



The mutual assistance clause in European defence policy: On the meaning and relevance of Article 42(7) of the Treaty on European Union

European View
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Abstract

This article analyses the legal meaning and relevance of the mutual assistance clause under Article 42(7) of the Treaty on European Union, highlighting its role as a legally binding obligation to provide aid in the event of an armed aggression. Although its activation occurs automatically on an intergovernmental basis, this does not preclude EU coordination. To deliver on the promise of the mutual assistance clause, the EU must upgrade its strategic, financial and institutional planning structures. In the future, bodies such as a European security council or a European operational headquarters could strengthen strategic guidance. Mechanisms such as Permanent Structured Cooperation or Article 44 of the Treaty on European Union further enable flexible operations via a 'coalition of the willing'. Regarding Article 5 of the North Atlantic Treaty, the mutual assistance clause subordinates itself to NATO ('NATO first').

Keywords

Article 42(7) TEU, Mutual assistance clause, European Defence Union, Common Security and Defence Policy, NATO–EU relations, European security architecture

Introduction

Europeans must adapt to the changing geopolitical environment. In this regard, the EU must strengthen its own capacities in order to be able to act as a true global player on the

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international stage (i.e. to be able to influence global politics to promote European interests and values). Today, the EU and its citizens are confronted with a security environment of high fragility and instability. Neither external nor internal security can be guaranteed at the national level anymore. In terms of external security, the mutual assistance clause (MAC) of Article 42(7) of the Treaty on European Union (TEU) constitutes the European promise. But can the EU deliver? And using what means?

Historical background

The MAC of Article 42(7) TEU is not an entirely new phenomenon. As early as 1952, the Treaty of the European Defence Community (EDC) provided a MAC (art. 2) which obliged the participating countries, as well as the planned European army, to provide automatic military assistance in the case of an armed aggression (i.e. the clause eliminated the need for a prior decision by a European or national governing body). Ultimately, the EDC Treaty was not ratified by the French Assemblée Nationale, so this first European MAC remained theoretical in nature.

In addition, Article V of the former Modified Brussels Treaty, which governed the Western European Union (WEU), also included a clause of mutual assistance. Like the EDC Treaty, it contained an automatic obligation to provide military and other assistance. It was, however, only binding on the 10 full members of the WEU, and the WEU ceased to exist with the entry into force of the Treaty of Lisbon. Prior to this, the integration of the WEU into the EU had been discussed, but it was never agreed upon.

The current Article 42(7) TEU has its origins in Article I-41(7) of the rejected Constitutional Treaty. Initially, this draft treaty had included an obligation to provide military assistance, but this was not accepted by the neutral states. Therefore, the term ‘military’ was excluded from the article. The MAC remained unchanged after the ‘reflection phase’ that followed the negative referendums in France and the Netherlands in 2005 and found its way into the TEU as part of the intergovernmental structure of the Common Security and Defence Policy (CSDP). Moreover, there is a safeguard for neutral states: through the so called ‘Irish clause’, the ‘specific character of the security and defence policy of certain Member States’ (Article 42(7) TEU) remains without prejudice. The extent of this clause is not, however, undisputed.

Constituent elements of Article 42(7) TEU

For Article 42(7) TEU to apply, a member state has to be the victim of an ‘armed aggression’. Even though this wording is not exactly the same as what occurs in Article 51 of the UN Charter (‘armed attack’), the same principles of interpretation can be applied: the ‘Definition of Aggression’ (UN General Assembly 1974, art. 3) can—in accordance with the finding of the International Court of Justice—be used as a means of interpretation, as it names several examples of an ‘act of aggression’ (Charter of the United Nations 1945). In addition, Article 42(7) TEU directly refers to the right of individual or collective self-defence in accordance with Article 51 of the UN Charter. However, also in relation to the latter, the interpretation of ‘armed aggression’ is not undisputed.

Different opinions exist as to the required intensity of the attack for the MAC to apply. Especially with regard to terrorist or cyber-attacks, this question is of vital importance. In any case, there can be no doubt that the term needs to be interpreted in a narrower sense than the term ‘use of force’ as it is defined in Article 2(4) of the UN Charter, because not every use of force amounts to an armed aggression. Other interpretations could create a considerable danger of escalation. Additionally, Article 3(g) of the Definition of Aggression requires such acts to be acts of ‘gravity’ (UN General Assembly 1974, art. 3). This indicates that a certain intensity of attack is required. In any case, the principle of proportionality would have to be respected, even more so in relation to the choice and use of a method of self-defence.

In addition, distinct stances are held regarding the state-like quality of the attacking party. The International Court of Justice prefers a restrictive interpretation of state-like quality: in the case of non-state groups or ‘armed bands’, their actions must be attributable to a state. This interpretation is in line with the historical intention of Article 51 of the UN Charter, which gives states, as primary subjects and actors in international law, a right to self-defence.

Finally, the armed aggression must take place on the territory of the member state. The many overseas territories of EU member states thus increase the geographical scope of the MAC considerably. Furthermore, when it comes to cyber-attacks, the notion of territory that underlies Article 42(7) TEU must not be read in a purely physical sense. While the classical understanding ties territory to land, internal and territorial waters, and airspace (and, functionally, to the vessels and aircraft registered in a member state), it is increasingly recognised that the territorial scope of state sovereignty extends to the cyber environment as well. Cyberspace lacks physical boundaries, but its constitutive elements such as servers, cables, integrated circuits and communication infrastructure are physically located within a state’s territory and subject to its sovereign powers. A state may therefore exercise its sovereign authority over the cyber infrastructure situated in its territory, and unauthorised cyber operations conducted there by another state may amount to a violation of sovereignty.

Quality of obligation

When a member state is the victim of an armed aggression on its territory, the other member states ‘shall have . . . an obligation of aid and assistance by all the means in their power’ (Article 42(7) TEU). Due to the vague wording, the exact content of this obligation is disputable.

On the one hand, one could argue that this obligation is merely a political one, without ‘hard’ legal consequences. This is because the scope of the wording (‘all the means’) would encompass military means. However, one could also argue that it seems quite unlikely that member states would want to commit themselves to military means, especially with regard to the problematic situation on Cyprus (and the possible conflict between the NATO and the EU MACs). Historically too, military contributions within the CSDP have been political and not legal.

On the other hand, because of the wording (i.e. ‘shall have an obligation’), it seems appropriate to assume that Article 42(7) TEU does constitute a legal obligation. Apart from anything else, it would be a conceptual fault of the often-mentioned principle of solidarity if no *legal* obligation for mutual assistance existed for the most elementary threat, that is, an armed attack.

Moreover, one could argue that Article 42(7) TEU provides two different levels of safeguards for member states: the first level, the discretion *to decide*, needs to be distinguished from the second level, that of the discretion *of choice*. On the first level, a member state has to decide whether it should take any action at all (i.e. it is an ‘if’ question), whereas the second level determines the member state’s choice of the specific means it wants to use (i.e. a ‘how’ question). It is obvious that on the first level, the wording of Article 42(7) TEU leaves no room for discretion. However, on the second level, the current wording reflects the heterogeneity of the European states and takes into account those states whose militaries are not strong enough or who are not willing to contribute with military means (for example, in the Cyprus conflict).

Finally, the aforementioned Irish clause in Article 42(7) (second sentence) constitutes a safeguard for those states that are neutral (i.e. Ireland, Austria, Sweden, Finland, Malta and Cyprus) and, arguably, also for those that have other specific security and defence policies, such as Germany in the case of the *Parlamentsvorbehalt* (parliamentary reservation). This clause, which also exists in Article 42(2)(2) TEU, functions as an ‘opt-out’ of the MAC.

Nevertheless, the exact scope of the Irish clause remains unclear. For example, could the invocation of the Irish clause lead to the opposite situation, in that a neutral member state could be denied assistance from other member states? Or would a neutral state be required to provide any assistance at all, such as flyover rights? In any case, the Irish clause provides neutral states with the guarantee that they do not have to take part in any *military* actions.

Procedural and institutional aspects

The prominent role of the member states

Questions also arise regarding the procedure for implementing Article 42(7) TEU. No procedure is required *expressis verbis*. One could assume that the procedure of Article 42(4) TEU would be applicable, which would require a unanimous decision. However, no ‘decision’ is required according to Article 42(7). The obligation to provide mutual assistance therefore occurs *ipso jure* and therefore automatically between the member states.

The EU itself only provides the framework within which the member states support each other. No powers are conferred to the EU through Article 42(7)—mutual assistance is agreed upon on an entirely intergovernmental basis.

When France invoked Article 42(7) after the terrorist attacks in Paris on 17 November 2015, however, the defence ministers were unanimous in their decision, assuring France mutual assistance. In consequence, this ‘decision’ was of a symbolic nature. Should the member states decide, however, on a common EU mission in accordance with Article 42(1) TEU, the procedure according to Article 42(4) TEU would need to be respected.

Does this mean there is no role for the EU?

Careful reflection on the legal and policy framework of Article 42(7) TEU suggests that the bilateral approach need not preclude EU coordination to ensure greater effectiveness. It could also be essential for future preparedness.

The top EU political leadership, including the high representative, the president of the European Council, the president of the European Commission and the relevant commissioners, would need to liaise closely to provide strategic guidance and oversee coordination efforts. In fulfilling this task, they would have to be equipped with all the necessary intelligence and situational assistance.

In this regard, a European security council might come into play. It could be the institution responsible for strategic guidance and coordination in the framework of the MAC. Implementation could be taken on by a European operational headquarters responsible for the operative coordination of national armies and a European rapid reaction force or EU Battlegroups (see European Commission and European Political Strategy Centre 2015, 9–10)

Together, Articles 42 and 46 TEU could help to frame the efforts of those member states that are capable and willing to go further. In addition to the possibility of this Permanent Structured Cooperation, Article 44 TEU on the implementation of missions provides for the launch of CSDP operations by a ‘coalition of the willing’ member states under an EU flag and EU political control. The idea is that Article 44 TEU enables greater burden-sharing on at least two levels: by broadening participation compared to interventions made outside the EU framework, and because common financing provisions can come into play.

Article 42(7) TEU and Article 5 of the North Atlantic Treaty

Article 5 of the North Atlantic Treaty also contains a (military) MAC that binds each treaty country to ‘. . . assist the Party or Parties so attacked by taking forthwith, . . . such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area’ (North Atlantic Treaty 1949, art. 5)—that is, to react at its own discretion. The NATO clause is more specific with regard to military means, which was excluded from the European MAC.

Concerning the area of responsibility, Article 5 of the North Atlantic Treaty limits itself to Europe, North America and other defined areas north of the tropic of Cancer. By contrast, Article 42(7) refers to ‘its territory’ and includes the overseas areas of the EU member states. Taking the Falklands war in 1982 as an example, it did not fall under Article 5 of the North Atlantic Treaty (as it is south of the tropic of Cancer), but could have activated Article 42(7) TEU had it been in force then.

Conflicts between the North Atlantic Treaty MAC and the European MAC are governed by the ‘NATO first’ principle. This principle is enshrined in Article 42(7)(2) TEU and corresponds with the concept of European defence as being the European pillar of NATO. Such a concept serves the purpose of maintaining Euro-American relations, as the effectiveness of self-defence under the North Atlantic Treaty is still largely dependent on the US.

The nexus between external and internal security: Article 42(7) TEU and Article 222 of the Treaty on the Functioning of the EU

The political reaction after the terrorist attacks in 2015 in Paris made it clear that Article 42(7) TEU needs to be read together with, but at the same time differentiated from, Article 222 of the Treaty on the Functioning of the EU (TFEU) (European Commission and European Political Strategy Centre 2017, 1–4). The ‘solidarity clause’ of Article 222 calls for common action in the case of internal security, in particular in the case of a terrorist attack or a natural/man-made disaster. It explicitly involves the Union and its member states and clearly states a legal obligation to take action.

Article 222 comprises not only retroactive but also preventive measures. First, in order to ‘prevent the terrorist threat in the territory of the member states’ or ‘protect democratic institutions and the civilian population from any terrorist attack’, the EU has the competence to mobilise all the instruments at its disposal, including the military resources made available by the member states.

Second, if such an attack has happened, the EU can assist a member state in its territory at its request. Finally, according to Article 222(2) TFEU, if a member state is subject to a terrorist attack, the other member states shall assist it at the request of its political authorities, through coordination in the Council.

Although Article 222 TFEU was developed for a situation stemming from a terrorist attack, its scope was (surprisingly) limited by Council Decision 2014/415/EU (European Council 2014). According to Article 4 of the Decision, a member state must first exploit all existing means and tools at the national and European level. Only if the crisis clearly overwhelms the response capabilities available to it, may it invoke Article 222 TFEU.

Article 222 TFEU can be the legal basis for internal, but not external action—that is, it cannot be used to intervene in a third country. This might be one reason why France did

not rely on Article 222 TFEU, but rather invoked Article 42(7) TEU. Concerning the measures that can be taken, both articles refer to all available and appropriate means and assets, but the solidarity clause also refers to instruments at the disposal of the Union that are not mentioned in the MAC. However, according to Declaration no. 37 concerning Article 222 TFEU, member states explicitly retain the right to choose the appropriate means. Therefore, member states have a large margin of discretion.

In principle, the solidarity clause—in the case of terrorist attacks—can only be invoked when a terrorist attack *by a non-state organisation* has occurred. This could lead to the conclusion that the clause constitutes a *lex specialis* to Article 42(7) TEU in this specific situation. However, it would not be applicable in the case of an attack by a third state, because this situation would constitute an armed aggression (according to the classic definition) in the sense of Article 42(7) TEU.

Conclusion

In order to deliver on the promise of Article 42(7) TEU, its text must be translated into strategy, planning and institutions. European defence has to be designed for the institutional triangle of the member states, NATO and the EU. The weaknesses of today's CSDP must be addressed (see European Commission and European Political Strategy Centre 2015, 4–6) This means looking again at burden-sharing and common financing provisions, as well as arrangements for effective planning and command and control of civilian and military missions at home and abroad, with the possible setting-up of a European security council and a European operational headquarters.

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