

# Post-Brexit Participation of the UK in CFSP and CSDP: Questions of EU and International Law

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## 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,<sup>1</sup> 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”.<sup>2</sup> In fact, given the – perceived – more intergovernmental nature of the

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<sup>1</sup> 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](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy_defence_and_development_paper.pdf).

<sup>2</sup> 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](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

Common Foreign and Security Policy (CFSP),<sup>3</sup> a continued participation in this policy area is often seen as easier to realise than participation in certain parts of the internal market.<sup>4</sup>

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.<sup>5</sup> The somewhat peculiar situation of CFSP being the only policy area (apart from the European Neighbourhood Policy) 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."<sup>6</sup>

Despite the fact that 'keeping CFSP intergovernmental' and 'keeping the Court out' has not proven to be very successful,<sup>7</sup> the very perception of an intergovernmental CFSP renders it logical for the UK to continue participating,

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in meeting the evolving threats we face together."; <https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018>.

<sup>3</sup> 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.

<sup>4</sup> 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).

<sup>5</sup> See for a comprehensive and very helpful analysis P.J. Cardwell, 'The United Kingdom and the Common Foreign and Security Policy of the EU: from pre-Brexit 'Awkward Partner' to post-Brexit 'Future Partnership'?', *Croatian Yearbook of European Law and Policy*, 2017. Cf. also D. Seah, (2015), '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', *International Review of Law*, 1; A. Menon, 'Defence Policy and the Logic of "High Politics"' in P. Genschel and M. Jachtenfuchs (Eds.), *Beyond the Regulatory Polity?: The European Integration of Core State Power* (OUP 2013).

<sup>6</sup> Secretary of State for Foreign and Commonwealth Affairs (David Miliband), HC Deb, 20 February 2008, col 378.

<sup>7</sup> Cf. R.A. Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy', *op.cit.*; as well as 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.

despite its intention to leave the European Union. 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.”<sup>8</sup> 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. Indeed, EU foreign policy did not play a major role in the referendum campaign,<sup>9</sup> and, overall, the UK has always been quite supportive of the agreed CFSP policies and decisions.<sup>10</sup> 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”<sup>11</sup> and that “it was generally strongly in the UK’s interests to work through the EU in foreign policy”,<sup>12</sup> if only to ‘upload’ its own policy preferences.<sup>13</sup> 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.

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<sup>8</sup> Cardwell, *op.cit.*, at 18. Cf. also C. Hillion, ‘Norway and the changing Common Foreign and Security Policy of the European Union’, *NUPI Report* 1/2019, 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 here: [www.gov.uk/government/publications/technical-note-on-consultation-and-cooperation-on-external-security](http://www.gov.uk/government/publications/technical-note-on-consultation-and-cooperation-on-external-security).

<sup>9</sup> Kenneth A. Armstrong, *Brexit Time: Leaving the EU – Why, How and When?* (Cambridge University Press 2017), at 32; J. Black et al., *Defence and Security after Brexit* (RAND Europe 2017), at 17.

<sup>10</sup> Cardwell, *op.cit.*, at 12. The quotes below were also found by Paul Cardwell.

<sup>11</sup> 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), at 138-139.

<sup>12</sup> ‘Review of the Balance of Competences between the United Kingdom and the European Union - Foreign Policy’, UK Government, 2013, at 87; [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/227437/2901086\\_Foreign\\_Policy\\_acc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227437/2901086_Foreign_Policy_acc.pdf).

<sup>13</sup> H. Dijkstra and S. Vanhoonacker, (2017), ‘The Common Foreign and Security Policy’, *Oxford Research Encyclopedia of Politics*.

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.’<sup>14</sup>

Thus it might not have come as a surprise that the Political Declaration (PD) of November 2018 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”.<sup>15</sup> The Political Declaration 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.”<sup>16</sup> And, “The High Representative may, where appropriate, invite the United Kingdom to informal Ministerial meetings of the Member States of the Union”.<sup>17</sup> 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”.<sup>18</sup> In addition, continued collaboration is foreseen in projects of the European Defence Agency (EDA),<sup>19</sup> the European Defence Fund (EDF), the European Union Satellite Centre

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<sup>14</sup> ‘Review of the Balance of Competences between the United Kingdom and the European Union - Foreign Policy’, *op.cit.*, at 7.

<sup>15</sup> Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, Brussels, 22 November 2018 (OR. en), Doc. XT 21095/18 BXT111 CO EUR-PREP 54, par. 81; [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/759021/25\\_November\\_Political\\_Declaration\\_setting\\_out\\_the\\_framework\\_for\\_the\\_future\\_relationship\\_between\\_the\\_European\\_Union\\_and\\_the\\_United\\_Kingdom\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom_.pdf)

<sup>16</sup> *Ibid.* par. 95.

<sup>17</sup> *Ibid.* par. 97.

<sup>18</sup> *Ibid.* par. 101. 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 ‘Foreign policy, defence and development: A future partnership paper’, HM Government, 2017; [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/643924/Foreign\\_policy\\_defence\\_and\\_development\\_paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy_defence_and_development_paper.pdf)

<sup>19</sup> 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

(EUSC) and in PESCO, the new permanent structured cooperation arrangements to strengthen defence cooperation between the Member States.<sup>20</sup>

Despite these clear intentions, a post-Brexit cooperation on 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,<sup>21</sup> imposing 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”.<sup>22</sup>

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.<sup>23</sup>

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

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and technology projects. See also S. Lain and V. Nouwens, ‘The Consequences of Brexit for European Defence and Security’, *Occasional Paper Royal United Services Institute for Defence and Security Studies*, 2017.

<sup>20</sup> Political declaration, par. 104 and 106.

<sup>21</sup> 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.”

<sup>22</sup> 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.

<sup>23</sup> Cf. 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).

and defence policy have been investigated,<sup>24</sup> the present paper will address a number of key legal questions related to a continued participation of the UK in this area. Section 2 will address the issues from a European law perspective, whereas section 3 will focus on international law aspects of the participation of the UK in CFSP and CSDP.

## 2. European Law Aspects of post-Brexit EU-UK Cooperation

### 2.1 *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 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.”<sup>25</sup> 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.”<sup>26</sup>

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<sup>24</sup> See for instance Richard G. Whitman, ‘The UK and EU Foreign, Security and Defence Policy after Brexit: Integrated, Associated or Detached?’ (2017) 238 *National Institute Economic Review* 43, 48; Malcolm Chalmers, ‘UK Foreign and Security Policy after Brexit’, *RUSI Briefing Paper*, January 2017; [https://rusi.org/sites/default/files/201701\\_bp\\_uk\\_foreign\\_and\\_security\\_policy\\_after\\_brexit\\_v4.pdf](https://rusi.org/sites/default/files/201701_bp_uk_foreign_and_security_policy_after_brexit_v4.pdf)

<sup>25</sup> Emphasis added.

<sup>26</sup> Comments on the Council’s Rules of Procedure, 2016, at 16; <https://www.consilium.europa.eu/media/29824/qc0415692enn.pdf>

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 treaty modification. This is not to say that all forms of participation of the UK in CFSP and CSDP are excluded (section 2.3 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.<sup>27</sup> 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 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).

*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.

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<sup>27</sup> 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 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.*<sup>28</sup>

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”.<sup>29</sup> 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.

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 Political Declaration on the future relationship seems to leave this option open (see further below). In any case, unless anything else is arranged for, 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 come to an end.<sup>30</sup>

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,<sup>31</sup> such a status could perhaps be foreseen for the UK in certain working parties.<sup>32</sup> However, the EU does not seem to be in favour of

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<sup>28</sup> 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)

<sup>29</sup> Art. 4(2) of the Rules of Procedure of the European Council.

<sup>30</sup> Cf. 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 [...]”

<sup>31</sup> 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.

<sup>32</sup> 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](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;



any form of ‘half-member’ status, let alone of voting rights for non-members.<sup>33</sup> While High Representative Mogherini seemed ready to explore the options,<sup>34</sup> the idea met with some critics among other officials, even where observer status in the PSC would be concerned.<sup>35</sup>

## 2.2 *The withdrawal agreement*

The Withdrawal Agreement (WA) that was agreed upon between the EU and the UK in November 2018 does not devote too much text to CFSP, but basically extends the pre-Brexit situation during a transition period (until 31 December 2020).<sup>36</sup> 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.”<sup>37</sup>

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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-](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)

[UK%20cooperation%20on%20foreign%20%26%20security%20policy%20April%202017.pdf](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)

<sup>33</sup> 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-](https://ec.europa.eu/commission/sites/beta-political/files/slides_on_foreign_security_defence_policy.pdf)

[political/files/slides\\_on\\_foreign\\_security\\_defence\\_policy.pdf](https://ec.europa.eu/commission/sites/beta-political/files/slides_on_foreign_security_defence_policy.pdf)

<sup>34</sup> Remarks by Mogherini on EU-UK future partnership CFSP, 2018; [https://eeas.europa.eu/headquarters/headquarters-homepage/44528/remarks-hrvp-mogherini-eu-](https://eeas.europa.eu/headquarters/headquarters-homepage/44528/remarks-hrvp-mogherini-eu-institute-security-studies-event-future-eu-foreign-security-and_en)

[institute-security-studies-event-future-eu-foreign-security-and\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/44528/remarks-hrvp-mogherini-eu-institute-security-studies-event-future-eu-foreign-security-and_en)  
<sup>35</sup> 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-](http://www.politics.co.uk/comment-analysis/2017/07/17/brexit-s-toll-on-foreign-policy-losing-our-reputation-day-af)

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<sup>36</sup> The text was adopted on 14 November 2018 and endorsed in a special session of the European Council on 25 November 2018. See [https://ec.europa.eu/commission/publications/agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community\\_nl](https://ec.europa.eu/commission/publications/agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community_nl).

<sup>37</sup> Article 127(2) WA.

It is interesting to note that, despite the general rule that nothing changes, the participation of the UK in the so-called permanent structured cooperation (PESCO) in defence matters is excluded;<sup>38</sup> the UK can participate on an “exceptional basis” only:

“for 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) 2017/23151 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.”<sup>39</sup>

Despite the in principle exclusion of the UK from PESCO, the withdrawal agreement foresees the possibility to continue participation in some of the CSDP institutions and operations,<sup>40</sup> including financial contributions.<sup>41</sup> 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”.<sup>42</sup>

The situation after the transition period will thus depend on what can be agreed upon in the future relationship agreement. Some hints may already be found in the 2018 Political Declaration that was adopted alongside the Withdrawal

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<sup>38</sup> See extensively on PESCO: S. Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?’, CMLR, 2018, pp. 1785-1826.

<sup>39</sup> Art. 17(7a) WA.

<sup>40</sup> 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.

<sup>41</sup> “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.” (Art. 157 WA)

<sup>42</sup> Art. 129 WA. See on the legal implications of this rule Wessel, ‘Resisting Legal Facts’, *op.cit.*

Agreement. 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.”<sup>43</sup> To that end the declaration *inter alia* also foresees that the UK, upon invitation by the High Representative, joins “informal Ministerial meetings of the Member States of the Union”<sup>44</sup> and that it participates “on a case-by-case basis in CSDP and operations through a Framework Participation Agreement”.<sup>45</sup>

The latter will certainly also be beneficial to the EU. The UK is one of only two Member States that has a nuclear capacity, it is one of the five spending 2% of its GDP on defence, and it is a permanent member of the UN Security Council.<sup>46</sup>

## 2.2 *Third country participation in CFSP*

The participation of third states in CFSP and CSDP 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”. Indeed, there are precedents for the situation the UK faces. 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 working groups.<sup>47</sup> Candidate countries show that it is even possible to be an observer in the PSC.<sup>48</sup> 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 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 further below). Moreover, it can possibly create political tensions in certain other EU member states, like Sweden, Denmark

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<sup>43</sup> Art. 94 PD.

<sup>44</sup> Art. 97 PD.

<sup>45</sup> Art. 101 PD.

<sup>46</sup> Cf. L. 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*, N. 4-2018 at 5.

<sup>47</sup> 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.*.

<sup>48</sup> Lis, *op.cit.*

and others, where Eurosceptic political parties could be tempted to push for ‘half-member’ status.<sup>49</sup>

*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. Despite the fact that the future EU-UK foreign and security cooperation will most likely have a different basis, we will briefly mention some examples as they have been part of the debate on the scenarios. The first type of cooperation is formed by the EFTA/EEA agreements.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> The EU-Norway relationship serves as a good example of a continuous dialogue with the EU on numerous foreign policy issues.<sup>53</sup> 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

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<sup>49</sup> 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](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>).

<sup>50</sup> 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*.

<sup>51</sup> 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/](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](http://edz.bib.uni-mannheim.de/daten/edz-k/gde/11/screening_report_31_is_internet_en.pdf).

<sup>52</sup> See for instance: EEA Council meetings (46<sup>th</sup>), 2016; <http://www.efta.int/sites/default/files/documents/eea/eea-news/2016-11-15-eea-council-conclusions.pdf>

<sup>53</sup> See Hillion, ‘Norway and the changing Common Foreign and Security Policy of the European Union’, *op.cit.*

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.<sup>54</sup> Norway's policy is to join EU statements whenever possible.<sup>55</sup> It has been observed that "Norway has thus been involved in essentially all of the core aspects of the EU CFSP".<sup>56</sup> 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.<sup>57</sup>

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.<sup>58</sup>

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."

Similar cooperation can be found in a number of Stabilisation and Association Agreements (SAAs).<sup>59</sup> Thus, in the EU-Serbia SAA Article 10 provides for "an increasing convergence of positions of the Parties on international

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<sup>54</sup> 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 EU's foreign and security policy', *The European Union's Non-Members: Independence under hegemony?*

<sup>55</sup> 'Cooperation on foreign and security policy', Norwegian Ministry of Foreign Affairs, 2018, *op.cit.*

<sup>56</sup> Hillion, 'Norway and the changing Common Foreign and Security Policy of the European Union', *op.cit.*, at 5.

<sup>57</sup> Cf. EU-Switzerland relations; <http://www.consilium.europa.eu/en/press/press-releases/2017/02/28/conclusions-eu-swiss-confederation/>

<sup>58</sup> 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.

<sup>59</sup> 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.

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.”<sup>60</sup> 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.”<sup>61</sup>

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.<sup>62</sup> Similar provision can be found in the Strategic Partnership Agreement with Canada, that was negotiated alongside CETA.<sup>63</sup>

These examples reveal the experience of the European Union with the participation of third states in foreign and security policy. It has become clear by now that the future arrangement with the UK will most probably be a separate agreement. Yet, examples can be drawn from the many existing agreements and arrangements.<sup>64</sup> In addition, ad hoc alignment with EU policies and actions remains possible. This will be particularly relevant in relation to (existing and new) sanctions.<sup>65</sup>

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<sup>60</sup> 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.

<sup>61</sup> 2006 EU-Georgia Action Plan; <https://library.euneighbours.eu/content/eu-georgia-action-plan>.

<sup>62</sup> 2017 Framework Agreement between the European Union and its Member States, of the one part, and Australia, of the other part.

<sup>63</sup> 2016 Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part.

<sup>64</sup> In that respect, the 2018 Political Declaration (*supra*) 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 PD).

<sup>65</sup> 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.

### *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 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.<sup>66</sup> 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.<sup>67</sup> 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”.<sup>68</sup> 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”.<sup>69</sup>

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.<sup>70</sup> A possible starting point may be offered by the position of Norway. Norway has contributed

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<sup>66</sup> 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](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.

<sup>67</sup> See also Lonardo, *op.cit.*, at 10; and Bakker et al., *op.cit.*

<sup>68</sup> Turkey’s FPA (annex II, Section 2, Article 6 (5)).

<sup>69</sup> 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](https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_6_CSDP_and_third_states.pdf)

<sup>70</sup> 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.”

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 European Defence Agency (EDA).<sup>71</sup> Nevertheless, Norway struggles with similar decision-shaping problems.<sup>72</sup>

### 3. International Law Aspects of post-Brexit EU-UK Cooperation

Brexit cannot merely be settled on the basis of European Union law. While future relations with the UK will be covered by EU external relations law, it is equally clear that any legal post-Brexit cooperation, including CFSP, will primarily take place on the basis of international law.<sup>73</sup> International law also has something to say on the continuation of currently existing agreements, for instance in relation to ongoing CSDP missions. Furthermore, question of international responsibility and dispute settlement may arise. This section will briefly highlight some of the international legal aspects related to the UK's participation in CFSP as a third state.

#### 3.1 Existing and new CFSP/CSDP agreements

Interestingly enough, agreements in the area of CFSP and CSDP are concluded as so-called 'EU-only' agreements. These are bi-lateral agreements between the EU and a third state that are not co-signed by the EU Member States, as would be the case for mixed agreements. Most of the agreements regulate the status of a CSDP

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<sup>71</sup> 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](http://www.epc.eu/documents/uploads/pub_8039_afterbrexitprospectsuk-eu.pdf?doc_id=1901)

<sup>72</sup> 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](https://www.delorsinstitut.de/2015/wp-content/uploads/2018/02/20180207_Towards-Norway-Plus-for-Brexit-Defence_Koenig.pdf)

<sup>73</sup> See in general on the international law aspects for instance J. Odermatt, 'Brexit and International Law: Disentangling Legal Orders', *Emory International Law Review*, vol.31, 2017, pp. 1051-1073; G. Van der Loo and S. Blockmans, 'The Impact of Brexit on the EU's International Agreements', *CEPS Commentary*, 15 July 2016; <https://www.ceps.eu/publications/impact-brexit-eu's-international-agreements>; as well as R.A. Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and its Member States', *Common Market Law Review*, 2018, pp. 101-132.



mission in a host state.<sup>74</sup> As I have argued more extensively elsewhere,<sup>75</sup> based on both treaty law and EU law arguments, it is not obvious that the UK can continue to rely on these agreements in a situation in which it would continue to participate in an ongoing mission post-Brexit. Agreements concluded by the EU usually apply to the territories in which the Treaty on European Union is applied.<sup>76</sup> Unless some kind of transitional regime is agreed to,<sup>77</sup> the territory of the UK will no longer be covered by the agreements after Brexit-day. Article 216(2) of the TFEU furthermore makes clear that international agreements concluded by the EU are (arguably *only*) “binding upon the institutions of the Union and its Member States”. From the EU side the situation is therefore quite clear: international agreements concluded by the EU are no longer binding on the UK. The latter is neither bound through EU law (Art. 216(2) TFEU), nor on the basis of international treaty law (Art. 34 VCLT<sup>78</sup>).

The argument that the EU merely concluded the agreements ‘on behalf of’ its Member States and that the UK would thus remain bound once the competences are returned to it seems problematic. This argument is often linked to the notion of ‘succession’. Yet, the Treaty on European Union clearly presents the EU as a separate international actor and the text of the agreements does not indicate the UK (or any other Member State) as a contracting party. Furthermore, as also held by

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<sup>74</sup> The international agreements concluded under the CFSP may be found in the EU database. See for a recent example the Agreement between the European Union and the Republic of Moldova on security procedures for exchanging and protecting classified information (OJ L106, 22/04/2017).

<sup>75</sup> R.A. Wessel, ‘Consequences of Brexit for International Agreements Concluded by the EU and its Member States’, *op.cit.*

<sup>76</sup> See for instance Article 360(1) of the 2014 Association Agreement between EU and Central American States provides: “For the EU Party, this Agreement shall apply to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties.” (<http://trade.ec.europa.eu/doclib/press/index.cfm?id=689>). Or, Article 52 of the EU-Korea Framework Agreement: “This Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union is applied and under the conditions laid down in that Treaty, and, on the other hand, to the territory of the Republic of Korea.” ([http://eeas.europa.eu/archives/docs/korea\\_south/docs/framework\\_agreement\\_final\\_en.pdf](http://eeas.europa.eu/archives/docs/korea_south/docs/framework_agreement_final_en.pdf)).

Compare also Article 29 VCLT, which sets out that a treaty is binding on a party in respect of its entire territory.

<sup>77</sup> See also the European Council (Art. 50) Guidelines of 15 December 2017 and the ‘Supplementary directives’ adopted by the Council on 29 January 2018, *op.cit.* More extensively: M. Dougan, ‘An Airbag for the Crash Test Dummies? EU-UK Negotiations for a Post-Withdrawal “Status Quo” Transitional Regime Under Article 50 TEU’, *CMLR* 2018.

<sup>78</sup> Article 34 of the 1969 Vienna Convention on the Law of Treaties provides: “A treaty does not create either obligations or rights for a third State without its consent”. Art. 34 VCLT is considered a principle of customary international law and is as such also binding on the Union (Judgment in *Brita v Hauptzollamt Hamburg Hafent*, C-386/08, EU:C:2010:91, paras 40–45).

Odermatt, it is far from clear that international law accepts the succession of international organizations by former Member States. The Vienna Convention on Succession of States in Respect of Treaties, for example, applies only “to the effects of a succession of States in respect of treaties between States” and it is clear that the EU is not a state.<sup>79</sup> In any case, viewing Brexit as resulting in a succession of (parts of) the EU by the UK remains somewhat problematic.

This implies that – unless all parties involved agree differently – the UK’s position in relation to ongoing and new missions will have to be settled on the basis of a new Framework Partnership Agreement (see above).<sup>80</sup> This can be a separate agreement, but it could also be a chapter in the more general new partnership agreements that is envisaged to regulate the new relationship between the EU and the UK.

### 3.2 *International responsibilities and dispute settlement*

It is a truism that with Brexit international responsibilities between the Union, its Member States and the UK will shift. So far, academics have largely focused on the division on international responsibilities between the Union and its Member States, for instance in relation to military missions.<sup>81</sup> New questions arise in relation to responsibilities flowing from earlier international agreements, including those regulating ongoing missions. The final Withdrawal Agreement and/or the future relationship agreement will have to cover how to deal with responsibilities flowing from pre-Brexit actions.

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<sup>79</sup> Odermatt, *op.cit.*, at 1059. The non-state nature of the EU was confirmed by the Court in Opinion 2/13 of 18 December 2014, para 156.

<sup>80</sup> This seems also foreseen in the Political Declaration of November 2018 (*supra*): “The Parties welcome close cooperation in Union-led crisis management missions and operations, both civilian and military. 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” (Art. 101 PD)

<sup>81</sup> See for instance A. Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control*, Cambridge University Press, 2016; and F. Naert, *International Law Aspects of the EU’s Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* Intersentia, 2009. Cf. also A. Sari and R.A. Wessel, ‘International Responsibility for EU Military Operations: Finding the EU’s Place in the Global Accountability Regime’, in B. Van Vooren, S. Blockmans and J. Wouters (Eds.), *The EU’s Role in Global Governance: The Legal Dimension*, Oxford: Oxford University Press, 2013, pp. 126-141; R.A. Wessel and L. den Hertogh, ‘EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?’, in M. Evans and P. Koutrakos (Eds.), *International Responsibility: EU and International Perspectives*, Oxford: Hart Publishing, 2013, pp. 339-358.

The Withdrawal Agreement foresees the establishment of “A Joint Committee, comprising representatives of the Union and of the United Kingdom”, that “shall be responsible for the implementation and application of this Agreement.”<sup>82</sup> For dispute settlement between the Union and the UK it is interesting that the withdrawal Agreement provides that the parties “shall only have recourse to the procedures provided for in this Agreement”.<sup>83</sup> The Joint Committee plays a first role, but “if no mutually agreed solution has been reached within 3 months after a written notice has been provided to the Joint Committee [...] the Union or the United Kingdom may request the establishment of an arbitration panel. Such request shall be made in writing to the other party and to the International Bureau of the Permanent Court of Arbitration.”<sup>84</sup> Obviously – keeping in mind the Union’s views on its autonomy<sup>85</sup> – “a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2)”<sup>86</sup> shall not be decided by the arbitration panel, but by the CJEU.<sup>87</sup>

No specific provisions in this regard can be found in relation to CFSP and CSDP. This seems to imply that any conflicts over CFSP issues are also to be solved on the basis of the procedures of the Withdrawal Agreement. Unless, indeed, the question concerns the interpretation of EU law. The question is how this will play out in cases in which the CJEU does not have jurisdiction given the restrictions it faces in the CFSP area.<sup>88</sup> Following the text of the Withdrawal Agreement it could then be up to the arbitration panel to rule. Yet, the experience with Opinion 2/13 has revealed the CJEU’s reluctance to accept possible interference by other Courts even in cases where it itself lacks jurisdiction.<sup>89</sup>

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<sup>82</sup> Art. 164 WA.

<sup>83</sup> Art. 168 WA.

<sup>84</sup> Art. 170(1) WA.

<sup>85</sup> Among the many publications on the autonomy of the EU, see for instance T. Molnár, ‘The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States’ (2015) *Hungarian Yearbook of International Law and European Law* 433–59; as well as C. Contartese, ‘The Autonomy of the EU Legal Order in the CJEU’s External Relations Case-Law: From the “Essential” to the “Specific Characteristics” of the Union and Back Again’ (2017) *Common Market Law Review* 1–46.

<sup>86</sup> Art. 89(2) WA: “If, in a judgment referred to in paragraph 1, the Court of Justice of the European Union finds that the United Kingdom has failed to fulfil an obligation under the Treaties or this Agreement, the United Kingdom shall take the necessary measures to comply with that judgment”.

<sup>87</sup> Art. 174(1) WA. A similar provision can be found in the Political declaration on the future agreement (Art. 134 PD).

<sup>88</sup> See Hillion and Wessel, *op.cit.*

<sup>89</sup> *Ibid.*, as well as more extensively: A. Łazowski and R.A. Wessel, ‘When Caveats turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR’, *German Law Journal*, 2015, pp. 179-212.

#### 4. Conclusion

Despite the clear ambitions of the UK to continue participating in the Common Foreign, Security and Defence Policy, questions arise from both an EU law and an international law perspective as to the realisation of these ambitions.

With regard to EU law, the present paper 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 any close cooperation will be excluded. The existing regimes with other third countries provide ample examples of alignment of the UK with EU possibilities 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.”<sup>90</sup> Obviously, future arrangements 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,<sup>91</sup> any ‘half member’ status 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.

Furthermore, it is clear that post-Brexit EU-UK relations will be covered by international law. Despite the fact that both the Withdrawal Agreement and any future relations agreement will be “an integral part” of EU law,<sup>92</sup> parties will have to follow the applicable international rules and principles. The new agreements will in particular have to regulate the new division of international responsibilities; not just for new EU external action the UK will participate in, but also for claims

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<sup>90</sup> Cardwell, *op.cit.*, at 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, forthcoming).

<sup>91</sup> The position of the European Parliament has also been quite clear in this respect: “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”. European Parliament resolution on the framework of the future EU-UK relationship, 2018 (2018/2573(RSP)); <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>

<sup>92</sup> To quote the famous Case 181/73 *Haegeman v. Belgium*.

flowing from previous or ongoing actions and missions. Finally, with regard to any dispute settlement on CFSP and CSDP issues, the current provisions are unclear as to the role of the CJEU whenever questions of EU law interpretation arise in international arbitration.

[...]