Private military and security industry
Regulatory challenges and opportunities

Åsne Kalland Aarstad

Introduction

The growth and weight of the private military and security industry is one out of many developments at the international arena that challenge the state-centric notion of how international affairs should be understood, as well as governed. Over the last two decades the industry has expanded in scope and scale, and constitutes currently an important stakeholder in conflicts worldwide. This reality became broadcasted to the world audience throughout the Iraq-conflict, where private contractors by far outnumbered American military personnel (Krahmann, 2009; Isenberg, 2007). It is widely held today that military dependence on private contractors is so heavy that many militaries, hereunder the US, the UK, Canada and Australia, cannot go to war without them (Priest and Arkin, 2010; Isenberg, 2010).

Despite the overwhelming focus in the literature on the US, which has undoubtedly reached a far more extensive level of military and security privatisation than most EU member states, it is important to recognise that the usage of PMSC is also growing steadily on the European continent. Looking to the UK, France, Germany, Finland, Denmark and even the EU itself, through its CFSP missions and diplomatic representations, the privatisation trend has become a European reality (cf. White and MacLeod, 2008; Krahmann, 2010; Krahmann and Abzhaparova, 2010; Bailes and Holmquist, 2007; European Parliament, 2011). Still, however, the EU is lagging short of a regulatory framework that would impact upon the export of private military and security services towards third countries (cf. Bailes and Holmquist, 2007; Born, Caparini and Cole, 2007; Den Dekker, 2009; Krahmann and Abzhaparova, 2010). The purpose of this chapter is thus to address the regulatory challenges that have arisen in parallel with the expansion of the private military and security industry, highlighting the role performed by the EU. An additional reason for looking at the EU in this context is the Union’s enhanced human rights responsibility and the desire to strengthening its international role after the entry into force of the Lisbon Treaty.

The chapter will move from the general to the specific, by starting out with an overall introduction to the private military and security industry and a general outline of the underlying
needs for regulation. Thereafter, the rationales of EU engagement will be discussed, followed by a presentation of the various international efforts taken towards regulation and a subsequent evaluation of the role performed by the EU with regards to these. Finally, the prospects for an EU regulatory framework will be discussed. It will be argued that the EU has yet to develop an independent position with regards to the regulation of the private military and security industry. Currently, the EU can be seen as reluctant actor with regards to the major international initiatives towards PMSC regulation, but recent development suggests that a more active approach is in the making. It will be argued that an active EU position targeting the private military and security industry is not only viable, it could furthermore prove a way for the EU to strengthen its role internationally by setting standards and spreading best practices through an EU regulatory framework.

An overview of the industry

The participation of private actors in warfare is not new in itself, a point that is important to underline in order to capture the ever-changing relationship between the public and the private (cf. Owens, 2008; Williams, 2010). Mercenaries were for example common ingredients in European warfare roughly up until the end of the eighteenth century, from when the practice gradually declined and went underground. Nevertheless, two main arguments underline the need for seeing the contemporary private and military security industry as different from former days’ private security arrangements. Firstly, the scale, global scope, open business profile and corporate organisation of the private military and security industry distinguish it from some of its more shadowy private predecessors. Acknowledging that private actors have a long history of offering their services to those with the means to pay, it is nevertheless argued that both qualitative and quantitative shifts have taken place since the end of the Cold War that makes it reasonable to speak about a new type of corporate military and security provision with a global outreach. Secondly, the contemporary industry challenges modern assumptions on how security should be provided, resting upon the centrality of the state. Over the last two centuries, Western states gradually took on new tasks, encompassing the provision of peace and physical security, liberty and legal certainty, democratic self-determination and (to varying extents) economic growth and social welfare (Hurrelmann et al., 2007). Most importantly, the very origins of the modern state became defined by its opposition to the notion of private security, captured by the Weberian notion of the ‘state monopoly on the legitimate use of force’ (Williams, 2010). The provision of security thus became seen as a defining characteristic of the modern Western state, and its monopoly on violence can be said to constitute a traditional theoretical conception (Abrahamsen and Williams, 2011). As such, the distinctiveness of the private military and security industry is also found in its confrontation with deeply rooted theoretical and ideal assumptions that have given rise to a range of practical arrangements. The current proliferation of private military and security companies thus suggests a renewed access of non-state actors to the security domain that has become both ideally and (largely) practically confined to the state.

A further important point regards the definitional problems surrounding the industry, as there is a fierce scholarly debate on how to identify companies that provide military and security services. The acronyms PMC (Private Military Companies), PSC (Private Security Companies), PMSC (Private Military and Security Companies) and PMF (Private Military Firm) are used interchangeably and often with various meanings (cf. Singer, 2005; Leander, 2004; Bailes and Holmquist, 2007). This can be seen as reflecting the companies’ multifaceted portfolios as well as wider disagreements on what constitute a military vs a civilian task in the war theatre. From a practical point of view it is also a politically loaded question, as it can be argued that both companies as well as the hiring institutions seek to avoid the troublesome ‘military’ connotation. A
distinction is often made between PMCs and PSCs, followed by the argument that PMCs offer offensive services with a military impact, while PSC offers defensive services, intended mainly to protect individuals and property. This distinction is problematic, because in a conflict situation, a ‘defensive’ service might very well become ‘offensive’ given the circumstances. Secondly, a company’s proximity to the war theatre, i.e. where one would assume a PMC to be located closer than a PSC, does not necessarily say anything about the company’s strategic impact on the actual conflict. In this chapter I will thus employ the term Private Military and Security Company (PMSC) to denote all companies within the private military and security industry, following the definition by Holmquist:

Essentially, we are talking about private, for-profit, enterprises that provide services traditionally associated with national militaries or other parts of the state security sector such as police or intelligence agencies.

(Holmquist, 2006: 12)

For the purposes of this chapter, the focus is directed towards external security services, i.e. the export of these services to third countries, and less towards the regulation of services offered at the domestic markets. PMSCs are, with some exceptions, regulated in all EU member states when operating on their own territories, despite varying national regulatory standards. The difference becomes stark when one looks at exports of EU-based PMSC services to third countries, were the activities remain largely unregulated (cf. Bailes and Holmquist, 2007; Born, Caparini and Cole, 2007; Den Dekker, 2009; Krahmann, 2007; Krahmann and Abzhaparova, 2010).

A growing industry

The contemporary private military industry is largely held to have proliferated throughout the 1990s, following the footstep of the domestic security ‘corporatization’ that can be traced back to the 1970s (Krahmann, 2009: 6). In 2003, Peter Singer drew large-scale attention to the international private military and security industry through his influential publication Corporate Warriors: The Rise of the Privatized Military Industry. He documented an industry that already at the beginning of the new millennium experienced global revenue over $100 billion, and which was furthermore expected to multiply by 2010 (Singer, 2008: 60). Together with several other contributions, Singer pointed to a variety of parallel trends that since the early 1990s had boosted both the demand for private military and security services and the supply of available contractors/companies (Singer, 2008; Wulf, 2005). Representing a rough generalisation of the literature on PMCSs, the following broad developments/trends can help explaining the growth of the industry:

- **An ideational shift** brought by the implementation and spread of neo-liberal economic models of governance have provided the logic, legitimacy and model for the entrance of market into the security domain (Avant 2005: 32; Bellamy et al., 2010: 322; Caparini and Schreier, 2005:14). The neo-liberal privatisation ethos captures both an attitude favouring individualised solutions, as well as the gradual de-regulation and opening up of markets that have helped facilitating the industry (Abrahamsen and Williams, 2011).

- **The changing nature of warfare**, where both high-intensity conflicts and low-intensity conflicts see a more limited role for the traditional military (Bellamy et al., 2010: 322, Singer 2008: 52). The revolution in military affairs created a spiralling demand for technical expertise, which has manifested itself through a high degree of dependence on commercial technology and private security experts (Perlo-Freeman and Sköns, 2008:3).
The end of the Cold War, which was followed by a large supply of discharged military and security personnel expertise that in turn facilitated the industry with experienced security professionals. The end of unipolarity furthermore accelerated the advance of the neo-liberal economic model, both in terms of depth and outreach (Bellamy et al., 2010: 322; Holmquist, 2007: 2; Singer, 2008: 49; Isenberg, 2007; Caparini and Schreier, 2005: 5, Avant, 2008: 36; Abrahamsen and Williams, 2011: 82).

In conclusion, when looking at the underlying reasons for the growth of the private military and security industry, it is crucial to see the interrelation between geopolitics, on the one hand, and broader socio-economic transformations on the other hand. However, this attempt to identify some consensus in the literature on PMSCs is arguably the exception that proves the rule, as widespread disagreement marks the field when it comes to questions of defining, let alone categorising, the industry (Isenberg, 2007: 149), as pointed out above. Furthermore, the consequences of its growth, be they social, political, economic, are disputed, both among scholars as well as practitioners. This lack of consensus can be said to be symptomatic for the broader failure of both states and institutions in their efforts to effectively address the regulatory aspects of the industry.

Scale and scope

The vast majority of modern PMSCs are like any other private company: ‘they have conventional corporate structures, operate as legal entities, and maintain internet sites and corporate ties’ (Holmquist, 2005: 4). The services offered range from operational support in combat, military advice and training, arms procurement and maintenance to logistical support, housing, communications services, security services, intelligence gathering and crime prevention. The largest amounts of tasks undertaken by PMSCs are military support services, followed by advice and training, none of which include lethal force (Kinsey, 2005: 17; Salzman, 2008: 857; Singer, 2008: 97).

Besides national governments, international organisations, non-governmental organisations and corporations make use of the industry for various services ranging from support capacities to risk assessment and protection of staff-facilities (Leander and van Munster, 2007; Singer, 2008; Ghebali, 2006; Holmquist, 2005). High Representative (HR) Ashton, in her official Commission reply to Member of the European Parliament, Dr. Franziska Brantner, stated firmly that the EU’s reliance upon PMSCs ‘has proved the only viable means of obtaining these services. In this respect, the EU has followed the practice of other institutional actors such as the UN and the growing recourse of MS to such services’ (European Parliament, 2011). Among EU member states, the highest concentration of companies is found in the UK, but also around the continent the usage of PMSCs’ services is widespread. Answering a parliamentary question issued by the Greens/Alliance, the German Federal Government reported of expenditures amounting to 365,000 EUR per month to PMSCs in Afghanistan alone (Brantner and Albani, 2010). Looking at the signatories to the International Code of Conduct of Private Security Companies (ICoC), a regulatory framework aimed at industry self-regulation, a substantial amount of companies are of European origin (ICoC Signatory Companies, 2012). This underlines the fact that security privatisation is by no means an American phenomenon. The increased demand and usage of these companies have brought them from the shadows to the public and gained them increasing international acceptance (Avant, 2008), some would even argue legitimacy (Kinsey, 2005).
The need for regulation

Before listing the arguments that point in favour of regulation, it is pertinent to ask the question of why (the lack of) regulation has become such a prominent problem for the private military and security industry. After all, as with other areas of commercial export of goods and services in a foreign country, civilian individuals would normally be subject to the domestic jurisdiction of the host state, referring to the state in which the service provision plays out (Singer, 2004: 12). This is as true for the cheese industry – an example brought forward by Singer – as it is for the private military industry, but, contrary to the latter, the cheese industry is not particularly drawn to zones of instability and conflicts (Singer, 2004: 12). Neither is the cheese industry associated with providing services that have been closely associated with so-called core competencies of the state. Exactly these characteristics are important to highlight in order to clarify why PMSCs need to be treated differently than other conventional export-based industries.

First and foremost, PMSCs are often operating within contexts where the lack of domestic capabilities might prevent legal accountability. It should be carefully underlined that it is normally the host state’s inability or incapacity to provide security and governance, hereunder enforcing the rule of law, that is the raison d’être of the resort to private contractors in the first place (Francioni, 2009: 2; Singer, 2004: 12). Secondly, existing international law – ranging from humanitarian law, human rights law to criminal law – only seem to apply to misconducts by PMSCs in very few cases, due to the mismatch between the legal categorisation and the contemporary nature of the companies in question (cf. Cameron, 2006; Doswald-Beck, 2007; Gillard, 2005; Schmitt, 2005, 2010). Thirdly, to fill the jurisdictional vacuum that is often present in conflicts, which indeed was the case in Iraq until 2009, some states have established domestic criminal jurisdiction over their civilians on the battlefield (Schmitt, 2005: 517). As such, in case of a criminal offence, the application of home state law, i.e. extra-territorial jurisdiction, can take place if there are effective laws governing the behaviour of PMSCs abroad. However, only the US, South Africa and Israel have specific legislation to control services exported abroad (Caparini, 2007: 158), and regardless of the often insufficient merits of these schemes, the small numbers of states operating such regimes is in itself a problem, as PMSCs can easily escape countries with stringent regulation and register in countries with more lenient approaches.

For different reasons, attention should also be drawn towards the possible negative consequences that privatisation can have for the home and/or contracting states. As argued by Avant (Avant, 2008), Krahmann (Krahmann, 2010) and Krahmann and Abzhaparova (Krahmann and Abzhaparova, 2010), the increasing use of contractors might reduce transparency and public accountability due to issues of contract confidentiality and fuel an increased relational distance between the security providers and the citizens. This, in turn, raises concern about citizen’s ability to evaluate governmental policy in the highly sensitive domain of military security, the responsiveness of governments vis-à-vis the preferences of the public, and related concerns about the possible consequences of giving private companies agenda-setting capacities in public security affairs (cf. Avant, 2006; Krahmann, 2011; Leander, 2005; Leander and van Munster; 2007). Whereas the external dimension requires joint international efforts towards establishing systems of registration, licensing and sanction possibilities, the internal dimension requires careful analyses and evaluations, public debates and, possibly, political measures in order to uphold solid democratic practises.

The area of concern that has attracted most public attention is undoubtedly the human rights abuses linked to PMSCs, and it remains a case in point that contractors are less likely to be punished for their misconducts than military personnel. In the case of Iraq, the country’s courts had no jurisdiction to prosecute PMSCs for conduct related to their contractual responsibilities without the permission of the sending state, from 2003 until 2009, due to the immunity...
granted to foreign contractors under the Coalition Provisional Authority (Elsea, 2010: 15). Furthermore, PMSCs have reportedly been engaged in sale or brokering of arms (Joras et al., 2008), and have in high-profiled cases circumvented UN embargoes and/or decisively contributed to turning the events in the war theatre. In a special case highlighted by Brandtner and Albani, it was revealed that the German PMSC Asgaard GSC in May 2010 had signed a contract to train the opponents of the Somali Government Forces, led by opposition leader Galadid Ahmad Darman. In the exact same time period, the CSDP training mission EUTM Somalia had just started training with the Somali Government Forces. As such, there was a highly controversial and contradictory clash between an EU mission, on the one hand, and the activities of a German registered PMSC, on the other hand (Brantner and Albani, 2010; The National, 2010).

Concluding this section, it is tempting to argue that it should be a self-evident realisation that an actor vested with the powers to use force or to provide security in hostile environments should be subject to a regulatory framework. However, as will be shown in the following, this realisation has had a hard time to manifest itself in practical terms.

Existing regulation

Existing regulation can be found on various levels, comprising the national, the international as well as industry self-regulation. These can be formal, binding conventions, but they can also be informal, voluntary agreements between a smaller number of states or companies (cf. Cameron, 2006; Caparini, 2007; De Nevers, 2009; Holmquist, 2005; Jennings, 2006; Chesterman and Lehnardt, 2007; Krahmann, 2007).

International conventions

The international community’s attempts to regulate private actors engaging in warfare through the United Nations span from the Mercenary Convention of 1989, the set-up of the Special Rapporteur of Mercenaries (now a Working Group), to a recent UN Draft Convention on Private Military and Security companies (the UN Draft Convention), presented to the Human Rights Council in September 2010 (Human Rights Council 15th session, 2010). The legally binding Mercenary Convention will not be touched upon in this article, since it only addresses the margins of the contemporary private military and security industry, due to its stringent criteria for what constitutes a mercenary (Cameron, 2006: 575; Kinsey 2005: 270). It can be added that the Mercenary Convention has not been well supported, and that the states that have endorsed the convention continuously fail to live up to its provisions.

Looking into the content of the UN Draft Convention, forwarded by the Working Group to the Human Rights Council in September 2010, the Convention requires states to adopt their own contracting and licensing procedures for the use, import and export of private military service (Elsea, 2010: 9). As such, the main focus is to create domestic regimes for regulation, but the UN Draft Convention also proposes international oversight through an international committee (Human Rights Council, 15th session). This committee would receive reports from member states on measures taken to implement the Convention, but would not have authority to direct action by any state, unlike the powerful committees set up by the UN counterterrorism regime. Overall, the UN Draft Convention emphasises that states should have an effective monopoly on the use of force, and that states are responsible under international law for their use of force whether on their own territory or beyond, and whether conducted by national armed forces or private armed groups operating under the state’s license or contract (Elsea, 2010: 8). The prospects for the new UN Draft Convention does not look promising, however, after having been
criticised in the Human Rights Council in September 2010 by key PMSC exporting states, including EU member states. In general, the EU has not been supportive towards the project (Human Rights Council, 15th session 2010; Human Rights Council 7th session, 2008), which can be seen as a mixed outcome of some member states’ objection to UN regulation in this area, others not finding the UN Human Rights Council to be the right forum for negotiating such a convention (Percy, 2007), and the belief by some that states are not capable to ensure compliance with national legislation abroad (Krahmann, 2007). The UN Draft convention is undoubtedly an important document that most likely will shape the discourse surrounding the discussion of international regulation of the private military and security industry for a long time to come. However, the machinery it proposes for enforcing existing rules of international law on the industry is unlikely to receive support from key states.

**Intergovernmental initiatives outside the UN**

Another key initiative outside the frames of the UN is the Montreux Document (the Document), which started up as an intra-state dialogue initiated by the Swiss Government and the International Committee of the Red Cross (ICRC) back in 2005. This initiative gathered the most important PMSCs hiring – and receiving states to address regulatory challenges in a process that cumulated in the drafting of the Document on 17th September 2008 (International Committee of the Red Cross, 2008). This refers to a non-binding document that describes international law as it applies to the presence of PMSCs in the context of an armed conflict, i.e. statements of lexis. The Document contains an outline of good practices, drafted with reference to types of documents that do not serve as sources of international law, such as corporate codes of conduct and administrative judgments (Cockayne, 2009a: 405). The Document only makes reference to already existing legal obligations, and does not create new obligations. The Document have been endorsed by key states, but only after having reached a negotiation outcome that was stripped for all language that could be seen as carrying with it obligations (see Cockayne, 2009a and White, 2011 for comprehensive overviews). The Document thus mirrors largely what Abbott and Snidal (Abbott and Snidal, 2000) would term a ‘soft’ cooperation outcome, i.e. an international agreement with no real implementation or enforcement arrangements.

Originally 17 states participated in the process that led up the adoption of the Document, and currently 37 states have embraced it, out of these 14 EU member states. There are, however, no official EU policy to trace that provides support for the document, despite the increasing number of EU member states becoming signatories.

**Self-regulatory efforts**

A whole range of various self-regulatory efforts, referring here to various forms of voluntary principles and ethical codes, have occurred in parallel with the expansion of the industry (Cusmano, 2009; Hoppe and Quirico; 2009). Arguably, PMSCs have an interest in legitimising their efforts and to be responsive to questions impacting their larger commercial reputation because, as claimed by one PMSCs representative, ‘[when] we sneeze in Africa, we get a cold in Asia’ (quoted in Sullivan, 2010: 897). Self-regulatory efforts have both been initiated by the industry itself and through joint efforts by states, institutions and industry stakeholders, and constitute important regulatory attempts. Factors such as adhering competitive advantages vis-à-vis market rivals and wishing to distance one’s company from perceived scandalous rivals, underline the appeal that such agreements can have towards the industry. However, currently the biggest industry associations, the international, US-based International Stability Operations Association
ISOA) and the British Association of Private Security Companies (BAPSC), have few or no sanctions against non-complying members except from expulsion. In the case of ISOA, the association has a permanent committee that hears and investigates complaints, but members are not obliged to cooperate. Nor are independent external monitoring agents taking part in the process. Such shortcomings have given rise to arguments that the industry associations are currently ‘without teeth’ (Cusmano, 2009: 14). The biggest EU based industry association, the Confederation of European Security Services (CoEss), can similarly be seen as promoting solid ethical standards, but comes to short in what regards options for sanctioning. Furthermore, the CoEss is by and large targeting companies operating within the domestic EU market.

The UN issued their own Corporate Social Responsibility (CSR) initiative for encouraging business worldwide to adopt sustainable and socially responsible policies and practices. All PMSCs have access to the Global Compact on the same requirements as any other business sector, and in 2008 a Conflict Prevention Working Group was established because it was recognised that ‘companies have an important role to play in contributing to security and development’ in conflict areas (UN Global Compact; White, 2011). At present, the Global Compact consists of more than 4,300 businesses in 120 countries, and these companies are expected to operate according to ten principles, representing a set of core values tailed for the Global Compact. The initiate has no sanction authority, and the biggest remedy that can be taken is merely to lose association with the UN brand that participation allows for (Cockayne, 2009b). Thus, as with the industry initiatives, it can be disputed whether the Global Compact can play an important role in ensuring well behaviour of PMSCs. Again, it is the ‘naming and shaming’ and the promotion of best practices that can possibly have an effect on the performance of companies, but the general impact remains yet to be seen and evaluated.

If the self-regulatory frameworks already mentioned seem inadequate, EU efforts aimed at ensuring accountability and common standards though CSR mechanisms fare no better. Nigel White claims that the EU’s CSR policies have been overly focused on setting environmental standards, and thus largely excluding issues of human rights and humanitarian law, measures more relevant for the private military and security industry (White, 2011: 981). According to White, NGOs and trade unions have been overly critical to the CSR initiatives stemming from the European Commission, in 2001 and 2006, for what they identify as a business-oriented definition of CSR, more concerned with establishing best practices and less concerned with setting minimum standards and ensuring compliance. However, it remains a case in point that the private military and security industry is still not properly recognised, discussed and debated at the EU level. The lack of targeted CSR practices could thus be seen more as a case of yet-to-come, rather than clear-cut unwillingness to deal properly with the industry. This can be seen in the positive way that the EU has responded to a very recent self-regulation initiative, namely the International Code of Conduct for Private Security Providers.

The International Code of Conduct for Private Security Providers (ICoC) came into being in November 2010, and is a voluntary agreement targeting squarely the private military and security industry (International Code of Conduct for Private Security Service Providers, 2010). The ICoC contains far-reaching commitments in terms of human rights protection and also aims to establish an effective oversight mechanism (Draft Charter for the Oversight Mechanism of the International Code of Conduct for Private Security Service Providers, 2012). Supported by key-states such as the US and the UK, and having gathered a large number of PMSCs as signatories, this initiative seems to represent the most comprehensive and functional regulatory framework currently available. As per February 1st, 2012, the number of signatory companies had risen to 307 (International Code of Conduct Signatory Companies, 2012). Extra ‘teeth’ of the ICoC is applied if states show willingness to make commitments about using only
companies whom are signatories to the agreement (Swiss Federal Department of Foreign Affairs, 2010). In High Representative Ashton’s Commission reply to the European Parliament, she argues that the EU will take this approach:

Presently, many of the existing contracts are not specific on subscription to the International Code of Conduct since they came into force before it was signed in November 2010. In due course, at the time of contract renewal, the policy on the EU’s use of PSCs should be that it will only sign contracts with PSCs that have subscribed to the Code of Conduct. 

(European Parliament, 2011)

This ambition, as expressed by HR Ashton, is remarkable in the way that it recognises the importance of the ICoC, and by the will expressed to actively support it. A reservation, however, is that Ashton refers squarely to companies operating under an EU mandate, hereunder CSDP/CFSP missions and EU delegations. For the ICoC to have real ramifications, all member states within the EU would need to take the same approach. The vast majority of private military and security companies located in Europe operates on behalf of member states or other hiring institutions, not through EU mandated missions.

From this outlook, it seems that the EU has yet to develop an independent position with regards to the regulation of the private military and security industry, and this lack of positioning is detectable when the matter is being discussed at the UN level. In a similar manner, the EU has not actively supported the Montreux Document, nor has been engaged in developing CSR mechanisms targeting the private military and security industry. There are, however, indications that things are about to change. In parallel with external developments, such as the increased usage of PMSCs by EU member states and increased scholarly activities in the field, and internal EU institutional developments, post-Lisbon, the EU seems, at the very least, to be monitoring the field (European Parliament, 2011). The ambition to support the ICoC, stemming from the highest possible level within the EU, seems to indicate that the EU is ready to take a firmer grip over the largely unregulated industry. As will be outlined below, this is not only the right way forward, it can also prove a way for the EU to position itself internationally. Looking to the existing international regulatory attempts, there is only room for improvement.

Conclusion: strengthening the EU through PMSC regulation

Three overarching rationales underline why the EU should force the question of regulation up on its agenda. First, the registered presence of PMSCs on EU territory and the usage of PMSCs by EU member states and by the EU, represent in themselves an argument for taking joint regulatory measures. The above-cited example regarding the contradicting operation between an EU mission and a German PMSC in Somalia highlight the dangers of having no joint registering and licensing agreements. Second, looking to other sensitive industries, such as arms export, the EU operates with a Code of Conduct on Arms Exports as well as a Council Common Position. In other words, the EU has proven capable of taking the necessary means in similar cases (see Krahmann, 2007; and Krahmann and Abzhaparova, 2010 for excellent oversights). Third, the human rights responsibilities of the EU, enhanced after the enforcement of the Lisbon Treaty, and the EU’s ambition to strengthen its position internationally, speak in favour of the EU playing a leading role in regulating the industry (cf. Keukleire et al., 2010; Emerson et al., 2011). The private military and security industry is slowly being touched upon in various EU forums (European Parliament Resolution 2010/2299(INI); European Parliament, 2011), but it is yet unclear which way the EU will go. In May 2011, the European Parliament adopted
Resolution 2010/2299(INI) on the development of the Common Security and Defense Policy after the entry into force of the Lisbon Treaty. Here, two specific paragraphs stress the need for EU regulatory measures over PMSCs (European Parliament, 2011). In the Commission, there are similar indications that measures must be taken, despite vagueness as concerns how and when. In her answer to the previously mentioned questions from Member of the European Parliament Dr. Franziska Brantner, HR Ashton stated that:

It is recognised that there is need for regulation and the establishment of internationally recognised standards, together with clearly defined and sanctionable contractual provisions to determine the threshold of acceptability. (European Parliament, 2011)

Arguing along with Krahmann and Abzhaparova, both preventative and punitive measures need to be included in a comprehensive regulatory framework (Krahmann and Abzhaparova, 2010: 18). The preventative measures would encompass registration and licensing of operating companies, preventing the danger of PMSCs moving from country to country in search for a more favourable regulatory framework. Such development has actually been achieved at the EU level in relation to arms exports, as earlier mentioned, providing an important model for further action (cf. Caparini, 2007; Holmquist, 2005; Krahmann, 2007). Preventative measures would furthermore ensure the screening of PMSC personnel, and establish behavioural and organisational standards. Punitive measures refer to national and international law, the main objective being to punish misconducts by PMSCs and their personnel (Krahmann and Abzhaparova, 2010). For a good oversight of how a solid EU regulatory framework could look like, the Recommendations for EU regulatory action prepared by the PRIV-WAR consortium represents the most developed proposal as per today (PRIV-WAR, 2011).

Despite severe challenges, in particular when it comes to the punitive arm of a regulatory framework, means such as harmonised EU legislation, registering and licensing procedures would bring the ‘precautionary aspects’ of regulation a large step further. In other words, the preconditions for professional behaviour would be established. Regulation of PMSCs at the EU level would not manage to stop some companies from leaving the area in search for a more lenient regulatory framework elsewhere. However, it could limit their access to rich clients, states, companies and organisations based in Europe. Furthermore, as documented by Krahmann, experiences from the set-up of the EU Code of Conduct on Arms Export did not lead to a major exodus of armaments companies from Europe to states with more lenient regulatory frameworks (Krahmann, 2007:191). One could furthermore speculate whether a common EU regulatory framework could spread best practices among aspirant members, strategic partners, neighbouring regions and in other international organisations. As argued by Bailes and Holmquist, given the EU’s ‘soft power’ and its practical significance as a base for PMSCs, ‘any position taken by the Union will be carefully noted by other world players including regional groupings and global institutions’ (Bailes and Holmquist, 2007: 24). Thus, the regulatory challenges presented by the private military and security industry can be said to represent an issue area where the EU could contribute to setting the global standard of how the private military and security industry can be approached in both realistic and efficient manners.

Notes

1 Being an ‘actor’ in this context draws upon Sjöstedt’s definition as having ‘the capacity to behave actively and deliberately in relation to other actors in the international system’ (Sjöstedt, 1977: 16). It is assumed that the EU has the capacity to ‘behave actively’ in international affairs, in particular after the changes implemented through the Lisbon Treaty regarding institutional representation, the acquirement
of a legal personality that enables the EU to be a full subject of international law and the introduction of the European External Action Service (EEAS).

2 For example, in the Commission answer to the European Parliament, High Representative Ashton used consistently the acronym PSC, while being questions on the usage of PMSCs, www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2011-006055&language=EN.

3 A reservation must be put forward here with regards to motivations of so-called weak states, since the turn to the private sector in more fragile states require additional explanations that will not be touched upon in this paper due to its EU focus. For a good overview and discussion, see Abrahamsen and Williams, 2010.

4 Referring, but not limited to, the role performed by MIPRI as a consultant and trainer for the Croatian armed forces leading up to the decisive ‘Operation Storm’ and Executive Outcome’s engagements both in Angola and in Sierra Leone in their civil wars during the 1990s (cf. Avant, 2008; Kinsey, 2005; Singer, 2008).

5 The Working Group superseded the Special Rapporteur in 2006.

6 Austria, France, Germany, Poland, Sweden, the United Kingdom, the Netherlands, Greece, Portugal, Spain, Italy, Cyprus, Denmark, and Hungary (see the Swiss Federal Department of Foreign Affairs’ web page for a full list, www.eda.admin.ch/eda/en/home/topics/intlaw/humlaw/pse/parsta.html).

7 The Draft Charter for the Oversight Mechanism of the ICoC was released for review and comments on January 16th 2012 (Draft Charter for the Oversight Mechanism of the International Code of Conduct for Private Security Service Providers, 2012).

References


