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CENTRE FOR EUROPEAN REFORM

The member-states and the EU: Taking back control?

by Agata Gostyńska-Jakubowska

In early February, Foreign Secretary Boris Johnson rehashed old British fears that the EU aims to "create an overarching European state", citing this as one of the reasons that the British people (rightly in his view) voted to leave the EU. But ten days after his speech, on February 23rd, a meeting of European leaders demonstrated that in reality the political winds in Europe are blowing in a different direction.

The topic of the meeting was the future of the EU after 2019 – an important year, in which EU voters will elect a new European Parliament, and the presidents of the European Council and the Commission will pass the baton to their successors. EU leaders showed that they were ready to oppose any further shift of power from the member-states to the Commission and the Parliament. Those who favoured a United States of Europe could go whistle.

First, EU leaders took back control of the procedure to appoint the next Commission president. In 2014, the European Parliament managed to impose a procedure of its own devising: the leading candidate (*Spitzenkandidat*) of the party that won the largest number of seats in the European Parliament automatically became the Commission's next president. That is why Jean-Claude Juncker – the *Spitzenkandidat* of the European People's Party (EPP) – is Commission president. But this year, national leaders decided that the *Spitzenkandidaten* process would not define their choice. Instead

they would follow the wording of the EU treaties to the letter. The treaties only oblige the European Council to take account of the result of the European elections when proposing their candidate for Commission president to the European Parliament. The European Parliament then votes on this candidate.

The Commission and the Parliament continue to argue for a rerun of the *Spitzenkandidaten* experiment, on the grounds that it will increase public interest in EU affairs. In the view of the EU institutions, it makes dull, low-turnout elections more interesting. Lead candidates promote their parties' political objectives on visits to European capitals, and compete with each other in televised debates. But EU leaders are not buying this. In 2014, only 5 per cent of voters indicated that they went to the polls in order to influence the choice of Commission president, and the decades-long drop in voter turnout continued unabated. Many member-states think that the *Spitzenkandidaten* system is designed mainly to strengthen the alliance between the Commission

and the Parliament, even at the cost of the EU's democratic legitimacy. As Donald Tusk, the president of the European Council, argued after the February meeting, the *Spitzenkandidaten* system robbed the Commission president of his usual 'dual legitimacy': the president is meant first to be proposed by democratically-elected national leaders in the European Council; and then elected by MEPs. The *Spitzenkandidaten* system, however, forces the European Council to nominate a candidate pre-selected by the pan-European political parties.

European leaders cannot force the political parties to scrap the *Spitzenkandidaten* process altogether. The majority of the current leaders belong to political parties which are fully committed to the *Spitzenkandidaten* system. The dominant EPP, with nine current prime ministers or presidents, will elect its lead candidate in Helsinki in November 2018. Still, member-states' leaders look set to take control over who their parties nominate as candidates. Leaders will encourage their parties to support candidates who stand a good chance of getting support across the political spectrum in the European Council. And if the parties ignore this advice, leaders can always resort to a hardline policy of 'no automaticity' and propose an alternative candidate for Commission president.

Second, EU leaders junked Juncker's idea of creating a so-called double-hatted president for the EU. Juncker's vision was that one day the Commission president should also chair European Council meetings. Although he can be under no illusions about member-states' appetite for this, he believes that in the long run merging the posts of the European Council and Commission presidents will simplify the EU's work, improve its efficiency and reduce inter-institutional rivalries.

Member-states demur. They think that Juncker is simply plotting another power grab for the Commission and indirectly for the Parliament. If the Commission president were in charge of chairing European Council meetings, he or she would probably insist that the Commission secretariat prepared the European Council's agenda and conclusions. The work of the Commission president is supported by thousands of the institution's officials, and he would want them to continue doing this job for him in his new capacity. But that would give the Commission great influence over what EU leaders discussed and decided.

The European Parliament would also win more power. Today, it is national parliaments that hold their prime ministers to account for what they decide in the European Council (though some do this more vigorously than others) and MEPs merely receive a report from the European Council president after the summits. But this could change significantly under a double-hatted system, because the Commission president is politically accountable to the European Parliament: MEPs not only elect the Commission president but can also throw him out, together with his or her fellow commissioners. National parliaments have no such power over the European Council president.

Third, EU leaders showed little appetite for reducing the number of commissioners in 2019. They will take a formal decision in March next year, but it now seems very unlikely that they will change the status quo. The EU treaties provide that the number of commissioners should equal two-thirds of the number of member-states, unless the European Council decides otherwise. Ahead of the Irish referendum on the Lisbon treaty in 2009, EU leaders decided to keep one commissioner per member-state. In his Sorbonne speech on September 26th 2017, Emmanuel Macron supported a leaner Commission, and suggested that France should set the example by giving up its own commissioner. But there was little sign at the leaders' meeting that other member-states would follow Macron's example. They might, in theory, agree that a smaller college would improve the Commission's work; but having a 'national commissioner' makes it easier for each EU capital to navigate European politics (even if, formally speaking, the Commission may "neither seek nor take instructions from any government"). EU capitals prize 'their' commissioner all the more because they fear that the *Spitzenkandidaten* process will otherwise push the European Commission into the arms of MEPs.

Theresa May was not invited to attend the February meeting because the summit concerned the EU's future post-Brexit. But if the British prime minister had been in the room that day, she probably would have welcomed the general direction of travel. The outcome of the leaders' discussions chimes with the original British vision for the EU, whereby the member-states have a strong voice in EU decision-making, and keep the European Parliament and the Commission at arm's length. But the irony of Brexit is that the EU is becoming more British just as the UK is leaving the EU.

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British foreign policy after Brexit: Hand in hand?

by Ian Bond

Since the attempted murder of the former Russian spy Sergei Skripal and his daughter on March 4th, almost certainly at the hands of the Russian state, British ministers and officials at the EU, NATO and other international organisations have been working to secure allied support for the UK's response to the attack. The incident has underlined that Britain needs reliable partners, and mechanisms to consult them in a crisis. The EU has provided both. Soon the UK will be trying to achieve the same impact from outside it.

The main focus of Brexit negotiations so far has been trade and economic issues. EU negotiators are likely to play hard-ball on this front: in some areas, UK losses (if Japanese companies decided to shift investment to the EU-27, say) could become gains for the remaining member-states. But any friction should not be allowed to contaminate other important aspects of the relationship, such as foreign and development policy co-operation. The only beneficiaries, if the UK and EU go their own ways on foreign policy issues, will be the adversaries of both.

The EU's Common Foreign and Security Policy (CFSP) is largely inter-governmental and provides more flexibility to accommodate non-member states than other areas. Even so, there will be limits to how special the UK's future relationship with the EU-27 can be. The EU insists that its foreign policy decision-making must be autonomous: there can be no veto, explicit or implicit, for the UK post-Brexit.

The EU has various arrangements for foreign policy co-operation with a number of like-minded countries, including Canada, Norway and the US, any of which could provide models for the EU-UK partnership. The EU seems willing to reach a free-standing agreement on foreign policy co-operation, which could enter into force even before Brussels and London agree on their long-term future economic relationship. The UK's overall aim appears to be to keep as much as possible of the existing co-operation intact. But the EU is reluctant to give the UK a greater role in foreign policy formulation than other like-minded non-members have – partly for fear that others, including Turkey, could ask for the same status as the UK.

Of the three main models, Norway has very few formal structures for foreign policy co-operation; but its niche role in various international peace processes, coupled with well-targeted secondments of staff to the European External Action Service (EEAS) and a large development

budget, have enabled it to influence EU policy in the areas that matter to Oslo. Canada has negotiated a binding treaty, the Strategic Partnership Agreement (SPA), covering foreign policy among other things. This puts an obligation on the EU and Canada to hold regular consultations at various levels from expert to summit, with a focus on a number of agreed subjects and regions. The US has arrangements which are similar in substance to those for Canada, but only politically binding in form. But Washington, like Oslo and Ottawa, backs up all the formal structures with extensive informal contacts with the EU and the member-states.

Much of EU foreign policy is declaratory: statements supporting or condemning various developments around the world pour out not only from Brussels but from EU delegations in international organisations such as the Organisation for Security and Co-operation in Europe. At present, countries applying for EU membership such as Albania, would-be applicants such as Ukraine, and European Economic Area members such as Norway may all align themselves formally with EU statements, but without being able to influence the drafting process. The UK might chafe at such limitations, but in many cases it might still choose to align itself with an EU position it agreed with.

The UK has played an outsized role in practical areas of EU foreign policy, including sanctions and development assistance. The UK provides much of the intelligence for current sanctions listings. It would take some time for the EU and major member-states such as Germany and France to fill the gap that will be left by Brexit. All parties have an interest in ensuring that UK and EU sanctions are co-ordinated and effective.

During the post-Brexit transition period from March 2019 to the end of 2020, the UK will still be bound by CFSP decisions, including on sanctions. The Union has offered Britain a consultation mechanism on CFSP, with the chance to opt out of measures that it considers to be against its vital national interests. But both sides recognise that the more countries apply identical sanctions, the more impact they are likely to have. The EU's experience of working with the US on the international response after the Russian annexation of Crimea and invasion of Eastern Ukraine showed that it is possible for the EU and a third country to have broadly compatible sanctions regimes. It also showed that keeping sanctions lists harmonised is hard work.

In relation to development policy, third countries can contribute to and have some management influence over various EU development trust funds (for example, the Emergency Trust Fund for Africa, which tries to address the root causes of irregular migration from the Sahel and the Horn of Africa). Since the British government has judged that EU development spending matches UK priorities and is well managed, it should look for ways to continue to contribute to EU-run programmes.

If the UK wants to ensure that its voice continues to be heard in foreign policy discussions, it should negotiate a treaty on the Canadian model, providing for frequent and regular consultations at the ministerial and expert levels. The Commission seems to be open to the idea of a binding agreement. But a treaty will not be a panacea.

Regardless of their different relationships with the EU, all the Union's Western partners agree that formal arrangements are necessary to ensure that decisions are recorded and implemented; but they are not sufficient to establish trust or manage relations day to day. For that, the UK must both maintain a strong presence in Brussels to deal with continued foreign and development policy co-operation with the EU; and rebuild its network of political officers in embassies in EU capitals – which means reversing the flow of diplomatic jobs out of Europe and into emerging markets, unless the Treasury allocates new resources.

The UK will also need to face up to a familiar dilemma, between autonomy and influence. In her September 2017 Florence speech, Prime Minister Theresa May said that the UK wanted to work hand in hand with the EU in economic and security relations. She should say more explicitly that the same is true of foreign policy. In theory the UK could pursue a radically different line from the EU; but the prime minister should rule out doing so, stressing that Britain's foreign policy interests will not change after Brexit. The more that the UK shows that it will remain a reliable foreign policy partner, the more likely it is that the EU-27 will want to work hand in hand with London to tackle international crises.

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This article summarises the main recommendations of a policy brief by Ian Bond, 'Plugging in the British: EU foreign policy'. The policy brief examines in detail the arrangements for foreign and development policy co-operation between the EU and countries including Canada, Norway and the US.

Europe's cyber problem

by Camino Mortera-Martinez

Cyber has become a buzzword in Europe. Just as both the migration crisis and the terrorist threat seem to have abated, a series of high profile cyber attacks in 2017, allegedly from both state and non-state actors, struck targets including national health systems, banks and electoral campaigns. These attacks have raised big questions about the European Union's attitude towards cyber security and its ability to deal with security breaches. The increasing incidence of online crime and the aggressive cyber tactics of countries like Russia and North Korea mean the bloc must raise its game in this area.

The EU's cyber security plans cover three different things: cyber crimes (like child pornography or online fraud); cyber attacks (like disrupting a city's transport network); and disinformation campaigns. Cyber crimes and cyber attacks sometimes overlap – like the 'Wannacry' ransomware attack attributed to North Korea, which blocked computers at large private companies and national service providers like the UK's National Health Service. All three cyber threats can come from both state and non-state actors. Russia was allegedly behind a major cyber attack in 2017 ('NotPetya'). Russian nationals have been indicted for meddling in the 2016 US presidential election. Drug dealers and other criminals make extensive use of the darkweb – websites which conceal users' identities. Terrorists are also using the internet to wage their own online jihad.

The EU has done well in dealing with more traditional cyber crimes, like identity theft. A

2013 directive harmonised national laws and penalties for cyber crimes and the EU will approve rules to tackle online fraud later this year. But obtaining digital evidence in cross-border cases is still difficult: member-states struggle to gain quick access to information stored in another EU country. This is even more problematic when evidence sits outside Europe. US tech companies like Facebook or Microsoft receive an average of 100,000 direct requests per year from EU governments. There is no law governing such requests so the whole system works on the assumption that internet companies will simply hand over information to law enforcement authorities. Such requests put firms in a difficult position, because they are also required to protect their customers' privacy.

This legal gap has already caused problems on both sides of the Atlantic. The US government is sueing Microsoft, which has refused to provide evidence stored on a server located in Ireland.

The EU is looking at ways to work around similar problems. The Commission is due to present a proposal on obtaining cross-border evidence within the EU in the spring. The EU is also considering options to make access to evidence in data form, stored outside the Union, easier for member-states. But better international co-operation is still needed, not only with the US but also with less obvious partners such as China or India – many large companies have outsourced their IT services there and co-operation with these countries is still patchy.

But Europe has a more urgent problem to solve: as state-sponsored cyber attacks increase all over the world, there is a gap between the EU's ambitions and its capabilities in cyber defence. Europe understands that a cyber war is already happening, but it does not know how to fight it. The EU's efforts to date have been few and far between. This is because there is little understanding in Brussels of what cyber attacks really are and how to deal with them, and, crucially, there is no consensus on who should be responsible for responding. Is it NATO, the EU, the national capitals, or a combination of the three?

Cyber security is a cross-border issue where the EU can certainly add value. The EU should find a common answer to the thorny question of what to do when a country launches a cyber attack against European interests. But, for now, the EU should focus on acquiring the knowledge and resources to build a robust cyber security strategy.

At the moment, those resources are confined to a few member-states (like Estonia, France, the Netherlands and the UK). To deal with state-sponsored cyber attacks, the EU must begin by understanding what cyber is and what impact it has on all its policies – from trade, to crime, to the rule of law. Hackers have begun to exploit weaknesses for the purpose of insider trading; cross-border networks of paedophiles have been active in Europe for years; and disinformation campaigns targeting elections threaten European democracies and the rule of law. A good place to start understanding the impact of cyber in Europe would be for the next European Commission to set up a task force from all the relevant Commission departments and EU agencies to advise on cyber issues. The Council of Ministers already has a similar group. ENISA, the EU's cyber agency, located on the Greek island of Crete, is supposed to support member-states, but is too under-resourced and too far removed to play that role.

The cyber world, like the real world, is full of bad actors. The EU is currently at a disadvantage because these actors – unlike the Union – know what they are doing. The challenge for the EU is to learn how to beat these international cyber villains. Otherwise, a major cyber attack could endanger not only the EU's economy but also its democratic foundations.

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CER in the press

Recent events

7 March
Dinner on 'The future of the
EU banking union', London
With Elke König

1 March
CER/DGAP launch of
'Can EU funds promote the
rule of law in Europe?', Berlin
With Franziska Brantner,
Carl Dolan, Heather Grabbe
and Milan Nič

Elke König

Franziska Brantner

1 March
CER/Kreab breakfast on
'Why the Arctic matters for
Europe', Brussels
With Karmenu Vella

8 February
CER/Kreab breakfast on
'German priorities in Europe',
Brussels
With Reinhard Silberberg

Karmenu Vella

Reinhard Silberberg

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