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Article 44 of the Treaty on European Union: enhancing efficiency in EU operations

Content, benefits and limits

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Until now, the Common Security and Defence Policy (CSDP) provided no means for the Council to take military action and launch an emergency operation with the support of a group of willing states. Article 44 of the Treaty on European Union (TUE)¹ remedies this, as it expands the scope of the usual procedures for launching an operation:

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

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

Unfortunately, Article 44 has not yet been implemented to launch a CSDP operation. It could have been used for the interventions in Mali, or more recently in the Central African Republic (CAR), but the possibility was never brought up. On 18 May 2015, when the latest operation, baptised EUNAVFOR MED, was launched, discussions on implementing Article 44 were rapidly dismissed, as Member States did not consider it to be of interest. In theory, Article 44 has its uses; why, then, has it not yet been implemented? What are the elements that make it difficult to put into action?

The original mechanism for launching a CSDP operation via Article 44 is based on a mandate being established which is approved by the Council, who then delegate a group of willing states the capacity to act in its name. Article 44 thereby renders CSDP more flexible and responsive when launching and conducting an operation.

It is of benefit to the Council, as it can act in emergency situations supported by the proposals by willing states in terms of chain of command and troops contributions.

Similarly, willing states gain in visibility, as the operation is carried out under the European Union flag. This is not enough, however, and once the mandate is approved by Council vote, the states that take on the operation's risks must be compensated, for example with:

- leeway to take the initiative on the launch and conduct of the operation, on condition that it remains within the boundaries set by the Council
- greater financial support than for a classic CSDP military operation, i.e. in addition to the usual mechanisms such as the Athena mechanism for European funding, other financial contributions should be granted
- support capacities from other non-participating Member States who voted in favour of the Council's decision and thereby commit to indirectly participating in the operation, according to terms defined prior to its launch.

¹ Lisbon Treaty on European Union, 13 December 2007.

Nonetheless, it must be noted that numerous precisions, specifically legal, must be put forward and approved for the operation's implementation. Several discussions took place within the Political and Security Committee (PSC) in Brussels in late 2014 and early 2015; these unfortunately yielded no progress. Quite the contrary: certain representatives fought hard to delete the original contents of the article, only to render even less appealing than the regular CSDP planning and implementation process.

Before Article 44 can be implemented, this clarification phase must be cleared in an attempt at "fair return", both in the interest of the European Council and the willing states. This is the subject of this paper, which offers avenues of convergence, starting with the detailed analysis of Article 44 and where it is placed within the CSDP instruments.

The purpose of Article 44 is not to expand the scope of application of CSDP missions, but offers a new tool for operations, together with the synergy provided by the other instruments at capability and industrial levels. The benefits of this article are the additional possibilities it provides in managing and controlling an operation, as well as facilitating the procedure to launch an operation (Tardy, 2014).²

This paper discusses the flexibility provided by Article 44 in the preparation and conduct of an operation, its funding and support, organisation and command structure. We shall then study Article 44 in its European context, comparing it to other CSDP instruments, namely how it will be used in relation to European Union Battlegroups (EU BG).

THE FLEXIBILITY OF THE MECHANISM PROVIDED FOR BY ARTICLE 44 TEU

According to an information report submitted by the French Parliament's Committee on European Affairs, (Pueyo, Fromion, 2012), "an important step was also taken with the new possibility for the Council to entrust the implementation of a military operation to a group of willing Member States with the appropriate capabilities (Article 44 of the modified TEU)". The phrase 'entrust the implementation' means a mandate is established for the group of willing states. It does not contradict the intergovernmental aspect of the CSDP structure, but rather adapts to it.

CONTENT OF THE MANDATE AND DECISION-MAKING PROCESS

Article 44 refers to Article 43 paragraph 2, which stipulates that "the Council adopts decisions concerning the missions outlined in paragraph 1 by defining their objective and scope and the general conditions for their implementation. The High Representative of the Union for Foreign Affairs and Security Policy, acting under the authority of the Council and in close and constant contact with the Political and Security Committee, shall ensure coordination of the civilian and military aspects of

² "In essence, Article 44 is about granting greater flexibility and speeding up reaction time. It aims to facilitate the deployment of CSDP operations by creating a framework which allows willing Member States to go ahead with an operation as efficiently and effectively as possible".

such tasks.” The HR has neither the authority nor the initiative to launch an operation, and therefore the intergovernmental aspect of CSDP remains enforced. The article avoids specifics, leaving room for interpretation. Specific details must be included that maintain its flexibility, while rendering it attractive.

The Council prepares the mandate, following the instructions given in Article 43 paragraph 2, which stipulates that it “[...] adopts decisions concerning the missions outlined in paragraph 1 by defining their objective and scope and the general conditions for their implementation”. The participating Member States “organise among themselves how the mission will be managed” (TEU, article 44 paragraph 1). The mandate may also contain general dispositions concerning the length of the operation, objectives, framework and rules of the engagement. The mandate will provide guidelines for drafting the crisis management concept (CMC).

An essential element is the autonomy allowed for the mandated states. The principle of operational efficiency means that the operating methods outlined in the Operation Concept (OPCON) and Operation Plan (OPLAN) are their own responsibility. They must be free to choose how command structures are organised, designate the operation commander and the composition of the forces. The OPCON and OPLAN are to be presented to the Council for information with a discussion, but without a procedure for approval. As the advantage of Article 44 is that it simplifies the decision-making process for operations, only the CMC should be approved by the Council,³ including the decision to launch the operation.

However, the CMC and mandate together should contain enough information and guarantees to provide the mandated states with the necessary remaining funding and support, which comes from either other Member States, the European External Action Service (EEAS) or the Commission, as well as contributions from potential partners. The mandated states that undertake the risk of intervention must receive solid guarantees in return.

However, in terms of CSDP, the PSC exercises “political control and strategic direction of the crisis management operations” (TEU, article 25) by assessing “the strategic military options, concept and operation plan, before submitting it to the Council”.⁴ Giving the PSC total control over the operation’s planning and management under Article 44 would be counterproductive and strip it of its main advantage. However, and this exists under French law, it could exercise limited control, restricted to the manifest error of assessment (Conseil d’État, 1961), and thereby apply the principle of subsidiarity so dear to Member States: it would ensure the conditions established by the mandate are respected, in order to ensure the engagement of the group of states does not stray from its perimeter.

SUPPORT AND FUNDING FOR AN OPERATION UNDER ARTICLE 44

The group of voluntary states, mandated by the Council, is merely artificially exclusive. Article 44 contains the possibility for other states to participate through a form of support already mentioned,

³ The intermediate MSO (*Military Strategic Options*) and IMD (*Initiating Military Directive*) planning phases will remain the responsibility of the participating states.

⁴ [Political and Security Committee \(PSC\)](#).

mainly in terms of funding and capabilities which are decided on prior to the operation and the CMC's approval. Article 44 does not exclude states from contributing after approval of the CMC (the Opt in option), once the initial group accepts it unanimously. A later commitment should be favourably welcomed, so that the mission can benefit from all available support. However, the mandated group of willing states alone will conduct the operation.

Article 44 is therefore inclusive in nature, as all states are encouraged to contribute to the mission or participate indirectly. Similarly, contributions are also welcome from partner countries. Article 44 is inclusive in three ways: other states can participate indirectly, for example by providing support in the form of transport, intelligence structures and logistics capabilities; troops from non-mandated states are not excluded from engagement; and there is nothing preventing a non-participating member state from providing specific funding in response to an Article 44 group request.

There is also financial compensation for the group of volunteering states. These states cannot and should not be responsible for the total financial cost of the mission that they volunteer for. Under specified conditions, a shared funding system may be enacted. For example, the Instrument for Stability (IfS) may assist the operation, as it is described as a "multidimensional and innovative instrument that contributes to combating the threats identified in the European Security Strategy. [...] It is used in tandem with CSDP operations, in order to strengthen the comprehensive approach" (Lavallée, 2015).

At the intergovernmental level, the start-up fund (TEU, Article 41)⁵ of an operation will also be used for tasks outlined in Article 44. Its use was encouraged by the European Parliament in order to bypass the slow administrative procedures during the planning phase: it calls for the expansion of the "field of application of the Athena mechanism and the use of the start-up fund in order to ensure rapid funding for urgent operations" (European Parliament, 2013). The Athena mechanism⁶ must be ready for systematic activation in the event Article 44 is implemented.

FORCE GENERATION AND COMMAND STRUCTURES

Article 44 states that "Member States which are willing and have the necessary capability for such a task" may be entrusted. There are therefore two criteria to be respected for the Council when establishing a mandate: the willingness of the states to be mandated and their capability to fulfil the task requested.

One of the advantages of Article 44 is that the group of volunteer states provides the necessary forces and command structures. The procedure for force generation, in the event of a classic set-up for a CSDP mission, is long and laborious. For example, the launch of the EUFOR RCA operation in early 2014 was disastrous: seven force generation conferences and a call for contribution from partners was not enough to fully meet the needs of such an operation.

⁵ "Preparatory activities for the tasks referred to in Article 42(1) and Article 43 which are not charged to the Union budget shall be financed by a start-up fund made up of Member States' contributions."

⁶ The Athena mechanism was set up in 2004. Its purpose is to manage the funding of the common costs necessary to implement CSDP military operations.

The “Article 44” group must remain in charge of force composition and its organisation, the sole objective being to meet the conditions of the mandate approved by the Council. As there is no certification process within the EU, unlike at NATO, the volunteer states alone will be the judge of their military capability to complete the task.

Article 44 paragraph 2 provides that “Member States [...] shall keep the Council regularly informed of its progress”. This means information provided regularly by the states in question. They shall draft reports biannually, as is the case for all CSDP operations, and give oral reports to the Council. This obligation for information does not mean that the Council can change the terms of the initial mandate. Only if there is a change of context or a need to adapt the mission objectives that Article 44§2 TEU authorises the Council to modify the initial objectives (TEU, article 44§2).⁷ Nonetheless, it is the responsibility of the participating states to inform the Council, which will adopt the decision.

The provisions of Article 44 and how it is to be implemented gives each state the opportunity to maximise their specific strengths and optimise their capabilities. Article 44 thereby contributes to the emergence of a more flexible Europe, where the competences and particularities of each state are better considered on a case-by-case basis and according to the types of missions envisaged. This configuration enables a more qualitative approach to be taken, one that corresponds better to the reality on the ground and is more respectful of the subsidiarity rule.

WHERE DOES ARTICLE 44 TEU FIT INTO THE CSDP STRUCTURE?

Article 44 is part of the range of measures provided for by the Lisbon Treaty, “of which Europe has not yet fully taken advantage of” according to the French Parliament’s Committee on European Affairs (2013). Increasing efficiency in operations, it exists in addition to the range of mechanisms provided for by the Lisbon Treaty. It can be compared to the European Union Battlegroups (EU BG), designed for emergency action.

ARTICLE 44: ENHANCING EFFICIENCY IN OPERATIONS

Article 44 should enable a CSDP operation to be launched in an emergency. There is an advantage and coherency in combining this rapid response with other tools, such as the EU BGs or the headquarters, both tactical (FHQ) and operational (OHQ).

Much like the action of fire-fighters when a fire breaks out – which is the most efficient action after prevention – the EU must be able to rapidly envisage other parallel or successive actions as part of the comprehensive approach. As such, the first relief of the operation under Article 44 must be planned for in the mandate: it is advisable to fix a limited time period rather than an outcome to be

⁷ “Those States shall inform the Council immediately should the completion of the task entail major consequences or require amendment of the objective, scope and conditions determined for the task in the decisions referred to in paragraph 1.”

obtained. The action under Article 44 must be planned in the long term, with other actors taking over subsequently.

The chronology of operational engagements involving local actors and organisations, UN or regional organisations, will be envisaged in the elementary stages of planning.

The EU is the only organisation with an article of such flexibility. It must be able to make use of it, despite the rare desire shown by its Member States to use it.

HOW ARTICLE 44 CONTRIBUTES TO CSDP MECHANISMS

Article 44 is the operational element of the range of mechanisms provided for by the Lisbon Treaty that include in particular permanent structured cooperation (PSC) and new forms of cooperation.

Article 44 is more flexible than permanent structured cooperation

In order to create a PSC, Member States must conform to the conditions outlined in Protocol no.10 annexed to the Lisbon Treaty: “proceed more intensively to develop its defence capacities through the development of its national contributions and participation, where appropriate, in multinational forces, in the main European equipment programmes, and in the activity of the Agency in the field of defence capabilities development, research, acquisition and armaments; have the capacity to supply combat units and logistical support elements in response to requests for a period of 30 to 120 days”.⁸ PSC is a mechanism that helps create a Europe “à la carte” for operations and capabilities. States wishing to participate must fulfil extremely specific criteria.

However, PSC has not yet been implemented as it is perceived as too inflexible. It is exclusive, permanent and therefore definitive. Even if certain interpretations seem to give it an air of inclusiveness (Biscop, Coelmont, 2010: 15), based on the moral commitment of candidates to fulfil the required criteria, it does not have the same purpose as Article 44, which is implemented for a specific task on a case-by-case basis, and can be re-implemented as many times as necessary with different combinations.

Article 44 complements the various types of capability-centred cooperation

Several forms of cooperation already existed before the Lisbon Treaty entered into force.

In terms of capabilities, the European Defence Agency (EDA) can launch tailored projects with a variable number of participating Member States. These are known as type A and type B “*ad hoc*” projects.⁹ The Type A project involves the participation of all Member States with an “opt out” possibility. The Type B project only initially concerns a limited number of participating states with an “opt in” option. This flexible mechanism corresponds to the aim of Article 44.

⁸ PSC is outlined in articles 42 and 46 TEU.

⁹ Articles 20 and 21 of Council Joint Action 2004/551/CFSP on the establishment of the European Defence Agency, which are also included in the Lisbon Treaty.

The Lisbon Treaty expanded enhanced cooperation to include the CSDP. It concerns the capability domain and is set up for a specific project on a case-by-case basis. However, it is less flexible than the EDA's ad hoc projects because it requires the participation of at least nine Member States. Furthermore, it needs the recommendation of the Commission, and Council authorisation after Parliament approval. Even if enhanced cooperation is more difficult to set up and is not based on purely intergovernmental logic, it can be used together with Article 44. Enhanced and ad hoc cooperation are to capability what Article 44 is to operations.

ARTICLE 44 AND BATTLEGROUPS

In an April 2013 report to the European Parliament, prepared by the Committee on European Affairs (Committee on European Affairs, European Parliament, 2013), the authors regret that the EU BG concept had not yet shown its utility as a rapid reaction instrument.¹⁰ The employment of an EU BG as a rapid response instrument should be likened to the purpose already mentioned of Article 44 (EU Council, EEAS, 2014).¹¹

A Battlegroup¹² is “the minimum effective, credible, rapidly deployable, coherent force package capable of stand-alone operations, of for the initial phase of larger operations. [...] A battlegroup is made up of around 1,500 troops” (EU Council, EUMC, 2005) (European External Action Service, 2013). The EU BG must be ready to deploy ten days after the Council decision (EU Council Secretariat, 2006).

Unfortunately, the Battlegroups remain unemployed because certain states opposed them and the planning procedures are too complex to allow for an urgent response (Council of the EU, CMUE, 2005).¹³

The synergy with Article 44 is perceptible here. While the employment of the EU BGs is governed by a standby system,¹⁴ it would be highly profitable to study its use as part of Article 44: this would combine the planning timeframe with the speed of deployment. Furthermore, certain reluctance to deploy the EU BGs for budgetary reasons could be surmounted by the potential financial mechanisms of Article 44 previously mentioned.

¹⁰ [Report](#) on EU's military structures: state of play and future prospects (2012/2319(INI)). “[...]deplors the fact that the concept has not yet proven its utility as a rapid reaction instrument in operations, and that without substantial modifications any agreement on deployment appears unlikely; considers that the situation in Mali is a missed opportunity for the first use of EU battlegroups”.

¹¹ “In addition, another alternate Rapid Response recourse mechanism could be Article 44 operations.”

¹² “A Battlegroup is the minimum effective, credible, rapidly deployable, coherent force package capable of stand-alone operations, of for the initial phase of larger operations. It is based on a combined arms, battalion sized force and re-inforced with Combat Support and Combat Service Support elements. It will be based on the principal of multinationality and could be formed by a Framework Nation or a multinational coalition of Member States. In any case, interoperability and military effectiveness have to be the key criteria. It must be associated with a HQ and pre-identified operational and strategic enablers.”

¹³ EU Battlegroups Concept, Brussels, “with a view to achieving concrete results as soon as possible both in the field of decision-making and planning”.

¹⁴ Namely two EU BGs on standby for 6 months.

Aside from the EU BGs, making multinational units available under Article 44 is perfectly conceivable. The examples of the Franco-German brigade, the German-Dutch corps and the CJTF¹⁵ should be studied. Eurocorps¹⁶ is one of the headquarters that could be used under Article 44.

Article 44 could become a tool for launching an operation based on the commitment of the EU BGs or pre-existing operational cooperation between several states.

CONCLUSION

Both the High Representative (HR) and Member States acknowledge the benefit of Article 44. “This article could be used in the context of rapid reaction, when consensus exists, and a group of Member States is willing to provide capabilities and take action on behalf of the Union. This offers benefits in terms of flexibility and speed of action.” (Final Report by the High Representative/Head of the EDA, 2013). The conclusions of the Council of 18 May 2015 highlighted its valuable contribution to the flexibility of the EU and its Member States (Council on Foreign Affairs, 2015).¹⁷

While there may not be consensus today among the Member States on the use of Article 44, we must continue to explore all the possibilities.

As a unique mechanism that combines flexibility and rapid response, it has high added value and has no equivalent in other organisations. It provides a way for the CSDP to be implemented in an emergency, despite the fact that Member States rarely wish to use it.

It is a qualitative instrument because it draws on the specific competences of the states, which can be employed on a case-specific basis and provides the CSDP with the adaptability it was lacking, though it already existed at the capability level.

It is an instrument destined to be made operational and should be placed in the same context as the EU BG’s purpose, which is urgent action. Similarly, thought should be given to the employment of multinational units or headquarters in the same context.

It is an instrument at the Council’s disposition, and should afford the EU greater visibility and credibility for the CSDP, and provide financial and material support for the participating Member States.

¹⁵ Franco-British brigade: *Combined Joint Task Force*

¹⁶ [Created in 1992 by France and Germany](#), today it is made up of five framework nations with Belgium, Luxembourg and Spain.

¹⁷ “Welcomes the clarification and understanding achieved regarding the possible use of Article 44 TEU, which provides a potential additional modality for the EU and its Member States acting as a security provider together, making use of the flexibility of the Union framework. It encouraged testing the related CSDP modalities in an exercise activity.”

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