

EVIDENCE ON THE GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

Foreign Policy Report

Dr Theodore Konstadinides, University of Surrey

The current state of competence in Civil Protection: Civil Protection and the Solidarity Clause (Article 222 TFEU)

a) Introduction

Member States are to make civilian and military capabilities available to the EU for implementation of the Common Security and Defence Policy (CSDP). Yet, military assets can also be made available inside the EU under new specific legal bases for civil protection: the so-called Civil Protection Mechanism of Article 196 TFEU and the Solidarity Clause of Article 222 TFEU. The Solidarity Clause will be considered in more detail as part of this Foreign Policy Report.

Article 196 TFEU

The Treaty of Lisbon introduced a supporting competence in the area of civil protection under Article 6 TFEU. What is more, Title XXIII entitled Civil Protection provides a specific legal basis through Article 196 (1) TFEU which provides that 'the Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing against natural or man-made disasters'. Under Article 196 (2) TFEU, the European Parliament and the Council can establish supplementary measures to assist Member States achieving such objectives. The House of Commons European Scrutiny Committee's 57th Report provides a detailed assessment of Article 196 TFEU (pp64 onwards).

Pre-Lisbon Council Decisions in the area of civil protection

At the moment, there are two main Decisions covering prevention, preparedness and response which pre-date Article 196 TFEU. They were adopted under former general legal basis of Article 308 EC – now Article 352 TFEU. These are Decision 2007/162/EC on a Civil Protection Financial Instrument and Decision 2007/779/EC on Civil Protection Mechanism. The introduction of Article 196 TFEU provides a specific legal basis in the area of civil protection and therefore makes any future resort to Article 352 TFEU redundant.

Article 222 TFEU

The introduction of Article 222 TFEU constitutes a further development in the field of EU civil protection. The 'solidarity clause' in Article 222 TFEU states that the EU and its Member States 'shall act jointly in a spirit of solidarity' and mobilise all available instruments to assist a Member State (at its request) in the event of a terrorist attack or a natural or man-made disaster. By contrast to Article 214 TFEU (external emergencies, re: humanitarian aid and relief for third countries – victims of natural or man-made disasters), Article 222 TFEU is addressing internal emergencies. It is also broader in scope in that, on top of natural or man-made disasters, it includes terrorist attacks.

b) Origins and scope

As it was the case with the majority of reforms proposed by the original EU Constitutional Treaty, the ‘solidarity clause’ was carried over to the Treaty of Lisbon. Similar to Articles I-43 and III-329 of the rejected EU Constitutional Treaty, Article 222 TFEU, which can be read in conjunction with the abovementioned Article 196 TFEU (cooperation between Member States), constitutes a soft mutual defence commitment for non-conventional threats to the Union’s security and stability. Textually, Article 222 TFEU merges together Articles I-43 and III-329 of the EU Constitutional Treaty and comprises what can be described as a verbose ‘solidarity’ provision. It states that the EU and its Member States ‘shall act jointly in a spirit of solidarity’ in order to address modern threats from non-state entities or natural or manmade disasters. Article 222 TFEU also provides for the mobilization of hard military resources in order to prevent such threats and protect and assist Member States at their request.

c) Implementation

The Commission has to put together a proposal for the implementation of the solidarity clause jointly with the High Representative for Foreign Affairs and Security Policy. The Council will then decide by qualified majority unless the decision in question involves the use of military resources or has defence implications, in which case unanimity applies.

The competent authorities of the Member State concerned must immediately contact with the Commission's **Emergency Response Centre (ERC)** which will act as the initial single 24/7 point of contact at service level for the Union. This is a new body which will draw its membership from the Commission’s Monitoring and Information Centre as well as its Directorate General for Humanitarian Aid and Civil Protection. It is expected that the ERC will take the lead in coordinating the operational response and in producing joint situation assessment reports.

Other actors in the process might involve the new (Article 71 TFEU) Standing Committee on Internal Security (COSI), which would assist the Council in the coordination of internal security operational actions (police and customs cooperation and judicial cooperation in criminal matters) but would not be involved in the preparation of legislation or the operations themselves. Moreover, in the event of a military response, the Political and Security Committee (PSC) would be authorized by the Council to take decisions related to the political control and strategic direction of the operation. In this case also, the Chairman of the PSC would participate in the Committee of Permanent Representatives II (COREPER II), which would be responsible for the preparation of legislative acts. The work of the Committee of Article Thirty Six (CATS), a Council working group made up of senior officials, would be crucial in coordinating the competent working groups in the field of police and judicial cooperation and to prepare the relevant work of COREPER II. Finally Eurojust, Europol and Frontex representatives would have the opportunity to attend COREPER’s meetings.

d) policy areas overlap

In line with the Commission’s proposal for a Council Decision on the arrangements for the implementation of the solidarity clause,¹ the arrangements for implementing the Solidarity Clause cover a wide number of policy areas and instruments. Inter alia, they include mechanisms and instruments enacted previously via Article 196 TFEU:

¹ Brussels, 21.12.2012, JOIN (2012) 39 final.

- the EU Internal Security Strategy
- the EU Civil Protection Mechanism
- Civil Protection Financial Instrument
- the EU Solidarity Fund
- the health security initiative for serious cross-border threats to health
- crisis response and analysis structures in the European External Action Service (EEAS)
- the Crisis Coordination Arrangements in the Council

1. In what areas of global affairs does the EU add value or deliver impact or not on behalf of the UK?

The EU has added value on behalf of the UK by:

a) Widening the notion of security in Europe / broadening the notion of threat

Recent natural and manmade disasters within and outside the territorial boundaries of the continent have generated a growing tendency within the EU to enhance its prevention, mitigation and response capabilities by using existing means and military capacities. As such, the coming into force of the Treaty of Lisbon has seen European security law² expanding beyond the margins of the Common Security and Defence Policy (CSDP). The general provisions on the EU's external action elaborated in **Article 21 TEU** are extensive and encompass all areas of traditional foreign policy, putting emphasis on security, peace, conflict prevention and assistance in case of natural and man-made disasters. A glance at both **Title V of the TEU** and **Title VII of the TFEU** is sufficient to establish that the EU security model now encompasses a wide array of security policies: from military operations to civil cooperation and joint EU action in case of terrorist attacks suffered by Member States. One can therefore speak confidently of a slow convergence between the so-called Petersberg tasks³ and collective self-defence.⁴

b) establishing a flexible response strategy against traditional and new threats

Civil protection encompasses both traditional threats (e.g. marine pollution, floods, earthquakes) and new threats (e.g. terrorist attacks, global warming). Both types of threat, albeit natural or man-made, necessitate flexible response and robust planning capabilities. To avoid disparities in the coordination between national and EU activities, the European Commission has for some time now developed an integrated European civil protection strategy. A Civil Protection Mechanism,⁵ an EU Solidarity Fund,⁶ and a European civil

² The term is used broadly. See M. Trybus, and N.D. White (eds.) *European Security Law* (Oxford University Press, 2007).

³ The so-called Petersberg Tasks were set out in the Petersberg Declaration adopted at the Ministerial Council of the Western European Union (WEU) in Bonn on 19 June 1992. They were later copied into Article 17 TEU of the Treaty of Amsterdam which referred among else to 'tasks of combat forces in crisis management, including peacemaking'. See A. Bloed, R.A. Wessel (eds.), *The Changing Functions of the Western European Union: Introduction and Basic Documents*, (Dordrecht: Martinus Nijhoff Publishers, 1994) p.137.

⁴ See H. Krieger, 'Common European Defence: Competition or Compatibility with NATO' in M. Trybus, *European Security Law* (Oxford: Oxford University Press, 2007), p.195.

⁵ See Council Decision 2007/779/EC, Euratom of 8 November 2007 establishing a Community Civil Protection Mechanism (recast) [2007] OJ L 314/9.

⁶ Council Regulation (EC) 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund [2002] OJ L 311/3.

protection force (Europe Aid)⁷ have been set up to facilitate reinforced cooperation between the EU and the Member States in civil protection assistance intervention in the event of major emergencies.

c) creating a new competence to act in risk prevention

The Treaty of Lisbon contains significant changes regarding civil protection that under **Article 6 (f) TFEU** provides the EU with supporting competence to act in risk prevention. This is reinforced in **Article 196 TFEU** where, inter alia, the EU has been charged with the task of assisting in the preparation and promotion of swift effective cooperative action between national civil protection services and to promote consistency in international activities. In this context, Article 222 TFEU would operate alongside Article 196 TFEU as a means of adopting civil protection legislation. Of course this new EU competence in the area of civil protection is complementary / supporting and, therefore, does not allow for any drastic changes in the way the UK has conducted policies within the Civil Contingencies Secretariat.

d) bridging civilian and military crisis management through 'solidarity' / 'mutual aid'

Article 222 TFEU amplifies the principle of solidarity in EU law by making it an overarching principle, similar to that of mutual recognition. Contrary to mutual recognition, solidarity does not have an approximating character. Post-Lisbon, mutual solidarity manifests itself differently in a number of Treaty provisions stemming from immigration and financial assistance to energy and security.

First, under **Article 67 (2) TFEU**, which aims at framing a common policy on asylum, immigration and external border control, the Union expresses solidarity through financial assistance to those Member States that apply the Schengen provisions on external borders and visa. Attention is also drawn to **Article 80 TFEU** which underlines that policies on border control, visa policy and the management of migration flows and their implementation 'shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'. On a different note, **Article 122 TFEU** provides for financial assistance to a Member State that 'is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control'. The loose wording of Article 122 TFEU has allowed the EU Institutions to use it as a legal basis to set up the European Financial Stabilisation mechanism (EFSM).⁸ What is more, **Article 194 TFEU** on EU policy on energy is intimately connected to climate change and allows action to be taken with the objective of promoting energy efficiency and energy saving as well as developing new and renewable forms of energy.

In the area of security and defence, solidarity has acquired a new legal dimension, which not only has it consolidated the old collective defence provisions of the WEU and NATO Treaties but it has also formulated an EU response to events such as 9/11, the more recent terrorist bombings of Madrid and London, earthquakes and pandemics. In this regard the potential of Lisbon's 'solidarity clause' expressed in Article 222 TFEU seems to add value on behalf of the UK.

⁷ See <http://ec.europa.eu/europeaid/index_en.htm>

⁸ Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L 118/1. See for criticism: House of Commons European Scrutiny Committee, Documents considered by the Committee on 26 January 2011, Available at: <www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-xiv/42803.htm>.

2. What are the comparative advantages/disadvantages of working through the EU in the area you wish to comment on, rather than the UK working independently?

Advantages

a) Establishing a coherent EU response to emergencies / disasters

Difficulties of multilateral cooperation among Member States demonstrate the need for EU-level action and coordination to address disaster-related time-critical situations with a strong transnational or multinational component. Current bilateral / multilateral arrangements do not guarantee sufficient European assistance. On the other hand, purely domestic action by the UK cannot guarantee an effective, coherent and visible EU response to disasters.

For instance, Article 222 TFEU addresses the threat scenarios listed in the 2003 European Security Strategy drafted by former High Representative Javier Solana.⁹ The Strategy lists the combating of proliferation of weapons of mass destruction, the fight against terrorism and organised crime, cyber security and energy security as high priority areas. Most significantly, at least for the sake of this report, the Strategy mentions that ‘the increasing convergence of European interests and the strengthening of mutual solidarity of the EU makes us a more credible and effective actor.’¹⁰

What is more, Article 222 TFEU aims at boosting the role of the EU in crisis management by enhancing its response in situations equivalent to the ‘volcanic ash crisis’ of April 2010 and pandemics such as the H1N1 swine flu which hit the continent in April 2009. In all those events it will be possible for the EU to activate its civil protection mechanism to deal with internal emergencies. This renders Article 222 TFEU a counterpart to Article 214 TFEU which addresses external emergencies. Contrary to Article 214 TFEU, Article 222 TFEU seems to be placing a lot more emphasis on prevention and protection than on assistance following a disaster. The European Parliament has, for instance, emphasised that an EU Chemical, Biological, Radiological and Nuclear (CBRN) Action Plan would enable both the EU and its Member States to implement effectively the Article 222 TFEU solidarity clause in order to counter CBRN disasters, whether caused accidentally or intentionally.¹¹

c) Connecting internal and external security

Working through the EU has provided a framework for connecting internal with external security. Internal security has, in recent years, become increasingly dependent on external security. For instance, the Stockholm Programme, which provided a roadmap for the new-fangled Area of Freedom, Security and Justice, made explicit reference to Article 222 TFEU.¹² Under the broad headline ‘Political Priorities’, the European Council highlighted the value of ‘an internal security strategy’ as an essential tool for achieving the objective of a ‘Europe that protects’ the lives and safety of its citizens. The Stockholm Programme also

⁹ ‘A Secure Europe in a Better World’ European Security Strategy, 12.12.2003. Available at <www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

¹⁰ Ibid, p.1.

¹¹ See European Parliament, Resolution on strengthening chemical, biological, radiological and nuclear security in the European Union – an EU CBRN Action Plan, 14.12.2010, Strasbourg (2010/2114(INI)).

¹² European Council, ‘The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens’, 04.05.2010, [2010] OJ C 115/01.

considered the main aspects of such strategy comprising judicial cooperation in criminal matters and the ‘solidarity clause’.¹³

b) maintaining national autonomy

The TFEU makes clear that the principal responsibility for civil protection rests with the Member States, but provides that the EU has competence to ‘support, co-ordinate or supplement’ their actions (Article 6 TFEU). As mentioned previously, the Treaty establishes a specific new legal base for civil protection (Article 196 TFEU) which may be used in conjunction with Article 222 TFEU.

Moreover, **Declaration No. 37** on Article 222 TFEU establishes that Member States are free to choose the most appropriate means to comply with their own solidarity obligation towards their counterparts. It would be up to them to decide how they would assist another Member State.¹⁴

According to the Commission in its proposal for a Decision on the implementation of Article 222 TFEU, ‘the EU should act only in exceptional circumstances and at the request of the political authorities of a Member State which sees its own capacities overwhelmed as the result of an actual or imminent terrorist attack or of a natural or man-made disaster.’

Disadvantages

a) a political commitment

Article 222 TFEU does not represent a clause on the defence of the EU’s territorial integrity. Furthermore, the European Security Strategy is merely a policy document aimed at guiding the EU security strategy and not a means of providing EU Institutions with a direct mandate to develop defence policy instruments. Furthermore, the position taken in relation to mitigating or alleviating the damage following a disaster is unclear in Article 222 TFEU. To that effect the Council has stressed that ‘reinforcement of the Union’s disaster response capacity should be achieved through a balanced approach guided by two principles: national responsibility and EU solidarity’.¹⁵

b) Legal substance problems

Article 222 TFEU cannot be employed in its own as a legal basis for the development of new legislative proposals which aim at protecting civilian populations through cooperation. Proposals for EU-level action and for enabling a certain response are not sufficiently detailed to rule out future concerns over subsidiarity.

c) Lack of implementation arrangements

¹³ The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens’ OJ C 115, 04.05.2010, p.1

¹⁴ S. Myrdal and M. Rhinard, ‘The European Union’s Solidarity Clause: Empty Letter or Effective Tool? An Analysis of Article 222 TFEU’ (2010) 2 Occasional Papers, Swedish Institute of International Affairs, p.7, Available at <www.ui.se>. Myrdal and Rhinard argue that ‘there is wide room here for defining what it means to assist’.

¹⁵ Council of the European Union, Council Conclusions calling for civil protection capabilities to be enhanced by a European mutual assistance system building on the civil protection modular approach, Brussels, 28 November 2008, 16474/08.

The fact that that Member States are free to choose the most appropriate means to comply with their own solidarity obligation is important when one considers the possible legal implications arising from a breach of Article 222 TFEU. With all these factors in mind, in 2010, the European Commission and the High Representative committed themselves to put together a proposal for the implementation arrangements of the Solidarity Clause within 2011.¹⁶ Furthermore, the Brussels European Council of 29 September 2011 prepared a number of questions for the Member States' delegations aimed inter alia at streamlining the debate on the scope of Article 222 TFEU and the role of the EU Institutions and the Member States in applying it.¹⁷ In its effort to give tangible expression to the principle of solidarity, the Presidency asked the following questions:

How to assess that a Member State is “the object of a terrorist attack or the victim of a natural or man-made disaster”? Should the assessment be made by the Member State concerned or by other means?

In which specific cases of Member States being “the object or victim” of an attack or a disaster should the obligation of solidarity apply? Could the concept of “being the object of an attack” be applied to preventive actions, before a terrorist attack has actually taken place?

Therefore, could a definition be adopted that would cover cases in which the Solidarity Clause could be applied and which would prevent its application to minor events? Or perhaps an ad hoc assessment should be made?

The Solidarity Clause underlines that its territorial application is limited to the territory of the Member State concerned. However, would it also apply if another EU Member State or a third country is the object of a terrorist attack by which the Member State invoking the Clause feels concerned as well?

Finally, how do the Member States consider that the regular threat assessment would be carried out by the European Council?

d) Lack of expertise

While recognising the input of numerous actors in the implementation of Article 222 TFEU, it is argued that while the Commission's Emergency Response Centre (ERC) has the expertise to deal with the humanitarian aspect of civil protection, has no expertise over dealing with cases regarding terrorism.

d) Mixing CFSP – TFEU objectives

The nature of the objective of the Article 222 TFEU ‘soft’ solidarity commitment is questionable. This is especially since Article 222 TFEU stretches beyond the CSDP by also engaging with non-military instruments. For instance, there is nothing in Article 222 TFEU which suggests that the ‘solidarity clause’ extends to attacks carried out by state-sponsored terrorist groups (the so-called acts by legitimate liberation movements in Cuba, North Korea,

¹⁶ European Commission, Communication to the European Parliament and the Council, ‘Towards a stronger European disaster response: the role of civil protection and humanitarian assistance’, Brussels, 26.10.2010, COM (2010) final.

¹⁷ Council of the European Union, ‘Solidarity Clause – the way ahead’, Brussels 29.09.2011. available at: <www.statewatch.org/news/2011/oct/eu-council-solidarity-clause-terr-14840-11.pdf>

and Syria)¹⁸ or, so to call them, rogue states' attacks. In these situations, the former pillar demarcation that Lisbon has taken pride of dissolving is as relevant as ever. This is because the fight against terrorism seems to concern equally the CFSP (and, by extension, CSDP actions) and the Criminal law *acquis* of the Treaty (e.g. Article 75 TFEU on smart sanctions and Article 83 TFEU on the definition of criminal offences).

3. How effective is the EU at combining its foreign, defence, economic and civil protection policy instruments to deliver best effect in foreign policy? What, if anything, should it do differently?

4. How effective are the EU's delivery mechanisms? Would any changes make them more effective, and if so, which ones and why?

Article 222 TFEU has not yet been employed to be able to assess its effectiveness.

5. Would a different division of EU and Member State competence in a particular area produce more effective policies? If so, how and why?

The following issues need to be addressed / clarified:

a) uncomfortable legal setting of Article 222 TFEU

First, in terms of its legal geography in the Treaty of Lisbon, it is argued that Article 222 TFEU sits, somewhat, in isolation.¹⁹ Perhaps this reflects the sentiment of the Treaty drafters that such a provision neither dovetails neatly with the European Union's external action (Part Five, TFEU) nor does it sit comfortably in Section 2 of the TEU (CSDP), for instance, as an inherent part of Article 42 (7) TEU, which encompasses the collective obligation of Member States to assist one of their counterparts in the event of attack on their territory by deploying their military assets. This, of course, seems to negate the reality being, in the words of a commentator, that 'the terrorism dimension of [C]SDP is today fast becoming a permanent field of EU policy'.²⁰ In other words, there is no obstacle in the TEU that would have prevented CSDP actions entailing the use of Member States' armed forces to realise soft security objectives within the EU in times of emergency. As a result, one finds it hard to rationalise the existence of a separate 'solidarity' civil protection provision in the TFEU. This is especially since the implications of Article 222 TFEU for EU Institutions and Member States are yet to be fully clarified.

b) CFSP – TFEU competence demarcation

The dual EU commitment to 'protect its citizens' (**Article 3 (5) TEU**) and to use CSDP tasks to achieve counter-terrorist objectives (**Article 43 TEU**) has added to the 'fuzziness' of competence delimitation between those aspects of security tied within the TEU (CSDP) and those related to the TFEU (judicial cooperation in criminal matters). Some clarification is therefore necessary.

More guidance is also needed with reference to the 'solidarity clause' of Article 222 TFEU vis-à-vis the so-called 'mutual defence clause' under Article 42 (7) TEU which comprises the

¹⁸ U.S. Department of State, Diplomacy in Action, 'Overview of State-Sponsored Terrorism'(2000) <www.state.gov>.

¹⁹ This is although the principle of solidarity rates high in the TFEU. See Article 67 TFEU, Article 122 TFEU, Article 194 TFEU; Article 214 TFEU.

²⁰ M. Reichard, 'The EU-NATO relationship: a legal and political perspective' (Ashgate Publishing, 2006), p.70.

'EU version' of Article 5 of the Washington Treaty 1949 (NATO) and Article V of the Modified Brussels Treaty 1949 (WEU). The first paragraph of the Article reads as follows:

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.

Perhaps a clearer demarcation of pillar-overarching areas would be desirable so that the competence under CFSP and TFEU would occupy different fields. For instance, Article 42 (7) TEU could deal with state violence against one or more Member States and state-sponsored terrorism through CSDP military means. On the other hand, Article 222 TFEU could focus on countering oppositional terrorism by non-state actors and serious crime through the EU Criminal law *acquis*. This leads us to the next section which studies the overlap between the TFEU 'solidarity clause' and the TEU 'collective defence clause'.

c) the relationship between Article 222 TFEU and Article 42 (7) TEU

The military aspect of Lisbon's internal security commitments under Article 222 TFEU has enriched the CSDP. Considering the erosion of the schism between internal and external security, Article 222 TFEU could have been expressly mentioned in Article 42 (7) TEU. As argued previously 'it is somewhat peculiar that this clause [on solidarity] is separated from the collective defence clause and is included in the TFEU (Art 222) rather than together with the [C]SDP provisions in the TEU.'²¹ Evidently, the legal geography of Article 222 TFEU is atypical but this is not sufficient to argue that a separate 'defence' clause was not necessary in the TFEU.

Despite the confusing similarities between the 'solidarity' and 'mutual defence' clauses, there are certain fundamental differences which need to be clarified. On the one hand, Article 42 (7) TEU applies only in cases of 'armed aggression' against the territory of a Member State. As such, it constitutes in its entirety an intergovernmental device and does not foresee for the involvement of EU institutions by creating any sort of new supranational competences. Conversely, Article 222 TFEU requests Member States to coordinate between themselves in the Council and provides the EU with power to mobilize all instruments at its disposal in order to protect and assist Member States in the event of a terrorist attack, or natural or man-made disaster. It is also argued that Article 222 TFEU can be used alongside other legal bases to justify new legislative acts that would presumably foster solidarity between Member States in the fight against serious crime and disaster response. Article 42 (7) TEU operates in isolation as a scheme which although reinforces the concept of self-defence in EU law, is, nonetheless, not conditioned by a predetermined minimum number of participant states.

d) the lack of enforcement credibility

These differences aside, both Article 222 TFEU and Article 42 (7) TEU suffer from lack of enforcement credibility. For instance although Member States are bound by the principle of sincere cooperation or loyalty under Article 4 (3) TEU to demonstrate solidarity to their counterparts, the present author predicts possible breaches of Article 222 TFEU and Article 42 (7) TEU in view of certain Member States' half-hearted compliance with the

²¹ S. Blockmans and R.A. Wessel, 'The European Union and Crisis Management: Will the Lisbon Treaty make the EU more Effective?' (2009) *Journal of Conflict & Security Law* p.301

commitments inherent in the solidarity and mutual defence clauses. The present author proposes that the duty to aid and assist the Member State(s) concerned needs to be meticulously aligned to the principle of loyalty expressed in Article 4 (3) TEU. Such a clarification will seemingly motivate Member States to sincerely co-operate within the framework of the Union's security strategy whilst the Court of Justice will be invited to sanction their actions or omissions.

6. How might the national interest be served by action being taken in this field at a different level e.g. regional, national, UN, NATO, OECD, G20 – either in addition or as an alternative to action at EU level?

a) An add-on to national broader security commitments

Both Article 222 TFEU and Article 42 (7) TEU 'clauses' offer a joint commitment which goes beyond the NATO and WEU collective security provisions. Complementary to mutual cooperation in the case of an armed attack on one of the Member States, the Treaty of Lisbon has created a link between the CSDP and the external dimension of the Area of Freedom, Security and Justice vis-à-vis improving security by controlling serious criminal threats, both inside and outside the European continent.²²

The similarities of Article 42 (7) TEU with Article 5 of the Treaty of Washington are obvious, although Article 42 (7) TEU does not explicitly mention 'the use of armed force'. What is more, contrary to NATO, the EU does not maintain strong military readiness structures or joint military planning. Thus, while such a military assistance obligation may at first glance be seen as a move towards EU military autonomy, a close reading of Article 42 (7) TEU puts into question the role of the EU as a 'defence organisation'.²³ Obviously EU defence cooperation capacities can change over time considering the potential of the European Defence Agency (Article 45 TEU) and the use of the newly-introduced permanent structured cooperation in security and defence policy (Article 42 (6) TEU) which features high among the Treaty of Lisbon provisions. Having said that, mutual assistance at EU level still has to be compromised with the broader security commitments of the Member States in NATO, especially those related to collective self-defence under Article 51 of the Washington Treaty 1949. The second paragraph of Article 42 (7) TEU is more explicit about the NATO-EU relationship. It reads:

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.

Hence, the clause's activation falls upon each Member State individually and does not depend on the EU as a whole. This is because Article 42 (7) TEU does not aim at transferring any competence upon the EU Institutions but rather creates responsibilities between Member States. Equally when it comes to the implementation of Article 42 (7) TEU, the EU

²² See R.A. Wessel, L. Marin and C. Matera, 'The External Dimension of EU's Area of Freedom, Security and Justice' in C. Eckes and T. Konstadinides (eds.) *Crime within the Area of Freedom Security and Justice: A European Public Order* (Cambridge University Press, 2011). See also M. Sossai, 'The Anti-terrorism Dimension of ESDP' in M. Trybus and N.G. White, *European Security Law* (Oxford: Oxford University Press, 2007), pp.157-174.

²³ See W. Wessels and F. Bopp, 'The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?' CEPS Challenge Paper No.10, 2008, p.10. Available at <<http://www.ceps.eu/files/book/1677.pdf>>.

Institutions play no role since all relevant arrangements will have to be unanimously agreed among the Member States. As such, similar to the solidarity clause, when it comes to mutual assistance a lot depends on the Member States' political consensus, especially within non-aligned countries, over the use of armed force under the EU banner.

b) The necessity of regular threat assessment / list of incidents necessitating EU action

The list of 'threat scenarios' would need to be regularly updated through a threat assessment report put together by the European Council. This will determine the future use of the 'clauses', which may - in some cases - involve a parallel activation of Article 42 (7) TEU and Article 222 TFEU in cases where the threat is ambiguous. This, however, may be seen as a weakness embedded in the clauses, which relates to their uncertain legal footing. In particular, the legal underpinnings of Article 222 TFEU, make one wonder whether in the absence of a solidarity provision in the Treaty of Lisbon, Member States would have still been able to make such an open, albeit vague, request for assistance.

Under the Treaty of Lisbon 'threat assessment' is carried out at political level through the European Council and not by specialist organisations such as Europol or agencies such as Frontex (border security). Additionally the clarification of Lisbon's sloppy implementation language regarding how national authorities need to take on board their solidarity obligations vis-à-vis an indicative list of incidents where they have to act jointly in a spirit of cooperation might be desirable. It is expected that from 2015 the Commission and the High Representative will regularly produce a joint EU threat and risk assessment report.

7. Are there any general points you wish to make, which are not captured above?

Very often the expression of solidarity under the Treaty of Lisbon concerns a reconciliation of the interests of those Member States seeking mutual solidarity by supporting the legal standing of Article 222 TFEU, those who wish to safeguard their neutral status in case solidarity mandates the use of force, and those seeking to ensure that committing themselves to EU security initiatives will not comprise an abuse of the 'solidarity clause' which will compromise the status of NATO.

The Commission's 2012 proposal for a Decision to implement Article 222 TFEU aims at establishing the necessary links between sector-specific early warning and crisis cooperation functions (in the area of health, civil protection, nuclear risk monitoring, and terrorism) and utilizing EU-led operational initiatives. These efforts will presumably bring into the 'civil protection equation' both EU agencies and the European External Action Service, which would in turn contribute to information sharing and threat/risk assessment reports.²⁴ The objective is to increase the EU resilience to crises and disasters so that by 2014 a coherent risk management policy would be established.²⁵

²⁴ European Commission, Communication to the European Parliament and the Council, 'The EU Internal Security Strategy in Action: Five steps towards a more secure Europe', Brussels, 22.11.2010, COM (2010) 673 final.

²⁵ European Commission, 'Communication from the Commission to the European Parliament and the Council', Brussels, 25.11.2011, COM (2011) 790 final.