



# European Studies Review

February 2021

Edition n° 2



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## A Note from the Editor-in-Chief

European Studies Review was founded with the aim of providing a platform for students and recent graduates with an interest in European affairs to publish independent research pieces and opinion pieces. Following the success of our December 2020 edition, the team are delighted to bring you our second edition. Since our last edition, we have made several changes to the journal, such as releasing a bi-monthly journal and launching our online blog for opinion pieces. Similarly, we have welcomed new members to the team.

First of all, I would like to thank everyone who has expressed support for the journal. We greatly appreciate your submissions and interest in our project. Secondly, I would like to thank the European Studies Review team; to the editors who review every article we receive, our outreach team to working on social media and our graphics, and to our writing team for producing such insightful pieces. The team who supported this edition include:

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We are continuously accepting articles for both our journal and blog. Find all the information on how to submit on <https://europeanstudiesreview.com/get-involved/>. We are also accepting applications to join our writing team. The deadline is 25 February 2021 and all information can be found on <https://europeanstudiesreview.com/current-vacancies/>.

Thank you for supporting us thus far, and we hope you enjoy our latest edition.

Aoife Griffin

Editor-in-Chief

# EU-US: a new transatlantic agenda for global change

Matteo Brizzi



## Introduction

In the post pandemic world, the European Union could – and should – seize the opportunity to become the central *soft* player in a new transatlantic relationship tailored to address the current global challenges. Although the Atlantic link has traditionally been ‘Northern’, this axis fails today to exhaustively reflect the economic, political and cultural processes taking place on both shores of the Atlantic. It may therefore be time to embrace a broader perspective, encompassing the Atlantic Ocean in its entirety, including the Southern Hemisphere both in its Latin-American and African shores. Even if NATO is presently undergoing a phase of stalemate if not outright crisis, instead of considering transatlantic relations an element of the past, we need to reassess, adapt and expand its strategic role. A shift that would increase the usefulness to the United States of its alliances with both Europe and its own hemisphere; at the same time, it would allow Europe to strengthen its ties with the countries of Latin America and Western Africa.<sup>1</sup> The first step for a new transatlantic partnership coincides with shaping a renewed, equitable relationship between the main Atlantic actors, the European Union and the United States. A step that could be significantly eased by the election of President Biden.

## The need for an equitable but complementary EU-US relationship

Even though there have been many efforts – and difficulties – in defining a common European strategic culture, the core of it remains the partnership with the United States and the membership to NATO. At the same time, the policies of US President Trump and the challenges faced by the present international order – the very same international liberal order that the Europeans and Americans spent the past decades designing and building - provide the opportunity and the need for the European Union to build both a strategic culture and a shared strategic identity that will strengthen its role on the world stage, beyond proving itself a worthy partner to the United States.<sup>2</sup> The 2016 Global Strategy (EUGS) states that “on the broader security agenda, the U.S. will continue to be our core partner”.<sup>3</sup> On a similar note, the 2018 review of the Strategy’s implementation emphasizes the relationship with the United States asserting that “a strong and well-functioning transatlantic

<sup>1</sup> D’Alema M. (2010). *The European paradox: weakness and strength in the 21st century*, addressed to the Istituto Rio Branco, the Brazilian Diplomatic Corps’ Training Institute

<sup>2</sup> Cassar V. (2020). *The Future of European Security and Defence: Keeping the Americans in?*, in *The future of the European Union, demisting the debate*, the Institute for European Studies, University of Malta.

<sup>3</sup> European External Action Service (2016). *Shared Vision, Common Action: A Stronger Europe*, European Union Global Strategy.



partnership remains a crucial element for Europe's security and prosperity".<sup>4</sup> In this sense, Ikenberry argues that "the future of this liberal order hinges on the ability of the United States and Europe – and increasingly a wider array of liberal democracies – to lead and support it".<sup>5</sup> Although Donald Trump has sometimes criticized his European counterparts for their low contributions to defence spending and burden sharing within NATO, the 2017 National Security Strategy, the most recent US strategic document, acknowledges the importance of a "strong and free Europe",<sup>6</sup> highlighting the interdependence of U.S. and European shared values and finally affirming the U.S. commitment to the European allies.

The EU also deepened its partnerships with NATO as highlighted by the third annual review of the Security Strategy: "unprecedented cooperation between the EU and NATO, with no less than 74 common actions to date in the framework of the two Joint Declarations of 2016 and 2018".<sup>7</sup> Besides, the ability to rely on NATO's (and US) hard power will allow the EU to focus more effectively on civilian security capabilities and its soft power as a global actor. What can the European Union do in order to reinvigorate the partnership with the US for the sake of autonomy and equity? First of all, as argued by the German Minister for Foreign Affairs Heiko Maas, strengthening the European pillar of the transatlantic alliance will create the conditions for "ensuring that Americans and Europeans can rely on each other also in the future".<sup>8</sup> The Global Strategy in general and specifically the activation of the Permanent Structured Cooperation (PESCO) follow Maas' strategy, albeit the current 47 PESCO projects are far from setting a coherent whole, mostly not addressing the well-known priority shortfalls in the European militaries, such as fragmentation, duplication and insufficient operational engagement, as recently stated by the HR Borrell after the defence review published on the last 23<sup>rd</sup> November.<sup>9</sup> For this reason, at least in a short-medium term, until a greater EU defence autonomy could be established, the European institutions and member states must reconfirm their reliance on NATO, as well as committing to an increase of their financial contributions, in order to 'disarm' any American accusation of a European passivity. Cooperation with the United States and the role of NATO will remain at the heart of Europe's strategic culture for the foreseeable future.

Nevertheless, once assessed that weakening the Transatlantic link would be disadvantageous, we also need to acknowledge that Europe's strategic outlook does call for an autonomous repositioning: "whatever strategy its American ally and the other great powers adopt, the EU and its Member States always must have enough freedom of action to defend the European interest".<sup>10</sup> In the context of the transatlantic relationship, this means that, generally speaking, Europe has to cooperate with the US also in order to protect European interests. On the other hand, whenever on a specific issue the interests of the EU and the United States interests may diverge, the Union should be able to operate with other security partners. The transatlantic security relationship between American and Europeans is built on enduring shared values, by similar perceptions about the nature of power, by the norms that should guide relations among states, as well as by the desire to promote

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<sup>4</sup> European External Action Service (2018). *Implementing the EU Global Strategy – Year 2*, European Union Global Strategy.

<sup>5</sup> Ikenberry G. J. (2018). *Is the end of the liberal international order?* International Affairs 94:1, International Institute for Strategic Studies (2018) 'Prospectives', Strategic Survey, 118 (1). pp. 7–23.

<sup>6</sup> The White House (2017). *The National Security Strategy of the United States of America*, pg. 47.

<sup>7</sup> European External Action Service (2019, p.11). *The European Union's Global Strategy three years on, looking forward*, European Union Global Strategy.

<sup>8</sup> Cassar V. (2020). *The Future of European Security and Defence: Keeping the Americans in?*, in *The future of the European Union, demisting the debate*, the Institute for European Studies, University of Malta.

<sup>9</sup> Brzozowski A. (2020). *Global Europe Brief: European defence, missing in action?*, EURACTIV.com

<sup>10</sup> Biscop S. (2020). *Strategic Choices for the 2020s*, Egmont Institute.

democracy and basic human rights. The partnership is however exposed to a serious risk of fragmentation.<sup>11</sup> A weaker liberal order is under pressure from domestic forces equated with autocracy, frequently supported by nationalism and protectionism. This fragmentation is further driven by changes in the international landscape, mainly the rise of multi-polarity, the emergence of China as a major security player in East Asia and the threatening comeback to a world of power politics or spheres of influence.<sup>12</sup> The worst that could happen would be for world politics to be frozen again into permanent antagonism between two blocs: Europe and the US versus Russia and China. Therefore, a nascent 'EU Grand Strategy' in the long run should address the above-mentioned difficulties, first of all by recognizing the need to defend Western values. A stronger transatlantic dialogue must be fostered in order to create a coherent transatlantic approach towards 21st century crises, from the multipolar instability to nationalistic pressures, from economic downturns to the pandemic.<sup>13</sup>

### **Biden has come: a new EU-US agenda for global cooperation**

The victory of President-elect Joe Biden and Vice-President-elect Kamala Harris, combined with a more assertive and capable European Union, created the space for achieving the aforementioned goal of an ambitious and effective transatlantic partnership. In this sense, the European Union has not wasted time: on December 2<sup>nd</sup>, the European Commission and the High Representative Josep Borrell presented a proposal for a “new, forward looking transatlantic agenda”.<sup>14</sup> This agenda for global cooperation, as we can directly read from it, “should be based on our common values, interests and global influence [...] should be the linchpin of a new global alliance of like-minded partners.”<sup>15</sup>

In terms of contents, such a proposal is divided into four main areas of actions, as the agenda is indeed centred on the sectors of bilateral convergence, where the collective leverage can best be used and where global leadership is required. First, “working for a healthier world”: the EU stresses the vital importance for the US to join its global leadership role in promoting global cooperation in response to the Covid-19 pandemic. This means not only to ensure the development and the equitable global distribution of vaccines, tests and treatments, but also to facilitate trade in essential medical goods and – most importantly – to reform the World Health Organization. Second, the protection of our common house, the planet: after a necessary and pre-conditional new commitment to the Paris Agreement by the United States, already planned and promised by the President-elect, the EU is proposing a shared transatlantic pledge to net-zero emissions by 2050. This would make climate neutrality a new global benchmark in the run up to COP26, the next UN Climate Change Conference, co-organized next year by the United Kingdom and Italy. Third, “working together on technology, trade and standards” means a reform of the World Trade Organization based on the active defence of economic openness, a specific dialogue on the responsibility of Big Tech, collaboration on fair taxation and market distortions, and develop a common approach towards technologies protection and Artificial Intelligence. Last but not least, the cooperation for strengthening democracy, supporting sustainable development and promoting human rights around

<sup>11</sup> Le Gloannec A-M. and Muniz M. (2014). *Redefining the Transatlantic Security relationship*, Transworld, working paper 38.

<sup>12</sup> Góralczyk B. J. (2019). *The End of the Value-Based Global Order* in Latoszek et al. (2019). *Reshaping the European Union internally and externally – a new matrix?* Warsaw School of Economics and Dom Wydawniczy, ELIPSA.

<sup>13</sup> Ortega A. (2020). *The U.S.-China Race and the Fate of Transatlantic Relations Part II: Bridging Differing Geopolitical Views*, Center for Strategic and International Studies (CSIS).

<sup>14</sup> 14 European Commission (2020). *EU-US: A new transatlantic agenda for global change*, press release.

<sup>15</sup> European Commission and High Representative (2020). *A new EU-US agenda for global change*, Joint communication to the European Parliament, the European Council and the Council.

the world.

Even though the new EU-US Agenda will be hopefully remembered as a “green” one, due to the extreme relevance of climate action, the two main liberal Powers cannot exempt themselves from a renewed, strong commitment on enhancing regional and global stability, developing international security and promoting the multilateral system of governance. As the European Council agreed<sup>16</sup> on the whole project of close partnership with the main Atlantic ally, the EU Commission’s President, Ursula von der Leyen, has proposed an EU-US Summit<sup>17</sup> in the first half of 2021 to launch the agenda. Now the ball goes to Biden. Will he be a surprising basketball player as his friend Barack Obama?

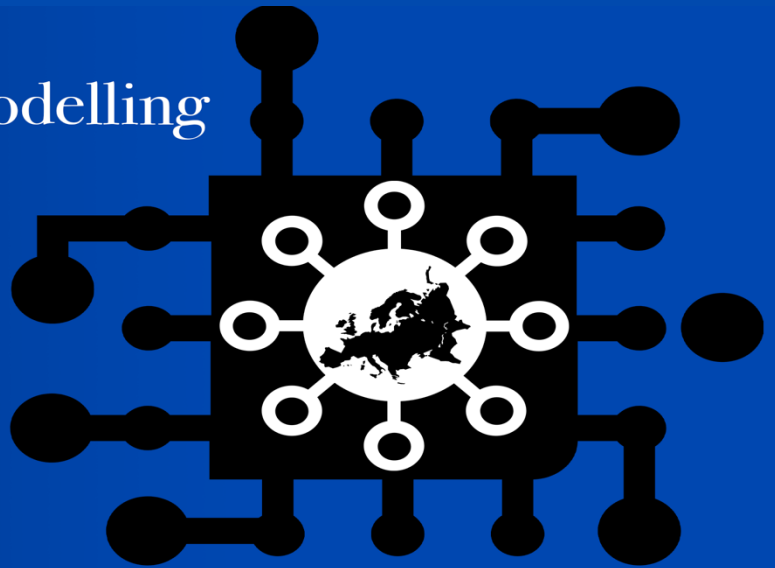
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<sup>16</sup> European Council (2020). *Council conclusions on European Union – United States relations*, from [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>17</sup> European Commission and High Representative (2020). *A new EU-US agenda for global change*, Joint communication to the European Parliament, the European Council and the Council.

# European Digital Remodelling

Anna Filippou



## Introduction

As we move through the era of the digital revolution, Europe is facing new challenges along the way toward full digital transition. Digitization has already brought about significant changes in societies and economies not only in Europe but globally. The great changes that have taken place in the field of artificial intelligence, big data, and new technologies, in the background of which again human intelligence emerges as the great protagonist, transport us with blistering speed to the new digital reality. With it comes changes to the field of legislation, the labor market, companies, and investment, as well as in international relations.<sup>1</sup> The European Union is demonstrating its ability to adapt to the new conditions by adopting the Digital Single Act Initiative as well as the Digital Market Act within its policies and priorities.

## The Digital Services Act and Digital Markets Act package

The Digital Services Act (DSA) and the Digital Markets Act (DMA) are two legislative initiatives proposed by the European Commission on 15 December 2020, moving in the context of the overall digital strategy adopted by the Union (“Shaping Europe, Digital Future”), intending to restructure the European legal and regulatory framework covering the existence and operation of the EU's digital services, thus bringing to the forefront the safekeeping of the private sphere that will be compatible with European values, by creating a digital environment more secure for its users while preserving their fundamental rights. Additionally, at the forefront of this legislative upgrade is the promotion of innovation and growth, setting new terms of competition not only in the European Single Market but also globally<sup>2</sup>.

The field of digital services we are talking about today certainly differs significantly from what prevailed 20 years ago, for example, when the e-commerce directive was first adopted. Online intermediary service providers play a particularly important role in the broader context of digital transformation. Online platforms have proven to be extremely beneficial to consumers and innovation by making cross-border trade within and outside the European Union easier

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<sup>1</sup> Dean Stoecker, “The Fourth Revolution: The Age Of Digital Enlightenment”, Forbes (Forbes, February 25, 2020), <https://www.forbes.com/sites/deanstoecker/2020/02/25/the-fourth-revolution-the-age-of-digital-enlightenment>

<sup>2</sup> “The Digital Services Act package”, European Commission (European Commission, December 16, 2020), <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>



through the removal of some of the barriers. However, some of the large online platforms<sup>3</sup> have become systemic and thus pose particular risks to users' fundamental rights<sup>4</sup>, information flows, and public participation.

The Digital Services Act states that binding EU-wide obligations will apply to all digital services that connect consumers to goods, services, or content and will include new procedures for faster removal of illegal content as well as comprehensive protection of fundamental internet rights. Under these circumstances, we find the balance between the rights and responsibilities of users, intermediate platforms, and public authorities, based on European values, including respect for human rights, freedom, democracy, equality, and rule of law to achieve more resilient democracies.<sup>5</sup>

In addition, the Digital Markets Act addresses the most negative consequences of specific platform behaviors that act as digital regulators of single market access. The problem lies more in the fact that the platforms that have the most significant impact on the internal market, have the ability to act as a customer gateway for business users and therefore hold a dominant position. To better understand how a leading platform works we could start our exploration with a brief look at how the API (Application Programming Interface) system works because this is exactly the gateway for web clients. To be precise, this gateway is a reverse mediator that conveys the requests of customers, gathers all the necessary services required for their fulfillment, and returns the result to the customers.<sup>6</sup> Most people have purchased airline tickets online either through their mobile or PC applications, which offer a comprehensive search of available seats and prices, for example, on all airlines companies either through the official websites of them. In order for all these people to get the results of their search and ultimately the product they want, which in this case is the air ticket they must have access to the airline database.<sup>7</sup> The API gateway is then the intermediary that transfers their request from the application they use to the company system, then gets its response to the request and returns it back to them. The more flexible the intermediation and processing program of the services, the stronger the control of the platform in the digital market. Thus, platforms that have a stronger base and therefore leading roles have the ability to increase their influence and share in the single market. An example of such a platform could be Amazon which developed its platform using its profits to secure its entry into new markets as a subsidy for cloud-computing services or even using its information to prevail over other companies, which operate as "complementary", i.e. in a system in which the products or services of one company are

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<sup>3</sup> Meredith Broadbent, "The Digital Services Act, the Digital Markets Act, and the New Competition Tool-European Initiatives to Hobble U.S. Tech Companies", Center for Strategic & International Studies, (Center for Strategic & International Studies, November 10, 2020), <https://www.csis.org/analysis/digital-services-act-digital-markets-act-and-new-competition-tool>

<sup>4</sup> European Commission, "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC", Brussels (15.12.2020), p.p. 12-13

<sup>5</sup> European Commission, "The Digital Services Act: ensuring a safe and accountable online environment", [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en)

<sup>6</sup> Microsoft, "Using API gateways in microservices." , ( October 23, 2018) <https://docs.microsoft.com/en-us/azure/architecture/microservices/design/gateway>

<sup>7</sup> Mulesoft, "What is an API? (Application Programming Interface)", <https://www.mulesoft.com/resources/api/what-is-an-api>

complementary (presuppose or strengthen the use) of the products or services of another.<sup>8</sup> This makes it possible to create a grid of interdependence and a possible connection between more than two dominant companies and therefore between their online platforms.

### **Facing the US digital reality**

In the digital age, a major competitor to the EU may be the United States. An important difference may lie in the fact that it has a fairly unified investment environment and a clear regulatory framework that encompasses a number of possible amendments and cases, while the European Union is more fragmented with rules and laws that change or differ from one Member State to another. Different national legislation may, for example, make it possible to maximize the differences between ISPs (Internet Service Providers) and their beneficiaries, as each may be based on different case law. The US has a broader and more extensive judicial interpretation of the rules concerning defamatory content or copyright infringement, a part in which the Union lags behind. As such laws may protect core values but are not as targeted and clear to be able to cover any significant change in the digital environment. Another example could be the lack of harmonious coherence between the rules for the elimination of illegal information in the EU, leading to an increase in the legal costs of the beneficiaries. At the same time, it is worth noting that European users moving in the digital environment did not have the security of legal protection against liability exceptions covering the distribution of content posted by other users.<sup>9</sup> The importance of the above becomes even more apparent once we consider the case of eBay. In less than three months in 2008, eBay received contradicting rulings from four European courts (French Civil Court of Troyes, Commercial Court of Paris, French Tribunal de Grande Instance, Court of Brussels) as well as the United States (District Court of New York) to cases on the sale of luxury products from companies that turned out to be counterfeit. It would probably be expected to have a different outcome of similar cases between a European and an American court, but not between the four European courts in France and Brussels. It is at this point that the need to harmonize the case of Internet law and rules becomes apparent. The problem was that the three European courts interpreted the rules differently because there did not exist a precise outline on which cases special liability rules could be applied. Arguments in support of eBay's definition of "hosting provider", a definition referred to in the e-commerce directive, have been heard in Paris as well as in Brussels, but the scope of the specific rules was open.<sup>10</sup> The two new Digital Acts are therefore a necessary innovation as they will pave the way for a clean, unified legal environment that will govern the rules of the single market. The new rules will make it possible to remove illegal goods and services from the Internet, a

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<sup>8</sup> Andreas Hein & Maximilian Schreieck & Tobias Riasanow & David Soto Setzke & Manuel Wiesche & Markus Böhm & Helmut Krcmar, "Digital platform ecosystems"- "Digital platforms" , Article in Electronic Markets,(Electronic Markets, November 2019)

<sup>9</sup> European Commission, "EU study on the New rules for a new age? Legal analysis of a Single Market for the Information" – "Liability of online intermediaries Society" (Chapter 6) , November 2009, p.p 34-36, <https://ec.europa.eu/digital-single-market/en/news/legal-analysis-single-market-information-society-smart-20070037>

<sup>10</sup> European Commission, "EU study on the New rules for a new age? Legal analysis of a Single Market for the Information" – "Liability of online intermediaries Society" (Chapter 6) , November 2009, p.p 2, <https://ec.europa.eu/digital-single-market/en/news/legal-analysis-single-market-information-society-smart-20070037>

wide range of transparency measures will be introduced as well as rules related to tracking down business users in online markets to facilitate detection of illegal goods or services<sup>11</sup>.

## Conclusion

The two new legislative initiatives proposed by the European Commission seem to cover many of the gaps that the comparison with the established US dual protection regime highlights. Turning our attention to Margrethe Vestager's (Executive Vice-President for a Europe fit for the Digital Age) statements:

*“The two proposals serve one purpose: to make sure that we, as users, have access to a wide choice of safe products and services online. And that businesses operating in Europe can freely and fairly compete online just as they do offline. This is one world. We should be able to do our shopping in a safe manner and trust the news we read. Because what is illegal offline is equally illegal online.”*

And to what Thierry Breton (Commissioner for Internal Market) has to note:

*“Many online platforms have come to play a central role in the lives of our citizens and businesses, and even our society and democracy at large. With today's proposals, we are organising our digital space for the next decades. With harmonised rules, ex-ante obligations, better oversight, speedy enforcement, and deterrent sanctions, we will ensure that anyone offering and using digital services in Europe benefits from security, trust, innovation, and business opportunities.”<sup>12</sup>*

Awaiting the ordinary legislative procedure which provides for the discussion and consideration of the Commission proposals by the European Parliament as well as by the national parliaments of the Member States and their final approval for finalization and legal validity of the official text for all EU countries, we can say that, for Europe, a new digital decade is beginning. An opportunity to show the European way of managing digital and technological development with an anthropocentric European approach to artificial intelligence. Technological training of the European workforce and the creation of a new wave of digital workers who can support the European labor market at all its levels could be the next challenge.

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<sup>11</sup> European Commission, “The Digital Services Act: ensuring a safe and accountable online environment”, [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en)

<sup>12</sup> European Commission, “Europe fit for the Digital Age: Commission proposes new rules for digital platforms”, Press release, (December 15, 2020), Brussels.

# Gaudete, gaudete?

## An analysis of the EU-UK Trade and Cooperation Agreement

Conor Spain



*“When people are divided, the only solution is agreement”- John Hume.*

More than four years on from the fabled Brexit referendum of 2016, in which the United Kingdom (UK) voted to leave the European Union (EU), the EU and the UK have concluded their negotiations on a treaty, dubbed the EU-UK Trade and Cooperation Agreement (TCA).<sup>1</sup> While the trials and tribulations of Brexit as a process are sure to be felt across the EU and the UK for some time to come, the results of over ten months of formal negotiations which had progressed at a leaden pace have been met with festive acclamations of *gaudete* [rejoice] as per the 16<sup>th</sup> Century Christmas carol, as well as with words of wintry caution. The agreed upon, yet unratified, EU-UK TCA comes to over one thousand pages and encompasses practically every aspect of EU-UK interaction, bar foreign policy. Principally, it is composed of three elements, a free trade agreement, an agreement on judicial cooperation and law enforcement, and finally a governance framework which aims to enforce commitments made under the agreement. It should be recalled too, that underlying the TCA, is the EU-UK Withdrawal Agreement, which was ratified in January 2020, and contains protocols on Ireland / Northern Ireland, Cyprus, and Gibraltar, as well as the EU-UK financial settlement, amongst other elements.

Interestingly, yet unsurprisingly, the EU and the UK presented the striking of a deal in rather different ways. For instance, UK Prime Minister Boris Johnson presented the agreement as an affirmation of the work he and his government had been undertaking in order to achieve Brexit and leave the European Union. “Taking back control” was the main motif of his speech announcing the deal, mentioning the word ‘control’ no less than four times, and referring to the deal as “Canada style”, “oven ready” and the largest UK trade deal struck yet.<sup>2</sup> UK government documents explaining the deal underline the accomplishments of the UK in achieving agreement with the EU, referring to it as the first EU agreement with zero tariffs and

<sup>1</sup> “EU-UK Relations: From the UK referendum to a new Trade and Cooperation Agreement – Timeline”, European Commission, accessed 27 November 2020, [https://ec.europa.eu/info/files/eu-uk-relations-uk-referendum-new-trade-and-cooperation-agreement-timeline\\_en](https://ec.europa.eu/info/files/eu-uk-relations-uk-referendum-new-trade-and-cooperation-agreement-timeline_en)

<sup>2</sup> Boris Johnson, “Prime Minister’s statement on EU negotiations: 24 December 2020”, Prime Minister’s Office, 10 Downing Street, accessed 27 December 2020, <https://www.gov.uk/government/speeches/prime-ministers-statement-on-eu-negotiations-24-december-2020>.



quotas, which will preserve free trade and its benefits for UK and EU citizens alike.<sup>3</sup> The EU reacted differently. European Commission President Ursula von der Leyen stressed that the deal was “fair and balanced”, protected European interests, and allowed the EU to put Brexit behind it.<sup>4</sup> Facing the loss of a Member State for the first time, the European Commission presented the deal as a loss for the UK, highlighting the elements of EU membership it was losing out on, rather than the elements it had managed to retain.<sup>5</sup> It highlighted that despite the deal, the end of the transition period marked significant changes to areas which are seen as fundamental to the EU; free movement of people, trade in goods and services, transport, energy and EU programmes. In many respects, the EU-UK TCA is seen as an adequate protection of EU interests by the European Commission, and a final step in the process of consolidating its sovereignty by the UK government.

Trade policy is an exclusive competence of the EU, where the EU’s economic and foreign policy objectives are sought to be furthered through multilateralism. The EU performs this through three main agreement types; Customs Unions, which establish joint customs procedures, Association, Stabilisation, Free Trade and Economic Partnership Agreements which remove or reduce customs tariffs in bilateral trade, and finally, Partnership and Cooperation Agreements which provide general frameworks for bilateral economic relations.<sup>6</sup> The EU-UK TCA falls somewhere in the centre category, famously not a Customs Union, yet more enhanced than a Partnership and Cooperation Agreement. Given the unique nature of the UK, either inherently or by virtue of being a former Member State of the EU, the EU-UK TCA is a rather bespoke agreement, which does not fall neatly into prior EU trade agreement formats.

### **Trade in Goods:**

For instance, regarding goods, the TCA provides for zero quotas and tariffs on goods traded between the EU and the UK, providing they meet the required rules of origin criteria, which can be self-certified by the trader.<sup>7</sup> This represents a first for the EU, perhaps demonstrating the unique nature of a post-Brexit EU-UK relationship.

### **Trade in Services:**

Services, however, do not fare so well, with the UK losing the benefit of the ‘country-of-origin’ principle, mutual recognition and ‘passporting’ with regards to the provision of services in a

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<sup>3</sup> “UK-EU Trade and Cooperation Agreement: Summary”, Prime Minister’s Office, 10 Downing Street, accessed 27 December 2020, 3, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/948093/TCA\\_SUMMARY\\_PDF.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948093/TCA_SUMMARY_PDF.pdf).

<sup>4</sup> “EU-UK Trade and Cooperation Agreement: protecting European interests, ensuring fair competition, and continued cooperation in areas of mutual interest”, European Commission, accessed 27 December 2020, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_2531](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2531).

<sup>5</sup> “EU-UK RELATIONS: Big changes compared to benefits of EU membership”, European Commission, accessed 27 December 2020, [https://ec.europa.eu/commission/presscorner/api/files/attachment/867615/EU\\_Membership\\_benefits\\_two\\_columns.pdf](https://ec.europa.eu/commission/presscorner/api/files/attachment/867615/EU_Membership_benefits_two_columns.pdf).

<sup>6</sup> Questions have been asked as to whether the bilateral nature of EU trade agreements has hindered the EU’s objective of multilateralism in its trade policy. See Patricia Garcia-Duran, “Reading EU trade policy from a multilateral perspective”, *Revista CIDOB d’Afers Internacionals*, no.108 (December 2014): 119-140, <https://www.jstor.org/stable/24364585>.

<sup>7</sup> “EU-UK Trade and Cooperation Agreement”, European Commission, accessed 27 December 2020, 18-74, [https://ec.europa.eu/info/sites/info/files/draft\\_eu-uk\\_trade\\_and\\_cooperation\\_agreement.pdf](https://ec.europa.eu/info/sites/info/files/draft_eu-uk_trade_and_cooperation_agreement.pdf).

Member State.<sup>8</sup> However, the TCA does provide for the removal of unjustified barriers to digital trade, equal footing for EU and UK public procurement markets and facilitations for short-term business trips and temporary secondments.<sup>9</sup> The section pertaining to services in the TCA contains a review clause, which allows the EU and UK to enhance trade in services at a later stage, although it explicitly excludes financial services.<sup>10</sup> Despite this, a Joint-Declaration on Financial Services Regulatory Cooperation between the EU and the UK was published alongside the TCA, aiming to move towards a Memorandum of Understanding by March 2021.<sup>11</sup>

### **Fisheries:**

Fisheries were a particular bone of contention for both sides during the negotiating process, and the deal struck maintains the *status quo* in terms of EU access to UK waters and *vice versa* for a period of five and a half years, after which point EU fishing quotas will be gradually transferred to the UK. Annexes included in the TCA illustrate this transition, for example, EU shares of UK herring stocks in the Irish Sea, will reduce from 11.01 shares in 2021 to 0.99 shares in 2026.<sup>12</sup> Afterwards, the EU and UK will hold annual consultation processes in order to agree on the total allowable catch (TAC) for the following year or years.<sup>13</sup>

### **Judicial Cooperation / Law Enforcement:**

The TCA is based on international law and is not subject to the scrutiny of the European Court of Justice (ECJ), which has been presented as a victory by the UK government.<sup>14</sup> However, the two parties have committed to continued cooperation between the UK and two EU agencies; Europol (the EU's law enforcement agency) and Eurojust (the EU agency for criminal justice cooperation).<sup>15</sup> Furthermore, the TCA makes arrangements for police and judicial cooperation between the UK and Member States, as well as for exchanges of Passenger Name Record (PNR) data, criminal record information, DNA, fingerprints and vehicle registration data. However, the UK will no longer participate in sensitive EU databases, such as the Schengen Information System (SIS II).<sup>16</sup> Perhaps influenced by the COVID-19 pandemic, the two parties have also agreed to cooperation on cross-border health security threats and exchanges of classified information. More detail on the exchange of and protection of classified information

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<sup>8</sup> "Questions and Answers: EU-UK Trade and Cooperation Agreement", European Commission, accessed 27 December 2020, [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_2532](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532).

<sup>9</sup> "EU-UK Relations: A new relationship, with big changes", European Commission, accessed 27 December 2020, [https://ec.europa.eu/info/sites/info/files/eu-uk\\_trade\\_and\\_cooperation\\_agreement-a\\_new\\_relationship\\_with\\_big\\_changes-overview\\_of\\_consequences\\_and\\_benefits.pdf](https://ec.europa.eu/info/sites/info/files/eu-uk_trade_and_cooperation_agreement-a_new_relationship_with_big_changes-overview_of_consequences_and_benefits.pdf).

<sup>10</sup> "Questions and Answers: EU-UK Trade and Cooperation Agreement", European Commission.

<sup>11</sup> "Joint Declaration on Financial Services Regulatory Cooperation Between the European Union and the United Kingdom", Prime Minister's Office, 10 Downing Street, accessed 27 December 2020, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/948105/EU-UK\\_Declarations\\_24.12.2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948105/EU-UK_Declarations_24.12.2020.pdf).

<sup>12</sup> "EU-UK Trade and Cooperation Agreement", European Commission, 893-899.

<sup>13</sup> "EU-UK Trade and Cooperation Agreement", European Commission, 261-275.

<sup>14</sup> Boris Johnson, "Prime Minister's statement on EU negotiations: 24 December 2020".

<sup>15</sup> "EU-UK Relations: A new relationship, with big changes", European Commission.

<sup>16</sup> "EU-UK Relations: A new relationship, with big changes", European Commission.

is included in a separate EU-UK Agreement on Security Procedures for Exchanging and Protecting Classified Information concurred alongside the TCA.<sup>17</sup>

### **Energy and Climate:**

The EU and the UK have agreed upon enforceable commitments to the Paris Agreement and non-regression on climate change and carbon pricing as well as cooperation in offshore energy in the North Sea and guarantees on energy supply via new arrangements for interconnectors.<sup>18</sup> If these enforceable commitments are breached, they could trigger the suspension of the agreement. The UK will no longer be a participant in the EU's internal energy market, or the Emissions Trading Scheme (ETS), nor will it participate directly in EU initiatives such as the European Green Deal. A separate cooperative Nuclear Cooperation Agreement between the EU and the UK was concluded along with the TCA, as the UK is no longer a member of the European Atomic Energy Community (Euratom).<sup>19</sup>

### **Cooperation in Transport, Social Security and EU Programmes:**

Both air and road transport are dealt within the TCA, allowing for unlimited point-to-point traffic between the EU and the UK. Member States can allow conduct bilateral agreements with the UK as for extra-EU cargo to be sent via UK airports, and EU-UK cooperation in aviation safety, security and air traffic control is included in the agreement.<sup>20</sup> Regarding road transport, the TCA allows for hauliers to perform two extra operations in either party's territory, and the provisions to aid in the smooth transport of road passengers between the EU and the UK.<sup>21</sup> The agreement also includes social security cooperation for EU and UK nationals living or working in the UK or EU, covering pensions, healthcare (including the European Health Insurance Card), maternity and paternity benefits related to childbirth and accidents at work, among other provisions.<sup>22</sup> The agreement also allows the UK to participate in certain EU Programmes, as per its level of financial commitment to them. The UK, therefore, can still participate in Horizon Europe, EURATOM Research and Training, ITER, Copernicus and have access to EU satellite surveillance and tracking (SST) services.<sup>23</sup>

### **State Aid:**

The TCA contains provisions to maintain the so-called 'level playing field' which was a key objective of the EU and its Member States in order to protect the integrity of the Single Market, for fear that the UK would undercut EU standards and subsidise certain industries to give itself

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<sup>17</sup> "EU-UK Agreement on Security Procedures for Exchanging and Protecting Classified Information", Prime Minister's Office, 10 Downing Street, accessed 27 December 2020, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/948107/EU\\_UK\\_Security\\_of\\_Information\\_Agreement\\_24.12.2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948107/EU_UK_Security_of_Information_Agreement_24.12.2020.pdf).

<sup>18</sup> "EU-UK Trade and Cooperation Agreement", European Commission, 156-172.

<sup>19</sup> "Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy", Prime Minister's Office, 10 Downing Street, accessed 27 December 2020, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/948106/EU\\_UK\\_Civil\\_Nuclear\\_Agreement\\_24.12.2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948106/EU_UK_Civil_Nuclear_Agreement_24.12.2020.pdf).

<sup>20</sup> "EU-UK Trade and Cooperation Agreement", European Commission, 221-246.

<sup>21</sup> "EU-UK Trade and Cooperation Agreement", European Commission, 246-260.

<sup>22</sup> "EU-UK Trade and Cooperation Agreement", European Commission, 260-261.

<sup>23</sup> "EU-UK Relations: A new relationship, with big changes", European Commission.

a competitive advantage over the EU. Both parties commit to enforce competition law on the same terms, as well as to certain provisions towards state subsidies for certain industries, state-owned enterprises, designated monopolies, taxation, environmental obligations and mechanisms to address violations of these commitments.<sup>24</sup>

### **Dispute Settlement / Governance of the Agreement:**

Another war of words occurred during the negotiations as to how the EU-UK agreement would be governed. The TCA includes a detailed process by which disputes under the agreement are to be remediated, namely via arbitration tribunals.<sup>25</sup> The agreement also allows for cross-sector retaliation in case of violations of the agreement, which applies to all areas of economic cooperation. A Joint Partnership Council is established by the TCA, which aims to ensure that the agreement is correctly applied.<sup>26</sup>

The last-minute nature of the Brexit process, which has breached many deadlines over the course of its existence, has continued. The announcement of a deal came on Christmas Eve, 24 December 2020, leaving little time for parliamentary scrutiny and ratification by either the EU or UK sides ahead of the end of the transition period. As such, the European Commission has proposed that the TCA should apply on a provisional basis until 28 February 2021, although the Council of the European Union would have to approve this provisional application. The European Parliament will then be asked to give its consent on the Agreement, and finally, the European Council will adopt a decision on the conclusion of the Agreement. On the UK side, parliament approved the Agreement on December 30, 2020.<sup>27</sup>

In conclusion, the EU-UK Trade and Cooperation Agreement is a historic document, given its nature as nominally the last step in the Brexit process, but also with regard to its scale. The Agreement is the largest bilateral trade pact in history, as well as the first trade deal to erect barriers between two markets, rather than remove them.<sup>28</sup> Both sides can present the agreement as an achievement with regard to their respective negotiating mandates. The EU has had to concede on certain elements in order to achieve its objectives on fisheries, level playing field arrangements and the governance of the agreement. While the UK has been reined in by the EU regarding non-regression on climate commitments, the EU's reluctance to grant EU-UK equivalence in financial services demonstrates that further political dramas have yet to be played out in the future EU-UK relationship. Nevertheless, only time will tell the fate of this agreement. While the deal is, on the whole, expected to be ratified, given the more economically detrimental alternative of no deal, the Brexit process is unlikely to end with its ratification. Spanish considerations with regards to Gibraltar must be kept in mind, as well as

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<sup>24</sup> "EU-UK Trade and Cooperation Agreement", European Commission, 179-217.

<sup>25</sup> "EU-UK Trade and Cooperation Agreement", European Commission, 383-397.

<sup>26</sup> "EU-UK Trade and Cooperation Agreement: protecting European interests, ensuring fair competition, and continued cooperation in areas of mutual interest", European Commission.

<sup>27</sup> "Brexit: MPs overwhelmingly back post-Brexit deal with the EU," *BBC News* (website), accessed January 19, 2020, <https://www.bbc.com/news/uk-politics-55478513>.

<sup>28</sup> Anna Isaac, Eleanor Mears and Barbara Moens, "UK-EU Brexit trade deal at a glance", *POLITICO EU*, 24 December 2020, <https://www.politico.eu/article/uk-eu-brexit-trade-deal-at-a-glance/>.



the specific circumstances that Northern Ireland finds itself in, as well as UK-Cyprus relations.<sup>29</sup> The continuing dialogue between Spain and the UK over the status of Gibraltar, and the decision of the Irish government to fund Erasmus grants for Northern Irish students following the UK's withdrawal from the scheme is demonstrative of the far-reaching and long-lasting effects of the UK's departure from the EU.<sup>30</sup>

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<sup>29</sup> Pedro Sanchez (@sanchezcastejon), 24 December 2020, <https://twitter.com/sanchezcastejon/status/1342127927488610304?s=20>.

<sup>30</sup> Simon Harris (@SimonHarrisTD), 26 December 2020, <https://twitter.com/SimonHarrisTD/status/1342888528888406018?s=20>.



# Keeping up with the trends: a digital euro?

Maria Callewier & Olivier de Bolster

The COVID-19 pandemic has increased the usage of electronic payment methods, due to fear of spreading the virus via banknotes and coins. So for the European Central Bank (ECB) there seemed no better time than the present to consult the public on the possible creation of a digital euro<sup>1</sup>. They are certainly not alone in their interest to keep up with the new digitized world, as China is already running test projects on their digital renminbi<sup>2</sup>. Furthermore, the popularity of private initiatives, such as Libra and Bitcoin, pose considerable threats to the monetary hegemony of central banks. With the potential to upend the scales of power, one should be aware of the geo-economic implications that awaits the international stage once its widespread usage becomes a reality. A digital currency is not without risk, but as many have started to realize, it's development can no longer be ignored.

## What is the digital euro?

The digital euro would be the digital equivalent of bank notes. Just as commercial bank money, they would be accessible to all, but the difference lies in the fact that it would be issued by the Eurosystem. It is not meant to replace, but compliment cash. Nor is it trying to compete with cryptocurrency. Crypto-assets, like Bitcoin, are volatile and not backed by any institution. Meanwhile, the digi-euro will uphold the same level of confidence as cash payments, as they are both backed by the ECB<sup>3</sup>.

This step towards a digitized euro will not prohibit commercial banks from giving out physical banknotes and coins, but should be viewed as an anticipatory move from the ECB. What is meant by that is that they expect the relevance of cash to go down in the coming years and wish to provide an alternative when the time comes. If they decide not to pursue this project, it would mean that the consumers will be left with only private payment services to choose from. The

<sup>1</sup> Euractiv. (2020, October 12). Why is the ECB eyeing a 'digital euro'? <https://www.euractiv.com/section/economy-jobs/news/why-is-the-ecb-eyeing-a-digital-euro/>.

<sup>2</sup> Tong, B. C. (2021, January 13). China's digital currency now in pilot test in Shanghai. CGTN. <https://news.cgtn.com/news/2021-01-13/China-s-digital-currency-now-in-pilot-test-in-Shanghai--X1kgustz9K/index.html>.

<sup>3</sup> European Central Bank. (2020). A digital euro. <https://www.ecb.europa.eu/euro/html/digitaleuro.en.html>.

problem is, taking into account economies of scale, that the payment market will be dominated by a few companies, mostly foreign ones. This could lead to high transfer fees, selling of consumer data and minimal regulation. As means of payment are considered a strategic part of the economy, the ECB is trying to provide an alternative option for the privately backed services, so that they can ensure that a safe and inexpensive substitute is available to all citizens<sup>4</sup>.

### **Where's the catch?**

The digital euro is a convenient, accessible, low cost alternative currency and would be able to mitigate some financial risks. As great as it may sound, however, the digital euro comes with its own set of risks.

If it is so secure and low cost, why should citizens not hold onto their money as a digital currency instead of in traditional deposit accounts? Ulrich Bindseil elaborated on this point in an ECB podcast<sup>5</sup>, where he mentioned that the ECB has no ambition to provide anything beyond a basic payment service. Especially because value added services are a costly endeavor when it comes to customer service and so forth. Hence, they will still be solely provided by the private sector. Nonetheless, critics believe that in case of a crisis the existence of such a system might facilitate a bank run when consumers want to cut their losses. This risk is only exacerbated by the incomplete banking union in the euro area, which does not provide a common deposit insurance, nor bail-out provisions<sup>6</sup>. Even a small reduction in bank deposits could end up having a slowing effect on the economic growth, as deposits are a source of investment funding through loans. A long-term slowdown of the economy could call into question the status of the euro as an international currency. This would have an array of possible side-effects such as higher transaction cost in international trade or the inability to borrow cheaply when needed<sup>7</sup>.

The main concern of citizens, as became apparent from the ECB's public consultation, is privacy. The infrastructure of the digital Euro will have to be extremely resistant against cyber-attacks, as both customer data and their money are at stake. On the other hand, private companies have a commercial interest in selling our data and are already doing so<sup>8</sup>. This would make a central bank-backed digital currency the more secure option of the two, at least in terms of data protection. Furthermore, questions arise about the accessibility of this digital coin. We may be evolving towards a digital era, though this does not mean that everyone already has access or the means to purchase the hardware necessary to keep up with this development. In the long run this means possibly shutting out entire groups of people from benefiting from this project. This pitfall would erode the legitimacy of the EU's stance on inclusivity.

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<sup>4</sup> The ECB Podcast. (2020, November 6). Is it time for a digital euro? [Podcast]. Soundcloud. <https://soundcloud.com/europeancentralbank/is-it-time-for-a-digital-euro>.

<sup>5</sup> The ECB Podcast (2020).

<sup>6</sup> Angeloni, I. (2020, December 1). Some unwanted consequences of a digital euro. VOX, CEPR Policy Portal. <https://voxeu.org/content/some-unwanted-consequences-digital-euro>.

<sup>7</sup> Subramanian, A. (2011). Eclipse - Living in the Shadow of China's Economic Dominance (1st ed.). The Peterson Institute for International Economics.

<sup>8</sup> Smith-Meyer, B. (2020, October 12). What's a digital euro? 5 things to know. POLITICO. <https://www.politico.eu/article/5-things-to-know-digital-euro-currency/>.

Moreover, ignoring the previously mentioned difficulties would weaken the validity of the project as well as the ECB's power. The European Central Bank's power will be crucial for the success of future policy and the survival of the euro. Central bankers will have to take into account these possible side-effects if they want to be perceived as a credible challenger in a dollar-backer world.

### **The sword, the shield, & the saviour**

With the potential to upend the scales of power (viable) crypto-assets are set to have a tremendous impact on the way we conduct business as it transforms the very nature of the international financial system, the backbone of the international economy. Unlike ordinary currencies, digitized versions have the potential to penetrate a third country's home-turf and crowd out the usage of local currencies decreasing their monetary autonomy<sup>9</sup>. With the rules of the game set to be rewritten, our present-day geo-economic behemoths may find their days numbered.

One should view the exploratory talks on a digital euro as a pre-emptive move to secure the Union's apex status on the long run. The core principle behind the digital euro is the much-touted idea of digital sovereignty, which fits within the wider discourse of strategic autonomy<sup>10</sup>. In accordance with the Commission's ambitions the inception of the digital euro should be viewed as an extension to bolster the international usage of the euro, seeking to both weaponize and protect the single currency. The digital euro is thus expected to become the sword and shield of the Brussels-Frankfurt duo.

For starters, the Trump Administration's extraterritorial sanctions in its high-pressure campaign against Iran obliged the Commission into drafting a multi-faceted game-plan to bolster the euro's usage vis-à-vis the US dollar in an effort to boost its resilience in the dollar-dominated international financial system<sup>11</sup>. Whereas expanding euro-denominated trade through conventional means such as trade in strategic sectors, euro-denominated contracts could lead to an incremental boost in euro's international usage, and a digital euro would represent a watershed moment. Its roll-out could constitute a de facto decoupling from the dollar-denominated financial system, rendering US sanctioning powers null<sup>12</sup>. Anticipating the potential geopolitical havoc, the US has successfully lobbied the major Western-affiliated central banks into endorsing the concept of a public-private partnership to the de facto exclusive benefit of US multinationals<sup>13</sup>. Through these partnerships the US would preserve much of its sanctioning powers as well. Despite lacking its own set of homegrown tech champions capable of competing against the US giants, Executive Vice President Dombrovskis (along with myself)

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<sup>9</sup> Häring, N. (2020). All the good things a digital euro could do – and all the bad things it will. *Real-World Economics Review*, 94, 53–61. <http://www.paecon.net/PAEReview/issue94/whole94.pdf#page=53>.

<sup>10</sup> Smith-Meyer, B. (2021, January 21). Dombrovskis: 'We need a digital euro'. POLITICO. <https://www.politico.eu/article/valdis-dombrovskis-i-want-a-digital-euro-ecb-commission/>.

<sup>11</sup> Valero, J. (2021, January 19). Brussels launches new offensive against US dollar supremacy. Euractiv. <https://www.euractiv.com/section/economy-jobs/news/brussels-launches-new-offensive-against-us-dollar-supremacy/>.

<sup>12</sup> Mayer, T. (2019b, November 6). A digital euro to save EMU. VOX, CEPR Policy Portal. <https://voxeu.org/article/digital-euro-save-emu>.

<sup>13</sup> Häring (2020, p. 54).



believes that the digital euro could potentially kick-start a raft of entrepreneurial innovations leading the vanguard in the upcoming digitalization of the EU27 economy<sup>14</sup>.

Secondly, the inception of the Facebook-led Diem project (formerly known as Libra) struck a nerve with many European policymakers<sup>15</sup>. Behind the barrage of criticism, one could not help but feel a hint of unease emanating from Brussels and Frankfurt. Given its 2.7 billion users, spread across the entire globe, Diem amounts to the most serious contender amongst a raft of so-called stablecoins. Already critical of the near omnipresent sway of the US Big Tech on society, the likes of Zuckerberg posed a two-folded challenge to EU policymakers since the European Debt Crisis: on the one hand challenging the central banks' monetary oligopoly and on the other hand challenging one of the tangible aspects of European integration, the euro.

To make matters worse the name change came along with a major rebranding of the entire Project. Whereas its predecessor Libra sought to establish a de facto global crypto-asset based on a (Western aligned) currency basket, and thus reassign the major currencies into "patrician status", Diem-tokens would be solely backed by dollar-denominated assets<sup>16</sup>. Diem thus represents an additional challenge: covert operation to further increase the Greenback's monetary chokehold. Additionally, the People's Republic of China has been spearheading domestic endeavours regarding a digital renminbi. The international roll-out of the digi-renminbi is set to have a tremendous impact on the international stage as it could represent the first major step towards internationalization of the PRC's currency without requiring any meaningful liberalization of its domestic financial markets<sup>17</sup>.

Fearful of losing out on its (hard-fought) market share and a pushback in the single market, the digital euro aims to shield the Euro area from being exposed at the mercy of outside powers and prevent the systemic overreliance on the Silicon Valley giants.

Finally, the introduction of a digitized monetary asset could severely impact the Eurosystem along with the wider governance structure, the ECB more specifically. The initiative has been coined as "the New Deal" for the single currency. As the 2008 Financial crisis has left the flawed euro architecture in a state of inertia due to the tug of war between the so-called frugalists and profligates, a digital euro could inject the much-needed impetus in securing a real monetary union contrary to the present-day cash union. As already mentioned, any future digi-euro would have the backing from the entire Eurosystem, therefore turning it into a de facto safe asset. The *conditio sine qua non* however is the introduction of a so-called backed safe bank deposit which would enjoy the monetary backing of the ECB through the purchase of government bonds. Hence the digi-euro would act as stabilizer, becoming the common currency's saviour<sup>18</sup>.

Closely interlinked is the discussion surrounding the future role of the ECB. Under Draghi's tenure the ECB intervened whenever the Eurogroup dropped the ball, becoming the last line of

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<sup>14</sup> Smith-Meyer (2021).

<sup>15</sup> Smith-Meyer, B. (2020b, December 1). Libra rebrands as Diem to reduce Facebook stigma. POLITICO. <https://www.politico.eu/article/facebook-digital-currency-libra-rebrands-as-diem-to-boost-public-image/>.

<sup>16</sup> Smith-Meyer (2020b).

<sup>17</sup> Häring (2020, p. 53-61).

<sup>18</sup> Mayer, T. (2019a). The Euro at 20: A New Deal to Save the Euro. *Intereconomics*, 54(2), 85–89. <https://doi.org/10.1007/s10272-019-0799-y>.

defense for the common currency. The issuance of a digitized monetary asset could rebrand the ECB-commercial bank relations, tipping the power balance in favor of the ECB by allocating the money-creating powers to Frankfurt.

The geo-economic implications however would be profound as a digi-euro would represent a covert step towards a full-fledged common currency without diving into the toxic political specifics. In line with the “Sword-discourse” a digi-euro could thus boost the international appeal of the common currency and pose a credible challenge to the Greenback’s global dominance<sup>19</sup>.

## **Conclusion**

The mass usage of crypto-assets is thus set to rewire the entire international financial system for better or for worse. As the keepers of the world’s second most important reserve currency Brussels and Frankfurt have a lot to lose in a digitized monetary system, thus explaining the duo’s keen interest in pursuing a digitized common currency. The road ahead however is full of hurdles as the EU’s historic overreliance on bank-based financing along with major concerns regarding privacy may impede on the project's survival.

Despite the concerns raised above, a digi-euro does have a silver lining. Implemented correctly it could challenge the Fed’s monetary “*dictatorship*” and present the world a long-vied alternative. As such, the conservative European central bankers will soon have no other choice than to experiment if they want to prevail in the increasingly interlinked climate.

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<sup>19</sup> Mayer (2019b).

# Is European Identity a myth or a reality?

Salome Dermati



## Introduction

The concepts of identity and identity politics are fairly new and highly controversial. Identity is usually understood as a broad spectrum with different hues and levels in which every individual can position themselves. Above all, identities are, by default, subjective and fluid.

National identity signifies a person's own recognition as a member of a larger community, that is, the nation, be it German, Greek or Irish. In this context, the term refers to a subjective, personal process that may be realized at any moment. This outcome is a result of intimate and private sentiments, normally positive, as well as a declaration of consent to participate in this model by adopting a list of social principles and values. The consciousness may be personal, but the practical effects and progression concern the whole of the nation.

Nonetheless, the notion of "European identity" rarely enters the public sphere. So much of the everyday debate is targeted at discussing and understanding the European Union's (EU) next budgetary plan or monetary policy, for instance, that both ordinary citizens and scholars are unlikely to pose the million-dollar question: *Am I European?* The existence of a European identity is often doubted, and even rejected by some. For these reasons, it is worth investigating the matter at hand by answering four separate questions: a) does a European identity actually exist; b) who declares themselves as European; c) which are the factors that undermine the consolidation of a European identity; and d) why should we settle this dilemma?

## What are the components of a European identity?

In order to define and understand what European identity is, we should trace the specific characteristics that embody it, conforming or contrasting with the nation state. To begin with, there are both an anthem, *Ode to Joy*, adopted by the Council of Europe in 1972,<sup>1</sup> and a

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<sup>1</sup> "The european anthem", *European Union*, [https://europa.eu/european-union/about-eu/symbols/anthem\\_en](https://europa.eu/european-union/about-eu/symbols/anthem_en).

European flag, embraced in 1985<sup>2</sup>. A single currency, the Euro, was introduced at the turn of the millennium, but eight member states remain outside the Eurozone<sup>3</sup>. Moreover, despite the fact that the EU has twenty four official languages, all but three (Hungarian, Estonian, and Finnish) belong to the Indo-European family; for instance, seven member states have an official Germanic language (Germany, Austria, the Netherlands, Belgium, Denmark, Sweden, and Ireland). This diversity should not be regarded as a disadvantage, considering the multiple similarities in alphabets, syntax, pronunciation, and vocabulary, as well as the relatively limited existence of local idioms and dialects.<sup>4</sup>

Other symbols include the burgundy EU passports<sup>5</sup> and the motto, “United in Diversity”. What is more, the buildings and emblems of EU institutions, such as the European Parliament in Strasbourg and the European Court of Justice in Luxembourg City, also represent the Union as a whole. Even politicians can be viewed as important figures that stand for the EU, principally the founding fathers, or even Guy Verhofstadt, the former Prime Minister of Belgium as well as former leader of the Alliance of Liberals and Democrats for Europe (ALDE—now Renew Europe), and the most prominent federalist today.

Culture has also been a unifying feature. On the one hand, it can be perceived as a unique social “way of life,” which includes, for example, the use of bicycles as a means of transportation, or the consumption of similar goods and products, such as beer and music.<sup>6</sup> On the other hand, the EU is seen as a consolidator and promoter of normative values, most prominently those of peace, solidarity, tolerance, multilateralism, and cooperation.<sup>7</sup> Lastly, the predominant religion is Christianity, Catholicism accounting for almost half of its followers, whereas a fourth of the EU’s population identifies as atheist.<sup>8</sup>

Additional connections are found on an institutional and political level. All candidate countries ought to be liberal democracies, respect the distinction of powers and the rule of law, acknowledge the importance of the welfare state, and have competitive market economies.<sup>9</sup> The 1993 Copenhagen and 1999 Helsinki criteria present a catalogue of benchmarks the candidate countries need to meet on a political, economic, administrative, and legal level.<sup>10</sup> These conditions illustrate that the Union and European identity are not static, since both can further expand geographically in order to contain more states that are willing to join.<sup>11</sup>

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<sup>2</sup> “The european flag”, *European Union*, [https://europa.eu/european-union/about-eu/symbols/flag\\_en](https://europa.eu/european-union/about-eu/symbols/flag_en).

<sup>3</sup> “The euro”, *European Union*, [https://europa.eu/european-union/about-eu/euro\\_en](https://europa.eu/european-union/about-eu/euro_en).

<sup>4</sup> Copsey, Nathaniel, “Rethinking the European Union” p. 58.

<sup>5</sup> “Document security”, *European Commission*, [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/document-security\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/document-security_en).

<sup>6</sup> See note 4, p.47.

<sup>7</sup> Ibid.

<sup>8</sup> El-Menouar, Yasemin, “The religious landscape in Europe”, *Europe Infos*, <http://www.europe-infos.eu/the-religious-landscape-in-europe>.

<sup>9</sup> See note 4, p.60-61.

<sup>10</sup> Accession criteria”, *European Commission*, [https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en).

<sup>11</sup> See note 4, p.65.

Furthermore, representative democracy is applied with regards to the European Parliament, since its members are directly elected, although indirectly to the European Council and the Council of the EU.<sup>12</sup>

Finally, at the Copenhagen European Summit of 1973 the then nine member states adopted the Declaration of European Identity with the view to “introduce the concept of European identity into their common foreign relations”.<sup>13</sup> This was a major step not only because it was recognised that European identity is composed of distinct, yet similar, cultures and past experiences, but also because it was argued that the European Communities’ (EC) external relations emanate from this shared heritage.<sup>14</sup> All three dimensions - enlargement, democracy, and a common foreign policy - justify the notion of an “EU of values”.

### **Who is claiming a European identity?**

The next sensible question that arises is that of *who* may call upon a European identity. A clear division is observed between the “elite” and the “masses”. The first category encapsulates the minority of the EU population that is more affluent, educated, politically active and invested in EU affairs, as well as largely europhile.<sup>15</sup> They travel more often, both within the continent and outside, either for work, leisure or to study, an experience that enhances their sense of belonging to a European community.<sup>16</sup> Most of them speak more than one language and are younger in age.<sup>17</sup> All of the above facilitate the interaction with other EU citizens and the creation of long-term bonds and relations, whether they are economic, professional or amiable.<sup>18</sup>

On the other side of the spectrum, the majority of the EU population is less likely to identify as European, mainly because of their economic and social status. Many hold blue-collar jobs or are unemployed, generally lacking in skills and diplomas.<sup>19</sup> They are less informed or concerned about their country’s membership to the EU and its consequences, therefore leaning towards eurosceptic views.<sup>20</sup> In addition, this group of people is older in average and more patriotic and conservative, even regressive.<sup>21</sup>

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<sup>12</sup> Ibid 4, p.62.

<sup>13</sup> “Declaration on European Identity (Copenhagen, 14 December 1973)”, *CVCE EU*, [https://www.cvce.eu/en/obj/declaration\\_on\\_european\\_identity\\_copenhagen\\_14\\_december\\_1973-en-02798dc9-9c69-4b7d-b2c9f03a8db7da32.html#:~:text=At%20the%20Copenhagen%20European%20Summit,D%20](https://www.cvce.eu/en/obj/declaration_on_european_identity_copenhagen_14_december_1973-en-02798dc9-9c69-4b7d-b2c9f03a8db7da32.html#:~:text=At%20the%20Copenhagen%20European%20Summit,D%20).

<sup>14</sup> “The Copenhagen Summit Conference”, *European Commission*, <https://ec.europa.eu/dorie/fileDownload.do;jsessionid=1KGyQ1tKtTpNjBQwQh6cwGC2yLn7BJMymvTrDq5s2rD3JYR9RfGQ!243197488?docId=203013&cardId=203013>.

<sup>15</sup> See note 4, p.48.

<sup>16</sup> Ibid, p.52.

<sup>17</sup> Fligstein, Neil, Polyakova, Alina, and Sandholtz, Wayne, “European Integration, Nationalism and European Identity”, p.4.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> See note 4, p.48.

<sup>21</sup> See note 17, p.4



It becomes apparent that the key word behind European identity is *integration*. In order for individuals to feel and aspire to be members of this larger community, they need to have acquired first-hand, practical knowledge or experience that emanates from their country's status as a full member state.<sup>22</sup> The freedom to travel within the Schengen Area, the right to seek employment in a foreign country, the various Erasmus programmes, and the benefits of the Single Market, such as lower prices of goods and services, are compelling evidence that everyone can benefit from the EU to some extent.<sup>23</sup>

### **Why is the consolidation of a European identity challenging?**

Overall, the EU is actively developing its identity in four ways. One instrument involves the aforementioned emblems. Others pertain to the material benefits of EU membership, some of which have been discussed, and the "EU of values". One more quality should be added to this list; *citizenship*. The establishment of a European citizenship in the Maastricht Treaty (1992-1993) is accompanied by specific uniform rights and duties that are shared throughout the Union, for instance, "participating in the political life of the EU," or consular protection.<sup>24</sup>

There are two controversial topics concerning European identity. The idea that all Europeans have experienced a common history that traces back to antiquity and the Roman Empire is widely disputed due to the distance between national narratives and their significance to their respective nation state.<sup>25</sup> This is even more questionable when taking into account the idea of a "European or Western civilization" that encompasses major historical events and eras, mainly the Renaissance, the Enlightenment and the Industrial Revolution, which were not experienced at the same time and with the same intensity throughout Europe.<sup>26</sup> The second issue addresses the fact that a European army has been repeatedly rejected, besides the recent creation of FRONTEX, the European border and coast guard agency<sup>27</sup> in 2004, and the Permanent Structured Cooperation (PESCO) in 2017 between twenty five member states<sup>28</sup>.

Another point should be made concerning the distinction between emotional and cognitive awareness of identity. It is accepted that the formation of a nation and a nation state resides in the personal, even instinctive, self-recognition of individuals as members, whereas the EU necessitates a more rational consciousness.<sup>29</sup> However, this may not be completely true for a) some of the more recent member states, that is, the countries that were formerly communist, whose people were labelled as 'second-class citizens,' or b) the younger generations that have been born and brought up taking the existence of the Union for granted.<sup>30</sup>

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<sup>22</sup> See note 4, p.52.

<sup>23</sup> Ibid, p. 54.

<sup>24</sup> "EU citizenship", *European Union*, [https://europa.eu/european-union/about-eu/eu-citizenship\\_en](https://europa.eu/european-union/about-eu/eu-citizenship_en).

<sup>25</sup> See note 13.

<sup>26</sup> See note 4, p. 58.

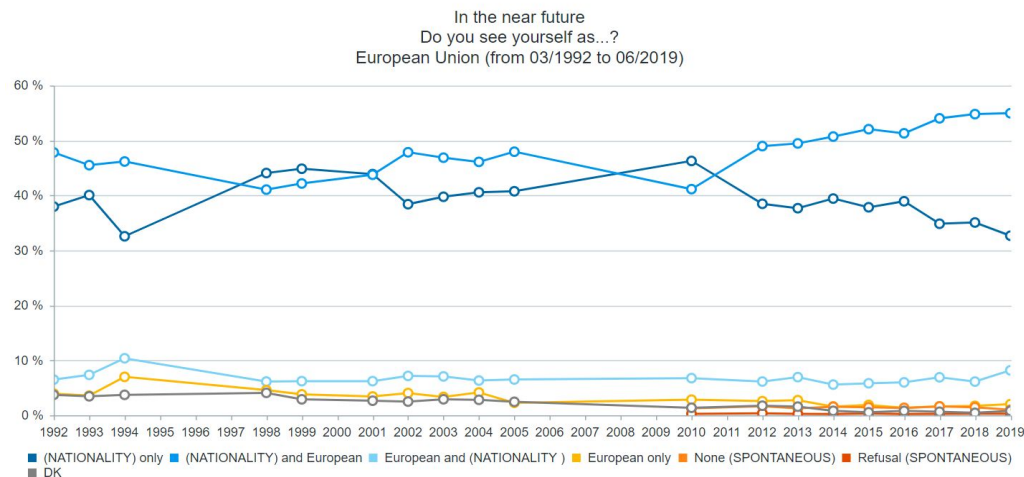
<sup>27</sup> "Key Facts", *FRONTEX*, <https://frontex.europa.eu/faq/key-facts/>.

<sup>28</sup> "PESCO", *PESCO*, <https://pesco.europa.eu/>.

<sup>29</sup> See note 4, p.57.

<sup>30</sup> Ibid 4, p.56.

A level of personal awareness and acceptance is also required for any common identity to emerge and endure. Indeed, according to the first Eurobarometer chart below, around 40% of the population has been consistently identifying solely as a national of their own country, even though at a declining rate. Similarly, a growing number of people are claiming their national identity first and acknowledging a European one secondly. In contrast, a limited and decreasing percentage of Europeans are declaring themselves to be entirely that.



Source: Eurobarometer

### Why is European identity important?

On account of being comprehended intellectually by a minority of wealthy and outgoing citizens, “external circumstances” are prone to eroding this fragile construct.<sup>31</sup> The most notable lesson is that of the Eurozone crisis of 2008-2012, which transferred Europeans’ interest towards their national governments and policies.<sup>32</sup> Even more so, the widespread public discontent it generated became an obstacle for further reforms and deepening, and confirmed that the lack of solidarity is debilitating European identity.<sup>33</sup>

In other words, when faced with extreme circumstances that demand immediate action and multilateral agreements, nation states have been hesitant to approve of and/or carry out major decisions taken at EU level. The reason behind this behaviour is closely linked to the issue of national sovereignty, meaning that member states view as their priority and responsibility the protection of their interests and political or economic power. This comes at the expense of integration owing to the absence of a strong social fabric, or identity, throughout the Union; the sense that *we* are consciously and willingly cooperating to achieve a certain goal or overcome a hurdle by virtue of our feeling of interdependence and of belonging to the same

<sup>31</sup> Ibid, p.70.

<sup>32</sup> See note 17, p.2.

<sup>33</sup> Ibid, p. 12.

community. We are, therefore, inescapably confronted with limited legitimacy that constrains the EU from functioning assertively and with high levels of public support.<sup>34</sup>

## Conclusions

Overall, humans tend to assign various labels to themselves so as to belong to multiple groups or identities. Consequently, a European, supranational identity can simultaneously coexist alongside a national, a regional, and/or a local one.<sup>35</sup> This concurrence can be harmonious because identity is not a *zero-sum game*, even in the long term.<sup>36</sup>

Secondly, the mere existence of a minority that self-identifies as European should be sufficient to conclude that a European identity exists. The indispensable criterion of self-awareness is met, alongside a broad series of symbols and features that are parallel to a national identity. Admittedly, the widespread ignorance and misinformation concerning the Union fuels eurosceptic rhetoric, which in turn distorts reality by claiming that the EU is working against national interests and violates the sovereign rights of the nation state.

The EU is a relatively young experiment. Six decades is not enough of a time frame for any entity, including nation states, to achieve high levels of recognition of a common identity. Similarly, European identity needs time to mature and expand; it is not a given nor an uncontested truth, but an ambition. It may be fragile and vulnerable to crises, yet it is imperative for the success and longevity of the EU. Without an extensive communal sense, European solidarity is diluted and so is, by extension, the integration process. This notion has resurfaced in light of the current pandemic when the respective governments and people were called to join a supranational fight against a common “invisible” enemy.

The future seems grim, since no one can affirm that the next crisis will not be met with national protectionism and introversion once again. Nevertheless, there is still cause for hope that resides in the next generation, the one that has grown up inside the EU and has made good use of the multiple benefits it produces, thus being prone to be more europhile than their parents or grandparents. This is highly promising, given that we are indeed the next wave of voters and leaders of the European project.

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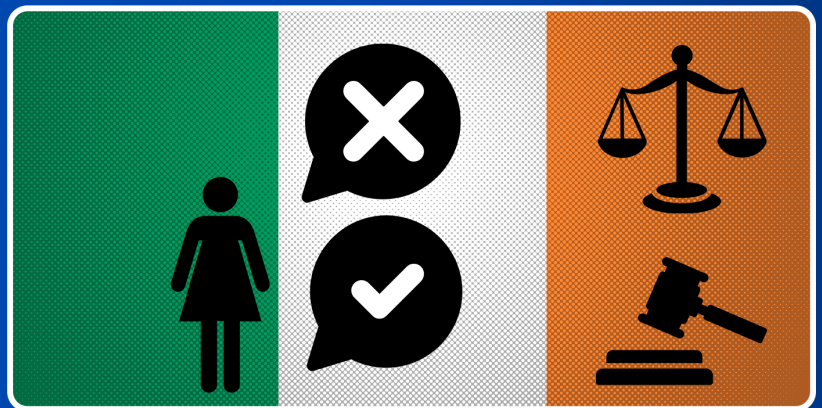
<sup>34</sup> See note 4.

<sup>35</sup> Ibid 4, p.64.

<sup>36</sup> Heywood, Paul et al, “Developments in West European Politics 2”.

# Affirmative consent – the future of Irish rape law

Conor Courtney



A recent Law Reform Commission Issue Paper discussed the potential for the Irish implementation of affirmative consent, and a proposal for a novel addition to sexual offences, that of ‘negligent rape’.<sup>1</sup> This paper examines modern rethinking of consent laws within a European framework.

## The Current Position of Rape Laws in Europe

2018 saw many European countries debating their stances on the requirements and the protections afforded by rape and consent laws. Several countries recognised a lacuna in the law, due limited means for prosecuting offenders, and rules which are restrictive for victims. Sweden has been at the forefront of this issue and has been through the process of implementing new legislation which requires affirmative consent, and Ireland may soon follow.

Affirmative consent mirrors the moralistic and socially accepted definition of sex; consent must be present. This concept simply requires that for sexual acts to be consensual, one must take reasonable steps to ensure that consent is present during sex. If one does not take such steps, then there can be no defence raised upon the basis of assumed consent. This, as the LRC notes, reflects other areas of law where silence or passivity have not been acceptable bases upon which to claim agreement. In contract law, for the most part, silence will not be evidence of acceptance, and there is an argument that similar considerations should apply for sexual acts. The Swedish government were insistent upon this criterion, outlining that, “Sex must be voluntary — if it is not, then it is illegal”.<sup>2</sup>

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<sup>1</sup> Law Reform Commission of Ireland, Issue Paper, *Knowledge Or Belief Concerning Consent In Rape Law*, (LRC IP 15 – 2018). [Hereinafter LRC Issue Paper]

<sup>2</sup> Christina Anderson, “Swedish Law Now Recognizes Sex Without Consent as Rape”, (The New York Times, May 23, 2018). [Hereinafter Anderson]

However, it should be recognised that the position in Swedish law prior to this governmental intervention was strikingly different than the current Irish position. Under the previously established Swedish considerations of voluntary sex and rape, the main evidence of rape involved some sort of physical assertion of control or violence. Through Sweden's previous regime, there could only be a case for rape where it was proven beyond a reasonable doubt that the victim was, "Compelled to have sexual intercourse with the accused by assault, violence or threat of criminal act, or where the accused exploited that a person was in a 'helpless state'".<sup>3</sup> This is a much stricter requirement than the current Irish stance.

Section 2(1) of the Criminal Law (Rape) Act 1981 outlines that an accused commits the offence of rape where: "(a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it, (b) at the time of the intercourse the man knows that she does not consent or is reckless as to whether she consents: this is the fault or mental element of the offence".<sup>4</sup> S.2(2) of the act outlines a defence to lacking consent, as the jury to a rape trial must consider the accused's perspective, "whether the man believed that a woman was consenting".<sup>5</sup> Further, the jury is required to have regard towards, "the presence or absence of reasonable grounds for such a belief...as well as any other relevant matters in considering whether the man so believed".<sup>6</sup> The presumption of innocence becomes crucial in this area of Irish law, as the jury are required to be informed that the accused has such a presumption.

Herein lies the main cause for alarm within the Irish system on consent. There seems, at times, to be a disproportionate degree of protection for an accused in such trials, due to the combined shield created by the presumption of innocence, and the wide range of the 'honest belief' defence. This reality is complicated further, due to the inherent difficulty in proving most rape cases to begin with. Physical evidence is rarely sufficient to secure a conviction, due to the fact that evidence of sexual interaction is not indicative necessarily of rape, and the mental element of consent is unstable, because proving that the victim was not consenting is not enough, one must prove that the accused did not honestly believe that the victim was consenting. However, there have been developments in rape law which has given a degree of protection towards those assailed.

Through the development of our common law system, Irish rape law has progressed beyond the viewpoint of rape held by the majority of European jurisdictions; that of a violent struggle. Cases such as *R v. Olugboja* highlighted that consent can be absent whether the victim verbally resists or not, and that, equally, there is no requirement for physical resistance. This less strict approach is crucial, given the fact that many victims are in a state of trauma or shock, or because many fear that escalating the situation with violence will simply put their lives into a greater position of danger.<sup>7</sup>

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<sup>3</sup> European Institute for Gender Equality, *Legal Definitions in the EU Member States*.

<sup>4</sup> LRC Issue Paper, *supra* note 1, at 1.

<sup>5</sup> *The People (DPP) v C O'R* [2016] IESC 64, [2016] 3 IR 322.

<sup>6</sup> LRC Issue Paper, *supra* note 1, at 1.

<sup>7</sup> *R v. Olugboja* [1981] 1 WLR 1382



In discussing the rape and consent laws of Sweden and Ireland, it is useful to briefly consider the wider European approach to rape laws, and how this stance could be interpreted in relation to the current reforms being considered. Sweden has not broken new ground in establishing rape laws which define rape in light of the absence of consent. In fact, this approach brings Sweden in line with several other European viewpoints. Sweden has, through this novel legislation, become the tenth European country to define rape under these terms. They join Germany, Ireland, the United Kingdom (representing its four constituent countries), Belgium, Iceland, and Cyprus, to have followed The Istanbul Convention, a Council of Europe convention containing recommendations to include consent-based laws on sexual violence.<sup>8</sup>

However, this marks the reality that the position of consent laws in Europe is, to a major extent, lacking and archaic. Interpreting this amendment to rape laws as an epochal change, a reflection to social reactions of rape, then one must wonder why so many European countries choose still not to define their own rape offences in similar terms. The view of rape as revolving around the absence of consent, rather than requiring some form of violence or vulnerable states, has been called for by Amnesty International guidelines. Yet only 10 of the 33 countries of Europe have accepted this new approach.<sup>9</sup> The reality of rape laws in Europe, it should be noted, are not only reflective of past beliefs that have yet to be changed, but rather, are also reflective of currently held beliefs. It is useful to note that although Sweden has accepted this new stance with a political majority, the same did not occur when a similar possibility became available in Norway. Norway chose to reject similar proposals only one month before the Swedish vote, and similar views have been reported in areas such as Finland and Denmark.

### *Affirmative Consent and Negligent Rape*

The Irish Law Reform Commission's recent paper discussed the concept of a model akin to affirmative consent, and the potential introduction of two differentiating types of rape offences. Under 2(1) of the Criminal Law (Rape) Act 1981, rape is defined as;

2.—(1) A man commits rape if—

(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, and

(b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it.<sup>10</sup>

A difficulty in securing rape convictions under Irish law comes from the extensive and broad application of the 'honest belief' defence. This allows for a primarily subjective interpretation of consent. In the UK, in *DPP v Morgan*,<sup>11</sup> and in the Irish Supreme Court in *DPP v C O'R*,<sup>12</sup> it has been established that this subjectivity means that belief of consent is not viewed from

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<sup>8</sup> Anderson, *supra* note 2.x

<sup>9</sup> Anderson, *supra* note 2.

<sup>10</sup> Criminal Law (Rape) Act 1981.

<sup>11</sup> *DPP v Morgan* [1975] UKHL 3, [1976] AC 182.

<sup>12</sup> *The People (DPP) v C O'R* [2016] IESC 64, [2016] 3 IR 322.

the perspective of a reasonable man, but from the individual accused of rape. This reality is an example of consent protections being lacklustre in their application. So long as the belief is ‘genuine’ and not an ‘obviously false story’,<sup>13</sup> then it is the attacker’s perspective which is important, not the victim’s. Herein lies the benefit of affirmative consent, because there is a clear shift from consent viewpoints, away from an ‘honest’ but incorrect belief, and towards a clear, unambiguous, and communicated consent.

Following Sweden, the Law Reform Commission has discussed the benefits of shifting consent rules, but they have also considered the adoption of a new degree of sexual offences, in considering the introduction of ‘negligent rape’. This offence mirrors a new offence created in Sweden, and would occur in situations where, “an accused honestly but mistakenly believed that there was consent...where a person should have been aware of the risk of non-consent, but still engaged in the sexual act”.<sup>14</sup> If negligent rape were to be introduced, this very act would create an Irish understanding of consent that would alter the previous understanding. Under traditional Irish rape law, there are effectively three viewpoints available regarding consent. The first, is that consent was present. The second, is that consent was not present, or the accused was reckless as to the presence of consent. The third, is that the accused honestly believed that consent was present, and this is to be determined objectively. The threshold for negligent rape, however, would invent a new and separate stance on consent. This can be seen as a type of conflation between ‘honest belief’ and ‘recklessness’, where the accused mistakenly believed consent was present, but should have considered the potential for non-consent. It seems unclear whether this new offence would affect the defences open to parties in traditional rape convictions. An admission, under the defence of honest belief under the traditional offence of rape, could amount to sufficient evidence for a conviction under negligent rape, and it remains uncertain how these two disparate elements would work in tandem. Suddenly, with this introduction, the honest belief defence would enter into unsure footing, and this issue would require a greater degree of clarification before serious discussions of implementation could be considered.

Crudely, ‘negligent rape’ has been described as marking the distinction between “an intentional rapist and a mistaken one”.<sup>15</sup> This model sparks an entirely new debate and highlights an important dialogue about the propagation of the stereotype that one cannot be raped unless there is a violent attack. A key concern, which the LRC raised, was that this dualistic approach to rape, this dichotomy between rape and negligent rape, might be seen as a distinction of severity. Unlike murder and manslaughter distinctions, this legal distinction could insight a viewpoint that diminishes non-violent rape, restoring the old definition of rape, which required proof of force and resistance.<sup>16</sup> Our system overcame the ignorant

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<sup>13</sup> *Ibid.*

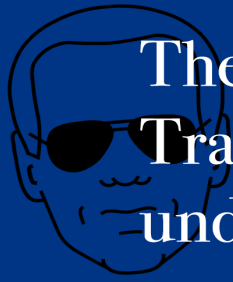
<sup>14</sup> Ministry of Justice, “Consent – the basic requirement of new sexual offences legislation” (2017). (<https://www.government.se/498ee7/contentassets/ee1de9e9781046afb784f034565f32e9/consentthe-basic-requirement-of-new-sexual-offences-legislation>).

<sup>15</sup> Criminal Law Review, State Government Victoria, Department of Justice, Review of Sexual Offences: Consultation Paper (2013) at 3-42. (Discussed by LRC at p.36.)

<sup>16</sup> LRC Issue Paper, *supra* note 1, at 37.

viewpoint that rape should require force and resistance to constitute rape, and this distinction in offences might undo that work, with little benefit to the victims, the accused, or the legal system.

To conclude, it may be worthwhile to consider that any theoretical discussion of rape laws overlooks the realities of the situations. Further, many point to the simple fact that shifting the burden of proof makes no claim for increasing conviction rates, but the benefit of affirmative consent may lie beyond conviction, and rest in deterrence. Katarina Bergehed of the Swedish chapter of Amnesty International argues that the true power behind affirmative consent revolves around changing social understandings of sex, rape, and consent. She makes the comparison to the previously legal acts of corporal punishment. Corporal punishment criminalisation uprooted a socially ingrained practice, and with this change came a shift in public opinion. Affirmative consent, at the very least, might change the mind-set of those engaging in sexual acts, and could increase awareness and compliance with the issue of consent, *actual consent*, not simply one party's *honest belief* of such.



# The Current State of Transatlantic Trade Relations and their Future under the Biden Administration: What is going to change?



Carlo Zarcone

“Our alliance with Europe remains the strongest the world has ever known:” this is what the then President of the United States, Barack Obama stated during his State of the Union Address in 2014.<sup>1</sup> It clearly shows the close ties between the two shores of the Atlantic. So close that, in 2013, they came up with the Transatlantic Trade and Investment Partnership (TTIP), which would have been, if ever completed, the largest and most prosperous Free-Trade Area in the world. However, the Partnership has come under fire from many actors — unions, charities, NGOs, and environmentalists, as well as President Donald Trump himself — and negotiations have halted. In light of the failure of the TTIP negotiations and the progressive deterioration of the US-EU trade relations under the Trump administration, what is the plausible future of the special relation between these two actors under Joe Biden’s Presidency?

## Obama’s Multilateral Approach and the Failure of TTIP

Barack Obama’s election to the Presidency of the United States in 2008 was highly welcomed by the Europeans, thanks to his campaign pledge to put an end to Washington’s unilateralist attitude and commit to a multilateral approach to foreign policy and trade.<sup>2</sup> This transition was a breath of fresh air to Europeans after the “unilateralist cowboy era of the Bush administration.”<sup>3</sup> In response to the huge wave of recessions between 2007 and 2009, in 2011 the two parties formed a High Level Working Group on Jobs and Growth, composed of both American and European experts, whose task was to analyze the best route to stimulate and facilitate trade and investment between the two powers.<sup>4</sup> This Group, led by US Trade Representative Ron Kirk and the then European Trade Commissioner Karel De Gucht, developed a public consultation with over 100 enterprises and entrepreneurs. Two years later, these experts presented their final report, which called for the creation of a comprehensive transatlantic trade agreement that would deal with a host of trade and investment issues and regulatory problems. This agreement would be designed to “substantially eliminate existing barriers to trade and

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<sup>1</sup> Barack H. Obama, “Address Before a Joint Session of the Congress on the State of the Union,” January 28<sup>th</sup>, 2014, available online at *The American Presidency Project*: <https://www.presidency.ucsb.edu/node/305034>

<sup>2</sup> Tasneem Sultana, “A Survey of US–Europe Relations,” *Journal of European Studies* 30, no. 2 (2014): 72.

<sup>3</sup> Maria G. Cowles and Michelle Egan, “The Evolution of the Transatlantic Partnership,” *Transworld Papers (IAI Project)* no. 3 (September 2012): 18.

<sup>4</sup> Sultana, “A Survey,” 73.

investment, while establishing mechanisms that enable a further deepening of economic integration.”<sup>5</sup> Had such an agreement been reached and the project been concluded successfully, it would have led to the largest Free-Trade Area in the world.

TTIP would have affected a vast range of sectors, procedures, and issues. The main areas concerned market access, which means removing customs duties on goods and restrictions on services, making it easier to invest, and having better access to public markets. Moreover, TTIP would have harmonized the standards and regulatory procedures on healthcare, manufactured products, and investments. Finally, the agreement would have promoted sustainable development and the protection of SMEs.<sup>6</sup> Among all these objectives and aspirations, the TTIP aimed at removing all the tariffs obstacles, legislative barriers, and regulations that further hindered the integration between the US and the EU. Of these aspects, the main obstacles to Transatlantic relations were the differences in regulations of goods and services (i.e. non-tariff barriers). Overall, as of 2013, non-tariff barriers increased the costs of the exchanges between the two parties by nearly 60%.<sup>7</sup>

Negotiations were structured on the basis of 24 joint EU-US working groups, each of which examined a distinct aspect of the agreement and scheduled regular meetings.<sup>8</sup> However, although the negotiation process was scheduled to be concluded in 2016, by the end of that year only 4 of the 27 negotiating areas were in an *advanced state of consolidation*. The success of negotiations was further hindered by the numerous criticisms and skepticism expressed by several activist groups, both in the US and in the EU. One of the main critiques of the TTIP concerned the lack of transparency that characterized the negotiation process. This secrecy raised issues related to the democratic legitimacy of the agreement, as the public had difficulty accessing the negotiation’s documents and reports and was generally kept in the dark.<sup>9</sup> Additionally, the partnership raised significant concerns in regard to environmental, health, as well as labor standards and workers’ rights. Finally, significant disagreements emerged relative to fields such as agriculture, public procurement, and investment protection.<sup>10</sup> In August 2016, even before the election of Trump, the then German Vice Chancellor Sigmar Gabriel stated that, due to the unresolvable disagreements between the EU and the US, negotiations “have *de facto* failed” and “nothing is moving forward.”<sup>11</sup>

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<sup>5</sup> “High Level Working Group on Jobs and Growth. Final Report,” February 11<sup>th</sup>, 2013, 2. Available online at <https://ustr.gov/sites/default/files/02132013%20FINAL%20HLWG%20REPORT.pdf>.

<sup>6</sup> Ioana Gutu, “The TTP and TTIP Agreements: The International Negotiation Process,” *CES Working Papers* 8, no. 1 (2016): 87–88; Jana Witkowska, “Implications of the Transatlantic Trade and Investment Partnership (TTIP) for Investment Flows between the European Union and the USA,” *Comparative Economic Research* 20, no. 3 (2017); Viera Ružeková, “Prospects for the EU-US Trade Relations in the Light of the TTIP,” *Studia Commercialia Bratislavensia* 9, no. 34 (2016): 218.

<sup>7</sup> European Commission, “Impact Assessment Report on the Future of EU-US Trade Relations,” (Strasbourg, March 12<sup>th</sup>, 2013): 12–13. Available online at [https://ec.europa.eu/smart-regulation/impact/ia\\_carried\\_out/docs/ia\\_2013/swd\\_2013\\_0068\\_en.pdf](https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/swd_2013_0068_en.pdf); Di Nolfo, *Il Mondo Atlantico*, 174.

<sup>8</sup> Gutu, “The TTP and TTIP Agreements,” 87–89.

<sup>9</sup> Monique Goyens and Léa Auffret, “TTIP: What is in it for Consumers?,” in Jacques Pelkmans et al., “TTIP: Political and Economic Rationales and Implications,” *Intereconomics* 50, no. 6 (2015): 333–334; Ferdi de Ville and Gabriel Siles-Brügge, “Why TTIP is a Game-Changer and its Critics Have a Point,” *Journal of European Public Policy* 24, no. 10 (2017): 1499–1500.

<sup>10</sup> Marianne Schneider-Petsinger, “US–EU Trade Relations in the Trump Era: Which Way Forward?,” *Chatham House – Research Paper* (March 2019): 3–4; Jeronim Capaldo, “The Trans-Atlantic Trade and Investment Partnership: European Disintegration, Unemployment and Instability,” *GDAE Working Paper* no. 14–3 (2014): 9.

<sup>11</sup> Tim Wallace, “EU’s TTIP Trade Deals with the US has Collapsed, says Germany,” *The Telegraph*, August 28<sup>th</sup>, 2016. Available online at <https://www.telegraph.co.uk/business/2016/08/28/eus-ttip-trade-deal-with-the-us-has-collapsed-says-germany/>.



## **An Ardent “America First” Approach**

Unlike his predecessor’s focus on a more multilateral perspective, Donald Trump campaigned and won the 2016 election on the premise of slogans such as “America First” and “Make America Great Again.” These mantras permeated Trump’s action on a variety of policy issues, including foreign policy and more specifically global trade, which has been characterized by a more unilateral, protectionist, and transactional approach. As a clear example of this assertive trade strategy, it could suffice to note that one of his first executive measures was a Presidential Memorandum signed on his first business day in office through which he instructed his Trade Representative to withdraw the US from the Trans-Pacific Partnership (TTP), a free-trade agreement signed in February 2016 along with 11 other countries of the Pacific area.<sup>12</sup>

The main feature of this approach was the constant perception of unfairness of the terms of the trade agreements that were being negotiated by the US and the insistent focus on the US’ trade imbalance with its trade partners, especially in goods. The US’s overall trade deficit with the EU has been constantly growing since 2009, reaching \$108.8 billion in 2019 (\$179.5 billion in goods), which is the second largest trade deficit that the US runs with a country — or, in the EU’s case, an integrated bloc of multiple countries — after China (\$307.8 billion). In particular, Trump has harshly targeted Germany over its trade surplus, as the trade balance with this country reached \$66.2 billion in 2019.<sup>13</sup>

While TTIP negotiations never resumed and the Council of the European Union adopted a decision in April 2019 in which it clearly stated that “[t]he negotiating directives for the Transatlantic Trade and Investment Partnership must be considered obsolete and no longer relevant,”<sup>14</sup> additional trade frictions emerged between the two shores of the Atlantic, as the Trump administration placed strong emphasis on the nexus between trade policy and national security.<sup>15</sup> In this regard, on June 1st, 2018, Trump unilaterally decided to impose punitive tariffs on steel and aluminum imports from the EU (respectively 25% and 10%, covering approximately \$46 billion of imports), pursuant to Section (§) 232 of the Trade Expansion Act of 1962. This provision allows the US President to take action to adjust the level of imports by increasing tariffs or imposing quotas in case an investigation conducted by the Department of Commerce has determined that specific imports have detrimental effects on the US national security. In January 2018, the final reports stated that “imports of certain steel mill products and certain types of primary aluminum and unwrought aluminum ‘threaten to impair the national security’ of the United States,” which prompted the Secretary of Commerce Wilbur L. Ross to suggest that the President “take immediate action to adjust the level of these imports through quotas or tariffs.”<sup>16</sup> Although the EU was initially exempted from these import tariffs due to Trump’s willingness to find alternative ways to address the issue, it was later included among the countries subject to the §232 tariffs as it refused to negotiate under Trump’s terms. This move by the Trump

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<sup>12</sup> Peter Chase, Peter Sparding, Yuki Mukai, “Consequences of US Trade Policy on EU-US Trade Relations and the Global Trading System,” study requested by the European Parliament’s Committee on International Trade (November 2018): 9. Here, the authors also provide further examples of Trump’s executive measures laying out an assertive “America First” trade strategy. Available online at [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603882/EXPO\\_STU\(2018\)603882\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603882/EXPO_STU(2018)603882_EN.pdf).

<sup>13</sup> Bureau of Economic Analysis, US Department of Commerce, “U.S. International Trade in Goods and Services,” (January 2021): 39–40. Available online at <https://www.bea.gov/sites/default/files/2021-01/trad1120.pdf>.

<sup>14</sup> Council of the European Union, “COUNCIL DECISION Authorising the Opening of Negotiations with the United States of America for an Agreement on the Elimination of Tariffs for Industrial Goods,” ST 6052 2019 COR 1 (April 9th, 2019), 2. Available online at <https://www.consilium.europa.eu/media/39180/st06052-en19.pdf>.

<sup>15</sup> Schneider-Petsinger, “US–EU Trade Relations,” 4

<sup>16</sup> Congressional Research Service (CRS), “Section 232 Investigations: Overview and Issues for Congress,” CRS Report R45249 (updated August 24<sup>th</sup>, 2020): 7. Available online at <https://fas.org/sgp/crs/misc/R45249.pdf>.

administration garnered harsh criticisms from Europe, with the then European Commissioner for Trade Cecilia Malmström declaring that “these measures are disruptive to alliances” and that the EU “had no choice but to respond.”<sup>17</sup>

The EU responded by issuing legal proceedings against the US at the WTO and imposing retaliatory tariffs on €2.8 billion (\$3.1 billion) of US products — including steel, aluminum, clothing, motorcycles, and agricultural goods.<sup>18</sup> Despite the bipartisan efforts launched in July 2018 by President Trump and the then European Commission President Juncker to de-escalate tensions and usher in new negotiations to resolve the tariffs issue and strengthen trade in several areas, the trade talks have not led to a significant agreement yet.

Similar to the steel and aluminum tariffs, in May 2018 Trump instructed the Commerce Department to launch a §232 investigation to determine whether imports of cars and automotive parts threaten to impair US national security. The final report was submitted in February 2019 but it has not been released to the general public.<sup>19</sup> However, Trump formally asserted that imported cars and automotive parts represent a threat to US national security when he announced his decision to delay the imposition of auto tariffs by six months.<sup>20</sup> Once again, EU Trade Commissioner Malmström harshly condemned this unilateral action by the Trump administration, calling it “absurd” and asserting that “if there will be tariffs there, we would take countermeasures.”<sup>21</sup> And given that the value of EU automotive exports to the US market is about 10 times greater than that of the bloc’s steel and aluminum exports combined, European retaliatory actions would likely target a larger amount of US exports to the EU.<sup>22</sup>

As of January 2021, no tariffs on cars have been levied by the US, but tensions between the two parties still remain. Despite a promising meeting between EC President Ursula Von Der Leyen and Trump in Davos in January 2020,<sup>23</sup> the worsening of the decades-long Airbus-Boeing dispute further compromised the transatlantic trade talks. Within this dispute, two WTO rulings gave a green light for both the US, first (in October 2019) to impose tariffs on \$7.5 billion of European goods, and for the EU, later (in October 2020) to retaliate imposing tariffs on \$4 billion in annual exports of US aircraft and other goods.<sup>24</sup> This is the troubling scenario on US-EU trade relations that the Trump Administration has handed on to the incoming President Joe Biden and his Cabinet.

## **What is the Future of US-EU Trade Talks under Biden?**

On January 20th, 2021, Joe Biden and Kamala Harris were sworn in as President and Vice President of the United States. What does it mean for EU-US trade relations? Trump’s defeat in the 2020 general election has raised hopes on the EU’s side over a possible restoration of normality and

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<sup>17</sup> “Transatlantic Trade in Turbulent Times,” speech by Cecilia Malmström, European Commissioner for Trade (July 2018). Available online at [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_18\\_4604](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_18_4604).

<sup>18</sup> Chase, Sparding, Mukai, “Consequences of US Trade Policy,” 29.

<sup>19</sup> CRS, “Section 232 Investigations,” 16–18.

<sup>20</sup> Haley Byrd, “Trump Says Foreign Cars are a National Security Threat. Will Congress Stop him Before Imposing Tariffs?,” *CNN Politics* (May 18<sup>th</sup>, 2019). Available online at <https://edition.cnn.com/2019/05/18/politics/trump-auto-tariffs-delay/index.html>.

<sup>21</sup> Jonathan Stearns, “Europe Renews Pledge to Retaliate Against Any Trump Car Tariffs,” *Bloomberg* (September 20<sup>th</sup>, 2019). Available online at <https://www.bloomberg.com/news/articles/2019-09-20/europe-renews-pledge-to-retaliate-against-any-trump-car-tariffs>.

<sup>22</sup> Jonathan Stearns, “Europe Renews Pledge.”

<sup>23</sup> Jakob Hanke Vela, “Von der Leyen: Trade deal with America ‘in a few weeks’,” *POLITICO* (January 22<sup>nd</sup>, 2020). Available online at <https://www.politico.eu/article/von-der-leyen-trade-deal-with-america-in-a-few-weeks/>.

<sup>24</sup> Ashutosh Pandey, “Airbus-Boeing WTO Dispute: What You Need to Know,” *Deutsche Welle (DW)* (October 13<sup>th</sup>, 2020). Available online at <https://www.dw.com/en/airbus-boeing-wto-dispute-what-you-need-to-know/a-49442616>.

predictability in America's relations with its allies, after the chaos and mutual incomprehension of the Trump era, including with respect to trade relations. Certainly, Biden will go back to a more Obama-era multilateral and holistic approach in which trade is viewed as an instrument to rebuild relations with key allies and to work more closely with them to confront common concerns such as the Chinese government. As a result, the Biden administration will try to ease the tensions with the EU on trade, eventually removing Trump's steel and aluminum tariffs (though not immediately<sup>25</sup>), ruling out any further threat of new tariffs, and adopting a less antagonistic approach in addressing controversial trade issues, attempting to reach more compromises than his predecessor.

However, things are not as straightforward as EU lawmakers would have hoped. Although Biden referred to Trump's trade wars and disputes as "ill-advised,"<sup>26</sup> a radical paradigm shift on trade policy under his administration is highly unlikely, especially in the early stages, which entails that a comprehensive US-EU free trade agreement similar to the TTIP is off the table. The newly elected US President made it quite clear that his priorities lie elsewhere, namely the American economic recovery amidst the COVID-19 pandemic, and that any decision he will make on trade will be based on the needs and interest of the American middle class.<sup>27</sup> Moreover, similarly to his predecessor, Biden emphasized his support for "fair trade" (i.e. in line with the interests of the US and its voters).<sup>28</sup> Therefore, we can assume that, although there will be a clear difference in tone and methods employed to address trade issues, many of the concerns raised by Trump will still be central to Biden's trade policy.

European lawmakers should thus not think of Biden as the Obama's heir and be wary that there is plenty of transatlantic disagreements ahead when it comes to trade negotiations. However, both parties will benefit from more constructive and cooperative trade relations to face future challenges coming from countries such as China. A first test for new avenues for cooperation has been the selection of the next WTO Director-General, Ngozi Okonjo-Iweala, whose candidacy was backed by the EU in October 2020 and later supported by the Biden administration in February 2021.<sup>29</sup>

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<sup>25</sup> Philip Blenkinsop, "Analysis: EU Sees no Abrupt End to Trump Tariffs when Biden Takes Charge," *Reuters* (December 8<sup>th</sup>, 2020). Available online at <https://www.reuters.com/article/eu-usa-trade-analysis/analysis-eu-sees-no-abrupt-end-to-trump-tariffs-when-biden-takes-charge-idINKBN28I20C>.

<sup>26</sup> Joseph R. Biden, Jr., "Why America Must Lead Again: Rescuing U.S. Foreign Policy After Trump," *Foreign Affairs* (March/April 2020). Available online at <https://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again>.

<sup>27</sup> Sam Lowe, "What Would a Biden Presidency Mean for US-EU Trade Relations?," *Center for European Reform* (CER) *Insight* (October 28<sup>th</sup>, 2020), 1–2. Available online at [https://www.cer.eu/sites/default/files/insight\\_SL\\_28.10.20.pdf](https://www.cer.eu/sites/default/files/insight_SL_28.10.20.pdf).

<sup>28</sup> Lowe, "What Would a Biden."

<sup>29</sup> Steven Overly, "U.S. backs Okonjo-Iweala, first woman and African, to head WTO," *POLITICO* (February 5<sup>th</sup>, 2021). Available online at <https://www.politico.com/news/2021/02/05/okonjo-iweala-head-wto-466262>.



# European Commission: overlooking the crisis or pretending it's not there?

## Rule of law crisis *in* Bulgaria.

Anastasiia Vasileva

### Introduction

Recent developments with corruption and the rule of law crisis in Bulgaria has gained momentum and due attention of the media. Unlike the media coverage, European Commission has not been active to publicly condemn the current crisis developments, commenting on the rule of law progress in Bulgaria as 'sufficient', nor has it come up with the tailor-made solution to resolve the growing tensions in the country<sup>1</sup>. Although the existent Cooperation and Verification Mechanism (CVM) has been in place since the accession of Bulgaria and Romania in 2007 to the European Union, consisting of the bi-annual reports in the field of reform of the judiciary, fight against corruption and organised crime, the results of its critical evaluation of effectiveness are questionable. The Bulgarian case follows a larger rule of law crisis that is spreading all over Europe with many fearing the escalation of the Hungarian and Polish case further to Bulgaria and Romania. The question is, how did the European Commission respond to this crisis and is it willing to take action?

### Bulgarian rule of law case

The spark of, what is called the 2020-2021 Bulgarian protests, calling for ending the corruption, the resignation of the current president Boyko Borisov that is in power since 2009, shed the light to the acuteness of the problem in the country and the civil society's call for decisive action by the European Union (EU). More than ten years after the accession of Bulgaria to EU, the country ranks first in the Corruption Perception Index 2019 in the EU followed by Hungary and Romania<sup>2</sup>. Although some progress has been made over the years, the destructive impact

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<sup>1</sup> European Commission : Midday press briefing from 07/08/2020 <https://audiovisual.ec.europa.eu/en/video/I-193971?lg=OR> (accessed on 10.01.2021).

<sup>2</sup> The Corruption Perception Index 2019: The EU is the best performer in the world [https://ec.europa.eu/regional\\_policy/en/newsroom/news/2020/01/27-01-2020-the-corruption-perception-index-2019-the-eu-is-the-best-performer-in-the-world](https://ec.europa.eu/regional_policy/en/newsroom/news/2020/01/27-01-2020-the-corruption-perception-index-2019-the-eu-is-the-best-performer-in-the-world) (accessed on 10.01.2021).

of corruption on democracy and democratization is especially evident in the post-communist countries which is the case in Bulgaria<sup>3</sup>.

Many scholars argue that the institutional instrument put in place by the Commission at the accession of the country (CVM) is ineffective as it neglects the importance of multilevel governance in Bulgaria. In particular, the power of the civil society organisations (CSOs) that would have nourished and promoted the EU values, especially in regards to corruption on the grass-root level as well as from the research perspective<sup>4</sup>. As the corruption should be seen as a collective action problem, there has to be a normative change in the society that would complement the institutional change, as some traditional practices in Bulgaria nourish corruption<sup>5</sup>. Not only the institutional, but the behavioural change of the domestic societal norms is needed to tackle corruption and that is what the CVM is overlooking<sup>6</sup>.

However, it is not only the corruption levels that undermine the rule of law commitments of Bulgaria but also its gender equality matters. Although the extensive corruption issues are the ones that went viral, numerous criticism is observed in the field of the Bulgaria's state of gender equality where it scores substantially lower than the EU average, in addition the country has been progressing in the field of gender equality at the slowest pace, in comparison with other member states (2005 – 2017)<sup>7</sup>. In the overall assessment of the legal state of gender equality it is noted that it has been compromised by conservative views expressed by the Constitutional Court of the country in its ruling on the Istanbul Convention combating domestic violence and violence against women. There is also no specific institutional body dealing with gender equality, no legal measures and instruments against the gender pay gap, therefore it needs further development and attention<sup>8</sup>.

Although the accession conditionality used by the European Union has generally proved successful in the areas of domestic change influence incentivising the potential member states to join the union, once the accession is preceded the incentive for compliance is less evident and respected<sup>9</sup>. For instance, the Bulgarian public procurement system is below the EU standards with numerous cases of corruption of the EU funds. The Public Procurement Law (PPL) being one of the main vehicles transporting the EU Directives into the Bulgarian law. Regardless of the fact that PPL has been identified as a high-risk corruption area in the CVM, it still lacks compulsory monitoring systems tracking anti-corruption initiatives with central

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<sup>3</sup> Rose-Askerman S (1999). *Corruption and government: causes, consequences, and reform*. Cambridge University Press, Cambridge.

<sup>4</sup> Pavlovska-Hilael S (2015). The EU's Losing Battle Against Corruption in Bulgaria. *Hague Rule of Law Journal* 7:199-217.

<sup>5</sup> Ibid.

<sup>6</sup> Börzel & van Hullen (2014). State-building and the European Union's fight against corruption in the southern Caucasus: why legitimacy matters. *Governance* 27(4):613-634.

<sup>7</sup> European Institute for Gender Equality. *Gender Equality Index 2019: Bulgaria*. <https://eige.europa.eu/publications/gender-equality-index-2019-bulgaria> (accessed on 10.01.2021)

<sup>8</sup> European Commission. *Gender Equality – Country report Bulgaria 2020*. Luxembourg: Publications Office of the European Union (81-86pp).

<sup>9</sup> Grabbe H. (2006). *The EU's transformative power: Europeanization through conditionality in Central and Eastern Europe*. Palgrave.



reporting<sup>10</sup>. Among the weaknesses of the public procurement that is directly related to the rule of law, the European Commission states the corruption, transparency around public contracts, weak administrative capacity, general lack of trust of the businesses to the Bulgarian public procurement system and the insufficient e-procurement adoption. It also indicates the recommendations for the Bulgarian government to tackle the issues from legal perspective as well as from practical one<sup>11</sup>.

### **European Commission's stands on the backsliding**

First of all, is the European Commission's CVM mechanism an effective durable solution? To my mind it has only been an effective conditional corruption control, as it simply does not possess the juridical power to act against the member state in case of its incompliance. The subject of corruption has only been the accessional condition and has no legal instruments in the EU law, which is why the EU institutions are legally unable to enforce sanctions on the member states<sup>12</sup>. This issue also brings us back to the case of the Hungary and Poland sanctioning where the EU – whose TEU has not been designed to resolve issues of such a kind, - is legally caught off guard carrying no suitable legal instruments to treat cases like this<sup>13</sup>.

What is important to presume is that whether the Commission is going to take more rigorous action or not is the question of its mandate as the Commission respects the rule of law itself, so it 'plays with the cards it has' as being the guardians of the treaties in the European Union<sup>14</sup>. Therefore it may only operate with adopted laws and in the previous part of the paper the lack of such adopted laws and legal instruments has been identified. The Bulgaria's commitments given in the CVM are expected to be respected. As the Commission states in its briefing on Bulgaria, there is a right for peaceful demonstrations in members states and the right for peaceful use of police forces when considered necessary and therefore, the Commission calls on the member states to respect those principles as it is up to the national systems to ensure that these commitments are respected<sup>15</sup>.

In response, however, to the state of rule of law deterioration in several countries the Commission has come up with the new rule of law mechanism, that will equip Commission with the tools to continue the work with Bulgaria as well as other member states on enforcement of the necessary reforms. The new tool is expected to cover the areas of the justice systems, anti-corruption framework, media pluralism and freedom as well as other issues in

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<sup>10</sup> European Commission (2015), CVM, Report from the European Commission to the Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism.

<sup>11</sup> Public procurement in Bulgaria (2015) [https://ec.europa.eu/regional\\_policy/sources/policy/how/improving-investment/public-procurement/study/country\\_profile/bg.pdf](https://ec.europa.eu/regional_policy/sources/policy/how/improving-investment/public-procurement/study/country_profile/bg.pdf) (accessed on 10.01.2021).

<sup>12</sup> Locatus C. & Sedelmeir U. (2020). Does monitoring without enforcement make a difference? The EU and anti-corruption policies in Bulgaria and Romania after accession. *Journal of European Public Policy*, 27:8, 1236-1255.

<sup>13</sup> Keleman D. (2020). The European Union's authoritarian equilibrium. *Journal of European Public Policy*, 27:3, 481-499.

<sup>14</sup> The speech of Věra Jourová the Vice President of the European Commission (2020). [https://www.youtube.com/watch?v=1\\_hExpHgmRE&ab\\_channel=EUDebates%7Ceudebates.tv](https://www.youtube.com/watch?v=1_hExpHgmRE&ab_channel=EUDebates%7Ceudebates.tv) (accessed on 10.01.2021).

<sup>15</sup> Midday press briefing from 07/08/2020. <https://audiovisual.ec.europa.eu/en/video/I-193971?lg=OR> (accessed on 10.01.2020)



the form of the report with 27 country chapters presenting the assessment on each member state. Therefore up from the 2020 the CVM is to be replaced by the Rule of Law Mechanism as it covers the broader scope of issues<sup>16</sup>.

### **Criticism of the Commission's actions**

Not only the journalists have criticized the Commission's prime reaction on the corruption case, but also numerous members of the European Parliament (predominantly from the Greens party). In his statement on the Bulgarian rule of law report, Daniel Freud has called on the Commission to "look at freezing EU funds to the government and instead directly fund beneficiaries in Bulgaria, to ensure that this money goes where it's needed and not into the pockets of the corrupt."<sup>17</sup>

Additionally, together over 50 members of the European Parliament (mostly from the S&D and Greens) have submitted their questions to the Commission referring to the emergency situation Bulgaria's state of the rule of law is in rights now and expressing their concerns about the situation<sup>18</sup>. Additionally, the challenge of criticism and decisive action from the EPP and the Commission is seen in the fact that Borisov is the member of the EPP, but also a close ally of the Commission President – Ursula von der Leyen and German Chancellor Angela Merkel<sup>19</sup>.

If the Commission isn't condemning the violence at the very least with its affirmation and statement, then it only contributes to the institutional mistrust in the EU project by the Bulgarian people that expect the Commission to react, as they are faced with the police violence, corruption and violation of their rights. Overall there has been a substantive criticism from some part of the European Parliament members reaffirming and calling the Commission for action, be it redistribution of funds or just voicing the problem<sup>20</sup>. What the EP fears – is that another Poland and Hungary is on its way, and that it might cause another problem for the EPP in its already uneasy rule of law environment, which is why as the agenda-setter Commission is the institution that is expected to act.

### **Conclusion**

In order to stick to its democratic principles the Commission should seek to avoid the party politics that most certainly undermine its credibility as an executive body and initiator of the treaties that are supposed to reflect on the needs of the citizens of the EU. Although the

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<sup>16</sup> Rule of law report 2020 – Q&A. [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_1757](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1757) (accessed on 10.01.2020)

<sup>17</sup> Bulgaria: Rule of Law Report 2020. <https://www.greens-efa.eu/en/article/press/bulgaria-rule-of-law-report/> (accessed on 10.01.2020)

<sup>18</sup> Parliamentary questions. 14 August 2020. [https://www.europarl.europa.eu/doceo/document/O-9-2020-000051\\_EN.html](https://www.europarl.europa.eu/doceo/document/O-9-2020-000051_EN.html) (accessed on 10.01.2021)

<sup>19</sup> MEPs tackle rule of law in Bulgaria as corruption crisis swells. <https://www.politico.eu/article/mep-rule-of-law-bulgaria-corruption-crisis/> (accessed on 10.01.2021).

<sup>20</sup> Protests in Bulgaria: will the EU at least condemn the violence? <https://www.brusselstimes.com/opinion/131263/protests-in-bulgaria-will-the-eu-at-least-condemn-the-violence/> (accessed on 10.01.2021).

Commission does not currently possess the necessary legal framework to sanction the rule of law infringements it should at the very least voice its concerns and support the democratic rule.

The identified shortcomings of the CVM should be addressed not only in terms of legal aspects but also with respect to the Commission's support to domestic NGOs, grass-root organizations, research groups that will foster the normative narrative change of the rule of law perception from within the society and not only on the institutional level. Noting that the CVM as a pre-accession mechanism has lost its legitimacy, the new rule of law mechanism reports might, indeed, create the assessment framework. But until the Commission has the tools to deal with identified infringements (which would normally be identified in the rule of law reports) – its ability to guard the treaties and democracy will remain very limited.



## A WHOLE NEW WORLD

In the past few years, the world has become more connected and digitalized than ever before. Technology will soon become the drive behind development and economic growth. Being a front-runner in the fourth industrial revolution will be the key to not only a state's competitiveness, but also their place within the world order. The recent COVID-pandemic is the prime example of this changing world, as we all have become accustomed to a lifestyle of working at home and virtual social gatherings.

The EU has already declared its ambitions to take a leading position in this digital transformation<sup>1</sup>. Previous revolutions have taught us that those who lead it are able to secure an extremely advantageous position. Moreover, there is a growing awareness of the importance of protection against cyber-crime and the need for a reliable network for the population and businesses. This realization also lives in the mind of the general public, given the increase of 'fake news' reporting via social media outlets in the past years. If Europe wants to ensure that everyone will uphold the highest ethical standard in the coming evolution, it must become a leading voice in the formation of an international framework. But if it wants to be heard, it needs to be respected in their expertise and capacity to lead.

The EU, after all, is not the only player seeking to assert its dominance over the technological advancements. Both China and the U.S. have shown their aspirations in becoming the driving force behind digital innovation, AI, robotics, etc. Whereas those countries might be economic strongholds, European strength lies in the fact that they are not them. In the midst of a trade war and a pandemic, setting up a new business in a cutting-edge field is anything but easy. Settling down in a country engaged in a trade war proves risky in a globalized world. This is exactly the edge the EU has on the rest of the world. Through its belief in cooperation with all countries and its pursuit of reciprocity, the EU has gained access to most markets—all whilst benefiting from an internal market that has become all the more connected in the past decade.

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<sup>1</sup> European Commission. (2015, April 14). Europe's future is digital [Press release]. [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_15\\_477](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_477)

The European Union has a window of opportunity to become the front-runner in technological innovations and set the tone for the rest of the fourth industrial revolution. It should grab it with both hands.

## **A GOLDEN OPPORTUNITY**

The ongoing tensions between China and the U.S. could serve as the perfect opportunity for Europe to tie the upcoming tech industry to the continent. The idea behind this is that the technological revolution is a global one, where companies no longer solely aim for one market. The greatness of the internet for example, is that it connects us all, wherever we are. Yet for companies aiming to conquer the global market, high tensions between the two economic powers are nothing but a handicap. Since locating yourself in one of these countries almost automatically runs you the risk of being faced with increased import tariffs, limitations on activities or in the worst case scenario a full ban. These barriers could render it quite difficult to ensure a profit or even participation in these markets. Take for instance the Chinese company Huawei, who is banned from doing any business with or in the United States<sup>2</sup>. Europe may be sceptical towards certain Chinese companies, they have shown willingness to cooperate with any country, as long as the relationship is reciprocal. As such, a complete shut-out of a certain area of the world is less likely. This means that in the light of the increasing strain on Sino-American relations, Europe can become a safe haven for companies trying to make it big in the global market.

In addition, as developments proceed, we will shift from internet innovations towards frontier tech like semiconductors, robotics and healthcare. All of these are areas where Europe has significant expertise, with education taking the forefront: five out of the top ten universities for computer science are located in Europe<sup>3</sup>.

Other favorable factors, such as the connectedness of the tech ecosystem, are a huge selling point for both investors and businesses looking for a place to settle. Yet another point adding to the attractiveness of Europe, is the heavy involvement of governments in digital innovation, as was shown during the Tallinn Declaration<sup>4</sup>. We see state leaders, such as Angela Merkel, pledging billions to fast-track their industries to the top of the food chain<sup>5</sup>. The coronavirus has only stimulated this development as countries change their infrastructure to accommodate remote working. In a way the pandemic is putting the future development of Europe on the fast track. There is no Silicon Valley or other geographic place that holds all the tech leaders. The EU's power lies in the fact that working across borders, from different locations, with different cultures is seen as a normal thing. The inevitable adjustment to work remotely has only accelerated this trend.

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<sup>2</sup> Kastrenakes, J. (2020, March 31). Huawei says US trade ban is a 'big difficulty' to selling phones. The Verge. <https://www.theverge.com/2020/3/31/21200183/huawei-2019-earnings-financial-results-us-trade-ban>

<sup>3</sup> Times Higher Education World University Rankings 2018

<sup>4</sup> European Commission. (2020, September 29). Ministerial Declaration on eGovernment - the Tallinn Declaration. <https://ec.europa.eu/digital-single-market/en/news/ministerial-declaration-egovernment-tallinn-declaration>

<sup>5</sup> Jones, M. (2018, 16 November). Merkel seeks to fast-track Germany's AI superpower status. TechHQ. <https://techhq.com/2018/11/merkel-seeks-to-fast-track-germanys-ai-superpower-status/?fbclid=IwAR1oRNE2LOsdlBhe-LfumfXiUIt4p2KQOXCwmVfKo53MxZIJKOLvo4aOeiI>

## ESTABLISHING LEADERSHIP THROUGH COOPERATION

The current developments make for a perfect starting ground to take the European ambitions to the next level. It seems that Europe is well aware of this, as they recently announced a rulebook for the digital age. The Digital Markets Act and Digital Services Acts<sup>6</sup> are only a small addition to the '*technological sovereignty*' plan that the Commission put on the forefront of their agenda. The proposal would effectively limit the market expansions of foreign technology giants and force them to adhere to the values set out by the Union. Even though this idea is still far from becoming a law, it stirred up some of the major tech companies.

Karan Bhatia, vice president of government affairs at Google said in a statement: "We are concerned that they appear to specifically target a handful of companies and make it harder to develop new products to support small businesses in Europe<sup>7</sup>."

As Brussels is trying to create order in the chaos that is the digital revolution, they are increasingly antagonizing companies from the United States and China. Therefore, it is of the utmost importance that next to setting standards for those that want to enter the market, they also find a way to cooperate. In a recent press release about the new transatlantic agenda there have already been mentions of creating a dialogue with the U.S. about the responsibilities of Big Tech<sup>8</sup>. A similar, yet more cautious stance has been adopted towards China. Horizon Europe is a prime example of this, as it stimulates cross-country cooperation on research. It was only last September that another 8 Chinese researchers have received funding through this initiative<sup>9</sup>. Even the EU-Chinese investment deal got pushed through, despite criticisms over labor rights. For many, this is considered as a strategic win that will prove vital to the economy, as well as have the potential of exerting more influence over China to adopt a higher practice standard<sup>10</sup>.

## CONCLUSION

In these changing times, Europe has an opportunity to leave its mark on the world. The global tensions, the coronavirus and the sheer ambition on the continent serve as the golden

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<sup>6</sup> Scott, M., Larger, T., & Kayali, L. (2020, December 15). Europe rewrites rulebook for digital age. POLITICO. <https://www.politico.eu/article/europe-digital-markets-act-services-act-tech-competition-rules-margrethe-vestager-thierry-breton/>

<sup>7</sup> Staff, R. (2020, December 15). Instant View: U.S. tech firms face new EU rules for business practices. U.S. <https://www.reuters.com/article/us-eu-tech-rules-instant-view-idUSKBN28P2CQ>

<sup>8</sup> European Commission. (2020, December 2). EU-US: A new transatlantic agenda for global change [Press release]. [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2279](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2279)

<sup>9</sup> EURAXESS. (2020, September 4). 8 Chinese nationals receive the European Research Council Starting Grant. <https://euraxess.ec.europa.eu/worldwide/china/8-chinese-nationals-receive-european-research-council-starting-grant>

<sup>10</sup> Burchard, H. (2020, December 29). Merkel pushes EU-China investment deal over the finish line despite criticism. POLITICO. <https://www.politico.eu/article/eu-china-investment-deal-angela-merkel-pushes-finish-line-despite-criticism/>

opportunity to extend its lead in highly technological innovations. Yet, we mustn't forget that the era of solo domination has passed. The challenge at hand will be which state (or union) has it in them to not only invest in their own competitive edge, but also extend a hand to others. Solely being a front-runner in an evolution that will bring the world population even closer together, is not enough. The key words will be cooperation and innovation.

If the EU wants to become the role model that it has set out to be, it should focus on those two words. They should continue to foster innovation, while further building a global framework on their own values. A European Union that is respected in the field of technology, but also well liked for their willingness to work together, will have the ability to set the standard for our future way of life.





# The Carrot and the Stick: EU Antitrust Law in Action

Shane Goodman

## Introduction

With the European project having its foundations in economic cooperation, it is no surprise that the European Commission places such a focus on ensuring a fair market within the Union by preventing monopolies and cartels from forming, while putting an end to those which have been found to exist. The foundational aspect of European antitrust law regarding cartels is Article 101 of the Treaty on the Functioning of the European Union (hereafter TFEU). Article 101 states that “*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*”.<sup>1</sup> What does the TFEU define as a cartel? In particular, undertakings which engage in price fixing or limitation of production, markets, technological development or investment could fall under the definition of a cartel.<sup>2</sup>

In November 2006, the then-European Commissioner for Competition Neelie Kroes noted that “*Cartels strike at the heart of healthy economic activity. They undermine competition, raise prices for consumers and reduce the diversity, quality and innovation of European companies*”.<sup>3</sup> Commissioner Kroes’ disdain for cartels reflects the attitude of the European Commission (hereafter the Commission) to cartels in any form that operate within the EU Internal Market. With such an emphasis from the Commission on the detrimental effects of cartels to the European economy, this article will explain and analyse some of the most important aspects of the European Union’s approach to the prevention of cartels.

## The Carrot and Stick

The primary deterrent against cartels at a European level is that fines are imposed on cartel participants. It is important to note that these fines are of an administrative nature and do not count as a criminal offence under Union law as of 2020. Financial sanctions are imposed under Council Regulation (EC) No 1/2003. Article 23(2) of the aforementioned Regulation concerns

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<sup>1</sup> “Consolidated version of the Treaty on the Functioning of the European Union”, Article 101.

<sup>2</sup> *Ibid.*

<sup>3</sup> “EU fines rubber cartel €519m”, The Irish Times, published Nov. 29<sup>th</sup>, 2006.

the main sanctions that can be imposed, stating that “*For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year*”.<sup>4</sup> This fine applies when a breach of Articles 101 or 102 of the TFEU has occurred.

It is important to note that, as that fines can be imposed on up to and including 10% of annual turnover, the Commission has a degree of discretion regarding the severity of the fines imposed. Commissioner Kroes has noted that during her tenure, only ten companies were fined in excess of 5% of annual turnover. This indicates that during the 2000s, the Commission was reluctant to impose fines towards the larger end of the scale in all but the most serious of breaches or breaches that have continued for a longer duration than most.<sup>5</sup> This approach has largely continued with only some improvements in the subsequent decade.

Article 23(1) of the above Regulation also elaborates on financial sanctions that are imposed on undertakings engaged in cartels. A less serious fine of any figure up to 1% of annual turnover may be applied where the undertaking is not co-operating with the investigation by the Commission.<sup>6</sup> This is intended to deter the obstruction of justice and to ensure that Commission investigations are as efficient as they could be. In addition to this, Article 24 refers to periodic penalty payments. Under this Article, fines of up to 5% of the average daily turnover from the previous business year can be imposed.<sup>7</sup> This can be used to incentivise undertakings to put an end to an infringement under Article 101 or 102 of the TFEU.

Ultimately, the purpose of these fines is to be both punitive and dissuasive. To use the common metaphor of giving a donkey a carrot or a stick, the fines may act as the allegorical ‘stick’ of EU Competition Law, but the leniency policy operated by the Commission would be the so-called ‘carrot’.<sup>8</sup>

However, the leniency policy is just that, a policy, and as such the Commission is by no means bound to continue following it. However, due to its ongoing success, it would be difficult to foresee the policy being cast aside. The policy incentivises undertakings to come forward to the Commission about a cartel in order to obtain full or partial immunity from the fines, based on how valuable the evidence given is to the Commission. However, there is one condition to this: undertakings are never granted immunity if they are found to have coerced others to join or to remain in the cartel, as in this scenario they are viewed as the ‘ringleader’. Indeed, the success of the policy has been noted in that without an effective leniency programme, “*the probability of detection and punishment in Europe [would] not be above 33%*”.<sup>9</sup> In his 2008 article on the matter, Dr. Declan Walsh praised the Commissions operation of public enforcement, noting that the “*persuasive effect of the leniency notice and the dissuasive effect of large fines are together providing DG Competition with the most successful period of EC*

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<sup>4</sup> Article 23(2) Council Regulation 1/2003.

<sup>5</sup> Kroes, Neelie, (2009) “Tackling cartels – a never-ending task Anti-Cartel Enforcement: Criminal and Administrative Policy” Brasilia, 8 October 2009.

<sup>6</sup> Article 23(1) Council Regulation No 1/2003.

<sup>7</sup> Article 24 Council Regulation No 1/2003.

<sup>8</sup> Walsh, Declan J. (2009) “Carrots and Sticks: - leniency and fines in EC cartel cases” E.C.L.R. 2009, 30(1)

<sup>9</sup> Wils, Wouter “Is Criminalisation of EU Competition Law the Answer?” World Competition Volume 28, No. 2.

*competition law enforcement in its history*".<sup>10</sup> By combining both the incentive of immunity from fines and the threat posed by increasing the severity of said fines, the Commission has created a robust system for public enforcement of EU Competition Law. The fines imposed have been increasing, progressing from €390 million in 2004 to €3.34 billion in 2007. By 2016 this has increased to €3.7 billion, but has unfortunately experienced a steady decrease in recent years, with only €1.48 billion fines being imposed on cartels in 2019.<sup>11</sup> These fines create a stronger disincentive for firms so that they do not engage in anti-competitive behaviour. The leniency policy has also been expanded on with the introduction of a 'whistle-blower' scheme in 2017, to anonymise those who came forward about the alleged breach, which could also act as a safeguard against liability under private enforcement.<sup>12</sup>

However, Walsh also warns of the danger posed by the encroachment of private enforcement on this system. He notes that *"there is a very real fear that undertakings may be well advised to steer clear of the leniency programme if the benefit of gaining immunity from fines is offset by handing over evidence that may lead to future actions for damages."*<sup>13</sup> Why would any undertaking co-operate with the leniency programme if it meant that they would be opening themselves up to liability from the private enforcement aspect of competition law? This would go against the rationale of an undertaking engaged in a cartel as a decision of the Commission against a cartel would obviously alert potential litigants as to the cartel behaviour. In such circumstances there is no arguable benefit to an undertaking to come forward.

### **The Question of Criminalisation**

One method which could improve the punitive aspect of EU antitrust law would be criminalisation of cartels. It has been argued that fines alone could not fully enforce EU competition law, as in order to have an impact upon large companies the fines would have to be unsustainably high.<sup>14</sup> One would have to increase the potential for fines from a maximum of 10% of annual turnover to 150% for there to be a serious disincentive for firms involved in a cartel. This would put firms at risk of bankruptcy, which ultimately would prove counter-intuitive in that it reduces consumer choice and competition in the marketplace. It is also argued that fines alone on corporate bodies may not be effective in encouraging responsible individuals to come forward. Instead, the company is incentivised to ensure that its agents do not report on any illegal undertakings, or else the agent may be in breach and the company may not have a method of reining them in. Of course, it is also a possibility that while the firm is targeted, the individual(s) responsible for the breach will have left the company, leading to punitive measures being taken for little to no reason.

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<sup>10</sup> Walsh, Declan J. (2009) "Carrots and Sticks: - leniency and fines in EC cartel cases" E.C.L.R. 2009, 30(1).

<sup>11</sup> Cartel Statistics, European Commission [<https://ec.europa.eu/competition/cartels/statistics/statistics.pdf>], (accessed December 12<sup>th</sup>, 2020).

<sup>12</sup> Schurmann, Anika, "Antitrust: The EU Commission introduces new whistleblower tool", Global Compliance News, published March 28<sup>th</sup>, 2017.

<sup>13</sup> Walsh, Declan J. (2009) "Carrots and Sticks: – leniency and fines in EC cartel cases" E.C.L.R. 2009, 30(1), 30-35.

<sup>14</sup> Wils, Wouter. (2005) "Is Criminalisation of EU Competition Law the Answer?" World Competition Volume 28, No. 2 117-159.

It is clear to see how imprisonment would act as an effective deterrent against anti-competitive practices. For the extremely wealthy, a short imprisonment often represents a greater threat than any amount of corporate funds that must be handed over. This was seen in the example of A. Alfred Taubman in the US, where antitrust law has been criminalised since the Sherman Act of 1890.<sup>15</sup> In the words of Joseph Bauer, *“the sight of A. Alfred Taubman, the extremely wealthy chairman of the board of Sotheby’s, the world-famous auction house, convicted and sentenced, at the age of 78, to a one-year term of imprisonment and a substantial fine for participating in a price-fixing conspiracy, doubtless sent a message to other business executives about the risks and penalties for this kind of behaviour”*.<sup>16</sup> The success of criminalisation in the US is impressive and cannot be overstated, it has been noted that many of the cartel cases prosecuted in the US involve international firms, as criminalisation has acted as a strong enough disincentive to dissuade domestic American firms from engaging in anti-competitive arrangements. Perhaps it is time to harmonise the European position with that of Ireland and to criminalise EU Competition Law within Union law itself. Unfortunately, however, with European jurisdictions such as France and Austria distancing themselves from criminalising cartels, this would appear unlikely to occur for the foreseeable future.

### **Private or Public Enforcement**

The final and perhaps most important aspect of EU antitrust law and policy would have to be the debate over the effectiveness of private enforcement. The academic Assimakis Komninos is a noted proponent of incorporating a greater role for private enforcement into Union law. He proposes a combination of the two approaches for maximum effectiveness.<sup>17</sup> The primary function of private enforcement is compensatory. In the US, victims of anti-competitive practices can only go before civil courts, where public enforcement does not have the standing required.

Of course, private enforcement has its weaknesses. In addition to the potential undercutting of the leniency programme, it is important to note that private enforcement alone cannot bring about the end of a cartel. Public enforcement bodies are needed to investigate and to confirm the existence of a cartel before private enforcement could ever hope to ensure a suitable remedy. Some academics have proposed using the private enforcement system to ‘fill the gaps’ of an under-resourced public enforcement system.<sup>18</sup> Private enforcement could not possibly constitute its own system due to the miniscule levels of litigation in this area of law. One must examine how private enforcement would interact with our current public enforcement-centric approach in Europe. This plays out in the form of interaction between the courts and the

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<sup>15</sup> Sherman Antitrust Act, [[https://www.law.cornell.edu/wex/sherman\\_antitrust\\_act](https://www.law.cornell.edu/wex/sherman_antitrust_act)] (accessed December 18<sup>th</sup>, 2020).

<sup>16</sup> Wils, Wouter. (2005) *“Is Criminalisation of EU Competition Law the Answer?”* World Competition Volume 28, No. 2 117-159.

<sup>17</sup> Komninos, Assimakis P *“Public and Private Antitrust Enforcement in Europe: Complement? Overlap?”* (2006) 3 (1) ComplRev 5.

<sup>18</sup> Wilsher, Dan *“The Public Aspects of Private Enforcement in EC law: Some Constitutional and Administrative Challenges of a Damages Culture”* Competition Law Review Volume 3 Issue 1.

National Competition Authorities. As noted by Commissioner Kroes, “*nationally oriented cartels are now –successfully – prosecuted by our Member States authorities*”.<sup>19</sup> This conveys how the National Competition Authorities, such as the Competition and Consumer Protection Commission in Ireland, are often given a large amount of autonomy from the Commission when it comes to investigating domestic cartels. The increase of litigation through private enforcement could in fact result in the courts developing a separate doctrine of competition law to the Commission, an outcome which should ultimately be avoided.

Following on from this, how much interaction should there be between the National Competition Authority and the courts? Dan Wilsher argued that perhaps the National Competition Authority would have been able to offer its expertise to judges. However, with the increased awareness of the judiciary regarding Union law, I would consider this argument to hold less standing than it did in 2006.<sup>20</sup>

While private party enforcement certainly does have its benefits, Walsh has noted that any further moves towards an American-style system would be detrimental to consumers. The primary disadvantage of private enforcement is that the amount of money lost by each individual victim may be too small for a rational person to litigate over, or else that there may be a lack of knowledge about how the cartel affects them.

One of the arguments in favour of private enforcement is that fines do not pose enough of a disincentive on their own. Whilst both Walsh and Kroes have conceded this, they have noted that simply increasing the fines would help solve this problem, “*fines were not deterrent in recent decades. We would go after a company, fine them and the impact would be minimal. Not any longer.*”<sup>21</sup>

Similarly, one could argue that whilst those engaged in a cartel may take fines into account when considering the risks of entering into such an agreement, the Commission should counteract this by also taking into account any illegal gains made by the undertaking as part of the fine.

## Conclusion

To conclude, there are no simple answers when it comes to finding the optimum method of enforcement of EU antitrust and competition law against cartel participants. However, some broad trends have emerged over the past few years, which have led me to believe that a combination of both public and private enforcement would be suitable, so long as arrangements are put in place so that private enforcement does not impede upon the success of the leniency programme. In addition to this, I believe that the criminalisation of EU Competition Law is imperative to the overall success of antitrust law in Europe. As seen in the US, it acts as a much

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<sup>19</sup> Kroes, Neelie, “Tackling cartels – a never-ending task”, speech given at the Anti-Cartel Enforcement: Criminal and Administrative Policy – Panel session in Brasilia, 8<sup>th</sup> October 2009, [[https://ec.europa.eu/commission/presscorner/detail/es/SPEECH\\_09\\_454](https://ec.europa.eu/commission/presscorner/detail/es/SPEECH_09_454)] (accessed December 27<sup>th</sup> 2020).

<sup>20</sup> Wilsher, *ibid.*

<sup>21</sup> Kroes, *ibid.*

stronger incentive to engage with the leniency programme should a breach of Article 101 have occurred, and more importantly, it acts as a deterrent so that the number of cartels and anti-competitive practices can continue to decline into the 2020s.



# EU-budget negotiations: The problems behind EU's compromising deal with Hungary and Poland

Dawid Aristotlelis Fusiek



## Introduction.

There is no denying that the last year has not been easy for the European Union. The coronavirus pandemic has achieved to set-in motion a chain of events that have both resurfaced several internal problems and enhanced pre-existing disputes. For instance, the discussions over the treatment of the pandemic's economic repercussions manifested not only the existence of a North-South division among the EU Member States but also the existence of divergent visions on the future of European undertaking.<sup>1</sup> Despite the gloomy predictions, the EU still managed to adopt an unprecedented decision, that of the €1.82 trillion budget and coronavirus recovery packages. However, the developments of the last month proved that the issue was not yet done.

On 16 November 2020, Hungary and Poland “attacked” the budget proposal. More specifically, they targeted the rule-of-law mechanism, which would allow the EU to cut off funds to a country found to be violating the rule-of-law in certain circumstances tied to the budget. Although the EU accomplished to pass the rule-of-law mechanism (as it requires only a qualified majority), Hungary and Poland vetoed the Own Resources Decision, which is a precondition for the continuation of the €750 billion recovery fund.<sup>2</sup> As expected, this move was not well-received by the other Member States that are currently confronted with the second wave of pandemic and in need of the promised European funding (the first dose date is 1 January 2020). It also further validated the EU officials and Member States' concerns regarding the backsliding of democracy in Warsaw and Budapest.

In this environment of growing internal hostility, the solution to the “internal crisis” came from Germany (which holds the presidency of the Council of the EU) and its compromising plan. Under the new plan, the rule-of-law mechanism has been limited to ensure that the EU funds are spent according to concrete criteria and not touch on social issues such as abortion, LGBT rights or migration policy. The deal also determined that the mechanism only applies to the 2021-2027 EU budget and recovery fund and induced a softer and more generic language (such

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<sup>1</sup> Fusiek, Dawid A. “UU Future of Europe #3: Europe's North-South division resurfaces during Covid-crisis”, *Utrecht University*, 27 September 2020. Retrieved from: <https://www.uu.nl/en/opinion/future-of-europe-3-north-south-division>

<sup>2</sup> Bayer Lili, & Herszenhorn, David M. “EU in crisis over Hungary and Poland's €1.8T hold-up”, *Politico*, 16 November 2020. Retrieved from: <https://www.politico.eu/article/eu-in-crisis-over-hungary-poland-budget-hold-up/>

as “the European Council will strive to formulate a common position”), hence both “watering down” significantly the pre-existing measures and decreasing the gravity and applicability of the democratic mechanisms. Satisfied by these alterations, Poland and Hungary lifted their vetoes on the financial package, thus allowing the adoption of the recovery budget.<sup>3</sup> Ultimately, the settlement was celebrated by both sides: while the Hungarian and Polish leaders framed it as a victory over the “intrusive” European institutions, the EU was just happy to save face and maintain its unity.

Setting aside the positive resolution, the deal is clearly beneficial for the “rogue regimes” as it accomplished to steer the debate away from the domestic human rights violations and guarantee their share from the €1.85 trillion recovery fund. At the same time, the EU did not only prove to be helpless but also accomplished to make a deal at the expense of the Hungarian and Polish populations and its own democratic identity. Thus, this paper argues that the recent dispute and the achieved settlement is highly disappointing and an omen of similar future scenarios. To prove this, the essay seeks to answer the simple question: Why is the current European compromise problematic? On top of that, it also discusses the implications and lessons stemming from this development.

### **A development that nobody saw coming, or not?**

Over the last years, Poland and Hungary have been the object of a constant EU’s criticism. In fact, the recent refusal to back down over EU veto is just one of the several instances where the two states have either confronted Brussels or challenged European values of democracy and rule-of-law. Looking at Hungary, Viktor Orbán’s Fidesz party has been “taking apart” democratic institutions since 2010. By carefully organized steps, he has achieved to reduce both the opposition’s power (e.g., taking half of their budgets) and authorities (e.g., cutting tax income for opposition-led cities), while constantly undermining independent online media.<sup>4</sup> Moreover, Orbán took advantage of the current coronavirus pandemic to reinforce his grip through the replacement of rule by decree on 30 March 2020.<sup>5</sup> Simultaneously, the Polish Law and Justice Party (PiS) has been pushing for more power and undercutting juridical independence. The situation has plunged even more after the “disputable” elections results, the anti-LGBTQ+ policies, and the reforms in the abortion laws.<sup>6</sup> Still, the domestic pushbacks have been stronger than in Hungary, particularly after the protests concerning the new abortion legislation.

A trait that both Fidesz and PiS share is a persistent antagonistic stance and rhetoric against the EU. This does not come as a surprise considering that both sides have repeatedly clashed in the last years, and the predominant negative discourse of EU officials.<sup>7</sup> For instance, the European

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<sup>3</sup> McLaughlin, Daniel. “Cheers and jeers as Poland and Hungary lift veto on EU funds”, *The Irish Times*, 11 December 2020. Retrieved from: <https://www.irishtimes.com/news/world/europe/cheers-and-jeers-as-poland-and-hungary-lift-veto-on-eu-funds-1.4434424>

<sup>4</sup> Drajić, Marko. *Serbia and Hungary: Hammering Democracy*. Belgrade Centre for Security Policy, 2020

<sup>5</sup> Bayer, Lili. “Hungary replaces rule by decree with ‘state of medical crisis’”, *Politico*, 18 June 2020. Retrieved from: <https://www.politico.eu/article/hungary-replaces-rule-by-decree-controversial-state-of-medical-crisis/>

<sup>6</sup> Mocek, Stanisław. “‘We, the People’ in Poland: Democracy of ‘Ordinary People’ in the Statements of Politicians and Posts on Social Media.” *European Politics and Society* 1-17 (2020): 1–17

<sup>7</sup> See: Baczynska, Gabriela. “EU slams Poland, Hungary as cash-for-democracy fight heats up”, *Reuters*, 30 September 2020. Retrieved from: <https://uk.reuters.com/article/us-eu-democracy/eu-slams-poland-hungary-as-cash-for-democracy-fight-heats-up-idUSKBN26L1QZ>

Commission triggered Article 7 disciplinary procedures against Poland in 2017, while the European Parliament launched the same procedure against Hungary the next year.<sup>8</sup> On the other side, Hungary and Poland have not remained stagnant but instead developed their narrative that presents the EU as an intrusive force aiming to dilute national identities and cultures.<sup>9</sup> In regard to Orbán, he has accused the EU of using "Gestapo tactics," behaving like "a colonial empire" and trying to impose multiculturalism through the reception of 35 million migrants.<sup>10</sup> At the same time, the Polish counterparts have assumed a more moderate approach, yet hostile towards Europe and its demands.<sup>11</sup>

The rationale behind Poland and Hungary's discord with Brussels follows a two-fold approach. On the domestic level, the two governments use the EU as a "scapegoat" to differ the attention of the public from internal issues. They also seek to appeal to the conservative parts of their societies by painting an image of themselves as the real protector of European civilization and Christian values. Simultaneously, at the European level, both states have adopted a "neo-revisionist" approach towards their relationship with the European institutions, which is characterized by an interesting paradox: while they remain in the EU, they also question and try to revise the principles and practices driving its *modus operandi*.<sup>12</sup> To achieve the latter, they make threats of departure from the bloc, criticize the EU's double standards, and challenge the EU's jurisdiction over their domestic affairs. The latest confrontation over the budget poses an excellent example of this practice and rationale. By vetoing the budget, the two states attempted to reform the unfavorable rule-of-law mechanism and ensure the reception of the European funds on their terms.

### **Why is the final resolution problematic?**

To understand the negative implications of the compromise, a good place to start is by examining the text of the deal itself. As a whole, it alters in substance and intent the text of the regulation that was agreed on previously by EU institutions and induces some provisions that delay the implementation of the rule-of-law mechanism by up to two years.<sup>13</sup> Whereas this deal does not seem so "defeatist" at first, further analysis shows that it accomplishes to weaken the rule-of-law considerably in several ways.

On the one hand, the two-years period gives plenty of time for the Fidesz party to continue its endeavor of reforming Hungarian laws and constitutional provisions, which could prove to be

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<sup>8</sup> Fleming, Sam., Hopkins, Valeria. and Peel, Michael. "EU identity crisis: Poland, Hungary and the fight over Brussels' values", *The Financial Times*, 4 December 2020. Retrieved from: <https://www.ft.com/content/bfa58276-1868-4011-9891-ccd363dc68dc?shareType=nongift>

<sup>9</sup> Dunai, Marton. "Hungary, Poland dig in heels in row with EU over budget, rule of law", *Reuters*, 4 December 2020. Retrieved from: <https://www.reuters.com/article/us-eu-budget-hungary-idUSKBN28E0SJ>

<sup>10</sup> Murray, Don. "Forget Brexit — the EU is trying to put out a fire in the east", *CBC*, 10 December 2020. Retrieved from: <https://www.cbc.ca/news/world/european-union-budget-hungary-poland-1.5834287>

<sup>11</sup> Kounalaki, Xenia. "Poland and Hungary 'are being attacked,' Polish ambassador tells Kathimerini", *Ekathimerini*, 5 December 2020. Retrieved from: <https://www.ekathimerini.com/259917/article/ekathimerini/comment/poland-and-hungary-are-being-attacked--polish-ambassador-tells-kathimerini>

<sup>12</sup> Sakwa, Richard. "Russia's 1989 Plea for a New World Order Was Rejected, and So Putinism Was Born," *The Guardian*, 31 March 2014. Retrieved from: <https://www.theguardian.com/commentisfree/2017/mar/31/putinism-russia-1989-world-order-rejected>

<sup>13</sup> Bayer, Lili. "EU budget plan lets Hungary, Poland off the rule-of-law hook (for now)", *Politico*, 9 December 2020. Retrieved from: <https://www.politico.eu/article/eu-budget-plan-lets-hungary-poland-off-the-rule-of-law-hook-for-now/>

very dangerous. This freedom allows Orbán to continue creating beneficial conditions for his party (mostly, by using the recovery funding in his favor) and marginalize both opposition and press, while the EU remains passive. The same stands for Poland, where its leaders could press on with moves to “tighten control of the media and courts without fears of an immediate financial backlash”.<sup>14</sup> On the other hand, the alteration shows that the power of the EU institutions can be directly challenged without any repercussions. By accepting the deal, the Council of the EU, showed disregard towards the EU Parliament’s demands, the EU Council’s decision, and the EU Commission’s ability to interpret and act on agreed EU legislation.<sup>15</sup> This move has further validated the pre-existing criticism regarding the EU’s institutional issues and the lack of a common and shared vision among its contributors.

Besides the deal, the compromise poses a real blow to what EU treasures the most, its democratic and normative identity. Despite its mostly economic foundations, the EU has become globally a protector and forbearer of certain values, such as peace, liberty, democracy, supranational rule-of-law, human rights, social solidarity, anti-discrimination, sustainable development, and good governance.<sup>16</sup> These norms have set the ideological base that has defined the EU’s expansion, *modus operandi*, and its distinctive normative identity.<sup>17</sup> In fact, most of the principles are legally binding and have been repeatedly stressed in its official discourse.<sup>18</sup> Within this context, Hungary and Poland’s behavior go against the EU’s normative identity, while challenging directly the vision and foundations of the European undertaking. At the same time, with the toleration of their behavior, the EU contradicts not only the normative elements that make it unique but also the rationale behind its existence. This antithesis creates a disruption in the EU’s image and discourse that can be utilized by other actors to undermine its policies and diplomacy (e.g., the rhetoric of double standards by China and Russia regarding their domestic human rights violations).

The EU also lost a chance to make a stand against Hungary and Poland. The compromise adds to the series of EU’s failures to tackle the human rights violations of its “rogue regimes” as the European Courts of Justice decisions against Poland and Hungary of the last years have had limited impact.<sup>19</sup> Instead of taking the easy road, the EU could have shown a united front like in the case of David Cameron’s veto in 2011, when the EU bypassed it by adopting a fiscal compact as an intergovernmental treaty. Considering that Hungary and Poland benefit greatly from the European funds, the EU could utilize them as a tool of pressure and hard power to achieve a better agreement. Furthermore, as Paul Taylor points out it could have offered more

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<sup>14</sup> Duna, Marton. and Plucinska, Joanna. “Ambiguous conditions on EU deal set to embolden Hungary and Poland”. *Reuters*, 21 July 2020. Retrieved from: <https://www.reuters.com/article/eu-summit-easteurope-rule-of-law/analysis-ambiguous-conditions-on-eu-deal-set-to-embolden-hungary-and-poland-idUKL5N2ER3QB>

<sup>15</sup> Soros, George. “The costs of Merkel’s surrender to Hungarian and Polish extortion”, *European Council on Foreign Relations*, 11 December 2020. Retrieved from: <https://ecfr.eu/article/the-costs-of-merkels-surrender-to-hungarian-and-polish-extortion/?fbclid=IwAR2CEwGWEo2UP1ANlJK5A39JrNxAl6nsfOl-s8BHEPDyYkBXoNi31CLKGKo>

<sup>16</sup> Manners, Ian. “Normative Power Europe a Contradiction in Terms?”, *Journal of common market studies*, Vol. 40, No. 2 (2002): 240.

<sup>17</sup> *Ibid.*, 239.

<sup>18</sup> Dunne, T. (2008) "Good Citizen Europe." *International Affairs. Royal Institute of International Affairs* 1944-. 84, no. 1 (2008): 22

<sup>19</sup> Fleming, *EU identity crisis*

reassurances regarding the neutrality and proportionality of the rule-of-law mechanism to keep it on the discussion table.<sup>20</sup>

Finally, the compromise sets not only a bad example for future similar scenarios but also dents the trust in the EU's capabilities. The current narrative of Budapest and Warsaw, which frame the settlement as a victory against the oppressive and intrusive tactics of the EU is especially dangerous: while it strengthens the image of Hungarian and Polish leaders in their countries, it also promotes a culture of Euroscepticism all over Europe. For instance, as Bulgaria and Romania are also facing problems with the European rule-of-law mechanism, the settlement could encourage them to follow similar policies. Putting it simply, the EU's loss created a "gap" in its image, which other insurgent elements can utilize in the future.

## **Conclusion**

The European surrender to Hungarian and Polish extortion has been extremely problematic. While the EU "saved face" and kept its unity intact and the budget running, it has achieved a compromise at the expense of the Hungarian and Polish population and its own normative identity. The delay in the implementation of rule-of-law conditionality by up to two years is highly dangerous as it gives the two nationalist regimes plenty of time to continue their human right violations and undemocratic internal reforms. Apart from that, the EU did not utilize the dispute to send a message to other problematic states and prevent eventual similar scenarios. Especially in the case of Hungary and Poland that are big beneficiaries from EU funds, the EU could have used plenty of instruments and tools to achieve a better result. Instead, it took the easy way out, a decision that contradicts both its normative identity and "causa". This discrepancy in its democratic image could be utilized by other member states and international actors to either challenge its course of action or achieve another compromise. Still, the settlement offers insights and lessons for the EU that might come useful to prevent similar future errors. In this case, if the EU had looked in its past, it could realize that retreating to rogue regimes have never worked but instead created long-term and costly consequences.

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<sup>20</sup> Taylor, Paul. "How Europe can bypass Poland and Hungary's vetoes", *Politico*, 2 December 2020. Retrieved from: <https://www.politico.eu/article/how-europe-can-bypass-poland-and-hungarys-vetoes/>