The Scope and Objective of Treaty-Based Flexibility Arrangements in The Area of European Security and Defence Policy (ESDP)

Abstract

From the very beginning of its existence, the European Community has been facing the problem of harmonizing the process of integration and heterogeneity. The challenge has been to organize a growing diversity within the Union without jeopardizing the dynamics of integration. In the area of foreign, security and defence policy, this heterogeneity is particularly marked, whereas unanimity is the principal way of decision-making. It was therefore necessary to provide for such forms of flexibility which would not block the development of this policy. The development of the EU security and defence policy is a result of differentiation which has been the core of the framing of this policy from the very beginning. Therefore, within this policy, differentiation occupies a position which it does not have in any other Union policies. The purpose of this paper is to analyse Treaty provisions on flexible cooperation within the EU foreign, security and defense policy. Their aim is to enable states to implement cooperation within the institutional framework of the EU, and conversely, to enable those states which refuse participation not to become involved. These innovations imply certain risks, since flexibility creates additional institutional complexity and may create a rift between states which choose to advance and those not willing to do so.

Key words: flexible cooperation, flexibility, differentiated integration, enhanced cooperation, closer cooperation, permanent structured cooperation, CFSP, ESDP.

Introduction

How is it possible to achieve unity in diversity? How can heterogeneity be aligned with the process of integration? European Community has been facing these questions from its very beginnings. Although the European integration process implies uniform application of the Community law, differences between Member States have created a necessity to examine the possibilities for advancing at a “differentiated” pace, in order to resolve the problem of harmonizing the processes of enlargement and deepening of the European integration (Chaltiel 1998: 290).
Thus, successive enlargements resulted in a certain degree of “flexibility”, primarily reflected in specific temporary derogations, with a consequence of differentiated application of the common body of rights and obligations. In the discourse on flexibility and differentiation in the process of integration, there is a real “confusion of terminology”, since terms in current usage include e.g. “multi-speed Europe”, “enhanced solidarity”, “enhanced cooperation”, “progressive integration”, “concentric circles”, “multi-track Europe”, “variable geometry”, etc. (Stubb 1996: 283). All of these terms are used to denote a phenomenon within the Community and Union whereby “states or groups of states act according to rules which differ from general rules, or rules applicable to all states” (Manin 1996: 9). Therefore, the challenge is to organize a growing diversity within the Union, without thereby jeopardizing the dynamics of integration (De la Serre, 2002: 167). Hence the concept of flexibility duly respects diversity and presents ways of harmonizing it with the dynamics of the integration process. However, in early 1990’s, there was a change in the essence of the differentiation process, which ceased to be a temporary solution and gradually became a concept which will enable the organization and codification of flexibility. Two events played a key role in this evolution: the creation of the economic and monetary union, on the one hand, and a perspective of post Cold War unification, on the other. Thus, the Treaty of Maastricht, with the creation of economic and monetary union, enabled the progress of some states, while some other states voluntarily opted out of this process, thereby being granted specific (permanent) derogations (Denmark, United Kingdom) (Ibid: 168). Therefore, flexibility is becoming a two-faceted process: on the one hand, the aim is to enable states to advance further in the process of integration and to implement cooperation in a specific area within the EU’s institutional framework, and conversely, to enable the states refusing to participate not to be involved on the basis of specific derogations (opt-out) (Chopin, Lument 2008: 1). However, flexibility implies certain risks. The first is an excessive fragmentation of the integration process, since differentiation creates additional institutional complexity, which is often subject to criticism. Another risk is the possibility of rift between the states which opt to advance, and those unwilling to do so.

In this article, we will focus on the forms of flexibility in the area of EU security and defense policy. We will note different terms used in this area, namely: “enhanced cooperation”, “closer cooperation”, “constructive abstention”, “permanent structured cooperation”, and these forms reflect the specific nature of this particular EU policy. However, regardless of variety of terminology, the concept aims to harmonize differences between states, including the principle of unanimity in decision-making, with the dynamics of the integration. The area of foreign, security and defense policy is specific, due to the particularly distinct heterogeneity of interests, ambitions and capacities and therefore, flexible forms of cooperation represent the most logical way to overcome the stalemate in the implementation of this policy.

This paper first presents an analysis of special procedures in the area of EU foreign and security policy, then proceeds to examine the forms of flexible cooperation in the
area of security and defense policy and finally points to the importance of flexibility in this area. The conclusion reached is that the major progress are the provisions of the Treaty of Lisbon, which introduce different forms of flexibility into the area of EU security and defence policy. However, these innovations imply certain risks since flexibility creates additional institutional complexity and can create a rift between states committed to advancing and those not willing to do so.

Flexibility arrangements in CFSP

Common foreign, security and defence policy is based on intergovernmental cooperation, since this area is traditionally regarded as a prerogative of national sovereignty. Bearing in mind unanimity as a basic principle of decision-making in this area, the European Union has, since it first introduced foreign and security policy into its institutional framework, faced the possibility of the impasse of this policy. It was thus necessary to find appropriate alternatives which would not block further development of this policy, as it seemed highly unlikely that the qualified majority principle would be introduced in this area. If we look at the provisions of the Treaty of Maastricht, we will observe that the example of Denmark represents a form of flexibility, primarily aimed at overcoming the stalemate in the process of political decision-making. Namely, Denmark rejected the Treaty of Maastricht in a referendum, and consequently it was decided, on the basis of the so-called “Edinburgh Compromise” from 1992, to annex Protocol no. 5 on the Position of Denmark to the Treaty of Maastricht, which foresees, inter alia, that Denmark “will not participate in the elaboration and implementation of decisions or actions of the Union which have defence implications” but will not thereby prevent the development of “closer cooperation between Member States” in the area of EU foreign and security policy. Therefore, this form of flexibility is based on the principle of non-participation (opt-out) and so it can also be termed the “destructuring” differentiated integration (Burgorgue-Larsen 2003: 123). In the domain of defence, the Treaty of Maastricht provided for different forms of cooperation arrangements, but outside of the EU treaty framework. Several clauses of the Treaty of Maastricht confirm this fact. First, the Treaty provides for the respect of specific character of national defence policies. The specific character refers to both neutral countries and to defence policies implemented in the scope of NATO. Second, flexibility was foreseen in the frame of Western European Union (WEU) itself - EU’s military pillar. And finally, the possibility to develop “closer bilateral cooperation” between two or more member states in the frame of WEU or NATO is provided for in Article 17 (former Article 1.7) of the Treaty on EU, but only to the extent that such cooperation does not preclude or run counter to cooperation on EU common foreign and security policy. This provision results from differences existing between member states’ defence policies.
and their military potentials. However, all the aforementioned treaty provisions foresee cooperation outside of the EU’s institutional framework (Diedrichs, Joppa 2003: 18) and therefore run the risk of “defragmentation” of foreign and security policy. It was therefore necessary to introduce specific forms of cooperation in this area, which would take into account great differences between member states, while allowing for their cooperation within the institutional framework of the EU. However, this did not materialise until the adoption of the Treaty of Lisbon.

However, following a new wave of enlargement, it was necessary to approach the process of differentiation in a fresh manner, taking into account the growing heterogeneity and the future of an EU with twenty or more member states. Mindful of this fact, the Treaty of Amsterdam formally introduced the possibility of the so-called “enhanced cooperation” within the scope of the EU institutional framework. What does the concept of enhanced cooperation actually mean? Unlike mechanisms of differentiation introduced by the Treaty of Maastricht, which are “derogations”, since they offer the possibility to individual member states (Denmark, United Kingdom) not to participate in some area, enhanced cooperation aims to allow states to advance faster and further than others, within the institutional system of the EU. Therefore, this cooperation has a “positive connotation”, while various derogations have a “negative connotation” (Manin 1998: 137). Some authors also point to gradual abandoning of the concept of flexibility in favour of the concept of enhanced cooperation, as a result of attempt to use less “ideologically cumbersome terminology”. Enhanced cooperation thus points to the practical side of this phenomenon, as opposed to flexibility, which is associated with subsidiarity or federalism (Stubb 2002: 43).

The Treaty of Amsterdam thus provided for the possibility of enhanced cooperation, introduced by Articles 43-45 of the Treaty on EU and by Article 11 of the Treaty on EC and covering the areas within the “first” and “third” EU pillar. Strict conditions governing this cooperation were defined. Thus, it could be introduced in the third EU pillar, provided that it aimed to achieve the objectives of the Union, to protect and advance its interests, that it was used only as a last resort, when the objectives of the Treaty could not be achieved by application of procedures foreseen, that it applied at least to the majority of member states, that it did not impact on the Community Acquis nor any competencies, rights, obligations and interests of member states not participating in cooperation (Art/43 (1), Treaty on EU). Within the first pillar of the Union, this cooperation could be introduced only in areas outside the exclusive competence of the EC, and provided that it had no impact on the Community policies, actions and programmes, that it did not refer to the Union citizens, that it remained within the competence of the Community and did not impose discrimination or trade restrictions between Member States (Art. 11 (1) of the EC Treaty).

However, this cooperation did not encompass the area of foreign and security policy. So, the will and determination of some member states to advance faster in
the process of integration is not foreseen in the Union’s second pillar. Why? It was pointed out that the second pillar of the Union is already sufficiently “flexible” and that introduction of enhanced cooperation would be counterproductive with regard to the continuity and coherence of the EU foreign and security policy, and would thus represent a potential source of confusion in relation to third countries. Thus this idea, advocated by some states (the Netherlands) during negotiations on the Treaty of Amsterdam, was entirely rejected eventually (Philippart, Edwards 1999: 99). A compromise solution was found, reflected in the introduction of provisions on the so-called constructive abstention, which was to replace the provisions on enhanced cooperation. This procedure was introduced by Article 23 of the Treaty on EU and provided for the possibility for a member state to abstain from voting, by delivering a formal declaration. In such case, the member state concerned is not bound to apply the decision, but is obliged to accept its binding character for other member states and to refrain from any action likely to conflict with, or impede Union action based on that decision. The goal of constructive abstention is to prevent blocking of the decision-making by a single state.

Constructive abstention is not a novelty of the Treaty of Amsterdam. This form of flexibility is defined by Article 205 (3) of the Treaty establishing the European Community, which underlines that, during the voting in the Council “abstentions by members present in person or represented by proxy shall not prevent the adoption by the Council of acts which require unanimity.” The difference between these two mechanisms is that in the first pillar, the decision also commits the state to abstain from voting, while in the second pillar that is not the case, and thus, there is a risk to infringe the principle of political solidarity laid down in Article 11 (2) of the Treaty on EU, stating that “the Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity” and shall “work together to enhance and develop their mutual political solidarity.” Constructive abstention in external and security policy has some additional shortcomings. Specifically, this form of “case by case” flexibility is based on the principle of non-participation. It is primarily a system of “discrete multiplication” of the opt-out principle, rather than the specific form of enhanced cooperation (ibid.). Further, constructive abstention is possible only when vital state interests are not jeopardized, as set forth in Article 23 of the Treaty on EU. Constructive abstention was first exercised in practice in February 2008 by Cyprus, in relation to the adoption of the EU Council decision establishing the “EULEX Kosovo” mission. On that occasion, this state delivered an official declaration, recalling Article 23 (1) of the Treaty on EU (Cremona 2009: 15).

The Treaty of Nice amended provisions on enhanced cooperation, henceforth to be termed “closer cooperation” and introduced the possibility of such cooperation into the area of foreign and security policy. When it comes to this cooperation in other areas, a minimum of eight states was set for the initiation of such cooperation, while new articles - from 27A to 27D - were introduced in the area of common
foreign and security policy. Under Article 27A, closer cooperation on foreign and security policy shall be directed at: “safeguarding the values and serving the interests of the Union as a whole by asserting its identity as a coherent force on the international scene.” Three conditions were to be fulfilled for its implementation. As it was emphasized in Article 27A (1), this cooperation must respect: the principles, objectives, general guidelines and consistency of the common foreign and security policy and decisions taken therein, competences of the European Community, and finally, consistency between all of the Union’s policies and its external actions. The procedure for introducing closer cooperation is laid down in Article 27C, which emphasizes that Member States intending to advance their mutual cooperation shall address such request to the Council of Ministers. The request shall be forwarded also to the European Commission and the European Parliament for information. The Commission shall pass its opinion on compliance of proposed cooperation with the Union policy, while the Council is responsible for granting authorization for the initiation of this cooperation.

There are significant limitations, both functional and financial, when it comes to closer cooperation in the area of foreign and security policy (Blanquet 2001: 65). Functional constraint is reflected in the fact that this cooperation can be introduced only for the purpose of implementing joint actions or common positions, namely, in cases where there is already qualified majority and constructive abstention. Some authors explain this limitation by the need for coherence of external and security policy, so that closer cooperation in this area cannot be used to establish the guiding principles of this policy (Fines 2000: 367). This limitation points to a different logic of cooperation on foreign and security policy from the concept of enhanced/closer cooperation as such. It is primarily about the mandate accorded by the Union to a defined group of member states, which, in turn, enjoy a certain degree of autonomy. Regarding financial limitations, they also exist, since closer cooperation in this area does not apply to issues with military or defence implications (Art/27B).

Unlike treaties hitherto, the Treaty of Lisbon marks progress on flexibility on common foreign and security policy. The Treaty introduced significant changes pertaining to European Union’s international activities. Firstly, the European Union would henceforth have legal personality, ending a debate on its “implicit” legal personality. Further, “pillars” upon which the Union had hitherto relied were abolished, which was expected to increase coherence between different policies in the EU’s external affairs. However, all these changes in foreign policy are hardly revolutionary, since they do not disrupt the dominant principle of intergovernmental cooperation in this area (Delcourt 2004: 312). As regards closer cooperation, it was introduced by Article 20 of the Treaty on EU and by Articles 326-334 of the Treaty on the Functioning of the EU (TFEU). This cooperation is foreseen in areas outside the exclusive competences of the Union, and aims to achieve the goals of the Union, protect its interests and strengthen the processes of integration (Article 20 (1) TEU). The Council passes a decision to initiate such cooperation, upon condition that it involves participation of a minimum of nine member states. This cooperation is
“open to all Member States” at all times. With regard to foreign and security policy, an important development of the Treaty of Lisbon is that it revokes limitations of this cooperation for issues with military or defence implications. However, closer cooperation in this area is of specific character which is due to the specific status of external and security policy within the Treaty of Lisbon. Specifically, Chapter 5 of the Treaty on EU is titled “General Provisions on the Union's External Action and Specific Provisions on Common Foreign and Security Policy”, which indicates the intention to place this policy within the single system of the EU external action, while maintaining its distinct character. The Treaty on the Functioning of the EU also points in that direction, by envisaging different categories of EU competences - exclusive EU competence (Article 3 TFEU), shared competence (Article 4 TFEU) and competence to support, coordinate and supplement the actions of the Member States (Article 6 TFEU) - without including EU foreign and security policy in any of these categories. Thus, Article 2 (4) of TFEU states that “The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.” It seems that the specific, *sui generis*, character of this policy is not clearly defined in the new treaty (Cremona 2003: 1354), thus preventing full harmonization of instruments and procedures divided into “pillars” (Bono 2004: 560). Hence, closer cooperation in this area is specific by comparison to such cooperation in other areas. As an example, while approval for cooperation in other areas is granted by the Council by qualified majority, in the sphere of foreign and security policy unanimity is required (Article 329 (2) TEU). Furthermore, member states must submit an application containing precise information on the scope and objectives of proposed cooperation in other areas, while in the area of EU foreign and security policy a simple request is sufficient, with no additional conditions (Article 329 (1) and 329 (2) TEU). Finally, aside from the Commission, in the area of foreign and security policy, the High Representative for EU Foreign and Security Policy is also obliged to pass an opinion on compliance of closer cooperation with EU foreign and security policy (Article 329 (2) TEU).

**Flexibility arrangements in ESDP**

The development of the European security and defence policy (ESDP), as a component of common foreign and security policy, has remained at odds with the decision-making procedure in this area. In order to preserve political unity within the EU and control over the development of this policy, it was necessary to introduce new arrangements on flexible cooperation in this regard, in order to enable the “coalitions of the willing” to engage in civil and military operations under the auspices of the EU. There are three reasons underlying the introduction of flexible cooperation in the area of security and defence within the institutional framework of the EU. First, defence cooperation between member states was taking
place outside the institutional framework of the EU, and thus it was necessary for this cooperation to be carried out in some form within the EU. Further, there were substantial differences between Member States in military capability which could no longer be ignored. Finally, the area of security and defence policy was an area where all decisions are made unanimously. Guided by these realities, the Treaty of Lisbon provides for three forms of flexible cooperation in the area of European security and defence policy.

The first form of flexible cooperation relates to provisions on the so-called "permanent structured cooperation". Specifically, a group of member states wishing to advance on defence and mutually engage in joint initiatives are enabled to cooperate in the frame of the Union. This form of cooperation aimed to institutionalise the hitherto practice between some Member States, in order for this cooperation to be implemented within the framework of the Union, with support from other member states. Thus, Article 42 (6) of the Treaty of Lisbon provides that "those Member States whose military capabilities meet higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework."

The process of establishing permanent cooperation is governed by Article 46 of the Treaty on EU and involves several stages. First, states wishing to establish permanent cooperation should notify the Council and High Representative for EU Foreign and Security Policy thereof. Secondly, within a period of three months from such notification, the Council shall adopt a decision, by qualified majority and upon consultation with the High Representative, on the establishment of that cooperation and shall determine the list of states participating in cooperation. Thirdly, the procedure for possible extension of permanent cooperation to other Member States is clearly defined. Namely, any state wishing to join this cooperation informs the Council and Minister of Foreign Affairs accordingly. Upon notification, the Council shall decide by qualified majority and following consultation with the Minister of Foreign Affairs on the participation of new members in structured cooperation. Only states participating of this cooperation are entitled to vote in that case. The possibility of excluding states which fail to meet the eligibility criteria for permanent structured cooperation is also foreseen. In that case, the Council shall decide on the basis of qualified majority principle. It is interesting that all decisions and recommendations related to structured cooperation, apart from the above-mentioned ones referring to the procedure for membership, are passed unanimously, as confirmed by Article 46 (6) of the Treaty on EU.

Criteria and requirements with respect to military capabilities of state parties in structured co-operation were adopted by the so-called Protocol on Permanent Cooperation established by Article 42 of the Treaty on EU. Pursuant to Article 1 of this Protocol, member states undertake to proceed more intensively to develop their defence capacities through the development of their national contributions and cooperation, where appropriate, in multinational forces, in the main European
equipment programmes, and in the activity of the European Defence Agency. Also, states undertake to supply by 2010 at the latest, either as national contingent or as component of multinational military forces, combat units for future missions, structured as tactical battle groups, with support infrastructure, including transportation and logistics, capable of carrying out, within five to 30 days, Petersberg missions, and, in particular, tasks in response to requests from the United Nations, for a period of 30 days, with a possibility of extension up to 120 days.

In order to fulfil these criteria, state parties of this cooperation, under Article 2 of the Protocol, undertake to cooperate, as from the entry into force of the Treaty of Lisbon, with a view to achieving agreed objectives concerning the level of defence expenditure. States should also align, to the extent possible, their defence assets, especially in the area of harmonizing identified military needs, and in pooling and specialising their means and defence capabilities and promote cooperation in the field of training and logistics. Further, state parties undertake to take concrete measures to strengthen the availability, interoperability, flexibility and deployability of their forces, in particular after identifying common objectives regarding the commitment of forces, including possibly reviewing their national decision-making procedures. Fourth, states also undertake to cooperate with a view to taking the necessary measures to address the shortfalls perceived in the framework of the “Capability Development Mechanism”. Fifth, states should participate in the development of joint or European military equipment programmes in the framework of the European Defence Agency. The stated criteria and requirements set for participation in structured cooperation must be observed and, in the event of a participating state failing to meet its obligations, the possibility of its suspension from cooperation is foreseen, as the Council may by qualified majority pass a decision to suspend a participating state. Finally, Article 3 of the Protocol entrusts the European Defence Agency (EDA) with a role of “guardian” of this cooperation, since it should “contribute to the regular assessment of participating Member States’ contributions” and report thereon at least once a year”.

On the basis of these Treaty provisions, three basic features of this form of cooperation transpire. First, structured cooperation is permanent; second, its establishment requires qualified majority; and, finally, a minimum number of states involved in this cooperation is not defined (Santopinto 2009: 5). These three features demonstrate advantage over closer cooperation, which requires unanimous decision and a minimum of nine participating states for its establishment. Some authors indicate that, at first glance, this distinction of structured cooperation may convey the impression that it aims to introduce a mechanism that would encourage states to increase their military expenditures (Howorth 2004: 486), but in reality, total confusion over this term prevails (Santopinto 2009: 1).

1 Howorth considers that the aim of introducing provisions on permanent structured cooperation is to encourage member states that wish to progress in the field of defence but also to contribute to the development of European security and defense policy. This refers primarily to France and Germany, which, during negotiations on the adoption of the Treaty proposed to create a "Euro-zone" in the field of security and defense.
Some ambiguities regarding this form of cooperation are observed. For example, it is not specified how the “high criteria” of participating states will be determined. For example, France proposed a minimum of six states-parties in structured cooperation (France, United Kingdom, Germany, Italy, Spain and Poland), which will be bound to spend 2% of their gross domestic product on defence, but the proposal was dismissed for its excessively “exclusive” connotation (Cremona 2009: 13-14).

Another form of flexible cooperation introduced by the Treaty of Lisbon refers to the possibility for the Council to entrust, within the EU, implementation of a Union task to a group of member states in order “to protect the Union’s values and serve its interests” (Art. 42 (5) TEU). The provision applies to those Member States that are willing to participate in such a task and have the necessary capability for its implementation. As set out in Article 44 of the Treaty on EU, interested member states, in association with EU High Representative for Foreign Affairs and Security Policy, shall agree among themselves on the management of the task. Member states participating in the task, either at their own initiative or at the initiative of another member state not participating in the task, shall keep the EU Council informed on the implementation of the task. In the event that the accomplishment of the task requires amendment of its objectives or entails new and far-reaching consequences, participating member states must immediately convene the Council, which takes the necessary decisions (Article 44 (2)).

This form of flexible cooperation among member states in the area of EU security and defence policy is specific, as it refers only to the implementation of a military mission in the scope of crisis management. Therefore, we can state that it is a form of enhanced cooperation of “executive” type (Iriantajyllou 2005: 110), whose objective is to enable task implementation when all member states are not equally willing to engage in the operation, or if the mission is very demanding and requires the deployment of military capabilities available only to some member states. Through the provision on this type of cooperation, the Treaty of Lisbon furnished the legal basis for operations previously carried out at a national level or outside the EU framework to be part of the EU common security and defense policy in the future. While in the case of permanent structured cooperation missions undertaken by participating states are not operations of the Union, the same states can participate in implementing a mission following the decision by the Council. Also, unlike structured cooperation which is permanent, this form of flexibility in cooperation is not constant, since member states make available to the Union their civilian and/or military capabilities or multinational forces in order to contribute to objectives set by the Union. The only criteria for participation in this form of enhanced cooperation are the will and necessary capabilities of member states. However, some questions still remain open. For example, the Treaty does not make reference to the procedure for possible involvement of states during the course of a mission. Furthermore, there are no requirements whatsoever regarding the number of states which can participate in the implementation of the EU military mission.
The third form of flexible cooperation introduced by the Treaty of Lisbon in the area of EU security and defence policy refers to the European Defence Agency. Under Article 45 of the Treaty on EU, principal tasks of the European Defence Agency are: to contribute to indentifying the Member States’ military capability objectives and evaluating observance of their capacity to perform designated tasks, to promote harmonization of operational needs and adoption of effective, compatible procurement procedures to propose multilateral projects to fulfill the objectives set forth in accordance with military capabilities, ensure coordination of programmes implemented by the Member States and management of specific cooperation programmes; to support defence technology research and coordinate and plan joint research activities and studies on technical solutions meeting future operational needs; to contribute to the identifying and, if necessary, implementing any useful measure for strengthening the industrial and technological base of the defence sector and for improving the cost-effectiveness of defence expenditures. The same Article states that the Agency “is open to all Member States wishing to be part of it”. In practice, all member states with the exception of Denmark participate in the work of the Agency. The possibility is also foreseen for setting up, within the Agency, “specific groups bringing together Member States engaged in joint projects” (Article 45 (2) TEU), which for some authors represents a specific approach to “flexibility within flexibility” (Diedrichs, Jopp 2003: 26).

Conclusion

Provisions on flexible cooperation in EU security and defence policy arouse some dilemmas. Is a certain degree of flexibility in this area desirable? Is this cooperation possible and in what form? Will this cooperation adversely affect political legitimacy of the European Union? We can cite at least two arguments in favour of introducing this cooperation. First, the provisions on this cooperation should enable to overcome the stalemate over unanimity as a basic decision-making principle and prevent the creation of various informal groups, outside the EU institutional framework. Therefore, flexible forms of cooperation are the most logical way to overcome the impasse in the development of this policy. For it would be paradoxical for an obstacle at the level of political decision-making to exist at a time when the Union is in the process of deciding on the creation of an autonomous decision-making and implementation capacity for military and civilian operations. In addition, the EU security policy would be intensified and further advanced through these forms of flexible cooperation, since, according to some authors, flexibility is envisaged in its “softer” version, aiming to involve as many states as possible, in order to avoid the creation of groups of “second-rate” or “third-rate” states (Diedrichs 2004: 4). This is the case with the European Defence Agency, which is open to all states, but (at first glance) also with permanent structured cooperation. But is that really quite so? There is no doubt that only a few member states have at their disposal the military capabilities needed to participate in flexible forms of security cooperation,
while a large majority of states will remain outside the scope of that cooperation, in particular of permanent structured cooperation, which foresees some specific eligibility criteria. It seems, however, that there is no alternative to these “coalition of willing” within the Union.

Also, the issue of relation between flexibility and effectiveness of this policy arises. On the one hand, flexibility strengthens efficiency, which, in turn, enhances the credibility of foreign, security and defence policy. But on the other, flexibility can be viewed as a factor of reducing cohesion and solidarity among member states, which can have negative impacts on the European Union’s external action, since some state will take little or no participation in operations conducted in the scope of flexible cooperation. Thus, flexible cooperation may be regarded as an attempt to undermine aspirations towards the framing of a common defence policy foreseen by treaty provisions.

The former “second” pillar of the Union is so regulated that, except for the provisions on closer cooperation, which are specific and applicable in the area of defence, there are also three distinct forms of flexible cooperation in the field of security and defence policy. In addition to structured cooperation, which represents the most ambitious form of flexibility in the defence domain, there is also cooperation among member states for the purpose of implementing a Union’s mission, which is the codification of existing practice (operations in Macedonia, Congo). It seems that this form of cooperation will often be used in future EU crisis-management missions and it is therefore affirmative that this practice has been institutionalized. The third form of flexibility refers to the European Defence Agency, which is open to all states. All member states participate in the work of the Agency, but it is envisaged that separate, smaller groups of states are created within its framework to collaborate on special projects. Hence this form of cooperation is specific, since it includes a dual flexibility within the Agency. It seems that such a solution was necessary, given the great heterogeneity among states with regard to equipment.

However, future development of flexible cooperation on EU’s security policy causes some dilemmas, having in mind the ambiguities associated with permanent structured cooperation. It seems that this cooperation pursues the same objective as the EU security policy itself, as well as the European Defence Agency. Why was it then necessary to include this form of cooperation in treaty provisions? This question becomes even more logical if one bears in mind that the Treaty of Lisbon approves the introduction of closer cooperation procedures also in the military domain. What is the purpose, then, of additional introduction of permanent structured cooperation, alongside the possibility of applying the provisions on enhanced cooperation? What is the “added” value of structured cooperation? Initially, permanent structured cooperation was conceived as a means for introducing a “two-speed Europe”, lead by states with significant military capabilities. This cooperation would enable participating states to “bypass” the area of political decision-making, as leaders (avant-garde) of future missions, and therefore would not depend on prior agreement.
by all states in the process of decision-making. So, the initial idea was that this cooperation should be an effective mechanism for crisis management missions, but according to treaty provisions, it currently seems to be an initiative focused solely on capacity-building, as there is a special form of cooperation yielding the possibility for the Union to delegate the implementation of a mission to a group of states. However, the development and strengthening of military capabilities through operability and complementarity is on one of the objectives to be implemented by the European Defence Agency, too. Further, if structured cooperation is actually meant to include as many states as possible, why wasn’t a minimum number of states needed to achieve this cooperation set? This fact suggests the possibility of institutionalisation of “directorates” or “triumvirates” made up of powerful states, which may lead to at least two negative consequences: undermine European solidarity and raise doubts about the autonomy of security and defence policy, since “small” states, fearing hegemony of the “big” ones prefer American “tutelage” in this area to a European directorate of any form. Still, the importance of introducing flexibility in this area cannot be denied, bearing in mind the specifically distinct heterogeneity of status, interests, ambitions and capacities of Member States and unanimity as a method of decision-making.

Therefore, we can emphasize that the differentiation in the area of security and defence policy has a positive (constructive) and negative (destructive) side (Burgorgue-Larsen 2003: 122). On the one hand, the institutionalization of flexibility represents a triumph of “reality”, because it respects the heterogeneity of interests, ambitions and capacities of member states. The development of the EU security and defence policy is itself a result of differentiation, as the basis for the framing of this policy from the very outset. It is a specific area, which can be developed only through specific forms of flexible cooperation. Hence, differentiation in this policy occupies a position it does not have in any other EU policies. This pragmatism is, however, also one of the motors of European integration and of the security and defence policy development. On the other hand, differentiation in this policy creates additional institutional complexity, and increases the possibility of a rift between the states which choose to advance further, and those not willing (or not able) to do so.

Bibliography


