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The European Defence Union and Denmark’s Defence Opt-out: A Legal Appraisal

Graham Butler*

When Denmark failed to ratify the Treaty of Maastricht in 1992, the heads of state and government meeting within the European Council concluded the Edinburgh Decision that established a number of opt-outs for Denmark, so it could subsequently ratify the treaty. One of these opt-outs was in regard to EU defence matters. Nearly three decades on, the Union is now seeing concrete steps being made across the treaties to deliver on a true European Defence Union. Given these developments, the Danish defence opt-out is coming under increased scrutiny. This article analyses the law, policy, and practice of the Danish defence opt-out contained in Article 5 of Protocol (No 22) on the position of Denmark annexed to the EU treaties, in light of the litany of initiatives that now make up the contemporary European Defence Union. Notably, these developments underscore and rationalize the basis of the EU’s internal market for deeper European integration. Moreover, with only one Member State possessing such opt-out, it is arguably detrimental to overall EU defence interests. This article contends that the time has come for Denmark to forgo its defence opt-out – a legacy of the past – and participate in the complete range of initiatives contributing to these new endeavours that form the contemporary European Defence Union.

Keywords: Denmark, Common Security and Defence Policy, CSDP, Opt-out, EU law, Union law, Protocols, Security Law, European Defence Union.

1 INTRODUCTION

Since defence matters have come within Union law, Denmark has had an obscure relationship with it. On face value, this appears as quite the puzzle. Denmark is not neutral; it is a militarily aligned state; and it is proactive in multilateral cooperation within many international organizations on defence policies, including membership in the North Atlantic Treaty Organization (NATO). Denmark’s possession of a permanent defence opt-out within the EU, therefore, appears as an anomaly. The defence

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* Associate Professor of Law, Aarhus University, Denmark. The author was a member of the commissioned investigation (udrøbning) undertaken under the auspices of the Danish Institute for International Studies (DIIS) on the Danish EU defence opt-out (forsvarsforbeholdet), appointed by the Ministry of Foreign Affairs of Denmark (Udenrigsministeriet). The final report, Europæisk forsvarsanbejde og det danske forsvarsforbehold: Udredning om udviklingen i EU og Europa på det sikkerheds- og forsvarspolitiske område og betydningen for Danmark, was published in Dec. 2019. The views expressed here in this academic article are the author’s own, and do not represent those of (nor should they be attributed to) anyone else, or any other organization. Email: gb@law.au.dk.
opt-out today appears in the form of a Protocol annexed to the EU treaties, and is unique given that no other EU Member State has such an opt-out. Its applicability is, in principle, confined to actions concluded on selected legal bases relating to the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) that could entail defence implications involving Denmark.

Denmark actively participates in the CFSP on matters that do not have defence implications, and also non-CFSP matters. Paradoxically, it is legally prohibited from partaking in certain aspects of the CSDP that do have defence implications, despite their close interconnection from a legal and policy perspective. The pace of developments in the European Defence Union has picked up tremendously. As the EU moves forward in this direction, there are legal obstacles from the point of view of Denmark, given its defence opt-out. A number of clear observations are set forth from the outset. Firstly, it is observed that the Danish defence opt-out is a legal opt-out, following a policy preference put into legal terms. Secondly, that the defence opt-out is binary and permanent, in that there is no possibility to opt-in on certain EU defence matters on an ad hoc basis. Thirdly, it is contended that the defence opt-out can be reneged upon by Denmark, which would be an irrevocable action. Fourthly, whilst the defence opt-out exists, it reduces the influence of the Member State on all matters in relation to defence, despite the fact that the defence opt-out is applicable only to certain aspects of the European Defence Union. Nevertheless, there are also implications for the EU, which lessens the impact of the European Defence Union when not all Member States stand ready to defend it.

On a substantive level, the Danish defence opt-out has remained static, but EU defence matters have been moving ahead towards deeper levels of integration, with a number of initiatives spread across the EU treaties that are all contributing towards the contemporary European Defence Union. Ever since the early 1990s, the defence opt-out has been serving its intended purpose, and its legal nature has ensured that the policy stance by Denmark of having no participation at EU level that entails defence implications has been respected. However, given new

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initiatives have been driven forward to build the European Defence Union, including Permanent Structured Cooperation (PESCO), the European Defence Fund (EDF), the European Peace Facility (EPF), inter alia; the applicability of Denmark’s defence opt-out has become the focus of renewed attention.

This article aims to elucidate a clearer understanding the application of Denmark’s defence opt-out in law and policy terms by examining it in light of a range of recent initiatives of the European Defence Union that have defence implications. It commences by firstly exploring the history of the defence opt-out, including why and how it came about. Secondly, given its existence, it frames the defence opt-out from the perspective of how it is applied in legal practice, including who interprets it, how it is navigated within Union structures, how it is invoked, and how it may be forgone. Thirdly, the applicability of the defence opt-out is analysed on the basis of the respective initiatives that have come about in recent years to determine the scope of the defence opt-out in light of the increasing number of initiatives. Conclusively, the article puts Denmark’s defence opt-out in its law and policy context, contending that in the longer-term, and for the overall betterment of the Union, the only real solution for full involvement of the Member State in the European Defence Union is through forgoing its defence opt-out.

2 HISTORY OF THE DEFENCE OPT-OUT

To understand how the defence opt-out works, it is appropriate to firstly examine its legal and political history. At the time that the Danish Constitution was last amended in 1953, the drafters envisaged that membership of international organizations in the post-war period was distinctly possible. Thus, Article 20 of Danish Constitution was created to allow Danish membership of international organizations, and for powers to be conferred to them. Since 1953, the Constitution has not been amended, and is textually silent on EU membership, and thus, there was no textual inhibition in the constitution affecting Denmark’s participation in international organizations, including its membership in NATO.

That said, there are limitations for what Article 20 of the Danish Constitution can permit, but none of which in themselves inhibit Danish participation in EU

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policies entailing defence implications, and Article 20 of the Danish Constitution has been eminently flexible to cater for all the developments within the Union legal order. This is despite EU foreign, security, and defence policies not being within the ambit of EU affairs upon Denmark’s accession to the EU in 1973. It was only with the 1987 Single European Act did anything encompassing foreign policy come into the EU treaties in the form of European Political Cooperation (EPC), namely Article 30.\textsuperscript{10} However, there was no mention of defence matters in any explicit way.

Later amendments to the EU treaties in the following decades has furthered the cause of the European Defence Union, notably through more detailed elaboration in the text. Presently, there are elaborate mechanisms for how EU defence matters through the CSDP is to function,\textsuperscript{11} and the 2016 Global Strategy had a number of different aims, one of which is to strengthen defence cooperation\textsuperscript{12} with the existing array of tools and arrangements in Union law across the entirety of the EU treaties. Given the Union operates on a conferred powers basis, all forms of high politics that are within the ambit of Union are governed by some form of legal rules, and defence matters are no different.\textsuperscript{13} Denmark’s defence opt-out from certain aspects of the contemporary European Defence Union are no mere political matter – it is a policy stance that is bound in legal text governed by Union law in the form of a Protocol.\textsuperscript{14} Both in theory and in practice, it has been a robust legal limitation on the Member State’s contribution to EU defence matters, and the Union has conversely been without all Member States contributing to the policy field.

2.1 The Edinburgh Decision

When the accession of Denmark to the EU did occur in 1973, there was no foreign, security, or defence matters to speak of from a legal perspective. However, the 1992 Treaty of Maastricht had many external goals aligned within it, namely, the explicit establishment of an EU foreign policy within the Union legal order in

\textsuperscript{10} Art. 30(6): The Member States ‘consider that closer co-operation on questions of European security would contribute in an essential way to the development of European identity in external policy matters. They are ready to co-ordinate their positions more closely on the political and economic aspects of security’, in Single European Act, L 169/1 (29 June 1987).
\textsuperscript{11} Covered mainly in Arts 23–46 TEU.
\textsuperscript{13} See G. Butler, In Search of the Political Question Doctrine in EU Law, 45 Legal Issues of Econ. Integration 329 (2018).
\textsuperscript{14} Art. 5, Protocol (No 22) on the position of Denmark, annexed to the EU treaties. There is no basis in domestic law that is relevant for interpreting the defence opt-out.
the name of the CFSP. Following the initial rejection of the referendum in Denmark that was meant to approve the ratification of the Treaty of Maastricht, a committee of the Danish Parliament (Folketinget) identified policy areas that would need to be addressed before Denmark could consider attempting to ratify the Treaty of Maastricht again. What emerged was the Denmark in Europe document, as part of the ‘national compromise’ to find solutions to the Danish rejection of the Treaty of Maastricht.

On the one hand, there was the balancing act of acknowledging there was to be no amendments to the Treaty of Maastricht, versus, on the other hand, attempting to achieve a concrete understanding that the Danish Government could present to the voting public for another referendum to be held. The eventual aspect of a common defence in the Treaty of Maastricht was attributed as being one of the reasons why the ratification failed to be approved by the voting public. The Treaty of Maastricht said ‘[t]he common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence’. The mere reference to the eventuality of a common defence was enough to spook the vocal critics. The fact that the stipulation merely provided a framework upon which further policy decisions could be developed within Union law was insufficiently highlighted to quell any unfounded misgivings. Thus, the Denmark in Europe document sought progress in ensuring that ‘Denmark does not participate in the ... defence policy dimension, which involves membership of the Western European Union (WEU) and a common defence policy or a common defence’.

When faced with the question of how to achieve the Danish understandings of the Treaty of Maastricht, it was decided at Denmark’s instigation that legal instruments had to be utilized. The question then arose as to what form of legal means was to be employed. From this came the Edinburgh Agreement from the summit, and with that, the accompanying Edinburgh Decision. There is a distinction to be drawn between the Edinburgh Agreement and the Edinburgh Decision, with the former being the set of summit conclusions, a political document; and the latter being the legal text of a newly framed defence opt-out, which was to be a matter of international law. The Edinburgh Decision was designed to have legally

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15 With Community matters in the first pillar, foreign and security policy matters in the second pillar, and justice and home affairs in the third pillar. See Butler, supra n. 2.
16 J. Ørstrøm Møller, Maastricht-traktaten og Edinburgh-afgørelsen, Danmark 30 år i EU: Et Festskrift, 50–59 (Gyldendal 2003).
17 Emphazus added Article J.4(1), Treaty of Maastricht.
18 Along with other opt-outs on Union citizenship, economic and monetary union, and justice and home affairs – all beyond the scope of this article. For more on this, see U. Neergaard, ‘A More United Union’ and the Danish Comandate, in The Future of Europe: Political and Legal Integration Beyond Brexit, 253–267 (A. Bakardjieva Engelbrekt & X. Groussot eds, Hart Publishing 2019).
binding effects, for it met the international legal criteria to be so.\textsuperscript{19} Whilst it was adopted by the heads of state and government of Member States, it was not an agreement or decision of the European Council. The Edinburgh Decision was instead a decision of heads of state or government meeting within the European Council. Thus, it was an independent standalone arrangement concluded outside the Union legal order. Keeping the arrangements outside the ambit of the European Council and Union law more generally ensured no role for the European Commission in the process, and no possibility of judicial review at the Court of Justice of the European Union.\textsuperscript{20} Moreover, such the Edinburgh Decision outside of the Union legal order ensured that national parliaments of Member States did not have to ratify it.

Whilst the Edinburgh Decision was not to be part of the Union legal order, it was to have an effect on the Treaty of Maastricht, giving rise to tensions between the two texts. For example, EU defence matters as put in the Treaty of Maastricht was predicated on the basis that all Member States participate in the discussion and elaboration of the policy, and critically, vote on it unanimously. Conversely, the Edinburgh Decision proposed that one Member State in particular, Denmark, would be absent from any discussion and elaboration. This went ‘well beyond what [was] required according to the provisions’ of the Treaty of Maastricht.\textsuperscript{21} To ease this tension, some Member States labelled the Edinburgh Decision as a ‘clarification agreement’, ‘an international agreement in simplified form’, and a ‘reservation’.\textsuperscript{22} The legal distinctions were relevant as a clarification agreement came under Article 31 of the Vienna Convention on the Law of Treaties (VCLT), whereas a reservation comes under Article 19 VCLT. Despite the Edinburgh Decision’s status as an international treaty, it was to be construed as an implementation agreement; even though it would only come into effect alongside the Treaty of Maastricht. Denmark’s defence opt-out was not incorporated into the Treaty of Maastricht, and nor was it an amendment. This would have been a cumbersome exercise. At that time, an incorporation or an amendment to the EU treaties would only have been possible by reopening the Intergovernmental Conference – a politically inconceivable event.

\textsuperscript{19} Art. 11 (Means of expressing consent to be bound by a treaty), Vienna Convention on the Law of Treaties 1969: ‘The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed’.
\textsuperscript{21} Howarth, supra n. 3, at 777.
Instead, a standalone international treaty was ratified between Denmark and all other EU Member States in their individual capacities (and not the EU or any of its institutions), and was deposited in the Office of the Secretary-General of the United Nations,\textsuperscript{23} at Denmark’s request, to clearly underline the legally binding nature of the Edinburgh Decision. Despite the internationality of the Edinburgh Decision, nonetheless, it was decided at EU level that the Edinburgh Decision was to be placed in the EU’s \textit{Official Journal} under the communication heading (C series),\textsuperscript{24} and not the legislative heading (L series). Subsequently, the unchanged text of the Treaty of Maastricht was presented for referendum for the second time in 1993, and this time, also with Edinburgh Decision, and was passed by a majority.

The most striking legal feature of the Danish defence opt-out at this juncture was that Denmark formally lost its power in the Council on certain matters, and thus, could not destabilize EU defence matters in a way that it could if the defence opt-out did not exist. Notably, this event marked the first occasion upon which a Member State had its participation in the Council voluntarily removed from it at its own request. This sense of detachment wanted from an envisaged policy domain of the EU had never been done before, legally or politically. It cannot be helped but to have seen a strong sense of irony here, as the Danish defence opt-out was politically framed as a means of demonstrating legal guarantees, but in fact, resulted in legal terms of the Member State being deprived of its voice in EU defence matters altogether.

At the time, the political priority was avoiding any sense of EU common defence rather than wielding any form of influence within the Council. Despite this, the fact that Denmark removed itself from such equations was considered an acceptable compromise in ensuring that the Treaty of Maastricht could be put up for a second referendum leading to its ratification. This removal was at the insistence of other EU Member States. Ensuring the Danish defence opt-out applied to both decision-making and implementation of EU defence matters was crucial, as otherwise, Denmark would have been able to wield its defence opt-out for achieving concessions, yet at the same time, use its defence opt-out to not implement the resulting outcomes.

\textsuperscript{23}‘United Kingdom of Great Britain and Northern Ireland, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, and Spain. Decision Constituting an Agreement Concerning Certain Problems Raised by Denmark on the Treaty on European Union (with Conclusions and Declarations). Concluded at Edinburgh on 12 Dec. 1992, Registered by the United Kingdom of Great Britain and Northern Ireland on 18 Feb. 1994 (No. 30685)’.

2.2 Incorporation into Union law

It became clear at the Intergovernmental Conference leading to the Treaty of Amsterdam that the defence opt-out in the text of the Edinburgh Decision had to be incorporated into EU primary law. This was done in the form of a Protocol annexed to the EU treaties. Such an event had the effect of making the Edinburgh Decision less relevant, given that if the Court of Justice of the European Union was ever asked to interpret the Danish defence opt-out, it would always provide precedence to the EU treaties over other international treaties given the EU’s hierarchy of norms and legal sources. That said, Denmark has been of the view that the continued existence of the Edinburgh Decision and the international treaty deposited with the Secretary-General of the United Nations is important for reinforcing its special position. Thus, the annexed defence opt-out appeared in Union law for the first time as follows:

With regard to measures adopted by the Council in the field of Articles J.3(l) and J.7 of the Treaty on European Union, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications, but will not prevent the development of closer cooperation between Member States in this area. Therefore Denmark shall not participate in their adoption. Denmark shall not be obliged to contribute to the financing of operational expenditure arising from such measures.

Accordingly, in terms of a special position for Denmark after the entering into force of the Treaty of Maastricht, the Edinburgh Decision was nothing more than a ‘legal mirage’ until the defence opt-out was transposed into Union law. At the Treaty of Amsterdam, the so-called ‘Petersburg Tasks’ were also incorporated in EU primary law, which included peacekeeping tasks, crisis management, and humanitarian and rescue tasks. On the same occasion, a specific procedural safeguard was put into EU treaties for other Member States with respect to EU defence matters. It stated that for ‘important and stated reasons of national policy’, Member States could not participate in select EU defence matters. Moreover, it scaled back the inevitability of a common defence, noting instead that ‘[t]he

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27 Thorning, supra n. 4, at 160.
28 Art. 6, Protocol on the position of Denmark, Treaty of Amsterdam.
common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, … which might lead to a common defence, should the European Council so decide. 31

The wording of the Edinburgh Decision incorporated into a subsequent Protocol was corrected to rectify incongruity related to the Treaty of Maastricht by stating that ‘[t]he unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the acts of the Council which must be adopted unanimously’. With the existence of the defence opt-out therefore, Denmark has been unable to exercise voting rights. Given this inflexibility, the defence opt-out had been labelled as being ‘negotiated preemptively’. 32

Pre-Treaty of Amsterdam therefore, if the substance of the Edinburgh Decision was challenged, it might have been contested over which judicial body would be the most appropriate for interpreting it. The jurisdiction of the Court of Justice of the European Union might have been excluded, and the matter would have been better suited towards interpretation before the International Court of Justice (ICJ). This would have been extremely problematic because the Edinburgh Decision mainly dealt with matters related to the EU treaties, and thus, the autonomy of Union law. Whilst it was been claimed that different parts of the Edinburgh Decision might have been attributable to either of the two courts depending on the specific opt-out, clarification on the interpretation of the Edinburgh Decision as a free-standing international legal instrument was never called for. Once the substance of the Edinburgh Decision was contained in a Protocol annexed to the EU treaties with the Treaty of Amsterdam, this conundrum became moot, as the Court of Justice of the European Union would subsequently provide sole authoritative interpretation of the defence opt-out as contained within the Protocol.

3 UNDERSTANDING THE DEFENCE OPT-OUT

The Edinburgh Decision which catered for the defence opt-out was highly symbolic, but has had drastic subsequent implications, as will be demonstrated below. Since the defence opt-out was first agreed to, its premise has remained, but the text of it has not always remained the same. Given that EU primary law has been changing at various intervals since the defence opt-out was designed, the


wording of the defence opt-out has had to keep pace of this wider change. However, none of these minor amendments to take a wider account of the EU treaties have altered the scope and objective of maintaining the defence opt-out. Accordingly, the applicable provision of the defence opt-out as it currently stands reads:

HAVING NOTED the position of Denmark with regard to Citizenship, Economic and Monetary Union, Defence Policy and Justice and Home Affairs as laid down in the Edinburgh Decision, 33

With regard to measures adopted by the Council pursuant to Article 26(1), Article 42 and Articles 43 to 46 of the Treaty on European Union, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications. Therefore Denmark shall not participate in their adoption. Denmark will not prevent the other Member States from further developing their cooperation in this area. Denmark shall not be obliged to contribute to the financing of operational expenditure arising from such measures, nor to make military capabilities available to the Union.

The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the acts of the Council which must be adopted unanimously.

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 238(3) of the Treaty on the Functioning of the European Union. 34

Accordingly, there are four matters to observe. Firstly, the interpretation of the defence opt-out. Secondly, how the defence opt-out is led by Denmark. Thirdly, how the defence opt-out is invoked in practice. And fourthly, the process under which Denmark may decide to forgo its defence opt-out, and under what legal conditions it may do so. Each of these issues are analysed in turn.

3.1 INTERPRETING THE DEFENCE OPT-OUT

The defence opt-out has been interpreted by Denmark to ensure that it is respected for various EU actions at all times. For a practical perspective, the consistent point of departure is that the defence opt-out is a legal concept, so each potential EU action requires legal analysis for its legal basis and defence implications, in line with the text of the Protocol. It has been interpreted as

33 Preamble to Protocol (No 22) on the position of Denmark, in C 202/1, supra n. 1.
34 Ibid., Art. 5.
applying to national measures that affect decision-making, implementation activities, and the financing of matters with defence implications at EU level.

The choice of words of the defence opt-out has been a source of interest, and can be called ‘unnecessarily cumbersome’. Actions with defence implications can be difficult, as matters with defence implications could potentially arise on a legal basis other than ones specifically mentioned in the Protocol. To illustrate, one provision from the CFSP articles in EU primary law is selected to be covered by the defence opt-out, Article 26(1) TEU, if actions based upon such have defence implications. Furthermore, not all CSDP parts of the CFSP provisions of the EU treaties are covered by the defence opt-out, but rather, are only selectively applied, namely, Article 42 TEU, and then Articles 43–46 TEU. As a result, the defence opt-out has been interpreted as to mean that Denmark is excluded from the participation in decisions and actions of a legally binding nature, such as actions that have defence (and thereby military) implications. Conversely, the defence opt-out has not meant that Denmark would be excluded from non-legal actions, mainly of a political nature involving defence implications, including the adoption of communiqués, meeting/summit conclusions, political statements, or other associated texts related to EU defence matters. Therefore, Denmark participates in discussions within the Council and European Council on EU defence matters, as long as no defence implications for Denmark arise. This can thus delimit the understanding of the defence opt-out as applying to everything that may have the word ‘defence’ attached to it.

In the years immediately after the Treaty of Maastricht when EU defence matters and the European Defence Union was in its infancy, only a limited number of legal acts were brought forward that entailed the defence opt-out being invoked. The practice was that the defence opt-out was applied in relation to all decisions and actions that had their legal basis in Article J.4 of the Treaty of Maastricht. Yet in the modern era, it is just as important to note what is, as is what is not covered by the defence opt-out. Article 5 of Protocol (No 22) on the position of Denmark applies to legal acts that have a specific legal basis referenced in the Protocols, namely, Article 26(1) TEU, Article 42 TEU, and Articles 43–46 TEU. Any CSDP mission that involves military apparatus of Member States clearly comes within the scope of Denmark’s defence opt-out given the defence implications. This is regardless of whether they are combative or peacekeeping missions. Therefore, it is also a question of assessing how other EU policies might

36 Thorning, supra n. 4, at 159. Furthermore, see, Neergaard, supra n. 18, at 261.
37 C 202/1, Consolidated Versions of the Treaty on European Union, supra n. 1.
come into conflict with the existence of the defence opt-out, so other, smaller-scale assessments have to be conducted on a case-by-case basis to ensure the defence opt-out is respected in good faith across all EU actions.

3.2 Leading the defence opt-out

Despite the defence opt-out being a matter of Union law, it is Denmark that takes the lead on presenting its interpretation with respect to proposed legal acts and other relevant matters. This is the latitude given to Denmark by the Council and other Member States within the Council. That said however, this is not to mean that Denmark has full flexibility, for it merely is the latitude to apply the defence opt-out in compliance with the legal text of the Protocol. Like any Member State, the defence opt-out might be applicable for numerous actors within. In practice, it is the Ministry of Foreign Affairs of Denmark (Udenrigsministeriet) who handle all legal questions regarding the interpretation and application of the defence opt-out. Therefore, whether it is the Ministry of Defence (Forsvarsministeriet), the Danish Armed Forces (Forsvaret), or other national actors, they all revert to the Ministry of Foreign Affairs for legal guidance on how to handle and manage the defence opt-out. The reason for this is a legacy issue, as historically, all matters relating to the state’s membership of the EU has been embedded with the Ministry of Foreign Affairs. That said, engagement between Denmark and the EU bodies is principally done between the Permanent Representation of Denmark to the European Union (Danmarks Faste Repræsentation ved den Europæiske Union) in Brussels, and only infrequently is contact directly established between the legal officials at the Ministry of Foreign Affairs of Denmark and the Council’s Legal Service, and other Brussels-based bodies.

Notwithstanding that the defence opt-out was designed and applicable to one Member State only; that does not mean that Denmark has a monopoly with respect to its legal interpretation. Given that the defence opt-out is a matter of Union law, it is subject to the interpretation of the respective interpretation of EU institutions, relevant applicable bodies, and other EU Member States. Yet, in practice, Denmark and the Council Legal Service have interpreted the defence opt-out in relative harmony, for they have the shared objective of reaching a common interpretation on what the defence opt-out is to cover, and what it is not to cover. There is no evidence to suggest their viewpoint on the defence opt-out has ever significantly diverged. However, the Court of Justice of the European Union is the only body that can give an authoritative interpretation of the defence.

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38 For example, agencies established on a CFSP legal basis such as the European Defence Agency (EDA), the European Union Satellite Centre (EUSC or SatCen), the European Union Institute for Security Studies (EUISS), as well as the European Security and Defence College (ESDC); all analysed below.
opt-out, should it be necessary to resolve a dispute between Denmark, the Council, or other Member States regarding its interpretation. On other matters, the Court has made clear in the past in a line of jurisprudence that opt-outs and derogations obtained by Member States obtained in political forums, and subsequently transposed into EU primary law through Protocols, are interpreted narrowly.

3.3 Invoking the defence opt-out

For the defence opt-out to be invoked, there are certain criteria that must be met. Namely, the legal basis of the measure; and whether the measure has defence implications. If the criteria is not met, then it is assumed Denmark elaborates and implements said measures like all other Member States. There must be a concrete measure proposed for the defence opt-out to be invoked, and an individual legal assessment is carried out on each proposed measures to assess which the defence opt-out is applicable. Therefore, measures adopted on the basis of the TFEU are not, from the outset, considered as being within the scope of the defence opt-out.

At the time of the Treaty of Maastricht, there was one legal basis applicable with respect to EU defence matters that would lead to defence implications, which was Article J4. One concrete example of the defence opt-out invoked in earlier days was the Council asking the WEU to examine how it could contribute to Joint Action in the Great Lakes Region of Africa. Denmark made a statement to the effect that it could not participate in the Decision, nor the potential implementation of such subsequent action arising from it. The WEU was assumed to have the potential for operational capacity, which is why the original Edinburgh Decision

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39 The attempt by the High Contracting Parties of the EU treaties to curtail the jurisdiction of the Court in the CFSP does not extend to preventing the Court from interpreting the Protocols annexed to the EU treaties. For more on this attempted curtailment, see, G. Butler, Implementing a Complete System of Legal Remedies in EU Foreign Affairs Law, 24 Colum. J. Eur. L. 637 (2018).
40 For example, see, Case C-77/05, United Kingdom v Council, EU:C:2007:803; Case C-137/05, United Kingdom v Council, EU:C:2007:805; Case C-482/08, United Kingdom v Council, EU:C:2010:631. To illustrate comparatively with other opt-outs, see, G. Butler & G. Barrett, Europe’s ‘Other’ Open-Border Zone: The Common Travel Area under the Shadow of Brexit, 20 Cambridge Y.B. Eur. Legal Stud. 252 (2018).
41 There is one potential exception to this – the solidarity clause – located in Art. 222 TFEU, analysed further below.
came up with the ‘defence implications’ term. Denmark was never a member of the WEU, and the EU treaties never obligated Denmark to become a member of the WEU. The EU treaties had a specific basis for Member States to be observers at the WEU, and a declaration annexed to the Treaty of Maastricht made by a number of Member States (excluding Denmark) noted that ‘[Member] States which are members of the [EU] are invited to accede to WEU on conditions to be agreed … or to become observers if they so wish’. Being an observer did not entail any legally binding obligations, and thus, Denmark being an observer at the WEU did not violate the defence opt-out.

There were also circumstances where the defence opt-out was not necessarily invoked, but it is likely that Denmark asked for the adoption of legal acts in which it partook to be amended in the event of future actions having ‘defence implications’. Accordingly, in 1997 when the Council was to adopt a Common Position regarding conflict prevention and resolution in Africa, there was an additional article inserted stating ‘[w]here any Union initiative undertaken in furtherance of the objectives … has defence implications, the Union shall request the [WEU] to elaborate and implement this initiative as regards these defence implications, in particular the use of military means’. This thus implied the application of the Danish defence opt-out.

Moreover, once the defence opt-out is found to be applicable and invoked, Denmark cannot prevent other Member States from acting as they wish on EU defence matters – a condition initially elaborated in the Edinburgh Decision. In such circumstance, firstly, Denmark is bound by the principle of sincere (loyal) cooperation under Article 4(3) TEU; and secondly, the defence opt-out states that ‘Denmark will not prevent the other Member States from further developing their cooperation in this area’. Thus, Denmark is legally compelled to not vote on such matters.

45 The Member States were Belgium, Germany, Spain, France, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom of Great Britain and Northern Ireland. The two other EU Member States; Greece and Ireland; were not members of the WEU.
46 Declaration on Western European Union, II. Declaration, annexed to the Treaty of Maastricht.
48 Art. 4(3) TEU: ‘Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives’.
3.4 FORGOING THE DEFENCE OPT-OUT

Article 7 of Protocol (No 22) on the position of Denmark allows the Member State, at any point that it so chooses, to forgo the defence opt-out. Specifically, it states: ‘[a]t any time Denmark may, in accordance with its constitutional requirements, inform the other Member States that it no longer wishes to avail itself of all or part of this Protocol’. In this were to occur, ‘Denmark will apply in full all relevant measures then in force taken within the framework of the European Union’.49 Thus, without any legal prohibitions in Union law, and with no permission or agreement needed from other EU Member States in order to do so, it would be a unilateral action as a matter of Union law, which distinguishes it from other Danish opt-outs.50

However, from the point of view of domestic law, matters are more varied given that the defence opt-out is just one of a number of special opt-outs that Denmark possesses.51 According to the national compromise reached in 1992 leading to the Edinburgh Decision, a referendum on the defence opt-out would be required before forgoing the defence opt-out on a political level. With regard to the most prominent opt-out on Justice and Home Affairs (JHA); to renege on the JHA opt-out, Denmark under national constitutional arrangements requires a referendum under Article 20 of the Constitution. A referendum to forgo the defence opt-out would also require a referendum, but by contrast, would be on the basis of Article 42 of the Constitution.52

This would mean; firstly, a political initiative by the national government; secondly, the passage of the applicable legislation in the Danish Parliament (Folketinget); and thirdly, approval by referendum – a national triple lock mechanism. Forgoing the defence opt-out however would require not only change in thinking with regard to Denmark and EU defence matters, but also would see some practical significance. Article 7 states that in the event of Denmark forgoing the defence opt-out, it would involve Denmark ‘apply[ing,] in full[,] all relevant measures then in force taken within the framework of the European Union’.49

49 Art. 7, Protocol (No 22) on the position of Denmark.
50 For example, abolishing the Danish opt-out from the third stage of EMU, and thus, the single Euro currency, would require convergence criteria before its adoption, despite the potential for the Member State to unilaterally abrogate it. See Protocol (No 16) on certain provisions relating to Denmark in C 202/1, supra n. 1. See U. Nieergaard, EURO-forbeholdet, in Egelund Olsen & Engsig Sørensen (eds), supra n. 4.
52 Thorning, supra n. 4, at 169–170. Art. 42(2) of the Danish Constitution: ‘Except in the instance mentioned in Subs. (7), no Bill which may be submitted to a referendum (see Sub-s. (6)), shall receive the Royal Assent before the expiration of the time limit stated in Sub-s. (1), or before a referendum requested as aforesaid has taken place.’ See J. Hartig Danielsen, One of Many National Constraints on European Integration: Section 20 of the Danish Constitution, 16 Eur. Pub. L. 181 (2010).
measures then in force taken within the framework of the [EU]'s. Thus, in such a circumstance, the defence opt-out would no longer be considered legally applicable whatsoever, and would be an irrevocable action.

4 APPLICATION OF THE DEFENCE OPT-OUT

The external relations of the Union are divided across the treaties with a variety of legal basis options available, depending on the type of policy in question. Broadly speaking, on the one hand are foreign, security, and defence policies through the CFSP and CSDP in the TEU. On the other hand in the TFEU are all other forms of external policies, including, inter alia, the Common Commercial Policy, development cooperation, humanitarian assistance, and other related external policies. In recent years, particularly post-Treaty of Lisbon, the EU and its Member States have been speeding ahead with defence integration, giving effect to the European Defence Union across both treaties. Given progress over recent years on how the European Defence Union has been manifesting itself, not all defence matters are now, strictly speaking, within the ambit of the CSDP where the defence opt-out is applicable.

Historically, the understanding of EU defence matters is that it has been conducted through the CSDP, and therefore, within the Council alone; excluding the Commission, the Parliament, and the Court. What is been seen is in the area of security and defence is a slow promotion of the role of the Commission, and thus, EU defence matters are now going beyond merely that of the CSDP. Thus, it is necessary to determine the applicability of the Danish defence opt-out with regard to a wide arrange of matters relating to the European Defence Union, including the CSDP, Permanent Structured Cooperation, EU agencies, the proposed EDF, the proposed EPF, the solidarity clause, and the European Intervention Initiative. Each of these initiatives within the broader sphere of the European Defence Union is analysed in turn.

4.1 COMMON SECURITY AND DEFENCE POLICY

The CSDP may appear to have intergovernmental instincts, but it is operational within the framework of the Union legal order, and thus, subject to ‘specific rules

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and procedures, just like the CFSP. Despite the attempted separateness of the CSDP, it has links with other parts of EU external action. This is a particular problem for the Danish defence opt-out from a practical perspective. Whilst it is recognized that the CSDP does not apply to all Member States equally, the defence opt-out explicitly mentions Articles 26(1) TEU, Article 42 TEU, and Articles 43–46 TEU only. The defence opt-out covers the Member State’s participation in the ‘elaboration and the implementation of decisions and actions’ within the Council with respect to the limited array of said legal bases. That raises the question as to what stage of negotiations leading up to the adopting of an EU legal act that Denmark no longer participates in the ‘elaboration’ of EU defence matters.

The practice that Denmark has followed within the Council is that once an envisaged measure has defence implications, Denmark removes itself from future discussions, and asks that the eventual legal act make reference to the defence opt-out within the preamble. When the EU is carrying out operations under the CSDP that have defence implications, such as military involvement, they cannot be charged to the EU budget. Thus, the defence opt-out ensures that Denmark is ‘not obliged to contribute financially’ to CSDP operations with defence implications. In 2004 when a Council Decision was adopted on how costs shall be administered for operations having defence implications, Denmark was sure to insist on a stipulation put into the Decision that such financing was not applicable to it. The operational missions launched by the EU under the CSDP follow the objectives decided by the Council. Such objectives are closely tied to the objectives that Denmark would see with respect to its own defence policies, in that the objectives are ‘almost identical’.

The EU’s operational CSDP missions involving deployment of personnel outside the Union are split across two different types of missions – military operations and civilian operations. With the defence opt-out, Denmark is precluded from participating in CSDP missions of a military nature, for it would violate the defence opt-out from the point of view that it be would implementing decisions

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55 Art. 24(1) TEU.
57 Art. 41(2) TEU.
and actions with defence implications. That said, the defence opt-out is no hindrance to Danish participation in CSDP missions of a civilian nature. As of 2019, there were sixteen operative CSDP missions – six of a military nature, and ten of a civilian nature, and Denmark has chosen to be a contributor to all ten of the civilian CSDP missions.

A particular mission worth noting was the EU’s first crisis management operation involving military forces. Operation Artemis in the Democratic Republic of Congo was to be a military mission, and thus the Council Joint Action made clear that ‘in conformity with … the Protocol on the position of Denmark annexed to the [treaties,] … Denmark does not participate in the elaboration and implementation of decisions and actions of the European Union which have defence implications’, and thus, ‘Denmark does not participate in the financing of the operation’. The operation was on foot of a UN Security Council Resolution called for ‘[UN] Member States to contribute personnel, equipment and other necessary financial and logistic resources’, but because of the involvement of the EU and it being under its auspices, the Danish defence opt-out was applicable.

The interchangeable nature of EU capabilities through the CSDP with NATO capabilities poses a problem for Denmark. To illustrate, in the context of Operation Concordia in Macedonia, armed forces of EU Member States on the basis of an EU operation took charge of a mission that was previously managed by NATO. Due to the existence of the defence opt-out, Denmark, which was a part of the NATO operation, had to withdraw from the mission given the military nature of the operation, which would have violated the defence opt-out due to it having defence implications. That said however, there was also an EU police mission, a civilian mission, which meant Denmark could participate, and did so.

Denmark’s defence opt-out has never been interpreted as to mean civilian operations (including those involving police forces) come within the scope of the defence opt-out, for they lack anything that could be considered as having defence implications. Similarly on civilian missions, the Police Mission in Bosnia

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61 ALTHEA/BiH, EU NAVFOR Somalia – Operation Atalanta, EUNAVFOR MED – Operation Sophia, EUTM RCA, EUTM Somalia, and EUTM Mali
62 EULEX KOSOVO, EUMM Georgia, EUCAP Somalia, EUCAP SAHEL Niger, EUCAP SAHEL Mali, EUAM Ukraine, EUAM Iraq, EUBAM Libya, EUROPOL COPPS Palestine, EUBAM Rafah
and Herzegovina (EUPM BiH) launched in 2003\textsuperscript{67} was overtaking tasks that were, up to that point, under the direction of the United Nations Mission in Bosnia and Herzegovina (UNMIBH). It was the Union’s first civilian crisis management operation under the CSDP. Denmark was able to legally contribute given the civilian aspects, and did so.\textsuperscript{68} However, the other EU mission in Bosnia and Herzegovina – Operation Althea\textsuperscript{69} – Denmark could not participate in given it was to be a military operation, thus automatically triggering the application of the defence opt-out.

In many cases, such as a Council Decision to launch a new EU military operation, the Danish defence opt-out is clearly applicable, and Denmark may not legally elaborate or implement such. However, there are circumstances in which the ‘defence implications’ of certain Council Decisions are not straightforward, and thus, require detailed legal analysis to determine whether the defence opt-out is applicable. Most curiously, there has been an EU joint civilian-military supporting actions, a hybrid decision, with such an example being a Joint Action on Sudan,\textsuperscript{70} EU Support to AMIS (Darfur), supporting the African Union. The preamble in the Council Decision stated that because of the Danish defence opt-out, ‘Denmark does not participate in the implementation of section III of this Joint Action and therefore does not participate in the financing of military components of this supporting action’. That meant that Denmark was partly contributing to the Joint Action as far as it could, without encroaching upon the defence opt-out. This illustrates how within certain legal acts, the civilian and military aspects can be delineated in certain circumstances, without the defence opt-out having to be invoked altogether. In more recent times, there has been a Military Planning and Conduct Capability (MPCC) unit within the EU Military Staff (EUMS).\textsuperscript{71} This has been to enhance the EU’s planning and conduct of EU military missions. Given MPCC clearly had


defence implications, Denmark’s defence opt-out applied, and was reflected in the preamble of the Council Decision.

4.2 Permanent Structured Cooperation

Permanent Structured Cooperation (PESCO) is a horizontal initiative between Member States within the confines of the EU treaties. Despite the basis for PESCO existing since the 2009 Treaty of Lisbon, it took eight years for appetite to finally be found for its use. This recent development contributes to the European Defence Union on defence industry collaboration and defence procurement, but seeks to be the basis for broadly inclusive defence integration within the context of the CSDP, and building upon European capabilities for the purposes of EU operations. The secretariat to PESCO is a joint body made up of the European External Action Service (EEAS), the European Defence Agency (EDA), and EUMS, and the legal basis for PESCO is to be found in Article 42(6) TEU, Article 46 TEU, and Protocol (No 10) on permanent structured cooperation. As a result, PESCO is thus squarely covered by the Danish defence opt-out, as these legal bases are explicitly mentioned in Article 5 of Protocol (No 22), and have defence implications. The Council Decision establishing PESCO specifically caters for the Danish position, stating that ‘[i]n accordance with Article 5 of Protocol No 22 on the position of Denmark annexed to the TEU and to the [TFEU], Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications. Denmark is therefore not bound by this Decision’.

Whilst PESCO could technically involve civilian operations, as opposed to military ones; PESCO is seen to be primarily of a military nature. It involves twenty-five Member States, and thus, Denmark is in a very small minority of states outside of it. PESCO is an envisaged step of seeking greater defence integration as per the EU treaties. Thus, in the future, PESCO could begin to absorb projects operations from outside the Union legal order, which would pose significant issues for Denmark. For example, if projects or operations with defence implications from either NATO or the European Intervention Initiative (E2I) were moved

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72 Art. 42(6) TEU, Art. 46 TEU, and Protocol (No 10) on permanent structured cooperation established by Art. 42 of the Treaty on European Union.


75 The only other Member States that are not participating in PESCO are the United Kingdom (given, at the time of writing, its pending withdrawal from the Union), and Malta; but these were voluntary national choices.

76 Analysed below.
into the PESCO framework, this would thus trigger Denmark’s removal from any
of the said NATO or E2I projects or operations. In the meantime, the initiation of
projects within PESCO will in many cases take some years to come to fruition.

4.3 EU Agencies

There are a number of EU agencies established on a CFSP legal basis whose
actions and activities may come into close contact with the Danish defence opt-
out, namely, the EDA, EUSC/SatCen, EUISS, and the agency-like ESDC. To
begin with, the EDA was established in 2004,77 and has been designed to assist
participating Member States in improving their military capabilities, identifying
operational requirements, and where appropriate, participate in improving such
capabilities with an armaments policy. Moreover, the EDA is to strengthen the
industrial and technological basis of the defence sector across Europe. The
Steering Board of the EDA is composed of Ministers for Defence of participating
Member States – the only EU agency whose steering body is composed of
ministerial ranks.

Initially, the EDA was established on the basis of what is now Article 28
TEU,78 which was not explicitly covered by the Danish defence opt-out.79
Nonetheless, a national political decision was made by Denmark in 2004 to not
to be involved, and thus, the then Council Joint Action on the establishment of the
EDA stated that ‘Denmark has therefore not participated in the elaboration and
adoption of this Joint Action and shall not be bound by it’. Yet it could have been
argued at the time that participating in itself, without leading to any defence
implications, would not have violated the defence opt-out. Nonetheless, the
legal basis of the EDA was subsequently changed, and with the entry into force
of the Treaty of Lisbon, it was given a standalone legal basis in EU primary law.
The EDA is now specifically mentioned in Article 42(3) TEU and Article 45
TEU, and the establishment decision is based upon these legal bases.80 As a result,
the Danish defence opt-out now prevents Danish participation in the EDA as a
member. In the current preamble of the founding Council Decision establishing
the EDA, it states that ‘[i]n accordance with Article 5 of Protocol No 22 on the
position of Denmark, annexed to the TEU and to the TFEU, Denmark does not

77 Council Joint Action 2004/551/CFSP of 12 July 2004 on the Establishment of the European Defence Agency,
L 245/17 (2004).
78 At the time, this was Art. 14 TEU.
79 The Danish defence opt-out at the time covered ‘Articles 13(1) and 17 … [TEU]’. Consolidated
Versions of the Treaty on European Union and of the Treaty Establishing the European Community, L 321 E/1
(29 Dec. 2006).
participate in the elaboration and implementation of decisions and actions of the Union which have defence implications. Denmark will therefore not be bound by this Decision.

The EDA does not assume that all EU Member States are part of its actions. In fact, the legal documents of the EDA do not refer to 'Member States' in the general sense, but rather, 'participating Member States'.\(^{81}\) Once a Member State is a party of the EDA, there is no differentiated integration within it. In fact, the only Member State that does have differentiated status with respect to the EDA is Denmark itself with respect to its defence opt-out.\(^{82}\) However, the EDA Decision is silent on whether a non-participating Member State can become an observer at the EDA. The EDA does have arrangements with third countries and other international organizations through administrative agreements,\(^{83}\) as well as memorandums of understanding and cooperation agreements,\(^{84}\) but these would not be suitable options for an EU Member State. Denmark is of the view that observer status of the EDA, if such a status was created, would not violate the defence opt-out, and has proceeded with an application to join.\(^{85}\) This observer status is not inhibited by the defence opt-out contained in the Protocol annexed to the treaties, nor the preamble to the Decision on the EDA on Denmark’s specific situation; recalling that Denmark was an observer at the WEU. Alternatively, if Denmark were to forgo on its defence opt-out,\(^{86}\) it would thus be able to accede to the EDA. However, that would entail a change to the Council Decision on the EDA which is on a CFSP legal basis, meaning that all other EU Member States would have to consent to such request.

The next EU agency on a CFSP legal basis is the European Union Satellite Centre (EUSC or SatCen).\(^{87}\) It has Article 28 TEU and Article 31(1) TEU as its legal basis.\(^{88}\) Originally decided to be established by the WEU, it is principally in existence to support CSDP operations and to have independent EU satellite

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\(^{81}\) Emphasis added.


\(^{83}\) There are administrative agreements between the EDA and Norway (2006), the European Space Agency (ESA) (2011), Switzerland (2012), the Organisation for Joint Armament Cooperation (OCCAR) (2012), Serbia (2013), and Ukraine (2015).

\(^{84}\) There are memorandums of cooperation between the EDA and the European Aviation Safety Agency (EASA) (2013) and the European Investment Bank (EIB) (2018); and an arrangement for cooperation between the EDA and the ATHENA Mechanism (2019).

\(^{85}\) The application for observer status is currently pending.

\(^{86}\) Analysed above in s. 3.4.

\(^{87}\) Butler, supra n. 2, at 189.

Given the legal basis for EUSC, Denmark’s defence opt-out does not apply. However, Denmark has insisted on drawing a distinction between the civilian and military aspects of what EUSC does, as the latter may entail defence implications, and thus, have the potential to violate the defence opt-out.

The preamble of the establishing Decision of the EUSC reiterates Denmark’s defence opt-out, however, as a hybrid Decision, importantly, states it ‘does not exclude the participation of Denmark in the civilian activities of [EUSC] on the basis of a declared willingness of Denmark to contribute towards covering the expenses of [EUSC] which do not have defence implications’. This is further supported by Article 17 of the Decision, which affirms that a member of the Board in respect of Denmark may participate in the agencies activities, that it should have equal treatment to its products and services as other Member States (as long as there are no defence implications), and that it may second staff to the agency. The defence opt-out with respect to the EUSC is thus illustrative of Denmark staying as closely aligned to developments of a security and defence nature within the wider Union legal order, whilst at the same time ensuring that the defence opt-out is respected in the process.

Next, the European Union Institute for Security Studies (EUISS) assists the EU and its Member States in the implementation of the CFSP, the CSDP, and other forms of EU external action, encompassing all aspects of the European Defence Union. More broadly, it aims to further the intellectual debate concerning European security, and strengthening the interests of the EU as a whole. Just like the EUSC, it is established upon a CFSP legal basis through Article 28 TEU and Article 31(1) TEU, entailing that the Danish defence opt-out does not apply. Instead, individual measures that Denmark partakes in at the EUISS would have to be scrutinized for their compatibility with the defence opt-out. To date, no actions or measures of EUISS have given any cause for concern for compatibility with the Danish defence opt-out.

Lastly, the European Security and Defence College (ESDC) was established and designed to improve the security and defence culture of Member States’ staff who handle matters relating to the CFSP and CSDP, indirectly supporting both military and civilian operations that the EU has. Strictly speaking, it is not an agency of the Union. Yet, it is closely intertwined

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92 S. Marquardt, Still New Kids on the EU’s Institutional Block? The High Representative and the European External Action Service Seven Years After the Entry into Force of the Treaty of Lisbon, in The EU as a Global Actor – Bridging Legal Theory and Practice 17 (J. Czuczai & F. Naert eds, Brill 2017).
with the EEAS, and has the legal capacity to execute certain tasks, including, amongst others, providing education and training for the needs of CSDP operations, which could entail defence implications. This is important with respect to the Danish defence opt-out given that certain tasks that the ESDC undertakes, with Denmark’s input, could conceivably be seen as Denmark ‘elaborating and [contributing to] the implementation of decisions and actions of the Union which have defence implications’, which is prohibited by the defence opt-out. The legal basis of the ESDC is Article 28(1) TEU, Article 42 (4) TEU, and Article 43(3) TEU; the latter two of which are covered explicitly by the defence opt-out. Yet, none of the underpinning secondary law governing the ESDC mention anything regarding the Danish defence opt-out, which normally do when Denmark believes the defence opt-out applies. This implies that Denmark’s participating in the ESDC, in principle, does not breach the defence opt-out. However, actions within the ESDC would have to be scrutinized from a legal perspective to determine the scope of each measure that the ESDC envisages undertaking, and whether Denmark’s input could be in violation of the defence opt-out.

4.4 EUROPEAN DEFENCE FUND

New initiatives with respect to the European Defence Union have arisen whereby a non-CFSP/CSDP legal basis is now being used for certain defence matters. In order for the European Defence Union to have true purpose, it has to have an underlying defence industry. In line with Union’s 2016 Global Strategy, the Commission has proposed a legislative measure that could increase the competitiveness and cross-border nature of the European defence industry – the EDF – a vertical initiative that will exist between the Commission and private commercial entities.

The 2016 Global Strategy also stated that ‘[EU] [d]efence … needs to be better linked to policies covering the internal market, industry and space’. The manifestation of this in part is the establishment of the EDF. Thus, the

93 The preamble to the Decision establishing the EEAS specifically states that the body ‘should provide … [the ESDC] … with the support currently provided by the General Secretariat of the Council’, Council Decision of 26 July 2010 Establishing the Organisation and Functioning of the European External Action Service (2010/427/EU), L 201/30 (2010).
95 Shared Vision, Common Action: A Stronger Europe, supra n. 12, at 50.
European Defence Union is now seeing steps towards increasing the capabilities of Member States’ military industries. Thus, the key partners here are not Member States, but rather, the private sector, which is part of the internal market. This is particularly remarkable given that EU defence spending is now being introduced at a time when national defence spending in Europe has been on a downward trajectory for many years.

What makes the EDF notable is that funding is to be located within the EU budget. The EDF is set to be a new dedicated fund under the next Multi-Annual Financial Framework (MFF) running from 2021–2027. Thus, it is the aim of the EDF to have enhanced research and development across the EU ensuring the EU’s strategic security and defence objects are maintained. In many ways, the proposed EDF follows the call of the St. Malo Declaration of the United Kingdom and France in 1998, pledging to ensure ‘a strong and competitive European defence industry’.

Predating this EDF has been the European Defence Industrial Development Programme (EDIDP) based on Article 173 TFEU. Similarly, the proposed legal basis for the EDF is Article 173 TFEU (under the ‘industry’ title); and Articles 182, 183, and 188 TFEU (under the ‘research and technological development and space’ title). Thus, the primary purpose is the pursuit of industrial policy, and from the perspective of Denmark and the Council Legal Service therefore, it is not directly linked with the Danish defence opt-out, which is thus not applicable. The proposed Regulation makes no reference to the Danish defence opt-out. This is logical given it is not based on a legal basis referenced explicitly in the defence opt-out, and nor does it have defence implications. Unlike the EDIDP however, where the EDA was responsible for implementing it; instead for the EDF, it will be the Commission doing the implementation – a stipulation that the European Parliament insisted on during the negotiations on its eventual adoption through the ordinary legislative procedure.

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96 Note that the proposed Regulation on the EDF is a ‘[t]ext with EEA relevance’, confirming this viewpoint.
99 Art. 173(1) TFEU states this legal basis is for the ‘competitiveness of the Union’s industry’.
100 Art. 182 TFEU is in regard to the Union budget and the multiannual financial framework; Art. 183 TFEU is in regard to the implementation of the MFF; and Art. 188 TFEU is merely a procedural point the EU institutions must follow.
4.5 European Peace Facility

Up to now, the role of the African Peace Facility (APF)\(^\text{102}\) has been to support operations through partners’ militaries outside of the EU budget. The funding comes from the European Development Fund, and its scope is curtailed to regional organizations in Africa, or the African Union (AU). In order to ensure respect for the Danish defence opt-out, the contribution of Denmark to this off-budget facility can only be used for civilian matters. There is no formal legal agreement between the Commission and Denmark on ensuring that this off-budget contribution from Denmark to the European Development Fund for use in the APF is spent on matters that do not have defence implications. However, given that the APF cannot fund military training, military equipment, as well as armaments or ammunition; it cannot, \textit{per se}, have defence implications. Despite this, in practice, Denmark individually monitors the projects in the APF that its contribution is spent on, ensuring that in it not participating in the ‘elaboration and the implementation of decisions and actions of the Union which have defence implications’.

However, the APF is set to be replaced by the proposed European Peace Facility (EPF). In 2018, the Council proposed that the EPF would be established on a number of legal bases – Articles 28(1), 30(1), 41(2), and 42(4) TEU. The EPF would allow for the financing of CSDP operations involving matters with defence implications. Accordingly, given the legal basis and substantive element, the Danish defence opt-out, in principle, applies to the EPF as a whole, and the preamble to the draft Council Decision establishing the EPF reiterates Denmark’s defence opt-out in its typical formula, and then stated further that ‘Denmark does not participate in this Decision and therefore does not participate in the financing of the Facility’\(^\text{103}\). However, in the explanatory memorandum, it goes on to say that ‘[g]iven Denmark’s non-participation in actions of the [EU] which have defence implications, it will not be bound to make yearly contributions to the Facility. However, it could potentially make voluntary contributions to individual actions’. Denmark, not fully satisfied with the initial proposal, sought reformulated language through the EEAS and the Council to develop new wording on the proposed EPF, to ensure that the state ‘is not obliged to contribute to the financing of operational expenditure arising from such measures’ that have defence implications. Therefore, if the eventual Council Decision reflects

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\(^{103}\) \textit{Proposal of the High Representative of the Union for Foreign Affairs and Security Policy, with the Support of the Commission, to the Council of 13 June 2018 for a Council Decision Establishing a European Peace Facility (HR(2018) 94).}
these intentions, the possibility will remain open for Denmark to make contributions to the EPF that do not have defence implications. However, how this manifests itself in practice will be seen once the EPF is established.

4.6 The Solidarity Clause

The EU now features a solidarity clause located in the TFEU.¹⁰⁴ This provision located in Article 222 TFEU provides for Member States to act jointly in the spirit of solidarity to come to the assistance of other EU Member States on foot of; firstly, a terrorist attack; and/or secondly, a natural or man-made disaster. The solidarity clause in Article 222 TFEU is not to be confused with the ‘mutual defence clause’ in Article 42(7) TEU – the latter being a distinctly defence-orientated clause, and one that is explicitly covered by the Danish defence opt-out.

The solidarity clause has a clear defence dimension to it,¹⁰⁵ but that does not mean it necessarily has defence implications. In textual terms, it can be summarized as being a ‘mandatory formulation emphasising the shared responsibility of EU institutions and Member States’.¹⁰⁶ Given its particular use of word the term ‘shall’, the solidarity clause is meant to apply over and above any bilateral assistance that other Member States may provide. Specifically, it states that ‘[t]he Union shall mobilize all the instruments at its disposal, including the military resources made available by the Member States’. Therefore, with the potential of military aspects, there is the prospect for the Danish defence opt-out to be invoked after the solidarity clause is utilized for the follow-up Council Decision on a CFSP legal basis that has defence implications.

In 2014, the Council adopted a Decision on the use of the solidarity clause.¹⁰⁷ Contained within it was no specific reference to the Danish defence opt-out. However, it did explicitly state that the solidarity clause implementation arrangements ‘will have no defence implications’, and that ‘[i]n the event that a crisis requires CFSP or CSDP action, a decision should be taken by the Council in accordance with the relevant provisions of the ‘Treaties’. In addition to the pre-amble of the Decision, it also reiterates it in Article 2(2).¹⁰⁸ Thus, the solidarity clause

¹⁰⁸ Art. 2(2): ‘This Decision has no defence implications.’
clause may lead to responses entailing defence implications, but in itself cannot lead to responses entailing defence implications. Under the solidarity clause alone, Denmark is perfectly capable of contributing to civilian aspects of actions, as long as a distinction can be drawn between civilian and military aspects. To date, the solidarity clause has never been invoked, and thus in practice, specific actions based on the solidarity clause have not been materially analysed for compatibility with the defence opt-out.

4.7 European Intervention Initiative

The European Intervention Initiative (E2I) presents the concept, at the instigation of France, that Member States could launch certain actions leading to civilian or military operations outside of the Union legal order altogether, disregarding the framework of the CSDP for operational activity. For now, it is not tied or linked to EU institutional structures. Being totally outside of the EU, the Danish defence opt-out does not apply to the E2I. Presently, the initiative involves ten Member States, including Denmark, who signed a letter of intent in June 2018.109 The aim is to build a European strategic culture around European security through a ‘flexible, non-binding forum of … participating states which are able and willing to engage their military capabilities and forces when and where necessary … without prejudice to the chosen institutional framework’.110 This initiative, distinctly possible and not prohibited by Union law, could run alongside PESCO.111

However, there are already concerning signs ahead for Denmark. The initiative also aims to ‘contribute to on-going efforts within the [EU] to deepen defence cooperation, notably PESCO’.112 More troublingly, ‘participating states will strive to ensure that [E2I] serves the objectives and projects of PESCO to the maximum extent possible, while taking into consideration national legal constraints … to PESCO’ – an implicit recognition of the Danish defence opt-out, and the future withdrawal of the United Kingdom from the European Union. Given the status of such operations falling outside of Union law would mean that the Danish defence opt-out would not be applicable, and there would be no EU legal constraints on participation of Denmark, as long as such was kept outside of the EU, and the

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109 Letter of Intent between the Defence Ministers of Belgium, Denmark, Estonia, France, Germany, the Netherlands, Portugal, Spain, and the United Kingdom Concerning the Development of the European Intervention Initiative (E2I) (25 June 2018). Finland were not original signatories of the letter of intent, but later joined on in Nov. 2018.
110 Ibid., at 2.
112 Letter of Intent, supra n. 109, at 2.
potential interrelationship with PESCO projects were to be kept as a sufficient distance. However, if anything related to the E2I was ever launched, and then brought inside the EU legal framework through the CFSP or PESCO, this would automatically entail the application of the defence opt-out, and Denmark would have to withdraw from such a specific activity. If E2I was ever to be called upon, in practice, for the foreseeable future, any response would likely be conducted under the EU’s CSDP operations, and thus, the Danish defence opt-out would apply.

5 THE DEFENCE OPT-OUT IN CONTEXT

Denmark is the only Member State with such a defence opt-out. However, it does not factor into wider European Defence Union considerations at Union level, and has not decreased progress given that the defence opt-out does not allow for the holding Member State from preventing progress on broader EU defence matters. As put, and correctly asserted at the time, the European Defence Union ‘will in all probability moved ahead without Denmark’. The continuing endurance of the defence opt-out can be seen as a contradiction in policy terms. As a small Member State, it seeks to build up influence on security and defence matters internationally, but has a self-imposed bar on building up support within the EU. Put more forcefully, the existence of the provision is an abhorrent way in which for the Member State finds itself in with respect to EU policy-making. The Member State’s interests, and the interests of the Union, would be served more strongly if Denmark’s full integration in the contemporary European Defence Union was realized. The then Danish Defence Minister in 2018 said that ‘it is in Denmark’s interest that the EU is able to efficiently respond to the challenges that Europe faces’, and that ‘Denmark will continue where possible to engage in and positively contribute’, whilst respecting the defence opt-out. Progress has, and will continue to be slow.

The Danish defence opt-out was legally constructed to politically allay fears of ensuring no Danish participation in EU defence matters at the time. The treaties today speak of a common defence, but with certain stipulations. Article 42(1) TEU, first paragraph, states the ‘progressive framing on a common Union defence policy … will lead to a common defence’. However, that is explicitly predicated

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upon when the European Council ‘acting unanimously, so decides’, and also, that any decision leading to a common defence must be ‘in accordance with ... [each Member State’s] respective constitutional requirements’. This voting right for all Member States on any form of common defence is not just held at political level by Member State’s individual governments, but there is also a guarantee of national locking mechanisms.

The EU may be ill-conceived as being a market-based organization, but in the twenty-first century, it is much more than that, for it is a deeply embedded constitutional project. The haunt of the European Defence Community (EDC)\textsuperscript{115} and its failure has plagued EU defence matters for a long time.\textsuperscript{116} The pressure for greater defence integration is growing due to a number of factors that have been posing particular challenges for Europe involving a mixture of old and new problems. Firstly, externally, there is a reviving Russia; a US administration cannot be fully relied on to come to Europe’s support; and ongoing strife in the Middle East and North Africa leading to migration of third-country nationals into Europe. Secondly, there are also internal struggles in the form of a withdrawing Member State, and ongoing rule of law challenges in certain other Member States. Well into the twenty-first century, there are now concrete signs of more positive, progressive developments for the European Defence Union. Europe no longer tries to shy away from its ambitions of strategic autonomy and the building up of a robust defence regime.

The participation of Denmark in the EDF is illustrative of how the defence opt-out is not all-encompassing, and how internal market thinking is now shaping the contemporary European Defence Union. To exemplify further, with respect to public procurement, the 2004 Public Procurement Directive\textsuperscript{117} was based on Article 53(1) TFEU (freedom of establishment), Article 62 TFEU (freedom of establishment), and Article 114 TFEU (internal market harmonization),\textsuperscript{118} and made clear that the Directive ‘shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article 296 of the Treaty.’\textsuperscript{119} A number of years later, the 2009 Defence Procurement Directive\textsuperscript{120} was adopted.


\textsuperscript{118} Then Art. 47(2) TFEU, Art. 55 TFEU, and Art. 95 TFEU.

\textsuperscript{119} Directive 2004/18/EC, supra n. 117, Art. 10.

upon the same legal basis. These legal acts had their legal basis in articles not covered by the defence opt-out, so therefore, Denmark was to be bound by their application, and thus transposed them into national law.\textsuperscript{121} Denmark has long partaken in joint public procurement with other Member States for large-scale acquisitions of military equipment.\textsuperscript{122}

What is been seen more broadly is the nexus of external security matters coming together with the realization of greater internal EU security. Behind the EU initiatives therefore have been to build Europe with greater autonomy. In the future, there is the declared intention at EU level to have greater intertwining between the civilian and military aspects of CSDP operations. As put, there will be a concerted effort to ‘foster synergies and complementarity between the civilian and military dimensions of CSDP’.\textsuperscript{123} This is a forthcoming problem for Denmark and its defence opt-out because if future CSDP operations are to jointly encompass both civilian and military dimensions, the use of the defence opt-out will become more frequent. Thus, Denmark may risk being excluded from civilian aspects as Denmark is the only Member State that, from the perspective of Union law, has to be capable of being able to draw a clear distinction between the civilian and military aspects of operations. Due to this, the defence opt-out is rightly now a discussion point in a national context.

It has been pondered whether the Edinburgh Decision would actually have the desired effect in time.\textsuperscript{124} Nearly three decades on, it is clear that it is only with the substance of the Edinburgh Decision was Denmark able to proceed with ratifying the Treaty of Maastricht. The allowances contained therein helped in ensuring a different outcome in the second referendum compared to the first. From the point of view of achieving stated objectives at a given time, the defence opt-out has had a remarkable realization, even if it has been circumspect from the perspective of European integration. Moreover, it has come at considerable cost, as it makes Denmark’s position as a security and defence actor unreliable, and the EU and its Member States cannot rely or depend on Denmark, whom, without the


\textsuperscript{122} For example, the Multinational Fighter Programme and the acquisition of F-16 aircraft. B. Heuninckx, The Law of Collaborative Defence Procurement in the European Union 113 (Cambridge University Press 2017).

\textsuperscript{123} Conclusions of the Council and of the Representatives of the Governments of the Member States, Meeting within the Council, on the Establishment of a Civilian CSDP Compact (Doc. 14305/18) 9 (19 Nov. 2018).

defence opt-out, would likely participate in all aspects of the European Defence Union.

One of the evident problems in the future for interpreting and applying the defence opt-out will be defining whether there can actually be a dividing line, in practice, between civilian and military operations; and ensuring that civilian missions do not substantively overlap with matters that have defence implications. Thus, the defence opt-out will be increasingly heavy on legal procedure, and each proposed EU legal action requiring Member State involvement will require careful legal scrutiny.

There has been increased legalization of the EU’s approach to defence matters, namely, the increasing role of the executive institution – the Commission. With the Commission now active in the European Defence Union and a new Directorate-General (DG) for Defence Industry and Space; the rise of the Commission in the European Defence Union poses a partial conundrum for Denmark, with its new ‘mostly in, sometimes out’ status. The Member State has traditionally seen the Council as the principle means of exerting its national interests, as well as being the place for ensuring the defence opt-out is respected. Whilst the legal analysis undertaken by the Denmark on each particular EU measure to ensure the defence opt-out is respected at all times, such analysis also looks at the contrary perspective to ensure that the defence opt-out is not invoked in areas where it is not strictly necessary. New institutions in the European Defence Union such as the Commission do not have the same level of expertise or institutional memory of the Danish defence opt-out in the same way that the Council does. Thus, these new actors in the field of defence have to acquaint themselves with the defence opt-out to determine where it is applicable, and where it is not.

There are slow signs that qualified majority voting (QMV) may be making its way into decision-making on a CFSP legal basis. Article 31(3) TEU – the passerelle clause – caters for the moving from unanimity to QMV under certain conditions with the unanimous approval of the European Council. Whilst there

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126 R. Brun Pedersen, Denmark and the Council of Ministers, in Denmark and the European Union 107 (L. Miles & A. Wivel eds, Routledge 2014).
127 Thorning, supra n. 4, at 164.
128 Butler, supra n. 2, at 258–268.
has been no European Council action on this yet, the Commission have urged it
despite having no formal legal power to do so.\textsuperscript{129} That being said, the passerelle
clause ‘shall not apply to decisions having military or defence implications’\textsuperscript{130} As a
result, even if the Danish defence opt-out was forgone, the Member State would
retain voting rights, and moreover, would retain the possibility to engage in
constructive abstention, which it has not been able to use given the existence of
the defence opt-out.

6 CONCLUSION

The European Defence Union has been incremental. The Union is leaning
towards a more comprehensive approach to defence matters, illustrated by defence
matters now coming with the sphere of the Commission. From a legal perspective,
the Danish defence opt-out has been ‘seen as an increasing problem’\textsuperscript{131} for some
time. In no way does it amount to a brake on the European Defence Union and
greater levels of integration. Rather, Denmark is left behind in such developments
related to the CSDP that are proceeding without it, and the legal nature of the
defence opt-out leaves it with no flexibility. Likewise, the Union loses out because
it does not have the entirety of Member State’s following such actions through. If
the defence opt-out was forgone, Denmark would gain the flexibility enjoyed by
all other EU Member States with regard to the European Defence Union, namely,
within the CSDP, to acquire voting rights that it presently does not have. The
defence opt-out ultimately went too far in law, in that it in effect was so broad to
become unaccommodating towards changes in the European Defence Union that
followed in subsequent decades. In the current era, other EU Member States have
no expectations of Denmark in fields of certain matters relating to the CSDP.

It can be suspected that Denmark, in the early use of the defence opt-out, was ‘somewhat paranoid’\textsuperscript{132} about how far the defence opt-out would reach. Since the
defence opt-out has come about, its legal interpretation has prevailed over any
subsequent political considerations given its compulsory application in given
circumstances. Yet by having a defence opt-out, Denmark is legally deprived of
having any influence over the CSDP. Barring a formative decision to abolish the
defence opt-out as permitted in Article 7 of Protocol (No 22), Denmark will stay

\begin{itemize}
  \item \textsuperscript{129} Communication from the Commission to the European Council, the European Parliament and the Council: A
  Stronger Global Actor: A More Efficient Decision-Making for EU Common Foreign and Security Policy,
  \item \textsuperscript{130} Art. 31(4) TEU.
  \item \textsuperscript{132} Wessel, \textit{The European Union’s Foreign and Security Policy: A Legal Institutional Perspective} (n. 23), at 140.
\end{itemize}
far removed matters emanating from the CSDP that involve defence implications, and thus, continue to sit on the fence on certain aspects of the European Defence Union as it continues to gather pace. Retention of the defence opt-out will mean Denmark will fall behind its abilities to contribute to EU’s wider global goals, which are aligned with Denmark’s own objectives. A stronger Europe in global foreign, security, and defence matters implies that Member States supports such endeavours.

The Danish defence opt-out is becoming increasingly out-of-kilter with wider EU policy developments. As a result, greater strain is being put onto the defence opt-out because of the intensification of EU developments, where the position on Denmark appears to be ‘in, except when legally out’. The legal onus continues to be on Denmark to contribute and follow developments in the European Defence Union that do not have defence (and thus military) implications, thereby meaning military operations, and only to apply the defence opt-out where it is necessary to ensure it is respected, as it has always done. To date, there has been a steady line of interpretation that Denmark and the Council Legal Service has followed to ensure the defence opt-out is applied correctly. Yet trying to apply the defence opt-out in a faithful way to the Protocol is becoming more time-consuming and more complex as the various initiatives in the European Defence Union becomes more sophisticated.

EU defence culture is seeing graduation towards EU actors beyond just the Council, and away from the immediate preferences of Member States. Moreover, the European Defence Union is now being shaped by internal market values. New legal actors now in the European Defence Union such the Commission might be less willing to accommodate the legal arrangements governing the defence opt-out compared to the Council, who have been accommodating to date. This will likely run the risk of Denmark having to more rigorously ensure that the defence opt-out continues to be respected, as well as ensuring other actors are adequately informed of the operational nature of the defence opt-out. In the longer term, the forgoing of the Danish defence opt-out would strengthen the EU’s ability to become a stronger and more coherent, global legal actor.
2019 European Foreign Affairs Review Annual Prize

The Editors and the Publishers are pleased to announce the winner of the 2019 European Foreign Affairs Review Annual Prize for the best article published by a scholar under the age of 35. The prize is awarded every year to encourage research by young scholars who give evidence of excellence, notably by being thematically groundbreaking, intellectually innovative or empirically significant.

The Selection Board has unanimously agreed to award the prize to Yun-Chen Lai for her article entitled:

Human Rights and Sustainability in EU-China Relations: The Limits of Normative Power

Yun-Chen Lai is an Assistant Professor, Department of Public Administration, Director of Division of International Academic Cooperation and Exchange, OIA, and Executive Director of European Union Research Centre of National Dong Hwa University, Taiwan.

The Editors wish to congratulate Yun-Chen Lai on the exceptional quality and innovative nature of her research and arguments.
**EFAR’s Special Issue 2021 Announcement**

As so many special issue proposals are received by the journal, the Board runs a competition where the most suitable proposal is selected from the pool of formal submissions in any one year. In order to consider your proposal, a formal submission must be made and the following sent to the editorial office:

1. A document outlining in detail the underlying theme of the special issue and why it is of relevance and importance. This document should also list all likely contributors, a short biographical note on each and the provisional or working title of each article.
2. Four full-length draft papers (6000–8000 words).

This proposal package must be received at the editorial office no later than 15 July 2020; the final decision will be announced by 15 September 2020. Publication will occur in the following year.

Please note that all special issues are required to be topical and interdisciplinary in nature (historical themes will not be considered). They must also remain within the space budget of 150 pages (64,000 words). The deputy editor can help with this assessment.

Finally, please note that the Editors retain the right to refuse publication of any or all articles in an accepted special issue based on the comments of the independent reviewers.