

Moldova's path to EU Membership and the possible activation of Article 42(7) TEU

Dr. Georgios-Orion Marias

Adjunct Lecturer

Department of Turkish Studies and Modern Asian Studies

National and Kapodistrian University of Athens, Greece

mariasg@turkmas.uoa.gr

Abstract

In December 2023, the European Council decided to open accession negotiations with Moldova, inviting the Council of the EU to adopt the respective negotiating frameworks once the relevant steps set out in the respective Commission's Report have been implemented. Subsequently, certain important issues that arise from European Council's decision are linked with Moldova's security and defense due to its strained relations with Russia. Thus, in case of an accession, the European Council's decision to grant EU candidate status to Moldova will instantly convert country's security and defense issues to Union's. Hence, the purpose of this article is to examine the possible activation of the mutual assistance clause enshrined in Article 42(7) TEU in case of Moldova's accession to the EU. Initially, the article focuses on previous experience in the field by analyzing the implementation of Article 42(7) TEU on the occasion of the terrorist attacks in Paris in 2015. Then it undertakes an institutional comparison between Article 42(7) TEU and Article V of NATO Charter in terms of their binding force.

Keywords: *Moldova, EU Membership, Article 42(7) TEU, EU Common Security and Defense Policy.*

Introduction

In March 2022, Moldova applied for EU membership. The Union granted to Moldova a candidate status in June of that year. At the European Council on 23 March 2023, the European Union (EU) reiterated its support to Moldova's European future, stating also its intention to reinforce country's resilience, security, stability, economy and energy supply in the face of destabilizing activities by external actors (European Council - Conclusions 2023, 3).

On this ground, the Council of the EU remained committed to the enlargement of the Union, stating in paragraphs 3 and 4 of its conclusions of 12 December 2023 that "enlargement is a geo-strategic investment in peace, security, stability and prosperity", and that "Russia's war of aggression against Ukraine shows that enlargement also is a strategic priority..." (Council of the European Union - Conclusions on Enlargement 2023, 3).

The explicit reference of support of Moldova's security on behalf of the EU, automatically raised the issue: how and on the basis of which legal framework such security support could be provided especially to a country, such as Moldova, which pursuant to its constitutional requirement of neutrality is not a member of NATO and thus cannot rely on Article V of NATO Charter in the event of an armed attack by a third country.

Analyzing the institutional basis of the EU Common Security and Defense Policy, articles 42 to 46 outline the "roadmap" through which EU member states can ensure peace and prosperity for their citizens, while seeking to demonstrate Union's readiness to respond to external threats and risks.

Hence, in case of a possible EU enlargement which would include Moldova, it would mean that the hybrid war (BalkanInsight, 2023), the continuous violations of the country's airspace (BBC, 2023) and the tensions in the disputed Transnistria region by Russia, would become EU

security issues. Especially, regarding the Transnistria region, the European Commission has stressed that the Union persists in a comprehensive, peaceful and sustainable settlement of the Transnistrian conflict, based on the sovereignty and territorial integrity of Moldova, with a special status for Transnistria (European Commission - Opinion 2022, 2).

Thus, in a situation like that, how could the European institutional framework provide the appropriate legal means of recourse to European military assistance? The purpose of this article is to analyze the possible activation of the mutual assistance clause enshrined in Article 42(7) TEU in case of Moldova's accession to the EU.

Methodology

The article proceeded in an in-depth analysis in case of Moldova's accession to the EU presenting the conditions under which a possible activation of Article 42(7) TEU could be achieved. Article's research methodology is based primarily on a wide range of EU Treaties, the North Atlantic Treaty, EU Institutions' reports and press releases, parliamentary minutes as well as scientific papers, policy papers, studies, governmental releases and newspapers articles.

PART ONE: Moldova and the EU Common Security and Defense Policy

European Parliament Resolution on Moldova's path to the EU

On 5 October 2023, the European Parliament adopted the Resolution on Moldova's path to the EU. With 448 votes in favor, 45 against and 43 abstentions, the European Parliament reaffirmed its commitment to Moldova's future EU membership, calling the Commission and the European Council to start the EU accession negotiations by the end of 2023 (European Parliament - Legislative Observatory, n.d.).

The European Parliament in paragraph 21 of its Resolution, expressed its satisfaction to the high-level political and security dialogue between the EU and Moldova but at the same time raised its concern for regional security and stability, hoping for effective assistance measures (European Parliament - Resolution 2023, 7). The Parliament's reference to assistance measures, based on security, leads to another question as to the nature of these assistance measures. Therefore, since the relevant reference is made in the context of the high-level dialogue between the EU and Moldova, in the event of an accession, the activation of Article 42(7) TEU would be necessary as a means of containment of third countries that could challenge Moldova's territorial integrity.

Moreover, in relation to the Resolution, it is also important to analyze the stance of the Council of the EU during the debate in the Plenary of the European Parliament in Strasbourg. Although, the representative of the Spanish Presidency of the Council made reference to Moldova's contribution to EU missions within the framework of the EU Common Security and Defense Policy, contented himself with asking Chisinau to continue the reforms in the fight against corruption and organized crime, while insisting on the necessary changes in the Moldavian public administration in view of the forthcoming enlargement package (European Parliament - Verbatim Report of Proceedings 2023, 167). Thus, Spanish Presidency's reluctance to formulate concrete European support measures in the areas of security and defense for Moldova, on the one hand, shows the ambivalent tendencies within the EU institutions regarding the European future of the country and on the other hand, demonstrates that the final accession will be the issue of a substantive and not a formal assessment, as Article 49 TEU stipulates, which requires unanimity within the Council of the EU in order to give the green light to Moldova's accession to the Union.

And this, despite the fact that in a short period of time, Moldova has managed to meet six of the nine measures (European Commission - Report 2023, 8-11) set out in the European Commission's Opinion of June 2022, on Moldova's application for EU membership.

The European Commission's 2023 Report on Moldova

On 8 November 2023, the European Commission issued its Report on Moldova for 2023. Specifically, in Chapter 31, the Commission, with regard to the areas of foreign affairs, security and defense, noted that Chisinau is in between moderate and good level of preparedness in the area of common foreign security and defense policy (*op. cit.*, 114-115). In particular, as far as the Common Foreign and Security Policy is concerned, the report indicated that compared to 2022, Moldova's degree of alignment with the relevant statements of the EU High Representative and Council decisions increased from 54% to 78% (*op. cit.*, 115). With regard to the Common Security and Defense Policy, the Commission's report reiterated Moldova's participation since 2014 in the EUAM RCA and EUTM Mali missions, highlighting Chisinau's desire to participate in both the ALTHEA military operation and the EUTM Somalia mission (*Ibid*).

Moreover, the Commission's Report made a reference to security measures. Hereto, the Report pointed out that the cooperation in the areas of security and defense has been strengthened, as it is taking shape within the framework of the European Peace Stability Mechanism (*op. cit.*, 116). Although, the Report does not provide any further information in relation to the European Peace Facility, the Commissioner for Humanitarian Aid and Crisis Management revealed, during his speech at the aforementioned EP plenary debate on Moldova's path to EU, that country's defense budget has been doubled through the aforementioned mechanism (European Parliament - Verbatim Report of Proceedings 2023, 169).

More specifically, in relation to the European Peace Facility, the Council adopted in December 2021 the first assistance measures for Moldova of 7 million euros, in support of military and defense matters (Council of the EU - Council adopts assistance measures for Georgia, the Republic of Moldova, Ukraine and the Republic of Mali, 2021).

Then, in June 2022, the Council adopted new assistance measures of 40 million euros for the benefit of the Moldavian Armed Forces (Council of the EU - Council adopts assistance measure in support of the Moldovan Armed Forces, 2022). Finally, in May 2023, the Council adopted another 40 million euros in support of country's Armed Forces (Council of the EU - Council adopts assistance measures to support the defense sector of the Republic of Moldova and Georgia, 2023).

Council Conclusions of 12 December 2023 on enlargement - The case of Moldova

During the General Affairs Council meeting, the Council adopted conclusions on the enlargement of the EU. Especially, on Moldova, the Council taking into consideration the Commission's Report, expressed its willingness to discuss country's accession path during the European Council meeting on 14-15 December 2023. Hence, on 14 December 2023, the European Council decided to open accession negotiations with Moldova, inviting the Council to adopt the respective negotiating frameworks once the relevant steps set out in the respective Commission's Report have been implemented (European Council - Conclusions on Ukraine, enlargement and reforms, 2023).

As noted above with regard to the stance of the Spanish Presidency during the EP plenary in Strasbourg, the Council in its conclusions stuck to the reforms that Moldova must carry out, particularly in the areas of justice, public administration, fundamental rights and the rule of law, merely expressing in paragraph 116 its satisfaction at the significant improvement in the

country's alignment with the positions and restrictive measures under the EU Common Foreign and Security Policy (Council of the EU - Conclusions on Enlargement 2023, 29). Hence, Council's hesitancy on supportive measures for Moldova's security and defense, confirms the aforementioned observation on ambivalent tendencies within the EU institutions regarding country's European future.

PART TWO: Article 42(7) TEU: From theory to practice

The activation of Article 42(7) TEU on the occasion of the terrorist attacks in Paris in 2015

The terrorist attacks in Paris in November 2015, opened the discussion for a military assistance clause between EU Member States, which until that moment the European project had regulated and foreseen only in its institutional dimension.

On 16 November 2015, the former French President François Hollande addressing the Senate, called for the activation of Article 42(7) TEU, expecting on behalf of the EU a tangible support to his initiative.

In his speech, François Hollande noted, among other things, that France was at war and that he had asked the French Minister of Defense to inform his European counterparts regarding Article 42(7) TEU, stating that all Member States must show their solidarity, as the enemy was not an enemy of France but an enemy of Europe (Le Sénat - Les messages du Président de la République au Parlement, 2015).

Specifically, Article 42(7a) TEU which was invoked by the former French President states that "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 defense policy of certain Member States" (Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union).

Therefore, taking advantage of the TEU, France asked its partners for their support and solidarity in response to the common enemy, in this case Daesh. But, was this really the case or France by activating Article 42(7) TEU was seeking to serve its national interests in the Middle East and in particular in Syria?

The origins of Article 42(7) TEU

Article 42(7) TEU does not constitute an innovation of the Lisbon Treaty. The origins of the article go back to the Brussels Treaty (1948), as amended by the Protocol of Modifying and Completing the Brussels Treaty of 23 October 1954. According to the Protocol, the contracting parties established the Western European Union in order to: i) strengthen the economic, social and cultural ties, ii) create a firm basis for European economic recovery in Western Europe, iii) promote unity and encourage the progressive integration of Europe and iv) afford assistance to each other in maintaining international peace and security and in resisting any policy of aggression (Brussels Treaty - Protocol Modifying and Completing the Brussels Treaty, 1954).

In particular, Article 5 of the Protocol stated that "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" (*Ibid*).

Over the years, the Western European Union became the defense arm of the EU. Hereto, under Article I.4(2) of the Maastricht Treaty, the Western European Union was entrusted with the task of formulate and implement decisions and actions of the Union which had defense

implications (Treaty on European Union). Also, according to the Declaration on Western European Union, its Member States agreed on to develop a European identity regarding security and defense and that Europe assume greater responsibility on defense matters (Declaration on Western European Union - Treaty on European Union, 1992). Thus, immediately after the end of the Cold War, the EU, via the Western European Union, retained the right to resort to collective defense in the event of an armed attack against one of its Member States, even though the Maastricht Treaty did not explicitly mention it.

In 1995, in preparation for the revision of the Maastricht Treaty, the Reflection Group published its Report. In this Report, the Reflection Group completed the first part with regard to the Strategy for Europe, making reference to the European Security and Defense Policy. Thus, the need to further strengthen the relations between the EU and the Western European Union was expressed, as an integral part of Union's development. Consequently, the most important view was the one advocating the gradual integration of the Western European Union into the EU, either in the form of an Article enshrined in the Treaty of Amsterdam or in the form of a Protocol attached to the Treaty and referring to a collective defense commitment (Reflection Group's Report - A Strategy for Europe, 1995) without any indication on the content.

Therefore, it could be argued that Article 42(7) TEU represents a repetition of Article I-41(7a) of the Treaty establishing a Constitution for Europe, according to which "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 defense policy of certain Member States" (Treaty Establishing a Constitution for Europe).

However, at this point, it should be mentioned that the capability of the EU to resort to collective defense, as a means of support to its Member States in the event of an armed attack, constitutes primarily an initiative of the French delegation. In particular, the former French President Valéry Giscard d'Estaing, in his capacity as Chairman of the Convention on the Future of Europe, argued that the EU solidarity clause for terrorist attacks should be extended to the collective defense of Member States (POLITICO, 2003). Also, the then French Commissioner Michel Barnier, in his capacity as Chairman of the Working Group on Defense within the Constitutional Convention on the Future of Europe, has raised the issue of EU's recourse to collective defense.

Initially, the Working Group stressed whether collective defense should have been preserved in the Treaty or in an annexed Protocol, possibly with an "opt-in" clause for states which might not want to join such a commitment (European Convention Secretariat – Note 2002 3), whereas at the end underlined that the procedures and methods of operation and decision-making with regard to collective defense should have been set out in a text (European Convention Secretariat - Final Report 2002, 22).

However, the above French initiative was strongly opposed, characterized by some Member States as "unacceptable" for reasons related to their "non-aligned status", while others considered that collective defense was guaranteed by NATO (*op.cit.* 21).

In particular, the United Kingdom through its former Welsh Secretary, Lord Peter Hain, declared before the Convention on the Future of Europe that: "EU shouldn't be in the business of setting out a territorial defense guarantee, or importing one by reinforced cooperation among some member" (The Guardian, 2002). In the same vein, was the statement of the former NATO Secretary General, Lord George Robertson, who before the members of the Working Group on Defense pointed out that: "the EU is at present not able to defend its people" (POLITICO, 2003). The same logic was followed also and by the former Irish

Defense Minister Smith, who told the *Irish Times* that: "there is no such thing as, if you like, complete military neutrality and the Government re-formulated their military neutrality concept to mean "non-membership of military alliance, and specifically, non-membership of an alliance with a mutual defense commitment" (Devine 2009, 8-9).

Nevertheless, despite the fact that the Treaty establishing a Constitution for Europe was approved by the European Council and signed in Rome in October 2004, France and the Netherlands eventually rejected the Treaty through referendums held in their countries.

Article 42(7) TEU as a means of promoting French national interests under the guise of the EU's Common Security and Defense Policy

The activation for the first time of Article 42(7) TEU by former President Hollande, on the occasion of the terrorist attacks in Paris, had a dual purpose.

The first purpose was that by invoking Article 42(7) TEU, the former French President sought to prepare the EU against a possible new terrorist attack as a consequence of the French policy both in Syria and in other countries such as Iraq, Mali and other Sahel countries. Thus, it could be argued that France sought to take advantage of the EU's operational and legal support for its attacks in Syria and other regions, using at the same time the Union as a "shield" in case of an armed attack on the French territory. Hereto, two questions arise i) why should France activate an article referring to mutual assistance clause, when there is a relevant article in the TFEU, namely Article 222 enshrining a solidarity clause, specifically for terrorist attacks? ii) why should France ask for assistance and support from its partners for its policy in Syria, Sahel and Central Africa?

Furthermore, France's "handling" of the EU, was reinforced by the joint statements on 17 December 2015 of the former French Defense Minister Jean-Yves Le Drian and the EU High Representative Federica Mogherini in Brussels. In response to a journalist's question "what concretely does France need as of today and from which partners, if any, will you ask assistance for?" the French Defense Minister replied that: "it will be implemented either through operational cooperation in the French interventions in Syria and Iraq, or through an alliance or support for France in other operations...France can no longer do everything, be simultaneously in the Sahel, in the Central African Republic, in Lebanon and in a state of intervention and readiness in the Levant and, in addition, to ensure its own territorial security with its own forces" (République Française - Conférence de presse, 2015).

The second purpose, was that France sought to create a "formula" via which Paris could reactivate Article 42(7) TEU in the future, again in areas of heightened interests, enjoying at the same time the support of its partners both at operational level and in terms of military personnel. An example of that, was France's pursuit of EU's helping hand towards its operation in the Sahel region, where the French President Emmanuel Macron has repeatedly requested for more EU financial and military support for the G5 Sahel Joint Force (Nigeria, Mali, Burkina Faso, Chad and Mauritania), in the war against terrorism, led and coordinated by France.

Furthermore, President Macron's statement on 30 June 2023 that "when France is involved, the whole Europe is involved with it" (G5 Sahel, 2020) reinforces the above observation as regards the possible reactivation of Article 42(7) TEU by France. Finally, in August 2022, though France withdrew its military forces from Mali, albeit Élysée in a statement, noted that: "France remains committed to Sahel, the Gulf of Guinea and the Lake Chad region along with all partners committed to stability and the fight against terrorism..." (République Française - Déclaration du Président Macron, 2022)

It can therefore be said that the activation of Article 42 (7) TEU in November 2015 by France has "awakened" EU to formulate a policy towards the issue of managing attacks on the territory of its Member States. Although, this activation at operational - military level was managed in the form of bilateral agreements between EU Member States, it signifies a historical event and a supreme legacy for the future.

The institutional comparison between Article 42(7) TEU and Article V of NATO

In order to explore the scope of Article 42(7) TEU and in particular its binding force, it becomes necessary to compare it with Article V of NATO Charter, which constitutes the quintessence of collective defense clause.

Article 42(7a) TEU states that: "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 defense policy of certain Member" (Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union). Thus, the question that arises concerns the means that Member States should use in order to support a Member State that is under an armed attack. Hence, the comparison between Article V of NATO Charter and Article 42(7) TEU stimulates the following observations.

Article V of NATO Charter states that: "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-defense recognized 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" (NATO - The North Atlantic Treaty, 1949).

Therefore, while Article V of NATO Charter contains an explicit reference to the "use of armed force", Article 42(7) TEU refers in general to "all the means". In this way, European Union's "constructive ambiguity" permits each Member State to interpret the reference "all the means" at its will. Thus, EU Members States are allowed to refuse any engagement to the use of armed force, limited to other forms of military assistance, such as information through radar, etc.

Consequently, the flexibility provided for by Article 42(7) TEU itself to Member States, in terms of their implication to a military involvement in the event of an armed attack by a third country, leads to the conclusion that it is difficult to clearly define the scope of the obligations arising in the event of an armed attack. Hereto, the ambiguity in the interpretation of the article is based on one hand on the fact that the EU started as a supranational organization seeking economic cooperation, leaving the area of defense and security to the exclusive competence of Member States and NATO, and on the other hand because Article 42(7) TEU has not been defined by the Treaty as a collective defense clause, as is the case of Article 222 TFEU, which has been defined as a solidarity clause.

Therefore, the lack of definition of Article 42(7) TEU as a collective defense clause in the Treaty in conjunction with i) the absence of an explicit reference to the use of military means in response to an external armed attack, as is the case with Article V of NATO Charter and ii) the fact that the defense area belongs to the exclusive competence of Member States, demonstrate the limited binding nature of Article 42(7) TEU.

Moreover, there are two more elements that demonstrate the limited binding nature of Article 42(7) TEU.

Firstly, the article itself which in subparagraph (b) stipulates that: "commitments and cooperation in this field shall be consistent with commitments under the North Atlantic Treaty Organization which, for those States which are members of it, remains the foundation of their collective defense and the forum for its implementation" (Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union).

Thus, subparagraph (b) explicitly states that cooperation in the field of collective defense, for those Member States which are at the same time members of the Alliance, is effectuated via NATO, unlike such EU Member States that do not participate in the Alliance, as is the case of Austria, Ireland, Cyprus and Malta respectively.

The second element is the procedure followed by France when it initially requested the activation of Article 42(7) TEU. As it was mentioned, the activation of Article 42(7) TEU was forged through bilateral agreements. Specifically, EU Member States' assistance to France took place in two distinctive stages, a military and a civilian one. With regard to the military assistance, it encompassed (i) contributions to airstrikes as part of operations in the Levant (Syria and Iraq) (ii) logistical support to the operations in the Levant (Syria and Iraq) (iii) support to French operations in Africa (iv) support to EU missions (v) support to UN missions (Anghel and Cirlig 2016, 3). As far as the non - military cooperation was concerned, several EU Member States expressed their support for enhanced cooperation in the field of intelligence and foreign policy (*op.cit.*, 4).

Conclusion

The war in Ukraine has resulted in a decisive strengthening of the EU's security and defense structures. Also, the war accelerated the enlargement of the EU, which has decided to play an active role in the external relations field.

In particular, Union's decision to give the green light to the opening of accession negotiations for countries threatened or being at war, constitutes the main reason for writing this article analyzing in depth a possible activation of Article 42(7) TEU.

Moldova's accession path is a key priority for the Union. As already mentioned, Chisinau in a short period of time has managed to meet six of the nine benchmarks set by the European Commission, while the European Council has decided to open accession negotiations.

Depending on the political will of the EU and on the successful completion of all the necessary European prerequisites, Moldova will become one of the next Member States of the Union. This means that instantly, security and defense issues of the country will become EU's issues. Thus, in case of a war between Moldova and Russia, the activation of Article 42(7) TEU would be imperative for Member States since there is an institutional precedent and a legal obligation. As pointed out in the Introduction of the article, Moldova's constitutional requirement of neutrality does not allow it to rely on NATO's Charter Article V. In case of Moldova's accession, the Transnistrian region could bring the EU before a "fait accompli". The foregoing analysis revealed that Article 42(7) TEU is a tangible but doubtful European defense instrument in comparison with Article V of the NATO Charter.

Hence, the reluctance of the EU institutions to formulate specific European support measures for Moldova's security and defense, proves firstly that the Union has not yet decided whether it would be willing to activate Article 42(7) TEU regarding Moldova and secondly that the flexibility provided by the Article itself does not allow the EU to take effective measures to

support Moldova's security and defense, thus indicating that the Union is not in a position to guarantee effectively country's territorial integrity.

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