

Post-Brexit participation of the UK in EU foreign, security and defence policy

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14.1 Introduction

The United Kingdom has frequently indicated that Brexit should not lead to a complete detachment from the European Union’s foreign, security and defence policy,¹ but that in this area EU membership should be replaced by a new security partnership, ‘that is deeper than any other third country partnership and that reflects our shared interests, values, and the importance of a strong and prosperous Europe’.² In fact, given the – perceived – more intergovernmental nature of the Common Foreign and Security Policy (CFSP),³ a continued participation in this policy area is often seen as easier to realise than participation in certain parts of the internal market.⁴ This may have been the reason that in the view of the UK, the CFSP would not become part of a possible Comprehensive Free Trade Agreement and that the shape and form of the foreign security policy partnership was left open: ‘Many policy areas – for example foreign policy or immigration policy – are for the UK Government to determine, within a framework of broader friendly dialogue and cooperation between the UK and the EU: they do not require an institutionalised relationship.’⁵ The EU, on the other hand, aimed at including foreign and security policy issues in a comprehensive partnership with a unified governance structure,⁶ and in the ‘Draft text of the Agreement on the New Partnership with the United Kingdom’ of March 2020, the ‘Security Partnership’ was indeed presented as one of the chapters.⁷

The wish to stay connected to CFSP may stand in stark contrast to the well-documented attempts by the UK to prevent any further integration in that area. The UK has a long history of blocking new initiatives to further integrate CFSP into the Union’s legal order.⁸ The somewhat peculiar situation of CFSP being the only policy area (apart from the European Neighbourhood Policy, ENP) in the Treaty on the European Union (TEU) rather than in the Treaty on the Functioning of the European Union (TFEU) was presented by the then British Foreign Minister Miliband in a victorious manner: ‘Common foreign and security policy remains intergovernmental and in a separate treaty. Importantly ... the European Court of Justice’s jurisdiction over substantive CFSP policy is clearly and expressly excluded.’⁹

Despite the fact that ‘keeping CFSP intergovernmental’ and ‘keeping the Court out’ has in the end not proven to be very successful,¹⁰ the very perception of an intergovernmental CFSP renders it logical for the UK to continue participating, despite the fact that it has left the EU. With a view to the UK position paper on continued participation in CFSP, it has even been observed that ‘in stressing the UK’s contribution to the CFSP and ability to project its own priorities and set the debate ... the document seems as though it is a case for being part of the EU, rather than setting out a “new” arrangement.’¹¹ Indeed, many of these documents read as a plea for a full opt-in and CFSP is presented as one of the ‘cherries’ that can easily be picked without too much of an institutional hassle. In other words, the UK seems to be aiming at a relationship that would perhaps best be characterised as ‘friends with benefits’.¹²

Indeed, EU foreign policy did not play a major role in the referendum campaign,¹³ and, overall, the UK has always been quite supportive of the agreed CFSP policies and decisions.¹⁴ It has been observed that the UK ‘long ago recognized the fact that the EU is Britain’s “point of departure” when it comes to foreign policy rather than the first thing that Britain bumps into’¹⁵ and that ‘it was generally strongly in the UK’s interests to work through the EU in foreign policy’¹⁶ if only to ‘upload’ its own policy preferences.¹⁷ The latter quote is from a UK position paper, that deserves to be quoted more in length, as it clearly balances the advantages and disadvantages of UK involvement in CFSP:

The key benefits included: increased impact from acting in concert with 27 other countries; greater influence with non-EU powers, derived from our position as a leading EU country; the international weight of the EU’s single market, including its power to deliver commercially beneficial trade agreements; the reach and magnitude of EU financial instruments, such as for development and economic partnerships; the range and versatility of the EU’s tools, as compared with other international organisations; and the EU’s perceived political neutrality, which enables it to act in some cases where other countries or international organisations might not.

Again according to the evidence, the comparative disadvantages of operating through the EU are: challenges in formulating strong, clear strategy; uneven leadership; institutional divisions, and a complexity of funding instruments, which can impede implementation of policy; and sometimes slow or ineffective decision-making, due to complicated internal relationships and differing interests. One commentator summarised it thus: ‘The issue is not legal competence, but competence in general.’ Some argued that the EU is at its most effective when the Member States, in particular the UK, France and Germany, are aligned and driving policy.¹⁸

Thus it might not have come as a surprise that the Political Declaration (PD) of November 2018 (slightly revised in October 2019) on the future EU–UK relationship foresees a ‘security partnership’, which ‘should comprise law enforcement and judicial

cooperation in criminal matters, foreign policy, security and defence, as well as thematic cooperation in areas of common interest'.¹⁹ The PD continues by stating that 'To this end, the future relationship should provide for appropriate dialogue, consultation, coordination, exchange of information and cooperation mechanisms. It should also allow for secondment of experts where appropriate and in the Parties' mutual interest.'²⁰ And, 'The High Representative may, where appropriate, invite the United Kingdom to informal Ministerial meetings of the Member States of the Union.'²¹ Where continued participation in the Common Security and Defence Policy (CSDP) is concerned, 'The future relationship should therefore enable the United Kingdom to participate on a case by case basis in CSDP missions and operations through a Framework Participation Agreement.'²² In addition, continued collaboration is foreseen in projects of the European Defence Agency (EDA),²³ the European Defence Fund (EDF), the European Union Satellite Centre (EUSC) and in PESCO, the new permanent structured cooperation arrangements, to strengthen defence cooperation between the Member States.²⁴ Some of these elements returned in the Draft Agreement of March 2020,²⁵ which foresees a structured consultation on foreign policy, security and defence as well as close cooperation on sanctions and the exchange of information. It also allows for the participation of the UK in EU crisis management operations as well for involvement of the UK in the activities of the EDA. And, despite the fact that 'Brexit has thus far proved to be a trigger in favour of greater development in Security and Defence'²⁶ and allowed the EU to take steps that were previously more difficult, some continued involvement of a state with strong military potential and experience is also beneficial for the EU.

Despite these clear intentions, and despite the fact that some third state participation in CFSP and CSDP is indeed not uncommon (as we will see below) and may provide a framework for the discussion with the EU, the more far-reaching close cooperation in this area as envisaged by the UK raises a number of legal questions. After all, the Treaties have established cooperation between the Union and its Member States on foreign and security policy; no reference is made to any participation of third states in this policy area. Quite the opposite, perhaps, as the treaty provisions underline the need for consistency in many provisions²⁷ and impose a binding obligation of coherence in EU external relations on the Union, connecting the list of policy objectives in 21(2) TEU to each other and to the functioning of pertinent legal principles. CFSP is clearly connected to many other external policies of the Union, including sanctions, migration, trade, development, and environmental and energy policy. Moreover, through the case law of the Court of Justice the obligation of loyalty has become directly connected to the objective of 'ensur[ing] the coherence and consistency of the action and its [the Union's] international representation'.²⁸

It will not be easy to uphold these rules and principles when participating third states are not equally bound by them. In that respect it should also be remembered that

CFSP is a *Union* competence (e.g. Arts 24(1), 25 TEU, Art. 2(4) TFEU). In fact, throughout Title V TEU (on CFSP) it is made clear that *the Union* is in charge, loyally supported by the Member States (Art. 23(3) TEU). This also implies that for a well-functioning CFSP, the application of the Union principles is essential.²⁹

While third state participation in CFSP and CSDP is far from unusual and scenarios for a post-Brexit participation of the UK in the Union's foreign, security and defence policy have been researched,³⁰ the present chapter will address a number of key legal questions related to the special position the UK has claimed in some of its position papers, that would lead to a new security partnership 'that is deeper than any other third country partnership'.³¹ Section 14.2 will address the legal institutional possibilities and obstacles. Section 14.3 will analyse the relevant provisions in the Withdrawal Agreement (WA). This will be followed by an investigation into the options for third country participation in CFSP (section 14.4) and CSDP (section 14.5) on the basis of past experience. Section 14.6, finally, will be used to draw conclusions.

14.2 Legal institutional possibilities and obstacles

To start with the obvious: the term 'common' in Common Foreign, Security, and Defence Policy refers to the Union and its *Member States*. Article 26(2) TEU entails a general competence for the Council to 'frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council'. The Council, in turn, 'shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote' (Art. 16(2) TEU). The CFSP provisions do not foresee the participation of non-EU states in the decision-making process. And, indeed, Article 28(2) TEU provides that the CFSP Decisions 'shall commit *the Member States* in the positions they adopt and in the conduct of their activity'.³² In short, as also explained by the Comments on the Council's Rules of Procedure:

It should be noted that it follows from the system of the Treaties, and from Article 16 TEU in particular, that the representation of the governments of the Member States of the Council is composed of nationals of the Member State concerned or, in any event, of a national of one of the Member States of the European Union. Therefore, the presence at a Council meeting of a national of a third State as a member of the delegation of a member of the Council should be ruled out, as it could be regarded by the other members of the Council as a factor which could affect the decision-making autonomy of the Council.³³

This also prevents that – on the basis of Article 4 of the Council's Rules of Procedure – 'a member of the Council who is prevented from attending a meeting may arrange to be represented' by a UK representative. Any attempt to provide a formal role to the UK in CFSP decision-making would thus require a modification of the rules. This is not to say

that all forms of participation of the UK in CFSP and CSDP are excluded (sections 14.4 and 14.5 will explore some practice of third country participation in CFSP). In institutional terms, several options have been discussed in the literature. First of all, the treaties are silent on the *presence* of third countries during the EU decision-making procedures. Yet, in the above interpretation offered by the Comments on the Rules of Procedure, the presence of third states during Council – and European Council – meetings seems excluded.³⁴ At the same time, the Rules provide some leeway to invite representatives of third countries to attend some of the Council’s work. In view of the importance of this issue for a possible UK presence during Council meetings, the Comments on the Council’s Rules of Procedure deserve to be quoted in length:

Participation in Council meetings must not be confused with the *occasional presence of representatives of third States* or of international organisations, who are sometimes invited as observers to attend certain Council meetings or meetings of Council preparatory bodies concerning a specific item.

Article 6(1) CRP provides that ‘... the deliberations of the Council shall be covered by the obligation of professional secrecy, except insofar as the Council decides otherwise’. Under this article, the Council may, whenever it considers it appropriate, decide by a simple majority to open its deliberations – or to disclose their content, inter alia by forwarding documents – to certain persons (or categories of persons).

The presence of observers must be authorised by the Council for a specific item on the agenda. In this case, the Presidency must warn the Council members of this fact in advance. In respect of this item, the Council (or the relevant preparatory body) implicitly decides, by simple majority, to set aside the professional secrecy provided for in Article 6(1). The observer must leave the room once the deliberations on this item have ended, or when requested to leave by the Presidency. The third-party observer may be invited by the Council Presidency to state his or her views or inform the Council concerning the subject at issue.

From a legal point of view, *the third party does not participate in the deliberations leading to the taking of a decision by the Council*, but simply provides the Council with information which it can draw upon before taking its decision.

The same rules apply to meetings of the Council’s preparatory bodies. The Presidency is responsible for organising the proceedings so as to preserve the Council’s decision-making autonomy.³⁵

With regard to the European Council, the regulatory provisions are (even) stricter as its Rules of Procedure provide that

meetings in the margins of the European Council with representatives of third States ... may be held in exceptional circumstances only, and with the prior agreement of the European Council, acting unanimously, on the initiative of the President of the European Council.³⁶

Here, any presence of third countries during formal meetings seems to be fully excluded and even meetings ‘in the margin’ of the European Council are subject to strict conditions. However, despite the fact that for the UK being present at European Council meetings might be important politically, the influence of this institution on key foreign policy issues has been doubted.³⁷

But, what about the lower organs? While the same rules apply to ‘the Council’s preparatory bodies’, participation of third states in the Political and Security Committee (PSC) or in Working Parties has proven to be possible in practice, albeit not in Coreper (the Committee of Permanent Representatives; see further below). At the same time, the question is whether presence at informal Council meetings (e.g. so-called ‘Gymnich meetings’ organised by the rotating Presidency) is also to be excluded. The PD on the future relationship seems to leave this option open (see further below). In any case, unless anything else is arranged, participation of the UK in specific CSDP bodies, such as the European Institute for Security Studies, the European Defence Agency, and the European Satellite Centre will have to be phased out.³⁸

While the above rules seem to underline that even on the basis of a special agreement an observer status of the UK at Council or Coreper meetings would be in conflict with primary law rules,³⁹ such a status could perhaps be foreseen for the UK in certain working parties.⁴⁰ However, the EU does not seem to be in favour of any form of ‘half-member’ status, let alone of voting rights for non-members.⁴¹ While former High Representative Mogherini at the time seemed ready to explore these options,⁴² the idea met with some critics among other officials, even where observer status in the PSC would be concerned.⁴³

14.3 The Withdrawal Agreement

The WA – that was agreed upon between the EU and the UK in November 2018, was revised in October 2019, and entered into force on 1 February 2020 – does not devote too much text to CFSP, but basically extends the pre-Brexit situation during a transition period (until 31 December 2020). The general starting point is the following: ‘Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period’ (Art. 127(1) WA). The UK’s participation in CFSP is, however, made dependent on what will be agreed upon in the future relations agreement:

In the event that the Union and the United Kingdom reach an agreement governing their future relationship in the areas of the Common Foreign and Security Policy and the Common Security and Defence Policy which becomes applicable during the transition period, Chapter 2 of Title V of the TEU [CFSP] and the acts adopted on the basis of those provisions shall cease to apply to the United Kingdom from the date of application of that agreement.⁴⁴

It is interesting to note that, despite the general rule that nothing changes, the participation of the UK in the so-called PESCO in defence matters is excluded;⁴⁵ the UK can participate on an ‘exceptional basis’ only:

[F]or the purposes of Article 42(6) and Article 46 TEU and of Protocol (No 10) on permanent structured cooperation established by Article 42 TEU, any references to Member States shall be understood as not including the United Kingdom. This shall not preclude the possibility for the United Kingdom to be invited to participate as a third country in individual projects under the conditions set out in Council Decision (CFSP) 2017/2315 on an exceptional basis, or in any other form of cooperation to the extent allowed and under the conditions set out by future Union acts adopted on the basis of Article 42(6) and Article 46 TEU.⁴⁶

So, participation of the UK in PESCO as a third state will be possible ‘on an exceptional basis’. In general, the possibility for third states to take part in PESCO projects was already foreseen in Article 9 of the PESCO Decision.⁴⁷ In anticipation of a specific Council Decision to that end, the Council furthermore recognised that

a third State could, and would need to, provide substantial added value to the PESCO projects, contribute to strengthening PESCO and the CSDP and meet more demanding commitments, while fully respecting the principle of decision-making autonomy of the EU and its member states.⁴⁸

In addition to the future possibility of the UK to participate in specific PESCO projects, the withdrawal agreement foresees the possibility to continue participation in some of the CSDP institutions and operations,⁴⁹ including financial contributions.⁵⁰ At the same time, the UK will remain bound by CFSP Decisions, unless it makes ‘a formal declaration to the High Representative of the Union for Foreign Affairs and Security Policy, indicating that, for vital and stated reasons of national policy, in those exceptional cases it will not apply the decision’. Yet, even in that case, the rule continues to apply that it ‘shall refrain from any action likely to conflict with or impede Union action based on that decision’.⁵¹

The situation after the transition period will thus depend on what can be agreed upon in the future relationship agreement. As we have seen, some hints may already be found in the PD that was adopted alongside the WA. The general plan seems to be to ‘design flexible and scalable cooperation that would ensure that the United Kingdom can combine efforts with the Union to the greatest effect, including in times of crisis or when serious incidents occur’.⁵² To that end the Declaration *inter alia* also foresees that the UK, upon invitation by the High Representative, join ‘informal Ministerial meetings of the Member States of the Union’⁵³ and that it participate ‘on a case-by-case basis in CSDP and operations through a Framework Participation Agreement’.⁵⁴ While the possibility to join informal meetings does as such not return in the Draft Agreement of March 2020, the possibility of UK participation in CSDP missions is regulated in a

‘Protocol establishing a framework for the participation of the United Kingdom of Great Britain and Northern Ireland in European Union crisis management operations’, that would be attached to the final Agreement.⁵⁵

The latter will certainly also be beneficial to the EU. The UK is one of only two European states that have a nuclear capacity, it is one of the five spending 2 per cent of its GDP on defence and it is a permanent member of the UN Security Council.⁵⁶

14.4 Third country participation in CFSP

The institutional obstacles discussed above should not prevent the UK from *any* form of participation in CFSP and CSDP. In fact, the participation of third states in these policies and actions has become common practice and also seems to contribute to the objective in Article 21 TEU that ‘The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share [its] principles.’ Some third states – Norway and Iceland in particular – take part in various theme specific Council working groups.⁵⁷ Candidate countries show that it is even possible to be an observer in the PSC.⁵⁸ However, the EU has no experience in giving observer rights that include the right to speak and agenda making to a non-EU member/non-candidate country in high-level formations such as the PSC, Coreper or the Foreign Affairs Council. Apart from the legal obstacles discussed above, granting such rights to the UK could also have political consequences. It has been observed that it could open the door to similar requests from other non-EU members such as Switzerland, Norway or Turkey (see also section 14.5). Moreover, it can possibly create political tensions in certain other EU Member States, like Sweden or Denmark, where Eurosceptic political parties could be tempted to push for ‘half-member’ status.⁵⁹

In practice, third country participation in CFSP currently takes place on the basis of agreed frameworks for cooperation. Despite the fact that the future EU–UK foreign and security cooperation will most likely have a different basis (e.g. a Protocol attached to the overall cooperation Agreement, or a separate agreement), we will briefly mention some examples as they have been part of the debate on the possible scenarios. The first type of cooperation is formed by the EFTA/EEA (European Free Trade Association/European Economic Area) agreements.⁶⁰ While these agreements do not formally include cooperation on foreign and security policy, the EU has the habit of inviting EFTA/EEA countries to join EU statements and positions on foreign policy.⁶¹ Furthermore, the EEA Council meets twice a year with representatives of the Commission and the European External Action Service (EEAS). Representatives of the European Council are present at those meetings as well as the representatives of the rotating Council presidency. During this EEA Council meeting, foreign policy is openly discussed while searching for consensus between the EU and the EEA nations.⁶² The EU–Norway relationship serves as a good example of a continuous dialogue with the

EU on numerous foreign policy issues.⁶³ This is done through a formal format that consists of two meetings per year between the Norwegian foreign ministers and the foreign minister of the EU. Additionally, there are several meetings where officials from Norway meet together with their counterparts from Iceland and Lichtenstein in CFSP working groups. So far Norwegian officials have participated in CFSP working groups that operate in policy areas that Norway has an interest in, such as the Balkans, Russia, anti-terrorism coordination and the Middle-East peace process. In the end, Norway is invited to sign EU foreign policy statements and thus to align its position to that of the EU.⁶⁴ Norway's policy is to join EU statements whenever possible.⁶⁵ It has been observed that 'Norway has thus been involved in essentially all of the core aspects of the EU CFSP'.⁶⁶ Apart from Norway (and Iceland) as active CFSP participants, Switzerland is worth mentioning as well. As a non-EEA EFTA member, Switzerland joins the EEA Council meetings and regularly joins EU foreign statements and participates in EU missions.⁶⁷

Third country participation in CFSP is also possible on the basis of a Partnership and Cooperation Agreement (PCA). While some PCAs do not expressly refer to foreign policy cooperation (e.g. the one with the Philippines), the EU–Ukraine PCA did as it allowed Ukraine to join EU statements and positions as well as having high-level dialogues at ministerial level and regular meetings at senior official level.⁶⁸

More comprehensive and in-depth cooperation is possible on the basis of an Association Agreement (AA). In the more recent AA between the EU and Ukraine, for example, Article 7 concerns cooperation on foreign and security policy and provides that:

The Parties shall intensify their dialogue and cooperation and promote gradual convergence in the area of foreign and security policy, including the Common Security and Defence Policy (CSDP), and shall address in particular issues of conflict prevention and crisis management, regional stability, disarmament, non-proliferation, arms control and arms export control as well as enhanced mutually-beneficial dialogue in the field of space.⁶⁹

Similar cooperation can be found in a number of Stabilisation and Association Agreements (SAAs).⁷⁰ Thus, in the EU–Serbia SAA Article 10 provides for 'an increasing convergence of positions of the Parties on international issues, including CFSP issues, also through the exchange of information as appropriate, and, in particular, on those issues likely to have substantial effects on the Parties' as well as 'common views on security and stability in Europe, including cooperation in the areas covered by the CFSP of the European Union'.⁷¹ In general, candidate countries – which basically are almost all countries that have signed an SAA – are invited to join Gymnich meetings and participate as observers in the PSC.

More generally, the EU has gained experience with third country participation in CFSP through its ENP. As the agreements are all tailor-made, they do not all deal

with foreign policy issues in the same manner. An example can be found in the EU–Georgia Action Plan, which – as ‘Priority area 7’ – mentions the goal to ‘Enhance EU–Georgia cooperation on Common Foreign and Security Policy, including European Security and Defence Policy. Georgia may be invited, on a case by case basis, to align itself with EU positions on regional and international issues.’⁷²

Similar notions may be found in so-called Framework Agreements. Thus, Article 3 of the 2017 Agreement with Australia provides for political dialogues and cooperation in the area of foreign policy,⁷³ as does the Strategic Partnership Agreement with Canada, that was negotiated alongside the Comprehensive Economic and Trade Agreement (CETA).⁷⁴

These examples reveal the experience of the EU with the participation of third states in foreign and security policy. For the agreement that is currently under negotiation between the EU and the UK, examples can be drawn from the many existing agreements and arrangements.⁷⁵ In addition, ad hoc alignment with EU policies and actions remains possible. This will be particularly relevant in relation to (existing and new) sanctions.⁷⁶

14.5 Third country participation in CSDP

Finally, apart from general CFSP cooperation, third country participation has proven to be possible in military and civilian missions in the context of the CSDP. Around 45 non-EU countries have contributed troops to CSDP missions and operations (approximately 30 if one detracts third countries that have since then become Member States). Four non-EU countries have participated in EU Battlegroups: Turkey, Norway, Ukraine and Macedonia.⁷⁷ This has included, for example, all NATO (North Atlantic Treaty Organization) members, and all EU candidate countries. The legal basis for such cooperation has been a treaty in the form of a Framework Participation Agreement (FPA) for more structural participation in CSDP missions, or a Participation Agreement for ad hoc participation in a mission. These agreements are concluded in the form of bilateral EU-only agreements on the basis of Articles 37 TEU and 218 TFEU.⁷⁸ Thus, for instance, the FPA with Turkey reveals the procedural rights of the participating country:

The Republic of Turkey shall have the same rights and obligations in terms of day-to-day management of the operation as European Union Member States taking part in the operation, in accordance with the legal instruments referred to in Article 2(1) of this Agreement.⁷⁹

This principle returns in all FPAs. Third countries are not involved in drafting the operations. They typically receive access to relevant documents once the participation has been accepted by the PSC. In practice, third countries are expected and required to accept the EU’s schedule and procedures, and ‘by nature, non-member states’

participation in EU operations requires a certain degree of acceptance of EU practices, as well as a degree of subordination'.⁸⁰

This latter point may be difficult for the UK to swallow, yet full participation in the preparation and formation of CSDP missions through, inter alia, the Civilian Committee, the EU Military Committee, the Politico-Military Group, the Civilian Planning and Conduct Capability, and the EU Military Staff will be difficult to realise. Apart from legal obstacles, other states that contribute extensively to CSDP missions – such as Turkey – are expected to demand equal treatment.⁸¹ A possible starting point may be offered by the position of Norway. Norway has contributed assets and personnel to a large variety of CSDP missions and operations. This country currently has access to a regular dialogue with regards to EU foreign and security policy. Moreover, Norway's agreement allows the country to join CSDP missions and operations, as well as cooperation in the EDA.⁸² Nevertheless, Norway struggles with similar decision-shaping problems.⁸³

14.6 Conclusion

Despite the far-reaching ambitions of the UK to continue participating in the Common Foreign, Security and Defence Policy – and its desire to be 'friends with benefits' – legal questions arise as to the realisation of these ambitions.

The present contribution points to a number of restrictions in both EU primary and secondary law to allow the UK to maintain its participation in the key decision-making organs. This is not to say that all close cooperation will be excluded. The existing regimes with other third countries provide ample examples of a possible alignment of the UK with EU policies and the use by the EU of UK diplomacy and capabilities. In a political sense, however, the legal restrictions imply that, as one observer held: the 'UK would have to accept a foreign policy role as a "rule taker" rather than as a "rule maker", and as a follower rather than as a leader'.⁸⁴ This idea returned in the Draft text of the Agreement that was presented by the EU in March 2020, which not only provides that

The United Kingdom shall associate itself with the relevant Decision by which the Council decides that the Union will conduct a crisis management operation, and with any other Decision by which the Council decides to extend a crisis management operation,

but even clearly underlines that 'The contribution of the United Kingdom to an EU crisis management operation shall be without prejudice to the decision-making autonomy of the Union.'⁸⁵

Obviously, ongoing and future negotiations may lead to an unprecedented form of cooperation in this area, but given both some primary law restrictions and political positions taken by the EU,⁸⁶ any 'half member' status – with the UK participating in the

institutional set-up and decision-making process – will probably have to be excluded (even) in the area of CFSP. Despite the obvious mutual benefits of a close cooperation on foreign and security policy, legal requirements of consistency also support the notion that CFSP cannot be the cherry to be picked. Over the years, the integration of CFSP and other external relations policies has become more intense and general Union principles largely apply to the CFSP regime. A renewed isolation of CFSP from other EU external relations policies would not only be a high price to pay, but would also violate key principles of Union law.

Notes

This contribution is based on an earlier (pre-Brexit) version that appeared as ‘Friends with Benefits? Possibilities for the UK’s Continued Participation in the EU’s Foreign and Security Policy’ (2019) 4 *European Papers* 427. Many thanks to my co-editors of this volume for their valuable suggestions. Credits are also due to Richard Haringsma, Eduard Hoek and Mikael Waelen for their valuable work on this topic in their Master’s theses for the European Studies programme at the University of Twente. These theses are accessible here: <https://essay.utwente.nl>.

1 See already the remarks made by Prime Minister Cameron after the referendum; Charles Tannock, ‘Brexit: The Security Dimension’ (2016), www.charlestannock.com/brexit-security-dimension.pdf accessed 14 March 2020. The EU’s negotiating guidelines for Brexit note that ‘The EU stands ready to establish partnerships in areas unrelated to trade, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy’ European Council Article 50 Guidelines for Brexit Negotiations (Brussels, 29 April 2017) 7. See also UK Government ‘Foreign Policy, Defence and Development: A Future Partnership Paper’ (Position Paper 2017), www.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy_defence_and_development_paper.pdf accessed 14 March 2020.

2 See the UK Government (n 1). See also the speech by PM Theresa May on 17 February 2018:

Europe’s security is our security. And that is why I have said – and I say again today – that the United Kingdom is unconditionally committed to maintaining it. The challenge for all of us today is finding the way to work together, through a deep and special partnership between the UK and the EU, to retain the co-operation that we have built and go further in meeting the evolving threats we face together.

(www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018 accessed 14 March 2020)

3 Elsewhere I have extensively dealt with the legal nature of CFSP; see recently for instance Ramses A Wessel, ‘Integration and Constitutionalisation in EU Foreign and Security Policy’ in Robert Schütze (ed.), *Governance and Globalization: International and European Perspectives* (Cambridge University Press 2018) 339; or

Ramses A Wessel, 'Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?' (2015) 20 *European Foreign Affairs Review* 123.

4 Cf Crispin Blunt 'Post-Brexit EU–UK Cooperation on Foreign and Security Policy' (Chairman of House of Commons Foreign Affairs Committee Discussion Paper 2017) 4:

The CFSP and CSDP are already substantially intergovernmental in nature, respecting the autonomy of EU member states in foreign and defence policy. Therefore, it should be possible to conceive of mechanisms for a high degree of involvement of the UK, voluntarily and without a veto, in EU foreign, security and defence issues, respecting the autonomy of both the EU and UK.

And Ann Jacobs and Sophie Vanhoonacker, 'EU–UK Cooperation in CSDP After Brexit: Living Apart Together?' (Dahrendorf Forum Policy Brief 2018): 'The intergovernmental character of CSDP cooperation and the relatively high scope for flexibility could be a further catalyst for a successful deal.'

5 UK Government, 'The Future Relationship with the EU: The UK's Approach to Negotiations' (Policy Paper 2020).

6 Council Directives 5870/20 ADD 1 REV 3 for the negotiation of a new Partnership with the United Kingdom of Great Britain and Northern Ireland (Brussels 25 February 2020):

The aim of the negotiations is to establish a new partnership between the Union, and Euratom where relevant, and the United Kingdom that is comprehensive and covers the areas of interest outlined in the Political Declaration: trade and economic cooperation, law enforcement and judicial cooperation in criminal matters, foreign policy, security and defence and thematic areas of cooperation. The envisaged partnership should form a coherent structure and be embedded in an overall governance framework.

7 See European Commission, Part Three Title II on Foreign Policy, Security and Defence in the 'Draft text of the Agreement on the New Partnership with the United Kingdom' (Brussels 18 March 2020), <https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-forpolsec.pdf> accessed 14 April 2020.

8 See for a comprehensive and very helpful analysis Paul James Cardwell, 'The United Kingdom and the Common Foreign and Security Policy of the EU: From Pre-Brexit "Awkward Partner" to Post-Brexit "Future Partnership"?' (2017) 13 *Croatian Yearbook of European Law and Policy* 1. Cf Daniel Seah, 'The CFSP as an Aspect of Conducting Foreign Relations by the United Kingdom: With Special Reference to the Treaty of Amity & Cooperation in Southeast Asia' [2015] *International Review of Law* 1; Anand Menon, 'Defence Policy and the Logic of "High Politics"' in Philipp Genschel and Markus Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Power* (Oxford University Press 2013).

9 Secretary of State for Foreign and Commonwealth Affairs (David Miliband), HC Deb 20 February 2008, col 378.

- 10 Cf Ramses A Wessel (n 3); as well as Christoph Hillion and Ramses A Wessel, ‘The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP’ in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook in EU Common Foreign and Security Policy* (Edward Elgar Publishing 2018) 65.
- 11 Cardwell (n 8) 18. Cf also Christophe Hillion, ‘Norway and the Changing Common Foreign and Security Policy of the European Union’ (NUPI Report 2019) who concludes that the UK’s ‘technical note on consultation and cooperation on external security ... ironically [displays] greater enthusiasm for the strengthening of the policy than at any point of its membership’. The ‘technical note’ can be found at www.gov.uk/government/publications/technical-note-on-consultation-and-cooperation-on-external-security accessed 14 March 2020.
- 12 Cf Ramses A Wessel ‘Friends with Benefits? Possibilities for the UK’s Continued Participation in the EU’s Foreign and Security Policy’ (2019) *European Papers* 427.
- 13 Kenneth A Armstrong, *Brexit Time: Leaving the EU – Why, How and When?* (Cambridge University Press 2017) 32; James Black, Alex Hall, Kate Cox, Marta Kepe and Erik Silfversten, *Defence and Security after Brexit* (RAND Europe 2017) 17.
- 14 Cardwell (n 8) 12. The quotes below were also found by Paul Cardwell.
- 15 David Allen, ‘The United Kingdom: A Europeanized Government in a Non-Europeanized Polity’ in Simon Bulmer and Christian Lequesne, *The Member States of the European Union* (Oxford University Press 2005) 138–139.
- 16 UK Government ‘Review of the Balance of Competences between the United Kingdom and the European Union: Foreign Policy’ (Report 2013) 87, www.gov.uk/government/uploads/system/uploads/attachment_data/file/227437/2901086_Foreign_Policy_acc.pdf accessed 14 March 2020.
- 17 Hylke Dijkstra and Sophie Vanhoonacker, ‘The Common Foreign and Security Policy’ (2017) *Oxford Research Encyclopedia of Politics*.
- 18 UK Government (n 16) 7.
- 19 Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, OJ [2020] C34/12, para 79.
- 20 *Ibid.*, para 93.
- 21 *Ibid.*, para 95.
- 22 *Ibid.*, para 99. This echoes the objective of the UK to have ‘a continued contribution to CSDP missions and operations, including UK personnel, expertise, assets, or use of established UK national command and control facilities’. See, UK Government (n 1).
- 23 Continued participation of the UK in the EDA could take place on the basis of an administrative agreement, following the example by Norway that is allowed to participate in the agency’s research and technology projects. See also Sarah Lain and Veerle Nouwens, ‘The Consequences of Brexit for European Defence and Security’ (Royal United Services Institute for Defence and Security Studies. Occasional Paper 2017).
- 24 PD (n 19) paras 102, 104.
- 25 European Commission (n 7).

26 Scarlett McArdle, ‘CSDP and the Development of the “Global EU”’: The Progress of EU Autonomy in the Shadow of Brexit’ (2020) 4 *Europe and the World: A Law Review* 17.

27 Thus, Article 21(3) TEU provides:

The Union shall respect the principles and pursue the objectives ... in the development and implementation of the different areas of the Union’s external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies. The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

28 Case 266/03 *Commission v Luxembourg* EU:C:2005:34, para 60 and C-476/98 *Commission v Germany* EU:C:2002:631, para 66. See, more extensively, Ramses A Wessel and Joris Larik (eds), *EU External Relations Law: Text, Cases and Materials* (2nd edn, Hart Publishing 2020) chs 1–2.

29 Cf Ramses A Wessel, ‘General Principles in CFSP Law’ in Violeta Moreno-Lax, Päivi Neuvonen and Katja Ziegler (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar Publishing 2020).

30 See for instance Richard G Whitman, ‘The UK and EU Foreign, Security and Defence Policy after Brexit: Integrated, Associated or Detached?’ (2017) 43 *National Institute Economic Review* 48; Malcolm Chalmers, ‘UK Foreign and Security Policy after Brexit’ (RUSI Briefing Paper 2017), https://rusi.org/sites/default/files/201701_bp_uk_foreign_and_security_policy_after_brexit_v4.pdf accessed 14 March 2020.

31 See UK Government (n 1).

32 Emphasis added.

33 ‘Comments on the Council’s Rules of Procedure’ (2016) 16, www.consilium.europa.eu/media/29824/qc0415692enn.pdf accessed 14 March 2020.

34 While the Rules of Procedure of both the Council and the European Council do not address this issue expressly, these Rules imply that only representatives of Member States are present.

35 Comments (n 33) 39 emphasis added. See also European Parliament ‘CSDP After Brexit: The Way Forward’ (Directorate-General for External Policies, Policy Department Study, May 2018), [www.europarl.europa.eu/RegData/etudes/STUD/2018/603852/EXPO_STU\(2018\)603852_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603852/EXPO_STU(2018)603852_EN.pdf) accessed 14 March 2020.

36 Rules of Procedure of the European Council, art 4(2).

37 See Luigi Lonardo, ‘The Relative Influence of the European Council in EU External Action’ (2019) 36 *Journal of Contemporary European Research* 51:

while it is true that the European Council is influential in the external relations of the EU, this might be the case only on non-critical issues. Instead, it fails to

express an influential position when highly divisive topics are on the table, and there is no evidence of its influence.

38 Cf Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L 29/7 (Withdrawal Agreement, WA) art 156 that deals with the budgetary questions during transition:

Until 31 December 2020, the United Kingdom shall contribute to the financing of the European Defence Agency, the European Union Institute for Security Studies, and the European Union Satellite Centre, as well as to the costs of Common Security and Defence Policy operations.

39 Something, for instance, suggested by Richard G Whitman, ‘The UK and EU Foreign and Security Policy: An Optional Extra’ (2016) 87 *Political Quarterly* 254.

40 See also Jean Claude Piris, ‘If the UK Votes to Leave: The Seven Alternatives to EU Membership’ (Centre for European Reform 2016), www.cer.eu/sites/default/files/pb_piris_brexit_12jan16.pdf. In an influential position paper, Blunt (n 4) has argued for far-reaching participation in for instance the PSC.

41 See also the Commission Foreign, Security and Defence Policy Slides (15 June 2018) in which the EU informally reacts to some of the UK’s proposals, https://ec.europa.eu/commission/sites/beta-political/files/slides_on_foreign_security_defence_policy.pdf accessed 14 March 2020.

42 Remarks by Mogherini on EU–UK future partnership CFSP (2018), https://eeas.europa.eu/headquarters/headquarters-homepage/44528/remarks-hrvp-mogherini-eu-institute-security-studies-event-future-eu-foreign-security-and_en accessed 14 March 2020.

43 Jonathan Lis, ‘Brexit’s Toll on Foreign Policy: Losing Our Reputation Day After Day’ *Politics* (London, 17 July 2017).

44 WA art 127(2).

45 See extensively on PESCO, Steven Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?’ (2018) 55 *Common Market Law Review* 1785.

46 WA art 17(7a).

47 Council Decision (CFSP) 2017/2315 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States [2017] OJ L 331/57.

48 Council Conclusions 10048/19 (Luxembourg 17 June 2019).

49 Yet, art 129(7) WA provides a number of limitations:

During the transition period, the United Kingdom shall not provide commanders of civilian operations, heads of mission, operation commanders or force commanders for missions or operations conducted under Articles 42, 43 and 44 TEU, nor shall it provide the operational headquarters for such missions or operations, or serve as framework nation for Union battlegroups. During the

transition period, the United Kingdom shall not provide the head of any operational actions under Article 28 TEU.

50 WA art 157:

Until 31 December 2020, the United Kingdom shall contribute to the financing of the European Defence Agency, the European Union Institute for Security Studies, and the European Union Satellite Centre, as well as to the costs of Common Security and Defence Policy operations, on the basis of the contribution keys set out in point (a) of Article 14(9) of Council Decision (EU) 2016/13531, in Article 10(3) of Council Decision 2014/75/CFSP2, in Article 10(3) of Council Decision 2014/401/CFSP3 and in the second subparagraph of Article 41(2) of the Treaty on European Union, respectively, and in accordance with Article 5 of this Agreement.

51 WA art 129. See on the legal implications of this rule Wessel (n 3).

52 PD art 92.

53 PD art 97.

54 PD art 101.

55 European Commission (n 7).

56 Cf Luigi Lonardo, 'EU Common Foreign and Security Policy after Brexit: A Security and Defence Treaty for the "Deep and Special Partnership"' (DCU Brexit Institute Working Paper 2018) 5.

57 Pernille Rieker, 'Outsidership and the European Neighbourhood Policy: The Case of Norway' (2017) 3 Global Affairs 1; Hillion (n 11).

58 Lis (n 43).

59 Piris (n 40). The possibility of voting rights for the UK was also excluded by the HR/VP in answering questions by reporters: 'Remarks' (n 42) as well as by the European Parliament in Resolution 2018/2573(RSP) on the framework for EU–UK cooperation (Strasbourg 14 March 2018).

60 See on the EEA in relation to Brexit: Christophe Hillion, 'Brexit Means Br(EEA)xit: The UK Withdrawal from the EU and its Implications for the EEA' (2018) 55 Common Market Law Review 135.

61 See also Kateryna Zarembo, 'Ukraine in EU Security: An Undervalued Partner' (FRIDE Policy Brief 2011) 88; as well as Norwegian Ministry of Foreign Affairs 'Cooperation on Foreign and Security Policy' (2018), www.regjeringen.no/en/topics/european-policy/Norways-relations-with-Europe/eu_fusp/id684931/ accessed 20 March 2020; Atli Isleifsson, 'Brothers without Arms: Explaining Iceland's Participation in European Union CSDP Operations' (Lund University Master's Thesis in European Affairs, Department of Political Science 2014); and European Commission, 'Screening Report Iceland' (2011), https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/iceland/key-documents/screening_report_31_is_internet_en.pdf accessed 20 March 2020.

62 See, for instance, Council of the EEA Conclusions EEE 1605/1/16 (Brussels 15 November 2016).

- 63 See Hillion (n 11).
- 64 Pernille Rieker, 'Norway and the ESDP: Explaining Norwegian Participation in the EU's Security Policy' (2006) 15 *European Security* 281; and Helene Sjørnsen, 'Norway and the EU's Foreign and Security Policy' in Erik Oddvar Eriksen and John Erik Fossum (eds), *The European Union's Non-Members: Independence under hegemony?* (Routledge 2015).
- 65 Norwegian Ministry of Foreign Affairs (n 61).
- 66 Hillion (n 11) 5.
- 67 Cf Council conclusions on EU relations with the Swiss Confederation (28 February 2017), www.consilium.europa.eu/en/press/press-releases/2017/02/28/conclusions-eu-swiss-confederation/ accessed 14 March 2020.
- 68 Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine (Section II) [1994] OJ L 49/3.
- 69 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2016] OJ L 161/03.
- 70 Cf Dragan Đukanović, 'The Process of Institutionalization of the EU's CFSP in the Western Balkan Countries during the Ukraine Crisis' (2015) 21 *Croatian International Relations Review* 81.
- 71 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part [2008] OJ L 278.
- 72 EU–Georgia Action Plan (2006), <https://library.euneighbours.eu/content/eu-georgia-action-plan> accessed 14 March 2020. See more extensively the contribution by Adam Łazowski in this volume.
- 73 2017 Framework Agreement between the European Union and its Member States, of the one part, and Australia, of the other part. See Joint Proposal for a Council Decision on the conclusion of the Framework Agreement between the European Union and its Member States, of the one part, and Australia, of the other part JOIN/2016/051 final – 2016/0367 (NLE).
- 74 2016 Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part [2016] OJ L 329.
- 75 In that respect, the PD indeed foresees a 'Political Dialogue on Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP) as well as sectoral dialogues' (art 97).
- 76 It has been observed that the 'European Union Withdrawal Bill 2017–19' will copy existing EU sanctions measures into UK law and may also provide a legal basis for new sanctions regimes. See Lonardo (n 56) 9. See more extensively on this topic, the contribution by Sara Poli Chapter 15, this volume.
- 77 See Anne Bakker, Margriet Drent and Dick Zandee, 'European Defence: How to Engage the UK after Brexit?' (Clingendael Report July 2017) 11. This report also provides a good overview of the current and past participation of the UK in CSDP missions.
- 78 Ibid. See also Lonardo (n 56) 10.
- 79 Turkey's FPA (annex II, Section 2, Article 6 (5)).

80 Thierry Tardy, ‘CSDP: Getting Third States on Board’ (European Union Institute for
Security Studies Brief 2014) 6.

81 See also the European Parliament (n 35) 19: ‘[S]hould London be granted too many
privileges, many other countries would go back on the attack to call for similar rights.’

82 Fraser Cameron, ‘After Brexit: Prospects for UK–EU Cooperation on Foreign and
Security Policy’ (European Policy Centre Policy Brief 2017),
<http://aei.pitt.edu/92359/> accessed 14 March 2020.

83 Nicole Koenig, ‘Towards Norway Plus? EU–UK Defence Cooperation Post-Brexit’
(Jacques Delors Institut Berlin Policy Paper 2018), [www.delorsinstitut.de/2015/wp](http://www.delorsinstitut.de/2015/wp-content/uploads/2018/02/20180207_Towards-Norway-Plus-for-Brexit-Defence_Koenig.pdf)
accessed 14 March 2020. [content/uploads/2018/02/20180207_Towards-Norway-Plus-for-Brexit-Defence_Koenig.pdf](http://www.delorsinstitut.de/2015/wp-content/uploads/2018/02/20180207_Towards-Norway-Plus-for-Brexit-Defence_Koenig.pdf).

84 Cardwell (n 8) 21. Cf also the monograph by the late Simon Duke, *Will Brexit Damage
our Security and Defence? The Impact on the UK and EU* (Palgrave Macmillan 2019).

85 ‘Protocol establishing a framework for the participation of the United Kingdom of
Great Britain and Northern Ireland in European Union crisis management operations’
in European Commission (n 7), art 2.

86 The position of the European Parliament has also been quite clear in this respect (n
59):

The European Parliament notes that, on common foreign and security policy, the
UK as a third country will not be able to participate in the EU’s decision-making
process and that EU common positions and actions can only be adopted by EU
Member States; points out, however, that this does not exclude consultation
mechanisms that would allow the UK to align with EU foreign policy positions.