

IN-DEPTH ANALYSIS

Will CSDP enjoy 'collateral gains' from France's invocation of the EU's 'mutual defence clause'?

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ABSTRACT

Following the terrorist attacks of 13 November 2015 in Paris, the 'mutual defence/assistance clause' of the Treaty of Lisbon (article 42.7 TEU) was invoked for the first time by an EU Member State. This tool is a 'reactive', intergovernmental instrument. Devoid of specific implementation arrangements, the text foresees no explicit role for EU institutions. As a result, any Member State invoking the clause maintains a wide margin of manoeuvre for pursuing bilateral discussions with partners, who are at once bound to assist and free to decide the type and scope of their assistance.

Article 42.7 was not the only clause France could have invoked to ask for assistance, but it was the least constraining. At a time when the country's financial and military capabilities are increasingly stretched, the simpler clause was a logical choice. Beyond the immediate consequences – Member States' unanimous political support and bilateral discussions on assistance – the act is likely to affect the wider debate about the EU's Common Security and Defence Policy (CSDP). The Union's strategic thinking (including on the future 'EU global Strategy for Foreign and Security Policy') and developments may be influenced by the inauguration, with a renewed focus on preparedness, pooling and sharing of capabilities, and the EU's 'comprehensive approach' to crises.

The European Parliament has long supported mutual assistance in cases of crises. With its oversight role (in particular based on Article 36 TEU) and role in coordinating with national parliaments, the Parliament could stimulate and take part in debates on the EU's role in multidimensional and transnational crises. Such debates can contribute to an evaluation of Article 42.7 and potentially improve the EU's security 'toolbox'.



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1 Context

France's inauguration of the EU's 'mutual defence clause' reaped unanimous political support from the country's partners, and opened the way to bilateral negotiations on the type of assistance to be obtained.

Following the terrorist attacks against Paris and Saint-Denis on 13th November 2015, French President François Hollande presented the government's reactions before the two houses of the French Parliament in Versailles on 16th November; he indicated that he would ask his Minister of Defence to invoke Article 42.7 of the Treaty on the European Union when meeting his 27 counterparts in Brussels, asking for EU Member States solidarity and assistance, as 'the enemy is not an enemy of France, it is an enemy of Europe.'¹

French Defence Minister Le Drian invoked the Article on Tuesday 17th November during the Defence part of the EU Foreign Affairs Council. He received 'unanimous' support from his colleagues, and HR/VP Mogherini reported that the EU 'expressed its strongest full support and readiness' to provide all the assistance required. She added that several countries 'have already announced offers or support through material assistance as well as to enhance support in other theatres' in order to free French capacities. Paris would therefore contact bilaterally the other Member States in order to receive the assistance it needs.

2 What is Article 42.7 of the Treaty on European Union?

Article 42.7 of the Treaty on European Union (reproduced in the 'Treaty of Lisbon', ToL) is a mutual defence (also often called "mutual assistance") clause which states that:

If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.

Article 42.7 of the Treaty on European Union, also called the mutual defence clause, is a reactive clause, to be invoked after an attack. Obliging other Member States to aid the one attacked, the clause was inherited from the 1954 Brussels Treaty.

This clause is said by many to have been inserted originally in the Treaty at the request of Greece, in order to have a collective defence protection clause in an EU (and not only a NATO) framework; this is catering for the fact that Turkey - long considered by Greece as potential source of tension or an adversary - is a member of NATO and not an EU member. In this sense it is a purely 'reactive' clause, rather than one catering also for some prevention aspects (see article 222 TFEU below).

Similarities can be observed with Article V of the 1954 modified Brussels

¹ '(...) l'ennemi n'est pas un ennemi de la France, c'est un ennemi de l'Europe'.

While the clause originally called NATO the 'foundation' of defence, the text now caters to the specificities of both NATO and non-NATO EU Member States.

Treaty ('... the other High Contracting Parties will, (...), afford the Party so attacked all the military and other aid and assistance in their power. '), but the ToL text goes beyond the guarantees as it mentions NATO. This clause as a matter of fact, like Article V, is designed to cater for the same Member States positions: those looking for a mutual defence commitment, those having a neutral status (i.e. last sentence of first paragraph), those having nuclear deterrence capabilities, and those NATO parties eager not to undermine the Organisation or even preserve the possibility to resort to NATO as a first reaction mechanism to an armed aggression (i.e. second paragraph).

The triggering of this article therefore does not necessarily imply the use of military action, despite the initial inspiring text of the Western European Union and the clear reference to an 'armed aggression'. This means that non-NATO EU MS (6 are not members of NATO: Austria, Cyprus, Ireland, Malta, Finland and Sweden), some of whom have a tradition of neutrality, can maintain the 'specific character' of their policy but still provide support by non-military means (intelligence, logistical support, etc...). Their support may also be discussed bilaterally with France.

While EU Member States are the actors mentioned, the EU institutions have no explicit role under this Article (although HR/VP mentioned possible facilitation or coordination by the EU²). There are also no implementation arrangements for the mutual defence clause, which may not be problematic in theory (NATO Article 5 has no implementing arrangements), but could be in practice in the absence of any past experience.

3 Other similar clauses

3.1 Article 222 of the Treaty of the Functioning of the European Union (TFEU)

Art 222 (TFEU) is a solidarity clause which states that:

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

- (a) - prevent the terrorist threat in the territory of the Member States;*
- protect democratic institutions and the civilian population from any terrorist attack;*
- assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;*

² she had been called by the EP to provide an analysis of the role of EU institutions via EP Resolution of 2012/2223 (INI).

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed.

For the purposes of this paragraph and without prejudice to Article 240, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 71; the two committees shall, if necessary, submit joint opinions.

4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.

Another 'solidarity clause', Article 222 of the Treaty of the Functioning of the European Union (TFEU), is both preventive and reactive, applying to terrorist attacks and natural or man-made disasters. This text places EU institutions in the driver's seat.

The text of this clause was first introduced in a declaratory tone in the Council conclusions of 25-26th March 2004 following the terrorist train attacks in Madrid (11th March), making reference to an Article (42) of the draft Constitutional Treaty for Europe which was being worked on by the European Convention. The incorporation of natural disasters is due to former French Commissioner and French Minister Michel Barnier's willingness to increase the EU role in managing unintentional disasters, together with intentional ones. This text was later on almost identically incorporated in the LT as Article 222 of Title VII of the Treaty on the Functioning of the EU.

This clause was meant to ensure that in the context of new risks and threats facing the EU, the largest possible range of tools available to the EU could be mobilised. This would complement (or counter?) the more 'military' Mutual Defence Clause' of Art 42.7.

The clause makes it a duty for the EU institutions and EU Member States (MS) to act jointly; it refers to the mobilisation of all EU tools in a coherent, coordinated and efficient way, thus evoking the notion of 'comprehensive approach' (now referred to frequently in the current debate on EU security); and it also incorporates the notion of assistance to be made available (possibly underlying the notions of capabilities and preparedness; in this sense the 'preventive' notion is included here, but not in Article 42.7).

On 24th June 2014, the Council adopted a decision 'on the arrangements for the implementation by the EU of the solidarity clause' (2014/415/EU), establishing the respective roles of the EU institutions driving the process (Council, Commission, EEAS), and also quite restrictive conditions to its

In 2014, implementation arrangements for the clause were adopted, restricting the conditions under which the clause could be invoked.

invocation (exhausting 'all means and tools' and being 'overwhelmed').

3.2 Article 5 of the NATO Charter

Article 5 of the Washington Treaty is a mostly military solidarity clause which stipulates that:

Article 5

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Article 5 of the NATO Charter reflects the principle of collective defence. Used only following the 9/11 attacks, it places the US at the centre of any decision and implementation.

This article was first activated by the Alliance after the terrorist attacks on September 11th against US territory. This request was followed up by the intervention in Afghanistan, and by air (AWACS) and naval patrolling activities.

It should be noted that when considering whether or not to activate Article 5, the NATO authorities considered as necessary criteria both the scale of the attacks and the external direction (i.e. whether this was an attack by internal or external terrorist organisations, as in the former case, the allies would not have considered it as falling under the Treaty rules)³. In the case of France, both could be questioned against this only precedent.

NATO's article 5 states that an 'armed attack' against any member of NATO 'in Europe or North America' is considered an attack against all NATO members. Resorting to Article 5 would place the US (and to a lesser but still important extent, Turkey), at the centre of the decisions to be made due to their political as well as military weight in the Alliance.

4 Why Article 42.7?

First of all, as Defence Minister Le Drian and HR/VP Mogherini said at the press conference following the Foreign Affairs Council meeting on 17th November, this is a 'political act'. In terms of political communication, internally this showed France was not acting in isolation (like this had been

³ See NATO Review of summer 2006, 'Invoking Article 5' by Edgar Buckley, former NATO Assistant Secretary General for Defence Planning and Operations (1999-2004)

A political act, France's invocation of Article 42.7 is logical, given the country, its objectives, and the political, tactical and geopolitical disadvantages of involving NATO in this context.

criticised in past cases), and externally, this was a good opportunity to get from EU partners the solidarity that had been absent following earlier requests.

Second, France's choice is clearly to go for an EU tool, versus a NATO one (i.e. involving both the US and Turkey), and inside the EU 'toolbox', for an intergovernmental tool rather than one giving a role to the EU institutions and processes (being more cumbersome, involving unanimity, and lacking fixed management structures fit for the situation).

1° While involving NATO in this terrorist/Syria linked context could have helped from the point of view of military/intelligence/logistics resources (especially by pulling on the US resources), several elements could have pleaded against such a choice:

- First of all, France has always pleaded for a European defence autonomous from the US; it is therefore no surprise that it goes for a route not involving directly the American ally (even if such autonomy is a plea that the US themselves have been making more or less subliminally in recent years);
- Second, due to the pre-eminence of the US - but also necessary involvement of Turkey - in NATO, France would certainly have been much less in control of the operations had they called for NATO assistance;⁴
- Third, many NATO allies are already involved in fighting ISIS at some level; by acting via Article 42.7, France can still get bilaterally negotiated support from EU NATO Members;
- Finally, several important political and geopolitical obstacles exist to the idea of a NATO involvement:
 - Due to the still important tensions with Russia in the Ukrainian context, some Eastern European EU and NATO MS might be reluctant to mobilise NATO in the context of Syria;
 - Involving NATO in the near/middle-east at this moment could be very sensitive and counter-productive for the ongoing efforts to progress towards a political transition process in Syria (i.e. recent Vienna discussions);
 - French increased military involvement in Syria: if France is pursuing on the path of an increased military involvement in Syria, it will need to operate a 'rapprochement' with regards to Russia; such a move excludes any resorting to NATO operations, an organisation officially declared by President Putin a 'threat' to Russia.

⁴ Interestingly, it is Republican Senator and presidential candidate Marco Rubio who recently suggested the invocation of Article 5 and the constitution of a larger coalition against ISIS. This might be an additional reason for France not to put President Obama in a difficult internal situation, a year before the next US Presidential elections.

France's choice to invoke Article 42.7 rather than 222 was likely deliberate: the conditions and implementation arrangements specified in Article 222 are more complex and may slow implementation.

The constrained French financial and security/military context also played a key role in the country's approach – as did other elements, such as the UK 'Brexit' debate.

2° By invoking the solidarity clause rather than the mutual defence one, France would apparently have used the 'natural' tool (as a 'terrorist attack' is clearly stipulated in the first sentence of Art 222, and not in Art 42.7), and it could have mobilised more instruments (the EU ones, not mentioned in Art 42.7).

However, by choosing the intergovernmental path rather than the EU one, France also avoids a number of obstacles and potential complications:

- France considers it has not (and does not want to be seen as having) exhausted all the means and tools at its disposal in front of the terrorist threat/armed aggression, and therefore is not 'overwhelmed' by the crisis, which are described as the conditions for invocation of Article 222 (cf. Art 4 of the implementing arrangements); this would also potentially lead to a politically difficult internal (and/or EU level⁵) debate on France lack of preparedness and of capacity to react/defend itself (which may be different in the case of a smaller MS);
- Additionally, turning to Art 42.7 means that Paris can act quickly at all stages of the implementation process, without 'any formal decision or Council conclusions to be taken' as HR/VP Mogherini stated ('we need no further formality');
- France also keeps control of the process, while Article 222 (and as detailed in the 2014 implementation arrangements⁶) gives responsibility over the coordination of the response to the invocation of Art 222 to the Council, supported by the General Secretariat of the Council, the Commission and the EEAS. They also are in charge of the political and strategic direction of the EU response, as well as performing threat assessments reports.

3° Additional important elements of context which can also contribute to explaining the French approach:

- The French overstretched military/security capacities due to their interventions in Africa and the Middle-East and internal increased vigilance since the *Charlie-Hebdo* terrorist attacks in early 2015: allies cannot not assist the MS victim of an armed aggression (there is a clear 'obligation' to act with 'all means in their power' - although the ECJ would not be involved in monitoring such responses). Following already engaged bilateral contacts, it is expected that some MS will help France release some of its capabilities in external operations to reinforce its actions internally or on the Syrian field of operations. In this sense, the French decision is clearly inspired by the Ministry of

⁵ Possible EU demands for lack of preparedness, and ECJ involvement for EU/MS possible non-compliance as far as responsiveness is concerned, could be involved in the Article 222 process;

⁶ Council decision of 24th June 2014 (2014/415/EU).

Defence rather than by other actors;

- The context of the UK 'Brexit' referendum: activating an 'EU institutional' response in a CSDP context (also leading to new competences for the EU in the case of Article 222) could be triggering a politically difficult and risky - thus currently unwelcome - debate for the British government (it would however also give the UK government - as for all MS - a 'veto right').

5 Possible consequences

Unanimous political support was provided to France, which will bilaterally negotiate concrete contributions from its 27 partners.

Concrete assistance to France: of course military/logistical support, either through direct contributions to the anti-ISIS coalition or through substituting French troops in CSDP (e.g. EU Training in Mali) or UN (UNFIL in Lebanon, MINUSMA in Mali or MINUSCA in CAR) missions would be for Paris welcome answers.

For non-NATO MS, the second sentence of Article 42.7 (*'This shall not prejudice the specific character of the security and defence policy of certain Member States.'*) leaves a large margin of manoeuvre for interpreting the nature of the obligation, which could involve for instance assistance in intelligence matters.

Despite choosing the 'intergovernmental' road, the invocation of Article 42.7 may have some consequences on EU developments, in particular in the field of CSDP.

- 'EU' solidarity/role: although the EU institutions are not explicitly mentioned, it is an EU tool which is being invoked with Article 42.7. Additionally, FR used the Council (rather than the European Council for instance) in order to communicate on this issue, and Minister Le Drian mentioned before the France National Assembly the need to reinforce *'l'Europe de la Défense'*. For some if not all MS, the entering into force of the ToL and therefore of the Mutual Defence Clause has triggered adaptation of Security/Defence provisions in the legal order. It introduces legal obligations, and therefore brings added value to the development of CSDP. For the general public (without entering in institutional/competences debates) this passes the message that, in a somewhat comparable manner to the NATO treaty, the EU also has instruments which can be called upon in times of crisis, and has a role to play in security dimension. This can be useful in the context of future debates and decisions for CFSP/CSDP.
- Concretely, the choice of the EU by France may contribute to stimulate/accelerate the already ongoing debate on CSDP policy developments and actions, especially as far as preparedness/anticipation, capabilities/procurement are concerned. As far as the European Defence sector is concerned, the 'pooling and sharing' or the interoperability' dimensions might benefit from the activation of Article 42.7, as the implementation of actions or projects already agreed may be accelerated, or debated decisions eventually

Beyond the debate on the role of the EU, France's invocation of Article 42.7 will affect the ongoing CSDP debate, particularly in relation to EU preparedness and capabilities. The act may also influence High Representative/Vice President's drafting of the EU Global Strategy for Foreign and Security policy.

agreed.

- In this context it would be surprising if the Paris events had no impact on the ongoing work by HR/VP Mogherini and her teams to prepare an EU Global Strategy for Foreign and Security Strategy. The terrorist attacks and the concrete questions and problems they raise should find some adequate responses inside the paper expected for June 2016. The intergovernmental approach of France is in this sense an additional challenge to the drafting of such a strategy, and certainly raises the question of the 'endorsement/approval' by the MS of the vision proposed.

6 The role of the European Parliament

The debate on EU and Member State preparedness and capacity to respond to terrorist attacks and crises will involve the European Parliament because of the institution's past commitments, its oversight role (Article 36), its links to national parliaments and the importance of reinforcing legitimacy among the European public.

First of all, while there is no explicit role foreseen in the case of Art 42.7, the triggering of this article may shed again light on the need for increased EU preparedness, processes and tools to respond to internal/external security crisis.

As a matter of fact, EP resolution of 2012 on the 'EU Mutual defence and solidarity clauses: political and operational dimensions'⁷ had insisted on '*the need for the MS and the Union to develop a policy anchored in prevention, preparedness and response with respect to all major security threats (...)*'. In this respect, in the light of recent events, there are reasons to believe that MS actions at EU level were - to say the least - too slow or insufficient. This may be changing now (e.g. full use of the IPCR arrangements in the case of the refugee crisis).

The EP has played an active role in this context by acting as a motivation force, stimulating the debate and questioning MS actions; this should continue.

In particular the EP should continue to follow the situation according to the possibilities offered by article 36 TEU, via the consultative process of HR/VP Mogherini who chairs the FAC, and as an active interlocutor of the Council (questions or recommendations). The Parliament should also be associated to ongoing and future debates, as the regular Joint Consultation meetings between the Council Presidency and the Parliament allow; finally the institution may play a role in terms of enhanced coordination with national parliaments (taking for instance advantage of the provisions for Interparliamentary cooperation in Protocol 1 of the ToL), and strategic/targeted communication the general public in the MS, as far as Security of citizens is concerned. With national parliaments in order to recall the principles of necessary shared responsibility and solidarity, and relentlessly pass the message that European tools are needed more often, not less in the current financial context; and with the public, justified by the democratic legitimacy of the EP, in order to reassure that security is an EU

⁷ 2012/2223 (INI) of 22 November 2012.

issue, which will be tackled and solved by solidarity and joint action, without sacrificing EU values.

Second, this is the first, but probably not the last time that these two EU 'solidarity' articles are coming to the forefront. For the future, there is a clearer role for the EP in the case of Art 222, because it is to be informed as far as implementing arrangements are concerned (which has been the case in June 2014 for the adoption of the 'arrangements for the implementation by the Union of the solidarity clause), and due to its authority over budgetary aspects.

The EP has in the past proposed initiatives aiming at ensuring and reinforcing mutual assistance in cases of crises or disasters.

The EP role could therefore in the future be to stimulate EU preparedness for a future activation of Article 222 Solidarity Clause, which is likely to arise due to the complex (internal and external, cross-border and non-state actors based) threat context.

While a large MS like France has decided for various reasons to use Article 42.7 in the present case, another MS or other Member States may, in the same way, consider it adequate and necessary to activate Article 222 in a non-so distant future (e.g. in the context of other terrorist attacks using conventional, or non-conventional weapons⁸ against a small MS or a group of MS).

One of the few - but important - limitations to such an invocation however lies with Article 4 of the implementing arrangements (*'Invocation of the solidarity clause'*), stating for instance (paragraph 1) that *'In the event of a disaster or terrorist attack, the affected Member State may invoke the solidarity clause if, after having exploited the possibilities offered by existing means and tools at national and Union level, it considers that the crisis clearly overwhelms the response capabilities available to it.'* As a matter of fact, this could trigger internal / EU debates on the exhaustion of 'existing means and tools' and the acceptance of declaring oneself 'overwhelmed'. Such limitations introduced by the implementation arrangements will need to be tackled if the full potential of this clause is to be expected when conditions for invoking it come. The issue of the possible complementarity between the two clauses (can they be triggered simultaneously or in sequence?) is also one which deserves attention.

Third, a debate will sooner or later have to take place on the evaluation of the implementation and impact of the invocation of solidarity clauses (Article 42.7), or solidarity tools (IPCR) within the EU in times of crises (although this is not foreseen in the ToL, but will no doubt soon become politically timely and operationally sound). At that time, the EP will need to have its say, taking as a starting point its resolution of November 2012, and thus contributing at its level to a necessary "lessons learnt" exercise.

⁸ e.g. CBRN risks were mentioned by the French Prime Ministers on 19th November.

A debate on solidarity within the EU (in particular touching on Article 222) necessarily concerns the EP.

The restrictive rules for invoking the solidarity clause may help trigger a reflexion on the adequacy and comprehensiveness of EU tools.

7 Conclusion

France's choice to invoke Article 42.7 was deliberate – the selection of an intergovernmental and reactive EU tool. While the decision was largely motivated by the national (political, tactical and logistical) context, the consequences are likely to be wider. Once the immediate reactions have subsided, a deeper, long-term analysis is likely to reveal rifts in the collective nature and in the complexity of EU solidarity and CSDP tools.

Threats and crises have grown multidimensional and transnational. This requires re-examining the EU collective 'toolbox' and the role of each instrument within the 'EU comprehensive approach' – and therefore also of the role of EU institutions. The debate on the need and ways to further 'pool and share' resources at the EU level is, in this context, likely to intensify.

France's decision to trigger 'only' Article 42.7 may only partially respond to the problems that the country – and the other Member States – face. If France cannot rapidly remove its troops from Syria and Iraq, the risk of the country's capacities becoming over-stretched capacities in the medium- to long-term will re-emerge: the country will not be able to play its role in NATO as a 'framework nation', from which smaller countries should be able to borrow capabilities.

But the solidarity clauses of the Treaty of Lisbon in the area of security (Articles 42.7 TEU and 222 TFEU) also appear, in their current form, to be only partial answers to the challenges facing the EU. Following France's invocation of Article 42.7, the implementation and impact of the article will certainly be discussed. A debate on the possible complementarity between the treaty's two articles may be useful, as would be specific proposals on how to link them, or to call on other tools (such as Article 42.6 TEU on permanent structure cooperation, or article 44 TEU on the implementation of a task to a group of MS). In parallel, the limitations of the EU's current 'solidarity system' for security could be addressed.

In a 2012 resolution, the European Parliament addressed *'the principles of indivisibility of security and mutual solidarity among MS, and taking into account the need for increased cost efficiency and a fair burden-sharing and division of costs'*. In the debate that is likely to come in the next weeks and months, the EP will continue to play an important oversight and stimulation role.