



CENTRE FOR STUDIES ON FEDERALISM

policy paper

*Alberto Miglio*

**A Schengen of Defence? Integrating  
Existing Clusters of Inter-State Defence  
Cooperation into the EU Legal Framework**

July 2017 - no. 25





The **Policy Paper** series of the Centre for Studies on Federalism includes analyses and policy-oriented research in the field of national and supranational federalism. The papers aim to stimulate scholarly and political debate on topical issues by presenting original data, ideas and proposals.

## **A Schengen of Defence? Integrating Existing Clusters of Inter-State Defence Cooperation into the EU Legal Framework**

*Alberto Miglio*

### **PESCO: What's in an Acronym?**

One of the major obstacles towards integrating security and defence cooperation into the EU framework has traditionally been the fear of loss of national sovereignty. Therefore, despite the advantages that a European defence could bring, caution has long been the watchword.

The tension between incentives to joint action and the preservation of sovereignty is easily perceived in the Treaty provisions setting out the constitutional framework of the Common Security and Defence Policy (CSDP). By providing the legal basis for the establishment of a true common European policy on defence, the Treaty drafters envisaged it as a gradual construction. Article 42(2) TEU makes that clear by stipulating that “[t]he common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides”. Therefore, while the Treaty grants the Union competence to set up a fully-fledged “common defence”, this ambitious step is made conditional upon an entirely discretionary decision

ALBERTO MIGLIO is Postdoctoral researcher, Law Department, University of Turin.

that requires the unanimous agreement of the Member States.

However, to counterbalance a rule that could indefinitely prevent the establishment of a European defence, the Treaty foresees a peculiar avant-garde mechanism called Permanent Structured Cooperation (PESCO). It is designed to allow those Member States wishing to enhance integration in security and defence to proceed further without having to wait for all the members of the bloc to commit to the experiment. PESCO responds to two goals. The first, rather obvious, is to facilitate the establishment of a European defence in the presence of expected resistance from some Member States. The second is intimately connected with the incremental logic behind the CSDP: the establishment of a pioneer group is functional to gradual and measurable convergence towards the ultimate goal of setting up a true European defence<sup>1</sup>.

PESCO can be established “within the Union framework” by the Member States “whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions” (Article 42(6) TEU). While the formula sounds rather cryptic at first, a protocol attached to the Treaty provides a more detailed explanation of the criteria and commitments it refers to (Protocol 10). In order to prevent the initiative from being blocked by the veto of recalcitrant Member States, the decision to authorise the establishment of PESCO is taken by the Council by qualified majority.

PESCO is a tool of differentiated integration, i.e. a mechanism that allows for differentiation within the Union by

stipulating that, as an exception to the general rule, a certain measure of a series of measures may be adopted without the participation of all Member States. In many respects it resembles enhanced cooperation, a general avant-garde tool introduced by the Treaty of Amsterdam<sup>2</sup>. Although enhanced cooperation has clearly inspired the provisions on PESCO, there are some important differences from the original model that make PESCO a particularly flexible and adaptive instrument.

Besides certain institutional adjustments — e.g. no minimum number of participating Member States is required, the Commission is not at all involved in the procedure and thus the Member States are firmly in the driver’s seat —, one of the most important differences relates to initial participation requirements. Whereas in enhanced cooperation participation is free at the time of its establishment and only Member States that join later may be required to comply with “conditions of participation” (Article 328(1) TFEU), a Member State wishing to take part in PESCO must not only make “commitments” but also fulfil criteria laid down in Protocol 10 to the Treaties. Although the final decision is left to the Council, the task of assessing the Member States’ capabilities and their ability to meet the participation criteria is not entirely the domain of political discretion as it is entrusted to the European Defence Agency (EDA), a technical body set up as an intergovernmental EU agency.

The second most significant deviation from the model of enhanced cooperation is closely linked to participation being made dependent upon the fulfilment of certain requirements. Unlike enhanced cooperation, which is irreversible (more States can join, but those already participating cannot leave

or be excluded once the cooperation has been implemented), PESCO is only really permanent in its name. Indeed, a Member State may decide to withdraw from PESCO, but may also be suspended if it no longer fulfils the participation criteria or no longer meets the commitments it has undertaken.

### **Towards the Activation of PESCO: Differentiation and the Challenge of Consistency**

Envisaged by the 2003 Constitutional Treaty and finally introduced by the Lisbon Treaty, PESCO has not been activated so far. However, the joint initiatives of the French and the German governments<sup>3</sup> and the recent EU institutions' efforts to boost defence cooperation<sup>4</sup> seem to have finally set the stage for the implementation of this mechanism.

Most recently, the European Council, in its conclusions on security and defence (22 June 2017), endorsed the activation of PESCO, stating that:

“The European Council agrees on the need to launch an inclusive and ambitious Permanent Structured Cooperation (PESCO). A common list of criteria and binding commitments, fully in line with Articles 42(6) and 46 TEU and Protocol 10 to the Treaty - including with a view to the most demanding missions - will be drawn up by Member States within three months, with a precise timetable and specific assessment mechanisms, in order to enable Member States which are in a position to do so to notify their intentions to participate without delay.”

Like any form of differentiated integration, PESCO inevitably poses some problems relating to coordination with other instruments.

First, the relationship between participating and non-participating Member States will have to be tackled. On the one hand, this will require balancing openness and effectiveness: the benefits of being part of the avant-garde group arguably generate an incentive to participate<sup>5</sup>, but too large a group of participating Member States might also hamper the effective implementation of PESCO<sup>6</sup>. On the other hand, the rights and obligations – *vis-à-vis* other Member States, but also third countries and international organisations – of the non-participating Member States will have to be respected.

Second, the scope of closer integration between the participating Member States will have to be carefully addressed. In principle, nothing prevents the establishment of more than one PESCO, with different scopes and potentially involving different groups of Member States. At least theoretically, PESCO might also coexist with other differentiation mechanisms such as enhanced cooperation. It will thus be vital, in order to preserve the coherence and the ultimate rationale of PESCO, to limit the proliferation of different groups for specific initiatives<sup>7</sup>.

Finally, in addition to the need to ensure the coherence between PESCO and other EU actions, problems of consistency are likely to arise due to already existing obligations that the Member States have undertaken outside the EU framework. As a consequence, not only will the implementation of PESCO have to take into account EU measures in other policy areas – the internal market and industrial policy, in particular – and to respect the rights and duties of non-participating Member States, but it will also need to be effectively coordinated with previous commitments undertaken by the participating Member States through *ad hoc* schemes.

## **Schengen as a Model: Integrating the Eurocorps into PESCO**

Closer integration between Member States through the activation of PESCO is sometimes referred to as a “Schengen of defence”<sup>8</sup>. This should be understood in a more profound sense than as a mere plea for differentiated integration. There are indeed some historical similarities between the experience of abolishing internal border controls and the steps that seem to be leading towards the gradual construction of a Europe of defence.

Not only has the suppression of internal border checks been a gradual phenomenon involving a growing number of Member States, but it has never ceased to be an example of differentiated integration, since not all Member States fully participate in the Schengen area. More importantly, this objective was originally pursued through international agreements concluded between Member States and only at a later stage integrated into the EU legal framework. Despite its evident links with the internal market, the gradual building of the Schengen area was at first implemented outside the Community, through the conclusion of the 1985 Schengen Agreement and of the 1990 Implementing Convention. Only several years later were the two agreements and the measures adopted on their basis finally transposed into EU law by the Amsterdam Treaty.

Albeit less coherently than the Schengen *acquis*, defence cooperation among the Member States has similarly developed partly outside the EU framework. Suffice it to think of the so-called “Petersberg” tasks, crisis response

operations originally established within the framework of the Western European Union (WEU)<sup>9</sup> and later integrated into the CSDP. Furthermore, several clusters of cooperation among Member States still coexist alongside EU projects: the European Air Transport Command, the Belgium-Netherlands naval cooperation and the Eurocorps are but the most prominent examples.

If the EU is to become the forum for more stable and ambitious cooperation in security and defence matters than could be achieved through *ad hoc* schemes, including the development of autonomous military capabilities, integrating those clusters of cooperation into the EU framework will have to be considered. In this perspective, instead of representing an obstacle or a limit to EU action, such initiatives could pave the way for it, forming the backbone of an effective European defence<sup>10</sup>.

In particular, with a view to establishing a fully-fledged EU headquarters, relying on the Eurocorps could greatly enhance the effectiveness of PESCO.

Established in 1993 based on the experience of the Franco-German brigade, the Eurocorps is a permanent multinational headquarters operating outside the EU institutional structure and available for both NATO and EU missions. It now comprises five fully participating “framework nations”: France, Germany, Spain, Belgium and Luxembourg. Greece, Poland, Italy, Romania and Turkey have associate member status.

From a legal perspective, integrating the Eurocorps into the EU framework should not pose excessive difficulties.

First, as regards the extent of the EU competence, the CSDP embraces a very broad range of potential actions clearly including the establishment of common headquarters at both strategic and operational level. If not all Member States are interested in taking part in this initiative, PESCO provides exactly the type of flexible instrument that enables the leading group to go forward whereas the others may decide to join at a later stage. Crucially, this means that contrary to the integration of the Schengen *acquis*, bringing the Eurocorps or other similar clusters of inter-State cooperation into the EU legal order would not require Treaty amendment.

From the perspective of the Member States, the fact that the Eurocorps is currently regulated by an international agreement is also an obstacle that can be easily overcome. As long as all Member States involved as framework nations agree to take part in PESCO, they can simply terminate the international agreement once the Eurocorps is carried into EU law.

The associate member status currently enjoyed by a third country would probably require some specific arrangement, but that should not be overly difficult to achieve: after all, there are plenty of examples – including the Schengen area – where third countries participate in EU policies or even in the structure and functioning of EU agencies.

Whether or not PESCO will eventually absorb the Eurocorps is thus a matter that ultimately depends on the political will of the Member States. From a practical point of view, there are at least two important reasons why that would be beneficial.

First, it would eliminate a source of potential duplication should PESCO strive for the establishment of an integrated operational headquarters while leaving the Eurocorps in place. The need for consistency appears particularly pressing in the light of the recent establishment of a permanent and autonomous EU Military Planning and Conduct Capability (MPCC)<sup>11</sup>. While the MPCC is only entrusted with the planning and conduct of EU non-executive military missions, its establishment marks the acceptance that the EU can acquire a proper command capacity and might well foreshadow more ambitious steps including the creation of a fully-fledged EU operational headquarters<sup>12</sup>. Since the launch of PESCO offers the opportunity to move in this direction, integrating the Eurocorps would improve consistency and prevent a project intended to be ancillary to European integration from actually hampering its development.

Second, reliance on a functioning structure that has been in place for over two decades and has been deployed in several missions would provide a solid backbone for an ambitious PESCO. This is crucial if the Member States are effectively willing to exploit the potential of PESCO, without limiting it to the task – by no means negligible – of rationalising defence planning and spending. Indeed, the supranational institutions seem to share the view that reinforcing the EU's military capability should take advantage of the Eurocorps. Answering a parliamentary question in April 2016, the High Representative stated that “the Eurocorps aspires to become a preferred military asset for the EU in the future”<sup>13</sup>. Whether this statement simply indicates the intention to rely on a formally external instrument or

betrays the intention to provide the Eurocorps with an EU legal basis is of course open to question, but the impending activation of PESCO offers precisely the opportunity to achieve the more ambitious goal.

In this perspective, Italy, as well as other Member States committed to building a European defence and supporting the launch of PESCO, should consider full participation in Eurocorps as a framework nation. This would give stronger credibility to the Italian Government's call for the establishment of a "permanent EU Headquarters, at a strategic level, to plan and conduct all CSDP operations and missions through subordinated Operational Headquarters"<sup>14</sup>. Integrating the Eurocorps into the EU framework would fit this plan well.

## Notes

- 1 F. Mauro, *Permanent Structured Cooperation – The Sleeping Beauty of European Defence*, GRIP Analysis Note, 27 May 2015.
- 2 See F. Fabbrini, *The Enhanced Cooperation Procedure: A Study in Multispeed Integration*, CSF Research Paper, October 2012.
- 3 J.-M. Ayrault, F.-W. Steinmeier, *Une Europe forte dans un monde incertain* (27 June 2016), in <http://www.france-allemande.fr/Une-Europe-forte-dans-un-monde-incertain-par-Jean-Marc-Ayrault-et-Frank-Walter.html>; *Revitalisation de la PSDC - Vers une défense au sein de l'UE globale, réaliste et crédible* (11 September 2016), <http://www.france-allemande.fr/article9346.html>.
- 4 On 14 November 2016, the Foreign Affairs Council concluded that the potential of inclusive Permanent Structured Cooperation (PESCO) should be explored. The Commission endorsed this effort in its communication of 30 November 2016, European Defence Action Plan, COM(2016) 950 final.
- 5 It has been observed that the establishment of a European Defence Fund designed to coordinate and supplement national investments in defence research can provide a further incentive to join PESCO: see S. Biscop, *Differentiated Integration in Defence: A Plea for PESCO*, IAI, 6 February 2017, p. 7.
- 6 This is why participation criteria have to be set in advance and a Member State can be suspended if it does not fulfil them.
- 7 See A. Marrone, N. Pirozzi, P. Sartori, *PESCO: An Ace in the Hand for European Defence*, IAI, 21 March 2017.

- 8 Calls for a “Schengen for defence” have been made, in particular, by then Italian Foreign Minister Paolo Gentiloni and Defence Minister Roberta Pinotti in an article published on *Le Monde* on 10 August 2016; see also P. Gentiloni, *EU needs ‘Schengen for defense’*, 15 September 2016, <http://www.politico.eu/article/italian-foreign-minister-eu-needs-schengen-for-defense-paolo-gentiloni-islamic-state-migrants-security/>. German Defence Minister Ursula von der Leyen used the same expression: see *German minister, in Lithuania, backs European ‘defence union’*, 8 September 2016, <http://uk.reuters.com/article/uk-europe-defence-germany-lithuania-idUKKCN11E1H0>.
- 9 See the Petersberg Declaration of the Council of Ministers of the WEU, Bonn, 19 June 1992. The Amsterdam Treaty later integrated the Petersberg tasks into the TEU.
- 10 A. Bakker, M. Drent, D. Zandee, *European Defence Core Groups. The Why, What & How of Permanent Structured Cooperation*, Clingendael Policy Brief, November 2016, p. 2; S. Biscop, *Differentiated Integration in Defence: A Plea for PESCO*, IAI, 6 February 2017, p. 6.
- 11 See Council Decision (EU) 2017/971 of 8 June 2017 determining the planning and conduct arrangements for EU non-executive military CSDP missions and amending Decisions 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces, 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian armed forces (EUTM Mali) and (CFSP) 2016/610 on a European Union CSDP military training mission in the Central African Republic (EUTM RCA).
- 12 T. Hardy, *MPCC: towards an EU military command?*, EUISS Brief No. 17, June 2017.
- 13 Answer given by Vice-President Mogherini on behalf of the Commission, 1 April 2016, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2016-001180&language=EN>.
- 14 See the document *For a Stronger European Defence: The Italian Vision*, September 2016, <http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2016/09/italian-proposal-finalUE.pdf>.

## CENTRE FOR STUDIES ON FEDERALISM

The **Centre for Studies on Federalism (CSF)** was established in November 2000 under the auspices of the Compagnia di San Paolo and the Universities of Turin, Pavia and Milan. It is presently a foundation.

The activities of the CSF are focused on interdisciplinary research, documentation and information on internal and supranational federalism, the developments of European integration, the government of globalisation.

The CSF promotes an annual **Lecture**, named after Altiero Spinelli, on topical European issues. The CSF publishes **Research and Policy Paper**, a book series on “**Federalism**”, **The Federalist Debate** (also online), the **Bibliographical Bulletin on Federalism**, the online-journal **Perspectives on Federalism**, the **International Democracy Watch**.

**CENTRE FOR STUDIES ON FEDERALISM**

Via Real Collegio, 30  
10024 Moncalieri (Turin) - ITALY  
Phone +39 011 670 5024  
Fax +39 011 670 5081  
**[info@csfederalismo.it](mailto:info@csfederalismo.it)**  
**[www.csfederalismo.it](http://www.csfederalismo.it)**