

The EU in the face of disaster

Implementing the Lisbon Treaty's Solidarity Clause

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The Council of the European Union is limbering up to implement the Lisbon Treaty's 'solidarity clause'. Under the terms of the clause, the EU and its members will be called upon to provide mutual assistance in cases of natural or man-made disasters as well as terrorist attacks. If the implementation decision, to be taken in 2010, is to form the basis for effective crisis response, it will have to accommodate acute national sovereignty concerns. For inspiration, the decision's formulators can look not only to the EU's experience in setting up the 2001 Civil Protection Mechanism but also to ongoing efforts to enshrine solidarity in the management of the EU's external borders.

It is a cross between a solidarity declaration, a commitment to disaster relief and a traditional collective defence mechanism: the EU's new 'solidarity clause' obliges the Union and its members to "jointly act in a spirit of solidarity if a member state is the object of a terrorist attack or the victim of a natural or man-made disaster" and to mobilise all the instruments at the EU's disposal, including military means made available by the member states (Art. 222(1) Treaty on the Functioning of the European Union, TFEU).

Article 222 opens a riotous can of worms for the EU. The clause touches on core attributes of national sovereignty, yet its precise machinery is not defined in the Treaty. This will be the subject of an implementation decision to be adopted by the Council on the basis of a joint proposal of

the Commission and the High Representative. Article 222 simply stipulates that the decision should be taken within the Council structures, in particular those dedicated to the Common Security and Defence Policy (CSDP) and those for internal security.

Disaster response in the EU— the state of play

Of course, when it comes to setting up this new machinery, the negotiators of the decision will not be starting from scratch, even if the wording of Article 222 is typically non-committal when it comes to the relation of the solidarity clause to the EU's existing structures for disaster relief.

The EU established a Civil Protection Mechanism (CPM) shortly after the terror attacks of 11 September 2001. The CPM can

be activated following disasters both inside and outside the Union. In the past, the CPM has been used in response to forest fires and floods in southern EU states as well as in the wake of the Asian tsunami of 2004 and most recently the earthquakes in Haiti and Chile in early 2010.

The CPM toolkit is located within the Commission, and is thus distinct from the EU structures for external crisis management within the Council, which deal, for example, with police and rule of law operations like EUPOL Afghanistan. CPM provides tools for EU members and other participating countries to coordinate their capacities when responding to natural and man-made crises, including acts of terrorism. It thus plays a handmaiden role in members' efforts to mobilise their existing capacities for disaster response (search-and-rescue equipment, medical services, temporary accommodation, fire fighting capabilities, etc.).

The CPM's prime instrument is a Monitoring and Information Centre, which operates at all hours and functions as a communication hub. When a member state (or a non-EU country) asks for assistance, the Centre notifies the other participating states and transmits their offers for support. Additionally, the Centre maintains a database of the resources that might be made available by the member states, detailing the number of available experts and the relevant mobilization times.

Compared to the CPM, Article 222 adds three novelty items. Firstly, it introduces into the EU Treaties an explicit obligation of mutual assistance for the member states. In contrast to the handmaiden flavour of the CPM—helping the member states should they *choose* to engage in mutual assistance—Article 222 thus creates the scope for a mechanism in which the fulfilment of a solidarity commitment is obligatory rather than down to good will.

Secondly, the solidarity clause ranks military means much more prominently amongst the possible instruments to be used in crisis response. The strong focus

on the military can be traced back to its roots: the clause originates in the working group 'Defence' of the European Convention, and in its first iteration was exclusively concerned with terrorism and other security threats by non-state actors. The aim was therefore to establish a mutual defence clause akin to Article 5 of the NATO Treaty for the post-9/11 era. Only later was it extended to include natural and man-made disasters.

Thirdly, Article 222 comprises a stronger pre-emptive element than the training and coordinating activities of the CPM. Its repertoire comprises not only the response to terror attacks but also their aversion. Solidarity is to apply to the prevention of terrorist attacks on the territory of a member state as well as to the protection of civilians and democratic institutions.

The tension between solidarity and sovereignty

This far-reaching, if loosely formulated article thus provides the potential for a rather more robust system of solidarity than the CPM. It implies a system so reliable that members would have the confidence to reduce or boost their national capabilities in concert with European needs. The question is whether the EU can achieve this potential.

To be truly robust and effective, the mechanism would have to be backed by permanent structures. These would have some say in the question whether European interventions are justified and what capabilities are required. Common structures would also play a role in contingency planning and risk assessment, in joint training as well as in operations.

Should the negotiators of the implementation decision deem such a robust mechanism a desirable goal, they will have to overcome one recurring problem that has plagued CPM in both its organisational and operational activities—the strong tension between the demands of an effective disaster response and the member

states' reluctance to cede sovereignty in this area.

Sovereignty concerns have, for instance, prompted member states to reject reforms to the CPM. The 'Barnier Report' of 2006 was developed by the Commission in response to the EU's problems in delivering rapid and effective help after the Asian tsunami of 2004. Its suggested creation of collective EU assets met with strict refusal in the Council.

Most of the member states quite simply regard disaster relief and the protection of their citizens as a national responsibility. It is not just that states are reluctant to allow foreign officials—particularly military forces—onto their territories. They also want to retain final decision-making power and full command over any forces they send abroad. After all, these may also be needed in a domestic context.

Well-equipped states' resistance to automatic solidarity commitments are compounded by their fear of free-riding by their partners. 'Accident prone' states such as those regularly affected by forest fires and those with poor disaster relief infrastructures could well prove quick to demand solidarity instead of increasing their own capacities. Well-equipped states will therefore resist 'catch-all' solidarity mechanisms, preferring to decide on a case-by-case basis whether to commit their resources. Yet, this understandable desire to maintain sovereignty—an impulse frequently manifested in bilateral shows of solidarity that by-pass EU structures—has led to duplications and gaps in capabilities as well as hold-ups in the most critical early phases of disaster response.

Article 222 does not offer a solution to this dilemma, but rather leaves the most difficult questions to the implementation decision: How should the mechanism be triggered to preserve sovereignty but enhance reliability? How will the necessary capabilities be assembled to maintain sovereignty but increase speed and effectiveness? Under what conditions may the most sovereignty-sensitive instrument, the

military, be used? And can the structures, which would theoretically overcome these sovereignty concerns, actually be integrated into the existing CPM and CSDP setup?

Here the negotiators would do well to look to the successes and failures of the CPM as well as experiences with similar endeavours—not least the EU's moves to operationalise the principle of solidarity in the management of its external borders.

Triggering solidarity

A first requisite for an effective solidarity system is a clear definition of how it can be triggered and by whom. Without this, the member states will resist signing up to automatic commitments about the use of their capabilities. In its current formulation, however, Article 222 looks set to spawn an ineffective system.

Establish a subsidiarity threshold: Well-equipped states are typically reluctant to accept solidarity following all but the most extreme disasters. They successfully argued for a stipulation that the solidarity clause can be initiated only on request. Article 222 therefore assigns the right of initiative in response to disasters to the political organs of the stricken member state.

Yet, by allowing not just resource-rich but also poorly-equipped member states considerable scope to demand solidarity from their partners, this preservation of national sovereignty may open the way to abuse. The governments of 'accident-prone' member states can cry solidarity and rely upon the EU to perform tasks they should really be doing themselves. If it is any indication of this risk, in summer 2007, Greece was able to issue four requests for CPM assistance to combat its forest fires.

Under Article 222's triggering system, well-equipped member states would probably make little use of the solidarity clause, whilst accident-prone states could rely upon it at the expense of the maintenance of their own capabilities. The spectre looms large for a duplication of European resources by well-equipped member states

whilst worrying gaps emerge in the capabilities of others.

One possible solution to this problem can be found in the deficits of the CPM and border control. A ‘subsidiarity baseline’ could be established as a second lock on EU action besides the stipulation that member state organs alone can trigger the solidarity clause. This baseline would set out a level of severity under which the affected member states would be obliged to deal with disasters themselves.

For ‘accident prone’ states, the baseline would infer an obligation to develop national capabilities, at least to a certain level. For well-equipped member states, such a baseline would provide a further tool to resist unwanted European intervention. With EU action now confined to particularly severe crises, these states’ readiness to establish a robust solidarity mechanism might also increase.

Formulate an enticing catalogue of disasters: Another means of winning over well-equipped countries would be to draw up an indicative ‘disaster catalogue’. This would give more detail on the crises to which the clause would apply and would show a sympathetic eye to the kinds of disasters where well-equipped members would be prepared to accept support from other states.

The catalogue would probably confine the use of the clause to disasters that affect a number of member states—the flooding of major rivers for example—as well as to terrorist attacks. Well-equipped member states would be happy to accept solidarity in the first case since joint relief efforts would anyway be in operation in neighbouring states and to refuse this support would be difficult to explain to citizens. In the second case, offers of solidarity would be understood less as an indication of the weakness of the stricken state than a sign of general support for its values.

Such a catalogue would also reduce the risk of the system being monopolised by a small number of member states. This problem has materialised in the area of

border control. There, certain countries have instrumentalised the glaring problems of migration control which they face, diverting common resources away from less obvious problems of interest to other members.

This risk is very real in the case of the solidarity clause. Thanks to the loose wording of Article 222, states could currently demand solidarity in a whole range of scenarios from cyber-attacks to fuel shortages. According to some interpretations, the clause might even apply to disasters outside the Union, if EU civilians are affected by a disaster abroad. Most well-equipped states will refuse to sign up to automatic commitments whilst the potential scope of application remains so large.

Fortunately, the solidarity clause already contains many of the building blocks necessary for the elaboration of a prospective catalogue of triggers. Article 222 (4) TFEU includes the provision that to “enable the Union and its member states to take effective action”, the European Council should regularly conduct a threat assessment. Here, the Council could go a step further and combine this task with a regular review of the European Security Strategy. This combined approach would allow the European Council to establish a connection between the perceived threats to the Union and the operational spectrum of the solidarity mechanism.

Neutralise the trigger decision: These efforts to pre-define the triggers of the clause could, of course, cause delays in the critical early days following a crisis. The necessity of first agreeing whether subsidiarity criteria are met would, for example, encourage political wrangling just when action is needed.

In EU border control, the decision to initiate common action has been somewhat depoliticised by increasing the input of the more ‘neutral’ agency Frontex. Equipped with its own intelligence analyses, Frontex has facilitated decisions about the necessity of action and the use of common resources. A similar arrangement could be found for

Article 222, if the necessary permanent structures could support decisions about whether a crisis exceeds the subsidiarity baseline and whether it falls within the catalogue of disasters.

Assembling the means

Once solidarity is called for, the main challenge lies in rapidly assembling the necessary means. Experiences from CPM, CSDP and border control operations show that ‘force generation’ is one of the most difficult parts of joint action, even in cases where there is a consensus among member states about the need to act.

Due to sovereignty concerns, member states have already reduced the scope for automatism as regards assembling means under Article 222. Declaration 37 of the Lisbon Treaty states that “none of the provisions of Article 222 is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation.”

Against this background, four key elements should be included in the implementation decision on Article 222.

Pre-coordinate means: First, the negotiators could learn from the efforts in CSDP to facilitate force generation. CSDP is subject to the same basic dilemma as the solidarity mechanism: the EU lacks both its own forces and the final decision-making power over the provision of national capabilities, be they civilian or military. CSDP resorts to a simple solution to ease the laborious force-generation process.

The CSDP structures maintain a catalogue of forces which the member states would potentially deploy. The Monitoring and Information Centre of CPM employs a similar approach, administering its own catalogue for civil protection.

The Article 222 machinery could usefully develop its own catalogue. Indeed, since both the CSDP and CPM activities comprise the civilian and military instruments which fall within the scope of Article 222, these existing catalogues should be integrated

with each other and that of the new solidarity mechanism.

Such a solution has weaknesses. Capabilities listed in this kind of catalogue are typically ‘double-hatted’ and may be earmarked for other purposes. There is no guarantee that they will actually be available if needed by another member state. In order to be able to act quickly in severe crises, the EU has created the Battlegroups, two of which are always on standby. The main difference to the catalogue approach is that the member states make a political commitment to hold the actual forces ready for deployment on a rotating basis. A similar system could be used within the solidarity mechanism while introducing an element of common funding in order to overcome the Battlegroups’ most profound weakness. In the case of Germany, this will have to pay heed to the competence of the *Länder* in the area of civil protection.

Pre-emptively build readiness: In EU border control too, resource-rich member states dislike putting national resources at the EU’s disposal when this occurs reactively and at short notice. They have therefore looked for other means of meeting their solidarity commitments. These states increasingly concur that it is better to support their partners’ efforts to build infrastructure *before* crisis strikes. By enhancing mutual readiness for crisis, they seek to reduce the incidence of reactive demands for their resources.

By giving their resources pro-actively, well-equipped states can also reduce instances of free-riding. They demand that their offers of pre-emptive support be matched by recipient countries which should undertake to build their own infrastructure. This ‘matching criterion’ would hardly be possible to impose in the heat of disaster.

The logic of pre-emptive solidarity can be transferred to Article 222. Reactive recourse to the solidarity clause could, for example, be reduced through the sharing of expertise about crisis readiness ahead of a possible disaster.

Impose conditionality 2.0: The EU's efforts to assemble means will face another key obstacle. Well-equipped member states frequently target support only at countries where they have a particular stake. Offers to share their means are bound with implicit conditions. These states expect something in return for their apparent altruism.

This desire to assert conditionality strengthens the preference for ad-hocery amongst resource-rich states. Blind commitments of solidarity could namely see their resources diverted to countries in which they have little interest. They prefer instead to weigh up decisions about what means to make available on a case-by-case basis.

Other solidarity mechanisms have faced similar obstacles, and have developed conditionality arrangements of their own. 'Second generation' conditionality mechanisms are generalised conditionality rules that apply to *all* states that aspire to receive solidarity under the mechanism. They frequently reflect the interests of resource-rich states.

EU border policy is a case in point. Well-equipped member states have made their approval of common border efforts more or less dependent upon the adherence of demandeur states to certain principles. They have, for example, blacklisted the mass regularisation of illegal immigrants in the EU—something which they deem irresponsible.

The Article 222 implementation decision should include a similar list of conditions. It would proscribe policies by which member states leave themselves vulnerable to crisis and prejudice the safety of their EU partners.

Set up permanent structures for planning: The rapidity of the disaster response will be key to the solidarity clause's effectiveness. A military commonplace is that swift responses require early planning for possible scenarios as well as established procedures and a clear plan on how to proceed in case of an emergency. NATO's collective defence clause is therefore backed by per-

manent political and military structures able to carry out regular threat assessments, contingency planning as well as a balanced allocation of responsibilities in case of emergency.

In comparison, the current Monitoring and Information Centre of CPM is mainly a communication hub. It plays a much less active role in the management of disaster relief operations—a task left to the member state which is being helped. Although the authorities of the affected state can provide valuable on-the-spot information about the area, this structure leaves the EU without the ability to plan for emergencies, establish routine command and control structures, or maintain awareness of the situation on the ground. The experience of the CPM has been that ad-hoc coordination of national responses often leads to confusion as well as gaps and duplication in capabilities in the essential early phases of disaster relief.

In order to support the solidarity clause, the EU would therefore do well to establish dedicated permanent structures capable of planning for both civilian and military instruments.

Logically speaking, states should have little against this solution. After all, a quick, effective response is also likely to carry fewer costs than a drawn out one. The possible creation of permanent structures, however, touches upon a sensitive issue: the establishment of an EU capacity for the planning and conduct of military operations has long been resisted by member states like the UK fearing the duplication of NATO capabilities.

In order to overcome this blockade, the EU should set up an integrated civilian-military headquarters with a strong civilian element. This headquarters would service the solidarity mechanism as well as external crisis operations. Such a construction would not entail a duplication of NATO assets and would benefit CSDP operations as well as the EU's disaster response capability.

The military dimension— more options, more problems

One lesson learnt from the CPM and already incorporated into the solidarity clause is that, in civil emergencies, the military may provide essential assets. This use of military resources is hardly unusual on the national level: even in a state as reluctant to resort to military means as Germany, the armed forces may assist in dealing with disasters. During the floods in central Europe in 2002, for instance, over 40,000 *Bundeswehr* soldiers provided help for transport, maintaining dykes and evacuating citizens. This was permitted because the soldiers operated with a non-executive mandate.

The inclusion of the military as a prominent instrument within the scope of the solidarity clause thus spawns more options for operationalising solidarity. Yet it creates even more headaches, too. Article 222 potentially goes much further than the non-executive employment of military resources typical of civil protection.

Originally conceived of as an instrument akin to a mutual defence mechanism against non-state threats, Article 222 appears to permit the use of the military—indeed the use of other member states' militaries—in the aversion of acts of terrorism and the protection of democratic institutions as well as of citizens.

Even after the September 2001 attacks on the US, using the military in counter-terrorism remains highly controversial and is an issue both constitutionally and politically contested in many member states. In Germany, for instance, the heated debate about whether the military may shoot down a hijacked aeroplane if it is being used for terrorist purposes resulted in a ruling by the Constitutional Court establishing that this would violate the German Basic Law.

Clearly define the tasks for the military:
The negotiators of the implementation decision for the solidarity clause therefore face another sovereignty dilemma. While Article 222 could provide a more robust

mechanism through its inclusion of military means, any use of the military under an executive mandate must reckon with resistance from certain member states.

The negotiators should therefore define the uses of military capabilities more clearly. The EU would do well to restrict the possible uses of the military within the Union to that of aid and assistance to the civilian authorities without executive mandate. This would be in line with what is constitutionally accepted, even in member states with strict limits for the internal use of the armed forces like Germany. It would allow for military assistance in crisis response, but also after acts of terrorism, e.g. by providing protection against the effects of chemical, biological, radiological or nuclear weapons.

If the negotiators aim to include the use of the military inside the Union with executive tasks, however, they should clearly differentiate between the possible tasks for the military. They should elaborate much stronger conditions than those imposed for non-executive tasks or 'traditional' disaster response.

According to the German Basic Law, the internal use of the armed forces with executive powers requires a declared state of tension (*Spannungsfall*) or defence. This declaration requires a two-thirds parliamentary majority as long as parliament is able to convene. The implementation of Article 222 should follow suit. The use of the military in executive tasks should be permitted only in a state of tension or emergency within the EU evocable under the most extreme circumstances, and requiring unanimity in the Council and a high majority in the European Parliament.

Institutions with substance

These lessons drawn from CPM, CSDP and border management suggest means of realising a robust, automatised solidarity mechanism. Even in a more modest version of the solidarity clause, however, these lessons could be incorporated.

Such a mechanism should include a threshold under which the member states remain responsible for dealing with catastrophes themselves. This would require all states to maintain the relevant capabilities and could significantly limit the potential for free-riding. Also, member states, though free to choose on the extent of their commitment, should nevertheless coordinate closely beforehand which resources they are willing to provide.

By the same token, concerns about sovereignty should not be allowed actively to run counter to these lessons. An effective disaster response will hardly be possible without permanent, central structures to back them up. To be truly effective, the Commission structures and the existing tools for external crisis management as well as internal security cooperation within the Council Secretariat should be as integrated as possible and empowered to coordinate prevention, contingency planning and execution for the EU in the face of disaster.

All this highlights the question where the machinery of the solidarity clause can and should be located. The Lisbon Treaty provides a clear legal basis for the further development of the CPM (Art. 196). Despite the overlap between the tasks of the CPM and the new solidarity clause, however, the two legal bases remain distinct. There is no legal obligation for the CPM and the Article 222 machinery to be integrated with one another. The situation is further complicated by the existence of crisis management capabilities within the CSDP. The tasks of the CSDP capabilities are confined to operations outside the Union, yet their role in managing civil-military cooperation as well as planning and coordination tasks will require close coordination with the Article 222 machinery. The nature of this relationship is not defined by the Treaty.

The institutional question will invariably entail tortuous wrangling. The crisis management bodies of CSDP, including the intelligence-sharing EU Situation Centre as well as the existing structures for planning

and conducting civilian EU operations, are to be integrated into the new European External Action Service (EEAS). The CPM machinery for now remains situated within the Commission. The negotiators of the implementation decision will thus have to decide whether the structures for the solidarity clause will be integrated most closely with those of CPM or those of CSDP crisis management.

Governments have yet to agree upon the kind of solidarity they are willing to commit to, and such thorny institutional issues are already undermining their enthusiasm for a robust solidarity mechanism. Concerned about making themselves liable before the European Court of Justice for any failure to show solidarity, the member states will be tempted to maintain the loose wording of Article 222 to the point of meaninglessness. This could see the commitments of Article 222 actually dip below the level already established by the CPM.

A more constructive approach is called for. The member governments should define the instances under which solidarity can be demanded, confining these to a meaningful catalogue of severe crises. They should then set about working out what structures are necessary to plan for and respond to such eventualities. Only in a third step should the precise institutional situation of these structures be set. Too often of late, the EU has reversed the process, defining political goals and principles through an institutional prism.

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