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OPINION OF THE LEGAL SERVICE¹

From: Legal Service

Subject: Article 42(7) TEU

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I. INTRODUCTION

1. This opinion is provided pursuant to a request made in the Political and Security Committee to provide written legal advice on the nature of the obligations arising under Article 42(7) of the Treaty on European Union. It addresses a number of general legal aspects of the provision including the nature and content of the obligations to which it gives rise and the criteria and procedures for its application and implementation.

¹ This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

2. The provision is by its nature one which applies in exceptional circumstances – that of armed aggression on the territory of a Member State – and has specific characteristics as compared to other provisions of the EU Treaties. The legal advice set out here is therefore necessarily of a general character and the application of the provision must always be assessed with regard to the specific circumstances in which it is being invoked. The Legal Service stands ready to provide such further advice as may be required.

II. BACKGROUND

3. Article 42(7) of the Treaty on European Union TEU (hereinafter “Article 42(7)”) was introduced into the primary law of the Union by the Treaty of Lisbon. It was invoked for the first time by France following the terrorist attacks in Paris on 13 November 2015. A request for assistance from the other Member States pursuant to this provision was presented during the Foreign Affairs Council on 17 November 2015. Ministers of all EU Member States expressed their unanimous and full support to France and their readiness to provide assistance pursuant to this provision.²

4. Article 42(7) reads as follows:

“If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.”

² See the Outcome of this Council Meeting in doc. 14120/15, p. 6 (“Defence ministers discussed the reaction to the Paris attacks of 13 November 2015. French President François Hollande had invoked article 42(7) of the Treaty on European Union, requesting bilateral aid and assistance from the other EU member states. Ministers expressed their unanimous and full support for France and their readiness to provide all the necessary aid and assistance. In the coming days France will have bilateral discussions with other member states. ...”).

5. Article 42 falls within Title V of the TEU on the Union's external action, and more specifically of its Chapter 2, which deals with the Common Foreign and Security Policy, and of section 2 thereof, which relates to the Common Security and Defence Policy.
6. Article 3 of the Protocol on the concerns of the Irish people on the Treaty of Lisbon (hereinafter "Irish Protocol")³ clarifies some aspects of Article 42(7). This provision of primary law, which is binding on all Member States, states *inter alia* that:

"[The Union's common security and defence policy] ... does not prejudice the security and defence policy of each Member State, including Ireland, or the obligations of any Member State.

...

It will be for Member States - including Ireland, acting in a spirit of solidarity and without prejudice to its traditional policy of military neutrality - to determine the nature of aid or assistance to be provided to a Member State which is the object of a terrorist attack or the victim of armed aggression on its territory."

³ OJ L 60, 2.3.2013, p. 131. This Protocol reflects the Decision of the Heads of State or Government of the 27 Member States of the European Union, meeting within the European Council, on 18-19 June 2009, on the concerns of the Irish people on the Treaty of Lisbon.

7. Article 42(7) is phrased identically to Article I-41(7) of the Treaty establishing a Constitution for Europe (which never entered into force).⁴ (The latter however differed materially from Articles I-40(7) and III-214 of the 2003 draft Treaty establishing a Constitution for Europe adopted by the European Convention⁵, which, *inter alia*, allowed Member States to decide whether or not to participate in what was termed “closer cooperation on mutual defence”).
8. Article 42(7) bears similarities to Article V of the modified Brussels Treaty⁶, establishing the Western European Union (WEU). This provided:
- "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power".*

⁴ OJ C 310, 16.12.2004, p. 1.

⁵ Article I-40(7) provided that:

“Until such time as the European Council has acted in accordance with paragraph 2 of this Article, closer cooperation shall be established, in the Union framework, as regards mutual defence. Under this cooperation, if one of the Member States participating in such cooperation is the victim of armed aggression on its territory, the other participating States shall give it aid and assistance by all the means in their power, military or other, in accordance with Article 51 of the United Nations Charter. In the execution of closer cooperation on mutual defence, the participating Member States shall work in close cooperation with the North Atlantic Treaty Organisation. The detailed arrangements for participation in this cooperation and its operation, and the relevant decision-making procedures, are set out in Article III-214”.

Article III-214 provided that:

“1. The closer cooperation on mutual defence provided for in Article I-40(7) shall be open to all Member States of the Union. A list of Member States participating in closer cooperation shall be set out in the declaration [title]. If a Member State wishes to take part in such cooperation at a later stage, and thus accept the obligations it imposes, it shall inform the European Council of its intention and shall subscribe to that declaration.

2. A Member State participating in such cooperation which is the victim of armed aggression on its territory shall inform the other participating States of the situation and may request aid and assistance from them. Participating Member States shall meet at ministerial level, assisted by their representatives on the Political and Security Committee and the Military Committee.

3. The United Nations Security Council shall be informed immediately of any armed aggression and the measures taken as a result.

4. This Article shall not affect the rights and obligations resulting, for the Member States concerned, from the North Atlantic Treaty.”⁵

⁶ Brussels Treaty of 17 March 1948, as amended by the Paris Agreements of 23 October 1954.

9. At the time of the dissolution of the WEU in 2010-2011, its ten full members, who were all Member States of the EU, referred to the inclusion of Article 42(7) in the Treaty on European Union.⁷

10. In addition, Article 42(7) TEU refers to the commitments of some EU Member States under the North Atlantic Treaty Organisation which includes Article 5 of the North Atlantic Treaty:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security .

11. While some parallels may be drawn between this provision and Article 42(7), their language and purpose are not identical. Article 42(7) is a distinct and autonomous legal provision, applicable to all EU Member States, which must be interpreted and applied in its own context within the overall framework of the EU Treaties.

⁷ See the Statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty – Belgium, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom, Brussels, 31 March 2010. This statement refers to Article 42(7) TEU and adds that the States Party “remain strongly committed to the principle of mutual defence of article V of the Modified Brussels Treaty” and that “The WEU has therefore accomplished its historical role”.

