Pioneers Wanted

On the Differentiated Integration Pathways Towards a Genuine European Defence Union

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With years of full-scale war on the European continent, lingering concerns about the possibility of a Russian kinetic attack against one or more EU member states before the end of the decade, uncertainties about citizens' willingness to take up arms, and doubts about the kind of support that the United States would be inclined to provide to a European ally invoking Article 5 of the North Atlantic Treaty – the stakes could hardly be higher. Yet, the EU still treats this existential security crisis like a regular bureaucratic undertaking, one it can address at its leisure in peacetime.

It is against this backdrop that Commissioner for Defence and Space, Kubilius, is expected to engineer a genuine European Defence Union. To that end, he has formulated a series of legal questions that ought to be answered. Two of them touch on the pathways to be followed: "Would [it] be impossible to squeeze such a European Defence Union into the existing Treaty on European Union?" And would a "new Intergovernmental Treaty on European Defence Union" be the best approach to get there? In our view, raising these leading questions amounts to answering them.

Politically speaking, differentiated integration is the most promising framework for the "progressive framing of a common defence policy [that] will lead to a common defence" (Art. 42.2 TEU). There are three pathways along which a core group of able, willing, and trustworthy member states can proceed: enhanced cooperation, an updated edition of the "permanent structured cooperation in defence" (PESCO 2.0), and incorporating an intergovernmental agreement *à la* Schengen into the EU Treaty.

Enhanced cooperation

Enhanced cooperation – the most generic form of differentiated integration – is outlined in Article 20 TEU and Articles 326-334 TFEU. While this mechanism seems more suited for regulatory action, there is no indication that defence policy is excluded. In fact, the exemption of military affairs from enhanced cooperation under the Treaty of Nice was removed with the Lisbon Treaty (and introduced in Art. 329 TFEU). This means that a new form of enhanced cooperation in defence can be created next to the existing PESCO.

This format presents at least three advantages. Firstly, it allows a minimum of nine like-minded states to proceed without being held back by less willing members, ensuring that defence integration progresses among those most committed to it. Secondly, by remaining within the EU legal order, an enhanced cooperation initiative benefits from institutional support through the EU's diplomatic, operational, and strategic planning resources, thus lending legitimacy and coherence to military cooperation. Thirdly, it may serve as a stepping stone towards broader defence integration, potentially evolving into a common defence capability over time.

On the downside, under Article 329(2) TFEU, the initiation of enhanced cooperation in the Common Security and Defence Policy (CSDP) requires unanimous approval by the Council, including non-participating member states. Secondly, it is generally intended as a mechanism of last resort when all other avenues of EU-wide cooperation have been exhausted. Whether that threshold has in practice been reached is, however, far from obvious. Thirdly, once established, decision-making within an enhanced coopera-

tion framework generally follows the qualified-majority-voting (QMV) rule (Art. 330 TFEU), but military and defence matters falling within the Common Foreign and Security Policy (CFSP) are subject to Article 31(1) TEU, which stipulates that unanimity remains the decision-making rule – even within the enhanced cooperation framework. This could limit the flexibility of an enhanced cooperation defence structure operating, particularly regarding rapid deployment or engagement in military operations. Fourthly, because enhanced cooperation does not create distinct institutional frameworks and must not undermine the functioning of the EU (Art. 20 TEU; Article 327 TFEU), its defence-related activities would still be subject to existing CFSP mechanisms, again reducing flexibility. A separate command and control structure, for instance, might therefore raise questions concerning the institutional balance of the EU. Finally, a parallel military initiative under enhanced cooperation, while feasible from a strictly legal point of view, could conflict with the objectives of PESCO.

On balance, the enhanced cooperation track is riddled with potholes.

PESCO 2.0

Permanent Structured Cooperation (PESCO) is the *lex specialis* for differentiated integration in defence (cf. Arts. 42(6) and 46 TEU + Protocol 10). Launched in 2017, it provides more space for further refining the CSDP institutional framework. It allows "those member states whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area" to cooperate more closely, and functions as a framework for 74 capability generating projects.

Helpfully, the EU Treaty prescribes QMV for the establishment of PESCO. From then onwards, decision-making follows the unanimity rule among the participating member states, giving them the possibility to veto any decision – including the launch of new projects. A *passerelle* exists to move from unanimity to QMV within each individual project, but so far no project leader has proposed this.

What started as the most popular of differentiated integration formats (25 out of 28 member states at initiation) has *de facto* evolved into a fully integrated policy field governed by unanimity among all EU countries minus one (Malta). EU constitutional law bears down on PESCO in a way that forces decisions towards the lowest common denominator. In practice, this means that even within a formally differentiated framework, more ambitious states remain dependent on the consent of less willing participants. Conversely, the enforcement mechanisms established within PESCO are so light that member states do not feel the urge to meet the expectations that they themselves have helped to raise. After seven years of implementation, only half of the anticipated 26 projects reached full operational capability in 2025, with the other half projected to be ready between 2026 and 2029 (PESCO Strategic Review, 2024). Germany's initial preference for inclusiveness slowed the maturation of projects; France and other member states might now use the current geopolitical turmoil as an opportunity to establish a more ambitious PESCO 2.0. After all, there is nothing in the Treaties that suggests that the procedure for establishing PESCO has been exhausted by its inaugural use. The only condition is that participating states fulfil the criteria and have made the commitments on military capabilities as listed in Protocol No. 10. Similarly, there is no minimum number of member states that must participate; a qualified majority in the Council suffices to decide on its creation. These are attractive features.

The key question is whether a PESCO 2.0 could function not just as a framework for capability development to raise the operational readiness of (multi)national forces, but as a platform for participating states to create more advanced command structures. Article 2 of Protocol No. 10 provides an opening by stating that participating countries will "bring their defence apparatus into line with each other as far as possible (…)". This may well include more advanced forms of planning and monitoring of higher intensity military operations. While the wording of Protocol No. 10 underscores that PESCO is about strengthening the "deployability" of national capabilities, not the

"deployment" of them or the fielding EU military forces, practice suggests that PESCO's operational scope might be interpreted more flexibly than its textual origins imply. One telling example: two days before Russia's full-scale invasion of Ukraine in 2022, the council of the Cyber Rapid Response Teams (CRRTs), a PESCO project led by Lithuania, confirmed that it would assist Ukraine in responding to cyber incidents. Since 2022, CRRTs have been deployed on three occasions in Moldova, once in support of EUTM Mozambique, and – despite the territorial boundaries that the Common *Foreign* and Security Policy normally implies – even inside a member state: Lithuania during the 2024 EP elections (EEAS, EUMS and EDA, 2024). None of the 26 participating states objected, confirming that PESCO extends beyond capability generation to encompass deployment within member states and capacity-building for third states.

This flexible interpretation suits the creation of a PESCO 2.0 as a voluntary defence pillar within the EU, sporting a European Security Council for strategic direction and control, supported by a higher command for the planning and conduct of 'EU special forces' performing tasks supplementary to national armed forces, e.g. in the field of cyber defence. Arguably, such projects developed under a PESCO 2.0 would help in progressively framing a common defence policy that will lead to a common defence. That said, the new edition of permanent structured cooperation would also have to ensure that the functioning of the EU and the rights of non-participating member states are not undermined. In particular, it ought not to displace or assume powers that the Treaties allocate to the CSDP as a whole. In other words, any PESCO 2.0 establishing command and control bodies could not decide on CSDP operations.

External differentiated integration

The third pathway leads outside the EU legal framework altogether. Concluding an intergovernmental agreement outside the EU legal framework offers maximal flexibility to defend Europe and deter its adversaries – as long as national constitutional law and EU law are respected (see German Constitutional Court in 2 BvE 4/11, para 100, and CJEU in C-370/12, *Pringle*) and the ambitions and actions of the group of pioneers do not impede the goals of the CFSP or the powers (explicit and implied) of the EU institutions. It avoids the political and procedural hurdles of EU Treaty reform, PESCO, and enhanced cooperation, and allows willing states to determine the institutional structure, participation rules, and decision-making mechanisms from scratch. Precedents for this model include the 1985 Schengen Agreement, which was incorporated into EU law with the Amsterdam Treaty, and the 2012 Treaty establishing the European Stability Mechanism, which has so far remained outside of the European Union. An alternative route was taken with the Western European Union (WEU), which operated until the Modified Brussels Treaty was terminated in 2011: only elements of that treaty (e.g., the mutual defence clause and the Petersberg tasks for crisis management) were incorporated into the Lisbon Treaty.

Following the third pathway would allow participating states to craft a flexible institutional design of a European Security Council supported by an independent command structure (inspired by or incorporating standing headquarters of Eurocorps and the European Air Transport Command), a dedicated military budget, and a multinational defence force. Cooperation with the EU's institutions would be allowed, as long as those bodies acted within their treaty mandate. For instance, the Political and Security Committee, the Council of Ministers' preparatory body composed of member states' ambassadors responsible for the CFSP/CSDP, could not be transformed into an organ of the new treaty organisation. Similarly, the new treaty would have to avoid introducing dispute-resolution mechanisms that bypass or undermine the autonomy of the EU legal order (see CJEU in C-284/16, Achmea BV, para. 32-37.)

Circumventing the formal financial constraints (Article 41.2 TEU) and unanimity decision-making (Article 42 TEU), such a pillar for European security would preserve the constitutional setup of the EU Treaties while expanding their operational capacity. It would function as a parallel and autonomous mechanism. In theory, such an institution could even be

NATO-compatible and made available to NATO if agreed with SACEUR, the Alliance's highest military commander.

If the longer-term objective were to integrate this external treaty into the EU once the political conditions allow, then the most practical avenue would be for a core group of EU member states to conclude the intergovernmental agreement first among themselves and subsequently include third countries through association agreements – Norway, the UK, and Ukraine.

Each legal avenue for deeper integration faces its own legal constraints. Yet, given the EU's current challenges, flexibility alone does not deliver a robust strategy. Coalitions of the willing can drive initial innovation, but without institutionalisation remain fragile and reversible. Of the three options, external differentiated integration offers the middle road between providing deeper integration and flexibility, yet solid ground for sustained defence efforts beyond the urgency of the current moment.

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