



## EU and NATO: The Legal Foundation of an Extraordinary Partnership

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### 1. Introduction

The EU and NATO are decisively two of the most influential organisations in the world. Established with different objectives, they have started collaborating to link economic growth to security in Europe after the end of the Cold War. The EU-NATO partnership was formalised only in 1999<sup>1</sup> and has developed rapidly in the new century. The EU and NATO are described

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<sup>1</sup> See the Cologne European Council Conclusion of 3 and 4 June 1999, available in [https://www.europarl.europa.eu/summits/koll1\\_en.htm](https://www.europarl.europa.eu/summits/koll1_en.htm) and the Helsinki European Council Conclusion of 10 and 11 December 1999, available at [https://www.europarl.europa.eu/summits/hell1\\_en.htm#:~:text=The%20European%20Council%20met%20in,stage%20in%20the%20enlargement%20](https://www.europarl.europa.eu/summits/hell1_en.htm#:~:text=The%20European%20Council%20met%20in,stage%20in%20the%20enlargement%20), for the EU; See the NATO Washington Declaration of 23 and 24 April 1999 signed and issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C., available at [https://www.nato.int/cps/en/natohq/official\\_texts\\_27445.htm?mode=pressrelease#:~:text=We%2C%20the%20Heads%20of%20State,and%20the%20rule%20of%20](https://www.nato.int/cps/en/natohq/official_texts_27445.htm?mode=pressrelease#:~:text=We%2C%20the%20Heads%20of%20State,and%20the%20rule%20of%20), for NATO.

as «unique and essential partner[s]»<sup>2</sup> that have strengthened their relationship since the beginning of the war in Ukraine. However, it is worth remembering that the EU and NATO are autonomous organisations with different (even though increasingly similar) membership, institutions, and internal procedures. These elements, together with their different goals, limit their freedom of action and have often led to unclear forms of cooperation that differ from the tools the EU has traditionally used with other third parties.

Over the years, the EU-NATO partnership has been exposed to critiques as an example of «institutional fatigue»<sup>3</sup> that does not allow for efficient cooperation. While NATO is a military organisation established to limit the expansion of the Union of Soviet Socialist Republics, the EU has always aimed at uniting European states by economy, and only with the Maastricht treaty was it opened to security. The purpose of this paper is indeed to identify and assess the legal foundation of the EU-NATO relationship as well as understand the effectiveness of this cooperation in practical terms.

This paper will follow a two-level structure. Section II will outline the meaning of partnership from a legal perspective to know how a partner is usually situated under EU and NATO law. Section III will instead focus on how the EU and NATO have defined their relationship throughout history. This section will categorise the EU-NATO partnership based on the binding or non-binding nature of their acts. Finally, the paper concludes by explaining why the EU-NATO partnership not only exists in law but is also effective in practice.

## 2. What is a Partnership from a Legal Point of View?

### 2.1. The EU Legal System

The concept of partnership is not unknown in the EU legal system. Partnerships with third countries and international organisations are clearly recognised and regulated by the founding treaties. According to Article 21, para. 1 of the TEU, «[t]he Union shall seek to develop relations and build partnerships with third countries and international, regional or global organisations which share the principles referred to in the first subparagraph». Furthermore, Article 220, para. 1 of the TFEU, which is a complement of Article 21 TEU, establishes that:

«[t]he Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development. The Union shall also maintain such relations as are appropriate with other international organisations».

However, the Treaties do not provide unlimited support for the EU's bilateral and multilateral cooperation. Art. 21(1) TEU states that third countries and international

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<sup>2</sup> NATO Vilnius Summit Communiqué of 11 July 2023 issued by NATO Heads of State and Government participating in the meeting of the North Atlantic Council in Vilnius, par. 73, available at [https://www.nato.int/cps/en/natohq/official\\_texts\\_217320.htm#:~:text=We%2C%20the%20Heads%20of%20State,cohesion%2C%20and%20solidarity%20at%20a.](https://www.nato.int/cps/en/natohq/official_texts_217320.htm#:~:text=We%2C%20the%20Heads%20of%20State,cohesion%2C%20and%20solidarity%20at%20a.)

<sup>3</sup> S. J. SMITH, *EU–NATO cooperation: a case of institutional fatigue?*, in *European Security*, 2011, p. 243 ff.

organisations must share the principles of «democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law».

On the other hand, the Treaties give the EU considerable discretion regarding which international organisations to engage with, since the list in Article 220 TFEU is not exhaustive, as the provision explicitly states.

The history of EU relations with other international organisations shows that the legal forms of partnerships can differ significantly. In external economic relations, trade partners are all the States having trade relations with the EU, irrespective of Free Trade agreements or Association agreements. In some cases, the EU also becomes a member of the International Organisation (i.e., the WTO). In others, the partnership is based on an operational basis, such as for the organs of the UN. Thus, the relations also depend on the International Organisations' membership rules. Many IOs accept only States as members, excluding the possibility of the EU joining the organisation.

The European Treaties basically require two conditions to build a partnership with a third party: EU competence and principles and values sharing.

### **2.1.1. EU Competence**

The Union can build partnerships in the exercise of its competencies. The EU legal order is based on the principle of conferral (Article 5 TEU) and the Union's system of competences is closed, as defined in Articles 2 to 6 TFEU. In this sense, Article 220 TFEU cannot properly be considered as a provision conferring a general competence on the Union to cooperate with all international organisations<sup>4</sup>. If anything, Art. 220 TFEU seems to suggest a method of how to engage externally under an already identified EU competence. Therefore, in order to establish relations between the EU and international organisations, the objectives and activities of the organisations in question must correspond to one of the existing competencies of the Union.

Since NATO is essentially a military alliance devoted to the collective self-defence of its members in case of armed aggression, justification for the Union to cooperate can be found in attributed powers relating to the security of the Union and its Member States. Common Security and Defence Policy (CSDP) provides the legal basis for the EU/NATO partnership. In particular, Article 42 TEU, in defining CSDP, explicitly states that certain Member States' security and defence policy is realised in the North Atlantic Treaty Organisation (NATO). Therefore, security and defence competencies empower the Union to build a partnership with NATO.

However, the Union's capacity to network with NATO is by no means limited to the CSDP. The evolving nature of the Alliance, as well as the development of new forms of weaponry, has required constant adaptation to new geopolitical scenarios. After the end of the Cold War, NATO experienced the disappearance of its *raison d'être* (i.e. the USSR) and thus complemented the traditional notions of defence and deterrence with a broader concept of security, including the threats of terrorism and cyber-attacks. The development of NATO's

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<sup>4</sup> F. ERLBACHER, *Article 220 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, New York, 2019, p. 1679.

activities to cover security threats other than military attacks, therefore, entails a further legal basis for the EU-NATO partnership: the solidarity clause (Article 222 TFEU). The Treaty of Lisbon introduced the solidarity clause in Part V, Title VI, within the external action chapter of the Treaty on the Functioning of the European Union. This additional TFEU legal basis allows for the institutional involvement of the Commission in relations with NATO, which would, in principle, be excluded if the partnership were based solely on a CFSP legal basis.

### **2.1.2. Principles and Values Sharing**

The second element that the EU must consider when establishing a relationship with a third party is the commonality of principles and values. In this respect, the EU treaties clearly list the principles to be shared. These include «democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law» (Article 21 TEU). This set of principles to be shared with the Union in order to enter into a partnership is quite broad, but mainly refers to the founding principles of the EU, as set out in Art. 2 TEU:

«The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities».

The partnership between the EU and any other legal actor is, therefore, only legally acceptable if absolute respect for the Union's founding principles exists. The drafters of the EU Treaty foresaw this burden because of the EU's need to promote its values worldwide.

In its preamble, the North Atlantic Treaty (NAT) reaffirms the Allies 'commitment to the purposes and principles of the UN Charter' and describes 'the principles of democracy, individual liberty and the rule of law' on which the Alliance is founded. Following the UN Charter, NAT commits the Allies to the peaceful settlement of disputes (Article 1) and on the non-recourse to the threat or use of force in any manner inconsistent with the purposes of the UN (Article 2).

The fact that both the EU and NATO share the same values and principles is not only evident in the North Atlantic Treaty but is also explicitly confirmed in many other operational documents. Indeed, both the EU and NATO recognise that they share the same values and are defined as like-minded partners:

«To uphold the international rules-based order, [the EU] will continue to strengthen our relations with partners and like-minded countries in the UN, NATO and G7 ... It [the EU] will also strengthen cooperation with like-minded partners in the area of cyber defence, notably NATO»<sup>5</sup>.

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<sup>5</sup> Conclusion 7371/22 of the Council of the EU of 21 March 2022 on a Strategic Compass for Security and Defence - For a European Union that protects its citizens, values and interests and contributes to international peace and security, pp. 18 and 35, available at <https://data.consilium.europa.eu/doc/document/ST-7371-2022-INIT/en/pdf>.

«The European Union is a unique and essential partner for NATO. NATO Allies and EU members share the same values. As a result, NATO and the EU play complementary, coherent and mutually reinforcing roles in supporting international peace and security»<sup>6</sup>.

Significantly, NATO's criteria for membership are another evidence of the common sharing of values with the EU. According to a 1995 Study on NATO Enlargement, applicants must demonstrate a functioning democratic political system based on a market economy, the fair treatment of minority populations; a commitment to the peaceful resolution of conflicts; the ability and willingness to make a military contribution to NATO operations; and a commitment to democratic civil-military relations and institutional structures<sup>7</sup>.

The EU-NATO partnership has always been based on respect for the autonomy and independence of the EU legal order.

«The transatlantic relationship and EU-NATO cooperation, in full respect of the principles set out in the Treaties and those agreed by the European Council, including the principles of inclusiveness, reciprocity and decision-making autonomy of the EU, are key to our overall security»<sup>8</sup>.

## 2.2. The NATO Legal System

Unlike the EU, NATO is a traditional intergovernmental organisation that lacks the legal complexity and constitutional constraints of the Union's legal system. Moreover, NATO's founding treaty is a light agreement that leaves ample room for manoeuvre for the Organisation, which has been able to adapt to the changes in the international security environment since the end of the Cold War. This has allowed NATO to rapidly expand its activities beyond its core military mission and more times in history.

Through an extended recourse to consultations between Allies recognised in Articles 4 and 12 of the North Atlantic Treaty, NATO has built partnerships worldwide so far. It currently counts 39 nation-partners and three international organisations, i.e., the European Union, the United Nations, and the Organisation for Security and Co-operation in Europe (OSCE).<sup>9</sup> The establishment of a «wide network of partnerships is of utmost importance to [Allies'] shared stability and security and how we promote [Allies'] values»<sup>10</sup> and is part of a long-standing NATO practice that emerged in the early 1990s in response to the transformative European security scenario:

«We recognise that, in the new Europe, the security of every state is inseparably linked to the security of its neighbours. NATO must become an institution where Europeans, Canadians, and Americans work together not only for the common defence but also to build

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<sup>6</sup> NATO Strategic Concept of 29 June 2022, par. 43, available at [https://www.nato.int/nato\\_static\\_fl2014/assets/pdf/2022/6/pdf/290622-strategic-concept.pdf](https://www.nato.int/nato_static_fl2014/assets/pdf/2022/6/pdf/290622-strategic-concept.pdf).

<sup>7</sup> T. MARAUHN, *North Atlantic Treaty Organization (NATO)*, in A. PETERS, R. WOLFRUM (eds), *Max Planck Encyclopedia of Public International Law [MPEPIL]*, Oxford, 2016, par. 29.

<sup>8</sup> EU Strategic Compass (2022) cit. par. 5.

<sup>9</sup> See NATO, NATO Partners, available at <https://www.nato.int/cps/en/natohq/51288.htm>.

<sup>10</sup> NATO, the Wales Declaration on the Transatlantic Bond of 5 September 2014, par. 8, available at [https://www.nato.int/cps/en/natohq/official\\_texts\\_112985.htm](https://www.nato.int/cps/en/natohq/official_texts_112985.htm).

new partnerships with all the nations of Europe. The Atlantic Community must reach out to the countries of the East which were our adversaries in the Cold War and extend to them the hand of friendship»<sup>11</sup>..

NATO started developing partnerships with non-member states in a more institutionalised way only after the end of the Cold War, expanding its influence beyond its membership.<sup>12</sup>

The first and most important NATO partnership model dates back to 1994, with the conclusion of the Partnership for Peace Programme (PfP), which allows third countries to develop an individual relationship with NATO. The current 17 participating states<sup>13</sup> to the PfP have committed to ensure, *inter alia*, the preservation of democratic societies, the respect of international law's principles, including the UN Charter and the Universal Declaration on Human Rights, and the Helsinki Final Act and all the other OSCE documents, the facilitation of defence transparency with NATO, democratic control of defence forces, the maintenance of steadfast military capabilities to contribute to UN missions, the development of cooperative military relations with NATO, and «the development, over the longer term, of forces that are better able to operate with those of the members of the North Atlantic Alliance»<sup>14</sup>. Therefore, NATO Allies and partners must share common ideals and be like-minded.

In 1997, Allies established the Euro-Atlantic Partnership Council (EAPC) as the «overarching framework for consultations among its members on a broad range of political and security-related issues, as part of a process that will develop through practice», ensuring inclusiveness and self-differentiation of partners<sup>15</sup>. All NATO Allies and PfP countries participate in the EAPC, making it the main forum of consultation for NATO partners.

Partnership for Peace is a programme addressed to States only and does not include the EU-NATO partnership. Nonetheless, the programme is relevant to the EU-NATO relationship since not all the EU Member States are NATO members and the PfP allows for developing a general partnership between members of both organisations. The PfP is even more critical in light of the significant overlap in membership between the EU and NATO. In particular, the EU and NATO share 22 states, while an additional 4 NATO members are EU applicants, and the United Kingdom is a former EU Member State. It can be argued that the EU-NATO

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<sup>11</sup> NATO Declaration on a Transformed North Atlantic Alliance of 6 June 1990 issued by the Heads of State and Government participating in the meeting of the North Atlantic Council ('The London Declaration'), par. 4, available at [https://www.nato.int/cps/en/natohq/official\\_texts\\_23693.htm](https://www.nato.int/cps/en/natohq/official_texts_23693.htm).

<sup>12</sup> The use of partnership as an instrument of power other than security is now clearer than ever. For example, Armenian Prime Minister, Nikol Pashinyan, has claimed that Armenia has made a 'strategic mistake' in relying solely on Russia and that it should diversify its security arrangements while deepening relations with the EU and the United States. For more information, see G. GAVIN, *We can't rely on Russia to protect us anymore, Armenian PM says*, 2023, available at <https://www.politico.eu/article/we-cant-rely-russia-protect-us-anymore-nikol-pashinyan-armenia-pm/>.

<sup>13</sup> Excluding Russia and Belarus, following NATO's decision to suspend any cooperation with them after 2014 and 2022 respectively. In addition, Sweden is still included among PfP members, but is on track to join NATO when Hungary ratifies membership.

<sup>14</sup> NATO, Partnership for Peace: Framework Document Issued by the Heads of State and Government participating in the Meeting of the North Atlantic Council of 11 January 1994, Annex to M-1(1994) 002, par. 3, letter e), available at

[https://www.nato.int/cps/en/natohq/official\\_texts\\_24469.htm?mode=pressrelease#:~:text=Further%20to%20the%20invitation%20extended,to%20contribute%20further%20to%20the](https://www.nato.int/cps/en/natohq/official_texts_24469.htm?mode=pressrelease#:~:text=Further%20to%20the%20invitation%20extended,to%20contribute%20further%20to%20the).

<sup>15</sup> NATO, Basic Document of the Euro-Atlantic Partnership Council of 30 May 1997, M-NACC-EAPC-1(1997) 066, par. 3, available at [https://www.nato.int/cps/en/natohq/official\\_texts\\_25471.htm?mode=pressrelease](https://www.nato.int/cps/en/natohq/official_texts_25471.htm?mode=pressrelease).



partnership is manifested not only when the two organisations sit together but also when their member states cooperate in the PfP<sup>16</sup>. To date, Cyprus is the only EU Member State that is not a member of NATO's PfP programme.

As will be seen below, the first formalisation of the EU-NATO partnership took place in 2002 with the Berlin Plus Agreement. Before this, the only formal point of contact between the EU and NATO was the space provided by the PfP at the level of their Member States. Since 2002, the EU-NATO partnership has instead been defined through flexible joint declarations, which allow the terms of the partnership to be adapted to the security environment and the evolution of the European Union's legal order.

### **3. The Legal Foundation of the EU-NATO Partnership**

#### **3.1. EU Perspective**

##### **3.1.1. Treaty Provisions**

NATO is explicitly mentioned only once in the entire EU Treaty architecture, in Article 42 of the TEU. NATO is explicitly mentioned in Article 42(2), the second subparagraph TEU, and in Article 42(7) TEU.<sup>17</sup>

The first reference to NATO is related to the «progressive framing of a common Union defence policy, including a common defence» (Art. 42(2) TEU). While the common Union defence policy is progressively framed, the «common defence» requires an active unanimous decision by the European Council and a formal treaty amendment, including ratification by the national parliaments<sup>18</sup>. According to Article 42(2) second subparagraph TEU:

«The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework».

Article 42(2) second subparagraph TEU provides for respecting all different security and defence arrangements of the Member States, establishing a hierarchy between EU CSDP and national defence policies. According to the intergovernmental character of the CSDP, the national policies prevail over the common policy. The Union, in framing the Common Policy and in the perspective of a Common Defence, must follow two principles: to no harm «the specific character of the security and defence policy of certain Member States» and to respect obligations stemming from the membership of NATO of other Member States. Member States

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<sup>16</sup> The importance of the PfP as an expression of the EU-NATO partnership is underlined by the fact that NATO remains an intergovernmental organisation and that the EU's CFSP and CSDP are essentially intergovernmental.

<sup>17</sup> T. RAMOPOULOS, *Article 42 TEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, New York, 2019.

<sup>18</sup> Noting that, unlike other policies, the establishment of a common defence is only 'recommended' for ratification by national parliaments.

retain full sovereignty over their defence policies, reflecting the still-rooted conviction that security is, first and foremost, a matter for nations<sup>19</sup>. This distinction represents the fact that the EU Member States can be divided into NATO members and neutral or non-aligned states. Currently, Neutral or Non-aligned EU Member States are Austria, Cyprus, Ireland, Malta, and Sweden<sup>20</sup>. As noted above, the majority of EU Member States are also NATO members, and thus, the need for EU Member States to preserve their transatlantic character was vital to the drafting of the EU Treaties.

The TEU recognises the strict correlations between CSDP and NATO. The EU's commitment to consistency with obligations stemming from NATO membership influences the partnership, too. The Union is in some way under an obligation to establish a «NATO-compatible»<sup>21</sup> Common Defence and Security Policy. To do so, strengthening the partnership with NATO is nothing more than a way of implementing Article 42(2), second subparagraph, of the TEU. It could be argued that a deep and far-reaching partnership with the Alliance is an uncompromising component of the EU's CSDP under Art. 42(2) TEU. The additional fact that NATO is directly mentioned in Art. 42 TEU, which provides the legal "umbrella" for the entire CSDP organisation and structure, further strengthens the EU's commitment to the Alliance.

However, respect for the neutral and transatlantic bounds of the EU Member States does not inhibit the principles of EU law that operate transversally within the EU legal order. In particular, EU Member States' allegiance to the principle of sincere cooperation to «assist each other in carrying out tasks that flow from the Treaties» in Art. 4(3) TEU cannot be impeded by the transatlantic dimension of certain EU Member States. Moreover, it is generally agreed that the principle of sincere cooperation does not negate the principle of loyalty, which applies specifically to the EU's external relations, thus including the CFSP and the CSDP<sup>22</sup>.

«The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action contrary to the Union's interests or likely to impair its effectiveness as a cohesive force in international relations» (Art. 24(3) TEU).

Therefore, EU Member States must incessantly cooperate to define common positions supporting EU external action. Complementary to the principle of loyalty, but usually regarded as separate from it, is the principle of effectiveness, laid down in Art. 24(3), last indent, TEU.

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<sup>19</sup> For a general account of the still widespread 'tradition of otherness' in the EU CFSP, see P. J. CARDWELL, *On 'ring-fencing' the Common Foreign and Security Policy in the legal order of the European Union*, 2020, pp. 443-463.

<sup>20</sup> Sweden is in the process of joining NATO. Only Hungary's ratification is pending.

<sup>21</sup> Resolution of the European Parliament of 22 November 2016 on the European Defence Union (2016/2052(INI)) (2018/C 224/03), letter G), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016IP0435>.

<sup>22</sup> See, more extensively, R. A. WESSEL, *General Principles in EU Common Foreign and Security Policy*, in K. S. ZIEGLER, P. J. NEUVONEN, V. MORENO-LAX (eds), *Research Handbook on General Principles in EU Law*, London, 2022.



The principle of effectiveness warns Member States against taking measures in the CSDP that are detrimental to the unity of the EU<sup>23</sup>.

The combination of the principles of loyalty and effectiveness contributes to ensuring the coherence of the CFSP itself and of all EU external action, as well as between the EU's external and internal policies, in accordance with Art. 21(3) TEU:

«The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect».

As Wessel has pointed out, «para. 3 of Art. 21 TEU can be considered the *lex generalis* coherence obligation in EU external relations»<sup>24</sup>. Thus, there is no reason not to extend the principle of consistency to the CSDP decisions and Art. 42(2) TEU. Against this background, Art. 42(2) TEU embodies a general rule of vertical reciprocity that finds its cornerstone in the constitutional principle of sincere cooperation in Art. 4(3) TEU. On the one hand, the EU must respect the decision of the majority of its Member States to integrate their security arrangements into the NATO framework, as well as the decision of certain Member States to maintain a neutral or non-aligned security status, by refraining from any action that could interfere with these national decisions. On the other hand, the EU Member States must coordinate their actions within the Union through the Council and the European Council, as well as through their working groups, to ensure and facilitate the «progressive framing of a common Union defence policy» which in the long term will lead to a common defence of the EU.

The second reference to NATO in the TEU is in Article 42(7) TEU:

«If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation».

Art. 42(7) TEU introduces the mutual assistance clause within the EU framework. The need to introduce a defence clause in the TEU is strictly related to the dissolution of the Western European Union (WEU), which established the mutual defence between European states outside the NATO framework<sup>25</sup>. The WEU goals and functions were transferred to the

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<sup>23</sup> See more extensively A. THIES, *The Search for Effectiveness and the Need for Loyalty in EU External Action*, in M. CREMONA (eds), *Structural Principles in EU External Relations Law*, Oxford, 2018.

<sup>24</sup> R. A. WESSEL, *Lex Imperfecta: Law and Integration in European Foreign and Security Policy*, in *European Papers* Vol. 1, 2016, No 2, pp. 439-468.

<sup>25</sup> Art. 5 of the WEU Modified Brussels Treaty [1954]: 'If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power'.

European Security and Defence Policy (now CSDP) in 2000. The transfer included the mutual assistance clause incorporated by the Lisbon Treaty in 2009 as a part of the CSDP.

The text of this provision considers the primacy of the national defence policies of the EU Member States and the fact that most of them are also members of NATO. This is evidenced by the fact that Art. 42(7) TEU refers to a bilateral commitment between only Member States, not the EU. In particular, the mutual defence clause refers to the EU Member States as victims of armed aggression and as providers of assistance, rather than requiring an armed attack on EU territory and invoking an EU response. The mutual assistance clause imposes a binding obligation on Member States to render ‘aid and assistance by all the means in their power’ to a Member State that is the victim of armed aggression on its territory.

The meaning of Art. 42(7) TEU is, therefore, primarily political and does not transform the EU into a military organisation similar to NATO. Indeed, Art. 42(7) TEU could be seen as an example of a kind of initial "common defence" to which Art. 42(2) TEU refers, postponing its full implementation to the future<sup>26</sup>.

Repeating the same formula of Article 42(2) second subparagraph TEU, Article 42(7) TEU makes the mutual assistance obligation conditional upon respecting ‘the specific character of the security and defence policy of certain Member States and of the commitments undertaken under NATO. This means that neutral and non-aligned states can be exempted from the obligation to provide mutual military assistance if this is in contrast with their national defence policy and for the NATO EU Members that the North Atlantic Alliance is the primary organisation for guaranteeing collective defence<sup>27</sup>.

Besides the residual character, the disposition leaves flexibility to the Member States in determining the appropriate means to provide aid and assistance; ‘in accordance with the provisions of Article 51 of the Charter of the United Nations’ on the right of self-defence. The EU-NATO partnership is, therefore, functional to coordinate NATO mutual defence and EU mutual assistance.

Similar to the mutual assistance clause is the solidarity clause recognised by Article 222 TFEU. While mutual assistance refers to cases of armed aggression from a State entity, solidarity can be triggered in case of a terrorist attack from a non-state entity or a natural or man-made disaster. The solidarity clause, different to the mutual assistance clause, is implemented within the EU framework and establishes an obligation of the EU and its Member States to ‘act jointly’ at the request of the Member State that has suffered a terrorist attack or a natural or man-made disaster.

The solidarity clause does not mention NATO, but it is possible a partial overlapping between the NATO mutual defence clause and the EU solidarity clause in case of a terrorist attack from a non-state entity, such as in the case of 9/11 (Taliban) when for the first time US invoked the NATO mutual defence clause. It is noteworthy that following the terrorist attacks

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<sup>26</sup> For a general account of the meaning of ‘common defence’ and the use of Art. 42(7) TEU as a forerunner of it, see V. SZÉP, R. A. WESSEL, E. SABATINO, C. GEBHARD, E. SIMON, *The Current Legal Basis and Governance Structures of the EU’s Defence Activities*, Engage Working paper, 2021, n. 4 available at <https://www.engage-eu.eu/publications/the-current-legal-basis-and-governance-structures-of-the-eus-defence-activities> .

<sup>27</sup> Since June 2022, Art. 42(7) TEU also applies to Denmark. See High Representative Statement on the outcome of the Denmark’s referendum on the opt-out in defence matters of 1 June 2022 in EEAS Press Team, available at [https://www.eeas.europa.eu/eeas/denmark-statement-high-representative-outcome-referendum-opt-out-defence-matters\\_en](https://www.eeas.europa.eu/eeas/denmark-statement-high-representative-outcome-referendum-opt-out-defence-matters_en) .

of 13 November 2015 in Paris (ISIS), France invoked Article 42(7) TEU instead of triggering the solidarity clause.

### 3.1.2. EU Non-binding Documents

Unlike the supranational EU policy areas, the EU defence and security policy, including the NATO partnership, are shaped by non-binding documents enacted by the institutions involved in the policy-making.

The Strategic Compass, adopted by the Council, is the Union's strategic document on security, providing both guidance and tools for Member States to make the EU an effective security provider and an assertive global actor<sup>28</sup>. The latest version was adopted in 2022 in response to the changing geopolitical landscape in Europe following Russia's full-scale invasion of Ukraine. It covers, among other things, the role of partnerships as «an essential tool to support the EU's ambition to be a global strategic actor»<sup>29</sup>.

NATO is interestingly mentioned first among the EU's multilateral partners in the 2022 Strategic Compass. Consistent with the concrete steps adopted since 2016, the EU and NATO have built «close and mutually beneficial cooperation» based on the principles of «inclusiveness, reciprocity, openness and transparency, as well as the decision-making autonomy of both organisations»<sup>30</sup>.

An essential soft player in the shape of the CSDP in the shadow of NATO is the European Parliament (EP). The EP is not directly involved in the elaboration of CSDP, but the other institutions must report to it on the implementation of the policy<sup>31</sup>. Through its resolutions, the Parliament can exercise soft power, especially on subjects not publicly available, such as defence matters. Parliament's resolution on the 2022 annual report on implementing the CSDP stresses the importance of enhancing the strategic partnership with NATO and welcoming the third joint EU-NATO declaration<sup>32</sup>. The Parliament recognises the need for further steps to deepen the partnership based on what the NATO Strategic Concept and EU Strategic Compass envisage, particularly in military mobility, dual-use infrastructure, resilience and joint exercises. In its resolution on EU-NATO cooperation, the Parliament recognised NATO's role as the cornerstone of collective security for those Member States that are also NATO members and highlighted the importance of EU-NATO cooperation<sup>33</sup>.

NATO was also at the heart of the EU's response to the war in Ukraine. In 2022, the European Parliament recommended to the Council and the High Representative of the Union

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<sup>28</sup> EU Strategic Compass (2022), cit.

<sup>29</sup> *Ibid.*, p. 53.

<sup>30</sup> *Ibid.*, p. 53.

<sup>31</sup> Art. 36, TEU: 'The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in briefing the European Parliament'.

<sup>32</sup> Resolution (2022/2048(INI)) of the European Parliament of 18 January 2023 on the implementation of the common foreign and security policy – annual report 2022, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0009\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0009_EN.pdf).

<sup>33</sup> Resolution (2020/2257(INI)) of the European Parliament of 7 July 2021 on EU-NATO cooperation in the context of transatlantic relations, par. 1, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021IP0346>.

for Foreign Affairs and Security to «intensify cooperation with like-minded partners around the globe, especially with transatlantic NATO allies» and devoted a specific section to EU-NATO cooperation, calling, inter alia, for «the Strategic Compass and the NATO strategic concept [to be] aligned and lead to increasing strategic complementarity»<sup>34</sup>. Similarly, an earlier European Parliament resolution on Russia's aggression in Ukraine stated that the EU and NATO must be prepared «for all possibilities»<sup>35</sup>. However, the increased cooperation between the EU and NATO may be drowned out by an increasing number of references to the Alliance in EP resolutions on foreign policy issues of various kinds, such as the reconstruction of Ukraine<sup>36</sup> and the fight against disinformation<sup>37</sup>, the situation in Turkey<sup>38</sup>, Montenegro<sup>39</sup>, Belarus<sup>40</sup>, Bosnia and Herzegovina<sup>41</sup>, Albania<sup>42</sup>, Switzerland<sup>43</sup> and in the context of the normalisation of Serbia-Kosovo<sup>44</sup>. The European Parliament's resolutions testify to NATO's increasingly inseparable role in the EU's CFSP and CSDP on many issues, often far removed from security.

Other relevant non-binding EU acts in the definition of the EU-NATO relationship are the Commission's Communications. The European Commission traditionally supports the development of European defence and the EU-NATO partnership<sup>45</sup>. Moreover, in coherence with the Union's competence, the Commission reiterated several times the role of NATO in countering hybrid threats and terrorism. The Commission's EU Security Union Strategy required the EU to counter terrorism by promoting «working with the leading global actors in this field, such as the United Nations, NATO, the Council of Europe, Interpol and the OSCE», as well as to counter hybrid threats by maximising «the effect of EU action by swiftly bringing

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<sup>34</sup> Recommendation (2022/2039(INI)) of the European Parliament of 8 June 2022 to the Council and the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy on the EU's Foreign, Security and Defence Policy after the Russian war of aggression against Ukraine, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0235\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0235_EN.pdf).

<sup>35</sup> Resolution (2022/2564(RSP)) of the European Parliament of 1 March 2022 on the Russian aggression against Ukraine, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0052\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0052_EN.pdf).

<sup>36</sup> Resolution (2023/2739(RSP)) of the European Parliament of 15 June 2023 on the sustainable reconstruction and integration of Ukraine into the Euro-Atlantic community, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0247\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0247_EN.pdf).

<sup>37</sup> Resolution (2022/2075(INI)) of the European Parliament of 1 June 2023 on foreign interference in all democratic processes in the European Union, including disinformation, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0219\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0219_EN.pdf).

<sup>38</sup> Resolution (2022/2205(INI)) of the European Parliament of 13 September 2023 on the 2022 Commission Report on Türkiye, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0320\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0320_EN.pdf).

<sup>39</sup> Resolution (2022/2202(INI)) of the European Parliament of 18 October 2023 on the 2022 Commission Report on Montenegro, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0369\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0369_EN.pdf).

<sup>40</sup> Resolution (2023/2041(INI)) of the European Parliament of 13 September 2023 on relations with Belarus, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0321\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0321_EN.pdf).

<sup>41</sup> Resolution (2022/2200(INI)) of the European Parliament of 12 July 2023 on the 2022 Commission Report on Bosnia and Herzegovina, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0284\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0284_EN.pdf).

<sup>42</sup> Resolution (2022/2199(INI)) of the European Parliament of 12 July 2023 on the 2022 Commission Report on Albania, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0285\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0285_EN.pdf).

<sup>43</sup> Resolution (2023/2042(INI)) of the European Parliament of 4 October 2023 on EU-Switzerland relations, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0345\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0345_EN.pdf).

<sup>44</sup> Resolution (2023/2880(INI)) of the European Parliament of 19 October 2023 on the recent developments in the Serbia-Kosovo dialogue, including the situation in the northern municipalities in Kosovo, available at [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0372\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0372_EN.pdf).

<sup>45</sup> Communication COM(2022) 60 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Commission contribution to European defence of 15 February 2022, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0060>.

together sectoral responses and ensuring seamless cooperation with our partners, NATO in the first place»<sup>46</sup>. In the wake of that, the EU Commission has also adopted an “EU Policy on Cyber Defence” in which a specific section addresses the EU-NATO partnership in countering hybrid threats<sup>47</sup>. It can, therefore, be argued that the Commission is not excluded, either practically or institutionally, from defining the relationship between the EU and NATO. On the contrary, despite its limited role in the CFSP decision-making process, the Commission supports the EU-NATO partnership in the field of hybrid and cyber operations as well as in the fight against terrorism, thereby revitalising it and the Commission's role in the field of European security.

## 3.2. NATO Perspective

### 3.2.1. Treaty Provisions

NATO is essentially a military alliance with defensive purposes that aims to ensure collective defence for its members. NATO's collective defence is based on Article 5 of the North Atlantic Treaty (NAT) which establishes that «an armed attack against one or more of them [members] in Europe or North America shall be considered an attack against them all». The NATO mutual defence clause requires each Ally to take the actions that «it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area», leaving the discretion of means to Allies: military assistance is just an available option. In practice, Article 5 has been invoked just once in NATO history, in October 2001, by the US in reaction to the terrorist attacks of 9 September 2001. Article 6 limits the geographical application of Article 5 to Europe and North America and, thus, NATO collective defence is limited to NATO's in-area, not more:

«For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:

- on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France (2), on the territory of or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;
- on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer».

Unlike Art. 42(7) TEU, Art. 5 of NATO is de facto backed by the United States, which makes NATO's commitment to mutual defence more credible in the eyes of external observers. In contrast, the EU's lack of military capabilities alone does not ensure the same degree of

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<sup>46</sup> Communication COM(2020) 605 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Security Union Strategy of 24 July 2020, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0605>.

<sup>47</sup> Joint Communication JOIN(2022) 49 final of the European Commission to the European Parliament and the Council - EU Policy on Cyber Defence of 10 November 2022, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022JC0049>.



deterrence as its transatlantic namesake, further weakening any future European Defence Union<sup>48</sup>.

Article 4 of the NATO Treaty is the driving force behind the proper functioning of NATO and the establishment of a strengthened partnership with the EU:

«The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened».

According to Art. 4 of the NAT, Allies may bring to the attention of the North Atlantic Council issues that, «in the opinion of any of them", threaten their "territorial integrity, political independence or security». To understand its significance in the Alliance's institutional system, it is worth noting that Article 4 of the NATO Treaty has been invoked only seven times since 1949<sup>49</sup>, making it, together with Article 5, the real engine of NATO action. For example, in reaction to Russia's invasion of Ukraine, on 24 February 2022, Bulgaria, Czechia, Estonia, Latvia, Lithuania, Poland, Romania, and Slovakia invoked Art. 4 NAT.

Article 4 of the NATO Treaty provides the legal basis for consultations within NATO. Based on Art. 4 NATO has developed its strategic partnership with the EU. However, Article 4 has not been limited to this. Indeed, consultations have gradually expanded beyond NATO's original purposes. While the invocation of Art. 4 NAT initially constituted the necessary procedural step to activate NATO's mutual defence clause, Art. 5 NAT, after the end of the Cold War Art. 4 became the legal basis for so-called "non-Article 5 operations". Art. 4 thus contributed to extending NATO's missions beyond its traditional North Atlantic area and began to provide the substantive (and not only procedural) basis for actions outside the scope of Art. 5 NAT. Since then, Art. 4 NAT has covered NATO out-of-area operations unrelated to collective defence.

### 3.2.2. NATO Non-binding Documents

After the North Atlantic Treaty, NATO's second most important document is the Strategic Concept. NATO's Strategic Concept aims to define on a regular basis the security landscape within which NATO must act and transform, as well as the main political and military guidelines. Recalling the words of the NATO Secretary General, «NATO's new Strategic Concept is the blueprint for the Alliance in a more dangerous and competitive world»<sup>50</sup>.

To date, NATO has adopted eight Strategic Concepts, four unpublished during the Cold War period and four made public since 1991. In 2021, the Allies provided the NATO Secretary

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<sup>48</sup> See, more extensively, V. SZÉP, R. A. WESSEL, E. SABATINO, C. GEBHARD, E. SIMON, *The Current Legal Basis and Governance Structures of the EU's Defence Activities*, cit.

<sup>49</sup> Five times by Türkiye (10 February 2003, 22 June 2012 and 3 October 2013; 26 July 2015; 28 February 2020); Once by Poland (3 March 2014); Once by Bulgaria, Czechia, Estonia, Latvia, Lithuania, Poland, Romania and Slovakia altogether (24 February 2022).

<sup>50</sup> NATO, NATO agrees new Strategic Concept, strengthened deterrence and defence, more support for Ukraine, invites for Finland and Sweden of 29 June 2022, available at [https://www.nato.int/cps/en/natohq/news\\_197358.htm](https://www.nato.int/cps/en/natohq/news_197358.htm).



General with an ambitious project to develop the next Strategic Concept.<sup>51</sup> In line with that mandate, the Allies' heads of state and government approved their Strategic Concept at the 2022 NATO Madrid Summit.

Through its Strategic Compass, NATO has interpreted its founding treaty more extensively to assume global awareness and address global threats more effectively. In particular, the NATO Strategic Concept has impacted two main areas. On the one hand, the material field of application of Art. 5 NAT. On the other hand, in defining the concept of partnership and consultation.

About the former, in 2016, the North Atlantic Council, for the first time, endorsed the possibility of invoking Art. 5 even in cases of hybrid attacks or cyber-attacks by state and non-state actors:

«The Alliance and Allies will be prepared to counter hybrid warfare as part of collective defence. The Council could decide to invoke Article 5 of the Washington Treaty. The Alliance is committed to effective cooperation and coordination with partners and relevant international organisations, in particular the EU, as agreed, in efforts to counter hybrid warfare»<sup>52</sup>.

Therefore, hybrid warfare today clearly falls under Art. 5 of the NAT, as also availed by the Allies at the 2023 Vilnius Summit:

«We reiterate that hybrid operations against Allies could reach the level of an armed attack and could lead the Council to invoke Article 5 of the Washington Treaty»<sup>53</sup>.

The 2022 Strategic Concept further specified that NATO will continue to support its «partners to counter hybrid challenges and seek to maximise synergies with other relevant actors, such as the European Union»<sup>54</sup>. Hybrid threats are a field of interest that goes beyond NATO and requires cooperation with different partners. To this end, the European Union is undoubtedly the main NATO partner in the fight against hybrid threats. Indeed, NATO and the EU have inaugurated the European Centre of Excellence for Countering Hybrid Threats in Helsinki (Hybrid CoE), which aims to «encourage strategic-level dialogue and consultations between and among Participants, the EU, and NATO».<sup>55</sup> Moreover, the EU Hybrid Fusion Cell and the NATO Hybrid Analysis cooperate closely through regular staff-to-staff exchanges. The EU-NATO joint fight against hybrid operations has been further strengthened in the context of

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<sup>51</sup> NATO Brussels Summit Communiqué issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels on 14 June 2021, available at [https://www.nato.int/cps/en/natohq/news\\_185000.htm](https://www.nato.int/cps/en/natohq/news_185000.htm).

<sup>52</sup> NATO Warsaw Summit Communiqué issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw of 8 and 9 July 2016, available at [https://www.nato.int/cps/en/natohq/official\\_texts\\_133169.htm](https://www.nato.int/cps/en/natohq/official_texts_133169.htm).

<sup>53</sup> NATO Vilnius Summit Communiqué (2023) cit., par. 64.

<sup>54</sup> NATO Strategic Concept (2022) cit., par. 27.

<sup>55</sup> Memorandum of Understanding on the European Centre of Excellence for Countering Hybrid Threats of 11 April 2017, available at <https://www.hybridcoe.fi/wp-content/uploads/2017/08/Hybrid-CoE-final-Mou-110417-1.pdf>.

Russia's aggression in Ukraine. It is now one of the most critical points of contact between the two organisations<sup>56</sup>.

The 2022 Strategic Compass also defines the EU as a “unique and essential partner” that shares the same values and plays «complementary, coherent and mutually reinforcing roles in supporting international peace and security», including in countering cyber and hybrid threats. Therefore, NATO recognises «the value of a stronger and more capable European defence that contributes positively to transatlantic and global security and is complementary to, and interoperable with NATO. Initiatives to increase defence spending and develop coherent, mutually reinforcing capabilities, while avoiding unnecessary duplications, are key to our joint efforts to make the Euro-Atlantic area safer»<sup>57</sup>.

About the second element, the 2022 Strategic Concept confirms consultation as the heart of NATO's functioning. Indeed, NATO is the «unique, essential and indispensable transatlantic forum to consult, coordinate and act on all matters related to our individual and collective security»<sup>58</sup>. NATO's key consultative forum in shaping North Atlantic security has been punctuated by the establishment of the NATO-Ukraine Council, «a new joint body where Allies and Ukraine sit as equal members to advance political dialogue, engagement, cooperation, and Ukraine's Euro-Atlantic aspirations for membership in NATO»<sup>59</sup>. In addition, EU officials often attend NATO summits at NATO Headquarters in Brussels, as the Alliance's larger membership, and especially the presence of the United States, helps to coordinate the shaping of far-reaching security decisions.

### 3.3. EU-NATO Perspective

#### 3.3.1. Hard Law

Significantly, the only legally binding source between the EU and NATO is the Agreement on Security of Information signed in Athens on 14 March 2003<sup>60</sup>. It was preceded by the “Interim Security Arrangements” concluded in January 2000 through an informal exchange of letters between Lord Robertson, the Secretary-General of NATO, and Mr. Solana, Secretary General of the Council<sup>61</sup>. It was specified that the Interim Arrangements «shall stand until to be replaced by Security Agreement once all requirements to it have been fulfilled»<sup>62</sup>, thus paving the way to a fully comprehensive agreement.

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<sup>56</sup> NATO Vilnius Summit Communiqué (2023) cit., par. 74.

<sup>57</sup> NATO Strategic Concept (2022) cit., par. 43.

<sup>58</sup> *Ibid.*, par. 3.

<sup>59</sup> NATO Vilnius Summit Communiqué (2023) cit., par. 12.

<sup>60</sup> Agreement Between the European Union and the North Atlantic Treaty Organisation on the Security of Information of 14 March 2003, EU OJ L 80/36 of 27/03/2003, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22003A0327\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22003A0327(01)).

<sup>61</sup> Interim EU-NATO Security of Information Agreement with NATO of 26 July 2000, The Solana/Robertson exchange of letters, available at <https://www.statewatch.org/news/2002/march/statewatch-news-online-the-solana-robertson-exchange-of-letters-26-july-2000/>. Read, in particular, the last sentence by Solana: ‘I am pleased to inform you of my acceptance of said letter which, together with this reply, constitutes Interim Security Arrangements which enter into force on the date of this reply’.

<sup>62</sup> *Ibid.*

The agreement aims to ensure the “control” of classified information exchanged between the EU and NATO based on the standardisation of rules<sup>63</sup>. The agreement was intended to enhance EU-NATO cooperation and increase mutual trust, avoiding embarrassing situations like NATO’s rejection of invitations to speak in EU institutions<sup>64</sup>. As a result, it was evident that the 2003 EU-NATO Agreement was an attempt to bring the EU closer to the NATO standard of secrecy and, therefore, closer to the regulations of a military organisation, raising transparency concerns among certain EU Member States. In some way, the fact that the only public legally binding act in the EU/NATO partnership is an agreement on the Security of Information has influenced the legal definition of the relationship based on a prevalence of non-public and apparently not-binding arrangements.

The bilateral agreement entered into effect immediately in March 2003 (Art. 16), replacing the Interim Arrangements. The EU concluded it according to Article 37 TEU (i.e., previous Art. 24 TEU), which allows the conclusion of international agreements in CFSP matters with, *inter alia*, international organisations. The agreement was signed by George Robertson, NATO Secretary General, and Georgios Papandreu, President of the Council of the EU.

Unlike today’s Lisbon Treaty, the 2003 Treaty of Nice provided for the Member State holding the Presidency of the Council to act externally on behalf of the EU as a whole, including the conclusion of international agreements in the CFSP area (previous Article 18 TEU). Indeed, the President of the Council was authorised to begin negotiations with NATO with the Council Decision of 15 April 2002<sup>65</sup> and to conclude the agreement with the Council Decision of 14 February 2003<sup>66</sup>.

The exchange of information between the EU and NATO is based on the «principle of originator control», according to which classified information «may be disclosed or released to States which are members of NATO, and to other States which are members of the EU and have subscribed to the ‘Partnership for Peace’ framework document and, in that context, have a valid security agreement with NATO» (Art. 5 letter a). The fact that the agreement expressly limits the release of classified information to EU-NATO members or, eventually, EU Member States involved in the NATO PfP programme, excludes only Cyprus from the EU-NATO partnership.

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<sup>63</sup> NATO, NATO-EU cooperation taken to a new level, available at [https://www.nato.int/cps/en/natolive/news\\_20245.htm](https://www.nato.int/cps/en/natolive/news_20245.htm) : ‘This agreement is the result of discussions between NATO and the EU on how to deal with classified information. NATO and the EU had to decide on common security standards to be able to share information and consult and cooperate on security issues’.

<sup>64</sup> Notable, on 23 August 2000 Bridget Austin, Acting Director (NATO Office of Security) declined the invitation from G. Watson, Chair of the Committee of Citizen’s Freedoms and Rights, to address the European Parliament’s concerning committee, defining a presentation by NATO as ‘premature and somewhat inappropriate’ because an organisation like the EU ‘has to have a security infrastructure in place which satisfies NATO’s security requirements’. See, more extensively, Letter from B. Austin to G. Watson of 23 August 2000, Document No. NOS/2(2000)102, available at <https://www.statewatch.org/media/documents/news/sept00/NATO.PDF>.

<sup>65</sup> This point was confirmed in the General Affairs Council Conclusions of 15 April 2002: ‘On the basis of a briefing by SG/HR Solana, Ministers - over lunch - took stock of developments on the ESDP, in particular ... the EU-NATO agreement on the security of information, on which the Council authorised the Presidency to begin negotiations with NATO and adopted negotiating directives to this end’; Available at [https://ec.europa.eu/commission/presscorner/detail/en/PRES\\_02\\_91](https://ec.europa.eu/commission/presscorner/detail/en/PRES_02_91) .

<sup>66</sup> Decision 2003/211/CFSP of the Council of the EU of 24 February 2003 concerning the conclusion of the Agreement between the European Union and the North Atlantic Treaty Organisation on the Security of Information, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003D0211> .

The agreement is not operational in itself but leaves to the EU Council General Secretariat Security Office, the European Commission Security Office and the NATO Office of Security the responsibility to implement the treaty by way of developing Security Arrangements for the protection of classified information within both organisations (Art. 11) and establishing «procedures to be followed in the case of proven or suspected compromise of classified information or material subject to the present Agreement» (Art. 13). Moreover, Art. 15 of the agreement introduced a conflict clause preventing the EU and NATO from entering into other agreements that can be in «conflict with the provisions of the present Agreement».

Actually, the 2003 EU-NATO agreement has *de facto* represented «a major step that will facilitate the take-over by the European Union of the military operation[s] ... led by NATO»<sup>67</sup>. For instance, the Council mandate establishing the so-called military operation Althea in Bosnia and Herzegovina in replacement of NATO's SFOR mission<sup>68</sup> in 2004 provided that the High Representative was authorised «to release to NATO ... EU classified information and documents generated for the purposes of the EU military operation».<sup>69</sup>

The reciprocal, more liberalised circulation of information between the two organisations was further confirmed by a Council's note sent to EU Member States' delegations that specified that non-EU NATO countries could have access to EU classified information without the conclusion of ad hoc international agreements anymore after the entry into force of the 2003 EU-NATO agreement:

«Concerning the abovementioned non-EU NATO countries (Bulgaria, Canada, Iceland, Norway, Romania, Turkey), EU classified information may be released to them or to their personnel under the EU/NATO security agreement. By contrast, an ad-hoc arrangement is necessary for those of the other countries that will actually participate to the operation»<sup>70</sup>.

### 3.3.2. Soft Law

The EU Berlin Plus Agreement is the most important agreement concluded by the EU and NATO. Based on the 1996 Berlin NATO Summit<sup>71</sup>, the Berlin Plus Arrangements evolved into a comprehensive agreement in the following years.

Initially developed with regard to the WEU, the Berlin Plus Arrangements were extended to the European Union with the NATO Washington Summit Communiqué on 24 April 1999, which acknowledged «the resolve of the European Union to have the capacity for autonomous action so that it can take decisions and approve military action where the Alliance as a whole is not engaged» and, thus, that «the decisions taken in Berlin in 1996, including the concept of

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<sup>67</sup> NATO Press Release (2003)022, NATO - EU security of information agreement signed today, available at [https://www.nato.int/cps/en/SID-C6721173-50F4A6DB/natolive/news\\_20256.htm](https://www.nato.int/cps/en/SID-C6721173-50F4A6DB/natolive/news_20256.htm).

<sup>68</sup> The NATO Summit Meeting of Heads of State and Government in Istanbul on 28 to 29 June 2004 decided to conclude NATO's SFOR operation in Bosnia and Herzegovina by the end of 2004.

<sup>69</sup> Joint Action 2004/570/CFSP of the Council of the EU of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina, EU OJ L 252/10 of 28 July 2004, Art. 14.

<sup>70</sup> Release 12466/04 of the Council of the EU of 14 September 2004 ALTHEA-related EUCI: security arrangements with third states participating to the operation.

<sup>71</sup> Some indicia appeared already in the NATO 1994 Brussels Declaration of the Heads of State and Government, available at [https://www.nato.int/cps/en/natohq/official\\_texts\\_24470.htm](https://www.nato.int/cps/en/natohq/official_texts_24470.htm).

using separable but not separate NATO assets and capabilities for WEU-led operations, should be further developed»<sup>72</sup>.

Indeed, the Berlin Plus Agreement is founded on a «separable but not separate concept», according to which NATO collective military capabilities are made available to the EU. More specifically, Allies committed to ensuring «ready access» to such capabilities to the EU by introducing a «presumption of availability»<sup>73</sup>. This point is highlighted in the 1999 NATO Strategic Concept:

«on a case-by-case basis and by consensus, to make its assets and capabilities available for operations in which the Alliance is not engaged militarily under the political control and strategic direction either of the WEU or as otherwise agreed, taking into account the full participation of all European Allies if they were so to choose»<sup>74</sup>.

The conclusion of the Berlin Plus Agreement occurred on 16 December 2002 with the adoption of the EU-NATO Declaration on ESDP. The agreement's text is not available to the public as it is a formal decision of the North Atlantic Council and is thus classified. The EU-NATO Declaration on ESDP is the only document made public by a press release.

However, the technical details and arrangements for its effective implementation were defined only in March 2003 with the conclusion of the EU-NATO Agreement on Security of Information and an exchange of letters between NATO Secretary General Robertson and the EU High Representative Solana on 17 March 2003 that finalised what is also known as the «Framework Agreement»<sup>75</sup>. The Berlin Plus Agreement's relevance was demonstrated in practice by allowing the EU to conduct two military missions within Europe while gaining access to NATO assets, namely Operation Concordia in 2003 and Operation Althea in 2004, and it is still in place for operation EUFOR Althea in Bosnia and Herzegovina.

Moreover, Berlin Plus institutionalised the relations between the EU and NATO. The EU-NATO Declaration on ESDP establishes the principles on the basis of the relationship between the European Union and NATO:

«Ensuring that the crisis management activities of the two organisations are mutually reinforcing while recognising that the European Union and NATO are organisations of a different nature;

Effective mutual consultation, dialogue, cooperation and transparency;

Equality and due regard for the decision-making autonomy and interests of the European Union and NATO;

Respect for the interests of the Member States of the European Union and NATO;

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<sup>72</sup> NATO Washington Summit Communiqué NAC-S(99)64 issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C. of 24th April 1999, par. 9, available at <https://www.nato.int/docu/pr/1999/p99-064e.htm> .

<sup>73</sup> *Ibid.*

<sup>74</sup> NATO, the Alliance's Strategic Concept NAC-S(99)65 approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C. of 21 April 1999, available at [https://www.nato.int/cps/en/natohq/official\\_texts\\_27433.htm](https://www.nato.int/cps/en/natohq/official_texts_27433.htm) .

<sup>75</sup> See, more extensively, F. CAMERON, G. QUILLÉ, *ESDP: The State of Play*, 2004, n. 11.



Respect for the principles of the Charter of the United Nations, which underlie the Treaty on European Union and the Washington Treaty, to provide one of the indispensable foundations for a stable Euro-Atlantic security environment, based on the commitment to the peaceful resolution of disputes, in which no country would be able to intimidate or coerce any other through the threat or use of force, and also based on respect for treaty rights and obligations as well as refraining from unilateral actions;

Coherent, transparent and mutually reinforcing development of the military capability requirements common to the two organisations».<sup>76</sup>

From a legal standpoint, the Berlin Plus Agreement is considered a non-binding agreement, similar to the 1975 Helsinki Final Act<sup>77</sup>. Some evidence corroborates this evaluation: on the EU side, the Agreement was concluded by the High Representative – not the President of the EU or the Council itself as requested by the pre-Lisbon TEU (Article 18); non-publication makes it impossible to assess the will of the parties to be bound by the agreement, on the contrary, it shows an intention to avoid international scrutiny.

The Berlin Plus Agreements do not apply to all EU Member States. As observed at the Copenhagen European Council of 12 and 13 April 2002, «the "Berlin plus" arrangements and the implementation thereof will apply only to those EU Member States that are also either NATO members or parties to the "Partnership for Peace", and which have consequently concluded bilateral security agreements with NATO». Cyprus is the only EU Member State that is not a member of NATO's PfP programme, excluding it from any involvement in EU military operations with NATO capabilities.

The EU-NATO Joint Declarations, even being non-binding instruments, are relevant to define the evolution of the EU-NATO partnership.

After the Berlin Plus, three Joint Declarations in 2016, 2018 and 2023 revised the EU-NATO strategic partnership.

The 2016 Joint Declaration identified seven areas that both sides of the Atlantic committed to strengthen.<sup>78</sup> In light of that, both organisations then approved a common set of 42 proposals on 6 December 2016<sup>79</sup> and an additional 34 actions on 5 December 2017,

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<sup>76</sup> EU-NATO Declaration on ESDP of 16 December 2002, Document No. (2002)142, available at [https://www.nato.int/cps/en/natolive/official\\_texts\\_19544.htm](https://www.nato.int/cps/en/natolive/official_texts_19544.htm).

<sup>77</sup> M. REICHARD, *Some Legal Issues Concerning the EU-NATO Berlin Plus Agreement*, in *Nordic Journal of International Law*, 2004, pp. 37-67.

<sup>78</sup> Joint Declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization, 8 July 2016, available at [https://www.nato.int/cps/en/natohq/official\\_texts\\_133163.htm#:~:text=In%20light%20of%20the%20common,be%20cause%20we%20have%20to%20make](https://www.nato.int/cps/en/natohq/official_texts_133163.htm#:~:text=In%20light%20of%20the%20common,be%20cause%20we%20have%20to%20make). The seven concerning areas are the following:

- Countering hybrid threats;
- Operational Cooperation including at sea and on migration;
- Cyber security and defence;
- Defence capabilities;
- Defence industry and research;
- Exercises;
- Supporting Eastern and Southern partners' capacity-building efforts.

<sup>79</sup> Conclusions 15283/16 of the Council of the EU of 6 December 2016 on the Implementation of the Joint Declaration by the President of the European Council, the President of the European Commission and the Secretary General of the North Atlantic Treaty Organization, available at <https://data.consilium.europa.eu/doc/document/ST-15283-2016-INIT/en/pdf>.



including three new topics, to further advance the implementation of the 2016 Joint Declaration<sup>80</sup>.

A second EU-NATO Joint Declaration was signed on 10 July 2018, calling for «coherent, complementary and interoperable» EU-NATO defence initiatives in order to reflect the US claim of a more equal participation of European NATO Allies in Transatlantic security burden-sharing.<sup>81</sup>

Recently, a third EU-NATO Joint Declaration was concluded and made public on 10 January 2023. The declaration, which aims to bring the EU-NATO partnership to the next level, describes Russia's war of aggression in Ukraine as the "gravest threat to Euro-Atlantic security in decades" and mentions for the first time "China's growing assertiveness and policies" as a challenge. It also underlines the "unprecedented progress" in all areas of cooperation, that «NATO remains the foundation of collective defence for its Allies and essential for Euro Atlantic security», and recognises that «a stronger and more capable European defence ... contributes positively to global and transatlantic security and is complementary to, and interoperable with NATO»<sup>82</sup>.

The implementation of the Joint Declarations is subject to a yearly review by both EU and NATO staff. So far, seven progress reports have been issued, with the last one on 20 June 2022. Such reports reflect the "ongoing and long-term process" of the EU-NATO partnership, making public the degree of advancement of EU-NATO cooperation on the ground. They are not limited to rhetorical declarations but report all the initiatives and meetings between the EU and NATO. Legally speaking, it is relevant that the last, seventh report of progress mentions in a more nuanced way the importance of "countries" in implementing the common set of proposals, giving the EU and NATO staff a primary role<sup>83</sup>. Differently, all the other six progress reports highlighted the fact that «[f]ull engagement and continued support by all NATO Allies and EU Member States remain crucial in order to reach the full potential of the 74 proposals»<sup>84</sup>. This difference may suggest a less relevant role, at this stage of advancement, of states as such in the implementation of the EU-NATO partnership and a more centralised role of the organisations and their institutions.

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<sup>80</sup> Conclusions 14802/17 of the Council of the EU of 5 December 2017 on the Implementation of the Joint Declaration by the President of the European Council, the President of the European Commission and the Secretary General of the North Atlantic Treaty Organization, available at <https://www.consilium.europa.eu/media/31947/st14802en17.pdf>.

<sup>81</sup> Joint Declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization of 10 July 2018, par. 10, available at [https://www.consilium.europa.eu/media/36096/nato\\_eu\\_final\\_eng.pdf](https://www.consilium.europa.eu/media/36096/nato_eu_final_eng.pdf).

<sup>82</sup> Joint Declaration on EU-NATO Cooperation by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization of 10 January 2023, par. 8, available at [https://www.nato.int/cps/en/natohq/official\\_texts\\_210549.htm](https://www.nato.int/cps/en/natohq/official_texts_210549.htm).

<sup>83</sup> Read the Seventh progress report of 20 June 2022 on the implementation of the common set of proposals endorsed by EU and NATO Councils on 6 December 2016 and 5 December 2017: 'In light of the current challenges to international peace and stability, and with the full engagement and continued support by all NATO Allies and EU Member States, the two staffs remain firmly committed to reach the full potential of the 74 proposals for common action, and to further enhance, deepen and expand our mutually beneficial cooperation'; Available at <https://www.consilium.europa.eu/media/57184/eu-nato-progress-report.pdf>.

<sup>84</sup> See, e.g., the Sixth progress report of 3 June 2021 on the implementation of the common set of proposals endorsed by EU and NATO Councils on 6 December 2016 and 5 December 2017, available at [https://www.nato.int/nato\\_static\\_fl2014/assets/pdf/2021/6/pdf/210603-progress-report-nr6-EU-NATO-eng.pdf](https://www.nato.int/nato_static_fl2014/assets/pdf/2021/6/pdf/210603-progress-report-nr6-EU-NATO-eng.pdf).

## 4. Conclusion

The EU and NATO are among the most important examples of an enduring and successful partnership. Despite a series of shocks and geopolitical changes, both organisations have seen their relationship strengthen over time, driven by a shared responsibility to work together to ensure the protection of their members. Their roles are not interchangeable but live within their detailed legal frameworks.

The EU-NATO relationship is legally recognised in the founding treaties of both organisations. While both the EU and NATO remain autonomous and have a separate legal personality, their legal frameworks allow for the possibility of deepening their relationship, and what is more, NATO arguably seems to be a living component of the EU CSDP. However, the EU-NATO partnership is not open-ended but must evolve within the institutional constraints of the EU and NATO. This means that while the EU must refrain from actions that would prejudice NATO's defensive action, EU Allies must cooperate loyally to ensure the coherence of the EU's CSDP.

The EU-NATO relationship is unique in EU law. Only one legally binding agreement on information security, signed in 2003, binds their partnership. Despite this, their relationship is becoming more intense and increasingly defined by political documents without binding force. Soft law plays a key role in determining the EU-NATO partnership, ensuring the degree of flexibility that the defence and security context requires to adapt to new geopolitical landscapes.

The unique legal discipline of the EU and NATO has fostered the effectiveness of their partnership. A variety of structures and mechanisms have been put into practice. This is particularly clear in the fight against hybrid threats, where the EU and NATO actively cooperate within the same structure, the European Centre of Excellence for Countering Hybrid Threats in Helsinki. The EU and NATO have coordinated their actions in military and civilian missions since 2003, with Operation Althea in the Former Yugoslav Republic of Macedonia under the Berlin Plus arrangements. Following the outbreak of hostilities in Ukraine on 24 February 2022, the EU and NATO have stepped up their coordination of the civilian and military dimensions of security operations, adopting a 360° approach<sup>85</sup>. The EU and NATO are also becoming more integrated in their policies by adopting foreign strategies that consider each other's participation. Finally, the partnership has developed in an increasing number of security-related areas, such

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<sup>85</sup> Unlike military missions, civilian operations involve the deployment of civilian personnel, such as political and legal advisers, judges and police officers, with the aim of ensuring long-term stability and the protection of civilians in third countries through conflict prevention, crisis management and post-conflict stabilisation. The European Union may, in principle, conduct both civilian and military operations under the Common Security and Defence Policy in order to carry out the wide range of crisis management tasks (advice, monitoring, capacity building) referred to in Art. 42(1) and 43(1) of the TEU. Civilian CSDP can be used both independently and alongside military missions. Out of a total of 21 ongoing EU CSDP missions, the majority are civilian in nature (12 to 9). See, more extensively, Conclusions 9588/23 of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 22 May 2023 on the establishment of a Civilian CSDP Compact, available at <https://www.consilium.europa.eu/media/64515/st09588-en23.pdf>. The EU-NATO partnership in the civilian dimension of security has been further developed through the European Centre of Excellence for Civilian Crisis Management (CoE), established in 2020 to support both the EU and NATO in civilian missions. See, more extensively, European Centre of Excellence for Civilian Crisis Management, About the European Centre of Excellence for Civilian Crisis Management (CoE), available at <https://www.coe-civ.eu/about>.

as energy, transport and space, by establishing the NATO-EU Task Force on Critical Infrastructure Resilience in 2023<sup>86</sup>.

In conclusion, the EU-NATO partnership reflects an extraordinary case of cooperation and mutual commitment to achieving a common goal: the protection of European territory. The high level of coordination between the two organisations reflects a shared will to contribute positively to European and transatlantic security. Over the years, however, their relationship has proved its worth on paper and in practice.

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<sup>86</sup> The NATO-EU Task Force on Critical Infrastructure Resilience was launched on 16 March 2023 following its joint announcement by Commission President U. von der Leyen and NATO Secretary General J. Stoltenberg on 11 January 2023, one day after the signing of the third EU-NATO Joint Declaration. The NATO-EU Task Force on Critical Infrastructure Resilience is an integral part of and reinforces the EU-NATO Structured Dialogue on Resilience, a key outcome of the 74 joint EU-NATO proposals developed in 2016 and 2017 in the light of the seven key areas of cooperation identified in the 2016 EU-NATO Joint Declaration. The NATO-EU Task Force on Critical Infrastructure Resilience strengthens EU-NATO cooperation in four sectors of key cross-cutting importance: energy, transport, digital infrastructure and space. See, more extensively, EU-NATO Task Force on the Resilience of Critical Infrastructure, Final assessment report of 29 June 2023, available at [https://commission.europa.eu/system/files/2023-06/EU-NATO\\_Final%20Assessment%20Report%20Digital.pdf](https://commission.europa.eu/system/files/2023-06/EU-NATO_Final%20Assessment%20Report%20Digital.pdf).