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<ct> Foreign policy between opt-outs and closer cooperation

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<a> 1. INTRODUCTION

The legal framework which governs the foreign and security policy of the European Union (EU) provides an intriguing case study of flexibility. On the one hand, it has provided fertile ground for an impressive range of structures of flexibility, both formal and informal, which have emerged in different ways and for different reasons over the course of the development of Common Foreign and Security Policy (CFSP) as a distinct strand of the Union's external action. On the other hand, flexibility has been inherent in the conduct of the policy as a matter of practice and quite independently from the legal mechanisms set out in the Union's primary rules.

This chapter will argue that there is a density of rules and procedures governing flexibility which which has developed independently from the *ad hoc* arrangements prevailing in the area of security and defence as a matter of practice. This phenomenon illustrates a heavily proceduralised emphasis on law which is justified by neither prior experience, nor subsequent practice. The analysis is structured as follows. First, it will examine the typology of flexibility mechanisms set out in the rules which govern the CFSP and the Common Security and Defence Policy (CSDP). Secondly, it will explore the central position of flexibility in the design and application of the CFSP/CSDP system and its impact on the conduct of the Union's security and defence policy. Finally, it will reflect on the qualitative differences which characterize flexibility in this area compared to other strands of EU action.

<a> 2. FLEXIBILITY AS AN INHERENT CHARACTERISTIC OF CFSP/CSDP

Flexibility has been inherent in the very design of the legal set of rules which governs CFSP/CSDP. This was apparent quite early on, since its inception as a distinct legal framework within the Union's constitutional structure.

** 2.1 The General Opt-out for Denmark**

The Single European Act (SEA) incorporated in primary law the first sets of rules on foreign policy. These were laid down in Article 30 SEA and governed the European Political Cooperation, the precursor to CFSP.¹ As these rules were of a somewhat loose wording and aimed merely to formalize prior institutional practice, the issue of an opt-out was not raised.

Things changed when the EU was established at Maastricht and the CFSP was introduced as a formal part of its constitutional structure. The formalization of CFSP was accompanied by an express opt-out for Denmark. The opt-out originates in a Decision of the Heads of Government and State adopted in Edinburgh in December 1992 following the rejection of the Maastricht Treaty by referendum in Denmark. It should be recalled that the Maastricht Treaty provided for the first time for the CFSP and set out a tighter set of rules to govern this policy in the form of the much maligned second pillar.² The opt-out was then formalised in a Protocol annexed to the Amsterdam Treaty and has been retained in every amendment of the Union's primary rules.

The Danish opt-out is set out in its current form in Protocol 22 on the Position of Denmark Article 5 of which reads as follows:

¹ On EPC, see Simon Nuttall, 'European Political Co-operation and the Single European Act' (1985) 5 *Yearbook of European Law* 203 and Stelios Perrakis, 'L'incidence de l'Acte Unique Européen sur la Coopération des Douze en Matière de Politique Étrangère' (1988) 34 *Annuaire Français de Droit International* 807.

² On the Maastricht rules on CFSP, see Panos Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Hart Publishing 2001) 18–26.

<quotation> With regard to measures adopted by the Council pursuant to Article 26(1), Article 42 and Articles 43 to 46 of the Treaty on European Union, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications. Therefore Denmark shall not participate in their adoption. Denmark will not prevent the other Member States from further developing their cooperation in this area. Denmark shall not be obliged to contribute to the financing of operational expenditure arising from such measures, nor to make military capabilities available to the Union.

The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the acts of the Council which must be adopted unanimously.

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 238(3) of the Treaty on the Functioning of the European Union.</quotation>

The material scope of the opt-out is defined in two ways: the first is in relation to measures adopted by the Union, namely general guidelines defined by the European Council and measures adopted in the context of CSDP; the second way is in relation to the effect of EU measures, namely the defence implications of EU decisions and actions. Article 5 of the Protocol only refers to guidelines defined by the European Council. This by no means suggests that the scope of the opt-out is confined to them. On the one hand, this choice is explained by the express reference in Article 26(1) first subparagraph TEU to the possibility that such measures may have defence implications. On the other hand, Article 26(2) first subparagraph TEU bestows on the Council the responsibility for the definition and implementation of CFSP by means of decisions and on the basis of the general guidelines defined by the European Council.

Another question raised by the wording of the first indent of Article 5 of the Protocol is about the choice of words which refer to the CSDP provisions: while all provisions of Section

2 of Title V TEU are mentioned, that is the CSDP-specific part of the CFSP set of rules, these provisions are not mentioned as a whole. Instead, reference is made expressly to Article 42 TEU and then to Articles 43–46 TEU. The unnecessarily cumbersome wording of the above rules notwithstanding, Article 5 of the Protocol exempts Denmark from the ambit of any CFSP measure with any defence implications. The opt-out refers to decision-making, implementation and financing of any such measures.

** 2.2 *Ad hoc* Opt-outs: Constructive Abstention**

In addition to the permanent opt-out granted to Denmark, EU law also provides for the possibility of an opt-out for individual Member States on an *ad hoc* basis. This takes the form of constructive abstention which aims to render the unanimity rule, pursuant to Article 31(1) first subparagraph TEU, more workable. It is set out in Article 31(1) second subparagraph TEU and reads as follows:

<quotation> When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present sub-paragraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member State comprising one third of the population of the Union, the decision shall not be adopted.</quotation>

The provision for constructive abstention has been part of the CFSP rules since the Amsterdam Treaty³ and its function is to ensure that decision-making is not rendered hostage

³ See art. 23(1) second subparagraph TEU (Amsterdam).

to a lone dissenter or a small minority of dissenters. It has only been invoked once, by Cyprus in February 2008 in the context of the launching of EULEX Kosovo under Joint Action 2008/124/CFSP.⁴ The political sensitivity underpinning this incident is apparent: Cyprus did not and has not recognized Kosovo as it objects to setting an international precedent which might be deemed relevant to the self-proclaimed Republic of Northern Cyprus.⁵ However, it did not wish its political objections to the issue of recognition to prevent the Union from engaging in a mission which would contribute to the peace and stabilization in the Balkans.

** 2.3 Security Opt-outs: Acknowledging National Choices about Defence**

Opt-outs, whether general or *ad hoc*, introduce flexibility by enabling specific Member States not to participate at all in a host of or specific policy initiatives. There is another form of flexibility which is indirect in the ways in which it manifests itself. It is about the acknowledgment of the fundamental defence choices made by Member States. This is illustrated by the second subparagraph of Article 42(2) TEU which reads as follows:

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

⁴ [2008] OJ L42/92. The text of the declaration by Cyprus is set out in Marise Cremona, 'Enhanced Cooperation and the Common Foreign and Security Policies of the EU' (2009) EUI Working Papers Law 2009/21, 15.

⁵ For political reasons, four other Member States (Spain, Greece, Slovakia, and Romania) have also not recognized Kosovo.

There are six EU Member States which are not NATO members, namely Austria, Finland, Sweden, Ireland, Malta and Cyprus.⁶ However, it is not just their special status that Article 42(2) TEU seeks to protect. The broad wording of this provision suggests a ‘catch-all clause’⁷ which aims to accommodate the security and defence considerations prevailing in different Member States. In fact, these qualifications are significant because they tell us something about the general tenor of the CSDP, that is its inherently limited function, its narrow reach, and the centrality of the Member States whose right to make the fundamental choices about their defence is not called into doubt.

This central aspect of the character of the policy is underlined further by Declarations 13 and 14 concerning the common foreign and security policy annexed to the Lisbon Treaty.

The former reads as follows:

<quotation> The Conference underlines that the provisions in the Treaty on European Union covering the Common Foreign and Security Policy, including the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.

⁶ Following the adoption of the Nice Treaty, the Irish Constitution was amended in order to include the following clause: ‘[t]he State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 1.2 of the [Nice] Treaty ... where that common defence would include the State’ (art. 29.4.9). On the origins and differences of the neutral status of these countries, see Eileen Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press 2002) 347–50.

⁷ Ben Tonra and Patrick Keatinge, *European Security and Defence Policy and the Lisbon Treaty* (The Institute of International and European Affairs 2009), para. 28.

The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.

It stresses that the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security.</quotation>

Declaration 14 reads as follows:

<quotation> In addition to the specific rules and procedures referred to in paragraph 1 of Article 24 of the Treaty on European Union, the Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State's membership of the Security Council of the United Nations.

The Conference also notes that the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament.

The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.</quotation>

The largely repetitive wording of the above Declarations focuses on the role of Member States in designing and carrying out their foreign policy as fully sovereign subjects

of international law. It also expressly maintains that 'the specific character of the security and defence policy of the Member States' would not be undermined by the CSDP provisions of the Lisbon Treaty. This illustrates a different type of flexibility, broader in its scope and wider in its implications as it touches upon the very core of CSDP. It is also more pervasive as it permeates the whole range of the Union's actions and underpins the specific ways in which the CSDP is carried out.

This type of flexibility ought to be understood in the context of the broader position of CSDP within the Union's constitutional order. The Lisbon Treaty approaches foreign, security and defence policy on the basis of a bifurcated approach. On the one hand, in the light of the arrangements introduced by the Lisbon Treaty and the ensuing revamping of the Union's external policies, CFSP appears integrated within the system governing the EU's external action: the much-maligned pillar structure is abolished and a set of principles and objectives are set out in Article 24 TEU and apply both to CFSP and all other strands of EU external action (economic, trade and political). So strong is the emphasis on the appearance of integration that the term 'external action' has been chosen to cover all strands of EU external relations, including CFSP/CSDP, hence conveying a sense of unity and common perspective. Therefore, the current constitutional arrangements stress the substantive integration of CFSP within the broader contours of EU external action.

On the other hand, the language of integration in which certain provisions about the constitutional position and conduct of CFSP are couched ought to be assessed against the clear indications of the distinct nature of the policy. First, the CFSP rules are not set out in the TFEU along with the provisions governing all the other strands of external action. Instead, they are laid down in the TEU. In fact, along with CSDP it is the only substantive policy whose provisions are set out in TEU. Secondly, the Union's competence in the area of CFSP is distinguished from the other EU competences and is not included in Article 2 TFEU and,

therefore, may not be characterized as either exclusive, shared, coordinating, supporting or supplementing. Instead, it is listed separately in Article 2(4) TEU. Similarly, Article 24(1) subparagraph 2 TEU states that the common foreign and security policy ‘is subject to specific rules and procedures’. Thirdly, Article 40 TEU, which refers to the relationship between the CFSP rules and the rest of the primary rules governing the Union's action, underlines further the distinct legal position of CFSP rules. Therefore, the whole logic of the institutional and normative underpinnings of CFSP/CSDP underline their distinct nature within the EU constitutional framework.⁸

<a> 3. ENHANCED COOPERATION IN CFSP/CSDP

The main provision for enhanced cooperation is set out in Article 20 TEU and the arrangements about its application in Articles 362–364 TFEU. Their analysis is beyond the scope of this chapter.⁹ For the purposes of this analysis, suffice it to point out that the scope of the application of this mechanism to CFSP is broader under the Lisbon Treaty in two ways. The first is about its relationship with existing policy initiatives. Under the pre-existing rules, enhanced cooperation was confined to measures adopted in order to implement a joint action or a common position.¹⁰ This restriction is now removed. The second way in which the scope of enhanced cooperation is broadened is in relation to security and defence policy. The pre-Lisbon provision exempted this area,¹¹ but this restriction is not repeated in Article 20 TEU. By broadening the scope of enhanced cooperation in relation to CFSP/CSDP activities, the

⁸ This point is elaborated on in Panos Koutrakos, *The EU Common and Security Policy* (Oxford University Press 2013) 25–35.

⁹ See, for instance, the chapter in this book by Peers.

¹⁰ See art. 26(b) TEU (Nice).

¹¹ Ibid. See Thomas Jaeger, ‘Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy’ (2002) 7 *European Foreign Affairs Review* 297.

Lisbon Treaty appears to render the latter closer to the mainstream of EU activities. It also appears to suggest an understanding of CFSP/CSDP as a policy space which is closer to other EU policies in conceptual terms than the previous constitutional arrangement had suggested. In doing so, Article 20 TEU reflects the language of integration in which the constitutional constellation laid down in the Lisbon Treaty is couched. A case in point is the elaboration of a set of principles and objectives common to all strands of EU external action set out in Article 21(1)–(2) TEU.¹² As enhanced cooperation aims 'to further the objectives of the Union', and given the single set of objectives of what the EU does in the world, the normalisation of the position of CFSP/CSDP within the scope of application of Article 20 TEU reflects the overhaul of EU external action carried out at Lisbon.

Furthermore, the procedure for the establishment of enhanced cooperation in CFSP is somewhat distinct from that which applies to other policies.¹³ The Member States which wish to establish such cooperation between them are to address their request to the Council, rather than the Commission, and they are not required to specify the scope and objectives of the enhanced cooperation proposed.¹⁴ The request is to be forwarded both to the High Representative of the Union for Foreign Affairs and Security Policy and to the Commission: the former gives an opinion on the consistency of the establishment of enhanced cooperation with the EU's CFSP, and the latter gives an opinion on its consistency with other EU policies. The consent of the European Parliament is not required. Instead, the request for the establishment of enhanced cooperation is to be forwarded to it for information.

¹² See art. 21(3) TEU.

¹³ See art. 329(2) TFEU.

¹⁴ This is a requirement which applies to the other policy areas under art. 329(1) TFEU.

Finally, the conditions for the participation of a Member State in an enhanced cooperation mechanism already in progress are also set out separately.¹⁵ The intention to participate is notified to the Council, the High Representative, and the Commission. However, no specific role for the Commission is laid down. It is for the Council to confirm the participation of the Member State having consulted the High Representative and after noting, where necessary, that the conditions of participations are fulfilled. In cases where it takes the view that the conditions for participation of the requesting Member State are not fulfilled, the Council ‘indicates the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request for participation’.¹⁶ The High Representative may propose transitional measures which may be necessary for the application of acts already adopted in the context of enhanced cooperation. Such measures are adopted by the Council. In this context, it appears that it is the role of the Council, acting by unanimity of the participating Member States,¹⁷ rather than that of the Commission which is central. This reflects the distinct character of CFSP and its position within the broader constitutional landscape: the Union's primary rules may well be couched in the language of integration, but the distinctiveness of CFSP/CSDP is actually reinforced.

<a> 4. FORMALIZATION OF FLEXIBILITY PURSUANT TO THE LISBON TREATY

One of the innovations introduced at Lisbon is the formalization of flexibility, that is the establishment of mechanisms which would authorize an *ad hoc* group of Member States to undertake CSDP actions on behalf of the Union. There are two such mechanisms.

¹⁵ Art. 331(2) TFEU.

¹⁶ Art. 331(2) subpara. 2 TFEU.

¹⁷ Art. 331(2) subpara. 3 TFEU.

** 4.1 Member States Acting on Behalf of the Union**

According to Article 42(5) TEU, the ‘Council may entrust the execution of a task, within the Union framework, to a group of Member States in order to protect the Union’s values and serve its interests’. This would be done in accordance with the standard voting requirement, namely unanimity, pursuant to Article 42(4) TEU, and following a proposal by the High Representative or an initiative by a Member State.

The delegation of this role is governed by Article 44 TEU which reads as follows:

<quotation> 1. Within the framework of the decisions adopted in accordance with Article 43, the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task. Those Member States, in association with the High Representative of the Union for Foreign Affairs and Security Policy, shall agree among themselves on the management of the task.

2. Member States participating in the task shall keep the Council regularly informed of its progress on their own initiative or at the request of another Member State. Those States shall inform the Council immediately should the completion of the task entail major consequences or require amendment of the objective, scope and conditions determined for the task in the decisions referred to in paragraph 1. In such cases, the Council shall adopt the necessary decisions. </quotation>

It follows from the above that there are two substantive conditions which need to be met: the first is subjective and requires that the Member States involved are willing to implement the task in question; the second condition is objective, and requires that the Member States involved have the necessary capability for such a task. The wording of Article 44(1) TEU makes it clear that these conditions must be met cumulatively.

The management of the task is for the relevant Member States to agree among themselves in association with the High Representative. It is not clear what the role of the High

Representative is in this context. As the Member States act in order to protect the Union's interest, they may not decline to consult with the High Representative. In any case, the expertise of the latter (assisted by the resources of the European External Action Service) on the management of CSDP tasks would make her advice invaluable for the Member States concerned. However, the High Representative may not dictate how a task should be managed under Article 44 TEU.

The above provision suggests a degree of close interaction between Member States and EU institutional bodies in the context of actions undertaken by Member States on behalf of the Union. In fact, there is a reasonably tight framework which provides for adequate supervision. In any case, the subject-matter of such actions distinguishes the legal and policy context set out in Article 44 TEU from other areas of EU law where Member States act as trustees of the Union's interests.¹⁸ The applicable criteria for assessing the effectiveness of the procedures governing management and accountability for tasks delegated to Member States allow room for political flexibility and independent action by those actually involved.

** 4.2 Permanent Structured Cooperation**

The Treaty provides a mechanism for permanent structured cooperation. In accordance with Article 42(6) TEU, this is open to 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'. However, rather than merely outlining the relevant criteria, the drafters of the Treaty seek to define them. In a Protocol attached to the Lisbon Treaty, the commitments on military capabilities are set out in detail. In Article 1, a Member

¹⁸ For an analysis of such areas, see Marise Cremona, 'Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union' in Anthony Arnall, Catherine Barnard, Michael Dougan and Eleanor Spaventa (eds), *A Constitutional Order of States: Essays in European Law in Honour of Alan Dashwood* (Hart Publishing 2011) 435.

State wishing to participate in a structured cooperation mechanism is required to:

<quotation> (a) proceed more intensively to develop its defence capacities 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

(b) have the capacity to supply by 2010 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group, with support elements including transport and logistics, capable of carrying out the tasks referred to in Article 43 of the Treaty on European Union, within a period of 5 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.</quotation>

In Article 2, the Protocol requires the participating Member States to:

<quotation>(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 or European equipment programmes in the framework of the European Defence Agency. </quotation>

Member States fulfilling the criteria and having made the above commitments may notify their intention to engage in permanent structured cooperation to the Council and the High Representative. In accordance with Article 46(2) TEU, the decision to establish such cooperation rests with the Council which is expected to take it within three months following notification by a qualified majority and following consultation with the High Representative.

Once permanent structured cooperation has been established, any decision and recommendation by the Council on its management is taken unanimously on the basis of the votes of the representatives of the participating Member States under Article 46(6) TEU, unless otherwise provided for in Article 46 TEU.

There are certain principles which appear to govern the permanent structured cooperation mechanism. First, the principle of openness: provided that the criteria and requirements set out in Article 46(1) TEU and Articles 1 and 2 of the Protocol are met, any Member State may participate in the mechanism, either *ab initio* or at a later stage. In the latter case, following a notification from the relevant State to the Council and the High Representative, the former will adopt the decision confirming the participation of the Member State by qualified majority of the participating Member States and after consulting the latter.¹⁹

¹⁹ Art. 46(3) subpara. 2 TEU.

The second principle is that of continuity: every participating Member State must fulfil the criteria and make the necessary commitments throughout their participation. According to Article 46(4) TEU, if at any point it ceases to do so, the Council may suspend the participation of the Member State concerned by a qualified majority of the members representing the participating Member States, with the exception of the Member State in question. In this respect, Article 3 of the Protocol on Permanent Structured Cooperation provides for the involvement of the European Defence Agency (EDA). In accordance with this provision, the role of EDA is broad: it contributes to the regular assessment of participating Member States' contributions regarding capabilities in general, and in particular these made in accordance with the criteria elaborated upon on the basis of amongst others, Article 2 of the Protocol. However, its impact is limited, at least as a matter of law: while it is entrusted with reporting at least once a year, its assessment 'may serve as a basis for Council recommendations and decisions adopted in accordance with Article 46 of the Treaty on European Union'.²⁰

Third, the free will of the Member States is an essential precondition for their participation: any participating Member State may withdraw by notifying its intention to do so to the Council. The latter has no power to approve or to veto this. In accordance with Article 46(5) TEU, it can only 'take note that the Member State in question has ceased to participate'.

The procedural arrangements governing the establishment of and participation in permanent structured cooperation suggest the willingness of the drafters of the Treaties to facilitate recourse to this mechanism. This is consistent with overall tenor of the Lisbon Treaty. After all, it is at Lisbon that the possibility of enhanced cooperation is extended for the first time to the area of security and defence policy. From a pragmatic point of view, this is sensible, given that the defence capabilities of Member States differ widely and only in the

²⁰ Art 3 of Protocol on Permanent Structured Cooperation.

case of a handful of them are they robust enough to carry out their internal security function and be deployed in different areas in the context of multinational operations simultaneously.

On the other hand, once the permanent structured cooperation mechanism has been established, the applicable procedure reverts to the one which governs all CSDP decisions, that is unanimity. The logic of the functioning of enhanced cooperation, therefore, is that of the conduct of CSDP generally: the direction and pace of development relies entirely upon Member States.

As for the definition of the capabilities criteria mentioned in Article 46(1) TEU and set out in Article 2 of the Protocol on Permanent Structured Cooperation, the relevant primary rules are not particularly illuminating. Their interpretation is subject to a dynamic, incrementally evolving process. Both Articles 2 and 3 of the Protocol suggest that they need to be further elaborated and defined in greater detail. This is realistic given that requirements related to military capabilities may vary depending on factors as diverse as technical and operational needs, geopolitical environment, activities of international security organizations, financial conditions, and political commitment. Treaties are unsuited to defining with any degree of precision such requirements. On the other hand, the vagueness of the relevant provisions is such as to render their application entirely a matter to be determined on the basis of factors as inherently fluid as political will, and as constantly evolving as economic realities.

Considerable vagueness characterises, therefore, the legal rules on permanent structured cooperation. Viewed as a way of enabling the Union to shape its security and defence identity more efficiently, one might have hoped that the mechanism of permanent structured cooperation would have provided a clearer yardstick as to quite how the Member States might rely upon it. The relevant legal provisions appear to acknowledge that their contribution to the Union's foreign affairs is merely to set out the broad parameters within which the Member States and the Union's institutional actors may determine how to proceed, at what

pace and in which direction. In this respect, there was some discussion amongst Member States during the Belgian Presidency in the latter part of 2010, and a German-Swedish proposal for closer military cooperation.²¹ However, neither has given rise to an progress under the legal umbrella provided by the TEU on permanent structured cooperation.

<a> 5. DIFFERENTIATION IN CFSP/CSDP AS A PARADOX

The analysis so far has suggested that flexibility and differentiation are an inherent characteristic of the legal framework which governs CFSP/CSDP. In their various forms, the different permutations of interests which are expected to be addressed, and the variety of actors involved make this policy area an ideal canvass in which the Member States may experiment with the legal management of flexibility. The drafters of the Treaties appear to accept this as they provide legal formulas which would seek to address a wide range of manifestations of flexibility.

The wide range of mechanisms set out in EU law and practice is a main characteristic of flexibility in CFSP/CSDP. This may be due to the fact that this policy area appears ideally suited for the application of flexibility mechanisms because of the nature of their subject-matter. As foreign policy and security and defence lie at the core of national sovereignty, their conduct is in greater need of being attuned to the different interests which Member States have in the area of high politics. This is all the more so in the light of the wide range of diverse Member States – small and large, north and south, new and old, rich and poor. While apparent in decision-making in any policy area, the differences to which this diversity gives rise emerge more starkly in foreign policy. In doing so, they introduce a factor which is

²¹ For a discussion of these developments, see Sven Biscop and Jo Coelmont, ‘CSDP and the “Ghent Framework”: The Indirect Approach to Permanent Structured Cooperation?’ (2011) 16 *European Foreign Affairs Review* 149. [The chapter was finalised in April 2014].

inherently intangible, and yet central to policy-making. This dimension was set out succinctly by Advocate General Jacobs, as he then was, in a different context in Case C-120/94 *Commission v Greece*:²²

<quotation> Because of differences of geography and history each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Community institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third State. Security is, moreover, a matter of perception rather than hard fact. What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless.</quotation>

This inherently indeterminate dimension of the subject-matter of CFSP/CSDP may explain why it may be viewed as fertile ground for flexibility.

The second characteristic is the gradual formalization and proceduralization of flexibility which is apparent in this policy area. Emerging gradually over the years, the Treaties provisions examined in this chapter intend to provide for legal solutions which would enable groups of Member States to do together within a set EU framework what they may otherwise choose to do beyond the EU structure altogether.

The third noteworthy feature of flexibility in this area has to do with the broader context of foreign policy in the EU. Coalitions of States have always been active in a manner considerably more direct than we encountered in other policy areas. For instance, in the 1990s there were bi-annual meetings between the leaders of the UK, France, Spain, Italy and Germany and the Turkish Prime Minister. Another prominent example of groups of Member

²² Case C-120/94 *Commission v Greece* [1996] ECLI:EU:C:1996:116, para. 54. For an analysis of this context, see Panos Koutrakos, 'Is Article 297 EC a "Reserve of Sovereignty"?' (2000) 37 CML Rev 1339.

States cooperating closely beyond the framework of the Union's primary rules was provided by the Contact Group in former Yugoslavia.

However, the effort to cater for such a range of flexibility mechanisms in legal terms is also characterized by certain problems. First, there is already considerable flexibility and enhanced cooperation within the CSDP as a matter of practice. A case in point is the existence of battlegroups. This is an initiative focused on the swift deployment of 'effective, credible and coherent' rapid reaction units.²³ Declared operational on 1 January 2007, battlegroups consist of 1,500 troops each of which should be deployable at 15 days notice and sustainable for at least 30 days (potentially extended to 120 days) either as a stand-alone force or as a part of a larger operation. The idea is that the EU should have two battlegroups on standby call at all times and that both should rotate every six months. This would enable the Union to carry out two simultaneous operation for a period of up to four months. Each battlegroup is led by a Member State which acts as the lead nation and provides the assets either on its own or with the contribution of other States. This initiative developed from the bottom up, an expression of the concern of the Member State that small, tangible forces would contribute effectively to the conduct of CSDP. No primary rules were required, and the absence of a detailed procedural framework for their establishment by no means prevented the establishment of battlegroups.

Second, in the area of defence in particular, a lot hinges on practical considerations: the defence capabilities of Member States, their willingness to deploy them, their ability to pay for them, the political capital which such choices would entail for the government of the day. In this respect, it is noteworthy that these practicalities appear to be acknowledged by the Member States. A case in point is the establishment of the European Defence Agency, an

²³ Headline Goal 2010, Annex I to the Presidency Report on ESDP (European Council, Brussels 17–18 June 2004).

intergovernmental agency which specializes in the area of defence capabilities development, research, acquisition and armaments.²⁴ And yet, everything about the Agency reminds us of the limits of primary legal rules in the area. It was established prior to the entry into force of the Lisbon Treaty,²⁵ and its work has been limited in effect and marred by disagreements among Member States, not least on issues related to the budget of the Agency.

The relevant legal framework illustrates the rather strong belief of its drafters that the provision of legal rules and procedures is a necessary feature of flexibility in CFSP/CSDP. The formalization of flexibility in primary law has been viewed as introducing a set of rules of considerable complexity which may prevent the emergence of initiatives by Member States beyond the EU framework altogether.²⁶ This view is entirely consistent with the broader tenor of the EU's approach to security and defence: a conviction that a tighter legal framework with a strong institutional and procedural dimension would enhance the effectiveness of the policy. This is the process-oriented approach which underpins the current rules on CFSP.²⁷

This view ignores two factors. The first factor is practice. Practice of CFSP/CSDP does not suggest a reduced appetite for Member States to act in parallel to or even independently from EU initiatives. The experience in Libya is a case in point. It is recalled that, in March 2011, a coalition of various States initiated a military operation against Libya under the authorization

²⁴ Art. 42(3) TEU.

²⁵ Joint Action 2004/551/CFSP [2004] OJ L245/15, repealed by Council Decision 2011/411/CFSP [2011] OJ L183/16.

²⁶ See Ramses A Wessel, 'Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility' in Martin Trybus and Nigel White (eds), *European Security Law* (Oxford University Press 2007) 247–8.

²⁷ This argument is put forward in Koutrakos (n 8) above.

of United Nations Security Council Resolution (2011) 1973.²⁸ This operation aimed to enforce a no-fly zone and a naval blockade. It led, controversially but inevitably, to strikes against forces remaining loyal to Gaddafi. The operation was not carried out by the EU, but a number of individual States and was led by the UK and France, while the US were content, for political reasons, to play second fiddle. It is worth noting that Germany abstained at the UN Security Council vote on SC Resolution 1973, in the company of China and Russia. It is also interesting that British Prime Minister David Cameron, French then President Nicolas Sarkozy and US President Barack Obama wrote an article about the operation in which there was not a single reference to the European Union.²⁹

The second factor is the profound role of the practicalities of an effective security policy: on the one hand, the political will of national governments to commit troops and capabilities, personnel and resources; on the other hand, the perilous state of defence industries. These are intrinsically linked: the Member States have shown little interest in addressing together the issue of their capabilities in a politically sensible and economically rational manner.³⁰

These two factors have something else in common too: they are impervious to legal formulas. The increased legalization which characterizes the Union's approach to security and defence is of questionable relevance when it comes to addressing these factors. This observation also applies to the duty which Article 42(3) TEU imposes on Member States. This provision requires that Member States 'make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council'. This is coupled with the duty on Member States to

²⁸ The Member States which participated in the coalition right from the start were Belgium, Denmark, France, Italy, Spain and the UK. They joined forces with Canada, Norway, Qatar, and the United Nations.

²⁹ *The Times*, 15 April 2011, at 25.

³⁰ See Koutrakos (n 8) above Ch. 9.

‘undertake progressively to improve their military capabilities’.³¹ These provisions appear to enhance the ability of the Union to carry out CSDP missions. And yet, their function is bound to be rhetorical at best. The choices of Member States about their capabilities are determined on the basis of multifarious factors extraneous to the legal provisions set out in the Treaty, including, but by no means confined to, internal political developments, economic exigencies, the geopolitical environment and the security approach of actors such as the US. The premise that a primary law provision would marginalize such factors and affect the political assessment of national authorities ignores the realities of security and defence policy.

The record of the Union's military operations and civilian missions illustrate clearly the inherent limits of heavily proceduralized rules in the area introduced in the Treaties. While the range and territorial scope of the Union's activities is broad, the overall size of the operations and missions is rather small, their mandate narrow and the terrain in which they are deployed largely safe. A characteristic which all military operations share is the unwillingness of the Member States to provide the troops necessary for deployment. Furthermore, considerable time and energy is spent in coordination and turf wars between the personnel deployed in CSDP operations and missions and other EU actors both on the ground and in Brussels.³²

Finally, there is another consideration which raises questions as to the role of the legal rules on flexibility in CFSP/CSDP. It does not follow that the ability to act faster by relying upon fewer Member States would necessarily render the Union's position more credible and influential on the international scene. As Monar points out:

<quotation> [A] majority decision on a foreign policy matter is totally different in character from a majority decision on an EC legal act: adopted against the will of some Member States it would lose much or even most of its international credibility

³¹ Art. 42(3) subpara. 2 TEU.

³² See the analysis in Koutrakos (n 8) above, in Chs 5–6.

and could be easily subverted by signals from the opposing Member States through its national diplomatic channels.³³

6. CONCLUSION

The analysis in this chapter suggested that differentiation and flexibility are prevalent in CFSP/CSDP as a wide range of arrangements which have been relied upon by the Member States as a matter of practice co-exist with an array of legal mechanisms set out in primary law. The latter lay down a heavily proceduralized framework which illustrates the conviction of the drafters of the Treaties that more constitutional law in this area will make for a more effective security and defence policy.

This approach is entirely consistent with the general tenor of the Union's approach to CSDP which is distinctly process-oriented and heavily legalized. It also gives rise to a paradox: while CFSP/CSDP is a policy area most suitable for accommodating differentiation in a wide range of mechanisms, it is also least amenable to a process-oriented management of differentiation. The CSDP practice has questioned further the relevance of existing primary rules on differentiation. All in all, there is a disjunction between the range and density of the rules and procedures governing flexibility and the conduct of CSDP on the ground. In this heavily politicized area, it appears that there is, after all, such a thing as too much law.

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