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NOTE

From: Politico-Military Group
To: Political and Security Committee
Subject: PMG Recommendations on Article 44 TEU

Delegations will find attached the PMG Recommendations on Article 44 TEU, as finalised by the Politico-Military Group on 11 February 2015.

PMG RECOMMENDATIONS ON ARTICLE 44 TEU

I. INTRODUCTION

1. In its conclusions of 9 October regarding Article 44 TEU, the PSC tasked the PMG to provide Recommendations on the basis of available contributions and the PSC discussion.
2. In the course of the PMG deliberations, the Council Legal Service provided a 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’ (doc. 5225/15, dated 13 January 2015).

II. CONSIDERATIONS

General

3. The PMG notes that the present discussion on the full scope of application of Article 44 TEU should contribute to awareness and clarification of possible modalities.
4. The PMG notes that the use of Article 44 should be considered on a case by case basis, and where this would add value in protecting the Union’s values and serving its interests. As an exception to the rule, it should not detract from the need to forge political consensus for standard CSDP missions and operations, i.e. those not launched under Article 44, including by encouraging Member States’ contribution to the force generation process.

Legal Framework

5. The PMG took note of the contribution of the Council Legal Service (see paragraph 2) providing guidance on the legal aspects involved in the possible use of Article 44:
 - The PMG notes that an action under Article 44 is another modality of a CSDP mission or operation, fully in line with Articles 42(1) and 43(1) TEU. As with all CSDP missions and operations a legal basis under international law remains necessary and the action under Article 44 TEU must comply with the Union’s obligations under international law.

- The PMG furthermore notes that, to the extent that Article 44 does not lay down specific provisions, relevant CSDP/CFSP Treaty articles and their related provisions and regulations thus apply, including those related to cooperation with partners and security of information. The PMG stresses the pivotal role of the PSC in line with Article 38 TEU. The Council Decision establishing the operation is taken by all Member States. In relation to financing, Article 41(2) TEU¹ applies; for CSDP operations having military or defence implications, the Athena mechanism is used for the common costs². All Member States who so decide may participate in a CSDP operation under Article 44.

Possible cases

6. Within this framework, and without prejudice to existing crisis management instruments, including the EU Battlegroups, the PMG has discussed potential cases in which the use of Article 44 could be considered in particular, for example when:
- all Member States politically support an operation or mission, but only a limited number of them are willing and/or able to participate militarily;
 - the envisaged operation would be at (very) short notice and/or of short duration (such as in support to evacuation operations or to humanitarian efforts);
 - there is an opportunity to tap into particular expertise, experience and capabilities of Member States, or cooperation established between them;
 - there is political consensus for the Union to take over an ongoing mission or operation conducted by one or more Member State on a national or multinational basis, subject to the decision-making process and modalities for political control as described below and any necessary hand-over arrangements.

¹ “Operating expenditure to which the implementation of this Chapter gives rise shall also be charged to the Union budget, except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise.

In cases where expenditure is not charged to the Union budget, it shall be charged to the Member States in accordance with the gross national product scale, unless the Council acting unanimously decides otherwise. (...”)

² Without prejudice to the position of Denmark in relation to military operations. A Member State could also abstain in the vote on the Council Decision, including a qualified abstention.

In light of this, the PMG underlines that Article 44 provides an additional modality that may enhance the role of the EU and its Member States acting as a security provider together, making use of the flexibility of the Union framework. Strengthening CSDP's effectiveness and responsiveness remains a continued need in today's increasingly unpredictable and rapidly changing security environment.

Political decision-making

7. The PMG underlines that political will among Member States remains crucial for swift decision making, also under Article 44. It takes note of the particular elements required for decision-making by the Council (namely the objectives, scope and general conditions for the implementation, which include political assumptions, limitations, constraints and restraints, military assumptions, mission concept, approximate size and key military or civilian tasks), as set out in the contribution of the Council Legal Service. To this end, the Suggestions for Crisis Management Procedures should be used expediently as needed to structure the decision-making process, including possibly through the options of a PFCA and/or fast-track procedure:
 - The PSC would be invited to discuss and agree a Crisis Management Concept³, to be forwarded to the Council for approval.
 - A Council Decision establishing the mission or operation shall subsequently, in line with Article 43(2) TEU, define the “objectives and scope and the general conditions for its implementation”, while entrusting its implementation to two or more Member States in line with Article 44 TEU under the continued political control and strategic direction of the PSC. The Council would also agree the financial reference amount. Hence, all Member States within the Council agree the key parameters. A key prerequisite for establishing an Article 44 mission or operation is that the group of willing Member States have the necessary capability to implement the task.

³ Or a CMC equivalent if so agreed by PSC. In accordance with Art. 30(1) TEU the High Representative or any Member State may submit to the Council initiatives or proposals relating to the Common Foreign and Security Policy.

- As outlined in the contribution of the Legal Service, also certain elements normally elaborated during the operational planning phase (and usually set out in the CONOPS and/or OPLAN, including RoE/Use of Force Rules) are to be considered as defining the ‘general conditions for the implementation’, hence to be agreed by the Council. The decision to launch the operation would also be taken by all Member States in the Council following such agreement.

Implementation

8. The PMG notes that, following the adoption of such a Council Decision, further steps of the CSDP planning process and implementation of the Article 44 mission/operation would be entrusted to the identified Member States, with due respect to the supervisory role and responsibilities of the PSC and the Council, and in close association with the HR/EEAS, and with Commission services as appropriate. It took note of the particular elements falling within the competence of the group of Member States, as outlined in the contribution from the Council Legal Service. Within the established mandate, these elements include the drafting of (a) planning document(s) covering the general conditions for implementation, in view of submission to the PSC and the Council for approval, as appropriate. Also the Force Generation process including the identification/activation of a national or multinational OHQ/FHQ would fall within the group’s competence⁴. The entrusted Member States would benefit from the political and legal cover of the EU (e.g. as regards status of forces/mission agreements and participation agreements⁵), in line with the agreed mandate, including in the area of operations, and assistance from the EEAS where appropriate.

Political control

9. The PMG stresses the key importance of ensuring that entrusting implementation to two or more Member States, in line with Article 44, respects fully the role of the PSC in exercising the political control and strategic direction of crisis management operations referred to in Article 43 TEU, under the responsibility of the Council and the High Representative. The PSC must be able to assess if the further planning and conduct is within the agreed parameters of the operation (scope, objectives, tasks, etc.). This is also important in view of Member

⁴ A decision to activate the EU Operations Centre shall be taken by the Council.

⁵ Without prejudice to the allocation of responsibility between the Union and the Member States concerned.

States' contributions to the common costs in line with the Athena mechanism. As for all autonomous CSDP missions and operations, the Council retains political responsibility for the mission or operation under Article 44. To this end, the entrusted Member States, recognizing their exceptional responsibility, would be obliged to provide PSC with complete information, also during the conduct phase. Appropriate modalities, reporting requirements and possible additional decision points for PSC and/or Council may be defined in the Council Decision which establishes the operation.

Duration/termination

10. The PMG underlines that the time frame of the mission/operation is agreed upon by all Member States in the Council Decision and through the CMC. The CMC should also outline the end-state as well as the exit- or transition strategy, looking for a smooth transitioning to other EU instruments or other actors. On the basis of a PSC assessment of the delivery of the mandate of the mission/operation, the Council may decide to extend the mandate under the provisions of Article 44. Lack of agreement would automatically result in ending the mandate. A further option would be, if so decided by all Member States, to initiate procedures to turn the mission/operation into a standard CSDP mission/operation.

III. RECOMMENDATIONS

11. The PMG recommends the PSC to:
 - (a) agree these Recommendations;
 - (b) agree on testing the modalities regarding the use of Article 44 in an exercise study as soon as possible;
 - (c) revert to this issue on that basis.