

## Europe's self-defence: *Tous pour un et un pour tous?*

**Christophe Hillion and Steven Blockmans**

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When he addressed the French Parliament following the heinous terrorist attacks in Paris on November 13th, French President François Hollande evoked Article 42(7) of the Treaty on the European Union (TEU). This provision, which is commonly referred to as the EU's 'mutual assistance clause', 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.

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.

Never before has this clause been invoked by an EU member state. What can Article 42(7) TEU provide and what are its practical implications?

### **France's choice: Neither NATO nor supranational assistance**

The introduction of a mutual assistance clause into the Lisbon Treaty constituted a major innovation in the development of the European Union. For the first time the EU was bestowed with a sense of military solidarity otherwise reserved for self-defence alliances: in the case of "armed aggression on [the] territory" of one (or more) of the member states, the others are obliged to assist. At the same time, the provision implies that the neutrality of some member states will be respected, as will the fundamental choices about security and defence made by other member states in relation to NATO. Indeed, for the 22 EU countries that are members of NATO, the Alliance remains the keystone for their collective defence and the forum for its implementation.

Christophe Hillion is Professor of European Law at the universities of Leiden and Gothenburg and a researcher at the Norwegian Institute of International Affairs (NUPI), the Oslo Centre for European Law and the Swedish Institute for European Policy Studies (SIEPS). Steven Blockmans is Head of the EU Foreign Policy research unit at CEPS and Professor of EU External Relations Law and Governance at the University of Amsterdam. The authors would like to thank Javier Solana for his useful comments on an earlier draft.

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Why then did France, which is a member of the North Atlantic Alliance, trigger the EU's mutual assistance clause rather than that of NATO? Activating Article 5 – the collective defence article of the Washington Treaty – has occurred only once, in the wake of the 9/11 terrorist attacks against the US. This would have complicated one of the envisaged responses to the Paris attacks, namely that of garnering support for France's role in the bombing campaign against Da'esh in Syria. There is no doubt that the involvement of NATO, in one way or another, would have prompted opposition from Russia and thereby undermined any emerging diplomatic and military cooperation to fight Da'esh and end the war in Syria. Choosing the EU route instead is more suggestive of an appeal for help from a civilian rather than a hard military power. But there is more to Article 42(7) TEU than meets the eye.

For instance, there is the parallel with Article 222 of the Treaty on the Functioning of the EU (TFEU), known as the 'solidarity clause'. It is striking that France chose not to invoke this particular clause, which requires that "the Union and its Members States shall act jointly in a spirit of solidarity" when a member state is hit by, inter alia, a terrorist attack. Article 222 TFEU also obliges the Union, i.e. the institutional structures of the EU, "to mobilise all the instruments at its disposal, including the military resources made available by the Member States". This mandatory language emphasises the shared responsibility of the member states *and* the EU institutions, and thereby gives the solidarity clause a character that supersedes the merely interstate obligation of Article 42(7) TEU. It is clear, however, that by invoking Article 42(7) TEU France opted for the most sovereign and least institutionalised form of cooperation, thus implying that it is up to the member states to decide between the EU's assistance mechanisms.

### **Interstate assistance: Initiation and operation**

Like Article 5 of the Washington Treaty, the EU's mutual assistance clause, Article 42(7) TEU, is purely intergovernmental in nature. This article binds member states without transferring any competences to the EU's institutions.

Formally, the clause was invoked by French Defence Minister Jean-Yves Le Drian at the Council of Ministers meeting on November 17th. In the words of High Representative (HR) Federica Mogherini, its activation was unanimously supported by "the European Union, through the voices of all the Defence Ministers of all the EU Member States", thereby dovetailing the November 14th Joint Statement of the Heads of State or Government and leaders of the EU and its institutions that the Paris attacks were "an attack against us all", and their commitment to "face this threat together with all necessary means and ruthless determination".

Once approved by the Defence Ministers, the request for assistance could immediately be discussed and agreed on a bilateral basis, rather than in an EU context. As noted by Mogherini in her subsequent press conference with Le Drian: "On the detail of the kind of aid and assistance that will be provided by all Member States, this will be subject to bilateral conversations, technical conversations that France will have with Member States. This will also be provided within the decisions that single Member States will take."

EU involvement was thus kept to a minimum, both in the initiation of the mechanism and at the operational level. As a result, the EU merely offers a framework within which the member states support each other. This was emphasised by Mogherini, who noted that the EU could facilitate and coordinate the aid and assistance given to France, "whenever and however it is useful and necessary".

The High Representative was right to note that Article 42(7) TEU does not require any formal decision or Council conclusions to be taken and that the EU “need[s] no further formality to move on”. Indeed, activating the mutual assistance clause does not in itself imply the launch of a civilian mission or military operation in the sense of Article 43(1) TEU. But this statement should not be interpreted as a circumvention of a possible EU dimension to the operational response to the Paris attacks. Given the legal landscape within which the clause is to operate, i.e. the part on Common Security and Defence Policy (CSDP) of the Treaty, a more contextual reading of Article 42(7) TEU could indeed provide for a more significant EU involvement. After all, it is not unthinkable that EU member states decide to launch a CSDP mission or operation in response to France’s requests.

### More than just symbolism

The fact that the Defence Ministers discussed France’s request for assistance on November 17th was purely incidental because their Council meeting had been scheduled long before the Paris attacks. But this does not mean that the member states can act in an unrestrained manner when implementing Article 42(7) TEU.

As underlined by the High Representative in her press conference with Le Drian: the activation of the clause was done in “a formal setting in a Council with all the ministers around the table expressing not only the solidarity but also the willingness and the readiness to provide aid and assistance according to an article of a treaty. This has institutional, political and practical implications that are obviously different from statements made in public”.

Indeed, invoking Article 42(7) TEU holds more than just symbolic value. It triggers an obligation of *conduct* rather than outcome. The provision reminds EU member states of their unequivocal obligation of aid and assistance “by all the means in their power”.

This formulation allows for various forms of assistance: diplomatic, financial or in kind. However, the article’s explicit reference to “armed aggression” points most specifically to member state assistance by military means. Support for such an interpretation can again be found in the legal geography of Article 42(7), which is set in the CSDP part of the Treaty, and in the prioritisation of means enshrined in Article V of the 1954 Modified Treaty of Brussels underpinning the Western European Union, from which the EU’s mutual assistance clause in the Lisbon Treaty hails: all members “will (...) afford the Party so attacked all the military and other aid and assistance in their power”.

Based on the observation that France can no longer do everything alone, namely be both in the Sahel, the Central African Republic, Lebanon and in the Levant while ensuring the security of its own territory, Minister Le Drian specifically requested that the assistance from ‘partners’ shoulder France’s military engagement in external theatres like Syria and Iraq.

When providing such assistance, member states should be reminded of the fact that Article 42(7) TEU imposes a duty to comply with Article 51 of the UN Charter, i.e. to immediately report to the Security Council any measures taken in the exercise of their right of (collective) self-defence and to halt such actions as soon as the Security Council itself takes measures that are necessary to maintain international peace and security.

Arguably, the French decision to bomb Da’esh in response to the Paris attacks falls within the scope of the mandate given by the Security Council to states in resolution 2170 (2014). Acting under Chapter VII, the Security Council urged all states to protect the civilian population, “to cooperate in efforts to find and bring to justice individuals, groups, undertakings and entities associated with al-Qaida, including ISIL and [the al-Nusrah Front,

and] to take all measures as may be necessary and appropriate in accordance with their obligations under international law to counter incitement of terrorist acts (...)"

The fact that the clause was invoked and first discussed in the context of an EU Defence Ministers meeting may further explain the military focus of the requested assistance. It is also partly in line with the legal origins of Article 42(7), recalled earlier. But the latter also acknowledges the differentiated character of the security and defence policy of certain member states, and thus implicitly recognises the possibility of non-military assistance, in the form of civilian and/or financial support. Article 42(3) TEU indeed talks of member states making *civilian* and military capabilities available for the implementation of the CSDP.

It is notable that President Hollande's allocution to the French Parliament referred to Article 47(2) to introduce the section dealing specifically with Europe. The President then called for various European policy initiatives, such as combating arms trafficking, protecting the EU's external borders, managing refugee issues in the EU and in neighbouring states. This suggests that France's political leadership envisages assistance in broader policy terms than simply security and defence. Indeed, Hollande's speech could be considered as a more general call to the EU and its member states to close ranks and engage more constructively with these inter-related issues, in line with the purpose of Article 222 TFEU, and an appeal to forge a more comprehensive and longer-term EU approach.

### **A European Defence Union?**

As repeatedly stressed by Minister Le Drian, the activation of Article 42(7) TEU is replete with symbolic significance. Yet the first-ever activation of the clause has little to do with *l'Europe de la défense* in any unitary sense. France's interpretation of the mutual assistance clause in the present context should rather be understood as a more general plea to EU states to live up to their responsibilities as a community founded on values and thus to engage cooperatively in regional and global affairs. France uses the clause to demand support and solidarity not so much to deal with the effects of the attacks on its territory, but in pursuance of a certain conception of Europe's role in global affairs. As such, France is in a position to spell out practically what mutual assistance substantively means.

The atrocities in Paris on November 13th mean that the onus is now on France to articulate the new form of solidarity that Article 42(7) TEU encapsulates. In that, the stakes are high: a successful operationalisation of the clause might just restore a sense of commonality – of purpose and of destiny – to the European Union.