



City Research Online

City, University of London Institutional Repository

Citation: Cardwell, P. J. ORCID: 0000-0002-7485-3474 and Gillies, L. (2017). EU External Relations. In: Busby, N. and Zahn, R. (Eds.), Studying EU Law in Scotland during and after Brexit. (pp. 85-92). Scottish Universities Legal Network on Europe.

This is the published version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/26663/>

Link to published version:

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

Chapter 15

EU External Relations

[Paul James Cardwell](#) *University of Strathclyde*

[Lorna Gillies](#) *University of Strathclyde*

The European Union has extensive competences to engage with the world beyond its borders. Therefore, the UK's own relationships with non-EU countries are deeply embedded in the EU institutional framework, and the process of Brexit will require substantial legal reform in the UK. The term 'external relations' in fact covers an extremely wide set of policies which rely on a diverse set of legal competences. For this reason, we tend not to use the term 'foreign policy' unless this refers to the 'political' as opposed to 'economic' aspects, though even these are not always easily separated.

'External relations' is taken to cover the Common Commercial Policy, the powers of the EU to make agreements with 'third' – i.e. non-EU – countries, neighbourhood policy, development policy, relations with international institutions and what is known as the 'external dimension of internal policies'. The latter refers to a long-standing legal principle set out by the Court of Justice in Case 22-70 [AETR](#), under which the EU has implied external competence where it enjoys internal competence. In addition to the wide variety of external competences which are scattered throughout the treaties, the legal instruments and institutional arrangements which apply across these areas are not the same throughout. This makes external relations a particularly complex area which the UK will need to extract itself from. We will address two of the main focal points of EU external relations: the CCP and the CFSP.

Common Commercial Policy (CCP)

Introduction

The EU Internal Market is premised on a common customs union aided by the free movement of goods, persons, services and capital (see the [\(External\) Trade Law](#) chapter). Whilst there is no single EU commercial *law*,¹ the CCP (found in [Articles 206-207 TFEU](#)) is an example of exclusive competence ([Article 3\(1\)\(e\) TFEU](#)), meaning that the UK and the other Member States are precluded from making individual agreements outside the EU framework. The Preamble to the original Treaty of Rome stated that the Contracting States 'desir[ed] to contribute, by a means of a common commercial policy, to the progressive abolition of restrictions on international trade.' The process of making international agreements is in [Article 218 TFEU](#). After the Treaty of Lisbon, investment is now included in the scope of the CCP.

¹ The closest being the European Commission's [Proposal for a Common European Sales Law](#), COM (2011) 635 final

Scope

The EU's Common Commercial Policy is now contained in [Article 206](#) and [Article 207](#) TFEU. Article 3(1)(e) explicitly confirms the exclusive competence of the EU, codifying the consistent case law of the CJEU to this effect. Article 206 confirms that the European Union's contribution vis-à-vis world trade through: the 'progressive abolition of restrictions on international trade and on foreign direct investment and, and the lowering of customs and other barriers'. In practice, the European Parliament and Council 'authorise' negotiations, whilst the European Commission is responsible for 'conduct[ing]' negotiations for such agreements (Article 207(3), Paras 2-3, TFEU). The European Council has an important role in the negotiations where such agreements impact upon internal rules relating to a range of services which may affect Member States' cultural diversity or where trade arrangements affect the delivery of essential services (Article 207 TFEU).

Objective

The Common Commercial Policy equips the EU with competence to [negotiate services](#) and enter into international investments with countries external to the EU. The Common Commercial Policy broadly focusses on international trade agreements between [the EU and third states](#), and agreements on foreign direct investment. The Policy covers a range of commercial areas. These include rules governing [anti-dumping](#), [import](#) and export controls, [foreign direct investment](#), [procurement](#), the [export](#) and most recently the [import of cultural goods](#). The Policy is a key driver towards the EU establishing international investment agreements in the future. The Policy has a political as well as an economic objective. In response, the EU institutions recognise that action under the Common Commercial Policy must take account of [security in exports](#), [human rights](#), [environmental standards and climate change](#), and [corporate social responsibility](#).

Future

The EU will continue to develop and implement its Common Commercial Policy with third states. However, the future success of the CCP will depend on a combination of three things. First, Brexit – the consequences for the UK in leaving the EU, and with it the CCP, are considered below. However, for the EU, the negotiations for the UK's departure will provide an insight as to how the EU will treat the UK as a third state in future. The EU continues to stress that a future trade arrangement or agreement with the UK is dependent on the latter retaining internal market and customs union membership, if the UK wishes to enjoy the benefits of these. This also means maintaining the adjudicative authority of the Court of Justice of the EU (CJEU). The UK is seeking to secure [bilateral trade arrangements](#) with the EU and third states, including agreement on binding arbitration. However, at the time of writing, any agreements between the UK and the EU on free trade will not be [considered by EU negotiators](#) until the UK has left the EU.

Second, the process of implementation of the EU's recent free trade agreements with Canada and Singapore may provide an indication as to the extent – perceived or actual – of

the EU's future influence on free trade, foreign direct investment and investment arbitration agreements. This point is particularly pertinent given the apparent rise in protectionism promoted by President Donald Trump in the US, and the interpretation in many parts of the globe that the UK (via the Brexit vote) has turned away from its traditional emphasis on free trade. Third, the political ambitions of the EU in furtherance of internal financial integration and enlargement will be important.² The ability of the EU to undertake bilateral treaties on behalf of its Member States is crucial to supporting further enlargement through increasing market access to new accession states and vice versa.

Common Commercial Policy and Brexit

The CCP was possibly the only area of external relations which was prominent in the referendum debate, generally characterised as the rights of the EU institutions to make 'trade deals' on behalf of the EU as a whole. The CCP had been strongly supported by successive UK governments, given the collective weight of the EU acting as a whole. It is therefore surprising that the CCP was portrayed in a rather negative light in the referendum campaign and the subsequent negotiations. The EU institutions, particularly the Commission, have developed extensive expertise in trade negotiations. The Member States, including the UK, have 'fed into' the process of negotiations to ensure that the EU position reflects national positions. Brexit therefore means that the UK will no longer be part of the agreements – or the negotiations.

As with other dimensions of EU law, the institutional competences are not always straightforward. For many years, questions have been raised about agreements with third countries which go beyond the parameters set out in the CCP. These are termed 'mixed agreements'. Since the Brexit vote, the CJEU gave an [opinion](#) on the Free Trade Agreement (FTA) between the EU and Singapore which stated that where aspects of agreements are based on shared competences, then the Member States need to be involved. This matters for Brexit, since future agreements with the EU will straddle a variety of competences.

The best known recent examples of agreements under CCP competences are the EU-Canada agreement ('CETA') and the EU-US agreement ('TTIP') neither of which is in force and both of which have proved controversial. Whilst leaving the EU would, in theory, free the UK from the often cumbersome procedures of negotiating an agreement with another country that has to satisfy 28 Member States, the UK would nevertheless have to discuss terms with the other party.

An analysis by the *Financial Times* suggests that there are an [estimated 759 agreements](#) which are currently operated by the EU and, though not all were concluded under the CCP, all will need to be renegotiated and replaced by the UK, simply to remain in the same position. These range from comprehensive free trade agreements with countries such as Vietnam, Mexico and South Korea, to technical, sectoral agreements with countries across the globe. Although the UK is a member of the WTO, it joined as a member of the EU and

² On enlargement, the accession of Croatia to the EU has resulted in a number of proposed Council Decisions for Economic Partnership Agreements or Partnership and Cooperation Agreements with third states: see [COM \(2017\) 382](#), [COM \(2017\) 81](#), [COM \(2017\) 82](#)

there is some debate about whether the transfer of competences would require the assent of the other WTO members.

By leaving the EU and the single market, the UK will no longer be a party to these agreements. The UK government's current approach is to try to 'cut and paste' EU agreements and replicate the text of the agreements with the respective third countries for agreement. But this is also dependent of the agreement of the third country and any domestic legal process they must go through. There are also major practical difficulties in negotiating agreements from scratch for the UK, which does not employ the number of specialists and negotiators needed.

Once the UK has left the EU, it will be able to seek individual agreements with third states but, whilst it continues to be a member of the EU, it cannot formally start this process since it would be contrary to EU law. Although it is perhaps unlikely that the Commission (or other Member States) would seek to enforce EU law to prevent the UK doing so – the ability of the UK to, at the same time, negotiate with the EU on the exit agreement and enter into detailed discussions with states across the globe is a practical impossibility.

Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP)

The CFSP was incorporated into the law of the EU by the Treaty on European Union in 1992. However, it has always had a 'special' character within the treaty arrangements. Before the Treaty of Lisbon, it was the second of three 'pillars' of the EU's legal order: the first being the Community pillar, which contained the law on the single market, competition, and environment, and which used the familiar regulations and directives. Such legal instruments do not apply in the CFSP. It has generally been regarded as an area of 'intergovernmental' cooperation, rather than 'supranational' integration. Although the Treaty points to the CFSP covering 'all areas of foreign policy', in reality there is not the same pooling of sovereignty as in other areas.

Successive UK governments have resisted any attempts to allow the CFSP to become less intergovernmental. Partly this can be explained by the UK's belief in the value of the EU as a trade-focused polity, which provided its motivation for eventually joining the club. But also because of the UK's own long-standing place on the global stage, as demonstrated by its permanent UN Security Council seat, role in NATO and close alliance with the United States and, to a lesser and declining extent, countries of the Commonwealth. Unlike smaller EU states, the UK has seen no need to use the CFSP as a means of gaining visibility in international affairs (though this does not preclude the ability to use the CFSP to amplify national foreign policy, as discussed below). The UK has consistently expressed a constant fear from the outset that the institutionalisation of the CFSP would be used as a means of usurping national foreign policy.

In Prime Minister [Theresa May's letter](#) to European Council President Tusk which triggered [Article 50 TEU](#) of 29 March 2017, there was no mention of the words 'foreign policy'. However, the following extract gained significant attention:

We want to make sure that Europe remains strong and prosperous and is capable of projecting its values, leading in the world, and defending itself from security threats. We want the United Kingdom, through a new deep and special partnership with a strong European Union, to play its full part in achieving these goals. We therefore believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the European Union.

These words were taken in some quarters as the UK using its relative military and security/intelligence strengths as a means of threatening the EU to offer a 'good' exit deal. 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 likely to be the primary areas for discussion (or indeed difficulty) during the Brexit negotiations. Indeed, the categorisation of foreign policy here as the 'other' suggests that CFSP is not an area where the EU expects great attention to be devoted.

in September 2017, the UK government published a position paper on Brexit's implications for foreign policy, defence and development. In theory, this should be less problematic than in many other areas: since diplomatic missions, armed forces and even policy statements have remained separate from the CFSP and European External Action Service, the 'extraction' from the EU should not entail lengthy debates. but the paper stresses the shared challenges the UK and EU face and the desire to work as closely together as possible after Brexit.

There are nevertheless important and potentially complex issues to resolve and which, in addition to the points raised above, connect the CFSP to policies on aid and development, trade, sanctions, climate change, and energy, all of which rely on overlapping competences in the treaties. Therefore, whilst it might be debated what the 'law' in CFSP consists of, there is little doubt that the regular 'law' in other dimensions of integration will not make extraction from the CFSP straightforward in reality.

A particular headache is the imposition of restrictive measures (sanctions), of which there are over 30 in place. These depend on measures taken under the CFSP, followed up by a regulation. They include measures placed by the EU on countries such as Russia and individuals suspected of funding terrorism. The UK will need to find a way to replicate these, which will also depend heavily on the relationship – should there be one – between the UK and EU single market and/or customs union, and whether this is a temporary or permanent solution. Restrictive measures are therefore one extremely diverse category which represents a highly complex legal issue to be resolved, in addition to the administrative, budgetary and operational issues of the CFSP. There is also a link between foreign policy and information sharing within the EU context which would require an agreement on cooperation to continue (see the [Police and Judicial Cooperation in Criminal Justice](#) chapter).

The situation that the UK and the EU find themselves in is thus unprecedented. Furthermore, there is no obvious model upon which future EU-UK relations regarding the

CFSP can easily be based. Much depends on the political will of the two sides to 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'.

Whitman identifies [three possible scenarios](#) for the UK in the CFSP post-Brexit: as an 'integrated player', 'associated partner' or 'detached observer'. In the first, the UK would have a bespoke, special status in which it would retain involvement in battlegroups, CSDP operations (as a 'reverse Denmark position') and participation in the Foreign Affairs Council for relevant matters. But, of course, it would be outside the mainstream fora for discussion and strategic direction.

As an 'associated partner', its position would be closer to that of Norway, having no membership of the Foreign Affairs Council but a 'dialogue' on related issues. Whilst it would still have the opportunity to participate in battlegroups and the European Defence Agency via specific agreements, this would appear to be a functional arrangement with little or no influence over policy-making. At the lowest end of the scale, a 'detached observer' would mean that 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.

In any of these scenarios, Brexit means that 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. As Dijkstra has [noted](#), the operational, technical and administrative implications cannot be fully considered until the 'big picture' political questions are settled.

at the meta-level it might, in theory, be possibly for a joint dialogue between the UK and EU on an agreed strategic approach to foreign policy. However, this would seem to be counter-intuitive to the purpose of Brexit and the mantra of 'taking back control' which was so prominent in the referendum campaign. Since the effectiveness of placing resilience at the core of EU foreign relies on the coherence of the EU's institutions, instruments and policies, an agreed approach with an outsider would not seem the opportune means to do this.

Further Reading

General Publications

Bungenberg, M 'Going Global? The EU Common Commercial Policy After Lisbon,' in Herrmann, C and Terhechte, JP (eds) (2010), *European Yearbook of International Economic Law*, 123-151

European Commission (2016) [Trade: Free Trade is a Source of Economic Growth](#), The European Union Explained

European Commission (2017) [Common Commercial Policy](#), Summary of EU Legislation

European Commission (2017) [Trade – Negotiations and agreements](#)

McClellan, P (2017) '[After Brexit: the UK will need to renegotiate at least 759 treaties](#)', *Financial Times*, 30 May

Paparinskis, M (2015) '[International Investment Law and the European Union: A Reply to Catharine Titi](#)', *European Journal of International Law*, 26(3), 663-670

Pitschas, C (2010) 'The Treaty of Lisbon and the "new" common commercial policy of the European Union', *International Trade Law and Regulation*

Shan, W and Zhang, S (2010) '[The Treaty of Lisbon: half way towards a common investment policy](#),' *European Journal of International Law*, 21(4), 1049-1073

Titi, C (2015) '[International Investment Law and the European Union: Towards a New Generation of International Investment Agreements](#)', *European Journal of International Law*, 26(3), 639-661

Weatherill, SR (2016) *Law and Values in the European Union* (Oxford University Press)

Weatherill, SR (2017) *The Internal Market as a Legal Concept* (Oxford University Press)

Woods, L, Watson, P and Costa, M (2017) *Steiner and Woods' EU Law* (13th Edition, Oxford University Press)

Brexit and the WTO

Allen Green, D (2017) '[Brexit and the issue of WTO schedules](#)', *Financial Times*, 28 February

Brexit and Trade Deals

Cardwell, PJ (2017) '[The free trade case for Brexit is folly](#)', *Prospect*, 7 September

Dhingra, S and Sampson, T (2017) [Life after Brexit: What are the UK's options outside the European Union?](#), LSE Centre for Economic Performance, Brexit Paper 1

CFSP/CDSP

Dijkstra, H (2016) '[UK and EU Foreign Policy Cooperation after Brexit](#)', *RUSI Newsbrief*, 36(5)

Smith, KE (2017) '[Brexit and British foreign policy: between a rock and a hard place](#)', *The UK in a Changing Europe*, 20 June

Whitman, R (2017) '[The UK and EU Foreign, Security and Defence Policy after Brexit: Integrated, Associated or Detached?](#)', *National Institute Economic Review*, 238(1), R1-R8

Opinion 2/15 (EU-Singapore Free Trade Agreement)

Ankersmit, L (2017) '[Opinion 2/15 and the Future of Mixity and ISDS](#)', *European Law Blog*, 18 May

Gammage, C (2017) '[Toward a "Global Britain": The post-Brexit landscape](#)', *University of Bristol Law School Blog*, 20 January

Thym, D (2017) '[Mixity after Opinion 2/15: Judicial Confusion over Shared Competences](#)', *Verfassungsblog*, 31 May

Balance of Competences Review – External Relations

- [Foreign Policy](#)
- [Trade and Investment](#)
- [Development and Humanitarian Aid](#)

For a comprehensive reading list of new and older works of security and defence

Kienzle, B and von Weitzershausen, I (2017) [Brexit Reader in Security and Defence](#)

Videos

External Relations and Brexit – Short films by Paul James Cardwell before the EU referendum:

- [Democracy Promotion](#)
- [Sanctions](#)
- [External Migration](#)

Instruments Relating to the Common Commercial Policy

[EU-CARIFORUM Economic Partnership Agreement](#) (2008)

[EU-South Korea Free Trade Agreement](#) (2011)

European Parliament (2012) Resolution – [EU and China: Unbalanced Trade?](#) (23/05/2012)

[EU-Canada Comprehensive Economic and Trade Agreement \(CETA\)](#) (2014)

European Commission (2016) [Towards a Robust Trade Policy for the EU in the Interests of Jobs and Growth](#), COM (2016) 690 final

Court of Justice of the EU (2017) [Opinion 2/15 on the EU-Singapore Free Trade Agreement](#)