

## A united response to the war on terror?

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**Public Law analysis:** Following the recent terrorist attacks in Paris, which President Hollande described as 'an act of war', the President invoked Article 42(7) of the Treaty of the European Union (TEU)--dubbed the EU's 'mutual defence clause'--to request bilateral aid and assistance from other EU Member States. At a European Council meeting on 16 and 17 November 2015, European ministers expressed their unanimous and full support to France. Dr Theodore Konstadinides, senior lecturer in law at the University of Surrey and a legal expert in EU Law, and Philip Moser QC of Monckton Chambers, explain the implications of the invocation of Art 42(7) TEU.

### What are the practical implications of a member state invoking Art 42(7) TEU?

**Theodore Konstadinides (TK):** The clause was invoked for the first time by France following the terrorist attacks in Paris. Its practical implications are therefore still to unfold. The clause falls under the EU's Common Security and Defence Policy (CSDP), which is dominated by national veto. Therefore, the clause's activation falls upon each Member State individually and does not depend on the EU as a whole. This is because Art 42(7) TEU does not aim at transferring any competence upon the EU institutions, but rather creates responsibilities between Member States. Equally, when it comes to the implementation of Art 42(7) TEU, the EU institutions play no role since all relevant arrangements will have to be unanimously agreed among the Member States.

**Philip Moser (PM):** The practical implications are unknown, this being the first time any EU Member State has invoked Art 42(7) TEU. The article states that the other Member States shall have an obligation towards--in this case--France to give 'aid and assistance by all the means in their power', which is potentially very wide indeed. It also makes reference in this regard to Article 51 of the UN Charter (on the right to self-defence). As a matter of legal interpretation France should be entitled to the widest possible cooperation on security and defence, as well as (for Member States in a position to do so) assistance in obtaining UN Security Council measures necessary to maintain international peace and security.

### Does the clause raise any concerns around interpretation?

**TK:** The clause can be interpreted in different ways. It is a call for help and solidarity, inviting Member States to use 'all the means in their power'. This may include both civilian and military means, inclusive of humanitarian tasks, military advice or joint disarmament and peace-keeping operations. It is interesting that according to Art 43 TEU, 'all these tasks may contribute to the fight against terrorism'. This links Art 42(7) TEU with another slippery provision--Article 222 of the Treaty on the Functioning of the European Union (TFEU) (or the solidarity clause). The latter provides that if a Member State becomes the object of a terrorist attack 'the EU shall mobilise all the instruments at its disposal, including military resources'.

**PM:** The very wide terms of the article do leave room for uncertainty as to the limits of the 'aid and assistance'. The article itself contains cross-references not only to Art 51 of the UN Charter but also the NATO Treaty. Any action under Art 42(7) TEU would, it appears, have to be in accordance (and not go further than) those other Treaty obligations. In addition, it is said that 'the specific character of the security and defence policy of certain Member States' may not be prejudiced. This is generally considered to be a reference to neutral countries (such as Austria or Ireland), where it is unclear to what extent they are obliged to assist at all. Presumably it would be up to those countries to define the 'character' of their policies, at least in the first instance.

### What assistance could a Member State reasonably expect from other Member States?

**TK:** Following the terrorist attacks in Paris, the EU's High Representative, Federica Mogherini, ruled out a common security and defence operation. She explained that this is a case of activation of bilateral aid and assistance, which provides Member States with ample scope for interpretation.

**PM:** Reasonably, one would expect the invocation of Art 42(7) TEU to make little difference to what France could expect in this instance. One would reasonably expect intelligence sharing and co-ordinated police action, especially by countries bordering France. It is harder to see how France could reasonably expect military action in the present circumstances,

although that is thought to be the principal rationale behind Art 47(2). It may be presumed that France does not desire other Member States' armies to enter and operate on its territory in this instance (as it might if, for example, it had been invaded by an enemy state). I will return to the issue of military action outside France under the next question.

### **Are there limits to what the invoking state can expect in terms of assistance from other Member States? Could Member States resist calls for assistance under Art 42(7)?**

**TK:** There are no limits to what a Member State can expect, given that the scope of Art 42(7) TEU is yet to be determined. President Hollande is currently using this clause as a declaration of support from the EU at both political and legal level. The clause cannot, however, be used as a form of endorsement of France's unilateral action in Syria.

Indeed, Member States could resist calls for assistance under the clause. A lot depends on the Member States' political consensus, especially within non-aligned countries, over, for instance, the use of armed force under the EU banner. What is more, there are no EU sanctions for lack of engagement.

**PM:** As a matter of law, the limits are those referred to before, under UN and NATO obligations, which still leaves a wide range of obligations. However, France could not expect neutral Member States to assist militarily if that went against those states' constitutions. The most interesting question is whether France could require military assistance outside its territory in this case, most obviously against IS in Syria. As a matter of drafting, that appears to be within the Art 42(7) range of assistance. However, Member States unwilling to go that far would and could argue that that was outwith the relevant 'aid and assistance' obligation if (contrary to France) they did not see such action in Syria as sufficiently relevant to the armed aggression that occurred in Paris or to defending against a recurrence thereof.

### **To what extent is this clause capable of being read as a mutual defence clause (ie, akin to the Art 5 NATO collective defence)? Why might a state opt for Art 42(7) over recourse to NATO?**

**TK:** Mutual assistance at EU level has to be compromised with the broader security commitments of the Member States in NATO, especially those related to collective self-defence under Article 51 of the Washington Treaty 1949. The second paragraph of Art 42(7) TEU is more explicit about the NATO-EU relationship. It provides that cooperation under NATO remains the foundation of collective defence and the main forum for its implementation.

The EU's 'soft' response to the Paris terrorist attacks appears pragmatic given that contrary to NATO, the EU does not maintain strong military readiness structures or joint military planning. Thus, while a military assistance obligation may at first glance be seen as a move towards EU military autonomy, a close reading of Art 42(7) TEU puts into question the role of the EU as a 'defence organisation'. EU law does not antagonise the long-established universal system for collective security. It rather confirms the primacy of the UN and NATO in the preservation of international peace and security through authorisation of the use of force and subsequent military action.

**PM:** It is capable of being read in that way, as the cross-reference to the NATO commitments indicates. A state might opt for Art 42(7) TEU over Art 5 NATO because it is both narrower and wider than Art 5--it is narrower because it does not include countries, such as Turkey or the US, which are not in the EU (and which France may or may not want to involve so heavily in its internal affairs), and it is wider in that it is more explicitly about security as well as defence policy.

### **What interaction does this clause have with the mutual solidarity clause?**

**TK:** Art 222 TFEU (solidarity clause) could have been expressly mentioned in Art 42(7) TEU. A possible interpretation of the current dispensation is that Art 42(7) TEU deals with state violence against one or more Member States and state-sponsored terrorism through common security and defence policy military means. On the other hand, Art 222 TFEU focuses on countering oppositional terrorism by non-state actors and serious crime through the EU criminal law acquis.

Art 42(7) TEU constitutes in its entirety an intergovernmental device and does not foresee for the involvement of EU institutions by creating any sort of new supranational competences. Conversely, Art 222 TFEU requests Member States to coordinate between themselves in the Council and provides the EU with power to mobilise all instruments at its disposal in order to protect and assist Member States in the event of a terrorist attack, or natural or man-made disaster. Moreover, Art 222 TFEU can be used alongside other legal bases to justify new legislative acts that would presumably foster solidarity between member states in the fight against serious crime and disaster response. Art 42(7) TEU operates in

isolation as a scheme which although reinforces the concept of self-defence in EU law, is, nonetheless, not conditioned by a predetermined minimum number of participant states.

These differences aside, both Art 42(7) TEU and Art 222 TFEU suffer from lack of enforcement credibility.

**PM:** The mutual solidarity clause is Art 222 TFEU. It might be thought that it would have been more appropriate for France to invoke that clause since (unlike Art 42(7) TEU) it refers expressly to terrorist attacks and defines more closely for what purposes resources are to be mobilised. A Member State could in theory invoke both clauses--although they are not expressly linked, they could be seen as complementary in this case. The difference is that under Art 222 TFEU it is 'the Union' that mobilises the resources, in practice involving the Commission and the High Representative, whereas Art 42(7) TEU is much more focused on action within the territory of the Member State.

*Interviewed by Lucy Trevelyan.*

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