
Common European Union Army Under the Constitutional Law of European Union

Radim Doležal*

Summary: Essay explores the legal possibility of creation of unified armed forces of the European Union. Essay analysis the possibility from the point of view of EU constitutional law. Primary focus of essay is the competence of EU. First, a question of division of powers between the EU and Member States is addressed. Second, a question of concrete legal basis for exercise of the determined power is addressed. As a secondary problem, essay explores the question of sovereignty of Member States and whether it would be infringed. Essay gives arguments why creation of unified European Union armed forces is legal and why it does not infringe the Member States' sovereignty.

Keywords: Armed Forces, Army, Common Foreign and Security Policy, Constitutional Law, Division of Powers, EU, European Armed Forces, European Army, European Security and Defence Policy, European Union, European Union Law, Law of European Union, Legal Basis, Proportionality Principle, Sovereignty, Subsidiarity Principle, Unification

1. Introduction

The main hypothesis of this essay is: It is possible to establish Common European Union Army under the constitutional law of European Union. I expect this hypothesis to be confirmed. In order to do so, I need to explore:

- 1) What sort of power under the division of powers by TFEU would creation of Common EU Army fall into?
- 2) What conditions need to be met for EU to exercise this sort of power?
- 3) What arguments would support compliance of these conditions?
- 4) Is there any concrete legal basis for creation of Common EU Army?

In the process of proving the main hypothesis I will address also a minor legal issue: the impact of establishing Common EU Army on Member States sovereignty. This I consider to be a great issue, not only legal one. Still, for the purposes

* Master student, Faculty of Law, Palacký University Olomouc, Czech Republic. Contact: dolezal.radim@gmail.com.

of this essay it remains minor for the purpose is not to deal with the sovereignty of the Member States, but the legal possibility of creating such an army. Minor issue will be addressed by answering following questions:

- 1) How is state's sovereignty defined?
- 2) Would a creation of Common EU Army breach such sovereignty?

The topic of Common EU Army has been recently mentioned in relation to the events of last months – situation in Ukraine, Turkey, Middle East, or so called immigrant crisis.¹ On 22nd of November 2016 the European Parliament adopted resolution on the European Defence Union.² Resolution requests the European Council to begin with harmonisation of European armed forces under the European Defence Union.³

Common EU Army is not a new topic though. When Winston Churchill was talking to the Assembly of the Council of Europe he expressed the importance of “*unified European Army*” that would have “*unified command*”.⁴ In 1952 the European Defence Community Treaty was drafted. Its objective: to merge national armies into one (European Defence Forces) with independent supranational administration under the scrutiny of European Assembly and Court of Justice.⁵

More recent history goes to the 1992 when Common Foreign and Security Policy (hereinafter CFSP) was formed by Maastricht Treaty. Later in 2000 Common Security and Defence Policy (hereinafter CSDP) was formed as a part of CFSP by the Treaty of Nice. The objectives of CSDP were set out by Petersberg Tasks and later by the Treaty of Lisbon.⁶ The objectives are now part of art. 42 and following articles of TEU. According to them the military units can be deployed for (1) peacekeeping, (2) conflict prevention, (3) strengthening

¹ This question was raised also by Czech Prime Minister Bohuslav Sobotka in his speech towards Czech diplomatic staff. KOPECKÝ, Josef. *Bez společné evropské armády se neobejdeme, řekl velvyslancům Sobotka*. [online]. Available at: <http://zpravy.idnes.cz/bez-spolecne-evropske-armady-se-neobejdeme-rekl-velvyslancum-sobotka-1kl-/domaci.aspx?c=A160822_092756_domaci_kop>

² European Parliament resolution 2016/2052 (INI) of 22 November 2016 on the European Defence Union

³ “*invites the European Council to take concrete steps towards the harmonisation and standardisation of the European armed forces, in order to facilitate the cooperation of armed forces personnel under the umbrella of a new European Defence Union*” Ibid., para. 12

⁴ TRYBUS, Martin. *The Legal Foundations of a European Army*. [online]. Available at: <<http://ssrn.com/abstract=2675017>>, p. 2

⁵ So called Plan Pléven that later failed because it was not ratified by all the members of the Treaty. European Defence Community Treaty 1952

⁶ TRYBUS: *The Legal Foundations...*, p. 3–4

international security, (4) help in self-defence conducted under art. 51 of United Nations Charter.⁷

In 1998 J. Chirac and T. Blaire agreed on the Joint Declaration on European Defence that later continued with conferences in Cologne and Helsinki.⁸ Blaire and Chirac were able to find a consent because they realized that even if Member States spend as much money on armed forces as USA they will not reach the same level of advancement at the end.⁹ These conferences came up with further development: General Affairs Council, the Political and Security Committee, EU Military Committee, EU Military Staff,¹⁰ European Rapid Reaction Force (never actually formed), and later also Battel Groups and EUFOR.¹¹

From history of the common defence, we can draft a following conclusion. (1) In historical and current EU the common defence was and is realized through policy depending on political consent of (at least some) Member States. (2) Under such policy EU armed forces were formed.¹² (3) The existing EU armed forces consisted of voluntary contributions of Member States. (3) The existing EU armed forces were established for a certain goal and temporarily (*ad hoc*). (4) The existing EU forces were never to substitute national armed forces.¹³

This essay is concerned with EU armed forces that do not fall under the conditions of previous conclusion. This essay considers true unified army¹⁴ for which I will use the term Common EU Army. Common EU Army would be the only all-military force in the EU made out of national armed forces; these would not be all-military and would be considered a part of the Common EU

⁷ Art. 42 TEU

⁸ TRYBUS: *The Legal Foundations...*, p. 5–6

⁹ “...although the EU Member States spend about two-thirds of what the USA spend on defence, they can only deploy about 10 per cent of what the USA can deploy.” TRYBUS: *The Legal Foundations...*, p. 5

¹⁰ European External Action Service. *Shaping of a Common Security and Defence Policy*. [online]. Available at: <http://eeas.europa.eu/topics/common-security-and-defence-policy-csdp/5388/shaping-of-a-common-security-and-defence-policy-_en>

¹¹ TRYBUS: *The Legal Foundations...*, p. 6

¹² Some – European Rapid Reaction Force – only on paper.

¹³ Such voluntary *ad hoc* cooperation seems to be the best option because it widely preserves the member states’ autonomy (and therefore sovereignty). But from strategic point of view the opposite is the truth. As it is discussed in the Report of a CESP Task Force voluntary *ad hoc* cooperation is way too loose. As a result, it undermines the CSDP and weakens EU as a whole. The Report gives an example of Netherlands that gave up its heavy armour. For Netherlands it was unwise to keep it, but from EU strategic point of view it was important contribution. Another example is situation in NATO where EU member states are unwilling to take an action. BLOCKMANS, Steven, FALEG, Giovanni. *More Union in European Defence*. [online]. Available at: <<https://www.ceps.eu/publications/more-union-european-defence>>, p. 7

¹⁴ I would say the unified European Army Churchill had in mind.

Army.¹⁵ This is where the development points to; where the history never really went yet; what is more controversial; what is maybe even called for by some and against by others.

2. Common EU Army as a Shared Competence

The EU is an entity made out of and by its members – states.¹⁶ Being such an entity EU has a structure, makes its own law, and respects the rule of law and the fundamental rights. These are notoriously known facts. Important is that these facts are considered to be the arguments supporting the requirement that the EU had a constitution.¹⁷

One of the attributes of constitution as a basic law of any entity is a division of powers.¹⁸ The powers within EU are divided horizontally between the bodies of EU itself and vertically between EU and Member States.¹⁹ The power between EU and Member States is divided into three categories: (1) Exclusive Competences, (2) Shared Competences, (3) Supportive Competences.²⁰

Exclusive Competences in art. 3 TFEU and Supportive Competences in art. 6 TFEU are defined by taxative list of areas where EU exercises its competence. Shared Competences in art. 4 TFEU are defined by demonstrative list of such areas.²¹ Common army is not listed among the Exclusive or Supportive Competences of EU; neither common defence is; neither common security is; neither anything at least remotely pointing towards unified armed forces. Therefore, the security and defence area including armed forces is part of Shared Competences. This is supported by art. 4 TFEU explicitly listing area of security in para.2, subpara. j).

Within the category of Shared Competences both EU and Member States can be legislatively active and exercise their powers.²² Member States are given two conditions to meet in order to do so. (1) EU has not exercised its competence.

¹⁵ I. e. with national armed forces harmonised in such a level that they seize to be all-military and attain narrow but high specialisation forming one autonomous and coherent Common EU Army. This seems not so far from the idea suggested in European Parliament resolution 2016/2052 (INI).

¹⁶ HAMULÁK, Ondrej, STEHLÍK, Václav. *European Union Constitutional Law*. Olomouc: Palacký University, 2013, p. 15.

¹⁷ HAMULÁK, STEHLÍK: *European Union Constitutional Law...*, p. 13.

¹⁸ “The doctrine of the separation of powers was for centuries the main [10] constitutional theory which claimed to be able to distinguish the institutional structures of free societies from those of non-free societies.” VILE, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. [online]. Available at: <http://oll.libertyfund.org/titles/677#Vile_0024_34>

¹⁹ HAMULÁK, STEHLÍK: *European Union Constitutional Law...*, p. 15.

²⁰ *Ibid.*, p. 2.1

²¹ HAMULÁK, STEHLÍK: *European Union Constitutional Law...*, p. 21.

²² Art. 2 TFEU.

(2) EU decided not to exercise its competence.²³ EU is also given two conditions to meet in order to exercise its powers within the Shared Competences areas. It is (1) subsidiarity, and (2) proportionality.²⁴ Therefore, EU can legally establish Common EU Army by its legislature if it meets the conditions of Subsidiarity and Proportionality principles.

3. Subsidiarity and Proportionality principles

Subsidiarity and Proportionality principles are to balance two interests: (1) EU's interest in achieving its objectives effectively on its own, (2) Member State's interest to keep as much sovereignty as possible.²⁵ Principle of subsidiarity means that EU shall act only if "*the proposed action cannot be sufficiently achieved by Member States ... but can rather ... be better achieved at Union level.*"²⁶ Principle of Proportionality means that EU's action (form and content) "*shall not exceed what is necessary*".²⁷ Subsidiarity and Proportionality as set out in TEU suffer from one problem that has been pointed out by many scholars. It is "*textual failure*"²⁸ because it is too "*vague and general*".²⁹

Subsidiarity and Proportionality are closely dealt with in Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality (hereinafter Protocol No. 2). In the preamble of Protocol No. 2, we find the main lead for interpreting Subsidiarity and Proportionality – the aspiration to keep the decision process as close to citizens as possible. Protocol No. 2 sets out procedure that must be followed by EU institutions so their actions comply with the Subsidiarity and Proportionality. National Parliaments are involved into this procedure – they have a say in legislative process since the draft legislative act was drawn.³⁰ The scrutiny of Court of Justice³¹ and other EU bodies³² is emphasized.

²³ Art. 2, para. 2 TFEU – It is basically one condition considering omission either wilful or not.

²⁴ Art. 5, para. 1 TEU.

²⁵ BARTON, Olivia. An Analysis of the Principle of Subsidiarity in European Union Law. In *North East Law Review*, 2014, vol. 2, iss. 1, p.84; The second interest is in my opinion also EU's interest since EU is its Member States.

²⁶ Art. 5, para. 3 TEU.

²⁷ Art. 5, para. 4 TEU.

²⁸ SCHÜTZE, Robert. *European Constitutional Law*. Cambridge: Cambridge University Press, 2012, p. 178.

²⁹ ESTELLA, Antonio. *The EU Principle of Subsidiarity and its Critique*. Oxford: Oxford University Press, 2002, p. 95.

³⁰ Art. 4 Protocol No. 2.

³¹ Art. 8 Protocol No. 2.

³² Art. 9 Protocol No. 2.

Subsidiarity is defined by (1) the sufficiency standard and (2) the efficiency test. The sufficiency standard means that Member State has to carry out an objective sufficiently; if not, EU institution can act. The efficiency test means that EU institution can act if its action will be more efficient than action of the Member State.³³ Here a question arises. Who is going to decide whether certain action (objective) undertaken by a Member State was sufficient, and whether an EU institution can carry out such action (objective) more efficiently? The answer seems to be: EU institution. Such answer is disturbing and also wrong.

The Member States are part of the decision process held over the question of sufficiency and efficiency. This is given in the Protocol No. 2. If only EU institution would decide what is sufficient and efficient, it would be dangerous because the objective of the whole principle is to keep it as close to citizens as possible.³⁴ Without citizen's (Member State's) control of whether the principle is met it is a mere declaration; EU institution can easily get around, claim it has been fulfilled and usurp the control.

Another problem with Subsidiarity lies in the objective that is to be achieved sufficiently and efficiently. This objective is given by EU; it is EU's interest.³⁵ From this point of view Subsidiarity looks like a smart move; result: EU will reach its interest no matter what. Either the Member States will fulfil EU objectives and interests, or if not EU institution will take over and fulfil it. Some would say "*masking principle*",³⁶ others might point even to bullying and power usurpation. They would be right if we would rip it out of the context. Truth is that it is the Member States who decide what EU objectives will be. They do so for example through nationally elected European Parliament members and nationally elected national governments members who form the Council and other EU institutions. The Member States exercise the control of Subsidiarity also in this aspect.

The problems arising from Subsidiarity and Proportionality as set out in TEU could be addressed further but it is not the purpose of this essay. From problems outlined above a conclusion can be made. Where is a problem, there is also a solution, if there is a will. Subsidiarity and Proportionality remain valid lawful principles that need to be met when exercising shared power.

Before moving on with the topic of Common EU Army we need to say how Subsidiarity and Proportionality can be met in practice. Meeting the Subsidiarity and Proportionality in practice is mostly a question of political consent between

³³ BARTON: *Analysis of the Principle of Subsidiarity...*, p. 84.

³⁴ Preamble of Protocol No. 2

³⁵ BARTON: *Analysis of the Principle of Subsidiarity...*, p. 85

³⁶ DASHWOOD, Alan. The Relationship Between the Member States and the European Union/ European Community. *Common Market Law Review*, 2004, vol. 41, iss. 2, p. 36

EU institutions and Member States. That is why TEU and Protocol No. 2 give only procedural norms without a detailed substantive definition of Subsidiarity and Proportionality. That is why the Court of Justice is sometimes reluctant towards cases concerning the principles of Subsidiarity and Proportionality.³⁷

4. Arguments supporting compliance with the Subsidiarity and Proportionality principles

The most common arguments in favour of Common EU Army are concerned with economic issues and power attainment issues.³⁸ These two are closely connected. It is economically effective to unify for military defence purposes. It is economically effective to hold higher importance within the world community; this can be achieved by attaining power through Common EU Army.

Günter Verheugen, former Commissioner for Industry and Entrepreneurship, stated that EU can never be a global player without having a Common Army.³⁹ Franco Frattini, former Italian Minister of Foreign Affairs, stated that Common Army would strengthen the position of EU in the world.⁴⁰ Radek Sikorski, former Polish Minister of Foreign Affairs, stated that if EU wants to become a superpower it has to have the means to assert its interests outside the territory of EU.⁴¹

Current trend is that each Member State in general spends less money on its army than Russia or some Asian states.⁴² a lot of Member States have small economy resulting in a small army; if they would want to reach a level of a bigger economy they would have to spend higher percent of GDP in comparison.⁴³ History showed that even after that, disunited Member States might still fall behind the bigger states like USA or Russia.⁴⁴ History also shows that states which

³⁷ BARTON: *Analysis of the Principle of Subsidiarity...*, p. 86–88

³⁸ In its Executive Summary the CESP report calls for stronger CSDP because otherwise EU will not be able to promote its values and interests. BLOCKMANS, Steven, FALEG, Giovanni. *More Union in European Defence*. [online]. Available at: <<https://www.ceps.eu/publications/more-union-european-defence>>

³⁹ KUBEŠA, Milan. Evropská armáda – utopie nebo reálná budoucnost? ... aneb společné ozbrojené síly EU „jinak“. In *Vojenské rozhledy*, 2013, roč. 22 (54), č. 2.

⁴⁰ KUBEŠA, Milan. Evropská armáda – utopie nebo reálná budoucnost? ... aneb společné ozbrojené síly EU „jinak“. In *Vojenské rozhledy*, 2013, roč. 22 (54), č. 2.

⁴¹ Ibid.

⁴² UHER, Michal. *NÁZOR: Federální armáda Evropské Unie*. [online]. Available at: <<http://www.armadinoviny.cz/nazor-federalni-armada-evropske-unie.html>>

⁴³ UHER: *Federální armáda Evropské Unie...*

⁴⁴ TRYBUS: *The Legal Foundations...*, p. 5.

used to be unified were able to have more advanced army for lesser percent of GDP than they have today after they have split up.⁴⁵

United States Armed Forces are composed of (1) United States Army, (2) United States Army Reserve, (3) Army National Guard.⁴⁶ The US Army is an all-military federal army; the USAR is simply reserve force; the ARNG is a militia force of each state under governor's command.⁴⁷ This unified structure enables to focus the economic means on the US Army as the only all-military armed force acting outwards. Whereas in EU each Member State focuses its economic means on its own all-military armed force.⁴⁸ That constitutes diversification of economic means and duplicity in expenditures resulting in ineffectiveness.⁴⁹

Common EU Army free of this diversification and duplicity would be economically more effective. British economist Keith Hartley estimated that savings for armaments would be 17% if the Common EU Army is established. The number would grow substantially because states could save not only on armaments but also on wages and running a whole administrative body.⁵⁰

Common EU Army would be more effective from the military point of view. Member States' armed forces are "*ill-equipped and ... [do] not allow the member states to autonomously manage crises...*".⁵¹ The situation is not any better when it comes to EU armed and defence programs. Nowadays, EU armed force is created *ad hoc* for each operation. Such *ad hoc* created military force is less effective because it is consisted of soldiers who are coming from different background – "*they are not one force but a combination of forces*".⁵² Moreover, the Member States are reluctant to provide the troops and technical support for the EU military operations.⁵³

Common EU Army would be more effective also from the political point of view. Foreign policy backed by a strong army is more successful and easier. EU has no army therefore in the most intensive situations its voice might be ignored.⁵⁴ Militarily stronger EU would strengthen NATO.⁵⁵

Militarily stronger EU would also strengthen itself internally because stronger external military force would calm internal radicalisation. The EU is

⁴⁵ E.g. Czechoslovakia. UHER: *Federální armáda Evropské Unie...*

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ BLOCKMANS, FALEG: *More Union in European Defence, Report...*, p. 2.

⁵⁰ TRYBUS: *The Legal Foundations...*, p. 9.

⁵¹ BLOCKMANS, FALEG: *More Union in European Defence, Report...*, p. 11.

⁵² Ibid., p. 10.

⁵³ Ibid., p. 3.

⁵⁴ TRYBUS: *The Legal Foundations...*, p. 11.

⁵⁵ BLOCKMANS, FALEG: *More Union in European Defence, Report...*, p. 4.

experiencing internal radicalisation because (1) Europe is surrounded by unstable and hostile states, (2) EU itself is unable to react adequately if necessary in extreme situation due to (a) lack of military strength, and (b) political denial of such a lack.⁵⁶

The biggest military power in terms of spending is USA.⁵⁷ USA spends ca. 600 million GBP annually.⁵⁸ Second biggest is China, spending five times less⁵⁹ (i. e. ca. 120 million GBP annually). EU Member States spend together on their armies ca. 400 million GBP annually.⁶⁰ This simply means that EU could be the second biggest military superpower without spending more than it is spending now or even with spending at least one time less. Common EU Army would mean (1) saving financial means, (2) better functioning, better trained, and better equipped military forces, (3) more inner stability (getting rid of inner radical elements), and (4) better external promotion of the EU's values and interests.

As it is set out above, one of EU objectives is security and defence, meaning also military defence and military maintained security.⁶¹ This objective falls into the category of Shared Competences. EU can exercise its power within the category of Shared Competences if and in so far as the Member States cannot reach the objective sufficiently and efficiently enough on their own. The EU institutions and Member States decide whether an objective was met sufficiently and efficiently.

This means that if EU institutions and Member States come to a consent that national armies do not fulfil the objectives of EU security and defence sufficiently and efficiently enough, EU itself can start acting. Such action would under these circumstances mean creation of Common EU Army if EU and Member States come to a consent that it is proportional. The arguments given above could⁶² comply with the principles of Subsidiarity and Proportionality. As a result, EU could⁶³ exercise its Shared Competence by creating Common EU Army. Such action would comply with the legal requirements given by constitutional law of EU.

As we can see, the legal validity of such argumentation lies and falls with wide political consent. That applies to any other argument given in favour of complying with the Subsidiarity and Proportionality of EU exercise of Shared Competence – the creation of Common EU Army.

⁵⁶ Ibid., p. 1.

⁵⁷ Ibid. p. 3.

⁵⁸ TRYBUS: *The Legal Foundations...*, p. 9.

⁵⁹ BLOCKMANS, FALEG: *More Union in European Defence, Report...*, p. 3.

⁶⁰ TRYBUS: *The Legal Foundations...*, p. 9.

⁶¹ Articles 42 and 43 TEU.

⁶² In my opinion not only could but actually do.

⁶³ In my opinion should.

5. Concrete legal basis for creation of Common EU Army

Once EU has the competence, the concrete legal basis has to be determined.⁶⁴ Concrete legal basis sets the borders for the competence of the EU institution and its exercise – extent, content, character.⁶⁵ In some cases the concrete legal basis is given by the Treaties; in some the so called flexible clause of art. 352 TFEU can be used.⁶⁶ The use of art. 352 TFEU cannot be by its own definition a legal basis for creation of Common EU Army.⁶⁷

Without concrete legal basis properly determined an action of EU institution can be annulled.⁶⁸ Proper determination of legal basis is such that is consistent with the aim and content of the legal basis in question.⁶⁹ This means that certain act of an EU institution cannot be founded in a legal basis which aim and content is merely similar to the act in question.⁷⁰

The problem outlined in previous paragraph is the reason why arts. 24 to 41 TEU cannot be legal basis for the creation of Common EU Army. In relation to this issue the rules in arts. 24 to 41 TEU on CFSP are general and therefore derogated by the rules in arts. 42 to 46 TEU on CSDP.⁷¹ The rules on CFSP as general rules will apply only subsidiary. Moreover, it gives space for doubt because it is too vague.⁷²

The arts. 42 to 46 TEU seem more promising since their aim is directly the CSDP. EU may use the CSDP to provide itself with an operational capacity using capabilities provided by Member States.⁷³ European Council can unanimously decide to create common defence by its CSDP.⁷⁴ Member States are obliged to make their capabilities available to EU for implementation of CSDP including

⁶⁴ “Every single activity (an adoption of the act or conclusion of an international treaty) shall have its legal foundation in the provisions of the Treaties.” HAMULÁK, STEHLÍK: *European Union Constitutional Law...*, p. 23.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Art. 352 para. 4 TFEU.

⁶⁸ Judgment of the Court (Grand Chamber) of 20 May 2008 C-91/05, paras. 106–110.

⁶⁹ Ibid., para. 106.

⁷⁰ Judgment of the Court (Grand Chamber) of 20 May 2008 C-91/05, para. 106.

⁷¹ According to the rule *lex specialis derogat legi generali* since CSDP is according to art. 42 TEU an integral part of the CFSP.

⁷² “The Union’s competence ... shall cover ... the progressive framing of a common defence policy that might lead to a common defence.” Art. 24 TEU

⁷³ Art. 42 para. 1 TEU.

⁷⁴ Art. 42 para. 2 TEU.

creation of common defence.⁷⁵ Art. 43 TEU sets legal basis for various military actions⁷⁶ and how to define them in detail.⁷⁷

This could be the legal basis for creation of Common EU Army. First, a CSDP setting appropriate defence objectives and goals would be formed. Second, European Council would unanimously decide that this policy can lead to common defence. Third, the Member States would be called to implement this policy and make their capabilities available for EU. EU would form a Common EU Army from provided means. Fourth, the Common EU Army would be deployed in actions according to art. 43 TEU.⁷⁸

Problem arises with art. 44 para. 1 TEU. Its wording might point towards the fact that implementation of CSDP, or at least action taken under art. 43 TEU, is voluntary by using the phrase “*Council may entrust ... Member States which are willing*”. On the other hand, its wording does not necessarily exclude the possibility that Council will not entrust the implementation of a task to a group of Member States and instead Council implements the task on its own using the capacities provided by Member States in compliance with art. 42 para. 3 TEU.

Another problem arises with art. 42 para. 6 TEU and following art. 46 TEU. These give legal basis for permanent structured military cooperation within the EU framework. Such cooperation is clearly voluntary. If all permanent structured military cooperation within the EU framework should be voluntary, also Common EU Army would have to be voluntary. Otherwise there would be no legal basis for it.

But from the wording of art. 42 para. 6 can be concluded that these arts. are concerning strictly cooperation of Member States who made binding commitments to one another. Legal basis of such cooperation is further developed by Protocol No. 10.⁷⁹ Such cooperation seems to be different from binding commitment made by EU and Member State(s) which Common EU Army would be. Nevertheless, “*the relationship between the various elements of the CSDP*” such as between the voluntary cooperation under art. 42 para. 6 TEU and art. 42 para. 2 TEU still needs to be defined.⁸⁰

Last issue needs to be addressed in this regard. The adoption of legislative acts in the area of the CSDP and the whole CFSP is excluded.⁸¹ CSDP is defined and implemented by European Council and Council; put into effect by the High

⁷⁵ Art. 42 para. 3 TEU.

⁷⁶ Art. 43 para. 1 TEU.

⁷⁷ Art. 43 para. 2 TEU.

⁷⁸ This whole process could be described much deeper but that would be for a whole other essay.

⁷⁹ Protocol No. 10 on Permanent Structured Cooperation Established by Article 42 of the Treaty on European Union

⁸⁰ LEGRAND, Jérôme, KRUIJS, Rick. *Common Security and Defence Policy*. [online]. Available at: <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_6.1.2.html>

⁸¹ Art. 24 para. 1 part 2 TEU.

Representative of the Union for Foreign Affairs and Security Policy and by Member States.⁸² a specific role is played also by European Parliament, Commission, and the Court of Justice of the EU.⁸³ The European Defence Agency plays auxiliary but important role.⁸⁴ This simply means that there is no legal basis for creation of Common EU Army by legislative act. Common EU Army would have to be created by specific rules and procedure of CSDP.

From the brief consideration provided above a conclusion can be drafted – the TEU does involve rules that seem to be the concrete legal basis for creation of Common EU Army as defined in the Introduction. Question is whether the Court of Justice of EU would find this legal basis as properly determined or rejected it as legal basis with similar but different aim.

6. Definition of sovereignty

Sovereignty is defined by International Public Law as independence with two aspects: (1) internal, (2) external.⁸⁵ The internal aspect means that the state is exercising highest and exclusive power over its territory and citizens.⁸⁶ The external aspect means that the state is not subordinated to any higher power.⁸⁷ The relationship with other states and organisations is only cooperation.⁸⁸

Part of the external aspect of sovereignty is the state's capability to create international legal norms or to be part of such legislative process; so called *ius tractati*.⁸⁹ Part of *ius tractati*, therefore part of sovereignty, is the capability of a state to transfer some of its sovereign powers onto another entity.⁹⁰ The sovereignty is preserved after such transfer if the state can wilfully and independently take its sovereign power back.

The organic theory defines the internal aspect of sovereignty as an exercise of a public power not submitted to another subject of International Law over the

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Art. 45 TEU

⁸⁵ DAVID, Vladislav, BUREŠ, Pavel, FAIX, Martin, SLADKÝ, Pavel, SVAČEK, Ondřej. *Mezinárodní právo veřejné s kazuistikou*. Praha: Leges, 2011, p. 133

⁸⁶ DAVID, BUREŠ, FAIX, SLADKÝ, SVAČEK: *Mezinárodní právo veřejné s kazuistikou...*, p. 133

⁸⁷ Ibid.

⁸⁸ Ibid., p. 134

⁸⁹ Ibid.

⁹⁰ DAVID, BUREŠ, FAIX, SLADKÝ, SVAČEK: *Mezinárodní právo veřejné s kazuistikou...*, p. 134. Interestingly it is not a new idea; first legally significant mention is from Case of the S. S. "Wimbledon", P. C. I. J. 1923

population's community and territory through a respective, independent political administration.⁹¹ The external aspect defines as a capability to assert its own interests and enter into legal relationships with other subjects of International Law.⁹²

7. Infringement of sovereignty as a result of Common EU Army

Would creation of Common EU Army breach the Member States' sovereignty? There are three major aspects to this question: (1) the compliance of Subsidiarity and Proportionality, (2) the control over Common EU Army, (3) the transfer of sovereignty.

The aspect of the compliance of Subsidiarity and Proportionality is explained above. Without meeting these two principles EU cannot act, cannot pass the legislature establishing Common EU Army, cannot exercise control over it. It is explained above that Subsidiarity and Proportionality could be met, therefore, Common EU Army could be legally established.

The Subsidiarity is a tool enabling the Member States exercise sovereignty because primarily the Member States should act; EU action is secondary (subsidiary) only if the Member States failed to act.⁹³ Such primary action of Member States is under scrutiny of local press, therefore electorate, therefore the politicians are more accountable,⁹⁴ therefore more likely to decide based upon "people's will". Since the people are the bearers of sovereignty such decision means exercise of sovereignty.

The aspect of the control over Common EU Army is another step. The control can be fully exercised by centralised EU institution with no participation of the Member states. The control can be also fully exercised by the Member States through newly formed platform where EU institutions will hold no decision power. The control can be also exercised in any other way falling in between the first two possibilities of exclusive control. Within this range a wide variety of control (i.e. command) mechanisms can be created.

No matter what control mechanism would form we can draft a conclusion. The closer it will be towards the exclusive control by Member States, the lesser are chances that anyone would raise an objection of sovereignty infringement.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Failed to act = failed to carry out the requisite sufficiency and efficiency.

⁹⁴ BARTON: *An Analysis of the Principle of Subsidiarity...*, p. 83

The closer it will be towards the exclusive control by EU institution, the bigger are chances that someone would raise an objection of sovereignty infringement. In my opinion, if the control would be exercised by already existing EU institution (let's say European Council) someone would definitely raise an objection of sovereignty infringement. Answer to this objection lies within the third aspect.

The aspect of the transfer of sovereignty is to ensure that possible infringement of sovereignty can be bridged. Even if creation of Common EU Army and its functioning would require transfer of Member States' powers onto EU institution resulting in deprivation of sovereignty it does not necessarily constitute the infringement of Member States' sovereignty.⁹⁵ Such transfer has been already conducted and has already been made legal under the EU constitutional law and under the Member States' constitutional law.

The Czech Constitution states that some sovereign powers of Czech Republic can be transferred onto international organization.⁹⁶ Article enabling such transfer was incorporated into Czech Constitution with the effect to the 1st of June 2002 while Czech Republic was preparing to join EU.⁹⁷ Later on this article enabled the acceptance of the Lisbon Treaty because under the Lisbon Treaty some Member State's powers are conferred on EU which would not be constitutionally possible for Czech Republic if it wouldn't be for this specific article.⁹⁸ EU constitutional equivalent is found in provisions of TEU and TFEU.⁹⁹

If certain power is transferred exclusively onto EU, the Member State cannot exercise this power unless EU allows it.¹⁰⁰ This constitutes exercise of certain power over state. Such is enabled in case of Czech Republic by its constitutional law.¹⁰¹ Such might be the breach of Czech sovereignty under the mere wording of the definition of sovereignty. But such breach can be bridged and therefore seizes to be a breach of sovereignty. Important argument in Czech Republic was the existence of art. 50 TEU.¹⁰² It is so because art. 50 TEU fulfils the request of broad definition of sovereignty: state can take its power back anytime, without any obstacles laid by the entity it transferred its power to.

⁹⁵ This is discussed in chapter 5. of this essay as part of a *ius tractati*

⁹⁶ Art. 10a, úst. zák. č. 1/1993 Sb., Ústava České Republiky, as amended to the day 10th October 2016.

⁹⁷ Art. 1, úst. zák. č. 395/2001 Sb.

⁹⁸ KÜHN, Zdeněk. *Nález ve věci Lisabonské smlouvy I. – obecné otázky*. [online]. Available at: <<http://jinepravo.blogspot.cz/2008/12/nlez-ve-vci-lisabonsk-smlouvy-i-obecn.html>>

⁹⁹ Especially art. 5 TEU and art. 2 to art. 6 TFEU.

¹⁰⁰ Art. 2 TFEU.

¹⁰¹ Supra note 96.

¹⁰² Decision of Czech Constitutional Court of 26th November 2008, Pl. ÚS 19/08-1; Decision of Czech Constitutional Court of 3rd November 2009, Pl. ÚS 29/09-3.

From the definition of sovereignty given above we can conclude that it is mostly the external aspect of sovereignty that might be threatened by creation of Common EU Army. Member States would lose their power to set their own security and defence objectives and then fulfil them on their own. But, even such a loss of power would not constitute the loss of sovereignty. This is under two conditions: (1) the Subsidiarity and Proportionality will be complied with when establishing Common EU Army and the mechanism of its control, (2) the transfer of sovereign power will be conducted in compliance with the Member States' constitutions and EU constitution enabling the Member States to take this power back without any obstacles.¹⁰³

Moreover, we can't forget that question of Common EU Army is a question of the Shared Competence. It is primarily Member States who have the responsibility (maybe even duty) to act. Only if the Member States do not act, EU can act as a secondary actor. CSDP as currently defined is counting even then on Member States participation.¹⁰⁴ Briefly said: strictly from the legal viewpoint, there is no need to question Member States' sovereignty because it is themselves who actively decide whether the EU will act¹⁰⁵ and how.¹⁰⁶

8. Conclusion

The main hypothesis explored in this essay is: It is possible to establish Common EU Army under the constitutional law of EU. Confirmation of this hypothesis consists of (1) the question of competence, and (2) the question of concrete legal basis. This hypothesis was confirmed as expected.

The competence was credibly established in chapters one to three of this essay. Creation and control of Common EU Army is a Shared Competence. EU can act if Member States fail to fulfil EU military objectives¹⁰⁷ sufficiently and efficiently enough. EU can act only in the manner necessary to fulfil its military objectives. The concrete legal basis was established with certain level of doubt.

¹⁰³ Here I think is no need for a new norm enabling the Member State to stay in the EU but take back its own competence to have its own army. It would be sufficient to use art. 50 TEU which would mean taking back all transferred competences and stepping out of the EU. Of course the first option would be more "political" and "friendly" which might make it easier to reach a consent on creating of Common EU Army. Another way could also be a "multi-speed Europe". But this would be a question for a whole other essay. Nevertheless, the mere existence of art. 50 TEU is important because it means that this legal condition is given in the present time.

¹⁰⁴ Articles 44 to 46 TEU.

¹⁰⁵ By their insufficient action or no action at all.

¹⁰⁶ By their involvement in the EU decision making process and CSDP processes.

¹⁰⁷ Of course only for defence and security purposes.

Therefore, it remains to be a question, whether the legal basis found in chapter four of this essay is sufficient.

Arguments supporting creation of Common EU Army are mostly economic arguments, and arguments oriented towards power attainment. These arguments are not of a legal nature but still legally valid. It is because of vague and subjective wording of art. 5 TEU.

Creation and control of Common EU Army would not mean infringement of Member States sovereignty. Under current law it is Member States who decides whether and how EU acts in the area of CSDP. Member States may have to transfer their military powers onto EU which would not constitute the breach of their sovereignty either because Member States are free to take transferred power back. Similar transfer already happened so it would comply with national constitutions.

As we can see, the real challenge in creating Common EU Army is not constitutional law of EU, neither the national constitutions of Member States. Legally it is most likely possible. In my opinion, the real challenge is politics; Common EU Army lies and falls with economic and political arguments controlled by the politicians and their consent.

In my opinion, there is not enough of political will within current EU to create Common EU Army. Especially given current mood; EU is jeopardized by so called Brexit that triggered a wave of populist's calls for leaving EU in other Member States (including Czech Republic). This rhetoric of political existentialism makes reaching the consent more difficult.¹⁰⁸

Yet, I think that in creating unified army lies the paradox of strengthening the European unification. It is so because one populist argument for leaving EU says that EU cannot protect its members (and citizens) enough from external danger (immigrants, Islamic State, Russia, etc.). By creating unified army EU would take away this argument. Maybe even some populists who are now calling against EU would start calling for EU

¹⁰⁸ Cardiff Law School professor of law Jiří Pribáň defines political existentialism as a politics which turns the question of decision making process and constitutionality into the questions of cultural existence and national fate. PŘIBÁŇ, Jiří. *Obrana ústavnosti, aneb, Česká otázka v postnacionální Evropě*. Praha: Sociologické nakladatelství (SLON), 2014, p. 14–15.