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# The “Solidarity Clause” of the European Union – Dead Letter or Enabling Act?



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The Solidarity Clause was formally introduced by the Lisbon Treaty. It creates an explicit demand upon the EU and its Member States to act jointly and to assist one another in the face of terrorist attacks, natural or man-made disasters. Solidarity has been one of the driving forces of European integration and through the insertion of Article 222 Treaty on the Functioning of the European Union (TFEU) the Lisbon Treaty has significantly fostered the reference to the concept of solidarity. In June 2014 the General Affairs Council of the European Union adopted a decision on the implementation by the European Union of the Solidarity Clause which shall establish the mechanisms of EU action in crisis situations. This decision should promote the use of the Solidarity Clause but also raises new legal questions. Indeed, the first reactions to the adoption of the decision by the Council were controversial and showed a certain lack of understanding of the primary law provision at the basis of the EU Council decision of June 2014. This makes it necessary to deeper analyse the main provisions of this new EU measure.

## INTRODUCTION

On 24<sup>th</sup> June 2014 the General Affairs Council of the European Union adopted a decision on the implementation by the European Union of the ‘Solidarity Clause’ (Art. 222 TFEU)<sup>1</sup>. The Solidarity Clause “creates one of the most explicit demands upon EU members to act jointly and to assist one another in the face of disasters, emergencies, and crises on the European continent”<sup>2</sup>. It commits the Union and its Member States to acting 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.<sup>3</sup> Solidarity has been one of the driving forces of European integration and through the insertion of Article 222 the Lisbon Treaty has significantly fostered the reference to the con-

cept of solidarity. The principle of solidarity among Member States is also referred to in a number of different policy areas (in particular the policy area ‘border checks, asylum and migration’ is bound by the principle of solidarity enshrined in Article 80 TFEU) as one of the guiding principles for European action. However, despite the references to solidarity contained in the EU treaties and notwithstanding the regularly occurring natural disasters and the current crisis situations in the European neighbourhood (Syria, Ukraine etc.) the implementation of the Solidarity Clause did not attract much attention neither from politics nor from the media.

The ‘Council Decision of 24<sup>th</sup> June 2014 on the arrangements for the implementation by the Union of the solidarity clause

(2014/415/EU)' (hereinafter: Council Decision) is the result of negotiations that took place in a 'Friends of the Presidency Group' of the Council<sup>4</sup>. The experts of the Member States negotiated about this implementing provision of Article 222 (3) TFEU on the basis of a 'Joint proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause'<sup>5</sup> (hereinafter: Joint Proposal) which was presented on 21<sup>st</sup> December 2012 by the High Representative of the EU for Foreign Affairs and Security Policy (HR) and the European Commission. The Council Decision aims at complying with Article 222 (3)<sup>6</sup>. This provision requires the Commission and the HR to submit to the Council a proposal on the Union's arrangements for the implementation of the Clause.<sup>7</sup>

### **SUBSTANCE OF THE COUNCIL DECISION**

As stated in the first Recital, the Council Decision "concerns the implementation by the Union of Article 222 of the Treaty on the Functioning of the European Union [...]. It does not concern the implementation by Member States of the solidarity clause pursuant to Article 222 (2) TFEU". Hence, it shall not regulate the second paragraph of Article 222 which refers to the duty of the Member States to assist the affected Member States "at the request of its political authorities" and to "coordinate between themselves in the Council". However, the Council Decision is closely related and often refers to the 'Integrated Political Crisis Response arrangements' (IPCR) which should represent the framework for the Member States' arrangements for coordination in the Council as mentioned in Article 222 (2). The IPCR shall "reinforce the European Union's ability to take rapid decisions when facing major emergencies requiring a response at

EU political level"<sup>8</sup>. The IPCR process is driven by the Presidency of the Council, which ensures its "political control and strategic direction"<sup>9</sup>.

In order to highlight the fact that the Council Decision should "rely on existing instruments", a Recital (5) was added during the negotiations where some of the "existing instruments" are mentioned, namely the "European Union Internal Security Strategy, the European Union Civil Protection Mechanism<sup>10</sup>" as well as "Decision No 1082/2013/EU of the European Parliament and of the Council<sup>11</sup> and the structures developed in the framework of the Common Security and Defence Policy (CSDP)". It is quite surprising that the Council Decision enumerates so diverse instruments. Whereas the European Union Internal Security Strategy<sup>12</sup> is a mere strategic paper which was adopted by the European Council in accordance with Article 68 TFEU<sup>13</sup>, the European Union Civil Protection Mechanism (CPM) is the core instrument of EU Civil Protection legislation and was originally set up in 2001 "to enable coordinated assistance from the participating states to victims of natural and man-made disasters in Europe and elsewhere"<sup>14</sup>. The operational hub of the CPM is the 'Emergency Response Coordination Centre' (ERCC) which has the task to monitor emergencies around the globe on a 24/7 basis and to coordinate the response of the participating countries in case of a crisis<sup>15</sup>.

For the purposes of the Solidarity Clause, the Union can mobilise all the instruments at its disposal, including the military resources made available by the Member States, to prevent a terrorist threat in the territory of the Member States and to protect the democratic institutions and the civilian population from any terrorist attack.<sup>16</sup> However, the Council Decision does not fall within the remit of the Com-

mon Security and Defence Policy (CSDP). In this respect we may recall that according to Article 222 (3), second sentence, TFEU the Council “shall act in accordance with Article 31 (1) of the Treaty on European Union where this decision has defence implications”. Already the Joint Proposal excluded “defence implications”. Accordingly, the Council Decision does not provide for a general legal framework for action if military means are used for defence purposes.

As during the negotiations some Member States raised the issue of the relation between the Solidarity and the Mutual Assistance Clauses (Art. 42 [7] Treaty on the European Union [TEU]), Recital (14) states that the Council Decision “is without prejudice to Article 42 (7) of the Treaty on European Union”. Neither the Joint Proposal nor the Council Decision shed any light on the question which Clause applies in particular in those cases (such as cyber-attacks) that cannot be clearly subsumed under one or the other provision.<sup>17</sup>

### **MILITARISATION OF THE UNION?**

The first reactions to the adoption of the Council Decision highlighted the possibility to use military assets, in particular the ‘European Gendarmerie Force’ (EUROGENDFOR)<sup>18</sup>, and to suppress social unrest<sup>19</sup>. Also the use of the special police forces such as the German Police Special units GSG 9 through the so called ATLAS network<sup>20</sup> was mentioned.<sup>21</sup> Indeed, the special police forces of a Member State could be requested by another Member State in a ‘crisis situation’ already before the Solidarity Clause and the Council Decision were introduced. The Council decision establishing ATLAS “lays down general rules and conditions to allow for special intervention units of one Member State to provide assistance and/or operate

on the territory of another Member State [...] in cases where they have been invited by the requesting Member State and have agreed to do so in order to deal with a crisis situation” (Article 1 Council decision 2008/617/JHA). However, the “practical details and implementing arrangements complementing this Decision shall be agreed directly between the requesting Member State and the requested Member State”. What does that mean for the Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause? Are EUROGENDFOR and the ATLAS network instruments at the disposal of the Union as outlined in Recital (5)?

With regard to ATLAS the answer will be affirmative. After all, there can be no doubt on the fact that the ‘ATLAS Council decision’ (2008/617/JHA) is an EU instrument. However, it is also perfectly clear that by activating the Solidarity Clause the different police units falling under the ATLAS ‘umbrella’ would not automatically turn into a sort of ‘EU special police unit’ perhaps under the command of the Commission or the High Representative. According to Article 3 (Council decision 2006/617/JHA) a Member State may ask to be assisted by a special intervention unit of another Member State in “a crisis situation”. The “requested Member State may accept or refuse such a request or may propose a different kind of assistance”. The ‘Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause’ does not change the freedom of the requested Member State to accept or refuse the request. One could even question whether the Council Decision – which only relates to the duty of the Union (and not the Member States) to assist – does affect the ATLAS network at all. In any case, this question should be of no particular rele-

vance as Article 222 TFEU introduces for both the Union and the Member States the duty 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. Therefore, the Council Decision should not be considered as being a sort of ‘Ermächtigungsgesetz’ (enabling act). Eventually, there already was the binding primary law provision of Article 222 TFEU which entered into force on 1<sup>st</sup> December 2009. Certainly, the Solidarity Clause itself could be interpreted as an ‘enabling clause’ giving the right to intervene in another Member State.<sup>22</sup> However, the activation would neither repeal or suspend the duty of the Union and the Member States to comply with the principles of subsidiarity, necessity and proportionality nor would it allow an exception from the Union’s obligation to respect international law (see Art. 3 [5] TEU). Neither Art. 222 TFEU nor the Council Decision make the use of a specific EU instrument (such as ATLAS) mandatory.

With respect to EUROGENDFOR it should be recalled that it is not an EU instrument. Therefore, the question could be raised whether it even falls under the remit of the Council Decision. The latter says that “[t]he solidarity clause calls for the Union to mobilise all the instruments at its disposal” (Recital [5]) which is a mere repetition of Article 222 (1). There is no restriction to ‘EU instruments’ and even though the Council Decision only lists as “relevant instruments” measures such as the EU Internal Security Strategy (ISS) and the CPM as well as the “structures developed in the framework of the Common Security and Defence Policy (CSDP)” it does not exclude other, even multilateral, instruments which can be made available to the Union. The so called ‘Treaty of Velsen’ of 18<sup>th</sup> October 2007 which established EUROGENDFOR ex-

plicitly mentions the possibility that the European Gendarmerie Force “may be placed at disposal of the European Union” but also, for example, of the United Nations, the OSCE and NATO (Article 5 Treaty of Velsen). Therefore, the EU could ask EUROGENDFOR to perform one of its tasks foreseen in Article 4 (3) Treaty of Velsen whenever a Member States activates the Solidarity Clause. Does the deployment of EUROGENDFOR become binding through the Solidarity Clause? As it depends on the High Level Interdepartmental Committee (CIMIN), which is the decision-making body governing EUROGENDFOR, to unanimously decide on a mission (Art. 7 [2] Treaty of Velsen) the Union cannot oblige EUROGENDFOR to assist an affected Member State. Every single Member State who is also Member of EUROGENDFOR can veto the deployment of the Gendarmerie forces. The assistance through EUROGENDFOR would, indeed, be a common assistance of the Union and (some) Member States. The Member States assisting through a EUROGENDFOR mission would then be exempted from any other duty to assist in a ‘crisis’ falling under Article 222 TFEU. It should be recalled that the duty of the Member States to assist an affected Member State is limited by the declaration no. 37 annexed to the Final Act of the Lisbon Intergovernmental Conference which adopted the Treaty of Lisbon. Member States are free to use the most appropriate means irrespective of the measures adopted by the Union and probably also irrespective of specific requests from the Member States.<sup>23</sup> The Solidarity Clause and the Council Decision implementing the Clause does not entail any particular effect neither for the use of the ATLAS network nor for the use of the European Gendarmerie Force. Both instruments strongly depend on the will of the Member States to apply them which

shows that the arguments of those who recognize in the adoption of the Council Decision a ‘militarisation’<sup>24</sup> of the European Union are rather far-fetched.

### SCOPE OF THE COUNCIL DECISION

The scope of the Council Decision is contained in its Article 2 and reads as follows:

“1. In the event of a terrorist attack or a natural or man-made disaster, irrespective of whether it originates inside or outside the territory of the Member States, this Decision shall apply:

(a) within the territory of Member States to which the Treaties apply, meaning land area, internal waters, territorial sea and airspace;

(b) when affecting infrastructure (such as off-shore oil and gas installations) situated in the territorial sea, the exclusive economic zone or the continental shelf of a Member State.”

The scope as outlined in the Council Decision was one of the most controversial provisions and led to a partial reformulation of the original text of the Joint Proposal. The question of geographical scope was also the object of a written opinion of the Council Legal Service (CLS)<sup>25</sup> confirming that the Joint Proposal was in line with international law, a fact that was questioned by some Member States. Before looking at the Council Decision it should be recalled that Article 222 (1) (a) TFEU introduces a limitation of the geographical scope to the territory of the Member States as regards the prevention of the terrorist threat (first indent) and the assistance in the event of a terrorist attack (third indent). It must be noted that with regard to the protection of the civilian population in Article 222 (1) (a), second indent, the Solidarity Clause does not contain any territorial limitation. Therefore, already the Joint Proposal’s version of Article 2 generated

some perplexity as it affirmed in its paragraph (b) that the decision of the Council shall apply “[w]hen affecting ships (when in international waters) or airplanes (when in international airspace) or critical infrastructure (such as off-shore oil and gas installations) when under the jurisdiction of a Member State”.

From the point of view of international law ships, airplanes and critical infrastructure cannot be considered as ‘territory’ of States. Certainly, a State may exercise jurisdiction over ships, airplanes and critical infrastructure in accordance with the relevant provisions of the law of the seas or the aviation law. This leads to the question of the notion of “territory” in Article 222 TFEU. The majority of the Member States finally favoured the approach of the authors of the Joint Proposal to consider the term ‘territory’ as replaceable with the term ‘jurisdiction’ meaning that Union law is applicable also on ships, airplanes and critical infrastructure. There is no doubt that Union law may become applicable on ships, airplanes etc. also outside the Union’s territory. The question was rather whether Article 222 TFEU would allow the Union to take action on ships, airplanes and critical infrastructures even outside the Union territory as now foreseen in the Council Decision. There are reasonable grounds to believe that such a wide interpretation is not fully in line with the meaning of Article 222 TFEU. In particular if we consider that the only case where the Solidarity Clause appears refusing any restriction to the territory of Member States is the case comprised in Article 222 (1) (a), second indent, namely when the Union has to “protect democratic institutions and the civilian population from any terrorist attack”. Infrastructure such as off-shore oil and gas installations cannot be considered as democratic institutions nor is the civilian population of

Member States usually located on such infrastructure at least not in a particularly large amount. Why does the Council Decision extend the scope of the Solidarity Clause only with regard to (critical) infrastructure but not, for example, to civilians of Member States in third States and to institutions like embassies (though it is questionable whether embassies fall under the term of ‘democratic institutions’)?

## DEFINITIONS

According to Article 3 of the Council Decision we have to distinguish between ‘disaster’, ‘terrorist attack’ and ‘crisis’:

“(a) ‘disaster’ means any situation which has or may have a severe impact on people, the environment or property, including cultural heritage;

(b) ‘terrorist attack’ means a terrorist offence as defined in Council Framework Decision 2002/475/JHA;

(c) ‘crisis’ means a disaster or terrorist attack of such a wide-ranging impact or political significance that it requires timely policy coordination and response at Union political level.”

The first salient issue is that of these three terms only ‘terrorist attack’ is mentioned by Article 222 TFEU. In accordance with the Council Framework Decision 2002/475/JHA the Solidarity Clause would, for example, apply when a terrorist group threatens to destroy a Government facility with the aim to seriously destabilise or destroy the fundamental political structures of a country. The Solidarity Clause would also apply in case of a hostage taking aimed at “unduly compelling a Government or international organisation to perform or abstain from performing any act” (Article 1 [1], second indent of Council Framework Decision 2002/475/JHA). As we can see, a very wide range of possible offences would fall under the term ‘terrorist attack’. To a certain extent

the Council Decision restricts the scope of the Solidarity Clause through the inclusion of the term ‘crisis’. Article 3 (c) establishes that only disasters or terrorist attacks “of such<sup>26</sup> a wide-ranging impact or political significance” are to be considered as ‘crisis’ under the terms of the Council Decision. Considering the genesis of the Solidarity Clause a restrictive interpretation of Article 222 TFEU aiming at the invocation of the Clause only in exceptional circumstances is perfectly in line with the original aim of the Clause.<sup>27</sup>

## ACTIVATION, PHASING OUT AND FINANCIAL CONSEQUENCES

The invocation of the Clause is provided for in Article 4 of the Council Decision which states that “the affected Member State may invoke the solidarity clause if, after having exploited the possibilities offered by existing means and tools at national and Union level, it considers that the crisis clearly overwhelms the response capabilities available to it”. Therefore, the affected Member State shall first exploit all national and European instruments (such as the Civil Protection Mechanism) and if these instruments appear to be insufficient to cope with the crisis it may invoke the Solidarity Clause.

In the provision on the activation of the Clause we can find the major contradictions of the Council Decision. First of all, we have to consider that the crisis situations which are most frequent and most likely to potentially trigger the Solidarity Clause are natural disasters such as floods or large-scale forest fires. For these incidents the European Union has since 2001 established the CPM which is, as already outlined, also one of the instruments available to the Union mentioned in the Council Decision. According to the decision of the European Parliament and the Council 1313/2013/EU “[t]he protection to be en-

sured by the Union Mechanism shall cover primarily people, but also the environment and property, including cultural heritage, against all kinds of natural and man-made disasters, including the consequences of acts of terrorism, technological, radiological or environmental disasters, marine pollution, and acute health emergencies, occurring inside or outside the Union. In the case of the consequences of acts of terrorism or radiological disasters, the Union Mechanism may cover only preparedness and response actions". The scope of the CPM is, hence, very broad and covers incidents falling under the Clause. The CPM is by and large based on the principle of voluntary participation. The Member States may voluntarily contribute to the European Emergency Response Capacity which is a "pool of pre-committed response capacities of the Member States" and which includes modules, other response capacities and experts (Article 11).

The Council Decision challenges the voluntary character of the CPM and introduces some contradictions in the relation between Art. 222 TFEU and the CPM. Article 4 Council Decision says that "after having exploited the possibilities offered by existing means and tools at national and Union level" the affected Member State may invoke the Clause. Does this provision mean that although the affected Member State already activated the CPM it can additionally invoke the Solidarity Clause? Or can the Solidarity Clause only be activated after all national and EU instruments have been exploited? Taking into account Article 4 it must be concluded that the latter interpretation is probably the correct one. But is it coherent with the rest of the provision on the invocation and the Council Decision in general? The answer must be negative considering that it remains under the sole responsibility of the affected Member State to invoke the

Clause ("it considers<sup>28</sup> that the crisis clearly overwhelms the response capabilities available to it") and to call for its termination<sup>29</sup>. Therefore, the other Member States and the Union do not have any possibility to confirm that the Solidarity Clause has been correctly activated as means of last resort. The affected Member State could activate the Clause without even making any attempt to exploit other means and tools.

Once the affected Member State has activated the Clause "the Council shall ensure the political and strategic direction of the Union response to the invocation of the solidarity clause, taking full account of the Commission's and the HR's competences" (Article 5 [1]). For that purpose the Council shall rely on the IPCR<sup>30</sup>. According to Article 5 (2) "the Commission and the HR shall inter alia:

(a) identify all relevant Union instruments that can best contribute to the response to the crisis, including sector-specific, operational, policy or financial instruments and structures and take all necessary measures provided under those instruments;

(b) identify military capabilities [...];

(c) identify and propose the use of instruments and resources falling within the remit of Union agencies [...]."

Moreover, the Commission and the HR shall submit proposals to the Council, for example, also with regard to "decisions on exceptional measures not foreseen by existing instruments". Thus, the activation of the Clause triggers a broad range of measures that have to be taken by the EU institutions which goes beyond the measures foreseen by the CPM. However, the most remarkable consequence of the invocation of the Clause from a legal point of view is the fact that the Union and the Member States are obliged to support (in whatever way) the affected Member States

and that this obligation could, at least in theory, become the object of an infringement procedure before the Court of Justice of the European Union (CJEU). At this point it should be recalled that the Solidarity Clause falls under the jurisdiction of the CJEU as Article 275 TFEU only limits the jurisdiction of the CJEU with regard to the CFSP and with respect to acts adopted on the basis of the CFSP provisions.<sup>31</sup>

Therefore, voluntary support through the CPM could theoretically turn into an enforceable obligation, at least for the Member States. Albeit it may be very unlikely that the Member States would not provide for assistance in a disaster falling under the scope of the Civil Protection Mechanism, it appears rather odd that neither the activation nor the phasing out of the Solidarity Clause foresee any possibility for the Union and/or the Member States to assess whether the requirements for the activation and/or the phasing out are fulfilled. In particular the question whether “all the possibilities offered by existing means and tools at national and Union level” have been exploited will usually remain unanswered. The Solidarity Clause applies whenever the affected Member State activates it and it remains active unless the affected Member State “considers that there is no longer a need for the invocation to remain active” (Article 7).

## CONCLUSION

The Solidarity Clause is one of the most remarkable innovations of the Treaty of Lisbon. At the same time it is also a “both rather ambitious and somewhat vague”<sup>32</sup> provision. The notion of ‘man-made disaster’ is not as easily discernable as the other two cases (‘natural disaster’ and ‘terrorist attack’) falling under the scope of the Solidarity Clause. The Council only superficially dealt with the interpretation of Article 222 TFEU. Therefore, when the Joint

Proposal was transmitted to the ‘Friends of Presidency Group’ in charge with the negotiations some very important issues like, for instance, the question which possible crisis situation could fall under the Clause or the issue of the Clause’s territorial scope remained unsolved. The notion of ‘man-made disaster’ is so broad that we could easily think of an activation of the Clause due to a massive migratory influx. The consequences of the activation of the Clause in such a migratory crisis cannot be easily estimated. However, it is very likely that the pressure on the Union and its Member States to take operational but also legislative action (e.g. by taking “provisional measures” in accordance with Article 78 [3] TFEU<sup>33</sup> and by giving full effect to Article 80 TFEU) would become very high. It should be recalled that the Council Decision explicitly foresees the duty of the Commission and the HR to “identify all relevant Union instruments that can best contribute to the response to the crisis” (Art. 5 [2] [a]) and to “advise the Council on whether existing instruments are sufficient means to assist the affected Member State” (Art. 5 [2] [d]). Hence, the Commission may, for example, submit a proposal that could assist the affected Member State through the resettlement of refugees and their distribution on the Member States in line with a well-defined distribution key. The Commission could also advise the Council to amend the existing legislation on the Common European Asylum System (CEAS) and in particular the Dublin Regulation which establishes the criteria for identifying the Member State responsible for the examination of an asylum claim in Europe.

As we have seen, the Solidarity Clause has a potentially very broad scope and can trigger a wide range of different EU instruments and (operational) Union action. The Council Decision appears confirming the

vast range of measures that can be taken to implement the Solidarity Clause. Probably the decision not to clarify the precise scope of the Clause was deliberately taken by the Commission and the HR. During the negotiations of the Council Decision the majority of the Member States showed little interest in a clear definition of the purpose of the Clause and preferred limiting the potential influence of the Union through rather bland provisions on the assessment of the preparedness and response capabilities. The drawback of this approach could be on the one hand a decreasing motivation of some Member States, in particular those most affected by the economic and financial crisis, to invest in their civil protection but also anti-terrorism capabilities and the tendency to rely on the 'European solidarity'. On the other hand the decision to leave it exclusively to the discretion of the affected Member State to activate the Clause could lead to false or from a strictly legal point of view questionable activation.

Will the Council Decision make the activation of the Solidarity Clause easier or will the Solidarity Clause remain dead letter? Already before the adoption of the Council Decision it appeared likely that the Solidarity Clause may not be activated very frequently. In the field of Civil Protection solidarity among the Member States but also among Member States and third States already worked fairly well before the introduction of the Solidarity Clause. If external assistance is activated it is, thus, likely that it will exclusively happen under the well-known and approved methods of the EU Civil Protection Mechanism. It would then be quite redundant to additionally activate the Solidarity Clause. Why should the affected Member State also activate the Solidarity Clause if the assistance through the existing instruments is under way? What is the added value of activating the Clause? The

Council Decision does not confer any particular incentive to an affected Member State to activate the Clause. The only incentive is the fact that the assistance under the Clause falls under the jurisdiction of the CJEU and could in theory become the object of an infringement proceeding. Is this very likely to happen? Certainly not, as claims of Member States against other Member States are very unusual. In addition, we have to consider declaration no. 37 to the Treaty of Lisbon and the therein enshrined 'right' of the Member States to "choose the most appropriate means to comply with its own solidarity obligation".

All in all, the Council Decision follows a rather conservative approach. It complies with paragraph 3 of Article 222 TFEU and defines the geographic scope, the activation and phasing out mechanisms (with all their weaknesses) and the response arrangements at Union level. Additionally it establishes the framework for the implementation of Article 222 (4) (threat assessments of the European Council) which *strictu sensu* would not have been mandatory.<sup>34</sup> However, it gives certain (but very little) guidance to the Commission, the HR and Union agencies on how they should proceed with regard to the implementation of para. 4. Some added value could derive from the fact that once the Solidarity Clause has been activated the Crisis Coordination Arrangements (recently revised and renamed into IPCR) launched after the Tsunami crisis in 2004 will be automatically triggered and the Council ensures the "political and strategic direction of the Union response to the invocation of the solidarity clause" as stated in Article 5 (1). Other than probably intended by the Commission, the Council Decision gives a stronger role to the Council. From a practical point of view this may not bring any operational added value as the well-established mechanisms, in particular in

the area of Civil Protection, would become active anyway. However, from a political point of view the involvement and, hopefully, commitment of the Council is vital in order to send a clear signal of European solidarity in a crisis. Nevertheless, it remains questionable whether the IPCR mechanism is best suited to provide for clear political statements in terms of European solidarity. Solidarity among Member States could be additionally supported by adopting a formal declaration of the Council or even the European Council as was already done in the past after large-scale crisis (such as the Madrid bombings in 2004). Most important would be that the proper use of the Solidarity Clause is promoted within the Union and the Member

States. Unfortunately, the negotiations of the Council Decision and, eventually, also its adoption have not been accompanied by an adequate involvement of the political stakeholders, the relevant national authorities and the public opinion and media but on the contrary was done ‘behind closed doors’. As we have seen, this could easily lead to misinterpretations and misinformation of the population. Therefore, the Union should urgently elaborate a strategy to promote the Solidarity Clause. This would also allow to better counteract the usual populist anti-EU propaganda and to prevent it from misusing an important instrument that was conceived to assist the population and surely not to be used against it.

<sup>1</sup> *Official Journal of the European Union L 192/53, ‘Council Decision of 24<sup>th</sup> June 2014 on the arrangements for the implementation by the Union of the solidarity clause (2014/415/EU)’, July 1, 2014.*

<sup>2</sup> *Myrdal/Rhinard 2010.*

<sup>3</sup> *Martino 2014, 55–56.*

<sup>4</sup> *See the mandate in Council document ‘Handling within the Council of the joint proposal by the Commission and the High Representative on the arrangements for the implementation by the Union of the Solidarity Clause (Art. 222 TFEU)’ (6598/13).*

<sup>5</sup> *Joint proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause, JOIN (2012) 39 final (18124/12).*

<sup>6</sup> *Article 222 TFEU reads as follows:*

“1. The Union and its Member States shall 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 shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) – prevent the terrorist threat in the territory of the Member States;

– protect democratic institutions and the civilian population from any terrorist attack;

– assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that

end, the Member States shall coordinate between themselves in the Council.

3. The arrangements for the implementation by the Union 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 Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed. For the purposes of this paragraph and without prejudice to Article 240, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 71; the two committees shall, if necessary, submit joint opinions.

4. *The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.*"

<sup>7</sup> See Martino 2014, 91.

<sup>8</sup> General Secretariat of the Council, 'The EU Integrated Political Crisis Response arrangements in brief', July 2013.

<sup>9</sup> *Ibid.*

<sup>10</sup> Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism (OJ L 347, 20.12.2013, 924).

<sup>11</sup> Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC (OJ L 293, November 5, 2013, 1).

<sup>12</sup> 'The Internal security strategy for the European Union – Towards a European security model' (5842/2/10) was developed by the Council and formally adopted by the European Council in accordance with the new legal basis for the definition of "the strategic guidelines for legislative and operational planning within the area of freedom, security and justice" (Art. 68 TFEU) established by the Treaty of Lisbon.

<sup>13</sup> Article 68 TFEU establishes the competence of the European Council to define "strategic guidelines for legislative and operational planning within the area of freedom, security and justice".

<sup>14</sup> European Commission, Humanitarian Aid and Civil Protection, 'EU Civil Protection Mechanism', available at <http://ec.europa.eu/echo/en/what/civil-protection/mechanism>.

<sup>15</sup> See *ibid.*

<sup>16</sup> Martino 2014, 56.

<sup>17</sup> *Ibid.*, 103–106.

<sup>18</sup> EUROGENDFOR "is a multinational initiative of six EU Member States – France, Italy, The Netherlands, Portugal, Romania and Spain – established by treaty with the aim to strengthen international crisis management capacities and contribute to the development of the Common Security and Defense Policy" (Online: <http://www.eurogendfor.org/organiza>

[tion/what-is-eurogendfor](http://www.eurogendfor.org/organiza/what-is-eurogendfor)). It was established by the Treaty of Velsen in 2007 and is composed of "multinational police force with military status" (Article 3 [a] Treaty of Velsen).

<sup>19</sup> Cf. Denis Krassnin, 'European governments prepare for military suppression of popular opposition', available at [http://www.wsws.org/en/articles/2014/07/10/euro-j10.html?view=article\\_mobile](http://www.wsws.org/en/articles/2014/07/10/euro-j10.html?view=article_mobile) or Andrej Hunko, 'The "European Gendarmerie Force" Project: EU Creates Legal Framework For "Military Use" against its Citizens', available at <http://www.globalresearch.ca/the-european-gendarmerie-force-project-eu-creates-legal-framework-for-military-use-against-its-citizens/5389037>.

<sup>20</sup> ATLAS was formally established by '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' (Official Journal of the European Union L 210/73, August 6, 2008).

<sup>21</sup> See Monroy 2014.

<sup>22</sup> See Martino 2014, 78.

<sup>23</sup> *Ibid.*, 76.

<sup>24</sup> See the press release of the Member of the German Bundestag Andrej Hunko on the adoption of the Council Decision, available at <http://www.andrej-hunko.de/presse/2107-the-eu-solidarity-clause-is-leading-to-a-militarisation-of-home-affairs-policy>.

<sup>25</sup> Contribution of the Council Legal Service: Joint proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause (Article 222 TFEU) – Scope (14498/13).

<sup>26</sup> *Emphasis added.*

<sup>27</sup> See the 'Final report of Working Group VIII – Defence' (CONV 461/02).

<sup>28</sup> *Emphasis added.*

<sup>29</sup> Cf. Article 7: "The Member State having invoked the solidarity clause shall indicate as soon as it considers that there is no longer a need for the invocation to remain active".

<sup>30</sup> See the document of the Council of the European Union 'Finalisation of the CCA review

process: the EU Integrated Political Crisis Response (IPCR) arrangements' (10708/13).

<sup>31</sup> See Schusterschitz/Stillfried 2012.

<sup>32</sup> Keller-Noellet 2011, 329.

<sup>33</sup> Art. 78 (3) TFEU: "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament".

<sup>34</sup> Art. 8 (2) of the Council Decision says that the threats assessments "shall be based solely on available assessments of threats compiled by relevant Union institutions, bodies and agencies under existing arrangements, and on information provided voluntarily by the Member States, while avoiding duplication of efforts".

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