

Understanding the Limitations of the EU's Common Security and Defence Policy

Written by Tom Dyson and Theodore Konstadinides

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Since the launch of the EU's Common Security and Defence Policy (CSDP)[1] at the 1999 Cologne European Council, significant steps have been taken towards endowing CSDP with the institutional structures and military instruments necessary to make it an effective mechanism for dealing with insecurity in Europe's geopolitical neighbourhood. Furthermore, two recent challenges have emerged which should provide new impetus behind CSDP. Firstly, in the context of rising Chinese power, European nations face a shift in US priorities from Europe towards Asia. The implications for European states are clear: take a greater burden of European security or allow a security gap to develop within and around Europe. However, Europe's ability to carry a more substantial level of their security burden is circumscribed by a second major challenge: financial austerity and defence cuts in the context of economic slowdown.

Hence strong incentives exist for further defence cooperation under CSDP and NATO. The 2009 Treaty of Lisbon and pooling and sharing initiatives such as CSDP's Ghent Framework offer new opportunities for cooperation. Indeed, CSDP should take on greater prominence as an institutional venue for defence cooperation as the potential of NATO's Smart Defence appears limited following US attempts to use the initiative as a mean to prompt its Alliance partners to purchase US armaments.^[2]

However, opportunities to pool and share capabilities under CSDP have not been taken and serious shortfalls in the military capabilities necessary for European military autonomy persist. European nations are dependent on the US for key strategic enablers.^[3] EU and NATO members also continue to duplicate military forces and capabilities and have failed to coordinate national defence cuts resulting from austerity measures. As Ivo Daalder, the former US Permanent Representative to NATO (2009-13), highlights: 'If current trends continue, in 10 years from now this alliance would not have been able to mount the kind of campaign it did in Libya'.^[4]

Where significant European defence cooperation has occurred in recent years, it has been bilateral, as demonstrated by the 2010 Franco-British Lancaster House Treaty. Bilateral cooperation will be insufficient to deal with the challenge posed by US disengagement from European security. Europe's military decline will be exacerbated by the growing ability of rising economic powers, particularly China and India, to translate their economic growth into military power. Hence European states face a clear choice: cooperate more intensively in pooling and sharing military capabilities and forces or suffer a rapid decline in international power and influence.^[5]

Academic debate on the potential scope and effectiveness of CSDP coheres around two main theoretical positions.^[6] The dominant school of thought on CSDP is Constructivism. Constructivism posits that identity is central to interest formation. Norms (rules of 'legitimate' or 'appropriate' behaviour) lie at the heart of the identities and interests of policy-makers, predisposing elites to favour certain policy choices over others. National strategic cultures composed of societally and institutionally-embedded norms which derive from formative historical experiences are the central determinants of states' defence policies.

While divergence in national strategic culture can hinder European defence cooperation, Constructivists argue that

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CSDP provides evidence of the development of a European 'strategic culture' and the 'Europeanization' of national defence and security policies.^[7] From this perspective, normative convergence between national strategic cultures is taking place, around the key security challenges of the post-Cold War era and the instruments which should be deployed in response. While national strategic cultures retain a high-level of rigidity, slowing convergence, Constructivist accounts of European Defence Cooperation are broadly optimistic that the state will be able to escape the pervasive effects of anarchy by establishing supranational institutions.

Neorealism is Constructivism's main theoretical competitor in conceptualising CSDP. Neorealists posit that the material forces of the 'balance of power' or 'balance of threat'^[8] create a limited measure of convergence in the defence and security policies of European states. These pressures, it is argued, have led to defence cooperation through NATO and CSDP, that represents either 'bandwagoning' on US power, or a process of 'soft balancing' against the US.^[9]

Neorealism argues that in the context of an anarchic and uncertain international system, states focus above all else on protecting their relative economic and military power. As a consequence, states exhibit a high-level of reticence to cede sovereignty in defence policy due to the significant potential negative ramifications of abandonment by Alliance partners. The presence of this so-called 'Alliance Security Dilemma', leads Neorealist scholars to the conclusion that we are unlikely to see a shift toward integration in defence policy and that the pooling and sharing of capabilities and forces will be limited.^[10]

This article uses the insights of EU law to assess the utility of these two competing theoretical accounts of European defence cooperation. Law provides a fertile testing ground for theories of European defence cooperation, as it provides an excellent guide to the scope for state action in the policy area of defence and for EU institutions to foster a move toward supranational governance. The article addresses two key empirical issues. Firstly, the degree of commitment to CSDP that Lisbon generates and secondly, the level of integration achieved indirectly through EU coordination of the internal market aspects of the Member States' defence policy in relation to armaments procurement.

The article provides empirical evidence that challenges the more optimistic Constructivist accounts of CSDP which emphasise the potential for a shift toward supranational governance in this policy area. It is argued that although demonstrating a certain degree of actorness, Lisbon's reforms have not pushed towards an integrationist approach in defence. The Member States' reticence to cede full authority to the EU in the field of defence is reflected in the Treaty's wording which leaves in tact national sovereignty in relation to military defence. As ever, the EU still relies on Member States and NATO with regard to all defence capability and force generation initiatives in post-Lisbon Europe. The article concurs with the Neorealist view that, despite the strategic challenge of US disengagement from Europe, EU defence cooperation is likely to remain intergovernmental and limited in scope and depth.

The Treaty of Lisbon: From Intergovernmentalism to Integration?

The ambiguity and abstract goals of the CSDP undermine hope that defence policy will be characterised by a shift from intergovernmentalism to integration in the near future. First and foremost, the Treaty of Lisbon lacks a literal definition of 'defence'. Instead, Article 42 (2) TEU provides two dimensions to 'defence' encompassing i) a mandate for the European Council, acting unanimously, to progressively develop a 'common EU defence policy', which will lead to ii) a 'common defence'. The second dimension to 'defence' is derivative of the first because 'common defence policy' falls within EU competence, whilst 'common defence' merely comprises an advanced stage of EU integration dependent on political will.

According to Article 43 TEU CSDP, 'common defence policy' covers a wide array of policy areas ranging from humanitarian and rescue operations to peace-making and post-conflict stabilisation. Lisbon has also played a significant part in augmenting the institutional presence of CSDP by introducing new institutions such as the new post of the High Representative of the EU for Foreign Affairs and Security Policy and her CSDP coordinating role under Article 43 (2) TEU). It has also provided for the institutionalisation of the European Defence Agency (EDA) in order to promote greater cooperation in the field of armaments procurement (Articles 42 (3) and 45 TEU). Inter alia, Lisbon

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also contains in Article 42 (7) TEU a mutual assistance clause which, rather symbolically, provides that Member States shall assist each other in the event one of their counterparts is attacked.

No doubt, these reforms offer more than a hint of progress. They have established a system of international cooperation based on voluntariness and consensus but also one based on flexibility and differentiation. This is manifest in the flexibility provisions inserted in Lisbon which provide a small group of Member States with the legal means for launching enhanced cooperation (Article 20 TEU); structured cooperation (Articles 42 (6) and 46 TEU, Protocol 10); as well as unilateral implementation of the so-called Petersberg tasks (Article 44 TEU). Frequent resort to such novel opportunities may undermine the meaning of 'Common' in CSDP by encouraging the advancement of a two-speed Europe with a *hard-core* operating beyond the control of the majority of Member States. What is of bigger concern to integrationists is the potential of this *hard-core* transforming into an *avant-garde* capable of surviving altogether outside the EU architecture with its own rules of conduct and institutions.^[11]

'Common defence', on the other hand, implies the transformation of CSDP to an integrative tool. This is easier said than done, especially since Member States have made it explicit in Lisbon that 'in particular, national security remains the sole responsibility of each Member State.' (Article 4 (2) TEU). As such, any move towards 'common defence' will have to be made by the twenty-seven Member States acting according to 'their constitutional requirements' as per Article 42 (2) TEU. Despite the progress made since Maastricht, the Heads of State in Lisbon remained adamant that state actors still dominate policy agenda-setting and implementation. Hence, the rebranding of the ESDP to CSDP and the change from 'European' to 'Common' Security and Defence Policy does not imply any alteration on the predominance of the state as the central actor in defence policy formulation and implementation. Neither does Lisbon cast any doubts as to NATO's supreme role in European security. The nature of CSDP remains an intergovernmental affair where Member States take decisions by unanimity and the Court of Justice of the EU (CJEU) has no jurisdiction to adjudicate upon the limited mandate of CSDP operations.

Does EU Defence Procurement Constitute a Step Towards Common Defence?

As briefly discussed, the Treaty of Lisbon does not generate initiatives that would compromise national autonomy in military planning.^[12] As such, EU law has concentrated on the place of defence industries at the centre of CSDP. Yet, despite the proliferation of EU collaborative procurement initiatives, Member States are far from transferring any decision-making powers to EU institutions. Defence procurement consists of a significant part of Member States' public spending and a national competence characterised by a complex legal web regarding the publication of contract notices and selection criteria towards public contracts covering defence products. Furthermore, national defence industries who are opposed to the loss of market share that common European projects might entail retain a high level of political influence in national capitals.^[13] As such, although public procurement in general falls within the scope of EU law on the prohibition of barriers to free movement, Member States appear reluctant to compromise their own preferences when it comes to defence and therefore include armaments within the framework of EU law.^[14]

Despite harmonisation of national procurement laws through EU legislation (see Directive 2009/81/EC and Directive 2009/43/EC) which implies that defence procurement contracts with cross-border interests must comply with EU law, Member States still often resort to a protectionist approach with reference to national defence industries. They seem to have found a way to legitimately derogate from their internal market obligations via automatic reliance to a Treaty exception regarding the scope of EU law. This exception is provided by Article 346 TFEU (former Article 296 EC) which stipulates exceptions for national security reasons in the field of armament production and trade. EU law shall, therefore, not preclude the application of the following rules:

- a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
- b) 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; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

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At first glance this elusive list begs the question of what kind of measures can suffice as 'necessary' for the protection of national essential security interests connected with the production of or trade in arm. A second reading of Article 346 TFEU provokes even more questions: i.e. What falls within or outside the scope of Article 346 TFEU? When is a piece of equipment specifically intended for military purposes?

Being an area under which European Courts have competence to adjudicate on, the CJEU has clarified matters by emphasising that while Member States are responsible for determining issues regarding the preservation of their national security, there is no general principle excluding procurement matters from the Treaty's scope. The CJEU has further established that national practices exempting defence contracts from the scope of EU law can be in breach of the conditions of competition in the internal market similarly to measures regarding products, which are not intended for specifically military purposes.^[15] Despite this effort by the CJEU to limit the scope of Article 346 TFEU, it will take time for European judges to establish a list as to what is regarded 'necessary' for the protection of the Member States' essential interests in every case the exception is relied upon by them.

The Member States' freedom to define their own security priorities and shape the essential interests of their national defence has been further shaken by the institutionalisation of the European Defence Agency (EDA) within the legal framework of the CSDP. The EDA's role is not to duplicate existing collaborative armament programmes in Europe but to support the Council and the Member States towards improving the EU defence capabilities within a voluntary and non-binding intergovernmental framework. Accordingly, the general rule is that all public contracts have to be put out to tender and would be awarded by the EDA on behalf of the participating Member States. Yet, the EDA has no say over the Member States' essential security interests – it cannot in itself invoke Article 346 TFEU to effectively derogate from the Treaties' application. It can only refrain from complying with the EU procurement framework if Member States decide to invoke Article 346 TFEU in relation to EDA procurement programmes. Hence, the EDA is not yet a defence procurement programme coordinator. It merely manages projects on behalf of the Member States and is controlled by them, operating under the political supervision of the Council and financed by the Member States.^[16]

Conclusion: A Bilateral Future for European Defence

The Treaty of Lisbon has not changed the manner in which CSDP policy formulation and execution operates. Policy decisions are still by and large taken unanimously by the EU Member States. Equally, with reference to the interaction of security and defence with the internal market, the Treaty has retained the separation between the 'European' and the 'national' despite the CJEU's attempts to clear the water vis-à-vis the invocation of Article 346 TFEU. Despite the rise of EU collaborative procurement initiatives, in the absence of structured coordination of national policies, the European armaments market remains fragmented along national lines.

Lisbon's legal limitations are illustrative of the lack of political will to generate concrete cooperative initiatives that will initiate a transition from 'defence policy' to 'defence'. Whilst Lisbon has created possibilities for approximation of national practices in the 'softer' aspects of security, such as the external dimension of Police and Judicial Cooperation in Criminal Matters, it has fallen short of generating cooperation in areas which carry important implications for states' relative power, such as military structures and capability procurement. As such, the utility of CSDP as an effective component of the EU's response to global threats and a means of facilitating cross-national coordination of defence policy remains a diamond in the rough. This empirical analysis suggests that Neorealism – that emphasises the restrictive impact of the anarchic international system on the scope and depth of cooperation – has the strongest analytical leverage in understanding CSDP.^[17]

Hence, while Constructivist approaches suggest that the development of regional institutions such as the EU have fostered socialisation processes which will drive convergence in security policy, such predictions about the centripetal dynamics of European defence appear over-optimistic. Variance in the 'balance of threat' – particularly the energy dependency and geographical position of the West European Great Powers – will develop strong centrifugal tendencies in European defence which will create little incentive to challenge the intergovernmental basis of CSDP.^[18] These centrifugal forces will make it difficult for European states to take full advantage of the institutional fora created by CSDP, such as the EDA, to remedy Europe's military capability deficits. The presence of the Alliance

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Security Dilemma, coupled with this differentiation in the balance of threat will make it very difficult to route pooling and sharing through CSDP institutions. European defence cooperation is therefore, likely to remain bilateral and sub-regional, with negative ramifications for Europe's power and influence in the international system.

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[1] Until the 2009 Treaty of Lisbon CSDP was known as the European Security and Defence Policy (ESDP).

[2] Sven Biscop, 'The UK and European Defence: Leaving or Leading?' *International Affairs* Vol. 88, No. 6 (2012), p.1303.

[3] Eric Schmitt, 'NATO Sees Flaws in Air Campaign against Qaddafi', *The New York Times*, 14 April 2012. http://www.nytimes.com/2012/04/15/world/africa/nato-sees-flaws-in-air-campaign-against-qaddafi.html?pagewanted=all&_r=0 accessed 24 September 2013

[4] Nick Hopkins, 'UK Urged to Spend Afghan Withdrawal Savings on Defence', *Guardian*, 31 December 2012, <http://www.guardian.co.uk/uk/2012/dec/31/uk-afghan-withdrawal-savings-defence> accessed 24 September 2013.

[5] Nick Witney, 'How to Stop the Demilitarisation of Europe', *European Council on Foreign Relations Policy Brief* no.40, November 2011. http://www.ecfr.eu/page/-/ECFR40_DEMILITARISATION_BRIEF_AW.pdf, date accessed 24 September 2013.

[6] It is important to note that CSDP is nevertheless characterized by a highly-diverse theoretical debate, with contributions from a range of theoretical perspectives. On Liberal Intergovernmentalism and CSDP, see Rob Dover, *The Europeanisation of British Defence Policy* (Aldershot: Ashgate, 2007); on Two-Level Games Theory and CSDP, see Janne-Haaland Matlary, *European Union Security Dynamics: In the New National Interest* (Basingstoke: Palgrave Macmillan, 2009); on Institutional Theory and CSDP, see Anand Menon, 'Power, Institutions and the CSDP: The Promise of Institutional Theory', *Journal of Common Market Studies* Vol. 49, No.1 (2011), pp.83-100; on Classical Realism and CSDP, see Sten Rynning, 'Realism and the Common European Security and Defence Policy', *Journal of Common Market Studies* Vol.49, No.1 (2011), pp.23-42.

[7] See, for example, Alessia Biava et al, 'Characterising the EU's Strategic Culture', *Journal of Common Market Studies* Vol.49, No.6 (2011), pp.1227-48; Paul Cornish and Geoffrey Edwards, 'Beyond the EU/NATO Dichotomy', *International Affairs*, Vol.77, No.3 (2001), pp.587-603; Bastien Giegerich, *European Security and Strategic Culture* (Baden Baden: Nomos, 2006); Jolyon Howorth, *Security and Defence Policy in the EU* (Houndmills: Palgrave, 2007); Frederic Merand et al. 'Governance and State Power: A Network Analysis of European Security' *Journal of Common Market Studies* (2011), pp.121-147; Christoph Meyer, 'Convergence towards a European Strategic Culture' *European Journal of International Relations* Vol. 11, No.4 (2005), pp.523-49.

[8] On the application of 'balance of power' and 'balance of threat' theories to CSDP, see Tom Dyson, 'Balancing Threat, Not Capabilities: European Defence Cooperation as Reformed Bandwagoning', *Contemporary Security Policy* Vol.34, No.2 (2013), pp.387-91.

[9] On soft balancing, see, for example, Barry Posen, 'EU Security and Defence Policy: Response to Unipolarity', *Security Studies* Vol.15, No.2 (2006), pp.149-86; on bandwagoning, see, for example, Tom Dyson, 'Balancing Threat, Not Capabilities: European Defence Cooperation as Reformed Bandwagoning', *Contemporary Security Policy* Vol.34, No.2 (2013), pp.387-91.

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[10] The concept of the 'Alliance Security Dilemma' was first developed by Glenn Snyder. It posits that the scope and depth of cooperation within alliances and other forms of cross-national defence collaboration is limited by the fear of abandonment or entrapment by other participants. See Glenn Snyder, 'The Security Dilemma in Alliance Politics', *World Politics* Vol.36, No.4 (1984), p.461.

[11] See Theodore Konstadinides, 'Now and Then: Fischer's Core Europe in the Aftermath of the Collapse of the Defence 2003 Constitutional Talks', Vol.11, No.1, *Irish Journal of European Law* (2004), p.117.

[12] Stefan Blockmans and Ramses Wessel, 'The European Union and Crisis Management: Will the Lisbon Treaty make the EU more Effective?', *Journal of Conflict and Security Law*, Vol.14, No.2 (2009), p.305.

[13] Tom Dyson, 'Explaining Germany's Limited Leadership in the European Defence Agency: The International and Domestic Constraints on Defence Cooperation', Paper Presented at the American Political Science Association Annual Meeting, Chicago, USA, 29 August-1st September 2013.

[14] Badouin Heuninckx, 'Towards a Coherent European Defence Procurement Regime? European Defence Agency and European Commission Initiatives', *Public Procurement Law Review*, (2008) Vol.17, No.1, pp.1-20.

[15] See, for detail, the recent CJEU judgment of 7 June 2012 in Case C-615/10 *InsTiimi Oy* [2012] ECR 00000, paras 40-44

[16] Panos Koutrakos, 'The Role of Law in Common Security and Defence Policy: Functions, Limitations and Perceptions' in P Koutrakos (ed.) *European Foreign Policy: Legal and Political Perspectives*, (Cheltenham: Edward Elgar, 2011)

[17] See T. Dyson and T. Konstadinides *European Defence Cooperation in EU Law and IR Theory* (Basingstoke: Palgrave 2013)

[18] The role of variance in the 'balance of threat' (notably energy dependency and geographical position) in fostering differentiation in CSDP is explored in Tom Dyson, 'The Material Roots of European Strategy: Beyond Culture and Values', *Contemporary Security Policy* Vol.34, No.4 (forthcoming, 2013).

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