On Reviving the 1952 European Defence Community

À la Recherche du Temps Perdu!

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Can we revive the 1952 European Defence Community (EDC) after it failed to get ratified by France and Italy more than 70 years ago? This intriguing – and counter-intuitive – idea is currently being explored by an ambitious project called ALCIDE led by Federico Fabbrini and chaired by Sylvie Goulard, which brings together a small number of distinguished legal historians, constitutional lawyers and political scientists. In the last two years, numerous working papers and academic publications, including a 2026 book in Italian, have appeared; and Fabbrini's tireless efforts in promoting ALCIDE's ideas have recently stirred – at least in Italy – a national debate about EDC ratification, with legislative bills supporting a belated ratification now introduced in the Italian Chamber and Senate, respectively.

What is ALCIDE's central idea? According to Fabbrini, "in strictly legal terms, the EDC can be brought into operation today—simply with the ratification by two states: France and Italy" (Fabbrini, 615), because the other four 1952 signatory states, Germany and the Benelux countries, continue to be legally bound by their respective ratifications. There is, consequently, no need to fundamentally re-think European defence cooperation under conditions of unanimity today, as "the EDC can enter into force with just two votes—an incredibly more easy path than the 27 votes it would take to amend the EU treaties or to operationalise its timid defence clauses by unanimous agreement of its member states" (ibid., 628).

Fabbrini's core justification for this unusual proposal is the 1969 Vienna Convention on the Law of Treaties (VCLT) and the assumption that the resurrected EDC will be compatible with European Union law today. Both assumptions will be questioned here, while the political consequences of a revived EDC – a loss of EU external autonomy – will be briefly discussed too. But beforehand: some legal history.

Some Legal History: From the EDC to the WEU

Following the 1951 Treaty establishing the European Coal and Steel Community (ECSC), the EDC Treaty was to be the second "foundational" treaty for a second supranational Community. Signed on 27 May 1952, its central aim was to solve, in light of the Soviet military threat during the Cold War, the "German problem" by creating a supranational army. Both issues were clearly connected: indeed, a day before the EDC Treaty was signed, the 1952 General Treaty had linked the end of Allied occupation and German sovereignty with the ratification of the EDC (Articles 4 and 8 of the General Treaty). To assuage France's fear of a remilitarised Germany, its military powers were, together with those of the other Member States, to be transferred to a supranational authority that was to co-command a "European" army. For various reasons, this was rejected by the French Parliament on 30 August 1954.

Two days later, on 1 September 1954, British Prime Minister Eden already called for alternatives to the EDC, and the solution ultimately favoured was the creation of a new organisation to integrate European defence: the Western European Union – with Germany's entry into NATO and German sovereignty now depending on the coming into force of the WEU. Remarkably, only five weeks after the defeat of the EDC, the "Paris Agreements" were signed in October 1954; and by 5 May 1955, these agreements had already been ratified by all parties – "with higher parliamentary majorities than those for EDC ratification" (Rohan, 45). One week later, on 12 May 1955, the Soviet bloc signed the Warsaw Pact, and the Cold War was institutionally set: NATO-WEU for the "West"

versus the Warsaw Treaty Organisation (WTO) for the "East".

The WEU, as the European pillar of NATO, had been created by repurposing the earlier 1948 Brussels Treaty. The 1954 Paris amendments here replaced the 1948 Treaty's original aim "to take such steps as may be held necessary in the event of a renewal by Germany of a policy of aggression" with the new 1952 EDC aim "to promote the unity and to encourage the progressive integration of Europe". This new key aim was repeated in Article VIII of the WEU Treaty; and a Protocol on "Forces of Western European Union" further clarified the wish of the contracting parties to functionally replace the EDC. (Articles 1 and 2 here directly referred to the European Defence Community.) The WEU had thus, albeit in a much more intergovernmental manner, assumed the functions of the EDC; and nothing shows this better than the fate of the 1952 General Treaty discussed below.

Some International Law: The Vienna Convention on the Law of Treaties

According to ALCIDE, Germany and the Benelux states are still bound by the 1952 EDC Treaty thanks to Articles 14, 55, 56 and 65 of the VCLT because states continue to be bound by their original ratification if they have not officially withdrawn it or formally terminated the treaty. Yet strangely not mentioned by Fabbrini, Article 59(1) VCLT here adds:

> *"A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time."*

In light of the previous section, are there not good reasons to consider the 1954 WEU to have terminated the 1952 EDC because all the parties considered the matter of European defence, the "German question" as well as NATO collaboration to be now governed by the new treaty?

The German case is here revealing. For the replacement of the EDC by the WEU can clearly be seen in the context of the 1952 General Treaty. Indeed, with the failure of the EDC, that treaty urgently needed an amendment to survive (as its original version had made German sovereignty and re-militarisation conditional on the entry into force of the EDC Treaty) and that amendment was now made through the 1954 Paris Treaties. The Paris arrangements, and particularly the WEU, henceforth re-opened the way to German sovereignty and defence cooperation. And thus, at least for Germany, the ratification of the WEU symbolically signalled the end of the EDC, because Germany politically preferred the much more sovereignty-friendly WEU. Chancellor Adenauer had, for that reason, categorically rejected any revival of the EDC (Herbst, 1996, 101).

But let us also look inside the EDC Treaty. According to Article 132, the EDC could only come into force after a ratification by all six founding Member States; yet the provision added:

> *"In the event that all the instruments of ratification have not been deposited within a period of six months following the signature of the present Treaty, the governments of the States which have made such deposit shall consult among themselves on the measures to be taken."*

Such discussions had, in fact, taken place in 1953 and 1954; and France, in the end, had proposed a daring new amendment. Yet the four states that had already deposited their ratifications rejected it while making their own counterproposal (Rohan, 39). It was this counterproposal that had failed to gain support in the French Parliament on 30 August 1954. No further discussions took place under Article 132 EDC – instead, all the Member States shifted their attention to the WEU.

There are, in sum, good reasons in international law to claim that the EDC has been dead since 1954 and that it cannot be resurrected by the "late" ratifications of Italy and France. Whether you focus on Article

59 VCLT or Article 132 EDC in combination with Article 54 VCLT, all earlier ratifications appear to have become defunct. (And *quaere*: would the original four ratifications still be valid under their respective national constitutions today in light of all their *post*-1954 amendments and re-interpretations?) A contemporary revival of the EDC would also have a strange additional effect: for since the EDC Treaty was set up for 50 years only, its resurrection would mean that a Treaty that was supposed to end in 2004 would come to life in 2026. Lazarus was resurrected by Jesus after 4 days to live the end of his life; ALCIDE hopes to apply its magic after 70 years and to bring to life something that would no longer be alive (if it had ever lived)!

Some European Law: The EDC and the EU Treaties today

Whoever reads the EDC Treaty will be struck by how closely it is inspired by the ECSC Treaty. Like the latter, it set up a Community that was to be "supranational in character" (Article 1 EDC) and only for a period of 50 years (Article 128 EDC). And like the ECSC, it centred around a supranational authority, the "Commissariat" (Article 19 EDC). There were also direct links to the ECSC "Assembly" (Article 31 EDC) and "the Court of Justice of the European Coal and Steel Community" (Article 52 EDC), which were borrowed by the EDC.

As regards the "Assembly", the solution within the EDC Treaty was nonetheless complex. Its lack of democratic credentials was criticised from the beginning; and for that reason, the famous Article 38 EDC envisaged the future replacement of the ECSC/EDC Assembly by a future Assembly "elected on a democratic basis" and with stronger supranational powers. This future political commitment was, as is known, meant to be addressed by a third Community: the European Political Community (EPC). For many contemporaries, the EDC was therefore closely linked to the EPC – so much so that the death of the former also caused the death of the latter. *Quaere*: can the EDC be resurrected without the simultaneous resurrection of the EPC (as well as the ECSC on which it so heavily relies)? Legally, this might be possible for the EPC (Article 33 EDC), but the EDC drafters clearly thought that its democratic arrangements were incomplete and unsatisfactory.

What would the legal status of a resurrected EDC be? Should the fully ratified EDC Treaty count as a "foundational" Treaty that enjoys the status of primary Union law; or would it be an international *inter-se* agreement between Member States? The first alternative may seem absurd, but the express reference in the EDC Treaty to its "supranational" character strongly works against an ordinary international law reading. Fabbrini nonetheless endorses this reading and points especially to *Pringle* to prove that international inter-se cooperation is possible. The European Court here, however, clarified that any inter-se cooperation would need to take place in conformity with all EU law (ibid., para.109); and the great bulk of the EDC Treaty appears to conflict with current EU primary law (as well as EU secondary law that is equally hierarchically superior to inter-se agreements of the Member States).

Take, for example, the role of the European Court: the EDC Treaty was here very progressive; yet could the Court's envisaged role apply in 2026 to only six Member States, and if so, which European Court: the ECSC/EDC Court, composed of seven judges, or the Court of Justice of the European Union with its 27 judges? According to Articles 273 and 344 TFEU, the answer should be the current Court; but what does this make of the exclusion of all CFSP jurisdiction under Article 24 TEU? And more generally: who is to act as the "Commissariat" or the "Assembly" for the EDC today? Should this be the Commission and the European Parliament, or two new institutions only reflecting the six founding Member States? When it comes to the borrowing of Union institutions in inter-se agreements, strict legal principles apply (*Pringle*, paras. 153-177), and for that reason, presumably, Fabbrini prefers two distinct institutions (Fabbrini, Chapter 9). Yet would the NATO-like mini-Parliament that he suggests really solve the Article 38 EDC problem about democracy discussed above? And can there be a supranational executive body apart from the Commission that – instead of the Commission – operates within the intergovernmental CFSP?

In my view, the supranational arrangements set up by the EDC cannot be integrated into the current CFSP institutional framework. Moreover, many substantive EDC provisions would break the current frame around Article 46 TEU, and especially Article 1 of the Protocol on Permanent Structured Cooperation, whilst the all-male compulsory military service envisaged by the EDC (Military Protocol, Article 12) would raise important constitutional doubts today too.

Some European Politics: Regression or Progression?

For anyone wishing to see more European "autonomy" in defence, including the emergence of a European army, ALCIDE represents a paradox. On the one hand, the EDC's provisions on Defence Forces (Articles 9-18 EDC) contain remarkably supranational features vis-à-vis the Member States; yet, externally, they also betray a remarkable dependence on NATO. Article 2 EDC commits it to operate "within the framework of the North Atlantic Treaty" and Article 18 EDC offers the European defence forces, especially in wartime, to NATO: "the competent Supreme Commander of the North Atlantic Treaty Organization shall exercise with regard to the Forces provided for above the full powers and responsibilities". Already in 1954, it was this NATO dependence that had – partly – caused the French rejection (Loth, 194).

Paradoxically, the current CFSP arrangements, especially after the formal dissolution of the WEU in 2011, here offer much more external freedom; and for all those favouring an externally autonomous European defence force, the revival of the EDC would thus be a step in the wrong direction. After repeated US American threats to NATO (and Danish sovereignty), the European Union can no longer rely on the hegemonic stabiliser that has, overall, been so beneficial for Europe in the second half of the twentieth century. Yet it is also undeniable that the current internal CFSP arrangements, especially the need for unanimity (Article 31 TEU), have caused major problems for the Union's autonomy from its Member States. But how to go about it? Should one qualify Article 31 TEU and exclude certain Member States from the vote, as has been suggested by some; or should one return to the EDC and exclude – even if only temporarily – 21 Member States from discussions about the future of European defence?

Differentiated defence integration is likely to be the future, yet surely not in the form of the 1952 EDC. For ALCIDE's proposal to revive the EDC through the late ratifications of Italy and France is based on a legal fantasy. Under international law, the EDC has been dead since it was abandoned by all six founding Member States in 1954; and even if one were to deny this, a miraculously resurrected EDC Treaty would violate the current EU Treaties (as well as existing EU secondary law). Finally, a revived EDC represents also, politically, a double-edged sword as it trades more internal autonomy for less external autonomy. Yet instead of chasing a lost – transatlantic – past, Europe might have to chart its own external future and gain more – not less – strategic autonomy from NATO and the United States. But this is a political, not a legal, question.

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