

Contents

3.1	Introduction	57
3.2	Historical Background	58
3.3	Foundations and Main Legal Principles	60
3.4	CSDP Missions in Theory and Practice	62
3.4.1	CSDP Missions: Theoretical Aspects	62
3.4.2	CSDP Operations in Practice	64
3.5	CSDP Resources	66
3.5.1	Cooperation and Consultation, Development and Procurement	66
3.5.2	Closing the Capabilities–Expectations Gap	69
3.6	The European Security Strategy and Its Progeny	71
3.7	Conclusion	72
	References	73

3.1 Introduction

A policy field intimately connected with the CFSP, and thereby also present in the Union’s ‘outer layer’, is the Common Security and Defence Policy. It forms a relatively new addition, reaching full operational status only in 1999. It has nevertheless rapidly grown to become of seminal importance.¹ Nowadays, it is through the CSDP that the EU is able to make a tangible difference in the wider world, by undertaking civilian or military missions in the face of natural or man-made disasters, occasionally providing for transitional justice, alleviating political tensions or strengthening the rule of law in third countries.

In some respects, the CSDP can be regarded a *lex specialis* of the CFSP, as it elaborates further on the ‘security’ element contained in the term ‘Common Foreign and Security Policy’. Moreover, the relevant provisions have been tucked away in Title V of the EU Treaty as well. At the same time, this view may give rise to

¹Article 42(1) TEU currently declares the CSDP to be ‘an integral part’ of the CFSP.

confusion, for in a broad reading, the CFSP could then of itself be considered to encompass each and every defence issue. There would therefore appear to be little need for another policy, the CSDP, which only differs in one formal aspect from the CFSP (namely, by the explicit inclusion of 'Defence' in its title). In comparison, the previous name of this policy field, 'European Security and Defence Policy', used until the entry into force of the Lisbon Treaty, was more distinctive (also when abbreviated: ESDP). It is mainly for reasons of clarity that we prefer to discuss the CSDP in a separate and dedicated chapter, instead of treating it as an appendix or sub-domain of the CFSP. This setup does not mean to downplay or negate in any way the manifest and inextricable linkages with the latter.

Since the CSDP is undeniably connected to the CFSP, albeit in a slightly fuzzy way, all the features described in the previous chapter (actors, decision-making, legal instruments) apply *mutatis mutandis*. In the previous chapters, we have already hinted at the specific manifestations of CFSP players and the specific application of CFSP concepts in the CSDP context. The current chapter links in with the previous and aims to 'fill in the blanks'. It discusses in subsequent order the historical evolution of the CSDP (Sect. 3.2), its foundations and main principles (Sect. 3.3), the theory and practice of CSDP operations (Sect. 3.4), CSDP resources (Sect. 3.5), and the European Security Strategy and its progeny (Sect. 3.6).²

Right from the start, it should be mentioned that the application of the CSDP is slightly differentiated, most prominently in the form of the permanent opt-out that was obtained by Denmark.³ Below, we will flag the flexibility that has been offered to some other Member States as well, for instance in the so-called mutual assistance clause.

3.2 Historical Background

The first provision ever regarding the Union's ambitions in the field of security was introduced with the Maastricht Treaty, but the clause was sketchy at best.⁴ What was then Article B of the TEU referred to 'the eventual framing of a common defence policy, which might in time lead to a common defence'. For several years, legal developments lingered, and either caution or weariness resulted in the fact that no follow-up actions were initiated. It was only through resolute political action in the late 1990s that the CSDP's foundations took shape in greater detail.

The original kick-start of this process can be traced back to a 1992 summit of the Western European Union, which took place in the hamlet of Petersberg, Germany. The so-called Petersberg Declaration sketched what ought to be the role of the

²The leading legal monograph on the subject is Koutrakos (2013); a lucid political science perspective offers Smith (2017).

³See Protocol No. 22 on the position of Denmark, O.J. [2012] C 326/299.

⁴The Pleven Plan, the earlier (stillborn) initiative for constructing a unified defence architecture was discussed in Chap. 2, Sect. 2.2.1.

WEU countries in ensuring a secure continent after the defeat of communism, as well as the missions they could decide to undertake for that purpose. Above all, this event was memorable for signalling the fact that Europe, after decades of military support from the United States, was finally ready and willing to take responsibilities into its own hands.⁵

Box 3.1 The Petersberg Declaration: A First Clarion Call

The foreign ministers of the WEU gathered in Petersberg with the intention of reviewing the significant changes that had taken place in the security situation in Europe in the years before. At the end of the summit, they declared their readiness to make available military units from the whole spectrum of their conventional armed forces for military tasks conducted under the authority of WEU, noting that participation in specific operations remained a sovereign national decision. They also signalled their intention to develop and exercise the appropriate capabilities to enable the deployment of those units by land, sea or air in order to accomplish these tasks.

For the first few years however, not much came of these lofty intentions. In the mid-1990s, the conflict in Yugoslavia escalated into a full-blown civil war, while the EU countries preferred to remain idle and keep their distance, only launching a handful of half-baked initiatives for restoring peace. Embarrassingly, the savage conflict dragged on for years, and it was not before the US subjected them to severe economic, diplomatic and military pressure that the warring parties consented to end hostilities.

In 1998, a new momentum arose at a Franco-British summit at St. Malo. At that spot, then French President Jacques Chirac and British Prime Minister Tony Blair asserted that the EU needed to command a stronger presence in matters of defence and security. One year later, at the European Council summit of June 1999 in Cologne, their ideas were rehearsed, expanded, and ultimately put down in writing.⁶ The European Council members agreed to transfer the responsibility for decision-making and the capacity for action across the full range of Petersberg operations from the WEU to the EU. This marked the official birth of what we now know as the CSDP. That same year, detailed plans were drawn up for procuring the necessary means and resources, culminating in the so-called Helsinki Headline Goals established under the Finnish Council Presidency in December 1999.

With the entry into force of the Amsterdam Treaty, the legal world realigned itself with the political ambitions, and a novel Article 17 was introduced in the EU Treaty. This clause placed solid bedrock under what was soon called the European Security and Defence Policy. The provision affirmed the neutrality of certain

⁵The full text may be obtained from www.weu.int/documents/920619peten.pdf.

⁶Presidency Conclusions, Cologne European Council, 3–4 June 1999, Annex III, Presidency Report on Strengthening of the Common European Policy on Security and Defence.

Member States and underscored the desire not to undermine NATO and UN obligations. In addition, it proffered an explicit legal basis for undertaking the tasks that were specifically mentioned in the Petersberg Declaration: humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking. Through the adoption of an impressive number of secondary legal instruments and soft law documents, the ESDP quickly rose in stature.

In the final section of what was then Article 17 TEU, the provision was singled out for review, so as to improve the prospects for attaining the Union's objectives in the fields of defence and security. In the European Convention that drafted the Constitutional Treaty, such a review was indeed undertaken. This eventually led to the novel CSDP regime introduced by the Treaty of Lisbon.⁷ To this regime we will now turn.

3.3 Foundations and Main Legal Principles

The Lisbon Treaty inserted a new Section 2 into Chapter 2 of Title V of the TEU. It consists of a handsome quintet of clauses on security and defence issues (Articles 42–46 TEU), where previously, as remarked, there was only one single provision.

Article 42(1) TEU reiterates that the CSDP has both a civilian and a military dimension. The same provision, as well as Article 42(3) TEU, requires the Member States to make civilian and military capabilities available to the Union for the implementation of the CSDP and the attainment of its objectives.

Article 42(2) TEU states that the CSDP includes the progressive framing of a common defence policy, 'which will lead to a common defence when the European Council so decides'. What such a 'common defence' structure boils down to is not entirely clear. Several commentators have noted that, at present, in some form or the other, a common defence is actually already in existence. Possibly, the provision envisages the creation of a single European army, yet the realisation of that goal would clash with NATO obligations—something the EU Member States have studiously sought to avoid.⁸

In CSDP decision-making, unanimity is the main rule.⁹ This entails that all should agree (with the representative of the government of Denmark not taking part in the deliberations and conclusions, pursuant to the opt-out mentioned earlier). The

⁷Which in turn ushered in the disbandment of the WEU per 30 June 2011—see Statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty, Brussels, 31 March 2010.

⁸As the second sentence of Article 42(2) and Article 42(7) TEU make clear. On the interaction between EU and NATO commitments, see e.g. Larik (2013).

⁹See Article 42(4) TEU, which applies here as a *lex specialis* to Article 31 TEU. One should keep in mind that Article 31(4) already rules out QMV for decisions with military or defence implications.

sole exception to the unanimity requirement pertains to adopting arrangements for the financing of certain types of operations.¹⁰

The initiative for the adoption of any act or instrument will come from either the High Representative or a Member State.¹¹ Thereby, as in the CFSP more generally, the Commission would appear to be sidelined. Where appropriate, the High Representative may however, in a joint effort with the Commission, propose a combined approach for setting up any actions or operations using both EU instruments and national resources.¹²

In Article 42(5) and (6) TEU, arrangements have been made for entrusting groups of Member States with special tasks, or to enable them to forge ahead in the form of ‘permanent structured cooperation’. This is further elaborated upon in Article 46 TEU.¹³ Importantly, compared to ‘enhanced cooperation’ in EU law in general, a more flexible framework can be designed here, *inter alia* because the scheme is not conditioned by a predetermined quorum of participants.¹⁴ In 2017, the historic decision was taken to set up such an *avant-garde*.

Another striking move has been the inclusion of a ‘mutual assistance clause’, mirroring similar provisions in the NATO and WEU treaties. Article 42(7) TEU lays down that, in case of armed aggression on the territory of a Member State, the other Member States are obliged to aid and support the latter with any means in their power. Such assistance should however comply with the requirements for invoking the right to self-defence, codified in Article 51 of the UN Charter, and should not prejudice the commitments of Member States under the NATO treaty. Three further limitations are immediately apparent. Firstly, the clause only applies to armed aggression (contrary to Article 51 of the UN Charter, which covers imminent threats of use of force). Secondly, it should concern aggression on its territory (in contrast to the international law regime, where attacks on a state’s goods and persons and means of transportation may also trigger the right to self-defence).¹⁵ Thirdly, if Member States pursue a special and distinct security and defence policy (e.g., Ireland, Finland and Sweden), Article 42(7) TEU suggests that they are not obliged to provide assistance.¹⁶ It has been contended however that

¹⁰Article 41(3) TEU.

¹¹Again see Article 42(4) TEU.

¹²*Ibid.*

¹³See also Protocol No. 10, annexed to the Treaties, which spells out the level of commitment Member States have to reach in order to apply, how the decision-making takes place, and what is expected of them once they decide to pursue this option.

¹⁴*Cf.* Article 326 *et seq* TFEU.

¹⁵*Cf.* Ranzhofer and Nolte (2012).

¹⁶Compare the wider ‘solidarity clause’ of Article 222 TFEU, which extends to terrorist attacks on Member States and any natural or man-made disasters. This clause has not been subjected to similar qualifications, albeit that further decision-making is required before specific action has to be taken; and in contrast to the intergovernmental approach in Article 42(7) TEU, a greater involvement of Union institutions is foreseen. See also Council Decision 2014/1415/EU on the arrangements for the implementation by the Union of the solidarity clause, OJ [2014] L 192/53, wherein Article 2(2) underlines that it is to have no defence implications.

they remain bound to aid and assist, and may then do so while continuing to wear their ‘neutral hat’.¹⁷ That ought to prove feasible indeed, considering that the clause does not dictate that the assistance should always be military in nature.

Box 3.2 The First Activation of Article 42(7) TEU

On 13 November 2015, a series of heinous terrorist acts was committed in Paris that sent shockwaves across Europe. This calamity led to the first ever activation of Article 42(7) TEU four days later at a meeting of the FAC, when France officially requested aid and assistance from the other EU Member States with recourse to this provision. In particular, it asked for support for the ongoing French operations in Iraq, Syria and other regions, which would allow a redeploying of troops where they were most needed. The desired pressure-relieving contributions were offered quickly thereafter, inter alia by Germany and the United Kingdom. Some considered it highly remarkable that France decided to invoke the TEU clause, breaking with the presumed ‘NATO first’ policy. Yet, the choice did echo the long-standing French preference for a European approach independent from the United States.

In Article 43 TEU, we once again encounter the list of Petersberg Tasks, albeit that they have been revised and enhanced to meet the challenges of the twenty-first century. We shall now proceed to zoom in on these a bit further.

3.4 CSDP Missions in Theory and Practice

3.4.1 CSDP Missions: Theoretical Aspects

With regard to the possible missions and operations to be undertaken under the CSDP, the old Article 17 TEU was short, vague and limited. It merely stated that the CFSP ‘included all questions relating to the security of the Union’, and the second section added that such questions ‘include[d] humanitarian and rescue tasks, peacekeeping tasks, and tasks of combat forces in crisis management, including peacemaking’. This terse enumeration corresponded one on one with the Petersberg Tasks. For all its brevity, the list did not appear to be exhaustive, allowing for various other forms of action to be undertaken. The newly revised provision is nonetheless appreciably richer, and provided for a timely and much-needed update. As remarked above, the EU is nowadays explicitly rendered competent to use civilian and military means. Importantly, Article 42(1) TEU makes it possible to

¹⁷See Rühl (2014), p. 21, pointing to the fact that the distinctive EU countries that are not NATO members have also repeatedly participated in UN missions with military contingents or observers, cooperating with NATO partners, occasionally even appending their own military contingents.

use these means on missions outside EU territory. The objectives of such missions may be (1) peacekeeping, (2) conflict prevention, and (3) strengthening international security, in accordance with the principles of the UN Charter. Article 43 TEU specifies that these three main tasks include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peacekeeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.¹⁸ Additionally, all these tasks may contribute to the fight against terrorism, which includes supporting third countries in combating terrorism in their territories.¹⁹ As not even this list appears to be exhaustive, there are few types of operations the EU should presently be considered incompetent to engage in.

One older discussion however retains some of its topicality, namely the issue of how broadly the mandate for EU military personnel to use force may be formulated. Since the Second World War, the United Nations has engaged in several peacekeeping operations. International lawyers commonly regarded strict neutrality, consent of the parties to the conflict and use of force only for self-defence as the classic elements and preconditions.²⁰ Over time, the concept evolved, leading to ‘second generation’ peacekeeping, entailing a more active role for the peacekeeping forces,²¹ and ‘third generation’ peacekeeping, also referred to as ‘robust’ peacekeeping.²² Some authors have taken the view that the EU was never meant to engage in the latter type of operations, and that under ‘peacekeeping’, the TEU understood nothing but the ‘classic’ variety.²³ Under the novel provisions, this issue remains unsettled. Its veracity can only be established by keeping a close watch on all forthcoming EU missions that are officially labelled as ‘peacekeeping’ ones (none have been so far). At the same time, due to the fact that Article 43 enables the EU to send out *peacemaking* missions as well, it is inevitable that, when assigned that particular task, EU servicemen may indeed resort to a broader use of force—while naturally still remaining within the boundaries of international (humanitarian) law. Again though, no such missions have been launched so far. Besides, unlike the UN and NATO, the EU does not yet have the political standing to be deploying ‘robust peacekeeping’ operations with any regularity—and without the

¹⁸A common synonym for peacemaking is peacebuilding, although some scholars employ a deviant terminology: cf. Merlingen and Ostrauskaite (2009).

¹⁹The latter phrase is slightly ambiguous: it could encompass lending support through an active (physical) presence of EU forces in those countries, or instead, merely supplying the latter with the means to engage the terrorists themselves.

²⁰Traditional manifestations were e.g. the establishment of buffer zones, interpositioning of forces, surveillance of conflict lines and monitoring of armistice agreements.

²¹More actively promoting and consolidating peace-processes, by e.g. drawing (interim) borders, disarming warring factions, seizing and destroying arms and equipment.

²²Here, a much wider mandate for using force is given, either on a broad reading of self-defence, or with authorisation for peace enforcement under Chapter VII of the UN Charter. It thus represents a rupture with the classic ideas of neutrality and consent of the parties.

²³See Graf von Kielmansegg (2007), p. 633.

necessary means to carry them out, the Union is in danger of punching substantially above its weight.

It is for the Council to decide on the launch of CSDP operations. The legal instrument employed is a decision of the ‘joint action’ type.²⁴ In such decisions, the objectives, scope and the general conditions for their implementation should be specified.²⁵ The management is entrusted to the PSC, with the Civilian or Military Planning and Conduct Capability delivering practical support and instructions, supervised by the Council and the High Representative.²⁶ The EU Military Committee and EU Military Staff furnish strategic guidelines where necessary. For civilian missions, CIVCOM plays an important preparatory and advisory role as well. On-the-spot tactical input can be provided through e.g. the EU Intelligence and Situation Centre or the EU Satellite Centre.

As regards the procedure for adopting the decisions through which CSDP missions are established, Article 43(2) applies as a *lex specialis* to Article 42 (4) TEU.²⁷ Significantly, where in general CSDP decisions are adopted on the initiative of the High Representative or a Member State, the Council is free to adopt decisions *proprio motu* where it concerns operational action involving the use of civilian and military means.

In accordance with Article 44 TEU, the Council may on an ad hoc basis entrust the implementation of a task to a select number of Member States, provided that the latter possess the necessary capability and are willing to take care of it. The management of the operation then devolves to this group, which is to liaise with the HR on how they go about it. The mission as such still falls within the scope of the CSDP, and will be carried out under the overall responsibility and control of the Council.

3.4.2 CSDP Operations in Practice

The very first CSDP (at the time: ESDP) mission was sent out in January 2003, on the territory of the former Yugoslavia—in itself a highly symbolic feat, as this was the scene of many earlier frustrations. From that moment on, the EU busied itself with a myriad of civilian and military operations. Over the past years, more than 30 missions have been launched, ranging from Bosnia²⁸ to Indonesia²⁹ and from

²⁴Cf. Article 28 TEU.

²⁵Article 43(2) TEU.

²⁶Cf. Article 38 TEU.

²⁷Which in itself forms a *lex specialis* for the CSDP, vis-à-vis Article 31 as the *lex generalis* in the CFSP.

²⁸EUPM, since 2003; EUFOR ALTHEA, since 2004.

²⁹AMM Monitoring Mission, 2005–2006.

Congo³⁰ to Afghanistan.³¹ The objectives have varied from advising on counterterrorism³² or strengthening the rule of law³³ to assisting in the build-up of maritime resources³⁴ or protecting civilians and facilitating the delivery of humanitarian aid.³⁵

All this makes for an impressive record indeed. Yet, one should keep in mind that the scale and size of missions have varied considerably. At one point, an EU operation consisted of only two dozen observers and advisors.³⁶ Moreover, as stated, the Union does not aim to duplicate the tasks of NATO or the UN, thwart their good efforts or needlessly get in their way. At the same time, though, when so requested, it is usually willing to step in and take over. This has already occurred on more than one occasion.³⁷

Box 3.3 The Union's First Naval Operations

The EU has not even shied away from taking to sea in eye-catching fashion. December 2008 saw the launch of its first-ever naval operation (code-named NAFVOR Somalia – Atalanta), aiming to deter and repress acts of piracy and armed robbery against private vessels in the vicinity of the Horn of Africa. An additional mission was established in April 2015 (NAFVOR Med – Sophia) to combat the smuggling of migrants and trafficking of persons in the Mediterranean and adjacent international waters. Possible use of force by the service personnel, including the capture and destruction of seized means of transport, was authorised beforehand by resolutions of the UN Security Council.

The foregoing reveals that the sophisticated institutional machinery has reached a quite reasonable 'cruising speed'.³⁸ For a complete picture, the unabated propensity of some countries to act outside the CSDP cadre should alas be noted. Apart from the infamous US incursion of Iraq in 2003 that was actively endorsed by the UK and Spain, just one other illustration offers the military strikes conducted inter alia by France in 2011 to topple the regime of Muammar Gaddafi in Libya. Especially the French government made clear that swift and decisive action was

³⁰DRC/Artemis, 2003; EUPOL Kinshasa, 2005–2007; EUFOR Congo, 2006; EUSEC Congo, since 2005.

³¹EUPOL Afghanistan, since 2007.

³²EUCAP Sahel Niger, since 2012.

³³EUJUST Themis, 2004–2005.

³⁴EU CAP Nestor, since 2012.

³⁵EUFOR Tchad, 2007–2009.

³⁶EUBAM Rafah, since 2005.

³⁷E.g. the EU Police Mission in Bosnia, taking over from the UN International Police Force; EULEX Kosovo, taking over from KFOR, a NATO operation.

³⁸Also exemplified in e.g. Pirozzo (2015).

called for to protect civilians and prevent an impending massacre, leaving no opportunity for protracted consultations with European or international partners. The rationale for such rampant unilateral or bilateral actions can therefore be practical, political or both.³⁹ They may entail an infelicitous pre-emption of CSDP operations, and the EU having to pick up the pieces afterwards.

3.5 CSDP Resources

3.5.1 Cooperation and Consultation, Development and Procurement

Evidently, in order to attain the objectives of the CSDP, the proper resources should be available. The term calls for a broad understanding here, covering inter alia people, equipment, armaments, transport, technical infrastructure, etcetera. Similar to the UN, the EU may send out missions under its flag, but it does not employ its own soldiers, nor does it dispose of its own *matériel de guerre*. For that reason, the Treaty makes the Member States responsible for providing the necessary civilian and military means. To guarantee that the EU is able to rise to challenges of the future, they are also instructed to improve their military capabilities.⁴⁰

In the past decades, multiple structures and working groups have been put in place for furthering mutual cooperation and consultation in defence matters, for promoting innovation and ensuring that essential resources were kept at peak levels.⁴¹ After the end of the Cold War, the traditional incentives for expanding the national military base and developing new weapons and military technology dissipated quickly. In the 1990s, the appropriate response to the new tide was not immediately clear. In 2004, the European Defence Agency was set up to play a pivotal role, identifying operational requirements, stimulating the necessary research and expenditure, and strengthening the industrial and technological base of the European defence sector.⁴²

The official tasks of the EDA are fivefold: first and foremost, it serves to identify the Member States' military capability objectives and to evaluate whether they live up to their capability commitments. Secondly, it aims to encourage harmonisation of operational needs and the adoption of effective, compatible procurement methods. Thirdly, the Agency is to propose multilateral projects so as to fulfil the objectives in terms of military capabilities and ensure coordination of Member State (cooperation) programmes. Fourthly, it is required to support, coordinate and plan (joint) defence technology research, as well as studies into technical solutions

³⁹Rühl (2014), p. 22.

⁴⁰See Article 42(1) and (3) TEU respectively.

⁴¹E.g. WEAG, WEAO, EDEM, OCCAR, POLARM. Some of these are still active at present.

⁴²Currently governed by Council Decision 2015/1835 defining the statute, seat and operational rules of the European Defence Agency, OJ [2015] L 266/55.

for future operational needs. Finally, the EDA ought to contribute to the identification and implementation of useful measures for strengthening the industrial and technological base of the defence sector, and to the improvement of the effectiveness of military expenditure.⁴³

The High Representative serves as head of the board of the EDA, ensuring a close and permanent link with the members of the Council. The Agency also carries out its task in liaison with the Commission where necessary. Participating in and contributing to EDA activities occurs on an entirely voluntary basis, however. Thus, as Article 45(2) TEU makes clear, Member States may decide for themselves whether or not to take part in its activities.⁴⁴

In line with the second of its tasks, the EDA's first major achievement was the approval of a voluntary 'Code of Conduct on Defence Procurement' in November 2005, which entered into force on 1 July 2006. This marked a crucial turning point. Although the Code was voluntary and non-binding, it was faithfully adhered to, and it turned on its head the established practice of Member States exempting defence issues from EU internal market and competition rules on the basis of Article 296 TEC.⁴⁵ From that moment on, all military and defence contract opportunities were published on the website of the EDA through an electronic bulletin board.⁴⁶

As pointed out by various scholars, this new approach still lay at odds with the official rules that ought to be complied with.⁴⁷ ECJ case law makes abundantly clear that Article 346 TFEU (formerly 296 TEC) has to be interpreted restrictively, and that it by no means grants a blank cheque.⁴⁸ Where the Treaty provision stipulates that Member States 'may take such measures as considered necessary for the protection of the essential interests of its security, connected with the production of, or trade in arms, munitions and war material', this is not meant as a categorical exemption. After all, it immediately adds that such measures shall (i.e. may) not adversely affect the conditions of competition in the internal market regarding products not intended for specifically military purposes. Correspondingly, the general EU public procurement rules apply without qualification, requiring public authorities to proceed in a consistent, transparent and non-discriminatory

⁴³See Article 45 TEU.

⁴⁴Currently all Member States do so (with the exception of Denmark, in accordance with its opt-out).

⁴⁵All EU Member States except Romania and Denmark participate in this scheme; so does Norway.

⁴⁶The Code of Conduct applied to contracts worth more than EUR 1 million. It introduced distinctive award criteria based on the most economically advantageous solutions for the particular requirement. It provided for a debriefing after the contract was awarded, during which session, upon request, unsuccessful bidders were given feedback.

⁴⁷See e.g. the Commission's *Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement*, COM (2006) 779 final.

⁴⁸See e.g. Case C-414/97, *Commission v Spain*; Case C-284/05, *Commission v Finland*; Case C-337/05, *Commission v Italy*.

way when putting certain projects, services or equipment out to tender.⁴⁹ The Code of Conduct, administered by the EDA, therefore established a special regime that flew in the face of primary and secondary EU law.

The incongruity did not go unnoticed. Some years after, special efforts were taken to counter the erroneous interpretations of the applicable rules, in an attempt to raise awareness of the limited discretion for pursuing particular national preferences here. Year 2009 saw the adoption of a special Directive that established a comprehensive set of rules for the procurement of arms, munitions and war material (plus related works and services), but also for the procurement of sensitive supplies, works and services for non-military security purposes.⁵⁰ This Directive can be applied to the vast majority of defence and security procurement contracts without putting at risk Member States' essential security objectives. It therefore intends to keep most of their purchasing and commissioning within the parameters of the internal market and the TFEU; the existence of tailor-made rules limits the possibility to argue that those essential security objectives cannot be guaranteed through the Directive's competitive tendering procedures. The Code of Conduct was consequently repealed in 2014.⁵¹

In spite of this legal-institutional evolution, it does remain questionable whether the Member States are truly willing to alter their past practices—which they might still believe to serve their national security and defence interests best. Very telling in this respect is that correct implementation and dutiful compliance with the new Directive has not been instantaneous, inciting a raft of infringement procedures initiated by the Commission.

For sure, it remains difficult to achieve integration in the atypical defence industry, where economic interests persuade governments to privilege their national 'champions', and where market forces apply haphazardly. This mostly pertains to the selection of countries that commands a significant industrial base in the sector. In the development, adoption and allocation of new means and technologies, the EU nevertheless will have to engage collectively.⁵² So long as Member States continue to prefer to safeguard their own companies and industries, one cannot help but be pessimistic with regard to the establishment of a true internal market for military equipment, a level playing field for defence contractors, and a further streamlining of the relevant technological and industrial base in the EU.

⁴⁹See Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ [2004] L 34/114.

⁵⁰Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, OJ [2009] L 216/76. See also Directive 2009/43/EC.

⁵¹For an exhaustive study, see Trybus (2014).

⁵²Heuninckx (2016) comes up with valuable concrete proposals.

3.5.2 Closing the Capabilities–Expectations Gap

At various times in the past, specific political commitments were undertaken to ensure that a shortage of means would not impair the realisation of the overall ambitions, or pose sudden restrictions at a moment when immediate action was called for. As mentioned above, in 1999, the Helsinki European Council laid down the so-called Helsinki Headline Goal (HHG). Therein, the EU Member States agreed that, by the year 2003, they would have to be able to deploy rapidly and sustain forces capable of the full range of Petersberg Tasks, including the most demanding of those tasks.⁵³ Also, these forces would have to be militarily self-sustaining, with the necessary command, control and intelligence capabilities, logistics, other combat support services, and additionally, as appropriate, air and naval elements. The Member States also agreed that these forces should be ready for deployment at this level within 60 days and that within this same time limit they should be able to provide smaller rapid response elements, available and deployable at high readiness. Finally, it was decided that they should be capable of sustaining any such deployment for a period of at least one year.⁵⁴ In follow-up meetings, these still fairly broad objectives were converted into more detailed commitments.⁵⁵

By 2003, significant progress had been made on the majority of the targets, but a number of objectives remained to be achieved. For that reason, one year later, a novel headline goal was set for 2010.⁵⁶

Box 3.4 The 2010 Headline Goal in Retrospect

Included in the ‘indicative list of milestones’ in the 2010, and successfully realised before the deadline or shortly thereafter, have inter alia been: the establishment of a civil-military cell within EUMS with the capacity rapidly to set up an operation centre for a particular operation; the establishment of the EDA; the implementation of EU strategic lift coordination, with a view to achieving necessary capacity and full efficiency there to assist anticipated operations; and an improvement of the performance of EU operations at all levels through the development of appropriate compatibility and network linkage of communication equipment and assets.

⁵³In operations up to corps level—i.e. up to fifteen brigades (or 50,000–60,000 persons).

⁵⁴Requiring an additional pool of deployable units (and supporting elements) at lower readiness, to provide replacements for the initial forces.

⁵⁵E.g. with the Helsinki Headline Catalogue, indicating that the capabilities sought would ideally involve 100,000 personnel, 400 combat aircraft and 100 naval vessels, and the European Capabilities Action Plan, focusing on particular crucial pieces of equipment, such as transport planes and unmanned aerial vehicles.

⁵⁶Headline Goals 2010, as approved by General Affairs and External Relations Council on 17 May 2004, endorsed by the European Council of 17 and 18 June 2004, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/2010%20Headline%20Goal.pdf>.

As part of the package, the first of the so-called EU Battle Groups, originally planned to form part of a Rapid Reaction Force, became fully operational in 2007. Though not completely matching the grand intentions sketched in the headline goals, these rapidly deployable forces do go a long way, consisting of 1500 men (supplied by three different Member States on a rotating basis), being ready for command within 10 days and able to engage in any desired theatre of operations within 15 days.

That same year, a separate headline goal was laid down for civilian crisis management operations.⁵⁷ The Civilian Headline Goal (CHG) sought to improve the Union's civilian capabilities and to respond effectively to crisis management tasks, building on the results and experiences in the ESDP so far. The CHG aimed to ensure that the EU is able to conduct any type of crisis management operation. For that purpose, high-quality resources had to be made available with all the support functions and equipment required in a short time span and in sufficient quantity. At the expiry of the deadline in 2010, the majority of the CHG objectives were achieved on paper. That however did not necessarily mean that the EU was now up to the task of staging *any* type of crisis management operation—a fact deserving renewed attention.

At a summit in 2013, while acknowledging the persisting shortcomings, the European Council identified a number of priority actions built around three axes: increasing the effectiveness, visibility and impact of the CSDP; enhancing the development of capabilities; strengthening Europe's defence industry.⁵⁸ It committed once again to delivering key capabilities and addressing critical shortfalls through concrete projects, such as the development of Remotely Piloted Aircraft Systems (RPAS) in the 2020–2025 timeframe, and multi-role-tanker transport of air-to-air refuelling capacity. This was followed up in 2016 by European Council Conclusions containing additional proposals and an implementation plan with detailed timelines, sparking the creation of a permanent operational planning and conduct capability for EU missions, a coordinated annual review on defence, and a European Defence Fund.⁵⁹

In sum, the gap between what is expected of the EU and what it is actually able to deliver does not yet appear completely closed. To reach the level that enables for all challenges and threats to be tackled adequately, still more needs to be done. It has been asserted that at present, only a meagre 10–15% of the total armed forces can be made available and deployed for EU purposes.⁶⁰ At the same time, this figure provides a neat indication of the Union's grand potential.

⁵⁷*Civilian Headline Goal 2010, as approved by the Ministerial Civilian Capabilities Improvement Conference and noted by the General Affairs and External Relations Council on 19 November 2007*, available at http://www.consilium.europa.eu/uedocs/cmsUpload/Civilian_Headline_Goal_2010.pdf.

⁵⁸European Council Conclusions, Brussels, 19/20 December 2013, EUCO 217/13.

⁵⁹European Council Conclusions, Brussels, 15 December 2016, EUCO 34/16.

⁶⁰See Biscop (2008), p. 431.

3.6 The European Security Strategy and Its Progeny

The first European Security Strategy (ESS) saw the light of day in 2003. It was authored by then High Representative Javier Solana and heralded yet another new era for the EU's foreign and defence policy.⁶¹ In the United States, every new administration comes up with an official security strategy, often giving birth to a particular doctrine, named after the incumbent president.⁶² The 2003 ESS was a first stab at visualising and ordering the mid- and long-term strategic priorities of the Union. In 2008, the first report on its implementation appeared, providing for a partial revision and update.⁶³

The ESS identified four key challenges and threats: terrorism and organised crime; proliferation of weapons of mass destruction; regional conflicts and state failure; cyber-security, energy security and climate change.⁶⁴ It also indicated four strategic objectives: to address threats as early as possible with a variety of instruments, including but not confined to military means; to build security in the neighbourhood and promote a ring of well-governed bordering countries; to contribute to the establishment of an international order based on effective multilateralism; to increase the EU's effectiveness with appropriate administrative and command structures, improved capabilities, well-trained staff and better support, employing a 'people-based approach'. The 2008 implementation report reinforces the broad understanding of security canvassed by the ESS, underlining the Union's ability to rely upon a combination of instruments, stressing the link between security and development, and pointing out the need to focus on enhanced regional integration.

In 2015, the European Council mandated the incumbent HR, Federica Mogherini, to overhaul the ESS and come up with a new text. After numerous exchanges with governments, parliaments and think tanks, the EU's Global Strategy (EUGS) was officially unveiled in June 2016.⁶⁵ Whereas the ESS expressed great faith in the Union's transformative power, the EUGS displays a higher dose of realism by embracing the idea of 'principled pragmatism'. Although the efforts to

⁶¹'A Secure Europe in a Better World – The European Security Strategy', available at <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

⁶²E.g. the 1948 Truman doctrine, spelling out the US's structural assistance to countries in the communist sphere of influence that risked being overwhelmed, or the 2002 Bush doctrine, stressing the US's readiness to engage in 'pre-emptive self defence'.

⁶³See Report on the Implementation of the European Security Strategy—Providing Security in a Changing World, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf.

⁶⁴The ESS should be distinguished from the Union's Internal Security Strategy, for the first time adopted in February 2010 (available at <http://register.consilium.europa.eu/pdf/en/10/st05/st05842-re02.en10.pdf>). Confusingly though, in some respects, the internal and external security strategies appear to overlap.

⁶⁵'Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy', available at <https://europa.eu/globalstrategy/en>.

ensure a ‘rule-based global order’ is still there, that notion plays a more secondary role than ‘effective multilateralism’ did in the ESS. The EUGS lists five priority areas of external action: the security of the Union; state and societal resilience in the East and South; an integrated approach to crises; cooperative regional orders; global governance for the twenty-first century. The Strategy stresses that the CSDP should be strengthened, enabling the Union to act autonomously while contributing to and undertaking actions in close concert with NATO. Yet its scope goes beyond that domain, by referring to issues like trade, energy and climate change, in addition to topics such as terrorism, border control and cyber-security. It moreover identifies regions as critical spaces of governance, aiming to stimulate the blossoming of cooperative regional orders and organisations.

Commendable as their content may be, the legal status of the security strategies remains questionable. The 2003 edition was, somewhat surprisingly, not tagged as an official ‘common strategy’ and not adopted on the basis of what was then Article 13 TEU. Its 2016 successor could well have been based on Article 26 TEU, but was not either. The same went for the implementation plans that followed in the EUGS’ wake. Thus, the documents were placed in a quaint legal limbo, shunning the firm status of a ‘decision’ that now lay so easily within reach.

Since none of the documents comprise tangible rights or obligations, in truth, they come across as even more ambiguous than the soft law documents referred to in the previous section. Scholars have dubbed the handiwork of Mr Solana an ‘inspirational sketch’, too full of political rhetoric to be assigned any legal meaning. The vision of Ms Mogherini can hardly be said to have eclipsed it. The tremendous symbolic value should nevertheless not be overlooked here: the mere issuing of a European security strategy illustrates the growing self-confidence of the EU as a (quasi-)unitary actor on the world stage. Indeed, the churning out of such a document could be considered a statement of identity, conveyed through the Union’s ‘front office’. Moreover, the importance attached to multilateralism has been hailed as a significant virtue in a time where other powerful international players are all too eager to go it alone. Seen in this light, the ESS and its progeny constitute a string of shining beacons, which exhibit the hallmarks of the ‘European way’ in promoting peace and justice across the world.

3.7 Conclusion

In its original form, the Common Security and Defence Policy passed through an eventful first decade. Quickly thereafter, with the complete overhaul of Title V TEU by the Treaty of Lisbon, its legal base was expanded. That transformation legitimised many of the developments that had hitherto taken place outside the official framework. After many shattered dreams and wasted opportunities in the 1990s, the EU got off to a new start at the turn of the century. The CSDP gradually gained momentum, and with the launching of more than 20 missions in barely 5 years’ time, the EU clearly affirmed its operational capacity.

In the new world order after the end of the Cold War, tried and tested organisations such as the WEU and NATO rapidly lost credibility, with the original configurations having surpassed their sell-by date, and sundry attempts at repositioning proving unsuccessful. In contrast, the potential for the European Union to step in and take over has grown exponentially. In the shifting international context, the geopolitical and strategic trend points cautiously towards Europeans accepting a greater responsibility for their own security, desiring resolute protection of their interests abroad.

The gamut of missions the EU is at least theoretically willing to engage in, is nothing short of impressive. Though several obstacles are yet to be overcome, through the European Defence Agency and the European Defence Fund, the Member States have been enabled to effectively pool resources, and coordinate and concentrate their R & D efforts. Even when the capabilities–expectations gap is likely to persist for some time more, over the past years, it arguably did become smaller.

So far, what has too often been lacking is the firm determination to make use of the possibilities that the CSDP has to offer. But, once countries pick up the gauntlet and further integrate their military systems and structures—as signalled by the 2017 decision to activate ‘permanent structured cooperation’—there will in the long run be only few security and defence issues left that the Union, in one way or the other, is unable to tackle.

References

- Biscop S (2008) Permanent structured cooperation and the future of the ESDP: transformation and integration. *Eur Foreign Aff Rev* 13:431–448
- Graf von Kielmansegg S (2007) The meaning of Petersberg: some considerations on the legal scope of ESDP operations. *Common Mark Law Rev* 44:629–648
- Heuninckx B (2016) *The law of collaborative defence procurement in the European Union*. Cambridge University Press, Cambridge
- Koutrakos P (2013) *The EU common security and defence policy*. Oxford University Press, Oxford
- Larik J (2013) *Arma fero, ergo sum?* The European Union, NATO and the Quest for ‘European Identity’. In: de Waele H, Kuipers JJ (eds) *The European Union’s emerging international identity—views from the global Arena*. Martinus Nijhoff, Leiden-Boston, pp 43–71
- Merlingen M, Ostrauskaite R (2009) *EU Peacebuilding in Georgia: Limits and Achievements*. CLEER Working Papers 2009/6
- Pirozzo N (2015) The European Union and civilian crisis management after Lisbon. *Eur Foreign Aff Rev* 20:287–306
- Randelzhofer A, Nolte G (2012) Article 51. In: Simma B, Khan D-E, Nolte G, Paulus AL (eds) *The charter of the United Nations: a commentary*. Oxford University Press, Oxford, pp 1397–1428
- Rühl L (2014) *European Foreign and Security Policy since the Lisbon Treaty: From Common to Single?* ZEI Discussion Paper C 226/2014
- Smith ME (2017) *Europe’s common security and defence policy—capacity-building, experiential learning, and institutional change*. Cambridge University Press, Cambridge
- Trybus M (2014) *Buying defence and security in Europe—the EU defence and security procurement directive in context*. Cambridge University Press, Cambridge