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The principle of coherence in the European Union's Defence Industrial Policy

Abstract

Achieving a coordinated defence industrial policy for the European Union Member States is essential to the goal of articulating a genuine Common Security and Defence Policy (CSDP). In recent years an institutional and financial system has been developed to implement this industrial policy under the framework of the Permanent Structured Cooperation on Security and Defence (PESCO) of December 2017. However, this development must preserve the principle of coherence, which has usually been regarded as one of the mainstays of the European Union's efforts in its functional integration process. This doctrinal contribution aims to provide clarity to the efforts made to establish the foundations of a truly European defence industry, as well as new windows of opportunity for the Spanish case.

Keywords

European Union, defence industry, Common Security and Defence Policy, Permanent Structured Cooperation, principle of coherence.

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Introduction

The European Union's (EU) Common Security and Defence Policy has made rapid progress in recent years and cooperation and convergence between national industries, both military and civilian, is crucial in this respect.

This article explains the development experienced by the aforementioned EU Policy, both in the framework of the successive treaties and the bodies and initiatives which have emerged in recent years, and in the context of the articulation of common projects aimed at coordinating the industries of the Member States, with special reference to Spain.

Indeed, the progressive consolidation of a defence industrial policy that serves to guarantee the European Union's operability and coordination between its participating countries has required a long period of time and has required overcoming many obstacles aimed at preserving national sovereignties and their freedom of action. But the evidence that we are now facing global challenges that affect all European partners (terrorism, transnational crime, mass immigration and illegal trafficking in human beings, armed conflicts on the periphery, cyber-attacks, etc.) has finally convinced national leaders of the need to step up industrial cooperation within the common framework of a coherent and effective security and defence policy.

As we shall see, the principle of coherence – in this case, under the framework of defence industrial policy – is configured as an informing and interpreting canon of the policies, actions, legal acts and decision-making processes of the institutions of the European Union and its Member States (Art. 13.1 TEU)¹. Thus, the principle of coherence underpins and articulates the essential harmonisation between Community and national systems in very different areas, such as in the context of the defence industry. In particular, the current Treaty of Lisbon emphasises the need to maintain coherence between the different areas of the EU's external action and between these and its other policies, with the Council and the Commission being mandated to cooperate to ensure such coherence, with the assistance of the High Representative for Foreign Affairs and Security Policy (Art. 21 TEU *in fine*)².

¹ Thus, for example, the High Representative of the Union for Foreign Affairs and Security Policy “shall ensure the consistency of external action” (Art.18.4 TEU).

² Bibliographical contributions have been constant in recent decades: see, for example, MISSIROLI, A (ed.) *Coherence for Security Policy: Debates-Cases-Assessments*, Paris, Institute for Security Studies-UEO, 2001; idem, “European Security Policy: The Challenge of Coherence”. *European Foreign Affairs Review*. 2001, vol. 6, no. 2, pp.177-196; GAUTIER, P. “Horizontal Coherence and the External Competences of the European Union”. *European Law Journal*. 2004, vol. 10, no. 1, pp.23-41; REYNAERT, V. “European Union's Foreign Policy since the Treaty of Lisbon: The Difficult Quest for More Consistency and Coherence”. *The Hague Journal of Diplomacy*. 2012, vol. 7, no. 2, pp.207-226; and GEBHARDT, C. “The Problem of Coherence in the European Union's International Relations” in Ch. HILL, M. SMITH and S. VANHOONACKER (eds.). *International Relations and the European Union*. 3rd ed., Oxford, Oxford University Press, 2017,

The objective of this work is twofold: on the one hand, to certify whether the process has maintained the required level of coherence that was solemnly expressed in the treaties and public declarations of the EU authorities; and, on the other hand, to offer the reader an overview of both the progress made in the Union's industrial defence policy, with its strengths and weaknesses, and the opportunities present for Spanish companies and projects in this sector.

Preliminary considerations on the principle of coherence

Consistency can be considered a structural, systemic and generally applicable principle of the European Union (as a self-imposed rule of behaviour), and as such is enshrined in Article 7 of its Treaty on the Functioning of the European Union (TFEU):

“The Union shall ensure consistency between its different policies and activities, taking all its objectives into account and observing the principle of conferral of powers”.

Although this research work will be limited to studying this principle in the context of the Union's external action, and more specifically its defence industrial policy. It can be said that the aspiration to coherence (referred to as ‘consistency’ in the EU Treaties) is common to the various areas of the European Union's international activity. The logic behind this endeavour is explained by the *ad extra* objective of having the EU speak with an identity of its own in the international community.

But coherence is also a necessity *ad intra* if we take into account the special structural and competence complexity of the EU: although the Treaty of Lisbon formally abolished the three-pillar structure, competences and decision-making processes still differ in the various fields of the Union's external action, and have to be coordinated with its Member States³. In this sense, the methods employed since the Treaty of Lisbon have gone beyond mere intergovernmental coordination, which can be seen both in material areas such as sanctions and crisis management and in structural areas with the consolidation of bodies similar to national foreign

pp.123-142. In particular, the principle of coherence has been particularly discussed in the field of development policy: AGUIAR, P. *Coherencia y Política de Cooperación para el Desarrollo de la Unión Europea*, Cerdanyola del Vallés, Institut Universitari d'Estudis Europeus, 2004; CARBONE, M. “Mission Impossible: the European Union and Policy Coherence for Development”. *European Integration*. 2008, vol. 30, no. 3, pp.323-342; CHICHARRO, A. “Coherencia de Políticas para el Desarrollo en la Unión Europea”. *Iberoamerican Journal of Development Studies*. 2017, vol. 6, no. 1, pp.4-25; AYUSO, A. *El reto de la coherencia de políticas para el desarrollo en la Agenda 2030*, Barcelona, CIDOB, 2018.

³ ENGBRINK, S.D. “The European Union's External Action: Coherence in European Union Foreign Policy despite Separate Legal Orders.” *Legal Issues of Economic Integration*. 2017, vol. 44, no. 1, pp.5-48; and PORTELA, C. and RAUBE, K. “The EU Polity and Foreign Policy Coherence.” *Journal of Contemporary European Research*. 2012, vol. 8, no. 1, pp.3-20.

ministries - the aforementioned High Representative and a European External Action Service⁴.

When defining the term coherence in law, it can be understood as the absence of contradictions -in the negative sense- and also as the need to coordinate actions -in the positive sense- here with the aim of coordinating the EU's external activities to ensure that it expresses itself with a single voice⁵. Thus, the principle of coherence is configured in this framework as:

“Co-ordinated, coherent behaviour based on agreement among the Union and its member states where comparable and compatible methods are used in pursuit of a single objective and result in an uncontradictory (foreign) policy”⁶.

Several authors have also identified three types of coherence that operate at different levels: horizontal, vertical and institutional⁷. On the one hand, horizontal coherence means that the various policies undertaken by the EU -with different objectives- must be consistent with each other, particularly when they have external implications; vertical coherence means that the Member States' national policies must be compatible with those agreed by the EU; and institutional coherence means that the two sets of institutions, bodies and procedures (one Community and one intergovernmental) with which the EU has been managing its external relations must act in a coordinated manner.

Following Nuttall, the debate on the issue of coherence is based on three erroneous assumptions⁸: firstly, coherence is seen as a single concept, when it is the nexus of different problems with solutions that are not always compatible; secondly, coherence

4 *Ibidem*.

5 TIETJE, C. “The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy.” *European Foreign Affairs Review*. 1997, vol. 2, pp.212-217; S. DUKE. *Consistency as an Issue in EU External Activities*, Maastricht, European Institute of Public Administration, 1999, p.3; HERTOOG, L. and STROB, S. “Coherence in EU External Relations: Concepts and Legal Rotting of an Ambiguous Term.” *European Foreign Affairs Review*. 2013, vol. 18, no. 3, pp. 373-388; and ESTRADA CAÑAMARES, M. “Building Coherent EU Responses’: Coherence as a Structural Principle in EU External Relations”, in M. CREMONA (ed.). *Structural Principles in EU External Relations Law*, Oxford, Hart, 2018, pp. 252-253.

6 KRENZLER, H-G. and SCHNEIDER, H., “The Question of Consistency” in E. REGELSBERGER, P. DE SCHOUTHEETE DE TERVARENT and W. WESSELS (eds.). *Foreign Policy of the European Union: From EPC to CFSP and Beyond*, Boulder, Lynne Rienner, 1997, p.134.

7 See NUTTALL, S. “Coherence and Consistency”, in Ch. HILL and M. SMITH (eds.), *International Relations and the European Union*, Oxford, Oxford University Press, 2005, p.92 et seq.; and GAUTIER, P. “Horizontal Coherence and the External Competences of the European Union”. *European Law Journal*. 2004, vol. 10, no. 1, pp.23-41; KRENZLER, H-G. and SCHNEIDER, H., *cit.*, 1997, pp.133-151; and TIETJE, C., *cit.*, 1997, pp.224-233.

8 NUTTALL, S. “Coherence and Consistency” in Ch. HILL and M. SMITH (eds.), *International Relations and the European Union*. Oxford, Oxford University Press, 2005, p.92.

is always seen as a positive value, even though it can be positive to maintain the distinction between two different types of foreign policy, one more similar to classical diplomacy and the other more “structural” and economic-commercial, more specific to the EU; thirdly, foreign policy considerations are often given preference if coherence problems arise, when it may be that giving priority to national approaches can lead to a more democratic solution.

The need for coherence became more acute as the institutional and organisational structure of the European Union grew. The complication is greater because we are dealing with an international organisation (not a state with a closed and unique decision-making process and precise dispute settlement mechanisms). Within the EU, the decision-making process is external, developing and reflecting different perspectives on the governance of the EU itself. This is why the search for coherence in its policies – and particularly in its external action – has become an obsession⁹.

The development of the European Union’s Defence Policy

It is well known that the European Communities emerged as a joint project to overcome previous warfare between neighbouring countries. Despite the abortive initiative of the European Defence Community in 1954, decades later the end of the Cold War and the Balkan War made Europeans aware of the need for progress in security and defence.

Until the Maastricht Treaty of 1992, the conventional background to the Common Foreign and Security Policy (CFSP) was European Political Cooperation (EPC), an intergovernmental cooperation procedure institutionalised by the Single European Act of 1986 -SEA- (Section III, Art. 30)¹⁰, but whose origin dates back to the Conference of Heads of State and Government of December 1969, where foreign ministers

⁹ Up to 16 clauses in the current Treaties refer to the concept of consistency, See ESTRADA CAÑAMARES, M. *cit.*, 2018, p.244 et seq. For example, the European Security Strategy (2003) devoted a whole heading to this need to be more coherent: “The European Union has made progress towards a coherent foreign policy and effective crisis management... But if we are to make a contribution that matches our potential, we must be more active, more coherent and increase our capabilities... The key to the Common Foreign and Security Policy and the European Security and Defence Policy is that together we are stronger... The current challenge is to bring together the various instruments and capabilities: European assistance programmes and the European Development Fund, Member States’ military and civilian capabilities and other instruments... It is essential for the fight against both terrorism and organised crime to improve coordination between external action and policies in the field of Justice and Home Affairs... Greater coherence is needed not only between the Union’s instruments but also in the external actions of each Member State... Coherent policies are also needed at regional level, particularly when dealing with conflicts.”

¹⁰ The Single European Act was signed by all the Community States in February 1986 and entered into force on 1 July 1987 (OJ L 169 of 29 June 1987).

were asked to submit a report on cooperation in foreign policy¹¹, which was presented and approved in Luxembourg in 1970¹². Within the structure of European Political Cooperation, the main body was the meetings of the Ministers of Foreign Affairs, and from there a set of bodies was institutionalised, such as the Political Committee, an EPC Secretariat, and a “Network of European Correspondents” (COREU), made up of officials from the national foreign ministries.

During these years, the concept of coherence in European foreign policy began to develop, appearing officially for the first time at the Paris Summit in December 1974¹³, and was already developed in the Single European Act, which indicated the following:

“The external policies of the European Community and the policies agreed within European Political Cooperation must be consistent.

The Presidency and the Commission, each in accordance with its own powers, will have the particular task of ensuring that such consistency is sought and maintained”¹⁴.

It was the first time that a Community treaty established the obligation of coherence in EU foreign policy (between EU policies and the EPC), and also gave the Presidency and the Commission responsibility for ensuring that it was complied with.

In the Single Act’s European Political Cooperation, the question of security was conceived as a way of contributing to the “development of a European foreign policy

11 “Final Communiqué of the 1969 Hague Conference”, *Bulletin of the European Communities*, 1970, no. 1, pp.12-17.

12 “Report of the Ministers of Foreign Affairs of the Member States on the Problems of Political Unification (Luxembourg Report) 1970”, *Bulletin of the European Communities*, 1970, no. 11, pp.9-15. Years later, the 1973 Copenhagen “Second Report on European Political Cooperation in Foreign Policy” (*Bulletin of the European Communities*, 1973, No. 9, pp.14-21) articulated its structure, defined its common lines and implemented a concerted diplomacy. See MARIÑO MENÉNDEZ, F. “El sistema de Cooperación Política Europea”. *Revista de Instituciones Europeas*. 1980, vol. 7, no. 2, pp.607-631; DE SOLA DOMINGO, M. “La Cooperación Política Europea”. *Anuario del Centro de la UNED*. 1985, vol.2, pp.49-62.

13 The Conference of the Heads of State and Government of the EEC countries -Paris Summit- in its General Declaration of 10 December 1974 stated:

“2. Recognising the need for a global approach to the internal problems posed by the construction of Europe, and to those with which Europe is confronted externally, the Heads of Government consider it appropriate to ensure the development and overall consistency of the Communities’ activities and the work of political cooperation....

3....With a view to ensuring the consistency of Community activities and the continuity of work, the Ministers for Foreign Affairs, meeting within the Council of the Community, will act as promoters and coordinators...

14 Article 30.5 SEA. Its preamble already pointed out the following in one of its paragraphs: “Aware of Europe’s responsibility to seek to adopt an increasingly uniform stance and to act in a coherent (cohesion) and supportive manner, in order to protect more effectively its common interests and its independence...”

identity” (Art. 30.6.a EU), but the coordination of Member States’ positions in this field was limited to the political and economic aspects of security -the other aspects being artificially excluded- and the possibility was assumed that certain Member States would develop closer cooperation “in the framework of the Western European Union (WEU) and the Atlantic Alliance” (Art. 30.6.c SEA)¹⁵.

In practice, the Single Act was in force during a particularly turbulent period of time - the late 1980s and early 1990s. For example, in response to the conflict in the former Yugoslavia, the European Community made many efforts to bring about peace: it offered its good services and mediation to resolve the conflict; it put pressure on the parties to accept ceasefire agreements and the deployment of European Community observers in the region; it opened several international conferences by presenting peace plans for Yugoslavia; it set up an arbitration commission (*the Badinter Commission*) to resolve legal questions on the state organisation of Yugoslavia, international recognition and relations between the former Yugoslav republics; it imposed sanctions on the republics which did not cooperate in a peaceful solution; and it decided that Yugoslavia was being dissolved and therefore recognised Slovenia, Croatia and Bosnia-Herzegovina. The Community also implemented certain Security Council sanctions decisions against third States in various crises¹⁶.

The subsequent Intergovernmental Conference to revise the ECT between December 1990 and December 1991 adopted the Treaty on European Union, signed in Maastricht on 7 February 1992 (TEU or Maastricht Treaty)¹⁷. It was based on three pillars, one Community pillar and two others of intergovernmental cooperation, the Common Foreign and Security Policy (CFSP)¹⁸ and cooperation in the fields of justice and home affairs. The TEU stated that one of the objectives of the European Union was “to assert its identity on the international scene, in particular by implementing a

15 In this regard see CARDONA LLORENS, J. “La dimensión de la seguridad en la Política Exterior y de Seguridad Común de la Unión Europea” in L. MARTÍNEZ VÁZQUEZ DE CASTRO (ed.). *Historia y Derecho. Estudios Jurídicos en homenaje al Profesor Arcadio García Sanz*. Valencia, Tirant lo Blanch, 1995, p.179; LIÑÁN NOGUERAS, D.J. “Una política exterior y de seguridad común para la Unión Europea”. *Revista de Instituciones Europeas*. 1992, vol.19, no. 3, 1992, p.817; AZNAR GÓMEZ, M.J. “¿Es posible una identidad europea de defensa? Recent aspects in regulatory and institutional developments”, *Official Journal of the European Union*. 1998, vol. 2, no. 4, p.621.

16 This is how Regulations (EEC) 2340/1990 and 3155/1990 (embargo against Iraq), 945/1992 (against Libya) or 1432/1992 (against the Federal Republic of Yugoslavia) were adopted. See PÉREZ-PRAT DURBÁN, L. *Cooperación política y Comunidades Europeas en la aplicación de sanciones económicas internacionales*, Madrid, UAM, 1991.

17 See ROBLES CARRILLO, M.A. *La Unión Europea Occidental y la cooperación europea en materia de seguridad y defensa*, Madrid, McGraw-Hill, 1997, pp.92-105; BARBÉ, E. *La seguridad en la nueva Europa*, Madrid, La Catarata, 1995, p.127 et seq.

18 On the CFSP pillar of the Maastricht Treaty, see, inter alia, LIÑÁN NOGUERAS, D.J. *cit.*, 1992, pp.797-825; SÁNCHEZ RODRÍGUEZ, L.I. “La Unión Europea y su política exterior y de seguridad”. *Revista de Instituciones Europeas*. 1993, vol. 20, no. 3, pp.773-796.

common foreign and security policy, in the future including the framing of a common defence policy, which might in time lead to a common defence” (Article B), although defence in the CFSP appeared to be a desire for the future, it was relatively institution-ised in the framework of the WEU (Article J.4.2 TEU) and was separate from the “joint actions” of Article J.3 TEU.

We should bear in mind that the context of the post-Cold War international system obliged the EU to consolidate coherence in its external activities (with the emergence of an EU with a three-pillar structure). Some noteworthy factors were the greater institutional and organisational development in the Union, the necessary assumption of “security” as an area of relevance to the EU with the end of the Cold War, the adoption of a growing number of decisions that did not operate solely within one of the pillars, the necessary coordination of the Member States with organisations common to them such as NATO or the United Nations, the growing regionalisation of external activities and the existence of special links that some of the Member States have with various countries and regions¹⁹.

Owing to their continued interdependence, the TEU jointly regulated the foreign policy and the common security policy, with several generic objectives including the strengthening of the security of the Union and its Member States (Art. J.I.1 and 2 TEU). To a large extent, the CFSP of the TEU codified and improved existing practice, but it did not transform the existing model of cooperation²⁰. In fact, the CFSP is clearly distinct from EU policies and does not have the legal instruments of the latter, such as regulations or directives, but other mechanisms - joint positions and joint actions. However, although the CFSP was an area excluded from Community law and distinct from that of the European Community’s external relations, important and unavoidable connections were nevertheless established between the two, known as “bridges” or “gateways”, both functional -since the implementation of joint positions and actions may require the exercise of EU competences- and organic -with the establishment of a single institutional framework for the whole European Union that guarantees the coherence and continuity of the actions developed in the various pillars (Article C TEU)- and budgetary -since the Community budget covers the administrative expenditure of the CFSP and, in the event of a unanimous decision by the Council, also the operational expenditure (Articles J.II.2 TEU; and 199, paragraph 2, TEC)²¹.

In this respect, particular emphasis was placed on strengthening the principle of coherence in the EU’s external action:

19 S. DUKE, *Consistency as an Issue in EU External Activities*, Maastricht, European Institute of Public Administration, 1999.

20 See, *ad exemplum*, PIÑOL RULL, J.L. And GONZÁLEZ BONDÍA, A. “El lento establecimiento de una política europea de defensa común”. *Anuario Internacional CIDOB* 1994, p.131.

21 REMIRO BROTONS, A. “Política Exterior Común” en *idem* (ed.), *Breve Diccionario del Tratado de Unión Europea*. Madrid, Política Exterior-CERI, 1993, pp.206-207.

“The Union shall in particular ensure the consistency of its external action as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall ensure, each in accordance with its powers, the implementation of such policies”²².

The legal system applicable to the non-EU areas of the European Union -including the CFSP- was public international law, in the absence of a specific legal system for those areas.

The intergovernmental nature of the CFSP is easily seen in the predominance of the principle of unanimity in the adoption of decisions, the lack of participation or effective political control by the European Parliament (Art.J.7 TEU), or the exclusion of judicial control by the Court of Justice of the Communities with respect to the provisions of Section V - (Art. L TEU)²³. Political responsibility for ensuring compliance with the provisions of the CFSP lay exclusively with the Council (Art.J.1.4 TEU).

The Maastricht Treaty establishes various techniques for achieving the objectives of the common foreign and security policy: it provides for systematic cooperation between Member States to develop a common policy by means of mutual information and consultation within the Council (Articles J.1.3 and J.2.1 TEU); the Council may define a common position when it considers it appropriate, and Member States are required to ensure that their national policies conform to the common positions of the European Union and must defend them within international organisations and at international conferences (Articles J.2.2 and 3 TEU); it furthermore provides for the gradual development of joint actions “in areas where Member States have important interests in common” (Article J.1.3 *in fine* TEU), and which involve the implementation of operational actions.

Indeed, a significant novelty of the CFSP is the power of the Council -which is not legally obliged- to adopt, in principle “unanimously”, joint actions on a foreign and security policy issue, ensuring the unity, consistency and effectiveness of the Union’s action (Article J.8.2 TEU). In the latter, qualified majority voting cannot be applied to security issues, which are subject to the general rule of unanimity (Article J.4.3 TEU).

Thus, as opposed to the common position, which is the expression of the EU’s position on a given situation or conflict, thus constituting an example of declaratory

22 Article C, second paragraph, TEU See NEUWAHL, N. “Foreign and Security Policy and the Implementation of the Requirement of “Consistency” under the Treaty on European Union” in P.M. TWOMEY and D. O’KEEFE (eds.). *Legal Issues of the Maastricht Treaty*, London, Chancery, 1994, pp.227-246; and TIETJE, C. “The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy”. *European Foreign Affairs Review*. 1997, vol. 2, pp.211-233.

23 WESSEL, R.A. *The European Union’s Foreign and Security Policy. A Legal Institutional Perspective*, The Hague, Kluwer, 1999, pp.216-217, which nevertheless grants some limited oversight role to national parliaments and courts. *Ibidem*, pp.230-234.

diplomacy, the decision on a joint action is the supreme instrument of the CFSP. The European Council adopted in June 1992 a report setting out the first set of general guidelines for joint action²⁴, reaffirming the principles of subsidiarity, *acquis communautaire*, consistency and the objectives set out in the TEU itself. Since then, joint actions have been approved, for example on the delivery of humanitarian aid to Bosnia-Herzegovina²⁵, continued support for the Mostar Administration by the EU²⁶, implementation of the peace plan for Bosnia-Herzegovina²⁷, support for the electoral process in that country²⁸, etc.

Institutionally, the Council is the main institution of the CFSP, with responsibility for conducting the Union's foreign policy. The rotating Presidency of the Council represents the European Union in CFSP matters and is responsible for implementing joint actions (Art. J.5.1, 2 and 3 TEU). A Political Committee (COPO) – originating from the EPC of the Single Act – would monitor the situation, contribute to the definition of the CFSP through opinions to the Council, and oversee its implementation (Art.J.8.5 TEU); COREPER (Committee of Permanent Representatives of the Member States) continued as a body preparing the work of the Council²⁹; and the General Secretariat of the Council provided administrative assistance³⁰.

The Commission is also empowered by the Maastricht Treaty -together with the Member States- to submit questions and proposals to the Council on any matter relating to the CFSP, in addition to helping ensure, together with the Council, consistency between the CFSP and the external relations of the European Community, and contributing to the representation of the EU in third countries through its international representations and delegations abroad (Articles J.6, J.8.3 and J.9 TEU). In general, the Commission was on an equal footing with the States in the CFSP.

24 See the “Report to the Lisbon European Council on the probable development of the Common Foreign and Security Policy” of 25 June 1992, approved by the Lisbon European Council of 26-27 June 1992, in Bulletin of the European Communities, 1992, no. 6, point 1.31, pp.19-22.

25 See for example Council Decisions 93/603/CFSP of 8 November 1993 (OJ L 286 of 20 November 1993, pp.1-2), 93/729/CFSP of 20 December 1993 (OJ L 339 of 31 December 1993, p.3), 94/308/CFSP of 16 May 1994 (OJ L 134 of 30 May 1994, p.1) and 95/516/CFSP of 4 December 1995 (OJ L 298 of 11 December 1995, p.3).

26 *Ad exemplum*, Council Decisions 94/790/CFSP of 12 December 1994 (OJ L 326, 17 December 1994, p. 2); 95/23/CFSP of 6 February 1995 (OJ L 33, 13 February 1995, p. 1); 95/552/CFSP of 19 December 1995 (OJ L 313, 27 December 1995, p. 1); Joint Action 96/442/CFSP of 15 July 1996 (OJ L 185, 24 July 1996, pp. 2-4); Joint Action 96/476/CFSP of 26 July 1996 (OJ L 195, 6 August 1996, pp. 1-2).

27 On the basis of Council Decision 95/545/CFSP of 11 December 1995 (OJ L 309 of 21 December 1995, p. 2).

28 Joint Action 96/406/CFSP of 10 June 1996 (OJ L 168 of 6 July 1996, p.1).

29 Article J.11.1 TEU provided for the applicability of Article 151 TEC in the CFSP.

30 According to the Declaration (No. 28) of the CIG'92 on practical arrangements in the field of CFSP, the Secretariat for European Political Cooperation was incorporated into the General Secretariat of the Council as a special autonomous division under the direction of the Secretary-General.

For its part, the European Parliament had limited political control over this inter-governmental pillar: the right to be informed regularly by the Council Presidency and the Commission on the development of the CFSP and to consult it on the main aspects and the basic options; to ask questions or make recommendations to the Council; and to hold a debate on the progress achieved (Art.J.7 TEU)³¹.

Regarding the financing of the CFSP, its administrative expenditure would be charged to the budget of the European Communities – as a manifestation of the principle of institutional unity³² – and for operational expenditure for the implementation of the CFSP, the Council could decide unanimously that it would be charged to the Community budget, or declare that such expenditure would continue to be paid by the Member States in accordance with a scale to be established (Article J.II.2 TEU)³³. In fact, the TEU makes it possible to link the Community structure to the implementation of the CFSP in two specific areas: the budget – as we have seen – and sanctions (Art.228 A TEC).

As for its relations with other relevant organisations, the Maastricht Treaty provided that the CFSP would cover “all questions relating to the security of the European Union” (Article J.4.1 TEU). There were three different material areas in the CFSP in this respect: common security, which is fully integrated into the CFSP; common defence policy; and common defence, the latter two as consecutive projects for the future. In fact, they are three stages of the same process.

Decisions with defence implications do not take the form of joint actions, but the Council of the Union unanimously takes the decisions necessary to define and implement the CFSP, which will be developed and implemented by the Western European Union (WEU). This organisation “is an integral part of the development of the European Union” and the latter asks it to “prepare and implement decisions and actions of the Union which have defence implications” (Article J.4.2 TEU).

The TEU did not go so far as to set out the process for adopting a common security policy. Indeed, the Maastricht Treaty conceives common defence as a non-binding but

31 On parliamentary control of the CFSP see, for example, COSIDÓ GUTIÉRREZ, I. “La Política Exterior y de Seguridad Común: la cuestión nuclear” in CESEDEN. *La Política Exterior y de Seguridad Común (PESC) para Europa en el nuevo marco del Tratado de No Proliferación de Armas Nucleares (TNP)*. Madrid, Ministry of Defence, 1996, pp.24-25.

32 See Article J.II.2 TEU and Article 199 TEC. See ROBLES CARRILLO, M.A. “La financiación de la PESC”. *Revista de Instituciones Europeas*. 1995, vol. 22, no. 1, pp.116 and 119.

33 As the expenditure can be included in the budget of the European Community, it is subject to the Community procedure and therefore to the audit and control of the Court of Auditors, as stated in Articles 188a and 188c of the European Community Treaty. MARTÍN ARRIBAS, J.J. “Consideraciones sobre la Política Exterior y de Seguridad Común de la Unión Europea”, *Gaceta Jurídica*. 1994, B-95, p.24.

desirable objective to be achieved when a common defence policy is defined (Article J.4.1 TEU). The Maastricht Treaty opens up the process of integrating the WEU as a defensive component of the European Union, although not all EU Member States were part of the WEU³⁴.

In addition, this Section V of the TEU contained some security policy precautions, such as

“the policy of the Union shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework” (Article J.4.4 TEU)³⁵.

In addition, these provisions on security and defence

“shall not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the WEU and the Atlantic Alliance, provided such cooperation does not run counter to or impede that provided for in this Section”³⁶.

This recognised the heterogeneous nature of any European security system. However, in subsequent practice, the degree of cooperation achieved in the field of multinational forces between different Member States, including Spain, went much further than the general provisions of Article J.4.1 of the Maastricht Treaty.

A novelty of the CFSP was to give the Council the power to adopt common positions by unanimity, binding on all EU Member States. One defect was that the CFSP clauses in the Maastricht Treaty were very complex, ambiguous and imprecise in their

34 Therefore, at the 1992 Intergovernmental Conference in Maastricht, the Member States of both organisations issued two Declarations concerning WEU, and the other European Member States of NATO were also encouraged to acquire the status of associate members of WEU, in order to fulfil the objective of building up WEU in stages as the defence component of the European Union for the development of a genuine European security and defence identity, and as a means of strengthening the European pillar of the Atlantic Alliance. “Declaration by Belgium, Germany, Spain, France, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom, which are members of the Western European Union”, paragraphs 1 and 2; and also the “Declaration by Belgium, Germany, Spain, France, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom, which are members of the WEU as well as members of the EU on the role of the WEU and its relations with the European Union and the Atlantic Alliance”, paragraphs 1-4

35 This provision implicitly referred to the particular situation of certain Member States -or which were soon to become so- such as Austria, Finland or Sweden with their neutral legal status, the nuanced positions on safety issues of Denmark and Ireland, or the special regime of France and the United Kingdom as nuclear powers.

36 Article J.4.5 TEU.

definitions³⁷, which allowed states to make the most favourable interpretations of their national interests³⁸.

Since the entry into force of the TEU, the Council has clearly developed the normative activity in the field of the CFSP, based on the identification of its material areas in the general guidelines presented by the European Council on several occasions (Brussels European Council of 29 October and 11 December 1993, and Corfu European Council of 25 June 1994³⁹), with Community financing of operational expenditure being the preferred option because of its greater efficiency and speed⁴⁰.

But the implementation of the TEU was not as advanced as desired: it had raised excessive expectations for its considerable inconsistencies and shortcomings, in addition to not providing it with sufficient legal, economic or military means and resources to materialise in practice⁴¹, and it therefore issued many more declarations than decisions⁴². At best, the CFSP was serving to strengthen the coordination of EU Member States' foreign policies. Furthermore, the empirical experience of the armed conflict in the former Yugoslavia demonstrated the ineffectiveness of the EC/EU in managing that crisis despite its unceasing mediation efforts at the successive negotiating conferences, the establishment and deployment of an observer mission in the region (the European Community Monitoring Mission [ECMM]), the development of some assistance initiatives (the European Community Humanitarian Aid Task Force) and temporary territorial management (the European Union Administration in Mostar), or the establishment of EU Member States as the main contributors of personnel to the UN peacekeeping operation in the area (United Nations Protection Force [UNPROFOR]). The relegation of the European Union to a secondary role continued in the Dayton Peace Accords and in the subsequent international military forces deployed in Bosnia and Herzegovina under the direction and control of the Atlantic Alliance (IFOR and SFOR).

37 MARTÍN ARRIBAS, J.J. "Consideraciones sobre la Política Exterior y de Seguridad Común de la Unión Europea". *Gaceta Jurídica*. 1994, B-96, p.10.

38 However, it was still an "advanced system of information, cooperation and consultation between sovereign states on an institutional basis", which was to condition and unify the national foreign policies of the EU Member States. SÁNCHEZ RODRÍGUEZ, L.I. "La Unión Europea y su política exterior y de seguridad". *Revista de Instituciones Europeas*. 1993, vol. 20, no. 3, pp.795-796.

39 See Bulletin of the European Communities, 1993, no. 10, p.8; *idem*, 1993, no. 12, pp.12-13; Bulletin of the EU, 1994, no. 6, pp.16-18.

40 ROBLES CARRILLO, M.A. "La financiación de la PESC". *Revista de Instituciones Europeas*. 1995, vol. 22, no. 1, p.123.

41 For example, see European Parliament Resolution on the progress made in the development of the common foreign and security policy, June 1997 (EP. 260/312).

42 BARBÉ, E. en *idem* (coord.). *Política Exterior Europea*, Barcelona, Ariel, 2000, pp.124-127; LIÑÁN NOGUERAS, D.J. "Flexibilité et Politique Étrangère et de Sécurité Commune de l'Union européenne" in AA.VV., *Mélanges en hommage à Michel Waelbroeck*, Brussels, Bruylant, 1999, pp.1155-1156.

For these reasons the need arose to revise the Treaty on European Union in order to make it more operational and dynamic, and so the 1996 Intergovernmental Conference of the Representatives of the Member States (IGC'96) was convened, resulting in the Treaty of Amsterdam – signed in 1997 and in force in 1999. The scope of the CFSP –Section V of the TEU – is maintained as in Maastricht as an area of intergovernmental cooperation, but the provisions relating to defence are especially reformed, without prejudice to the fact that the CFSP would continue to cover “all questions relating to the security of the Union, including the progressive framing of a common defence policy” (Article 17.1 TEU), which was reiterative.

The purpose of the Treaty of Amsterdam was to achieve significant improvements in the effectiveness, coherence, credibility and visibility of the CFSP⁴³, through the following developments:

1. Better systematisation of the contents of Section V, dedicated to the CFSP.
2. More precise definition and better structuring of CFSP instruments, both of their principles and general guidelines, and the identification of the new instrument of common strategies in “areas where Member States have important interests in common”, “including matters with defence implications” (Articles 12 and 13.1 EU); the adoption of joint actions; the adoption of common positions; and the strengthening of systematic cooperation between Member States⁴⁴. The Council shall recommend common strategies to the European Council and shall implement them, in particular through the adoption of joint actions and common positions (Article 13.3 EU). On the one hand, joint actions “shall address specific situations where operational action by the Union is deemed to be required” and “shall be binding on the Member States in the positions they adopt and in the conduct of their activities” (Art. 14.1 and 3 EU); on the other hand, common positions “shall define the approach of the Union to a particular matter of a geographical or thematic nature” and “Member States shall ensure that their national policies conform to them” (Art. 15 EU),
3. Some progress in the Council decision-making process on the CFSP. Although unanimity was maintained as a general rule (Article 23.1 EU), certain flexibility mechanisms were admitted, such as constructive abstention or qualified majority (except for decisions with military or defence implications, which always required unanimity - although constructive abstention was possible) and procedural issues would be decided by the Council by a simple majority of its members (Article 23.3 EU).

43 REMIRO BROTONS, A. “¿Qué ha significado el Tratado de Ámsterdam para la PESC?”. *Gaceta Jurídica*. 1998, no. 29, pp.80-85; BARBÉ, E. “La Política Exterior y de Seguridad Común en la reforma del Tratado de la Unión Europea”. *Revista Española de Desarrollo y Cooperación*. 1997, no. 1, p.12 et seq.

44 CONDE PÉREZ, E. *Los instrumentos de la política exterior de la Unión Europea*, Madrid, UCM, 2002, pp.65-77; ÁLVAREZ VERDUGO, M. *La política de seguridad y defensa en la Unión Europea*, Madrid, Dykinson, 2003, pp.176-202.

4. Creation of a specific organic and functional structure for the CFSP. The Presidency represents the EU in CFSP matters, is responsible for implementing the decisions adopted and is assisted by the Secretary-General of the Council who, elected unanimously by the Council (Art. 207.2 EC), “shall exercise the functions of High Representative for the common foreign and security policy” (Art. 18 EU), contributing in particular to “the formulation, preparation and implementation of political decisions and, where appropriate, conducting political dialogue with third parties” (Art. 26 EU). This personifies the CFSP in the Secretary General of the Council, in order to give it greater visibility and coherence. The Treaty of Amsterdam recalls the responsibility of the Council and the Commission to ensure the consistency of the EU’s external action as a whole, by cooperating to that end and ensuring that it is carried out (Article 3 EU). With regards to the Commission, the treaty text stresses its full association with the work of the CFSP (Articles 18.4 and 27 EU), and grants it the right of initiative, shared with the Member States (Article 22.1 EU). As for the Council, it may request the Commission to submit appropriate proposals to ensure implementation of a joint action (Art. 14.4 EU); may appoint “a special representative with a mandate in relation to particular policy issues” (Art. 18.5 EU); and may conclude agreements with states and international organisations to implement the CFSP (Art. 24 EU), which may not, however, involve any transfer of competences from the Member States to the European Union⁴⁵, and which shall not be binding on a Member State whose representative in the Council declares the need to conform to its own internal constitutional procedure. The Secretary-General of the Council/High Representative for the CFSP was to head a novel policy planning and early warning unit. On the other hand, the European Parliament still had a secondary role in this area in Amsterdam – as in the Maastricht Treaty – and the provisions of the CFSP were kept outside the judicial control of the Court of Justice⁴⁶.
5. Incorporation into the Treaty of Amsterdam of the tasks set out in the Petersberg Declaration of the WEU Council of June 1992: humanitarian and rescue tasks, peace-keeping tasks and tasks of combat forces in crisis management, including peace-making (Art.17.2 EU). Member States retained their discretion to decide whether or not to participate in such missions.
6. Greater communitarisation – and simplification of procedures – of CFSP funding, since as a general rule not only administrative but also operational expenditure is charged to the budget of the European Communities, except for the above-mentioned *Petersberg* tasks and cases where the Council decides otherwise by unanimity (Art.28.2, 3 and 4 EU)⁴⁷.

45 Cf. Declaration (No. 4) on Articles 24 and 38 of the Treaty on European Union

46 Art.46 EU.

47 The financing of the CFSP was organised by an Interinstitutional Agreement between the European Parliament, the Council and the European Commission, signed on 16 July 1997 (OJ C 286 of 22

7. The Treaty of Amsterdam regulated the European Union's relations with the WEU and with NATO: on the one hand, the WEU provided for a possible merger with the European Union through a selective incorporation of competences and functions which were previously exclusively within the WEU⁴⁸. However, under the Treaty of Amsterdam, both organisations maintained their own political and legal subjectivity with a relationship of enhanced partnership, whereby the WEU provided the European Union with a certain operational capability and contributed to the formulation of a European defence doctrine: the EU was responsible for political direction and responsibility in the fields of security and defence, and the WEU for the preparation, organisation and implementation of military missions.

With regards to NATO, the primacy of the Atlantic Alliance's coverage for those Member States that wish to do so continues to be respected in Amsterdam, since

“the policy of the Union... shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which *see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty* and be compatible with the common security and defence policy established within that framework”⁴⁹.

Moreover, the Treaty of Amsterdam itself expressly allows for the possible development of enhanced cooperation “between two or more Member States on a bilateral level, in the framework of the WEU and the Atlantic Alliance”, as long as it does not run counter to or impede the cooperation established under the CFSP⁵⁰.

September 1997, pp.80-81), and replaced by a new one of 6 May 1999 (OJ C 172 of 18 June 1999, pp.1-22).

48 According to the Amsterdam Treaty, the WEU remains “an integral part of the development of the Union”, which for its part “shall have recourse to the WEU for the preparation and implementation of decisions and actions of the Union which have defence implications” (Art.17.3, first paragraph, EU), and furthermore “shall provide the Union with access to an operational capacity in particular in the context” of “humanitarian and rescue tasks, peace-keeping tasks and tasks of combat forces in crisis management, including peace-making” (Art.17.1 and 2 EU) -the *Petersberg* operations- in which case “all Member States of the Union shall be entitled to participate fully in these tasks” (including non-Member States of the WEU). And the WEU followed the Union in “defining the defence aspects of the common foreign and security policy”, so the Union will “promote closer institutional relations with the WEU with a view to the possible integration of the WEU into the Union”, should the European Council decide to do so (Art.17.1 EU). See also Protocol (No. 1) on Article 17 of the Treaty on European Union.

49 Article 17.1, third paragraph, EU (emphasis added).

50 Article 17.4 EU. GUTIÉRREZ ESPADA, C. “El Tratado de Ámsterdam (1997) y la defensa de Europa” in J.M. PELÁEZ MARÓN (dir.), *Cuestiones actuales de Derecho Comunitario Europeo*, vol.4, Córdoba, University of Cordoba, 1998, pp.166 and 168.

In short, the European Political Cooperation of the Single Act was declarative, reactive and behavioural – not as a result – decisions were taken by consensus, and a clear separation was established between the Community legal order and the EPC, with a duty to consult only in areas of common interest, with the exception of security. In the Maastricht Treaty, the CFSP is already enforceable through common actions and common positions, with an obligation of result and not only of behaviour, and partly overcomes the disparity between the Community and foreign policy cooperation fields. The Treaty of Amsterdam also limits the unanimity rule, strengthens unity and coherence, and solidifies and expands the effectiveness of the EU⁵¹.

But in practice, the common foreign policy for years produced an abundance of declaratory but little operational practice. The CFSP was not really a truly common policy, but a procedure for trying to create it gradually, with the political will of the Member States remaining the decisive criterion for achieving it. In the field of common security, the Treaty of Amsterdam incorporated as a novelty the defence of the integrity of the Union (Art. 11.1 EU), and therefore matters with defence implications were included in the principles and general guidelines of the CFSP, to be defined by the European Council (Art. 13.1 EU). The experiences of Bosnia-Herzegovina and Kosovo in the 1990s had demonstrated Europe's inability to deploy military forces autonomously, so the EU was gradually being called upon to achieve a common security and defence capability of its own if it was to give real credibility to its foreign policy⁵².

But since 1998 the development of the CFSP has been directed towards the gradual institutionalisation of a European Security and Defence Policy (ESDP)⁵³, and in March 1998 the European Conference of Heads of State and Government was formal-

51 ALDECOA LUZÁRRAGA, F. and CORNAGO PRIETO, N. “El nuevo regionalismo y reestructuración del sistema mundial”. *Revista Española de Derecho Internacional*. 1998, vol. 50, no. 1, pp.92-93.

52 AZNAR GÓMEZ, M.J. “¿Es posible una *identidad europea de defensa*? Aspectos recientes en la evolución normativa e institucional”. *Revista de Derecho Comunitario Europeo*. 1998, vol. 2, no. 4, pp.619-638. The only precedent can be found in the European Defence Community, which was promoted in the 1950s but failed because its founding treaty did not receive French parliamentary approval and this frustrated military convergence in Europe for decades.

53 See for example GONZÁLEZ VEGA, J.A. “Los “Acuerdos de Niza”, la PESC y la arquitectura europea de seguridad y defensa”. *Suplemento BEUR*. 2001, no. 9, p.13 et seq.; JORGE URBINA, J. “Reflexiones en torno a la configuración de una política de seguridad y defensa en el seno de la Unión Europea”. *Revista de Derecho Comunitario Europeo*. 2001, vol. 5, no. 10, pp.439-471; GONZÁLEZ ALONSO, L.N. “La Política Europea de Seguridad y Defensa después de Niza”. *Revista de Derecho Comunitario Europeo*. 2001, vol. 5, no. 9, p.199 et seq.; VILANOVA, P. and FERNÁNDEZ, N. (coord.), *Europa: el debate sobre defensa y seguridad*, Barcelona, University of Barcelona, 2001; ÁLVAREZ VERDUGO, M. *La política de seguridad y defensa en la Unión Europea*, Madrid, Dykinson, 2003; CEBADA ROMERO, A. and PÉREZ GONZÁLEZ, C. *El Alto Representante de la PESC y la nueva Política Europea de Seguridad y Defensa*, Madrid, Dykinson, 2003, p.93 et seq.; GARCÍA PÉREZ, R. *Política de Seguridad y Defensa de la Unión Europea*, Madrid, UNED, 2003, p.59 et seq.

ised, despite the fact that it was a time of national defence budget cuts by the most important European Union states.

A first step was taken by the Franco-British Joint Declaration on European Defence of 4 December 1998, which recognised the need to develop an autonomous military capability in the EU⁵⁴, and coincided with a lesser US willingness to sustain the predominant financial effort for European security.

The Cologne European Council in June 1999 decided to incorporate the common defence dimension of the WEU into the CFSP pillar of the European Union, so that the Council (with the participation of defence ministers where appropriate) would be responsible for the political control and strategic direction of EU operations. The Cologne European Council therefore approved a Declaration in which it set out its intention to obtain the necessary means and capabilities to enable it to assume its security and defence responsibilities and to provide the EU with an operational military capability in the form of a rapid intervention force dedicated to the execution of the *Petersberg* tasks, for which purpose the already constituted European Army Corps (Eurocorps) could be used as a nucleus⁵⁵. Thus, various political and military structures and bodies were designed which the European Union should have at its disposal for the development of the *Petersberg* tasks, which were to be approved and specified by the Helsinki European Council of December 1999⁵⁶.

First, the Helsinki European Council decided to establish three bodies to institutionalise the European Security and Defence Policy: a Political and Security Committee (PSC), based permanently in Brussels and composed of national representatives, which was given decision-making powers to exercise political control and strategic direction of crisis management operations; a Military Committee, composed of national Chiefs of Defence Staff represented by their delegates, to provide military advice to the PSC and operational direction; and a European Military Staff, which would provide military expertise in support of the Common European Security and Defence Policy, including early warning, situation assessment, strategic planning and conduct of EU military operations.

Secondly, at this Helsinki European Council, the “Millennium Declaration” included the decision of the EU Member States to be in a position to deploy military forces in order to integrate a joint European Rapid Reaction Force of up to 50,000 to 60,000 troops, with naval and air support, to be responsible for carrying out the so-

54 See its text in the report of the Assembly of the Western European Union, “L’UEO et la défense européenne: au-delà d’Amsterdam”, document 1636 of 15 March 1999, annex, p.30.

55 “Declaration on the strengthening of the common European policy on security and defence” of 3 June 1999. See the Presidency Conclusions of the Cologne European Council in Bulletin EU, 1999, no. 6, point I.58, pp.35-36, approving the Presidency report on strengthening a common European security and defence policy (doc.8239/1/99 REV 1).

56 See Presidency Conclusions of the Helsinki European Council in EU Bulletin, 1999, no. 12, point I.9, para.25-29, pp.10-11.

called *Petersberg* tasks on European territory⁵⁷. This would not be a permanent military force but a set of military units assigned by each Community state, ready and available to operate when activated through the principle of voluntary cooperation, a modality whereby each country decides at its own discretion its contribution to each specific mission. Such assets and units would also be available for NATO missions⁵⁸.

The EU Council decided in February 2000 to partially implement the institutional structure approved at the Helsinki European Council⁵⁹. Bearing in mind that the ESDP project is not only military in nature, a number of other bodies within the European Union began their work, such as a Committee for Civilian Aspects of Crisis Management⁶⁰; a Situation Centre/Crisis Cell, established by the High Representative for the CFSP⁶¹; or a coordination mechanism in the General Secretariat of the Council, which created a database on civilian police capabilities to obtain and share information⁶².

In order to complete the design of the EU's operational capabilities and enable it to deal with all types of crisis, the Feira (Portugal) European Council of June 2000 set the goal of having up to 5,000 police officers ready to be deployed in 2003 in international operations aimed at conflict prevention and crisis management, recognising as priority areas of action the strengthening of the rule of law, the reinforcement of local administration, and civil protection and rescue of people⁶³.

57 Presidency conclusions at the Helsinki European Council, 10-11 December 1999, in EU-Bulletin, 1999, no. 12, point I.9, para.28, pp.10-11.

58 In fact, obtaining adequate means in these areas obliged the EU to conclude agreements with NATO in order to be able to use its resources. See WEU Council of Ministers, *Audit of Assets and Capabilities for European Crisis Management Operations. Recommendations for Strengthening European Capabilities for Crisis Management Operations*, Luxembourg, 23 November 1999.

59 Thus, see Council Decision 2000/143/CFSP of 14 February 2000 (OJ L 49 of 22 February 2000, p.1) setting up the interim Political and Security Committee; Council Decision 2000/144/CFSP, also of 14 February 2000 (OJ L 49 of 22 February 2000, p.2), setting up the interim military body, composed of representatives of the Chiefs of Defence of the Member States, to provide advice in the military field to the Political and Security Committee and the High Representative for the CFSP; and Council Decision 2000/145/CFSP of 14 February 2000 (OJ L 49 of 22 February 2000, p.3) on national experts in the military field on secondment to the General Secretariat of the Council during the interim period.

60 Council Decision 2000/354/CFSP of 22 May 2000 (OJ L 127 of 27 May 2000, p.1).

61 This unit was conceived at the Helsinki European Council - Presidency conclusions of that European Council, in Bulletin EU, 1999, no. 12, point I.9, para.25, p.10; and the Presidency report on non-military crisis management in the European Union.

62 This coordination mechanism had been approved at the Helsinki European Council in December 1999 (Annex 2 to Annex IV -Section B- of the Presidency Conclusions, in EU Bulletin, 1999, No. 12, p.29).

63 Presidency Conclusions, Feira European Council, Bulletin EU, 2000, no. 6, point I.8, para.11, p.9

In addition to assets and capabilities, a genuine European Security and Defence Policy requires a defined conceptual and doctrinal framework, with a clear determination of the goals pursued and the regulatory principles: thus, in 2003 the European Council adopted the “European Security Strategy” as a strategic concept for adopting a comprehensive vision of Europe’s security and defence that would make it possible to identify the European Union’s strategic objectives and common doctrine⁶⁴ and to better address global threats and challenges through the use of appropriate means and instruments⁶⁵. The concrete proposals for the implementation of this strategic concept concerned effective multilateralism centred on the United Nations, the fight against terrorism, and comprehensive regional strategies for the Middle East and Bosnia-Herzegovina. In order to determine the legal regime applicable to EU operations, its Member States concluded an agreement on the status of military and civilian staff posted to the Union’s institutions and to its headquarters, forces and military and civilian personnel (EU SOFA)⁶⁶, which is very similar to the agreements of the same type concluded by the United Nations with various States in the context of their peacekeeping missions.

It may be that some, but not all, Member States of the European Union contribute to a given operation, together with third States, and in such cases the emergence of specific structures is necessary, such as the establishment in each mission of an *ad hoc* committee for the day-to-day management of the operation. However, the decision to terminate an operation would be taken by the Council of the EU, following consultations with the States participating in that committee.

As the absorption of WEU peacekeeping powers by the European Union -a process concluded in December 2000- was precipitated, the Union established a formal relationship with NATO, with a direct strategic dialogue on high-risk areas between bodies, working groups and officials of both international bodies, and the conclusion of various agreements – known as *Berlin Plus* agreements – to allow access to the EU of Atlantic collective resources and capabilities in operations led by the European Union⁶⁷. On the ground, NATO and the EU have worked together since 2001 to bring the conflict in the former Yugoslav Republic of Macedonia to an end.

64 There were three strategic objectives defined in the 2003 Strategy: to guarantee internal security, to contribute to the establishment of a security environment for Europe, and to promote European defence through institutionalised cooperation with “effective multilateralism”.

65 This European Security Strategy of 2003 followed the parameters of national security or defence strategies, as the relevant bodies of the Member States collaborated in it. See Presidency Conclusions of the Brussels European Council of 12 December 2003, EU Bulletin, 2003, no. 12, paragraph 1.32, paras.83-86; and ORTEGA, M. “Beyond Petersberg: missions for the EU military forces” in N. GNESOTTO (ed.). *EU Security and Defence Policy: the first five years (1999-2004)*, Paris, EU Institute for Security Studies, 2004, pp.82-84.

66 This agreement was signed on 17 November 2003 (OJ C 321, 31 December 2003, pp. 6-16).

67 Framework agreement, based on the Joint Declaration on the European Security and Defence Identity of 16 December 2002; and agreement on information security of March 2003. The Council

The next version of the TEU was the Treaty of Nice of 2000, which made some relevant reforms to the CFSP with respect to the Treaty of Amsterdam⁶⁸:

1. Almost all the references to the WEU in the TEU (Article 17 EU) disappeared as a result of the integration of its peacekeeping and crisis management functions into the EU.
2. It was solemnly stated that international agreements concluded in the field of the CFSP would be binding on the institutions of the Union (Art.24.6 EU Nice). And if the agreement is intended to implement a joint action or a common position, then the Council will decide by qualified majority (Art.24.3 EU Nice).
3. Enhanced cooperation was expressly incorporated into the CFSP, with the aim of defending the values and serving the interests of the Union as a whole (Art.27 A.1 EU Nice)⁶⁹. Such enhanced cooperation should respect the principles, objectives, general guidelines and consistency of the CFSP and shall only relate to the implementation of common actions or common positions, but not to matters having military or defence implications (Art.27b EU Nice)⁷⁰. Member States which intend to establish enhanced cooperation between themselves will address a request to the Council, which will authorise it by qualified majority, and any Member State may participate in enhanced cooperation already established.
4. The Political and Security Committee, established by the Helsinki European Council of December 1999, was incorporated into the Treaty on European Union (Art. 25 EU Nice), bringing to it the functions of the Political Committee and incorporating its own functions of exercising political control and strategic direction of crisis management operations conducted under the authority and responsibility of the Council. In fact, in January 2001 the Politi-

of the EU had approved this agreement and authorised its President to sign it through its Decision 2003/211/CFSP of 24 February 2003 (OJ L 80 of 27 March 2003, pp. 35-38, with the text of the agreement). This agreement replaced a previous interim security agreement between the General Secretariat of the Council of the EU and NATO, formalised by an exchange of letters on 26 July 2000.

68 See for example HERRERO DE LA FUENTE, A.A. “La política exterior y de seguridad común de la Unión Europea tras la “cumbre” de Niza. La política europea de seguridad y defensa”. *Noticias UE*. 2003, no. 218, pp.63-78; GONZÁLEZ ALONSO, L.N. “La Política Europea de Seguridad y Defensa después de Niza”. *Revista de Derecho Comunitario Europeo*. 2001, vol. 5, no. 9, pp.197-238; and JORGE URBINA, J. “Reflexiones en torno a la configuración de una política de seguridad y defensa en el seno de la Unión Europea”. *Revista de Derecho Comunitario Europeo*. vol. 5, no. 10, 2001, pp.439-471.

69 See MANGAS MARTÍN, A. “Las cooperaciones reforzadas en el Tratado de Niza” in MOREIRO GONZÁLEZ, C.J. (coord.), *Tratado de Niza. Análisis, comentarios y texto*, Madrid, Colex, 2002, pp.78-82; MARTÍN and PÉREZ DE NANCLARES, J. “La cláusula de cooperación reforzada a la luz del Tratado de Niza: Crónica de una modificación necesaria”. *Noticias UE*. 2003, no. 218, pp.95-109.

70 On the need to combine coherence, effectiveness and flexibility in the CFSP/ESDP see MISSIROLI, A., “Coherence, Effectiveness and Flexibility for CFSP/ESDP” in E. REIFER, R. RUMMEL and P. SCHMIDT (eds.). *Europas ferne Streitmacht*, Hamburgo, Mittler, 2002, pp.119-148.

cal and Security Committee, the Military Committee and the Military Staff of the European Union would be permanently established⁷¹. And a Declaration on the European Security and Defence Policy, annexed to the Final Act of the Intergovernmental Conference, underlined the EU's objective of making this policy rapidly operational.

As regards practical experience at the beginning of the 21st century, since 2003 the European Union has undertaken various operations under its European/Common Security and Defence Policy, such as in Bosnia-Herzegovina, the Democratic Republic of the Congo, Gaza, Georgia, Guinea-Bissau, Macedonia and off the coast of Somalia⁷². These operations consolidated the role of the Political and Security Committee, which assumed its political control and strategic direction under the responsibility of the Council (Article 25, paragraph 3, EU Nice). With the aim of financing common costs related to EU military operations under the European Security and Defence Policy, the Athena mechanism was created in 2004⁷³.

These missions have been symbolising the progress the EU has made towards achieving a genuine European defence policy, but it should be recognised that they have generally been low-intensity missions, demonstrating limited operational capabilities, as the European Union was not capable of undertaking complex and simultaneous operations owing to its serious shortcomings in strategic air transport or communications, which led it to depend on NATO assets and capabilities, in a strategic partnership.

Furthermore, the EU has not yet proved capable of assuming responsibility for guaranteeing peace and stability in Europe, and has continued to depend on essential US military assistance. Indeed, the total defence budgets of all the European Union Member States are still considerably smaller than those of the United States, which is a clear demonstration that Europe still relies heavily on American military contributions

71 Successive Council Decisions 2001/78/CFSP, 2001/79/CFSP and 2001/80/CFSP established the permanent formations of the Political and Security Committee, the Military Committee and the Military Staff of the European Union (OJ L 27 of 30 January 2001, pp.1-3, 4-6 and 7-11 respectively).

72 GONZÁLEZ ALONSO, L.N. "De las declaraciones a los hechos: las primeras operaciones de gestión de crisis de la Unión Europea". *Revista de Derecho Comunitario Europeo*. 2003, vol. 7, no. 15, 2003, pp.653-682; and GARCÍA PÉREZ, R. "Las misiones PÈSD como instrumento de política exterior de la UE", in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2009*, Bilbao, Universidad del País Vasco, 2010, pp.21-71.

73 The Council of the European Union established this Athena mechanism by Council Decision 2004/197/CFSP of 23 February 2004 (OJ L 63, 28 February 2004, pp.68-82). Almost all the EU Member States participate in this mechanism, except Denmark, which decided not to participate in ESDP military affairs. Its legal basis is currently Council Decision (CFSP) 2015/528 of 27 March 2015 (OJ L 84 of 28 March 2015, pp.39-63). With respect to Athena's scope, this mechanism can finance the common costs of EU military operations, as well as costs of a national nature -such as accommodation, fuel, transport, infrastructure and similar costs of national contingents- if the Council so decides, normally at the request of the operation commander. But the practical reality is that most of the costs of the EU's military missions (up to 90 percent) are not considered common expenses to be financed by the Athena mechanism.

for its own security. This European military dependence, which has been dragging on since the Cold War years, has the advantage of being able to count on sufficient security at a reduced price, but with the double disadvantage of not possessing autonomous capacity for action and being subordinate to another power.

Outside the institutional framework of the European Union, a major restructuring of defence-related industries has been taking place in recent decades, and these companies – faced with growing competition from other economic powers – have been demanding a more open and efficient market in order to improve competitiveness. Initially, the main EU Member States reacted with several *ad hoc* agreements⁷⁴.

Finally, on 17 June 2004 the European Council approved the “Headline Goal 2010” –recently adopted by the Council two months before – which established a new target for the development of the European Union’s military capabilities, drawing on the previous “Goal” designed at Helsinki in 1999 – but not attained – the experience of the first EU military operations and the doctrinal input of the “European Security Strategy” of 2003. It also called for action led by the EU Member States with the greatest military and economic capacity, perhaps through a model of structured cooperation⁷⁵. But there was still a major difference in pace between the development of the institutional framework of the EU’s Common Security and Defence Policy and the actual implementation of military and civilian capabilities, which revealed the lack of genuine political will in this field.

Security and Defence Policy since the treaty of Lisbon

The current Treaty of Lisbon, of 2007 and in force since 2009, expressly grants the EU a single international legal personality (Art.47 TEU), which recasts the three previously existing pillars and reduces the conventional instruments to two, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Both strengthen foreign policy, as Section V of the TEU is devoted to the Union’s external action-and specifically to the CFSP (Articles 21-46) – and the TFEU devotes Part Five (Articles 205-222) to this area, which includes the former Community policies with external projection – such as the common commercial policy, cooperation with third countries, humanitarian aid, international agreements and relations with other international subjects.

⁷⁴ Such as the Letter of Intent on the European Defence Industry (and its Framework Agreement), signed by the Defence Ministers of six Member States -Germany, France, Italy, Sweden, the United Kingdom and Spain- on 27 July 2000, to facilitate industrial restructuring and promote the competitiveness of the European defence technological and industrial base; or the Joint Organisation for Cooperation in the field of Armaments (OCCAR) – created by Germany, France, Italy and the United Kingdom – to improve the management of armaments cooperation programmes.

⁷⁵ FERNÁNDEZ SOLA, N. “El impacto de un eventual Triunvirato sobre la política de defensa de la Unión Europea”. *ARI (Real Instituto Elcano)*. 2004, no. 10, pp.9-12.

On the institutional front, for foreign policy the Treaty of Lisbon creates a specific post, the High Representative for Foreign Affairs and Security Policy, which merges the former posts of Commissioner for External Relations and High Representative for CFSP and which we will examine later.

The Treaty of Lisbon generally encourages the adoption of legislative acts by qualified majority in the Council (and the Council-Parliament codecision procedure becomes the ordinary legislative procedure), but maintains unanimity as the rule for adopting decisions in matters such as foreign relations and defence-including the CFSP in general and the Common Security and Defence Policy (CSDP) in particular. In fact, the powers to define and implement the CFSP are vested in the European Council and the Council acting unanimously (unless the treaties provide otherwise)⁷⁶, and they are implemented by the High Representative and the Member States⁷⁷.

The Treaty of Lisbon does not confer any new powers or functions on the Commission or the European Parliament, whose roles remain secondary⁷⁸. And external action remains an area excluded from the jurisdiction of the Court of Justice, although it has jurisdiction to review the formal legality of acts adopted and the legality review of Council decisions imposing restrictive measures on natural or legal persons⁷⁹.

The CFSP therefore remains an area of intergovernmental cooperation, since it is governed by specific rules and procedures (with the express exclusion of legislative acts)⁸⁰, and the Union's institutions do not act in this area in the same way as they do in Community policies.

In the sphere of the CFSP-CSDP, the Council – in its Foreign Affairs configuration, chaired by the High Representative – is the institution with decision-making and operational management powers, with control over the resources employed; it prepares the Union's external action (including the CFSP and CSDP), taking into account the objectives, general guidelines and strategic lines defined by the European

⁷⁶ Article 26.1 and 2 TEU. It should be recalled that the European Council -formally recognised as an EU institution by the Treaty of Lisbon but without legislative functions (Articles 13 and 15 TEU) - is composed of the heads of state or government of the Member States, its president and the president of the Commission; and the High Representative of the Union for Foreign Affairs and Security Policy participates in its work. The President of the Council shall be responsible for the external representation of the Union in the CFSP, without prejudice to the powers of the High Representative (Article 15.6 TEU).

⁷⁷ According to Article 24.1, 2nd paragraph, of the TEU, the CFSP is defined and implemented by the European Council and the Council "acting unanimously, except where the Treaties provide otherwise", and is executed by the High Representative and the Member States. See also Article 22.1, 2nd paragraph, TEU.

⁷⁸ This is recognised in Declaration No. 14 annexed to the Final Act of the Intergovernmental Conference.

⁷⁹ Article 275, 2nd paragraph, of the Treaty on the Functioning of the European Union.

⁸⁰ Article 24.1, 2nd paragraph, TEU.

Council and the proposals of the High Representative, and ensures that the EU's action is consistent between the different areas of its external action and between these and its other policies, together with the Commission and the High Representative⁸¹.

The Treaty on European Union requires the Council and the High Representative to ensure that the principles of solidarity, loyalty, consistency and common interest are respected by the Member States in the area of the CFSP (including the CSDP), while ensuring the unity, consistency and effectiveness of Union action⁸².

The European Security and Defence Policy is now called the Common Security and Defence Policy (CSDP)⁸³, but the Treaty of Lisbon includes the same wording as above:

“The competence of the Union in the field of the common foreign and security policy shall cover all areas of foreign policy and all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence”⁸⁴.

And indeed,

“The common security and defence policy shall include the progressive framing of a common policy on the defence of the Union”, which “shall lead to a common defence, when the European Council, acting unanimously, so decides”⁸⁵.

The CSDP thus continues to form part of the Common Foreign and Security Policy (CFSP) -and of the Union's external action- and must operate with the same principles and objectives⁸⁶, within its legal structure and under the authority of the High

81 Articles 16.6, 18.4, 21.3 and 26.2 TEU.

82 Articles 24.3 and 26.2 TEU. In this respect, the Treaty of Lisbon stresses the importance of the EU moving within the international legal framework, and thus “the Union's action on the international scene shall be based ... on respect for the principles of the United Nations Charter and international law”, and to this end “shall promote multilateral solutions to common problems, in particular in the framework of the United Nations” (Art. 21.1 TEU). Furthermore, “the European Union and its Member States shall remain bound by the provisions of the Charter of the United Nations and in particular by the primary responsibility of the Security Council and its Member States for the maintenance of international peace and security”. Declaration No. 13 annexed to the Final Act of the Intergovernmental Conference on the common foreign and security policy.

83 The Treaty of Lisbon devotes specific provisions to regulate the Common Security and Defence Policy in its Articles 42 to 46 TEU, and Protocols Nos. 10 and 11.

84 Article 24.1 TEU, and also Article 2.4 TFEU.

85 Article 42.2 TEU.

86 The principles of the Union's external action are set out in Article 21.1 TEU: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, respect for international law -in particular the principles of the United Nations Charter- and multilateral cooperation, in particular in the

Representative. However, the CSDP adds the gradual objective of the progressive definition of a common defence policy which may lead to a common defence (probably with integrated common or national armed forces) when the European Council has decided unanimously and the Member States adopt a decision to that effect in accordance with their respective constitutional requirements⁸⁷.

The Council and the High Representative are responsible for defining the CSDP. Decisions in this area (including on missions) are taken by the Council acting unanimously on a proposal from the High Representative or on the initiative of a Member State⁸⁸. And the implementation of this policy is the responsibility of the High Representative as a mandate holder and with the supervision of the Council, or certain bodies under its authority⁸⁹.

Indeed, the Treaty of Lisbon confers on the High Representative a central position and functions in the CSDP (and in the CFSP in general⁹⁰). Organically, he is a member of all the relevant institutions in the area of the EU's external action and, of course, its defence and security policy: he is the president of the Foreign Affairs Council (made up of the foreign ministers of the Member States), one of the vice-presidents of the Commission (thus controlling the budget of this EU institution in foreign policy and cooperation), and he participates in the meetings of the European Council, in addition to directing the European External Action Service⁹¹.

framework of the United Nations. And paragraph 2 of the same Article 21 reaffirms the objectives to be achieved in defining and implementing their common policies and actions in international relations, already set out in Article 3.5 TEU for this area: defence of their values and fundamental interests; consolidation and support for democracy, the rule of law, human rights and international law; peacekeeping, conflict prevention and strengthening international security in accordance with the United Nations Charter, the Helsinki Final Act and the Paris Charter; support for sustainable development, including environmental protection and the eradication of poverty; the integration of all countries into the world economy and free international trade; aid in the event of natural or human disasters; and the promotion of an international system based on strong multilateral cooperation and good global governance.

87 Articles 24.1 and 42.2 TEU.

88 Article 42.4 TEU.

89 Articles 18, 24.1 and 26.3 TEU

90 In fact, Article 18.2 TEU expressly states that the High Representative is at the head of the EU's common foreign and security policy.

91 However, in order to avoid any reluctance on the part of certain Member States, Declaration No. 14 annexed to the Final Act of the Intergovernmental Conference on the common foreign and security policy stresses "that the provisions relating to the common foreign and security policy, including those concerning the High Representative of the Union for Foreign Affairs and Security Policy and the European External Action Service, shall not affect the existing legal bases, responsibilities and powers of each Member State with regards to the formulation and conduct of its foreign policy, its national diplomatic service, its relations with third countries and its participation in international organisations, including membership of the United Nations Security Council by a Member State".

⁹²And on a functional level, in addition to the essential mandates of presenting proposals on the CSDP and taking charge of their implementation – for which purpose it coordinates the foreign and defence ministers from the Foreign Affairs Council – he is entrusted with many other functions: mediating if a state has severe difficulties in assuming a European commitment; proposing the special representatives appointed by the Council for matters connected with defence; holding regular consultations with the European Parliament on the main aspects of the CSDP; proposing the method of financing European missions in this field; directing, on behalf of the EU, the dialogue with third states and international organisations in these matters, coordinating the positions of the Member States and negotiating and concluding – if necessary – international treaties on behalf of and following a mandate from the Council; and expressing the European position to them, including the United Nations Security Council

As for the specific organisational structure in the field of the CFSP-CSDP, the Treaty of Lisbon creates or maintains a broad organisational chart: on the one hand, the Political and Security Committee has the general function of monitoring the international situation and contributing to the definition of policy through opinions addressed to the Council, either at the request of the Council or the High Representative or on its own initiative. It also monitors the implementation of agreed policies – without prejudice to the powers of the High Representative – and continues to exercise political control and strategic direction of crisis management operations under the responsibility of the Council and the High Representative⁹³.

For its part, the European Defence Agency -created in 2004 as an intergovernmental agency of the Council of the EU with the task of supporting the Council and the Member States in their efforts to improve the Union's defence capabilities in the field of crisis management and of supporting the European Security and Defence Policy- was refocused to promote permanent cooperation between the Member States in the progressive development of their military capabilities, including scientific and technical research, technological development, arms production and acquisition, etc. To this end, the Agency is responsible for identifying operational requirements, promoting measures to satisfy those requirements, contributing to identifying and implementing measures to strengthen the industrial and technological base of the defence sector, participating in defining a European capabilities and armaments policy, and assisting the Council in evaluating the results achieved. The fulfilment of its functions is based on intergovernmental cooperation, to take advantage of the synergies of the military industries of the participating States (all except Denmark) and, thus, to harmonise the national productive and technological means through a functional distribution of the productive process that makes investments profitable -public and private- and favours

⁹² Article 34.2 TEU: "When the Union has defined a position on a subject which is on the agenda of the United Nations Security Council, those Member States which are members of the Council shall request that the High Representative be invited to present the Union's position.

⁹³ Articles 38 and 43.2 TEU, as already indicated in Article 25 of the Treaty of Nice

the formation of economies of scale⁹⁴. It therefore acts above all as a catalyst for such inter-state cooperation.

Certainly, the European Union's capacity in defence industry policy can find some accommodation in the TFEU, as the legal basis of the EU's industrial policy is found in Article 173 thereof, with the aim of improving the competitiveness of the Union's industry. It is also based on Article 352.1 as a general clause, which applies when "action by the Union within the scope of the policies defined in the Treaties is deemed necessary to attain one of the objectives of the Treaties, but the necessary powers have not been provided for in the Treaties", i.e. to cover a lack of competence⁹⁵. However, it should be noted that there are several restrictive provisions in this area: this Article cannot "serve as a basis for achieving objectives in the field of the common foreign and security policy and any act adopted in accordance with this Article shall respect the limits set out in the second paragraph of Article 40 of the Treaty on European Union"⁹⁶; and "any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material"⁹⁷.

On the other hand, the European External Action Service -provided for in the Treaty of Lisbon and created in 2010⁹⁸- is the EU's main body for its international relations in all Union policies with an external dimension – CSDP included – (although the management of these remains the responsibility of the relevant institutions), and incorporates the main bodies of the EU's defence policy, such as the Political and Security Committee, the Military Committee, the General Staff and the Joint Situation Centre for Intelligence Analysis⁹⁹. The Service is headed by the High Representative and is the first of a multinational nature, comprising officials from various EU institu-

94 Art.45 TUE.

95 LIÑÁN NOGUERAS, D.J. "Ciudadanía europea y crisis: apuntes para una revisión conceptual" in D.J. LIÑÁN NOGUERAS, A. SEGURA SERRANO and C. GARCÍA SEGURA (coords.), *Las crisis políticas y económicas: Nuevos escenarios internacionales*, Madrid, Tecnos, 2014, p.86; and VILCHEZ VIVANCO, M. "La industria de defensa en el marco europeo". *Revista Internacional de Doctrina y Jurisprudencia*. 2018, vol.19, pp.5-6.

96 Article 352.4 TFEU.

97 Article 346.1.b TFEU.

98 Article 27.3 TEU. This service was established by the Council in its Decision 2010/427 of 26 July 2010 on the organisation and functioning of the European External Action Service (OJ 2010 L 201, p.30).

99 As explained above, the Military Staff is responsible for assessing and monitoring situations, issuing early warnings in the military and defence field, strategic planning and supervising the military aspects of the EU's external security and defence missions; it has a civilian and military composition, with experts and representatives of the armed forces/defence ministries of the Member States and officials of the Council of the EU. For its part, the current EU Intelligence and Situation Centre (EU INT-CEN) is the information service of the High Representative; its functions relate to the CFSP-CSDP and the national intelligence services of the Member States participating in the CSDP cooperate with it.

tions (European Commission, General Secretariat of the Council) and from national diplomatic services of the Member States.

There are also two other EU entities in this field: firstly, the Institute for Security Studies, an agency from the WEU, with the aim of promoting a common European security and defence culture¹⁰⁰. Second, the Security and Defence College functions as a network of academic institutions in the field of the CSDP in order to pool the national training processes of the Member States and direct them towards progressive convergence.

The Treaty of Lisbon provides for mutual solidarity and collective defence between Member States: on the one hand, the TFEU expressly includes a “solidarity” clause:

“If a Member State is the subject of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall, at the request of their political authorities, assist it”, and “The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, for example to prevent a terrorist threat”¹⁰¹.

On the other hand,

“If a Member State is the subject of armed aggression on its territory, the other Member States shall give it aid and assistance by all the means in their power, in accordance with Article 51 of the Charter of the United Nations... without prejudice to the specific character of the security and defence policy of certain Member States” and recalling that “commitments and cooperation in this area shall continue to be consistent with commitments under the North Atlantic Treaty Organisation, which, for those Member States which are members of it, remains the foundation of their collective defence and the forum for its implementation”¹⁰².

The TEU establishes a novel mechanism, “permanent structured cooperation”, whereby Member States with the highest criteria for military capabilities and which have the most binding commitments to perform the most demanding missions can establish an institutionalised channel for cooperation and coordination within the EU¹⁰³, which is a notable innovation in common European defence. The idea is to open up the possibility for those Member States that expressly wish to do so to set up advanced cooperation with commitments and regulated operations within the Union.

¹⁰⁰ The residual functions of the Western European Union (WEU), an organisation that ceased to exist in 2011, were absorbed by the EU through the European Defence Agency.

¹⁰¹ Article 222.2 and 1 TFEU As indicated in Article 222.3 TFEU, a Council Decision will define the arrangements for implementing this solidarity clause, and if this Decision has defence implications, the Council will act unanimously in accordance with Article 31.1 TEU.

¹⁰² Article 42.7 TEU.

¹⁰³ Articles 42.6 and 46 TEU.

But this permanent structured cooperation will not affect the provisions of Article 43 of the TEU on field missions - established and controlled by the Council.

This was the beginning of a process to remove the traditional resistance of some Member States to intense cooperation in sensitive areas (such as defence). Indeed, quasi-military structures have been established in the EU, such as a kind of permanent headquarters officially called the Military Planning and Conduct Capability (MPCC), led by the Director-General of the General Staff and under the control and strategic guidance of the Political and Security Committee.

Another important area in this field is exports: Council Common Position 2008/944/CFSP of 8 December 2008¹⁰⁴ defines common rules governing the control of exports of military technology and equipment; and Council Decision (CFSP) 2018/101 of 22 January 2018 promotes effective controls on arms exports¹⁰⁵.

In general, the EU export control regime for dual-use items is regulated by Council Regulation (EC) 428/2009/EC of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items¹⁰⁶. This regulation establishes common control standards, a list of these products, and the coordination and cooperation necessary for their consistent application throughout the EU. The Commission has regularly taken care to evaluate the functioning of this system, for example in 2011 with a Green Paper on the EU Dual-Use Export Control System¹⁰⁷.

With regards to the creation of a European defence equipment market, a strategy for the development of a European Defence Technological and Industrial Base (EDTIB) is one of the priority objectives of EU defence industry policy¹⁰⁸. Hence, a voluntary intergovernmental mechanism to ensure competition in defence equipment procurement in the European market was set up in 2008 on the basis of a Code of Conduct on defence procurement of EU Member States participating in the Europe-

104 OJ L 335 of 13 December 2008, pp.99-103. This Common Position replaced the EU Code of Conduct on Arms Exports of 5 June 1998 (text at <http://archivo-es.greenpeace.org/espana/Global/espana/report/other/c-digo-de-conducta-de-la-ue.pdf>).

105 OJ L 17 of 23 January 2018, pp.40-47.

106 OJ L 134 of 29 May 2009, pp.1-269.

107 *Green Paper. The dual-use export control system of the European Union: ensuring security and competitiveness in a changing world* - COM(2011) 393 final of 30 June 2011 And in this respect also see the Communication from the Commission to the Council and the European Parliament, "Review of export control policy: ensuring security and competitiveness in a changing world" COM(2014) 244 final of 24 April 2014.

108 See CESEDEN. *La industria y la tecnología en la Política Europea de Seguridad y Defensa*. Madrid, Ministry of Defence, 2008; and the subsequent contribution by BARTRINA, J.A. and RAMOS, C. "El desarrollo de una base tecnológica e industrial europea de defensa: una perspectiva desde España" in AA.VV. *La industria de defensa en España tras los consejos europeos de diciembre de 2013 y junio de 2015*. Madrid, Escuela Superior de las Fuerzas Armadas, 2015, pp.151-188.

an Defence Agency, adopted on 21 November 2005¹⁰⁹. Another relevant instrument in this respect was the Code of Best Practices in the Supply Chain of 27 April 2005¹¹⁰. But the integration of national markets in this industrial sector requires legal and technical harmonisation of defence equipment, and the portals of the European Defence Standards Information System¹¹¹ and the European Defence Standards Reference System¹¹² were created for this purpose. The Commission also adopted in 2013 an Action Plan to improve the efficiency and competitiveness of the European defence industry, with concrete actions in the various relevant areas¹¹³.

In the field of defence procurement and transfer, the Commission presented in 2004 the Green Paper on defence procurement¹¹⁴, with the aim of maximising the use of resources in this sector and the competitiveness of European industry. The fact is that the public procurement rules¹¹⁵ were not suitable for security and defence matters, and so more transparent provisions were established¹¹⁶, meaning that the common procurement procedure is the negotiated one with a published contract notice and specific rules for the security of sensitive information, security of supply and subcontracting. At the same time, the conditions and procedures for their transfer were simplified and harmonised by creating a uniform and transparent licensing system – of three types¹¹⁷.

109 See www.eda.europa.eu/docs/documents/CoC.pdf [accessed on 28 September 2019].

110 This Code of Best Practice was jointly adopted in April 2006 by the European Defence Agency and the Association of the European Defence, Security and Aerospace Industries. See www.eda.europa.eu/docs/documents/CoBPSC_final [accessed on 28 September 2019]. In November 2005 the European Defence Agency approved the “Intergovernmental Regime on the promotion of transparency and free competition in defence procurement”, which was governed by the principles set out in its two Codes of Conduct.

111 See <https://edsis.eda.europa.eu/>

112 See <http://edstar.eda.europa.eu/> This Reference System replaced the European Handbook for Defence Procurement, created by the European Commission in 2008.

113 Such an Action Plan can be found in the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions “Towards a more competitive and efficient security and defence sector” (COM(2013) 0542) of 24 July 2013, pp.6-19.

114 European Commission Communication COM/2004/0608 of 23 September 2004. And on this Green Paper, the European Parliament adopted its resolution 2005/2030(INI) of 17 November 2005 (OJ C 280 E, 18 November 2006, pp.463-467).

115 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

116 Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security.

117 Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community.

The current framework for European Defence industry cooperation

In 2016 the current European Security Strategy was approved under the title “Global Strategy for the Union’s Foreign and Security Policy”, replacing that of 2003. It activated an accelerated process of strengthening cooperation between Member States in the field of security and defence to promote coordination between them, increased investment and cooperation in the development of defence capabilities¹¹⁸. Thus, some important instruments were created in this direction:

1. In November 2016 the European Commission presented the European Defence Action Plan (EDAP), with the aim of developing defence technologies through the allocation of funds for joint research¹¹⁹. This Action Plan arose because of the challenges posed by increased external competition, a fragmented non-converging European industry, and growing threats to European security. In fact, the segmentation of the industrial sector is very common in this area, and the TFEU allows each Member State to establish the national restrictions on free competition in the production and trade of defence material that it considers necessary for the protection of its essential security interests¹²⁰; however, the TFEU has limited the scope of these restrictions, in that they do not operate, for example, when it comes to civilian and military dual-use material¹²¹.

118 See ROLDÁN BARBERO, J. “La Europa de la Defensa pasa a la ofensiva”. *Revista General de Derecho Europeo*. no. 43, 2017.

119 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, “European Defence Action Plan”, COM(2016) 950 final, 30 November 2016. This Action Plan is based on several pillars: the European Defence Fund; boosting investment in the defence procurement process; and the single market for defence. See the previous Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards a more competitive and efficient security and defence sector”. COM(2013) 542 of 24 July 2013 with an action plan to improve the efficiency and competitiveness of the European Defence Industry. See ÁLVAREZ, G. and IGLESIAS, J. “El Plan de Acción Europeo de Defensa, un impulso a la industria de defensa y un medio de integración de la Unión Europea”. *Boletín I.E.E.E.* 8/2018, of 22 January 2018, p.392 and ff.; and LÓPEZ DE, J. “La Agencia Europea de Defensa como plataforma para el progreso de la Política Común de Seguridad y Defensa”. *Análisis GESI (Grupo de Estudios en Seguridad Internacional, Universidad de Granada)*. 15/2018, 20 March 2018, pp.14-15, at <http://www.seguridadinternacional.es/?q=es/content/la-agencia-europea-de-defensa-como-plataforma-para-el-progreso-de-la-pol%C3%ADtica-com%C3%BAn-de> [accessed on 19 September 2019].

120 Article 346.1.b. TFEU.

121 For example, see Judgement of the Court of Justice (Fourth Chamber) of 7 June 2012 (Case C-615/10), ECLI:EU:C:2012:324. In fact, Article 346.1.b. TFEU indicates *in fine*: “these measures must not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.” And on this subject see PARDO GARCÍA-VALDECASAS, J.J. et al., *La Contratación y el Artículo 346 del Tratado de funcionamiento de la*

2. The European Defence Fund, created to provide economic incentives for defence cooperation by co-financing projects from the EU budget; and has two phases, one for research and the other for capabilities, with a European Defence Industrial Development Programme¹²². The purpose is to strengthen European defence as a complement – not an alternative – to NATO.
3. In 2017 the Preparatory Action for Defence Research (PADR) was launched -with a duration of three years- as part of the European Defence Plan and financed by the aforementioned European Fund: its aim is to promote scientific and technological advances in defence and security in the Member States and their industries, similar to how the Horizon 2020 (H2020) projects -the European Commission's civilian research, development and innovation programme – have operated¹²³ – and in 2021 a European Defence Research Programme and a post-H2020 Framework Programme will be launched simultaneously, which will probably continue to include security among its thematic areas or challenges. Certainly, the EU has funded civilian research above all, but some technological areas – such as dual-use materials or information and communication technologies – have had an impact on improving the technological base and competitiveness of the defence industry.

In this process, the competent Ministers of 23 Member States signed a joint notification on Permanent Structured Cooperation on Security and Defence (PESCO) on 13 November 2017 and sent it to the High Representative and the Council (joined by two other Member States on 7 December of that year), with a list of twenty common commitments on defence investment, capability development and operational readiness, and a set of proposals on PESCO principles and regulation¹²⁴.

On 11 December 2017, the Council adopted the decision establishing the above-mentioned PESCO and the list of participants – 25 of the 28 EU member states (all except

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Unión Europea. Centro Superior de Estudios de la Defensa Nacional (CESEDEN) Working Paper, 2/2017, at www.ieee.es/Galerias/fichero/docs_trabajo/2017/DIEEET02-2017_Contratacion_Art346_TratadoFuncionamiento_UE.PDF [accessed on 5 September 2019].

¹²² Regulation (EU) 2018/1092 of the European Parliament and of the Council of 18 July 2018 establishing the European Defence Industrial Development Programme, with the objective of supporting the competitiveness and innovation capacity of the EU defence industry, to operate in 2019 and 2020 with a budget of 500 million euros and whose beneficiaries and subcontractors participating in the action are public or private companies established in the Union (OJ L 200 of 7 August 2018, pp.30-43).

¹²³ LÓPEZ DE, J. *cit.*, p.3. The H2020, which has been in operation since 2014, is a multidisciplinary programme for challenges that explicitly or implicitly referred to external security. *Ibidem*, p.12 et seq. The H2020 has a challenge dedicated to “Secure Societies”, aimed at promoting research to preserve the freedom and security of the EU and its citizens.

¹²⁴ See the joint notification in OJ L 331 of 14 December 2017, pp.65-66.

Denmark, Malta and the United Kingdom after Brexit)¹²⁵ – a cooperative structure with the Treaty of Lisbon as its legal basis¹²⁶. Its avowed aim is to deepen defence cooperation between Member States with the capacity and willingness to jointly strengthen defence capabilities in order to offer them to EU military operations and thus reinforce the EU's strategic autonomy while maintaining the national sovereignty of the Member States. The aim is to move towards a military and defence European Union that enhances its international influence, improves the protection of its citizens and optimises the efficiency of expenditure in this field.

The importance of PESCO is that, although membership is voluntary, the commitments made by its participating States are legally binding. However, it is these participants who take decisions on PESCO in the Council, and it is understood that they will do so without prejudice to the preservation of their national sovereignty or to the specific character of the security and defence policy of certain Member States of the Union¹²⁷. Indeed, the military capabilities developed in the framework of PESCO remain under the power and control of the Member States, which may decide to use them for operations of other international organisations in which they also participate, such as NATO or the UN.

PESCO is a permanent framework for advanced cooperation in security and defence and simultaneously involves a structured process as an element for promoting integration in this field, by improving cooperation in investment, developing military capabilities and their operational readiness – reducing the differences between national armaments systems – enhancing operational coordination of their armed forces and increasing industrial competitiveness.

In terms of its structure, PESCO is organised on several levels:

1. On the one hand, the Council of the EU is responsible for its general political direction, decision-making and the system for assessing the degree of fulfilment of the commitments made by its participants. In this area, only the States participating in PESCO have voting rights in the Council and a unanimous vote by all of them is required for a decision to be taken (but decisions on PESCO membership -suspension of the status of participating State

125 Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation and determining the list of participating Member States (OJ L 331, 14 December 2017, pp.57-77). On PESCO, see the brilliant studies by ALDECOA LUZÁRRAGA, F. “La Cooperación Estructurada Permanente: haciendo creíble la Alianza Defensiva de la Unión Europea, sin perder la condición de potencia normativa y diplomática”. *Anuario Español de Derecho Internacional*. vol.34, 2018, pp.1003-1020; and LÓPEZ-JACOISTE DÍAZ, E. “La nueva Cooperación Estructurada Permanente: ¿impulso definitivo para una verdadera Política Común de Seguridad y Defensa en Europa?”. *Anuario Español de Derecho Internacional*. 2018, vol.34, pp.1075-1097.

126 Articles 42.6 and 46 TEU and Protocol No. 10 on permanent structured cooperation.

127 Recognised in Article 42.7 TEU, *in fine*, and also in Declarations 13 and 14 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

and entry of new participating States- are taken by qualified majority). The Council has developed the legal regulation of PESCO: in March 2018 it adopted a Recommendation establishing a programme for the implementation of this Permanent Structured Cooperation¹²⁸; and on 25 June 2018 it approved a Decision on common rules of governance for projects, including the duty to submit annually to the Council detailed information on the progress and objectives achieved by each project¹²⁹.

2. At the level of projects developed within the framework of PESCO, each project is managed by the participating Member States with the supervision of the Council. As these projects often have very high costs, they can obtain funding from the European Defence Fund. The PADR and PESCO highlight the need for powerful defence research and technological development projects in order to acquire common capabilities within the EU and provide appropriate means for their operational missions.
3. The PESCO Secretariat is provided jointly by the European Defence Agency and the European External Action Service - including the Military Staff.

With regards to the system for evaluating the implementation of PESCO, this is based on the obligation assumed by each participating State to draw up an annual national implementation plan detailing how it is meeting its binding commitments, which it is to communicate to the other participating States. On this basis, the PESCO Secretariat analyses the national plans sent and the High Representative submits an annual report on PESCO to the Council. In this way, the Council evaluates each year the functioning of PESCO and the fulfilment of the commitments of its participating States, and initiates the process of approving new projects and updating existing ones.

Indeed, the degree of success of PESCO depends on the projects developed within its framework: to be approved, a project is required to provide a high European added value for the EU's operational and capability needs, in accordance with the priorities established by the Member States in the Union's Capability Development Plan and the Annual Coordinated Defence Review (CARD)¹³⁰. Throughout 2018 – in March and November – the Council approved the first 34 projects and the participating states of each, with clear objectives in highly sensitive areas for European security and defence, such as the creation of a centre of competence for missions in training, military disaster relief and improvement of maritime surveillance, joint medical command, rapid cyber-reaction teams and mutual assistance in cybersecurity, European military network on the space environment, common intelligence school, etc.

¹²⁸ Council Recommendation of 6 March 2018 on a programme for the implementation of permanent structured cooperation (PSC) (OJ C 88 of 8 March 2018, pp.1-4).

¹²⁹ Council Decision (CFSP) 2018/909 of 25 June 2018 establishing a common set of governance rules for projects in the framework of permanent structured cooperation (PSC) (OJ L 161 of 26 June 2018, pp.37-41)

¹³⁰ This Annual Coordinated Defence Review (CARD) is conducted by the European Defence Agency through the examination of national defence expenditure plans.

Third States may exceptionally be accepted into PESCO projects, but this possibility is first examined by the States participating in each project with regards to a particular third State which meets the conditions required, and then it is the Council which decides on their admission; if it does so, then the legal basis will be an EU administrative arrangement with the third State for its participation in that PESCO project, to be concluded in accordance with the Union's procedures.

All these recent EU activities are underpinned by a growing awareness among European citizens of the need to share a European defence culture leading to a common defence policy; this should prevent duplication of efforts and resources by the EU and its Member States in dealing with recent security threats¹³¹.

In this regard, the European Defence Agency has sought to take the lead, especially in the acquisition and pooling of industrial capabilities in the defence sector, with initiatives such as “pooling and sharing” between Member States in collaborative research projects, the European Industrial Technology Base (established in 2017), the development of dual-use technologies (civilian and military) or cooperation in projects with other relevant bodies, whether of the EU -such as the European Space Agency – or of the Member States – such as the Strategic Research Agencies¹³².

Indeed, the regulatory act establishing the Agency already empowered it to manage specific projects or programmes of varying scope -categories A and B- with their corresponding specific budgets paid for by the participating States, as well as research and technology (R&T) studies financed directly by the Agency - which therefore retains the intellectual property of its products¹³³. Thus, a Pilot Project, managed by the European Defence Agency with EU funds, was established in 2016 to finance R&T projects for the development of military capabilities and thus strengthen the defence industry, with the active participation of all the actors involved: EU institutions -such as Parliament and the Commission – companies – as project implementers- and national defence ministries - as end users of the results.

In fact, research and development in these areas has an impact on a large number of companies directly or indirectly connected with defence industrial production, which can help to finance it, renew the production process and improve their levels of competitiveness.

Therefore, in recent years the convergence of the EU Member States in security and defence matters has been fostered owing to their interdependence in shared challeng-

¹³¹ Thus, see LÓPEZ DE, J., *cit.*, p.2., which refers to the European Parliament's Eurobarometer; and NANCY, J. *A dos años de las elecciones europeas de 2019. Eurobarómetro especial del Parlamento Europeo*. European Union, April 2017, pp. 25-26 and 35, at www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2017/two-years-until-the-2019-european-elections/analytical-synthesis/es-analytical-synthesis-two-years-until-the-2019-european-elections.pdf [accessed on 28 September 2019].

¹³² LÓPEZ DE, J., *cit.*, pp.9-10.

¹³³ See Articles 19, 20 and 13(3)(ii) of Council Decision (CFSP) 2015/1835 of 12 October 2015.

es, threats and needs, although until now it has been a policy of intergovernmental cooperation, not a common supranational policy. Similarly, the necessary coherence requires that a security and defence policy be based on two closely coordinated pillars: the definition of strategies (clear strategic objectives) and the acquisition of capabilities (above all military), but the EU has not taken much care of this connection¹³⁴.

Similarly, practice has shown the importance of involving purely Community institutions in the effective implementation of the Common Security and Defence Policy: enshrining the principle of “coherence” made the CSDP a cross-cutting policy¹³⁵, whose consolidation required the active contribution of the European Commission in several areas, such as the management of the budget linked to the CSDP, the connection of security and defence with some material Community areas -energy, immigration, economy- and the involvement of the bodies involved in submitting proposals on the CSDP to the Council¹³⁶.

For its part, the European Parliament has held numerous joint meetings with other Union institutions and bodies -such as the Council, the Commission and the European External Action Service – approved periodic resolutions to promote the various aspects of European defence¹³⁷ – and discussed various reports on the importance of combining defence-related policies in research and development projects as a way of reflecting the cross-cutting nature of the CSDP¹³⁸. Already in 2015 Parliament began to allocate budget lines for security and defence research, as well as transferring funds to

134 VERGARA MELERO, J.A. *Capacidades militares y defensa común en el ámbito de la Unión Europea (1999-2014)*, PhD thesis, Universidad de Granada, Granada, 2015, p.II et seq.

135 Joint Communication – from the European Commission and the High Representative – to the European Parliament and the Council “The EU’s integrated approach to external conflicts and crises” of 11 December 2013 (JOIN(2013) 30 final).

136 See MARTÍ SAMPERE, C. “Implicaciones de los fondos y programas de la Comisión para la investigación y desarrollo de las capacidades militares de la UE”. *Analysis by the Real Instituto Elcano*. no. 93, 21/11/2017, in www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/defensa+y+seguridad/ari93-2017-martisempere-programmes-commission-research-development-skills-military-eu [accessed on 29 September 2019]; and LÓPEZ DE, J., *cit.* p.6.

137 Thus, in its resolution on the implementation of the CSDP (2012/2138(INI)) of 22 November 2012 (OJ C 419 of 16 December 2015, pp.124-137), the Parliament reiterated the need to consolidate the defence technological and industrial base in order to strengthen European capabilities; in its resolution on the European defence technological and industrial base (2013/2125(INI)) of 21 November 2013 (OJ C 436 of 24 November 2016, pp.26-34), it called for strengthening European industrial cooperation and supporting CSDP missions with research and development on the basis of the Horizon 2020 programme; in its resolutions 2015/2037(INI) of 21 May 2015 (OJ C 353 of 27 September 2016, pp.74-81) and 2015/2272(INI) of 13 April 2016 (OJ C 58 of 15 February 2018, pp.109-118), Parliament called for an effective and ambitious CFSP with a shared vision of European interests; and in its resolution 2016/2052(INI) of 22 November 2016 (OJ C 224 of 27 June 2018, pp.18-28) proposed the urgent creation of a European Defence Union.

138 LÓPEZ DE, J., *cit.*, p.7.

the European Defence Agency for the same purpose. Thus, the financing of the CSDP has become the logical channel for increasing the participation and supervision by the Commission and Parliament.

Effective collaboration in the military industry for capability development would bring major budgetary benefits, investment recovery and job creation. It would also improve R&T capabilities -avoiding duplication of programmes- and strengthen European industry and its level of competitiveness. To this end, real coordination of European and national efforts should be achieved.

However, national policies in the oligopolistic defence industry have usually been protectionist, not only in matters of national sovereignty and preservation of defensive autonomy, but also in resistance to sharing advanced defence technologies; all this has prevented structured European cooperation in this field. Thus, for decades, collaboration between European States in the defence industry has taken shape only in certain specific projects, which have often encountered problems and delays in their implementation, largely because of the requirement imposed by the contributing States to receive a full return on their investment: that each national industry should receive a share of the work and employment equivalent to the value of its economic contribution to that cooperation programme¹³⁹. These traditional misgivings of the Member States to protect their own companies and have defensive independence have hindered the emergence of economies of scale, synergies in logistics and equipment, the operability of EU forces and, in general, the acquisition of military capabilities.

Opportunities and weaknesses of Defence industrial policy

The European Defence Fund in the face of new political and technological challenges

As we have pointed out, the European Union's industrial defence policy is characterised, not as a result but as a process of a whole series of initiatives that began to address the issue in greater depth with the Global Strategy of the European Union¹⁴⁰ of June 2016 and the launch of the European Defence Action Plan (EDAP), all of which are materialised through Permanent Structured Cooperation. The establishment of the Annual Coordinated Defence Review (ADCR), aimed at increasing the transparency of European defence capabilities, has made it possible to improve the detection of shortfalls and to optimise defence investment planning. The Military Planning and Conduct Capability (MPCC) has begun the path towards greater synchronisation in

¹³⁹ See CALCARA, A. "Cooperation and conflict in the European defence-industrial field: the role of relative gains". *Defence Studies*. 2018, vol.18, no. 4, pp.474-497.

¹⁴⁰ See http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf [accessed on 30 September 2019].

defence and faster and more coherent operational implementation. These two frameworks represent an effort to increase the political visibility of defence capabilities and to refine the appropriate analysis of what needs to be improved or maintained in this public policy.

In view of the United States' technological-military revolution through its *Third Offset Strategy*, the resurgence of competition between major powers, hybrid threats and a highly competitive geo-economy, the European Union set itself the goal of achieving greater strategic autonomy. The European Union's defence industrial policy is seen as an essential axis. However, before going into detail on the issue, it is important to note brief differences between the European Union's industrial policy and its defence industrial policy, which are two distinct policies. Firstly, at a regulatory level, the legal basis of the European Union's industrial policy is Article 173 of the TFEU, which seeks to improve the competitiveness of Community industry through the implementation of measures across several sectors. By contrast, defence industrial policy, although based on the same article, has been effectively developed thanks to Article 346.1 of the same Treaty, which has made it possible to make progress towards internal market rules on the acquisition of defence equipment. Article 346.1 states that "any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material". Likewise, defence industrial policy is based on Article 352 of the TFEU, which contemplates those cases in which the EU treaties do not make special mention of the powers of action necessary for this purpose, but which are necessary to achieve some of the Union's objectives. Second, another of the main differences is that defence industrial policy is developed under the auspices of the European Defence Agency, in order to support the policies of the Common Security and Defence Policy, which is part of the Common Foreign and Security Policy. Meanwhile, the EU's general industrial policy covers a whole range of industries which are managed on a decentralised basis by the Directorate-General best suited to the nature of the subject, such as the digital industry, the energy industry, the nuclear industry, and others.

The specificity of defence industrial policy points to the need to complement and consolidate the collaborative efforts of the Member States to develop defence capabilities through a defence industry characterised¹⁴¹ as competitive, based on innovation and marked by efficiency. To this end, the European Defence Fund was launched in June 2017 with an initial amount of 5.5 billion euros¹⁴² with two main objectives: to mitigate the fragmentation of the internal market¹⁴³, and to give a boost to the demand

¹⁴¹ See www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/ITRE/DV/2018/06-18/9-provisional-agreement-edidp-ES.pdf [accessed on 10 September 2019].

¹⁴² See https://europa.eu/rapid/press-release_IP-17-1508_es.htm [accessed 8 September 2019].

¹⁴³ ARTEAGA, F. y SIMÓN, L. "El Fondo Europeo de Defensa y el futuro de la industria española". *Elcano Policy Papers*. Madrid, Real Instituto Elcano, 2019.

of a sector that was in the process of falling. In this way, transaction costs are reduced and greater channels of communication are built between demand – the Member States- and supply – the industries in the sector.

The European Defence Fund is divided into two sections: research – *Preparatory Action for Defence Research* (PADR)- and development and procurement – *European Defence Industrial Development Programme* (EDIDP). It is estimated that increased defence cooperation would lead to a reduction of up to 30% in annual defence spending¹⁴⁴. In fact, the European Union's Multiannual Financial Framework for the period 2021-2027 identifies increased defence and security spending as one of the three priorities in the negotiations on this framework¹⁴⁵, which is still under negotiation. If approved, 4.1 billion euros would be allocated to research and 8.9 billion euros to development and acquisition.

However, when analysing the opportunities and weaknesses of this defence industrial policy, the monitoring, evaluation and verification of executive programmes and funds are important, but insufficient. To this end, it is necessary to take a critical look at the challenges this policy faces on the basis of two additional factors: the high dependence on the European Defence Agency for the correct implementation of programmes and potential risks; and the differences in the defence culture of each Member State and the implications for building a “community strategic culture” that complements the strategic autonomy we have been discussing up until now.

We focus on these two factors because, while many others could be taken into account in the evaluation of defence industrial policy at the Community level, the purpose of this article is to focus on their congruence for the Spanish case. Specifically, through the opportunities to which Spain could avail itself, or those initiatives in which it is already involved and from which new learning can be taken to channel the Spanish defence conglomerate in the framework of the opportunities offered by the European Industrial Defence Policy. That is why we will end this section with a proposal for improvements, all of which are linked to possible opportunities aimed at positioning Spain.

From an agency and accountability perspective

The amount of funding proposed for the Multiannual Financial Framework for the period 2021-2027 is a clear symbol of the impetus of the European Union and its Member States to increase strategic autonomy by channelling better defence capabilities and generating a shared culture of endogenous production. However, once it

144 Report from the Munich Security Conference, 2017, at <https://securityconference.org/en/publications/munich-security-report/munich-security-report-2017/> [accessed on 2 September 2019].

145 See www.consilium.europa.eu/es/policies/eu-budgetary-system/multiannual-financial-framework/mff-negotiations/ [accessed on 9 September 2019].

starts, it will be the organisational and resource capacity of the managing agencies that will determine the degree of effectiveness and success of the implementation of the different programmes, as well as the community agenda of priorities derived from the pandemic originated by the COVID-19.

Since its establishment in 2004, the European Defence Agency has been responsible for promoting collaboration between companies and countries in order to provide greater military capabilities. Since these initiatives were launched, they have become more important, particularly in terms of *coordinating* national defence plans and ensuring *coherence* – as mentioned in the previous section – between the various plans.

In this sense, although its mandate is executive, its knowledge of the subject and the need to respond to a long list of proposals has given it added value in providing advice on decision-making. Understanding this leadership is important because of the impacts it has on what we have wanted to call the “sequential governance of the European Union’s defence industry”. In other words, for strategic autonomy to be possible, each of the requirements must be met step by step in order to guarantee transparency and effective compliance with the programmes. The first phase is therefore the identification of capabilities – through the *Capabilities Development Plan* or CDP-, followed by the search for cooperation opportunities – through the CARD – ending with planning and implementation through development and acquisition – through PESCO and the European Defence Fund.

The European Defence Agency has received several criticisms in recent years: firstly, due to delays in delivery and execution times¹⁴⁶. Secondly, because the maintenance of the Value Added Tax -or VAT- did not encourage cooperation between countries for the development of common programmes. Thirdly, by not taking into account the differences in positioning and size of each of the Member States in the industrial network, both international and European.

However, since 2017 the Agency has taken a step forward and started working to generate investment incentives by improving the return per euro allocated to defence. However, it has not yet succeeded in promoting *fair retour*¹⁴⁷ – a tacit agreement whereby each Member State gives priority to having an optimal individual net financial position vis-à-vis the Community budget. In other words, the Agency is promoting improvements in the *outputs* or results of the process, making it an interesting framework in which to invest; but it is not reducing the structural inequality on which it is initially based, it is not making those countries with a smaller industrial size find incentives to join these projects. It favours minimising costs and maximising profits, making it attractive to investors, but these are the same players who have traditionally

146 FONFRÍA MESA, A. “La Agencia Europea de Defensa y la colaboración industrial en defensa” (68/2015). Instituto Español de Estudios Estratégicos, Ministry of Defence, 2019.

147 RICHTER, S. “Facing the Monster ‘Juste retour’: On the Net Financial Position of Member States vis-à-vis the EU Budget and a Proposal for Reform”. *WIIW Research Report*, 2008, no. 348.

participated, without the incorporation of other new states. Thus, the system is maintained, albeit at a lower cost.

Another criticism received concerns taxation. However, progress has been made, and in 2017 the Agency's Annual Report indicates that, for the first time, VAT exemption was applied to two *ad hoc* projects of the Agency¹⁴⁸. The same exemption policy would apply to four other projects to be completed in 2018. The potential of this incentive is significant and can help those states that do not traditionally invest in defence programmes, at least collaboratively, to do so. The creation of the Financial Mechanism for Co-operation -or FCM- by the European Investment Bank is promoting an inclusive model to reduce the differential of "two-speed Europe", at least in the field of defence industrial policy. However, as it is so recent, it will take several years to evaluate its effectiveness.

On the other hand, PESCO plays an important role in defining responsibilities. It is based on two components: binding commitments from Member States, and specific projects involving the private sector. Both elements require either an operational nature or a capacity. It is here that the European Defence Agency is ceding part of its leadership. For the capabilities dimension, it is the Agency itself that is responsible for managing it. However, the European External Action Service is responsible for the operational aspects of PESCO¹⁴⁹. This allows for a more coherent framework, with top-down coordination, and allows for other, less hierarchical structures to be involved in the future.

From a defence culture perspective

Since the birth of the European Defence Agency, the most important and longest running collaboration programmes have been refuelling in the air, maritime surveillance, the fight against improvised explosive devices, the European air transport fleet, the availability of helicopters for emergencies, and the SESAR project, aimed at reviewing air traffic management.

However, there have been major differences in the participation of Member States in PESCO projects, as indicated in the 2019 Annual Book of the EU Institute for Security Studies¹⁵⁰. We will divide the whole into three groups: firstly, those countries with a low participation rate, which represent the majority of Member States: for

148 See <https://eda.europa.eu/docs/default-source/eda-annual-reports/eda-2017-annual-report-final> [accessed on 25 September 2019].

149 EU Institute for Security Studies. "Permanent Structured Cooperation: What's in a name?". *Chaillot Papers*. EUISS, no. 142, 2017.

150 EUISS. *2019 Yearbook European Security* EU Institute for Security Studies. "Permanent Structured Cooperation: What's in a name?". *Chaillot Papers*. EUISS, No 142, 2017., 2019, at www.iss.europa.eu/content/euiss-yearbook-european-security-2019 [accessed on 5 September 2019].

example, Ireland, Lithuania and Luxembourg with two projects, or Slovenia, Latvia and Finland between three and four. It is striking, however, that one part of the group, despite collaborating in a few projects, leads some of them, such as Slovakia or Austria. A second group would be made up of those countries that participate in a greater number of programmes -between six and eight- but without leading any, such as Greece, Poland or Portugal. Finally, the third group is that of the countries with the greatest number of projects, and coordination within them.

Spain is the leading country in terms of participation in PESCO projects, specifically 16, followed by 14 in Italy and 13 in France. However, this first position in participation does not go hand in hand with leadership in the coordination of such projects. On the contrary, Spain is only leading one of the 16 projects in which it is involved. Meanwhile, Italy and France lead seven. Germany is close by, leading six of the eight totals.

This leads us to briefly consider the difference in the strategic culture of military doctrines, and the clash this entails with respect to the EU's ambition of greater strategic autonomy. These strategic cultures can be divided into three dichotomous variables¹⁵¹: Firstly, differentiating between Atlanticists – such as the United Kingdom or the Netherlands – and Europeanists – such as France and Germany. Secondly, between the multilateralist countries – those states that lead or those with fewer resources that choose to join – and the sovereigntists. Thirdly, between the powers that tend to use their military capabilities with greater force – such as France and the United Kingdom – and those that are more preventive – such as Germany.

These differences lead us to ask whether a “strategic community culture” is possible. We do not refer to strategic autonomy as the availability of defence capabilities in the face of external security challenges, but to a strategic culture understood as the existence of a set of common beliefs, assumptions, attitudes, norms, world views and behavioural patterns¹⁵². In the case of defence industrial policy, the paradox is that a central authority would have capacity without legitimacy, and state institutions would continue to have such legitimacy, but without sufficient capacity¹⁵³. While we do not consider that the net effect of such divergence and difference would be strategic incoherence in defence collaboration plans, as Howorth would say¹⁵⁴, it is true that it can generate rivalries in the final phases of implementation and application of the acquired defence product.

151 PINTADO RODRÍGUEZ, C. *Pooling & Sharing y la industria europea de defensa. Viejas ideas para nuevas soluciones*. Instituto Español de Estudios Estratégicos, Ministry of Defence, 2013, no. 104.

152 DUFFIELD, J.S. “Political Culture and State Behaviour: Why Germany Confounds Neorealism”. *International Organization*. 1999, no. 53, pp.765-803.

153 BIAVA, DRENT, HERD. “Characterizing the European Union's Strategic Culture: An Analytical Framework”. *Journal of Common Market Studies*. UACES, 2011. pp.1-22.

154 HOWORTH, J. “The CESDP and the Forging of a European Security Culture”. *Politique Européenne*. 2002, no. 8, pp.88-108.

It is true that constructivism is right when it states that national strategic cultures have been coming closer together in the understanding and perception of threats, in institutional socialisation and in the way of assuming crisis scenarios¹⁵⁵. However, the resulting defence products come from projects in which not all Member States participate, nor do they participate at the same stage – research, equipment or procurement. The way of deciding the use of each of them will be done to variable geometry.

In addition to this mosaic of diverse strategic cultures within the European Union and its effect on defence industrial policy, possible tensions may arise with respect to NATO in this area. NATO has a much more mature defence planning process than the European Union, both in terms of time and issues. However, what the EU highlights¹⁵⁶ is that it has a strong framework for the defence industry, including both legislation (the directives on the transfer and acquisition of defence equipment) and a political framework (PESCO, CARD), and a European Defence Fund, which supports the development of defence capabilities and research. The development of Community initiatives has raised doubts as to whether the Union is creating tools that can create duplication in military capabilities, but also discriminate against non-EU NATO members and, conversely, against non-NATO EU members. Indeed, despite these frictions, the EU and NATO have moved closer to working together on defence industry issues. For example, in July 2016 they published a Joint Declaration in which they pointed to the need to facilitate a stronger defence industry and stronger research cooperation both within Europe and in the Atlantic. The following declaration of 2018 reiterates the need for coherence, complementarity and interoperability of EU and NATO executive programmes. However, this declaration of 2018 is aimed at cooperation in hybrid threats, military mobility, capability building and hybrid threats, but defence industrial cooperation as such was conspicuous by its absence. Unlike military mobility – which is one of the strengths of NATO-EU cooperation¹⁵⁷ – defence industry cooperation has been more limited¹⁵⁸. The European Defence Technological and Industrial Base Strategy is aimed at supporting European industry and ensuring that NATO and the EU can act autonomously, without overlapping, but still generating confidence. However, there are frictions in terms of economic competitiveness and strategic autonomy, as well as fears on the part of the United States of losing room for manoeuvre on the continent.

155 MEYER, C. “Convergence Towards a European Strategic Culture? A Constructivist Framework for Explaining Changing Norms”. *European Journal of International Relations*. 2005, vol. 11, no. 4, pp.523-549.

156 FIOTT, D. “The EU, NATO and the European defence market: do institutional responses to defence globalisation matter?”. *European Security*. 2017, vol. 26, pp.398-414.

157 DRENT, M., KRUIJVER, K., ZANDEE, D. *Military Mobility and the EU-NATO Conundrum. Clingendael Report*, La Haya, Clingendael Institute, 2019, pp.9-12.

158 FIOTT, D. “Defence industry, industrial cooperation and military mobility” in G. LINDSTROM and T. TARDY (ed.). *The EU and NATO: The essential partners*. Paris, European Union Institute for Security Studies, 2019, pp.44-51.

Proposals for improvement

The European Defence Fund, PESCO and the other initiatives have started to work their way since 2017. However, other previous projects are still underway, such as *ad hoc* consortia and *joint ventures*, where two or more parties pool resources to fulfil a specific activity.

The analysis of these previous joint programmes makes it possible to contribute with new recommendations to the improvement of the industry. In particular, the aerospace sector is the only strategic industry at European level that receives strong investment, has decreasing costs, and where the speed of deployment of technological innovations is high¹⁵⁹. However, it is in land defence where collaborative projects are most limited by a lack of sufficient investment. The naval field is in an intermediate scenario, although with duplications, and a large number of SMEs highly dependent on the process of outsourcing tasks, thus generating a high elasticity. It is therefore recommended that investments between the three defence sectors be levelled out as far as possible.

The second recommendation we make is oriented towards the question of the specialisation versus concentration dichotomy. A commitment to specialisation would allow for greater efficiency. As the projects are based on collaboration between several countries, a direct and visible return benefit cannot be expected in each of them, but in the long term it will favour the structuring of a sustained and sustainable model.

Thirdly, distinguishing between strategic equipment -such as weapons, helicopters or maritime surveillance- and non-strategic equipment -such as ammunition, clothing, personnel, recruitment and training – would probably fuel a more inclusive distribution of projects among all Member States, also encompassing those with less industrial positioning or financial investment capacity.

In this sense, these recommendations are articulated as some of the main axes of the improvement, not only of the executive application of the projects contained in the initiatives of the European Defence Fund, CARD and others, but also of the scope and nature itself. Only in this way can the improvement of the operational dimension of PESCO be achieved through concrete measures for the availability, interoperability, flexibility and deployment of defence products.

*The Spanish case: windows of opportunity for strengthening the Defence industry**Challenges of the defence industry sector in Spain*

The four largest national defence industries in Europe -namely the UK, France, Italy and Germany- cover approximately two thirds of the total defence market in

159 PINTADO RODRÍGUEZ, C. *Pooling & Sharing y la industria europea de defensa. Viejas ideas para nuevas soluciones* (104/2013). Instituto Español de Estudios Estratégicos, Ministry of Defence, 2013.

the European Union¹⁶⁰. According to the latest Spanish Defence Industry Catalogue for the period 2019-2020, published by the Ministry of Defence¹⁶¹, of the 528 companies registered in the catalogue, 373 have invoiced some product or service over the period 2017, with a total turnover in the defence industry for that year of 6.19 billion euros.

The report states that Spain's Defence Technological and Industrial Base (DTIB) is facing a current scenario marked by budgetary constraints, a high degree of competition between industrial actors in consolidated and emerging countries, and the restructuring of the European market in this area. In this respect, the document warns of the need for the DTIB to adapt to these new ways of proceeding so as not to fall behind in the technological and industrial capacities required. Two methods are useful: the implementation and monitoring of the Industrial Defence Strategy, and "the identification, preservation and promotion of the Industrial Capabilities and Knowledge Areas that affect the essential interests of Defence and Security"¹⁶² of Spain.

Although it is true that the nature of the Spanish defence industrial conglomerate is export – 81% of sales were destined abroad – and this profile has been growing rapidly – 5.03 billion euros in 2017, 2.68 billion more than in 2011 –, there is still a high dependence on small and medium-sized enterprises (SMEs), which represent 83% of the total number of companies dedicated to this sector in our country. On the one hand, it is positive because of the high generation of stable jobs. However, on the other hand, it has several weaknesses.

Firstly, there is a problem of lack of coordination and communication between companies, as well as a lack of influence. The absence of a medium and long-term state agenda based on the construction of a powerful business fabric, organised in consortiums, or with the presence of interest groups in the headquarters of the European Union, is noticeable. No such grouping exists, whether public or governmental or private in nature. The comparative weakness of the Spanish defence industry sector with respect to that of other Member States therefore requires the joining of forces and stronger coordination channels in order to achieve real influence – and presence – in the most innovative projects, as well as better positioning in the high-end phases of the value chains for creating a defence product.

Secondly, there is a lack of leadership, both executive and political. Traditionally, the most consolidated national industrial conglomerates have the figure of an inter-

160 EUISS (2019): *2019 Yearbook European Security*, at www.iss.europa.eu/content/euiss-yearbook-european-security-2019 [accessed on 15 September 2019].

161 *Catálogo de Industria Española de Defensa 2019-2020*. Madrid, Ministry of Defence, at <https://publicaciones.defensa.gob.es/catalogo-industria-espanola-de-defensa-2019-2020.html>; also see *Criterios básicos para el establecimiento de la política industrial de Defensa*, Cuadernos de Política Industrial de Defensa nº1, Madrid, Ministry of Defence, 2010.

162 *Catálogo de Industria Española de Defensa 2019-2020*. Madrid, Ministry of Defence, at <https://publicaciones.defensa.gob.es/catalogo-industria-espanola-de-defensa-2019-2020.html>, p.21.

mediary or state representative in international contracts. In Spain this figure is lacking and, when it has been attempted, its relevance in terms of functions and time has been minimal. Furthermore, while European defence is in a “phase of cooperation rather than communitisation”¹⁶³, Spain must continue to expand its political agreements on industrial cooperation with those countries with which it has common geostrategic interests, such as France for the Sahel and Northwest Africa. Achieving this equivalence would enable it to acquire greater influence and leadership in military cooperation agreements, thanks to greater empowerment in the industrial field. On the other hand, a greater presence of Spanish civilians is needed in senior decision-making positions for industrial defence plans at Community level. However, we consider that a greater acquisition of technical skills and a stronger business fabric in Brussels is the *sine qua non* condition for Spain to really acquire greater influence, which can subsequently be strengthened through political figures.

On the other hand, Spanish industry has improved in terms of capacity and product creation. However, its export profile does not allow it to fully exploit what is known as “effective technology transfer”, understood as the development and growth of various sectors of society thanks to the exchange of information on new technologies created, access to research, and the development of technological innovations in an intersectoral manner; the fact that almost all Spanish products are destined for foreign companies does not allow for a transmission of the new creations by other sectors nor does it allow for excellence in innovation in Spain. Hence the need for a strong business conglomerate to build bridges of collaboration and communication.

Opportunities offered by new industrial cooperation initiatives at Community level

As Figure 1 shows, Spain, together with France, is the only country that participates in all the military formations established at Community level. Thus, the good image and high reputation of the Spanish military corps are a launching pad for the development of research and acquisition of industrial defence products. However, they are not enough. That is why we propose the following aspects.

One of the major concerns in this matter is the overlap of cooperation plans at intra-European level with plans framed from the state level. However, although in the short term it may be an arduous process due to the need for multilevel coordination between actors, in addition, from different countries, in the long term the strategic autonomy to which we aspire may be complemented by the strategic culture we discussed in the previous section.

Spain’s deepening of defence industrial planning at Community level is an opportunity for our country’s Defence Technological and Industrial Base. Firstly, because

¹⁶³ ARTEAGA, F. y SIMÓN, L. “El Fondo Europeo de Defensa y el futuro de la industria española”. *Elcano Policy Papers*. Madrid, Real Instituto Elcano, 2019, p.19.

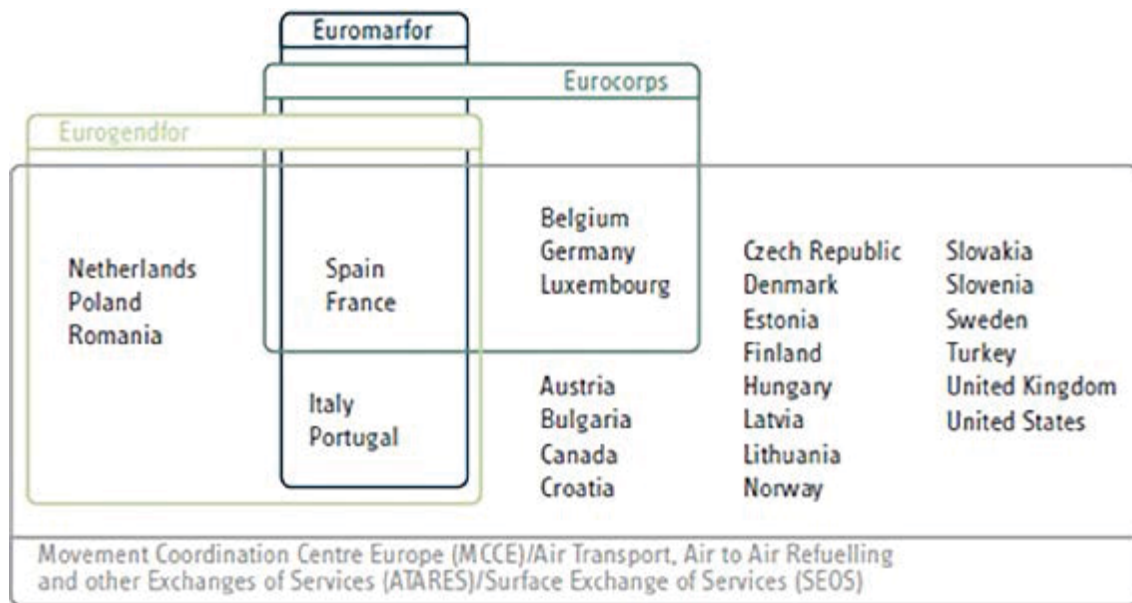


Figure 1: Participation of Member States in military groupings at Community level, 2017
Source: EU Institute for Security Studies: "What is PESCO in a name?" (2017)

the budgetary effort made in both research and development and acquisition programmes is expected to be reflected in returns from the European Defence Fund. However, mere financial participation does not ensure that these are returned in an equitable manner. As some researchers point out¹⁶⁴, Spain would need to provide additional funds for co-financing, since it is the countries that do so that usually end up receiving more benefits in return.

One of the dilemmas still to be resolved is the question of participation in Spanish industrial companies with capital from outside the European Union, and how this could generate imbalances in the EU's ambition for strategic autonomy. It is therefore recommended that Spain should take advantage of the possibilities of co-financing from the European Defence Fund to position itself as a major partner in the cement of the European defence industry. This would also allow it to move from being the leading country in terms of participation in PESCO projects but with a very low rate of coordination of these projects, to being a credible state to which to turn to.

Furthermore, the opening up of the Spanish defence industry to the outside world, not in the traditional form of producer-customer, but through the prism of horizontal cooperation programmes, is not only going to enable it to improve its position at European level, but is also going to become a mechanism for reinforcing and consolidating the internal structures of the State Administration. The requirements for improving the supply chain, new methodologies for research and the harmonisation of standards for the procurement and execution of defence products are some of the pillars that will enable Spain to learn from "good practices" carried out by other consolidated countries in the defence industry. This 'benchmarking' process will also be

¹⁶⁴ ARTEAGA, F. y SIMÓN, L. "El Fondo Europeo de Defensa y el futuro de la industria española". *Elcano Policy Papers*. Madrid, Real Instituto Elcano, 2019, p.21.

fed from a political-strategic perspective, improving the channels of dialogue with high levels of management. It will also offer a new model of intelligent management, based on greater efficiency in the collaboration of the different territorial and departmental levels of public administration.

The involvement of the private sector is also key. As we mentioned earlier, improved financing must be a traction factor for companies, so that they can develop their capacities and become more involved in European projects. Since we have so far devoted an important part of the analysis to the public sector, we will devote the following section to the role that the Spanish private sector is already playing in some of the European defence projects promoted since 2017.

Spanish participation in specific programmes of European industrial cooperation plans

In 2018, the European Defence Fund began to become a reality, materialising specific projects with annual and interannual frameworks for funding by participating Member States. The first three pilot projects completed in 2018 were the SPIDER programme -on innovative systems for warfare in urban areas and access to hostile establishments – EuroSWARM – to test the efficiency of unmanned swarm systems composed of heterogeneous sensors useful for minimising uncertainty in surveillance operations – and TRAWA – for the standardisation of remote manned aircraft systems¹⁶⁵. None of them had Spanish participation in the consortium.

It was in the next phase, with the PADR – the Preparatory Action for Defence Research – that Spain became increasingly involved. Specifically, of the four advocacy programmes proposed, it is involved in three of them¹⁶⁶, although with different degrees of participation: with relevant positions, or leading one of them.

The first programme is called *Ocean2020*¹⁶⁷. Aimed at improving maritime safety, it seeks to build an open “system of systems” architecture that will allow the interoperability of the various maritime operations centres of several armed forces of European Union Member States. To this end, its main objective is the integration of information, so as to have a situational knowledge of a maritime risk scenario in a faster and more effective way. It also aims to improve the interoperability of working standards between the EU and NATO. With a total budget of 35 million euros for the period 2018-2021, Spain is one of the 15 participating countries. After the coordinating company, Leonardo S.p.A., it is the Spanish corporation INDRA that is in second position

¹⁶⁵ Information on the three above-mentioned pilot projects (2018) at www.eda.europa.eu/info-hub/press-centre/latest-news/2018/02/23/pilot-project-euroswarm-and-spider-activities-completed [accessed on 10 September 2019].

¹⁶⁶ See https://europa.eu/rapid/press-release_IP-18-763_en.htm [accessed 10 on September 2019].

¹⁶⁷ Information on the *Ocean2020* programme available at <https://ocean2020.eu/> [accessed on 10 September 2019].

at the head of the project. It focuses particularly on the design and production of maritime operations command systems, the design and production of sensors, and the improvement of communications and safety systems. One of the clients of the project is the Spanish Ministry of Defence.

The second programme is *GOSSRA*¹⁶⁸, geared at the standardisation of electronic devices, voice and data communication, software, human interface devices, sensors and effectors. With a budget of 1.5 million euros for the period 2018-2020, two Spanish companies are participating: *GMV Aerospace and Defence S.A.*, in second position of the project after the German coordinator; and the company *INDRA*, in eighth position of the total of nine participants.

The third programme, *Vestlife*¹⁶⁹, is aimed at developing greater protection for military clothing. The project has a budget of approximately 2.43 million euros for a period of 36 months. Two Spanish companies are participating: *TECNALIA*, oriented towards the development of integral bullet-proof solutions with CBRN (chemical, biological, radiological and nuclear) detection systems, and the company *AITEX*, which is also the coordinator and leader of the project.

The only programme without Spanish participation is *ACAMSII*¹⁷⁰. With a budget of 2.6 million euros for the period 2018-2021, this programme aims to integrate adaptation mechanisms to optimise soldier camouflage systems.

Recently, in September 2019, the industrial coordination of a new joint European defence project has been assigned to the Spanish company *INDRA*¹⁷¹. This designation for the *FCAS* programme – *Future European Combat Air System* – is going to allow a high return of benefits to the Spanish industry in terms of business generation, development of its export capacity, generation of highly qualified jobs, and creation of technologies for civil use. This project will be developed by the Spanish company together with Dassault –France – and Airbus – Germany.

Strategies for channelling EU policies into the Spanish defence industry ecosystem

In the same way that it is intended that there should be more Spain in the European Union, the European Union can translate into advantages and added value within

168 Information on the *GROSSA* project available at https://www.eda.europa.eu/docs/default-source/projects/padr-gossra-projectweb_v2.pdf [accessed on 10 September 2019].

169 Information on the *Vestlife* project available at <http://vestlife-project.eu/> [accessed on 12 September 2019].

170 Information on the *ACAMSII* project available at <https://www.eda.europa.eu/docs/default-source/projects/padr-acamsii-projectweb-final.pdf> [accessed on 12 September 2019].

171 Information available at: <https://www.indracompany.com/en/noticia/indra-nominated-national-industrial-coordinator-fcas-program-future-european-combat-air> [accessed on 12 September 2019].

Spain's own ecosystem. Not all Spanish security and defence companies participate in Community projects, nor is the Spanish business landscape itself homogeneous. Each company has a different nature, size, interests and strategic sectors. Hence the importance of knowing how to channel the lessons learnt from the Community example effectively – in terms of time and results- and efficiently – in terms of savings in transaction costs, and of greater territorial and sectoral structuring of Spanish companies within the state ecosystem.

This is an effort proposed by the Ministry of Trade and Tourism, as well as by the Ministry of Defence. The Spanish ecosystem can be improved from within, by and for its own endogenous enterprises, through various dimensions.

The first step is a general shift from the traditional approach to the cost-effectiveness analysis of procurement to a new approach linked to life cycle cost¹⁷². No doubt there are companies that have already made this change, but it is not yet a trend that is certainly integrated into all companies. Moving to this new life-cycle approach – instead of acquisition – would allow companies to monitor their transparency, control and audit activities in a homogeneous way in all the programmes they carry out, as well as would lead to the cohesion – standardisation – of processes, cost structures and procedures so that any evaluation carried out *ex ante* and *ex post* is done under the same methodology. That is, it aims to move from a performance-based approach to each project implemented, to a risk-based approach (with a common methodology, whatever the project).

The second axis is state coordination of compliance with certain economic intelligence standards within the organisational architecture of each of the security and defence companies. Although Spanish companies are characterised by a high degree of integration of economic intelligence within their structures¹⁷³, a framework of state control is recommended to monitor the degree of success of economic intelligence tasks within companies. This would allow for greater productivity on the part of companies and for savings in costs that have been identified as unnecessary. However, this framework must be articulated with respect for the principle of confidentiality and a guarantee that there is no unfair competition in reporting such matters.

Thirdly, this issue leads to the protection of knowledge created within the Spanish ecosystem, in relation to the International Patent Classification. Taking into account the growing geopolitics of technologies, telecommunications and digital products,

172 ORTÚZAR MATURANA, R., MOLINA MORENO, V. and PASCUAL JIMÉNEZ, R. “Metodología para el análisis económico de activos del sector de la defensa: criterio fundamentado en el parámetro de ciclo de vida”. *Economía Industrial Núm.412: Industria de Defensa*, Madrid, Ministry of Industry, Trade and Tourism, 2019, pp.43-47.

173 COZ FERNÁNDEZ, J.R. and VALIÑO CASTRO, A. “Integración de un modelo de gestión del conocimiento para evaluar el impacto económico en la gestión de programas del sector de la defensa”. *Economía Industrial Núm.412: Industria de Defensa*, Ministry of Industry, Trade and Tourism, 2019, pp.57-65.

and the undeniable development of security and defence products, both technological and thanks to digital techniques, in cyber security, artificial intelligence, 5G, quantum computing, and data management itself, there are certain dual-use technologies that have no place within the traditional classification of patents. Their dual application, both civil and military, makes it difficult to categorise these technologies. On the one hand, the first obstacle is that there is no homogeneous definition of what an “artificial intelligence project” is, as is the case within the Pentagon. A Department of Defence Inspector General audit in 2020 concluded that there is no comprehensive governance framework on artificial intelligence (AI)¹⁷⁴: neither are there technical, operational or programmatic requirements on what the implementation and deployment phases of AI should look like, nor is there clarity on what should be labelled as an AI project. On the other hand, this extends to the International Patent Classification where, according to Silvia Vicente Oliva¹⁷⁵, it is the multinational companies that register the most innovations (in number) in Spain, labelling it in English and with different nomenclatures to those of the Spanish ecosystem. This delays Spanish innovation and hence the need to homogenise definitions and encourage a more interconnected value chain between companies of Spanish origin.

Fourthly, the Spanish ecosystem requires the inclusion of new measures linked to digitisation¹⁷⁶ and Industry 4.0. This is an aspect that has been contemplated in the *General Guidelines of the new Spanish industrial policy 2030*¹⁷⁷. Furthermore, digitisation can enable Spain to achieve the objective set by the European Union of a 20% share of GDP for industrial activities, if this digitisation is approached under a mission-country vision. Such is the importance of digitisation at industrial level, in general, and in security and defence companies, in particular, that the digital transformation is at the top of the priorities of the above-mentioned strategic framework. Defence industries will have to produce “intelligent weapon systems” to provide the armed forces with the material means to ensure their superiority in action in the 4.0 operating environments. This requires a Spanish ecosystem capable of doing so at the various levels of production, development, implementation and deployment. The digital technologies that allow the hybridisation between the traditional physical domains -sea, air, land- and cybernetic, as well as the growing dominance of outer space,

¹⁷⁴ INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENCE. *Audit of Governance and Protection of Department of Defense Artificial Intelligence Data and Technology*. Washington, U.S. Department of Defense, 2020. Retrieved on <https://media.defense.gov/2020/Jul/01/2002347967/-1/-1/1/DODIG-2020-098.PDF>

¹⁷⁵ VICENTE OLIVA, S. “Protección del conocimiento y de tecnología con utilidad de defensa”. *Economía Industrial Núm.412: Industria de Defensa*, Ministry of Industry, Trade and Tourism, 2019, pp.77-88.

¹⁷⁶ MINISTRY OF DEFENCE. *Defence Industry Perspective*. Madrid, Ministry of Defence, 2019, pp.24-30.

¹⁷⁷ MINISTRY OF INDUSTRY, TRADE AND TOURISM. *General Guidelines of the new Spanish Industrial Policy 2030*. Madrid, MINOCTUR, 2019.

include: Internet of Things, blockchain, Artificial Intelligence, cyber security, 5G, Big Data, autonomous systems, robotics, advanced computing, additive manufacturing, and augmented reality. Digitisation goes hand in hand with innovation: an almost indivisible binomial, but not necessarily always intertwined. This means that companies must not only direct their products towards the integration of technologies *per se* within security and defence systems, but that other industries -not necessarily linked to security and defence- can complement the latter by providing added value in innovation. By this we mean biotechnology, new materials, advances in navigation and positioning, or 3D printing. In this sense, the Spanish security and defence industry ecosystem can be revalued if it is accompanied by sectors which, without being linked to the subject, can provide it with added value through complementary or facilitating technologies.

Conclusions

As we have seen, the construction of European defence is being carried out gradually, functionally and at different speeds, as has traditionally been the case in the EU in other areas¹⁷⁸. In this respect, it is necessary to achieve an inclusive Defence Framework Programme, taking into account that investments are long or very long term.

Throughout this process, the principle of coherence must be safeguarded and play a central role, as recognised by the European Union and the Member States through their various agreements, initiatives and documents. That is why it is so important to follow the recommendations made in the text of this article as proposals for improvement: to encourage collaborative projects in the specific area of land defence through a greater and more consistent financial effort; to commit to the coordinated specialisation of national industrial policies, which will yield positive results in the long term and, therefore, to forget about demanding a direct and reciprocal return on each investment; and to facilitate a more inclusive distribution of projects among all Member States, paying special attention to the integration of countries with lower industrial or economic capabilities.

As far as Spain is concerned, the participation of the national defence industry conglomerate in most of the major programmes demonstrates the Spanish drive to jump on the innovation bandwagon. Its aim is to specialise in high-end products in the value chain. Although there are still many challenges to be achieved in terms of European positioning with respect to other countries, the efforts made at a rapid pace in recent years show the vigour of becoming one of the main and leading partners in the

178 ROLDÁN BARBERO, J. "La Europa de la Defensa pasa a la ofensiva". *Revista General de Derecho Europeo*, no. 43, 2017, p. 3; DE CASTRO RUANO, J.L. "Hacia una Unión Europea de la Defensa o cómo hacer de la necesidad virtud". *Anuario Español de Derecho Internacional*. 2018, vol.34, pp.1045-1073; and ALFONSO MEIRIÑO, A. "La globalización de los asuntos de defensa: capacidades militares, mercado e industria". *Cuadernos de Estrategia*. 2015, no. 175, pp.143-186.

sector. To this end, collaboration through technology transfer and the consolidation of greater collaboration networks within our country are two essential measures for carrying this out. All of this also opens up new lines of research for the consideration of civil-military relations as a push factor towards the achievement of the ambition that is beginning in our country.

Therefore, beyond the labels emanating from the Community leadership on “strategic autonomy” or the recent “strategic cooperation” -by means of which it aims to secure new regional partners in security and defence matters-, it is in the principle of coherence that lies both the need and the opportunity for Spain’s positioning on the European stage and the strengthening of the European Union as a geopolitically significant actor.

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