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CONTRIBUTION OF THE LEGAL SERVICE¹

To:	Delegations
Subject:	Legal Service contribution on the conditions and modalities of recourse to Article 44 TEU - entrusting the implementation of a CSDP task to a group of Member States

Introduction

1. As part of the broader efforts to strengthen the Union's Common Security and Defence Policy (CSDP) and in follow-up to the December 2013 European Council conclusions on security and defence, discussions are ongoing in several Council preparatory bodies about the conditions and arrangements for the possible use of Article 44 TEU.² That provision allows the Council to entrust the implementation of a CSDP task to a group of Member States. It reads as follows:

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² This provision corresponds to Articles III-310 of the Treaty establishing a Constitution for Europe (see also Article I-41(5) thereof).

“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 [...], 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.”

2. This contribution sets out the Legal Service’s consideration of the main legal aspects related to the possible use of Article 44 TEU in response to questions from delegations during the discussions in several Council instances. These include in particular the funding arrangements and the scope of the delegation of a task to a group of Member States. It reflects and elaborates on the views which the Legal Service has expressed orally in the course of the discussions. It does not exhaustively address all possible legal issues that may arise in relation to Article 44 TEU.

The nature of missions conducted under Article 44 TEU

3. Article 44 is situated in Title V, Chapter 2, Section 2, TEU. That section deals with the CSDP, within the Union’s Common Foreign and Security Policy (CFSP), which is part of the Union’s external action.
4. Article 44 elaborates on paragraph 5 of Article 42 TEU, which is the basic article on CSDP. Pursuant to this paragraph *“The Council may entrust the execution of a task, within the Union framework, to a group of Member States in order to protect the Union’s values and serve its interests. The execution of such a task shall be governed by Article 44”* (emphasis added).

5. Article 44(1) TEU specifies that the Council may entrust the implementation of a task “*Within the framework of the decisions adopted in accordance with Article 43*”. Article 43 TEU in turn provides a (non-exhaustive) “*list of the tasks referred to in Article 42(1)*” (first paragraph; emphasis added)³ and specifies that the Council shall adopt decisions relating to these tasks (second paragraph).
6. It is therefore clear that a mission or operation⁴ set up under Article 44 (hereinafter an ‘Article 44 mission’) is a Union CSDP mission (“*within the Union framework*”), that its tasks must fall and remain within those covered by Articles 42(1) TEU and 43(1) TEU (bearing in mind that the latter are non-exhaustive) and that it must “*protect the Union’s values and serve its interests*”. As an EU CSDP mission, an Article 44 mission or operation is thus different from the situation where the EU provides political support for Member States’ operations. Rather, an Article 44 mission may be assimilated to the type of EU operation undertaken prior to the Treaty of Lisbon under the name Artemis, an operation which was conducted by the Union in the DRC in 2003 and which was in practice executed by a limited number of Member States with France acting as Framework Nation.⁵

³ These tasks “*shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories*” (emphasis added). Moreover, Article 42(1) TEU provides that the Union may use the CSDP’s operational capacity “*on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter*”. It adds that “*The performance of these tasks shall be undertaken using capabilities provided by the Member States*”.

⁴ In this contribution, the terms mission and operation are used interchangeably.

⁵ See Joint Action 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of Congo, OJ L 143, 11.6.2003, p. 50, Article 2. In this operation, all decisions and key planning documents were adopted/approved by the Council. See *ibid.*, Article 6 and Council Decision 2003/432/CFSP of 12 June 2003 on the launching of the European Union military operation in the Democratic Republic of Congo, OJ L 147, 14.6.2003, p. 42.

7. Finally, the question arises whether the term "*task*" in Article 44 refers to an entire mission/operation, and/or to a specific duty within the operation. In this regard, it should be noted that in Articles 42 and 43 TEU, the Treaty uses the terms "*missions*", "*operations*" and "*tasks*" in an apparently interchangeable manner⁶ and that the logical reading of these provisions suggests that "*task*" in Article 44 is intended to cover an entire mission or operation. Nevertheless, this wide scope of the term "*task*" does not exclude that only one or more specific duties within a mission or operation may be entrusted to a group of Member States ("*generalia specialibus non derogant*"). The latter case is, however, not specifically addressed in this contribution.

The decision-making procedures under Article 44

8. As mentioned above, entrusting the implementation of a task to a group of Member States takes place "*Within the framework of the decisions adopted in accordance with Article 43*" (Article 44(1) TEU) and pursuant to Article 43(2) TEU it is for the Council to adopt decisions "*defining [the] objectives and scope and the general conditions for [the] implementation*" of CSDP tasks.⁷
9. These decisions are adopted by the Council acting unanimously since decisions relating to the CSDP "*including those initiating a mission as referred to in [Article 42], shall be adopted by the Council acting unanimously on a proposal from the High Representative [...] or an initiative from a Member State. ...*" (Article 42(4) TEU).
10. Therefore, an Article 44 mission can only be established on the basis of a Council Decision setting up the mission, adopted by unanimity.

⁶ See notably Article 42(1), third and fourth sentences, and 43(1), first sentence.

⁷ Furthermore, "*The High Representative ..., acting under the authority of the Council and in close and constant contact with the Political and Security Committee, shall ensure coordination of the civilian and military aspects of such tasks*".

11. In practice, all Member States take part in the adoption of such a decision, with the exception of Denmark in case of "*decisions and actions of the Union which have defence implications*".⁸ A Member State could abstain in the vote on such a decision, but abstentions do not prevent the adoption of the decision. It would also be possible for a Member State to qualify its abstention by making a formal declaration as laid down in Article 31(1) TEU (the so-called "*constructive abstention*").⁹

The financial aspects of an Article 44 mission

12. Since an Article 44 mission is a CSDP mission and Article 44 does not lay down any specific rules on the financing of its costs, the general provisions for financing CSDP missions laid down in Article 41 TEU apply.
13. In accordance with Article 41 TEU, the administrative expenditure is charged to the Union budget. For the operating expenditure, the following rules apply:
- Expenditure arising from operations having military or defence implications is not charged to the Union budget.
 - Expenditure arising from operations not having military or defence implications is charged to the Union budget unless the Council acting unanimously decides otherwise.
 - In cases where operating expenditure is not charged to the Union budget, it is charged to the Member States in accordance with the gross national product scale, unless the Council acting unanimously decides otherwise (Article 41(2), second paragraph, first sentence, TEU).

⁸ See Article 5 of Protocol No. 22 on the position of Denmark, which adds that "*The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the acts of the Council which must be adopted unanimously*".

⁹ "*When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted*".

- For expenditure arising from operations having military or defence implications, Member States whose representatives in the Council have made a formal "*constructive abstention*" declaration (see above) "*shall not be obliged to contribute to the financing thereof*" (Article 41(2), second paragraph, second sentence, TEU).
14. The Council has set up the Athena mechanism to administer the financing of the common costs of EU operations having military or defence implications.¹⁰
 15. In its Decision 2011/871/CFSP ("*the Athena decision*") setting up this mechanism, the Council laid down rules that apply to any EU operations having military or defence implications as well as certain military supporting actions.¹¹ Military CSDP operations conducted under Article 44 TEU qualify as EU operations having military or defence implications for the purpose of the Athena Decision. In particular, pursuant to Article 2(1) of the Athena decision, "*A mechanism to administer the financing of the common costs of operations is hereby established*" and pursuant to Article 15 of the Athena decision, certain 'common costs' of any EU military operation are borne by Athena,¹² whereas for other costs this is only the case when the Council or the Athena Special Committee so decides.¹³ In addition, Article 17 of the Athena Decision provides that "*Any Council decision by which the Council decides to establish or extend an EU military operation shall contain a reference amount for the common costs of that operation*" (emphasis added).

¹⁰ Council Decision 2011/871/CFSP of 19 December 2011 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena), OJ L 343, 23.12.2011, p. 35. The Athena Decision is under review and so far there is no provision specifying any particularity for an Article 44 operation.

¹¹ See the definitions in Article 1 of the Athena Decision: "*(c) 'operations' shall mean the EU operations having military or defence implications;*" and "*(d) 'military supporting actions' shall mean the EU operations, or parts thereof, decided by the Council in support of a third State or a third organisation, which have military or defence implications, but which are not under the authority of European Union Headquarters*". In the remainder of this section, military supporting actions are not further addressed.

¹² See especially Article 15(1) (when they relate to a specific operation), (2), (3)(a) and (5).

¹³ See especially Article 15(3)(b) and (c) and 15(4) (for military supporting actions) and (7).

16. Furthermore, Denmark does not contribute to the financing of operational expenditure arising from military operations.¹⁴
17. Therefore, it results from these provisions that:
- a civilian Article 44 mission will be funded from the EU budget, unless the Council unanimously decides to charge it to Member States. In the latter case, Member States will contribute in accordance with the gross national product scale, unless the Council again unanimously decides otherwise; and
 - the costs for an Article 44 mission having military or defence implications will be charged to the Member States, except Denmark and except any Member State which "*abstains constructively*" at the time of adoption of the decision setting up the mission in accordance with the second subparagraph of Article 31(1) TEU.¹⁵ The common costs to be funded by the contributing States¹⁶ would be managed by Athena in accordance with the provisions of the Athena Decision.

¹⁴ See Article 5 of Protocol No. 22 on the position of Denmark, which provides that "*Denmark shall not be obliged to contribute to the financing of operational expenditure arising from [measures adopted under Articles 42 to 46 TEU having defence implications], nor to make military capabilities available to the Union*".

¹⁵ Article 41(2), second subparagraph, final sentence, explicitly provides that "*As for expenditure arising from operations having military or defence implications, Member States whose representatives in the Council have made a formal declaration under Article 31(1), second subparagraph, shall not be obliged to contribute to the financing thereof*". A contrario, this does not apply to civilian missions, even if their expenditure were charged to the Member States by a unanimous Council Decision.

¹⁶ This notion is defined as follows in Article 1(b) of the Athena Decision: "*the Member States contributing to the financing of the military operation in question in accordance with Article 41(2) of the TEU and the third States contributing to the financing of the common costs of this operation pursuant to agreements between them and the European Union*".

18. Although the Council could decide under Article 41(2) TEU to charge the costs of a military Article 44 mission to Member States in a different manner, it could not do so without first amending the Athena decision to allow for this possibility.¹⁷ The reason is that once the Council has adopted rules of general application, including financing rules such as those laid down in the Athena Decision, it must respect those rules in individual cases.¹⁸

The applicable rules of international law

19. Article 3(5) TEU provides that in its relations with the wider world, the Union shall contribute to “*the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*”. In addition, pursuant to Article 21 TEU, the Union's external action shall be guided by and shall respect the principles of the rule of law, human rights, international law and the UN Charter and shall *inter alia* pursue the consolidation and support for democracy, the rule of law, human rights and the principles of international law.¹⁹

¹⁷ Depending on the political will, it could be provided for example that an Article 44 mission will only be managed by Athena if so decided by Council.

¹⁸ This is a position which the Legal Service has previously expressed in relation to the Staff Regulations, the Council's Rules of Procedure, the Financial Regulation and the Comitology decision/regulation (in most of these cases this applies to the co-legislators and not only to the Council); see document 13780/07 of 11 October 2007, paras. 13-16, referring also to the judgement of the Court of Justice of 23 February 1988 in Case 68/86, *UK v. Council*, ECLI:EU:C:1988:85, para. 48 (concerning the Council's Rules of Procedure).

¹⁹ “1. *The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. ...*
2. *The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: ...*
(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, [...]
3. *The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action [...], and of the external aspects of its other policies.”*

20. Furthermore, the Court of Justice has also confirmed that the Union must comply with its obligations under international law, including customary international law, in the exercise of its powers in the area of external relations.²⁰
21. Therefore, as a Union activity, an Article 44 mission must comply with the Union's obligations under international law in the same way as all other CSDP missions.
22. This means that such an Article 44 mission must have a sound legal basis under international law, which would usually be a UN Security Council mandate and/or the consent of the host State government. It also means that, in the conduct of the mission, the relevant rules of international law must be complied with, whether this be (applicable) human rights law, international humanitarian law, the law of the sea (in maritime operations), or any other relevant rules.²¹
23. Finally, the Union may conclude international agreements in the framework of an Article 44 mission pursuant to Articles 37 TEU and Article 218 TFEU, in accordance with the rules applicable under these provisions (involving the High Representative and the Council, with the European Parliament being informed). This would normally concern status of forces or mission agreements as well as participation agreements (see also below on third State participation).²² It could also include detainee transfer agreements such as those concluded in relation to the Atalanta and EUFOR RCA operations.

²⁰ Case C-286/90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, judgment of 24 November 1992, ECLI:EU:C:1992:453, para. 9; Case C-308/06, *International Association of Independent Tanker Owners and Others*, judgment of 3 June 2008, ECLI:EU:C:2008:312, para. 51 and Case C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, judgment of 21 December 2011, ECLI:EU:C:2011:864, paras. 49-55 (on international agreements) and 101-102 (on customary law: "*Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union*").

²¹ For guidance in this respect in relation to the use of force, see the EU Concept for the use of force in EU-led military operations (Doc. 17168/1/09, R-UE/EU-R) and the Guidelines for the development of civilian CSDP mission-specific rules for the use of force (Doc. 111908/14, R-UE/EU-R).

²² Framework participation agreements would apply to an Article 44 mission as they would to other CSDP missions.

The question of the participation of third States in an Article 44 mission

24. As the implementation of an Article 44 mission is entrusted to a group of Member States, the question arises whether third States can be allowed to participate in such missions.
25. In this respect, it must be noted that while the Treaty does not specifically provide for third State participation in CSDP missions, it has always been understood that in such operations third States participation can be accepted. Indeed, as part of the EU - NATO arrangements it was specifically provided that the European non-EU NATO members in particular could be allowed to participate in CSDP missions under certain circumstances. There is no indication that the Treaty of Lisbon intended to affect this possibility, whether in general or in relation to Article 44 TEU,²³ and in practice third State participation in many CSDP missions has continued. There is no reason to treat an Article 44 mission differently in this respect from a legal point of view.
26. Third State participation can therefore be provided for in the Council Decision setting up an Article 44 mission. That decision should then set out the applicable rules, including a mandate for the Political and Security Committee (PSC) (in its normal composition) to take decisions in this respect.²⁴ As indicated above, participation agreements would be applicable or have to be concluded to this effect as in any CSDP operation (by the Council in its normal composition).

The scope of the task delegated to a group of Member States and the role of the Council and the PSC

27. A key question in relation to Article 44 is the scope of the delegation to the group of Member States concerned (hereinafter "the Group") and the powers to be retained by the Council (or PSC).

²³ The provision in Article 42(1) TEU providing that the performance of the CSDP tasks "*shall be undertaken using capabilities provided by the Member States*" does not mean that such capabilities can be provided *exclusively* by Member States.

²⁴ In accordance with Article 38 TEU.

28. Article 44(1) provides that the Council may "*entrust the implementation of a task*" to a group of Member States, within the framework of the decisions adopted in accordance with Article 43. It adds that those Member States, in association with the High Representative, "*shall agree among themselves on the management of the task*".
29. Article 43(2) specifies that the decisions of the Council on CSDP tasks shall define "*their objectives and scope and the general conditions for their implementation*". Article 44(2) adds that the 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 and 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 Council decisions concerned; in such cases, the Council adopts the necessary decisions.
30. The decisive issue is therefore the determination of the contents covered by the "*objectives, scope and general conditions for the implementation*" of a task, on the one hand, and the determination of the contents of "*the implementation of a task*" by a group of Member States and of "*the management*" of the task, on the other hand.
31. As a general rule, the "**objectives**" of a CSDP mission are set out by the Council in its Decision establishing the mission, typically in the articles entitled "*mission*" and "*mandate*", and in a separate planning document, namely the Crisis Management Concept (CMC) approved by the Council for that mission. Indeed, in many cases the Council decision refers to the CMC in these provisions.²⁵

²⁵ See e.g. Council Decision 2014/486/CFSP of 22 July 2014 on EUAM Ukraine, OJ L 217, 23.7.2014, p. 42, Articles 1-2 and Council Decision 2014/73/CFSP of 10 February 2014 on EUFOR RCA, OJ L 40, 11.2.2014, p. 59, Article 1 (the provision in decisions on military operations is often less extensive than that in decisions on civilian missions).

32. There is considerable practice illustrative of the contents of the term "**objectives**".²⁶ As a matter of EU law (the principle of "*parallélisme des formes*") a change of the objectives of a mission requires Council approval, while less important changes in planning documents can be approved by the PSC (see Article 38 TEU and various Council Decisions establishing mission).²⁷
33. The term "**scope**" of a CSDP mission certainly includes its geographical and temporal elements, i.e. the area of operations and the duration. It also covers the main elements of the substantive mandate.
34. The third element reserved for the Council, i.e. the "**general conditions for the implementation**" ("*les modalités générales de leur mise en oeuvre*"), although not defined in the Treaty, clearly must have a meaning that is different from the "**scope**" and "**objectives**". Thus the phrase "**general conditions for the implementation**" would *inter alia* cover general issues such as political assumptions, limitations, constraints and restraints, military assumptions, mission concept and key (military or civilian) tasks. It cannot cover very specific and technical implementing conditions, such as those typically contained in some of the technical annexes to an Operational Plan (OPLAN) (e.g. logistical details, movements, engineer support, communications and information systems, intelligence, training and mission rehearsals communication and information systems, etc.).

²⁶ For instance, for civilian CSDP Mission, limited changes to the Operational Plans have frequently been approved by the PSC, whereas significant changes are agreed by PSC and subsequently approved by Council. The same applies for military operations but there limited changes are less frequent.

²⁷ See e.g. Council Decisions 2014/486/CFSP and 2014/73/CFSP (above note 25), respectively Article 7(1) and Article 5(1).

35. The planning document which probably best corresponds to the "*general conditions for the implementation*" is the Concept of Operations (CONOPs) and in civilian missions the practice until recently has been that the Council adopted the Decision establishing a mission and approved the CONOPS at the same time. That being said, it is obviously not the name of the document which matters, nor whether something appears in the main body of a document or in an annex; what is important is the content of the document.

Moreover, where the Athena rules apply (see above), the Council would also need to agree the financial reference amount (see Article 17 of the Athena Decision). This necessarily implies that the Council must then also agree on the approximate size of the mission, as that will affect the costs.

Finally, particular considerations apply to conditions for implementation which may affect fundamental rights. Such conditions should always be regarded as "*general conditions for implementation*".²⁸ This would *inter alia* cover use of force rules or rules of engagement as well as any detention issues, even if these are normally part of, or relate to, annexes to an OPLAN.²⁹

36. By contrast, in principle, the "***implementation of the task***" entrusted to the group of Member States (as opposed to the general conditions for the implementation) means the actual conduct of the mission. This primarily concerns the implementation of the mission in the area of operations following the decision to launch the mission. Activities before that stage in principle constitute planning rather than conduct, and are not covered by the notion "*implementation*". However, whenever some preparatory activities take place prior to the

²⁸ See the judgment of 5 September 2012 in Case C-355/10, *Parliament v. Council*, ECLI:EU:C:2012:516, paras. 63-84 in relation to FRONTEX, especially paras. 77-78, where the Court held that provisions conferring powers of public authority on border guards – such as the powers to stop apprehended persons and to seize vessels – mean that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required. In the CSDP framework, the latter corresponds to the involvement of the Council.

²⁹ In military missions, the rules of engagement are set out in a separate document (a Rules of Engagement Authorisation or ROEAUTH), which must be read together with the annex of the use of force (usually Annex E). In civilian missions, the rules on the use of force are part of the OPLAN. Detention in military operations is usually addressed in Annexes E (use of force) and AA (legal) to the OPLAN.

launching of the mission, they can be considered as part of the implementation rather than planning where this has been agreed (as was the case for EUFOR RCA). As such, these preparatory activities can be entrusted to the group of Member States implementing the task.

37. Article 44(1) TEU provides that the Member States entrusted with the implementation of a task "*in association with the High Representative*" shall agree "*among themselves on the management of the task*" ("*conviennent entre eux de la gestion de la mission*"). Thus the **agreement on the management of a task** between the Members States concerned comprises not only the actual management of that task, which is part of its implementation, but also *agreeing on* that management. This poses the question of the delimitation between this notion and the "*general conditions for the implementation*" which must be approved by the Council (see above).
38. One element which would be covered by the "*agreement on the management of the task*" would be the force generation process and the specific composition of the force. Another, related aspect would be the designation/appointment of the commander of a military Article 44 mission and the senior subordinate commanders.³⁰ The Legal Service considers that it is in the nature of an Article 44 mission that, unlike in a standard CSDP mission,³¹ commanders would not need to be appointed by the Council or PSC and that the chain of command would, in principle, also be within the remit of the group of Member States.³² The same would apply to a civilian Article 44 mission.³³ Furthermore, the technical issues mentioned in para. 34 above, would also fall within the management arrangements.

³⁰ However, that appointment should be properly communicated to the Athena administrator for the purposes of applying the Athena rules.

³¹ The expression 'standard CSDP mission' is used in this contribution to refer to a CSDP mission not conducted under Article 44 TEU.

³² However, any involvement of other international organisations, e.g. recourse to NATO command and control assets under the Berlin plus arrangements, would need to be agreed by Council, also bearing in mind the implications for third State participation in such operations (on that, see above).

³³ It would require further analysis whether a civilian Article 44 mission could be commanded by the Civilian Operations Commander with the support of the Civilian Planning and Conduct Capability. If this were the case, that would need to be decided by the Council.

39. However, the precise and complete delimitation between the "*general conditions for implementation*" and the "*agreement on the management*" will have to be established in each specific case because it cannot be determined *a priori* in a general and abstract manner. The practice so far indicates that it is unlikely that the Council Decision establishing a mission and the Crisis Management Concept planning document would fully cover all the elements which need to be agreed by the Council.
40. A number of these elements would instead be contained in the CONOPS and/or parts of the OPLAN.³⁴ Unless all of these elements are already set out in the CONOPS, Council approval of the relevant elements of the OPLAN would be required.³⁵ Furthermore, in any event the Council would need to approve the Rules of Engagement or Use of Force Rules. As in a standard CSDP mission, these documents could be approved by the Council in its decision on the launching of the operation, which marks the end of the decision-making phase.
41. Where Council or PSC approval is required in accordance with the above considerations, it would be a matter of discretion as to which Council preparatory bodies should be tasked to prepare the decisions concerned.³⁶ In this respect, it should be kept in mind that the Crisis Management Procedures which guide this process can be applied flexibly as needed to each specific mission.³⁷

³⁴ Under the standard planning process (see doc. 7660/2/13, below note 37), the CONOPS is an intermediate planning document followed by the OPLAN, which is the final planning document. Both documents overlap to a significant extent but the OPLAN contains more detailed and elaborate arrangements.

³⁵ If all of these elements are set out in the CONOPS, then Council approval of the CONOPS would suffice to meet the legal requirements. In this context, it should be noted that in certain other discussions, e.g. on rapid response, the notion of an "OPLAN minus" or "CONOPS plus" has been raised.

³⁶ Except for COREPER, which must be involved in preparing any Council approval, unless a written procedure is used.

³⁷ This is reflected in their full title ('*Suggestions for crisis management procedures for CSDP crisis management operations*'; emphasis added) and in their scope (see doc. 7660/2/13, p. 8).

42. A final point concerns the role of the PSC in relation to the conduct of an Article 44 mission once it has been launched. Pursuant to Article 38 TEU, the PSC exercises "*political control and strategic direction of the crisis management operations referred to in Article 43*". As indicated above, this includes an Article 44 mission. Therefore, the PSC would play its normal role in relation to such a mission.³⁸ In this respect, the regular information or information upon request which the Group has to provide to the Council pursuant to Article 44(2) TEU would primarily be provided to, and as required discussed in, the PSC.

Conclusions

- An Article 44 mission is a Union CSDP mission and its tasks must fall within those covered by Articles 42(1) TEU and 43(1) TEU.
- The term "task" in Article 44 covers an entire operation but could also cover some specific duties within that operation.
- An Article 44 mission must be established on the basis of a Council Decision setting up the mission, adopted by unanimity.
- The general provisions for financing CSDP missions (Article 41 TEU) apply to an Article 44 mission. Military Article 44 missions qualify as EU operations having military or defence implications for the purpose of the Athena Decision.
- An Article 44 mission must comply with the Union's obligations under international law.
- The Union may conclude international agreements in the framework of an Article 44 mission pursuant to Articles 37 TEU and Article 218 TFEU.

³⁸ In order to avoid any confusion, it should be noted that political control and strategic direction are situated at the strategic level, whereas 'technical' command and control is exercised at the operational level by the Operation Commander, Mission Commander or Civilian Operations Commander (authority over mission personnel is transferred to the latter).

- Third State participation can be provided for in the Council Decision setting up an Article 44 mission. That decision should then set out the applicable rules in this respect. Participation agreements with the third States concerned would be applicable or have to be concluded.
- The Council (in its normal composition) must adopt / approve the objectives and scope of an Article 44 mission, as well as the "general conditions for the implementation" of the task. This generally includes some provisions in the Council Decision establishing the mission as well as parts of the Crisis Management Concept for that mission; the mission's geographical and temporal elements; the main elements of the substantive mandate; general issues such as political assumptions, limitations, constraints and restraints, military assumptions, mission concept and key tasks; as well as implementing conditions which may affect fundamental rights such as rules of engagement and detention issues.
- Where the Athena rules apply, the Council must agree the financial reference amount, which implies agreement on the approximate size of the mission.
- By contrast, the implementation of the task and agreement on the management of the task are entrusted to the group of Member States. Implementation means the actual conduct of the mission, especially in the area of operations following the decision to launch the mission. This may include preparatory activities prior to that decision where this has been so agreed. Agreement on management includes the force generation process, the specific composition of the force, the designation of the commanders and technical implementing conditions, such as those typically contained in some of the technical annexes to an OPLAN.
- The precise and complete delimitation between the "general conditions for implementation" and the "agreement on the management" will have to be established in each specific case.

- Where Council or PSC approval is required, it would be a matter of discretion as to which Council preparatory bodies should be tasked to prepare the decisions concerned.
 - The PSC would play its normal role in relation to the conduct of an Article 44 mission once it has been launched.
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