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- Views of the Austrian Delegation

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The Solidarity Clause (Art. 222 TFEU), which has become legally binding through the entry into force of the Treaty of Lisbon, commits the Union and its Member States to act jointly 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. The Union mobilises all the instruments at its disposal, including the military resources made available by the Member States, to prevent the terrorist threat in the territory of the Member States and to protect the democratic institutions and the civilian population from any terrorist attack.

The Member State concerned, at the request of its political authorities, is assisted by the other Member States. To that end, the Member States coordinate between themselves in the Council. To the extent the assistance of the EU is concerned, the arrangements for the implementation of the Solidarity Clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy.

The ‘Political and Security Committee’ (PSC) and the ‘Standing Committee on Internal Security’ (COSI) assist the Council for these purposes. If necessary, the two committees can submit joint opinions. Furthermore, Article 222 TFEU provides for the European Council to regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.

While the proposal for the implementation of Art. 222 TFEU is expected for 2012 COSI –together with PSC – had a first discussion on this new provision in December 2011. Whereas CATS focused on legal questions in his debate in October 2011, COSI together with PSC contributed to the operational aspects of the implementation of Article 222 TFEU.

In this context, preliminary work as well as the work on related issues accomplished outside the EU framework, e.g. by the ‘International Law Commission’ or the ‘Institut de Droit International’, should be considered while dealing with questions pertaining to Article 222 TFEU

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Bearing in mind that when dealing with the question of the implementation of Article 222 TFEU it is crucial to respect the general provisions of international law (Article 3 (5) TEU), the following issues seem to require further analysis in the relevant EU forums.

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<sup>1</sup> E.g.: *Report of the ILC 2011, UN Doc. A/66/10, pp 249 – 268; Resolution of the Institut de Droit International “Humanitarian Assistance”, Bruges Session 2003, available at [http://www.idi-iil.org/idiE/resolutionsE/2003\\_bru\\_03\\_en.PDF](http://www.idi-iil.org/idiE/resolutionsE/2003_bru_03_en.PDF).*

## **I. Scope of Article 222 TFEU**

Paragraph 1, sentence 1, lists three cases, namely terrorist attacks, natural disasters and man-made disasters. Sentence 2 enumerates three forms of assistance that the Union may render to the affected Member States. Reading both sentences together, it could be assumed that this list is exhaustive. The question arises whether the cases triggering the solidarity of Member States in paragraph 2 are the same as in paragraph 1.

As regards terrorist attacks: whereas paragraph 1 mentions “a terrorist attack”, sentence 2, item a, also mentions the prevention of “the terrorist threat” and protection from “any terrorist attack”. It is up for discussion what level of likelihood or specificity should be necessary for a threat to fall within the meaning of the Solidarity Clause.

As regards disasters, Article 222 TFEU applies “in the event of a natural or man-made disaster”. Therefore, it could be assumed that in this case preventive measures are outside the scope of the Solidarity Clause.

Article 222 TFEU (1)(a), third indent, as well as (b), require the request of the political authorities of the affected Member States for assistance. The first and second indents of item (a), however, do not contain such a requirement. With regard to the sovereignty of the Member States, it should be clarified whether all cases falling under Article 222, (1) and (2), require the request of the political authorities of the affected Member States for assistance, or, whether the range of measures available to the EU in cases where the assent of the Member State is not mentioned (Paragraph 1 item (a) first and second indent) is restricted to such measures not infringing upon the sovereignty of the Member State concerned. Moreover, it should be considered whether the Union could also act in the absence of a request by a Member State (e.g. based on an EU threat assessment).

The situations triggering Article 222 TFEU seem to require exceptional circumstances. This does not preclude the possibility of cooperation and assistance in cases of lesser gravity, but these would not be covered by Article 222 TFEU. Emergencies and crises are covered by the EU emergency and crisis coordination arrangements (CCA), setting out the mode of interaction of EU institutions and affected Member States. A first assessment should be done by the Member State concerned. Checklists or any quantitative criteria are less useful as the assessment of an incident ultimately remains a political question and therefore can hardly depend on quantitative criteria.

However, it must be clear that the Clause shall not be misused for smaller-scale incidents since it is the primary responsibility of each and every Member State to provide for physical and infrastructural security and safety within their own territories.

Furthermore, it should be clarified whether there is a structural difference between paragraph 1 and paragraph 2 of Article 222 TFEU (see also under IV.). It should be made clear, whether the Council Decision mentioned in paragraph 3 only relates to the assistance of the Union in accordance with paragraph 1 or if it also relates to the assistance of Member States in accordance with paragraph 2. In the first case horizontal arrangements between the Member States for the implementation of paragraph 2 would have to be agreed upon in a different legal form (e.g. Council conclusions).

#### Geographical Scope:

The limitation of the geographical scope to the territory of the Member States is clearly stated in the Treaty. Given the possibility of cross-border effects of natural or man-made disasters, Member States can be affected by incidents originating in third countries (e.g. nuclear accidents). However, the assistance provided would be in the territory of the Member States. Should the Union envisage assistance to third countries, such assistance needs to be based on other articles of the treaties, including Article 43 TEU and Article 214 TFEU. It must be noted that the language on the protection of the civilian population in Article 222 (1)(a) does not contain any territorial limitation.

The idea of possible Union actions in relation to incidents on ships, airplanes or in embassies of EU Member States or in delegations of the European Union could only be discussed when other articles of the treaties and public international law are taken into account, bearing in mind that embassies cannot be considered territory of Member States.

## **II. The notion of being “the object” or “the victim” of an attack or a disaster**

When is a Member State the object or the victim of an attack or a disaster? In Austria’s opinion, the provision also applies if the attack or disaster has occurred in another Member State or a third country, yet the Member State invoking the clause is affected as well. Thus, a Member State whose territory is not directly affected should be able to ask for support on the basis of the Solidarity Clause (e.g. when critical infrastructure in another Member State or a third State is affected and the consequences indirectly cause an emergency in (an) other Member State(s)).

In this regard, it is worth noting that according to paragraph 1, item (a), and item (b), the Union and the Member States shall “assist a Member State in its territory” (see chapter on “geographical scope” above).

Regarding the application of the Clause before the terrorist attack has occurred, what must be the level of threat to allow the Union to pro-actively prevent a terrorist threat on the territory of a Member State (paragraph 1, item (a), first indent) or protect the democratic institutions and the civilian population from any terrorist attack (paragraph 1, item (a), second indent)?

Taking into account the principle of subsidiarity it should be considered if the following conditions shall be satisfied:

- one of the situations mentioned in Article 222 TFEU, i.e. a terrorist threat, a terrorist attack, or a natural or man-made disaster must have occurred;

Either:

- the Member State concerned must request the assistance of the Union and/or of the Member States (paragraph 1, item (a), third indent, item (b) and paragraph 2);

Or:

- the "preventive scenario" applies (see also below);
- the Council comes to the conclusion that the Member State concerned is indeed the object of a situation triggering the Solidarity Clause.

In principle, the affected Member State(s) should make a first assessment of the kind of assistance needed and table a request on the political level to the other Member States.

With regard to the 'preventive scenario' of paragraph 1, item (a), first and second indent, it could be questioned whether the preventive tasks of the Union enshrined in paragraph 1, item (a), first and second indent, require that a terrorist attack has already occurred. Does "the terrorist threat" relate to the first sentence of Article 1 or is it to be seen independently from a specific incident that can trigger the Solidarity Clause? In this regard the different wording of the first and second indent should be considered. Whereas the first indent says that the Union shall prevent "the terrorist threat" the second indent provides for an obligation of the Union to protect from "any terrorist attack". The first indent seems to relate to a specific threat whereas the second indent seems to relate to the general possibility of a terrorist attack.

### **III. Relation to other provisions in the Treaties**

The type and degree of assistance will depend on the request and on the assistance that can be offered by the other Member States. In this regard, Declaration No. 37 on Article 222 TFEU must be considered. Member States are allowed to choose the type of assistance which seems most appropriate to them. For legal or political reasons, limitations of assistance, in particular in the form of military assistance, have to be considered, taking into account the specific character of the security and defence policy of certain Member States.

In this respect it could be questioned which kind of assistance would fall within the scope of the Clause. Could for example also (legal) measures adopted by the Union or measures of the Member States aiming at a better integration of third country nationals, which could have a positive impact on the prevention of radicalisation, fall within the Clause?

Moreover, the decision on the implementation of the clause should be worded in such a way as to make clear that the scope of application of Article 222 TFEU does not overlap with that of Article 42(7) TEU ('mutual assistance clause'). Article 42(7) TEU is more narrowly focused and intergovernmental, whereas the Solidarity Clause has a supranational orientation. Whenever Article 42(7) TEU is applicable Article 222 cannot be applied for the same measures.

Eventually the relation between Article 222 and Articles 347 and 348 TFEU could be clarified, considering that the provision in Article 347 could give the Member States the possibility of denying their duty of solidarity.

Moreover, the formulation of the decision implementing the Clause should take into account the competence of the ECJ for Article 222 TFEU and – *inter alia* – the possibility of infringement procedures.

#### **IV. The procedure(s)**

The Council, assisted by PSC, COSI and COREPER, should play a central role in coordinating and implementing assistance – without prejudice to existing operational mechanisms (e.g. Civil Protection Mechanism, Monitoring and Information Centre [MIC] etc.) – which could take over the processing of such assistance. In this regard Austria is of the opinion that consular activities cannot be included in actions under Article 222.

##### **a) In relation to paragraph 1:**

First, it has to be pointed out that the Council decision foreseen in paragraph 3 is meant to be of a general nature, foreseeing horizontal provisions on the activation and use of the clause. The necessity to react as quickly as possible would make any formal decision-making procedure on the side of the Council too cumbersome. Moreover, existing structures should be utilised as much as possible.

The question arises whether different procedures should apply, depending on the type of situation (terrorism / disaster) or on the means to be deployed (military / civilian).

As the wording of Article 222 indicates, the Clause can only (in the case of Art. 222(1) (a), third indent, (b) and paragraph 2) be activated on the political level by the competent representatives of Member States concerned. It should be discussed, if the decisions should define which political authorities are entitled to request assistance. Expert or operational levels can be activated in parallel. Possible other supporting mechanisms (e.g. Civil Protection Mechanism) should equally be started rapidly. The Council (if necessary through its preparatory bodies) should endorse the necessary measures and/or adopt a declaration when an incident occurs and the Solidarity Clause is to be applied.

In this regard, it should be taken into consideration that almost in every situation triggering the solidarity mechanism both internal security and security policy issues would probably be concerned.

A possible procedure that would apply as a standard procedure could be the following:

1. Common extraordinary meeting of PSC and COSI to elaborate a common position, which should contain a first analysis of the situation as well as options for action and their assessment.
2. Special meeting of COREPER to prepare the discussion at Ministerial level.
3. Special meeting of the Council to adopt political conclusions in support of the Member States concerned.
4. Upon request of the Member State concerned, the other Member State(s) could deploy support units on the legal basis of e.g. the ‘Prüm Decisions’<sup>2</sup> and/or the ‘ATLAS Decision’<sup>3</sup>. Where necessary, COSI could facilitate the operational coordination.

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<sup>2</sup> Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ L 210, 6.8.2008, p. 1) and Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA (OJ L 210, 6.8.2008, p. 12)

<sup>3</sup> Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations(OJ L 210, 6.8.2008, p. 73)

In this context, the use of the EU First Response Team within the framework of Europol to assist (in case of a terrorist attack) the Member State concerned could be envisaged. Moreover, existing instruments such as the ‘Europol Preparedness Programme’ shall be also considered for the support of the Member State concerned.

b) In relation to paragraph 2:

Finally, it should be discussed if, as the wording suggests, the Clause (Art. 222(2), second sentence) does not establish a competence of the Union to regulate and assure the coordination or to facilitate coordination of the Member States and the Council could only be used as an intergovernmental platform for coordination. Consequently, horizontal provisions would only be envisaged in other legal forms (e.g. Council conclusions).

## V. Costs

The rendering of assistance by the Union or the Member States in accordance with paragraph 1 or 2 does not mean that the assisting Union or Member States also have to bear the costs. Without prejudice to bilateral agreements foreseeing a bilateral assistance free of charge, the costs shall, as a matter of principle, be reimbursed by the assisted Member State.

## VI. Threat analysis

A duplication of existing reports should be avoided. It is important to reflect on whether a general threat analysis covering all the different Article 222 situations is reasonable and which frequency would be most appropriate for an assessment according to Article 222(4).

In principle, existing EU capacities and instruments should be strengthened; new ones should only be created if strictly necessary. As an example, the threat assessment on Serious and Organised Crime made by Europol (SOCTA) could be extended to threats related to terrorism. IntCen should closely cooperate with Europol in this regard.

An integrated and comprehensive approach as regards the threat assessment is necessary. This should also include the services of Member States as appropriate. The European Council should regularly be informed about threats and challenges in the area of security.

## **VII. Scenarios**

The non-exhaustive list of scenarios listed below may vary widely in degree. In some cases, they may not fall under Article 222 TFEU. The purpose of the list is to start a discussion on which scenarios could, in principle, fall under Article 222 TFEU, and whether specific procedures or a general procedure for every case would be appropriate to handle them.

### “Terrorist acts”:

- a terrorist attack involving CBRN material
- a cyber-attack
- a series of terrorist attacks affecting several MS

As regards the qualification of “terrorist attack”, further work could build on the definition provided for in the Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

### “Disasters”<sup>4</sup>:

- nuclear incidents (not involving terrorist attacks, e.g. Chernobyl-like situations)
- large-scale contamination of rivers, bodies of water, coastline, or geographic areas (e.g. due to industrial accidents)
- massive floods affecting larger parts of the territory of a MS
- earthquakes
- volcano eruptions
- landslides
- avalanche catastrophes
- large-scale forest fires
- situations requiring the evacuation of larger groups of the population
- break-down of transportation systems (e.g. caused by floods, snow, earthquakes)
- pandemics

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<sup>4</sup> On the notion of ‘disaster’ and ‘man-made disaster’ see also the *Resolution of the Institut de Droit International 2003*, available at [http://www.idi-iil.org/idiE/resolutionsE/2003\\_bru\\_03\\_en.PDF](http://www.idi-iil.org/idiE/resolutionsE/2003_bru_03_en.PDF), as well as the *Memorandum of the UN Secretariat, Protection of Persons in the Event of Disasters*, Doc A/CN.4/590, para. 9.

- large-scale infrastructure failures (e.g. caused by lack of electricity / gas supply, computer / network failures)

One possibility to refer to the Solidarity Clause could be in case of preventing a clear and imminent threat. However, a typology of threats does not seem practical since flexibility should be the underlying principle of any action taken under Art. 222 TFEU.

### **VIII. Added Value of the Clause**

The primary purpose of the Clause and its added value as far as the operational aspects are concerned is a more coordinated and integrated use of existing instruments and mechanisms. In any case, duplications with these instruments and mechanisms should be avoided. Politically the Clause is first and foremost a tool to provide for political visibility of solidarity within Europe in case of (imminent) threats or hardships. The Council of the European Union together with the Commission shall take over the leading role in the necessary coordination of the solidarity measures. Moreover, the Clause imposes an obligation on the Member States to act jointly in case of a terrorist attack or a natural or man-made disaster which will foster European integration in the field of security and disaster management.

Finally, the Solidarity Clause could support the efforts undertaken by the Council, the Commission and the EEAS to enhance cooperation and integration between the Area of Freedom, Security and Justice and the Common Foreign and Security Policy.

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