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Norway and the changing Common Foreign and Security Policy of the European Union

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Summary

For decades, Norway has cooperated with the European Union in matters of foreign policy, security and defence. It has thus participated in EU civilian and military operations, aligned itself with EU political declarations and restrictive measures against states and/or individuals, and collaborated with the European Defence Agency.

Unlike other frameworks of cooperation between the EU and Norway, such as the EEA and Schengen agreements, the cooperation in foreign policy, security and defence does not rely on a single setup, with elaborate institutional arrangements and dynamic obligations. Rather, Norway joins forces with the Union in an ad hoc fashion and often based on informal arrangements. This allows for flexibility, but also entails that Norway has few formal channels for exerting influence on EU CFSP decisions to which it subsequently subscribes.

Against this backdrop, and as the EU has become more active in this policy area, Norway has shown a renewed interest in deepening its relationship with the Union in CFSP matters. This report examines the ways in which Norway can enhance its cooperation and develop its institutional arrangements with the EU in this fast-evolving field.

The discussion is based on an assessment of what the EU is able to offer in view of its constitutional framework, as informed by its on-going discussions with the UK on a future security partnership post-Brexit. Given the increasing interactions between the CFSP and other fields of the EU's activities, the analysis also discusses whether Norway may draw a cooperation dividend from its participation in the single market through the EEA, to build a deeper and more participatory cooperation with the EU in CFSP matters.

The report envisages four possible ways of enhancing the Norway-EU cooperation in the area CFSP: an extension of the present cooperation by ad hoc participation in new CFSP initiatives, a more active use of other existing EU-Norway frameworks of cooperation including the EEA, the setting up of a distinct EU-Norway CFSP agreement and the participation in a multilateralised EU-UK CFSP partnership.

Introduction

Norway and the European Union (EU) have cooperated in foreign, security and defence policies for decades.¹ The cooperation has developed incrementally, alongside the other frameworks which structure the EU-Norway relationship such as the agreement on the European Economic Area (EEA) and the Schengen association agreement. It has also progressively widened as the EU has become more active in those areas through the steady development of its distinct Common Foreign and Security Policy (CFSP), including a Common Security and Defence Policy (CSDP).²

Norway has thus participated in several EU civilian and military operations, cooperated with the European Defence Agency (EDA), aligned to, and supported EU political declarations and restrictive measures against states and/or individuals, while being allowed increased access to the embryonic European defence market. Norway has thus been involved in essentially all of the core aspects of the EU CFSP.³

As a result, Norway-EU interactions in this area have taken a variety of expressions, from formal agreements to ad hoc and non-legal setups. Unlike the other established EU-Norway frameworks of cooperation, cooperation in the field of the CFSP does not rely on a single comprehensive system involving elaborate institutional arrangements and dynamic obligations. Rather, Norway has joined forces with the Union in an ad hoc fashion, and often on the basis of specific and flexible arrangements.

While this approach has in principle preserved Norway's formal national sovereignty in foreign, security and defence policy, it has also entailed that the country has few formal channels at its disposal for exerting influence on EU CFSP decisions to which it subsequently subscribes. This partly explains Norway's interest in putting its CFSP

¹ On Norway connections with the EU CFSP/CSDP, see NOU 2012:2 *Utenfor og innenfor*.

² See in this respect, Blockmans and Koutrakos (eds) *Research Handbook on EU's Common Foreign and Security Policy* (Edward Elgar, 2018).

³ For an overview of existing arrangements:

<https://www.regjeringen.no/no/tema/europapolitikk/tema-norge-eu/utenriks-sikkerhetspolitisk-samarbeid/fusp-erklaringer/id521074/>

cooperation with the EU on a firmer and more institutionalised basis, with a view potentially to participating more actively in the *shaping* of CFSP decisions.⁴ In this sense, the Government 2018 Strategy towards the EU underlined the country's ambition to develop its political dialogue and practical cooperation with the EU and promote more favourable conditions for its defence industry.⁵

Global and regional challenges have also invigorated the appetite for a deeper CFSP cooperation with the EU. The evolving attitude of the US administration towards transatlantic relations, combined with the volatility of Europe's neighbourhoods, and the withdrawal of the United Kingdom from the EU ('Brexit') pose new questions regarding security cooperation in Europe in general, and in Northern Europe in particular. Meanwhile, and perhaps in connection with this context, a new momentum for the development of the CFSP is noticeable. Recent declarations from EU Member States,⁶ as well as the rhetoric of EU institutions, including from the European Commission itself,⁷ are testimony of a political impetus for further cooperation in foreign policy, security and defence in Europe.⁸ Indeed, the Treaty of Lisbon, and the opportunities it sets out to bolster the EU global role, has equally catalysed new EU initiatives in these fields.

Given these parameters, the present report seeks to examine the potential for enhanced cooperation and reformed institutional arrangements between Norway and the EU in the area of CFSP. The analysis mainly revolves around the question of what the EU is able and

⁴ See e.g. Rieker, "Norway and the ESDP: explaining Norwegian Participation in the EU's Security Policy"; 15 *European Security* (2006), 281, Sjursen, "From fly in the ointment to accomplice: Norway in EU foreign and security policy" [ARENA Working Paper 2/2012](#);

⁵ www.regjeringen.no/en/dokumenter/eu_strategy/id2600561

⁶ See e.g. speech by President Macron - Ambassadors' Conference 2018, available at www.diplomatie.gouv.fr/en/the-ministry-and-its-network/events/ambassadors-week/ambassadors-week-edition-2018/article/speech-by-president-emmanuel-macron-ambassadors-conference-2018; speech by German Chancellor Merkel at an election rally in Munich in May 2017, reported in *The Guardian* of 27 May 2017; speech by German Foreign Minister Maas at the Federal Academy for Security Policy, 8 October 2018: <https://www.auswaertiges-amt.de/en/newsroom/news/maas-baks/2146822>; as well as the Franco-German "Meseberg Declaration" of June 2018: www.diplomatie.gouv.fr/en/country-files/germany/events/article/europe-franco-german-declaration-19-06-18

⁷ 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, COM(2018)647 final. The Commission's support for a more active CFSP is remarkable as the Commission is not traditionally known to have a keen interest in the development of a policy which deemed to overshadow its own clout on the international plane.

⁸ See 2016 Global Strategy for the EU's Foreign and Security Policy at www.eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf; and the 2017 "State of the Union" speech of the President of the European Commission.

willing to offer in this respect, considering the legal constraints framing its external action.

Although the EU is a political actor on the international scene, it is also, and perhaps primarily a legal entity that acts on the basis of the limited competence which the Member States have attributed to it. It is therefore critical to recall the legal framework within which the EU operates on the external plane in general, and in the CFSP area in particular, to envisage the terms of a potential deepened cooperation therein. Indeed, while the CFSP remains a distinct EU competence in legal and institutional terms, it is not as intergovernmental and therefore flexible as often contended. In this policy area too, the EU is constrained by several rules and principles, which have been recalled and articulated in the specific context of Brexit.

The report is structured as follows: the first sections discuss significant factors of change, starting with the recent CFSP initiatives (1), the deepening of the CFSP in the EU legal order since the Lisbon Treaty (2), and the discussions surrounding the UK withdrawal from the EU (3). The fourth and last section spells out possible forms of enhanced EU-Norway cooperation in CFSP (4).

1. New EU initiatives in the area of CFSP

Against the backdrop of regional and global uncertainties, EU Member States have displayed increasing willingness and ability to make use of hitherto unexplored CFSP tools. Following the publication of its Global Strategy for a Stronger Europe,⁹ the EU thus took several new initiatives aimed at strengthening the common foreign, defence and security policy, with a view in particular to bolstering the EU's *strategic autonomy*.¹⁰

These initiatives have a bearing on existing arrangements governing the EU cooperation with Norway. Alongside the ambition to reinforce EU-NATO cooperation,¹¹ which would potentially, though indirectly, intensify Norway's relations with the EU in security and defence matters, two recent EU initiatives stand out in terms of potential impact on EU-Norway cooperation in CFSP matters: namely the launch of "Permanent Structured Cooperation" in the area of defence (PESCO) (1.1) and the establishment of the European Defence Fund (EDF) (1.2).

1.1 PESCO and increased culture of commitment in CFSP

Inspired by innovations introduced by the Treaty of Lisbon,¹² the EU has recently activated PESCO whereby a large majority of the Member States (25) have made binding commitments to one another to fulfil more demanding military missions. Based on a Council CFSP Decision of mid-November 2017,¹³ PESCO aims at increasing defence spending in the EU and building capabilities more efficiently through cross-border

⁹ 2016 Global Strategy for the EU's Foreign and Security Policy; op. cit.

¹⁰ In its December 2018 conclusions, the European Council underlined that "These initiatives contribute to enhancing the EU's strategic autonomy and its capacity to act as a security provider, while complementing and reinforcing the activities of NATO and strengthening EU-NATO cooperation, in full respect of the principles of inclusiveness, reciprocity and decision-making autonomy of the EU."

¹¹ https://eeas.europa.eu/topics/common-foreign-security-policy-cfsp/48265/eu-and-nato-defence-europe-coherent-complementary-and-interoperable_en

¹² See Article 42(7) TEU, and Protocol 10 to the EU Treaties. Further on these developments, see Blockmans "The EU's modular approach to defence integration: Inclusive, ambitious and legally binding?" 55 *Common Market Law Review* (2018), 1785

¹³ Council Decision establishing Permanent Structured Cooperation (PESCO) and determining the list of Participating Member States, 8 Dec. 2017.

cooperation. The purpose is to develop joint defence capabilities, invest in shared projects and enhance the operation readiness and contribution of armed forces.¹⁴

While voluntary, participation in PESCO involves *binding* commitments from the participating States. Indeed, the Council's decision makes it clear that the EU High Representative for Foreign Affairs and Security Policy, assisted by the European External Action Service (EEAS), and the Council are to oversee the participants' performance, with a risk of suspension from the project should commitments not be fulfilled.¹⁵ The Member State's decision to take part in PESCO, while voluntary, therefore involves some degree of *EU monitoring*. The PESCO initiative thereby potentially strengthens the culture of obligation and compliance in a field hitherto less prone to such Member States' engagement.

Importantly for the purpose of the present discussion, this initiative includes the possibility for third states to participate in PESCO projects.¹⁶ The *conditions* for such participation are still being discussed among participating Member States, the initial ambition to adopt a decision to that effect by the end of 2018¹⁷ having been postponed. That said, the PESCO decision itself, and the on-going discussions within the EU, already contain several significant elements conditioning any external participation.

Thus, the preamble of the Decision as well as its Article 4(2)(g)¹⁸ suggest that potential participation of third states is to be *exceptional*, based on the *invitation* of participating Member States, and for the purpose a *particular project* only and hence on a case-by-case basis. This general approach indeed translates a degree of reluctance of some

¹⁴ See www.consilium.europa.eu/en/press/press-releases/2017/12/11/defence-cooperation-pesco-25-member-states-participating/

¹⁵ Art. 6(3) and (4) PESCO.

¹⁶ According to Art. 9 of the Decision: (1) The general conditions for the participation of third States in individual projects shall be specified in a Council decision adopted in accordance with Article 4(2), which may include a template for administrative arrangements with third States. (2) The Council shall decide in accordance with Article 46(6) TEU whether a third State, which the participating Member States taking part in a project wish to invite to take part in that project, meets the requirements set out in the decision referred to in paragraph 1. (3) Following a positive decision as referred to in paragraph 2, the participating Member States taking part in a project may enter into administrative arrangements with the third State concerned for the purpose of its taking part in that project. Such arrangements shall respect the procedures and the decision-making autonomy of the Union.

¹⁷ Pt 13 of the Council recommendation of 6 March 2018 concerning a roadmap for the implementation of PESCO: Brussels, 6 March 2018.

¹⁸ See also Art. 9(1) PESCO.

Member States, to allow too easy an access to PESCO¹⁹ for third states. According to Annex III of the Decision (“Governance”) the invited third state would also have to provide “*substantial added value* to the project, contribute to strengthening PESCO and the CSDP and *meet more demanding commitments*. This *will not grant decision powers* to such Third States in the governance of PESCO. Moreover, the Council in PESCO format will decide if the conditions set out in the general arrangements are met by each Third State invited by the respective project participants”.²⁰

While potential participation of third states is to be assessed on a case by case basis, continuing participation, once allowed, would depend on the participating third state’s enduring fulfilment of its commitments, as it is the case of participating Member States. As one of the principles governing the participation of third states requires that such participation should not be made any easier than that of Member States, it can be expected that third states participating in PESCO are to be subject to an equivalent EU *monitoring* to the one that is performed in relation to participating Member States.

1.2 EDF and the establishment of a European defence market

A related enterprise in the security and defence sphere is the establishment of the European Defence Fund (EDF).²¹ The initiative is purported to support joint research and development in the defence industry across the EU, with the ultimate aim of enhancing the EU’s strategic autonomy.²²

Remarkably, the Fund has been initiated by the European Commission in the form of a proposal for a regulation to the European Council, Parliament and Council, based on Articles 173(3) (industry)

¹⁹ According to *POLITICO*: ‘the participation of a non-EU country “should not lead to dependencies that would potentially hamper or block the (joint) usability or operational deployment of the capability developed in an individual project.” And it stipulates that “the invited third state should provide substantial added value to achieving the objectives of the individual project (contributing with resources or expertise).”’

<https://www.politico.eu/article/pesco-military-uk-and-us-will-be-allowed-to-join-some-eu-military-projects/>

²⁰ See also Art. 4(2)(g) and Art. 9(2) PESCO.

²¹ See Blockmans (2018), op. cit.

²² See the Commission’s proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund, COM(2018) 476 final. Further on the notion of strategic autonomy: Mauro, “Autonomie Stratégique – le nouveau Graal de la défense européenne” *Les Rapports du GRIP 1/2018*.

182(4), 183 and 188(2) (research and development) TFEU.²³ It is thus not a CFSP-based initiative, but an instrument intimately connected to the operation of the single market, as further supported by the Commission's indication that the text has 'EEA relevance'.

Like the PESCO Decision, the draft EDF Regulation foresees the possible participation of third states. The draft Preamble makes a specific reference to the participation of EEA EFTA states, which would take part "in Union programmes in the framework of the cooperation established under the EEA Agreement, which provides for the implementation of programmes by a decision under that agreement."²⁴ Article 5 of the draft regulation, entitled "Associated Countries", circumscribes the latter notion to "the European Free Trade Association (EFTA) members which are members of the European Economic Area (EEA), in accordance with the conditions laid down in the EEA agreement", in terms of access to EDF funding.²⁵

Norway, as the other two EEA EFTA states, are not regarded as third states for the purpose of the EDF. If incorporated in the EEA, the EDF would in principle be accessible by the three EEA EFTA states on the same terms as EU Member States. This in turn would imply financial commitments, most likely based on the EEA key. Importantly, the Commission proposal also underlines the "close links between the Fund and projects implemented in the framework of ... [PESCO]. Once assessed as eligible, a 'PESCO bonus', in the form of a higher funding rate, will be granted to eligible PESCO projects". Norway's broader access to the EDF could in effect facilitate its participation in PESCO, and vice-versa.

²³ COM(2018) 476 final, op. cit.

²⁴ Para 39 mentions that "third countries which are members of the European Economic Area (EEA) may participate in Union programmes in the framework of the cooperation established under the EEA Agreement, which provides for the implementation of programmes by a decision under that agreement. A specific provision should be introduced in this Regulation to grant the necessary rights for and access to the authorising officer responsible, the European Anti-Fraud Office (OLAF) as well as the European Court of Auditors to comprehensively exert their respective competences" (emphasis added).

²⁵ The advantageous position of EEA EFTA states in the operation of the EDF, and indirectly in the development of the European defence market is further illustrated by the fact that Switzerland as EFTA state is not included in the list of "Associated countries". Article 10 of the draft EDF Regulation instead limits the entities eligible for funding applicants and subcontractors established in the Union or in an *associated country* (as defined in Article 5 above), have their executive management structures in the Union or in an *associated country* and are not controlled by a non-associated third country or by a non-associated third country entity. An exception to this principle is envisaged for an applicant established in the Union or in an associated country and controlled by a non-associated third country or a non-associated third country entity, which could be eligible for funding "if this is necessary for achieving the objectives of the action and provided that its participation will not put at risk the security interests of the Union and its Member States.

These initiatives are notable not only because they illustrate the growing, though not entirely new relevance of other EU (read non-CFSP) rules and tools in the development and pursuit of the EU's foreign, security and defence policy ambitions.²⁶ They also typify the Member States' interest in deeper cooperation to develop the Union's CFSP based on positive differentiation, thus in ways that prevent EU action being hampered by potential Member States' veto. Indeed, such initiatives show and contribute to a growing culture of binding commitments and monitoring in CFSP, a policy area whose hallmark has traditionally been their absence.²⁷ The articulation of the solidarity clause enshrined in Article 42(7) TEU, which France has repeatedly called for, could further express and encourage this cultural change in/of the CFSP.²⁸

²⁶ See further below under section 2.

²⁷ Declarations 13 and 14 annexed to the EU Treaties.

²⁸ Speech by President Emmanuel Macron - Ambassadors' Conference 2018, *op. cit.*

2. Evolving nature of CFSP in EU law

While motivated by regional and global challenges, the above-mentioned initiatives have been stimulated by the general evolution of the CFSP. Following the entry into force of the Treaty of Lisbon, the CFSP is no longer as traditional and diplomatic in nature as often alleged, but increasingly legalised and formalised as an area of EU competence. The CFSP is now more deeply integrated in the general EU constitutional order (2.1), catalysing further interactions between the CFSP and other EU rules (2.2).

2.1 Further integration of CFSP in EU legal framework and policies

Though specific in its institutional setting,²⁹ the EU CFSP “*competence*”³⁰ has become less distinct from other EU (external) competences than hitherto, being instead increasingly determined by the same institutional and substantive principles as those governing other fields of EU external action.

Thus, while the CFSP still forms a separate section of the Treaty on European Union,³¹ the negotiation and conclusion of EU agreements in the CFSP field has, since the Lisbon Treaty, been governed by the sole EU treaty-making provision, Article 218 of the Treaty on the Functioning of the EU. Any agreement which a third state would seek to conclude with the EU to establish a new cooperation framework in the specific field of the CFSP would, unlike under the pre-Lisbon dispensation, be negotiated and concluded on the basis of that general procedural framework.³² Indeed, the post-Lisbon EU treaty-making procedure involves several new protagonists. In addition to the Council, which traditionally plays a pivotal role in the CFSP, the Union’s High Representative for Foreign Affairs and Security Policy, acts as negotiator of CFSP agreements. The European Parliament has also gained

²⁹ Art. 24(1) TEU.

³⁰ Art. 2(4) TFEU. Since the Treaty of Lisbon, EU law characterises the CFSP as a “competence” of the EU.

³¹ Chapter II of Title V TEU.

³² See in this respect Case C-244/17, *Commission v. Council (Kazakhstan)* EU:C:2018:662.

prominence, acting as democratic supervisor of the EU external action as a whole.³³

The establishment of the European External Action Service (EEAS), assisting the High Representative, and the latter's appointment as the permanent chair of the Foreign Affairs Council, further exemplify the diminishing inter-governmental character of the CFSP. Instead, the latter's development increasingly involves a Brussels-based bureaucracy which any State wishing to consolidate ties with the EU has to factor in. The growing centralisation ("*Brusselisation*")³⁴ of decision-making in CFSP matters in turn potentially facilitates third states' interactions with the EU in this domain: while contacts with Member States' capitals remain significant, CFSP cooperation increasingly depends on connections with the Brussels-based multi-layered CFSP forum of discussion and exchange.

A striking illustration of the degree to which the CFSP is now governed by the core principles of the EU legal order lies in the increased role of the European Court of Justice in relation to that policy. Endowed with a limited though significant jurisdiction in relation to the CFSP, the Court of Justice has since been called upon to refine the terms of the policy's recalibration instigated by the Lisbon Treaty. The ensuing case law is indeed remarkable in its substantiation of the tight imbrication of the CFSP in the EU constitutional fabric. For example, the ECJ has confirmed the applicability of general EU institutional principles to the CFSP, particularly insofar as the exercise of the CFSP competence involves the EU treaty-making procedure located in Article 218 TFEU.³⁵ More generally, the Court of Justice has stressed the significance of EU constitutional principles, and especially the protection of fundamental rights in the interpretation of the specific institutional provisions governing the CFSP, and in particular with respect to the terms of its own jurisdiction therein.³⁶

³³ See e.g. Case C-263/14, *Parliament v. Council (Tanzania)* EU:C:2016:435.

³⁴ See e.g. contributions in J Peterson and H Sjørnsen (eds) *A Common Foreign Policy for Europe? Competing visions of the CFSP* (London: Routledge, 2000).

³⁵ See e.g. Case C-263/14, *Parliament v. Council (Tanzania)* EU:C:2016:435; Sánchez-Tabernero, "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)*" 54 *Common Market Law Review* (2017), 899.

³⁶ Case C-130/10, *Parliament v. Council (Smart Sanctions)*, EU:C:2012:472; Case C-72/15, *Rosneft*, EU:C:2017:236; Poli, "The Common Foreign Security Policy after *Rosneft*: Still imperfect but gradually subject to the rule of law", 54 *Common Market Law Review* (2017), 1799; see also Wahl and Prete, "The gatekeepers of Article 267 TFEU: On jurisdiction and admissibility of references for preliminary rulings", 55 *Common Market Law Review* (2018), 511.

Any third state's cooperation with the EU in the CFSP field therefore requires consideration of the *institutional* principles governing the EU external action. The same holds true as regards the *substantive* principles, and particularly the treaty-based objectives of the EU external action. Indeed, contrary to the situation that prevailed before the Lisbon Treaty, the CFSP does no longer pursue its own distinct aims.³⁷ The latter, hitherto clustered in a separate TEU provision,³⁸ have been merged with the general objectives of the EU external action.³⁹ When acting externally, the EU must as a result take account of, and pursue *all* its "external" objectives, and not only those previously related specifically to the CFSP.⁴⁰ Conversely, the EU has to pursue old CFSP-specific objectives now subsumed in the general list of EU external goals, when exercising any other EU (external) competence. In other words, the EU pursues its foreign policy objectives not only in the context of specific CFSP instruments, but *also* when acting in the context of *non*-CFSP frameworks, and thus equally in the frameworks of arrangements like Schengen and the EEA.

In contrast to what is sometimes alleged,⁴¹ cooperation with the EU in the area of CFSP is not devoid of legal obligations. It is increasingly structured by the same horizontal principles governing the operation of the EU legal order in general, and the external action of the Union in particular, as further illustrated below. In turn, the progressive inclusion of the CFSP in the mainstream EU legal order also entails that the EU (and its Member States) may become a more predictable and reliable partner in those matters, but also potentially more compelled and demanding. For the classic constraints on Member States and institutions that derive from EU law are no less relevant in the CFSP area than in other areas of external action. This is also connected to the increasing substantive interactions between the CFSP and other areas of EU law.

³⁷ Enshrined until the Treaty of Lisbon in Art. 11 TEU.

³⁸ *ibidem*.

³⁹ Art. 21(2) TEU.

⁴⁰ Art. 23 TEU makes clear that akin to any other external undertaking of the Union, the EU action in the area of CFSP (including the Common Security and Defence Policy, CSDP) "shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with the general [Treaty] provisions [on the Union's external action]".

⁴¹ See, for instance, UK Prime Minister Speech at Munich Security Conference, 17 February 2018.

2.2 Increasing interactions between CFSP and other areas of EU law

While the Treaty of Lisbon has further embedded the specific CFSP institutional framework in the EU legal order, the development of that policy interacts with, and is increasingly pervaded by other EU rules and principles. The intersections between EU policies partly stems from the legal requirement, since the entry into force of the Treaty of Lisbon, that “[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies”.⁴²

First, the CFSP does not develop in a vacuum but overlaps with other external EU policies and competences, such as international trade, development cooperation, or the neighbourhood policy. The CFSP also links up with internal policy frameworks such as internal security. Secondly, EU substantive rules having horizontal application, specifically single market norms, increasingly affect the development and application of the CFSP, particularly in its operational dimension.⁴³ The European Court of Justice has recently confirmed that EU public procurement and budgetary rules as well as staff regulations do apply to EU CFSP operations, which are therefore not immune from the application of EU substantive rules and principles.⁴⁴

The EU restrictive measures provide further illustration of the cross-policy aspects of the CFSP and in particular its interactions with the operation of the Single Market. Thus, while the initiation of EU restrictive measures against third states or individuals takes the form of a CFSP decision, such sanctions are often operationalised in the form of trade and/or financial measures (e.g. freezing of assets in Member States’ banks), decided by the EU exercising its trade and/or market competence, thus outside the CFSP framework. They can also involve restrictions of movement of persons, in terms of crossing the Schengen borders. The EU sanctions policy, to which Norway regularly aligns itself, thus touches upon domains covered by other frameworks of EU-

⁴² Art. 21(3) TEU.

⁴³ Already in the 1990s did the Commission push for this comprehensive approach to defence: COM(96) 10 final; COM (97) 583; then COM(2003)113; COM(2004) 72. See Koutrakos, “Trade, Foreign Policy and Defence in the EU (Oxford: Hart, 2001), ch 8; M Trybus, *European Union law and defence integration* (Oxford: Hart, 2005), ch. 5. On Article 296 TEC: COM(2006) 779; Koutrakos, “The application of EC law to defence industries – Changing interpretation of Article 296 EC” in Barnard and Odudu (eds) *The outer limits of Community Law* (Oxford: Hart, 2009). On public procurement COM(2007)766; on competitiveness in defence: COM(2007)764; on intra-Community transfers, COM(2007) 765. Editorial: “The Commission’s “defence package””, 33 *European Law Review* (2008), 1.

⁴⁴ Case C-439/13, *Elitaliana SpA v. Eulex Kosovo* EU:C:2015:753; Case C-455/14 P, *Hv. Council and Commission*, EU:C:2016:569, Van Elsuwege, “Upholding the rule of law in the Common Foreign and Security Policy: *Hv. Council*”, 54 *Common Market Law Review* (2017), 841.

Norway cooperation, and in particular the EEA and the Schengen agreements.

In the light of these interactions, EU external cooperation in the area of CFSP does not systematically take the form of a separate framework, distinct from other frameworks of cooperation. Depending on the purpose, nature, scope and context of the CFSP cooperation, the latter may be integrated in non-CFSP frameworks. Indeed, a comprehensive agreement containing CFSP provisions would not systematically involve the exercise of the specific EU CFSP competence, and thus activation of a CFSP legal basis and procedure to conclude the agreement.

If the CFSP dimension of the agreement is deemed *ancillary* to the main purpose of the agreement, e.g. trade or development, it is *absorbed* by the main EU competence(s) being exercised (e.g. trade and development), based on the related trade and development legal foundations and procedural arrangements. The European Court of Justice has confirmed this point in a 2018 judgment dealing with the EU partnership agreement with Kazakhstan, which further exemplifies the high degree of integration of the CFSP with the standard operation of the EU legal order.⁴⁵

The judgment indeed makes clear that the EU external objectives that were specifically CFSP related pre-Lisbon, and now merged in the general list enshrined in Article 21 TEU, can be pursued not only through the exercise of the specific CFSP competence. They can, and indeed should, equally be pursued through the exercise of other competences, *in casu* the EU Common Commercial Policy and development cooperation.⁴⁶ In sum, the CFSP as a policy which is being mainstreamed in the EU external action,⁴⁷ but without the latter being further “intergovernmentalised” as a result.

Third states’ cooperation with the EU in the CFSP domain is increasingly intertwined with cooperation in other areas. As will be discussed further below, enhanced cooperation with the EU in CFSP

⁴⁵ Case C-244/17, *Commission v. Council (Kazakhstan)* EU:C:2018:662. The case involved a dispute between the Commission and the Council as to the choice of legal basis for the adoption of a decision on the position to be adopted on behalf of the EU in the Cooperation Council established under the Agreement (itself signed on the basis of a combination of Arts. 37 and 31(1) TEU (CFSP), and several TFEU legal bases: Arts. 91, 100(2), 207 and 209 TFEU; the procedural legal basis being Art. 218(5) and (8) second indent) Art. 205 TFEU, and in particular as to the necessity to include a CFSP provision (*viz.* Art. 31(1) TEU) therein, the Court treated the question as if it concerned any other conflict of legal basis when applying its classic “centre of gravity test”.

⁴⁶ Art. 205 TFEU.

⁴⁷ In line with Art. 24(1) TEU.

matters may therefore take place both through specific CFSP channels, but also through other (existing) frameworks of cooperation, including the EEA and Schengen.

3. Significance of Brexit for EU CFSP cooperation with third states

The development of the CFSP presented above may open new avenues for EU-Norway cooperation in this specific area. The on-going negotiations between the EU and the UK as regards a potential post-Brexit security partnership equally contribute to shedding further light on the nature and forms of cooperation in the area of CFSP. Indeed, Brexit has unfolded at a time of geopolitical shifts and events that have added momentum to further cooperation in the field of Foreign and Security policy in the EU.

Both the EU27 and the UK have expressed interest in establishing a strong cooperation in the field. While the parties seem to share views as to the scope and aims of such cooperation, they have dissimilar approaches regarding the latter's *modalities*, and in particular as regards the degree and forms of UK access to, and participation in CFSP decision-making structures.

Indeed, two essential approaches to the issue of future CFSP cooperation in general, and participation in the CFSP bodies in particular, seem to have framed the discussions on the future EU-UK partnership thus far. The first is primarily dominated by security concerns and interests, and is generally advocated by the UK to build its case for a wide access to EU structures: the terms of the future cooperation must be framed by essential European security imperatives.⁴⁸ The other approach, on the EU side, is determined by legal and institutional considerations: security concerns cannot trump the EU constitutional identity, including its autonomy, and the integrity of its membership.⁴⁹ The two approaches are often, and mistakenly,

⁴⁸ See e.g. UK Prime Minister May Speech "A new era of cooperation and partnership between the UK and the EU", 22 September 2017; House of Commons, "The Future of UK Diplomacy in Europe", Foreign Affairs Committee, Report HC 514, 30 January 2018; Report Tannock, "Brexit: the security dimension" Conservatives in the European Parliament, February 2017. See also: Giegerich and Mölling, "The United Kingdom's contribution to European security and defence", IISS – DGAP, February 2018.

⁴⁹ See e.g. Slides on Security, Defence and Foreign Policy, 28 January 2018: https://ec.europa.eu/commission/publications/slides-security-defence-and-foreign-policy_en ;

presented as conflicting, while they will ultimately have to be reconciled.⁵⁰

The UK is indeed eager to remain as closely involved as possible in the EU's CFSP. In particular, the UK Government has voiced an ambition to establish an unprecedented ("bespoke") post-Brexit security cooperation with the EU. With respect to the CFSP more specifically, the UK envisages a partnership that goes *beyond* any existing third country arrangements with the EU, both in terms of scope (viz. it should cover both foreign policy, sanctions policy, development and external action, defence and space), objectives (unconditional commitment to Europe's security) and also in terms of the practical and institutional modalities of such cooperation.

The importance the UK ascribes to the CFSP was made remarkably conspicuous in a so-called "technical note on consultation and cooperation on external security"⁵¹ – ironically displaying greater enthusiasm for the strengthening of the policy than at any point of its membership.⁵² The UK wants post-Brexit cooperation in CFSP to involve extensive exchange of expertise and information, regular multi-layered dialogue, consultation and cooperation in Brussels, as well as in multilateral fora and third countries, possibly aiming at joint outcomes in the form of "joint statements, joint positions and joint demarches" or, importantly, possible "mutually supportive sanctions". The future EU partner seeks to maintain its access to the CFSP institutional framework, underlining the value of the latter's multi-layered forum for dialogue, consultation and decision, and thus as a multiplier of influence in foreign policy matters.⁵³ Official documents of the UK Government thus generally suggest a CFSP cooperation in the form of a *new, flexible* and *scalable* framework of consultation and cooperation with the EU,

⁵⁰ See Oral Evidence of Pierre Vimont, "Brexit: Common Security and Defence Policy (CSDP) missions", Select Committee on the European Union, House of Lords, 8 March 2018.

⁵¹ www.gov.uk/government/publications/technical-note-on-consultation-and-cooperation-on-external-security

⁵² See e.g. 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) 13; Santopinto, "Le Brexit et la défense européenne" *Les Rapports du GRIP* 2018/5; European Parliament, "Study: CSDP after Brexit: the way forward" Policy Department, May 2018.

⁵³ See the Foreign Policy Report: Review of the Balance of Competences, 28 Nov. 2012, available at: www.gov.uk/government/consultations/foreign-policy-report-review-of-the-balance-of-competences

enabling the parties “to work closely together to have maximum impact”.⁵⁴

In reaction to the UK aspirations, the EU has also produced several notes (and “slides”) spelling out the terms upon which its CFSP cooperation with the UK, as ex-Member State, could develop. Hence, the European Council’s Guidelines, adopted on the context of the withdrawal procedure of Article 50 TEU, have underlined that the Union stands ready to establish a partnership in the field of security, defence and foreign policy with the UK,⁵⁵ as a significant foreign, security and defence player, and in collaborating with it to promote policies in other third countries and third organisation.⁵⁶

At the same time, the EU has made clear that the cooperation would remain constrained by core principles which the European Council has spelled out and reiterated throughout the withdrawal negotiations. Thus, as it leaves the Union, the UK will indeed stop enjoying the benefits of membership; it will thus no longer be part of the EU CFSP.⁵⁷ Instead as a third state, its cooperation with EU27 in the CFSP area will require a new basis. In this context, the European Council has underscored the principle of autonomy of the Union, in particular that of its decision-making process, as well as its “strategic autonomy”. Observance of these principles is not only a legal imperative for the EU, it is also a way of securing the integrity of the EU legal order, itself conceived as a contribution to European peace and security.⁵⁸

Considering these principles, the EU has displayed reservations in relation to various UK intentions in CFSP cooperation, in particular in terms of its potential access to relevant EU institutions and bodies.⁵⁹ In effect, the withdrawal negotiations and the discussions on the future

⁵⁴ www.gov.uk/government/publications/technical-note-on-consultation-and-cooperation-on-external-security

⁵⁵ See pt. 22, European Council Guidelines, April 2017

<https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexite-guidelines/>

⁵⁶ Slides on Security, Defence and Foreign Policy, 28 January 2018, p. 7:

https://ec.europa.eu/commission/publications/slides-security-defence-and-foreign-policy_en ;

see also Foreign, Security and Defence Policy (slides), 15 June 2018:

https://ec.europa.eu/commission/sites/betapolitical/files/slides_on_foreign_security_defence_policy.pdf

⁵⁷ See pt 18 of European Council Guidelines, April 2017, op. cit.

⁵⁸ Para 2 of European Council Guidelines, April 2017, op. cit.

⁵⁹ See e.g. pp. 13ff of Foreign, Security and Defence Policy (slides), 15 June 2018:

https://ec.europa.eu/commission/sites/betapolitical/files/slides_on_foreign_security_defence_policy.pdf

partnership suggests that the EU has become highly principled in contemplating novel models of institutional engineering with third states in general, and in the field of CFSP in particular. A spin-off of the Brexit negotiations has thus been the EU scrupulousness to preserve the integrity of its legal order and of its decision-making. Indeed, the EU has consistently recalled the relevance of *existing arrangements* between third states and the EU in the CFSP area, as a basis for the discussions with the UK.

This general approach is reflected in the content of the EU-UK Political Declaration of 22 November 2018, which accompanies the withdrawal agreement negotiated in the context of Article 50 TEU, and is designed to establish the general framework of the future EU-UK relationship. The Declaration contains a specific section on “Foreign policy, security and defence” included in the part of the document that is devoted to the potential “Security Partnership”. It is not the purpose of this study to provide a detailed analysis of what remains a list of general political propositions rather than tangible commitments of the parties. Still the document deserves to be briefly discussed as it does contain some elements of significance for contemplating potential enhanced cooperation between Norway and the EU in the CFSP field.

On the one hand, the EU core principles are clearly visible in the Declaration. It sets out that the partnership would respect the autonomy of the Union, in general terms, as well as the sovereignty of the UK—noticeably put on the same level. The premise of the potential cooperation is that the two parties will indeed conduct independent foreign, security and defence policies “according to their respective strategic and security interests, and their respective legal orders”. Thus, they would pursue “independent sanctions policies”. Indeed, the parties envisage potential “agreed statements, demarches and shared positions”, in relation to global challenges. No alignment with EU position is envisaged, nor conversely is there any reference to joint decision-making to agree positions.

Moreover, the more specific content of the Declaration in the different aspects of the CFSP cooperation reflects the classic arrangements thereof. For example, the document points to the need for a Framework Participation Agreement for the UK potential participation “on a case by case basis” in CSDP missions and operations (Section C),⁶⁰ and to its participation in the Force Generation conference, Call for Contributions and the Committee for Contributors meeting for the sharing of

⁶⁰ Pt 101 of the Declaration.

information regarding the implementation of the mission and operation, in case the UK does contribute to a specific CSDP mission or operation.

As regards defence capabilities development (Section D), the document underlines the possibilities of cooperation “to the extent possible under the conditions of Union law”. It thus refers to the possible UK collaboration with the European Defence Agency through the usual Administrative Arrangement, to the potential UK participation in PESCO under the basic condition for third states’ involvement, namely if invited to participate on an exceptional basis, while participation of eligible UK entities is envisaged in the context of EDF, but implicitly under the specific terms applicable to non-associated countries, as per the planned regulation.⁶¹

That said, some elements of the Declaration are noteworthy as potential ingredients of an *enhanced* CFSP cooperation. The first interesting proposition relates to the terms of foreign policy “consultation and cooperation” (section A). While reflecting established arrangements of existing CFSP cooperation, in the form a multi-layered political and sectoral dialogue,⁶² the section nevertheless envisages that the “High Representative may, where appropriate, invite the United Kingdom to informal Ministerial meetings of the Member States of the Union”.⁶³ In other words, the UK as non-Member could take part in Gymnich meetings of EU Foreign Affairs Ministers, a formula which has occasionally be experimented in the EU-Norway context, though not in Foreign Affairs ministerial formations.

Secondly, the section on sanctions policy (section B) envisages that “where foreign policy objectives that underpin a specific future sanction regime are aligned between the Parties, intensified exchange of information at appropriate stages of the policy cycle will take place, with the possibility of adopting sanctions that are mutually reinforcing”. While falling short of envisaging joint decision-making, the intensification of the exchange of information could provide the UK with a significant channel of influence on the shaping of the EU sanctions, particularly in view of the upstream exchange of information on listing, their justification, development, implementation and enforcement, which the declaration also envisages.

⁶¹ See discussion above under section 1.2.

⁶² See e.g. Art. 27 of the Strategic Partnership Agreement between the EU and its Member States, of the one part, and Canada, of the other part, OJEU 2016 L 329/45.

⁶³ Point 97 of the Declaration.

The third noticeable element relates to the cooperation in relation to EU operations and mission (Section C). Should the UK indicate its intention to contribute to a planned CSDP mission or operation open to third countries, the Parties should *intensify interaction* and exchange of information *at relevant stages of the planning process* and *proportionately* to the level of the [UK]’s contribution” (emphases added).⁶⁴ The document adds that this would allow the UK “to best tailor its contribution and provide timely expertise”. The possibility for the UK, when participating in CSDP military operations, to second staff to designated Operations Headquarters is also contemplated, which would be “proportionate to the level of contribution”.

Partly inspired by the British ambitions, the Declaration speaks of a “flexible and *scalable* cooperation that would ensure the [UK] can combine efforts with the Union to the greatest effect... [and] to this end the future relationship should provide for appropriate dialogue, consultation, coordination, exchange of information and cooperation mechanisms” (emphasis added). The notions of *scalability* and of *proportionality* of the cooperation seem indeed to infuse the articulation of the most innovative modalities of their potential CFSP partnership. In sum: the higher the UK contribution is in a particular CFSP action, the more intensified the cooperation the EU would be willing to entertain in the shaping and implementation of this action, though without prejudice to its autonomy.

The operationalisation of such proportionate, scalable, and thus *à la carte* type of UK engagement is potentially complex to operationalise. On the one hand, the UK might expect to have more access to EU CFSP structures from the moment it indicates its *intention* to contribute and as a *condition* for such contribution. The EU for its part might want tangible and non-retractable commitments in operational terms first, as a *condition* to have more intensified access:⁶⁵ too easy retraction in the course of the shaping of a particular CFSP action would allow influence without commitment.

⁶⁴ Point 102 of the Declaration.

⁶⁵ The June slides of the Commission interpret “scalable” in the context of CSDP missions in the following way: “provided there is a confirmed UK political commitment to significantly contribute to a CSDP mission/operation, the interaction should intensify at relevant stages of the planning process, to allow the UK to best tailor its contribution and provide timely expertise to the EU” – a footnote to the word “significantly” points to qualitative terms (strategic assets, including to fill a gap) or quantitative terms (number of staff”); see p. 9 of Foreign, Security and Defence Policy (slides), 15 June 2018:

https://ec.europa.eu/commission/sites/betapolitical/files/slides_on_foreign_security_defence_policy.pdf

To be sure, whether and how the novel elements of CFSP cooperation contained in the Political Declaration will materialise depends on the future formal negotiations of the post-Brexit partnership, to be initiated after the UK has formally withdrawn. Arguably, the legal principles and constraints framing the EU external action might become more salient than in the context of the elaboration of this Political Declaration, particularly in view of the increased constitutionalisation of the CFSP, recalled above.

Indeed, the EU willingness effectively to explore and legally spell out advanced forms of CFSP cooperation with the UK will much depend on the *credibility* of the latter's willingness to commit itself in the support of the CFSP in general. Its relatively low engagement, as a Member State, in the development of the policy has generated a degree of scepticism on the EU side in contemplating advanced forms of CFSP cooperation with the UK.⁶⁶ Its ex-member status and its significant security and defence clout might not in themselves provide the UK with a specific advantage in relation to the EU post-Brexit, compared to other European states, and in particular Norway, notably in terms of access and participatory rights.

Moreover, the depth of the relationship with the EU in other domains, such as trade, or lack thereof might facilitate or conversely hamper the depth of CFSP cooperation.⁶⁷ Practically, the deeper the relationship generally, the more integrated and trustworthy the partner, and thus the broader access the EU might be willing to concede.

⁶⁶ Dassù, Ischinger, Vimont and Cooper, "Keeping Europe safe after Brexit", ECFR March 2018, esp. p 13; Bond, "Plugging in the British – EU Foreign policy" CER March 2018; Besch "Plugging in the British – EU defence policy" CER April 2018;

⁶⁷ See e.g. Chalmers, "Brexit and European Security" RUSI, Briefing Paper, February 2018

4. Mapping the enhanced EU-Norway CFSP cooperation

Considering the general evolution of the CFSP, the initiatives that have been taken since, and the ongoing discussions between the EU and the UK on a potential new security partnership covering foreign policy, security and defence, this final section will further explore the terms of a possible enhanced CFSP cooperation between the EU and Norway. The discussion will take account of existing arrangements between the EU and Norway, and explore their possible relevance in further CFSP cooperation. Indeed, a potential enhanced cooperation in CFSP may, in general, have to take into consideration precedents of enhanced cooperation in other areas too, e.g. EEA and Schengen, as acceptable models from EU legal point of view, while bearing in mind the remaining specificities of CFSP.

Some general principles should be recalled, partly inspired by the ongoing discussions between the EU and the UK, and which frame the elaboration of such scenarios.

First, the principles that non-members cannot enjoy the same privileges as Member States, and that the EU decision-making autonomy must be preserved, have significance beyond the context of the Brexit negotiations. As a non-member, Norway cannot expect to have similar access to CFSP decision-making as members.

Second, the notion of autonomy has also become central to the development of the EU CFSP, as evident in the EU Global Strategy, and the initiatives that have followed and their strict conditions for third states' participation. That said, it appears from the recent CFSP measures that the EU is showing more openness towards European States which already have a deep relationship with the EU in other areas, for legal and practical reasons. The draft EDF regulation is a case in point.

Third, it should be recalled that any formal enhancement in the relationship may come at the cost of additional constraints: first, enhancement may require further commitments including in terms of compliance, as exemplified by PESCO and EDF. It may also involve additional financial implications. If the cost is deemed too high, building on informal exchange to exert influence could be contemplated in addition to, or instead of the scenarios presented below.

4.1 Extending EU-Norway cooperation by ad hoc participation in new CFSP initiatives

The first way the EU-Norway cooperation in CFSP may develop is through additional ad hoc measures. Under this scenario, Norway would essentially follow the same approach as the one so far charted, namely adding a sectoral cooperation to existing channels of CFSP cooperation, in the specific context of new EU initiatives. Norway would thus seek to participate and cooperate in PESCO and EDF frameworks, under the specific conditions envisaged by the EU.

This first scenario would thus involve much continuity in terms of maintaining a degree of flexibility in the CFSP cooperation, but also in terms of limited influence in the development of the CFSP. This would not require any particular adjustments to existing frameworks of CFSP cooperation. It could however involve and strengthen the connection between those and the EEA, given the interactions of the new instruments, such as EDF, with the Single Market.

4.2 Using other existing EU-Norway frameworks to develop CFSP cooperation

In the second scenario Norway and the EU would make active use of existing structures of cooperation in non-CFSP areas to strengthen cooperation relating to the CFSP. This approach is premised on the notion, explained above, that the development of the CFSP increasingly interacts with other EU policy areas, including the Single Market. These interactions open the possibility to involve the institutional arrangements underpinning Norway's participation in e.g. the Single Market and Schengen to develop its cooperation in the CFSP.

Indeed, a regular political dialogue between the EU and Norway already takes place in the context of the EEA. In practice, the EEA Council has offered a forum for the EEA parties to discuss political issues,⁶⁸ such as Brexit and the EU enlargement policy.⁶⁹ Also, officials of the EEA EFTA states are regularly invited to “political dialogues held

⁶⁸ Article 89(1) EEA foresees that the “EEA Council is responsible for giving the political impetus in the implementation of th[e EEA] Agreement and laying down the general guidelines for the EEA Joint Committee.. [it shall] assess the overall functioning and the development of the Agreement...”. It meets twice a year.

⁶⁹ See for instance Conclusions of the 49th meeting of the EEA Council, Brussels, 23 May 2018.

at the level of the relevant EU Council working parties”.⁷⁰ These can be further used as channels of consultation on CFSP matters.⁷¹

Given the intersections between the Single Market rules and EU CFSP, discussed above, one could envisage that the EEA framework be more actively involved as a forum for broader CFSP cooperation, at least to discuss and exchange on CFSP issues that can be connected to the functioning of the Single Market.⁷² This in turn links up with the notion of potential “EEA relevance” of some CFSP related initiatives.

The establishment of the EDF, and its declared “EEA relevance” typify the overlap between CFSP questions and the EEA. As Single Market rules pervade aspects of the CFSP and CSDP, it could lead to further linkages between these aspects and the EEA, beyond the sole case of the EDF. For example, since EU sanctions are not only CFSP in nature but often imply economic or financial applications, and thus implications for the functioning of the Single Market, one could contemplate regular dialogue within the EEA on the EU sanctions policy, at least in their Single Market dimensions. The recognition of the EEA relevance of (some) EU restrictive measures would indeed activate the decision-shaping rights for the three EEA EFTA states, while potentially clarifying and strengthening the legal underpinning of Norway’s alignment with EU sanctions.

The foregoing indicates that developing the cooperation with the EU in the area of CFSP is also function of the existing arrangements in other fields between the EU and the third country concerned. Not only because being integrated in the Single Market substantively facilitates cooperation in related domains, including the development of the European defence market, but also because of the particular type of relationship the EEA entails, in terms of compliance, loyalty and in turn trustworthiness among the partners, which can then spill over in other areas of cooperation. Norway as EEA participant may consequently benefit from a privileged position compared to third countries having a Free Trade Area arrangement with the EU. The more integrated a third state is with the EU, and in particular in the Single Market, the more

⁷⁰ As underlined in the Conclusions of the 50th meeting of the EEA Council, 20 November 2018, pt. 1.

⁷¹ *Ibid.* As indicated on the website of the Norwegian MFA: “policy coordination and consultation take place on a regular basis, primarily with the European External Action Service (EEAS) and the member states. The EU invites Norway and the EFTA partners to consultations with the Council Working Groups and the EEA Agreement facilitates biannual political dialogue on foreign policy”.

⁷² Since it is responsible for establishing its own rules of procedure, it has a degree of discretion in the way in which it organizes its work.

likely it will have access to CFSP initiatives having a market dimension, and CFSP cooperation more generally.

A similar approach could be applied to the institutional framework of the EU-Norway Schengen agreement. In particular, the mixed committee could serve as a forum for dialogue and consultation on Schengen-related CFSP developments, such as the management of the southern borders of the EU.

4.3 Establishing a distinct EU-Norway CFSP agreement

The third option to enhance EU-Norway cooperation in the area of CFSP would be to negotiate and conclude a new distinct agreement in the field. All existing instruments of EU-Norway CFSP cooperation would be put under a common CFSP institutional umbrella, and a distinct CFSP pillar thus would be added to the other main pillars of EU-Norway cooperation, namely EEA and Schengen arrangements.

This could take the form of a strategic partnership agreement (SPA) of the kind the EU has already established with other third states, like Canada.⁷³ An equivalent EU partnership with Norway would however have to be tailored to the specific circumstances of existing EU-Norway relations, and in particular in view of the scope and depth of their existing links. Indeed, some provisions of the EU SPA with Canada, such as the promotion of free trade and enhancing investment,⁷⁴ or the provisions on migration, asylum and border management would be superfluous in a Norway-EU SPA considering the provisions of the EEA and of the Schengen agreements.

Conversely, a SPA-like arrangement between the EU and Norway could borrow elements of the institutional arrangements of the EEA and/or Schengen agreements, in particular in terms of providing Norway with *decision-shaping* rights, thus going beyond the standard “consultation mechanisms” included in the Canada SPA.⁷⁵ One could thus envisage that the arrangement foresee the consultation of Norwegian experts on new EU CFSP initiatives, and the participation of Norwegian officials in ministerial meetings in a format inspired by the

⁷³ See e.g. Article 27 of the Strategic Partnership Agreement between the EU and its Member States, of the one part, and Canada, of the other part, OJEU 2016 L 329/45.

⁷⁴ Article 10 of the EU-Canada SPA.

⁷⁵ Article 27 of the EU-Canada SPA.

Schengen mixed committee,⁷⁶ while consolidating and extending the current EU practice of consultations between officials from the EEA EFTA States and relevant EU Council working parties.

Indeed, the new consultation arrangement could equally include some of the propositions contained in the EU-UK Political Declaration discussed above. For example, it could foresee the occasional participation of the Norwegian foreign minister (and/or of the defence minister) in informal ministerial meetings of the Member States of the Union, to exchange on CFSP (and CSDP) matters.

Such an institutionalised cooperation would come at a cost for Norway, in terms of having to commit itself to respecting the eventual CFSP measures. Indeed, a connection is likely be made in a new institutionalised CFSP cooperation between Norway's access and involvement upstream, and the degree of contribution and compliance constraints downstream, akin to the EEA and Schengen arrangements.⁷⁷ Alternatively, a more flexible arrangement, involving less systematic participation could be contemplated, based on the notions of scalability and proportionality mooted in the EU-UK Political Declaration, with the alluded complexities in terms of operationalisation that this arrangement would entail.

4.4 Joining a multi-lateralised EU-UK CFSP partnership?

Though highly speculative at this stage, a fourth scenario would be for Norway to develop its CFSP cooperation with the EU in connection with the latter's future 'security partnership' with the UK. Should the EU and the UK establish such a distinct partnership, along the terms of the Political Declaration, one could explore the possibility for Norway to join such an arrangement, if the option was made legally feasible, and if on balance it would provide Norway better access and influence.

From a Norwegian perspective, such an option would however have to be envisaged without prejudice to the other rights and access that Norway enjoys in the context of, and thanks to the other frameworks, such as the EEA of Schengen. As argued earlier, Norway's participation in the Single Market appears to generate more privileged access to

⁷⁶ See e.g. Articles 3 and 4 of the agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis, OJEU 1999 L176/36.

⁷⁷ For the implications of such commitments, see Sjørnsen, "Reinforcing executive dominance – Norway and the EU's foreign and security policy" in *The European Union's non-members: independence under hegemony* (Routledge, 2015).

certain CFSP initiatives, such as EDF, compared to what the UK may obtain in this respect, as per the Political Declaration.

In other words, unless the UK partnership eventually contains equivalent access as Norway currently enjoys, e.g. with respect to EDF, joining the EU-UK security partnership could be of a lesser interest, especially if Norway was able otherwise to yield additional influence through scenario 2 or 3. Whether the EU would have an interest in multi-lateralising its arrangements with the UK indeed remains to be seen.

Conclusion

The Norwegian cooperation with the EU in the field of foreign and security policy primarily takes place outside the EEA and is based on a patchwork of formal and informal arrangements. Unlike other frameworks of cooperation like the EEA, the CFSP cooperation between Norway and the EU lacks a comprehensive framework and a strategic platform to engage more actively in the new security system currently being envisaged in Europe.

Several factors suggest that Norway might want to seek deeper CFSP cooperation with the EU. At one level, Norway is amongst the most engaged third countries in the CFSP/CSDP through notably its alignment with the EU sanction policy, and engagement in its missions.⁷⁸ Such commitments come at a cost, in terms of democracy and accountability, and thus legitimately prompt increased interests in enhanced participatory rights to address the imbalance between constraints and influence. At another level, and as indicated above, the EU has become more active in CFSP. Engaging with the EU in CFSP, notably in terms of alignment and contributions, has become more demanding and indeed costly, in recent years. A growing discrepancy is thereby appearing between increased commitments on the one hand, and limited channels of exchange and consultation on the other, especially if compared to other areas of cooperation between Norway and the EU.

Based on the report the following concluding observations can be made.

First, Norway has the possibility to join new EU initiatives in CFSP, thereby supplementing its existing arrangements in the area. This is borne out by the current EU discussions on the possible participation of third states in e.g. PESCO and EDF.

Second, European states like Norway could also benefit from the on-going discussions between the EU and the UK. The latter is an important actor in foreign policy, security and defence, and the two parties have shown shared interests in deep cooperation in this particular domain. It has been suggested that these discussions could lead to unprecedented

⁷⁸ See in this regard, Sjursen (2012) and Rieker (2006).

forms of CFSP cooperation. This could in turn help Norway's case for a deepened cooperation with the EU.⁷⁹

Third, the Brexit negotiations nevertheless demonstrate that the Union is also in the process of reaffirming and further articulating core principles underpinning the EU legal order, with a view to preserving its integrity, and also to protect the privileges of membership. While having a strong interest in security cooperation with the UK, the EU does not intend to grant any withdrawal dividend to the exiting state, by allowing it too privileged an access to EU structures. In envisaging the future relation with the UK, the EU rather appears to embolden the limits of its openness towards third states' participation, especially in consideration of the intention of the UK to leave the Single Market and the EU customs union.

The fourth observation, connected to the previous point, is that Norway may in effect enjoy an advantageous position vis-à-vis the EU to deepen its cooperation in the CFSP area as compared to post-Brexit UK. In particular, Norway may draw benefits from its partial integration in the EU legal order, and notably the Single Market, to build a firmer and perhaps more participative cooperation with the EU in CFSP. Indeed, the increasing interactions between the CFSP and other fields of EU law, including the Single Market, may bolster the relevance of the EEA in acceding to EU CFSP initiatives. Norway could thereby draw a *cooperation dividend* from its participation in the EEA, both in structural terms and in terms of trustworthiness - a condition sine qua non for closer participation in EU structures.

Any potential deepening of the CFSP cooperation would however come with new challenges in terms of potential additional constraints, ranging from dynamic obligations, financial engagements, potential stricter compliance monitoring, which in turn may raise the perennial issue of sovereignty.⁸⁰ A balancing between furthering access to gain influence or preserving sovereignty may therefore have to be carried out, again.

⁷⁹ Cp. Svendsen, "European defence and third countries after Brexit" NUPI policy brief 3/2018.

⁸⁰ A deepened EU-Norway CFSP cooperation would thereby underscore the relevance of the Norway model of relation with the EU, as template for participation in the integration process outside the framework of EU membership.



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