

## COMMON SECURITY AND DEFENCE POLICY

### The Solidarity Clause of the Lisbon Treaty's

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The Solidarity Clause, enshrined in Article 222 of the Treaty on the Functioning of the European Union (TFEU), enforces the legal obligation for “the Union and its Member States to act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a manmade or natural disaster”. They will assist such a Member State “at the request of its political authorities”. The clause further provides that “the Union shall mobilise all the instruments at its disposal including the military resources made available by the Member States” for prevention, protection and assistance in case of terrorist threats or terrorists attacks. This clause was introduced by the Convention; while another “solidarity clause” – more comprehensive – dealing with “mutual defence” was not going to be acceptable due to a curious alliance of Atlanticists, led by the United Kingdom (UK), and neutrals. In the Intergovernmental Council (IGC) which followed the Convention, the principle of a mutual defence guarantee in accordance with article 51 of the United Nations (UN) Charter was however accepted on the understanding that this should not prejudice the specific situation of the neutrals nor commitments under NATO, which for those states belonging to it remains the foundation of their collective defence and the forum for its implementation.

#### Implementation

As far as the formal *procedure* is concerned, the situation is pretty clear: the arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision of the Council acting on a joint proposal by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy... The Council shall act unanimously where this decision has defence implications and the Parliament shall be informed.

As far as the “will” to give a quick follow up to this provision of the treaty, the situation is more complicated for many reasons, political as well as practical. Seven years after its conception during the Convention on the Future of Europe in the aftermath of 9/11, the Solidarity Clause no longer appears to be such a high political priority for either the Members States or

the Institutions. The new general context created by the Lisbon treaty characterized – to a certain extent – by a return of “intergovernmentalism” and a central role given to “subsidiarity”, does not favour the establishment of a potentially “intrusive” mechanism, which could risk undermining the principle of sovereignty of Member States or, at least, interfere significantly in their internal organisation, including democratic control, citizen’s rights, national security, constitutional and judicial traditions, etc. These fears are all the stronger given that the solidarity clause, as it stands in the treaty, entails, in a single rather vague provision, recourse to “all the instruments” at the Union’s disposal (see Article 222 paragraph 1), such as police and judicial cooperation, civil protection interventions and even military resources made available by Member States.

The drafting of Article 222 – which is both rather ambitious and somewhat vague – is precisely the second obstacle to its implementation. Indeed the provision included in the Lisbon Treaty does not contain any details of any kind on the application of the clause, details which would have been an extremely useful guide for the legislator in its task and would therefore have facilitated the rapid adoption of the implementing measures. The third paragraph simply mentions the procedure according which the Council is asked to adopt a decision defining the necessary arrangement for its implementation. The absence of any outlines – either institutional nor operational – inevitably opens the door to different interpretations as regards, *inter alia*, its scope, the possible measures to be decided, what could trigger them, the respective responsibilities of the Union and the Member State concerned, and the role of the High Representative as well as that of the Political and Security Committee (PSC) and the Standing Committee on Internal Security (COSI), etc. If the avoidance of such detail on these very sensitive matters certainly made the task of the Convention and the subsequent IGC easier at the time, it now constitutes a challenge for the Institutions... and especially those that have to put a proposal on the table, i.e. the Commission and the High Representative.

A final reason why the implementation of the solidarity clause has been delayed is probably due to a decline in its practical interest due to the reduction of its potential scope. Since its original conception, some of the objectives of the Solidarity Clause have been overtaken by various concrete initiatives and decisions, in particular in the area of terrorism prevention. Improvement of existing mechanisms, creation of new legislative and operational instruments in the field of police and judicial cooperation, as well as systematic reinforcement of information gathering capacities have resulted in significant progress over the last seven years in the areas covered by the clause, thus reducing the sense of urgency in its implementation.

All these reasons, combined with urgent problems needing to be resolved in other spheres of Union’s activity (EEAS, economic crisis and economic governance), as well as some natural reluctance by Member States to activate binding procedures, could explain why work on the solidarity clause has been delayed. Such a cautious approach was revealed by the fact that

the solidarity commitment made in the Declaration on Combating Terrorism following the attacks in Madrid was not reiterated in the wake of the bombings in London one year later. The reasons for this preference for a national response could be: the long tradition of the UK intelligence services, the fear of disclosing sensitive intelligence sources, as well as subsidiarity-related considerations. On the other hand, the recent experience of the H1N1 pandemic, the volcanic ash crisis, forest fires in Portugal and other countries have demonstrated that cross-border crises are becoming increasingly frequent and make it impossible for any single European government to manage.

The best way to overcome these political doubts and to resolve the potential difficulties raised by the effective implementation of the clause is probably to try to analyse the legal nature and the purposes of the basic provisions as laid down in the treaty, to identify the different issues at stake, and to imagine concrete options for politically reasonable, practical and effective solutions.

## The general level of ambition

The Solidarity Clause is now a treaty provision under the jurisdiction of the European Court of Justice. Even if the involvement of the court seems quite theoretical at this stage, for many reasons, there is no doubt that there is already today a “legal obligation” to help, although Member States are free to decide how, having coordinated within the Council. There is therefore a need to reflect on a pragmatic line to take in case a Member State invokes the clause before the adoption of the necessary arrangements – these reflections serving at the same time as a basis for the preparation of the formal implementing proposal to be put on the table of the Council.

The solidarity clause has to be seen in conjunction with other specific provisions of the Lisbon Treaty that pursue different, but interlinked objectives, such as TFEU Article 196 on civil protection, TFEU Articles 75, 83 and 88 on terrorism, Article 168 on public health, and Article 214 on humanitarian aid. It has also to be read in the broader context of Treaty on European Union (TEU) title V1 (general provisions on the EU’s external action, including provisions on consular cooperation) as well as TEU title V2 (Common Security and Defence Policy – CSDP).

The large number of provisions already enshrined in the treaty, having – directly or indirectly – solidarity as one of their *raison d’être*, could give the impression that the solidarity clause of Article 222 should be seen as a mainly “procedural facility”, aimed at maximising the effectiveness of the other existing instruments. However, this minimalistic approach does not correspond to the spirit and the letter of the treaty, which gives the EU the responsibility for mobilising all the instruments at its disposal as well as ensuring the adequate coordination of Member States in the Council. In doing so, it should of course build on what already exists...

## Practical aspects of application: Nature and magnitude of the event or threat

To avoid unnecessary or disproportionate intervention by the EU, it will be necessary to identify - and to agree on - broad criteria to qualify which kinds of crises and / or disasters will fall under the solidarity clause. Two main types of criteria may be taken into consideration. The first one is based on the magnitude of the event in order to define what could be called a “subsidiarity threshold”. This criterion would avoid a situation whereby any type of attack could fall within the loose scope of the Solidarity Clause – which would imply a risk for both the subsidiarity principle as well for countries’ national capacities, where an over-reliance on the solidarity of others could create dangerous capacity gaps. Since a purely quantitative approach is inappropriate, the only way to circumscribe the material scope of the clause is to try to define qualitative criteria characterising crises and disasters to be taken into consideration; those criteria could be *inter alia* a) their cross-border nature, meaning for example that they have an impact in one or more other European countries, b) their “multisectorial” impact, c) their magnitude being such that they overwhelm the response capacity of a single Member State.

In other words, the two main reasons that could justify action at the EU level are on one hand the “global” nature of the threat / event (echoing new paradigms that have been given a variety of labels such as “global security”, “human security” or “societal security”) and on the other hand its “level” measured against the capacities of the Member State concerned as well as the effectiveness of any response (subsidiarity principle). In concrete terms, this mixed approach could be reflected in a text which could include:

- General qualitative criteria on the global nature of the threat/attack/disaster as well as, where possible, indicative thresholds linked to implementation of the subsidiarity principle;
- A (non exclusive) typology of the main threats/crises to be taken into consideration: what is a man-made disaster: maritime spills? pandemics? immigration flows? etc;
- A triggering procedure allowing a reasonable interpretation of these principles on a case by case basis.

Finally, it should be noted that even if clarifications on all these points would be welcomed in implementation arrangements, the principle has to remain that the assistance clause can be triggered only at the request of the political authorities of the Member State concerned.

## Geographical scope

The text of Article 222 always refers to the territory of the Member States,<sup>1</sup> which seems to imply that in principle the applicability of the clause is limited to the territory of the Member

1. See paragraph 1 (a) first and third indent, and (b)

State *stricto sensu*. However, this principle has to be qualified in three ways. First, it is clear that the clause applies irrespective of whether the crisis originates inside or outside the Union; secondly, it will apply in the event of an attack on a Member States' embassy / European Delegation or to ships and planes of a Member State; finally, the question of the applicability of the clause in relation to consular cooperation (for example, a Mumbai-like incident) – even if not obvious – is worth considering because it appears as being more a question of opportunity – or ambition – than one of a purely legal nature. The same problem applies to the interpretation of “natural or made disasters” in cases of trans-boundary threats, such as terrorism, migration, oil spills, etc.

## Role of the institutions

The Council shall adopt the arrangements for the implementation by the Union of the solidarity clause on the basis of a joint proposal by the Commission and the High Representative. Those arrangements could be seen as one single framework act covering any relevant situation or as individual ad hoc acts for every single crisis requiring the activation of the solidarity clause. The former option seems more appropriate for many reasons inter alia because adopting a specific act during a crisis could be lengthy and thus not compatible with the urgency characterising this kind of situation. Afterwards, the role of the Council needs to be focused on giving political guidance and orientations and not on the operational level. The clause foresees a role for the Political and Security Committee (COPS) and the Standing Committee on Internal Security (COSI), which should be consulted in order to ensure – when necessary – operational cooperation in areas covered by Common Foreign and Security Policy (CFSP) and Internal security. The role of the Counter Terrorism Coordinator will also have to be clarified. As far as the European Council is concerned, its main task – and prerogative – shall be to regularly assess the threats facing the Union and give political guidelines to enable the Union and its Member States to define priorities and take effective action in response to those threats, including prevention efforts. This threat analysis should be carried out with the help of all the EU and national competent authorities (EEAS, i.e. the Joint Situation Centre – SitCen; various Commission services; Agencies; national experts; etc), whose coordination should be improved.

The Commission has the responsibility, jointly with the High Representative / Vice President, to present a proposal on the necessary arrangements for the implementation of the solidarity clause. As recalled above, the Commission will also be on the frontline at the operational level because most of the instruments / policies to be mobilised in response to the threats are directly or indirectly under the Commission's responsibility, even if, for historical reasons, the clause comes under TFEU Part five (external action). The High Representative will normally be involved in the event of a terrorist attack or a manmade disaster whose origin is external to the EU, thus implying a possible diplomatic dimension; following the same reasoning, one could imagine that the High

Representative will also intervene when military means are mobilised, in order to coordinate the resources made available by Member States. It may, however, be worth differentiating between the use of military resources for relief / civil protection purposes and military resources used for security purposes. In both cases, the High Representative's services should work in close collaboration with the services of Commission and the competent authorities of the Council.

## Conclusions

At a time where various types of cross-border threats and crises are becoming ever more frequent, the solidarity clause could bring a significant contribution to the global response of the EU alongside the efforts made at national level. This should encourage the coming Trio Presidency to adopt quickly the necessary arrangements for the effective implementation of the clause. They should pay particular attention to end with general – and not case by case – implementing provisions, which must (i) build on what already exists in this field at the Union level (through better coordination and coherence between actors and instruments) and (ii) bring a specific added-value at both the political and operational level, while respecting the division of competences between the Institutions as well as between the EU and the Member States.