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CSDP and the development of the ‘Global EU’: The progress of EU autonomy in the shadow of Brexit

Scarlett McArdle

University of Lincoln; smcardle@lincoln.ac.uk

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Abstract

Security and Defence is a complex area within the EU. In spite of a long-standing history, its development and role within the EU has long remained distinct from other areas; the particular attachment of this area to state sovereignty has necessitated a cautious approach. This paper explores the recent developments in Security and Defence since the Brexit vote in 2016, arguing that, rather than the prospect of a UK withdrawal causing a weakening in the EU in this field, instead, it has seen a reinvigoration. It is argued that this is reflective of a broader development of the EU in terms of its autonomy as an external actor, which has shaped developments and continues to do so. While this is beneficial in some ways, the paper concludes by exploring some of the potential problems that may arise from the EU’s particular approach to autonomy as the Brexit process continues.

Keywords: Brexit; CFSP; security; defence; autonomy

In the aftermath of the UK's 2016 referendum result to leave the EU, and the beginnings of the discussions on what form this might take, the area of Security and Defence appeared to be uncontroversial. Initial statements from both sides appeared to agree that continued close partnership, particularly in this field, was both necessary and desirable.¹ The desire for continued cooperation in Security and Defence was accompanied by a concern at the root of this as to the potential consequences if such a close partnership were not to arise. These concerns have been relatively well documented from the UK perspective, with the desire for a close relationship in this field forming part of the UK documents, but concerns also arose from the EU perspective.² The role played by the UK in the Common Foreign and Security Policy (CFSP) broadly, and Common Security and Defence Policy (CSDP) more narrowly, in terms of its financial, military and political resources, has been significant, which has led to discussions about the challenges for the EU once the UK leaves.³ Rather than any potential damage to Security and Defence, however, there has been a reinvigoration of EU cooperation. Security and Defence is particularly noteworthy here as an area that has seen significant development in the face of Brexit, with its previous development having been gradual and cautious. Brexit appears to have provided the impetus for change in this previously difficult area. This paper argues that the EU was well placed to push back against potential Brexit damage in the field of Security and Defence due to its long-standing development of autonomy as a foundational principle; rather than cause damage, the process of Brexit has seen a reinvigoration of the EU as an autonomous global actor pushing forward externally. Autonomy remains a complex concept, however, with the particular approach taken risking negative future consequences.

The principle of autonomy examines the relationship between the EU and its Member States and has had significant positive effects in enabling the development of the EU as an internal cohesive legal order. The initial development and expression of autonomy as an external principle came through the case law of the Court of Justice of the European Union (CJEU or 'the Court'). The Court's expression of autonomy has become increasingly stringent in approaching autonomy, in a negative sense, as a concept that can reinforce and protect the demarcation of the EU internationally. While this negative approach to autonomy in seeking to protect from external influence is a significant, and necessary, part of autonomy, the issue is the extent of this approach and its influence. Without this approach also being in combination with a positive approach that seeks external development, problems can arise. A multifaceted approach to autonomy of protection from external influence, while enabling external projection, would give autonomy real meaning.⁴

While there have been other approaches to autonomy within the EU, the difficulty with the Court's highly restricted approach has been that it has also been highly influential. It has resulted, at points, in complicating the EU's global actions and potentially further limiting its actions; if the EU is entirely demarcated from other legal orders at the international level, this fails to recognise that there is an interaction between legal orders that is necessary for actions to take place, with issues arising, for example, as to jurisdiction for adjudication of disputes. This has given rise to particular difficulties in the post-Brexit actions of the EU, with the EU's approach to negotiations having taken a particularly stringent and negative expression of autonomy at its core. It is clear that the specific objectives of the CJEU in its approach to autonomy, in seeking to uphold its jurisdictional monopoly, and those of internal EU institutions, in

¹European Council, 'Conclusions: Negotiating Guidelines for Brexit', EUCO XT 20004/17, 7; HM Government, 'Foreign Policy, Defence and Development: A Position Paper' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy_defence_and_development_paper.pdf> accessed 13 April 2019.

²HM Government, 'Foreign Policy, Defence and Development: A Position Paper' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy_defence_and_development_paper.pdf> accessed 13 April 2019.

³Marta Dassù, Wolfgang Ischinger, Pierre Vimont and Robert Cooper, edited by Susi Dennison, 'Keeping Europe Safe, European Council on Foreign Relations Policy Brief, March 2018 <https://www.ecfr.eu/page/-/keeping_europe_safe_after_brexit.pdf> accessed 3 February 2020; Luigi Lonardo, 'EU Common Foreign and Security Policy after Brexit: A Security and Defence Treaty for the "Deep and Special Partnership"' (27 April 2018) DCU Brexit Institute – Working Paper No. 4 <<https://ssrn.com/abstract=3169898>> or <<http://dx.doi.org/10.2139/ssrn.3169898>> accessed 3 February 2020; Benjamin Martill and Monika Sus, 'Post-Brexit EU/UK Security Cooperation: NATO, CSDP+, or "French Connection"' (2018) 20(4) British Journal of Politics and International Relations 846–63, ISSN 1369–481, at 848–9.

⁴For a discussion of negative and positive liberty, see Isaiah Berlin, 'Two Concepts of Liberty' in *Four Essays On Liberty* (Oxford University Press 1969) 118–72.

seeking to develop and protect substantive policymaking, are highly distinct. They are viewed together here, however, as different mechanisms and approaches within a single legal order that seek the same overarching objective: to develop and protect the EU as a self-referential and autonomous legal order.

This article argues that the Brexit process has been the trigger for a reinvigoration of EU cooperation in Security and Defence. Instead of allowing Brexit to precipitate damage, it has proven a trigger for internal institutional developments in External Relations fields generally, but also specifically in the field of Security and Defence. It is in this field that significant progress has been seen in developing the institutional framework to enable the external projection of the EU as a cohesive international actor. While this is potentially very positive, alongside doing this, the EU has also taken an incredibly strict line in seeking to uphold its substantive autonomy within the Brexit negotiations, in particular in relation to policymaking and institutional arrangements. In taking such a strict approach to autonomy, the guiding objective in upholding this autonomy is the seeking of a self-referential legal order in highly distinct terms; the assurance of seeking complete protection from any external influence. A comparison can be drawn with the overarching aims of the much-criticised negative approach of the CJEU to autonomy. While the specific motivations of each of these, in terms of either jurisdictional monopoly on the part of the CJEU or policymaking on the part of Brexit negotiations, are highly distinct, their overall motivations have a clear thread at their core: the insistence that autonomy is a concept that must be established internally and that the self-determined internal legal order must be protected from any and all external influences, rather than a recognition that autonomy can equally be about the ability to engage and manage interactions with external normative frameworks. This approach has been much criticised in the context of the CJEU and has arguably limited progress in a number of areas. In taking this overall interpretation of autonomy, there is a risk of damage rather than progress.

This argument is made in three parts. The first part argues that the EU has progressed significantly in terms of its external autonomy and that this is a development that has been seen gradually in the field of Security and Defence through a long-standing tentative and positive approach to autonomy. It argues that a shift has been seen, with a stringent approach to achieving the broad overarching aim of autonomy, in terms of policymaking, akin to the negative approach developed by the CJEU in terms of the protection of its jurisdictional monopoly now shaping the post-Brexit negotiations. This approach has the consequence of too stringently demarcating the EU from other legal orders, risking the capacity of the EU to continue to grow globally. The paper then, secondly, examines a number of significant developments in Security and Defence that have been seen since the referendum result. It argues that a backlash can be seen here with the EU institutions and the EU27 seeking to protect the EU and reinforce this stringent concept of autonomy of the EU on the global stage. When faced with the withdrawal of a Member State that has historically been a significant contributor and actor within this field, the EU has taken the opportunity to engage in further progress. The paper then, finally, argues that in spite of developments being seen, some concern needs to be maintained as to the potential consequences of this process and the strict nature of the principle of autonomy. This section argues that the autonomy may currently enable progress for the EU but that its strict nature could limit developments, including the future relationship between the UK and the EU.

1. Autonomy and its evolution into a substantive External Relations principle

Autonomy is a complex concept but one that is useful to understand the nature of the EU. In turn, it helps to understand the response of the EU to the Brexit process as one pushing back to promote and further protect the EU's external identity. While the focus in Brexit terms has frequently been that of the general withdrawal from international organisations, it must be recognised that the complexity with the EU is all the more heightened because of its different nature. While the UK context may have maintained a focus on the importance of sovereignty in the domestic context, there is equally, at the EU level, a concern to ensure the maintenance of autonomy of the EU legal order. This concept of autonomy in terms of the existence of the EU as a distinct legal order and the consequent protection of this legal order has evolved

as a substantial principle at the very foundations of the EU's external action, considered by some to exist in a constitutional sense.⁵

In general terms autonomy focuses upon independence and delineation from all others. Autonomy of law generally, and autonomy of institutional legal orders specifically, requires far more precision and consideration. There is a focus on the need to identify a legal order as being self-referential in order for it to be considered autonomous. It must be remembered, however, that autonomy does exist in a sense of degree rather than in absolute terms, being referred to in terms of 'layers' of autonomy by some.⁶ Overall this begins to demonstrate the difficulty in determining autonomy. The central point of autonomy lies in being able to determine a distinct legal order. This is often discussed in terms of the extent of 'institutional autonomy',⁷ but a determination of this can also be difficult. From the perspective of international institutional law, there has been a focus on the concept of international legal personality in order to determine autonomy.⁸ This can be a limited view, however, as personality establishes nothing more than a capacity to act, whereas autonomy is much more than this in determining a legal order to exist in a self-referential manner.

While the CJEU's case law is often discussed as being central to the development of autonomy, the later discussions in the case law have been highly distinct in their development of the concept as a negative one. In other words, the focus of the Court is about preventing external intervention and, more specifically, preventing external adjudication over EU norms and principles. In doing this, it takes a problematic absolutist approach to autonomy. It must be noted, however, that it was with the CJEU that the concept of autonomy really began, most prominently with the famous determination that the Union was a 'new legal order of international law', the latter three words being quickly dropped by the Court in favour of statements of the EU as a legal system for which Member States had limited their sovereign rights.⁹ This is the very early foundation of the principle of autonomy; it was one seeking to demarcate the EU from its Member States and establish it as a distinct actor. This initial statement, together with numerous other principles developed by the Court, such as supremacy and direct effect, for just two substantial examples, began to develop the self-referential nature of the EU. The determination of the EU as a self-referential legal order distinct from its Member States is highly instructive about the nature of EU normative provisions.

The approach by the CJEU was, after this early determination, naturally limited in focusing upon disputes and engagement with an external normative framework. It really became focused upon the negative concept of autonomy, through a determination that there would be no external review or adjudication of internal EU norms, thereby reinforcing quite a blunt approach to autonomy and one that is problematic in being so absolutist. This potential 'threat ... to the autonomy of the Community legal order'¹⁰ has been revisited in numerous cases¹¹ and has often been subject to criticism.¹² This is

⁵J. Odermatt, 'How to Resolve Disputes Arising From Brexit: Comparing International Models', iCourts Working Paper Series, No. 131, 2018, p 8; J. Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' in M. Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2018) 291.

⁶N. D. White, 'Peacekeeping Doctrine: An Autonomous Legal Order?' (2019) 88(1) *Nordic Journal of International Law* 86, 91.

⁷R. Collins, 'Modernist-Positivism and the Problem of Institutional Autonomy' in R. Collins and N. D. White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011) 25.

⁸N. D. White, 'Peacekeeping Doctrine: An Autonomous Legal Order?' (2019) 88(1) *Nordic Journal of International Law* 86, 91.

⁹Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

¹⁰Opinion 1/91, Opinion delivered pursuant to the second subparagraph of Article 228(1) of the Treaty – Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1991] ECR I-6079.

¹¹See, for example, Case C-402/05 P, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

¹²G. de Búrca, 'The European Court of Justice and the International Legal Order after Kadi' (2009) 51 *Harvard International Law Journal* 1; T. Locke, 'The Future of the European Union's Accession to the European Convention on Human Rights after *Opinion 2/13*: Is It Still Possible and Is It Still Desirable?' (2015) 11 *European Constitutional Law Review* 239; T. Isiksel, 'European Exceptionalism and the EU's Accession to the ECHR' (2016) 27 *European Journal of International Law* 565.

naturally limited when considering CSDP due to the lack of capacity for the Court to engage in any review in this area generally, together with the limited engagement with external normative frameworks; there is only so much that the CJEU is capable of engaging in.

Alongside this increasingly stringent and absolutist expression of autonomy by the CJEU, however, have been the internal institutional developments of the EU that have created and enabled the 'self-referential' legal order capable of acting externally. In other words, the institutional and policy approach within the EU has been one of positive autonomy; institutional developments from within the EU have developed and enabled the EU to engage as an effective international actor. It is this measured and gradual internal institutional development that has been crucial not just in terms of its internal legal order, but also in terms of the external projection of the EU as a distinct entity. Crucially, more recently significant developments have been seen in the field of CFSP generally, and CSDP specifically, that further develop the comprehensive nature of this internal legal order in a manner that enables it to make this external projection. With Security and Defence being fields where the EU acts in an obviously external manner and which have previously been keenly maintained as areas more strongly in the realms of Member State control, EU institutional progress is highly significant. While the CFSP could begin to claim institutionalisation with the development of the High Representative and the European External Action Service (EEAS), and through this effectively a Foreign Minister and Diplomatic Service, the more recent past has seen institutional development in the field of CSDP. The creation within the EEAS of the Crisis Management Planning Directorate (CMPD) was in order to improve coordination between various aspects of crisis management. The development of military operations already saw a role for an EU Military Committee (EUMC) and EU Military Staff (EUMS) but more recently, the civilian operations found their development in the Committee on Civilian Aspects of Crisis Management (CIVCOM) and the Civilian Planning and Conduct Capabilities Unit (CPCC). There is an overall role for the Political and Security Committee (PSC), which advises and engages with the Council. These various institutional developments in crisis management place control and authority over operations in EU entities, ensuring that action is seen more in the realms of the EU than the Member States. In addition to these institutional developments, the Court has also clearly stated that CFSP in broad terms is an integral part of the EU legal order and is consequently subject to the EU's constitutional norms and values.¹³ In making this transition, actions in this field can be identified as being part of the EU and being subject to its norms and principles; crisis management operations are being created, operationalised, and regulated internally within the EU and subject to its norms and principles. This is a real manifestation of the concept of autonomy. The significant developments here show an ongoing growth in the capacity for external projection of the EU's self-determined legal order.

These are developments that happened prior to Brexit and which have grown and evolved over time. The internal systems of the EU have sought *gradually* to achieve the creation and growth of institutional systems and frameworks so as to enable the increased action of the EU as a distinct external actor. This has been slow, but steady, in its development. It is a necessary aspect of the development of autonomy. With autonomy requiring the existence of independence and a distinct legal order as a self-referential concept, the internal development of distinctly 'EU' entities developing and implementing EU norms and principles is crucial in achieving this and moving beyond the blurred boundaries of action between the EU and its Member States. This concept of autonomy is a much more sedate and pragmatic one than that sought by the CJEU. Not only that, but it is also much more accepting of the concept of autonomy by degrees. This is a fundamental aspect of the concept, and one that is often overlooked by the overly stark approach of the Court. It is, furthermore, significant that both the positive and negative approaches to autonomy have been present within the EU as it has evolved as a global actor. While each have their limitations, in combination they have the capacity for autonomy to really develop with meaning.¹⁴

¹³Case C-455/14, *H v Council of the European Union, European Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina* EU:C:2016:569.

¹⁴See, for example, S. Colligan, 'Negative and Positive Liberty and the Freedom to Choose in Isaiah Berlin and Jean-Jacques Rousseau' (2018) 12(1) *The Journal of Philosophical Economics* 36 and his argument that the two concepts are interdependent.

It is at this point, however, that the EU becomes caught in a tension, with these two approaches to autonomy not speaking to each other and working in combination but, rather, beginning to conflict. When developing internally and in a manner that enables the evolution and expansion of autonomy, the EU views autonomy as a pragmatic concept of degrees. This can clearly be seen in the differentiated approach taken to institutional development and to different policy areas within the EU. The CSDP is a particularly good example of the EU acting externally but the extent of this developing and evolving over time. The EU has continually recognised the need for engagement with other actors, including Member States, third states and international organisations, just as some examples. This has not impacted the capacity of the EU to act and for this action to be definitively EU action. When it comes to judicial determinations, and through this sometimes the attempt to implement these gradually developed policy choices, however, a much more stringent, and misguided, approach to autonomy is understood. Autonomy as an externally facing principle is seen as one that is necessary to preserve and protect this legal order.¹⁵ With this direction of autonomy, the criticism of the principle has developed further than that of being vague and ‘ill-defined’.¹⁶ These initial critiques are ones that could be said to be true of autonomy in the broadest sense. When considering the development of autonomy in the external relations of the EU, the Court is now maintaining a highly distinct and, in many ways, negative and internally facing approach to autonomy when faced with external relations. This can be seen with the consequences of CJEU rulings that serve to further hinder EU action globally.¹⁷ This difficulty with the interpretation of autonomy is a symptom of the continued attempts, and difficulty in those attempts, at the classification of the EU in some form.¹⁸ A continuation of this approach runs the risk of limiting the capacity of the EU to engage globally, rather than enabling it.

This article argues that in spite of a gradual evolution of the EU as an increasingly autonomous international actor, the EU’s response to the referendum result can be seen to have a negative approach to autonomy at its core. The decision of a Member State generally to leave provides what could be considered as an existential threat to the EU. While the timing of the release of the latest EU Global Strategy in June 2016 had been long planned prior to the referendum result, there were points within the strategy that showed a clear desire on the part of the EU to develop solidarity.¹⁹ The idea of pursuing a greater Global Europe and increased solidarity and, more particularly, the implementation of this, is naturally read in the light of the referendum result. With a determination that this decision should not be allowed to split the approach of Member States or enable a degree of contagion, the concern of the EU, from the outset, was the protection of its legal order.

This desire can be seen to have manifested in more concrete terms in two main ways since that starting point. The first of these is through the EU’s general approach to the negotiations. Autonomy has been one of the clear principles within any response of the EU to negotiations, as can be traced within the EU’s general negotiating guidelines, for example any ‘future partnership must include appropriate enforcement and dispute settlement mechanisms that do not affect the Union’s autonomy, in particular its decision-making procedures’.²⁰ In this broad sense, it is clear, and unsurprising, that the EU is taking the opportunity to demarcate and protect the integrity of the ‘distinct’ legal order which has been building for so many years.

The second way, which is much more pertinent to the present paper, is that the manifestation of autonomy can be seen in a much more pragmatic way, with a desire to push forward and see progress in the EU’s global identity, generally in foreign policy and specifically in the field of Security and Defence; if there is a greater degree of integration and a greater role for the EU in this field then there is

¹⁵Case C-284/16, *Slowakische Republik v Achmea BV* ECLI:EU:C:2018:158, para 35.

¹⁶P. Koutrakos, ‘What Is the Principle of Autonomy Really About?’ (2018) 4(3) *European Law Review* 1, 1.

¹⁷See Opinion 2/13 re ECHR Accession EU:C:2014:2454 and the ongoing questions of EU accession to the ECHR.

¹⁸C. Binder and J. A. Hofbauer, ‘The Perception of the EU Legal Order in International Law: An In- and Outside View’ (2017) 8 *European Journal of International Law* 139; J. Odermatt, ‘Unidentified Legal Object: Conceptualising the European Union in International Law’ (2018) 33(2) *Connecticut Journal of International Law* 215.

¹⁹High Representative for Foreign Affairs and Security Policy, ‘Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union’s Foreign and Security Policy’, Brussels, 2016 (EUGS 2016).

²⁰European Council, ‘European Council (Art. 50) guidelines following the United Kingdom’s notification under Article 50 TEU’, point 23.

a greater attempt to evolve and further protect the legal order. Since the referendum result the EU has shown significant foreign policy developments. While the referendum result may not have impacted the European Global Strategy (EUGS) itself, the result has arguably impacted its subsequent action plan on Security and Defence. There have been further developments since then with the operationalisation of the Permanent Structured Cooperation (PESCO), and the creation of the European Defence Fund (EDF) and the Coordinated Annual Review on Defence (CARD). While these are not ‘creations’ in response to Brexit, it is argued that their operationalisation following so long since the creation of their possibility is, in itself, significant. It is argued that this shows that, as the UK has decided to leave, the EU has pushed forward in its integration. This is where the complexity arises and these conflicting aims, with simultaneous integration and disintegration, begin to shape the inevitable distinct nature of future relations between the UK and the EU.

2. Brexit and the ‘autonomy effect’ on CFSP

The EU institutions’ initial response to the UK referendum result in June 2016 showed clear concern about what this would mean. While the UK is not a founding Member State, it is a long-standing one that has had a significant role. When considering CFSP, it is important to recognise its different background and nature, as compared to other areas of integration. With its inception in the Treaty on European Union (TEU) in 1992, CFSP showed a new stage in the process of ever closer union. While this is a significant role, it has long been considered as ‘distinct’. With its maintenance of different legal instruments and processes,²¹ together with a highly restricted role for the Court of Justice,²² there is a degree of accuracy about this distinction. It must also be recognised, however, that over the years since its creation, there has been significant development and its intergovernmental nature has been increasingly analysed.²³ As CFSP has evolved, not only has it grown in its own capacity, but its interconnectedness with other areas has also increased, which begins to question its separation and distinct nature.²⁴ Furthermore, as the CJEU has had increasing opportunities to examine the relationship between the CFSP and other aspects of the legal order, its lack of jurisdiction cannot now be said to be as absolute as it was once perhaps viewed.²⁵ The nature of CFSP is, therefore, a complex one, but it is clear that it is a central part of an integrated EU legal order.

CSDP is an integral part of the CFSP.²⁶ It may only have relatively recent origins with the development of crisis management operations in the 2003 European Security Strategy (ESS), which followed the Saint-Malo summit in 1998,²⁷ but with the discussions on the concept of CSDP stretching back to European Political Cooperation (EPC), it has a developed history in the EU legal order.²⁸

²¹See art 24(1) TEU; arts 136–138 Treaty on the Functioning of the European Union (TFEU).

²²P. J. Cardwell ‘On “Ring-Fencing” the Common Foreign and Security Policy in the Legal Order of the European Union’ (2013) 64 Northern Ireland Legal Quarterly 443–63.

²³R. Wessel, *The European Union’s Foreign and Security Policy: A Legal Institutional Perspective* (Kluwer Law International 1999); H. Sjurjen, ‘Not so Intergovernmental After All? On Democracy and Integration in European Foreign and Security Policy’ (2011) 18 Journal of European Public Policy 1078.

²⁴J. Larik, ‘Much More than Trade: The CCP in a Global Context’ in M. Evans and P. Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Hart Publishing 2011) 12; A. Ingemann Johansen, ‘Sophia as a Showcase for the Bridging of External and Internal Security?’ *EU-CIVCAP*, 1 January 2017 <<https://eu-civcap.net/2017/01/01/sophia-as-a-showcase-for-the-bridging-of-external-and-internal-security/>> accessed 3 February 2020.

²⁵Case C-455/14 P, *H v Council of the European Union, European Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina*, Judgment of the Court (Grand Chamber) of 19 July 2016 ECLI:EU:C:2016:569; Cases C-72/15, *Rosneft*, ECLI:EU:C:2017:236; C-439/13 P, *Elitaliana v Eulex Kosovo*, ECLI:EU:C:2015:753.

²⁶Art 42(1) TEU.

²⁷Saint-Malo Declaration, 1998 Joint Declaration issued at the French-British Summit at Saint-Malo, 3–4 December, Paris: EU Institute for Security Studies <https://www.cvce.eu/content/publication/2008/3/31/f3cd16fb-fc37-4d52-936f-c8e9bc80f24f/publishable_en.pdf> accessed 3 February 2020.

²⁸European Council, Helsinki European Council, 10–11 December 1999, Presidency Conclusions <http://www.europarl.europa.eu/summits/hell1_en.htm> accessed 3 February 2020; Javier Solana, ‘A Secure Europe in a Better World: European Security Strategy’, Paris: European Union Institute for Security Studies, 2003 <<https://europa.eu/globalstrategy/en/european-security-strategy-secure-europe-better-world>> accessed 3 February 2020; Council of the European Union, ‘Civilian Headline Goal 2008’ 15863/04, 7 December 2004.

This history, furthermore, underpins the concerns initially expressed regarding the potential withdrawal of the UK from the EU. The UK has been at the core of the inception of these areas. Furthermore, even with the variety of interpretations of the UK contributions, it is fairly widely accepted that the UK's role, financially, practically and diplomatically, has previously been significant. The possibility of the exit of the UK from the EU as a whole, but also at the micro level of Security and Defence, could have been damaging to this policy area when considering the variety of roles that the UK has had in Security and Defence. The significance of the UK can be seen with the financial contributions of the UK, in addition to its domestic military capabilities in terms of it being one of only two EU Member States capable of deploying full-spectrum military capabilities,²⁹ and its international influence in terms of its UN Security Council seat and its long-standing diplomatic links around the world.³⁰

It is easy to overstate these concerns, however. While the UK had considerable political authority, in spite of its early role, this had always been tempered by concerns as to the expansion of foreign policy in the EU.³¹ The initial creation of the CFSP was centred around it being different to other areas of integration and the UK has long played a role in maintaining this in order to allay domestic concerns that further integration in the field of foreign policy may override national priorities.³² This 'blocking' role of the UK can be slightly overplayed as the UK has long been an active player in this area and has had a role, both generally in the field of CFSP, but also in terms of operationalising missions and operations under the remit of the CSDP. This is a role that has been a balancing act for the UK, however. With the perception that foreign policy integration may be met with disquiet at the domestic level, in spite of the UK's demonstrable engagement in this area the UK has sometimes been reluctant to be an *open* voice calling for, or even enabling, further foreign policy integration.³³

In spite of these concerns, developments were already being seen prior to the referendum, with a degree of institutional development in crisis management with the creation of European structures. The increased developments of definitively EU entities within CFSP generally and then, more recently, more specifically in the command structures of crisis management operations, have been significant. There has been an overall move towards greater institutionalisation within this field, progressing it further away from the realms of actions that could be considered to be those of collective Member States. It remains a distinct area of EU action but progress has clearly been seen. The developments in this field, therefore, are moving definitively in the direction of a greater institutionalised global EU. This has been a gradual evolution since the very beginnings of CFSP, with the distinct approaches to action and EU systems showing a recognition of the flexible nature of attribution; the lower levels of integration and EU institutionalisation in this field have not prevented development nor consideration that action taken was that of the EU. As the EU further develops its internal institutional structures in Security and Defence, it increasingly develops a form of order to this area, with autonomy forming a necessary part of the discourse. This remains distinct from other aspects of its legal framework but it is increasingly a 'European' system of Security and Defence; autonomy then becomes more important. This development is a delicate one, however, and the post-referendum developments under the ambit of the Global Strategy have been significant in showing progress in this field for a greater degree of autonomy on the part of the EU.

²⁹B. Martill and M. Sus, *Known Unknowns: EU Foreign, Security and Defence Policy after BREXIT* (Dahrendorf Forum IV Working Paper No. 01, 26 January 2018) p 2.

³⁰Benjamin Martill and Monika Sus, 'Post-Brexit EU/UK Security Cooperation: NATO, CSDP+, or "French Connection"?' (2018) 20(4) *British Journal of Politics and International Relations* 846–63. ISSN 1369–481, at 848–9.

³¹P. 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"?' (2016) *Croatian Yearbook of European Law and Policy*.

³²F. Heisbourg, 'Brexit and European Security' (2016) 58(3) *Survival* 13, 15–16; T. Oliver, 'Never Mind the Brexit? Britain, Europe, the World and Brexit' 54(4) *International Politics* 519, 526. 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"?' (2016) *Croatian Yearbook of European Law and Policy*.

³³For more detailed consideration of the UK's role in CFSP see 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"?' [2016] *Croatian Yearbook of European Law and Policy*.

2.1. *Autonomy and the Global Strategy in a post-referendum environment*

With these small steps already being taken in this field, the result of the referendum had a number of possible consequences. The UK has long been a significant contributor to this area in terms of role and resources, whether economic, political or personnel.³⁴ The EU, however, downplayed any potential concerns about the withdrawal of this resource, with the High Representative for Foreign and Security Affairs, Federica Mogherini, for example, claiming contributions by the UK were only marginal and easy to accommodate.³⁵ The subsequent response to the referendum result, in fact, showed a strengthening rather than a weakening of the EU in this field. This strengthening through policy developments, and voiced through aspects of the Brexit negotiations, shows a significant push back to enable EU progression in this field rather than endanger it. At the point at which the EU could have seen a move away from expansion in its external nature and a weakening of its global nature, it has moved towards reinforcing this and developing it further. It is at this point that the strength of the principle of autonomy can be seen to be shaping the significant reaction by the EU to the initial vote and to the ongoing uncertainty as to the outcome. Rather than this prompting the feared consequence of split and dissipation of the EU overall and, very specifically, Security and Defence, the very opposite effect has been seen, with Brexit pushing the EU towards its desired position as a 'Global EU'.

First and foremost, the publication of the EU Global Strategy in June 2016 in the immediate aftermath of the UK referendum result was not, in any way, a direct response to this. The early references to responding to 'times of existential crisis' and standing 'united in building a stronger Union'³⁶ are inevitably read with this background however. Furthermore, Nathalie Tocci, Special Advisor to the High Representative for Foreign Affairs/Security Policy/Vice-President of the Commission, who drafted the strategy, has stated that a considered and deliberate choice was made to proceed with publication of the EUGS as had been originally planned.³⁷ After such a long and considered process of drafting, the strategy had been created for long-term strategic development. The choice to proceed was taken to reassert this goal and to push against the uncertainty that the referendum result would inevitably create. She furthermore stated that the opening lines of the EUGS were rewritten in the aftermath of the referendum result to acknowledge the challenges faced.³⁸ This shows that an immediate response was already being taken by EU institutions at this early stage to try to address the issues and protect EU progress. The really significant impact of the referendum has really been seen in the progress made under the EUGS since its publication. With the EU being pushed forward as a distinct 'global security provider', the concept of the EU moving forward as a distinct global actor is only increasing.³⁹ This development of a distinct form of action is central to the strategy, with an open ambition of 'strategic autonomy'.⁴⁰

The previous focus on ensuring that CFSP remained a completely distinct area of competence within the EU has begun to be challenged by the EUGS through the linking of Security and Defence to other internal areas, such as internal security and migration.⁴¹ While the extent to which CFSP has really remained as distinct as is sometimes mooted is now questionable, the EUGS is explicit in advocating for greater integration. This is most particularly interesting when considering CSDP and crisis management and the recognition of the increasing need for an interaction between internal and external security. Crisis management is definitively about external scrutiny and it has only been relatively recently with the

³⁴B. Martill and M. Sus, *Known Unknowns: EU Foreign, Security and Defence Policy after Brexit* (Dahrendorf Forum IV Working Paper No. 01, 26 January 2018) pp 2–3.

³⁵Federica Mogherini, 'In partnership with NATO, the EU continues to strengthen its security profile' 2017, Brussels: EEAS <https://eeas.europa.eu/headquarters/headquarters-homepage/23940/mogherini-partnership-nato-eu-continues-strengthen-its-defence-and-security-profile_en> accessed 19 April 2017.

³⁶High Representative for Foreign Affairs and Security Policy, 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy', Brussels, 2016, p 7.

³⁷Nathalie Tocci, 'From the European Security Strategy to the EU Global Strategy: Explaining the Journey' (2017) 54 *International Politics* 487, 490–1.

³⁸*ibid* 489.

³⁹EEAS, 'Implementing the Global Strategy: EU delivers on Security and Defence', 27 June 2018.

⁴⁰High Representative for Foreign Affairs and Security Policy, 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy', Brussels, 2016, p 4.

⁴¹*ibid* p 7.

EUNAVFOR Med operation that a more explicit interrelationship between internal and external security has been seen.⁴² Prior to this these were maintained in two distinct policy areas even with these two areas long having had a significant degree of natural interaction. The recognition of this perhaps begins to show a move towards more of an explicit integration of CSDP within the ‘mainstream’ EU legal order, as increasing links are not only made, but also increasingly recognised.

The EUGS also sees an increased focus on the role played by the EU in managing crises.⁴³ There is a clear desire to pursue an integrated approach to crises that goes much further than the previous coordinated approach.⁴⁴ While there is recognition of the continued need for multilateralism at the global level, there is also a focus on the need for the EU to evolve to play a role in this as well as ‘to act autonomously if and when necessary’.⁴⁵ As well as this broad commitment, there is also more specific recognition of the need to integrate and align CSDP with other areas of EU action, in particular, for example, the Area of Freedom, Security and Justice (AFSJ), with indications of the view of internal and external security having a symbiotic relationship.⁴⁶ The EUGS also recognised the different intra-agency relationships that this would give rise to, for example connections between CSDP actors and those in the European Border and Coastguard Agency and other agencies involved in border protection, maritime security and cross-border crime.⁴⁷

The real progress since the referendum has following the publication of the EUGS, most particularly in terms of the implementation of the EUGS. In December 2016, the European Council endorsed the implementation plan on Security and Defence, which sought to progress Security and Defence in the EU through three strategic priorities. These were (i) responding to external crises and conflicts; (ii) building the capacities of partners; and (iii) protecting the EU and its citizens.⁴⁸ In order to pursue this, four specific actions were focused on. These were (i) launching the CARD to enhance defence cooperation among states; (ii) establishing PESCO to strengthen defence cooperation among those Member States willing to go further in this cooperation; (iii) setting up a military planning and conduct capability (MPCC) to improve crisis management structures; and (iv) strengthening the EU’s rapid response toolbox, including the EU Battlegroups and civilian capabilities. Following this, the annual reports on the implementation of Security and Defence under the auspices of the EUGS show the relative speed of progress since the initial implementation plan as compared with previous moves.⁴⁹

2.2. Policy developments since the EUGS: In active pursuit of the ‘Global Europe’

The above mechanisms being created, reinvigorated or developed all seek to expand the role of the EU and to evolve its legal capacity as a global actor. There are two ways in which these developments can be seen to develop this progress and further develop a distinct EU order that can be identified as apart from its Member States. The first of these is through institutionalisation and increased mechanisms at the EU level, which can be seen throughout the four specific actions developed. All actions seek to develop something at the EU level, whether this is a framework or an actual system of action. The formal institutionalisation of the EU and, through this, the creation of a distinct global actor is central to the EU’s external expansion. The second approach, which is perhaps more subtle but no less significant, is

⁴²Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR Med) [2015] OJ L122/31; A. Ingemann Johansen, ‘Sophia as a Showcase for the Bridging of External and Internal Security?’ EU-CIVCAP, 1 January 2017 <<https://eu-civcap.net/2017/01/01/sophia-as-a-showcase-for-the-bridging-of-external-and-internal-security/>> accessed 3 February 2020.

⁴³High Representative for Foreign Affairs and Security Policy, ‘Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union’s Foreign and Security Policy’, Brussels, 2016, p 9.

⁴⁴ibid pp 28–29.

⁴⁵ibid p 19.

⁴⁶ibid p 7.

⁴⁷ibid p 20.

⁴⁸European Council meeting Conclusions EUCO 34/16, Brussels, 15 December 2016; High Representative of the Union for Foreign Affairs and Security Policy, Vice-President of the European Commission, and Head of the European Defence Agency, Implementation Plan on Security and Defence 14392/16, Brussels, 14 November 2016.

⁴⁹EEAS ‘Implementing the Global Strategy: EU delivers on security and defence’, 27 June 2018, <http://eueuropaeas.fpfis.slb.ec.europa.eu:8084/headquarters/headquarters-homepage/47517/implementing-global-strategy-eu-delivers-security-and-defence_en>.

through a greater coordination between different areas, for example in the alignment between internal and external security. While this may seem much less significant than the first, when considering the common approach that may be developed between areas, this coordination can be extremely significant in the evolution of an overall system.

Considering the first of these approaches, each of the actions identified above seek to determine some sort of institutionalised framework. The interesting aspect is that none of the actions that they have sought to undertake have been new innovations but rather have been a reinvigoration and a new attempt at mechanisms that already existed. The prior existence of these mechanisms alongside discussions of a long-standing reluctance of the UK has led to considerations that the referendum result saw an unshackling of the EU in its ability to evolve in foreign policy terms. This is too blunt an approach, which fails to consider the additional underlying reasons for limited development. A much more accurate view is to consider these developments as a reaction to the potential danger of a Member State leaving. There was a desire to push back and show solidarity and, more than this, to further enable the development of this field in line with the concept of autonomy and showing a more cohesive EU at the global level.

When considering each of these developments, the significance of their development can be seen. PESCO is one example of this. PESCO is a system of cooperation among Member States who have committed to the process to provide coordination at the EU level. The potential for PESCO was created in Lisbon and can be found in Articles 42(6) and 46 TEU. In spite of this, no moves had previously been made to launch PESCO. Following the EUGS 2016, however, PESCO was launched in 2017 with the commitment of 25 Member States⁵⁰ and with the support of the Council.⁵¹ This is a substantial development. Not only has it launched but it did so with almost all Member States signing up. The nature of PESCO makes this all the more noteworthy.

While PESCO remains voluntary for Member States to commit to, once they have it does create legally binding commitments on the part of those Member States. The Council has the authority to adopt decisions (a) providing strategic direction and guidance; (b) determining the sequencing of commitments, as well as specific objectives at the beginnings of different phases of commitments; (c) updating and enhancing the commitments made ‘in order to reflect the Union’s evolving security environment’; (d) assessing Member State contributions; (e) establishing a list of projects under PESCO; (f) establishing governance rules; (g) determining the rules that would govern third-state involvement; and (h) providing for any other measures required to implement this decision.⁵² While a significant role for Member States is maintained here, it is also noteworthy that roles are playing in the decision-making processes by EU agencies and institutions. There is a move here towards more European ‘ownership’ over these projects. While proposals come from Member States and the Council makes decisions, this is after recommendations from the High Representative and military advice from the EUMC.⁵³ Support is provided to PESCO from the EEAS and the European Defence Agency. While financing of projects largely comes from Member States, this can be contributed to by the Union budget and it is the Union budget that pays administrative costs of the involvement of Union institutions. Again, there may be a substantial role for Member States but there is increasing action and involvement of the EU. The potential budgetary

⁵⁰The participating Member States are: Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

⁵¹European Council, ‘Defence cooperation: Council establishes Permanent Structured Cooperation (PESCO), with 25 member states participating’, Press Release, 11 December 2017, Brussels: European Council <<http://www.consilium.europa.eu/en/press/press-releases/2017/12/11/defence-cooperation-pesco-25-member-states-participating/#>>; European Council, ‘Security and defence: Council reviews progress and agrees to improve support for military missions’, Press Release, Brussels: European Council, 2017 <<http://www.consilium.europa.eu/en/press/press-releases/2017/03/06-defence-security/>>; European Council, Council conclusions on progress in implementing the EU Global Strategy in the area of Security and Defence, Press Release, Brussels: European Council, 2017; EEAS, ‘Permanent Structured Cooperation (PESCO) Factsheet’, 11 November 2019, <[https://eeas.europa.eu/headquarters/headquarters-homepage_en/34226/Permanent%20Structured%20Cooperation%20\(PESCO\)%20-%20Factsheet](https://eeas.europa.eu/headquarters/headquarters-homepage_en/34226/Permanent%20Structured%20Cooperation%20(PESCO)%20-%20Factsheet)> all accessed 3 February 2020.

⁵²Art 4 Council Decision establishing Permanent Structured Cooperation (PESCO) and determining the list of participating Member States 14866/17, Brussels, 8 December 2017.

⁵³ibid.

commitment here also shows a further distinct role for the EU in its own right and a development of its identity.

The operationalisation of PESCO emerged alongside that of the CARD, which seeks to appraise the capacity and compliance of Member States. The objective of the CARD builds on the Policy Framework for Systematic and Long-Term Defence Cooperation and seeks ‘to develop, on a voluntary basis, a more structured way to deliver identified capabilities based on greater transparency, political visibility and commitment from Member States’.⁵⁴ The Council endorsed the establishment of the CARD on 18 May 2017, beginning with a trial run in autumn 2017.⁵⁵ The conclusion of this trial run came with the submission of the report to Ministers in November 2018. This has then fed into the development of the first full cycle, which is under way at the time of writing. One interesting conclusion of the trial run was that currently the military capabilities committed are insufficient to achieve the ambition set out in the Global Strategy. While this could begin to call into question the extent to which this is then feasible and represents real development, it is also interesting to see this level of planning and preparation. The CARD shows a degree of coordination that has not been seen before in order to pursue goals set at the EU level.

There is, thirdly, the establishment of the MPCC in order to improve crisis management structures. This was established within the EUMS in June 2017. It has assumed command authority over all military non-executive missions, of which there are currently three. The Council also decided to create a Joint Support Coordination Cell of civilian and military experts to share expertise and support practical cooperation. While there had already been some institutionalisation in terms of internal command structures in crisis management, this is yet another development. It is also a development in the field of military operations, which have long been more sensitive in terms of their development, as opposed to civilian missions.

With, finally, the strengthening the EU’s rapid response toolbox, including the EU Battlegroups and civilian capabilities, this has proven complex. Battlegroups are multinational military units that are composed of around 1,500 personnel, and their existence allows a more rapid response to crises. The capacity for Battlegroups has existed since 2007 but numerous barriers have arisen in operationalising this.⁵⁶ One of the barriers has been in terms of financing and the sensitivities of Member States in financing this aspect. Following this push in the implementation plan, there have been moves to reconsider financing and, in particular, to consider whether the Athena mechanism could have a role here.⁵⁷ Battlegroups have previously been seen as unfeasible but these varied approaches on financing show attempts at progress. It cannot be said that this is as simple as not having a ‘block’ in the way that the UK is viewed in some of the literature, but rather this is part of an overall institutionalised reinvigoration of the field of Security and Defence. Whatever the basis for this, however, these suggestions, in particular potential EU funding, show increased moves towards more of a role at the EU level. While these are highly positive institutional developments in line with the overall EU approach to autonomy in this field as a gradual institutional concept, the EU’s approach to negotiations cannot be said to be the same, which begins to pose a difficulty in terms of future consequences.

2.3. Between increased integration in the ‘closer Union’ and UK disintegration: The difficulty for a future Security and Defence relationship

The various different developments in the field of Security and Defence have each been significant in themselves but they are also important in terms of their contributions to the evolution of the EU’s role in Security and Defence. Prior to these post-Brexit developments, any developments in this field remained

⁵⁴European Defence Agency, *Coordinated Annual Review on Defence* <[https://www.eda.europa.eu/what-we-do/our-current-priorities/coordinated-annual-review-on-defence-\(card\)](https://www.eda.europa.eu/what-we-do/our-current-priorities/coordinated-annual-review-on-defence-(card))> accessed 13 April 2019.

⁵⁵General Secretariat of the Council, ‘Council conclusions on Security and Defence in the context of the EU Global Strategy’, 9178/17, Brussels, 18 May 2017, see in particular para 22; European Defence Agency, *Coordinated Annual Review on Defence* <[https://www.eda.europa.eu/what-we-do/our-current-priorities/coordinated-annual-review-on-defence-\(card\)](https://www.eda.europa.eu/what-we-do/our-current-priorities/coordinated-annual-review-on-defence-(card))> accessed 13 April 2019.

⁵⁶European External Action Service (EEAS), ‘EU Battlegroups’, Brussels, 9 October 2017 <https://eeas.europa.eu/headquarters/headquarters-homepage/33557/eu-battlegroups_en> accessed 13 April 2019.

⁵⁷ibid.

ostensibly still distinct from the further integration of the EU and ‘ever closer Union’. This paper argues that this is where the move has come since the referendum result. There has been a decisive shift further towards EU institutionalisation and operationalisation. This was coming prior to the referendum result but the result prompted much quicker moves on this; the emerging approach on this took off in earnest after June 2016. These commitments are not undertaken lightly and overall it shows a move not just in terms of development of the area of CSDP, but development of the EU as a global security actor. As the EU increasingly moves in this direction, there is a growing desire to protect these developments. This is where the distinct concept of autonomy emerging in EU external relations really begins to come to the fore.

Autonomy becomes important here in two ways. The first of these is in terms of developments in Security and Defence. While the EU’s development of a ‘special’ legal order that needed protection in order to ensure its autonomy initially emerged in an internal sense, with a focus on the development of the EU as a distinct legal order, it was only later that the concept was applied in an external sense. As the EU further develops its internal institutional structures in Security and Defence, it increasingly develops a form of order to this area, with autonomy increasingly forming a necessary part of the discourse. This remains distinct from other aspects of its legal framework but it is increasingly a ‘European’ system of Security and Defence; autonomy then becomes increasingly important. The second way in which autonomy becomes important is in terms of the development of autonomy. While autonomy was initially about protecting the EU internal order and enabling the self-determination of its legal framework, autonomy has now evolved further to also be a principle determining and demarcating the EU in terms of its engagement and relationship with other legal orders. As it does so, autonomy becomes more of a priority in protecting and enabling this system to work and to emerge.

As the role of the EU in Security and Defence emerges, this must be understood when considering the specific negotiations, and the potential future relationship between the UK and the EU in this area must be considered to begin to explore the broader impact of Brexit in this area. While both sides have, from the outset, sought to pursue an ongoing, close partnership in Security and Defence, there remains a significant degree of uncertainty as to what this precisely means and what shape it might take.

The simultaneous withdrawal of the UK from the EU at the point at which the EU has been developing and integrating further in the area of Security and Defence is highly significant; the simultaneous progression of the EU, what some might consider as integration in a practical sense, at the point at which the UK is seeking to detach itself poses a further challenge to the development of a relationship as they seek opposing aims. The positions of the UK and the EU regarding Security and Defence have been closely aligned with desiring a continued, close relationship after Brexit.⁵⁸ As the negotiations have progressed and there has been increased tension between the positions of the two sides, this potential closeness can be questioned. It must furthermore be questioned in the light of the UK’s previous position in terms of Security and Defence. While it had previously had a great deal of engagement, this was often while not being explicit about this towards a domestic audience that was perceived to have concerns about European integration in this area. This meant that policies and approaches of the UK prior to the referendum result often did not prioritise the EU when addressing defence.⁵⁹ A further challenge to seeking a new relationship at this stage, and with that background, is the number of developments at the point that the UK has chosen to leave. Developments such as PESCO, which do mean more of a role for the EU, show a greater degree of practical alignment between Member States and the EU. Attempting to negotiate a close relationship between the UK and the EU as the boundaries of EU action shift becomes more complex.

The complexity of negotiating an ongoing relationship is also exacerbated by the respective positions of the two sides. The UK has sought a negotiating strategy to protect its own perceived internal interests of disentangling from the EU, but this has often been without recognising the ongoing work on the part of the EU towards integration. The EU has also sought to negotiate while seeking to protect the autonomy of

⁵⁸HM Government, ‘Foreign Policy, Defence and Development: A Position Paper’ <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy_defence_and_development_paper.pdf> accessed 13 April 2019; European Council, ‘Conclusions: Negotiating Guidelines for Brexit’, EUCO XT 20004/17, 7.

⁵⁹HM Government, *National Security Strategy and Strategic Defence and Security Review* (Cmd 9161).

its own legal order. This desire for the protection of EU autonomy is often an underexplored point. It is an important one, however. There are two fundamental difficulties that this causes. The first of these is that there is a basic difficulty in terms of a tension between a desire for disintegration, on the part of the UK, and a desire to protect integration, on the part of the EU. This potentially places a large gap between the two positions. There is also the second consequence, however, of these negotiations being between the UK, as it seeks to 'protect' its sovereignty, and the EU, as it seeks to 'protect' its autonomy. While these positions are similar to those taken in the course of general negotiations between the EU and any third state, whether in the realms of the negotiation of a trade agreement, or an association agreement, just as a couple of examples, the Brexit process is distinct and can be easily demarcated from any 'normal' negotiation with a third state. The Brexit process is the breakdown of a pre-existing relationship, with each side seeking to determine the best outcome for them at a time when the likely outcome for both sides will be negative: there is a breakdown of what already exists. In comparison, 'normal' negotiations involve the attempt to develop a new relationship, which will often seek to be more positive than that which has previously existed. When this is also considered in relation to each side maintaining their positions in a decidedly fixed manner due to the high stakes involved, each of these perspectives will likely perceive the other perspective as a threat making any negotiation an incredibly difficult task.

The expression of autonomy is very much in line with the Court's approach of needing to 'protect' the EU legal order from outside 'dangers' from other legal systems. This focus on autonomy can be considered through the explicit sense of the negotiations and the drawing of particular lines in the negotiation strategy, or through the more implicit moves of the EU towards greater unity and integration, such as that seen with Security and Defence. The importance placed by the EU on protecting this legal order, however, must be viewed together with the prominence placed by the UK on 'taking back control' and 'regaining sovereignty'. The result of this approach to autonomy would always be a complex international one. Autonomy in an internal sense, with the growth and progression of the EU's distinction from its Member States, creates a significant degree of clarity in internal structures; autonomy in an external sense, however, can have the consequence of creating further difficulties and confusing through an approach that seeks to demarcate the EU entirely rather than recognising interactions.

3. The difficulties of an increasingly 'Global EU' with a strict autonomy construction at its core: The ongoing difficulties of Brexit for a future Security and Defence relationship?

In spite of the significant progress seen by the EU in the field of Security and Defence since the referendum result in June 2016, at the time of writing, the specific nature of the withdrawal or the future relationship remains unclear. From the outset, both parties considered that the only appropriate relationship in this field was one of close cooperation, with the UK phrasing this as a 'new, deep and special partnership'⁶⁰ and the EU 'stand[ing] ready to establish partnerships in areas unrelated to trade, in particular ... security, defence and foreign policy'.⁶¹ In spite of this broad agreement, however, there remains a lack of certainty in this field. In fact, Security and Defence has received relatively little attention over the course of the negotiations, with much of the discussions on withdrawal focusing on citizens' rights, the financial settlement and the Irish border, and much of the existing discussions on the future relationship surrounding commercial relations. When considering the course of the negotiations and the approach that has been taken in this field, this begins to demonstrate, furthermore, the complexities that are likely to arise in a future relationship.

In the lead-up to the official notification on 29 March 2017 that the UK intended to leave the European Union,⁶² a number of negotiating positions were set out by Theresa May as Prime Minister⁶³

⁶⁰HM Government, 'Foreign Policy, Defence and Development: A Position Paper' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy_defence_and_development_paper.pdf> accessed 13 April 2019.

⁶¹European Council, 'Conclusions: Negotiating Guidelines for Brexit', EUCO XT 20004/17, 7.

⁶²United Kingdom notification under Article 50 TEU, Brussels, 29 March 2017, XT 2000117; See also European Union (Notification of Withdrawal) Act 2017.

⁶³Theresa May, Speech: 'A Global Britain', Delivered at Lancaster House, 17 January 2017 <<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>> accessed 3 February 2020.

and then further developed within a White Paper.⁶⁴ Although these lacked substantial and precise detail on the direction of Brexit and relationship sought by the UK, they were indicative of the approach that the UK would take to negotiations. The mantra of ‘no deal is better than a bad deal’⁶⁵ was one frequently expressed together with the intention that, whatever shape Brexit did take, it would not be one that maintained the current relationship but in a different form.⁶⁶ This determination that Brexit will mean a different relationship does give some indication that a new understanding would be needed of every area of the EU–UK relationship. The real difficulty is that, even at this late stage, we are not much closer to clarity and understanding on what that relationship might look like. The determination of this relationship is more about politics than it is about law. The result of that determination, however, could have significant legal consequences.

The proposition has been made that, in the event any treaty on the future relationship between the UK and the EU is concluded, this should not include CFSP–CSDP cooperation.⁶⁷ Rather than a clear determination, the current aim seems to be for flexibility to enable change.⁶⁸ While flexibility is a familiar concept within the EU to enable a variety of levels of Member State involvement, the difficulty when faced with the UK’s position is the complete lack of clarity in this regard.⁶⁹ It remains unclear as to any of the particular aims with regard to Security and Defence beyond ‘partnership’. Rather, the argument has been made that the post-Brexit landscape should be analysed before considering any fixed arrangements. In terms of the newer developments in PESCO, EDF and the European Defence Agency (EDA), any developments should be made on a case-by-case basis. A number of options are possible to facilitate engagement with CSDP operations. This could be viewed as sensible at a point where negotiations and development in relation to the future relationship have yet to really be developed. It leads to a great deal of uncertainty, however. When considering the potential future relationship that may evolve, it has to be questioned whether this would involve some of the newer developments that have been pursued in the expansion of a ‘Global Europe’ at a point when the UK is withdrawing.

The engagement of external states with foreign policy, broadly defined, has long been enabled and even encouraged by the EU. Candidate countries, European Economic Area (EEA) and European Free Trade Area (EFTA) countries and those within the European Neighbourhood Policy (ENP) in Eastern Europe are invited to align with declarations on foreign policy once Member States have agreed these.⁷⁰ When considering the more specific area of crisis management, third-state involvement has long been accepted. There has been involvement from 45 non-EU countries in CSDP operations, whether through an ad hoc arrangement or through a Framework Participation Agreement (FPA). With any of this cooperation, however, third states can only align with a position once agreement has been reached between Member States, and contributions are only sought from non-Members once a plan is in place; they are excluded from decision making and formalities. This can be seen in any of the ad hoc arrangements or through the FPA. Irrespective of any formal arrangement between the UK and the EU, either in broad terms of the future relationship, or specifically in relation to Security and Defence, this would not affect the UK being engaged in ad hoc arrangements.

⁶⁴White Paper, *The United Kingdom’s Exit from, and new relationship with, the European Union* (15 May 2017, Cm 9417).

⁶⁵See, Theresa May, Speech: ‘The Government’s Negotiating Objectives for Leaving the EU’, 17 January 2017 <<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>> accessed 3 February 2020; also, White Paper, *The United Kingdom’s Exit from, and new relationship with, the European Union* (15 May 2017, Cm 9417) 12.3.

⁶⁶See, Theresa May, Speech: ‘The Government’s Negotiating Objectives for Leaving the EU’, 17 January 2017 <<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>> accessed 3 February 2020; also, White Paper, *The United Kingdom’s Exit from, and new relationship with, the European Union* (15 May 2017, Cm 9417) Conclusion.

⁶⁷European Parliament Policy Department for External Relations, ‘CSDP After Brexit: The Way Forward’, 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)>.

⁶⁸ibid.

⁶⁹Norway and Denmark show particular examples of flexibility. See Protocol No. 22 on the Position of Denmark attached to the Treaties, OJ C326, 26.10.2012, pp 299–303; Christophe Hillion, *Norway and the Changing Common Foreign and Security Policy of the European Union* (Norwegian Institute of International Affairs NUPI Report, January 2019).

⁷⁰P. 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”?’ (2016) *Croatian Yearbook of European Law and Policy*.

In the negotiations the UK has argued for a continued partnership with the EU. Unfortunately, there has continued to be a complete lack of clarity as to what shape or form such a partnership may take and, in particular, what is envisaged by the UK side in advocating for this. The current Political Declaration on the Future Relationship commits to ‘ambitious, close and lasting cooperation’⁷¹ in Security and Defence, with close cooperation in crisis management missions and operations. It seeks UK participation on a case-by-case basis through an FPA.⁷² The precise nature of this FPA is currently unclear. In spite of this desired close partnership, however, this is unlikely to come with some of the elements that have been mentioned as part of the UK aims. The UK has been arguing for a bespoke partnership that involves involvement within bodies such as the PSC and engagement with the Council. In spite of this claim and desire, this argument is without current precedent. Furthermore, these bodies are central decision-making elements and, as a third state, it would not be possible for the UK to be engaged with the decision-making processes. Not only would this be called into question with the relevant treaty provisions, but also the inclusion of a third state within core decision-making systems of the EU would be detrimental to the autonomy of the EU. One of the key aspects that has long been considered with autonomy is the development and maintenance of a self-referential legal order.⁷³ There is a long-held desire by the EU to protect against anything that may threaten this basic concept of autonomy, which can be traced back to the very origins of the EU.⁷⁴ Not only this, but if the stringent and absolute approach to autonomy is pursued then any development that may enable priority of an external legal order would be completely contrary to this. To have a third state exerting an influence over decision-making processes within the EU could easily be perceived as creating a crack within the strength of the EU legal order; there may be aspects of decisions being made, or influenced, from outside the EU. As a result, it is unlikely this would be contemplated. It would potentially raise questions as to the interactions of these legal orders and whether there might be too much engagement from an external normative framework. This sort of an approach is likely to result in strict boundaries on what will be permissible in this, likely, complex future relationship.

With the likelihood for Security and Defence appearing to be some sort of FPA but with the precise details still unclear, this is sufficient for consideration of some of the difficulties that this may pose. These difficulties arise because irrespective of the specific arrangements, this question of disentangling different legal orders is a complex one and it is one that is currently leading to a complex relationship between the EU and the UK post Brexit. With the EU in uncharted territory in disentangling a Member State from its legal order first of all, its difficult development with autonomy then begins to come to the fore. In negotiating for a future relationship, and one that both parties are seeking to pursue in a highly close fashion, the EU will be seeking to definitively remove the UK from its internal systems. To have the UK partially in the EU, or even enjoying some of the benefits of membership, begins to call into question the EU’s legal integrity and through this its autonomy. This simultaneous disentanglement and alignment is a highly complex task, however, and one which inevitably has the consequence of difficulties in the future relationship. With the UK moving from the internal to the external, furthermore, the EU has to begin considering this relationship in terms of an external one directed by the UK’s existence as a third state at the global level. Again, the stringent approach to autonomy will be a difficult one to take for the EU when engaging with a process of disentangling a newly external legal order from its systems. Seeking to ensure a clear demarcation between the EU legal orders and an external legal order that was previously a part of the EU framework is a complex task.

In pragmatic terms, there arise a number of issues. This approach will, first, affect the specifics of what is capable of being agreed upon in the final FPA. With the approach that there needs to be such clear

⁷¹Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom, para 92 <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> accessed 13 April 2019.

⁷²ibid, para 101.

⁷³N. Tsagourias, ‘Conceptualising the Autonomy of the European Union’ in R. Collins and N. White (eds), *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge 2011) 339 at 339–40.

⁷⁴Most particularly, Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

demarcation from the side of the EU, combined with a UK approach seeking a very visible demarcation but alignment with the EU, it is difficult to see how much meaningful alignment will be capable of being agreed upon. Second, this will cause further complexity in the field of international responsibility and addressing the question of accountability when wrongs occur, either during the course of collective action with which the UK is involved, or wrongs between the EU and the UK. The question of determining whether action lies with the EU or with its Member States is already a complex one, but one that has been increasingly considered over recent years. If, in future, action involving the UK comes into question, this complex relationship will provide further questions in this regard. It will also raise the long-problematic question of possible external jurisdiction over the EU as the UK seeks to be removed from the jurisdiction of the CJEU. While the current withdrawal agreement and Political Declaration on the Future Relationship refer to the Joint Committee, this is clearly not settled enough nor yet is it a long-term solution. The stricter each side is in maintaining its positions, the more complex any determination of future dispute settlement will become.

In general terms, the UK will be treated in the same way as any other third state, barring any distinct agreements to the contrary. The UK will be outside of commitments to a common defence union. It may contribute to missions or operations but it will not be a part of the process that decides whether any action will be launched and what the remit of that action may be. It may contribute to the budget but without being a part of the process to determine the overall budget. The involvement of third states with PESCO is also currently unclear. The possibility exists for it but the particular format this might take remains unclear. The Council Decision on the matter extends as far as requiring arrangements to ‘respect the procedures and the decision-making autonomy of the Union’.⁷⁵ This shows us the priorities of the EU: maintain the integrity of the legal order and continue its progression. This position may be one that is not be entirely palatable to the current desires of the UK, but claims that the EU will provide such a substantial exception for the UK fail to consider the desire of the EU to maintain its autonomy and that aim as being a primary one for the EU. It may well be feasible to envisage some slight movement and some form of individualised relationship emerging, but the aims as currently set out simply are not feasible.

4. Conclusion

The consequences of the UK referendum result in June 2016 have been far reaching. Even with the early statements that sought alignment and agreement in the field of Security and Defence, this has been a field where the consequences have stretched far and which are continuing to emerge now. The most significant consequence thus far has been the expansion and consolidation of the EU in the field of Security and Defence. Initial concerns surrounding the damage that might be caused by the exit of the UK have, thus far, proved entirely unfounded. If anything, Brexit has triggered greater development in this field than has been seen in a number of years.

Rather than the potential undermining and limiting of the EU in this area as a result of the withdrawal of one of its largest Member States, the autonomy backlash has been significant. Brexit has thus far proved to be a trigger in favour of greater development in Security and Defence and has prompted the sort of alignment and integration in this field that previously had been slow to emerge. When faced with the risks of undermining the EU project, Member States have reinvigorated the EU in this field and the EU has developed in policy fields that previously lay dormant with concerns that they would not find a way towards being operationalised. While the EU is still dependent on Member States, particularly in the field of foreign and security policy, the volume with which Member States have committed to this and enabled the greater development of the EU is significant.

The EU is developing in Security and Defence and these developments are more than just piecemeal policy areas; there is a push towards an integrated and considered approach to this. The moves seen by the EU since the publication of the Global Strategy in 2016 have begun to develop the aims set out in Article 24(1) TEU much more substantially. The remit of the EU in foreign policy as set out in this paper is vast, with CFSP covering ‘all areas of foreign policy and all questions relating to the Union’s security,

⁷⁵ Art 9 Council Decision establishing Permanent structured Cooperation (PESCO) and determining the list of participating Member States 14866/17, Brussels, 8 December 2017.

including the progressive framing of a common defence policy that might lead to a common defence'. As the EU begins its real push towards a 'Global EU', it begins to move into a position where it could possibly pursue this.

The real area for consideration, however, is one that currently remains highly unclear and uncertain: what comes next. While Brexit has been a positive trigger to enable progress, this is progress that will sit at the core of a complex and limited concept of autonomy in the EU. As long as there is the pursuit of a concept of autonomy that seeks to demarcate the EU from other legal orders rather than engage and interact with them, determining the global nature of the EU will be a complex task. When this is considered within the task of simultaneously disintegrating a Member State and then reintegrating it, to a certain extent, in terms of a future relationship, this becomes all the more complex.

Declarations and conflict of interests

The author declares no conflicts of interest with this work.