Brussels are calling for it to be set up, and the High Representative has been instructed to make proposals to that effect. The problem is that no one remembers the intention of the drafters of the treaties, nor what «permanent structured cooperation» really means. Its understanding requires considerable analytical work and a great effort of synthesis.

Moreover, let us not delude ourselves, ticking the box to eliminate the last obstacles to the establishment of a true European defense will not be enough. Indeed, as permanent structured cooperation was inspired by the Euro-zone idea, it is affected by the same design flaws as the Maastricht criteria.

But if structured cooperation is not the miracle solution and its implementation is too complicated, what else?



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