Written evidence from Professor Paul James Cardwell (EUR0006)

I am a Professor of Law, specialising in the law and politics of the external relations of the European Union.¹ I have published widely on EU external relations, with particular focus on migration, democracy promotion and the questions of institutional coherence arising from the Treaty of Lisbon. I have submitted this evidence relating to Brexit which reflects some of the research I have been undertaking in recent months on Brexit and the CFSP.

In this submission, I have focussed my comments on one of the issues in the call for evidence:

- Potential institutional frameworks for a post-Brexit foreign and defence policy partnership including, but not limited to, continued UK participation in aspects of the Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP)

1. As a third country, the UK will be formally outside the Treaty frameworks on CFSP and CSDP and, significantly, the formal and informal networks that these policy areas provide. The situation that the UK and the EU find themselves in is thus unprecedented. There is no obvious model upon which future EU-UK relations regarding CFSP and CSDP can easily be based. Much depends on the political will of two sides decide to work on areas of common interest which would therefore provide an impetus to resolve the institutional questions. This is dependent of course on the UK’s own vision of a ‘Global Britain’ and the EU’s willingness to involve the UK.

2. The situation is complicated by the law on CFSP and CSDP. Although the Treaty has ‘specific provisions on CFSP and CSDP’ (Article 23-46 of the Treaty on European Union) which give the two areas a legally distinct set of powers and instruments, generally characterised as more ‘intergovernmental’ than ‘supranational’, neither are hermetically-sealed categories within the EU legal order. In fact, the CFSP has witnessed a ‘legalisation’ during its 25 year history, which makes it more entwined with the rest of the EU’s legal order than might appear from a reading of the Treaty and especially the exclusion of the jurisdiction of the Court of Justice.² With that in mind, a partnership with

¹ My institutional webpage with further details of my publications can be found here: https://www.strath.ac.uk/staff/cardwellpauljamesprofessor/
the EU on CFSP and CSDP is likely to run into difficulties because of the relationship with other parts of the Treaty, on issues where there might be no UK-EU agreement. This is implicitly recognised in the relevant HM Government position paper (2017), which places Development alongside Foreign Policy, Defence and also includes coverage of External Migration. The issues of sanctions is a case in point (covered by a separate Call for Evidence).

3. Various non-EU states do have a form of institutional relationship with the CFSP/CSDP. The candidate states become gradually more involved as their candidacy moves forward as part of the *acquis*, and so do states including Norway and Iceland. These, and other associated states in the EU’s neighbourhood (including states in the Western Balkans and the Caucuses), have aligned themselves with various CFSP policies, including sanctions regimes. There is thus a possibility that the UK might continue to play a part in the CFSP in some form after Brexit but the main question appears to be whether this would part of a wide-ranging structural arrangement or on an *ad hoc* basis.

4. The UK would join several states including Norway and Turkey as NATO members in Europe which are not part of, or in process of joining, the EU. This is significant, because NATO is mentioned a total of 16 times in the EU’s Global Strategy launched in 2016, with a great emphasis on cooperation with non-EU NATO members. However, cooperation via NATO is fraught with difficult, with political deadlock the norm (largely due to the dispute between Cyprus – an EU Member State, but not a NATO Member – and Turkey) even though organisational cooperation can be effective.3

5. I agree with Whitman’s (2017) identification of three possible scenarios for the UK in the CFSP post-Brexit: as either an ‘integrated player’, an ‘associated partner’ or a ‘detached observer’.4 All these are, in theory, legally possible via an arrangement with the EU but would depend on the degree to which (a) the UK is prepared to support a foreign policy

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2 Paul James 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


agenda set by the EU and over which it may have little influence and (b) the EU is prepared to accommodate UK involvement rather than forge closer cooperation amongst the remaining members.

6. As an ‘integrated player’, the UK could aim to have a bespoke, special status in which it would retain involvement in battlegroups, CSDP operations (as a ‘reverse Denmark position’\(^5\)) and to participate in the Foreign Affairs Council for relevant matters. But the UK would nevertheless be outside the mainstream fora for discussion and strategic direction. An integrated player is thus suggestive of a role in which is supportive of EU foreign policy but without possibilities to lead.

7. As an ‘associated partner’ the UK position would be closer to that of Norway, having no membership of the Foreign Affairs Council but an established ‘dialogue’ on related issues.\(^6\) Whilst it would still have the opportunity to participate in battlegroups and the European Defence Agency via specific agreements, this would be a largely functional arrangement with little or no influence over policy-making. Again, this would reduce the UK’s current capacity to take the lead on foreign policy issues.

8. As a ‘detached observer’, the UK would not participate in any institutional formats and would probably be limited to participation in civilian missions on a case-by-case basis. This would fall short of the relationship envisaged in the position paper and would remove the advantages of foreign policy cooperation as stressed in both the position paper and the Balance of Competences Review (2013).

9. In any of these scenarios, the UK would lack any capability to steer the direction of the CFSP. Even being free of the ‘political’ baggage of being too closely associated with EU missions in this area of closely guarded national sovereignty, we do not yet know to what extent the UK could conceivably play a constructive role and how receptive the rest of the EU27 will be. The operational, technical and administrative implications cannot be fully considered until the ‘big picture’ political questions are settled.\(^7\)

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10. Whilst the EU’s negotiating guidelines for Brexit note that, ‘The EU stands ready to establish partnerships in areas unrelated to trade, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy,’ the framing of ‘areas unrelated to trade’ clearly demonstrates that the CFSP, including defence, are not primary areas for negotiation. The priority appears to be greater cooperation amongst the remaining EU members, using the Treaty provisions which are already in place but – so far – underused.

11. Therefore, whilst in the longer term it might, in theory, be possibly for a joint dialogue between the UK and EU on an agreed strategic approach to foreign policy, this would seem to be counter-intuitive to the purpose of Brexit. Since the effectiveness of placing increasingly prominent aims and goals (as found in the Global Strategy, such as ‘resilience’) at the core of EU foreign relies on the coherence of the EU’s institutions, instruments and policies, an agreed approach with an outside, third state would not seem the opportune means to do this. The changes to the institutional machinery of the EU as introduced in the Treaty of Lisbon, primarily the creation of the EEAS, are still in relative infancy and it seems logical to suggest that ensuring coherence between the EU’s institutional actors will remain higher on the agenda than ensuring the continued involvement of the UK.

12. Although HM Government’s position paper makes an enthusiastic case for a new partnership, it would also seem worth mentioning that the process of concluding a new institutional agreement for CFSP/CDSP and potentially other externally-areas may be hampered by the recent lack of enthusiasm shown by the UK. In the period following the entry into force of the Treaty of Lisbon, the UK government made clear its intention to regard the CFSP and the new European External Action Service (EEAS) as merely one point in a ‘networked approach’ to national foreign policy and at pains to demonstrate the development of a national foreign policy ‘which does not see EU foreign policy as a key prerogative’.

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7 Hylke Dijkstra, ‘UK and EU Foreign Policy Cooperation after Brexit’ (2016) 36 RUSI Newsbrief 1
8 European Council, ‘Conclusions: Negotiating Guidelines for Brexit’ EUCO XT 20004/17, 7.
9 Richard G. Whitman and Ben Tonra, ‘Western EU Member States foreign policy geo-
13. This has manifested itself in several ways. For example, the emphasis on the role of the ‘five eyes’ security community (with four English-speaking, non-EU countries: USA, Canada, Australia and New Zealand) as a cornerstone of UK foreign and security policy. This was in evidence in the run-up to the Scottish independence referendum of 2014.\textsuperscript{10} Membership is not open to other states, as Germany has discovered.\textsuperscript{11}

14. A further example was a much-publicised agreement with Canada to share diplomatic resources, announced by the Foreign Secretary in 2012.\textsuperscript{12} The agreement has not, it seems, led to any concrete initiatives, other than UK and Canadian citizens being able to rely on each other’s consular services in third countries.\textsuperscript{13} Nevertheless, the publicity surrounding the announcement seemed to be designed to underline the UK’s continued attachment to non-EU powers and a willingness to distance itself from greater EU cooperation in foreign and security policy.

15. Although the Brexit Position Paper on Foreign Policy, Defence and Development suggests otherwise, recent UK strategy documents, including the National Security Strategy and Strategic Defence and Security Review (2015) did not prioritise involvement in EU frameworks in the UK’s defence and security.\textsuperscript{14} Rather, the national strategy notes the EU’s considerable capabilities to ‘build security and respond to threats’, but these should be seen merely as ‘complementary to those of NATO’.\textsuperscript{15} Although the EU is mentioned at other points in the document, these are generally where the internal market competences overlap with foreign policy (such as sanctions and arms embargoes) and the UK would be Treaty-bound not to act unilaterally.

orientations’ in Amelia Hadfield, Ian Manners and Richard G. Whitman,\textit{ Foreign Policies of EU Member States: Continuity and Europeanisation} (Routledge 2017) 38, 49
\textsuperscript{10} HM Government, ‘Scotland Analysis: Security’ (Cmd 8741).
\textsuperscript{12} James Blitz and Hannah Kuchler, ‘UK and Canada to Share Embassies’\textit{ Financial Times} (London, 24 September 2012) <https://www.ft.com/content/4a31dcac-0625-11e2-a28a-00144feabdc0>.
\textsuperscript{13} I am grateful to Charles Tannock MEP for his help on this point.
\textsuperscript{14} HM Government, ‘National Security Strategy and Strategic Defence and Security Review’ (Cmd 9161).
\textsuperscript{15} ibid 53.
16. In short, which there is little doubt that foreign policy values between the UK and EU will continued to be shared and there is a willingness amongst the EU27 for the UK’s continued involvement in foreign policy, the difficulties (both legal and political) in doing so should not be underestimated. The complexities of ensuring institutional effectiveness in CFSP/CDSP (and their relationship with other externally-focussed EU policy areas) even within the EU have been a long-term concern that successive treaties have attempted to resolve. This does not bode well for establishing a new type of institutional agreement with the UK as a third country, with the additional layers of complexity required. There may well be a lengthy gap between the exit of the UK from the EU and the establishment of a new type of partnership.

November 2017