ROSA LUXEMBURG STIFTUNG
BRUSSELS OFFICE

A EUROPE OF CAPITAL

KENNETH HAAR

PREFACE BY THE EDITOR

Over 30,000 lobbyists walk the halls of European government buildings in Brussels. The decision-making process in the European Union (EU) affords great opportunities to these representatives of corporate interest, despite recent efforts to keep their influence in check and encourage ground-up democratic input. This imbalance between corporate and societal interests represents an existential challenge to democracy, social rights, peace and the planet. Activists are rightly calling for social, environmental and democratic interests to have more of a say in Europe's decision-making processes, as well as for greater transparency and regulation of corporate influence on EU policies. Yet the central issue is not the sheer number of corporate lobbyists who encourage decisions and set agendas, nor is it the vast financial means at their disposal. The democratic deficit of the EU decision-making process is there by design, and cannot be solved by simply replacing one set of lobbyists with another.

As this book demonstrates, business leaders and corporate representatives have been instrumental in shaping the EU's institutional foundations since its inception, inscribing their vision into the fundamental principles upon which the union was built, and which dictate its functions today. As a result, the EU firmly privileges competitiveness as the rationale behind social, economic and political integration. Its constitutional order affords pre-eminence to corporate power, exempting it from adhering to principles of equality and equity. All-encompassing bureaucratisation is the hallmark and driving force of the "European competition state", marginalising any genuine concern for the common good. This argument is what sits at the heart of the intriguing story presented by Kenneth Haar in this book.

The author draws on a wealth of expertise and original material – some of it confidentially leaked – as well as reports and analyses from his work as a researcher and campaigner with Corporate Europe Observatory, where he shines light into the darkest corners of thirty years of corporate meddling in EU institutional development. In this book, he demonstrates that the ruthless logic of competitiveness operates at every level of decision making, be it European, national or local. From trade to big tech, from patents to weapons deals, from the European Monetary Union to the climate, regulations follow the economic model – enshrined in EU statutes – of the Single Market and its Four Freedoms. The book centres on the result of this "competitiveness at all costs" approach: a realignment of social, democratic and environmental agendas to suit the interests of transnational capital, both inside and outside of the EU (token progress and a few substantial concessions notwithstanding).

The author is clear-eyed about the shortcomings in the EU's democratic legitimacy: a limited say for "ordinary" interests; limited transparency and accountability; and limited attention to the needs of those less well-off. These failings at an EU level have generated unease among many European citizens as to the "real" beneficiaries of EU integration, feeding cynicism and apathy. This has, in turn, yielded support for the far right that capitalises on vague concepts of "elite rule" to attack social rights and democracy, while eroding social actors' and individuals' willingness to challenge the tutelage of "big business" and "its politicians." Yet Haar's book is a strong reminder of the potential to question, challenge and halt the corporate capture of Europe, as demonstrated by the alliances and movements of diverse actors in the past.

Kenneth Haar's call is for a change that reflects contemporary political and class struggles; his ideal is a systemic alternative to the competition model currently in place – one that puts democracy, sustainability and prosperity for "the many" at the centre. To tackle the core elements of the EU's democratic deficit, Haar identifies several directions for reform: rolling back the EMU rules that privilege the EU economy over those of Member States; strengthening parliamentary and other forms of democratic control over the Commission to balance bureaucratisation processes; realigning the rule by standards and indicators from corporate to public interests; allowing comprehensive regulation by Member States to protect citizens from harmful application of the Competition Principle; and foregrounding social rights at an EU level.

"A Europe of Capital" is a rich resource for anyone looking to understand the role and workings of corporate interest representation in the EU, both in general or historical terms, and in a range of specific policy areas. This book is more than the sum of its constituent narratives: it provides a comprehensive argument about what has become of the EU, and where it is headed. We at the Brussels office of the Rosa-Luxemburg-Stiftung are delighted to have worked with Kenneth Haar on this important contribution to the debate about the contemporary EU and the future of democracy, solidarity, social rights, climate justice and peace, both on the European continent and globally. These concerns are at the heart of our work, and will continue to shape public concerns and debates as the EU sets out into a new legislative period.

Ada Regelmann, March 2024.

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PREFACE BY THE AUTHOR

Corporate Europe Observatory (CEO) has been studying the influence of lobbyists over EU institutions for 25 years. As a lobby watchdog, CEO has exposed countless scandals, as well as a number of methods which representatives of large companies have used to promote their own interests.

I have had the pleasure of being part of the organisation since 2008, and, in this capacity, it has been a privilege to work on some of the most significant events faced by the EU since I initially joined. First the financial crisis, then the euro crisis, followed by big political upheaval over trade, social, and labour market policies, as well as health policy during the COVID-19 pandemic. I have long thought that the wealth of experience on how the EU works and what often drives it, gathered by CEO over the years, should be applied more broadly and not just limited to the time-bound reports and articles that we regularly publish. In other words, our vast experience can and should be used to tell a broader story about the EU.

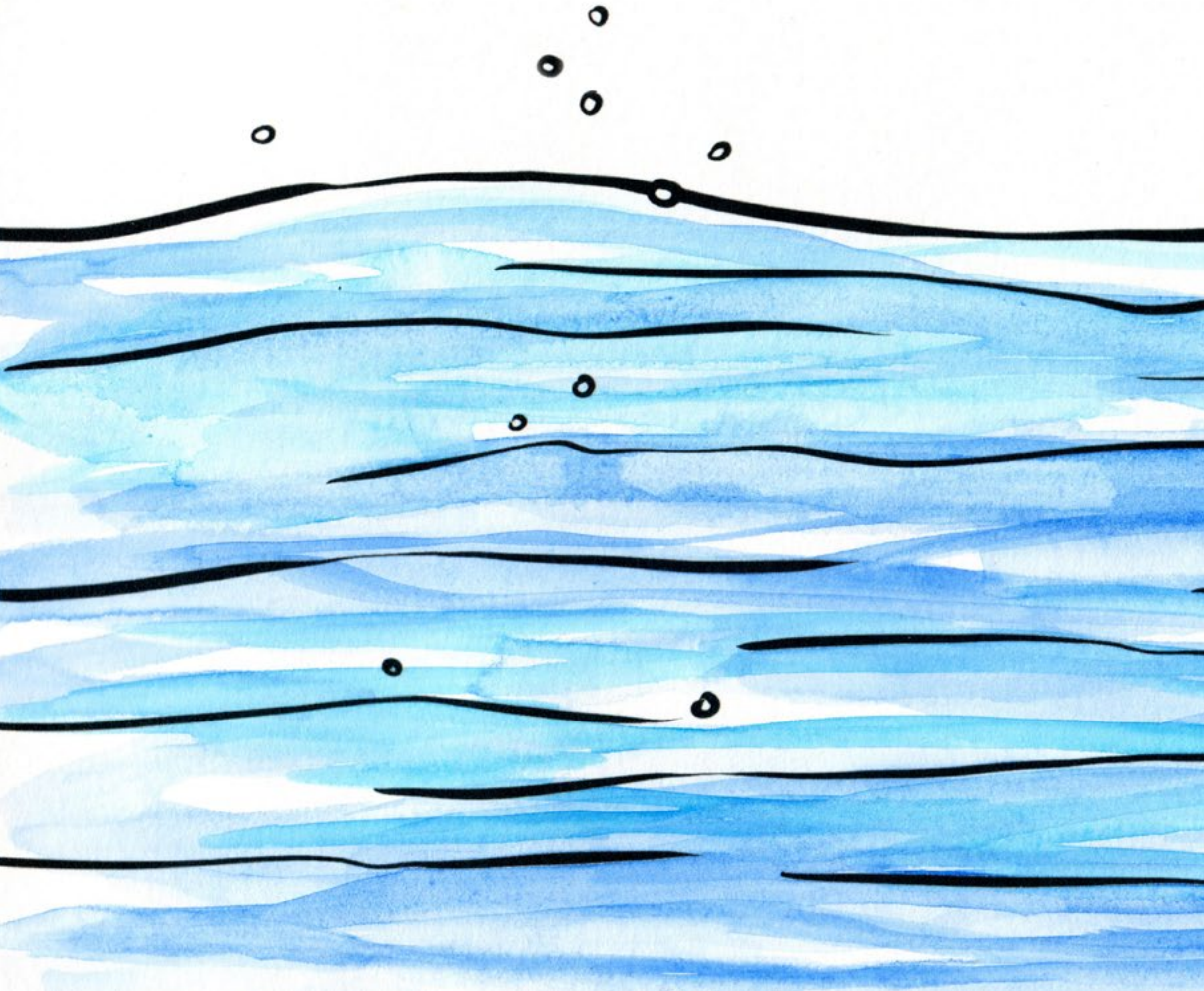
This reasoning has been the driving force behind this book. Since the book is largely based on CEO's work, part of the credit goes to my current and former colleagues.

I would also like to offer my sincere thanks to the adult education organisation Democracy in Europe (DEO) for its assistance with the Danish-language version, and to Ada Regelmann from the Brussels Office of the Rosa-Luxemburg-Stiftung for her invaluable work on the English-language edition. Thanks to her, this version of the book is not just an update on the Danish version from April 2022, but an improved one too.

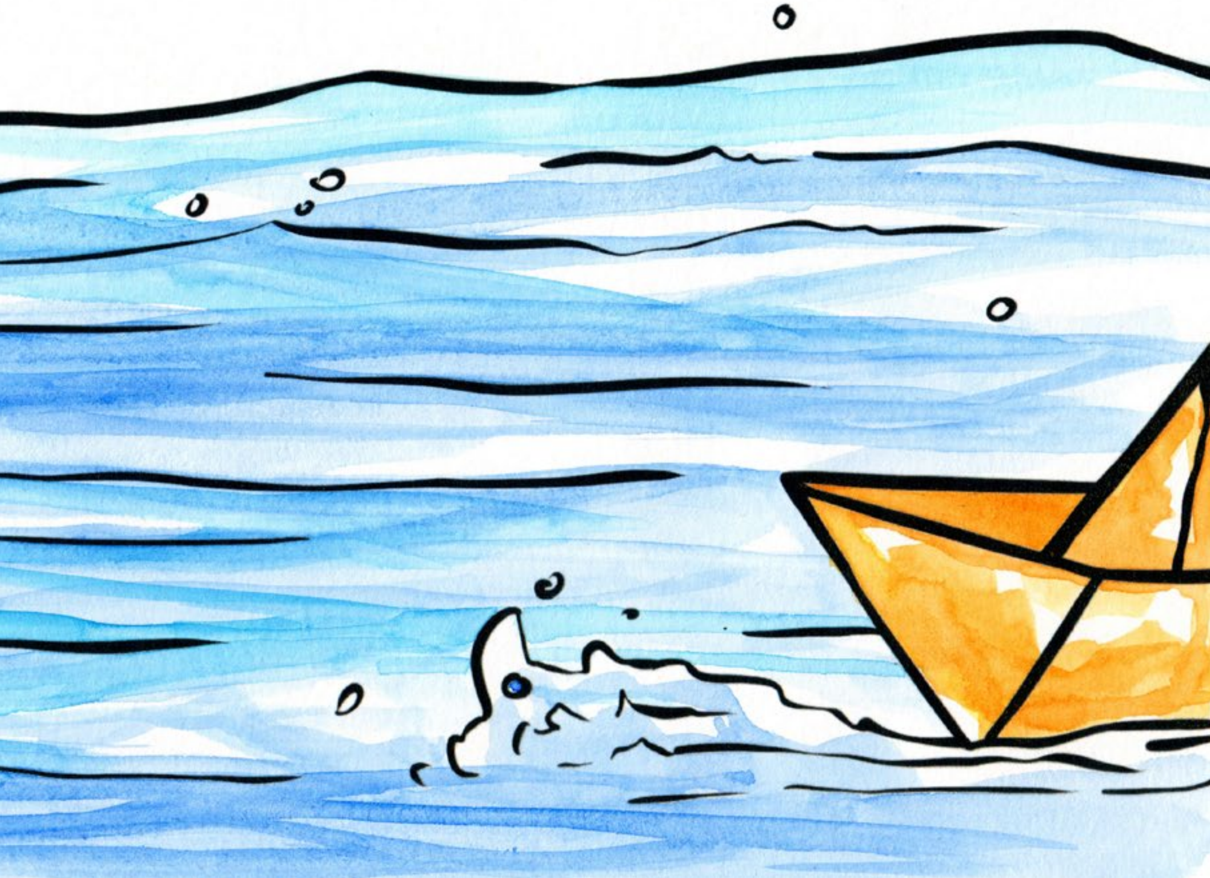
Finally, I would like to express my gratitude to a number of people who have contributed with their comments on individual chapters, including Ulf Vincents Olsen, Jens Peter Kaj Jensen, Finn Sørensen, Olivier Hoedeman, Rebecca Trixa, and Rikke Fog-Møller.

Without their invaluable contributions, this book would not have come to fruition. Nevertheless, the responsibility for the content of this book lies entirely with me.

Kenneth Haar, December 2023.



THE LOBBY WATCHDOG AND THE TREE BY THE PARLIAMENT



A small tree stands a few metres from the entrance to the European Parliament in Brussels. An unnecessary refuge in the middle of the road is dedicated solely to the tree, which stands on a small elevation, bordered by cobblestones. A plaque is placed at the foot of the tree with thanks from donors to the Parliament for years of cooperation on transparency and democracy. The cheerful giver is an association of lobbyists called the Society of European Affairs Professionals, and the tree is also a tribute to themselves and the role they play in the EU. Few take note of the tree, and perhaps even fewer stop to reflect on it nowadays, except the groups that take part in guided lobbying tours organised by Corporate Europe Observatory (CEO) – a lobby watchdog that aims to reveal the methods used by corporate lobbyists to gain influence in the EU institutions.

The concept behind the tours is plain and simple. The groups – typically visitors from associations, school classes or students – are escorted by one of CEO's researchers around the European Quarter, which houses the European Parliament (EP), the European Commission (also known as the Commission) and the EU Council of Ministers (also known as the Council). Depending on the theme, each tour features the addresses of the most relevant respective lobbyists. This may include the offices of a large company, a trade association or lobbying consultancies, commonly referred to as public affairs firms. At each stop, CEO shares anecdotes about the individual firm's role in the institutional tug-of-war that decides future EU rules.

The tours last a couple of hours, bringing hot EU topics to the fore along the way. The topics might include rules applicable to big banks, or pesticides that were expected to be banned, but in the end were not. The guide may choose instead to talk about an ambitious proposal on food labelling that ended up being shelved. Whatever the angle, the common thread that binds all the tours together is the fact that lobbyists play a major role in the political life of EU institutions. Participants see physical expressions of lobbyists' massive presence in the European Quarter, including buildings, logos or door signs, and often leave with a renewed understanding of how the institutions work and what role lobbyists play.

A lobby tour is a way to give the audience a first impression of the massive presence of lobbyists in the neighbourhoods surrounding the EU institutions in Brussels, but this book will go much deeper. It will go beyond individual lobbying battles and analyse the power of big business in EU institutions at higher levels too. Drawing on CEO's immense work over the years, it is about seeing corporate power and corporate lobbying as a driving force in the development of the European Union. Due to our specific focus on business lobbyists, we have always operated within the core areas of the EU, including nearly all aspects of the economy, and I believe there is a bigger story hidden between the lines of our reports, a story about how the interests of big business and corporations have shaped the European Union to make it a "competition state" – a state that first and foremost protects the interests of corporations by safeguarding and increasing their competitiveness. In this way, I can highlight crucial aspects of the EU's development which are rarely reflected elsewhere. This is a book that covers the bigger, long-term development of the EU as seen from the insider perspective of a lobby watchdog.

AN ARMY OF LOBBYISTS

When I joined CEO in 2008, an estimated 15,000 lobbyists regularly engaged with EU institutions. The figure now sits at around 25,000-30,000, roughly double what it was 15 years ago. Such a crowd represents strong firepower in day-to-day political life. Often the lobbyists concerned are so proficient at setting the agenda that the real question is not whether parliamentarians on the right or the left will get the upper hand, or whether it is Germany or France that gets its way. The question is, rather, whether the larger firms in the field will succeed in getting their demands met or their proposals adopted.

Most lobbyists represent large companies directly or indirectly, either as employees of the firm in question, members of a trade association, in an ad hoc coalition in a particular field, or as temporary hires through a consultancy or law firm. Even in times of peril, when a lot is at stake for their associated industry, lobbyists have immense amounts of money at their disposal. This was clearly demonstrated in 2010, when the food industry trade association invested €1 billion in defeating a food-labelling proposal that seemed to have a majority in the European Parliament.[1] Similar things happened again in 2022, when major internet platforms were discussed in order to agree on EU regulation, and Google suddenly became the company with the biggest lobbying budget at €5.8 million a year, closely followed by Facebook with €5.5 million allocated to lobbying efforts.[2]

CEO has been working for many years to uncover how such large sums of money directly translate into influence. We have examined countless political clashes and have conducted in-depth investigations into even the smallest steps in the decision-making procedures, from the Commission's initial consideration of new proposals, right through to the implementation of administrative decisions on the ground. Indeed, industry lobbyists are among the only players present at every stage of the process, so we have to follow them closely. Focusing exclusively on the moments when a political issue comes up for open debate in the Council of Ministers or in the European Parliament will only tell part of the story. The mission we have taken on therefore requires us to dig through piles of documents from obscure, lesser committees and commissions, and a smoking gun can often turn up in the most unexpected or overlooked of places.

FROM INDIVIDUAL REPORTS TO THE BIG PICTURE

Our mission to shine a light into the darkest corners of European politics has led us to scrutinise events at all stages of decision-making, even at stages that few people are even aware of. We have been physically present at many conferences and meetings where we were most definitely not welcome, and although there have never been more than 16 of us on the team, we have gained experience and produced extensive analyses in many fields that only we could have delivered. Said in all modesty, we have produced a vast amount of material on the relationship between big business and EU decision-makers, which has been essential for the many political campaigns in which we have taken part. For instance, our material on agro-industry practices to keep glyphosate (the active ingredient in the RoundUp herbicide) on the European market has been part of the campaign aiming to get it banned. Our revelations of the gas lobby's campaigns for expansion of the gas infrastructure have given plenty of fuel to green activist groups around the EU working for more renewable energy. Our work on trade policy has paved the way for major coalitions to defeat proposals to give sweeping rights to big business both at home as well as abroad.

Our countless analyses of the consequences of an EU Commissioner accepting a job as a lobbyist or an adviser to, for example, an investment bank, have had a significant impact on the debate and even on the rules governing this particular field. Our work on EU lobbying transparency since 2005 has been instrumental in ensuring that the Commission's register of lobbyists active in the EU institutions – once considered a tragic joke – is actually considered useful today. The list of achievements we have made on lobbying regulation, on our own or with others, is long. The fact is that we are not just a think tank; we are a campaigning organisation with a political project that defines our core mission to roll back the influence of big business over EU institutions.

The material, analyses and revelations that have emerged as a result of our extensive research and that bear our name do indeed merit an entire book. CEO is able to deliver plenty of stories about dirty tricks, about how money can be used strategically to buy influence, about shrewd PR campaigns and surprise political manoeuvres outside the (immediate) public spotlight. CEO has never shied away from dealing with the grand and long-term plans for the EU, such as the strategies for a common economic policy that grew out of both the financial crisis and the euro crisis. However, the vast majority of our output is quite time-bound and created for and in a particular context. Thus, scandals we exposed five or ten years ago may end up becoming little more than amusing anecdotes of a bygone era, irrelevant to the challenges we are facing at present.

That would be a sad and undeserved fate. This book, therefore, is my attempt to build on the experience that my colleagues and I have gained over the years. I aim here to go a step further, and develop a more comprehensive understanding of the evolution of the European Union by shedding light on how big business interests not only impact individual decisions on specific laws, but also how they have shaped the rules, approaches and procedures that govern the institutions themselves. By connecting the dots between our reports, an image emerges of a European Union which has developed in response, and service, to the interests of big corporations. The result is a quasi-state formation with all the characteristics of a competition state – a state that first and foremost sets out to ensure the global competitiveness of private companies.

NOT JUST ORDINARY LOBBYING

This influence on the EU goes well beyond what can be explained on a guided lobby tour. The walk in the European Quarter can give you a strong sense of the massive resources companies have at their disposal, and it is a good way of getting familiar with the ways they conduct specific lobbying battles, but that is not even half the story of their power.

The interaction between the big corporate players and the decision-makers in the EU institutions is complex. It cannot be boiled down to a classic lobbying scenario, where an industry focuses on a legislative initiative that would go against their interests. Said industry might decide to invest a large sum of money in an army of eloquent people specialising in smooth-tongued communication, people who are then dispatched to go knocking on the doors of EU Commissioners or Members of the European Parliament (MEPs). Once they have acquired their target's attention, they then cajole (or coerce) them into agreement. This is sometimes how it is done, as was the case with the aforementioned billion euros invested by the food industry to combat the infamous labelling scheme. However, usually there is a significantly more complicated and broader story to tell.

To begin with, corporate heavyweights often fill the role of advisers to policy makers, and they step in well before a draft EU law has even seen the light of day. Though the interests of business leaders are rarely fully aligned with those of society, they are frequently called in to advise the Commission on new initiatives. It is a very common practice that, when something comes up that concerns a particular industry, the Commission quickly opens a direct line to lobbyists advocating for that industry without much regard for other interests in society. When a direct counterpart exists, for example a consumer organisation, an environmental organisation or a trade union, they are rarely able to capture the attention of policy makers. At best they get a single seat at the table in an advisory group dominated by business representatives, only to discover that the entire agenda and purpose of the group has been modelled to accommodate business interests.

My first project in CEO concerned the Commission's advisory groups, so-called "expert groups." At the end of 2008 we were in the midst of a dramatic financial crisis, with financial institutions falling like dominoes whilst others were propped up by massive state-funded support. The financial crisis caused me to cautiously suggest that we spend a few months examining the financial lobby. On the one hand, we had to look back at how EU rules had come about, which everyone could now see had been disastrously weak. On the other hand, we also had to look forward to how the financial sector would react to the reforms that were the logical outcome of the miserable situation facing the EU.

After many months of research, and together with two other organisations, we published a report to explain that in the years leading up to the financial crisis, the Commission had set up a series of expert groups to help develop a set of EU rules in an area that until then had been governed by only a few general rules.[3] The expert groups were all dominated by people from the financial sector. The proposals had set the agenda for further discussion, and as the financial sector itself had been given plenty of time to prepare they ended up drawing the long straw, as they had done on all occasions before the financial crisis.

Upon publication the report was quickly welcomed by many, including prominent members of the European Parliament and heads of government. MEPs expressed shock over the findings. The Commission, however, shrugged off the criticism. A Commission official pointed out to a journalist that the expert group recruitment process had been done by the book: "If you want financial advice you don't ask a baker," they stated,[4] and there is a certain amount of logic to that statement. The financial sector is the foremost authority on the financial sector, but the advice it offers is undoubtedly biassed. It is inconceivable that the big European banks would advise the Commission to take matters into its own hands and intervene through tight regulation, because that would negatively impact their bottom line.

If this problem were just related to the financial sector it might be manageable. However, it is a pattern that is woven into many areas if we look hard enough. In recent years, for example, CEO has published stories on how central the gas industry is to EU decision-making on new energy infrastructure, as well as exposés uncovering the mighty behind-the-scenes clout that was wielded by the pharmaceutical industry during the COVID-19 pandemic.

The phenomenon of "lobbying via expert groups" has been well known for decades, and it has survived despite numerous scandals. That does not mean that victories cannot be won on an issue, as was the case with the tobacco industry, which had historically enjoyed optimal conditions for influencing decision-makers, including a strong presence in expert groups on tobacco. Over time, however, it has been met with less enthusiasm in Brussels, partly as a result of an international agreement on the tobacco industry, and partly due to political decision-making procedures. Yet even here we regularly see setbacks. For instance, the EU has officially committed to follow the rules on tobacco lobbyists in the the World Health Organisation's Framework Convention on Tobacco Control, which includes a clear demand to keep contact with tobacco lobbyists to a minimum (Article 5.3).[5] However, the Commission has often failed to be transparent about its exchanges with tobacco lobbyists, and they have often sidestepped the limits on interaction that they were supposed to follow.[6]

A SENSE OF MISSION AND OBJECTIVES

Influence in the EU is not just a question of who occupies the highest positions in the Commission's civil service. It is also a matter of what the civil service's main objectives are, which are themselves a product of the way the EU has been shaped and defined in recent decades. This means that civil servants often have a surprisingly narrow view of their own area of responsibility.

I experienced this personally, when one day I was called into a coffee meeting in the Directorate-General for the Internal Market, Industry, Entrepreneurship and SMEs. I had just written a brief report on Airbnb's growing political influence over the Commission, arguing that existing EU rules did not give city and national governments enough power to curb the trend of flats and houses being converted into permanent mini-hotels.[7] My claim in the report was that the Commission's announcements and a series of veiled threats to take several Member State governments to the European Court of Justice (ECJ) constituted an abuse of power, and that the Commission had sided with Airbnb. Many comments were made during that conversation, but one, in particular, echoed in my head long after the meeting was over: I had to understand that their office had been set up to ensure that companies have the best possible conditions to operate in the EU. It was in light of this that I had to consider the Commission's approach to Airbnb.

This mission is also reflected in higher level decision-making. For two decades the Commission has adopted overarching principles on lawmaking to strengthen emphasis on business interests and competitiveness. As a consequence, the EU's regulatory machinery has been guided by the need to ease the burden on businesses. Various formulas have been invented, such as "one in, one out" (whereby one new rule imposed on businesses means another must be repealed), and numerous procedures and bodies have been established to keep the appetite for business regulation in check. Such schemes not only affect EU bureaucrats' sense of purpose, as with the civil servants and the Airbnb report mentioned above, they also create a more general bias in the Commission's lawmaking.

This approach is a product of the persistent work of a number of lobby groups and their extensive network of contacts inside the institutions, which have a major impact. This networking also becomes apparent when it comes to the big question: the development of the EU project through the extension of powers. This is done via treaty changes, or by stretching the existing treaty base to the limit, and here too, business lobby groups have been influential.

SHAPING THE FUNDAMENTALS OF THE EU

On top of the influence won through expert groups, business interests have directly influenced the broader development of the European Union as well. The creation of the European Union with the Maastricht Treaty in 1993 came at a time when an economic crisis was hitting many nation states whose economic policies had been inspired by Keynesian thinking. Europe's economy had stagnated due to overproduction, investments had ground to a halt, and unemployment was soaring. From the perspective of the leading capital groups, the economic crisis of the 1970s and 1980s largely came down to an outdated economic model that assigned the state a central role in the economy, often that of the social-democratic welfare state or a variation on it. Capital accumulation mostly took place within a national framework. This model was considered obsolete and archaic by leaders of transnational companies, and by big business as a whole.

In response to the perceived limitations of this model, better conditions for capital accumulation were to be achieved by creating larger markets. A larger market entails common product standards, as well as rules on the quality and safety of the products that are bought and sold on these markets. This in turn leads to a demand for regulation and the implementation of such rules at the supranational level. This was the fundamental rationale that underpinned the beginnings of the European Union.

Needless to say, the project was not delivered overnight as a ready-made package. The Maastricht Treaty laid the foundations for a more complete state formation. It entailed a massive transfer of formal powers to the EU level that facilitated the construction of a new economic and political model, which would then be implemented piece by piece over the following years. To broaden the scope of European integration, the Amsterdam, Nice and Lisbon Treaties added further powers.

Each of these steps was about expanding the EU's mandate, and in particular any economic issue would slowly but surely come under the auspices of the EU institutions. In some cases, the scale and significance of that transfer would only become obvious many years later. For instance, the economic policy of member states, including fiscal policy and labour laws, would come under some degree of control with the introduction of the euro, but it was only after the euro crisis in 2010 that the EU's impact on national social policies and labour markets would become clear. When it comes to the relationship between state and capital, treaty changes formed the basis of the paradigm shift that was to come, but the deployment of this strategy through European legislation took many years.

THE COMPETITION STATE

Business lobby groups, leaders of transnational companies in particular, were not passive bystanders in the development of the EU. They were deeply involved, and helped set the course for the single currency, the Single Market, and more generally for the strengthening of EU institutions. They were not able to do this by simply mobilising an army of lobbyists. Instead, their representatives were brought in and actively awarded positions of influence because their view of the EU's long-term goals matches that of the political elite (though publicly they were hired as "expert" advisers). This alignment can be seen through the close cooperation between the European Commission and business lobby groups, not just on individual laws, but on the design of the EU itself, including how decisions are made.

The Commission has skillfully navigated different national governments' views to steer the European Union, and more than any other institution they are the engine of the EU project. The principle behind its work is to create an "ever closer union," and the Commissioners have always performed this task with great political skill and efficiency. This has also been the case over the past decade, with the euro crisis in particular pushing for more centralised economic policy development.

Therefore, the relationship between the Commission and big business lobby groups is key to understanding their impact on the EU project. The EU that grew out of the crisis of Keynesian states – which they helped to design – was their preferred model of "European cooperation."

Their model for cooperation, in short, aims to create a deeply integrated internal market that in turn forms a base for the creation of bigger, stronger, globally competitive European companies. Competitiveness is moved to the centre of the strategy, and while that may sound uncontroversial, it is all too often a way of saying that the interests of capital or particular factions of capital must prevail over the public interest or other class interests.

In my view, the term that best describes this project is the "European competition state," a term used in academic debate since the 1980s. A competition state is one whose primary objective is to provide the best conditions possible for business competitiveness in a global context, and this objective permeates almost everything the EU does. This does not mean that other considerations such as social, environmental or consumer rights are of no relevance, but they are always subordinated to the ultimate goal of competitiveness. The outcome is that considerations of competitiveness frequently overrule efforts to protect welfare, decent working conditions and the environment.

The reason why I opted for the term state (or state formation), has to do with the substantial mandate the EU currently holds. Many of the tasks attributed to states – such as ensuring a workforce, providing a regulatory framework to underpin a well-functioning market, ensuring technological development, and so on – are areas in which the EU plays a major role.

SYSTEMIC DEMOCRATIC DEFICIT

This book's title – "A Europe of Capital" – is a literal description of what it covers: a Europe developed and governed by capital and its interests. What is fundamentally at stake in the EU is the question of what kind of state formation, and what kind of relationship between state and capital, will result from the ongoing decline of national welfare states.

This requires an in-depth analysis that goes beyond mere scrutiny of decisions to delve into the real-world effects of EU lawmaking, and an exploration of the decision-making processes behind it. In particular, I set out to identify the power of corporate lobby groups in the institutions, bringing in analysis of how the EU Treaty, the fundamental rule-book that guides decision-making, grants them generous room for manoeuvre, as well as procedures or strategies that have emerged in the last decades and that give their priority to business interests. The result is an unflattering image of EU institutions that have given countless privileges to big companies and transnational corporations. While the European competition state leaves ample space for business groups to set the agenda, the obstacles to other social and political progress are often immense.

One of the consequences of this transition towards the competition state is that political decisions are moved away from open, democratic debate and voting by elected assemblies, and into opaque committees of unelected civil servants, often accompanied by advisers from the business community. This also leads to an increasing bureaucratisation of decision-making: decisions that should be made through democratic process and open exchange are turned into administrative exercises, dealt with exclusively by civil servants who establish and enforce standards and thresholds to keep both the EU and Member States in line.

Examples of bureaucratisation include the Commission's rules on lawmaking, or what they call "Better Regulation," which intends to make sure that all proposals give priority to competitiveness. This procedure can put the brakes on efforts to regulate businesses at an early stage, well before any genuine public debate or even debate in elected assemblies such as the European Parliament. Other examples include the procedures adopted during the euro crisis on the surveillance of member state budgets and economic policies, or the story of how trade bureaucrats and Commission civil servants decided that the EU should not support technology-sharing on COVID vaccines. I could go on, but this book is filled with examples of crucial political decisions that were made at a distance from elected assemblies and public debate.

The EU Treaty's design has opened the door to a web of close links between the Commission and business lobby groups, often but not always with the blessing of Member State Governments, and it is also responsible for the aforementioned bureaucratisation of decision-making that business lobby groups thrive on. This ability to evade public debate and make far-reaching decisions without any risk of outside interference is an outcome of what I call "democratic deficit." This deficit grows in parallel with ambitions to create a competition state by reforming decision-making processes. In turn, this marginalises potential popular opposition by bureaucratising the legislative pathway to important decisions.

A DIFFERENT EUROPE

In light of all the above, the EU has become not more but less democratic in recent years. This development puts obstacles in the way of solutions to some of the biggest political challenges faced by both European and global societies. When we ask what the EU is doing about social inequality, to stop climate change, or to respond to other pressing issues, we quickly run into problems caused by the EU's own strategies to bolster competitiveness. Faced with these questions, it is necessary for progressives across Europe to think bigger and more long-term, to look beyond the adoption of the next political proposal or the next climate plan. Real change will require a radical transformation of the EU's foundations.

In my view, what we need is a new form of European cooperation, but the purpose of this book is not to outline what such cooperation might look like – this would be far beyond the scope of this analysis. Instead, it is my intention to spark debate about future European cooperation, first and foremost by presenting a sobering analysis of the obstacles to change that we face at the EU level.

The book is therefore an analysis of the recent history of the EU competition state. In it, I track how business lobby groups have co-developed not only specific policies, but also how they have co-developed broad strategies, and how they have even helped engineer the basic modus operandi of the EU's institutions.

This theme has been a common thread through CEO's work over many years, even if it has not always been made explicit. For this reason, all the chapters in this book draw heavily on articles and reports we have published.

In terms of structure, the first chapter is of crucial importance. In it, I look back to the early 1990s at exchanges between the European Commission and one of the most important big business lobby groups, the European Roundtable for Industry (ERT), to identify what their demands were back in the early days of the European Union. Discussion of this pivotal period forms the primary basis for the rest of the book, not least because it showed what kind of EU was desired by some of the biggest European companies at the time. The exchanges in this period were a leitmotif that set the scene for the development of the EU in trade policy, labour laws, social policy, and more. They invoked later events when particular capital groups established dominance in interactions with institutions, and even shaped the way they function. Chapter 1 and its discussion of the ERT is the cornerstone of this book, and it serves as a prologue to much of the action in the following chapters. For this reason, the outline of the remaining chapters is included at the end of Chapter 1.

What emerges is a somewhat gloomy picture of how the EU works and what the outcomes are in areas such as climate change and social rights. To some, change may even appear illusory when reading about the shocking power wielded by corporations. Nevertheless, the intention here is to provide input for a discussion on alternatives that are rooted in a sober and realistic understanding of what the EU is and how it works. Only by accepting the fundamentals of the EU competition state, and the many ways its design gives precedence to big business, can we develop strategies and alternatives.

NOTES

1 Corporate Europe Observatory, *A red light for consumer information*, 10 June 2010. Available at: corporateeurope.org/en/2010/06/red-light-consumer-information, (accessed: 26 October 2023).

2 Corporate Europe Observatory, *The lobby network: Big Tech's web of influence in the EU*, 31 August 2021. Available at: corporateeurope.org/en/2021/08/lobby-network-big-techs-web-influence-eu, (accessed: 26 October 2023).

3 Kenneth Haar et.al., "A captive Commission - the role of the financial industry in shaping EU regulation," *ALTER-EU*, October 2009. Available at: www.alter-eu.org/sites/default/files/documents/a-captive-commission-5-11-09.pdf, (accessed: 5 December 2023).

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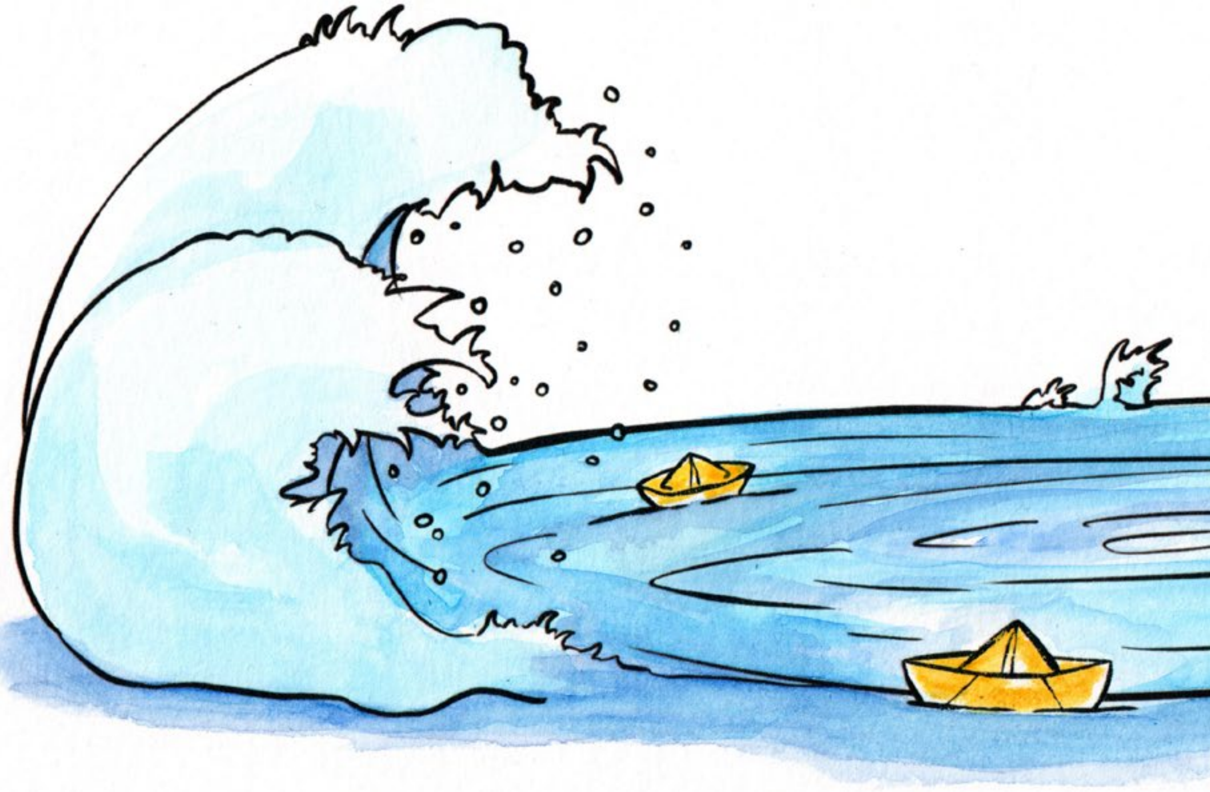

THE CAPTAINS OF INDUSTRY AND THE EUROPEAN COMPETITION STATE

About once a year, the most powerful people in the EU gather for an exclusive meeting on EU strategy. At these events, the German Chancellor, the French President and the President of the Commission convene with European industry leaders. For a time, the location alternated between the two heads of governments' headquarters: one year at the Élysée Palace in Paris, the other in the German Chancellor's residence. The first three parties make for a political powerhouse: the two driving forces of EU integration (when able to reach an agreement), together with the President of the Commission who formally drafts all EU laws. When the fourth party – made up of the heads of some of Europe's largest companies – steps in, it is potentially the most powerful assembly imaginable in all of Europe.

The relationship between the highest ranking EU officials and the group of industry leaders known as the European Roundtable for Industry (formerly the European Roundtable of Industrialists) is long-standing. This group held a lot of sway in the crucial, formative years of the EU project in the early 1990s, and their activities in those years are a good starting point for understanding the EU's development. Thanks to privileged access to EU Commissioners, they have been there as a partner and adviser when big decisions were to be taken.

The tenure of the president of the European Commission, Ursula von der Leyen, is no exception. She met with Chancellor Merkel, President Macron and representatives of the European Roundtable for Industry (the ERT) as early as October 2019, more than a month before her Commission was finally approved.[1] After a pause in physical meetings during the COVID-19 pandemic, von der Leyen met again with the French President and German Chancellor Scholz in Paris in late February 2022, just a few days after Russia's invasion of Ukraine.

When the ERT meets with the Commission and the leaders of the two governments, what unfolds is a kind of EU business summit with a big turnout of industry leaders, typically drawing between 25 and 50 attendees at each meeting. These attendees all decide in advance what the theme of the year will be, and they arrive well prepared. One year, the theme may be the shortage of skilled labour. The next it might be easing regulation on business at the EU level, either across the board or in specific areas. Other years, the agenda may specifically address economic crises, and in more recent years the ERT has prioritised the Digital Single Market. In 2022 high energy prices – and energy policy more broadly – caught much of the attendees' attention. The meetings, however, are not a complaint box for petty issues, but rather a place where industry leaders come to discuss the big picture fundamentals of the development of the European Union.

The ERT is in a league of its own in the lobbying world, and in fact they would prefer not to be called lobbyists at all. They are high-level advisers who don't bother with one particular industry's quibbles on product approval, one-off EU directives or individual regulations. Their true mission is to talk about the EU's overall development, and ERT members are typically the leading figures of a large enterprise. At the time of writing, for example, the chair of the Vodafone group, Jean-François van Boxmeer, is the ERT Chair. Other members represent oil companies such as Total, energy companies such as ENGIE and other industry giants like l'Oreal, BASF, AstraZeneca and Daimler.[2]

In total, around 60 large enterprises from across many sectors are represented by one of their top executives at the ERT. The organisation is the voice of big industry. Members seek to express their collective views and interests to the two Heads of State and the Commission. It is these three parties, in particular, who they need to convince if they wish to make their mark on the EU's development.

BIG BUSINESS'S BLUEPRINT FOR THE SINGLE MARKET

The ERT has achieved astonishing results and made a huge impact in areas where few others even stand a chance, which is not surprising given that this is the organisation's *raison d'être*. The ERT was founded in 1983 on the initiative of then CEO and chairman of Volvo, Pehr Gyllenhammer. He saw a European Economic Community (EEC, as the EU was known before the Maastricht Treaty) that was struggling to find a response to the economic crisis Europe was facing at the time. Flanked by Gianni Agnelli of Fiat and Wisse Dekker of Philips, Gyllenhammer brought together a group of industry leaders from many different sectors to create a business-friendly formula for the development of the EEC.

In order to achieve this he worked closely with the then Commissioner for Industry, Etiènne Davignon. The Commission therefore actually played an active role in setting up the ERT, an organisation whose purpose was to prepare EU development proposals on behalf of some of Europe's largest enterprises. Having a direct line to the Commission would soon become the ERT's main asset: they essentially had a VIP pass to the engine room of what was to become the EU. They quickly leveraged this access to develop a project for the creation of a genuine Single market, with common rules for everything affecting the exchange of goods and services.

The vision for the Single Market came to dominate the ERT's work plan in its early years. In January 1985, ERT President Wisse Dekker put forward an ambitious vision for removing barriers to trade over a five-year period in the article "Europe 1990 – An Agenda for Action."[3] Just three days after its launch, the newly appointed President of the Commission, Jacques Delors, gave a speech that drew heavily on the proposals presented in the article. A few months later, Industry Commissioner Lord Cockfield issued what was known as a White Paper, an in-depth report that eventually served as the basis of the Single Act, the package of measures that form the backbone of the Single Market. Lord Cockfield's White Paper differed from the ERT report on only one point, which was the year of implementation.[4]

Cockfield made no secret about the fact that the White Paper was strongly influenced by the ERT. In the same vein, Commission President Jacques Delors stated in 1993 that the ERT was "one of the main driving forces behind the Single Market."[5] The ERT had been a resounding success from the beginning, and was destined to become an institution that would shape EU politics for many years to come. They were also, unsurprisingly, involved in drafting the Maastricht Treaty – arguably the most important treaty in the EU's history – where their top priority was the Economic and Monetary Union (EMU), which aimed to create a single currency with rules for common economic policy.

They had already advocated for the single currency in 1987, and although the task of building a business lobbying coalition for the EMU was delegated to another group – the Association for the Monetary Union of Europe (AMUE) – ERT leadership came to play a crucial role.[6] In the 1991 report "Reshaping Europe," the ERT proposed a roadmap for the completion of the EMU that bore a close resemblance to the plan adopted by the Maastricht Treaty just a few months later.[7] Remarkably, this took place despite a lack of enthusiasm for the single currency and for the EMU among certain members of the ERT, with German business leaders in particular, being especially reluctant.

However, the scepticism dissipated over time, and a few years later the ERT became a keen and influential adviser on the implementation of the EMU, to the point where they even stepped in and made their voices heard when the implementation schedule appeared to be lagging. In a letter to the heads of state and government at a summit in Madrid in 1995, the ERT, according to then Secretary General Keith Richardson, urged leaders to keep up the pace: "We wrote to them, we asked them to do that. And they did it."[8]

PRIORITISING COMPETITIVENESS

With the active work on the roadmap and rules for the single currency underway, another issue took priority; the EU's "competitiveness." Both the Single Act and the Maastricht Treaty laid solid foundations for building a strong EU project, but in many ways it still lacked a clear direction. While the EEC was a market with common rules for trade in goods in particular, the EU had the potential to establish a broad mandate in overall economic policy. Nevertheless, even in 1993 many avenues were open and several models were possible within certain limits, including an EU that could put environmental or social concerns at the heart of the project.

In this respect, 1993 and beyond were critical years in which the ERT played both an active and productive role. This was particularly evident in the Beating the Crisis report, a concise synthesis of a number of other reports which included a hard-hitting and blunt "Charter for Europe's Industrial Future," the main aim of which was to put competitiveness "at the top of the European agenda."[9]

Beating the Crisis described the state of the EU in alarmist terms: "Europe has become a high-cost, low-growth economy that is not adapting fast enough and is therefore losing its competitive edge to more dynamic parts of the world. As a result, too many people are out of work."[10]

The ERT's wish list in the report was wide-ranging. Efforts to bring down labour costs were high on the agenda, coupled with lower taxes and social policy reforms. Demands were also being made for a more flexible labour market that would encourage part-time contracts, flexible working hours and "a whole range of new types of useful employment that are in the grey area between formal jobs, self-employment and social work." It placed a particular emphasis on labour mobility – including through posting in other countries and the possibility of relocation (essentially outsourcing) – as a golden opportunity for the European economy.

Education systems would also need to be radically changed according to the ERT, which called for a system that could support adaptability throughout life, and for a higher education sector that should be "narrowly relevant to the needs of society." Their focus was on doing what was "necessary to make Europe competitive on the global market." As for the public sector, it stated that privatisation of all commercial enterprises should be "pursued with great determination," whilst public services should aim to be made "cost-effective."

In the area of competition policy – which creates rules on monopolies and unfair market practice – the ERT emphasised a global perspective "which allows for the emergence of strong European companies." Competition in the Single Market, they noted, "is the best way to develop global players." In other words, they were seeking policies on competition that did not actively limit the activities and size of large enterprises. In their view, competition policy should not concern itself with the size and power of companies: big, strong mega-companies were considered positive.

On top of this, the ERT pushed for the simplification of the regulatory environment to relieve businesses from the pressures of what they called "an excessive layer of bureaucracy." The ERT bluntly demanded a temporary halt to new regulation, especially in the area of environmental regulation.

THE ERT-COMMISSION PARTNERSHIP

The ERT's extensive activity and productivity from 1993 onwards did not occur in a vacuum because, as stated above, the European Commission itself worked closely with the ERT. In June 1993, the Commission published a White Paper with the aim of forging a consensus between the Commission and Member State governments on generating growth and jobs in the coming years. The work was completed in December 1993 when the then Commission President Jacques Delors presented an extensive 140-page plan on "Growth, Competitiveness and

Employment" at an EU summit.[11] In many ways the plan heralded a break with the standard Keynesian tools and shared many similarities with the ERT's Beating the Crisis report. This was no coincidence. Presenting the Commission's conclusions, Jacques Delors thanked the business community in general, and the ERT in particular, for their contributions.[12]

Research into the ERT and its influence in the EU was done by Bastian van Apeldoorn of the Vrije Universiteit in Amsterdam in the 1990s. Numerous interviews were conducted with prominent figures in the ERT that showed just how closely the two sides cooperated before the publication of the Commission's growth plan. A senior representative of the ERT even told van Apeldoorn that their work and that of the Commission were developing in parallel: "[w]e saw their draft and they saw our drafts [...]. Beating the Crisis is a very short and very clear statement, but the message is the same: these things all go together – you won't fight unemployment if you don't fight for competitiveness, you won't get growth if you don't have investment."[13]

The ERT's report and the Commission's plan share the basic premise that increased growth and employment can only be achieved by strengthening the competitiveness of European industry. The idea of "competitiveness" in this context is extremely broad, and covers issues far beyond what most people would immediately understand as the driving force behind a solid business. First and foremost, it is about access to cheap labour and a market that is easily accessible, as opposed to one governed by regulations that impose "burdens" on businesses. However, it also covers social policy, environmental policy, the public sector, and taxation. The two sides had a clear, shared understanding of what "competitiveness" meant, and the Commission spoke of "three inseparable elements" in its plan:

- The first was a "macroeconomic framework that supports rather than constrains market forces," which includes viewing the reduction of deficits, even in times of crisis, as a way to fight recessions. This is in stark contrast to the Keynesian-inspired policies of the past where government investments, among other things, are used to create demand and renewed growth.
- The second was the "elimination of all rigid rules," which were considered to be an obstacle to business competitiveness, particularly in the Single Market.
- The third consisted of "active policies and structural changes in the labour market and its rules." In other words, a labour market policy that identifies the lack of "flexibility" as the main issue.

The second and third of these elements showed deviations from the usual methods of the welfare state in the days of Keynesian prosperity. At that time, "market failure" was a recognised factor, and unemployment was not seen as a simple consequence of people not wanting to work. There could be many other factors at play over which workers had no control, and these underpinned both state intervention and social rights and benefits for the unemployed. However, according to the Commission, the ERT and the Member States that had pushed for a new approach to employment policy, the actual problem in 1993 was that firms were subject to rigid labour market conditions and regulatory failure.[14 15]

In fact, the June 1993 White Paper failed to address the issue of a "social Europe." In previous years, Jacques Delors had made an unsuccessful attempt to find room for a social dimension in the EU, but by 1993 the tone had become much more tentative. The proposal was now "a sort of European social pact," but lacking any tangible content.[16]

There were many other similarities between the two papers, including the EU's role in globalisation and world trade. Both the ERT and the Commission warned against protectionism, which would be "suicidal for the European Union, the world's leading trading power," as it would "go completely against the stated objectives" of the EU. The ERT had a somewhat mercantilist approach to trade in the early years of its existence, but a decade later that had completely changed. The ERT now proposed that the EU should open up to the immediate outside world by removing barriers to trading with Central and Eastern European countries, and more generally by eliminating measures against imports of any kind, except for a few countermeasures against "blatant contraventions of free trade principles."[17] To them, the EU had to work for "an international framework that can help European companies tap the fastest growing markets through both exports and investments."[18]

COMPETITIVENESS AT THE CORE

There was a strong global dimension to the ERT's and the Commission's reflections on the EU's competitiveness which has to be understood in the light of the global context at the time. "Europe is losing its competitiveness. Its share of world markets is declining and fewer of the most important investments are coming to Europe. [...] This is why we believe that industry and governments must join forces to find a radical solution," the ERT had urged in 1993.[19]

This "radical solution" was fundamentally tied to the relationship between the state and capital. States had to be modelled to prioritise and secure the competitiveness of businesses, and this had implications far beyond narrow areas of regulation such as product standards. As we have already seen, the ERT's definition of competitiveness was strategically vague, with broad implications for most if not all aspects of society, including fiscal policy, public services and labour markets. It is, ultimately, a completely open-ended concept. A former senior ERT official explained this to Bastian van Apeldoorn by stating that the ERT provides input on "issues of crucial importance for the economic strength of Europe, what we are now calling the sort of general term of competitiveness. And competitiveness is now a useful word but it is really like a paper bag into which you put things."[20]

Obviously, the ERT never put random ideas into the paper bag. While they present competitiveness as a broad and dynamic concept, it is actually, fundamentally, about placing the state in service to companies, in particular transnational companies. To achieve this, the ERT saw a need to transform European states *en masse* by strengthening and empowering the EU bloc, meaning it could become the main engine of reform in replacing what was seen as an archaic relationship between state and capital. As far as the ERT was concerned, the core objective of expanding the EU's mandate was therefore to grant it the ability to enact widespread reforms on a European level.

OUSTING THE KEYNESIAN NATION-STATE

The exchange and cooperation between the Commission and the ERT in the early 90's need to be put in historical context for a deeper understanding, as it represented a political and economic paradigm shift.

The post-war period had led to the formation of strong nation states and national economies with a degree of protection from outside competition, states which exercised a decisive influence over the economy. This led to large state investments in infrastructure and, in general, to the building of welfare states, albeit in very different ways. The British state theorist Bob Jessop assigns four characteristics to this model of state formation, which he called "Keynesian national welfare states":

- An economic policy aimed at achieving full employment and support for infrastructure development.
- Collective agreements in the labour market or other support mechanisms to ensure demand, in combination with extended welfare rights. Purchasing power for workers was essential to capital accumulation.
- The national economy as the focal point of both economic and social policy.
- The state as a primary actor when the market fails. In many ways a "mixed economy" of sorts.[21]

However, the economic crisis of the 1970s set in motion a new development that had far-reaching political consequences. The political right was gaining ground, which led to dramatic breaks with decades of economic policy. Internationally, this marked the beginning of a neoliberal era. Led by US President Ronald Reagan and British Prime Minister Margaret Thatcher, a general assault was launched against government regulations, high taxes and the public sector as a whole. The first target was state-owned manufacturing companies, but soon the very idea of public services came under attack, causing a wave of privatisation of core public services. An all-out offensive against the welfare state was underway.

This quickly took on significant international dimensions when a US-led alliance of major European powers – including Britain, Germany and France – launched a push for global liberalisation. One of the most significant manifestations of this neoliberal wave – the international negotiations on global trade (referred to as GATT) – expanded considerably from 1986 onwards. The purpose of a new international trade agreement extended beyond simply lowering tariffs on goods, as rules applicable to services, investments and intellectual property would also support business globalisation. The result was the establishment of the World Trade Organisation (WTO) in January 1995, with the aim of ensuring comprehensive liberalisation of global trade.

Furthermore, these years saw the development of accelerated global financial markets, and barriers to the free movement of capital were removed at the global level by means of multilateral pressure through the International Monetary Fund (IMF). The 1980s and 1990s were the era of so-called structural adjustment programmes: many, if not most, low- and middle-income countries were in debt and chose to take out large international loans through the IMF, but there were strings attached. One of the conditions was the removal of controls on the movement of capital, others included reducing government spending and opening markets and industry up to free trade. In parallel, the major powers changed their approach on the domestic front, most notably in the US, where old rules that kept the financial sector in check were repealed.

A STATE FIT FOR GLOBALISATION

This all marked the birth of the era of "neoliberal globalisation," a type of globalisation that has at its core the free movement of capital, goods and services, as well as the dismantling of barriers to direct investment. This form of globalisation has often been realised through targeted international pressure (from the US in particular) and international institutions such as the IMF.

Faced with a crisis of accumulation, capital's strategy pivoted towards the expansion of a global market and the removal of barriers to more integrated global production. As the new neoliberal economic model became dominant, it led nations to change their terms and conditions in dealing with other countries, while domestic markets became relatively less important and concern for domestic demand decreased.

This shift also impacted the role of the public sector in relation to the national welfare states that had been, up to this point, in their heydays. Only by moving states (or governance) away from the Keynesian-national welfare model could capital provide itself with the framework it needed to further expand.

It is first and foremost in this context that the European Union and its development must be understood. Much of what we consider today as the main features of the EU – including the Single Market, the EMU, and the EU's trade policy – came about or was remodelled in response to the challenges posed by a crisis of capital accumulation.

The debate on grand plans in 1993 – including the ERT reports and the Commission White Paper – was about how to position the EU project in relation to this evolution, not reactively but as a global power shaping and creating the era of globalisation. From 1993 onwards, the Commission and the ERT promoted an EU that embraced globalisation and was driven by free trade in international markets and global competition.

THE HEGEMONY OF TRANSNATIONAL CAPITAL AND THE COMPETITION STATE

This expansive new direction helps explain how a certain faction of European companies came to be the dominant voice, namely those that were to become the main market operators in the face of globalisation. Therefore, when the ERT report and the Commission's White Paper both made competitiveness their top priority, it was not in a general sense: they had a particular flavour in mind.

Transnational companies that operate globally via a network of non-EU subcontractors, or that have moved all their production outside the EU, have an obvious interest in free trade, while companies that mainly produce for the national or regional market will be more inclined to demand a protectionist policy.

As a voice for transnational capital, it became imperative for the ERT to push trade liberalisation as the key to ensuring competitiveness. The use of trade protectionism or state aid to promote the interests of European companies – which France in particular, as well as parts of the ERT, had backed at various points – was therefore not part of the concept from the early 1990s onwards (with the important exception of agricultural policy).

The focus on globalisation and transnational corporations is also what put the Keynesian model under pressure. For example, by decreasing emphasis on domestic demand, the stage is set for a transformation of the labour market. The steps taken by the Commission in 1993 can therefore be said to represent a move away from social democratic crisis policy, even though the Commission President at the time himself, Jaques Delors, was a social democrat.

In Apeldoorn's analysis, "social democracy" shares the fate of mercantilism in the business community, as both are trends that gain ground every now and then, but mostly on a symbolic level. Apeldoorn uses the term "embedded neoliberalism" to refer to a neoliberal hegemony that occasionally leaves symbolic room for mercantilist or social democratic elements, but never enough for them to fully challenge the prevailing doctrines. Consequently, there is no room for the state-centric strategy of full employment, expansionary fiscal policy, or other strategies for achieving full employment that characterised the Keynesian model.

In Apeldoorn's view, the ousting of social democratic and Keynesian thinking is clearly expressed in the ERT and the Commission's respective announcements in 1993. From that point on, the prevailing logic dictated that the only path to growth and prosperity was the removal of all barriers to industrial competitiveness, while unemployment must be blamed on rigid labour market rules, and a tight fiscal policy, not public investment, was the right way to tackle economic crises.[22] For these closely related purposes, the ERT and the Commission saw a strong EU as a prerequisite for achieving its goals. The EU they envisioned can best be described as a competition state.

THE EU AS A COMPETITION STATE

The short definition of a competition state is – in the words of Bob Jessop – one "which aims to secure economic growth within its borders and/or to secure competitive advantages for capital based within its borders even where they operate abroad, by promoting the economic and non-economic conditions that are currently deemed vital for success in competition with economic actors and spaces located in other states."[23] In the competition state the goal of the state is not full employment, social redistribution, or social rights. In fact, in order for these factors to have any weight at all they must be achieved solely by strengthening competitiveness.

One very narrow definition of a state is that they have a monopoly on violence, which makes control over law enforcement, the military and territory its central feature. In my opinion, such a narrow definition is useless. States practising highly developed capitalism have so many other key tasks of importance to society that this single criterion falls short, especially in an EU context. It could also be argued that the EU is not strictly speaking a state, but functions in a complex interaction among nation states, where the states themselves often hold decisive power. The term "multi-level governance" is often given as the EU's main characteristic. It is an entity that cannot be understood without accounting for its relationship to other entities.[24]

This level of complexity is hard to get around. Nation states still have weight and importance, and the EU is not alone in being a competition state. However, over time the EU has taken on a strong supranational dimension. This could be an argument for calling the EU a "quasi-state" or a "state formation," meaning it is an incomplete state.

For the purposes of this book suffice to say: the EU is a competition state, albeit an unfinished one. This is because nearly all areas that are important for a competition state are those where the rules are made in the EU and where it casts the deciding vote. The exceptions include tax policy and social policy, where EU power is formally limited. However, even here it is well on the way to expanding its role, and there are many ways in which the EU may seek to fulfil these ambitions without taking formal power in any legal sense.

While there is plenty of literature on the competition state, the EU is rarely analysed from this angle, and when it is, its role is more often than not downplayed. In my view, the discussion that unfolded after the Maastricht Treaty entered into force – to which the Commission White Paper and the ERT reports make the most important and weighty contributions – was fundamentally a discussion about what major tasks the EU should undertake as a competition state.

THE PURPOSE OF THE EU

This book takes the interaction between the Commission and the ERT as a point of departure. Point by point, I will examine the different aspects of a competition state that we can identify in that exchange. It is remarkable how many of the tasks identified by the Commission and the ERT during that period after the Maastricht Treaty came into force in 1993 have since played a prominent role in the EU's development. I am able to identify six aspects, or tasks, stemming from the plans made in the early 1990s. To these I will add three themes that were barely touched on by the ERT and the Commission at the time (financial markets, militarisation and climate change), but which are unavoidable in their own ways. Each of these aspects are given a chapter each. What I end up with, I believe, is a broad analysis of the EU's emergence as a competition state:

CREATING AN INTEGRATED SINGLE MARKET

The first prerequisite for competitiveness is a large market inside the EU, namely the Single European Market. This is a market that has been steadily expanding. A growing number of sectors have become either harmonised or subject to some form of regulatory framework that promotes the free movement of goods, services, capital and labour.

The concrete implementation of the Single Market has shown that there are constant contradictions between a deeper, more integrated market and public or general interest concerns such as public health, social conditions or the environment. This is not least a result of the Commission placing itself at the forefront of a deregulation agenda that was already foreshadowed in the 1993 White Paper. "Those States," the Commission wrote at the time, "which have taken the lead in deregulation, have the fastest growing markets and the lowest consumer prices."[25] This topic will be further clarified in Chapter 2.

CAPITAL MARKETS

The second task is the creation of liberalised capital markets. This topic forms part of the Single Market, but also constitutes an area that deserves special attention. In the White Paper, the Commission writes that the free movement of capital should provide the basis for "the liberalisation of the Community's financial services market."[26]

It is worth mentioning that liberalising the financial market was not a top priority in 1993, and was not high on the ERT's wish list. Pressure to liberalise EU financial markets did not come from large industrial companies, but rather from the British government and the financial sector. In turn, the liberalisation process gained momentum in a determined Commission, backed by EU governments, which launched a liberalisation project in 1999, long after the ERT had worked with the Commission on the first major plans that paved the way for the EU project. What this led to, and how it relates to the 2007-2008 financial crisis, is discussed in Chapter 3.

MACROECONOMIC STABILITY

As stressed at the time by both the ERT and the Commission in the two referenced papers, the primary purpose of the single currency was to create stability. The introduction of the euro marked the end of a period in which several EU countries had devalued their currencies to compensate for trade deficits, and it turned out to be a tight deadline. In practice, the euro fell far short of the stability its architects had hoped to achieve, and the stabilisation of the single currency became the EU's greatest challenge to date. The euro crisis and its current ramifications are covered in Chapter 4.

CREATING A POSITION OF STRENGTH ON THE GLOBAL MARKET

Creating room for European companies globally is not just about lowering tariffs. In the age of globalisation there are many other hidden layers to trade policy that ensure global value chains work in favour of European companies, allowing them to, for example, easily outsource their production, import semi-finished products and raw materials, and so on. Another challenge is to create global standards that work for businesses. In this and other fields, trade policy and the functioning of the Single Market have long since become intertwined. Here there are also numerous contradictions between the public interest and the interests of transnational capital. In Chapter 5, we take a closer look at the EU's trade policy.

CREATING THE BEST GROWTH CONDITIONS FOR LARGE, HIGH-TECHNOLOGY COMPANIES

Globalisation is about staying at the forefront internationally by stimulating the emergence of privately owned high-technology companies. Thus, the creation of "European flagships" came to be a watchword that would dictate the terms of EU policy.

The aim in the EU is not to operate with high tariffs to protect businesses from competition. A large, deeply integrated Single Market, an expansionary competition policy that does not crack down on market dominance, support for research and development in strategic sectors, and strong intellectual property rules are all components of policy that ensures optimal conditions for European transnational capital. These components are the focus of Chapters 6 and 7 where they are analysed through the battle over COVID-19 vaccines and the EU's conflictive relationship with large US tech companies.

MILITARISATION AND THE ARMS INDUSTRY

Chapter 8 addresses an issue that played no part in the strategising of the early 1990s – the build-up of a genuine EU capacity for military interventions, and more broadly the development of the EU's military dimension. While the Maastricht Treaty did include provisions on Common Foreign and Security Policy, it was still in its very early stages. In recent years, things have moved so quickly on this front that it is now perfectly apt to talk about militarisation of the European Union.

There is a strong link between this militarisation and the interest of the arms industry, and the striving for the competitiveness of the arms industry plays a big role in the topics that this book focuses on. The link between militarisation and the European competition state is analysed in Chapter 8.

THE PROVISION OF FLEXIBLE LABOUR

As described above, access to flexible labour is a high priority for both the ERT and the Commission. This is a field characterised by the EU's limited competence in the area of labour markets, but where there is a will, there is a way, and over the years the EU has succeeded in gaining the power to intervene extensively in labour market conditions. The prospect of a "social Europe" looks somewhat bleak, even at a time when a new project has emerged, the so-called "social pillar." Chapter 9 addresses this issue.

CLIMATE CHANGE AND COMPETITIVENESS

It would be wrong to say that climate change was not contemplated by the ERT and the Commission in the early 1990s. In fact, the ERT advocated for trading in emission permits, the market-based approach that would go on to become a cornerstone of EU climate policy. Clearly climate change has increased in importance since then, and in recent years it has taken centre stage with the adoption of the European Green Deal in December 2019. This is not to say that this vital area is unaffected by the dogma underlying the competition state, far from it. Chapter 10 goes into what the consequences are for climate policy when it is conditioned by the global competitiveness of European industry.

Taken as a whole, these themes are meant to provide a comprehensive picture of the EU's role as a competition state, and they form the framework for this book. Most but not all of them refer back to the Commission's White Paper, the ERT's ideas, and the circumstances under which they were produced. These constitute a significant chapter in the history of the EU.

Meanwhile, it is not the case that the EU developed a complete script to be consulted in case of doubt. As for the ERT's contribution, Beating the Crisis is nearly impossible to find, and has long ceased to serve as a reference. Similarly, the Commission's White Paper has been replaced by other strategic plans over the years. One could argue that both documents offered proposals for the EU based on the interests of big industry, which were then used as structuring principles for the EU's development. Once they became outdated, they were easily replaced by other, similar documents, though structured around the same body of thought and the same view of the EU's role.

What is most significant about this period is that representatives of transnational capital are assigned a prominent political role in the development of overarching plans. This would come to be a defining characteristic of the EU, sometimes in unison with the ERT, and other times alongside specific sectors or the powerful European employers' association, BusinessEurope. The period was undoubtedly significant, given that the publication of the White Paper marked the beginning of a longer process that broadly speaking ended with the desired outcome for the most powerful group of industrialists in the EU's history: the proclamation of competitiveness being the primary objective of the EU.

THE ROAD TO LISBON

While the White Paper was considered a significant victory by the ERT, it was only the first step. What was lacking was both a higher level of detail and a more concrete example of the practical implementation of the ambitions set out in it. Beating the Crisis included a proposal for the creation of a European Competitiveness Council with direct business participation. This would be a Council with an official mandate to keep competitiveness "at the top of the political agenda."[27] The fact that the ERT asked to make big business part of the new body, and that they succeeded in placing their preferred item at the top of the EU agenda, was not unusual, neither then, nor now.

However, although the concrete form proposed by the ERT – a body of the Union with its own participation and decision-making powers – was not entirely clear, there was sufficient support to launch a remarkably similar project. In February 1995, the Commission's Competitiveness Advisory Group (CAG) was formed with 13 members, including ERT members Floris Maljers (Unilever), Percy Barnevik (ABB), David Simon (BP) and Jorma Olila (Nokia). The Commission made no secret of the fact that it was a body destined to have major influence, and it was asked to submit biannual reports on the development of European competitiveness and to develop in the main areas for its strengthening. "The Commission expects to receive clear, unambiguous advice from this group on major policy priorities that must be pursued to improve the competitiveness of the European Union," said the Commission President when the initiative was presented.[28]

In the latter half of the 1990s, the CAG was asked to work on operationalising the concept of competitiveness so as to prevent it from just remaining a political buzzword. Now, the focus was on competitiveness being an operational concept. Across four reports, the group recommended infrastructure development, deregulation, privatisation, liberalisation of public services (particularly in the areas of energy, transport and telecommunications) and environmental policy, all with a view to increasing competitiveness. In its third report, the group recommended flexible labour markets, wage moderation and increased cross-border mobility, while the fourth report focused on providing the EU with decision-making procedures and a mandate to negotiate and conclude international trade agreements more effectively.[29]

All reports were tactically published right before the bi-annual EU Summits of Heads of State and Government, and influenced debate in the Council. Many of the recommendations in the reports were carried out. The CAG's members subsequently changed, though the ERT still had substantial representation.[30] In the years that followed, the ERT would work closely with the institutions directly through its representation in the CAG, and at the same time it worked in parallel – sometimes in cooperation with the CAG, sometimes independently – to promote concrete methodologies for measuring competitiveness, yet again, in cooperation with the Commission. In addition, a High-Level Group on Benchmarking was set up in 1997 at the request of the Council of Ministers to bring the EU closer to a proper benchmarking formula, which aimed to create a common regulatory framework based on clear parameters.

Overall, a massive effort was made to develop formulas and methods for implementing "competitiveness" policies in the 1990s, and the work led to ambitious plans and strategies relatively quickly. However, the most significant sign that the ERT model had prevailed was the adoption of the Lisbon Strategy- This took place at an EU summit held in March 2000 on "Growth and Jobs" in the city bearing the same name.

The ERT was also present on this occasion. "The ERT and our Competitiveness Working Group were heavily involved in the planning of the summit," said ERT representative Baron Daniel Janssen.[31] The Summit Declaration left no doubt that the industry leaders' favourite keyword, competitiveness, was now placed firmly at the top of the EU's agenda: "The Union has today set itself ***a new strategic goal*** for the coming decade: *to become the most competitive and dynamic knowledge-based economy in the world* [...]."[32]

NOTES

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2

POLICING THE SINGLE MARKET

To achieve its goal of becoming the world's most competitive economy, the EU needed to speed up the liberalisation of trade in goods and services. The summit declaration of the European Council in Lisbon, March 2000, announced nothing less than "economic reforms for a completed and fully operational single market."[1] Gas, electricity, postal services, financial markets and transport were identified as priorities that required the EU to move towards more liberalised markets. Services – just about anything you can buy but not drop on your foot – opened up a new chapter that led to the development of the Single Market.

This marked the beginning of a period of expansion for the Single Market and a battle over the nature of the rules to be adopted in EU laws. This battle focused on the principles of regulation and to what end the market needed to be regulated, including which types of rules should be given priority and which should be omitted.

A liberalised Single Market with a broad scope is essential to the European competition state. From a business point of view, a large market with few constraints on companies, provides the best framework for growth and ultimately for global competitiveness. For organisations such as the ERT and the employers' association BusinessEurope, it was always crucial to have the Single Market expand into more sectors, and to have rules adopted and implemented that would enable easy access to markets. Such organisations wanted to have a European-level rulebook and procedures in place that would uphold the free movement of goods, services, capital and labour power by removing obstacles at the European or national levels.

To keep the Single Market within the confines of this neoliberal framework, business groups and strategists in the European Commission began developing long-term strategies to expand the Single Market. In order to implement these, they designed a plethora of tools to prevent digression, tools that provide the Commission with the power to discipline with little to no parliamentary control – in other words, bureaucratic power.

"BETTER REGULATION"

The Lisbon Strategy adopted by the European Council in June 2000 signalled a new level of ambition around both of these points – the scope of the Single Market and the policing thereof – but realising this ambition would not be easy. It is a testimony to the significance of the Single Market that the plans to expand and deepen its presence in the service sector quickly conflicted with non-commercial interests. Disagreements included labour issues, what could or could not be considered to be public services of a non-commercial nature and the right to opt out of certain types of service providers (such as Uber, which became a point of contention a number of years later).

The Commission's legislative proposals in the service sector in the years following the adoption of the Strategy have often run into headwinds, with numerous disputes over its interpretation, several of which having ended either in formal complaints or before the ECJ. Interpretation and enforcement became major areas of conflict on which the Commission worked intensively for several years, slowly strengthening their hand in many ways, as we shall see.

In addition to the significant expansion of the Single Market in the area of services, the Lisbon Summit would also pave the way for more radical disciplinary measures. The summit conclusions regarding the Strategy stated that "the competitiveness and dynamism of enterprises depend on a regulatory environment conducive to investment, entrepreneurship and innovation. Further action is needed in order to lower the cost of doing business and cut unnecessary red tape [...]."[2] Eventually, this led to a strategy for "Better Regulation," the Commission's terminology for a range of measures taken to ensure that regulation was kept to a minimum and that competitiveness was always duly taken into account. The first initiative, under the label "Better Regulation," was launched in June 2002 and has since been followed by many other initiatives under the same name.

Surely, everyone can agree that "unnecessary" red tape is an unwanted affliction and that, to the extent that businesses suffer from it, there is reason to examine the regulatory framework in place. However, hidden behind this particular wording was a much more fundamental seed of meaning: rules on how the EU makes rules. These rules would eventually become a powerful weapon in the hands of business lobbyists, evolving into an intricate system of procedures that tend to work towards their own advantage. It is somewhat ironic that the relentless battle between businesses and bureaucracy has often led to the introduction of a host of complex, non-transparent procedures. This is bureaucracy brought to a head, but it also happens to be bureaucracy that businesses, in general, have widely appreciated and welcome with open arms.

Continuous pressure from a wide range of business lobby groups has led to procedures aimed at filtering out rules that do not adequately support competitiveness. Groups like the ERT and BusinessEurope have often lent their names to far-reaching formulas for determining how the Single Market should develop. Although it has not always led to the desired outcome, those behind the Better Regulation agenda have built consensus with the Commission, resulting in a kind of filter that makes it more difficult to push certain types of legislation through at the EU level. However, this is but one filter of many, as we shall see. In fact, the Better Regulation agenda was to become a multi-faceted project that would bureaucratise important elements of EU decision-making, in particular decisions on the Single Market.

THE POWER OF THE FOUR FREEDOMS

Control over the Single Market, and steering Single Market legislation is akin to controlling the engine room of the European Union. The Single Market is the EU's core competence and this is where the EU system holds most of its power. It is about creating a regional market, and the EU's role is to develop it step by step by removing barriers to the four freedoms: the free movement of goods, labour and capital, and the right to provide services. If the EU were a religion, these would be its four commandments. Legally speaking, the four freedoms occupy a prominent place in the EU Treaty; they will almost always have to be considered first when there is doubt about European law. This does not mean that there cannot be "obstacles" to free movement, but that they must be expressly justified and anchored in the EU Treaty.

In this way, law-making at the national level, and political decisions in general, will be impacted even in the absence of European legislation in a given area involving one or more of the four freedoms. However, the concrete effects of the four freedoms are mainly implemented through Single Market legislation, of which there is quite a lot. At the last tally in December 2020, there were 1,027 EU directives and 5,409 EU regulations in force that deal with the Single Market.[3] Compared to 2002, when the figures showed 1,497 directives and only 299 regulations, respectively,[4] and 2012 when there were 1,525 directives and 1,347 regulations in force, we see a sharp increase from 1,796 laws in 2002 and over 2,872 in 2012 to 6,436 in 2020.

On the one hand, this is evidence of a strong and productive legal machine, demonstrating the pace at which the Single Market has been integrated over the last twenty years. On the other hand, these figures also indicate a change in approach, with a sharp rise in the number of regulations and an overall decrease in the number of directives. The difference between the two types of laws is that directives only take effect once they have been transposed into national law, whereas regulations apply directly throughout the territory of the EU from the moment they enter into force on a specified date. Additionally, regulations do not leave room to adapt EU laws to specific national circumstances or the prevailing political situation. The fact that regulations are the Commission's preferred tool is not surprising. It is part of the Commission's job description that it should aim to ensure the highest possible degree of European integration. Moreover, since the implementation of directives constitutes a major political issue in itself, and tends to create conflicts, regulations are often the preferred option from the Commission's point of view.

It may seem odd that in the more than twenty years of EU slogans calling to ease the burden on business, the number of EU laws has virtually exploded. However, the reason for this is that Single Market legislation primarily aims to lay down rules to ensure that the four freedoms are exercised. In the trading of goods, this typically involves defining common product standards. If these rules go too far – for example, if they ban a number of products or ingredients that are not widely recognised anyway – businesses will consider them a burden. On the other hand, if they give businesses more leeway, they are considered a gift. This dominant form of legislation – one that promotes liberalisation – is obviously not in the lobbyists' line of fire. Bureaucracy as such does not present an issue for lobbyists as long as it is the right kind of bureaucracy.

After decades of expanding and deepening the Single Market, the EU's legislative catalogue is huge. In fact, according to three researchers at US universities, the EU is so economically integrated that it surpasses the US, where individual states have more leeway for local regulation than EU Member States.[5] However, the four freedoms do not end there. They also apply in areas where no actual EU legislation has been adopted. In addition, both regulations and directives are often written in a way that leaves them open to wide interpretation. It is often the ECJ that provides the definitive answer on what is law in response to disputes, when, for example, other EU institutions or national courts press legal charges.

Furthermore, rulings by the ECJ often contain elements of surprise. Between 2007 and 2008, the ECJ issued four judgements that redefined EU law on posted workers. All of these judgements were about which rights member states could insist on regarding posted workers. In particular, a directive hitherto interpreted as a minimum directive – a directive laying down minimum standards for payment and working conditions – suddenly became a maximum directive due to an interpretation by the ECJ, much to the surprise of the trade union movement and many Member States. With this judgement, as well as three others issued in a seven-month period, the battle against social dumping was significantly weakened, not just in those four countries associated with the cases (Germany, Luxembourg, Finland and Sweden), but across the entire EU (see Chapter 9).

THE SINGLE MARKET: AN EXERCISE IN IN-DEPTH INTEGRATION

Trade of goods is by far the most harmonised area of the Single Market. An individual Member State has little to no influence on what can and cannot be imported or exported once an EU law has been adopted on the product in question. Where the law leaves room for assessments to be made on whether a product is harmful to the public, it is ultimately the European Commission that has the upper hand. In the vast majority of cases, the Commission exercises that mandate very restrictively, routinely threatening to bring cases before the ECJ to ensure that Member States' national rules do not diverge. This also sets limits on how far a country can go to protect, for example, the environment or public health.

In the mid-1990s, phthalates, a type of chemical found in certain kinds of dummies and toys for young children, was suspected of being an endocrine disruptor. However, despite pressure from several Member States, it took until 2006 to achieve an EU ban on the chemical, and even then only in a limited number of substances. It was not until 2009 that the EU adopted a directive on toy safety. Progress has been slow – in fact, much slower than several Member States would have liked – and the story continues to this day. The presence of endocrine disruptors in toys is still an issue, which is one of the reasons why the European Parliament has pushed for higher standards.[6]

As a rule, it is the European Commission that enforces EU rules in the first instance, that is, before a case is brought before the ECJ. However, companies may also present cases, which can end up before the ECJ, as in the case of chemical ingredients in cosmetics, where the French cosmetics industry took the French state to court. The industry opposed putting a warning on products containing phenoxyethanol, a substance that has been linked to eczema and life-threatening allergic reactions, and which can be particularly harmful to young children.[7] The Court did not question the concern about the effect of the substance on children, but decided that imposing a labelling requirement on all products containing phenoxyethanol was too far-reaching and not covered by a safety clause in the regulation.[8] The French authorities had to drop the rule.

Sometimes Member States pick up the gauntlet and conduct a targeted political campaign for the right to spearhead or impose stricter rules than those that apply across the EU. Austria, for example, campaigned long and hard for the right to keep genetically modified (GM) crops out of Austrian agriculture, occasionally receiving support from other EU countries. This is an arduous process, though.

The many obstacles faced by interventions at the national level can be a source of much frustration. Denmark's left-wing party, the Red Green Alliance (Enhedslisten in Danish), has tabled numerous proposals that were rejected on the grounds that they contravene EU rules. These proposals have covered issues such as labelling toys with toxic substances, ensuring better food controls on meat contaminated with bacteria or salmonella, introducing climate labelling on foods, stopping the use of climate-damaging palm oil in biofuels and banning meat glue. Around 100 proposed legislative changes have met a wall of resistance in the Danish Parliament each time, simply because a ministry interpreted them to be in breach of EU rules.[9 10]

The fact that common EU rules can set limits on national-level regulations is, of course, the whole point. The goal is a large market that provides better conditions for production, larger and more potent companies, and a better basis for generating capital. With the abolition of tariffs many years ago, the Single Market became focused on in-depth economic integration, with the four freedoms as the focal point. This does not mean that headway cannot be made on matters of public health, the environment or social rights, but rather that the four freedoms represent an initial obstacle that often blocks progress.

This is indeed the common thread running through the thousands of Single Market directives and regulations. In principle, anything that could be seen as a serious obstacle – as a hindrance to trade in goods or the provision of services – should be avoided. This creates a constant tension between the four freedoms and other considerations, such as social or environmental concerns. In other words, the Single Market is in large part a game of tug-of-war around what considerations, and how many of them, can be made before the EU decides that they conflict with one or more of the four freedoms.

KEEPING MEMBER STATES IN CHECK

The phenomenon of Member States taking liberties to adopt measures that they consider more restrictive than can be justified by EU law has acquired its very own term, "gold-plating," and working against such actions has long been a priority of BusinessEurope. The employers' association clearly opposes any national-level regulation that, according to their own interpretation, goes further than what EU law stipulates. From their point of view, the solution is to have increasingly fine-grained monitoring and greater powers bestowed upon the Commission to force Member States to take corrective action. In the area of goods, disciplinary enforcement has been tightened through legislation on several occasions. In the area of services, many initiatives have been launched by the Commission, including an attempt to obtain far-reaching veto power over rules made at the national and local level. The Commission failed to get this so-called Notification Directive adopted, but it did show just how far the Commission is prepared to go to prevent Member States from adopting rules on services that go against the liberalising trend in EU law, as we shall see below.

In this context, it is important to keep in mind that the reading of EU laws is not an exact science, given that numerous EU rules leave ample room for interpretation. Whether a substance is hazardous enough to ban it under rules on chemicals is a regular point of contention. The educational level required in certain sectors is not always a given or self-evident. Moreover, whilst many EU countries are often reprimanded by the Commission, or taken to the ECJ, the Commission's interpretation does not always equal a legal victory in court. Many times, the Commission is willing to uphold liberalisation to a larger extent than EU law technically allows for. For that reason, it makes sense for BusinessEurope to get the Commission more involved in conflicts with Member States when their goal is to enforce a restrictive interpretation of the rules, preferably before the case even reaches the Court.

One of the methods to achieve this is via "notification procedures." Notifications are messages sent by Member State governments to the Commission when an administrative or legislative initiative is under consideration or going through the decision-making process in their national parliament. The notification gives the Commission the opportunity to assess whether Member States are respecting the rules, whether the EU covers the ban on a specific substance, or whether existent regulations stipulate certain requirements for service providers. The Commission then has the opportunity to raise an objection if it finds something it considers to be in breach of EU law, whether existing laws or the four freedoms. If this is the case, the Commission may request that adoption and implementation of the initiative be postponed, if it is not rejected altogether.

If businesses find a notification to be ineffective, a direct right of appeal is available to private companies. A brief letter to the Commission may result in a dialogue between the Commission and the Member State concerned, and if the Commission is confident in its case and the Member State government is not flexible, the case may end up before the ECJ.

One example is Airbnb, the world's largest online marketplace for renting and booking accommodation. Since the use of Airbnb skyrocketed in Europe in 2014, many major cities have imposed restrictions on rentals via this and similar platforms in an attempt to stem the conversion of ordinary rental housing for local residents into tourist rentals and, in some cases, to prevent the degradation of important local communities. As Airbnb guests move in large numbers, locally based shops risk going out of business. For example, the greengrocer is replaced by craft stalls, the playground is replaced by cafés, and night-time is marked by the sound of a deep and pounding bass beat coming from the all-night partying of guests. Consequently, cities such as Barcelona, Vienna, Amsterdam, Berlin, Brussels, and many others have found it necessary to adopt precautionary measures. Barcelona, for example, imposed a temporary freeze on new flats entering the short-rental market in certain parts of the city, and Amsterdam, in turn, imposed a cap on the number of days per year a flat could be rented out.

In June 2016, the European Holiday Home Association (EHHA), a lobby group advocating on behalf of rental platforms, including Airbnb, announced that it had filed a complaint with the Commission about the rules in four cities: Berlin, Brussels, Barcelona and Amsterdam.[11] This would eventually lead to criticism of the Barcelona City Council by the Spanish government and the opening of a case against Belgium claiming that the Member State failed to fulfil its obligations, a case which could eventually end up before the ECJ.[12] Cases like this are not uncommon; sometimes all it takes is a letter from a company to get the Commission to reprimand, and possibly take action against, a Member State.

THE SERVICES DIRECTIVE: AN ATTEMPT AT MASSIVE DEREGULATION

Naturally, companies would prefer to avoid spending time and energy on matters concerning the interpretation of existing EU laws. For them, it is best if the rules are clear, in their favour, and enforced. In the area of services, both business and industry have long complained about what they see as flawed rules at the national level, and have pressed for the adoption of procedures to put an end to national service legislation that they believe limits the full exercise of the four freedoms.

Deepening the Single Market by removing real or perceived obstacles to service providers has been a priority for the Commission for more than two decades. For goods, there is a robust system in place, where an early notification system for national rules has proved effective in curbing unlawful national initiatives in their infancy. This has been more difficult to put in place in the wider service sector, but the Commission has proved itself to be stubborn and ready to go the extra mile to do so.

From 2004 to 2006, the Commission attempted to adopt a directive on services, at times referred to as the Services Directive or Bolkestein Directive, named after the EU commissioner responsible for the first draft, Dutchman Frits Bolkestein. The Directive quickly faced strong opposition, initially from the trade union movement, its fiercest opponent, and later from environmental organisations, human rights groups and citizens' groups of all kinds. All of this stemmed from one key term in the legal text: the country of origin principle.

Unlike directives in other areas, the Services Directive does not create harmonisation. This would have meant a comprehensive law that brings together all the rules and procedures that regulate the large services sector. Instead, the Commission's proposal stipulated that service providers operating in other EU countries should simply follow the rules they follow in their Member State of origin. The reasoning behind the proposal was that this would keep everything simple.

At a glance it may sound fairly harmless to allow service providers to operate as they would in their own country of origin, but many people did not see it that way. The trade union movement claimed that the Directive would open the floodgates to social dumping in one Member State by simply enforcing the conditions – including conditions of payment – applicable in another Member State, the "country of origin." The Directive essentially meant that, across all sectors, a company simply had to establish itself in the country with the most lax rules, for instance the lowest salary requirements, in order to apply these same conditions in any other Member State. A race to the bottom would have been the logical outcome.[13]

In the run-up to the adoption of the Directive, trade unions and civil society organisations across the EU took to the streets, formed a myriad of pressure networks and conducted political campaigns, aiming both to "rescue" individual sectors and to reject the Directive outright. The resistance did have some effect. When the Directive was finally adopted in December 2006, it had clearly been scaled down.[14] For example, pay and working conditions were explicitly excluded, as was the entire health sector.

LACK OF CLARITY OPENS NEW BATTLES

Nevertheless, the Directive remained overall intact, covering sectors that account for 40% of the EU's total GDP.[15] The final version of the Services Directive contained a set of broadly worded principles that Member States are supposed to follow when regulating services. For example, they may not introduce rules for reasons of public health or to protect the environment that are not considered to be "necessary." Nor may they introduce rules that go beyond what is necessary to achieve the defined objective. In other words, the Directive requires proportionality. As for the quality of a service, the Directive imposed limits on the use of authorisation schemes frequently used by Member States to enforce quality standards in certain sectors. Furthermore, when the Directive entered into force, it was forbidden to limit the number of service providers in a given area. Such abstract rules beg the question: what does any of it really mean? Such broad wording clearly creates a wide margin for interpretation.

In fact, the Directive was so unclear that it raised many doubts as to which situations it was intended to cover. Therefore, the first step upon its adoption involved thorough discussions and negotiations between the Member States and the Commission on which national laws had to be amended as a consequence of the Directive. At the time, I spoke to several people about the risk that the Directive could have a negative impact on urban planning.[16] With a rule prescribing that you are not allowed to take decisions that limit the number of service establishments in a given area, is there no danger that limiting the number of large supermarkets in urban planning projects could be construed as a breach of said Directive? This may sound like an overinterpretation, but it was later confirmed in a ruling by the ECJ that the Services Directive can indeed be used against cities with plans that oppose the proliferation of super- or hypermarkets in order to, for example, protect small shops.[17]

The Directive initially gave Member States, municipalities and regional councils leeway to make their own assessments of how the text should be construed, as is always the case with Directives. Meanwhile, after a few years, various parts of the service industry began to complain about the introduction of new rules, which they considered to be in breach of the Directive, and BusinessEurope in particular launched a sustained effort to get the Commission to tighten up on enforcement. Despite the adoption of the Directive, "many obstacles remain due to different interpretations of the Directive and thus its implementation," BusinessEurope wrote in September 2015.[18] Employers called on the Commission to take a stricter approach and ensure that all new "laws, regulations and administrative decisions" at the national level were assessed by the Commission to ensure enforcement of the Directive.

THE COMMISSION TRUMPS LOCAL DEMOCRACY

These statements did not fall on deaf ears. What followed was the incident referred to above, an incident that showed just how far the Commission is prepared to go to ensure the rigid enforcement of its rules. In January 2017, the Commission issued a proposal for a directive, the Notification Directive,[19] that would make it possible to do away with any new rules it found to be in breach of the Services Directive, even before they could be examined by any politically elected assembly. In the case of a new proposal being considered by a government, a city council or a regional council, a notification should enable the Commission to ensure its compliance with the rules. If not, according to the draft Directive, the proposal was to be stopped. If it was tabled and adopted anyway, the Commission could declare it illegal, override it, or order the Member State "to repeal it."[20] BusinessEurope's request for more resolute enforcement had now been met.[21]

It is perhaps worth explaining what this procedure entailed and what types of decisions might be involved at the municipal, regional, and state levels. Corporate Europe Observatory asked the Commission which sectors the procedure might concern, and in response, we received an incomplete, yet comprehensive list of 79 sectors.[22] Among the areas identified by the Commission were sectors as diverse as childcare, accountancy, temporary employment agencies, architectural services, veterinary services, water supply, urban planning, waste management, gas supply, fire protection, energy, hotels, entertainment, and even prostitution.

The Notification Directive tabled in 2017 escaped public attention for a long time. During that time, while there was little controversy around its content, the European Parliament expressed its support without any hesitation. In the Council of Ministers, however, things moved at a slower pace. Meanwhile, in a number of national parliaments, representatives took a different view. The Italian Senate, the Austrian Federal Council, and the two chambers of both the German Bundestag and the French Parliament clearly rejected the Directive.[23] The Amsterdam City Council was among the first municipal governments to renounce it in a resolution adopted unanimously, in which the Council complained that the proposal "affects the competence and autonomy of the city council and thus poses a threat to local democracy."[24]

Criticism from both city councils and parliaments slowly put the Commission on the defensive. In the Council of Ministers, a common position was proposed, which redacted some of the most far-reaching elements of the proposal, and which, for some time, seemed likely to be adopted. However, in the end the Commission feared that the final text, drafted in the wake of such strong opinions from major Member States' parliaments, would be quite unsubstantial. Therefore, the Commission reacted by withdrawing the proposal in October 2020.

However, that was hardly the end of the matter. According to an infuriated and disappointed Commission official I spoke to on the phone while the proposal was being put under pressure, they wanted to see if it was possible to proceed in much the same way as would have been done with the failed draft directive, even in the absence of a new specific EU law on the subject. This idea came about after an analysis of the wording of the provisions on notification in the Services Directive which states that the Commission can "adopt a decision asking the Member

State concerned to refrain from taking the proposed measures."[25] This was never understood as a veto power, but the Commission considered a re-interpretation of the original Directive to make up for the defeat they suffered in 2020.

In the aftermath, the Commission launched several projects in an attempt to tighten their grip on Member States' implementation of the Directive. The projects included a website where businesses could complain directly about local and national rules – an initiative under which the Commission said it would follow up on all relevant complaints. Furthermore, the Commission began actively encouraging businesses to comment on notifications to increase its own clout in talks with Member State authorities.[26]

DO AWAY WITH IT ALL

The period since the adoption of the Lisbon Strategy has seen major development of the Single Market, including significant expansions in the services market, determined enforcement and hundreds of cases brought before the ECJ. However, if you ask organisations like BusinessEurope, the ERT, the chemical industry, the food industry or almost any other industry, they will say that market-based integration has not at all gone far enough and that the integration that has taken place takes too many other considerations into account on top of the four freedoms. The more strategically oriented companies that have been engaged in policy initiatives, typically the largest companies in the market, have worked to secure a legislative process that focuses more unilaterally on integration based on pure market terms, without factoring in a lot of other considerations.

One of the more outlandish examples came from the ERT in 2012 in the form of a declaration with an ambitious wish list for EU institutions in general, and particularly the Commission. According to the ERT, "all policies in Europe should aim at improving industrial competitiveness," and this was to be done through three interlinked initiatives.[27] First, the ERT wanted "a moratorium on all business-related regulation, including the implementation of existing regulations at the EU and national levels, which has no proven immediate positive effect on economic growth." Secondly, the ERT wanted all existing rules to identify those pieces of legislation "which inhibit growth and could be discontinued without affecting fundamental protections." Finally, the ERT called for "an independent mechanism to guarantee that all business-related policy proposals are assessed for their expected impact" on growth and on costs to businesses. This mechanism would guarantee the halting of all "policy initiatives that do not improve growth."

It cannot get much more far-reaching than that. Simply put, any legislation that big business does not like must go, whether it is in the pipeline or already in force. Moreover, it should not be possible to introduce any similar legislation in the future. When ERT Secretary General Brian Ager was later confronted about the proposal, he backed down a bit, saying that "moratorium was perhaps a clumsy way of putting it, we were probably too black and white."[28]

There is no doubt that most of us will be alarmed upon hearing business leaders openly say they are going to remove, stop and prevent any kind of regulation that may affect their interests. When they state that they want to do away with everything that inconveniences them, and at the same time suggest that they want to have procedures introduced into the legislative process to filter out initiatives that might go in a different direction, it then becomes clear that democracy is being put to the test.

Nevertheless, organisations such as the European Chemical Industry Council (CEFIC), the tobacco industry, the oil industry and BusinessEurope have put considerable resources into introducing procedures that would prevent legislation that goes against their interests from being brought to the table in the first place, and so far they have had some success. In the EU, all that is needed is to convince the Commission of the benefits of this approach. After all, they are the only ones who can suggest legislative initiatives.

A TRIUMPH FOR INDUSTRY

The first significant initiative moving in this direction was launched by the tobacco industry in the mid-1990s. As a result of lessons learned in the US, British American Tobacco (BAT) had concluded that cost-benefit analyses were a good way to avoid tight regulation being imposed on the tobacco sector. Reports quantifying and assessing the economic impact of new regulation on business had proved a powerful tool for stopping new initiatives, partly because they succeeded in exaggerating the economic impact, and because the downside – in this case the impact on public health – was often harder to quantify. As this was a tool that would certainly come in handy in the European context, BAT approached lobbying consultancy Charles Barker for assistance in finding a way to make cost-benefit analyses a standard methodology in the EU.[29]

One of the first things the consultants recommended was that BAT should not try to accomplish this on their own, but instead form a coalition with other "big industry names." This led to what formally looked like a working group of the

Brussels-based think tank European Policy Centre (EPC), a group they called the EPC Risk Forum. As it turned out, BAT had no trouble finding other big industrial names to join the group. Shell, SmithKline Beecham – later GlaxoSmithKline – (pharmaceuticals), Tesco (food retail), Bayer (chemicals) and Unilever (packaged goods) were among the companies that quickly got on board.[30]

This newly formed coalition in business-related "risk management" would end up leaving its mark for a long time to come, likely because it proved a successful venture from the very beginning. Just a few years after the formation of the EPC Risk Forum, they attained probably the biggest success a lobby group can achieve: an amendment to the EU Treaty. This happened with the adoption of the Amsterdam Treaty where Protocol No. 30 stipulated that "for any proposed Community legislation, the reasons [...] must be substantiated by qualitative or, wherever possible, quantitative indicators."

This was fully in line with the goal set by BAT and the EPC Risk Forum. The "impact assessments" that the Commission began to carry out as a consequence of this treaty change became a useful tool for many industries. The big regulation on "Registration, Evaluation, Authorisation and Restriction of Chemicals" (REACH) was adopted in December 2006, according to a group of researchers from Bath University, only after the chemical industry had succeeded in using impact assessments as a tool to have key elements removed. This was particularly the case for a proposal to phase out some of the most dangerous chemicals on the market.[31]

It later turned out that the cost-benefit analysis requirement anchored in the Treaty also made it possible to overturn political decisions. In 2018, for example, chemical giant Bayer succeeded in getting the ECJ to overturn a ban on the pesticide Fipronil, introduced five years earlier, on the grounds that an adequate impact assessment had not been carried out before the ban was adopted.[32]

UPGRADING "BETTER REGULATION"

The Lisbon Strategy supported the filtering out of certain proposals. Promises to cut costs and red tape in the name of competitiveness were seen as a good sign by lobby groups ready to get to work. From 2000 to 2004, whilst the Commission was at its busiest liberalising large parts of the services sector – an effort that business had been pushing for – the ambitions for "Better Regulation" were not nearly as high. However, this changed when Portugal's José Manuel Barroso took over as President of the European Commission in 2005, and the programme gained priority. In September of that year, the Commission dropped as many as 60 different legislative proposals. According to Barroso, proposals that seemed too costly for business, or that went too far, were to be taken off the table.[33]

Mr Barroso considered many proposals to be absurd and, for example, expressed nothing but scorn for a proposal regarding the working environment for hairdressers. "The EU should not deal with blonde women in high heels," he said, according to the European Services Workers Union, UNI Europa, which promptly made an objection.[34] In general, dealing with the Barroso Commission was a weary task for the trade union movement, which had to see many of its preferred initiatives dropped, not least in the area of health and safety at work.[35]

The Barroso era from 2004 to 2014 was a time when many heavy legislative initiatives aimed at completing the Single Market, including REACH, the Services Directive, and many more. At the same time, however, the Commission was also looking for rules it could abolish – rules which they considered a burden on business. For this reason, the Barroso era was characterised by deregulation and ample opposition to initiatives that did not fit a narrow set of business-friendly criteria.

Barroso had even bigger ambitions, beyond introducing a strategy of deregulation during his own mandate. He wanted to establish more permanent mechanisms that would maintain this approach to regulation in the future. In 2007, he set up a working group, chaired by German conservative politician Edmund Stoiber, to find ways of more systematically abolishing rules in order to serve the interests of business. The working group was dominated by people with ties to various industries.[36]

It was in this context that the ERT made its bombastic announcement that existing legislation would be reviewed, new initiatives dropped and that, in the future, initiatives would be subject to examination by an independent body to assess their impact on business. Strictly speaking, however, this development was already well under way. The only thing missing was a clear system, and it was developing rapidly.

In December 2012, not even a year after the ERT's announcement, the Commission published a programme of deregulation, called EU Regulatory Fitness (REFIT), which has been in place ever since.[37] Under REFIT, the Commission routinely reviews the EU regulatory framework with the intention of identifying draft laws or existing rules that, in their view, should be abolished, and this annual exercise has since yielded results. Accordingly, between 2012 and 2015, more than 140 proposals were dropped, including one to prevent soil erosion, a second dealing with justice and protection for environmental interests, and a third on increased oversight of the pharmaceutical sector. A number of measures in the first phase of REFIT quickly prompted the trade union movement to raise the alarm and see the programme as a threat, particularly with regard to rules on health and safety at work, including the Commission's intention in 2014 to eliminate the handling of carcinogenic substances in the workplace.[38] Due to stiff resistance, the Commission finally had to drop the idea, but the case demonstrated that REFIT was about far more than eliminating "red tape" – and it would continue unabated. In the subsequent period between 2015 and 2018, REFIT tasked the Commission to come up with 150 initiatives to ease the administrative burden on business.

REFIT brought the EU closer to the moratorium referenced by the ERT, and thanks to the work of the Stoiber Group under the Barroso Commission, there was even more to come. With the adoption of the "Better Regulation" programme in May 2015,[39] the Commission took a significant step towards realising the ambition to stop legislative initiatives "in time." Initiatives would have to be screened by a panel of experts before the Commission would even present them for consideration by politically elected assemblies. For this purpose, the Regulatory Scrutiny Board, an expert committee whose main task is to review the Commission's impact assessments (including cost-benefit analyses), was set up by the Commission to assess whether the quality of proposed initiatives is sufficiently high.

A COST-BENEFIT ANALYSIS OF HUMAN RIGHTS

In practice, this has meant on several occasions that the Board has put the brakes on initiatives that have been unpopular with significant sections of the business community and that the reasoning used by the Board is closely linked to the competitiveness paradigm. Ultimately, it is up to the Commission as a whole to decide whether to go ahead with the Board's assessments, but a negative decision gives leeway to political forces that do not favour the proposal. This happened in the case of the proposal on liability for human rights violations.

UN rules on good business conduct have long been in force, but they only become effective once legislation is introduced at the national level, or, as is the case with the EU, at the regional level. It is fair to say that there have been plenty of occasions revealing the need for legal action. These include the Shell oil company's responsibility for the devastation of the environment in the Niger Delta in West Africa, or European fashion companies' shared responsibility for the Rana Plaza scandal in Bangladesh in 2013, where 1,100 textile workers were killed when a derelict factory building collapsed. Many similar events have called for prompt action as well.

After many years of delay, the European Commission finally started preparing legislative proposals on corporate liability. In autumn of 2020 a consultation was launched in which the Commission bounced a number of ideas off the public and, perhaps especially, the business community. To the surprise of many parties involved, these were relatively far-reaching proposals that would, for example, hold boards and management accountable if they were complicit in human rights abuses. Another proposal aimed to ensure that victims of European companies would have direct access to European courts, for example, in the case of legal action for damages. Many announcements went further than most had expected.

As a special feature, the relevant body of the Commission, the Directorate General for Legal Affairs (DG JUST), decided to exclude lobbyists from the preparatory phase. No meetings were held with any of the many lobbying associations or companies that had been knocking on the door for months. Faced with silence, the lobbyists' usual methods of influencing the Commission's final proposals, such as expert groups or regular meeting activity, were unavailable. In response, a number of employers' organisations, notably from France, Denmark, and Sweden, addressed the Regulatory Scrutiny Board. The strategy seemed to work. Twice, the Board rejected the Commission's proposals and made assessments that made it difficult to stick to the original starting point.

The assessments by the Regulatory Scrutiny Board had a strong political flavour. For example, in their view, the proposal did not contain "enough policy options." In other words, the Commission had not presented enough possible approaches to the problem. Instead, they called for a higher degree of "nuance," meaning that they considered the Commission's analysis too harsh on companies. In addition, they expressed dissatisfaction over the absence of a clear cost-benefit analysis.[40] What was really being asked was how much would it cost European companies to be committed to human rights. What does it cost to respect human rights? Thus, the Regulatory Scrutiny Board revealed itself to be a committee that is rather political in nature, substantiating their claims based on considerations other than just the technical assessments of proposals.

The Board's negative assessments, combined with the pressure exerted by BusinessEurope on other parts of the Commission, paid off. In May 2021, the Directorate General for the Single Market under Commissioner Breton, the area of the Commission most open to lobbyists, was also brought into the fold, thereby changing the dynamic. The result was a proposal that fell far short of the level of ambition initially announced by the Commission.[41]

There are clear indications that the Regulatory Scrutiny Board has, over the years, become a force to be reckoned with. Among some Commission staff, the body is reportedly so unpopular that it has made appearances at Commission staff Christmas parties in the form of a voodoo doll. To put it in numbers, in 2021 the committee dealt with 83 cases, of which 31 ended up being dismissed.[42]

RULE BY IMPACT ASSESSMENT

Another significant – and, in a sense, more resolute – contribution to keeping a narrow focus for the Single Market came from Jean-Claude Juncker, President of the European Commission from 2014 to 2019. Juncker appointed a Commissioner to be Vice-President for "Better Regulation," granting him powers beyond those of his colleagues. In order to ensure that "innovation and competitiveness" were not hampered by "detailed rules" and "bureaucratic over-regulation,"[43] the Commissioner was mandated to filter out proposals that were incompatible with the guidelines.[44]

The years following the Juncker Commission have also seen more streamlining, particularly, for the purpose of easing the burden on businesses. This model of appointing vice-presidents as examiners was copied by the current President of the European Commission, Ursula von der Leyen.[45] In addition to the existing pile of initiatives, procedures and principles to keep the regulatory machinery on a narrow path, Ursula von der Leyen has finally implemented the ERT's demand for a "one-in-one-out" policy: for every new law that imposes new "burdens" on business, another one must be scrapped.[46]

Last but not least, the Commission has done its part to discipline both the Council and the Parliament. When the Commission presents a proposal to Parliament, many things can happen. Sometimes Parliament may disagree with the proposal, and a majority will then do its utmost to pull the final version in a different direction. Additionally, Parliament regularly adopts amendments that raise eyebrows in the other two institutions. In a 2015 proposal on "Better Regulation," the Commission points out that between 2007 and 2014 it produced over 700 impact assessments, while the Parliament assessed only 20 of its own amendments in a similar manner. Thus, the Commission recommended that the Parliament carry out impact assessments "of all substantial changes" during the legislative process.

This is no small request to make of any parliament, not only because of the cost involved, but also because it opens the floodgates to thousands of lobbyists who will begin to court Members of Parliament in connection with any discussion on economic affairs. At the same time, the Commission proposed that each institution be able to request another institution to "convene an independent body" to carry out an impact assessment – in other words, a body like the Commission's own Regulatory Scrutiny Board.[47]

At face value, one might not think that this proposal would be deemed acceptable in the EU Parliament, or any other parliament for that matter. Nevertheless, both the Parliament and the Council welcomed the idea. In a cooperation agreement between the three institutions, the parties agreed that they would carry out impact assessments on "substantial amendments" whenever they consider it appropriate.[48]

ATTACKS ON THE PRECAUTIONARY PRINCIPLE

The EU's Single Market has evolved massively since the Lisbon Summit of March 2000 set the course to "complete" it. However, it is still far from completion, at least according to the standards used by business groups, notably BusinessEurope and the ERT. BusinessEurope and the ERT regularly complain that things are moving too slowly and in the wrong direction. This is mainly due to the organisations' radical view on the ideal model for a Single Market.

The essence of their strategy papers is to ensure that the narrow interests of companies are primarily taken into account, and this view became a well-established paradigm with the Lisbon Strategy. The primary focus on "competitiveness" as the common thread for the development of the Single Market has remained intact as a principle for more than 20 years. This is particularly evident in the development of principles governing which proposals may be presented by the Commission for consideration by the other two main institutions, the Council and the Parliament. This is akin to a dream scenario for the big players running the business sector as long as they can safely count on legislation being equipped with a filter that automatically safeguards their interests.

Nevertheless, these organisations' work on "Better Regulation," understood as one-sided or single-minded liberalisation, is missing many aspects in order to be complete. One such aspect concerns the circumventing of principles in the EU Treaty. This might seem impossible to do, but great strides have been made with regard to the "precautionary principle."

Since 2013, the EPC Risk Forum has been campaigning to gain support for a so-called innovation principle. The intention is to provide a greater counterweight to the "precautionary principle" enshrined in the EU Treaty, which requires authorities to choose in favour of public health or the environment if there is scientific uncertainty around whether or not something is hazardous. Interventions may not be postponed "solely on the grounds of scientific uncertainty."[49] This contrasts with the US where a principle of "sound science" prevails, meaning that authorities must demonstrate an unequivocal risk if, for example, a chemical is to be banned. This difference in regulatory principles means that the regulation of chemicals in the US, for example, is markedly less rigorous than that in the EU.

The precautionary principle was enshrined in the EU Treaty with the Maastricht Treaty in 1993, but it would be wrong to say that it serves as a stable guideline. Speaking about EU chemicals legislation, REACH, Steffen Foss of the Technical University of Denmark told CEO that "the Commission seems to be deliberately ignoring scientific uncertainty and the irreversible damage some chemicals may cause."[50]

Nevertheless, the principle is a thorn in the side of the chemical industry, in particular. This is an industry which has promoted a principle of innovation together with others through the European Risk Forum, forming a coalition including BAT, Chevron, Dow, Bayer/Monsanto, BASF, as well as the industry associations CEFIC (chemicals), Fuels Europe (oil), and PlasticsEurope. The principle dictates that "the impact on innovation should be taken into account" when a given law is under consideration, even when it may cause the legislation to go against the precautionary principle.

Only three years after the EPC Risk Forum had launched its campaign – in an adoption by the Council of Ministers in 2016 – ministers endorsed the use of the "innovation principle when assessing policy and regulatory actions for their impact on research and innovation."[51]

We are not yet at a point, however, where the precautionary principle is about to be struck down. Most likely it will keep its place in the Treaty, but its formal status says little about its real impact. It can be weakened by simply not being applied, or by reducing its impact through a growing emphasis on other issues, such as "innovation." The quick success the tobacco, chemicals and oil industries have had with their campaign against the precautionary principle in the span of a few years is likely to inspire them to keep up the pressure.

SINGLE MARKET "COMPLETION": THE PERFECT WEAPON

It is safe to assume, then, that the innovation principle is a part of the package when the chemical, tobacco, oil and plastics industries talk about an operational Single Market that strengthens competitiveness. Likewise, we can also count on representatives of transnational capital to always regard the "completion" of the Single Market as a key issue.

After leaving BusinessEurope to the strategic thinking and practical work of developing the Single Market for so long, the ERT returned to its old *raison d'être* in 2022. What they would like to see is a single market that is enforced much more effectively, not least in the area of services.[52] To illustrate this with a concrete example, they believe more attention needs to be paid to "protectionist restrictions in retail at the regional and local levels" in the enforcement of the Services Directive.[53] They also express a desire to get rid of urban planning obstacles to large supermarkets or hypermarkets, as well as a hope that the Commission's defeat in the case of the Notification Directive would not be the last word on that matter. In this and many other areas, the ERT wishes to have market principles prevail unfettered.

The ERT will certainly talk about the need to complete the Single Market as long as any areas of it remain ungoverned by market principles, and they are far from the only interest group with such a wish. In this as in other cases, the ERT is merely a mouthpiece for the interests and wishes of most business organisations. Often, the main employers' organisations come together to show common ground on the overall framework for the development of the Single Market and, in fact, never miss an opportunity to do so. For instance, in June 2022, the ERT, BusinessEurope, and three other associations called on the Commission, the Council and the Parliament to agree on an "all-encompassing programme to deepen the Single Market" and to "remove all barriers to cross-border business transactions."[54]

The strategy of establishing bureaucratic procedures to prevent legislation other than that desired by businesses has not been achieved or exhausted either. In the same declaration, the ERT calls for an extension of "existing Single Market governance mechanisms and sufficient capacity in public administration to remove all barriers." They seek "a strong legal and institutional filter against any proposal at the EU level that could potentially give way to market fragmentation. Any EU initiative should go hand in hand with unconditional guarantees for the freedom to trade in the Single Market."

Given the draconian means already in place to manage the Single Market, one has to ask what could possibly be added. However, the imagination of employers never fails, and in the spring of 2022 they started talking regularly about a so-called "competitiveness check" on all EU proposals.[55] It was only a matter of months before that idea reached the highest levels of the EU. In a speech to the European Parliament in October 2022, Commission President Ursula von der Leyen said the time had come to "introduce a standardised competitiveness check into regulatory work."[56]

MARKET-MAKING AND THE DEMOCRATIC DEFICIT

Looking at the proposals tabled over the years by the ERT and BusinessEurope, it is quite remarkable how far they have come. Even outrageous proposals raised by the ERT in 2011 to stop all regulation not considered business-friendly, which first appeared politically unrealistic, would soon find fertile ground and lead, for instance, to the introduction of the Regulatory Scrutiny Board.

Not all whims of the business community have materialised in new procedures, though. The defeat of the Notification Directive shows us that there is a limit to just how much power democratic institutions in Member States are prepared to concede to the European Commission. Still, that should be seen in light of the massive power already enjoyed by the Commission to direct the EU towards deeper liberalisation – often leaving parliaments or city councils in an inferior position.

Moreover, the EU's often deeply undemocratic governance should be considered work-in-progress. New and radical ways to circumvent true democratic decision-making will appear again and again on the political agenda, precisely because they are seen as a useful step towards a European competition state.

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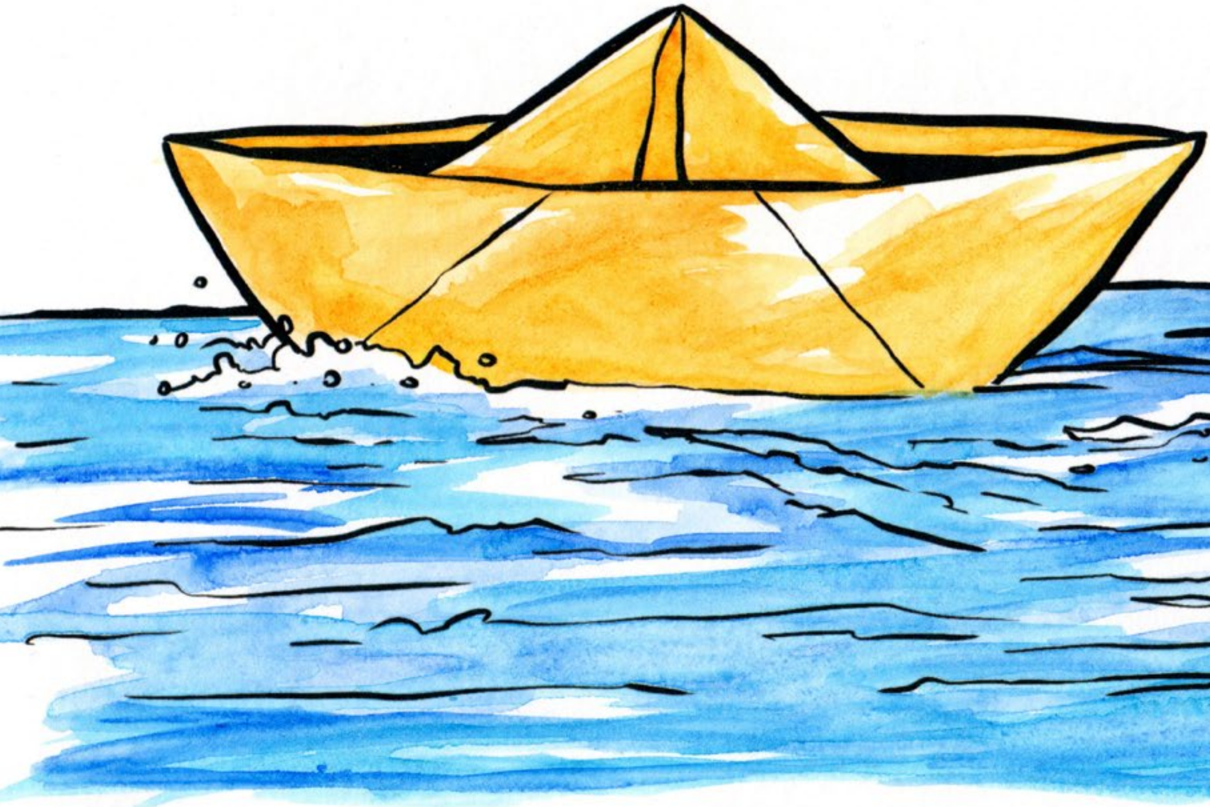

THE COMPETITION STATE OF THE BIG BANKS

On 15 September 2008, the US investment bank Lehman Brothers went bankrupt. One of the great flagships of Wall Street was no more, and their collapse was monumental. Just four years of massive investments in complicated securities combined with problems in the US housing sector had proved fatal. Not just the US financial sector, but the entire global financial market was in a state of shock, which left deep marks on the global economy. Millions lost their homes and jobs, while authorities everywhere worked overtime to find a response that would contain the crisis and mitigate its damaging impact.

It was structured bonds (also known as "Collateralized Debt Obligations" or CDOs) that triggered the avalanche of financial destruction. These were composed of many parts (known as tranches), some of which could be highly reliable sources of income, while others could be very risky. In this case, CDOs included so-called "subprime loans" which were offered to poor Americans who wanted to buy their own homes, and it was a very risky market to invest in. However, the multi-layered nature of CDOs made it difficult for investors and regulators alike to understand how much risk an investor, such as a bank, investment fund or pension fund, was taking on by buying this type of security. In the time leading up to the crisis, there appeared to be no danger of a financial collapse at the global level, at least not in the eyes of credit rating agencies. The sole purpose of these agencies is to rate the soundness of investments, and they gave the CDOs their highest rating: AAA (also called "Triple A"). All looked fine on the surface, and regulators did not see the crisis coming in time.

The fall of Lehman Brothers was the symbolic apex of the financial crisis. From then on, both small and large financial firms in the US and around the world began to fall like dominoes. They were not all directly linked to CDO investments, but the fallout from CDOs affected the entire financial market. Not everyone was hit equally hard. Canada was among the countries that escaped relatively unscathed, whilst the EU was hit much harder, and was plunged into a crisis that lasted longer than it did in the US. A number of major European banks were in serious trouble and brought down companies and investors with them, and many of the parties most heavily impacted by the crisis were domiciled in the EU. The price tag was overwhelming: not only did millions lose their jobs and savings, governments also shovelled hundreds of billions of euros into big financial institutions to save them from collapse. The public purse took a monumental hit when the losses were socialised.

THE COMPETITION STATE AND THE FINANCIAL CRISIS

The 2008 crisis begged the question of how we could have ended up in such a dire situation, with such horrible consequences for citizens. However, looking at how the EU had approached financial regulation in the preceding years, it is no wonder that the economy was hit hard. As we shall see, the Commission and Member State governments set out to deepen the Single Market for financial services in the late 1990s with little regard for financial stability. Their aim was to strengthen the European financial industry and to build the finance sector, and with it the financial markets component of the European competition state. This was all about liberalisation and deregulation.

It would be fair to say that the impetus and the plans were not presented to the Commission by a well-organised finance sector in the beginning. There was no finance version of the ERT, no well-established coalition of big European banks with a common project. Instead, the Commission actually helped big finance institutions to organise themselves around the task, as we shall see in this chapter. From the very beginning, then, big banks and investment funds were welcomed in to frame and form the Single Market for financial services. Their position at the heart of power in EU institutions has since made it extremely difficult to reform financial markets, let alone bring them under genuine democratic control. The financial crisis and its gruelling aftermath bear witness to that.

It would be incorrect to say that the crisis changed nothing. However, if we look at reforms in terms of the types of speculation that are now inhibited or prohibited by means of measures, the changes implemented since 2008 have been modest, and never went much further than the financial sector itself wanted. Even the speculative securities that both experts and politicians singled out as the main source of the financial disaster – complex "securitisations" or CDOs – were rehabilitated in the EU only a few years later.

Apparently, a financial meltdown was not enough of a reason to challenge the paradigms that claim liberalised financial markets are an undeniable public good. In addition, the big banks that lost face for a time and received astronomical capital injections from European taxpayers were never faced with any real demand to change their business model to prevent a similar disaster from happening again. The story of the financial crisis is that of the European competition state's destructive outcomes and resilience, even in the face of a financial apocalypse.

In the most intense months of the financial crisis in 2008 and 2009 there seemed to be an opportunity to pick a different path. There was massive public outcry, as well as strong pressure from European trade unions and other civil society organisations demanding changes to the financial system, and there seemed to be a willingness among political actors to change course and reform financial markets. It was now obvious to everyone that these markets had been given too long a leash, and that the time had come to put an end to the global casino that they had come to represent.

There was a good dose of optimism in many circles. The era of unfettered liberalisation was surely over and we could now embark on a new phase where major policy reforms would put an end to speculative excesses. In October 2008, Commission President José Manuel Barroso convened a press conference ahead of a European Council meeting to take the first steps to counter the economic avalanche triggered by the crisis. "There can be no business as usual. We need to rethink both regulation and supervision when it comes to financial markets, including banks, mortgage institutions, hedge funds and investment funds."[1]

On this occasion, Mr Barroso presented a group of experts, a High Level Group sometimes referred to as "the Wise Men," whose purpose was to ensure that the Commission's own guidelines were followed. However, before we get to the Commission's new strategy, it is worth asking several questions. What was this financial services project in the first place and how had it so obviously failed?

What principles had been guiding the EU's actions and, above all, how had they been conceived, developed and put into practice?

FINANCIAL MARKETS DESIGNED BY BIG BANKS

A deeply integrated, liberalised financial market was high on the financial sector's wish list in the 1990s, and several Member State governments, not least the UK government, put lots of energy into realising the idea of a deregulated single market along these lines. In 1998, the Commission began to take action, and the first item on the agenda was to seek advice from the financial establishment. A High Level Group of 20 representatives of financial firms, all of whom had a strong commitment to a single market for financial services, was set up to help the Commission identify a basic structure, a list of priorities, and a way forward.

The Commission was not prepared to reveal to the public which companies were involved in the group,[2] but it is known that the major Dutch bank ABN AMRO was among them. In a report, two of the bank's advisers wrote about a successful lobbying effort at the time. They argued that ABN AMRO's membership of the "expert group" was a sign that the bank had succeeded in establishing a lobbying presence in Brussels and was now recognised as an "authoritative supporter and stakeholder."[3] This High Level Group came to play the same role in the area of finance as the ERT played in industry; serving as a key source of inspiration and ideas for the next major steps towards a liberalised single European market for financial services.

Building on the work of the High Level Group, the Commission adopted a Financial Services Action Plan in 1999 (also known as "the Action Plan"), which provided a roadmap for liberalisation and harmonisation of rules across the Union. "With the introduction of the euro, there is a unique window of opportunity to equip the EU with a modern financial apparatus in which the cost of capital and financial intermediation are kept to a minimum," the Commission stated at the time. [4]

The Action Plan is characterised by its lack of substantive information about the steps that need to be taken to ensure that an integrated EU financial market does not cause instability. Although two prudential measures are briefly referenced in passing, there is no doubt as to the overarching intention. According to the Action Plan, a string of old EU directives needed upgrading, and a number of new ones needed to be added in order to build an "optimally functioning European financial market" as a matter of urgency.[5]

It was a time when global financial markets were facing many serious problems. In 1997 and 1998 many countries across the world fell into financial crises, including large parts of South-East Asia, Brazil, Turkey and Argentina, to name but a few. Then around the year 2000 the dot-com crisis – a bubble of investments in internet-related companies that burst – served as another reminder of how important it is to properly control and regulate the financial sector. Despite all this, the focus of the Commission's plan was one-sided: no more constraints should be placed on the financial sector if growth was to be a top priority.

In the years following its adoption in 1999, financial companies played a key role in elaborating the details of the Action Plan. Six working groups consisting of representatives from financial firms appointed through both national and the European industry associations, began by identifying what kind of legislative acts were needed.[6] The Commission was then ready for the final stage, involving a more concrete implementation of the legislative proposals set out in broad terms in the Action Plan. At this stage, the financial sector was again represented at the table through new expert groups.

These expert groups were the subject of the first major study undertaken by the Alliance for Lobbying Transparency and Ethics Regulation in the EU (ALTER-EU). This was a coalition of NGOs, including Corporate Europe Observatory (CEO), who worked together on lobbying regulation in the EU during the financial crisis. ALTER-EU explored the question of how the rules, which even the Commission recognised as dysfunctional, had come about, and who had acted as advisers in this context.

The picture that emerged after a year of research was clear: when the Commission assembled the advisory panels (or "expert groups") in each area, they ensured that representatives of the sector itself remained the dominant interest group.[7] For example, in an expert group on banks, 21 out of 23 members were selected from the financial sector. In the group on insurance and pensions, 21 out of 22 members came from the sector itself, whilst two expert groups on investment funds were composed entirely of representatives of the financial sector, most of whom had a direct or vested interest in hedge funds or private equity.

PRIVILEGED ADVISERS

Membership of an expert group is often a lobbyist's ultimate goal. With a seat on one of the Commission's advisory bodies, they have the opportunity to directly influence the structure of a new proposal. Moreover, simply being in the company of many other representatives from the same industry means any final proposal may well end up being completely aligned with a lobbyist's own commercial interests. Although the work of an expert group is often followed by a political process of discussion and negotiation in the Council and the Parliament, it is a position of strength to be able to set the agenda from day one, and thus be ahead of the game before the proposal is even published.

Thanks to their dominance of the relevant expert groups, the financial lobby had another potentially game changing ploy at their disposal: simply suggesting that the Commission do nothing. There are at least two examples of when they have done just this.

The first example is illustrated by the Commission's consideration of proper rules for investment funds. This included the most speculative entities in the financial world – hedge funds – which were operating in an unregulated field. In January 2006, the Commission set up an expert group to examine the need for adopting potential EU rules in this area. The task was completed in July of the same year when they concluded that there was no need for "specific and targeted regulation at the European level."[8] And that was that. The Commission accepted the recommendation and, as only the Commission can make such proposals in the EU, the last word was said on the matter for years to come.

The second example is credit rating agencies, which had lost all public trust in the run-up to the financial crisis by giving their highest ratings to high-risk securities. In the pre-financial crisis era there were only optional guidelines in this area, though these did receive some attention in 2004 as a result of the dot-com crisis, when credit rating agencies played the same damaging role by recommending investments that turned out to be quite risky, ultimately contributing to the great collapse. This practice can be explained by the fact that these agencies, at least to some extent, make a living by evaluating the securities of the financial companies that pay for their services. Thus, they have an incentive to rate them highly. However, at that stage, and after a thorough consultation of financial sector stakeholders, the Commission concluded that it was not necessary to tighten the existing voluntary guidelines, even though they were less ambitious than those in the US.[9] It was only after the 2008 crisis that rating agencies once again came under the spotlight.

These two examples demonstrate that the EU had been working hard to remove barriers to a single market in financial services in the run-up to the financial crisis. The approach was straightforward: the financial sector was asked to come up with ideas on how to break down barriers to their own businesses, and the Commission happily accepted their proposals. It did not turn out well, hence the need for "rethinking" that Commission President José Barroso spoke of in October 2008 when markets were collapsing and bottom lines were plummeting into the red.

HALF-HEARTED INTROSPECTION

From the end of 2008 there was good cause for soul-searching across the financial sector, and at the political level there were subsequently signs that the penny had finally dropped with regard to the causes of the crisis. One speech in particular, delivered in February 2009, five months after the collapse of Lehman Brothers, gave the impression that the EU had finally given in to those who had called out the financial sector's privilege. The speaker was not just anybody, but Single Market Commissioner, Charlie McCreevy of Ireland, the EU figure with the biggest political stake in the crisis and its subsequent handling. McCreevy signalled new times as well as a new approach to financial sector lobbyists: "What we don't need is to be captured by those with the biggest lobby budgets or the most skilled lobbyists. We must remember that it was many of the same lobbyists who in the past managed to convince legislators to insert clauses and provisions that greatly contributed to the weak standards and excesses that created systemic risks. Taxpayers are now forced to foot the bill."[10]

This was a groundbreaking recognition of the need to take the public into account, and to be cautious about advice from the financial sector. McCreevy added: "I've learned that all advisory bodies should be able to take a step back and say 'it makes great sense what the industry has said, but we also need to be a bit more objective ourselves' [...]. Just because there is consensus among stakeholders, doesn't mean it should all just be implemented."[11]

One could hardly ask for more. It sounded as if a positive change was on the horizon, and it gave the impression that the Commission would not allow the financial industry to keep taking lead in the legislative process. However, in the months that followed the crisis' peak, at the time when McCreevy gave his surprising speech, things actually remained the same.

We can return here to the aforementioned High Level Group known as the "Wise Men," which was appointed by Barroso to provide the initial strategic guidelines for EU reform efforts in the wake of the crisis. Led by Jacques de Larosière – an adviser to the major French bank BNP Paribas – the group was made up of people with direct links to other major banks, including Otmar Issing (Goldman Sachs), Onno Ruding (CitiGroup), and José Pérez Fernández (formerly of the large Spanish bank BBVA). There was even room at the table for a former high-ranking banker from Lehman Brothers, Rainer Masera. Of the eight members of the group, only Lars Nyberg of the central bank of Sweden had (arguably) few close ties with the private financial sector, and therefore little direct stake in the financial markets that were now about to be reformed.[12]

With the makeup of the group in mind, it is no surprise that the Commission was not handed a recipe for radically overhauling the failing financial system when the High Level Group published its report in February 2009.[13] The report in fact consisted of a catalogue of reform proposals signalling a wide range of adjustments aimed at ensuring that markets could continue to operate on essentially the same concepts as before, primarily focusing on European supervision rather than bans or restrictions on specific securities or highly speculative strategies. The agenda they suggested to the Commission was definitely not ambitious.

HEDGE FUNDS GET THE LAST LAUGH

Until 2014, reform was high on the EU's political agenda. Twenty-seven proposals on multiple aspects of financial markets were discussed and debated, usually yielding an outcome that left much to be desired. A well-equipped financial lobby, with some 1,700 lobbyists in place in Brussels, was present at all stages of the decision-making process, and they were in close dialogue with the Commission before any proposal saw the light of day.[14] They had meetings with MEPs and they were usually also present during the final stages of the procedures regarding new proposals, when working groups led by the Commission set out guidelines for the practical implementation of decisions that had been made.

One of the first regulatory battles between financial companies and their critics was over private equity funds and hedge funds,[15] a largely unregulated area at EU level. Some Member States had authorisation schemes for the funds, but nothing similar existed at the EU level. Although the aforementioned Commissioner Charlie McCreevy had decided to leave the area alone, one group in the European Parliament in particular, the Socialists (or Social Democrats) in the S&D Group, was not so willing to keep the area protected against regulatory measures.

Even before the financial crisis, the S&D Group had been pushing hard for the regulation of what were known as alternative investment funds. They had also written extensive reports on the methods employed by these funds, including "short selling," a form of speculation that leads to pressure on share prices and is capable of bringing even sound companies to their knees.[16] Though initially very hesitant, in view of the financial crisis McCreevy succumbed to the pressure from Parliament and put forward a proposal. Therefore, although the role played by hedge funds during the financial crisis was considered to be secondary, they did in fact play a leading role in the first dramatic clash over financial regulation, which began when McCreevy tabled a proposal for regulation of investment funds in April 2009.

McCreevy's proposal was not ambitious, and was mainly aimed at increasing transparency and requiring funds to publish basic information about their investments. This was a proposal which, according to the Socialist Group, was "full of holes like a Swiss cheese."[17] The funds, however, responded aggressively to the proposal with a lobbying campaign led by the European Venture Capital Association – an interest group advocating for private equity funds – and the Alternative Investment Management Association – another interest group working to safeguard the interests of hedge funds. A media effort was launched to spread the message that regulating hedge funds would lead to industrial decline.

"If this directive goes through as drafted, large chunks of the industry will be leaving Europe," the manager of a hedge fund noted in support of the campaign.[18] The proposal led to a stormy debate and an ensuing frenzy of lobbying activity. As many as 1,600 amendments were submitted by MEPs, of which, according to an assessment by a Green Group adviser, some 900 were drafted by financial lobby groups.[19] In general, the years after the crisis showed how adept financial sector lobbyists are at getting EU parliamentarians to make their proposals their own by presenting them in the form of amendments.[20]

The result was a directive that imposed new transparency requirements on investment funds vis-à-vis regulators. However, the bans and restrictions on the conduct of funds for which the Socialists had identified a need were nowhere to be seen. In fact, the directive ended up being a victory for investment funds as it included a rule that once an investment fund was authorised in one Member State, it should also have access to the financial markets of all other Member States. This EU passport, as it came to be known, even led the funds to consider the new directive as progress, to the extent that, in negotiations after the 2016 Brexit referendum on the UK's EU membership, one of the UK financial sector's foremost requests was to retain this passport, along with others granting them access to the continent's financial markets.

WATERED-DOWN REFORMS

Subsequently, a series of proposals more directly linked to the financial crisis followed. These proposals about bankers' bonuses, credit rating agencies and accounting firms were designed in a way that did not pose a challenge to the financial sector.

During a high-profile debate on banks, the European Parliament chose to make a cap on the bonuses given to bank directors a key requirement of their proposals. The theory was that banks make risky investments because of the way fund managers are paid: large bonuses are paid in return for a large return. The reasoning was that such a remuneration scheme inspires short-term thinking and risky investments.

However, despite the fact that the Parliament emerged victorious at the political level on the issue of bonus schemes, the desired effect failed to materialise. In London's financial district, the City of London, financial firms quickly found ways to redefine bonuses as another form of remuneration, and given that EU rules only applied to bonuses there was little that could be done to stop this practice. The Parliament's reforms to bankers' bonuses, in which they had invested most of their prestige during the post-crisis bank regulation debate, amounted to almost nothing.[21]

Credit rating agencies also came under scrutiny in 2010, when the Commission conducted a consultation to determine what could be done about the world famous "Triple-A factories" in 2008. By giving such favourable ratings, an agency indicates that an investor can count on a good return, but this was not the case in the period of 2007 to 2008, when institutions were giving the highest possible rating to securities that turned out to be extremely risky.

This could partly be explained by the agencies' aforementioned conflict of interest: low valuations meant a lower payout for the agency, at least in part. To this we can add that sometimes banks are even co-owners of the agencies, an issue which the Commission had its eye on but never managed to eradicate. In the end, the publication of ratings for large shareholders was made mandatory, but the conflict of interest itself remained unaddressed.[22]

The audit firms known as the "Big Four" – Ernst & Young, PriceWaterhouse-Coopers, Deloitte and KPMG – also came under scrutiny both during and in the aftermath of the crisis. Ernst & Young in particular had helped to paint an inaccurate picture of how solid a business their long-time client Lehman Brothers really was.

This prompted a tightening of rules applicable to audit firms, with the intention of preventing excessively close and long-term relationships between them and large financial institutions. However, by the time the rules were finally put in place in 2014 – following an unsurprising period of intense lobbying activity[23] – there was plenty of room left for long-lasting business relationships: a bank was, and still is, allowed to use the same audit firm for 24 years before they began to fall foul of the rules.[24]

THE ACQUITTAL OF LIBERALISED FINANCIAL MARKETS

Of the 27 proposals for new or revised financial market regulation considered in the aftermath of the financial crisis, not a single proposal set a significant new course for future financial regulation. The "re-thinking" that the Commission had seemingly called for in October 2008 never materialised. It would be wrong to say that the financial crisis had no consequences for the EU. Among other things, several new EU bodies were created in the years that followed, and existing agencies in areas such as banking regulation and insurance were strengthened with an expanded supervisory mandate. In addition, the European Central Bank (ECB) was endowed with a special body responsible for managing systemic risks in financial markets. However, the basic rules of the game, or lack thereof with regard to financial markets, were never seriously challenged.

For a time, it seemed that a tax on all financial transactions would be introduced. This Financial Transaction Tax (FTT), would aim to stabilise financial markets by imposing a very small tax on all trades, for example 0.1% of the total value. This measure was intended to reduce the number of trades and slow down the markets because every trade would incur a cost. Such proposals gained some popular support in the aftermath of the South East Asian financial crisis of 1997, and the tax became a symbol of the demand for democratic control of global financial markets.

The kind of high-speed speculative transactions targeted by the tax had little to do with the developments that led to the financial crisis in 2008. However, as many as 11 EU Member States, led by Germany and France, announced their readiness to introduce an EU-wide tax, and even when a number of other Member States backed out they continued to discuss and develop the proposal, which they believed could eventually be implemented under the so-called "enhanced cooperation" rules that allow a smaller group of Member States to develop cooperation in a specific area. Internal disagreements over the level of the tax (the percentage to be charged) eventually led to the proposal being shelved.

From 2014 onwards, the financial crisis was a distant memory and other issues had begun to occupy EU institutions. The financial sector remained on the political agenda, but the approach was now different, as further liberalisation of the single capital market was beginning to gain ground. That year, a Commissioner for financial markets was appointed, the British politician Jonathan Hill, who had great ambitions in this area. One of his goals was to launch the series of reforms that would lead to what the Commission termed the Capital Markets Union.

On Hill's list of priorities was strengthening securitisation, the kind of investments that consist of multiple layers of different securities, and inspiration was apparently close to hand. A coalition of major banks, called the Prime Collateralized Securities Association, had developed a system of securitisation which the Commissioner believed the EU could make use of. This resulted in a programme of securitisation that ended up giving ample space to CDOs in the European market, the very type of securities that had set the whole crisis in motion in 2008.[25] The CDOs went back on sale for the first time in January 2020, a great event for the banks, who once again had free rein to sell a popular product regardless of what it had cost us all in the past.[26]

BIG BANKS GET EXPENSIVE

There was one particular financial issue that would keep the EU institutions busy for many years, much longer than any other, and that was banking. Banks had been at the centre of the financial crisis globally and in the EU in a number of ways. The crisis had revealed that a large number of European banks were much weaker than expected, so to avoid serious repercussions for the economy, Member States had been forced to come to their rescue. From 2008 to 2017, EU Member States spent roughly €5.1 trillion on aid packages for financial firms, corresponding to approximately 10 times the GDP of Belgium. If we do not include liquidity support, meaning the money that was returned, we are still left with a fortune: €1.46 trillion or, to repeat the comparison, about three times the GDP of Belgium.[27]

Doing nothing was certainly not an option, as the banks had become too big to fail. Had governments simply let the banks fall under their own weight, they would have dragged a large part of the national economy down with them. At the time, many major European banks had assets comparable to the GDP of the country they were based in, and the same is true today: for example, the French bank

BNP Paribas, has assets equivalent to 113% of French GDP, and the Spanish bank Santander has assets worth 134% of Spanish GDP (based on 2020 figures).[28]

The top priority should have been to bring banks into a position that would make the spending of billions or trillions to save them unnecessary in the future. An effective way to do this would be to break up banks into smaller entities that are easier to supervise, meaning they can fail without impacting the entire economy. However, this solution never gained the support of the Commission or any Member States. Instead, the European response to the crisis came to focus on so-called "capital requirements." The first priority was to tighten international rules for banks, specifically the Basel rules, and in this way the constant concern for the competitiveness of European banks would also be less of a headache.

CAPITAL REQUIREMENTS AND CREATIVE MODELS

The fact that banks played a major role in the financial crisis was not least due to the international rules introduced in the years after 2004 (Basel II), which were seriously flawed. These rules had been negotiated in the Basel Committee. Since its inception in 1974, this is the place where central bankers and supervisors have adopted international rules, and it has become the main institution in international banking regulation.

The Basel Capital Accord mainly applies to capital requirements, or the obligation for banks to have a certain amount of money to hand, the scope of which is determined by how risky a bank's business is. In other words, banks need to save up to withstand a potential economic downturn, and the amount is determined by how much risk they take on.

The level of capital requirements agreed by the Basel Committee set a minimum standard of sorts, with the intention of avoiding irresponsible strategies being spurred on by global competition. It is not, however, immune to pressure from banks, nor from governments who believe banks should be given a lot of leeway. In light of the crisis, the consensus was that the capital requirements set out in the second version of the Basel rules (Basel II) were too low, and too much flexibility was available in their implementation. Therefore, soon after the collapse of Lehman Brothers, the Basel Committee (BCBS) came together to develop new rules.

There turned out to be much more to deal with than just the level of capital requirements. The rules had also allowed big banks to assess the riskiness of their own investments themselves and, on the basis of that risk, to set the level of capital they needed to have available in difficult situations. This self-assessed model for determining capital requirements, known as an internal model, had proved quite unsustainable. In one assessment, three experts from the Organisation for Economic Co-operation and Development (OECD) concluded that the use of the internal models "undermines the effectiveness of capital requirements."[29]

In 2010, the new rules were already broadly negotiated. Capital requirements were raised, although effective lobbying by the Institute of International Finance – the lobbying organisation advocating on behalf of the largest global financial firms – kept the level of ambition intentionally low. As for internal models, concrete proposals were largely lacking. That question was left for much later.

It is worth noting that many argue it is precisely in the area of banking regulation that the EU made great strides in the aftermath of the financial crisis, though in reality the EU has proved to be far from ahead of the game. In 2014, the Basel Committee published a report in which the EU was deemed to be far behind the US, among others, when it came to implementing new and stricter capital requirements. This assessment was made after the EU introduced the new rules.[30]

While internal models were subject to increased scrutiny, no targeted guidelines were developed in the EU to counteract the potential for creative approaches by financial institutions. For example, in 2013 it became clear that Deutsche Bank was in financial trouble and risked having to meet higher capital requirements. The bank's crafty solution was to introduce a new method for calculating its own business, and with little more than a penstroke it made itself €26 billion healthier than before.[31]

Since the financial crisis, the EU has been a reluctant party in the Basel negotiations, and has consistently opposed ambitious proposals. This became particularly clear in the period from 2020 to 2021, when the EU did its part to delay and water down the Basel Convention's measures targeting internal models. Though international negotiations had moved towards limiting the use of internal models, the EU met proposals with a high degree of opposition. When the Commission finally presented an official scheme in October 2021, it consisted of a variety of proposals which, in their own words, aimed to "boost the competitiveness and sustainability of the European banking sector."[32] Such a boost, however, comes at a price. According to Fitch Ratings, the overall effect of the proposals would entail a halving of the impact of capital requirements for banks by 2030.[33] In other words, the Commission's proposals would allow the banking sector to take far greater risks than recommended by international experts in the Basel Committee and by other major economic powers.

THE BIGGER THE BANK THE BETTER

The EU has proved keen to avoid imposing strict regulations on banks, even more so than other global powers. This is particularly true for the functional separation of banks, so when the Commission opened a discussion on this issue in 2012, it was unsurprising that the proposal went nowhere.

The inspiration for introducing a distinction between investment banks and retail banks originated in the United States, and stemmed from the famous reforms undertaken by US President Roosevelt after the stock market crash of 1929. Faced with the enormous losses suffered by ordinary small savers and the devastating effect of the crash on American society as a whole, the US Congress passed the Glass-Steagal Act in 1933, a banking law that clearly separated ordinary banking from investment banking.

The Glass-Steagal was law until 1999, when it was repealed under President Clinton. This decision came at a high cost to Americans, and in 2008, with the financial crisis in full swing, Nobel Prize winner Joseph Stiglitz wrote that the decision had changed the culture of American banking:

"Commercial banks are not supposed to be high-risk ventures; they are supposed to manage other people's money very conservatively. It is with this understanding that the government agrees to pick up the tab should they fail. Investment banks, on the other hand, have traditionally managed rich people's money—people who can take bigger risks in order to get bigger returns. When repeal of Glass-Steagall brought investment and commercial banks together, the investment-bank culture came out on top. There was a demand for the kind of high returns that could be obtained only through high leverage and big risk taking."[34]

The problems associated with large and complex banks were not completely ignored by the EU, nor by the Commission. In November 2011 an expert group was set up, led by former Finnish central bank governor, Erkki Liikanen, with the aim of developing proposals on the EU's banking structure. The question was whether banking sector reforms other than the Basel rules were in fact needed. Liikanen's group thought so, and their additional proposal was a functional separation of banks, a kind of "Glass-Steagal lite"[35] that required a clear separation between investment and retail banking divisions within the large banks.

However, this idea of separation was watered down by the Commission when they proposed that the separation of functions should not be mandatory. Despite this weakening of an already timid proposal, it ended up coming under fire from both the financial sector and large Member States, such as Germany and France. A combination of low ambition in the Commission, resistance among Member States and an agile and alert financial lobby led to the scrapping of the entire European banking structure exercise. According to the Commission, the reason was that the rationale of the proposal on financial stability in the meantime has been taken over by other proposals, notably the "banking union."[36]

BANKING UNION: BIG BANKS' LIFELINE

In the years after the peak of the 2008 financial crisis, one thing in particular was causing unrest among the general public: the vast sums spent by governments to save ailing banks. At one point EU Member States had supplied them with state aid to the tune of €4.5 trillion. Even if the final bill was only a third, it was still a massive amount.[37] The banking union was sold to the public as a measure that would make such massive state aid to irresponsible banks a thing of the past, but it failed to deliver on this promise.

Strictly speaking, the banking union is not about creating financial stability as such. Rather, it should be seen as an attempt to deal with financial instability – and the huge risk that mega banks pose once they become unstable – through increased supervision of banks. Under the banking union, the 130 largest banks in Europe are subject to the Single Supervisory Mechanism, implemented by the ECB's new supervisory authority which was created in 2015. In 2016 the banking union was expanded with rules on "bank recovery and resolution." This was done through the Single Resolution Mechanism, a set of procedures for what regulatory authorities on the ECB's Single Resolution Board should do if a bank shows signs of weakness.[38] In the worst case scenario, the supervisory board may decide that the bank needs to be resolved, meaning it is saved from insolvency to protect public interests. As only large banks are covered by this scheme, there is often a lot of money involved.

When the original proposal was being discussed in 2013 and 2014, the expectation that banks would have to pay part of the money themselves caused a stir, and intense lobbying ensued to avoid them having to contribute significantly to resolution funds. In the end, a small levy on banking was put in place, and earmarked for a resolution fund to finance the first contribution if a bank needs to be resolved. By 2024, the banking union should be fully paid up and will have up to €70 billion available in total contributions from the financial sector. This contrasts with the aid packages dating back to the 2008 crisis, which amounted to 73 times the amount set aside for contributions under the new measure. The amount is intended to function as a small buffer, but not a safeguard against big collapses, and therefore not against new bank support schemes paid for by taxpayers.

While discussion will continue on how the rest should be financed – be it through national contributions or pooled European money – a banking union certainly does not protect taxpayers. The amount of money coming from the financial sector itself does not come close to the amount needed if one or more of the very large banks are at risk.

A banking union is certainly not about creating smaller banks, in fact it provides some opportunities for big banks to grow even bigger. Under the banking union, one important tool at the disposal of supervisory authorities is the ability to sell failing banks to other banks. On that point, the chief executive of the French bank BNP Paribas said that "the strongest part of the banking system can constitute a form of consolidation – either through acquisitions or through organic development plans."[39] Big banks such as BNP Paribas, which is considered by the top managing director as a strong part of the system, would then be able to grow even bigger, and perhaps even at a small price. He was pleased that the method for assessing the value of a weak bank's assets had to be in the buyer's favour, as prices were determined using the so-called Mark to Market (MTM) valuation.[40] Thus, the resolution mechanism can contribute to large banks becoming even larger, and being afforded even greater financial advantages.

So far, the EU banking union is fully living up to low expectations. In June 2017 the Single Resolution Board decided to give the green light to the acquisition of Spain's ailing Banco Popular by the big bank Santander for the manageable sum of €1. That same year, the same body decided that two floundering Italian banks should also be given state aid to protect vulnerable investors. The aid amounted to approximately €5 billion,[41] and so a big bank became even bigger while a treasury became poorer.

If the problem is that big banks are too big – so big that it will cost the Treasury dearly if they are in danger of failing or actually do fail – then a banking union is not the answer. Not even if its final elements are successfully put in place in the form of common guarantee schemes for deposits from ordinary retail savers and a common treasury to resolve banks.

THE EU'S BIG AMBITIONS

The EU has taken on a very different role from the hopes and expectations of some on the European centre-left who had, since the 1990s, viewed the EU as an institution with the potential to rein in financial markets by means of regulation. If we look at developments since 1999 – when the Commission's Action Plan for a more integrated single market for financial services was adopted – the Left did not get anything close to what they wanted. Before the 2008 crisis the EU ignored the risk of liberalising financial markets and paid a high price for its disregard, but post-crisis reforms served mostly to ensure business as usual for the financial sector. This was most evident when CDOs – the catalysts of the financial crisis – were rehabilitated.

It is the desire for a strong European financial sector, and the goal of securing a leading role for European banks, that lie behind this development and have prevented a full-scale reform of the financial markets. Sometimes the financial lobby has had to pull out all the stops in the Parliament to sway events in their favour, but they have always enjoyed strong political support from some governments. Their goals have enjoyed and continue to enjoy strong support among Member States, exemplified by the German and French governments stepping up to defend not only the EU's direction in this area, but also their own big banks. Add to this the Commission, and taming the financial markets and the finance lobby seems a tall order indeed.

Claims that big banks are in the public interest remain inexplicable. Why is it considered wise to have banks holding assets on a scale exceeding national GDPs? Especially in a European context, where we have had to pull through not just a financial crisis, but also a euro crisis.

The answer to this question is that a globally competitive financial sector is considered essential. In order to bring European banks into a leading position globally, they have to be offered optimal conditions in the European market. To that end, the biggest players in finance are repeatedly invited in to help design the markets themselves. Not even a devastating financial crisis changed that modus operandi at the EU level, because it is considered a natural component of what the EU is supposed to be – a genuine competition state.

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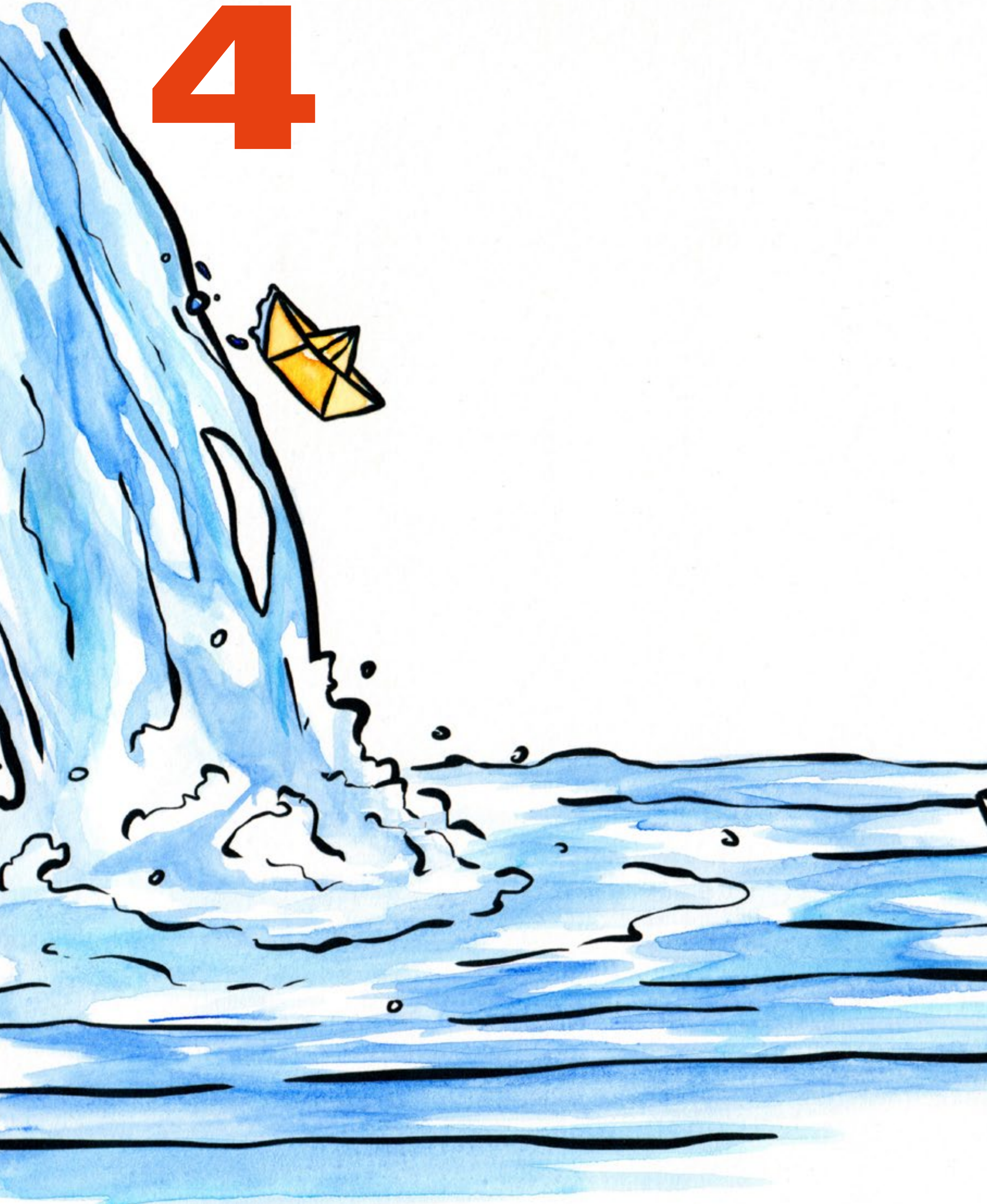

THE EURO CRISIS AND THE SILENT REVOLUTION

In times of crisis, we set political agendas that are not viable in times of stability. Whoever commands the narrative of the crisis – including both why it happened and how to solve it – can achieve great things. By 2010, the financial crisis in the EU had evolved into a broader economic crisis. It turned out to be so severe that the Union's single currency, the euro, was in mortal danger, owing to pressure from financial markets. This next phase of the crisis, the euro crisis, would transform the EU. The event paved the way for a new and deeper version of the still on-going economic and political integration, and a plethora of procedures to reform Member State economies were put into place.

Both the Commission and various lobby groups, such as the ERT, had several proposals for tighter European economic policy coordination rejected in the years before the crisis took hold. However, once the crisis began, a lot could be achieved from their perspective – and at a fast pace. This was a source of enthusiasm for several Commissioners, not least Commission President Barroso, who described the groundbreaking development in 2010 as "a silent revolution."[1] Thanks in no small part to his Commission, the German government, the ERT, and the employers' association BusinessEurope, the euro crisis became a turning point in the attempt to build a European competition state.

THE CRISIS AND THE DEEPENING OF THE COMPETITION STATE

To begin with, Barroso and his allies were successful in framing the crisis as one of competitiveness. Flawed economic policies had led many Member States down a path that now revealed them to be in severe breach of the fiscal rules, with budget deficits and debt soaring. The years after the onset of the euro crisis in 2010 would then see a structured attack on Keynesian policies. The crisis was not to lead to ambitious, state run investment programmes, but rather austerity imposed by EU institutions. In terms of labour, paradigms suggesting an increase in consumption and support for the unemployed as pathways out of the economic plunge were made impossible by decisions taken at the EU level.

This marked a move of the competition state into new territory. Previously, Member States' labour market policies and budgets had certainly been discussed, but by and large as matters of national policy-making. With the euro crisis, a transformation took place that would delegate significant power to the Commission over these matters, and that would institutionalise key dogmas of the competition state more firmly at the EU level. A new system of so-called "economic governance" was put in place.

It was not a surprise to any experienced observer that the euro would trigger a high degree of integration. When the euro was introduced in 1999, everyone knew that there would have to be convergence between the euro area economies in order for the currency to be stable. In other words, weakness at one end of the euro area would spread to the other. This caused the German government, in particular, to make big demands early on with regard to the EMU – the very foundation of the euro – as a condition for waving goodbye to the solid Deutschmark. This led to the Stability Pact of 1997, which was enshrined in the new EU Treaty of the same year, the Amsterdam Treaty.

The objectives were to commit all EU countries to a tight fiscal policy with a maximum public deficit of 3% and a maximum debt of 60% of their GDP, according to the Stability Pact agreed at a European Council meeting in Amsterdam in June 1997. This rule was to ensure that all Member State economies were resilient and would be able to handle disparities. Governments in the North were worried that debt and deficit in other EU Member States would lead to economic ills, including inflation, that would spread to their economies. Thus, discipline was needed.

According to some economists, however, the risk was minimal. Monetarists believed that the introduction of the currency would easily eliminate imbalances between national economies. Others were much more sceptical, and saw a risk in a common currency, as well as in the Stability Pact.[2] The euro, they said, would lead to greater disparities, and the euro crisis confirmed the suspicions expressed by these sceptics. Disparities had grown between Member State economies, and imbalances in the euro zone had played a major role in this.

While the financial crisis was rooted in unfettered speculation in the financial markets, it quickly spread to the so-called real economy. Financial institutions fell like dominoes, companies went bankrupt, and millions of people lost their homes or jobs. This trend was seen in many other places, but in the EU the crisis took hold in different ways than in the US because it interacted with existing imbalances in the eurozone. Thus, the crisis in the EU became more widespread and longer lasting than it did across the pond. Years later, neither Greece, Italy, Portugal or Spain had made up for lost ground, and they are still struggling with a gross domestic product that, in 2022, remained below its pre-crisis level of 2010.

WINNERS AND LOSERS

The crisis resulted in the eurozone being divided into winners and losers. Whilst Germany, the Netherlands, Finland and Austria represented a kind of centre that escaped the crisis relatively unscathed, the situation was vastly different for Ireland and Southern Europe. With the euro, the possibility of using the devaluation of the national currency to compensate for the pressures of fierce competition from other parts of the EU no longer existed. During the period 1999-2007, this led to large trade deficits in countries such as Italy, Greece, Portugal, Ireland and Spain with the rest of the EU, in particular with Germany, which in turn ran a high surplus.[3] Conversely, Germany enjoyed more prosperous times during the post-euro era, both in terms of trade surpluses vis-à-vis other EU countries and a booming export industry.

A significant part of the explanation for how this came to be can be found in wage developments. In 1999, social partners in Germany agreed on wage moderation, ostensibly to secure more jobs. Since then, the German government has implemented a series of reforms to ensure the supply of labour and keep wages down through the so-called Hartz laws. The Hartz IV reform, in particular, drastically reduced unemployment benefits and made working conditions for German workers more precarious. For the German economy, and especially for German export companies, these reforms were a gift. Wages were kept down in Germany, and this measure gave the country a competitive advantage, thereby making market conditions more difficult for companies in other Member States within the Single Market.[4]

The unequal relationship between Europe's industrial powerhouse and Southern Europe contributed to a boom in German exports to other EU Member States and the rest of the world. The share of German GDP derived from exports rose sharply in the years following 1999, increasing from around 30% to a peak of 50% in 2013.[5] The opposite was true for many other eurozone countries, which lost massive ground in the realm of international trade.[6]

Pressure to keep wages low has been a general feature of eurozone countries since the Maastricht Treaty, which imposed "flexibility" on labour markets, thereby cementing the single currency policy and rigid fiscal policy across the eurozone. "The race to the bottom was won by Germany, which has squeezed wages far more successfully than countries on the periphery over the past decade," wrote Greek economist Costas Lapavistsas in 2013.[7]

Trade developed unevenly also because the exchange rate of the new currency, the euro, was fixed as an average. The strength and level of the euro was assessed according to the EU's overall position in global trade, even though the exchange rate covered regions with significant differences. By German standards, the euro exchange rate was low, which was an advantage for German exports, while by Greek or Spanish standards it was too high and therefore disadvantaged those countries' exports.

However, euro membership also brought an advantage to Southern European countries, namely low interest rates. Like the exchange rate, interest rates represented sort of an average of what they would be in Germany and Greece were there not a common currency, so for Greeks, Spaniards and Italians it was cheap to borrow money. Additionally, loans became the way out for many struggling companies in Southern Europe.

This development meant that countries on the periphery were already heavily burdened by debt when the financial crisis erupted. This was mainly private, not public debt, however. Spain and Portugal showed by far the highest rates of private debt compared to public – 87 and 84%, respectively – while Greek debt was predominantly public – at 58%.

The financial crisis only made matters worse, because it struck at the very heart of the regional imbalances built into the euro project. When financial institutions began to collapse under the pressure of speculative investment, and when the financial crisis closed off many channels to credit, it had an impact on all EU countries. However, some countries suffered more than others did. In October 2009, the Greek government revealed that the national debt was much higher than previously reported, triggering a period of public spending cuts. Then, in February 2010, the euro crisis became a reality.

At that time, financial markets began to demand higher interest rates on Greek government bonds. Until then, it would have been unthinkable that higher interest rates could be demanded from a particular part of the eurozone since financial markets accepted it as an entity, as an undivided whole. However, in 2010, interest rates on Greek, Spanish and Portuguese government bonds soared, thanks in part to speculative attacks on the euro.[8] This could have resulted in state bankruptcy, which would have meant the end of euro membership for peripheral countries. That is why, from 2010 onwards, all sails were set to save the euro. On the one hand, the ECB started buying government bonds, and on the other, the ECB and other EU institutions took a hard look at how to deal with the most troubled countries.

AN EARLY MOVE TO PUT COMPETITIVENESS AT THE CENTRE

The disparity and uneven impact of the crisis showed that the eurozone was not the ideal single currency area that many had perceived it to be. In fact, the internal disparities were so extensive that, following the financial crisis, it led to another deep crisis in the real economy. That such imbalances could arise was not surprising to everyone, however. In particular, Keynesian economists typically reason that a single currency also requires a state that can provide transfers to those areas that are lagging behind.

Indeed, several estimates have been made as to how large transfers would need to be between the centre and the periphery of the euro area in order to ensure a well-functioning single currency. In 2010, British economist Lord Skidelsky estimated that the EU would need about 10% of the GDP of its member countries for redistribution – ten times as much as the entire EU budget today – in order to make up for the imbalances that caused euro instability in the first place.[9]

Even before the euro crisis broke out, demands to have an EU budget to support ailing economies were coming from the periphery of the eurozone, led by France, while the German government had embarked on a course of demanding spending cuts. In the midst of such a situation, the Commission did not sit idly by. In early 2009, they began systematically working on a strategy to address the crisis that would ensure a central place for competitiveness and continuity for the Lisbon Strategy.

The discussion of this strategy ultimately determined how the Commission and the Council would understand and address the crisis. In November 2009, the Commission asked for input from all stakeholders and major players in the business community. In particular, BusinessEurope and the ERT were quick to launch a systematic effort to build support for a competitiveness-based approach to the crisis and for stronger governance of Member States' economic policies. They "pressed unremittingly for the further expansion of the technocratic control function of EU institutions vis-á-vis the economic and fiscal policies of the member states […]. They succeeded in including these policy aims into a strengthened global competitiveness strategy and in placing it on the EU's agenda well before Greece got into financial difficulties," Bob Jessop and Mathis Henrich wrote in an analysis of the battle over austerity policy.[10]

A SHORT FIGHT OVER CRISIS INTERPRETATION

This strategy, dubbed the Europe 2020 strategy, was more than just a roadmap to get out of the euro crisis. It was, for example, just as much about the Single Market and trade policy. When it was adopted in March 2010, just as the euro crisis was gathering momentum, the Europe 2020 strategy provided a consensus on policy response to the crisis. "Fiscal consolidation and long-term financial sustainability will need to go hand in hand with important structural reforms, in particular of pension, health care, social protection and education systems," the strategy states. Increased governance and stronger enforcement of the Stability Pact were to ensure the implementation in Member States of "key structural reforms to address their bottlenecks to growth."[11]

Thus, the southern clamour for transfers from winners to losers was quickly countered and swept off the table. From the perspective of the Commission, or any austerity government in the EU – in particular Germany, the Netherlands, Finland, Denmark or Sweden – the devastating impact of the financial crisis that became the euro crisis was due to irresponsible economic policies pursued by governments in Southern Europe, particularly in the years leading up to the crisis. There was no recognition of the imbalances that stemmed from the introduction of the euro.

The criticism, heard frequently from the Commission and Member State governments in the North, focused on two issues. First, it pointed to what they considered "outdated" labour market legislation that had led to irresponsible wage developments, with wages exceeding a level that productivity developments could justify. Secondly, it suggested that high government spending had resulted in low reserves once the crisis hit. This account of the crisis and its roots was disseminated by all available means in 2010, and with the adoption of the Europe 2020 strategy, this overarching narrative became the dominant one.

"Sometimes crises also do good," said the Commission President in May 2010. "Rather than focusing, as in the past, on the pros and cons of stability policy, the discussion is now about how to strengthen the [Stability] Pact. The French are talking about including limits on public debt in the Constitution. That would have been unimaginable just a few weeks ago."[12]

THE TROIKA AND ITS LOAN PROGRAMMES

The divide that resulted between countries with the biggest losses and those that got off more easily would define the most intense period in the EU's recent history. Portugal, Ireland, Italy, Greece and Spain, as well as the new member countries in Central and Eastern Europe (perhaps with the exception of Poland) came to form an economic periphery, whilst Germany, the Netherlands, Belgium, Austria and the Nordic countries formed the centre. The latter include those national economies that did suffer losses, but escaped a very grim fate.

A period full of tensions ensued, with deep divides between governments as the periphery was effectively put under administration. Portugal, Ireland, Greece and Spain all had to take out large loans through a body made up of three institutions, the IMF, the ECB and the Commission. These three institutions formed the "Troika," which, in the years following the euro crisis, was responsible for lending, and not least for developing and enforcing the conditions of these loans: the abolition of debt, a small or zero deficit in the state budget, and detailed requirements for the privatisation of public enterprises.

In addition, a requirement for "structural reforms" was set, which, in the eyes of creditors, pointed the way out of the crisis. This term covered "market liberalisation and deregulation with a strong emphasis on labour markets" in a strategy geared towards keeping wages down and deteriorating pension schemes.[13 14] In addition, it called for "reforms of public administration, restructuring/privatisation of publicly owned enterprises, improvement of public employment services, and liberalisation of public procurement rules," as explained in one analysis.[15]

German Finance Minister Wolfgang Schäuble, who was probably the most outspoken exponent of the call for structural reforms during the euro crisis, delivered a speech at an event in the German Finance Ministry in 2015, stating that "you cannot secure public budgets without structural reforms, especially labour market reforms and welfare reforms. On the contrary, one supports the other."[16] In this line of thought, it is through labour market reforms and welfare reforms that EU countries become competitive, and the lack of such structural reforms was seen as the very cause of the crisis. Gone was any hint of the role of financial speculation, or of the uneven impact caused by introducing the euro.

Not all countries followed the same path to the loan programmes, though. Slovenia's loan was predominantly an IMF loan, in which the Troika played only a minor role. In the case of Spain, it was a loan to rescue Spanish financial institutions that triggered a relatively short-lived programme. For both Ireland and Italy, it was the ECB that took the lead. Being the "national bank of the eurozone," the ECB is both independent of governments and responsible for the eurozone's monetary policy, making it a very powerful institution. Both governments received letters threatening to cut off their national banks' access to cash – an action that could have crippled their economies if carried out. Thus, in the case of Ireland, the government was pressured to take out a loan to rescue two banks.[17] In Italy, President Silvio Berlusconi refused and subsequently had to resign.[18] Instead, the ECB's demands were implemented by a technocratic government led by former EU Commissioner Mario Monti.

GREECE MOVES TO THE LEFT

In 2010, Greece implemented the most brutal austerity programme of the entire crisis. State assets were sold, including the important port of Piraeus located just south of Athens, tens of thousands of public employees were laid off, pensions and other social benefits were cut, and Greek workers saw many of their long-held rights stripped away overnight. Half a million malnourished children and a 45% surge in the suicide rate were clear signs of "the cure's" impact on Greek society.

In 2015, the crisis led to a political avalanche in Greece. In the January elections, left-wing Syriza won a majority in parliament, making its leader, Alexis Tsipras, the central figure in negotiations with creditors, flanked by his Finance Minister, Yanis Varoufakis. The demands included that Greece's debt be reduced by €160 billion, with a promise that all private creditors and the IMF would get their share.

Syriza's own crisis programme consisted of four main parts:

1. Responding to the humanitarian crisis: €1.88 billion to meet the most basic needs of poor Greeks.
2. Economic kick-start and tax fairness: reduction of certain taxes to ease pressure on the middle class, which suffered the most during the crisis, and creation of a public development bank with an initial capital of €1 billion.

3. Labour Market Plan: a plan to create 300,000 jobs across the economy – in both the public and the private sectors.
4. Deepening democracy: a plan to strengthen the autonomy of local authorities and establish new institutions to increase popular participation in the legislative and other processes.[19]

This plan contrasted sharply with the way the crisis had been handled in the EU until then. Though not particularly comprehensive, and actually rather timid, it was the kind of crisis policy of the past that powerful actors in the EU wanted to do away with.

The Greek government pointed out that debt relief had been the norm in the past, when creditors had recognised that the money would never come in and when repayments would have crippling effects on the debtors. The Greeks were referring to Germany's debt, which Greece had helped to cancel in 1953. Syriza's response to austerity, in turn, can best be described as a Keynesian programme that, with relatively little funding, was supposed to set in motion a counter-economic movement to help the country emerge from austerity that had failed horribly in the years before the plan was unveiled in 2014.

SYRIZA BEATEN INTO SUBMISSION

In the first months after the Greek elections in February 2015, Syriza's leadership had expressed some cautious optimism. In March 2015, when I asked one of the government's top advisers, economist John Milios, about the prospects of Syriza reaching a new type of deal with the Troika, he was optimistic. He agreed with the government's view that it was entirely realistic to expect different treatment from the EU following the change of government, which, in his opinion, made a plan B unnecessary. Exiting the euro and taking up production of its own currency again – which would otherwise have taken the sting out of threats from the ECB to halt money supply to Greek banks – was not a viable path, he said, although this strategy was popular among many other Syriza members. In fact, "no sacrifice for the euro" was not just a slogan, but the party's official policy.

Given the situation, it is difficult to determine what spurred this optimism. Since the beginning of the euro crisis, the EU's plan had been rather straightforward. Neither suicide rates, starving children, skyrocketing unemployment, or any other evidence of grave conditions in Greece would make any change. The threat of a euro exit alone could rattle the Greek counterparty, but that was a threat that the Greek government as a whole was never really prepared to carry out.

It all came to a head in June and July of the same year. A memorandum from the creditors arrived on 25 June 2015, demanding an urgent signature. The letter included conditions that were unlikely to be deemed acceptable by those who had voted for Syriza: additional cuts and a more comprehensive plan for privatisations. In response, the Greek government made a surprise move and put the plan to a referendum. This was surprising as the initiative came from the Prime Minister himself, by all accounts the government's most compromising figure who found himself in regular conflict with Finance Minister Varoufakis on the domestic front. Judging by the latter's book about his time in office, the referendum was intended to give Tsipras justification for a full capitulation.[20] Although not spelled out in the book, the conclusion must be that Tsipras counted on a yes vote to the demands of creditors from a majority of Greek voters.

The key question at this critical juncture was how to ensure that Greek banks had sufficient liquidity. In other words, the issue was not about whether or not the banks were solvent, but whether they could ensure the flow of money into the Greek economy. In the worst-case scenario, the ECB would close the cash register, and that's exactly what happened the day the Greek government announced the referendum.

In the days that followed, the government of Greece, including both Finance Minister Varoufakis and the Prime Minister, had to figure out how to find enough money to fill ATMs so that Greek bank card holders would be able to withdraw the €60 each that the government deemed sufficient to make the holding last until the referendum.[21] Greece was truly on its heels.

In this situation, the government considered a Greek exit from the euro a real possibility – an exit not at the behest of the Greeks, but at the behest of their EU partners. Finance Minister Varoufakis laid out a Plan X in the form of a parallel Greek payment system that could eventually become a path towards reinstatement of the Greek currency. "Read it and weep," he told Tsipras. Switching back to the Greek drachma would not be painless, but in Varoufakis's opinion, the alternative, namely accepting the creditors' demands, was even less desirable.[22]

For this reason, Greeks went to vote on the referendum on 5 July 2015 with the same feeling that the government must have felt – like they had a gun held to their heads. Still, the Greeks voted no, by a surprisingly large margin. A considerable majority of 61.3% of voters gave the Greek government its mandate to reject the demands.

Only ten days after the referendum, however, the Syriza government made a sharp U-turn and ended up accepting these same demands. Altogether, it had taken about five months to undermine the crisis strategy of the hardest-hit country in the EU. By July 2015, the Greek left-wing experiment, which had a narrow Keynesian-based strategy as its focal point, was a thing of the past.

The Syriza government would later sign several agreements, but under very different circumstances than in the past. The Greek government had lost all clout and the last agreement signed by Syriza bound Greece to a 2.2% state budget surplus until 2060, and imposed constraints on what future Greek governments can and cannot do over the same period.[23] Thus, an example was made out of Greece.

DISCIPLINE, AND NOT JUST FOR THE PERIPHERY

In parallel with the Greek episode, the Commission quickly set in motion a development that would give EU institutions a much greater role in the formulation of Member States' fiscal and wider economic policies. When the so-called European Semester was adopted at an EU summit in June 2010, just three months after the start of the euro crisis, Commission President Barroso commented on the situation: "What is going on is a silent revolution – a silent revolution in terms of stronger economic governance by small steps. The Member States have accepted – and I hope they understood it exactly – but they have accepted very important powers of the European institutions regarding surveillance, and a much stricter control of the public finances."[24]

The European Semester is a procedure to ensure a continuous discussion and examination of Member States' overall economic plans as well as their budgetary policies. In brief, the European Semester begins with Member State governments sending the Commission a National Action Plan, which gives indications of what the following year's budget will look like and what economic policy will look like in more general terms. The Action Plan is analysed by the Commission, which then makes a number of recommendations. These recommendations are then presented for discussion and put to a vote at a Council of Ministers meeting in June or July of the same year. Finally, governments draw up their budget proposals for the following year on this basis.

This procedure, however, was not a new idea. In 2002, ERT had already stated as follows: "at the drafting stage, the implications of national budgets and of major national fiscal policy measures [should be] reviewed at the level of the Union."[25] EU Commissioner Mario Monti was one of the enthusiastic supporters of this idea, which was put forward in a proposal of his at a Council of Ministers meeting in 2005 when France and Germany were having difficulty complying with the rules on debt and deficits set forth in the Stability Pact. At a conference in Brussels in January 2011, marking the opening of the first round of the European Semester, Monti was among the keynote speakers. He was delighted that the proposal he had seen dropped six years earlier had finally become a reality. The time had come: "Thank you, Greek crisis...," he said with a big smile.[26]

The European Semester was only the first small step towards further control of economic policy at the EU level. From 2010 to 2014, nine new sets of rules were adopted, which formed the basis of what is known as "economic governance" and tightened the requirement for compliance with the Stability Pact. The deadlines by which a country could be deemed to be so far out of line that a sanction had to be applied were shortened. In addition, the maximum fine was increased.

In parallel, a whole new set of rules on so-called "macroeconomic imbalances" was introduced, which, like the budget deficit procedure, could result in a special procedure and a fine. Subsequently, a country that failed on all indicators could end up having to pay a fine of no less than 0.5% of its GDP, equivalent to half of its annual contribution to the EU. It was not long before the new model of economic governance was to prove its strength and take its toll on one of the most powerful EU countries, France.

THE EU AND FRENCH LABOUR MARKET REFORMS

While the financial crisis and the euro crisis did not hit France as badly as countries on the periphery of the eurozone, its budget deficit was large enough for the Commission to open proceedings against France as early as 2009. In the years that followed, the focus was on productivity, and, more specifically, on wages and working conditions in the French labour market. Reforms were needed, said the Commission and several Member States, most notably Germany.

This demand was made in the form of persistent pressure for seven years and ended with major reforms to French labour legislation. Labour market reforms had long been on the Commission's wish list, and with the brand new 2013 Macroeconomic Imbalances Procedure, another disciplining EU law that was then integrated into the European Semester, new opportunities were found to push France in a certain direction.[27]

The objective was clear: French wage trends were unsatisfactory in terms of competitiveness and the government would have to take steps to change some of the ground rules. Thus, all recommendations for France during the European Semester from 2011 to 2017 underlined the fact that France was suffering not only from a debt crisis but also from a competitiveness crisis. The Commission, in particular, felt that "structural reforms" were needed. The German government also played a highly active role in the French labour market reform process. High-level meetings between the two governments were held, where the German government sought to pressure the French onto a particular reform path. Several meetings between ministers of the two governments followed, during which the Germans made it clear that it would damage relations between the two countries if France did not comply with the Commission's demands. There was even a German offer to help the French write a draft state budget and a plan for structural reforms.[28]

The French employers' association, Mouvement des Entreprises de France (MEDEF), had been working hard for years to reform labour legislation and was therefore a key player in the battle for the French labour market. MEDEF worked actively to bring the EU into their work towards reform, both on its own and under the auspices of BusinessEurope. With the European Semester, BusinessEurope had fulfilled an old objective and was now making every effort to maximise its influence on the outcome of the process.

STRUCTURAL REFORMS, BY DECREE

The main slogan of the European Semester was "structural reforms," especially of labour legislation, and France was one of the priorities. BusinessEurope set up a special programme, the so-called "Reform Barometer," in which it produced recommendations for each Member State, based on contributions from relevant employers' organisations. In other words, when MEDEF called for reform, it could count on immediate support from BusinessEurope and, more importantly, from the Commission.

The French government carried out reforms in two stages. First, with the "Macron Law" of 2014, which provided greater scope for imposing work on employees outside normal working hours as well as for dismissing employees. Neither the Commission nor MEDEF were satisfied, though. In Brussels, MEDEF used the "Reform Barometer" to label further labour market reforms as "extremely important."[29] There are indications that MEDEF spent lots of energy persuading the Commission to accept their recommendations. In the first half of 2015, when the Commission wrote its recommendations to France and the full Council of Ministers voted on them, MEDEF met eight times with different EU Commissioners.[30]

When the Commission's recommendations came, they left nothing to be desired for MEDEF. Recommendation number six, for example, stated that there should be "exemptions at company and sector level from national rules," meaning that national collective agreements should not continue to constitute a minimum standard. The conflict between the Commission and the Council on the one hand, and the French government on the other, had meanwhile escalated. France was at odds with both deficit and macroeconomic imbalance rules and was at risk of an €11 billion fine.[31]

The country had to do more, and this demand materialised in a second step after the Macron Law, the so-called El Khomri law, which aimed to dismantle the status of national industry-level agreements under French labour law, particularly in terms of working hours and job security. The intention was to make it possible to have local agreements that offered less security than national ones, and this was fully in line with EU recommendations.

This led to massive protests that lasted for months. In the French Parliament, the proposals were met with strong opposition, and in the end, the El Khomri law, like the Macron law, was adopted by presidential decree and not by a vote in parliament.

DISCIPLINE UNDER ALL CIRCUMSTANCES: THE FISCAL COMPACT

Although the German government occasionally preferred to keep a low profile, momentum and proposals for the next steps towards economic governance almost always came from Angela Merkel and her ministers, not least her finance minister Wolfgang Schäuble. The prospect of German money being lent to ship-wrecked Southern Europeans prompted them to raise the bar several times, and after eight EU laws that tightened the rules on debt and introduced new procedures, Merkel still felt that certain parts of the puzzle were missing.

In March 2012, Merkel pulled another initiative out of her pocket: the Fiscal Compact. This was a pact based on the German "debt brake," which obliges any German government in office to avoid incurring debt. The debt brake is enshrined in the German constitution and is difficult to change by a new political majority in the Bundestag, as it requires a two-thirds majority. What Merkel wanted was to enshrine a similar brake mechanism into the constitutions of the other Member States as well.

There were many allies backing her up, not only among Member States, but also in the Commission and the ECB. "To continue, the monetary union needs from all the countries the willingness to be subject to a discipline that cannot be changed by any government whatsoever," said then ECB chief Mario Draghi at a press conference.[32]

In short, the Fiscal Compact led to further tightening of the rules on debt and deficits. The countries joining had to ensure that the so-called structural deficit – the cyclically-adjusted deficit – would not exceed 0.5% of the GDP. This made countries subject to rules designed to ensure restraint – whether the economic outlook is good or not. Equally as important, the rules were to apply not only at the national level, but also at lower levels, where key welfare services are provided in both Northern and Southern European countries.

For that, even countries with relatively strong economies, including those outside the eurozone, ended up under a strict regime that hurt welfare policies. In Denmark, a country that voted against eurozone membership at a referendum in 2000, the government has done its utmost to keep its policies closely aligned with the euro area, and in their view, support for the Fiscal Compact was a no brainer. At a hearing in the Danish Parliament, the President of the country's national bank, Nils Bernstein, stated: "In my opinion, Europe is bureaucratising economic policy. Unfortunately, it is necessary, given the circumstances."[33] He was afraid that flexibility would allow states to evade "necessary adjustments," and the answer was to let the economy be steered by bureaucratic indicators and procedures.

As a result, in the small country of 5.8 million inhabitants, citizens would lose nearly €4 billion in welfare from municipalities in the following years, according to a statement issued by the trade union movement.[34] Fearing the sanctions that come with Danish implementation of the fiscal pact, municipalities simply spend less – in many cases even less than budgeted.

Thus, it is a wide range of procedures introduced in the wake of the euro crisis that address nearly all aspects of economic policy. A report by Martin Schirdewan, MEP for the German party Die Linke, shows that the European Semester showed no lack of recommendations, even for sensitive issues relating to welfare and labour market rules. It confirms that in the period 2011-2018, recommendations to Member States to increase the retirement age or to cut pension expenditure were adopted as many as 105 times. Recommendations appear 63 times to cut health care, 50 times to keep wage growth down, and 45 times to cut unemployment benefits or public assistance for vulnerable groups in society.[35]

In other words, parameters in sync with the dogmas of the competition state are being promoted as much as possible. The reason for this is that the European Semester was set up with a specific purpose in mind: to push for structural reforms – particularly in the labour market – and to keep Member States' budgets on a disciplined track. It is here that we see the structured attempt to do away with Keynesian formulas and replace them with the tenets of the competition state. Moreover, this is a clear example of the kind of systemic democratic deficit that accompanies the European competition state. Crucial political decisions were moved from the national to the European level, and there they would be dealt with in a manner void of meaningful participation and debate.

ON THE ROAD TO DEEPER EU ECONOMIC GOVERNANCE

Out of these efforts to consolidate the competition state on fresh soil, a well-structured witch hunt has emerged, targeting anything that does not promote competitiveness and sound finances. Admittedly, today's European Semester also deals with issues such as education, youth unemployment, and many other social problems, while climate change is slowly making it to the Semester recommendations as well. However, the primary focus of the European Semester is on structural reforms, and its main strength lies in rules on debt, deficits and macroeconomic imbalances. Under the Semester recommendations attain high status when linked to the controlling debt and deficit.

Even as the new economic governance laws were being discussed in the European Parliament and the Council, German Finance Minister Wolfgang Schäuble was making the case for the appointment of a new Super-Commissioner – dubbed by others a "budget czar" – with the mandate to veto a Member State's budget law prior to it being passed by the national parliament. This was an idea that quickly got the backing of ECB President Mario Draghi.[36] However, the plan for this new Commissioner has not yet been realised, nor has the German government mentioned it in recent years. A discussion has been initiated on more forceful implementation, though, and a Super-Commissioner is one model, among others.

To BusinessEurope, the main voice of business in Brussels, the heart of the problem lies in implementation, or lack thereof. It is undeniable that when a country is in difficulty – defined according to the parameters that count in the European Union, namely the Stability Pact and macroeconomic imbalances – the European Semester is an effective tool, as illustrated by the French example. If, on the other hand, a country keeps a safe distance from fines and disciplinary procedures, then those involved in the European Semester – the Commission, other Member State governments, and whatever business advisers are around – cannot do much to force reforms.

This has been a major source of frustration for BusinessEurope, which has long pressed for the recommendations of the European Semester to be made more binding. That includes recommendations to Member States not in violation of the rules on debt and deficit. On that note, according to a paper by BusinessEurope in 2015, national parliaments must ensure discussion and follow-up on the recommendations. Though national parliaments have no say over these recommendations, the business group would like to see them experience a sense of ownership over them and a responsibility to carry them out.[37]

Implementation and enforcement of the recommendations under the European Semester would, indeed, become an often repeated demand of BusinessEurope. "We must strengthen the role of the European Semester in boosting growth, competitiveness and convergence by ensuring that all Member States [...] implement the agreed growth- and employment-enhancing structural reforms," BusinessEurope wrote in 2021.[38]

FIVE PRESIDENTS' REPORT

At the highest levels of the EU institutions, long reports have also been written on the next steps to be taken. Particularly significant in this respect is a 2015 report written by the five presidents of ECB (Mario Draghi), the Commission (Jean-Claude Juncker), the European Council (Donald Tusk), the Eurogroup (Jeroen Dijsselbloem), and the European Parliament (Martin Schulz).[39] Although the report is from 2015, it remains a central reference to this day. In many areas, for example in the development of a banking union and a capital markets union, the roadmap set out in the report was broadly followed in the years after it was published.

This report sticks to very general considerations of what more common economic policy guidelines should look like, the main concepts that guided political intervention during the euro crisis are in place: "Sustainable convergence," the chairmen wrote, "requires a broad range of policies under the heading of 'structural reforms', that is, reforms aimed at modernising economies to create more growth and more jobs. This means more efficient labour and product markets and stronger public institutions."[40] According to the report, it is in the post-2017 phase that these reforms should be "made more binding through a set of convergence benchmarks that enjoy the status of law. Significant progress towards these standards – and continued respect for them once achieved – would be among the conditions for participation in shock-absorbing mechanisms for all Eurozone members."[41]

In other words, all eurozone members must be willing to commit to structural reforms in labour market policy, and not least in the public sector. Should they not, they can expect tough treatment from the other members of the eurozone.

Although the language is vague, there is no reasonable doubt about the underlying intention. Demanding the kind of structural reforms that have set the tone in the EU since the euro crisis, whether a country is in economic trouble or not, is a far-reaching measure and therefore not one that is taken easily. After all, it could carry with it serious social and political implications. For this reason, the plans laid out in the Five Presidents' report should be seen as a long-term project, and not something to be implemented over the next few years. The 2025 deadline set by the Presidents themselves seems unrealistic.

CORONA PACKAGES

Further development of the EMU and economic governance will be a leitmotif for the EU's own development in the coming years. This was also the case during the COVID-19 crisis in 2020, when Member States and the Commission decided to suspend the Stability Pact's rules on deficit and debt – or more precisely, they decided not to pursue violations and impose fines. Using the euro crisis as a yardstick, it was a somewhat different response to economic challenges. However, there were also many similarities.

The pandemic posed a major economic challenge that no EU country could tackle without extensive use of state aid for businesses, including support in maintaining jobs. This applied to all Member States across the board. Thus, it was also inevitable that everyone would operate in breach of the rules of the Stability Pact as the crisis took hold and governments found themselves having to provide support to businesses and to keep many workers in gainful employment. Debt rose significantly, as did the budget deficit. For such situations, an article in the EU Treaty allows temporary derogation from the rules in case of "an unusual event outside the control of the Member State concerned, which has a major impact on the financial position of the general government or in periods of severe economic downturn for the euro area or the Union as a whole."[42]

The crisis sparked an experiment in joint borrowing for the Union, primarily for the purpose of making long-term loans available to member countries, loans that are not due to be repaid until 2058. Throughout 2021 the EU raised and lent €724 billion, divided into €386 billion in grants and €338 billion in loans. The distribution key meant that the biggest countries got most of the funds, but smaller countries with less GDP per capita received relatively more. At the same time, it was not immediately decided how the money would be repaid, which left the door open for it to be raised through some form of taxation paid directly to the EU. As the

EU does not have any significant amount of power to collect taxes directly, this is an approach that may eventually become an incentive to take new steps towards integration in the field of taxation.

Thus, the euro crisis led to a significant tightening of budgetary rules and the development of a series of disciplines and procedures aimed at a stricter economic policy, particularly in terms of public spending and the labour market. Only by means of drastic economic measures would the countries with the biggest financial challenges be able to obtain loans. This has led many to sense a distinct change of direction in the EU, where future crises, whether in individual countries or all Member States, will be met with a greater amount of flexibility and where reforms of existing rules are, therefore, to be expected. However, the handling of the COVID-19 crisis has not lived up to expectations.

In the first place, applying the general rules was clearly not possible. The pandemic constituted a crisis that dealt a hard blow to all economies, and sticking to the general rules would have put obstacles in the way of all Member States' crisis policies. Secondly, the EU would have had to take firm action against Italy, being the first country to be badly hit, and a large country at that. Given the situation back in 2020 and 2021, doing so would have been politically explosive or, simply put, completely impossible.

The Commission and the Council opted for a different path than that chosen during the euro crisis. The Recovery and Resilience Facility (RRF) loan packages for investment in climate-related projects and digital transformation, for example, were an innovation. However, there was also a high degree of continuity, and the strategy was in some ways also an elaboration of the European Semester, the procedure under the EMU which had grown steadily in importance. This procedure, which under normal circumstances would assess Member States' policies primarily against budgetary requirements, for a time, became a forum for the Commission and Council to assess whether Member States were meeting the requirements of the loan packages.

These loans were certainly not unconditional. One of the conditions was that all countries had to comply with the recommendations made during the 2019 European Semester, and in many cases this meant extending the policy of spending cuts into the COVID-19 period, as with pensions, where 13 Member States had been asked to implement cuts. In addition, the approval of the loan packages was preceded by an extended process in which Member States adapted their approach so that loans and grants could gain the necessary support from other Member States and the European Commission. For example, there was a long tug-of-war between the Spanish government and the European Commission over labour market reforms. A new Spanish government had set out to undo reforms introduced by the conservative government during the euro crisis in 2012, under pressure from the EU. Thus, the discussion turned to how many measures could be undone, as a full rollback of the damage did not garner support from other Member States.[43]

Preparations for the loan packages started from the idea that they should entail fundamental reforms of various kinds, or as stated in the rules for the loan packages: "the implementation of the envisaged measures is expected to bring about a structural change in the administration or in relevant institutions [...] or in relevant policies [...] and is expected to have a lasting impact."[44] In other words, structural reforms were needed. This led to the RRF becoming a platform for the promotion of the "active labour market policies" and the deterioration of pension schemes, which have long been promoted by the Commission through the European Semester (see Chapter 9).

DEEPLY INTEGRATED EURO CRISIS POLICY

In this way, the RRF can be seen as an experiment that may inspire further development of the EMU. It takes European integration of economic policies beyond fiscal discipline and fines; from a regime based entirely on the stick, it adds a carrot. Money for investment – be it loans or grants – can also be used to push through reforms. This thinking was not far from the minds of the Five Presidents when they wrote their report in which they proposed – in cautious terms – the creation of a "stabilisation function," a money box that could be used to reward member countries that meet the economic policy "standards" central to their plan.[45] Therefore, while the COVID-19 pools were a different kind of crisis response than what we saw during the euro crisis, the concept was not entirely off the mark. The "standards," the yardsticks of economic policy, were the same.

The COVID-19 packages are not some kind of subversion of the budgetary rules either. Those rules are deeply rooted in the Treaty and they are seen as key to European economic integration by most member state governments, the Commission, and big business groups. In addition, changes to the basic design of fiscal rules are not on the agenda. In early 2023, Member States entered their third year of talks on possible adjustments to the fiscal rules, and by all accounts, they will end up making very few adjustments, if any at all.

THE CORE OF THE COMPETITION STATE

This is why the euro crisis and the EU's response to it remain a necessary reference point for understanding where the EU is going. Because economic and fiscal policies are at the heart of the competition state, we have only seen the beginning of the expansion of the EU's mandate in these areas. Under the slogan of "completing the Economic and Monetary Union," this will be a central battle in the coming years.

It will be a difficult battle to fight, however, in that the euro crisis left us with a deeply bureaucratic approach that allows the Commission and Member States to consider crucial welfare and labour market issues behind closed doors, in procedures few understand. Perhaps it is therein that the systemic democratic deficit inherent to the European competition state finds its most clear expression.

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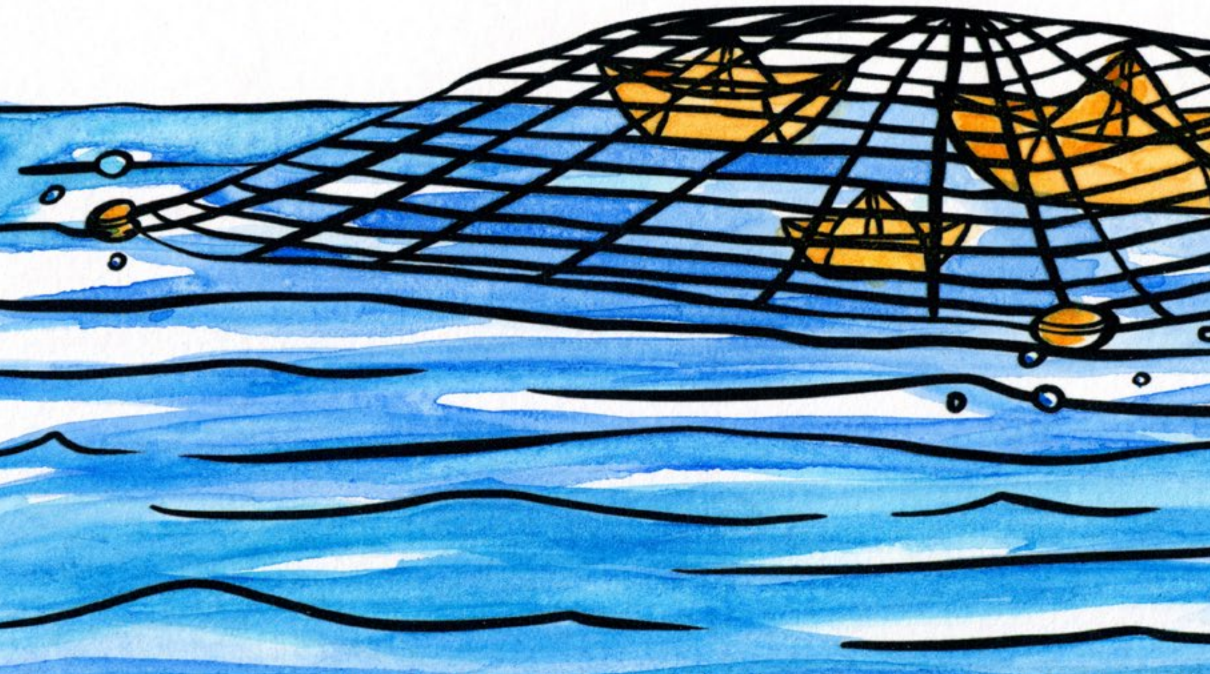
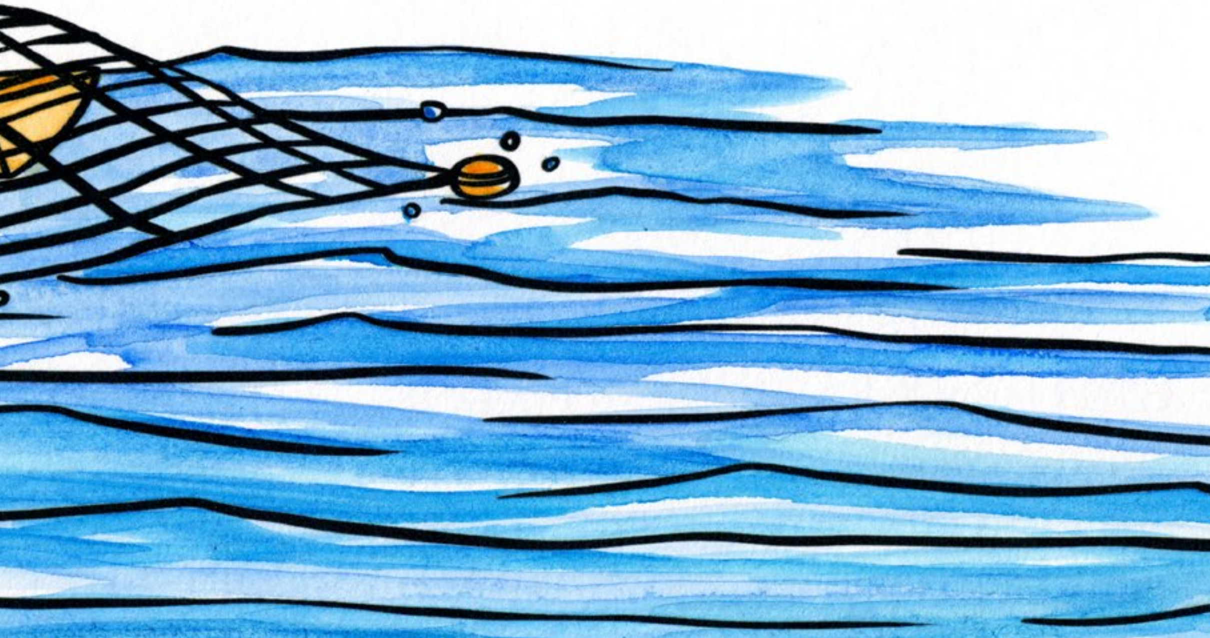


THE POWER OF TRADE BUREAUCRATS – DOMESTICALLY AND ABROAD



Ever since the ERT set out in the 1990s to have a trade policy supportive of the internationalisation of industry, the EU has moved markedly in the same direction. The priority is trade agreements that can contribute to global value chains, and that can give the EU a central position in trade in services and can ensure that it gains an advantage through a technology monopoly. Valuable trade agreements are not just about tariffs, but also about investment protection, competition policy, intellectual property (for example patents) and government procurement, as well as standards, quality and risk assessments of goods.

This development has meant that trade policy has come to influence domestic politics to a much greater extent than previously. Much of what most would understand as ordinary national or European business regulation has become a factor in international trade relations. Trade policy interests – foreign or domestic – may therefore be key factors in cases concerning, for example, the regulation of pesticides, pollution from coal-fired power stations, the labour market, or food quality in domestic markets.

When the ERT or other representatives of transnational capital sets the agenda for the next round of negotiations on a trade agreement between the EU and a third party, they are almost always making proposals that will affect how we organise ourselves at home. For example, if European companies want access to the public procurement market in Japan, Japanese companies will have to be given the same access to the European market. If European companies wish to be granted additional rights when investing in the US, US companies will expect something in return.

Trade policy was key to the transformation of European capitalism that took off in the 1980s, and the EU would become its main organising institution. Trade policy is about creating new and bigger markets for European companies, and creating better conditions for global value chains. National markets are deemed insufficient as a space for capital accumulation, and transnational companies push for deeper global economic integration, as the ERT did in 1993 in its exchanges with the Commission on the future of the EU.

The impact of a stronger and more ambitious EU in terms of trade is keenly felt in countries outside the bloc. The EU's often aggressive trade policy has created many tensions – including in developing countries – since it took off in the 1990s. On the other side of the coin, global trade policy has implications for internal affairs too, as trade agreements typically require market access for those on both sides of the bargain. One of the implications is that standards for goods and services have to be more or less aligned, and for transnational companies, the ideal scenario is one where identical goods and services can be sold everywhere.

For this to work properly for big European companies, they not only want the EU to be a strong negotiator of trade agreements abroad, they also want an EU capable of transforming internally to be the perfect base for companies striving for global competitiveness. To meet their demands, the EU needs to enact changes internally. In other words, there is a strong link between the EU's aggressive trade policy and its role as a competition state.

THE WISH LISTS OF CORPORATE LOBBY GROUPS

EU trade policy is largely the domain of big business, something that becomes clear when we look at how a mandate for negotiations comes about and where the Union's priorities lie in this process. In international negotiations with the World Trade Organization (WTO) or agreements with individual countries, the first step is for the Commission to define the interests of business, especially the big players. Once their wish lists have been run through consultations or meetings, the Commission drafts a negotiating mandate. This is then sent to the Council of Ministers for discussion, where member governments are given the opportunity to object if they feel their special economic interests have not been adequately met.

Parliamentary scrutiny is feeble at all stages, except at the very end, when Parliament – and sometimes national parliaments – get to vote on an agreement. At that stage, it is all or nothing. A rejection at this point would be a loss of face for the EU as a whole, and an agreement would be lost, so it rarely happens that an agreement is voted down. One example, among very few, is the Anti-Counterfeiting Trade Agreement (ACTA), which was voted down in 2012 in the European Parliament because of provisions that would have weakened data protection and hence privacy of citizens considerably.

Throughout the entire process, the heavyweights of the business world are exceedingly close to the epicentre of action. Trade policy is seen as their natural domain and they therefore have privileged access to EU negotiators in the Commission. This ease of access to decision-makers and negotiators might have been perfectly acceptable a few decades ago, but the trade agreements of today are about much more than just tariffs on goods. They impact the ways in which individual countries organise their own economies, meaning this clandestine approach to trade policy has drawn fierce criticism, including from EU parliamentarians. However, it is not easy to effect change.

On one occasion in 2011 CEO went to the trouble of taking the Commission itself to the European Court of Justice over negotiations with India on a controversial trade agreement. CEO's assessment of the EU's requirements for India was that they could lead to social, health and environmental problems: the removal of tariffs on industrial goods could be a major blow to the Indian textile industry; the dismantling of export restrictions on raw materials could lead to the plundering of natural resources, and the introduction of strict patent protection on medicines could end up being a major blow to the Indian pharmaceutical industry. The last of these also had the potential to cause pharmaceutical prices to spike, not only in India, but also elsewhere in the world (see Chapter 6).

An investigation into the process around these negotiations showed that when large European companies show up to prepare for negotiations, as was the case with India, few or no demands from their side are removed by the Commission. That is why we and many others had long been calling for greater transparency about this type of negotiation, and for other interest groups in society to be able to participate on an equal footing with businesses. The specific reason for the case reaching the Court was some negotiation documents sent from the Commission to BusinessEurope, documents to which we were refused access. The case was brought before the Court in 2011 and, four years later, the decision was that the Commission was fully entitled to seek assistance from whomever it chose, without any interference from others. If the Commission had picked business lobby groups for close dialogue and extensive information exchange, it was fully acceptable to the court.[1]

AFRICANS PAY FOR NEW TRADE POLICY

As we can clearly see, big European companies set the agenda, and their mighty ambitions are undeniable. Early examples of this came under the auspices of the WTO, where the EU challenged the US's dominant role in world trade politics in the late 1990s. In 1999, the Commission presented a proposal on behalf of the EU for a significant expansion of the WTO agreements to include new rules on competition policy and investment. The issue of investment was particularly controversial, as the proposed measures would give greater protection to foreign investors, including by allowing them to take legal action directly against the state in cases where something went against their own interests that had been decided politically or administratively. This agenda, known as the "Millennium Round," was the result of strong pressure from European and American big business interests, who acted through their joint organisation, the Transatlantic Business Dialogue (TABD).[2] Although the initiative came primarily from the EU, the US government also supported the project, not least because of pressure from the TABD.

During those years, the WTO provided the international framework around which EU trade policy revolved, ensuring favourable rules for the EU's large companies among its members, who themselves formed a network that spanned most of the world. When it became clear that old preferential agreements between the EU and former European colonies – also known as the Africa, Caribbean, Pacific countries (ACP) – were at odds with WTO rules, the EU set about reforming them. In order to enter into new WTO-compatible agreements with ACP countries, the EU had to demand easier access for its own products to the markets of the developing countries that were part of this group. It was not difficult for the EU to go down that road, as it was not them that would have to pay the price.

For ACP countries this was a losing proposition. Lower tariffs, for example, could hinder industrialisation by preventing developing countries from providing new industry with the protection against outside competition that may be needed to build it up in the first place, as so many highly industrialised countries had themselves done in the past.[3] It could also lead to large government deficits, especially in African countries where a large part of government revenue comes from tariffs on imports.

The termination of the old agreements in 2000 therefore marked the beginning of two decades of conflict between the EU and the ACP countries. In the period of 2017 to 2020 alone, the EU ended up in a stand-off with Cameroon, Tanzania, Nigeria, Burundi, Gambia and Mauritania. While the EU has maintained that the new agreements were also designed to promote regional integration, it has not shied away from trying to strike deals with individual countries – as it did in 2019 when Kenya made an agreement with the EU without regional partners – and thereby undermine regional unity, and potentially regional trade too.

The EU has even resorted to threats of trade sanctions to get its way. In 2013 it was agreed that 14 countries that had not signed various agreements by 1 October 2014 would be removed from the list of countries with easy access to the EU market.[4] Although the countries in question initially stepped in line, the conflicts continued. In 2017, for example, Burundi expressed fears that relaxed tariffs would start to drain their coffers. The response was a threat of trade sanctions.[5]

The EU had embarked on a major redefinition of its trade policy, and the impact was felt throughout the Global South. Apart from the clashes over bilateral trade relations (between the EU and a third party, a non-EU state or several non-EU states), it was not easy for the EU at the international level in the WTO either.

The proposal for additional rules that the EU put forward at the WTO in 1999 – a significantly more developed framework for investment and competition policy aimed at strengthening the operations of European companies across the globe – was not in the interest of many low- and middle-income countries. When the proposal was put forward at a WTO summit in Seattle, US, it failed to resonate with countries in the Global South, as the EU and US strategy was to try and push its ideas through and control the battle through divide-and-rule tactics. The US and EU established a leadership bunker at the summit – the so-called "green room" – where selected developing countries were invited in for tactical dialogue and political pressure, a method the two powers would use for years to come. However, their agenda and methods backfired on this occasion. The African group opted out of the negotiations altogether, and the Seattle summit ended in a resounding failure.

Conflict over the WTO's development split into two main camps. On one side there was the EU and the US, and on the other a broad coalition including India, Brazil, South Africa and other countries in the Global South. Disagreements were to continue for many years, and laid the foundations for the crisis in which the WTO finds itself today.

This, however, did not mean that the EU had abandoned the political agenda it had originally presented in Seattle, it simply meant that the focus shifted from the multilateral level to bilateral trade agreements. Presently, the EU therefore has to prioritise bilateral agreements, which have become the vehicle for its ambitions and agreements on new issues. Since 2000, agreements have been reached with 68 countries, in most of which the EU has tried, albeit with varying success, to secure agreements that were not possible in the WTO.[6]

ISDS – SPECIAL COURTS FOR BUSINESS INTERESTS

Controversy around the EU's new trade policy is not confined to agreements with lower income countries. In fact, the stiffest resistance that the Commission has encountered in recent years has been over trade negotiations with the United States and Canada.

Trade policy often affects domestic political matters on both sides of an agreement, even more so when dealing with trading powers at the same level of industrialisation, because the demands of the other party will be more politically ambitious, and could relate to issues such as the conditions faced by investors from the other party. This is less of an issue when dealing with African countries that have few large EU investors, but when it comes to high-income countries with numerous investments in the EU the consequences are more tangible, and they often cause greater concern among the general public. The most prominent examples of this public backlash were seen during negotiations on trade agreements with the US and Canada concerning the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic Trade Agreement (CETA), respectively.

Two elements of the TTIP proposal in particular provoked widespread uproar. The first was that of investment protection, as it sought to give the best possible protection to US investments in the EU and vice versa. The second was about how the two sides should deal with differences in approach to areas such as chemicals, pesticides and food.

Both parties went to great lengths to ensure investment protection. According to the draft agreements, both parties agreed that TTIP should allow companies to take direct legal action against states if they considered that either an existing law, or administrative or policy decision, worked against their interests in such a way that they could claim that they had not received "fair or equitable treatment."[7] Such a case could then be brought before a special international court – typically the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank – where three lawyers would decide whether the state in question should compensate the company. The three lawyers would only consider the case in light of the investment protection agreement, meaning national or European legislation would have no say in this context.

This model of dispute resolution – known as the Investor-State Dispute Settlement (ISDS) – was not tailor-made for TTIP. It featured in a wide range of previous bilateral trade agreements, notably between the US and third countries, but also between individual EU Member States and other countries, both within the EU and further afield. In addition, there are a number of international agreements on specific areas that hinge on ISDS. This is particularly the case for the Energy Charter Treaty, which covers energy investments and has the support of 51 countries.[8]

These agreements are full of vague wording, which entails considerable risk for the public interest that may contradict the interests of investors. Broadly formulated principles of "fair treatment" for investors leave a very wide margin of interpretation for the three lawyers in charge of a case, often leading to decisions that actually widen the scope of what these special courts can be used for. As a result, it is common for politicians to be surprised by a ruling, and many decisions over the years have been deemed highly controversial by parliaments and city councils.

Investment protection agreements such as those laid out in the TTIP draft aim to deter the elected assemblies of the member countries from adopting any measure that might harm foreign investors. The fines are designed to sting and to make policy makers think twice before making decisions that could affect the profits of foreign companies. One famous example is the case of an Australian mining company that had its application to expand operations in south-west Pakistan rejected in 2013. The company responded by filing a lawsuit against the Pakistani government, and in 2017 was able to collect damages to the tune of US$5.9 billion, an amount far in excess of their initial investment of US$150 million.[9]

The case is testimony to the fact that the aim of investment agreements is not only to compensate companies' original investments, but also the returns they expected to yield from it in the future. In this way they create a deterrent effect. Above all else, however, the threat of large fines provides an incentive to settle cases quickly, with as little financial damage as possible. This goes beyond finance, and can also involve massive political concessions.

This was the case in 2009 when a lawsuit between Swedish state-owned multinational power company Vattenfall and the German state ended in a settlement.[10] The subject of the dispute was new, stricter German rules on pollution from coal-fired power plants, areas of which Vattenfall took exception to, believing themselves unfairly burdened. A settlement was eventually reached, which included damages paid to Vattenfall and the introduction of special rules exempting Vattenfall's coal plants from the new rules in the future.

Investment agreements of this type – most of them are largely similar – have been used in countless cases as a powerful instrument by large corporations around the world. They are unpopular, but difficult to get rid of as they have high priority in the strategy of many transnational corporations.

INVESTMENT TREATIES IN TROUBLE

The ability of trade agreements with third countries to suddenly limit, or even prohibit, long standing domestic policy instruments can make them politically vulnerable. This was especially evident with agreements with ISDS, which had far-reaching consequences for investment protection. After the uproar surrounding TTIP, ISDS became something of a toxic subject in the EU institutions. It caused big problems for the CETA deal with Canada, and next in line for scrutiny was the Energy Charter Treaty, an energy investment protection agreement that has been used by oil and gas companies to defend their interests since its inception in 1991.

This agreement has been a powerful tool in holding back the development of alternative energy systems.[11] Indeed, it was this agreement that Vattenfall was able to use in 2009 to push back against tougher environmental requirements for coal plants in northern Germany, and that they also used to heavily criticise the

German decision to phase out nuclear power. The Energy Charter Treaty is now widely recognised as an obstacle to the green energy transition, and as matters currently stand the EU is therefore on its way out of the agreement altogether.

Supporters in the EU of far-reaching investment protection have since been faced with yet another issue, though it came from an unexpected source: the European Court of Justice. In a case brought before them in 2018, the Court struck down investment agreements between EU countries because they gave advantages to companies in some Member States and not to others. This decision, in turn, caused the end of dozens of other agreements, many of them concluded by the Netherlands or Germany, and which included other EU countries. The ruling triggered massive pressure from large sections of the business community to replace those agreements with an EU-wide regime that made use of ISDS and all it entails. As matters stand, however, the Commission is not prepared to take that step, allegedly because it could quickly backfire in the same way TTIP did. Instead, the Commission is provisionally exploring other options to offer greater "investment protection."[12]

The coalitions behind ISDS – made up of business lobby groups and EU Member State governments – have had to take several steps back in recent years, but it is unlikely to stay that way. The forward march of this very radical pro-business model of investment protection has temporarily been halted in the EU due to a series of cases that have shown it to be detrimental to environmental policies, social rights and democracy. This is, however, unlikely to be the end of ISDS. This type of investment protection has been a focal point for many industries since the early 1990s, and although it has suffered a string of defeats, it has always found a way to come back.

REGULATORY COOPERATION

The second element of the TTIP negotiations that caused difficulties for EU negotiators was standards, including for chemicals such as pesticides, food and genetically modified substances. This issue has led to many conflicts between the EU and the US in recent decades because, as a rule, the US regulates only when the authorities can definitively prove that a product is dangerous. Conversely, the EU's approach – though often only on paper – is that a company must prove that a substance is not harmful, and if scientific research does not provide a clear answer the product in question should be banned. The EU approach rests on a precautionary principle.

There is therefore a world of difference when it comes to regulating chemical substances on either side of the Atlantic. There is a much more relaxed approach to, for example, genetically modified organisms (GMOs) in the US than in the EU where food standards are also generally more restrictive, just as many pesticides banned in the EU are widely used in the US.

When TTIP was discussed in the US Congress, the understanding was that this particular area should be subject to greater harmonisation. It was hard to imagine EU negotiators getting away with making significant concessions to the US, as this would require immediate and perhaps drastic changes to EU law that would be very difficult to push through. However, thanks to documents leaked to CEO in December 2013, a picture began to emerge of the model being developed to find a solution for the negotiators. This model was called "regulatory cooperation."[13]

In short, regulatory cooperation involves an ongoing dialogue between at least two parties – in this case the EU and the US – on the development of regulatory frameworks for specific sectors of the economy. The aim is to ensure that the two sets of rules are not at odds with one another when it comes to trade policy. The aim is not necessarily cooperation in the form of harmonisation of rules, but simply to ensure that the rules do not constitute an obstacle to trade. There are many creative ways of avoiding conflict under this model, including preventing proposals from being put forward at all, and taking administrative decisions that do not need to be approved by an elected assembly.

BAD EXPERIENCES

The EU and the US had, in fact, already tested this model, albeit not with as broad a scope as proposed under TTIP. In 1998, the two sides signed an economic cooperation agreement called the Transatlantic Economic Partnership, in which regulatory cooperation played an important role. Under the umbrella of the Transatlantic Business Dialogue (TABD), large companies on both sides played an important role in setting up the various dialogue bodies that were established in six different areas.[14] The Transatlantic Economic Partnership dialogue bodies had no formal authority to effect regulatory change in principle, but as subsequent years would show, regulatory cooperation was definitely not just a toothless debate club.

There are five examples that can provide some insight into the phenomenon:[15]

ANIMAL TESTING

In 1993, an EU ban on cosmetic products tested on animals was ready for adoption. However, the ban only became a reality 15 years later, mainly due to pressure from the US through regulatory cooperation.

DATA SECURITY

In 2000, the EU and the US reached an agreement on data security called the Safe Harbour agreement, which was developed through regulatory cooperation. Although the European rules were stricter than the equivalent US rules, it was then up to US companies to decide how to ensure compliance with EU law. Despite the fact that this type of self-regulation was not popular in the EU and the Parliament viewed it negatively, the agreement ended up being adopted. It did not turn out all that well. Under the agreement, US companies were supposed to voluntarily ensure full respect for EU rules, especially those applying to data privacy, but in fact they largely ignored them. In 2015, the European Court of Justice ruled the Safe Harbour agreement illegal.

ELECTRONIC WASTE

In 2002, an EU directive on hazardous electronic waste was watered down as a direct consequence of regulatory cooperation with the US. It has been argued by a German researcher, Oliver Ziegler of the Freie Universität in Berlin, that the precautionary principle was disregarded on this occasion as the changes made it impossible for Member States to take action to ban a substance when it was deemed to be hazardous.[16]

INTERNATIONAL FINANCE REGULATIONS

In the context of the cooperation on financial regulation initiated in 2002, the parties agreed that the supervision of large financial houses with activities in the financial markets of the other side would not be subject to supervision by local authorities. Supervision was to be carried out only by each Member State's own authorities. This agreement had the worst possible outcome. When the financial crisis broke out around 2008, one of the financial institutions most in the spotlight was the US insurance giant AIG. The company had sold off enormous amounts of insurance products to support speculative investments in the housing market, and found itself in a very difficult situation at the time. Since the AIG subsidiary that was mainly responsible for these investments was based in London, it was not possible to get a full picture of the situation. On the European side, no one had a mandate to supervise, due to the agreement between the EU and the US, and on the US side, AIG's London subsidiary had not been a high priority for US financial regulators since it was located elsewhere in the world.

CLIMATE ACTION

In 2013, a European proposal to introduce climate action for air travel was heavily attacked by the US in the regulatory cooperation framework of the time. The EU decided to postpone an initiative to discuss the issue separately with the Americans. It took several years before the EU took up the initiative again internally.[17]

Regulatory cooperation – despite the absence of a real mandate to override the sovereignty of authorities – is a potentially powerful instrument, especially in Europe, where the Commission is the only institution that can present a proposal for adoption or decide not to do so. If those on the other side of trade talks manage to convince the Commission to drop a proposal, the decision cannot, in principle, be undone, so when it comes to detailed regulation on how to implement European rules, the Commission has extensive powers at its disposal.

TTIP: BIG BUSINESS AS CO-AUTHORS

The power of the Commission in this context can be illustrated with an example from 2012 – when TTIP negotiations were still in their early stages – concerning the cleaning of beef using lactic acid.[18] The practice was banned in the EU, not only because of potential health risks, but also because EU rules formally sought to produce meat with such a high level of animal welfare that chemical cleaning was not necessary. However, despite opposition from many Member States the Commission managed on its own to accommodate the US by forcing through a lifting of the ban.

With cases such as this in mind, it is no wonder that ambitiously pursuing a more elaborate and systematic regulatory cooperation between the EU and the US became one of the main priorities of the business community during TTIP negotiations. At a conference in Copenhagen organised by the Confederation of Danish Industry, Shaun Donnelly of the US Council for International Business announced that "TTIP is only worth dealing with if the regulatory side is covered, including the repeal of the precautionary principle." He was supported by Markus Beyrer, President of the European employers' organisation BusinessEurope, who said that "differences in regulation must be eliminated, not just existing differences.

We must also prevent new differences from arising."[19] Companies, especially, transnational ones, have an interest in setting uniform standards as it can minimise costs. And the lower those standards are, the better.

BusinessEurope in particular played a key role in developing a formula for enhanced regulatory cooperation between the two sides. Together with the US Chamber of Commerce, they drew up a detailed proposal for a cooperation model, the goal of which was for business to "co-write legislation."[20] To this end, they established procedures that ensured that business was involved early in the rule-making process, that there was always a screening of new rules for their impact on trade with the counterparty, and that business generally had "a formal and preferential consultative role."[21]

During a meeting in November 2012, the two business groups had the opportunity to present the proposal to the Commission, where it received a positive reception. Regarding the privileged and formal role of business, the Commission noted that this would probably be easier to establish if regulatory cooperation was organised into sectors, with separate dialogues on areas such as chemicals, financial regulation and food. The Commission also promised to work closely with BusinessEurope on the development of what the two business organisations described as a "game changer."[22]

In 2013, when it became clear that the TTIP negotiations involved discussion of enhanced regulatory cooperation, CEO began to investigate. A close examination of documents received in December 2013 showed that the Commission – hand in hand with the two major business organisations – was prepared to go a long way.

In these documents, the Commission proposed the creation of a permanent "Regulatory Cooperation Council" to ensure "regulatory convergence" between the EU and the US.[23] In addition, any new proposal would have to be examined for its impact on transatlantic trade in particular, meaning that new rules that did not comply with US food standards, for example, would face serious pushback at the initial stage – and may never get beyond that.

Moreover, it was suggested that both parties should be obligated to consult the other "before their co-legislators," ie. prior to the publication of new proposals, and that business groups should have the opportunity to respond well in advance of a proposal being tabled. Finally, EU institutions and the US would be obligated to monitor developments at all levels, which for the EU meant that the Commission would have to step up its monitoring of developments in the Member States to prevent inconsistencies with the objectives of the trade agreement. Finally, the parties were to ensure that "substantive joint submissions from EU and US stakeholders" would be considered, a reference to cooperation between business interest groups in different sectors.[24]

A TRANSNATIONAL COMMUNITY

As the negotiations progressed, other leaked documents revealed industry associations' plans for aligning regulations under the regulatory cooperation framework. The increasing demand for transparency also led to the publication of individual official documents, though often because those same documents had already been made available to the public by other means.

We can begin by looking at the long standing conflict between the EU and the US over chemicals. A 2013 paper[25] co-authored on this topic by the American and European chemical industries – the American Chemistry Council (ACC) and the European Chemical Industry Council (CEFIC) – with precise proposals on how regulatory cooperation on chemicals should work was received with a certain degree of disbelief among green think tanks. This was because it suggested enabling the other party to delay or dilute proposals to strengthen chemical regulation. In a report on the paper, environmental law specialists ClientEarth and the Centre for International Environmental Law wrote that "[t]hese proposals would delay the development of stronger rules for hazardous chemicals in the US and EU, and undermine democratic principles that underlie two of the world's largest economies."[26]

Similar events took place in the case of pesticides. An alliance between US CropLife and European ECPA had, according to ClientEarth, put the EU under pressure to "change its laws and policies to the lower standards of protection found in the US."[27] The potential loss was considerable: of the 374 active substances in pesticides approved for outdoor agricultural applications in the USA, there are 72 that are banned in the EU.[28] Still, in the case of both pesticides and chemicals, the business community's proposals were broadly accepted by the Commission.

The talks on Regulatory cooperation during the TTIP negotiations went two ways. They were not only focused on lowering European levels of protection to those of the US: the European side also, sometimes, took the offensive. This happened in finance when several major European banks did not like the US implementation of the new international banking rules on capital requirements (Deutsche Bank in particular was strongly opposed to having to operate in the US under US rules).

With the support of the US financial industry, the European banking community – led by the City of London – had been pushing for European banks operating in the US to be regulated solely under EU rules, and they made great political strides towards making this happen in the EU. In July 2014, CEO and the Dutch think tank SOMO got their hands on a Commission proposal that showed they were backing the ideas developed both by EU and US major financial institutions.[29] What was remarkable about this stream of proposals was that they were the result of collective contributions from big finance companies on both sides of the Atlantic. There was clearly a collective interest in deregulation, especially among companies with a strong presence in both the US and the EU.

NOT ONLY TTIP

By 2015, TTIP was in dire straits. On the European side, fierce criticism of the agreement – including from the Parliament that ultimately had to approve it – had drastically reduced the Commission's room for manoeuvre. Three million people had signed a petition against it, and tens of thousands had demonstrated in major cities. At the peak of the TTIP resistance in October 2015, 250,000 people protested on the streets of Berlin.

There were also conflicts between the parties that were never resolved. The EU had spearheaded calls for financial regulatory cooperation, but the US had turned it down. Conversely, the EU was not happy with some of the US proposals on chemicals and food. No progress was made in the negotiations from the end of 2015, and in 2016 they ended inconclusively. When Trump came to power in the US, bringing with him a very different view on trade agreements compared to most of his predecessors, TTIP was already a thing of the past. He definitively put TTIP to rest, but by that point most had long considered it dead.

This meant that the potentially most far-reaching trade deal the EU had ever negotiated was a closed chapter by the end of 2016. However, this does not mean that the EU has since abandoned the approach to trade policy that TTIP represented, as both regulatory cooperation and investment protection continue to be crucial tools in EU negotiations. One example where regulatory cooperation played an especially important role is the Comprehensive Economic and Trade Agreement (CETA), which the EU signed with Canada in 2014.

Although CETA was actually a predecessor to TTIP, with negotiations beginning in 2009, it only really entered public debate once the storm of protest against TTIP had begun in late 2013. At that time the agreement was already finalised and signed, and all that remained was the final approval of the Member States. What was supposed to be a done deal ended up becoming long and drawn-out, as several Member State governments came under intense public pressure for having signed an ISDS agreement.

At the time of writing CETA has not yet fully entered into law, but regulatory cooperation under the agreement was brought into force soon after it was passed. Even though there are fewer regulatory pitfalls than there are when dealing with the US, Canada too can represent a challenge for EU standards, and one possible outcome of such cooperation can be illustrated with a story about pesticides. EU requirements for pesticides are generally stricter than those in Canada and the US: there are twenty-three active substances in pesticides that are banned for use in the EU but allowed in Canada.[30] This stricter and more ambitious European regulation gives the EU what appears to be a global leadership role, but this it is not a stable position, because when pesticide regulation meets trade policy, the EU's handling of the phenomenon becomes curiously inconsistent. For example, the EU produces and exports around 81,000 tonnes of pesticides a year that are banned for use within its own borders, some of which then return in the form of residues in imported food.[31]

In and of itself, it is remarkable that the EU allows the production and the export of pesticides that are banned for domestic use. However, when it comes to the issue of pesticide residues, the issue becomes grotesque, as according to scientific studies, some pesticides are so dangerous that even the smallest residue in food can be harmful. For this reason, the Commission has long been pushing for rules banning products that may contain even the slightest amount of pesticide residue.

In March 2018, during a meeting of an EU-Canada regulatory cooperation body, the Canadians highlighted that the introduction of zero tolerance for certain pesticide residues would hit Canadian exports to the EU, whereupon EU representatives assured the Canadians that plans for tighter rules would be dropped. Soon after, the Commission made an official promise that zero tolerance was off the table.[32]

FINDING WAYS TO CIRCUMVENT OPPOSITION

TTIP's collapse did not lead to a change in the basic concepts of EU trade policy. Future trade agreements can be expected to have a similarly negative impact on the requirements that can be placed on companies at home, as well as the rules that can be set for the market. In some cases regulatory cooperation will be the preferred method for doing this, meaning trade officials' top priority when dealing with issues such as environmental regulation will be minimising disruption to international trade.

This occurs within an institutional framework that leaves plenty of room for big business. While there are companies from both the EU and Canada, they do not necessarily represent different interests. Quite the opposite in fact, as companies are often good at finding common interests and working towards them together. This is why, in the case of pesticides, it is difficult to see the differences in approach between European, American or Canadian producers. They are all working towards the common goal of minimising regulation across the board.

This also means that many trade agreements, typically those with high-income countries, will have a bigger and more profound impact on national or regional regulation than agreements with low-income countries. No one fears the influence of African countries on food standards or chemical regulation in the EU, meaning there is very little political attention paid to trade agreements with them. The political headwinds faced by CETA and TTIP, on the other hand, reflected their potential to impose extensive constraints in very specific areas. This is because trade policy with bigger economies – such as the US and Canada – has tangible implications in a range of areas, including health policy, consumer rights, and sometimes even social and trade union rights, potentially turning them into major political issues.

This effect on domestic regulation and domestic politics can make trade policy very controversial, with TTIP and CETA being the most prominent examples in recent history. Even though widespread outcry across the EU played a part in bringing down TTIP, there are clearly few signs of public opinion charting the course of EU trade policy in the longer term. Instead, it will simply lead to new strategies in order to meet the same objectives, as we can see in the EU Commission's antidote to the delays caused by public opposition to CETA.

The Commission had its work cut out as opposition to CETA began to set in. The issue stemmed from the fact that investment areas covered by the agreement were still considered a "shared competence," meaning parts of it were regulated on a national level. A unanimous verdict was therefore needed for the Council to approve CETA, so if only one Member State failed to approve it, then neither could the EU.

This issue came to the fore when the Belgian region of Wallonia refused to support an agreement that included ISDS, thus preventing Belgium – and by extension the EU itself – from giving the green light. This led the Commission to propose splitting CETA into two parts. The parts of CETA that are covered by the EU's exclusive competence were put into force immediately, whilst the parts that are not were postponed to a later date. This allowed the regulatory part of CETA to enter into force.

This trick was considered so successful that the Commission has expressed its preference to use it as a systematic approach in the future. This would allow opposition to any new agreements to be dealt with in stages, the first being a quick vote in the Council. This move was, naturally, met with some resistance among NGOs, which have criticised the impact of EU trade policy on the environment and social rights at home and abroad.[33]

The proposal is a sign that the Commission considers it necessary to push through agreements that may be unpopular. Many more agreements will follow in the coming years, including agreements with Mexico, Chile and Mercosur (Brazil, Uruguay, Paraguay, Argentina), and a new voting method may be resorted to again.

THE DANGERS OF EU TRADE POLICY

EU trade policy has always existed to serve the economic interests of big European companies. The aim of the European Commission and of Member State governments was a trade policy in line with the interests of transnational companies, which is one of the key tasks of any competition state. The secrecy, corporate capture, and single-minded pursuit of profit on behalf of business bear witness to a clear understanding of a simple task: to help businesses have it their way on the global trade scene.

In the current historical context, this puts trade policy at odds with environmental policies, consumer safety, public health, and social rights, making it a profoundly undemocratic force in two senses. First among these is the absence of public input in the way trade agreements are prepared and negotiated: negotiations happen behind closed doors among representatives of big companies, governments and the European Commission. The second is its broader impact on democracy itself, because over time trade agreements have increasingly eroded or encroached on democratic rights, as our look at investment agreements and regulatory cooperation has shown.

The democratic deficit of the European Union is compounded by the fact that trade agreements increasingly constrain local, national and European decision-making.

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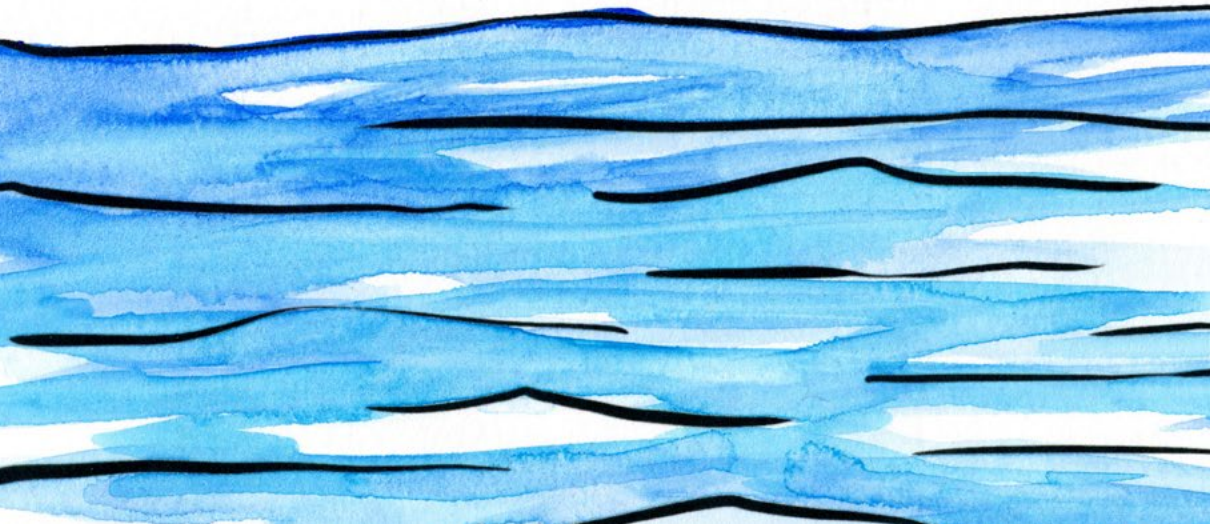
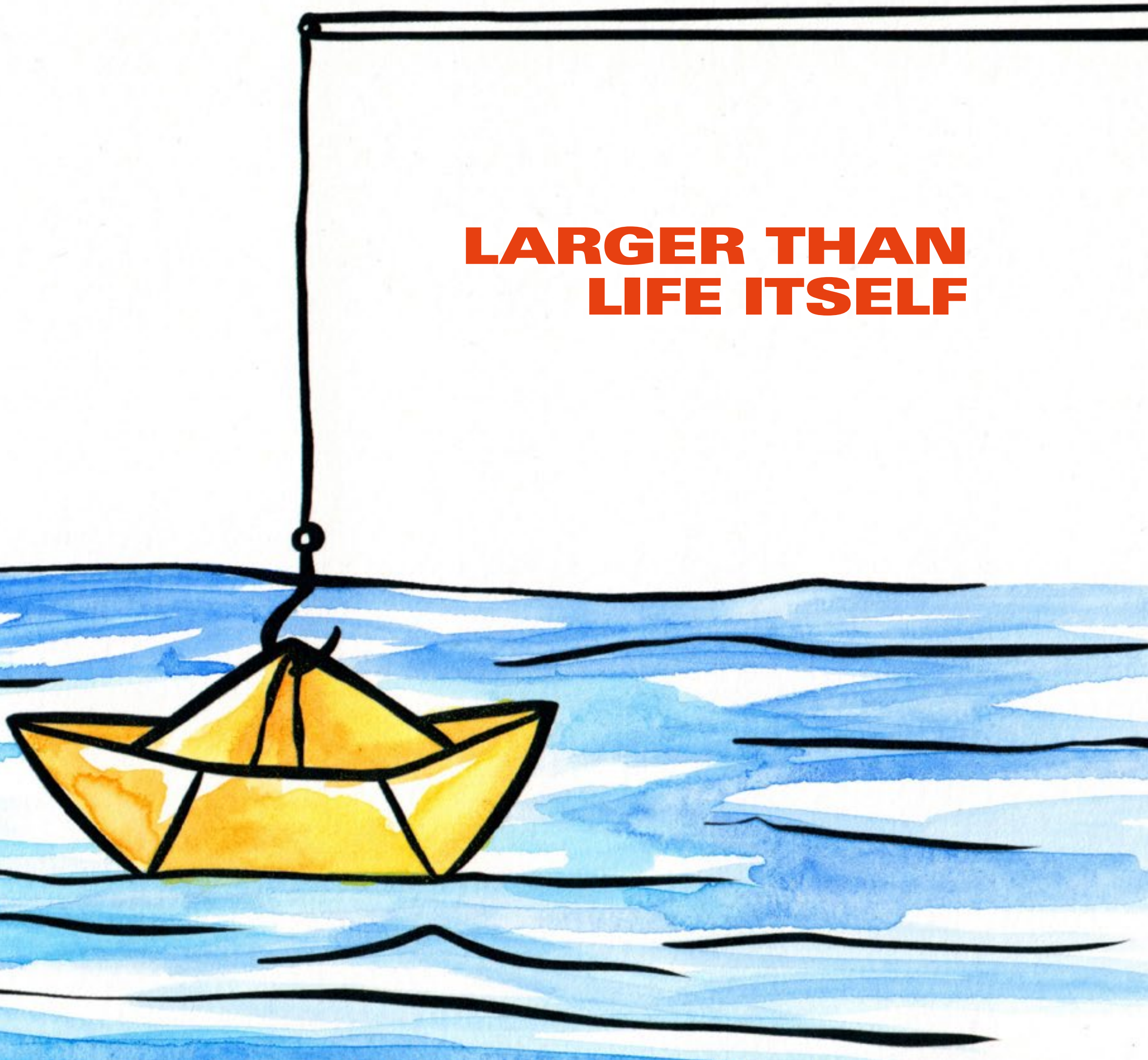


LARGER THAN LIFE ITSELF



The COVID-19 pandemic had been raging for a few months when leaders from around the world gathered for a meeting at the World Health Organization (WHO) on 24 April 2020. Safety restrictions meant that the meeting had to be conducted online, but the pandemic had created an urgency for the world's nations to agree on a strategy to combat the virus, including how best to support each other in obtaining the necessary vaccines.

Representing the EU, Commission President Ursula von der Leyen delivered one of the most remarkable speeches during said meeting. Her speech left no doubt that EU leaders considered international cooperation essential in their efforts to tackle the crisis. The urgency of the situation demanded an immediate response and left no room for petty nationalism and self-sufficiency. We were all in the same boat and had to face big challenges together. This was particularly true for the development and distribution of vaccines. Ursula von der Leyen's call for a global solution was unmistakable:

"We need to develop a vaccine. We need to produce it and to deploy it to every single corner of the world. And make it available at affordable prices. This vaccine will be our common universal good. [...] The European Union will spare no effort to help the world come together against coronavirus. Because united we will make history with a global response to the global pandemic."[1]

It was a remarkable statement. Difficult to believe for anyone familiar with the territory, with the EU's historical role in the area of patents on pharmaceutical products. The Commission President spoke in favour of the development and production of a vaccine, understood as a common good within the framework of a non-commercial project. Surely that meant that the patents of the pharmaceutical industry, and of intellectual property more broadly, would not be allowed to stand in the way of the common global response to the pandemic. Did this mean that we would not be seeing the EU let Big Pharma turn the pandemic into a for-profit venture?

That there was substance to her bold statements seemed to be confirmed two months later when the Council and the Commission signed an agreement on the principles that would guide forthcoming negotiations with the pharmaceutical industry on the joint EU procurement of vaccines. The agreement stated that "the Commission will promote a Covid-19 vaccine as a global public good. This promotion will include access for low- and middle-income countries to these vaccines in sufficient quantity and at low prices. The Commission will seek to promote related questions with the pharmaceutical industry regarding intellectual property sharing, especially when such IP has been developed with public support."[2]

Considering the free rein awarded to other epidemics in recent decades in the narrow economic interests of certain countries and corporations – and keeping the EU's role in the same epidemics in mind – this agreement marked a complete change of tune. It had to be interpreted as European support for at least a temporary farewell to the intellectual property rights regime that had posed a recurring threat to global public health since 1994, when trade agreements leading to the formation of the World Trade Organisation (WTO) were concluded. It sounded like a fundamental reckoning with the way the EU had handled patents on medicinal products during the same period.

The fact is, the EU has acted fully in line with its function as a competition state in the area of medicinal patents since it was founded in 1993. In this age of globalisation, the EU needs to secure technological market advantages for businesses. Companies do not necessarily have to develop the technology themselves, but they must secure a market monopoly through intellectual property rules, even if there is a significant element of government support for the development of the technology from which they will profit.

Protecting intellectual property rights is not necessarily about supporting innovation. After all, innovation moves faster if patent rules do not slow down the process of technology sharing. In the EU, though, intellectual property rights have a very high standing and are seen as a self-evident necessity to secure the regional and global interests of the pharmaceutical industry.

The EU has arguably the world's strictest intellectual property rules, especially when it comes to medicine, and neither the Commission nor member state governments rarely ever stop to think if this serves the public interest. Their thinking strictly follows the mission of a genuine competition state, with competitiveness as the highest possible goal, and protection of technological innovation – real or perceived – being crucial.

Therefore, in recent decades, the EU and the US have gone to extremes to defend their monopoly on technology, even against the backdrop of life-threatening epidemics. However, for a brief moment in 2020, it seemed that there had been a change of course, a much-needed change of course.

THE EU SIDES WITH BIG PHARMA IN THE AIDS CRISIS

Conflicts between intellectual property laws and public health have plagued international trade policy since the 1980s. Back then, the US and its closest European allies worked to secure a genuine international agreement on intellectual property during the preparation of the WTO agreements, which would later form the basis of the organisation of the same name, but encountered a number of obstacles along the way.

Many countries in the South expressed no interest in the agreement on intellectual property, and India, in particular, resisted the endeavour. Indeed, India had made a virtue of national regulations that gave considerable leeway to imitate inventions from other parts of the world, including medicine. This had allowed the country to build an impressive pharmaceutical industry, and India came to be referred to as the "pharmacy of the developing world," as Indian pharmaceuticals were far cheaper than their American or European counterparts.

For this reason, India opposed the draft agreement put forward by the US and its European allies, in effect written by the US pharmaceutical industry's umbrella organisation PhRMA, and was met with a concrete threat.[3] If India did not accept the draft, the US would impose tough trade sanctions on the country. India relented and accepted the WTO agreement on intellectual property, the so-called Trade Related Intellectual Property Rights agreement (TRIPS). However, the final word had not been said, and several clashes were yet to happen.

The turmoil began a few years after the WTO agreements came into force in 1995. The reason was that, by this time, the AIDS epidemic had spread in many low-income countries, particularly in Africa. Then, in the latter half of the 1990s, the epidemic exploded, and by the end of 2001, the vast majority of AIDS patients were in sub-Saharan Africa: 28.5 million out of a total of 40 million worldwide.[4] This had become a critical location for a major epidemic, and with a very weak pharmaceutical industry, Africans were fully dependent on their ability to import vital medicines.

However, TRIPS rules under the WTO stood in the way, which became apparent when the South African government under Nelson Mandela decided to make way for imports from India of cheap HIV and AIDS drugs produced by the "generic industry," that is, by companies that have only provided a small part of the technology behind the final product. The pharmaceutical industry, represented by 39 major companies, promptly sued the South African government in an attempt to block this remedy. Importing cheap versions of drugs from Indian pharmaceutical companies would violate their patent rights and contravene the international agreement in force. The case led to the rise of a global movement that attacked the pharmaceutical industry for its overt cynicism.

The controversy was quickly elevated to the international level, reinforcing many countries' dissatisfaction with the WTO. Now, these countries were demanding action. On the surface, it seemed that both the US and the EU were accommodating and willing to yield. However, behind closed doors, tough negotiations took place, down to individual terms and phrases in the wording of their response. They continued until 2003, when the final agreement was reached.

In the future, imports of generic medicines from other countries, including India, would be explicitly allowed. Imports would be facilitated through so-called "compulsory licences," which under some circumstances would have to be negotiated with the companies concerned, in order to ensure appropriate compensation. In other scenarios a number of legal obstacles make compulsory licensing very slow and difficult. As mentioned by Doctors Without Borders in a briefing:

"Compulsory licensing only provides a remedy after patent barriers on individual medical products have been established, blocking production and supply."[5]

Those barriers were not removed at the time. In fact, the whole debate and the end result did very little to alleviate the burden on African countries, as concluded by an investigation commissioned by the United Nations Development Programme in 2007.[6]

DATA EXCLUSIVITY: AN EXTRA LAYER OF PROTECTION ON PATENTS

Though the concessions on intellectual property during the peak of the AIDS epidemic were minimal, as compulsory licensing proved ineffective, the EU proceeded to try to protect patents even more. During this period, the EU began to emerge as a new economic power and made determined efforts to make it difficult to use compulsory licences at all. Throughout negotiations, the EU concentrated its efforts around the right to test results, so-called data exclusivity, which reflected the interest of the European pharmaceutical industry by making it impossible for companies to see or use test results of other companies' preparations during authorisation procedures by national authorities.

Any product of this kind must be reviewed by the authorities to ensure that it has been sufficiently tested and examined to be suitable for use. Moreover, producing this documentation entails significant costs. Since most generic companies do not have the apparatus or resources to conduct the extensive testing required to get a new drug approved, this stance was a quiet way to undermine access to compulsory licensing.[7]

However, this did not work out as the EU had hoped and data exclusivity did not become part of the WTO rulebook on this occasion. As it turned out, there were so many obstacles to making compulsory licensing work – as a means of fighting a horrifically deadly epidemic – that the EU's attempt to place restrictions on the compulsory licensing model was unnecessary. In the end, it never became the break in the monopoly that many had hoped for, even with data exclusivity left out of the text.

As the saying goes, however, more wants more, and the EU continued its stubborn fight for rules that went further than the TRIPS rules under the WTO: the so-called "TRIPS Plus" rules. This was done through other trade policy activities and negotiations on agreements with individual countries and regions. In negotiations to conclude a partnership agreement with countries close to the EU, data exclusivity was consistently on the list of minimum requirements.

In agreements with Albania, Serbia, Kosovo, Bosnia and Herzegovina, Georgia, Moldova, Ukraine and Turkey, all countries accepted, albeit in some cases very reluctantly, an approach that closed the door to cheap products for a number of years. The EU has also brought the pharmaceutical industry's wish list to negotiations on bilateral trade agreements with Colombia, Peru, South Korea, Japan, Singapore, and Canada.

Even some of the world's poorest countries have ended up granting European pharmaceutical companies monopolies beyond the level of the TRIPS agreement. This happened, for example, with the Central American countries of Costa Rica, Panama, Nicaragua, El Salvador, Honduras and Guatemala, which were persuaded by both the US and the EU to accept five-year data protection for medicinal products.[8]

There have also been setbacks to the EU's successful crusade to defend monopolies by pharmaceutical companies. During negotiations with Brazil, Argentina, Uruguay and Paraguay – the so-called Mercosur agreement – the EU pushed for a tight block on generic medicines, but had to give up. When it came to negotiations with India, the country and its government were naturally on guard. In countries as far away as Cambodia, demonstrations took place against the European demands on India because they could have led to increased prices for medicines in poor countries, which still benefited from production on the subcontinent.[9] In 2011, Indians unequivocally said no, which, along with other disagreements, led to the negotiations being put on hold.

A GLOBAL CONTRADICTION

In this way, the EU has gone from one fight over pharmaceutical product patents to the other, doing its utmost to curb global generic production. Over the years, the Commission staff running the negotiations have consistently acted on the suggestions of the Brussels-based trade association and lobbying organisation, European Federation of Pharmaceutical Industries and Associations (EFPIA). This approach has been supported by most Member States throughout the process, and it is precisely the reason why Ursula von der Leyen's statements in April 2020 had such a surprising effect on those of us who have been following developments in this area for many years. The very notion that a vaccine should now be considered a common universal good seemed like a decisive break with an era when intellectual property was worth more than life itself.

However, words are one thing, and political reality is another. In October 2020, India and South Africa raised the issue in a WTO context, and the EU moved quickly to pull the plug on the initiative. India and South Africa proposed a temporary waiver of global intellectual property rules for vaccines, medicines and testing devices relevant to COVID-19 in three areas of importance: patents, trade secrets and industrial design. The aim was to make it possible for manufacturers other than the patent holders to produce essential goods.

Thanks to generous government support, there were many promising vaccine candidates at the time. However, there was no finished product yet. The willingness of Member States to throw money at vaccine development might suggest that it was seen as an opportunity to create a common good rather than a profitable venture.

The reality was different, however, and things progressed quickly. The Commission took the lead in negotiating with the relevant pharmaceutical companies for substantial vaccine purchases that would make the pharmaceutical companies huge profits. These negotiations were politically controversial from the outset as they were conducted behind closed doors. Furthermore, the contracts were published only many months later, and only partially. Examining them, it appeared that the purchase agreements were concluded without the technology sharing clauses that were in the agreement between the Commission and the Member States. With its considerable purchasing power, the EU had a real opportunity to make vaccines a common universal good. Yet, that never happened.

Around the turn of the year 2021, the first vaccines were approved in many parts of the world, including the EU, and the question of who would have access to vaccines and who would not began to loom large. It quickly became clear who had the advantage: countries that had signed early purchase agreements with a few pharmaceutical companies, most prominently AstraZeneca, Moderna and the two collaborating companies, Pfizer and BioNTech. Not surprisingly, it was mainly rich areas of the world that fared the best. In the case of the EU, its strong position was achieved by hoarding vaccines and contracts for doses that have, so far, greatly exceeded the actual need.

FAILED CHARITY

This so-called "vaccine nationalism" was a sign that something was very wrong, and the sight of rich countries feathering their own nests without a second thought caused an uproar and disgust. Much could have been gained by ensuring that vaccines were distributed more fairly, but there was even more to gain by ensuring that more vaccines were produced in the first place. In fact, this was the rationale behind the call for a temporary infringement of patent rights and technology sharing.

The need was obvious. In April 2021, a Bloomberg team estimated that only three out of 54 African countries had vaccinated 1% of their population, and that throughout most of Africa, widespread vaccination would not even be possible until 2023.[10] In December 2021, the vaccination rate across the African continent was 9%. It was a slow process, and slowness allows for the emergence of new variants, such as Omicron, which caused the third wave in late 2021, and which allegedly originated in South Africa.

Many had already predicted the global imbalance that became apparent in early 2021. This is why India and South Africa raised the issue of patent rights with a proposal to the WTO in October 2020, and why a number of countries, including Norway, Costa Rica and Portugal, launched an initiative under the WHO in April 2020 (C-TAP) to ensure that technology, medicines and knowledge on vaccine production would be shared.

However, a significantly more powerful group of countries allied with circles in the UN system, and a number of charitable foundations led by Bill Gates – a man who had used intellectual property rules to create a fortune and a monopoly – had something entirely different in mind. Their response to the supply crisis was international charity while fully respecting intellectual property rights. Countries with surpluses of vaccines were asked to donate through the so-called COVAX programme, which would ensure distribution of the vaccines to countries in need. This move towards a charity-based system was a countermove; instead of tweaking the global intellectual property rights regime, governments should opt for charity. That was the implicit message from COVAX.

The focal point of the COVAX vaccine distribution programme was the Astra-Zeneca vaccine, which had the distinction of being developed by scientists at Oxford University, not by AstraZeneca itself. The story about how this vaccine came to be charity vaccine number one and most favoured by the COVAX programme features Bill Gates as a protagonist.

Among the scientists at Oxford University that developed the AstraZeneca vaccine, the idea prevailed that the vaccine should be made freely available. However, in September 2020, when the details on prices and distribution were to be agreed, someone had a different plan in mind. In a process, the details of which are not publicly known, the university was reportedly encouraged or pressured by the Bill & Melinda Gates Foundation to change course. While the vaccine would be sold at a low price to countries in the Global South, at least until July 2021, it would be covered by patents just like the other vaccines.[11] This would eventually turn out to be a big problem.

Thanks in no small part to the Bill and Melinda Gates Foundation, the vaccine became the main vaccine for the COVAX programme. However, AstraZeneca itself had limited production capacity, so if the vaccines were to be distributed in sufficient doses, capacity had to be found elsewhere.

This is precisely where AstraZeneca's terms were restrictive. Only a few companies were chosen to produce for the global pool of charity vaccines, probably as a sign that AstraZeneca was cautious about not having too many companies involved, which in turn could have put its intellectual property rights at risk. It was better to bet on a few, and hope they could deliver. That turned out to be a losing bet, though.

One of such potential partners stood out: the Serum Institute of India. To Bill Gates and the rest of COVAX, getting the Serum Institute of India to supply vaccines to African countries proved more difficult than originally anticipated. This was in part because the EU insisted that some production in India be sent to the EU to fulfil the purchase agreement AstraZeneca had signed. Furthermore, the Indian government banned the export of the vaccines when the epidemic suddenly spread at lightning speed across the vast country. This was a ban that stretched well into 2021 and meant that the COVAX target of vaccinating 20% of the population in low- and middle-income countries was not met.

Picking only a few companies, and first and foremost the Serum Institute of India, as suppliers seemed to backfire. Given the situation, it was striking that there was such a large capacity for production that was not being utilised. The capacity was in fact there, as we shall see, except that it was represented by companies without patents. For that, the low price of the AstraZeneca vaccine was of little consequence for the Global South. Vaccines were scarce, and would be for a long time.

INTELLECTUAL PROPERTY RIGHTS PREVENT PRODUCTION

Many pharmaceutical companies came forward at an early stage to assist in the production of vaccines and medicines, for example, as part of the WHO's C-TAP initiative, to which 21 companies from around the globe volunteered to contribute. Specific offers and plans were also presented by pharmaceutical companies in Canada, Bangladesh, Denmark and Israel, however, they never materialised. One major issue was that the companies that owned the vaccines were not willing to cooperate to enable other pharmaceutical companies to produce them.

Had there been backing in the WTO to secure a legal basis for technology sharing, this situation would hardly have continued. European governments and the US government could have intervened to secure technology sharing and provide the backing for more production. Instead we saw governments in the Global South, as well as COVAX itself, at the mercy of Big Pharma, the patent holders.

In February 2021, Nicole Lurie of the centrally located Coalition for Epidemic Preparedness Initiatives (CEPI), which is part of COVAX, stated: "There is production capacity that is not being used at the moment. The companies that have vaccines are very reluctant to establish partnerships, especially with companies in developing nations."[12]

Thus, vaccine manufacturers were not interested in sharing the recipe, and vaccine manufacturers relying on so-called mRNA technology were particularly hard to reach. This presented a problem because, according to the humanitarian organisation Doctors Without Borders, mRNA is not only relatively easy to produce, it is also easy to adjust to cover new variants of the virus unlike, for example, the more traditional AstraZeneca vaccine.

The criticism highlighted the monopoly on technology and the intellectual property rules on which vaccine manufacturers could rely. It was in a sense a monopoly gifted by governments in the North to manufacturers, in that the vaccines were not developed at the manufacturers' own expense. In total, around €80 billion in state aid was given for the purpose of vaccine development. There was such massive state support from various sources, including the UK, the US and the EU that, in principle, the manufacturers could not, strictly speaking, claim any special right to the technology.

STATE-AID AND BIG PROFITS

Thus, there was a clear mismatch between the size of the companies' investment and the rights they claimed. For example, Pfizer-BioNTech received more than €400 million from the German government for development alone. This is an amount, according to their annual accounts, equivalent to about half of the total cost of developing the vaccine,[13] and which, according to one estimate, takes them only 48 hours to earn.[14] No less glaring is the example of the AstraZeneca vaccine, the research and development of which happened to be 97% publicly funded.

Moreover, due to their monopolistic privileges, the companies were in a position to set the price. In the contract setting out the terms of AstraZeneca's collaboration with Oxford University, the former did agree that the sale would not involve any profit, yet the agreement was broken in July 2021. There was no such clause for the Pfizer-BioNTech vaccine, which sold for between €14 and €18 per dose in 2021, but for which Pfizer states that the normal price would be around €140.[15] According to Oxfam, the three companies Pfizer, BioNTech and Moderna earned a total of approximately €30 billion from the vaccines in 2021 (up to November), corresponding to approximately €88 million a day.[16] In 2022, things certainly did not get any worse for vaccine owners. Pfizer-BioNtech's revenues on the vaccine amounted to €52 billion while Moderna generated a turnover of €17 billion.[17] This leaves those companies with a profit that makes the cost of development look like sheer pennies.

Given the exceptional circumstances, there were ample arguments for suspending international intellectual property rules in relevant areas, thereby taking the first step towards technology sharing. This is another reason why the position presented by von der Leyen and the Commission in April 2020 was so important. However, six months later, when South Africa and India put a concrete proposal on the table in the WTO, the reality was very different.

There were, in particular, two main arguments against moving towards technology sharing. On the one hand, it was argued that full respect for intellectual property rules was a precondition for vital innovation in the future – otherwise, companies would not make the necessary investments. This argument sounded hollow in light of the massive state aid at stake. In addition, it was argued that low production really came down to practical supply chain issues, which would not be solved by opening the door to new manufacturers.

No evidence of this claim was ever made public, but a document made available to CEO by the Commission, based on a request for access to documents, points to supply problems with fairly mundane items such as filters, disposable bags, and test tubes, all of which are items that many companies around the world have their own channels for sourcing.[18]

AN ADMINISTRATIVE DECISION ON THE SINGLE MOST IMPORTANT THING IN THE WORLD

Despite all the good arguments presented, the EU's attitude towards technology sharing was entirely negative from the moment in October 2020 when it was raised in the WTO by India and South Africa. The EU negotiators made their position very clear in what can be described as a turnabout from Ursula von der Leyen's tangible statements made in April, just a few months earlier. The question for us, representing CEO, was what had really happened in the meantime? How had the EU gone from talking about a common global good to blindly insisting on patent rules?

We started looking for the answer in February 2021, and it took us a couple of months to find what we were looking for. It appeared that the issue had not even been discussed at the ministerial level in the Council. This left us with two possibilities: either the Commission had taken care of the matter itself and did not bother to discuss it with anyone, or the Commission had discussed the matter with Member State officials in the Council's Trade Policy Committee.

This kind of information is not necessarily made public, so it was only when we managed to get hold of confidential documents from the German Bundestag that a clearer picture began to emerge. On 8 January 2021, the matter was discussed at a meeting where none of the Member States' representatives had opposed the Commission's position, meaning that the derogation from the patent rules would not benefit from EU support. The discussion instead focused on how to better sell this position to the public. The representatives of Germany, the Netherlands, Italy, France, Sweden, and Denmark all shared this concern.

The issue was raised again at several meetings over the coming months, although a proper discussion of the substance of the issue never took place. The overall lines enjoyed broad consensus in that the parties agreed that this was a matter of defending intellectual property.[19] All things considered, this did not come as a surprise since this committee is made up of trade policy officials with a rather simple mandate: to defend the interests of European companies in global trade.

In this way, one of the most important political issues of the day revolved around the business of officials who, behind closed doors, were more concerned with whether the official EU position was being sold well enough than whether there might be opportunities to derogate from existing patent rules. The ministers only came on board when an unexpected policy change in the US cast the EU in a bad light.

On 3 May 2021, U.S. Secretary of Commerce Katherine Tai wrote the following statement: "The Administration is a strong supporter of intellectual property rights, but in order to bring the pandemic to an end, we support an override of that type of protection for COVID 19 vaccines [...]. This is a global health crisis, and the extraordinary circumstances require extraordinary action."[20 21]

EU GOVERNMENTS FEIGN OPENNESS TO WAIVER

The US announcement confused and exasperated EU decision-makers in the field. According to minutes written by the German delegation, critical remarks in the Trade Policy Committee concerned the US government's unilateral move. While EU officials were aware that it was the EU that was the most dismissive of the idea of derogating from existing patent rules, the perception – as recent as 29 April, a week before the US announcement – was that "Australia and the US [had] moved closer to the EU's sceptical position."[22]

However, in the case of the US, they got it wrong. Not only were EU officials taken by surprise, so were the Commission and the heads of state and government. It seemed as if an ancient musketeer's oath had been broken, and the EU now emerged as the only significant obstacle to opening a new chapter in the fight against pandemics. Egos were apparently so bruised that in the days following the Biden administration's announcement, many felt the need to cover their tracks and try to save face.

Just two days after the announcement, the President of the Commission and many heads of government expressed their willingness to discuss new options and immediately found the proposal to suspend patent rules both interesting and exciting. "The EU is also ready to discuss any proposals that address the crisis in an effective and pragmatic manner [...]. That is why we are ready to discuss how the US proposal for a suspension of intellectual property rules on COVID-19 vaccines can help achieve that goal," von der Leyen said without disclosing too much.[23] Despite the EU's efforts to avoid substantive negotiation in the WTO, with the recent US announcement, there was no way around it now.

By this time, a large network of organisations from across Europe was campaigning for a relaxation of patent rules – both globally and in the EU. Doctors Without Borders, Amnesty International and many others welcomed the news from the US. Their best hope was that it would lead to an open political debate in the EU, as well as a new position on patent rules.

Yet, there was no real open political debate before a decision was taken. The discussion among Member States took place at a meeting of EU Foreign Ministers on 20 May, but details about the talks did not reach the public until several weeks later. The public agenda of the meeting made no mention of international negotiations, nor did the public announcement of the decisions made during the meeting address the issue at hand.

The only discussion of the matter at ministerial level was thus kept a secret. This was a clear example of the status that industry "competitiveness" typically enjoys. It was such a natural starting point in this process that the case was dealt with predominantly by trade officials, yet another example of how a democratic deficit can arise from a one-track focus on business interests.

It is undeniable that governments benefited from the obvious bureaucratisation of the entire process. As far as the public knew, ministers and representatives from a wide range of governments – including Ireland, Greece, Belgium, Spain, the Netherlands, Poland and Italy – had spoken out in favour of suspending the patent rules. Only Germany, led by Chancellor Merkel, was quick to dismiss the idea, while French President Macron was in favour of a suspension at first but then resolutely joined the German minority position.

Looking at the media, it seemed there was openness. However, it turns out that what was said at the Council of Ministers meeting was not always in line with the public statements being made. In the end, it was not particularly difficult to come to an agreement in the Council. While many governments had seemed sympathetic to technology sharing and to the waiver proposed in the WTO, in the secrecy of the EU Council of Ministers, the tone was different in several cases. At this meeting, only France, Hungary, and Spain wanted to support a temporary derogation from the rules, while the majority, including Germany, Denmark, Sweden, the Netherlands, the Czech Republic, Estonia, Ireland, and Italy, all agreed that the cause of the actual problem was anything but intellectual property rights.[24]

THE EU'S FINAL BATTLE AGAINST THE WAIVER

Thus, the Commission got the ministers' support in May 2021 for a rejection of the South African and Indian proposals, with the added small nuance that the EU was now ready to negotiate. It was clear from the beginning, however, that willingness to negotiate was not the same as willingness to concede on the substance of the matter. At no point did the EU come close to accepting any suspension of intellectual property rights that Big Pharma companies would not agree to. In fact, they only went to the negotiating table with the goal of making compulsory licensing the focal point of any relaxation of the rules. This was a path that Doctors Without Borders and many others believed would lead to a deal of little significance, given that compulsory licensing had proved to be a slow process during the worst years of the AIDS epidemic.

The EU came to play a crucial role in the negotiations in the WTO, as US support for a temporary suspension of patent rules on vaccines did not reflect an active interest on the part of the Biden administration. After the landmark announcement in May 2021, the US did little, or rather nothing at all, within the WTO to build momentum. The EU, on the other hand, was presumably concerned with saving face and trying to find a way out of the international isolation that the US position had put the EU in. Documents obtained by CEO, including minutes of the Trade Policy Committee meetings, show the EU's eagerness to get India and South Africa to lower their ambitions. Interestingly, when India was at its toughest, the EU concentrated on South Africa in its diplomatic efforts.[25]

In March 2022, India, South Africa, the EU, and the US, presented a joint proposal, which bore no resemblance to India's and South Africa's original proposals. EU representatives, on the other hand, were likely pleased. At a WTO summit held in June 2022, two and a half years after the outbreak of the pandemic, the proposal was finally adopted. In the end, a minimal and temporary adjustment of the rules for exporting vaccines produced on a compulsory licence was made. In fact, the reform was so minimal that its impact would hardly be felt.[26] Moreover, it came so late that a lot of precious time had already been lost – not to mention lives.

STRONG PHARMACEUTICAL TIES

All this makes the tone set in April 2020 by the European Commission look like window dressing. In the end, the EU acted as usual on the international stage, putting the interests of the pharmaceutical industry above public health. What then can explain the statements about vaccines as a common good made by von der Leyen in international meetings throughout 2021, meetings in which the Commission did its utmost to minimise concessions to a group of the nearly 160 WTO member countries that supported a temporary waiver of patent rules?

This is the side of the European Commission that reflects reality. In the Commission, there are primary and secondary tasks, and competitiveness of enterprises is a highly prioritised primary task. As it turns out, this priority ended up being decisive in this case. As Belgian MEP, Marc Botenga, noted on Twitter in response to the proceedings: "There is something very fundamental about the structure of the EU: the main purpose is to promote the interests of private companies, to fight for their interests globally. This means that there is a red line that runs through any policy: it must not damage what they refer to as 'competitiveness', which means shareholder returns, and the position of multinationals on a global scale."[27] Thus, with the backing of a large majority of Member States, the vaccines were treated as a formality to be handled through trade policy channels by Commission officials without any actual political discussions being conducted.

At the suggestion of Doctors Without Borders' Brussels office, CEO set out to investigate who had met with the Commission on matters relating to the production and distribution of COVID-19 vaccines and medicines during the period between March 2020 – the onset of the pandemic in Europe – and March 2021. Doctors Without Borders itself had tried to schedule a meeting between one of the executive international managers of its own organisation and the Commission, however the request for a meeting was rejected.

Their impression was that the Commission had been stuck in an echo chamber, where only views that coincided with those of the pharmaceutical industry were heard. This was an impression that our own study would later confirm to be the case. It turned out that since the early days of the pandemic, EU Commissioners and their senior officials had met with representatives of individual pharmaceutical companies 44 times and with their associations as many as 117 times. In contrast, the Commission and their cabinets – in other words, the officials closest to the Commissioners – had only met once with an organisation that viewed the patent issue differently from the pharmaceutical industry.[28] It was not until much later that the Commission began to meet with Doctors Without Borders as well.[29] The EU's position, however, was all the while categorically clear and irreversible.

"OUR" INVESTMENTS, "OUR" INVENTION

Listening to this story according to those working directly for the competitiveness of European companies, it sounds as if the EU had won a global competition of sorts. With BioNTech's leading role in the Pfizer vaccine, AstraZeneca, and Johnson & Johnson, the EU had come out on top of the world. In February 2021, with the main vaccines approved and roll-out well underway, Thierry Breton, Commissioner and Head of the Commission Task Force on COVID-19, stated:

"Nine months. That is how long it took to develop a vaccine against the virus, where five to ten years are generally required. The first licensed vaccine was invented by European teams. The mRNA technology is a pure product of European research. We have won the battle of science. We should be very proud of that. The upcoming battle now is the battle of industrial production."[30]

For Breton, it seemed that the road to vaccines was a kind of first-come, first-served competition. "Winning" was a sign of research superiority, he thought; now it was time to show superiority as a manufacturer as well. How did the EU win this "competition," then? Breton emphasises investment in innovation, but neither patents nor, more broadly, intellectual property. "Vaccines are the most visible part of our investment in innovation. Investing in innovation means investing in the future and in our ability to be at the technological forefront, always, and in a situation of non-dependence. This is why Horizon Europe, the world's most ambitious research programme, is so crucial, with 95 billion euros over 7 years. Europe, and first and foremost our industry, showed agility and flexibility at the beginning of the health crisis."[31]

Breton must be understood to be hailing European investment in innovation as the fundamental reason why we were able to put vaccines on the market so quickly. However, he did not specify how the investments were made or by whom. It also remains unclear in his speech what role the two EU research programmes Horizon 2020 (2014-2020) and Horizon Europe (2021-2024) played.

The Commission's own breakdown of the €350 million from the Horizon programmes that went to vaccine development shows that the money mainly funded 18 smaller research programmes, including the international organisation Coalition for Epidemic Preparedness Innovations (CEPI). The only vaccine money that ended up being used on a large scale was the substantial financial guarantee of €100 million to BioNTech and €75 million to the company CureVac. The Commission stresses that this guarantee "enabled two European biotech firms developing promising mRNA vaccines to obtain debt financing agreements."[32] Does this really reflect a strong European effort, though?

Breton's account of the mRNA vaccine development also differs from reality. Its core technology, the mRNA technique, was developed by researchers at US universities under the leadership of Kalina Katiko, who fought hard for many years to get funding for her research. Scraping by on a small salary, she has been described in the New York Times by Dr. Anthony Fauci, the head of the National Institute of Allergy and Infectious Diseases in the US, as someone who is "positively obsessed with mRNA."[33] She made the discovery in 2005, but the technology did not get much attention.[34] It was many years before two companies showed interest – BioNTech in Germany and Moderna in the US – and neither party took long to develop a vaccine based on Katiko's invention. By the time the vaccine was ready, Katalina Katiko was 66 years old and had focused on mRNA for her entire career,[35] an effort for which she would receive the Nobel Prize in Medicine in 2023.

In other words, there is little truth to Breton's claim that the mRNA vaccine is in fact a European invention. In the end, it was European companies and factories that were at the forefront of the launch and production of vaccines, but the invention was not particularly European, and the underlying research did not come about thanks to patent rules or even to pharmaceutical companies.

INDUSTRY'S REJECTION OF PANDEMIC RESEARCH

How, then, should we understand and assess Breton's claim about European investment in innovation? A bag of money was certainly handed over to companies after the pandemic broke out and the world was faced with a public health emergency. However, what transpired during the pre-pandemic era? Had the EU taken the risk of pandemics into proper consideration when planning investments in research and technology before the pandemic broke out?

The Horizon 2020 research programme, already in operation in the years before the pandemic began, came about as an extension of the Lisbon Strategy, which aimed, among other things, to boost competitiveness by securing research in strategically important areas. Detailed priorities were defined through so-called "technology platforms," dominated by representatives of companies in the field concerned. More precisely, medicine and health became the focus of one of the main initiatives of the Horizon 2020 programme.

Under the Innovative Medicines Initiative (IMI), EU funds and funds from private pharmaceutical companies would be pooled in equal measure to launch research and development of new medicines. This was a public-private partnership aiming to boost competitiveness and, to a lesser degree, to ensure coverage of medical or social needs that constituted societal challenges. In practice, however, everything came down to the former.

The Commission chose the European Federation of Pharmaceutical Industries and Associations (EFPIA) as its main partner, giving this organisation a decisive influence on what the funds were used for. Overall, public funds were spent in areas where the pharmaceutical industry already had strong interests, and, as a rule, the companies concerned patented their state-supported research.

Additionally, if the Commission ever had any intention of steering research towards the development of medicines to which the market did not readily assign high status, it certainly was not evident from the results of Horizon 2020. HIV/AIDS, as well as poverty-related and unexplored tropical diseases were among the issues that many had identified as obvious areas for action, but they were largely ignored during the initiative. Only a few of the many diseases identified by the WHO as particularly important areas for global action made it onto the EU list. For example, major killers, such as malaria and heart disease, as well as widespread severe rheumatic diseases, were not picked up by the IMI.[36] In this way, the pharmaceutical programme constituted state-funded aid to a few selected large pharmaceutical companies, without taking into account broader societal interests. Pandemics were certainly no exception, contrary to what Breton suggested.

At a meeting of the IMI Board on 20 March 2018, attended by the Commission and the EFPIA, the parties considered a request from the CEPI for action in the field of epidemics. Suffice it to say, there was no lack of incentives to do so. The swine flu had broken out in 2009, recurring Ebola epidemics were hitting the African continent, and SARS, a deadly respiratory disease originating from the coronavirus, had emerged.

However, the EFPIA rejected the Commission's proposal, and that was that. "No joint financing needed," the minutes read.[37] When the pandemic struck, there were perhaps Europe-based scientists who had gained knowledge in this area, knowledge that could be easily applied, but it was neither European industry nor European research programmes that had created the necessary preparedness. This preparedness came from other sources, including an obsessed American scientist with the patience of an angel.

Thus, when Breton talks about EU research programmes as the explanation for the mighty success of mRNA technology, there is little substance to the claim. As for intellectual property, it is only one part of a longer history of how patents have led to the socialisation of costs, with society or the state footing most of the bill for development while private companies pocket the profits. In that area, the EU does indeed come first in class.

Currently, the EU has possibly the strictest intellectual property system in the world. Only the US is in the same league, yet the EU exceeds it in several parameters. In the EU, pharmaceutical companies can keep crucial test results secret for 10 years, thereby blocking generic production, while in the US the limit is 5 years. Moreover, intellectual property exceptions are provided for in US law, allowing patents to be invalidated if public health concerns immediately require it. No similar rule exists in the EU. The EU has even gone so far as to tell the WTO that the modest flexibility added to patent rules in 2003 should not apply to the EU.[38] This means that the EU will not be able to import generic products manufactured under a compulsory licence – not even in an emergency.

As a consequence, Europeans also pay a price for the high protection of intellectual property rights – quite literally. One of the effects of this strict intellectual property regime is higher prices. The longer a company can rely on a monopoly for one type of medicine, the easier it is to maintain a high price level, even when it is far above what any research and development (R&D) expenditure can justify. Additionally, prescription drug costs are generally very high in the EU – so high, in fact, that it has been a major political issue for many years.

In 2018, the Commission asked a number of experts to look at possible ways forward and they called for revisiting "the promotion of innovation through patent law and market exclusivity, as other mechanisms to promote and reward high-value innovations can and should be devised."[39]

THE FUTURE AS SEEN FROM A MODEST BUILDING IN CAPE TOWN

Such a revamp of the EU approach will not materialise easily, and in the same vein, it is likely the EU will continue to defend Big Pharma globally, with little regard to the consequences. Something probably did change during the pandemic, though. It may have created a movement in the Global South that will sooner or later lead to less reliance on pharmaceutical companies in the North.

The years of the pandemic will probably be most memorable for all of those who were left behind – of which there are many – while the world's richest nations hoarded vaccines and big pharmaceutical companies pocketed soaring profits. Nearly six million had died from COVID-19 by the end of 2022, a figure that may be even higher if calculated on the basis of excess mortality. A preliminary analysis published by the CEPI, one of the organisations behind the failed UN COVAX initiative, suggests that as many as 61% of these deaths could have been prevented with more equal distribution of vaccines.[40] However, no one has carefully investigated what a relaxation of the patent rules would have meant.

In any case, the Global South has gained hard-won experience of the impact of monopolies on technology. Hence, the African Union talks of securing "medical sovereignty as quickly as possible," of "vaccine apartheid," and of its widespread aversion to the idea of having to ask for "crumbs from wealthy countries' overflowing plate of vaccines."[41] African governments have adopted a new, aggressive tone towards the EU.

The pandemic and the political and economic dynamics surrounding it have certainly led to several projects in Africa aimed at creating independence through the strengthening of the local pharmaceutical industry. Consequently, there are promising projects underway in the field of vaccines. In a modest building in Cape Town, South Africa, a team of researchers have started producing mRNA-based vaccines under the name Afrigen. The project started when Moderna decided not to enforce their patents on the vaccine in a number of low- and middle-income countries. The first batch is ready and now awaits approval, which could be a lengthy process. Moderna has not shown much interest in cooperating with the South Africans on test results, thus making the process very slow.

However, the project belies many of the statements made by industry and European politicians since March 2020 about the overall lack of skills and infrastructure in African nations. Modern mRNA vaccines can indeed be produced relatively easily by others, including the African pharmaceutical industry. If you ask the anchors behind Afrigen, there is huge potential to be tapped. They have ambitions that go far beyond a temporary emergency derogation of patent rights and herald new fractures in future intellectual property conflicts. "We need to have a license to utilize the components of the IP that is relevant for our vaccine eternally," Petro Terblanche, one of the researchers behind the project, told Politico in February 2022.[42] In fact, this story is not merely about South Africa or any one company. Afrigen is part of a WHO project, and thus part of a network of African, South American and even Eastern European researchers who will take vaccines and medicines based on mRNA technology much further.

GLOBAL PATENT RULES INTACT

Such ambition makes the project a challenge for the big players in the pharmaceutical industry, and the question is whether Afrigen can progress without suddenly encountering the wall of intellectual property rules that the US and European pharmaceutical industries have helped to put in place globally, and which they diligently use on a daily basis to maintain their monopolies. The EU – in the face of massive public criticism during the pandemic – has promised broad support for the development of an African pharmaceutical industry. However, there is still no end in sight to the constraints that intellectual property places on public health globally. Unless something changes, Afrigen and the WHO project could also be at risk.

Moderna may have said that it will not enforce its patents for a period of time, but when does that period end, and could Moderna suddenly decide to take legal action against Afrigen? Some observers believe this to be a realistic scenario. Moderna has already revised its promise to deviate from patent law once before. In the future, they will only be flexible if new vaccines are sold exclusively in 92 specific low- and middle-income countries. Thus, a new revision could hit Afrigen, a project that Stéphane Bancel, Chief Executive Officer of Moderna Therapeutics, did not speak favourably of, likening the vaccine to "copying a Louis Vuitton bag."[43]

Moderna's competitors have been quick to take action as well. The kENUP Foundation, a Malta-based consultancy hired by BioNTech, which produces the best-selling vaccine in partnership with Pfizer, sent a letter to the South African government stating that the hub's "project of copying the manufacturing process of Moderna's Covid-19 vaccine should be terminated immediately."[44]

This meant that Petro Terblanche had to answer to the South African government and shareholders.

THE EU AS A GLOBAL HARDLINER

Afrigen and the WHO project got off easy for now. However, if they are ever to make a real difference, it is hard to imagine that they will not come under attack from the pharmaceutical industry, the US and the EU. After all, vaccines are not a common universal good, nor are other vital pharmaceutical products. The EU seems to have become a major global guarantor of that.

With the EU's role in the COVID-19 pandemic, Europe has become the leading global defender of disciplinary measures that are demonstrably catastrophic. This is in part due to the von der Leyen Commission and the Member State governments at the time. Beyond that, though, the roots of this development are to be found in the successful, targeted strategy for the formation of a perfect competition state on European soil, a state that first and foremost protects the "competitiveness" of large companies. That is why a vital global health issue ended up on the agenda of an obscure committee of Member State trade bureaucrats, and that is why they were mandated to handle the matter in the exact same way they would handle other trade issues: by taking European companies and their competitiveness as the logical beginning and end of the story.

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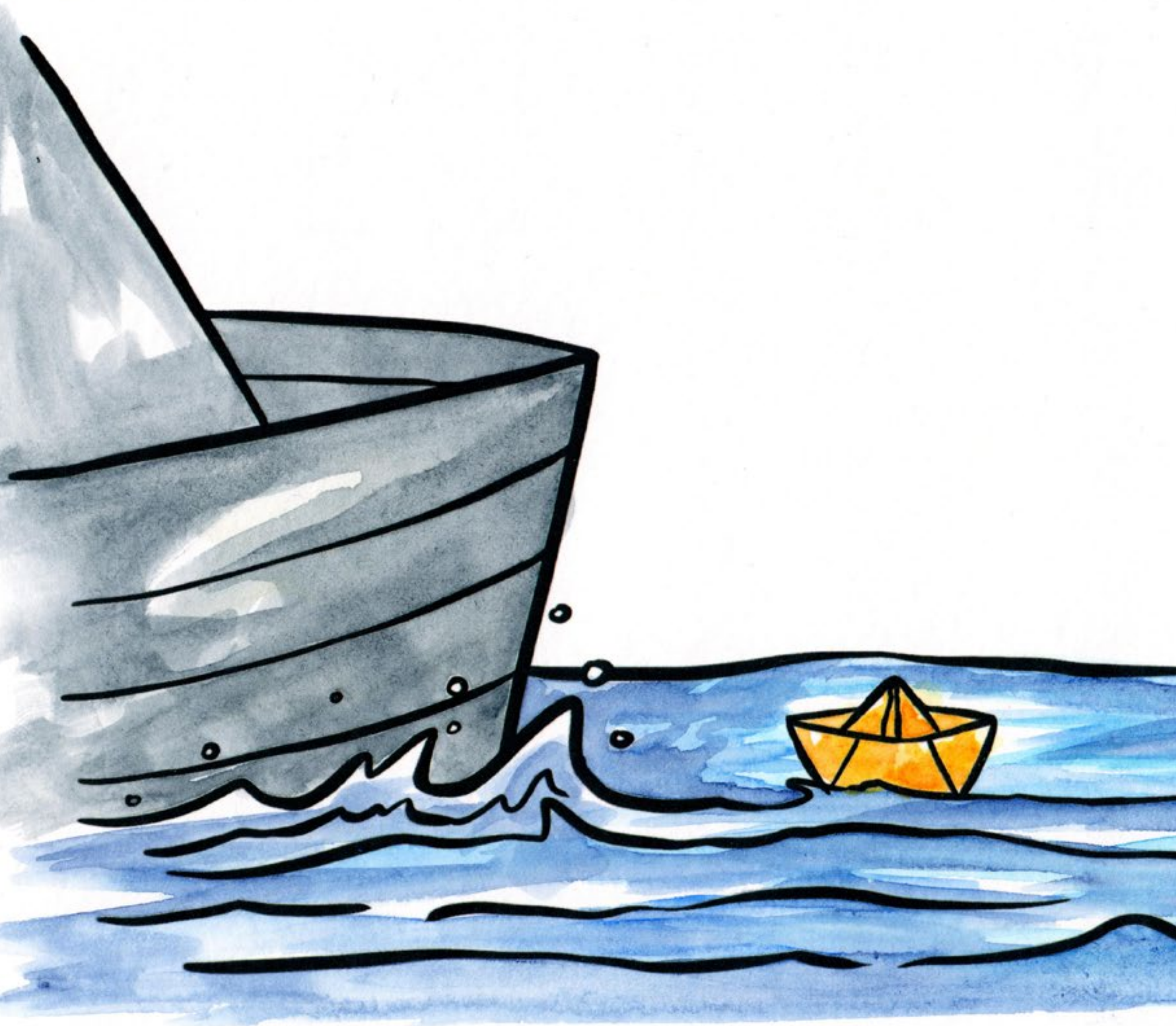
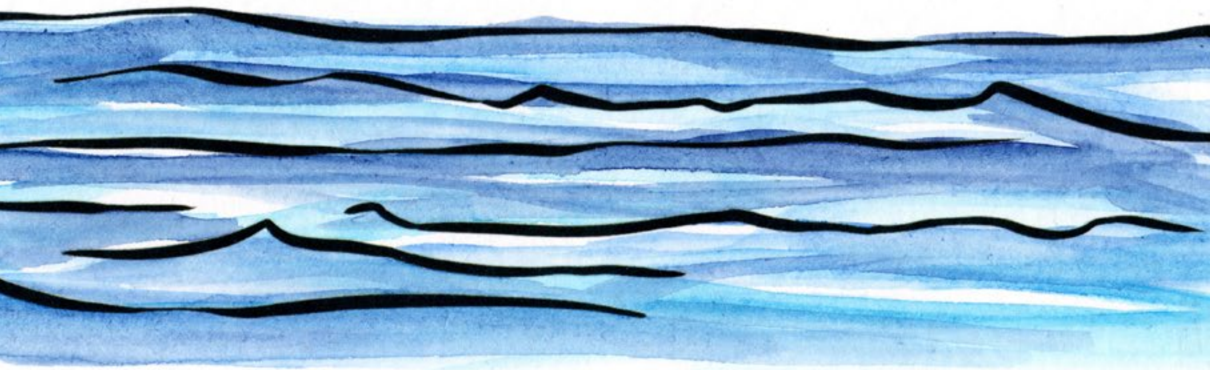


AMERICAN GIANTS AND EUROPEAN FLAGSHIPS



Margrete Vestager, European Commissioner for Competition, began going after the internet giants early on. Not long after taking on the powerful position in 2014, she brought her first legal action against US tech giant Apple over unfair tax breaks in Ireland, where the group has its European base. This was a case she had taken over from her predecessor, as US tech giants had long posed a strategic challenge to the Commission.

For Vestager, this was merely the first of many cases. After taking office she often used her power as European Commissioner for Competition against Big Tech, earning her a reputation as Silicon Valley's arch-enemy in the EU.[1] The New York Times gave her a powerful shout-out in 2018, writing that she has "emerged as a major voice of warning about the effect of tech firms on our habits, our privacy, our ability to make human connections and even democracy itself."[2]

This is an issue that revolves around the dominance of the internet giants in the market and what this dominance means for competing companies, as well as for their users who make up the vast majority of EU citizens. Under EU rules, large companies are prohibited from abusing their market dominance to impede competition. Enforcing these rules is the job of the Commissioner for Competition, who wields a great deal of power. With the support of the rest of the Commission, whoever holds this position is able to issue large fines without consulting an elected assembly or a court, and is authorised to reject mergers and order companies to be split up. The Commission acts here as an investigator, a prosecutor and a judge, and appeals can only be made to the European Court of Justice. Over the past decade, US companies in particular have experienced the full force of this powerful adversary.

It is fair to say that Vestager waged a determined campaign. The five dominant powers – Google, Apple, Facebook (or Meta as the corporation came to be called in October 2021), Amazon and Microsoft (referred to collectively as GAFAM) – have all been put in the EU dock and fined as a result, four of them during the Vestager era. The sums paid out were in some cases staggering: Google, the biggest offender, was fined a total of €8.2 billion between 2010 and 2020,[3] while Facebook was fined €110 million in 2017.[4] Though Vestager was leading the charge for many years, national competition authorities have also taken action: Amazon has paid €746 million to the Luxembourg competition authority and €1.1 billion to the Italian competition authority.[5] [6]

It is true of all five Big Tech giants that they know how to fight back. Google in particular appeals all verdicts wherever possible, as it did in January 2022, when its parent company asked for a retrial of a $2.8 billion fine at the European Court of Justice.[7] In the end, Big Tech companies have often found ways to defeat Vestager, or to go over her head. In two cases on corporate tax breaks – one against Apple in Ireland[8] and another against Amazon in Luxembourg[9] – the Court ruled in favour of the companies because it found no evidence that they had received special benefits not given to other companies. However, the fact that the EU has its internal tax havens (Ireland and Luxembourg among others) makes it difficult to argue that advantages being given to corporations is an anomaly.

MARKET DOMINANCE AND DISTORTION OF COMPETITION

It would be wrong to say that Google is completely unaffected by a billion-dollar fine, but the fines imposed to date have not been enough to force the tech behemoth to change its business model: in a single quarter in 2021 Alphabet Inc., the parent company of Google and its subsidiaries, pocketed a profit of $18.5 billion (€17.3 billion).[10] To a giant of Google's calibre, antitrust fines of €8.2 billion spread over a decade is manageable, while the €746 million fine paid by Amazon for violating data privacy rules is an inconvenience, and Facebook's €110 million for supplying misleading information to the Commission on its acquisition of WhatsApp[11] is, by comparison, a drop in the ocean.

The Commission's high level of legal activity is aimed at the dominant market position that these giants occupy. They have typically gone after their linking of co-products with operating systems, such as Microsoft linking Windows with the Internet Explorer browser in 2013, or Google's Android system where the platform's own products, such as Gmail and the Google Chrome browser, take precedence over competing products. The Google search engine also places its own products high on the search list – when users search for price comparisons, for example, Google's own engine comes up first while others are pushed down the page.

These huge companies have clearly found effective ways to use and maintain their dominance, but there are EU rules that target such methods, and the Commission has used them frequently since 2014. However, it does not seem like the tech giants have been seriously affected, the reason being that EU competition policy has limited reach when it comes to curbing the power of big business.

There are also limits to how far those who enforce the policy are willing to go. The Commission does not just have an eye on how big US companies behave; it is simultaneously seeking to create the best possible conditions for European companies, so when it comes to Big Tech they tread carefully so as not to hamper the digital sector as a whole. Indeed, the aim of competition policy is not to put an end to the unfair power of big business over our lives, but rather to limit its dominance of the market. Their goal is to provide a level playing field that also leaves room for other companies to grow, and this can only be done by preventing abuse of market dominance.

This is a narrow approach to competition policy, a result of the evolution that the EU has undergone in this specific area since the 1980s. As we saw in chapter 1, for the big European transnational companies in the ERT the right form of competition policy was of the utmost importance, and it seems they are getting their way with regard to Big Tech. The EU competition state they argued for should not restrict the growth of companies, but instead support their expansion so they can compete on the global stage.

NEOLIBERAL COMPETITION POLICY

The EU (and the EEC before it) has had competence over competition policy since its early beginnings in 1957. Since the early 1960s, the Commission's Directorate-General for Competition has had far-reaching powers in this field. In its efforts to counter cartels (agreements among companies to stifle market competition), the Commission has been able to impose heavy fines and prohibit state aid. While both the Council of Ministers and the Parliament are involved in adopting legislation in this area, it is the Commission that serves as the ultimate executive body, and it has acted quite independently in this area over the years. This has occurred, for example, through the development of various guidelines and codes of conduct, referred to by some experts as "quasi-legislation," outside the Council and Parliament. "There is simply no room for political interference," according to Margrete Vestager.[12]

EU competition policy has been through two vastly different phases. In the first phase, from the early 1960s to the early 1980s, the Commission was not particularly concerned with taking action against forms of state aid such as favourable loans, tax concessions or guarantees for public procurement. Moreover, when sanctions were adopted by the Commission against cartels, they were rather mild. During the economic crisis of the 1970s, the Commission even allowed cartels to form in a number of industries such as steel, shipbuilding, chemicals and textiles.[13]

It was seen as good form to seek to build "European Champions," meaning companies with a strong position in Europe and in the world at large. This was done through industrial policies such as state aid and protectionist trade policy, and this mercantilist approach was particularly strong in France. In general, the Commission took a wide range of factors into account, including macroeconomic and even social considerations when developing its competition policy tools, but there were other considerations that played a significant role.

From the mid-1980s, the Commission changed tack and embarked on a neoliberal phase of competition policy. From then on, the dominant logic was that price competition would enhance the efficiency of companies and lead to lower prices for consumers. This was, in fact, a "competition only" policy. Other approaches and considerations, such as social or industrial policy considerations, were slowly removed from the criteria for EU intervention against companies.[14]

It was precisely this kind of competition policy that the European Roundtable was arguing in favour of when it was in dialogue with the Commission in 1993 on the further development of the EU (see Chapter 1). They wanted a framework that allowed European companies to grow very large without fear of hitting a ceiling at which the Commission would intervene.

From the 1990s onwards, the Commission was particularly zealous about state aid and state-owned enterprises. This was particularly apparent when ten former Eastern bloc countries joined in 2004: in the four-year period from 2000 to 2004 the Commission's total fines against cartels came to €270 million, but they soared to almost €8 billion between 2005 and 2009.[15]

Although the EU Treaty can be interpreted as requiring the EU to remain neutral on the question of ownership, whether public or private, there are parts of it that say something else entirely. Article 106 (2) – known as the "privatisation clause" – allows the Commission to use the means it deems necessary if activities have an adverse effect "to such an extent as would be contrary to the interests of the Union."[16] This somewhat imprecise wording provides some leeway for the EU to take measures that move towards privatisation.

MERGERS ARE (ALMOST) ALWAYS APPROVED

The Commission has played an active role when it comes to public undertakings and monopolies, but has not taken a particularly strong stance in recent decades against mergers that could lead to actual market dominance. In fact, there were no merger rules in place at all until the 1989 Merger Regulation was adopted. At the time, mergers were commonplace because the Single Market had been greatly deepened thanks to the adoption of the Single Act, also known as the new version of the 1986 Treaty. This was a time when companies of a certain size were eager to expand in a deepened Single Market, while many others had to give up, close down, or allow for mergers. When the Commission began to think more carefully about the future of competition policy in 1985, it caused quite a stir among businesses.

They saw the more integrated market as an opportunity to grow significantly. The Commission assured the ERT, BusinessEurope (then called UNICE) and the American Chamber of Commerce (representing major US companies in the EU) that it did not think "that bringing the big together is bad."[17] The ERT thought it crucial from a global perspective that the EU promoted the emergence of large competitive companies, and they were to do this by removing barriers to their construction. According to the ERT, "European flagships" should be built through competition, not state aid and protectionism.[18]

Ever since, the Commission has ignored all but the biggest of mergers, although the limits on how big companies have to be before merger control kicks in meant that most go unnoticed anyway: one major criterion is that the merger must affect companies with a combined turnover of more than €5 billion.

Stimulating the emergence of large, competitive businesses was and is a key objective of the Single Market. Consequently, if there were rules and practices in place that cracked down on large companies it would almost be a contradiction in terms. It is safe to say that this was not the case. According to the Commission's own statistics on mergers for which approval was sought during the period of 1990 to 2021, they reviewed 8,367. Of these, it rejected only 30. In the period from 2011 to 2021, there were 3,813 mergers, of which only 10 were rejected.[19] This makes it hard to argue that EU competition policy generally aims to oppose mergers of large companies. On the contrary, European law nurtures the growth of mega-companies due to one of the basic criteria for assessing mergers: in order for a merger to be rejected under EU competition law a company must not only be dominant in a Member State, but also "in the common market or in a substantial part of it."[20]

A complete list of mergers that have been rejected is not readily available. However, it needs to be pointed out that mergers, which seem to otherwise have little to do with either the EU or the Single Market, have also been reviewed by the Commission and, in some cases, rejected. For example, a merger between two Korean shipyards was rejected by the Commission in January 2022.[21] Other cases – such as a ban on a merger between Germany's Siemens and France's Alstom that would have led to quasi-monopolies in rail – were met with such restrictive conditions from Commissioner Vestager that the deal eventually had to be dropped.[22]

However, the bar is so high that it certainly does not act as a safeguard. In a 2018 commentary, The Economist wrote that European politicians' obsession with creating very large enterprises in everything from "From eyeglasses to steel-making, from stock markets to railways" should be setting off alarms. The article went on to say that "[w]hen concentration is rising and profits are persistently high, the answer is not to make companies even larger."[23]

The fundamentally positive attitude towards very large companies has also been the dominant trend during the period in which Margrete Vestager has taken on Big Tech companies. One example reflecting this trend was the approval in December 2020 of a merger (albeit with conditions) between Fiat Chrysler and Peugeot Citroën, which then became a group covering the car brands Peugeot, Citroën, Fiat, Chrysler, Jeep, Alfa Romeo and Maserati.

WATER MONOPOLIES

In December 2021 Vestager approved the merger between two French service giants – Veolia and Suéz – which have long been the largest providers of waste-water management and drinking water supply, both in Europe and on a global scale. The two companies have built a global reputation for delivering services that are both poor and expensive, and the case has highlighted the risks of allowing a vital service to slip into private hands.

In Indonesia's capital, Jakarta, Suéz has been supplying the western part of the city of ten million people since it signed a contract in 1997, shortly before the Suharto dictatorship was overthrown. A lack of transparency and soaring water bills led to many years of protests in the city, with attempts to cancel the contract and very lengthy court cases led by citizens' groups who refused to put up with price increases and declining quality.[24] The turmoil was only quelled when a judge decided to cancel Suéz' contract in 2015. The two French companies have run into this type of clash with citizens' groups over price and quality in many places around the globe, including Manila in the Philippines,[25] Nagpur in India,[26] Buenos Aires in Argentina,[27] Osorno in Chile,[28] and in colder latitudes in the UK[29]and in Berlin.[30]

Despite these events, the EU has been kind to Veolia and Suéz on the global stage. In particular, the EU has been at the forefront of demanding access to the water supply market for European companies, a demand expressed during negotiations on the liberalisation of services with the World Trade Organisation (WTO). The negotiations, however, were not very successful from the two companies' point of view,[31] and over the past fifteen years there has been a global backlash against the privatisation of water services.

Following the approval of their merger, Veolia and Suéz are in an immensely strong position to expand in the global market. According to the latest estimate of their total global market share of privately operated drinking water supply, the two companies are already leaders in their field by a long stretch: they supply water to 264 million people, a figure that puts them in a league of their own.[32] If we disregard three Chinese companies with no major operations outside China, Veolia and Suéz now supply five times as many people with water as their closest competitor, VA Tech Wabag, an Indian company. Given the favourable conditions created by the EU, the impact of the merger on the global market could be quite significant. The EU has even offered the two companies its full support in the area of trade policy, as well as in other areas including their support at the World Bank.

Unsurprisingly, citizens' groups around the world which had been involved in clashes with the water companies over their business practices did not take kindly to the news of the merger. Mary Grant of Food & Water Watch, an NGO that has worked with many citizens' groups on the right to water, calls the plan "appalling." "The merger of the world's largest water corporations will erode any semblance of competition for water privatisation deals. This lack of competition will worsen our water affordability crisis, eliminate good union jobs, and open the door to cronyism and corruption," she said.[33]

The decision to approve the merger could have undesirable consequences in many parts of the world where water supply is both privately and commercially run, or where privatisation is underway. In the UK, competition authorities have raised concerns. "The Competition and Markets Authority (CMA) has received a number of complaints from customers and other market participants during its investigation and it has identified a number of competition concerns that could lead to councils paying higher prices, with a knock-on effect on taxpayers," the UK competition authorities wrote in December 2021.[34]

THREE TIMES AGRIBUSINESS

During her time in office, other approvals made by Vestager have elicited a harsh response, in particular from three big mergers that heavily affected the agro-industry: US chemical companies Dow Chemical and Dupont; Bayer and Monsanto; and China National Chemical Corporation's (ChemChina) acquisition of Syngenta. When it comes to pesticides, seeds and GMOs, these six companies are in a class of their own. Consequently, the three mergers posed new challenges in the market.

The new situation has been very badly received by consumer groups, environmental organisations and small farmers on both sides of the Atlantic. In the US, farmers in the National Farmers Union (NFU) have done their utmost to block all three mergers, particularly that of Dow and Dupont. In their view, the mergers will seriously reduce seed diversity.

"The merger of Dow and DuPont, the 4th and 5th largest firms, would give the resulting company about 41% of the market for corn seeds and 38% of the market for soybean seeds," said Roger Johnson, head of the NFU at the time. "If the Dow-DuPont and Bayer-Monsanto mergers were both approved, there would effectively be a duopoly in the corn and soybean seed markets," he said at the beginning of negotiations with the US authorities and the European Union in 2017.[35]

European concerns rose to similar levels. In March of that year, a few days after the NFU announcement was made, a large coalition of over 200 environmental organisations, small farmers, trade unions and organic producers sent a letter to the Commission calling for an immediate rejection of all three mergers.[36] The companies would hold a combined market share of 70% of all chemicals used in agriculture and 60% of all seeds, they said. In addition, they would be able to use intellectual property rules to squeeze smaller producers out of the market, raise prices, and do great damage to rural economies. It was argued that less diversity would not only reinforce the trend towards monoculture, but also towards an agricultural industry heavily dependent on chemicals, including highly dangerous pesticides.

But the Commission chose to approve all three mergers, and strictly speaking, no one in the know should have been surprised. As we have already seen, the limits are set high for a company to be considered so large that it unduly restricts competition, leaving room for competition to lead to an even greater concentration of capital, and thus to even more powerful multinational corporations.

Even if we look at what was arguably the most important merger that was not approved – Siemens-Alstom – the applicants used extensive arguments to describe how current global competitiveness was developing. They sought to appeal to Vestager by playing a trump card of sorts: asserting that Chinese companies risk getting the upper hand in the market, a view supported by the French government among others. Vestager replied that she did not see significant Chinese competitors emerging "in the foreseeable future."[37]

What is remarkable about the argument is that global market considerations should not, strictly speaking, be a factor in the handling of large merger cases in the EU. If EU companies' ambitions at the global level were to become the central focus, then all concerns over domestic dominance would lose significance, paving the way for even higher concentrations of capital, and even bigger companies. The genie, however, seems to have long since left the bottle. Veolia made a big deal of global competitiveness in environmental services when arguing for the merger with Suéz,[38] and when it was first made public the approval was also seen as a way to enable the two merged companies to compete with their Chinese rivals.[39]

GAFAM'S UNIQUE POSITION

A picture is emerging of a European competition policy with a narrow focus, and a very high bar for when a company is considered to be truly dominant. There are not many factors involved when the big political decisions have to be taken, and size is hardly a factor in itself. Margrete Vestager, however, has a slightly more nuanced view on the matter: "You are allowed to grow if it is because customers like your products and services. However, if size comes from you cheating in that market so customers don't meet any other service provider, then size does become an issue," she said in September 2021.[40]

On this basis, the Commission has presented its cases against Big Tech, even before Vestager came into office. This was partly in response to complaints received from many European companies, but there is also a wider perspective at stake for the Commission.

Google, Facebook, Amazon, Apple and Microsoft (GAFAM) are a special case. These are companies that have each gained a unique market position that they exploit to the fullest, contrary to classic competition policy mantras. They are also all US companies, not European.

For more than two decades, the EU has been striving to create a breeding ground for similar tech giants on European soil. In the regulatory field, the EU came close to copying US legislation with the e-commerce Directive of June 2000.[41] Numerous programmes have been launched to support research and development, and over the past decade the Digital Single Market has been a top priority. The aim is to put infrastructure at the forefront of technological developments and to develop an EU-specific approach to data, an approach that the Commission has been strongly encouraged to take by the CEOs of big companies.

This push for big, competitive European companies has also led to a development that, on the face of it, may look like a return to the old days, when France in particular was calling for the creation of European flagships through state aid and protectionist trade policies. The resemblance has been particularly striking with the current Commission, where Thierry Breton serves as the Commissioner for Internal Market of the European Union.

"TECHNOLOGICAL SOVEREIGNTY"

When Breton was appointed EU Commissioner in 2019, he came straight from his previous job as CEO of Atos, a French company providing a wide range of IT solutions, Cloud services, cyber security, and supercomputers. Some like to call Atos "the invisible tech giant," as it is a company with 110,000 employees worldwide yet it remains relatively unknown.[42]

This creates a serious conflict of interest for an EU Commissioner, who is not supposed to have close links to any company, or sector for that matter.[43] The appointment was no less striking in light of the initiatives Breton launched, which focused on technological development and production backed by the EU, who provided both legislative and financial support. This is reflected in support programmes for supercomputers and microchips, areas which are of great importance to both Atos and the Commissioner. A case in Spain where – with support from Breton and the Commission – the normal tendering procedure was overruled in order to award Atos a contract for a supercomputer therefore looked rather suspicious.[44] However, this had little to do with the Commissioner's reverence for Atos. There was a bigger picture at play, as the competitor in the tendering process – IBM-Lenovo – was a US-Chinese company, and this fanned fears that the EU was being left behind. In response, the Commission stepped in to support Atos, and in so doing they invoked one of the defining concepts of the time.

This concept comes in several forms, and has several names. The Commission calls it "digital autonomy," but Breton often calls it "technological sovereignty" or "strategic autonomy."[45] It is also sometimes called "open strategic autonomy," with the added "open" serving to underline the inclusion of free trade as a basic premise. One of its implications is a commitment by the Commission to create companies within Europe that are at the forefront of technology, and to continuously launch new legislative proposals to support ongoing developments. This takes the form of providing European companies with research support, development programmes, investment in digital infrastructure, and strategies to secure supplies of key raw materials.

In Breton's case, there is a strong identification with the plans to secure "strategic autonomy." Presenting the Commission's proposal to "address the shortage of semiconductors" (through what would become the EU Chips Act), he said: "I want to be a net exporter of semiconductors."[46] This came in the wake of the COVID-19 crisis, when the EU had experienced a shortage of semiconductors in production and, at the same time, was seeing China realise its ambition of developing and strengthening its own channels for microchip production.

Seeing a French IT executive heading the project might bring to mind the French mercantilism of days gone by, when the EU was still called the EEC. In this instance, however, the EU took the lead in both legislative and financial support to back the technological upgrading of industry, in line with both the Commission's own position in recent decades and with transnational capital's expectations for the EU. However, the mission to create "European flagships" is by no means a French speciality, but rather an integral part of the competition state project that was launched in the early 1990s.

While Commissioner Breton may stand out as a clear exponent of greater "state intervention" by the EU to support technological dominance, this kind of intervention is not new to the EU. When the ERT discussed the future of the EU project with the European Commission back in 1993, it was also a widely shared objective that the Union should actively promote the position of European industry in high technology.

As far as the ERT was concerned, one of the key demands was the EU backing technological developments in industry. This was to take the form of, among many other things, development programmes and a training policy to ensure a skilled workforce. Additionally, in the 1993 White Paper (see Chapter 1) the Commission spoke of "industrial policy" in areas where "market forces are slow to commercialise the results of RTD [research and development]," and more generally, of implementing a policy to improve the European technology industry.[47] An entire chapter was also dedicated to a strategy for securing the EU's position in "information and communication technologies."

The current discussion on strategies to actively ensure the competitiveness of European industry at the forefront of technological development is nothing new. Moreover, conflicts between groups of Member States in recent years – specifically that between a French "dirigiste" model and a Northern European liberalist and globalist model – are often exaggerated by commentators. Northern European "globalists" also subscribe to the goal of technological sovereignty and digital autonomy.[48] That said, there is not full agreement in the EU, and probably not in the Commission, on which instruments are best suited to achieving this aim.

COMPETITION POLICY AND TECHNOLOGICAL SOVEREIGNTY

In the von der Leyen Commission, from 2019 onwards, the forces of competition policy and technological sovereignty have sometimes been at odds with one another, but the disagreements have usually been easily resolved moments of friction rather than serious conflicts.

Vestager has often been seen as the liberal opposite to Breton's support for state intervention, and the two have had several public clashes. Their different approaches to competition policy became apparent during the handling of a merger between the Israeli company Mellanox and the US chipmaker Nvidia, best known for its graphics cards. Breton saw the merger as a threat to European producers and wanted to stop it, but Vestager approved the deal.[49]

However, in big-picture terms, Vestager's approach is not markedly different from Breton's: "It's obvious that Europe needs to be fertile ground for IT companies to scale up. And the time to solve the problem is right now, because we are already at the beginning of the next big digitisation round," she told a Danish magazine in April 2021. She continued, "[i]t is important that we do not have the ambition to copy. One Facebook is fine. I don't think we need a European version of the same. What we do need in this next amazing chapter of digitalisation, where public services are digitalising, where industry is digitalising, where agriculture is digitalising, is to see European companies scaling up and taking on significant roles."[50]

Vestager's point in this interview was that the EU must come to terms with the dominance of the US giants in their fields, and shift their focus onto winning the "second round" that includes supercomputers and artificial intelligence. As a Commission initiative states, the EU has to become "a global leader in innovation in the data economy and its applications."[51]

To achieve this objective, new means are also being deployed, including in the field of competition policy. For example, the Chips Act included a provision to ensure that state aid could be granted to European companies in this area in a way that would not normally be allowed,[52] an approach supported by the employers' organisation BusinessEurope as well as Vestager.

NARROW SCOPE OF NEW LEGISLATION

We have to view the EU's approach as an attack on US Big Tech giants, rather than a response to citizens' concerns over their business models. The EU has been left behind over the past decade, and the Commission is responding to this with the resources at its disposal. So, after years of fines and court cases that have had little impact on GAFAM's business models or its dominance, it was to be expected that new initiatives would emerge.

In 2020, the Commission prepared two new legislative proposals to regulate the platforms: the Digital Services Act, which included things like rules on website content; and the Digital Markets Act, which followed years of wrangling with tech companies over competition policy and aimed to pick up where Vestager's aforementioned wave of lawsuits against GFAM left off. It could also be said that the new initiatives sought to achieve what the Commission's competition policy had thus far failed to do, which was to break market dominance.

The run-up to the presentation of the two new EU laws was dominated by public disagreements between Breton and Vestager, both of whom wanted to stimulate Europe's global competitiveness, but took different approaches. Breton, who was very familiar with the industry in question, supported a tougher line in the Commission by calling for a structural break-up of the tech giants. He believed this would give European companies a better chance, and also provide a solution to many of the means by which the Big Tech companies had gained a competitive advantage in the first place. Vestager, for her part, preferred to fine the Big Tech giants into submission, as she did at the time by launching a volley of fines against behaviours such as Google's methods of prioritising its own services on its search engine.

For Vestager's part, however, there was no appetite for splitting up the tech giants. None of the cases against the big companies had led her to believe that this would be the best solution,[53] and In the end, she won the battle. The proposed Digital Markets Act, tabled in December 2020, did not come close to the splitting up of Big Tech that Breton had envisaged,[54] nor did the final version that was passed after negotiations between the Council and Parliament in November 2022.

The Digital Markets Act focuses on the relationship between large tech companies and other businesses. It imposes obligations on very large companies, known as gatekeepers, to ensure that other companies can use the services they provide.

According to the law, other companies should have access to the data generated by the use of a gatekeeper platform, and should be able to check for themselves the quality of the advertising they place on them. Major platforms are also forbidden from giving preference to their own services.[55] However, they have often ignored this rule, leading to fines in several instances.[56] In addition, tighter controls are imposed on large companies acquiring small, new firms, which in some cases will have to be stopped by the Commission.

What the Digital Markets Act does not address is Big Tech platforms' control of digital infrastructure. Google, for example, can continue to dominate the world of search engines, but they are asked to hold back on discriminating against other companies' products through technical means. The paragraph addressing this issue recommends that platforms ensure that specific services can operate on them. Rather than promoting the emergence of new platforms that can compete for basic systems, this provision has the potential to actually increase systemic dependency on the core platforms, whose position remains unchallenged and secured in their primary market. The Digital Markets Act sets the stage for a future where the likes of Google, Facebook, Microsoft – the very companies that set the standard and dominate the core infrastructure – are placed in the centre. Within that framework, the intention is to create better opportunities for European competitors to jump on the same bandwagon and prosper. The bandwagon itself, however, still belongs to the Big Tech companies.

As for the measures for enforcing the new rules, many critics were clearly unimpressed, including the European Consumers Organisation (BEUC). At an early stage, they pointed out that, under the new law, action would only be taken after three breaches of the rules within a period of five years and after an investigation had been carried out. "Six years is a very long time in which to further entrench a gatekeeper position and damage the contestability and fairness of digital markets. By this time, the damage could effectively be irreparable," they argued.[57] The final result ended up being slightly worse: only after 8 years and three infringements is the Commission able to open an investigation against a company.[58]

NOT THE EXPECTED SHOWDOWN WITH BIG TECH

The Digital Markets Act failed to put an end to Big Tech's dominance, as some had hoped, though it is unclear whether this was ever a realistic hope. There are two reasons for this. The first is that GAFAM has proved able to put up a formidable fight to protect their territory – on the lobbying scene as well as in court. The second is that the primary concern of the Commission was to address the unequal competitive position that other companies find themselves in vis-à-vis GAFAM. Issues such as data protection, and the invasion of privacy that results from weak protection, are secondary or even hindering factors when the primary objective is – as in the case of the Commission – to stimulate the rise of European tech giants.

In this respect, the Digital Markets Act has a narrow scope. Its main objective is to nurture competition between companies on equal terms, without taking things like the consumers' rights into account. "Individual gatekeepers can dictate a quality standard in the market that affects, among other things, the protection of users' data, their freedom of expression and their right not to be discriminated against," said a letter at the presentation of the proposal from a group of civil rights organisations such as Amnesty International and data protection organisations such as the European Digital Rights Initiative. "However, the European Commission's proposal totally fails to consider this perspective. Indeed, there is little mention of end users' perspective in the proposed Regulation, and the same is true for the accompanying package (impact assessment and explanatory memorandum). On the contrary, the main focus is on the relationships between core platforms and their business users."[59]

The Digital Markets Act retained this feature after discussions in the Council and the European Parliament where governments, in particular, insisted on keeping a narrow focus. When the European Parliament suggested a ban on the use of personal data to guide advertising towards individual users, neither the Commission nor the Council were supportive, and the issue was dropped.[60]

Looking at how national competition authorities have dealt with Big Tech, it is remarkable that they often pick fights that are broader in scope than just the relationship between companies. In Germany, for example, the Federal Cartel Office ruled that Facebook's collection of data on citizens without their consent – from both its own platform and others – constitutes an abuse of a dominant market position.[61]

This case strikes at the heart of Facebook's business model, and has the potential to disrupt platforms' abuse of personal data. After the verdict in Germany, the European Court of Justice to assessed whether the decision was in line with European law. In July 2023, the ECJ sided with the German court against Facebook.[62] While neither the Commission nor Member States showed any appetite for including a ban on spy ads in EU law, national legal systems present a real challenge to the business model of Facebook and other platforms. The results will most likely prove to be far more significant than the effects of the Digital Markets Act.

WORKING TOWARDS A STRONG EU

Ensuring a strong focus on consumer interests – and citizens' interests more broadly – is not the Commission's aim, and they have Member States' blessing in this regard. The momentum of the campaign against Big Tech in fact comes from one of the primary missions of the EU competition state: to grant European companies the technological superiority needed to give them strength in the marketplace.

It is undeniable that much progress has been made in the area of data security and online privacy at EU level. It has been a major theme in European politics over the past decade, with rules adopted that are far more stringent than those in the US, especially the General Data Privacy Regulation (GDPR). However, the ultimate goal is putting Europe in a strong position in the high technology industry, not protecting citizens from the risks associated with this development. This inevitably has a number of consequences.

Vestager, for her part, shrugged off a Parliament proposal that would have led to a ban on targeted advertising based on surveillance technology under the Digital Markets Act. "Where I come from, it is legitimate to advertise, it is legitimate to try to find the people with whom you want to communicate."[63] Neither the Commission nor the Council were keen to go down that road, perhaps because it could also hamper European industry.

This tech sector agenda will shape the EU's work for many years to come. It is tied into a grand strategy for a strong EU like no other industry, and what we have seen in recent years should only be seen as the first steps in a larger strategy that reaches into numerous areas, including access to raw materials.

The 2023 Chips Act on semiconductors and microchip production provides, among other things, a "toolbox" of measures to ensure access to raw materials in the event of a supply chain problem. These include a number of traditional tools, such as surveys of potential supplies, international negotiations and more. According to the Chips Act, international cooperation is preferable, but the door is kept open for more far-reaching initiatives: "Europe's aim will be to establish a cooperative approach that addresses its security of supply. At the same time, the EU should be prepared for a possible failure of such an approach, a sudden change in the political situation or unforeseen crises, which could threaten the EU's security of supply."[64]

This is an indirect reference, at least initially, to measures such as export controls. However, there is a striking and unsettlingly close link being forged between the EU's industrial development strategy, particularly in the digital field, and the development of its military capabilities.

MORE HARD POWER TO BOOST INDUSTRY

"Open strategic autonomy" or simply "strategic autonomy" has become a mantra among EU strategists, and while it could potentially become the focal point of many policy areas, the digital domain currently has the highest priority. In June 2020 Josep Borrell, High Representative of the Union for Foreign Affairs and Security Policy (the closest the EU has to a foreign minister), and Thierry Breton wrote a joint commentary on the further development of the EU's global impact. "Virtuous 'soft power' is no longer enough in today's world. We need to complement it with a 'hard power' dimension, and not just in terms of military power and the badly needed Europe of defence. Time has come for Europe to be able to use its levers of influence to enforce its vision of the world and defend its own interests." They continue, "How would we justify our lack of ability to protect, where necessary, our strategic activities weakened by the crisis from predation by non-European players? We also clearly need to diversify and reduce our economic and industrial dependencies, as the pandemic has brutally revealed."[65]

In other words, the strategic autonomy now brought to the centre of the EU's development brings economic and industrial power into close contact with its militarisation. This can be seen as an outcome of recent major crises – be it the COVID crisis or Russia's invasion of Ukraine – or as a sign that the building of a common European competition state will, sooner or later, lead to the development of military capability.

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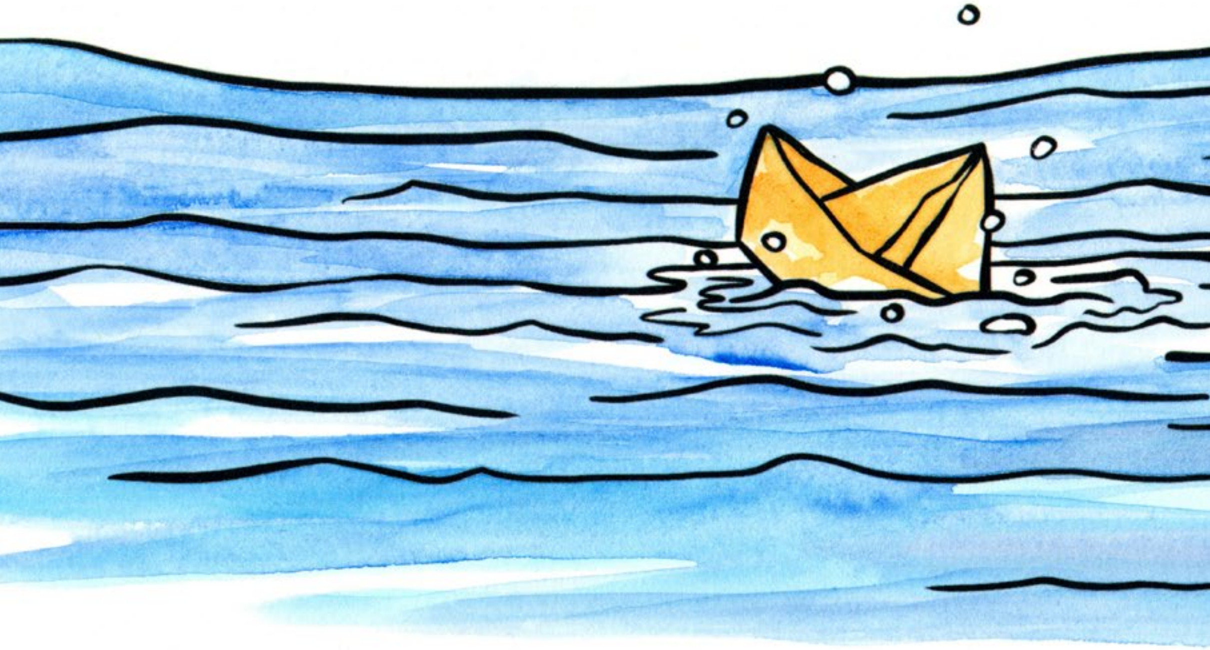
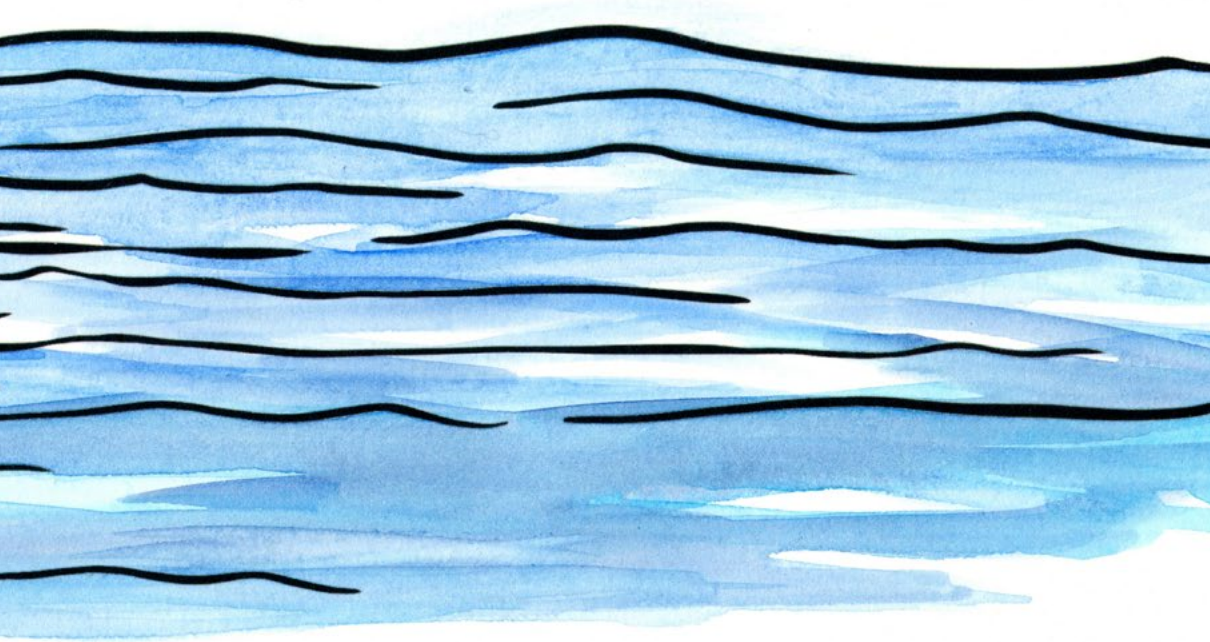


THE "PEACE PROJECT" AND THE MERCHANTS OF DEATH



A Union based on a deeply integrated Single Market, a single currency, and a common commercial policy, and which has gradually developed common foreign and security policy, will sooner or later also develop a shared military identity. The more areas of national interest that become common concerns, the greater the incentive to go the extra mile and build an actual common military, including shared rearmament, command, and objectives.

In an era of competition states, national interests are linked to industrial interests. Security means securing supply chains and nurturing a strong and competitive arms industry. In the case of the EU, High Representative Josep Borrell has even said that the arms industry will take on a central role: "I am strongly convinced that the future of European Defence will start from the European defence industry," he said in 2020.[1]

In the EU, progress on common military action has been slow – remarkably slow. It has not been equally self-evident to all that the EU would need to develop a truly common security and defence policy or close military cooperation. The Commission had been patiently arguing for it for years, but the Council had almost routinely rejected the idea. Several Member States had been quite comfortable with the slow pace of integration in the field of security and defence, but then something happened that changed the whole dynamic among Member States and prompted the Council to fast-track a genuine common security and defence policy (CSDP): Brexit.

It seems to be commonly accepted that Donald Trump's presidency served as a major impetus for the militarisation of the EU. In my view, however, there is little reason to believe this. Others would have it that the Russian annexation of Crimea in 2014 was an important factor, and while it may have contributed, it is not quite in line with the deep economic ties between Germany and Russia in the years that followed. After all, Germany received massive gas imports from Russia, and even worse, German and French arms sales to Russia continued long after the invasion of Crimea. The same goes for the Russian invasion of Ukraine. Whereas there is little doubt that the brutal actions of the Russian regime have sparked intense involvement by EU Member States and inspired new political initiatives, Russia's expansionist actions were not what instigated the first big political moves towards strengthening EU security and defence policy back in 2016. With Brexit, though, the opportunity for deepening internal cooperation – and doing it quickly – was there.

The United Kingdom has always been the most sceptical member of the Union with regard to a genuinely common military dimension among Member States, as demonstrated in 2011, when the UK Government blocked a proposal from EU High Representative (EU Foreign Minister) Catherine Ashton to set up a permanent headquarters for EU defence and security operations.[2] The top of British society is marked by a belief in its own strength and an ingrained aversion to the idea of a military structure where France dominates. Furthermore, the UK government maintains a deep commitment to its special relationship with the United States. Consequently, British presence at the table has been an obstacle to the development of a common military dimension in the EU.

MILITARISATION FAST-TRACKED

Nevertheless, the referendum of 23 June 2016 voted the British out of the EU, and although it took several years for the country's withdrawal to become a reality, from that moment on the UK no longer had influence on the broad outlines of the Union's development. In fact, with regards to its CSDP, the Council took the first major step just five days later. On 28 June 2016, Member State governments, without further ado, approved a Commission proposal for the further development of the CSDP: the so-called Global Strategy. Only five months later, in November 2016, it was further expanded by an action plan with concrete targets and dates, which passed easily.[3] In 2017, Commission President Jean-Claude Juncker even proposed an actual CSDP based on a majority vote rather than unanimity. This so-called Defence Union will still take years to agree on, but Juncker showed little doubt about the validity of the proposition back in September 2017: "We need it. NATO wants it."[4] The Defence Union will certainly be slowed down or constrained by requirements for unanimity in the Council, but even so, a lot can happen in due time.

In the following years, the Commission and the Council proceeded to launch a wide range of initiatives. As part of this, in 2017 the European Council formed a forum for enhanced cooperation, PESCO, to increase military spending and strengthen coordination and cooperation among Member States. Two smaller programmes for joint weapons research and development were implemented in the period of 2017-2020 – Preparatory Action on Defence Research (PADR, 2017-2019), and the European Defence Industry Development Programme (EDIDP, 2019-2020) – with a total budget of €590 million. These were the first ever EU funds explicitly dedicated to weapons technology. They were followed by the European Defence Fund (EDF), a much larger pool of money from the EU budget that was used to allocate €8 billion for research and development between 2021 and 2027. This development also prompted the 2019 creation of a civil service department under the Commission, the Directorate-General for Defence and Space (DG DEFIS), responsible for, among other things, the arms industry.

Beyond EU-funded research and development, it was agreed in 2017 to set up a common operations headquarters, quite similar to the one rejected by the UK six years earlier. Then in 2021, the European Peace Facility (EPF) came into force, with the purpose of funding military support outside the EU in the form of training or weapons. In the same year, the EU Military Mobility Programme was also launched to facilitate the rapid deployment of equipment and troops by reforming EU transport infrastructure.

This was followed by two laws adopted in the summer of 2023, the European defence industry reinforcement through common procurement act (EDIRPA), aimed at encouraging the common procurement of weapons, and the Act in Support of Ammunition Production (ASAP), intended to ramp up ammunition production in the EU.

One measure led to another, and the EU's common involvement in arms production, and in military matters more broadly, unfolded rapidly after the summer of 2016. All this could hardly have happened so seamlessly and so quickly, had the British been involved. Completely new perspectives on EU development in the military field had opened up.

STRIVING FOR STRATEGIC AUTONOMY

The EU has been acting as a unit on the global stage for decades, including in security policy. The Maastricht Treaty, which entered into force in 1993, established an intergovernmental foreign policy pillar – a foreign policy coordination, if you will – while the 1999 Amsterdam Treaty created the basis for a kind of common foreign and defence minister position in the European Commission: the High Representative for Common Security and Defence Policy. This position was filled in 1999 by Javier Solana who had just served as Secretary General of NATO. In addition, the 2009 Lisbon Treaty provided the EU with a basis for the integration of the European Defence Agency (EDA), founded in 2004, into the Treaty. The Lisbon Treaty also provided a legal basis for joint military action, along with a commitment to "progressively increasing military capabilities."[5]

This development did not occur in conflict with NATO, though. Just as the EU Treaty stipulates that the Union must cooperate closely with NATO, nothing in the EU's development towards a common security and defence policy has so far led to looser ties with NATO or the United States. Quite the contrary, in fact. However, NATO is an organisation under US hegemony, and EU Member States do not always share the same priorities as the US. Germany and France spoke out against the Iraq War in 2003, and over the years, relations with Russia have driven a wedge between the EU – primarily Germany – and the US, as well as being a point of contention within the EU. Moreover, there were major disagreements between many EU countries and the US on the withdrawal from Afghanistan in September 2021. Despite these differences, attachment to NATO remains very strong in all countries with dual membership. Even France, which has historically been the strongest advocate of an actual EU military, is not even close to proposing a decoupling from NATO.

The elaboration of a CSDP under the Global Strategy of 2016 is therefore not about distancing the EU from NATO. Rather, epitomised by the key concept of "strategic autonomy," the objective is to define more closely the EU's own interests and, on that basis, build capability, including military capacity that will enable the EU to protect those interests independently. As the document explains: "The Strategy nurtures the ambition of strategic autonomy for the European Union. [...] This is necessary to promote the common interests of our citizens as well as our principles and values."

In fact, there is nothing new about the EU wanting to assert its interests globally when it comes to the economy, climate policy or migration. The novelty of the Global Strategy is its emphasis on the military dimension. "An appropriate level of ambition and strategic autonomy is important for Europe's ability to promote peace and security within and beyond its borders. We will therefore enhance our efforts on defence, cyber, counterterrorism, energy and strategic communications [...]."

THE THREAT OF THE "JUNGLE"

These statements on the new turn in EU policy do not leave much room for interpretation: the EU must learn to strike on its own with more forceful means than in the past. In February 2017, then EU High Representative for Foreign Affairs and Security Policy, Federica Mogherini, said that the EU was "a security provider. It is also a hard power, even if this is not perceived too much here [...]. We are also a military power, and if people are serious about the need to have European Member States investing not only more but also better on defence, this can be done with the support of the European Union."[6] Her successor as "EU Minister for Foreign Affairs," Josep Borrell of Spain, has followed up on countless occasions to stress that securing the EU's place in the world requires action. In 2020 he wrote: "This is a world of geostrategic competition, in which some leaders have no scruples about using force, and economic and other instruments are weaponised. To avoid losing out in today's US-China competition, we must relearn the language of power and conceive of Europe as a top-tier geostrategic actor." The EU, he continued, had historically separated hard power "from economics, rule-making, and soft power."[7] Intensified global competition has made this formula unfruitful, Borrell argued.

It is a new and more self-confident EU that we see emerging on the global stage, an EU with more military teeth. In addition, the most prominent representatives are not above reviving the European self-assertive, not to mention colonialist rhetoric, of the past. This was illustrated by a speech Josep Borrell gave in Belgium in October 2022 in the company of his predecessor Federica Mogherini: "The rest of the world – and you know this very well, Federica – is not exactly a garden. Most of the rest of the world is a jungle, and the jungle could invade the garden. The gardeners should take care of it, but they will not protect the garden by building walls. A nice small garden surrounded by high walls in order to prevent the jungle from coming in is not going to be a solution. Because the jungle has a strong growth capacity, and the wall will never be high enough in order to protect the garden. The gardeners have to go to the jungle. Europeans have to be much more engaged with the rest of the world. Otherwise, the rest of the world will invade us, by different ways and means."[8]

With this announcement, one can only imagine what the EU's increasing militarisation may lead to. In this chapter, not all aspects of this development towards a new and more aggressive CSDP will be analysed, however. Our focus here is on what "strategic autonomy" means in the context of the EU as a competition state, and thus, the role of the arms industry is of particular interest.

THE ARMS INDUSTRY HELPS DEFINE STRATEGY

When the European Commission is planning a new, comprehensive initiative, the first partners they turn to are often the relevant industry's trade associations and the largest companies in the field. The arms industry, despite the nature of its business, is no exception. This industry has always been a supporting factor in the planning of the CSDP, and the major influence it exerts on the policy's development is well documented.[9] They do not hold back on bragging about their achievements either. In 2008, four years after the creation of the EDA, Michel Troubetzkoy of EADS (now Airbus) boasted that the agency was "EADS' baby" and that 95% of the organisation's structure was copied from EADS' proposal – thanks to close contacts with French President Giscard d'Estaing and then French European Commissioner Michel Barnier.[10]

The arms industry's lobbying is not just about weapons technology in the narrow sense, but also about larger debates. This includes institutions such as the EDA, which works not only on defence technology, but is also involved in the governance, coordination and promotion of the integration of Member States' security and defence policies. Industry lobbyists do not have free rein here, and it will always be a complicated game of broader national interests as well. Governments have the final word, and industry does not always have it their way. On the other hand, as with the above example of the EDA, the power of the arms lobby is significant, and they have lobbied for many years to promote the kind of "security narrative" needed to initiate an era of EU militarisation. However, an analysis of their power, and an understanding of what it means to put their interests at the heart of EU security and defence policy, must begin with an understanding of their role in pushing for rearmament through EU research and development programmes.

When it comes to the development of weapons and the economics behind it, the arms industry is dominant not just because they excel at acting on opportunities, but also because they are invited to the table by decision-makers in order to play an active role. In the aftermath of the terrorist attacks of 11 September 2001 in New York, years of an intense "war on terror" followed, which also set the agenda in the EU and gave a boost to the influence of the arms industry. In 2003, an "expert group" of 25 representatives of the industry – the "security industry," a mix of the arms industry and related sectors, such as producers of arms components or dual-use products, whether civil or military – was set up. At that time, money could not be taken directly from the EU budget for arms development, as the purpose of the fund was to enable national governments to support their own arms industries. Therefore the mission focused on developing dual-use equipment, that is, equipment that filled a civilian purpose as well.

The limitation to dual-use equipment was gradually called into question, though. Behind the scenes, the arms industry would work hard to have EU research programmes make space for arms development, and their influence was so heavy that in 2009 researcher Ben Hayes from the think tank Statewatch wrote that in the aftermath of 11 September 2001 the integration of "EU security policy making and the emerging homeland security industry" had become a reality in the EU.[11] However, there were still obstacles to full-blown common research programmes on weapons technology.

DIRECT SUPPORT FOR NEW WEAPONS TECHNOLOGY

It was not until 2016 that new ground was broken with the European Commission, when it began to move fast on EU security and defence policy in the aftermath of the Brexit referendum. Leading up to this, the arms lobby had gone to great lengths to push for new development. In 2015 the two main arms lobby groups, the Aerospace and Defence Industries Association of Europe and the European Organisation for Security, along with the ten biggest arms companies, had a whopping 327 meetings with Commissioners and their cabinets.[12] More importantly, though, the arms lobby was invited by the Commission to join an advisory group that would prepare the next step: EU-funded research and development, this time in weaponry, not just products of dual use.

This was done through a group called the Group of Personalities (GoP), set up in 2015 with a total of 15 participants. Of those, nine were representatives from the arms industry, including some of the largest arms producers in the EU, while the other six were two former ministers from Sweden and Poland, a Member of the European Parliament, a former head of the EDA, and finally two representatives from foreign and security policy think tanks.[13] This group, not surprisingly, proposed a significant increase in support for arms production.[14]

Then, in 2017 it was officially decided, for the first time, to create a fund specifically for weapons development, followed in 2019 by a second, larger fund. These pools, PADR and EDIDP, in force from 2017 to 2020, provided the exact support the arms industry was asking for. In fact, the industry itself was instrumental in setting up the initiative.

Such ambitious EU-level development projects were certainly welcomed by representatives of the arms industry. Some of the major beneficiaries of funding from the first two programmes were even companies represented in the GoP, namely Leonardo (Italy), INDRA (Spain), TNO (the Netherlands), and MBDA (France). Of the top ten beneficiaries of the two development programmes, the only ones not included in the GoP were GMV Aerospace of Spain and Thales, Safran and ONERA, all from France.[15]

As mentioned above, from the current budget period until 2027, the EU will spend €8 billion under the EDF on weapons development. This money comes directly from the EU's own budget and is to be supplemented by contributions directly from Member States.

In this way, the arms industry has joined the fray in an unprecedented way. It has now become commonplace to hear EU commissioners talk about the need for a large, strong and, above all, "competitive" arms industry. For example, "A more integrated, innovative and competitive European defence technological and industrial base is essential for a stronger, more resilient and strategically autonomous Europe," said European Commissioner for the Internal Market, Frenchman Thierry Breton, at the signing of the agreement establishing the EDF in 2020.

DUAL USE: SINGLE-MINDED AND DANGEROUS

Allowing the arms industry to steer EU-funded research and development has a string of implications. Putting them and their drive for profits in a key position means that ethical or human rights concerns risk being pushed even further into the background. There is nothing neutral about arms development. Nevertheless, arms companies have carried significant weight all along, as the EU has the explicit objective of strengthening the "European defence technological and industrial base," in other words, a strong defence industry based on technological superiority. This is a goal that the arms industry itself has had for many years, and in which they have long since found common ground with the Commission. In fact, there has been close cooperation between the two parties. In the period from 2003 to 2009, the era of the war against terrorism, the Commission set up three advisory bodies, all of which were to contribute to the development of "security-related" research projects in the EU, namely the GoP on Security Research (2003), the European Security Research Advisory Board (2005), and the European Security Research and Innovation Forum (2008). In all of them, representatives of the security and defence industry, including many arms manufacturers, dominated the work. The European Security Research and Innovation Forum was a large structure, which, in addition to a central body, also consisted of many working groups of "stakeholders," as many as 660. Of these, only nine were from civil society organisations, while 433 were from the industry.[16]

In a 2014 report commissioned by the European Parliament's Legal Affairs Committee, a number of researchers painted a damning picture of what resulted from the first major round of EU-funded security technology developments under the Seventh Framework Programme (2007-2013). They identified what they called a closed community in the making, "interested in the development of huge margins of profits for the industry," which has successfully defined the rationale and parameters for EU-funded research and development, and where "the main stakeholders have increasingly played a role of gatekeepers."[17]

The report also found that while the programme officially aimed not only to develop technology, but also to give due consideration to human rights and, more broadly, citizens' rights, those objectives were invisible in the practical results. "Funding has been overwhelmingly devoted to security and defence programmes of large transnational corporations, Ministries of Interior and Defence and technical research institutions, with little funding for data protection, privacy and the respect of fundamental freedoms in security applications," the authors wrote.[18]

This, according to the authors, is reflected in the technology that has been developed under the Framework Programme. For example, they highlight the paradox that while the European Parliament adopted a strong statement on citizens' right to privacy in the wake of Edward Snowden's revelation of widespread surveillance of US citizens, the EU is developing technology that does not consider this risk. Likewise, they criticise a number of projects that "resort to techniques of crowd-surveillance in a technologically driven approach that displays little awareness around more political issues, such as racially-biased surveillance."[19] Importantly, the report's analysis of technological developments in the field of border control pointed to the "dehumanisation of European borders," which has led to "the de facto dismantling of search-and-rescue capacities,"[20] as human rights organisations criticise.

THE NEW STAGE: MILITARY TECHNOLOGY

The authors of the report from 2014 went a step further and sought to determine how EU-supported technology would continue beyond the framework programme they had assessed. What they saw was an intensification of the trends they had identified, and in their view the programme that replaced it, Horizon 2020, was even worse. The assumption that supporting this industry will lead to growth and jobs "overrules all other societal considerations," they wrote.[21] According to the authors, "funded security research in the future will be mainly put at the service of industry rather than society."[22]

The industry's ability to use the Commission's platforms, including high-level groups such as the GoP, to dominate research and development is important to bear in mind in a situation where the development of weapons technology has become much more of an EU matter. Instances of ethics and human rights neglect pile up when the arms industry is allowed to run research and development programmes, and industry players have been in key positions from the beginning, back in 2016.

When the GoP published their 2016 report on EU-funded defence research that was to inspire the EDF, it was with a message that close collaboration between industry and policy makers should be the norm. "Such cooperation is necessary for the preparation of the work programmes as well as for decisions on the use of research results," they wrote. "The governance of the future programme must reflect this in order to ensure that research activities lead to market uptake and the development of required new capabilities."[23] This close dialogue with industry is indeed an integral part of the EDF procedure. Among other things, Commissioner Breton, head of the new DG DEFIS has set up a so-called expert group, to assist the Commission in its work on the space and defence industry. It is a group dominated by the arms industry, where all arms producers of a certain size in the EU had a seat.[24]

As the EDF is still quite young, it is too early to assess how the programme will unfold in detail. However, a fund – like EDIDP and PADR – whose purpose is to "foster the competitiveness, efficiency and innovation capacity of the European defence technological and industrial base"[25] is likely to lead to the same industry-dominated technology development.

Indeed, the first signs are worrying. In a report by ENAAT and Transnational Institute, the authors point to how, for instance, dangerous automated weapons based on AI technology are prioritised, despite ethical concerns. Furthermore, the structures supposedly set up to secure ethical and legal norms are based on the assessment of the producers. The EU has left a lot of the initiative to companies, and the consequences could be dire: "This suggests that the EU is more concerned with innovation and protecting corporate profits rather than ensuring that no public money is spent on weaponry that, if deployed, could potentially change the conduct of war and render obsolete the current rules of war embodied in the Geneva Conventions and other binding international treaties and resolutions. Funding controversial 'smart' technologies and other cutting-edge equipment puts the EU on a direct collision course with fundamental human rights norms and International Humanitarian Law (IHL)."[26]

COMPETITIVENESS REQUIRES EXPORTS

Another and perhaps more serious implication of strengthening the "European defence technological and industrial base," thereby making support for industry a core objective of EU defence and security policy, is that arms exports then become a supportive measure, even a prerequisite, for maintaining "competitiveness" in the field. In their report, arms industry representatives and politicians in the GoP stated: "Domestic demand coupled with export success is essential in order for Europe to retain viable and globally competitive defence industrial players."[27] EU High Representative Josep Borrell put it even more succinctly in a response to a critical European Parliament resolution on arms sales: "To ensure a thriving defence industry, exports are essential."[28]

One consequence of this focus on exports is that it sets a low standard regarding the recipients of EU arms exports. In 2022, two organisations, Facing Finance and Urgewald, published a database of companies supplying weapons of war. Their inventory findings revealed that 8 out of 10 of the largest recipients of EDF funding have supplied weapons to wars elsewhere in the world.[29] Indeed, the European Network Against Arms Trade (ENAAT) sees a clear trend that the criteria set by the EU to prevent contributions to repression and violations of international humanitarian law are often disregarded for the sake of exports.[30]

The EU has had arms trade criteria in place for decades. In 1998, the Council adopted the EU Code of Conduct on Exports of Military Technology and Equipment, which set out general principles on the sale of arms to other countries, or, more precisely, to whom arms may not be sold. This scheme became EU law in 2008 – and upon first glance, the criteria look convincing. They include, for example, rejecting support for regimes that are subject to an international arms embargo, that violate human rights or international humanitarian law, that will use the weapons for repression at home, that will use the weapons to prolong an armed conflict, or that prolong tensions or conflict at home or abroad. The problem is that these criteria cannot actually be enforced. Article 346(1)(b) (EC) of the EU Treaty guarantees the right of Member States to sell arms to whomever they wish, and the Code is therefore non-binding. In an optimistic reading, the Code may occasionally be useful to human rights organisations in Member States that have the resources to bring specific cases before the courts, but even in such cases the court can only rule against the government for procedural errors.[31]

Although the Code of Conduct is not strong, the Commission has managed to find a way to weaken it even further, spurred on by leading Member States. In a situation where the EU seeks to strengthen the arms industry through joint development projects, such as cross-border cooperation in the development and production of weapons, different standards on recipients of exports from cooperating countries can easily create a problem – participating countries do not necessarily share views on which countries should be able to purchase their weapons. Projects supported by PADR, EDIDP and EDF, which are intended to lead to new and more sophisticated technology, can also be a source of conflict. For example, if two Member States involved in the same project disagree on whether the importing country should be excluded according to the criteria in the Code of Conduct, it may not be possible to find an immediate solution.

This is precisely the problem the Commission sought to address in a February 2022 package of proposals on what it can do to strengthen defence and boost arms exports. To deal with this issue, the Commission proposed that Member States "seek an approach according to which, in principle, they would respectively not restrain each other from exporting to a third country any military equipment and technology developed in cooperation. This could apply to intended exports of equipment or technology incorporating components from another Member State exceeding a certain *de minimis* threshold."[32] That means that, when the contribution from one Member State represents a relatively small portion of a project, the Member State with the largest share in the project should be able to freely export what they wish to whom they wish without consulting the other Member State(s).

The Commission's proposal did not come out of the blue. In 2019, Germany and France signed an agreement called the Aachen Treaty to pave the way for better cooperation between the EU's two political heavyweights. Among the points of contention discussed were arms exports. Here, France typically pays less attention to who the recipient is and what the arms are used for than Germany. Together with Sweden and Italy, among others, Germany was quick to impose an arms embargo on Saudi Arabia when journalist Jamal Khashoggi was murdered by agents of the Saudi regime in Turkey in 2017 – an initiative that France did not join. With the Treaty of Aachen, France was granted the concession that when German components in common weapons account for only 20% or less of the product, France alone has the final say over whether or not to authorise an arms sale. This was the model that the Commission adopted as its own and that Member States were now invited to follow.

KILLING OF CIVILIANS IN YEMEN

This new weakening of the rules on arms exports is particularly relevant for one of the conflicts in which European arms are heavily involved: the war in Yemen. Yemen has long been a divided country, both among clans and between Shia and Sunni Muslims. In January 2015, a disagreement over a new constitution emerged between the Shia Houthi movement and the Sunni-dominated government. It was to become a protracted and horrifically bloody civil war, with Saudi Arabia and the United Arab Emirates moving in against the Iran-backed Houthis. In 2018, a UN report stated that Yemen was "the worst humanitarian crisis in the world,"[33] while in 2022, Amnesty International estimated that approximately 20,000 civilians had been killed since 2015.[34]

There is a consensus among human rights organisations that arms sales to Saudi Arabia and the United Arab Emirates have contributed significantly to the number of casualties and that violations of international humanitarian law and human rights are regularly committed using European weapons. Saudi-Arabia carries out air strikes with Tornado bombers (developed by German, Italian and British companies), with Eurofighter aircraft (the product of European cooperation), and with French Rafale aircraft from Dassault. All of these types of aircraft can be directly linked to bombings that have led to the killing of civilians. In December 2019, a number of human rights organisations took the case to the International Criminal Court in The Hague, submitting a 350-page document detailing the use of European equipment in 26 airstrikes, which they believe constitute war crimes.[35]

With the Aachen Treaty and the Commission's proposal in 2022, there is no immediate indication that European governments, or the EU for that matter, are changing course. On the contrary, what has been happening in North Africa and the Middle East in recent years resembles a fierce competition between the EU and the US for arms supply contracts. The US has long been the biggest arms seller in the region, but Europe is winning an increasing share of the market. According to industry analysts, the European arms industry is slightly less critical than that of the US: "European defence suppliers often employ a marketing argument similar to one put forward by Russia and China; unlike the United States, they're willing to turn a blind eye to end use," wrote Hassan Maged and Jalel Harchaoui in an article from the Carnegie Endowment for International Peace.[36] The exception to this supposed US restraint is the period from 2017 to 2021 when US President Trump removed all potential human rights-based barriers to arms exports. According to the two analysts, this only made the Europeans go even further: "From the European perspective, Trump's arms-exports policy encouraged even more leniency vis-à-vis MENA (Middle East and North Africa) clients and even less coordination vis-à-vis Washington," wrote Maged and Harchaoui.[37]

Indeed, there is nothing new or surprising in the fact that the European arms industry profits from human rights abuses, rearmament, and instability. However, what is new in recent years is that the EU has entered the field at a whole new level – with research and development programmes, with collective pressure for rearmament, and with close coordination between the arms industry and the European Commission as the political centre of the EU system. In addition, the EU is acting as a well-oiled competition state in this area. As with the financial sector and the pharmaceutical industry, strategies have been developed in cooperation with industry to ensure "competitiveness," covering several levels of business. Programmes to develop new technology are funded so as to secure a competitive edge. In the end, the moves made to secure global exports have implications for the EU's global role and relationship to different regimes worldwide.

EU MILITARISATION, BUT TO WHAT PURPOSE?

There is of course much more to EU militarisation than the bare financial interests of the arms industry. It marks a new era in which the EU is beginning to apply hard power in support of a whole host of various interests. What are these interests, though? Or, to keep ourselves within the confines of the main concept of "strategic autonomy," what does the EU need all this autonomy for?

A clear definition of common interests is a prerequisite for a solid CSDP. This is what the concept of "strategic autonomy" is supposed to achieve – even if it may not always be clear what those interests are, and even if EU Member States in some cases have different interests. "Strategic autonomy" reflects the idea that the EU has special interests that only the EU itself can take care of. In the present context, this refers mainly to interests that cannot be pursued through NATO, because the US is not always going to have the same interests as the EU in any given part of the world. In particular, US engagement in Africa is less intense and comprehensive, while the EU has many interests in its southern neighbour, making it an obvious target for the EU's strategic autonomy.

On that note, it is worth reflecting on the role of the Russian invasion of Ukraine to ask ourselves what the connection has been between this bloody war in our own neighbourhood and the rapid unfolding of EU militarisation. The fact is that while the war did lead to coordination of support for Ukraine and to programmes such as the Act in Support of Ammunition Production, there is actually no strong link between the two. The steps towards common arms production and development, rearmament through PESCO, and external actions through the European Peace Facility – none of these were initiated out of concern for Russian aggression. Likewise, adopting strategic autonomy as an objective in EU security and defence policy was not driven by an interest in containing Russia, at least not initially.

The development of the "strategic autonomy" approach is a gradual and ongoing process, the Global Strategy from 2016 and the 2022 Strategic Compass being the key documents defining the concept.[38] In assessing the global security situation, there are many similarities between the content of the two documents, including fears of terrorism, nuclear build-up in Iran, and instability in neighbouring regions. Relations with both China and Russia are included as well, although in both cases the tone has been changed, sharpened, and clarified in the Strategic Compass.

In the Global Strategy, the EU condemns Russia's annexation of the Crimean peninsula and the destabilisation of eastern Ukraine is deemed unacceptable. Nevertheless, the overall message is welcoming: "At the same time, the EU and Russia are interdependent. We will therefore engage Russia to discuss disagreements and cooperate if and when our interests overlap."[39] Naturally, such accommodation is completely absent from the Strategic Compass, adopted just one month after Russia's bloody invasion of Ukraine. It does, however, indicate that the EU strategists who had been building a militarised bloc brick by brick since 2016 were not thinking about waging a war against Russia. In fact, throughout the process of EU militarisation, relations with Russia were rather relaxed.

It was the invasion of Ukraine that exposed the flaws of the EU's policy on Russia in the years leading up to the attack. The dependence of many Member States on Russian gas, with Germany as the most obvious example, was a particularly embarrassing reminder of the many years of EU naivety and opportunism. It speaks volumes that between 2015 and 2020, after Russia's annexation of Crimea, EU arms producers from 10 EU Member States sold weapons to Russia to the tune of €346 million.[40] Indeed, in the months following the invasion, there was some internal wrangling over how far to go to support Ukraine, with major gas importer Germany showing reticence. In this context, the United States acted more decisively, and perhaps not least for this reason, the Ukraine war should not be seen as a major step towards a proper European security and defence policy. Instead, the conflict has pushed NATO even closer to the centre of EU defence policy.

To the EU, the war in Ukraine touches on territorial defence, and for this, the EU has no immediate mandate. The Treaty commits the EU to ensuring that the CSDP is "compatible with the obligations" that most Member States have vis-à-vis NATO.[41] If we add to this Sweden's and Finland's applications for NATO membership, with Finland already a member at the time of writing, the conclusion must be that the EU has become more integrated into NATO and that Russia's invasion of Ukraine cannot, as such, be said to have encouraged the further development of a security and defence policy specific to the EU or to have been developed on the basis of specifically European interests. NATO remains "the foundation of collective defence" to its members, as stated in the Strategic Compass.[42] To understand the core concept of "strategic autonomy," we will have to look elsewhere.

THE COMPASS OF THE COMPETITION STATE

The Strategic Compass, adopted shortly after the Russian invasion, is in many ways different and more elaborate than the Global Strategy from 2016. For obvious reasons the Compass takes a much tougher stance on Russia than the Global Strategy. However, more interesting in this context is that the approach to defence and security policy in the Strategic Compass is more closely linked to the EU's economic interests in a strategy that is clearly intended to embrace a variety of interests under the same umbrella.

The Compass was drafted while the COVID-19 pandemic was still ongoing, and initial deliberations were heavily influenced by industry shortages of raw materials and semi-finished products – such as semiconductors (see Chapter 7) – as well as by an intense but short-lived search for protective measures. "The crisis has revealed areas where Europe needs to be more resilient to prevent and better withstand future shocks," wrote EU High Representative Josep Borrell in a presentation about the Compass.[43] "These include health protective equipment and medicines of course, but also more broadly key technologies, certain critical raw materials (such as rare earths), security and defence industries and the media. Without isolating ourselves from our partners, without engaging in protectionism, everything calls for increasing our collective capacity to protect our own values and interests."

As on many other occasions, the representative was careful to stress that the EU remains committed to trade liberalisation, the preferred tool for access to raw materials, but the language used suggests that something new was happening in EU foreign and security policy. This was confirmed by the Compass, which attaches great importance to integrating particular economic considerations into foreign and security policy. "The Covid-19 pandemic has fuelled international rivalry and showed that disruptions of key trade routes can put critical supply chains under pressure and affect economic security," the Compass states.[44]

More than ever, economic interests, such as global supply chains, including energy supply, are tied to EU foreign and security policy. In the context of developing the capability to use "hard power," and with the backdrop of increased militarisation, it raises the question of which actions are considered so central to the EU that they could trigger the use of this power.

EU INVOLVEMENT IN AFRICA

Now that the EU has brought access to raw materials and critical technology under a framework that also serves as a security policy framework, time will tell what this actually means. Hard power does not always equate to military power. However, given the rhetoric of people like Commissioner Breton and High Representative Josep Borrell, the prospect of the EU resorting to military force beyond defence purposes seems realistic and worrisome. Furthermore, when it comes to energy, and more specifically gas supplies, the EU has already begun to build a bridge between military engagement and supply of the natural resource.

It is in Africa that the vast majority of the military actions in which the EU is involved are taking place. In recent years, former colonial power France has been under severe pressure from anti-French sentiment in many African countries, not least in the Sahel region, where France led unpopular military operations in Mali until recently. Nevertheless, the country has managed to put itself at the forefront of EU engagement on the continent.

France has a wealth of economic interests in Africa and the Indian Ocean, including gas exploration off the coast of Yemen. The Transnational Institute and ENAAT see a link between those interests and EU rearmament through the EDF, given that France is by far the largest recipient of EU funding: "The EDF will almost certainly strengthen French policy in the Indian and Pacific Ocean areas: the race for offshore gas in Mozambique, Tanzania and Yemen, facing war and displacement; the destabilisation of Madagascar already ongoing; and pressures in New Caledonia where there is a strong independence movement."[45] However, perhaps more strikingly, the EU, through EPF, is involved in a conflict in northern Mozambique revolving around gas supplies.

GAS FOR EUROPE, PROFITS FOR TOTAL

Northern Mozambique has been the scene of a bloody civil war since 2017. Al-Shabab, not to be confused with the group of the same name in Somalia, is an Islamist group of insurgents that originated among the Mwanis in the Cabo Delgado province. At the time, it launched a bloody campaign against government representatives and other ethnic groups in the area, particularly against the predominantly Christian Makonde population. The conflict has claimed more than

4,700 lives, and more than 800,000 people had been displaced as of September 2023.[46] Islamist groups from other parts of East Africa played a role in building the movement, and for a time ISIS referred to the group as a branch of its own movement. Al-Shabab has all the characteristics that make it an ideal target for counter-terrorism campaigns. However, the conflict fundamentally revolves around something else. Northern Mozambique is rich in natural resources, with ruby deposits on land and large gas deposits off the coast.

The rush to mine these gas deposits is headed by both European and Mozambican endeavours. In 2019, French oil and gas company Total made its entry with an investment of €19 billion. However, this venture turned out not to be quite as straightforward as anticipated. In April 2021, Islamist insurgents came so close to Total's facilities that the company decided to withdraw its employees. A few months later, in July 2021, the EU Council of Ministers agreed to support the Mozambican army with €4 million, an amount that was increased by another €40 million in November 2021. This has led to the creation of an EU training mission and €20 million in support for the Rwandan troops who had joined the Mozambican army in July 2021. Since then, a steady stream of funds has flowed into the war chest of the Mozambican regime. The regime's own representatives act only as "rentiers" – they profit from the extraction of natural resources, but do little or nothing to ensure that the resources support local or national development.

For Josep Borrell, European involvement is directly linked to the presence of gas, though he downplays the role of this European interest in Cabo Delgado: "Some journalists in Mozambique have asked me whether our support to the fight against terrorism in Cabo Delgado is linked to the gas reserves in this region," he wrote in September 2022. "My answer was clear: the gas discoveries in Mozambique should benefit the Mozambican people first and foremost, while they can also help to tackle the global energy crisis and energy demand. But that is not the primary reason of our engagement in Mozambique. The security of Europe starts in places that can be sometimes thousands of kilometres away."[47]

IGNORING THE SOCIAL ROOTS OF THE CONFLICT

However, what Borrell does not address in his lengthy analysis of the situation in Mozambique is the root cause of the rebellion. While gas resources have been a gift for the wealthy ruling party, they have been a curse for the local population. Thousands of local inhabitants have lost their livelihoods as fishermen or farmers, in many cases because they have been displaced. They are a large part of the local rebellion against a commodity venture that benefits a few very rich people, mainly in the south of the country. Southern Africa expert Joseph Hanlon compares the situation to the time when the people of the same area rebelled against Portuguese colonial rule – a time when local wealth flowed solely to the colonial power. "The grievance was the same in both wars. Independence had been the flag 50 years earlier; this time, the flag is Islam."[48]

EU involvement in Mozambique, in terms of military support, grew quickly in the aftermath of the problems Total encountered with gas extraction in 2019. It also resulted in a major development programme designed to support the social and economic development of the country. This programme, according to the EU, is based "on the ruling party FRELIMO's 2019 electoral manifesto and on the specific priorities of the government established by President Nyusi at the start of his mandate."[49]

Thus, the EU has entered into a close alliance with the Mozambican ruling party, the very same corrupt party that bears responsibility for the rebellion, and which has its eyes set on a military crackdown. The reason for this is that the EU has an interest in protecting Total's investment and because gas supplies from outside of Europe have become so much more important since Russia's invasion of Ukraine. Hence, the EU decided to increase military support in September 2022, ostensibly in response to a terrorist attack in which Islamist rebels had beheaded six people, including an Italian nun. An additional €15 million euros for a military force from the Southern African Development Community (SADC) was added to the €89 million that had already been allocated to the Mozambican forces.[50]

This is an attempt to resolve an armed conflict by military means, ignoring the social context and roots of the clash, with local impoverished populations losing in a game over the spoils of gas exploitation. According to Joseph Hanlon, it is not going to work: "FRELIMO and the government hope that by representing themselves as the victim of a global enemy, Islamic terrorists, and a player in the new East-West cold war, they will attract support without being closely scrutinised. They intend to end the war within a few years, while maintaining the rent system. However, the country's history suggests that, without dealing with the many grievances, this will fail."[51]

In the years following Total's entry into Mozambique, however, it was clear that the EU was highly receptive to a narrative placing the brutal, extremist, global Islamist terrorist movement at the centre of the conflict. This narrative is a convenient red herring, with the real stakes revolving around access to gas supplies and the defence of European-French investments.

A "PEACE PROJECT" IN SUPPORT OF THE ARMS INDUSTRY

A few years ago, such a high level of EU involvement in the conflict in Mozambique would have been unthinkable. It would not have been unusual to see individual European countries in that role, but the engagement of a true common EU project would have been politically impossible. However, with the developments we have seen since Brexit, including common weapons programmes and the gradual development of a real CSDP, the EU is indeed becoming a military project. EU leaders have long seen it as the logical next step on the path towards EU integration that the economic superpower would also become a military superpower, equipped to add "hard power" on top of economic muscle, if necessary.

If there was ever any shade of truth behind the perception of the EU as a "peace project," it is quickly evaporating as the Union arms itself and sets far-reaching benchmarks for how common security is to be understood. The "project of competitiveness," aimed at strengthening the European arms industry, will only end up fuelling local conflicts, as with the war in Yemen. Furthermore, EU militarisation has been revealed to be mainly designed to secure economic interests for the Union, even in far-distant climes.

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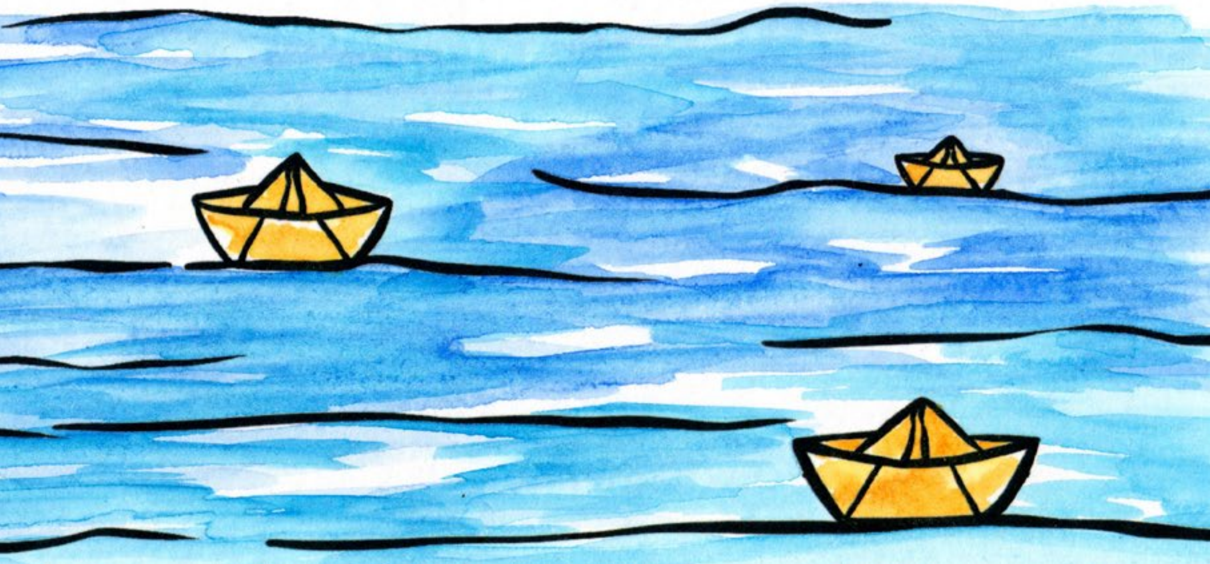
9

THE SUBORDINATION OF SOCIAL EUROPE



Social rights are a hot topic in the EU right now. In November 2017, Member States adopted the Commission's proposal for a social pillar, or Pillar of Social Rights, a charter of social rights for citizens in the EU. This has resulted in decisions on extended and equal rights for maternity leave, a proposal on the recognition of rights for workers on internet platforms, and a proposal on minimum wages. The social pillar will be a focal point for social policy in the EU for years to come, whether through the European Semester or outright legislation.

Compared to the time of José Manuel Barroso's presidency (2005-2014) and the tough years of the 2010-2014 euro crisis, there has been a marked difference in the rhetoric coming from the Commission, and a cautious optimism can often be detected among European trade union organisations, which have sought for decades to steer the EU's development in a more social direction under the slogan of "social Europe." However, it would be an over-interpretation to see this development as a break from past negligence of social rights. The Commission's vision of a "social Europe," as expressed in the social pillar, amounts to little more than a list of principles and targets for training, employment and poverty reduction.

There has never been a will, neither in the Commission, nor in the Council, to introduce a genuine, tangible social dimension to the EU's mission. A social Europe was certainly part of the rhetoric in the late 80's when Commission President Jacques Delors introduced the idea of a "social dimension" in the European project,[1] one that would prevent economic integration from undermining social rights and welfare in Member States, but those ideas never materialised. After the adoption of the Lisbon Strategy in March 2000, which made competitiveness the strategic goal of the Union, social policy at EU level began to be pushed down the list of priorities. At this point the contradiction between the persistent rhetoric of some governments and the Commission about a social dimension and reality became clear. Later, when the euro crisis led to a frontal attack on the trade union movement in many countries, first and foremost in the euro area, hopes for a "social Europe" hit rock bottom.

In previous decades, it has been part of the European Union's agenda to to control wages, to make labour markets more flexible in favour of employers, to expand the labour force through attacks on pensions, unemployment benefits and job security, and to introduce "active labour market policies" that shift responsibility and the blame to the unemployed. Minor concessions have been made to trade unions, and sympathetic rhetoric was developed to secure support and legitimacy, but the endgame of EU social policy has always been to create a cheaper and more flexible workforce. The Commission's priority is strengthening the euro and EMU, regardless of what it means for workers. Looking at their actions in recent decades makes it plainly clear: there is no doubt that labour rights and social policy have been subordinated to competitiveness.

The trade union movement has also experienced first-hand the clear contradictions between trade union rights and the rules of the Single Market. The rights given to companies under the biggest set of rules in the EU have caused many clashes between workers and the EU over the past 20 years.

It is tempting to think that the social pillar, the EU's new, broad social agenda, heralds the beginning of a new, progressive era. Sadly, that is not the case, because the social pillar in fact does nothing to mitigate the impacts of the two key neoliberal features of the EU – the Single Market and EMU – which are essential for its development as a competition state. We should be under no illusions: the social pillar exists simply to underpin the EU's ultimate goal of striving for economic competitiveness. This does not mean there will be no concessions in the coming years to the trade union movement. The social pillar will not be a completely hollow gesture, but any concessions made will not affect the EU's fundamental direction in terms of labour markets and social policy.

This chapter consists of a close examination of the tensions between the core strategies of the EU, including the main economic elements of the Treaty (EMU, Single Market) and labour and social policy. It shows how the latter has always been systematically subordinated to concerns of competitiveness or growth.

THE LAVAL/VAXHOLM CASE

A good place to start is just outside Stockholm, in late 2004.

What took place there was not unusual in Sweden at the time. Renovation work in a school on the small island of Vaxholm had sparked a conflict between the construction company – the Latvian company Laval – and the trade union movement. Local unions had launched a blockade in response to poor pay and working conditions, as is expected when a company will not sign a collective agreement, especially in Sweden where trade unions are especially strong.

The case ended up before a Swedish court, which quickly decided to refer it to the European Court of Justice (CJEU). According to the Swedish judge, it was unclear what rights a foreign service company had, and what room for manoeuvre Member States had to organise their labour market legislation under EU law. Therefore, the only body equipped to give a response was the EU's highest court.

Many cases on labour law and trade union rights had been brought before the CJEU in the past, but this one was special. The issues were more fundamental than previous cases, as they dealt with the right to take industrial action when a company ignored collective agreements. It also struck a chord in the heated debate about social dumping within the EU, which had gained momentum following the enlargement of the EU to include ten Central and Eastern European countries, including Latvia, in May 2004.

In that part of Europe there was plenty of cheap labour, which the trade union movement in the old Member States saw as a serious challenge. An unfortunate outcome in the Vaxholm case (often called "the Laval case" after the name of the Latvian company) would have been a serious defeat in the fight against social dumping. If employers could get away with offering miserable wages and working conditions to "posted workers," the collective agreements in force in that area would become a thing of the past, or at the very least would be severely eroded. Thus, it was crucial for the trade union movement to ensure the same conditions for migrant workers as those agreed through collective bargaining.

NOT JUST SWEDEN

The results of the fight against social dumping vary between countries. In the Nordic countries, the trade unions and their relationship with employers play a crucial role. Wages and working conditions are largely determined by negotiations between the two parties, not by legislation. Restrictions on the use of industrial action such as blockades or strikes – as was the case in Vaxholm where the employer did not respect the collective agreement in force – pose a threat to the trade union movement. The agreement reached may be eroded, and the balance of power between the two parties altered in favour of the employers if a blockade is to be considered illegal in the first place.

Although labour market conditions and labour laws in other EU countries look different – typically with a greater role for the state and weaker trade unions – the Vaxholm case was closely watched from all sides, as it touched on something fundamental: the relationship between the rules of the Single Market and labour rights.

Some European employers' organisations hoped that the principles of freedom to provide services would be strengthened, not least the Swedish employers' organisation Svenskt Näringsliv, who even stepped in to cover legal costs for Laval after they filed for bankruptcy in the wake of losing the Vaxholm contract. They had something to gain by suppressing the trade union movement through EU judgements.

The CJEU ruling was about as bad as could be imagined, as it was, in effect, a slap in the face to the trade union movement. According to the CJEU, the use of industrial action was in breach of EU rules in situations such as the one in Vaxholm. As is often the case with the Court of Justice, the starting point was the weighty provision of the EU Treaty on the freedom to provide services, which is paramount unless there are good and legally very strong reasons to override it, such as a directive setting out clear exceptions to the general rule of free movement.

The trade union movement had seen such an overriding reason in the so-called Posted Workers Directive. This was an EU law that had been in force since 1996, which stated that Member States could demand compliance with existing minimum levels of salary and working conditions. This had always been interpreted to mean that the applicable conditions, including collective agreements, also applied to posted workers. The directive was understood by almost everybody as a so-called "minimum directive" that established a floor of rights.

However, the court decided otherwise. The December 2007 ruling turned the interpretation of the Posted Workers Directive on its head: henceforth, the minimum wage at national level was to be the maximum requirement. The right to provide services "precludes" trade unions from taking industrial action aimed at getting employers to pay more than the minimum wage as required by law, the ruling said. No industrial action by trade unions "to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement" to obtain more favourable conditions than the minimum wage was to be allowed.[2] In essence, the judges chose to assert the importance of the right to deliver services – one of the four economic freedoms in the Treaty – over the rights of workers.

In the absence of a statutory minimum wage, not only the Swedish but also the Danish trade union movement was now in serious trouble. Though all collective agreements in these countries operated with something resembling a minimum wage, it was very low, and only became a decent wage by virtue of allowances and bonuses. A simplistic rule to have a minimum wage as the only indicator with legal weight would therefore undermine collective agreements. The Vaxholm judgement opened the floodgates for social dumping.

THE SINGLE MARKET VERSUS TRADE UNION RIGHTS

The Vaxholm case was a milestone in the history of the trade union movement's relationship with the EU, but it was far from a one-off. A related case, known as the Viking case, took place when the Finnish ferry company Viking Line decided to outsource to neighbouring Estonia, a much cheaper option than being subject to Finnish collective agreements. This resulted in a strike, which was brought before a court in London where the judge ruled that nothing in EU law gave Finnish workers the right to strike against outsourcing. The case then came before the European Court of Justice, which assessed whether strikes or other industrial action were covered by EU law at all. It concluded that they were: the Court did have a mandate to make decisions that would have an impact on the scope of the right to industrial action. This case was decided on by the ECJ on 11 December 2007, a mere week before the decision in the Vaxholm case.

Another related case around the same time would narrow down the understanding of minimum wages and make the attack on labour rights even more pronounced. The Rüffert public procurement case concerned the minimum wage for the renovation of a prison in Lower Saxony, Germany, where local authorities demanded compliance with the local collective agreement. The case ended up in the European Court of Justice, which ruled in favour of the contractor. The Court stated that where a national minimum wage is lower than the local one, only the national one can be claimed, no more.[3] There was also the Luxembourg judgement, in which the Court restricted the number of areas in which Member States could place demands about working conditions on contractors based in other Member States.[4] In particular the decision underlined that indexation of wages – the upwards adjustment to compensate for inflation, as is customary in Luxembourg – cannot be required.

All four judgments were an outcome of judges applying the full strength of the four economic freedoms. While that is not unusual, the judgments did take many by surprise. In the Nordic countries, for instance, trade union leaders held the firm belief that the Treaty would prevent the judges from interfering in labour law, and in wage negotiations. They could point to the Treaty to find wording that seemed to support their argument, but the logic applied in the end by the judges was one that prioritised the four freedoms.

The Posted Workers Directive, which had now become a weapon against fair wages, collective bargaining and trade union rights, was part of the work programme called "the social dimension." This programme dated back to the late 1980s and the then President of the Commission Jacques Delors, whose greatest political victory during his time in office was the adoption of the Single Market through the Single Act.

By doing this, he had let business have their cake and eat it, but he wanted the EU to become not just a market union but also a social project. "Nobody can fall in love with a common market," Delors is often quoted as saying.[5] This is the reason why a protocol to the 1986 Single Act (subsequently incorporated into the Maastricht Treaty) added some provisions to the Treaty, giving the EU some room for manoeuvre in the field of social and employment policies. Since then, this social chapter has been translated into a work programme on issues such as working time, minimum protection and holiday provisions. However, there were limits. In particular, the Treaty does not give the EU the power to intervene in wage formation.

Getting through the work programme and translating it into EU rules turned out to be a laborious project, and the end result was not impressive. As an example, there have often been years of negotiations over adjustments to working time directives, leaving plenty of room for employees to demand working weeks of up to 60 hours.[6]

Neither the governments in the Council nor the Commission had great ambitions, so a real social dimension was not achieved. Perhaps the two most important measures were a directive on maternity leave and the Posted Workers Directive, which seemed to guarantee posted workers at least the same pay, working conditions and protection as local workers. This was the directive which, in the case of Vaxholm, had gone from being a protection directive to the opposite – instead of setting a minimum standard it came to set a maximum. The rulings were an expression of the inherent bias in EU law, which hinges on protecting certain freedoms such as the free movement of goods, capital, labour and services. Other considerations may be taken into account, but they must have a solid basis in the Treaty. The last word on the matter had certainly not been said, but it would be ten years before the legal precedent established by the Laval/Vaxholm ruling was corrected.

CONFRONTATIONS LEAD TO CALLS FOR TREATY AMENDMENTS

In the period of 2004 to 2007 – at the time of the Vaxholm ruling – few spoke with conviction of a social dimension. In the European trade union movement, there had long been a move towards much more critical positions on EU developments than in the 1990s. A body like the European Trade Union Confederation (ETUC) was certainly not a fighting organisation in the 1990s.

As it became clear that the European political project was turning into something that did not serve the trade union movement well, the ETUC had to step up its game. On several occasions over the course of the 2000s, the organisation spearheaded political campaigns and demonstrations to influence developments in the EU. This was because the four court rulings described above came at a time when the trade union movement had already begun to face a series of challenges with EU laws, most of them concerning legislative initiatives aimed at deepening the Single Market, particularly in the area of services. With the aim of liberalising this area, the then EU Commissioner for Internal Markets Frits Bolkestein presented the Services Directive (also known as the Bolkestein Directive) in 2004 (see Chapter 2). Movements to liberalise trade in services (which covers just about anything you can sell but not drop on your feet) lagged far behind those of trade in goods, and both the Commission and the leading business organisations such as BusinessEurope were becoming impatient. The model of liberalisation chosen by the Commission aimed to put an end to their frustrations.

Instead of a myriad of harmonisation laws that would apply the same standards and rules across the bloc, the Commission chose instead to build the process around the "country of origin principle." This meant that service providers would only have to follow rules in their own country when providing services in other countries. The trade union movement was quick to see the risk in this concept: if any service company were based in a place where trade union rights and wages were at a minimum, they could stick to them, and thus compete successfully against companies based in other Member States with stricter rules.

This led to vigorous protests, organised by large coalitions of trade union organisations. As a result, when the Services Directive was adopted in 2006 it was in a reduced version compared to the original, with a number of sectors, such as health and transport, completely excluded from the directive. Trade union rights, collective agreements and pay were completely omitted. This did not mean that the Services Directive had become completely harmless from the trade union perspective, but the worst-case scenario had been averted.[7]

In general, the 2000s were a time of numerous confrontations between the trade union movement and the EU, stemming from the Commission's liberalisation efforts and the Lisbon Strategy, which was dictating the Council's overall agenda.

A protracted conflict over the "Port Services Directive" that began in 2003 highlighted the need for an effort to counter the onslaught of market deregulation. The problem with this directive was a rule stating that ships' crews should also be able to carry out pilotage and loading work, which went against the interests of dock workers. The consequence, according to the trade unions, would be that underpaid workers on the ships could undercut and out-compete local port workers who were working under a collective agreement.

The directive was met with harsh criticism. Dockers blockaded 13 European ports before the Parliament first voted on the directive in November 2003, and the proposal was rejected by a slim majority of 229 to 209. That seemed to be the end of it, but a few years later, in 2006, the Commission and the Council tried again. However, it seemed that this second round was seen as a provocation by MEPs, and the proposal was voted down in the European Parliament by a much larger majority.

The aforementioned four court cases, and fights over labour rights and EU laws, resulted in a widespread demand from the major European trade union organisations to put a definitive end to their attacks, which had their roots in the Single Market. It did so with a 2008 proposal for a "social protocol," which would put social progress and concerns above those of the Single Market. "Economic freedoms cannot be interpreted as granting undertakings the right to exercise them for the purpose or with the effect of evading or circumventing national social and employment laws and practices" read one of the key parts of the protocol.[8]

THE SOCIAL DEMOCRATS' LISBON STRATEGY

The pressure for deregulation, which did not always bear fruit, must be seen in the context of the Lisbon Strategy. Drawn up by the Commission and adopted at a meeting of the European Council in Lisbon in March 2000, it set the overarching goal for the coming decade: "The Union has today set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion."[9] A series of initiatives under the Single Market were to be an important part of the way forward, but the Lisbon Strategy also included a more explicit agenda on social policies and labour markets. Wording on "more and better jobs and greater social cohesion" seemed to indicate an imminent upgrade of "the social dimension," as did the concept of "modernising social protection" that was used in the conclusions of the summit.[10]

It was a choice of words that spoke to sections of the trade union movement, not least the ETUC in Brussels, where it was seen as a step away from the EU's decidedly neoliberal approach. In 2003 the ETUC felt it could register a victory, and stated that "in adopting the Lisbon Strategy the European Union itself has made a choice which proves that our demands were well grounded."[11]

But what was the actual social agenda of the Lisbon Strategy? The summit declaration left no doubt that this was a strategy aimed at dismantling protection rather than modernising it. "Active employment policy" was the essence of the "social" part of the Lisbon Strategy, and it was about adapting the workforce, among other things "through flexible management of working time." The central approach of the strategy was "enlarging the labour force," which would "reinforce the sustainability of social protection systems." This increased workforce was to be provided by "an active welfare state to ensure that work pays." Social cohesion and social inclusion were to be achieved by "the economic conditions for greater prosperity through higher levels of growth and employment."[12]

The strategy could hardly be called a modernisation of social protection as it takes the demands of business as its starting point, and in doing so resolutely moves the agenda away from the social protection that many associate with social democratic welfare states. For that reason, it is rather surprising that it was the Social Democrats who dominated the table in Lisbon. Of the 15 governments represented at the meeting, 12 were either exclusively Social Democratic or Social Democratic-led governments. This was, undoubtedly, a sign that the social democratic movement was also committed to the common, fundamental goal of making the EU a competition state.

THE SOCIAL DIMENSION OF THE LISBON STRATEGY

In the years that followed, a lot of energy was put into implementing the social dimension of the Lisbon Strategy. Since this was not an obvious area of EU competence, it was done through a new procedure, called the "open method of coordination." Implementing the labour market part of the strategy through new EU legislation would have been impossible or difficult, so instead it took the form of dialogues around non-binding guidelines which the Commission played a major role in developing. The goal was to identify and emulate "best practice."

From 2005 onwards, this method also led to the annual drafting of national reform programmes, written by Member State governments and presented to and discussed with the Commission and other Member States. The collective effort to modernise social protection took a firm grip on some aspects of national government, including the welfare state.

Unemployment benefits came under scrutiny on the grounds that a seemingly generous system would backfire: "Good unemployment benefit systems are necessary to offset negative income consequences during job transfers, but they may have a negative effect on the intensity of job search activities and may reduce financial incentives to accept work," the Commission wrote in a 2007 communication. Collectively, "strict employment protection" was identified as an obstacle to employment growth,[13] and an "active labour market" policy was the Commission's solution. Together with discussions on pension reforms and other ways to increase labour supply, it formed the backbone of the social dimension of the

Lisbon strategy, thus putting the needs of the competition state ahead of traditional social democratic labour market policy.

According to an analysis by Bastiaan van Apeldoorn and Sandy Hager, both of whom have been analysing the EU, and in particular the role of ERT, for a number of years, this should be seen as an outcome of the "embedded neoliberal project" of the EU, whereby poverty, marginalisation and unemployment are seen in the Lisbon Strategy as issues to be solved through increased "competitiveness." The EU follows a labour market policy model that Bob Jessop calls a "Schumpeterian Workfare Regime," where social policy is completely subordinate to economic policy, thus creating pressure to bring down the cost of social benefits.[14]

The Lisbon Strategy treated labour market reforms as a priority for dialogue on a common direction but not legislation, as this was complicated by limitations on EU competence in the labour market. Accordingly, it is difficult to assess which national reforms stemmed directly from the Lisbon Strategy. However, during the period of 2000 to 2010, several Member States adopted comprehensive reforms that promoted workfare over welfare. Most famous are the German Hartz laws (see Chapter 4), but Italy was also among the countries that weakened protection under labour law. This was done through the Biagi reform, adopted in 2003, which promoted a new form of contracting that did not provide for holidays, maternity leave, days off or sick leave. In both Italy and Germany, inequality rose the most during the Lisbon period, while for the EU as a whole there was a clear trend towards a decline in the quality of jobs, with greater use of part-time work, temporary employment agencies and short-term contracts.[15]

While the ETUC regularly complained about what they perceived as an imbalance between the economic, market-oriented and social parts of the strategy, they never definitively distanced themselves from the Lisbon Strategy. Likewise, the business community, specifically BusinessEurope and the ERT, was never dissatisfied with the content of the strategy. The only perceived drawback was its pace, together with the lack of tools to ensure the implementation of reforms.[16]

The ERT was concerned early during the Lisbon period with how to put in place procedures that would ensure the effective implementation of structural reforms in the labour market. In 2002, this led the ERT to propose that Member States' fiscal budgets and economic policies should be subject to scrutiny at EU level before being adopted. This proposal was not supported by the Council at the time, perhaps because both Germany and France, arguably the two most powerful Member States, were at that point struggling with debt and deficit thresholds.

On the other hand, the ERT strongly welcomed the National Reform Plans, which became the focal point for part of the implementation of the 2005 Lisbon Strategy. They considered the plans a "practical tool" to "continue and speed up structural reforms ," as expressed in a letter to German Chancellor Angela Merkel in 2007.[17] However, it was not until the euro crisis hit that such ideas were systematised and translated into legislation and established procedures.

THE EURO CRISIS AND STRUCTURAL REFORMS

The euro crisis led to a sharp turn in the EU approach to labour laws and labour markets, not so much in terms of goals and strategy, but very much in terms of methodology. The time when core labour issues were cautiously dealt with via soft law was coming to an end. Going forward, labour laws, including wages, would become part of the mix when Member States with ailing economies, particularly those in the eurozone, were pushed to implement changes by their peers in the Council and by the Commission. First of all, Greece, Ireland, Spain and Portugal were subjected to the demands of the creditors who were part of the Troika (ECB, the European Commission and IMF), as we saw in chapter 4. Greece endured the worst crisis of all with widespread cuts in collective agreements, interference with the right to strike, mass redundancies and many other major challenges. However, in the other three countries, the working class also felt the impact of EU austerity policies.

In Ireland, minimum wages were cut in a number of sectors, while reforms in Portugal were broader in nature. Among other things, the Portuguese government was ordered to curb collective agreements that did not express wage moderation, reduce public wage expenditure, promote agreements concluded outside trade unions, reduce severance pay and reduce overtime pay across the labour market.[18] In Spain in 2012, following pressure from the ECB, the government introduced far reaching labour reforms that severely weakened the system of collective bargaining.[19] As for Greece, the country would be subjected to an even bigger package of labour market reforms, which had immediate and severe social consequences and would change the Greek labour market profoundly to the advantage of employers.[20]

The euro crisis was a period of rigorous cutbacks and frontal attacks on hard-won rights such as the right to enforce collective agreements, to pensions, to a decent wage, to job security and so on. The bill for the crisis, which began with reckless speculation on the financial markets, ended up being passed on to the European working class. This happened in some countries more than in others, but that development was not confined to the hardest hit countries.

The crisis led to the establishment of much more robust mechanisms for delivering labour market reforms than the Lisbon strategy could have offered. The first signs of this appeared in March 2010 when the Lisbon Strategy's successor, the Europe 2020 Strategy, was launched. It was essentially a continuation of the Lisbon Strategy, with the same emphasis on competitiveness and structural reform, but it also presented an escalation in the attack on labour rights, which prompted the ETUC to reject it.[21]

For the trade union movement, two elements of the strategy in particular changed the picture. Firstly, by adopting this strategy the Commission and the Council had agreed on a comprehensive approach to the economic crisis, which was to develop into a crisis for the currency – the euro crisis – just weeks later. The strategy stated that "fiscal consolidation" should go hand in hand with the implementation of "structural reforms," including labour market reforms. The second aspect was the strategy's enforcement, which had been the weakest aspect of the Lisbon Strategy. With Europe 2020, the experiment of the open method of coordination was replaced by the European Semester, which would eventually evolve into a much more intrusive procedure (see Chapter 4). This would represent a major challenge to the trade union movement, as it meant that open negotiations and talks on labour markets would move into opaque processes conducted among government representatives.

Within a few years, the regulatory framework for EMU had expanded considerably, and the European Semester was at the heart of this development. Not only were tougher procedures and sanctions introduced to enforce the rules on budget deficits and debt, there were also other ramifications for the common economic policy. Not least among them was the so-called "macroeconomic imbalances" procedure, which aimed from the outset to ensure competitiveness by lowering unit labour costs. According to the new procedure, Member States were to make sure unit labour costs would stay under thresholds defined by the Commission. If unit labour costs went up substantially, procedures would kick in to have the Member State introduce rapid and effective reforms. In case of inaction, the

Member State in question could be fined. In this way, the EU suddenly had an indirect but explicit competence in the area of wages that was not available during the Lisbon period, a competence that was used extensively in the following years.

As described in Chapter 4, it was therefore not only wage earners in the hardest-hit countries who ended up footing the bill for the crisis strategy. In France, for example, pressure from the EU was an unavoidable factor in implementing labour market reforms that weakened the collective bargaining system and employment security. In other situations the new rules were used as a threat, as was the case with Belgium in 2011 and 2013, when the Commission demanded structural reforms to avoid the country being placed on a path towards sanctions. On both occasions the Commission hinted at the abolition of wage indexation to make up for inflation.[22] [23] BusinessEurope played an active role in all of these interactions, as they were continually persuading the Commission of the need for action in several Member States.[24]

In 2012, after just two rounds of the European Semester, Belgium, Italy, Spain, Cyprus, Luxembourg, Malta, France, Slovenia, Bulgaria and Finland had all received recommendations to bring down wages by either decentralising the bargaining system, phasing out wage indexation (upwards adjustment to neutralise price increases), reducing the minimum wage or, more generally, taking steps to bring wage developments under control.[25]

In some cases, recommendations did not lead to major results. Some Member States had little to fear, either because their economies were in relatively good shape, or because they were not in the eurozone. In other cases, such as in Spain and France, the recommendations led to labour law being profoundly reformed in favour of employers.

FIVE PRESIDENTS LOOK AHEAD

With the worst of the crisis behind them and a series of new laws on economic policy under their belts, the Commission and the Council began to look further ahead in 2015. The EMU was greatly expanded but not finished, and completing it would require an even greater degree of discipline in future economic and fiscal policy-making.

The now more developed economic policy framework provided many tools to intervene in member states if their economies were faltering due to debt, deficits or "macroeconomic imbalances," but there was a strong desire among EU leaders to go further and develop agreements on economic policy beyond times of crisis.

This is what gave rise to the Five Presidents' report of June 2015 – thus called because it was written by the presidents of the ECB, the Commission, the Council, the European Parliament and the Eurogroup. One of its main objectives was to establish shared long-term guidelines for economic policy, a fiscal union under which there would be "increasingly joint decision-making on elements of their respective national budgets and economic policies."[26] On economic policy more broadly, the report suggested that "the convergence process would be made more binding through a set of commonly agreed benchmarks for convergence that could be given a legal nature."[27]

The plan for completing EMU was highly ambitious. It was an outline of far-reaching centralisation of economic policy making, with policies laid down bureaucratically through "benchmarks" or "standards." Such a project will by definition have implications for social policy, and the Five Presidents addressed this issue in two ways.

Firstly, Member States – primarily those in the eurozone – had to ensure the implementation of "structural reforms" to reduce government spending at the expense of social safety nets. Secondly, the Five Presidents said the EU should earn a "social triple-A" rating, a perhaps slightly unfortunate reference to the top rating given by credit rating agencies to US securities in the runup to the 2008 financial crisis. Even so, it became a term the President of the Commission Jean-Claude Juncker would use frequently.

In defining the "social triple-A" status, the Five Presidents closely follow in the Lisbon strategy's footsteps: it consists of "tailored support for the unemployed to re-enter the labour market, improving education and lifelong learning" and lower taxation on labour. More generally, the social objective of the strategy is to ensure employment, as unemployment "is one of the main reasons for inequality and social exclusion. Therefore, efficient labour markets that promote a high level of employment and are able to absorb shocks without generating excessive unemployment are essential: they contribute to the smooth functioning of EMU as well as to more inclusive societies."[28]

The few passages in the report that explain the meaning of "triple-A" do not contain anything that is at odds with EU labour market policy since Lisbon, just as the concept is not at odds with the erosion of social protection that we saw during the euro crisis. Only one formulation pulls in a slightly different direction, and that is where the Five Presidents talk about establishing "a social protection floor," to protect the most vulnerable in society.[29] However, this "floor" – placed in quotation marks in the report – is neither explored nor explained beyond one fleeting mention.

Thus, the Five Presidents' Report provides an outline of the strategy for completing EMU, and is still referred to when new initiatives are taken, including in the field of social policy. While it can hardly be taken as a perfect expression of the views of all relevant parties, there is no getting around it to this day. The report served as a roadmap for the Commission on many initiatives in the following years, not least in the field of social policy, and the first of these was the European Semester.

A MORE SOCIAL EUROPEAN SEMESTER

The Five Presidents called for "employment and social concerns" to "feature highly in the European Semester."[30] In this context, the 2017 European Semester, which had otherwise been dominated by calls for tighter budgets, lower pensions and lower wages, was enriched with a social "scoreboard" to assess social developments in member states, and where recommendations could also be made to individual governments by the Commission and the remaining Member State governments.

The problem quickly became that the Semester was closely tied to the debt and deficit criteria of the Stability Pact, and to the procedure against macroeconomic imbalances, both of which could enforce austerity and structural reforms through procedures and threats of fines.

No such binding instrument existed for making social recommendations, leaving this area in a marginal position. Just as importantly, social recommendations were also viewed in this context via other, more weighty objectives. In particular, the prevailing view was that employment and job opportunities should be provided through structural reforms such as an increased emphasis on "active labour market policies," resulting in more pressure on unemployed people. Through this lens, vulnerable groups and unemployed people have to be protected by strengthening the link between social benefits and active labour market policies.[31] In other words, there were more conditions put on social benefits.

In his analysis of the social upgrading of the European Semester, Professor of European Law Mark Dawson considers that poverty is most often subordinated in this way "to other objectives and priorities," and that there is a sense in which

"EU action on poverty is targeted either at only a section of those facing poverty or at what 19th century romanticists once referred to as the 'deserving poor'."[32]

"In short," writes Dawson, "while 'displacement' (in the sense of coordinating social policy largely through the lens of other policy goals) was one among many options for the future of EU social policy coordination in the late 1990s, displacement has become more and more prominent as the European Semester has evolved."[33]

A THIN SOCIAL PILLAR

The social pillar must be seen in the light of the Five Presidents' report and the strategy for completing EMU. The social pillar, adopted at an informal European Council in Gothenburg in November 2017, set the agenda for the following years of discussion on social rights in the EU. The pillar contains rights that cover an enormous number of areas: education, equality, employment, pay, social dialogue, work-life balance, health and safety at work, data protection, childcare, social security and benefits, minimum income, pensions, health, support for disabled people, housing and access to basic services. However, almost without exception these are abstract declarations of intent, the practical implementation of which may range from hollow symbolism to real progress.

On trade union rights, for example, it seems progressive. The social partners are "encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action."[34] However, there is nothing to suggest that the EU's attempts to undermine or weaken collective bargaining systems will be stopped. The pillar simply states that collective bargaining, in and of itself, is a good idea.

More problematically, the pillar is carefully worded so as not to undermine the social policy stance that has prevailed in the EU for more than 20 years. It is predominantly a pillar of "active labour market policy," not an order to enshrine tangible rights for Europe's wage earners. This is perhaps most clearly defined in principle 5, which covers "secure and adaptable employment." This is intended, among other things, to ensure "the necessary flexibility for employers to adapt swiftly to changes in the economic context."[35] Even the description of a minimum wage leaves room for interpretation, which is far from accidental. According to the pillar, a minimum wage must be provided "in a way that provides for the satisfaction of the needs of the worker and his / her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work."[36] A corresponding logic is in place in the Pillar's wording on unemployment benefits, which "shall not constitute a disincentive for a quick return to employment."[37] The same goes for the promise that everyone in old age has "the right to resources that ensure living in dignity," which has had no impact whatsoever on the ongoing offensive to get Member States to downgrade their pension systems.[38] In these and in other areas, the vague wording of this list of rights ensures that it will, by all accounts, have little impact.

In her assessment of the social pillar, Silvia Rainone of the European Trade Union Institute (ETUI), an ETUC-affiliated think tank, writes that the social policy and social standards promoted by the pillar are "framed in a context rich of allusions to flexibility, adaptability and labour market functioning. The overarching economic rationale might thus impede the European Pillar of Social Rights from addressing social and labour standards without being conditioned by the economic functionality paradigm."[39] The pillar is far from a rights-based model of social policy, which has important implications for the role it will play in the development of the EU.

The social pillar, in its current format, is not particularly advanced. At the time of writing there are a number of draft directives to implement it in legislation, but not much has happened so far. However, the crucial issue is not slow handling, but rather the fact that the pillar does not mark a change in the subordination of social and labour market policies. The pillar will not change the problems that emerged from the Laval and Viking rulings, namely that we are faced with fundamental principles of EU law – rooted in the Single Market and in the Treaty – that pose a serious threat to social and trade union rights. It will therefore leave the overall approach to social and labour market issues untouched. The active labour market principles that subordinate social rights to competitiveness prevail.

This raises the question of what the implications of these rights are and what purpose the pillar serves in the first place. It also raises the question of what impact the pillar will have on the EMU's well-developed architecture of "economic governance" that operates through the European Semester.

THE SOCIAL PILLAR AND THE EMU

The social pillar is important for the Commission, and certainly for leading Member State governments, because it is closely linked to the completion of the EMU. When presenting a public consultation on the social pillar in April 2017, the Commission wrote that the pillar should be seen as an attempt to stimulate competitiveness and the digital labour market, and to deal with the social consequences of the euro crisis, demographic changes, and what this all means for pension systems and the differences between national economies.[40]

These are all challenges that "take a specific meaning for the completion of Europe's Economic and Monetary Union," as stressed in the Five Presidents' Report.[41] Therefore, in its plan for "Establishing a European Pillar of Social Rights" the Commission writes that the Pillar is "primarily conceived for the euro area but open to all EU Member States." In the same document the Commission also, interestingly, states that "some of the principles and rights established by the Pillar could serve the purpose of more binding standards in line with the process of EMU deepening."[42]

The social pillar is intended to be part of the process of establishing economic policy guidelines for Member States in the context of completing the EMU. The social pillar should therefore help pave the way for a major political deal in which Member States – in line with the Five Presidents' report – agree on economic policy guidelines that keep a tight rein on wages and working conditions, even beyond times of crisis. The euro crisis was understood by the Commission and most governments to be the outcome of undisciplined public spending and an overly lenient approach to wage earners in a large number of countries. This perspective is therefore built into the preliminary plans for the completion of the EMU.

In order to achieve a major political deal of this nature, there is a need to consider the response of European workers, and if possible to find a way to appease trade unions. There is no willingness to reform EMU itself, for example by dropping demands made on workers during the euro crisis. Legitimacy must therefore be brought about through a broader social policy agenda to identify and make symbolic social concessions, though this entails a political balancing act because the principles of the EMU have gone against social rights on countless occasions. We must therefore understand the social pillar as a tool that lays the groundwork for completing the EMU. It aims to secure the support of the trade union movement through a set of carefully worded potential concessions that are designed to not meaningfully interfere with the neoliberal goal of completing EMU.

This tactic also dovetails nicely with the major policy proposals that have come out of the social pillar so far, including a minimum wage proposal. This is not a proposal that would introduce an EU minimum wage, nor a national minimum wage, the aim is merely to provide a framework to guarantee the effectiveness of minimum wage schemes.[43] In other words, the Directive on minimum wage provides guidance on how to ensure compliance with a minimum wage, and what procedures and principles need to be in place nationally with regard to making it efficient. The legislative text presented by the Commission stops far short of introducing genuine, binding rules on minimum pay rates.

Adopting the Directive will strengthen the EU's overall role in labour market policy, and that is not necessarily a good thing. Particularly in the Nordic countries, the Directive on minimum wage has been received well by the trade union movement, which sees it as a threat to labour markets that do not primarily depend on legislation. It is a losing proposition for the trade unions, but the question is also how much could be gained elsewhere in the EU because, as previously mentioned, the Directive is about how a minimum wage should be administered, not how high it should be.

At most, this can be considered "a good step," as noted by the ETUC,[44] but it is not without risks. In many places, the draft directive explicitly highlights "competitiveness" as a benchmark for setting the minimum wage,stating, for example, that the proposal is "designed in such a way to safeguard access to employment and take into account the effects on job creation and competitiveness."[45] Such a reference to competitiveness should raise fears about what might happen if the Commission were to decide that the minimum wage in a given country cannot be justified. Given the EU's expanded competence under the EMU, this could lead to further bureaucratic control of wage formation.

In this way, the social pillar is not a solution to the problems arising from the EMU. It is linked to the Five Presidents' recipe for completing the EMU, and it is based on a labour market paradigm which, even in the current context, can easily lead to worsened conditions. As Mark Dawson notes: "Absent a more radical overhaul of Europe's Economic and Monetary Union, EU social policy coordination seems to have entered a blind alley, without easy escape routes."[46]

FROM CORONA TO RECOVERY PROGRAMMES AND BACK TO AUSTERITY

This impasse was also evident during the COVID-19 pandemic, when the most intrusive tools of the EMU were put on hold. When the Council and the Commission decided to temporarily suspend the possibility of intervening against member states with excessive deficits and debts during the COVID-19 crisis, and instead created a pool for loans and grants, the ETUC expressed some optimism.

Commenting on the final model, the ETUC welcomed the fact that "macroeconomic conditionality" had been slightly weakened during the preparations and that, conversely, the social and environmental dimensions had been strengthened. In the same communication, they welcomed the fact that the regulation contained more direct references to the social pillar.[47]

Regrettably, at the time of writing roughly two years later, things are looking less rosy from a social perspective. The programmes that were finally approved by the Member States show no evidence of the social rearmament that was necessary to combat a major crisis. Thus, from the outset, there was no link between the new financial resources and the social agenda, in contrast to investments related to the climate or the digitalisation agenda. Even though labour market or social issues were at the heart of the reforms that became part of the national programmes, they did not merit either loans or grants.

For this reason, the interesting question was how social policy reforms would be treated, as they appeared to be little more than conditions for loans for investments in other areas. In what was probably the most thorough analysis of Member States' plans to date, the conclusion was overwhelmingly negative. This analysis was conducted by Silvia Rainone of the ETUI, whose sweeping conclusion was that there are still "important obstacles to an effective 'socialisation' of the Semester and of EU governance," even taking into account COVID loans and grants. The impact of the social pillar on the EU and the Member States "does not constitute a sufficient counterbalance to the EU executive's tendency to address social and labour policies as if they were variables in relation to growth priorities and attaining fiscal and macroeconomic stability."[48]

The Recovery and Resilience Programmes (RRPs) that emerged from the discussion between governments and the Commission concern the field of social policy, and they belong predominantly to the category of "active labour market policies." Only four countries can be said to have programmes that aim to achieve better working conditions, and they are Slovenia, Romania, Portugal and Spain.

In this context, Portugal and Spain are interesting examples, in that both countries had governments that had just come to power on the back of promises to improve labour market conditions. In Spain, the Socialist Party (PSOE) and the left-wing Podemos party took office after the April 2019 elections, prior to the COVID-19 crisis. When the parties agreed on the government platform, one of the key goals was to abolish the draconian labour legislation passed in 2012.[49] These laws had significantly reduced the employment security of wage-earners in the Spanish labour market, making it significantly easier and cheaper for companies to fire their employees. In addition, they had changed the collective bargaining system so that individual companies could conclude agreements that undercut those collectively made on a regional or national level. Therefore, changes to labour law were a natural part of the centre-left government's agenda.

However, things were not so easy for the Spanish government at the European level. When political negotiations on the support packages and the related national programmes began in 2020, the message from the European Commission was that the relatively new Spanish government had to toe the line if they wanted to receive funds. "There is no going back," EU Commissioner Valdis Dombrovskis said of the Spanish plans, adding that all countries would be subject to "comprehensive evaluation."[50] Given that Spain's programme had to be approved not just by the Commission, but also by the other Member States, this announcement was seen as a clear threat.

When Spain's RRP plan was negotiated with the Commission, only a limited part of the 2012 Labour Code was allowed to be put on the chopping block.[51] This was a potential obstacle to Spain receiving the full amount, as payments of RRP funding could be stopped if Spain took any action that could jeopardise the objective of the plan, which was, in the eyes of the Commission, post-pandemic economic recovery. This also applies to Portugal, where the Socialist Party regained power in January 2022 on a promise to, among other things, raise the minimum wage to €1,000 over a number of years. However, as the Portuguese government has not included this ambition in its RRP programme, it risks being blocked.

While there are big differences between the EU's handling of the euro crisis and the COVID crisis, much remains the same, and the social pillar has not changed that. The EU's attacks on social rights are set to continue, and their subordination to competitiveness remains firmly in place.

THE SUBORDINATION OF SOCIAL EUROPE

The subordination of social policy to other policy objectives – competitiveness first and foremost – has been a constant feature of the EU for decades now, and a series of terrible crises has not changed that fact. Just as many in the European trade union movement strongly supported the Lisbon Strategy – despite all the evidence that it lacked the mechanisms needed to counter a broad offensive against worker protection – the major European trade union organisations are now holding back from attacking the Single Market and the EMU, despite all evidence that their basic functions can threaten workers rights.

Thus, while ETUC refrained from issuing a separate statement on the adoption of the social pillar back in November 2017, they instead opted to write a joint statement with BusinessEurope. According to the statement, the two sides are united in "improving coordination and cooperation in the Economic and Monetary Union and ensuring the proper functioning of the EU single market and its four freedoms."[52]

The fact that the European trade union movement – specifically the ETUC – can acknowledge the significance of a feeble social pillar with a renewed commitment to the EMU and the Single Market is likely indicative of the prevailing balance of power in the EU. Over the past two decades, European unions have learned the hard way that these two fundamental elements of EU cooperation do not favour trade union and social rights. In fact, despite its best efforts the trade union movement has only had a modest impact on the EU's course. This is true for EMU policy, just as it is true for the Single Market. Still, it takes little more than a symbolic commitment from the Commission and governments to make big trade union organisations rejoice and eye a bright future for a social Europe.

However, this does not mean that nothing has been achieved. In 2018 a new version of the Posted Workers Directive was finally adopted that annulled most of the damaging effects of the December 2007 ruling and allowed trade unions to enforce collective agreements against foreign employers. On that occasion, many were delighted. When the new (or old, depending on how it is viewed) version of the Directive came into force in 2020, the ETUC even called it a "major victory."[53]

There is no denying the significance of unpicking a decision made by the European Court of Justice, but from a different viewpoint it could be said that it took over ten years for trade unions to simply regain the right to defend collective agreements. It was a manageable victory, if it can even be called that. In some contexts, such as in the Nordic countries, the changes to the Directive have been taken to mean that the type of special collective agreements that were developed in response to the Vaxholm case are now legal. These were agreements that aimed for parity between posted workers and local workers, but they could not achieve it in full. In addition, the more fundamental problem remains that the European Court of Justice has jurisdiction in such cases. That may bring unpleasant news for the trade union movement in the future.

Initially, the European trade union movement had set a different and much more ambitious goal in the wake of the Vaxholm, Viking, Rüffert and Luxembourg judgments. What it wanted was a social protocol designed to prevent the rules of the Single Market from blocking or undermining social progress.[54] The fact that it never managed to gain sufficient support for that particular project means that the Single Market continues to put persistent pressure on social rights in the same way as the EMU. The EU's objective was never to put social policy on the agenda, but to ensure that social rights will be subordinated to its other, more fundamental political objectives.

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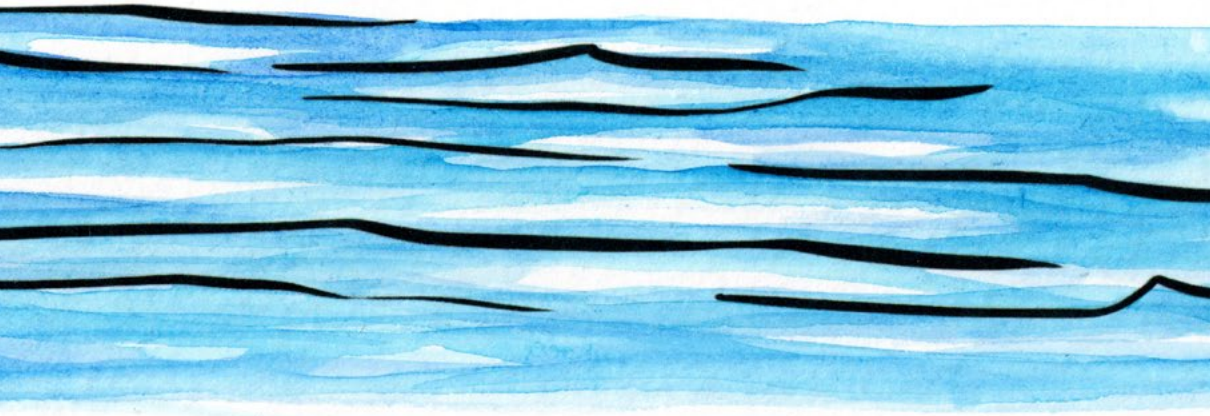
10

THE CLIMATE AND THE MAN ON THE MOON



"This is Europe's 'man on the moon' moment," said new EU Commission President Ursula von der Leyen in December 2019 upon presenting the EU's roadmap for the green transition, the European Green Deal (EGD).[1] Never has climate change been so high on the EU agenda since the plan was adopted by the Commission and shortly thereafter given the blue stamp by Member States. Whereas competitiveness plans previously took centre stage – as in the case of the Lisbon Strategy, Europe 2020 and "Better Regulation" – climate change now appeared to be at the top of the political agenda.

The excitement of seeing humanity's greatest current challenge forming the basis of EU strategy was enormous and widely welcomed. Even top business representatives in the EU, not least BusinessEurope, gave their applause. During the presentation of the EGD, Markus Beyrer, Director General of BusinessEurope, said: "The European Green Deal is an important initiative to protect our planet and put Europe on a pathway to a sustainable future. The question is not about whether this societal transformation is needed, but how we make it successful [...]. It is therefore essential to connect the Green Deal with a strong industrial strategy that mobilises the hundreds of billions of euros of investments needed.

We're ready to bring solutions and to work with the new college of Commissioners to make this deeply transformative agenda a success."[2]

It was an unusual statement from this organisation. In recent years, BusinessEurope has been among the most foot-dragging lobby organisations with the least climate-friendly approach. The Employers' Confederation – unlike many other lobby groups with more limited and specific targets – has made several wholehearted and persistent attempts to get the EU to lower the entire level of ambition for greenhouse gas reductions. High target rates of CO2 reduction have made employers see red.

This time, the Commission had decided to raise the target from 40% to 55%, but BusinessEurope was surprisingly silent on this matter. It might have been that something else was of greater importance, namely the choice of tools and instruments used to help the EU reduce greenhouse gas emissions. In this instance, BusinessEurope had every reason to be pleased with the EGD, the new big overarching strategy. It is actually carefully designed not to challenge corporate interests. The quest for "competitiveness" has determined the choice of instruments to such an extent that the strategy is unreliable if we want to achieve the reductions necessary to do our part. In previous years, the term "competitiveness" was used ad nauseam by business groups in campaigns to do the opposite of what the EGD was supposed to do: drive down climate ambitions. With that in mind, it was a safe assumption that this rocket to the moon was heading in the wrong direction from day one.

The origin of the EGD is intriguing. It was presented only days after the new European Commission had been approved and only ten days after Ursula von der Leyen took office. Considering all the applause and the ease with which it was approved, she had clearly hit the nail on the head in her attempt to please both business lobbyists and governments. What she presented was just the strategy they were looking for, as it fit very well with the main tasks of a competition state. In the plan, climate policies are subordinated to concerns of competitiveness across the board, with only a few exceptions, such as the so-called Farm to Fork Strategy, which does come with consequences. Looking at the the EGD in late summer of 2023, there is no denying that there are so many obstacles to effective climate action that achieving the target reduction in emissions of 55% by 2030 is unrealistic and will remain so unless there is a remarkable change of strategy.

STRATEGY NOT FIT FOR PURPOSE

It is no wonder that from BusinessEurope's perspective, the EGD is taking the right approach. It is not just a climate strategy, but also a "new growth strategy."[3] In fact, this is a strategy which states that the policy response to the climate challenge must be "bold and comprehensive and seek to maximise benefits for health, quality of life, resilience and competitiveness. It requires intense coordination to exploit the available synergies across all policy areas."[4] Thus, the question is what contradictions this may give rise to along the way, what dilemmas may arise between the interests of competitiveness and the green transition. If the two objectives were one and the same, the world would arguably look quite different.

If we examine the main building blocks of EU strategy and the main features of development in the first years of the EGD, it is evident that much attention has been paid to competitiveness and growth, and that the climate battle will be a challenge for the EU in the coming years. High reduction targets are fine; they are even necessary. If the 55% goal by 2030 still proves insufficient, then raising ambitions is a good thing. If the tools are not fit for the job, however, the target is simply not trustworthy.

The 2030 goal is what matters. The next decade will be decisive in keeping global warming below 1.5 degrees and away from a scenario of no return. It is therefore not the long-term goal that is of greatest interest. Making the EU "climate neutral" by 2050 sounds terrific, but it means nothing if efforts in the short and medium term are seriously inadequate. The important question is therefore whether the EGD will be able to deliver by 2030.

Unfortunately, this will be near impossible. Though the EGD is not a finished legislative package featuring a catalogue of specific proposals, it does describe all the main approaches to be used during the Commission's term, that is, until 2024. It is a catalogue of ideas that have either been heavily criticised by many actors, or simply proven ineffective. You do not need to be a rocket scientist to see where we are headed. Close scrutiny yields worrying results.

A LOT OF HOT AIR

Any climate plan must address fossil fuels, the main culprits of climate change, and be judged primarily on what it proposes in that regard. Where will energy come from if reduction targets are to be met? What should we forgo and what should we expand? What does the EGD say about oil, coal, and gas?

Surprisingly, the EGD does not actually mention anything about oil. Not a single word. However, there are a few sentences about coal that are worth noting, basically stating that the EU must push internationally for a halt to new coal plants, and, on the domestic front, coal must be phased out quickly. This is to be achieved as part of a development whereby renewable energy will be dominant in power plants, complemented by "decarbonised gas."

Gas, one of the cornerstones of the EGD, is to be seen as a "transition fuel," in particular, to help Central and Eastern European countries move away from coal. This is despite the fact that gas is not significantly more climate-friendly than coal. Therefore, to explain away that inconsistency the plan makes use of a new buzzword, invoking a great effort to "decarbonise gas."

"Decarbonised gas" covers several methods that have been the subject of much experimentation in many parts of the world. Carbon Capture and Storage (CCS) involves capturing CO2 during combustion and storing it deep underground (or pumping it into oil fields to facilitate further extraction). Carbon Capture and Utilisation (CCU) goes a step further and uses captured CO2 to produce biofuel, for example. CO2 from CCU can also be used in the production of hydrogen.

CCS and CCU have occupied much space in the debate carried out in the EU over recent years, and a lot of money is being spent on developing the technology behind these methods – without any great result. In 2018, the EU's auditors reported that the results do not justify the large sums of money spent on CCS.[5] There is simply a lack of experience and technology for the massive deployment of CCS. Many small-scale experiments have been carried out, but switching to widespread use will take a very long time, will be very costly, and, in the end, may not deliver the desired result.

As for hydrogen production, which has received much hype in the EU in recent years, the most common ways of producing hydrogen are not at all sustainable.[6] In the EU, 97% of hydrogen production is based on gas. Thus, in the long term, there is the risk that powerful hydrogen production infrastructure will be built, justified by the possibility of using renewable energy sources, but that production will ultimately be fuelled by gas.[7]

Nevertheless, "decarbonised gas" is a key element of EU energy and climate policy. Assumptions that CCS and CCU ensure that in the future we can simply cancel out the greenhouse effect of gas, also known as "decarbonisation," help to legitimise the massive expansion and construction of infrastructure. The gas industry has been pushing hard for many years to get support for the development of gas infrastructure in the EU, often in cooperation with other industries with an interest in gas, such as the chemical industry, and they have their share of credit for the prominence given to gas in the EGD strategy.

In particular, this "gas lobby" has been pushing for projects involving large gas pipelines through both the Black Sea and the Mediterranean, as well as gas terminals. These are projects that were then given EU priority status, such as the Projects of Common Interest. In 2016 alone, the gas lobby invested more than €100 million in their campaigns to make gas more of a priority.[8] Furthermore, during the period of 2010 to 2019, just five oil and gas companies spent over €250 million on lobbying.[9]

As a result, there are major EU-funded gas projects currently under way, such as pipelines from the Caucasus and across the Mediterranean as well as nine major gas terminals. When the Commission presented a list of 151 EU-funded projects to improve energy infrastructure in October 2019, 32 gas infrastructure development projects were included in the package.[10]

However, the strategy of focusing on gas goes against climate science. Thus, both the Intergovernmental Panel on Climate Change (IPCCC)[11] and the International Energy Agency (IEA)[12] believe that any investment in new fossil energy infrastructure will put us on the wrong side of the Paris Agreement's maximum temperature increase target of 1.5 degrees Celsius. In the European Union, though, gas infrastructure is being expanded, and more often than not, it is branded as a climate-friendly exercise. In July 2022, the European Commission adopted a taxonomy to categorise investments aimed at preventing "greenwashing." With an official doctrine, it would not be possible for private and public investors to call an investment green or sustainable if it did not meet clear criteria. However, with the Commission's decision – taken in consultation with the Council and Parliament – both gas and nuclear energy were given the designation "sustainable" in a move that prompted green groups to take the Commission to court.[13]

THE INVASION OF UKRAINE AND REPOWER-EU

As we can see, gas infrastructure has been expanded in recent years, and the greenwashing of gas is likely to prolong that endeavour in the future. Another factor that has come into play, however, is the Russian invasion of Ukraine. Gas has been a major political hot potato in the EU for many years because Russia is the main regional producer of the resource. This is good reason to believe that many of the infrastructure projects have emerged in response to the tragic events in Ukraine. Yet, according to several experts, this does not quite explain the huge extent of investment made. In January 2020, think tank Artelys wrote that "the existing gas infrastructure in the EU is sufficient to handle a range of future gas demand scenarios, even in the event of extreme supply line disruptions."[14] Thus it would seem that in 2020, the EU was more than prepared to sustain a much lower supply of gas from Russia. Even so, the EU would continue to lean into its addiction to gas following the invasion.

When the Russian incursion happened, it was a source of immediate embarrassment for the EU in general, and Germany in particular. Years of growing dependence on Russian gas, which was never systematically curbed or phased out, now became a major political challenge. Suddenly, the EU was faced with the grotesque situation that Russian warfare could in part be carried out with money Russia had earned, and was continuing to earn, from gas exports to the EU, among other places. Sanctions against Russia followed swiftly, and gas imports from the country became more restricted – albeit not cut off. This was an opportunity to dismantle dependence on gas, not just from Russia, but in general, many claimed. Others, however, did not think along these same lines.

In March 2022, a few weeks after the war began, Ursula von der Leyen met with a delegation from the ERT to reflect on the situation. As always, when the EU is at a crossroads, the ERT is on the scene, and the invasion of Ukraine was no exception. The only difference was that this time it was about the future of the energy supply. The President was responsive, and a few days later, on March 23, 2022, she wrote on Twitter that she had spoken with "CEOs of energy companies and with the ERT" and that the Commission would now "set up a group of industry experts to help reduce our dependency."

This, of course, piqued CEO's curiosity, and we wanted to know who these experts were. When it turned out that the Commission did not immediately intend to describe said group in the formally obligatory register of expert groups, we had to request access to the document and later open an official complaint on the case. Many months later, in October 2022, the list was finally published.[15] The experts, who helped the Commission draft the strategy, all came from the energy sector, with oil and gas companies solidly represented, including Shell, BP, Total, Enel, and many more. However, no climate experts were to be seen, nor environmental organisations, for that matter.[16] It was an advisory group with a vested interest.

The group's work and subsequent negotiations in the Council resulted in REPowerEU, a programme that proposes a pathway for Europe to become independent from Russian gas. As early as May 2022, the Commission was ready with the basic ideas of the plan, and while a renewed focus on renewables, and a target to increase the share of renewables from 40 to 45%, was guaranteed, there was also a considerable element of fossil fuel build-up, namely new gas and oil infrastructure.

The objective was to rapidly replace Russian gas, and the EU and several Member States therefore moved quickly to replace the fuel source by negotiating closer cooperation with Azerbaijan, Egypt, Israel, Algeria, and Qatar, among other nations. This would perhaps lead to less dependence on Russia, but also increased dependence on other repressive regimes.

By January 2023, the invasion had led to the adoption of 34 gas infrastructure expansion projects in 10 member countries, as well as 7 pipeline projects. At the same time, it was agreed that Member States could use COVID-19 Funds (RRF) to finance RePowerEU projects. This would allow money earmarked for the "green transition" to go towards new gas infrastructure.[17]

This persistent focus on gas in the short and medium term amounts to an Achilles heel for climate action in the long term. The more gas infrastructure that needs to be funded, the greater the incentive and the pressure to continue with gas in the long term.

THEORY VERSUS REALITY IN EMISSIONS TRADING

The obsession with gas is but one of the problems with the EGD, though. The second issue that bears mentioning is what is often considered to be the central tool of the EU's climate strategy: emissions allowances, or the Emissions Trading System (ETS).

The trading system was set up to put pressure on the most energy-intensive companies to integrate climate considerations into their production and reduce their energy consumption. The system does not cover all business sectors, nor does it represent the full scope of EU climate policy. However, approximately 45%

of emissions in the EU are covered by the ETS, so what happens in the sectors that are covered, namely industry and energy production, is quite crucial.

The basic idea behind the system is simple. If companies hold back on greenhouse gas emissions, they can make money by selling excess emissions allowances. Conversely, they can buy the right to more emissions if they need to and if there are enough allowances available on the market. This market-based system is supposed to make sure that reductions are made where it is cheapest to do so.

According to the Commission, this is why the ETS has been made "a cornerstone of the EU's policy to combat climate change and its key tool for reducing greenhouse gas emissions cost-effectively."[18] It is the Commission's alternative to what it calls traditional "command and control" regulation,[19] where companies are simply told to reduce emissions or adopt more energy-efficient production methods.

ETS enjoys massive support from business lobbyists, and they have consistently pushed for this approach to emissions reductions from day one. As early as 1993, the ERT wrote about future climate policy, stating that "regulations and taxes are not the only way. Tradable permits may be useful where some given level of total emissions is environmentally acceptable."[20] Thus, BusinessEurope has always seen the ETS as a guarantee that climate policy does not undermine competitiveness – and with good reason.

ETS: THE FIRST THREE PHASES

The ETS has gone through three distinct phases, all marked by major difficulties. During the first phase from 2005 to 2007, quotas were distributed in such abundance that prices dropped like a stone. It became so cheap to acquire extra pollution permits that the whole endeavour proved completely ineffective. During the next phase from 2008 to 2012, the EU was hit by the financial crisis, which brought economic activity to a standstill in several parts of the economy. This, in turn, also led to very cheap permits.

We cannot say that emissions were not reduced, though. Between 2005 and 2012, EU greenhouse gas emissions fell by around 1.1 gigatonnes of CO2, and emissions also fell in the sectors covered by ETS. However, according to a 2013 analysis by the research institute CDC Climat, the decrease cannot be explained as a consequence of ETS. Instead, the researchers surmised that the decrease is a result of the economic crisis in the EU combined with the EU's efforts to promote more renewable energy and greater energy efficiency.[21]

During the third phase from 2013 to 2020, allowances were auctioned, but this phase was also characterised by difficulties, in part because free allowances were generously distributed to industries that felt their competitiveness was threatened. Furthermore, the price of quotas began plummeting again well into this phase. A 2017 report by the Danish government's Climate Council can be taken as evidence of the problems of this last phase. According to the report, the quota system at the time was "inflated and suffering from a large surplus of quotas. The consequence is a low allowance price, and thus the system is not a real driver for the green transition."[22]

Common knowledge tells us that putting a price on emissions will create an incentive for companies to invest in greener production methods. On that note, however, it is important to consider the significance of relocation. In the manufacturing industry, we have to take full account of the fact that since 1990 – also known as the "base year" to which all reduction targets relate – a very large proportion of industrial polluters have moved from Europe to China, Vietnam, Indonesia and elsewhere in the Southern Hemisphere. Therefore, to assess the impact of the ETS, it is necessary to conduct an analysis at the company level as well. As it turns out, the results of such an analysis are indeed disappointing. According to a 2021 study of the energy and manufacturing industries in the five largest economies of the EU, covering the period 2005-2017, "few installations have proactively sought to deeply decarbonise after thirteen years of carbon emissions regulation, whereas many have augmented emissions instead. In most of the analysed cases, the inferior emissions reduction performances after 2013 indicate that the increased stringency of EU ETS Phase 3 did not translate to emissions abatement. Instead, additional policies are likely necessary to achieve carbon neutrality by 2050."[23]

MANIPULATIVE STATISTICS AND FALSE OPTIMISM

Despite all of this, it is not unusual to hear optimistic statements about the effect of the ETS. One case in point is an analysis that came out of the statistical office of the European Union. Eurostat announced in an article on the publication of a December 2022 inventory that manufacturing industries delivered a reduction of as much as 23% between 2008 and 2021.[24] Such a claim calls for close scrutiny, revealing an image that does not play into the hands of the proponents of ETS. In the period from 2013 to 2021, actual total industrial emissions in the EU fell by just 2%.[25]

The reason why the two figures are so vastly different is Eurostat's selection of 2008 as a starting point for its data, a date that proves a bit too convenient if you are looking to prove success with emissions reduction alone. This was the year the financial crisis hit in earnest, followed by the euro crisis. The economic downturn meant that companies closed down in droves, taking their emissions with them. That wave lasted until 2012. In the end it was not the ETS who had delivered, it was the financial crisis.

In recent years, emissions trading may very well have had some impact, but this should also be viewed in the context of very high energy prices, which alone would be incentive enough for companies to cut emissions. For example, the price of emitting a tonne of CO2 was less than €10 between 2011 and 2017, but has risen steadily in recent years. In February 2023, the price reached a record high at around €100 per tonne, and in October that same year, it fell to around €82 – much lower, but still significantly above the price five years earlier. This development is partly due to tighter regulation, such as a lower ceiling on the total number of quotas. However, high energy prices play a big role in how much is emitted. In other words, if the goal is to push companies to go green, emissions trading is a very uncertain tool at best.

Nevertheless, the ETS remains a cornerstone of EU climate policy because large companies feel more comfortable with a market-based option they can manipulate, thereby avoiding "command and control regulation." There is no "disruptive" intervention in the market, and the allocation of allowances even allows requirements to be fine-tuned for individual sectors and companies. While this fine-tuning can happen in several ways, one of them deserves a special mention: free quotas.

FREE QUOTAS FOR COMPETITIVENESS

A well-planned lobbying effort can ensure a period of several years during which climate-friendly initiatives and green transformation are not necessary for certain industries because they have already received an excess of cheap allowances. When a quota policy is up for review, lobbyist traffic in and out of meeting rooms is particularly hectic. For instance, when drafting a 2015 proposal for adjustments to the ETS system, the Commission held 52 meetings with business representatives. The oil, energy, steel, concrete, chemical and transport sectors, in particular, are frequent visitors on such occasions.[26]

The standard argument given at these meetings was that EU businesses risk losing out in global competition when climate commitments are imposed on them, a phenomenon known as "carbon leakage." However, real evidence for such claims is certainly not always available, and there are plenty of reports that have pointed in a different direction.

In 2008, the International Energy Agency (IEA) analysed the EU's energy-intensive sectors (steel, cement, aluminium) and concluded that there was no evidence of carbon leakage[27] – contrary to the industry's own claims.[28] In 2013, a study done by think tank Ecorys at the request of the European Commission also found that the first two phases of the ETS showed no signs of carbon leakage.[29] A third 2015 study from the London School of Economics concluded that emissions trading has at most a marginal effect on competitiveness.[30] As such, the business sector's lamenting is based on little to no evidence at all. It is, nonetheless, effective.

A series of meetings, contacts in the EU system, and a large number of letters and press releases, are almost always enough to make decision-makers more amenable to negotiation. Many industries are even so efficient that they easily manage to get free allowances in surplus, even reaping a considerable amount of additional income by selling the extra quotas. According to the Commission's own figures, the cement industry has raised no less than €3 billion in this way. According to think tank CE Delft, oil company Shell reaped €781 million from the ETS in the run-up to 2016.[31]

In total, €200 billion worth of free allowances have been handed out between 2008 and 2019, leading to extra profits of €50 billion when added up, according to CE Delft.[32] In such a situation, industrial companies have no reason to seek to reduce emissions, and may fall behind in the global green transition. For example, the European cement industry emits more CO2 per tonne of cement produced than the cement industries in China and Brazil combined.[33]

Free allowances were also one of the key issues when, in the wake of the adoption of the EGD, the EU upgraded its rules on emissions trading yet again with a package of proposals to ensure a 55% reduction in the EU by 2030, called Fit for 55. The package aims to tighten up ETS rules to ensure that target reductions actually materialise. A cap will be put on the total number of allowances available, but the system of free allowance allocation, as well as a number of different pools for allocation in specific situations, will be maintained. Only in 2034 will there be a full phasing-in of an allowance system based on allowances sold at auction.

Carbon Market Watch, an organisation that has zealously followed and criticised the ETS for many years, responded to the final political agreement on the new version of the ETS with a sigh. "Fearing the bogeyman of Europe's alleged future deindustrialisation, policymakers have continued their misguided approach of letting heavy industry off the hook," said Sabine Frank, the organisation's executive director. In the EU, the "polluter pays" principle clearly does not apply, and incentives to switch to more sustainable production were also lacking this time, writes Carbon Market Watch. "This is because policymakers keep showering heavy industries with free pollution permits, to the tune of over €400 billion. This is a practice that has clearly failed to trigger cuts in emissions in the past, as evidenced by data."[34]

THE BELT-AND-BRACES APPROACH: IMPORT DUTIES

It was no easy task for the Commission, but the EGD actually prescribes the eventual abolition of free quotas. As always, this was done in the face of a grumbling industry chorus complaining about tougher international competition. The Commission's response was a promise to introduce, in parallel, a tax on the import of products for which, according to the Commission (not to mention the industry itself), quota trading creates a disadvantageous situation for EU producers subject to obligations under the ETS. This is called the Carbon Border Adjustment Mechanism (CBAM). The immediate response from BusinessEurope was that there should be room for both free quotas and taxes.

In June 2021, BusinessEurope President Markus Beyrer wrote to the Commission that free allocation is "vital for maintaining a global level playing field while incentivising EU producers towards best performing plants."[35] As so often before, his tone was alarmist. "Carbon leakage is already an unfortunate reality in many sectors, and it is crucial to prevent this phenomenon from undermining our competitiveness and climate efforts."[36] In the letter, Beyrer pleaded for both free quotas and CBAM levies. And so it shall be. In the period leading up to 2034, free quotas and import tariffs will thrive side by side – seen by some as a double protection for certain industries.

This move has been met with a great deal of fear and criticism, particularly in low- and middle-income countries. A report on the impact of the CBAM in Africa concludes that the continent stands to lose €15 billion in GDP per year ($16 billion USD) under the new regime.[37] As it has long been recognised internationally that the responsibility for solving the climate crisis lies primarily with the richest countries, this move by the EU is bound to result in a backlash. For instance, it has already led the Indian government to consider submitting a formal complaint to the WTO.

ETS FOR SHIPPING, AVIATION AND ROAD TRANSPORT

With all the aforementioned weaknesses of emissions trading and the quota system in the EU, it was hard to be impressed by the EGD's proposal that the same methods should now be used to deal with three specific areas, namely shipping, aviation and road transport. Bringing these three areas under the ETS was certainly no guarantee of success, at least not according to the green organisations and think tanks that have followed these areas most closely.

UMAS, a UK consultancy with expertise in shipping, has produced a report on the ETS's impact in this area. They conclude that for the system to have a significant impact on the sector, the price of allowances must be set at around $200 per tonne – well above the previous record.[38] Most of the time, if not always, quotas would be cheaper than required to have a significant impact. Thus, while it is interesting that a scheme aiming to reduce emissions from shipping is now in place – at least for some shipping traffic – it is hard to see this as a major step forward. The price that shipping companies have to pay for allowances is less than the difference between sustainable shipping and "normal" shipping. The incentives for technological change are therefore not sufficiently great.[39]

For air travel, the pattern that emerges is even more blatant. In fact, it was already clear from the EGD that the EU would be seeking an arrangement under the auspices of the International Civil Aviation Organization (ICAO), an organisation dominated by the aviation industry. However, such a deal was not in the cards. Consequently, instead of taking immediate action on all inbound and outbound flights, the EU has limited itself to including domestic aviation under the ETS. This means that short flights will be slightly more expensive. "We are about to lose another decade of climate inaction because of EU governments' cowardice towards ICAO," Jo Dardenne from Transport & Environment said when the agreement was reached.[40]

Air traffic has increased significantly in recent decades, and any plan needs to address this issue first. However, while no one seems to argue that the cost to airlines of entering the ETS will in itself lead to a reduction in air traffic, the hope among politicians in the European Parliament is that the pool of money resulting from ETS payments can be used to develop more sustainable technology in the long term. There is an extreme level of patience – and optimism – on display here. There seems to be a very long way to go from where we are now to anything approaching sustainable aviation.[41]

Finally, we have road transport. As concerns cars, buses and trucks, the ETS will not make a big difference in terms of pricing, and for that reason alone it will not lead to substantial changes in behaviour. The NGO network Transport & Environment has calculated what the extra cost of CO2 allowances would mean for the price of petrol and found an increase of about 6 cents per litre, based on the (relatively high) price of allowances in early 2020. In their estimation, this will lead to a 2% reduction in emissions from road transport over time.[42] Thus, Transport & Environment concluded that the ETS does not at all solve the issue with regard to road transport. Conversely, it explains why precisely the automotive industry has been such a strong proponent of the scheme.[43]

It is not the case that the car industry has been sticking to its old ways all along. In fact, European car manufacturers are quickly and enthusiastically investing in electric car production. In fact, the development of electric cars is moving so fast that the car industry has even changed its tone and tactics. Electric cars are the future, according to both politicians and the car industry. Thus, a ban on the sale of fossil fuel cars from 2035 – except trucks which we are not set to get rid of any time soon[44] – was adopted without much drama in November 2022. That, however, is an effect of global competition and a change of attitude among consumers, not an effect of the ETS.

AUTOMOTIVE INDUSTRY HERALDS INDUSTRIAL CLIMATE PLAN

Few industries have received the same stellar treatment by the EU as the car industry. Or rather, they are so powerful that their skilled lobbyists have, again and again, been able to avert any regulations not in their interests. Recent years are no exception.

When it comes to the ETS, and many other climate policies, the automotive industry also uses carbon leakage as its overriding argument, as nothing can distract both Commissioners and governments more than making references to global competitiveness. This is why international trade is also a crucial dimension of European climate policy. The Commission sees it as a key task to safeguard industry in every possible way, while doing their utmost to defend the liberalisation of world trade that the EU has always promoted. This means that customs duties are rarely, if ever, used as a means of negotiation and the CBAM is exceptional in that way. State aid is not alien to the EU – it has always been practised in agriculture, and exists in many forms in other industries, including aid for research and development, project aid of various kinds, and so on. However, the line has usually been drawn at direct state aid for production. Restrictions on state aid are strictly enshrined both in international trade agreements in which the EU is a party and by the EU's internal rules on state aid. These rules are zealously enforced and have often stood in the way of the green transition.

However, the inflation and energy crises of 2022-2023 led to a change of course. Energy prices had already risen significantly before Russia's invasion of Ukraine in February 2022, and only got worse in the months that followed. Many came to pay dearly, as high energy prices stoked inflation, and governments in the EU and elsewhere intervened in various ways in an attempt to combat inflation. In the US, the legislative response to the crisis was the Inflation Reduction Act (IRA), which is a plan to support businesses, especially those that use US raw materials, and to secure jobs, particularly in the many marginalised areas of the country. Some of the companies that will be benefiting handsomely from the $360 billion plan extending until 2032 are the makers of electric cars. Cash and generous tax breaks were allocated to boost electric car manufacturers and other industries, encapsulated in a plan that aims to support businesses and climate change efforts. Many have called the IRA the greatest climate plan the US has ever adopted. In major US media outlets, it was dubbed "a historic climate plan."[45]

With regard to the US, European businesses have also expressed deep concern about a number of differences in basic economic conditions, including higher energy prices in the EU. The IRA was the straw that broke the camel's back, creating political momentum for new EU industrial policy. In February 2023, after prolonged pressure on the part of the European automotive industry, the Commission presented a plan to support the Net-Zero Industry, a plan that aims to ensure competitiveness to a degree that will enable the EU to "lead the way globally in the era of climate neutral industry."[46]

This plan, called "a green industrial plan for the net-zero age" is a plan to ensure competitiveness. It is one of the reasons why state aid is now beginning to flow into the car industry on a scale not seen in decades. France, for instance, got the green light to support car industry research in battery technology with €1.5 billion.

In the documents for the industrial plan, relatively little attention is given to what the climate impact actually is, or for that matter, whether an industrial support plan is the right way to go. Considering the context, though, this was no surprise. The car industry, in particular, was greatly shaken by the American plan, and so were the French and German governments. This put an enormous amount of pressure on the Commission to find a rapid response to the IRA, and although an industrial policy plan of this type does not have direct roots in the EGD, the plan is now an important part of its "climate action."

As of now, it is still too early to assess the overall impact of the net-zero plan. It is comprehensive, addressing technology support, the security of raw material supplies, as well as "predictable and simplified regulation." While much of this is old wine in new bottles, there are several new breakthroughs, especially in state aid. Whilst the EU has always used existing rules under the WTO's global trade rules to defend its industry against state aid elsewhere, the plan this time is to go further. "The Commission intends to allow additional flexibility for member countries to grant state aid, limited to well-defined areas and on a temporary basis," it says.[47]

The busiest industry in the run-up to the presentation of the plan in February 2022 was undoubtedly the automotive industry. This result was received with joy by the car manufacturers' association ACEA in that it gave them the prospect of receiving state aid: "Europe needs a strong response to the fundamental challenges posed by the United States' Inflation Reduction Act (IRA) and the risks it creates for 'investment leakage' out of the EU. Without stronger financial and regulatory support for nascent industries, the scale of the subsidies available in the US will attract green and advanced technologies at Europe's expense – from development to production and manufacturing."[48]

There is a cruel irony in the fact that this "green" industrial policy plan has been created to please the car industry. The car industry has been skilfully and successfully fighting tight fuel efficiency rules for at least 25 years, ensuring that rules would not have much impact on their business. In the meantime, there have been no strong incentives in the rules to explore climate-friendly alternatives. Perhaps that is why the car industry has struggled in recent years and has not been at the forefront of electric car development. If that is the case, they may now be set to receive state-aid in the form of subsidies or tax breaks because of their own hostility to a change of direction in earlier days.

However, apart from the bitter taste left by the history of the car industry, one must also ask whether it is even good and solid climate policy to support electric cars in this manner. Recent research shows that an electric car needs to drive about 40 km a day for three to four years before it can be said to have a positive climate impact, taking the car's entire life cycle into account.[49] It begs the question of whether public money is best used by supporting more cars, even if they are electric.

GREEN TRADE AGREEMENTS

The cases of the ETS, CBAM, and the new industrial policy show that EU climate policy is not just domestic policy, it is very much about trade policy too. The EGD has many elements that relate to how the EU climate agenda is supposed to fit into priorities of global competitiveness – a very important question for any competition state.

Thanks in part to the EU, the current global trading system has not incorporated climate or environmental concerns to any significant extent. Hand in hand with industry, the EU has played a big role in building an international trading system that helps create frictionless global value chains. Throughout this process, and particularly when the World Trade Organization was being founded from 1994 to 1995, there was little concern with climate change among trade officials. However, back then there was already noteworthy friction between free trade and climate change. This is why there has long been controversy about the contradictions that can arise between a liberalised trade arrangement on the one hand, and climate and environmental policy on the other. It has clearly been difficult for the authors of the EGD to find a credible formula as well.

The EGD pledges that the Commission will strengthen dialogue with trading partners, taking forward specific sustainability chapters in trade agreements, as well as ensuring enforcement of those already in place. "Commitments to sustainability have been continuously strengthened in EU trade agreements, in particular with regard to enhancing climate change action," the EGD says. These "efforts will be further enhanced with the appointment of a Chief Trade Enforcement Officer."[50]

It is indeed true that many bilateral trade agreements have chapters or annexes dealing with shared concerns that trade should take place on an environmentally sound basis, leading to sustainable development. However, these chapters and annexes are not binding parts of the trade agreements, and though the operational aspects of the agreements have elements that pull in a different direction, they never constitute a significant counterbalance.

The contradictions between climate or environmental policies and trade agreements have often led to embarrassment, and the Commission has been called on to find a solution. As early as 2011, this led the Commission to set up advisory bodies intended to ensure that the "sustainability chapters" of trade agreements were respected. This led to the creation of 11 "watchdogs," supervisory working groups that have proved to be as much a window dressing as the sustainability chapters they were set up to enforce.

In October 2021, the 11 groups collectively addressed the Commission in a letter, noting that they had not been effective and questioning whether it was even possible for them "to do what they were set up to do." Their recommendations had not been reflected in EU priorities, and while their contribution was sometimes "reflected upon," there was no concrete follow-up.[51]

More recently, the Mercosur agreement between the EU on the one hand and Brazil, Uruguay, Paraguay, and Argentina on the other has completely undermined the Commission's pious promises of new, sustainable trade agreements. EU-Mercosur is probably the most environmentally damaging agreement the EU has concluded in the last decade, so significant is its impact on the climate.[52] It is rare for a bilateral trade agreement to attract much attention for reasons related to climate change, however in this case, both Brazilian and European environmental organisations did manage to get the Commission to act. While the agreement had long been signed and negotiated, in 2023, the EU did try, through an addendum, to add more strength to the otherwise very weak and non-binding wording on climate change, sustainability and deforestation. The end result, though, was unimpressive, according to NGO coalitions.[53]

Across EU capitals, national parliaments have managed to consider environmental impacts that were not clear when the agreements were signed in 2019. In March 2021, the EU Ombudsman ruled that the Commission had made a serious error in failing to complete an environmental impact assessment before signing the agreement, as required by EU rules. This, they said, amounted to "maladministration."[54]

The Commission must therefore fight for its reputation when sustainable trade agreements are at the core of the climate strategy. For now, there is nothing new under the sun, and sustainable trade agreements involving the EU as one of the contractual parties are still entirely theoretical.

FROM FARM TO FORK

The EGD does take a significant and tangible step forward, without obvious creative loopholes for industry exploitation, in one area in particular: agriculture and food. Agriculture is required to be sustainable, and the Farm to Fork Strategy will ensure this, among other things by "significantly reducing the use and risks of chemical pesticides, as well as the use of fertilisers and antibiotics. The Commission will identify the measures, including legislative ones, to deliver these reductions,"[55] based on dialogue with "stakeholders." The proportion of organic farming in Europe must also increase, and the EU must "stimulate sustainable food consumption and promote affordable healthy food for all."[56]

This is like music to the ears of organic farmers, but in this context, the main "stakeholders" are an infamous force in EU politics: big farmers and agribusiness. The Farm to Fork Strategy was further detailed by the Commission in May 2020, when it set the target of cutting the use of chemical pesticides and particularly hazardous pesticides in half by 2030,[57] a goal supported by both the Council and the Parliament.

Nevertheless, the Strategy lacked a decisive action plan and precise steps to be taken to put it all in place. Moreover, difficulties have already arisen, as implementation of the Farm to Fork Strategy is not possible without a change in the Common Agricultural Policy (CAP). If the Farm to Fork Strategy does not have a major impact on agricultural support, the prospects for organic conversion are poor. Furthermore, the project faces a strong coalition made up of large-scale farmers, agribusiness and several governments.

In response to the Farm to Fork Strategy, an organisation that has been championing the interests of large-scale farmers in the EU for decades, COPA-COGECA, launched a campaign to avoid clear commitments in the Strategy and to reduce its level of ambition. This was a lobbying campaign in which both the chemical and food industries acted as allies, including the German chemical giant BASF, as well as the international association of pesticide producers, CropLife.[58]

Their tactic was to keep the Farm to Fork Strategy out of the CAP as much as possible, and this opportunity arose in the period after the launch of both the EGD and the Farm to Fork Strategy, namely during a review of the CAP rules.

A rare coalition of small farmers, green organisations and the Commission formed against big farmers, agribusiness, and especially the German and French governments.[59] However, the latter came out on top. No conditions of importance for agricultural support were incorporated when the final version of the revised agricultural policy was ready in November 2021.

In the meanwhile, the Russian invasion of Ukraine in February 2022 was used by agribusiness and its allies as an excuse to plead for a postponement of the plan far into the future, or alternatively, for it to be dropped altogether.[60] After a short time, Agriculture Commissioner Janusz Wojciechowski also promised that the plan would be looked at again "in the light of the problems with the supply of food" that the invasion allegedly caused. This would lead to friction within the Commission. When the long-awaited proposal to cut pesticide use in half before 2030 was presented in June 2022, Dutch Commissioner Frans Timmermanns said: "Using the war in Ukraine to water down proposals and scare Europeans into believing sustainability means less food, is frankly quite irresponsible [...]. Because the climate and biodiversity crises are staring us in the face. And every European citizen is seeing this on a daily basis now, wherever you live. Let's also be quite straightforward: Science is very clear: this is what threatens food security. This is what threatens our long-term food security."[61]

Nevertheless, the Farm to Fork Strategy was postponed when the Council discussed the status of the plan at a meeting in December 2022. They decided that a further impact assessment of the proposal was needed,[62] and since impact assessments can be time-consuming and subject to both pressure from lobbyists and lengthy internal Commission scrutiny, this was a serious step. In late 2022, the plan for more organic farming and far less use of pesticides therefore seemed like a tentative declaration of intent.[63]

COSTLY CLIMATE POLICY VS. FRUGAL BUDGETARY RULES

Going green will be expensive. According to the EGD, around €260 billion in additional investment is needed each year in the EU to meet the 2030 reduction target.[64] In addition, the EGD does include some rather costly plans, not only in terms of more renewable energy, but also energy renovation of the housing stock, for example, which is highlighted as an important area for action in the EGD. In fact, all evidence suggests that €260 billion is a serious understatement.

Still, there is no clear plan for where the money will come from, and it could be a heavy burden to shoulder, particularly in the EU context, given that all EU Member States took a severe economic hit during the COVID-19 pandemic. Nevertheless, we could just count that loss and decide that now is the time to act and make a special effort to save ourselves and the planet from catastrophic climate change, even if it leads to higher debt and deficit. Big investments would certainly be warranted, but an EU Member State cannot simply choose to incur more debt. In the EU, strict rules on budgetary policy are in force, and if deficits and debt are not brought down, the Member State in question is put in a vice. As we have seen in Chapter 4, relaxing the rules has proved very difficult on numerous occasions. While they may be tweaked a bit, there is no sign that budgetary rules are about to be dropped or adjusted in a way that will create space for large-scale public investment in the green transition.

Therefore, when the EGD brings something into the picture that seems to require large public investment, it leaves a big question mark. A case in point is energy renovation of the housing stock, which will require a substantial amount of money. This particular issue, however, was included in the Fit for 55 package of proposals, put forward by the Commission in July 2021. According to this plan, the housing stock will also be subject to emissions trading rules under the ETS. This means that properties with poor energy performance – poor insulation, for example – will have to pay for emissions permits on the market. Conversely, properties with very good conditions – for example, if there has been significant investment in energy improvements – will have allowances that can be sold on the market.

The bill could easily end up only affecting residents in low quality or simply old buildings. There are many such homes, and the residents are usually the poorest. "It passes the cost of carbon permits onto tenants who can't afford to pay for energy efficiency upgrades, and people in regions without decent public transport. One early estimate expects household energy bills to go up by an average of €429 per year – an unaffordable price for many. The carbon savings are not even expected to be significant," wrote Martha Myers of Friends of the Earth in a commentary.[65]

What the Commission put forward may have been a convenient quick fix for a major political problem, but it certainly was not a sustainable solution. There would have to be some sort of solution for funding, otherwise the impact would be minor or highly unjust policies would be introduced that would make the poorest bear the biggest burden. To make up for this, the Commission and Council set up the Social Climate Fund, which will be fed by income generated through emissions trading under the ETS. This is predicted to bring in approximately €86 billion – in total, not annually.[66]

While that may sound like a lot, it is a far cry from what will be needed. Thus, it is no surprise that the lack of funding made progress on the renovation of buildings very difficult in 2023. Furthermore, the numbers show a more general problem with the EGD from a financial perspective. If the EU is to meet the target of a 55% reduction in emissions across the EU, it will come with a hefty cost. The Commission's own figures show an additional €275 billion per year for the renovation of buildings alone.[67] The same Commission, however, estimated that the transformation foreseen under the EGD as a whole was an "additional annual investment" €260 billion,[68] less than the amount needed for buildings alone.

SMALL CHANGE WILL NOT YIELD BIG MONEY

In short, the monetary cost of reaching the emissions reduction target is very high, and there is currently no overall plan for where the money will come from. Shortly after the launch of the EGD, the Commission made its own concrete proposal on how to raise €1 trillion over the period of 2021 to 2027. This equates to about half of the total additional investment needed, which will come from the Sustainable Europe Investment Plan.[69]

According to this plan, most of the funds are expected to come from private sources, based on assumptions that frankly look quite shaky. Furthermore, half of the money will come from the existing EU budget.[70] The Commission is planning to achieve this primarily by including a strong green element in regional aid and the CAP. While this is in line with other existing initiatives such as the so-called Just Transition Mechanism, it is only a very small initiative to support green transition in the countries where it looks most difficult, for example Poland.

The other part of the plan is to stimulate private investment by supporting lending from the European Investment Bank (EIB), in order to ensure that smaller grants or loan guarantees turn into big money. This is a continuation of the so-called Juncker plan launched in 2015, which, at the time, was presented as a solution to low economic growth. A contribution of just €21 billion to stimulate investment was expected to grow to as much as €315 billion in the years after 2015. However, the Juncker plan was never the economic miracle it was presented to be.

In September 2019, the think tank Counterbalance estimated that after four years of the Juncker plan, the resulting growth amounted to less than a quarter of the target.[71] Still, the Commission is trying to continue with the same concept through the Sustainable Europe Investment Plan, and its focus leaves much to be desired.

The reason for this is that only large and profitable projects are supported; otherwise the EIB would never even consider them. "The approach of turning projects into bankable ones ignores the fact that a majority of the needs for ecological transition will simply not be bankable and offer any return on investment," Counterbalance wrote in its analysis of the Commission's investment plan.[72]

In 2022 and 2023, the discussion on financing the transition imperceptibly shifted focus towards COVID-19 relief and RRF replenishment. These were packages specially designed to support the green and digital transitions, serving many purposes at once. However, even if we were to imagine for a moment that these packages – which cover a period of about six years and which will probably be a one-off event – would have any impact at all, we are still far from the amount of progress that the Commission considered necessary in the EGD.

THE CLIMATE CRISIS VERSUS THE COMPETITION STATE

Many other smaller aspects of the EGD have not been mentioned here, but the above examples provide a basis for characterising and assessing the plan that Ursula von der Leyen called "Europe's man-on-the-moon moment." It is a plan in which all means deployed are thoroughly screened for their impact on business in general and competitiveness in particular.

The ETS was designed to have a minimal impact on business in order to support competitiveness, and the system has delivered as intended. However, it has failed to deliver green transformation and massive reductions in emissions. The system has experienced so many long periods of difficulty that its central place in the EU's climate strategy can only be explained by the fact that considerations other than climate change are crucial to EU climate policy. As far as trade policy is concerned, all that the EU has delivered so far is rhetoric about sustainable trade – in parallel with the EU entering into trade agreements like EU-Mercosur with potentially major and serious environmental consequences.

Additionally, loose ideas about renovating buildings have little value if there is no trustworthy plan behind them. Furthermore, if the money for that, or for other investments, is to come from the public purse, little may happen as long as the EU's own tight budgetary rules are left broadly intact. Let us not forget the Farm to Fork Strategy either, perhaps the EGD proposal least impaired by competitiveness concerns. In the end, it was undermined by a strong agribusiness lobby and by politicians eager to please them. Finally, there is the cost of the transition and the question of where the money should come from. Here too, the plan is to bet on financial wizardry and shaky market-based strategies, instead of reforming the budget rules.

All this adds up to a climate strategy not at all fit for purpose, that is, if the purpose is to reduce emissions to the extent necessary. Though some of the steps taken since 2019 cannot be blamed on those behind the measures – the best example being the defeated Farm to Fork Strategy – that should not hide the fact that the plan was flawed to begin with. In terms of what really counts – namely, reductions in emissions – it was never really a trustworthy strategy. There is still little evidence to suggest the EU will reach the target of 55% by 2030. The European Court of Auditors, one of the EU institutions set up to monitor the work of the institutions, including emissions, wrote in a report in June 2023 that, in view of the EU's emission reduction targets, they "found little indication so far that this ambition will translate into sufficient action."[73]

Still, when Commission President Ursula von der Leyen took the stage in September 2023 to give the annual State of the European Union speech in the European Parliament, the tone was self-congratulatory: "We shifted the climate agenda to being an economic one. This has given a clear sense of direction for investment and innovation. And we have already seen this growth strategy delivering in the short-term. Europe's industry is showing every day that it is ready to power this transition. Proving that modernisation and decarbonisation can go hand in hand." Somewhat unsurprisingly, she underlined that "this transition is essential for our future competitiveness in Europe."[74]

Listening to her words raises an obvious question: what is most important – emissions reductions or competitiveness? The Commission's answer seems to be that there is no contradiction or tension between the two. Climate change is presented as a golden egg for industry, not as a challenge that requires anything other than a hunt for competitiveness and dominance in the marketplace.

However, this clash between priorities is bound to happen when climate policy meets the competition state. On countless occasions, even in the drafting stage of the EGD, the entire policy was designed to underpin the competitiveness of European companies.

In the coming years, there will be opportunities to have the EU adjust their course here and there, and public opinion in Europe will continue to demand much more than the EGD or future official strategies will deliver. In that sense, it is not a closed chapter. However, fighting climate disaster in the EU clearly clashes with the systemically dominant strategy for competitiveness. To merely fight that battle from directive to directive, or from regulation to regulation, is not an effective approach. There needs to be a more radical component to the struggle that penetrates the core of how EU institutions work and that targets their overarching strategies.

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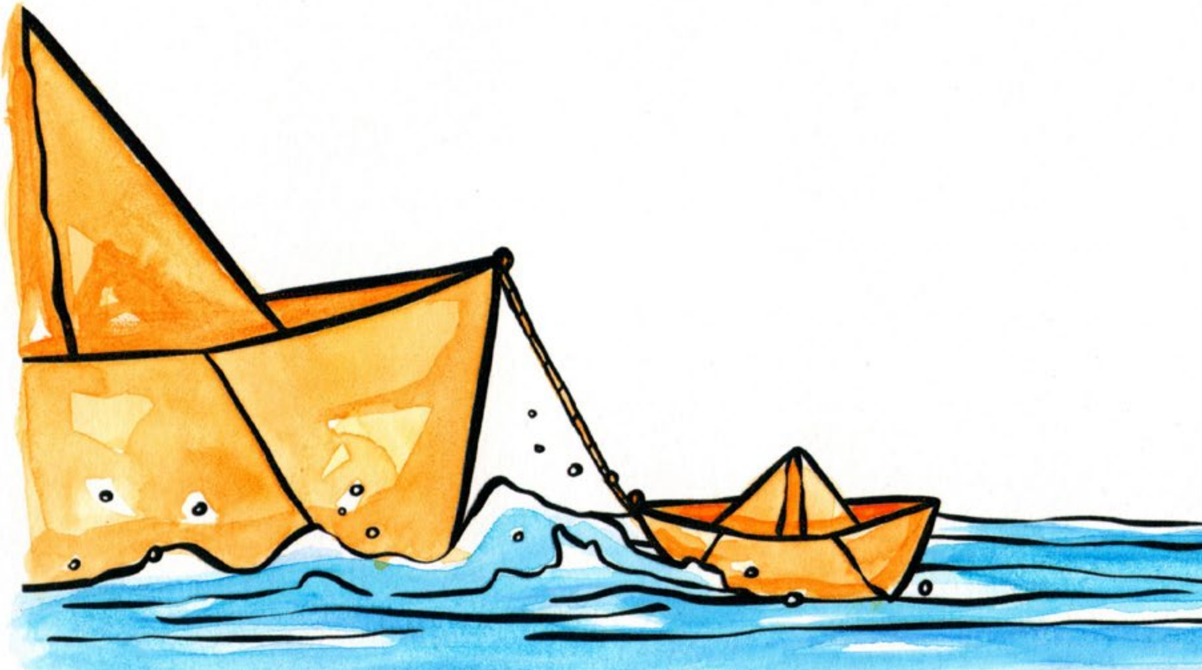
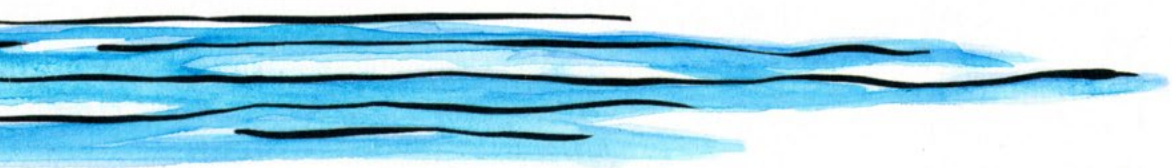


THE DEMOCRATIC DEFICIT OF THE COMPETITION STATE



In July 2021, international anti-corruption organisation Transparency International published a report entitled Global Corruption Barometer EU on the current situation in the Union. The main element of the report was a survey with both encouraging and discouraging responses regarding the public's trust in the authorities, or lack thereof. At one point, Transparency International asked whether respondents agreed that their government is predominantly controlled by a few "big interests."[1]

To this question, 53% of respondents answered yes. At the top of the list, we find countries in Southern Europe as well as Central and Eastern Europe, but other regions follow closely behind them. The top scorer is Slovenia with 70%, Spain comes second with 64%, Germany is in 62% agreement, well above average, while Italy scores slightly lower, at 51%.[2]

These numbers indicate that the notion that things are being run by big business or corporate power resonates with the general public. This must be seen against the background of transformation, witnessed in recent decades, in which the interests of corporations, especially large transnational corporations, have taken top priority in growth and accumulation strategies at the national level as well as at the European level. That is precisely the story unfolded in this book.

It is the story of the emergence of a European competition state, by and large designed to support transnational capital and bolstered by decision-making procedures that institutionalise the project through treaty provisions, multiannual strategies such as the Better Regulation agenda, and a concentration of the right to initiative in one powerful body, the Commission. At the core of this design, we find a growing democratic deficit. Its efficiency stems in part from the way key political decisions are removed from public debate, often to be dealt with in cooperation with representatives of big companies or industries. In some cases bureaucratic procedures are even introduced, giving elected assemblies a marginal role in the area concerned.

The objective of this book was first and foremost to lay bare the ugly truth of the European competition state in order to facilitate a discussion on what kind of action should be taken. I did not set out to present a full alternative, nor to go deeply into what a political strategy for progressive change may look like. I do, however, hope that this book serves as inspiration. Talking strategy for progressive change may seem a heavy task, especially considering the many examples of political domination in the areas analysed here, which to some may seem overwhelming or disempowering. That is not my intention, though. The goal was always to present the scale of the challenge, and if we are to meet the biggest challenges of our time – including inequality, poverty, climate change – we need to think big when it comes to the European Union. Tinkering around the edges is not enough; we need to change the model.

TRANSNATIONAL CAPITAL SETS THE AGENDA

The current model puts competitiveness and the interests of transnational corporations at the heart of the EU, an approach that can be seen in the role that big business lobby groups have played. When it comes to the EU's overall strategic development, the influence of transnational companies is described here mainly through investigations into the exchange between the Commission and the ERT, the most prominent lobby group for transnational capital known in the EU. This exchange was not just about the immediate political horizon in 1993, but also what purpose the EU should fill and what role it should play. In essence, it was about how the EU could become a supportive vehicle to secure the competitiveness of transnational companies – in other words, a European competition state.

Looking at the ERT's proposals, it is striking to see how many of the ideas they presented in a report in 1993 (see Chapter 1) have actually been implemented. The ERT had a plan, and they were invited in to set the agenda. In the decades that followed, not only the ERT, but also a cross-section of other lobby organisations in Brussels, would constantly pressure the Commission, the Parliament, and the Council to keep the EU on the same track. Despite the fact that there are many other players at the table, the ERT has been most successful in giving political expression to the interests of big industry. They have helped create an EU with a highly liberalised Single Market with rules covering a large part of the economy and where the four freedoms prevail over everything else.

By default, this design systemically and incessantly puts non-commercial social interests under pressure. Social and labour market policies are subordinate to economic policy, and the EU has seized the power to impose this model on the trade union movement. Owing to the ERT's influence, competition policy also leaves plenty of room to build mega-corporations. In line with the demands of big industry interest representatives, EU trade policy provides a powerful apparatus to satisfy the aspirations of large European companies on the global stage. Little thought is given to the impact this policy will have on other parties, including low and middle income countries, who must fight hard to minimise losses in the trade policy arena. The list goes on.

However, not all transformations towards the competition state can be traced to the ERT and the interests of big industry. Big finance was also brought in to play a parallel role in their own area. Because they were not as well organised, though, the Commission actively brought together the companies needed to set the course. A case in point is illustrated by the preparations to liberalise the financial markets starting in 1999, when the Commission ensured that reform plans were in line with the interests of major European banks and other financial institutions. The financial crisis proved just how damaging this approach was, yet without leading to a change of course. Even after the crisis, the Commission and the Council were still keen to let major financial corporations set the agenda.

This brought many other players to the table in addition to the ERT, including the Association of Financial Markets in Europe (AFME, a finance lobby group for big banks and investment funds), the oil and gas lobby, the arms lobby, and more. However, the ERT has been particularly successful in its lobbying efforts, because it has aptly given voice to cross-industry interests in the design of EU policies and EU institutions. In fact, had they made a checklist of their key objectives for EU development back in 1993, there would not have been many boxes left to tick.

SYSTEMIC DEMOCRATIC DEFICIT

Putting transnational companies' interests at the heart of the EU is what led to the competition state, and introducing competitiveness as the main objective of that state has made the EU more undemocratic in the last decades. When we talk about the "democratic deficit" tainting the decision-making process in the

EU, it is often in light of the fact that it is only the Commission that has the ability to present legislative proposals for consideration, and not, for example, the Parliament or the Council of Ministers. However, given how the EU has evolved in the last two decades, the democratic deficit has come to be much more than that. Procedures and strategies have been adopted that have allowed for big decisions to be made via exchanges between certain areas in what I refer to as "the systemic democratic deficit" in the intro to this book.

The first area revolves around the implications resulting from the objective to "complete the EMU." As discussed in this book, Member State governments engage in an in-depth dialogue with the Commission and with other Member States on economic policy and the national budget at a very early stage, well before the same issues emerge for discussion in national parliaments. Additionally, the Commission is mandated to scrutinise proposals on national budget bills, labour market policies and public spending long before the same proposals are even debated by elected assemblies. If a Member State is at odds with budgetary rules, debt rules, or with one or more of the so-called "macroeconomic indicators" set by the Commission as a yardstick for economic policy, the Commission may then require the government in question take corrective action.

While there is still a long way to go before the EMU is complete, the way that the EU's "economic governance" is designed has already taken us very far. Our next big steps may not be just around the corner, but we are indeed moving in the direction foreseen. Thus, the 2015 Five Presidents' Report proposed a set of mandatory economic policy standards to ensure growth and competitiveness, a concept that suggests further bureaucratisation down the road. It is a plan that so far has stood the test of time, in that its objectives are still being pursued.

The second area is the Single Market. Despite decades of legislative momentum in the EU, the Single Market is still considered an incomplete project. Here, the Better Regulation agenda provides optimal conditions to ensure that narrow business interests are already given priority at a very early stage of the legislative process – in other words, before the Commission tables a proposal. Furthermore, the power enjoyed by the Commission as the enforcer of Single Market rules, should also be factored in here, as it very often goes well beyond the task of upholding clearly defined laws. There is often much room for interpretation, a domain mainly left to the Commission.

Recent events have shown that the Commission and business groups are prepared to take this interpretative power to a new level. The Commission's Notification Directive discussed in Chapter 2 stands as a milestone of how far both the Commission itself and a large number of business organisations are willing to go, aiming for strict discipline at all levels of government and full respect for the imperative to liberalise. The proposed Directive, which would have allowed the Commission to veto proposals at the local, regional and national levels, makes the slogan of "completing the Single Market" rather worrying.

The third area is trade policy, where, especially in the last 20 years, we have seen how the international ambitions of European transnational companies influence decisions on domestic policy and regulation. Transnational companies have successfully used the pressures of international competitiveness as an argument to lower standards. This reflects clearly that the EU accepts the interests of such companies as key.

Thus, regulations that transnational corporations see as going too far and getting in the way of their global strategies are coming under pressure from these companies. Through closed dialogues with trading partners, also known as "regulatory cooperation," even principles enshrined in the Treaties have come under severe pressure, a case in point being the precautionary principle that has been recognised by the Maastricht Treaty. In some cases, this has led directly to the postponement or cancellation of initiatives in the field of the environment, for example, without any real democratically elected assembly playing a role in the process.

In this context, the campaign led by many sectors of the business community to secure the increase of special tribunals for investment protection should be highlighted as one of the areas where important decisions are set to be taken in the EU over the coming years. After years of trying to close agreements on the establishment of special tribunals with countries outside the EU, not least the US and Canada, the current ambition is to find a way for private companies to protect their investments between EU countries even beyond the protections they already enjoy under existing laws.

Finally, there are many examples where the institutional set-up allows the Commission – often in cooperation with governments – to remove policy issues from the open political debate altogether. Among the examples highlighted above is the EU's rejection of technology sharing on COVID-19 vaccines, predominantly decided on behind closed doors by an opaque committee. Another is the lack of regulation of investment funds at the European level before the financial crisis – an omission that resulted from an exchange between the Commission and various investment funds. Last but not least, it is frightening that the arms industry has also been invited in to help deliver rearmament and technological superiority in warfare.

This all forms part of the democratic deficit, and much of it can even be characterised as the outright bureaucratisation of decision-making. Bureaucratisation is when decision-makers introduce procedures and standards, such as quantitative standards, that allow them to move decision-making away from politics. Instead, a great deal of responsibility and power is entrusted to Commissioners and their civil servants. The main examples investigated in this book are the Commission's Better Regulation agenda, including the Regulatory Scrutiny Board's ability to reject proposals on the basis of concerns about the regulatory burden for businesses and the complex system of economic governance introduced after the euro crisis. Both cases are quite substantial strategies affecting a plethora of political issues that merit attention from elected representatives.

A BIASED STATE

The democratic deficit, in turn, allows big business lobbyists to thrive. For instance, centralising the right of initiative in the Commission has made it possible to establish a strategic relationship with relevant groups in the business sector and to carry out strategic planning with the Commission at the helm. From the lobbyists' point of view, a close relationship with the Commission is undoubtedly essential for successful action. This relationship lets them enjoy privileged access and gives them an opportunity to influence both long-term plans and small legislative initiatives well before they reach the public. For lobbyists, it is also a plus that a large part of the Commission's dialogue with Member States takes place with officials on committees in closed, confidential settings. It is this closed and often bureaucratised way of making decisions that gives business interests such priority over other interest groups in society that have a much harder time making their voices heard.

Now and then, the number of lobbyists that a given sector can mobilise is also crucial. Being able to visit a high number of MEPs and having a presence at all relevant meetings can give a certain sector of industry the force needed to meet their objectives. When the food industry won on food labelling in 2011, or when the finance sector prevented qualitatively new steps on banking regulation, both victories were owed to the presence of many lobbyists. However, numbers are not everything. At least as important is a fundamental political alignment with the strategies put in place by institutions in which the Commission is the executive. This is precisely the arrangement that big business lobbyists have been able to find with the Commission for decades and which can be described as a kind of symbiosis between powerful business organisations and the Commission.

This means that any response or counter-strategy cannot simply rely on "counter-lobbyism." Power differences mean that other interest groups usually have very limited success, as they do not enjoy the kind of privileged access to decision-makers often awarded to business lobby groups. Therefore, a strategy on the part of the trade union movement, which prioritises increasing the presence of trade union representatives in EU institutions, is doomed to failure. The actual ability to exert influence, for both the trade union movement and the environmental movement, depends primarily on their ability to generate popular engagement and open debate – not on the quality or quantity of the representatives they have on the lobbying stage in Brussels.

These multiple obstacles and barriers to progressive change do not mean that the EU is completely impervious to change in general. Indeed, the road to the competition state has always been – and will continue to be – a bumpy ride, marked by contradictions and often shaped by compromises. It would be misguided to conclude that every action undertaken by the EU is dictated by the interests and representatives of big business. Such an understanding would, of course, be a gross oversimplification of the organisational complexity that characterises the EU as a whole. Mandatory environmental assessments of construction projects and the protection of delicate ecosystems are examples of areas where the EU has played a positive role, as is data protection legislation, or GDPR, which came into force despite the Commission's long-standing laissez-faire stance on the issue.

It is true, regarding most of the topics covered in this book, that transnational capital – whether industrial or financial – rarely dictates all the terms. There are other economic interests and other political movements at play besides those that constitute the vanguard of the competition state. It does happen, for instance, that companies that benefit from protectionism obtain concessions and get the EU to employ mercantilist policies, as mentioned in Chapter 1. The CBAM, set up to protect European companies from competition in an era of climate change, can be seen as another case in point. Ultimately, the idea that one can never achieve political results or bring about positive change by following the beaten path of EU institutions is a false assumption.

However, the EU is not a platform where all interest groups have equal opportunities and play by the same rules. This phenomenon of bias is well known in national governments, but the EU takes it to a whole new level. Since its establishment in the early 1990s, the EU has let transnational capital dominate its economic policy, an approach that has left lasting imprints not only on policy-making, but also on policy development and implementation. For example, if we look at the euro crisis and the tentative, fledgling attempt of Greece to implement a different and more socially balanced crisis policy, the conclusion is rather frightening. It is a known fact that the Greek experiment was simply steamrolled without the slightest hesitation.

A COMPLEX STRUGGLE

The state of affairs clearly calls for transformation at the European level if any progressive change is to happen at all. However, before examining what such transformation could look like, it must be pointed out that addressing the effects of the European competition state is a complex, multi-level matter. The activity and developments within EU institutions are not the whole story. Though the scope of this book does not allow for analysis at the national level, it is nevertheless important to stress that the same process – whereby the importance of the EU grows with every treaty amendment, development strategy, directive and regulation – is also being carried out by individual nation states over the course of their own evolution.

The European competition state is not simply an added dimension to individual nation states – it is not external to them. Member States are following a process of change in parallel to the EU. For example, the Fiscal Compact led to a new and stricter approach to national budgets that was then integrated into national legislation. Many changes have been made over the last decades to put the competitiveness of companies at the heart of government initiatives, most frequently as an outcome of strategies agreed at the European level, but sometimes rather independently as well.

As described in the introduction and Chapter 1, the competition state emerged in response to an insufficient, more nation-centred model of capital accumulation, in which the state and state intervention played more significant roles. Establishing a European competition state was perhaps the most important strategy in facing that challenge, but in the process, nation states underwent developments of their own, sometimes under EU influence and sometimes in a more autonomous manner.

The EU developments described and analysed in this book have their counterparts on the national level as well. Thus, a fight against the drawbacks of the competition state is not simply a fight against the EU – the situation is more complex. Looking at Britain's exit from the EU, for example, does not provide any particular insight into the struggle to create a viable alternative to the competition state. With Brexit, the most nationalistic parts of the Conservative Party championed a separation that would restore the country as an economic and political superpower independent of the EU – much to the opposition of powerful business organisations, including the financial sector. Thus, the fight for change is a battle on many levels. What this book offers is an analysis to serve as a basis for understanding the challenge Europe is currently facing.

FOUR REFORMS TO BEGIN WITH

The burning question is how to begin pulling Europe in a different direction. In my view, based on the experiences and the analysis detailed in this book, what is needed is a European struggle for radical reform. This would entail reforms that halt the forward march of the competition state by strengthening democracy and scaling back the importance of competitiveness as an EU objective.

When we talk about effecting social change in an effort to create greater equality, or when we seek to fight climate change, we quickly come up against constraints imposed by EU rules and the EU system as a whole. This is ultimately a challenge to democracy, and this is why we must begin to rethink the European Union.

Such reforms cannot be abstract inventions dreamed up in an ivory tower. They must build on existing struggles and ideas that fit with real political battles and class struggle. I believe that the following four reforms meet these criteria:

A SOCIAL PROTOCOL TO PREVENT THE UNDERMINING OF SOCIAL RIGHTS

In connection with the four decisions of the European Court of Justice in 2007 and 2008 that undermined collective agreements and made Member States more vulnerable to social dumping, the ETUC elaborated a proposal for Treaty changes that would give social rights a much stronger general standing, and that would have prevented the four decisions in the first place (see Chapter 9). They called this proposal a "Social Progress Protocol," intended for adoption by the Council and integration into the Treaty.

This protocol introduces clauses that would prevent EU decisions of any kind that undermine social rights and advances for the trade union movement at the national level – in both general and specific terms. Generally, it imposes an obligation for the EU to improve "the living and working conditions of its population as well as any other social condition," and to ensure "the effective exercise of the fundamental social rights and principles, and in particular the right to negotiate, conclude and enforce collective agreements and to take collective action." The protocol is also supposed to ensure that "improvements are maintained" and that there is no regression.[3]

As far as Single Market rules are concerned, the protocol is clear: "Nothing in the Treaties, and in particular neither economic freedoms nor competition rules shall have priority over fundamental social rights and social progress."

Though the EMU and economic governance are not mentioned in the protocol for obvious reasons, this would have immediate implications in terms of what kinds of recommendations or demands could be made to Member States. In short, it would create a strong line of defence for social rights.

THE RIGHT TO BE MORE AMBITIOUS ON THE SINGLE MARKET

Because of the juridical weight given to the four freedoms in the Treaty, and because of the Commission's far-reaching powers in that area, progress on environmental legislation, safety at work, and a plethora of other areas, is often stopped at the EU level. That in turn makes it difficult to create momentum behind reforms needed to protect the public interest. In the case of glyphosate, for example, sale of the chemical serves the interests of the chemical industry and agribusiness, but not the interests of citizens. To pave the way for looser reins on national decision-making, the Treaty's rules on the Single Market should be amended to allow individual Member States to introduce more ambitious rules than others when it is not possible to reach an agreement. This could happen through an amendment to article 114.5 TEU, which at the moment allows for exceptions if new evidence has been presented and if the common rules create a problem "specific" to that Member State.

In this way, it would be possible to allow public interest to be considered through political decisions at the national or local level, without these decisions then being trumped by an abstract market-based principle. For instance, it may be that there is little support for a comprehensive ban on specific chemicals – be it glyphosate, endocrine disruptors, or PFAS – but those Member States who do see a need to do so, should be able to impose bans.

At the moment, the opposite is happening in the EU. The Commission and business lobby groups are busy inventing ways to counter "gold-plating." Their aim is to stop Member States from imposing tougher rules than what they deem necessary and warranted. Such contradictions are very real, and despite an imposing and powerful apparatus to police Single Market rules at the EU level, Member States frequently take decisions that lead them into conflict with the Commission. Establishing a strong Treaty basis for more ambitious regulation would provide Member States with the option of going it alone on decisions involving issues such as the banning of chemicals, measures to strengthen safety at work, securing access to housing through restrictions on short-term rental platforms, or whatever public interest may be at stake. That, in turn, can pave the way for more ambitious measures at the EU level.

This would, of course, mean taking a small step back from the general rule of harmonisation, from integration. Having a fully integrated market is not an end in itself at any rate, and in many ways it has proved to simply be a business agenda more than anything else.

AN END TO EU-IMPOSED AUSTERITY

The euro crisis revealed the flaws and weaknesses of the euro, and it led to an era of harsh austerity for many Member States, imposed by creditors and the EU. Since then, bureaucratic and undemocratic procedures have been at play to bring the economic and fiscal policies of Member States under firm control. The outcome has been a wave of privatisation, pension scheme reductions, cuts in social spending, and undermining of collective agreements (see Chapters 4 and 9). Furthermore, the austerity approach to the euro crisis led to a prolonged economic downturn for many Member States.

To avoid a repetition of this, the EMU is in need of fundamental reforms. This must include more flexibility – in other words, debt and deficit targets that are much less strict – and the introduction of waivers that allow eurozone Member States to stimulate their economies in times of crisis and to invest in the green transition.

Regarding the expansion of procedures to keep economies in check, economic governance, and the European Semester, these policies have all been used single-mindedly to impose anti-social reforms and have no democratic legitimacy. They must be rolled back to the status of mere recommendations or simply abolished. Finally, should a Member State wish to withdraw from the euro, a gradual and orderly exit must be made possible.

In view of the importance of the EMU, and the massive pressure to deepen or "complete" the EMU, this may seem like an impossible task. However, the EMU is probably the most contentious issue in the EU, one which Member State governments even disagree on. The results of its current design – cuts to public spending and attacks on social rights, for example – are often met with massive mobilisations, which in effect oppose the EU strategy to develop the EMU, even if most participants are unaware of it, as the role of EU rules and the EU institutions are not always obvious.

INSTITUTIONAL REFORMS

Finally, there is a great need for institutional reform, including a reduction in the immense power currently vested in the unelected institution of the Commission, power that has led to crucial decisions being taken in close collaboration with the most dominant capital groups. This can be reduced through a strengthening of parliamentary control over the Commission – both at the European level through the European Parliament, and the national level through national parliaments. Ultimately, parliamentary support should be required for all major EU strategies. Furthermore, rules can be introduced to simply prevent the Commission from associating with business lobby groups, inspired by the steps taken at the international level to control the tobacco lobby (see the introduction).

Eventually, the EU will need to adopt an entirely new design. The Commission has become the powerful and efficient body it was supposed to be, but its independence has made it undemocratic and accountable to no one.

Although these proposals are only the beginning of the democratisation measures needed to backstep the competition state, adopting them would already transform the EU significantly. They would constitute a fundamental change of course and a challenge to the competition state as we know it. However, these proposals all require Treaty changes, and Treaty changes are not easy to achieve. Proposals of this kind would not only need to be tabled by a government, they would require the support of all 27 Member States.

Any high-level talk of Treaty changes in the EU over the past decade has been in the context of developing austerity policies, with the German government, in particular, voicing the need to provide more tools to impose structural reforms against social interests on Member States.[4] In addition, recent proposals for changes to competition policy have been tabled to make it easier to build so-called "European flagships." Finally, there was Angela Merkel's reaction to Hungary's decision to purchase Russian and Chinese vaccines against COVID-19, something she thought should be prevented in the future by implementing Treaty changes.[5]

However, none of these hints at Treaty amendments relate to the above four proposals, of course. After all, such proposals would take the EU in a very different direction than the one supported by governments today.

NOT QUITE AS SOLID AS IT LOOKS

There is a strong consensus between governments and the leading capital groups in the EU on the current nature and design of the European project and, by and large, on its future development. If there were ever serious contradictions between governments in the Council that have indicated a desire for a change in the course towards a fully-fledged competition state, it is within the EMU, where countries on the periphery of the eurozone have pushed cautiously to ease fiscal rules. However, the basic structure of the project has never been seriously challenged (except by the Greek government for a short period).

From that perspective, it is difficult to imagine the EU changing its course. Proposals for Treaty changes could thus create a false sense of optimism with regard to the nature of the current European project. It might therefore be better to think of the above referenced four proposals as strategic benchmarks. Without imagining something completely different, we are bound to continue asking for more of the same.

A different Europe will have to be built by resisting and rejecting the undemocratic competition state that the EU has become. Disobedience is one such way to fight the endemic obstacles to change found in the EU rulebook. This could mean banning a toxic substance despite warnings from Brussels or challenging the rules behind the EMU (again, which Greece has already done once briefly). The road to another form of European cooperation will most likely be full of conflicts and challenges over time and space, and, for some states, it may even come down to the question of whether or not to remain in the EU. This tactic is often dubbed "strategic disobedience."

By its very nature, it is not an easy task and may seem impossible to achieve while the EU competition state remains unchallenged to any measurable degree. However, things look quite different beneath the surface. Looking out across the European landscape, we often see serious cracks in consensus – and not just on smaller issues. Over the past two decades, at numerous occasions, workers in many parts of the EU have organised protests and campaigns against EU policies, rooted in the Single Market and the EMU. During the euro crisis, the EU's approach to economic governance evoked political upheaval and massive protests against reforms prescribed by the Commission. Popular resistance to pension reforms of the magnitude we have seen in France, indicates that the fundamental building blocks of the EU strategy do not always sit well with citizens. Furthermore, it is remarkable and telling that when Treaty changes or new treaties are put to referendum, drama often ensues, throwing the EU back into crisis mode. This is illustrated by the French and Dutch "no" votes on a proposal for a proper Constitutional Treaty in 2006.

EU developments have already led to changes in the political landscape in several Member States – for instance, the battle over labour market reforms in France, which helped decimate the French Socialist Party. In the case of Spain, a fractious left-wing movement emerged in response to many of the outcomes of the euro crisis, leading to the formation of Podemos, which would later form a government with the Spanish Social Democrats. At the other end of the spectrum, Germany's Alternative für Deutschland was strengthened by the EU's austerity policies, which they saw as too generous a handout to a troubled Southern Europe. Meanwhile, Finland got its own nationalist right-wing movement, for the same reason. In Italy, reforms imposed by Brussels and implemented by the bureaucratic government of former EU Commissioner Monti led to a political landslide in 2013 that resulted in the Five Star Movement, the largest party in the country, led by populist comedian Beppe Grillo. In the following years, fascist and ultranationalist parties would grow stronger and form more governments.

The EU may appear solid and immune to change, but its very own modus operandi creates deep conflicts and political instability. The results can either strengthen right-wing authoritarianism or lead to progressive change.

A DIFFERENT EUROPE

The next decade may offer plenty of opportunities to reassess the EU. If the plans for the EMU go ahead, they will affect the entire way in which economic policy is conducted, especially within the euro area but also outside of it. "Bureaucratisation" is the term that most aptly describes the project, which will be biassed against social interests and designed to meet the needs of businesses. If completion of the EMU takes its intended shape, it will require Treaty changes and lead to referendums in a number of countries. In turn, this could create a new situation where the future of the EU project will truly be on the agenda, opening a potential pathway for progressive change.

The expansion of the "competitive EU" will thus not be a smooth process. It may even be one of those occasions that create opportunities for transformation. If we are to have a future with prosperity and democracy for all at the centre of EU politics and in which we can effectively tackle the climate crisis, then the EU in its current form is not the right model, not the right form of cooperation, and not the right state configuration. As my analysis demonstrates, we need a systemic alternative instead. The challenge will be to find other forms of cooperation with new objectives and by new means – institutions built firmly on principles of democracy and social rights. We must have cross-border relationships that do not destroy democracy in the name of competitiveness, but that rather expand and strengthen democracy to create a green future with prosperity and democracy not for an elite few, but for all.

NOTES

1 Transparency International, *Global Corruption Barometer European Union 2021, Citizens' Views and Experiences of Corruption*, (Berlin: Transparency International, 2021). Available at: images.transparencycdn.org/images/TI_GCB_EU_2021_web.pdf, (accessed: 6 December 2023).

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3 ETUC, *ETUC proposal for a "Social Progress" Protocol*, 18 March 2008. Available at: www.etuc.org/sites/default/files/social_progress_protocolEN_1.pdf, (accessed: 14 December 2023).

4 Bruno Waterfield, "Angela Merkel pushes for EU treaty change," *The Telegraph*, 22 October 2013. Available at: www.telegraph.co.uk/news/worldnews/europe/eu/10397512/Angela-Merkel-pushes-for-EU-treaty-change.html, (accessed: 14 December 2023).

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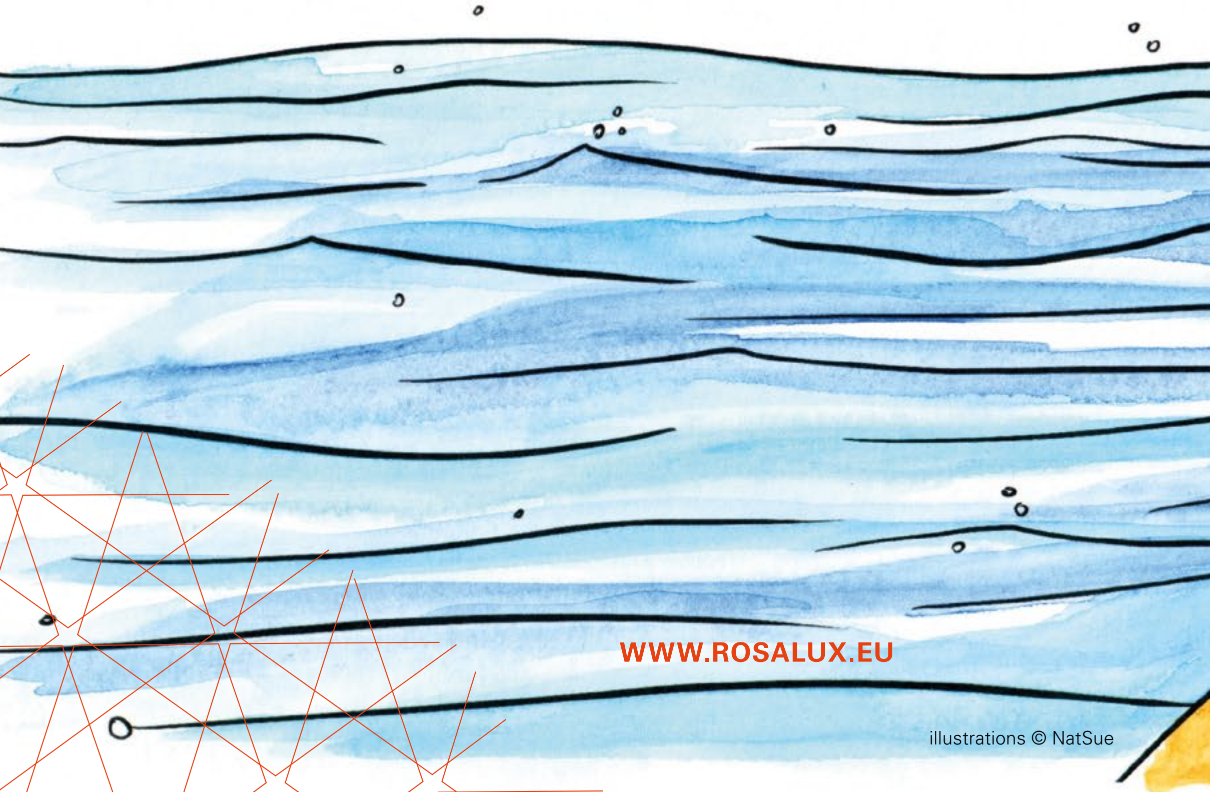
30,000 lobbyists… and counting. The sheer number of corporate lobbyists that influence EU policy-making, and the financial firepower available to them, constitute a challenge to democracy, social rights, peace and the planet. In this book, lobbying researcher and campaigner Kenneth Haar explores how corporate representatives have shaped the institutional foundations of the EU. He examines how they inscribed their vision into its fundamental principles, constructing a "European competition state," marginalising concern for the common good, and generating an enormous democratic deficit.

The author brings a wealth of material and his long-standing expertise to bear on a range of policy areas, from trade to big tech, from patents to weapons deals, from the European Monetary Union to climate, and more. To tackle the core elements of the EU's democratic deficit, "A Europe of Capital" calls for a change that reflects contemporary political and class struggles, and a shift towards a systemic alternative to the competition model currently in place – one that puts democracy, sustainability and prosperity for "the many" at the centre.

"A Europe of Capital" is a rich resource for everyone looking to understand the workings of corporate interest representation in the EU, both in general and in a range of policy areas. It provides a comprehensive, clear-eyed and unflattering assessment of what has become of the EU, where it is headed, and how to guide it in a direction that prioritises people over profit.



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