

The Participation of Members and Non-Members in EU Foreign, Security and Defence Policy

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1. Introduction: Between a Common and a Differentiated Policy

From the outset the EU's Common Foreign and Security Policy (CFSP) – including the Common Security and Defence Policy (CSDP) – has been struggling with the ambition to create and uphold a *common* policy and the often diverging views of the Member States.¹ The – at least initial – requirement of unanimity for each and every (implementing) decision was necessary to convince certain Member States that Union foreign policies would never conflict – let alone set aside – national foreign policies. The creation of CFSP was a compromise born out of the development of the European Political Cooperation in the 1970s and 80s and the wish to create something of a 'European Political Union' alongside the Economic and Monetary Union.² The idea was to unite Member States on foreign policy issues to allow the Union to act as a cohesive force in external relations.

While CFSP started out as 'the odd one out', over the more than 25 years of its existence we have slowly witnessed a 'normalisation' of this policy area.³ Analyses of this normalisation highlighted the consolidation of EU foreign policy

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¹ See R.A. Wessel, 'Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility' in Martin Trybus and Nigel White (eds), *European Security Law* (Oxford University Press 2007), pp. 247–248.

² See on the origins and early days of CFSP: R.A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective*, The Hague: Kluwer Law International, 1999.

³ See (also for many references to earlier studies): R.A. Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy', in R. Schütze (Eds.), *Governance and Globalization: International and European Perspectives*, Cambridge: Cambridge University Press, 2018, pp. 339-375; 'Editorial Comments', *Common Market Law Review* 55: 1-10, 2018; S.R. Sánchez-Taberno, 'The Choice of Legal Basis and the Principle of Consistency in the Procedure for Conclusion of International Agreements in CFSP Contexts: Parliament v. Council (Pirate-Transfer Agreement with Tanzania)', *Common Market Law Review*, 2017, pp. 899-920.

– as well its constitutionalisation as part of the Union’s legal order – by subsequent treaty modifications (*inter alia* integrating the Union’s external objectives⁴) as well as institutional adaptations (such as the introduction of the European External Action Service (EEAS) and the combination of the High Representative for CFSP and the Commission for external relations⁵). These changes have largely made an end to the (partly perceived⁶) distinction between CFSP and other external Union policy areas.

This, however, has not changed the fact that it remains difficult to reach consensus among the Member States on EU external action, despite the ambition that CFSP covers “*all* areas of foreign policy and *all* questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence” (Article 24(1) TEU).⁷ The idea of a common policy is, firstly, that it includes *all* Member States. The notion of normalisation, secondly, strengthened the idea that – because of the links between CFSP and other EU external policies such as trade and development – it should include EU *members only*. As to the first element, practice revealed the many difficulties of establishing a common foreign policy by the Union without having recourse to the usual machinery of the ordinary legislative procedure and the familiar role of the Institutions.⁸ And with a view to the second element, the – perceived – more

⁴ Art. 21(3) TEU; see below. See also Luigi Lonardo, ‘Common Foreign and Security Policy and the EU’s external action objectives: an analysis of Article 21 of the Treaty on the European Union’, *European Constitutional Law Review*, pp. 584–608, 2018. As argued by Larik, “The Lisbon Treaty has both expanded and streamlined the Union’s global objectives. [W]e can see that the EU Treaties codify a range of global objectives both in terms of substance but also specifically harnessing law [...] Together, these elements coincide with the idea of the Union as a ‘transformative power’, changing not only fundamentally the relations among its members but also of the world around it.” J. Larik, ‘Entrenching Global Governance: The EU’s Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality’, in B. Van Vooren, S. Blockmans and J. Wouters (Eds.), *The EU’s Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013), pp. 7-22 at 10-11.

⁵ On the EEAS see for instance M. Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination*, Brill/Nijhoff, 2017; and G. De Baere and R.A. Wessel, ‘EU Law and the EEAS: Of Complex Competences and Constitutional Consequences’, in J. Bátora and D. Spence (Eds.), *The European External Action Service: European Diplomacy Post-Westphalia*, Basingstoke: Palgrave MacMillan, 2015, pp. 175-193. On the High Representative see in the latter volume Niklas Helwig, ‘The High Representative of the Union: The Quest for Leadership in EU Foreign Policy’, pp. 87-104.

⁶ Cardwell pointed to the difficulty to change the “tradition of otherness” in analyses of CFSP, which made it difficult to fully value the (post-Lisbon) changes. P.J. Cardwell, ‘On ‘ring-fencing’ the Common Foreign and Security Policy in the legal order of the European Union’, *Northern Ireland Legal Quarterly*, 64(4), 2015, pp. 443–463.

⁷ Emphasis added.

⁸ Cf. Steven Blockmans, ‘Differentiation in CFSP’, in Steven Blockmans (ed.), *Differentiated Integration in the EU. From the Inside Looking Out*, Brussels, Centre for European Policy Studies (CEPS), 2014, p. 46-56, at 46: “More often than not, a common commitment to a shared strategic vision, treaty-based values and norms, is an insufficient basis for policy consensus on what are still perceived as different foreign policy interests and threat perceptions by individual member states.”

intergovernmental nature of the Common Foreign and Security Policy,⁹ caused for third state participation in this policy area to be seen as easier to realise than participation in certain parts of the internal market.¹⁰

While it has been observed that “Flexibility has been inherent in the very design of the legal set of rules which governs CFSP/CSDP”,¹¹ the present contribution aims to assess how the Union has attempted to overcome the tension between the ambition to create a common foreign policy as a clear *Union* policy, and the need to pragmatically accept the fact that not all member States are always onboard (and that third states sometimes are). The notion of ‘EU membership’ that is central to this project will thus be approached from two different angles: 1. to what extent does EU membership entail the demand that all Member States agree to and implement CFSP decisions; and 2. to what extent is it legally possible for third states to participate in CFSP?

2. Treaty Rules on Differentiated Integration and Voting in CFSP

2.1 Voting and its Consequences

It is well known that CFSP is formed on the basis of “specific rules and procedures” (Art. 24(1) TEU). This is characterised in particular by the exclusion of the use of the ‘legislative acts’¹² (Art. 23(1) TEU; and thereby the use of the legislative procedure which is the regular decision-making procedure for most other Union policies, and by unanimity rather than qualified majority voting (QMV) as the default voting rule.¹³ This does not imply that all Member States necessarily agree

⁹ Elsewhere I have extensively dealt with the legal nature of CFSP; see recently for instance R.A. Wessel, ‘Integration and Constitutionalisation in EU Foreign and Security Policy’, in R. Schütze (Eds.), *Governance and Globalization: International and European Perspectives*, Cambridge: Cambridge University Press, 2018, pp. 339-375; or R.A. Wessel, ‘Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?’, *European Foreign Affairs Review*, 2015, pp. 123-146.

¹⁰ Cf. the position paper ‘Post-Brexit EU-UK Cooperation on Foreign and Security Policy’ by the Chairman of the House of Commons Foreign Affairs Committee, Crispin Blunt MP: “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.” (at 4).

¹¹ P. Koutrakos, ‘Foreign Policy between opt-outs and closer cooperation’, in De Witte, B., Ott, A. and Vos, E. (Eds.), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law*, Edward Elgar Publishing, 2017, 405-424.

¹² Note that this does not imply that CFSP acts are not binding on Member States. See R.A. Wessel, ‘Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?’, *European Foreign Affairs Review*, 2015, pp. 123-145.

¹³ Unanimity continues to form the basis for CFSP decisions, “except where the Treaties provide otherwise” (Article 24(1) TEU).

with all CFSP decisions. Article 31(1) TEU allows Member States to abstain from Council decision-making. On the basis of the second subparagraph “any member of the Council may qualify its abstention by making a formal declaration”. The consequence of an abstention is that the member in question shall not be obliged to apply the decision, but shall accept that the decision commits the Union. “In a spirit of mutual solidarity, [that] Member State shall refrain from any action likely to conflict with or impede Union action based on that decision, and the other Member States shall respect its position.” The latter requirement is a logical implication of the general duty of loyal cooperation in CFSP: it “shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations” (Article 24(3) TEU).

While an abstention obviously do not change the concept of membership, it is interesting to see that it does create different membership duties. For instance, it allows the abstaining Member States not to participate in the operational management of a CSDP mission (which is conducted within the Committee of Contributors), while at the same time it remains involved in the political and strategic decision-making in the Political and Security Committee.¹⁴ The overall idea of constructive abstention is that the decision remains a Union decision, based on a Union competence,¹⁵ but that variations occur in the way in which Member States engage in the implementation of that decision. In the words of Blockmans: “the mechanism of constructive abstention aims at reconciling the position held by the majority of member states with the reservations and concerns of some.”¹⁶ Obviously, there are limits to the number of abstentions and as in the end the idea of a ‘common’ policy needs to be preserved. Article 31(1) second subparagraph TEU provides that if constructive abstentions “represent at least one third of the member states comprising at least one third of the population of the Union, [then] the decision shall not be adopted.” This may form a reason why constructive abstentions are a rare phenomenon.¹⁷

¹⁴ Cf. also Törö, *op.cit.*, at 63.

¹⁵ Art. 24(1) TEU: “The *Union’s* competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.” (emphasis added)

¹⁶ Blockmans, *op.cit.*, at 49. See also: C. Törö, “The Latest Example of Enhanced Cooperation in the Constitutional Treaty: The benefits of flexibility and differentiation in European Security and Defence Policy decisions and their implementation”, *European Law Journal*, Vol. 11, 2005, pp. 641-656.

¹⁷ In fact, so far, constructive abstention has been used only once, by a Member State. See the abstention by Cyprus in 2008 when the Council adopted the Decision establishing the EULEX Kosovo mission; Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, OJ 2008 L 42/92.

(Brussels, 12.9.2018 COM(2018) 647 final Communication from the Commission to the European Council, the European Parliament and the Council: *A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy*

At the same time it is important to note that QMV is possible even in relation to CFSP decision-making in various situations,¹⁸ and that Article 31(3) TEU even enables the European Council to extend the cases of QMV by unanimously adopting a decision stipulating that the Council shall act by qualified majority in other cases, with the exception of decisions having military or defence implications (Article 31(4) TEU). Indeed, the latter is the clear treaty exception to the use of QMV. In addition, Member States may block a shift towards QMV and pull the so-called ‘emergency brake’. Article 31(2) TEU provides that

“If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. If he does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity.”

The fact that the use of QMV is ruled out in CSDP underlines that – at all stages of the decision-making process – all Member States need to be onboard (see also Article 42(4) TEU). In that respect, it is striking that QMV is allowed for the establishment of closer military cooperation between (groups of) Member States, resulting in the so-called permanent structured co-operation (PESCO). Article 46 TEU provides:

“1. Those Member States which wish to participate in the permanent structured cooperation referred to in Article 42(6), which fulfil the criteria and have made the commitments on military capabilities set out in the Protocol on permanent structured cooperation, shall notify their intention to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy.

2. Within three months following the notification referred to in paragraph 1 the Council shall adopt a decision establishing permanent structured cooperation and determining the list of participating Member States. The Council shall act by a qualified majority after consulting the High Representative.”

(https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-efficient-decision-making-cfsp-communication-647_en.pdf).

¹⁸ In that respect it is interesting to point to the fact that apart from the previously existing possibilities for QMV under CFSP which mainly related to implementation acts, it is now possible for the Council to adopt measures on this basis following a proposal submitted by the High Representative (Article 31(2) TEU). Such proposals should, however, follow a specific request by the European Council, in which, of course, Member States can foreclose the use of QMV. In addition, QMV may be used for setting up, financing and administering a start-up fund to ensure rapid access to appropriations in the Union budget for urgent financing of CFSP initiatives (Article 41(3) TEU). This start-up fund may be used for crisis management initiatives as well, which would potentially speed up the financing process of operations. In addition, QMV may be extended to new areas on the basis of a decision by the European Council (Art. 31(3) TEU).

The absence of the unanimity requirement returns in paragraphs 3 and 4 in relation to the decision to allow states to join PESCO at a later stage, or to suspend a participating state. Unilateral withdrawal from PESCO can simply take place on the basis of a notification by the Member State (paragraph 5).

It is also worth noting that the requirement for unanimity does not prevent smaller groups of Member States to go ahead in case there are simply no objections from others. As noted by Törö: “Although unanimity is prescribed, it is important to note that full consensus is not required. In other words, the Council cannot take decisions on any organisational or operational (military or civilian missions) aspect of the common security and defence policy unless and until all formal and open disagreement has been overcome by mutually acceptable compromise, even in the absence of full consensus.”¹⁹ This implies that those members of the Union with no intention of participating in a proposed CSDP mission have the opportunity to allow a smaller group to establish the mission nevertheless.

More in general, the unanimity requirement in CFSP is currently under debate. In his State of the Union speech of 2017, President Juncker suggested “looking at which foreign policy decisions could be moved from unanimity to qualified majority voting”,²⁰ and in 2018 the Commission drafted a proposal towards more effective decision-making in CFSP.²¹ The Commission argued the following:

“In the future [...] certain Common Foreign and Security Policy decisions should be taken by qualified majority. The use of qualified majority would make the Union a stronger, more effective and more credible international actor, as it would make it easier for the Union:

- To act on the global scene on the basis of robust and consistent positions;
- To react with speed and efficiency to pressing foreign policy challenges, both where a new position needs to be established and in the implementation of an agreed strategy;
- To strengthen the resilience of the EU by shielding Member States from targeted pressure by third countries that try to divide the EU.

Taken together, this would help the Union to pull its weight acting in concert as more than the sum of its parts. Experience from other policy areas where qualified majority is the rule shows that qualified majority fosters common solutions.”²²

¹⁹ Törö, *op.cit.*, at 67.

²⁰ http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm; 13 September 2017.

²¹ Brussels, 12.9.2018 COM(2018) 647 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN COUNCIL, THE EUROPEAN PARLIAMENT AND THE COUNCIL A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy (https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-efficient-decision-making-cfsp-communication-647_en.pdf)

²² *Ibid.*, at 4.

Obviously, other Union policy areas have shown us that an increase in QMV possibilities does not necessarily affect the unity among members. There even seems to be a link between the increase of QMV in the treaties and European integration.²³ At the same time, the general view still seems to be that it will be good to keep the specific nature of CFSP in mind. As earlier held by one observer more than twenty years ago: “[A] majority decision on a foreign policy matter is totally different in character from a majority decision on an EC legal act: adopted against the will of some Member States it would lose much or even most of its international credibility and could be easily subverted by signals from the opposing Member States through its national diplomatic channels.”²⁴ While there is still a lot of truth in this statement, CFSP – as we have seen – is much more part of the Union’s legal order than it was twenty years ago.

2.2 *Forms of Differentiated Integration in CFSP and CSDP*

a. Principles of EU External Action

The ‘common’ nature of the EU’s foreign and security policy has not prevented Member States to develop initiatives in which not all of them participate. Given the different (geo-)political interests of the Member States this should not come as a surprise.²⁵ The present section aims to list the main possibilities to break the ‘unity of membership’. It should be kept in mind, however, that both in their internal EU cooperation as in dealing with third states, Member States remain bound by the principles underlying all EU external action (including the principles of sincere cooperation and consistency. Indeed, as I have argued elsewhere,²⁶ the presumption is that all structural as well as more substantive principles apply to the CFSP and, moreover, that it would not be easy to rebut this presumption. This conclusion can be drawn on the basis of the Treaty provisions themselves, which are usually phrased in quite general terms, and are not excluding specific policy areas. This holds true for all key EU principles, including the principles of cooperation, the principles of conferral, subsidiarity and proportionality, more substantive

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²⁴ J. Monar, ‘The European Union’s Foreign Affairs System after the Treaty of Amsterdam: A “Strengthened Capacity for External Action?”’ (1997) 2 *European Foreign Affairs Review* 418.

²⁵ Cf. Koutrakos, *op.cit.*: “As foreign policy and security and defence lie at the core of national sovereignty, their conduct is in greater need of being attuned to the different interests which Member States have in the area of high politics. This is all the more so in the light of the wide range of diverse Member States – small and large, north and south, new and old, rich and poor.”

²⁶ R.A. Wessel, ‘General Principles in CFSP Law’, in V. Morena, P. Neuvonen, K. Ziegler (Eds.), *Research Handbook on General Principles of EU Law*, Edward Elgar Publishing, 2019 (forthcoming)

principles, as well as some general principles of international law referred to in the Treaties.

One might even argue that structural principles are particularly important in the area of CFSP – where Member States, as at least perceived, play a larger role – to live up to the requirement of “consistency, effectiveness and continuity of its policies and actions.”²⁷ On top of this, all of this seems to be confirmed by Article 24(2) TEU, which provides that the Union shall conduct, define and implement a common foreign and security policy “[w]ithin the framework of the principles and objectives of its external action.” The reference to ‘external action’ cannot be read as restricting the list of principles to that particular dimension of the Union’s policies. In fact, Article 21(1) TEU clearly links the principles as applied in the internal context to external action: “The Union’s action on the international scene shall be guided by *the principles* which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world [...]”.²⁸

This notion is further strengthened by the requirement of consistency, which is not termed a principle in the treaties,²⁹ but nevertheless guides the EU’s external action more generally and functions as a principle to work towards the attainment of the objectives.³⁰ Both in Article 3(5)³¹ and in Article 21 TEU on the external objectives of the Union specific references to CFSP are absent. Indeed, the Lisbon Treaty consolidated the Union’s external relations objectives and CFSP is just one of the means to attain these objectives. The requirement of consistency in Article 21(3) TEU is meant to prevent a fragmentation of the Union’s external action.³²

²⁷ Art. 13 (1) TEU, as well as other provisions, including Art. 21(3) TEU. Cf. also L. Azoulay, ‘Structural Principles in EU Law: Internal and External’, in Cremona pp.31-45 at 33): “Structural principles are seen as forms of rationalisation of a highly valuable but essential unstable project. To make EU law subject to structural principles is to make it and the EU more resilient”.

²⁸ Emphasis added. As these principles, the Article mentions: “democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law

²⁹ Nevertheless, Article 22 TEU refers to “the principles and objectives set out in Article 21”.

³⁰ See also M Estrada Cañamares, “‘Building Coherent Responses’: Coherence as a Structural Principle in EU External Relations”, in Cremona, *op.cit.*, pp. 244-262, at 256: “Because of its location under Article 7 TFEU, coherence can be considered a ‘Principle’ of ‘General Application’ to the Union.” Cf. Larik, who argues that the EU objectives “provide a sense of purpose as to the exercise of powers through the structures of the constitutionalised legal order”. (‘From Speciality to the Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union’, (2014) 63 *International and Comparative Law Quarterly* 936, 962.

³¹ Art. 3(5) TEU: “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”

³² It provides that: “[...] 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

Specifically 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”.³³

It is essential to keep this in mind when assessing the different forms of differentiated integration in CFSP.

b. Enhanced cooperation in CFSP

A first form of closer cooperation is termed ‘Enhanced cooperation’ and is introduced in Article 20 TEU.³⁴ It can be used in CFSP, including CSDP and allows smaller groups of Member States to move ahead in certain policy or security fields.³⁵ Article 331(2) TFEU provides:

“Any Member State which wishes to participate in enhanced cooperation in progress in the framework of the common foreign and security policy shall notify its intention to the Council, the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.

The Council shall confirm the participation of the Member State concerned, after consulting the High Representative of the Union for Foreign Affairs and Security Policy and after noting, where necessary, that the conditions of participation have been fulfilled. The Council, on a proposal from the High Representative, may also adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation. However, if the Council considers that the conditions

by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.” Cf. also Art. 7 TFEU: “The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.” The TEU contains four other provisions which pertain to coherence in its material and institutional dimensions. All in their own way, these provisions strengthen the relationship (or in fact, the integration) between CFSP and other external relations policies. See more extensively Van Vooren and Wessel, *op.cit.*, Chapter 1; as well as C. Hillion, ‘Cohérence et action extérieure de l’Union Européenne’, *EUI Working Papers Law*, 202/14.
³³ Case C-266/03, *Commission v Luxembourg*, [2005] ECR I-4805, para 60, and Case C-476/98, *Commission v Germany*, [2002] ECR I-9855, para 66. See further on the role of the Court in CFSP: C. Hillion and R.A. Wessel, ‘The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP’, in S. Blockmans and P. Koutrakos (Eds.), *Research Handbook in EU Common Foreign and Security Policy*, Cheltenham/Northampton: Edward Elgar Publishing, 2018, pp. 65-87.

³⁴ “1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union’s non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union.

Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.”

³⁵ Cf. Marise Cremona, ‘Enhanced cooperation and the European Foreign and Security and Defence Policy’, in Jose Maria Beneyto (ed.), *Unity and flexibility in the future of the European Union: the challenge of enhanced cooperation*, Madrid: CEU Ediciones, 2009,

of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request for participation.

For the purposes of this paragraph, the Council shall act unanimously and in accordance with Article 330.”

Articles 326-328 TFEU provide that enhanced cooperation shall comply with the Treaties and Union law, that is shall not undermine the internal market or economic, social and territorial cohesion and that it shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them. In addition, enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it.

Despite this possibility, that was introduced by the Lisbon Treaty, enhanced cooperation in CFSP was a clear compromise and a number of criteria were introduced that are not easy to meet: a minimum number of nine participants, the requirement of unanimity in the Council for authorising any kind of enhanced cooperation in CFSP, and the requirement of the consent of the European Parliament.³⁶ Furthermore, the treaty has made clear that “The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole” (Art. 20(2) TEU). Any decision on differentiated integration can therefore not be taken lightly and, so far, practice shows that Member States have not been able to agree on establishing any kind of enhanced cooperation in CFSP.

c. Other Forms of Closer Cooperation

While formally institutionalised enhanced cooperation may be difficult to realise, practice has revealed the creation of coalitions of Member States working closer together. Blockmans distinguishes between three different types of coalitions:³⁷

- permanent (e.g. Benelux) and ad hoc (e.g. the UK and France pushing the EU on lifting the ban on arming opposition forces in Syria);
- institutionalised (e.g. Visegrad Group) and loosely organised (e.g. the EU Core Group on Somalia, created early 2004, consisted primarily of the UK, Italy, Sweden and the European Commission, and was endorsed by the Council);
- regional (e.g. Baltic Council of Ministers), inter-regional (e.g. the partnership framework of the Baltic and Benelux countries and that of Nordic, Baltic and Visegrad countries), and thematic (e.g. mediation or reconciliation efforts). While

³⁶ See also J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, pp. 89-90.

³⁷ Blockmans, *op.cit.*, at 53.

there is always the risk that the ‘Common’ in CFSP is affected, it has been argued that these initiatives may actually be helpful in strengthening CFSP, e.g. through the taking of new initiatives or a smoother implementation.³⁸

Differentiation in Member State participation also occurs in a CSDP context, and is far from new.³⁹ The most far-reaching form is the opt-out granted to Denmark in relation to defence matters. This opt-out basically allows an EU Member State non-participation in a common policy. Article 5 of Protocol 22 reads as follows:

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

While this is an express opt-out for one Member State, the Treaty also seems to allow all Member States to take a step back in case their EU obligations would get in the way of, in particular, NATO commitments. Article 42(2) TEU provides:

“The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realized in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.”

This provision seems to apply to NATO members only (and hence not to Austria, Finland, Sweden, Ireland, Malta and Cyprus). Yet, the first part (“the specific character of the security and defence policy of certain Member States”) seems more general and has been interpreted as to accommodate the security and defence considerations prevailing in different Member States.⁴⁰

³⁸ Keukeleire, *op.cit.*

³⁹ A. Missiroli, ‘CFSP, Defence, and Flexibility’, *Chaillot Paper* No. 38, WEU Institute for Security Studies, 2000.

⁴⁰ Koutrakos, *op.cit.* Cf. also Declaration No. 13, indicating that the CFSP provisions: “do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations. [...]”. And, Declaration No. 14, that these provisions “will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation

The most obvious example of *ad hoc* opt-outs and opt-ins is provided by the fact that in most EU military missions not every Member State is involved. But ‘less close cooperation’ may also be the result of what has been termed “flexibility in execution”, which implies that not all Member States are forced to implement CSDP decisions in the same manner.⁴¹ The reason for this is believed to be found in “historical reservations when it came to defence-related issues from Denmark (with its opt-out on all defence-related provisions of the TEU), as well as the political or constitutional concerns of the neutral or non-aligned EU member states (Austria, Finland, Ireland and Sweden)”.⁴²

The Treaty, in fact, expressly foresees the possibility of differentiation in security and defence policy. Article 42(5) TEU allows for the Council to “entrust the execution of a task, within the Union framework, to a group of Member States in order to protect the Union's values and serve its interests.” While membership differentiation in this area has thus been built into the Treaty, an overall responsibility for the Council remains. Article 44 TEU stresses that Member States participating in the task “shall keep the Council regularly informed of its progress on their own initiative or at the request of another Member State. Those States shall inform the Council immediately should the completion of the task entail major consequences or require amendment of the objective, scope and conditions determined for the task [...]”.

In a more institutionalised sense, closer cooperation in CSDP can take the form of the so-called permanent structured cooperation (PESCO).⁴³ It is interesting to note that the Treaty does not merely allow for this form of differentiated integration, but actually seems to *encourage* states to engage in it, Article 42(6) TEU provides:

“Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions *shall establish* permanent structured cooperation within the Union framework.”⁴⁴

in international organisations, including a Member State's membership of the Security Council of the United Nations”.

⁴¹ Törő, *op.cit.*, at 63.

⁴² Simon Duke, “The Convention, the draft Constitution and External Relations: Effects and Implications for the EU and its international role”, EIPA, Working Paper No. 2003/W/2, European Institute of Public Administration, Maastricht.

⁴³ See for instance S. Biscop, ‘Differentiated integration in defence: A plea for PESCO’, in *Re-founding Europe. The Responsibility to Propose* (IAI, 2017).

⁴⁴ Emphasis added. See also Toro, *op.cit.*, at 70.

The details of PESCO are spelled-out in Protocol No. 10 that is annexed to the Treaties.⁴⁵ Despite the fact that the possibility was already formally included through the Lisbon Treaty, and despite earlier cooperation in the form of for instance ‘Battlegroups’,⁴⁶ PESCO was only vitalised in its current form in December 2017.⁴⁷ All Member States are onboard, except for Denmark (because of its CSDP opt-out), Malta (for constitutional reasons related to neutrality) and the UK (Brexit). Differentiation largely occurs through the ways in which the different Member States participate in the (now) 34 ‘PESCO projects’ that were defined by the Council.⁴⁸ The projects in the areas of capability development and in the operational dimension range from the establishment of a European Medical Command, an EU Training Mission Competence Centre, Cyber Rapid Response Teams, Mutual Assistance in Cyber Security, Military Disaster Relief or an upgrade of Maritime Surveillance to the creation of an European Military Space Surveillance Awareness Network, a joint EU Intelligence School, specialised Helicopter Training as well as co-basing, which would allow the joint use of national and overseas bases.⁴⁹

PESCO consist of “legally binding commitments” aimed to prepare the Union to be ready to perform all crisis management tasks listed in Article 43 TEU. As Blockmans argued, PESCO faces at least three key challenges: “raising the level of ambition while ensuring inclusivity; maintaining credibility in case Member States do not comply with their commitments; and ensuring coherence with the many other building blocks in Europe’s defence architecture”.⁵⁰

Finally, practice has revealed the possibility of closer cooperation between EU members, but *outside* the EU framework. EUROCORPS, the Franco-German Brigade, with units from Spain, Belgium and Luxembourg as national contributions

⁴⁵ Article 1 of Protocol No. 10 thus spells out that any Member State wishing to participate in PESCO should:

“(a) proceed more intensively to develop its defence capacities ...; and (b) have the capacity to supply ... targeted combat units for the missions planned, structured at a tactical level as a battle group, with support elements, including transport and logistics, capable of carrying out the tasks referred to in Article 43 (TEU), within a period of five to 30 days, in particular in response to requests from the (UN), and which can be sustained for an initial period of 30 days and be extended up to at least 120 days.”

⁴⁶ Willem F. van Eekelen and Sebastian Kurpas, “The evolution of flexible integration in European Defence Policy: is permanent structured cooperation a leap forward for the Common Security and Defence Policy?”, CEPS Working Document No. 296, Centre for European Policy Studies, Brussels, June 2008.

⁴⁷ Council Decision (CFSP) 2017/2315 of 11 Dec. 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, O.J. 2017, L 331/57.

⁴⁸ COUNCIL DECISION (CFSP) 2018/1797 of 19 November 2018 amending and updating Decision (CFSP) 2018/340 establishing the list of projects to be developed under PESCO, OJ L 294/18, 21.12.2018.

⁴⁹ See also the PESCO Factsheet; https://eeas.europa.eu/sites/eeas/files/pesco_factsheet_november_2018_en_0.pdf

⁵⁰ Blockmans, PESCO at 1811.

is the most prominent example. In addition, we have witnessed other institutionalised groups of EU members, such as the EUROMARFOR (naval forces bringing together France, Italy, Spain, Portugal), the European Air Group (Germany, Belgium, Spain, France, Italy, the UK) and the German-Netherlands First Corps (Germany, the Netherlands, the UK). Looser cooperation frameworks (lacking a joint HQ) also exist, as exemplified by the Spanish-Italian Amphibious Force.⁵¹

One could safely say that the above overview reveals that differentiation in member participation has been part and parcel of the EU's security and defence policy. At the same time – as we see with the development of PESCO in particular – the initiatives are perceived as contributing to a stronger Union and not to fragmentation.⁵² As observed by Törő, “The repeated examples of Common Security and Defence Policy missions by variable combinations of states from inside and outside the Union illustrate a consolidated pattern of practice. Acting in coalition by some or many of the member states representing the entire EU continues to define the prevailing mode of execution of CSDP missions.”⁵³

3. Beyond EU Membership: Possibilities for Third State Participation in CFSP

The possibilities for non-EU members to participate in CFSP have gained more attention now that the United Kingdom has indicated that, post-Brexit, it would be interested in continuing cooperating on foreign policy.⁵⁴ In fact, in the UK's view, 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

⁵¹ See more extensively Törő, *op.cit.*

⁵² Cf. “We have activated a Permanent Structured Cooperation on Defence – ambitious and inclusive. Member States have committed to join forces on a regular basis, to do things together, spend together, invest together, buy together, act together. The possibilities of the Permanent Structured Cooperation are immense.” Federica Mogherini, High Representative/ Vice-President (December 2017).

⁵³ Törő, *op.cit.* at 67.

⁵⁴ See already the remarks made by Prime Minister Cameron after the referendum; Charles Tannock MEP, ‘Brexit: The Security Dimension’ (2016) <http://www.charlestannock.com/brexit-security-dimension.pdf>. 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, ‘Conclusions: Negotiating Guidelines for Brexit’ EUCO XT 20004/17, 7. See also the 2017 UK position paper, HM Government, ‘Foreign policy, defence and development: a future partnership paper’; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy_defence_and_development_paper.pdf.

interests, values, and the importance of a strong and prosperous Europe”.⁵⁵ Despite these clear intentions of the UK, participation of third states in foreign, security and defence matters raises a number of questions under both EU and international law. After all, the Treaties have established a 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. On the contrary perhaps, as the treaty provisions underline the need for consistency in many provisions (see above), imposing a binding obligation of coherence in EU external relations on the Union. CFSP is clearly connected to many other external policies of the Union, including sanctions, migration, trade, development, and environmental and energy policy.

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 underlined once more 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). Moreover, international agreements in the area of CFSP are ‘exclusively’ concluded by the Union as so-called ‘EU only’ agreements; there are no mixed agreements in CFSP.⁵⁶

3.1 *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

⁵⁵ See the UK position paper ‘Foreign policy, defence and development: A future partnership paper’, 2017;

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy_defence_and_development_paper.pdf. 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.”; <https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018>.

⁵⁶ See G. Van der Loo and R.A. Wessel, ‘The Non-Ratification of Mixed Agreements: Legal Consequences and Options’, *Common Market Law Review*, 2017, No. 3, pp. 735–770.

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.”⁵⁷ 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.”⁵⁸

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 third state representative. Any attempt to provide a formal role to third states in CFSP decision-making would thus require a treaty modification. This is not to say that all forms of third state participation in CFSP and CSDP are excluded (see also below). In institutional terms, several options have been discussed in the literature. First of all, the treaties themselves 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.⁵⁹ At the same time, the Rules seem to 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 (or other third state) presence during Council meetings, the Comments on the Council’s Rules of Procedure deserve to be quoted in length (emphasis added):

“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).

⁵⁷ Emphasis added.

⁵⁸ Comments on the Council’s Rules of Procedure, 2016, at 16; <https://www.consilium.europa.eu/media/29824/qc0415692enn.pdf>. Emphasis added.

⁵⁹ 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.

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.⁶⁰

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”.⁶¹ 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.⁶²

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 (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 same seems to hold true for third state participation in specific CSDP bodies, such as the European

⁶⁰ Comments, *op.cit.*, at 39; emphasis added. See also the European Parliament study ‘CSDP after Brexit: the way forward’, Directorate-General for External Policies, Policy Department, May 2018; [http://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)

⁶¹ Art. 4(2) of the Rules of Procedure of the European Council.

⁶² However, despite the fact that for third states being present at European Council meeting might politically be important, the influence of this Institution on key foreign policy issues has been doubted. See L. Lonardo (2019), ‘The Relative Influence of the European Council in EU External Action’, *Journal of Contemporary European Research* 15(1): 36-56, at 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.”

Institute for Security Studies, the European Defence Agency, and the European Satellite Centre will have to come to an end.⁶³

While the above rules seem to underline that even on the basis of a special agreement an observer status of third states at Council or Coreper meetings would be in conflict with primary law rules,⁶⁴ such a status could perhaps be foreseen for in certain working parties.⁶⁵ However, the Brexit debate has revealed that EU does not seem to be in favour of any form of ‘half-member’ status, let alone of voting rights for non-members.⁶⁶ While High Representative Mogherini seemed ready to explore the options,⁶⁷ the idea met with some critics among other officials, even where observer status in the PSC would be concerned.⁶⁸

3.2 *Third Country Participation in CFSP in Practice*

Despite to institutional obstacles assessed above, the participation of third states in CFSP and CSDP policies and actions has become common practice and one could even argue that it 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”. EU-third state cooperation on foreign affairs usually takes place on the basis of some form of agreement that functions as the base for their cooperation. Some third states – Norway and Iceland in particular – take part in various theme specific Council

⁶³ Cf. in relation to Brexit: Art. 156 WA 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 [...]”

⁶⁴ Something for instance suggested by R.G. Whitman, R. G. (2016), ‘The UK and EU foreign and security policy: an optional extra’, *The Political Quarterly*, 87(2), 254-261.

⁶⁵ See also J.C. Piris, *If the UK votes to leave: The seven alternatives to EU membership*, Centre for European Reform, (2016); http://www.cer.eu/sites/default/files/pb_piris_brexit_12jan16.pdf. In an influential position paper, Blunt has argued for far-reaching participation in for instance the PSC; C. Blunt, (2017), ‘Post-Brexit EU-UK Cooperation on Foreign and Security Policy’; <https://www.blunt4reigate.com/sites/www.blunt4reigate.com/files/2017-04/Post-Brexit%20EU-UK%20cooperation%20on%20foreign%20%26%20security%20policy%20April%202017.pdf>

⁶⁶ See also the Foreign, Security and Defence Policy (slides), European Commission, 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

⁶⁷ 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

⁶⁸ Lis, J., (2017), ‘Brexit’s toll on foreign policy: Losing our reputation day after day’, *Politics*; <http://www.politics.co.uk/comment-analysis/2017/07/17/brexit-s-toll-on-foreign-policy-losing-our-reputation-day-af>

working groups.⁶⁹ Candidate countries show that it is even possible to be an observer in the PSC.⁷⁰ However, the EU has no experience with 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 third states could also have political consequences. It has been observed that it could open the door to many requests from non-EU members such as Switzerland, Norway, or Turkey that currently have close relations with the Union (see further below). Moreover, it can possibly create political tensions in certain EU Member States, like Sweden, Denmark and others, where Eurosceptic political parties could be tempted to push for ‘half-member’ status.⁷¹

a. Templates for Third Country Participation in CFSP

In practice, third country participation in CFSP currently takes place on the basis of agreed frameworks for cooperation. The first type of cooperation is formed by the EFTA/EEA agreements.⁷² 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 position on foreign policy.⁷³ Furthermore, the EEA Council meets twice a year with representatives of the Commission and the 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.⁷⁴ The EU-Norway

⁶⁹ P. Rieker (2017) ‘Outsidership and the European Neighbourhood Policy: The Case of Norway’, *Global Affairs*, 1-13; C. Hillion, ‘Norway and the changing Common Foreign and Security Policy of the European Union’, *op.cit.*.

⁷⁰ Lis, *op.cit.*

⁷¹ Piris, *op.cit.* The possibility of voting rights for the UK was also excluded by the HR/VP in answering questions by reporters (Remarks by Mogherini on EU-UK future partnership CFSP, retrieved from: https://eeas.europa.eu/headquarters/headquarters-homepage/44528/remarks-hrvp-mogherini-eu-institute-security-studies-event-future-eu-foreign-security-and_en) as well as by the European Parliament in a 2018 Resolution (European Parliament, (2018), EP resolution on the framework for EU-UK cooperation; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BMOTION%2BB8-2018-0135%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN>).

⁷² See on the EEA in relation to Brexit: C. Hillion, ‘Brexit Means Br(EEA)xit: The UK Withdrawal from the EU and its Implications for the EEA’, *CMLR*.

⁷³ See also Zarembo, K. (2011), ‘Ukraine in EU security: an undervalued partner’, *FRIDE Policy Brief*, 88; as well as ‘Cooperation on foreign and security policy’, Norwegian Ministry of Foreign Affairs, 2018; https://www.regjeringen.no/en/topics/european-policy/Norways-relations-with-Europe/eu_fusp/id684931/; A. Isleifsson, (2014), *Brothers without Arms: Explaining Iceland’s Participation in European Union CSDP Operations*; and Screening Report Iceland, 2011, retrieved from http://edz.bib.uni-mannheim.de/daten/edz-k/gde/11/screening_report_31_is_internet_en.pdf.

⁷⁴ See for instance: EEA Council meetings (46th), 2016; <http://www.efta.int/sites/default/files/documents/eea/eea-news/2016-11-15-eea-council-conclusions.pdf>

relationship serves as a good example of a continuous dialogue with the EU on numerous foreign policy issues.⁷⁵ This is done through a formal format that consists of two meetings per year between the Norwegian foreign minister and the foreign ministers 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.⁷⁶ Norway's policy is to join EU statements whenever possible.⁷⁷ It has been observed that "Norway has thus been involved in essentially all of the core aspects of the EU CFSP".⁷⁸ 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.⁷⁹

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.⁸⁰

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."

⁷⁵ See Hillion, 'Norway and the changing Common Foreign and Security Policy of the European Union', *op.cit.*

⁷⁶ P. Rieker, (2006), 'Norway and the ESDP: explaining Norwegian participation in the EU's Security policy', *European Security*, 15(3), 281-298 and H. Sjursen (2015), 'Norway and the EUs foreign and security policy', *The European Union's Non-Members: Independence under hegemony?*

⁷⁷ 'Cooperation on foreign and security policy', Norwegian Ministry of Foreign Affairs, 2018, *op.cit.*

⁷⁸ Hillion, 'Norway and the changing Common Foreign and Security Policy of the European Union', *op.cit.*, at 5.

⁷⁹ Cf. EU-Switzerland relations; <http://www.consilium.europa.eu/en/press/press-releases/2017/02/28/conclusions-eu-swiss-confederation/>

⁸⁰ 1994 Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine (Section II), Official Journal, L 49/3, 19.2.98.

Similar cooperation can be found in a number of Stabilisation and Association Agreements (SAAs).⁸¹ 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.”⁸² 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 European Neighbourhood Policy (ENP). As the agreements are all tailored 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.”⁸³

Similar notions may be found in so-called Framework Agreements. Thus, Article 3 of the 2017 Agreement with Australia provided for political dialogues and cooperation in the area of foreign policy.⁸⁴ Similar provision can also be found in the Strategic Partnership Agreement with Canada, that was negotiated alongside CETA.⁸⁵

These examples reveal the experience of the European Union with the participation of third states in foreign and security policy. In addition, ad hoc alignment with EU policies and actions remains possible.⁸⁶

b. Third country participation in CSDP

Finally, third country participation has proven to be possible in CSDP missions, both civilian and military. Around 45 non-EU countries have contributed troops to

⁸¹ Cf. D. Đukanović, D. (2015), ‘The Process of Institutionalization of the EU’s CFSP in the Western Balkan Countries during the Ukraine Crisis’, *Croatian International Relations Review*, 21(72), 81-106.

⁸² 2008 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.

⁸³ 2006 EU-Georgia Action Plan; <https://library.euneighbours.eu/content/eu-georgia-action-plan>.

⁸⁴ 2017 Framework Agreement between the European Union and its Member States, of the one part, and Australia, of the other part.

⁸⁵ 2016 Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part.

⁸⁶ 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, *op.cit.*, at 9.

CSDP missions and operations (approximately 30 if one detracts third countries that have since then become member states). As calculated by Törő, “The variety of potential partners from outside the Union envelops European NATO members (Norway, Turkey or Albania), EU candidates (Croatia, FYROM or Montenegro), other states from Europe (Switzerland) or partners from other continents (the US, Brazil, Canada and South Africa) interested in, and capable of contributions to a given joint security enterprise under the EU’ banner and direction.”⁸⁷ Four non-EU countries have participated in EU Battlegroups: Turkey, Norway, Ukraine and Macedonia.⁸⁸ This has included, for example, all NATO members, and all EU candidate countries. The legal basis for such cooperation has been a treaty in the form of a Framework Participation Agreement (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.⁸⁹ 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”.⁹⁰ 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 Political and Security Committee (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”.⁹¹

The latter point underlines that full participation of non-EU members 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, it is politically difficult to differentiate between

⁸⁷ Törő, *op.cit.*, at 66-67. See also C. Törő, ‘External state partners in ESDP missions: third country participation in EU crisis management’, *European of Foreign Affairs Review*, Vol. 15, 2010, pp. 325–345.

⁸⁸ See A. Bakker, M. Drent, D. Zandee, ‘European defence: how to engage the UK after Brexit?’, Clingendael report, July 2017; https://www.clingendael.org/sites/default/files/2017-07/Report_European_defence_after_Brexit.pdf, at 11. This report also provides a good overview of the current and past participation of the UK in CSDP missions.

⁸⁹ See also Lonardo, *op.cit.*, at 10; and Bakker et al., *op.cit.*

⁹⁰ Turkey’s FPA (annex II, Section 2, Article 6 (5)).

⁹¹ T. Tardy (2014), ‘CSDP: Getting third states on board’, *European Union Institute for Security Studies*, 6; https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_6_CSDP_and_third_states.pdf

different EU partners as they expect equal treatment.⁹² This is not to say that the different arrangements the EU has with external partners are all alike. The example of Norway shows that that country not only contributed assets and personnel to a large variety of CSDP missions and operations, but also that it 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 European Defence Agency (EDA).⁹³ Nevertheless, Norway struggles with similar decision-shaping problems.⁹⁴

4. Conclusion: CFSP as a Common Policy between the EU and its Members?

The Common Foreign, Security and Defence Policy is characterised by the EU Treaties in three ways: 1. as a *common* policy of the Union, supported by its members; 2. as an *EU-only* policy on the basis of a Union competence that is also used for the conclusion of EU-only agreements with third states; and 3. as an *exclusive* EU policy that is not designed for third state participation. Perhaps paradoxically, on all accounts the practice of CFSP is different.⁹⁵ First of all, the notion of a 'common' policy is put into perspective by the many forms of differentiated cooperation among smaller groups of Member States. Secondly, Member States have an essential role in CFSP. Unlike for instance the Common Commercial Policy, the Common Foreign, Security and Defence Policy is much more built on coalitions of members. Thirdly, while third state participation in CFSP is nowhere mentioned in the Treaties, in all areas of CFSP and CSDP – ranging from political cooperation, to sanctions or military missions – non-EU members participate; either through an alignment with EU policies or on the basis of an almost equal participation in the implementation of decisions and actions.

Perhaps much more than any other EU policy, CFSP is characterised by a patch-work of diverging and overlapping members and non-members that – sometimes institutionalised, sometimes *ad hoc* – contribute to helping the EU to achieve its objectives as a global actor. To some extent, primary law indeed allows

⁹² See also the European Parliament study 'CSDP after Brexit: the way forward', *op.cit.*, at 19: "should London be granted too many privileges, many other countries would go back on the attack to call for similar rights."

⁹³ F. Cameron (2017), 'After Brexit: Prospects for UK-EU cooperation on foreign and security policy', *European Policy Centre*; http://www.epc.eu/documents/uploads/pub_8039_afterbrexitprospectsuk-eu.pdf?doc_id=1901

⁹⁴ N. Koenig (2018), 'Towards Norway Plus? EU-UK defence cooperation post-Brexit', Jacques Delors Institut Berlin; https://www.delorsinstitut.de/2015/wp-content/uploads/2018/02/20180207_Towards-Norway-Plus-for-Brexit-Defence_Koenig.pdf

⁹⁵ Cf. Koutrakos, *op.cit.*: "flexibility has been inherent in the conduct of the policy as a matter of practice and quite independently from the legal mechanisms set out in the Union's primary rules."

for, or even encourages working in smaller groups. One reason may also have been to simply accept that this is the closest thing to a common foreign policy among 28 sovereign states, while at the same time preventing that they seek their options outside the EU framework.⁹⁶ Yet, the downside is equally obvious. With the increasing ‘normalisation’ of CFSP it has become part and parcel of the overall external relations regime of the Union and it becomes difficult to clearly separate foreign policy from other EU external action. This also points to another looming risk: fragmentation in CFSP may make it more difficult to live up to many of the principles that are at the basis of EU law and cooperation. In the further development of CFSP a balance will have to be sought between the advantages of working in smaller groups of both EU and non-EU members⁹⁷ and the need to uphold the principles of consistency and loyalty that are key to any common policy.

⁹⁶ See on this argument already my ‘Differentiation in EU Foreign, Security, and Defence Policy’, *op.cit.*

⁹⁷ Cf. S. Keukeleire (2006), “EU Core Groups – Specialisation and division of labour in EU foreign policy”, CEPS Working Document No. 252, Centre for European Policy Studies, Brussels: “[U]nder certain conditions, the specialisation and division of labour among EU member states [big and small] can strengthen both the effectiveness and legitimacy of the foreign policy of the EU [...]”