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AVOCAT À LA COUR

Wednesday 30 November 2016

## The full energizing of article 42 TEU

Presentation for ALDE



European Parliament

# What is article 42 TEU ?

# a long, rich and complex piece of legislation

42.1 What CDSP is:

- a. **part of CFSP**
- b. **operational capacities** – both civilian & military
- c. **provided by the MS**
- d. for missions **outside the EU** ⇔ art. 43

42.2 What CDSP aims at:

- a. progressive framing of a common **Union defence policy**
- b. that will lead to a **common defence**
- c. **which shall respect:**
  - the **specific character** of the security & defence policy of certain MS (the neutrals)
  - the obligations of certain MS, which see their common defence realised **in the NATO**

## ... Indeed complex

42.3 How CDSP is workable:

- a. pledge of MS to make capabilities available to the Union – both national and multinational (between MS - e.g. the Franco German brigade – Eurocorps - Euromarfor)
- b. pledge of MS to improve their military capabilities – under the control of EDA

42.4 How CDSP is decided:

- a. by the Council acting unanimously
- b. on a proposal of the HR/VP or an initiative of a MS
- c. the HR/VP propose the use of both national resources and Union instruments

42.5 The Council may 'entrust the execution of a task to a group of MS to protect the 'Union values and serve its interests' - ⇒ art. 44.

42.6 Those MS whose military capabilities fulfil higher criteria and which have made more binding commitments to one another with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework ⇒ art. 46 PESCO

42.7 If a MS is victim of armed aggression on its territory, the other MS shall have towards it an obligation of aid and assistance by all the means in their power... (Mutual Defence clause)



# Why so long and so complex?

## It was rewritten three times and duly negotiated

Draft Treaty establishing a Constitution for Europe (18 July 2003)

Treaty establishing a Constitution for Europe (16 December 2004)

Treaty on the European Union (17 December 2007)



**Some bits are missing** e.g. art. 40.7 of the draft treaty : in the in between the common defence is declared 'a **closer cooperation shall be established**, in the Union framework, **as regards mutual defence.**'



**Some articles seem to contradict themselves** e.g. PESCO seems to be mandatory (art. 42.6) and should have been declared by 2010 - but decided on a voluntary basis (art. 46.1.) which leads to the question: is PSDC mandatory or optional ?

## In order to understand article 42



**We have to go back to the intent of the 'Constituent'** (Group VII on defence at the European Convention)



**We have to read it as a whole** – reading it piece by piece is misleading  
If the Constituent's intention was to make several pieces of legislation (Mutual Clause, PESCO, EDA... ) he would have separated them in different articles

# Our understanding of article 42



It is all about a **goal**



a **process** to reach this goal



in a specific historical **context**

# The context [2001 – 2003]

## A confrontation between two different approaches

Deepening first – « Europe puissance » France [Chirac]

Enlargement first – “Europe is only a market place” U.K. [Blair]

## The trade-off

Enlargement comes first, but ‘the ones who want’ are free to move forward towards an integrated **‘European Defence & Security Union’** (preparatory works)

This is why PESCO can be triggered with a simple majority and there is no condition about the numbers of MS (two will do) – which is not the case of the ‘enhanced cooperation’s’ (unanimity) article 20 TEU and 329 (2) TFUE in the field of CSDP



## The question of ‘inclusivity’ is irrelevant

By nature PESCO is meant to be an ‘avant-garde’, a ‘centre of gravity’, ‘a core group’ – but everybody is welcomed to join - like for the euro

It is not meant to exclude the weakest MS but to allow the ones who do not want to join to keep out EDU (e.g. the neutrals – U.K. in 2002) whilst staying in the Union (‘flexibility’ – “géométrie variable”)

# The goal

is written in the treaty: art. 42.2.



**Step 1: a common (Union) defence policy**

Which was supposed to be implemented on the entry into force of the Treaty



'closer cooperation as regards mutual defence' (the missing bit)



**Step 2: a common (Union) defence**

Later  
(to be defined)



An integrated defence which does not have to wear the same uniform, (it is not a common army) but act in a coordinated manner *i.e.* :

**permanently** (for a foreseeable future)

and

**structurally** (which generates structural effects such specialisation)

# The process

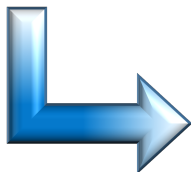
is described in the preparatory works and in the Heads of State and Government's speeches (France and Germany):

Amongst many declarations the most enlightening is the final report of the Group VII on defence:

*“Several members of the group proposed that, **like the Maastricht Treaty**, a special form of co-operation for the establishment and management of the euro, the new treaty took the form of **closer cooperation between Member States**. (Bold in the text) who wish to carry out the most demanding missions and fulfil the conditions necessary for their commitment to be credible. One of the conditions for participation in this **Eurozone of defence** must be a presumption of availability of pre-identified forces, as well as command and control capabilities. Another condition could be participation in multinational forces with integrated command capabilities. Other factors are equally important, such as force readiness, interoperability and deployment capabilities” \**



The whole idea of CSDP (and therefore article 42) is:  
to duplicate the **Eurozone's concept**



What is the Eurozone's concept?



Economic and Monetary Union

'EUROZONE' Concept

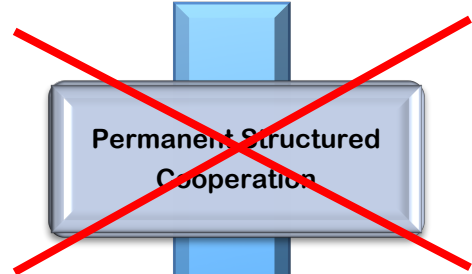
Defence and Security Union



Almost respected

Economic Convergence Criteria

is the idea that quantitative and qualitative criteria



2010 Not implemented

Majority rule

European Central Bank

whose strict application is guaranteed by an independent body

European Defence Agency

Unanimity rule

Euro

will create convergence and enable the good functioning of the tool

Common Defence Policy

Step 1

Economic integration Common market

that will produce the desired end state

Military integration Common defence

Step 2

## Important consequences



### **PESCO has no meaning by itself**

It is not a 'basket' that you could fill with different objects

Like the 'convergence criteria' it is a gear box

It has no rewards but to reach the goal of common defence



### **EDA without PESCO is like the BCE without the EURO**

Without PESCO it is impossible for the Agency to be an active part of the convergence process and almost impossible to be part of the Defence Planning Process

EDA shall be ruled according to the majority rule

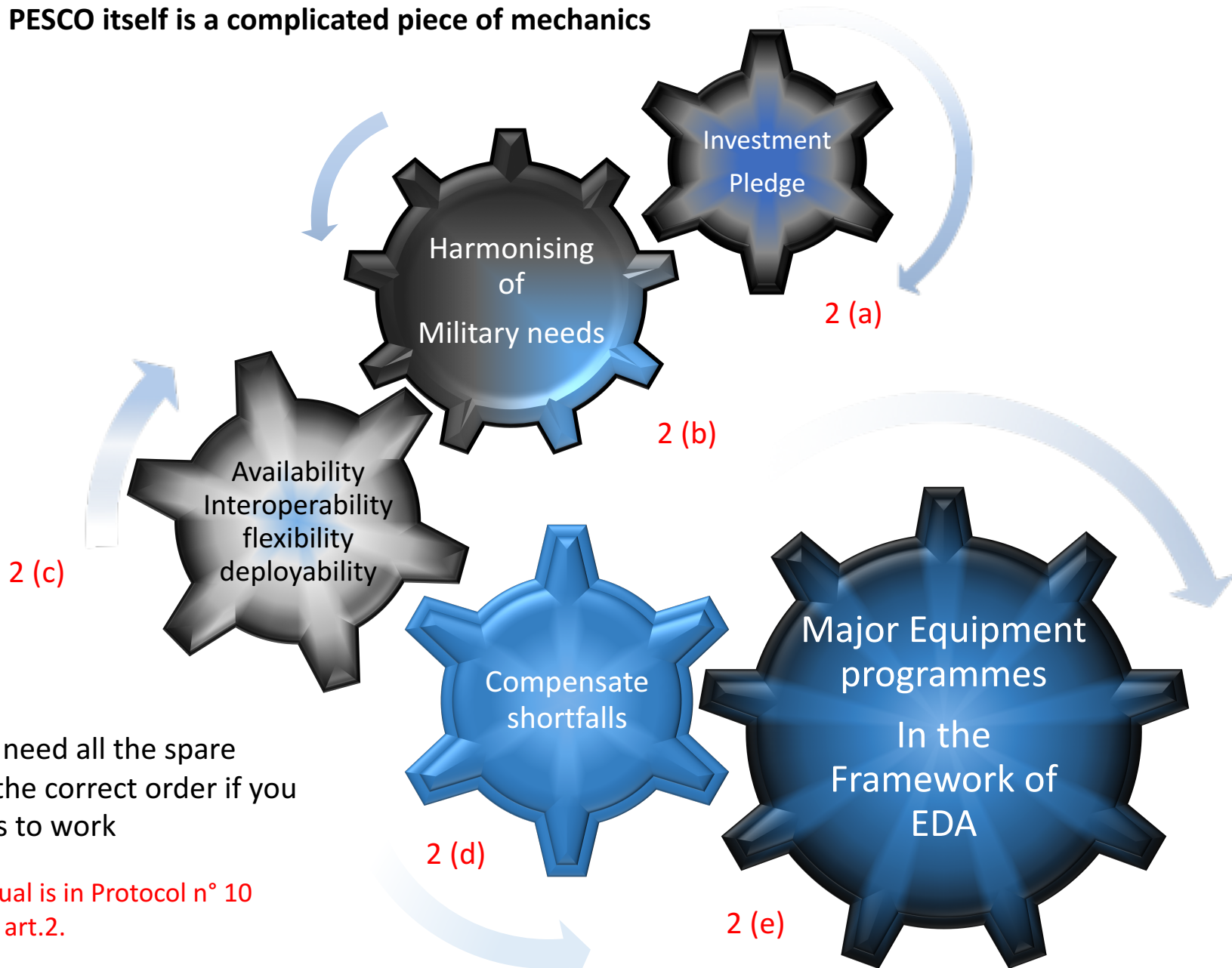


### **The whole process takes places 'within the Union framework'**

It does not imply a 'Federal State' but it goes as far as possible in a 'collaborative' (**intergovernmental**) process amongst 'Sovereign MS'

It was supposed to be '**pragmatic**' [Chirac – Humboldt University 2000]

# PESCO itself is a complicated piece of mechanics



And you need all the spare parts in the correct order if you want this to work

User manual is in Protocol n° 10 on PESCO art.2.



# why it didn't work?

## Too complicated to explain

The words 'structured permanent cooperation' are not understandable by the average citizen

## The two negative referenda and the subsequent change of mind-set

Fra : 29 May 2005 : 54 % non NL : 1 June 2005 : 62 % niet

## The lack of leadership

The Designers left [Chirac September 2005 - disease] [Schroder – November 2005]  
2007 Sarkozy versus Chirac's legacy : (bilateralism v/ unilateralism, Atlanticism v/  
Europeanism - U.K. oriented policy v/ Germany oriented policy)

## The 'pragmatic' approach

Make it simple – Don't touch anything please !

## The deadly debate about 'inclusiveness' & 'effectiveness'

Some countries were frightened to be left apart



**Today nobody reminds what PESCO is and nobody can explain it in simple words**

# How to implement the full energizing of article 42?

# Option 1 - carry on being

'pragmatic'...

Forget about article 42 and enforce  
the NATO Wales Summit  
Investment pledges [Sept. 2014]

We have been pragmatic for 17 years.

So why should we change, do we?

But...

	Dépenses de défense en Milliards de dollars (aux prix constants et taux de change 2010)					En pourcentage du PIB		
	2014	2015	Evolution en %	2016 estimation	Evolution en %	2014	2015	2016
France	50,2	49,6	- 1,2	49,9	+ 0,6	1,84	1,80	1,78
Germany	43,2	43,7	+ 1,2	44,6	+ 2,1	1,19	1,19	1,19
Italy	22,1	20,8	- 5,8	23,1	+ 10,6	1,09	1,02	1,11
Spain	12,6	13,1	+ 4,5	13,2	+ 0,6	0,91	0,92	0,91
Poland	9,9	12,4	+ 24,8	11,4	- 7,8	1,85	2,23	2,00
Netherlands	9,8	10,0	+ 2,6	10,3	+ 2,3	1,15	1,16	1,17
Greece	5,5	5,8	+ 7,1	5,8	- 0,1	2,22	2,38	2,38
Belgium	4,8	4,6	- 4,6	4,4	- 5,3	0,97	0,91	0,85
Portugal	2,9	3,0	+ 3,0	3,2	+ 5,7	1,30	1,32	1,38
Romania	2,5	2,7	+ 11,4	2,9	+ 6,5	1,35	1,45	1,48
Czech Rep.	2,0	2,3	+ 14,4	2,3	+ 0,3	0,96	1,06	1,04
Hungary	1,2	1,3	+ 10,3	1,5	+ 9,4	0,87	0,94	1,01
Slovakia	1,0	1,1	+ 18,7	1,2	+ 4,8	0,99	1,14	1,16
Croatia	0,8	0,8	- 1,0	0,7	- 8,8	1,41	1,37	1,23
Bulgaria	0,7	0,7	+ 1,0	0,7	+ 6,2	1,32	1,29	1,35
Slovenia	0,5	0,5	- 1,9	0,5	+ 1,5	0,98	0,94	0,94
Estonia	0,4	0,5	+ 7,8	0,5	+ 6,4	1,94	2,07	2,16
Lithuania	0,4	0,5	+ 31,7	0,7	+ 34,1	0,88	1,14	1,49
Latvia	0,3	0,3	+ 14,3	0,4	+ 42,2	0,94	1,04	1,45
Luxembourg	0,2	0,3	+ 16,4	0,3	+ 5,7	0,39	0,43	0,44
<b>EDA countries</b>	<b>170,9</b>	<b>174,2</b>	<b>+ 1,9</b>	<b>177,6</b>	<b>+ 1,9</b>	<b>1,46</b>	<b>1,44</b>	<b>1,46</b>
UK	57,2	55,8	- 2,5	59,9	+ 7,4	2,20	2,09	2,21
Turkey	14,8	15,2	+ 2,3	14,7	- 3,2	1,70	1,69	1,56
Norway	6,9	6,8	- 1,7	7,2	+ 5,4	1,51	1,16	1,54
Denmark	3,8	3,8	- 1,1	3,9	+ 4,3	1,16	1,18	1,17
Albanie	0,2	0,2	- 11,6	0,2	+ 7,9	1,34	1,49	1,21
<b>NATO - Europe</b>	<b>253,8</b>	<b>255,8</b>	<b>+ 0,8</b>	<b>263,4</b>	<b>+ 3,0</b>	<b>1,46</b>	<b>1,43</b>	<b>1,44</b>
US	611,2	593,6	- 2,9	+ 608,4	+ 2,5	3,78	3,59	3,61
Canada	18,0	17,6	- 2,7	+ 18,1	+ 3,3	1,02	0,98	0,99
<b>North America</b>	<b>629,2</b>	<b>611,1</b>	<b>- 2,9</b>	<b>626,5</b>	<b>+ 2,5</b>	<b>3,51</b>	<b>3,33</b>	<b>3,36</b>
<b>NATO</b>	<b>883,0</b>	<b>867,0</b>	<b>- 1,8</b>	<b>890,0</b>	<b>+ 2,7</b>	<b>2,50</b>	<b>2,41</b>	<b>2,42</b>

## It will be costly...

+ 72 Bn € / year for EDA countries

+ 23 Bn € / year only on equipment

## probably inefficient ...

Military efficiency is not only a question of **inputs** but also of **outputs** and moreover efficient political process, efficient military chain of command, good interoperability...

Doctrine  
Organization  
Training  
Materiel  
Leadership and Education  
Personnel  
Other ...



In one word: **integration**



**under U.S. control...**

Forget about European strategic autonomy

**and likely to become more complicated with the new US president-elect**

2016 prix courants	Effort à faire pour remplir le critère de 2 %		Effort à faire pour remplir le critère de 20 %	
	En millions de dollars	En millions d'euros	En millions de dollars	En millions d'euros
Belgium	+ 5 443	+ 4 971	+ 1 806	+ 1 649
Bulgaria	+ 319	+ 292	+ 113	+ 103
Croatia	+ 380	+ 347	+ 147	+ 134
Czech Rep.	+ 1 782	+ 1 627	+ 603	+ 550
Estonia	0	0	+ 32	+ 30
France	+ 5 391	+ 4 923	+ 1 321	+ 1 207
Germany	+ 27 678	+ 25 277	+ 8 110	+ 7 406
Greece	0	0	+ 232	+ 212
Hungary	+ 1 218	+ 1 113	+ 331	+ 302
Italy	+ 17 542	+ 16 020	+ 3 550	+ 3 242
Latvia	+ 152	+ 139	+ 39	+ 36
Lithuania	+ 216	+ 197	+ 60	+ 54
Luxembourg	+ 932	+ 852	+ 306	+ 279
Netherlands	+ 6 396	+ 5 841	+ 1 781	+ 1 627
Poland	0	0	0	0
Portugal	+ 1 250	+ 1 142	+ 544	+ 497
Romania	+ 972	+ 888	+ 254	+ 232
Slovakia	+ 742	+ 677	+ 157	+ 144
Slovenia	+ 451	+ 412	+ 166	+ 151
Spain	+ 13 252	+ 12 103	+ 3 178	+ 2 902
<b>EDA countries</b>	<b>+ 84 116</b>	<b>+ 72 334</b>	<b>+ 22 730</b>	<b>+ 20 758</b>
Denmark	+ 2 464	+ 2 251	+ 757	+ 691
Albanie	+ 94	+ 86	+ 36	+ 33
Norway	+ 1 773	+ 1 619	+ 454	+ 415
Turkey	+ 3 264	+ 2 981	+ 770	+ 703
UK	0	0	0	0
<b>NATO - Europe</b>	<b>+ 91 712</b>	<b>+ 83 754</b>	<b>+ 24 747</b>	<b>+ 22 600</b>
Canada	+ 15 706	+ 14 343	+ 3 440	+ 3 141
US	0	0	0	0
<b>North America</b>	<b>+ 15 706</b>	<b>+ 14 343</b>	<b>+ 3 440</b>	<b>+ 3 141</b>
<b>NATO</b>	<b>+ 107 418</b>	<b>98 098</b>	<b>+ 28 187</b>	<b>25 741</b>





# But think about it: 'NATO's 2 % policy is Article 42's false twin

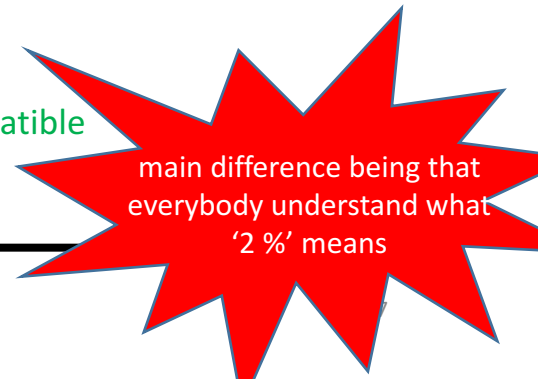
## Similarities

<b>Quantitative criteria</b>									
NATO Investment Pledges	<table border="0"> <tr> <td>Def. exp. as a % of GDP</td> <td style="color: red;">2 %</td> <td>Mil. equipment. exp. as a % of GDP</td> <td style="color: red;">20 %</td> </tr> </table>	Def. exp. as a % of GDP	2 %	Mil. equipment. exp. as a % of GDP	20 %				
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EU PESCO	<table border="0"> <tr> <td>Envisaged in the prelim. works</td> <td style="color: red;">No</td> <td>Article 2 protocol 10 TEU</td> <td style="color: red;">To be defined</td> </tr> </table>	Envisaged in the prelim. works	No	Article 2 protocol 10 TEU	To be defined				
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<b>Qualitative criteria</b>									
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Art. 2. e. protocol 10	take part, where appropriate, in the <b>development of major joint or European equipment programmes</b> in the framework of the European Defence Agency.								

# 'NATO 2 % policy': PESCO's false twin

## Differences

<p><b>Process</b></p> <p>NATO Investment Pledges</p> <p><b>Real commitment</b> EU PESCO</p>	<p>Non binding</p> <p>Binding</p> <p> compatible</p>
<p><b>Duration process</b></p> <p>NATO Investment Pledges</p> <p><b>Allows greater speed</b> EU PESCO</p>	<p>10 years time from 2014</p> <p>To be defined</p> <p> compatible</p>
<p><b>Members concerned</b></p> <p>NATO Investment Pledges</p> <p><b>More realistic</b> EU PESCO</p>	<p>All</p> <p>An 'avant-garde' followed by all the willing</p> <p> compatible</p>
<p><b>Aim</b></p> <p>NATO Investment Pledges</p> <p><b>Political purpose</b> EU PESCO</p>	<p>Share the burden : no free riders – moral responsibility</p> <p>&amp; 'keep the Americans in'</p> <p>Common Defence Policy</p> <p>Common Defence</p> <p> compatible</p>



So why Member States should be so reluctant about PESCO,  
whilst they have agreed highly demanding criteria at the Wales Summit  
Assuming that those Investment pledge are serious ?

# Option 2 – push the can down the road: PESCO



'Let's go, Let's go!'

'Let's go, Let's go!'

And we stand still

'The comic-opera vision of European military grandeur' N. Vinochur NYT 2003- Last example:



'The 'axis of unfeasible' NYT 2003

'Council conclusions on implementing the EU Global Strategy in the area of Security and Defence' 14 November 2016

'Actions' – 'The Council agrees on the following **actions**' (...) 'Drawing on the full potential of the Treaty: PESCO

'17. To strengthen CSDP, **the Council agrees to also explore the potential of an inclusive Permanent Structured Cooperation (PESCO)**, including a **modular approach** as regards **concrete projects** and initiatives, subject to the willingness of Member States to undertake **concrete commitments**. It invites the High Representative to provide elements and options **for further reflection as soon as possible**.' and give 7 'types of possible CSDP civilian missions and military operations derived from the EU level of ambition.

But who remembers Council's 'Policy Framework for Systematic and Long-Term Defence cooperation' 18 November 2014 ?

A state of the art beautiful eight pages document with 13 bullet points as 'guiding principles' and the solemn declaration that '**Member States are committed to deepening defence cooperation** as a way to develop, deploy and sustain future-oriented military capabilities, which the may make available, on a national and voluntary basis, for national, multination, CSDP, United Nations or NATO engagements'

Which is the same thing: Policy Framework for Systematic and Long-Term Defence Cooperation = PESCO

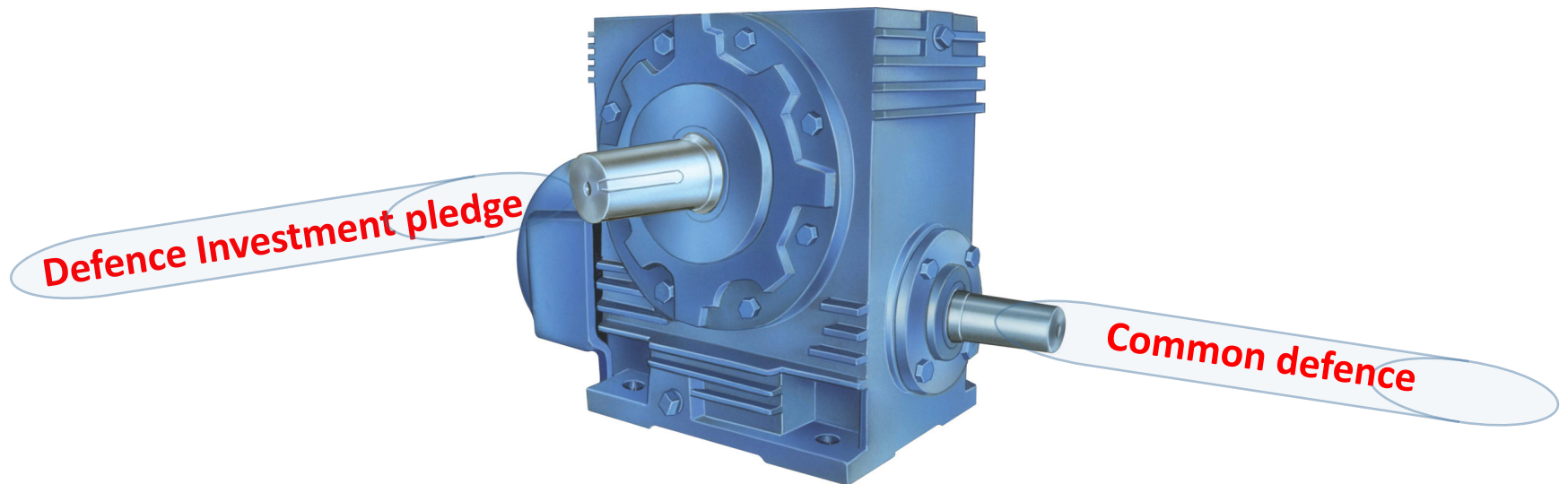
**People in Europe have had enough of political wishful thinking and lip service**



**Once again PESCO is a gear box – an essential piece designed to produce convergence**

**You just have to switch it on**

**once it is done, it's done and you can do it only once**



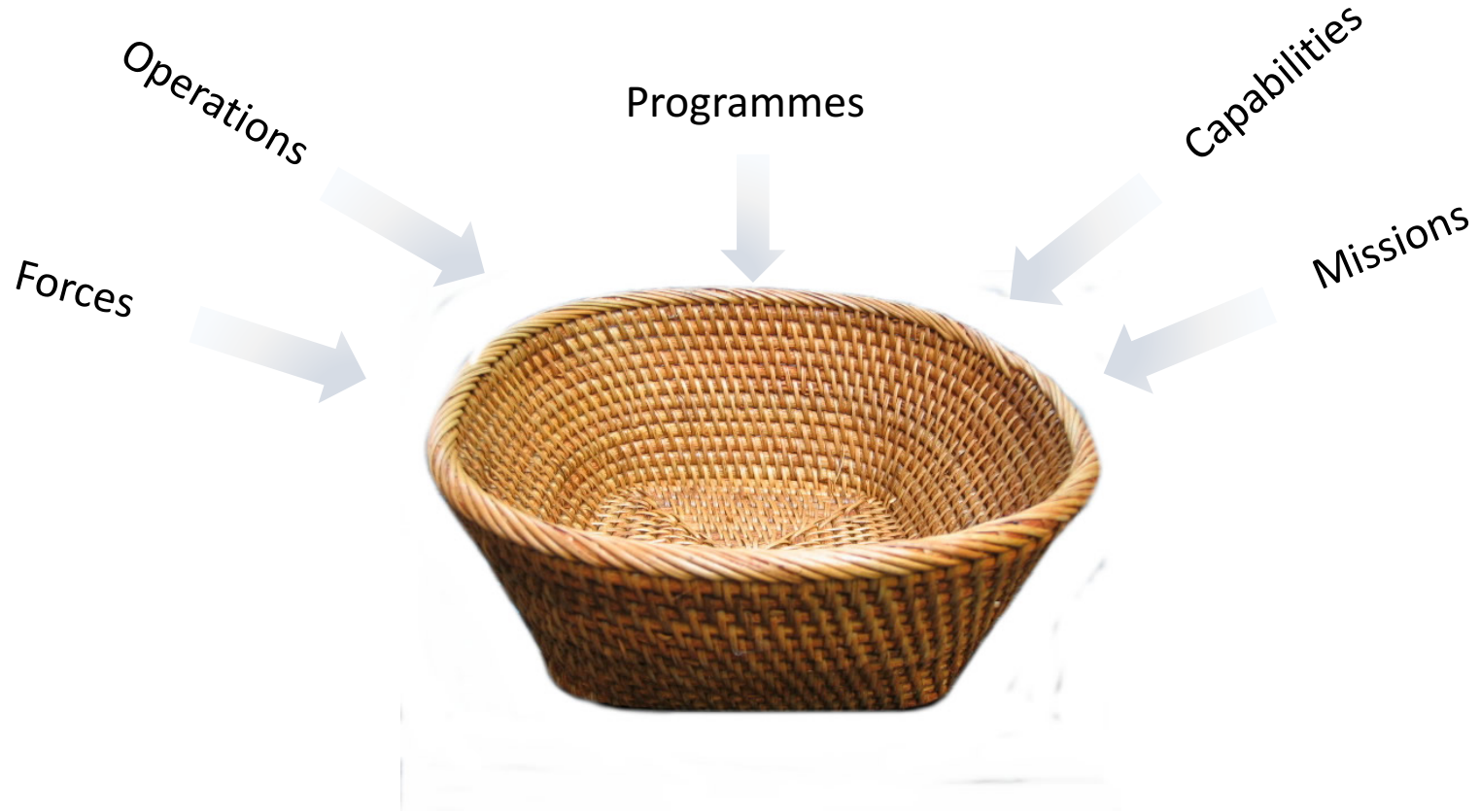
**However, you can fine tune many gears**

**starting with the level of the investment pledge**

NB. The word 'cooperation' is misleading. The correct word should have been 'convergence criteria'

Indeed PESCO is not a basket in which MS could put whatever they'd like

On a 'modular' and 'voluntary' basis



Stop this Mr Bean sort of policy



PESCO is within your hands  
Don't explore it  
If you really believe in what you are saying

**Just do it**

# Option 3 – Revive the old ‘European Defence Union’

## ‘common defence’ = PESCO + AED



### 1. Forget rhetoric and Trigger PESCO for real

- ✓ It does not require any change of the treaty

It is a mere question of implementation [just read art. 2 protocol n° 10 TEU]:

- a) Increase your defence equipment expenditure
- b) Harmonize your needs (through an authentic defence planning)
- c) Increase your interoperability, deployability, availability, flexibility
- d) Compensate your shortfalls
- e) Implement major equipment programmes in the framework of EDA

- ✓ It can be triggered by two MS only

- ✓ The Council will vote according to the majority’s rule to allow PESCO

- ✗ PESCO is in the hands of the M.S.



**Nobody can force them to trigger it**

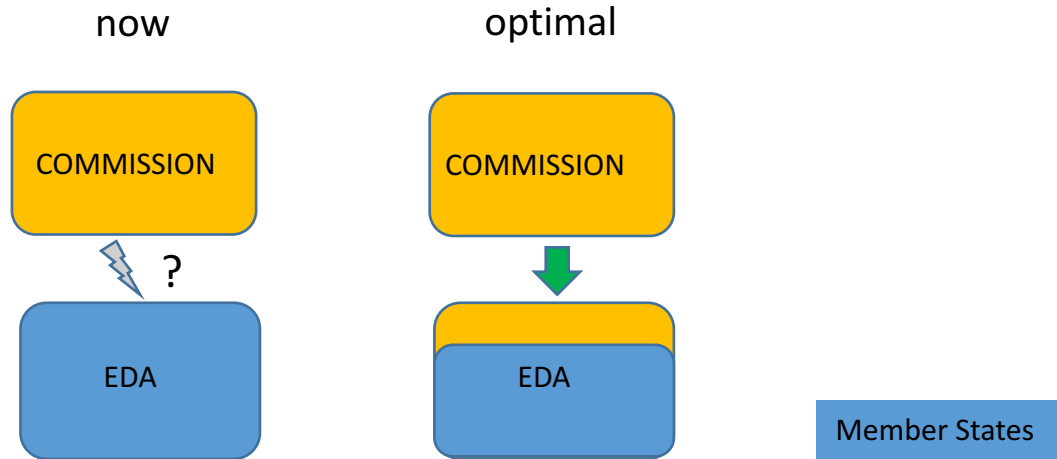


## 2. Reform EDA for real: implement majority rule & merge with OCCAR

- ✓ The majority rule is in the Statutes : [art. 9.2]

Find the right articulation between community method and intergovernmental approach

Go back to the initial plan

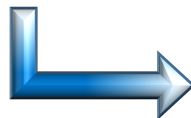


The real name of EDA is: an 'Agency in the field of defence capabilities development, research, **acquisition** and **armaments**

Go back to the initial plan

- ✓ The merger with OCCAR  
it will give EDA the technical expertise it is lacking and connect it with armament programmes

- ✗ It seems to be a heck of a change



**will the Member States accept it?**

**In both case:**

## **Common defence is all about Governance**

It is not only about putting together the 'tools', the 'arms' and 'legs' of the Military

It is about creating the political 'brain' in the first place, the **arbitration body** able to make critical decisions: do we go to war? Do we use the force? Against who? How and when?



**How do we agree to always agree even if we disagree?**

Think about the Falklands, Iraq, Libya, Mali, Syria, Ukraine...

## **The essential part of EDU is PESCO – the sleeping beauty of European defence**

decisions and recommendations within the framework of PESCO 'shall be adopted by **unanimity**' of the participating Member states' - art. 46 (6)



**Change would require to modify the treaty**

## **Without majority rule it will be fairly difficult to run a common defence**

EDU as designed in 2002 suffers the same **flaws** than the Economic & Monetary Union

**It might be better not to awake the beauty if it reveals a monster**

## Option 4 move to a 'defence eurogroup' and forge a new European Defence Union

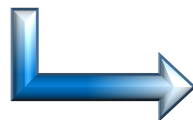


Create from scratch a renewed European Defence Union

- ✓ Everything is open to negotiation
- ✓ The new treaty can overcome the 'inclusive' problem making no specific requirement – they are already in the NATO Investment pledge
- ✓ The new treaty can overcome the governance problem: accepting the majority rule

It is outside the framework of the Union (like was the euro, and Schengen)

- ✗ It requires strong Political will from the Member States in order to adopt the unanimity rule and therefore transfer their sovereignty

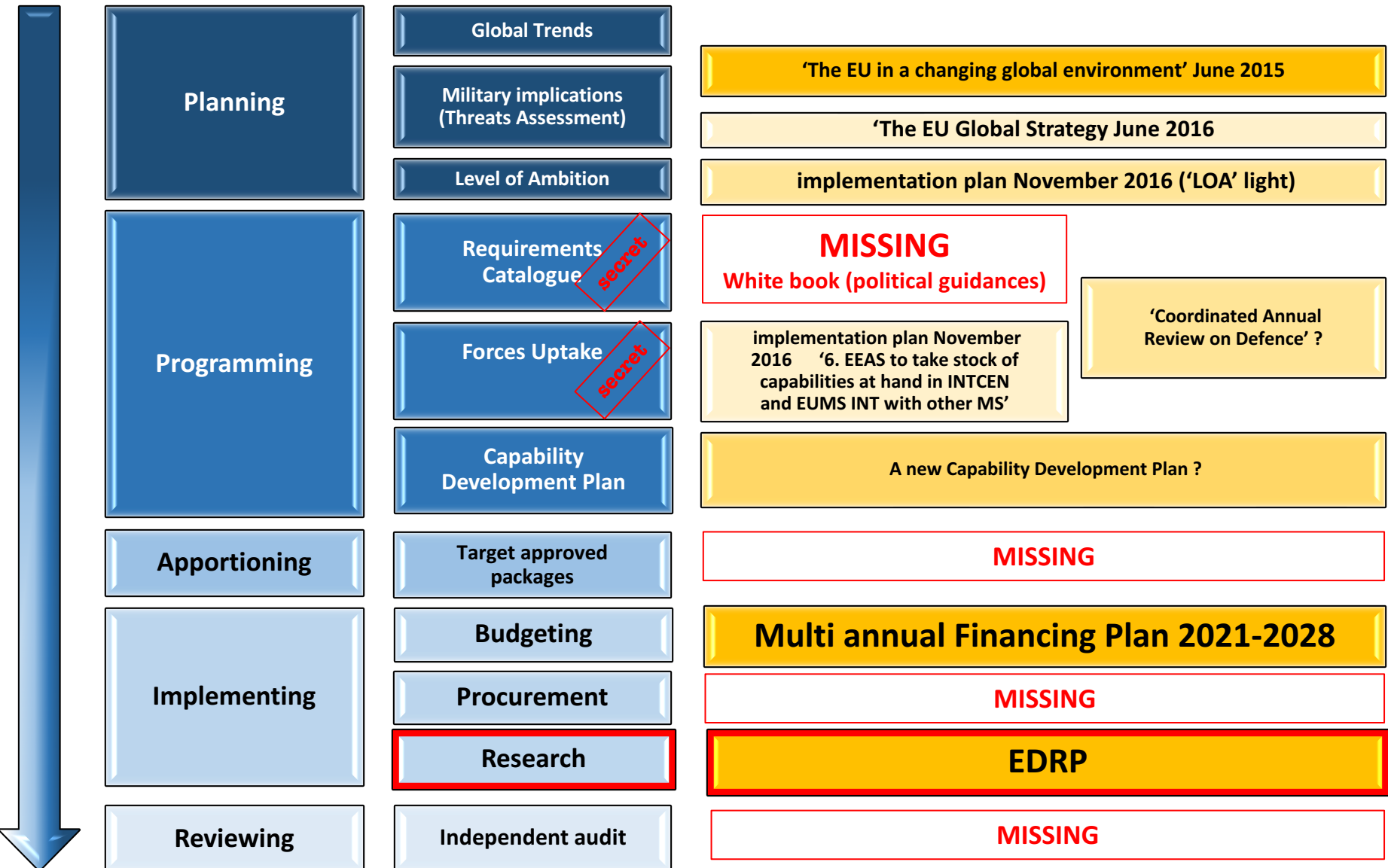


**for the moment this political will  
does not seem to exist**

NB. This option has been explored and proposed in a French Senate's Report [2013]



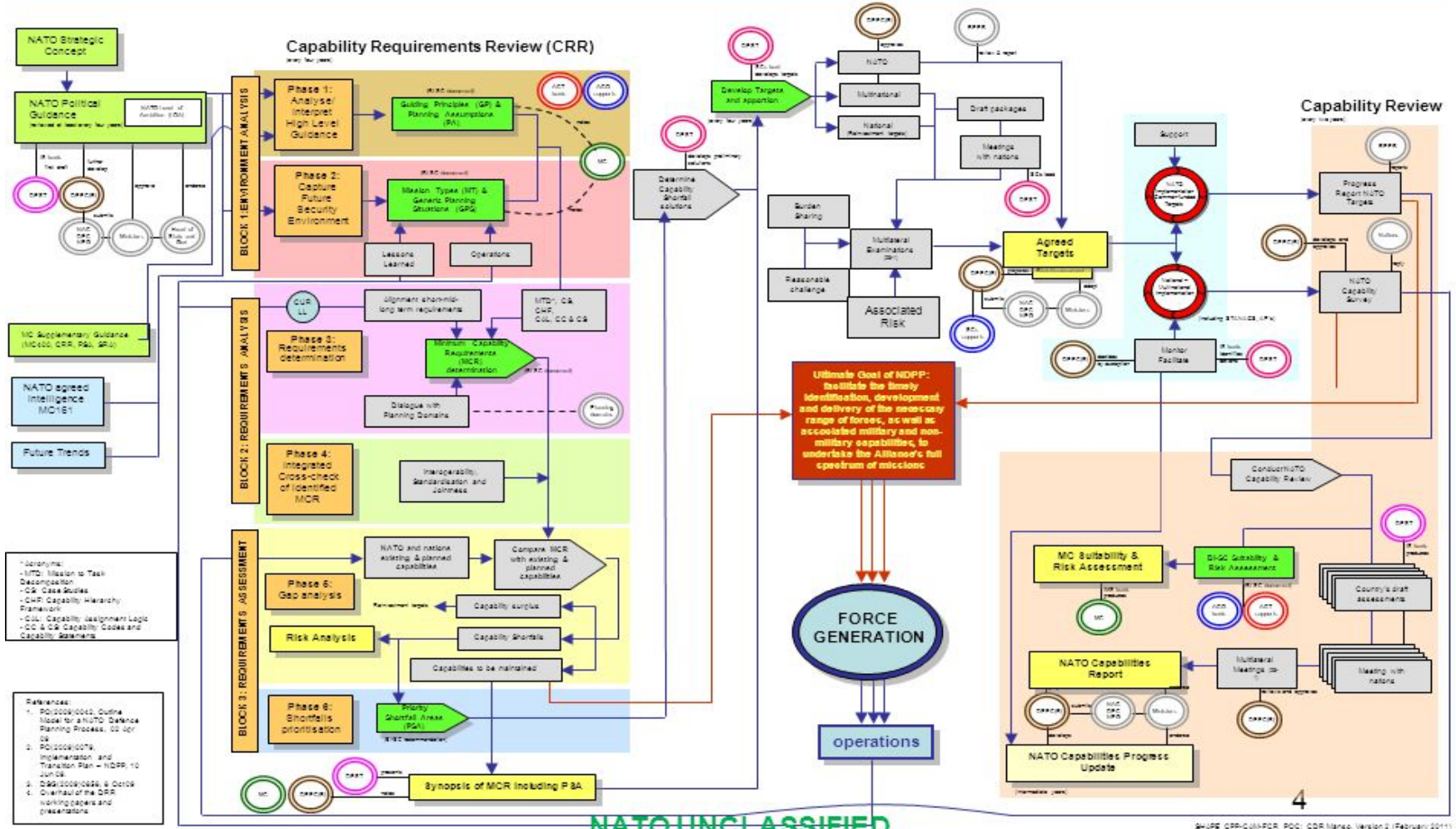
# Fill the European Defence planning process missing bits





# Or bridge global strategy and European Defence research programme with NDPP

## NATO Defense Planning Process



# Conclusion

## The answer to the question is in your hands

No experts can make the choices in place of elected people

## There is an astral conjunction

threats are up

American defence's pledge is down

European defence's fiercest opponent is out

## If not now when?

The time has come to raise the flag and to fight for our ideas

'United we stand, divided we fall'

