



In groups we trust

Implementing Article 44 of the Lisbon Treaty

by Thierry Tardy

In the field of CSDP, some provisions enshrined in the Lisbon Treaty are yet to be implemented. Article 44 is one of them. It posits that within the framework of the decisions adopted in accordance with Article 43, the Council may 'entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task'. The High Representative's preparatory report for the December 2013 European Council on Defence notes that Article 44 offers 'benefits in terms of flexibility and speed of action', and mentions the military intervention in Mali (France's Operation Serval) as a case in point. The report also calls for 'further improvements in rapid response', which includes exploring 'the use of Article 44 TEU'. Finally, the November 2013 Council Conclusions on CSDP note the 'possibility of looking into the appropriate use of relevant Treaty Articles in the field of rapid response, including Article 44 TEU' – whereas the ensuing December European Council omits any reference to it.

In this context, the EU and its member states have recently started to look into what Article 44 is – or is not – potentially about. Ideas have been brought to the table from various angles, even in discussions on the response to the Ebola crisis. Yet there are still many unknowns surrounding

the purpose, implications and added-value of the Article.

No new category of operations

First, Article 44 does *not* create a new category of EU operations. It explicitly refers to Article 43 operations (the expanded 'Petersberg tasks') and therefore does not extend the scope of possible CSDP missions – nor does it open the door for the emergence of a different decision-making process or legal framework. As a consequence, operations established in the framework of Article 44 would abide by Treaty provisions relating to CSDP, in particular in terms of legal basis, political control, and financing.

Article 44 is about CSDP operations and missions, i.e. military *and* civilian; it does *not* deal with capability development. It does not directly relate to the so-called permanent structured cooperation (PESCO) laid down in Article 46, nor would it represent a case of 'enhanced cooperation' (Title IV TEU) – although flexibility is central to all three cases.

The origin of the Article is difficult to trace. The text appeared in the draft constitutional treaty

(2003) with the same wording, but the report of the preparatory working group on defence did not elaborate on its meaning. However, most documents produced at the time insisted on the necessity to give greater flexibility to the EU in crisis management and, therefore, to allow for some sort of ‘coalition of the willing’ inside the Union.

In practice, an ‘Article 44 operation’ would be established by the Council of the EU acting unanimously, as for any other CSDP operation. This means that no Article 44 operation is possible in the absence of a consensus among EU member states. The legitimacy provided by a UN Security Council resolution would be as important as in any other case.

Article 44 of the Lisbon Treaty

1. Within the framework of the decisions adopted in accordance with Article 43, the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task. Those Member States, in association with the High Representative of the Union for Foreign Affairs and Security Policy, shall agree among themselves on the management of the task.

2. Member States participating in the task shall keep the Council regularly informed of its progress on their own initiative or at the request of another Member State. Those States shall inform the Council immediately should the completion of the task entail major consequences or require amendment of the objective, scope and conditions determined for the task in the decisions referred to in paragraph 1. In such cases, the Council shall adopt the necessary decisions.

Insofar as an Article 44 operation would be an EU mission, it would be placed under the political control and strategic direction of the Political and Security Committee (PSC). The type of oversight is likely to be different from traditional CSDP operations, yet the prerogatives conferred to the PSC by the Treaty (Article 38 TEU) will fully apply.

As for funding, CSDP financing rules would *a priori* apply to Article 44 operations, i.e. through the Athena mechanism for the common costs of military operations or the CFSP budget for civilian missions. However, the Council could also decide unanimously to act otherwise (Article 41§2). The group of member states running the operation could design *ad hoc* mechanisms which could, for

example, cover more than the traditional ‘common costs’ reimbursed by Athena. Theoretically, Athena can also be combined with these other mechanisms, thereby establishing different layers of sources and rules for funding. In any case, as one of the main reasons for triggering Article 44 would be the need for a rapid (re)action, resorting to Athena can only be possible if it does not delay the deployment of the operation.

What will be different then?

What an Article 44 operation would look like in reality is still unclear and, as is often the case in the CSDP domain, will become evident only when such an operation is indeed established and concrete mechanisms are put in place. Given the flexibility offered by Article 44, however, it is also possible that two such operations would significantly differ from one another in terms of institutional and procedural setting.

In essence, Article 44 is about granting greater flexibility and speeding up reaction time. It aims to facilitate the deployment of CSDP operations by creating a framework which allows willing member states to go ahead with an operation as efficiently and effectively as possible.

An Article 44 operation would have to be conducted by at least two EU member states – the Article refers to ‘a group of Member States’ and therefore excludes the possibility of a one-nation operation – that are willing to deploy military or civilian assets rapidly. Once a group of states has indicated to the EU their intention to run an Article 44 operation, the Council would have to consider the idea and unanimously decide to activate the Article. In doing so, the Council acknowledges that the operation is an EU action but also that the EU procedures and planning cycle cannot be fully followed – and therefore ‘entrusts’ the operation to the group.

The participating member states would keep responsibility for the planning (CONOPS, OPLAN) and command of the operation. In a way, the use of Article 44 would add a third layer to the existing two planning methods, namely traditional and fast-track. Its implementation may therefore require that the new crisis management procedures agreed in 2013 be revised to factor in the specificities of these methods.

Planning and conduct of the operation would be carried out by the implementing states’ own structures, at both strategic and operational

levels. If it is a military task, the five national operational headquarters available for EU operations would likely be used, but other national assets can also be mobilised. In the civilian domain, running a large mission without any support from the European External Action Service (EEAS) – and the Civilian Planning and Conduct Capability (CPCC) in particular – would be more problematic, and the level of EEAS support that is possible under Article 44 may need to be clarified.

A related issue is who is responsible for drafting the Crisis Management Concept (CMC). The CMC would most likely have to be crafted with some degree of collaboration with all member states and the Crisis Management and Planning Directorate (CMPD), as any Council decision to establish an operation is directly influenced by the CMC. A CMC authored by the CMPD would also give assurances to all member states that the EU does not give *carte blanche* to a few states. In theory, however, it is not unthinkable to have an Article 44 operation created on the basis of a CMC which has been drafted by the core group only – as a matter of urgency, for example.

A possible interpretation of Article 44 is that it offers a framework for temporary measures before the EU fully takes over. The fact that Article 44 allows for rapid deployment outside of the realm of EU planning and conduct structure – yet inside the broader CSDP framework – hints at an expectation of eventual transition between these measures and fully-fledged CSDP operations. An Article 44 operation would thus be a form of *avant-garde* or bridging measure to a more traditional collective operation, giving the EEAS time to prepare the required planning documents. In such a case, the member states that were not originally part of the core group would adopt – and possibly amend – the CONOPS and OPLAN.

Foreseeable cases

Scenarios for Article 44 operations are difficult to draw up but the range of options is extremely broad. An easily conceivable scenario would be the evacuation of European citizens somewhere

in Africa, whereby two or three EU countries, with the logistical support of a few others, would deploy relevant assets within 48 hours. The Council would invoke Article 44 as the operation would be established without hardly any EU planning.

Similarly, a humanitarian operation could be run by a group of states under Article 44. Most recently, the Article was also mentioned in the context of the Ebola crisis and how it could give the EU visibility while adding coherence to national responses. The idea would also be to allow smaller states to maximise their individual contributions.

By extension, any situation whereby two or more states are willing to respond quickly to an emergency and is, in principle, endorsed by all member states may lead to the activation of Article 44. In retrospect, and in theory, if there had been more than one country willing to contribute, Operation Serval in Mali could have been an Article 44 operation – as the Council gave it its full support at the Foreign Affairs Council on 17 January 2013.

Article 44 is designed to facilitate rapid reaction and flexibility rather than address force generation difficulties. Presumably, the prospect that an Article 44 operation is launched implies that the core group of willing states is already identified. An article 44 scenario therefore contrasts with the deployment of the Battle Groups as it is not dependent on countries on standby. However, there is no obstacle to the deployment of a Battle Group in the context of Article 44.

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Furthermore, while rapid reaction is central to the spirit of the Article, it could also be used in non-emergency cases when the EU as a whole does not want to intervene. Without invoking Article 44 retroactively, a mission first launched by one (or several) state(s) outside of the EU framework could theoretically then become an Article 44 operation if the Council so decides.

The recourse to national planning and conduct capabilities under Article 44 can also be a way to give substance to the Comprehensive Approach

by allowing for truly civil-military operations that the EU is still not in a position to run. As long as the EU operational planning and conduct structure is not involved, nothing theoretically prevents the creation of a military-civilian mission placed under a joint command structure.

In the context of the Comprehensive Approach and in parallel to recent discussions on 'exit strategies', an Article 44 operation could also be a 'transition' activity before non-CSDP actors take over – be it the Commission, the UN, or other security, development or humanitarian agencies.

In terms of conduct of the operation, Article 44 speaks of the 'management of the task', on which the states implementing the operation shall agree, in 'association with the High Representative' (HR). The actual meaning of 'management' and the degree of association of the HR will arguably require further elaboration, or might also be practically defined through the first case(s) of an Article 44 operation. But it is clear that the core group would run the operation: the PSC would keep the political control, but participating nations would likely establish an *ad hoc* body (for example composed of the ambassadors of the countries in question) reporting to the PSC.

Possible concerns

What remains to be addressed, in this context, is the question of EEAS support to such operations – in terms of planning but also of conduct, especially with regard to civilian missions. How to work with the EEAS crisis management structure, but also possibly the Foreign Policy Instruments (FPI) and the Commission at large, may have to be addressed, even if each case may call for a different set-up.

At a political level, at least two concerns may lead to frictions with member states on the pertinence of Article 44: the fear of losing control and the risk of undermining CSDP.

Some member states may indeed have issues with the possible loss of control over the operation or with the unintended consequences of a group of states acting on behalf of the EU while by-passing, to some extent, its structures and procedures. But credible safeguards seem to exist in this respect. First, the Council remains the decision-making body, acting unanimously. According to the Article, member states participating in the task shall 'keep the Council regularly

informed of its progress', and those states shall 'inform the Council immediately should the completion of the task entail major consequences or require amendment of the objective, scope and conditions determined for the task'. What 'major consequences' may mean is not specified, but the sentence is clear on the necessity to keep the Council fully in the loop about any development that may affect the operation.

Furthermore, the 28 EU members may request the establishment of a system of tight reporting to the PSC – with monthly briefings for example – in order to closely monitor the execution of the task and address the concern of 'parallel' operations escaping EU political control.

As for the wider impact of Article 44 operations, it cannot be ruled out that CSDP would be undermined by the mere fact that an alternative practice would start to materialise. The nascent EU planning structure is still at a stage where it needs to assert its own credibility, and resorting to other mechanisms may have a negative impact.

Also, in the event of an Article 44 operation handing over to a more regular CSDP operation, the Union may suffer from a comparison between national and EU planning capacities. And, if Article 44 operations prove successful, incentives to resort to mainstream operations may also become less evident.

This said, Article 44 operations are unlikely to replace traditional operations. They are conceived to allow for a rapid response when normal procedures would make an EU involvement unlikely or too slow, or where the EU as a whole would simply not be in a position to intervene for various political reasons. They would not be substitutes for fully-fledged EU operations or missions.

The whole idea behind Article 44 is to facilitate the Union's involvement, to enhance its visibility and, therefore, to offer another way to make CSDP a reality by widening the range of options the EU and its member states can resort to.

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