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China, Russia and NATO: The Dragon and the Bear Challenging NATO?

Conceptualizing the Role of NATO: between past and present



**NATO**  
*in* **focus**

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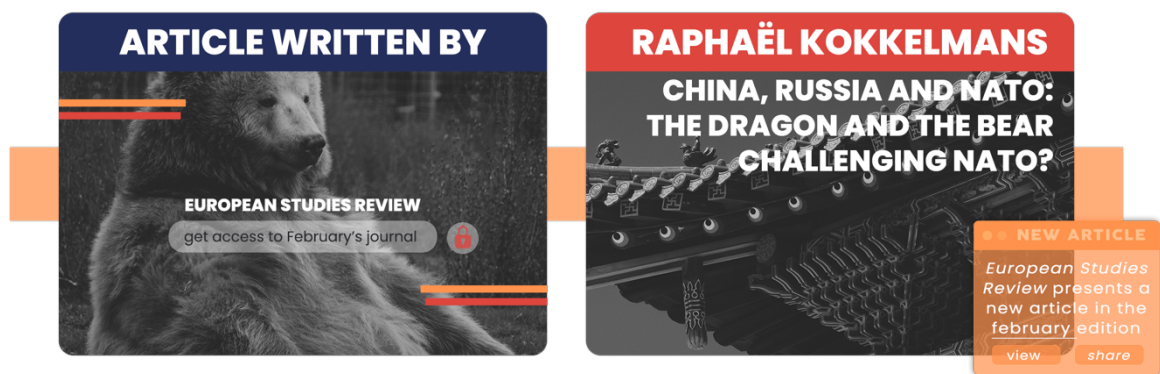
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For a long time, Russia has been at the centre of NATO's attention. However, another great power is increasingly catching the eye: China. While NATO was looking to the country of the Tsars, China was able to quietly grow under the radar as a new concern for NATO. That changed with the 2019 London Declaration, when the Alliance first acknowledged the challenges posed by China's growing influence and policies for the Alliance.<sup>1</sup>

The growing confrontation between the United States and China, the American pivot to the Indo-Pacific region, and the subsequent AUKUS military alliance are indicators of this shift.<sup>2</sup> The 2019 Strategic Outlook also marked a milestone when the cautious EU described China as a systemic rival.<sup>3</sup> Some even speak of an American "otanization" of the Chinese question within the transatlantic Alliance.<sup>4</sup> Nevertheless, recent events in the European neighborhood remind us that Russia is not likely to disappear from NATO's radar.

Beyond the discussion of who poses the greatest threat to NATO, this article suggests that it is necessary to go beyond the analysis of China and Russia as potential stand-alone threats by asking whether and how these two countries can also pose a challenge to transatlantic security. NATO Secretary General Jens Stoltenberg declared in 2020, that China and Russia "*are two very different challenges for NATO*"<sup>5</sup> but is it truly the case? While they undoubtedly represent different threats, can they also pose common challenges? For instance, what about the Chinese support for the Russian push "*to get Western security guarantees precluding NATO's eastward expansion*"<sup>6</sup> at the Ukrainian border in 2021? More broadly, what about their growing military cooperation?

<sup>1</sup> "London Declaration." NATO, December 4, 2019, accessed December 28, 2021, [https://www.nato.int/cps/en/natohq/official\\_texts\\_171584.htm](https://www.nato.int/cps/en/natohq/official_texts_171584.htm).

<sup>2</sup> Alexandra de Hoop Scheffer and Martin Quencez, "Comment la compétition États-Unis/Chine redéfinit la relation transatlantique [How the US-China competition is redefining the transatlantic relationship]." *Revue Défense Nationale* 845, no. 10 (2021): 69, <https://doi.org/10.3917/rdna.845.0069>.

<sup>3</sup> Janka Oertel, "US-China confrontation and repercussions for the EU" *European Council on Foreign Relations*, March 25, 2021, accessed December 28, 2021, <https://ecfr.eu/article/us-china-systemic-rivalry-repercussions-for-the-eu/>.

<sup>4</sup> de Hoop Scheffer and Quencez, *op. cit.*, 70.

<sup>5</sup> Natasha Turak, "NATO chief sees no 'imminent threat' against allies in face of China, Russia tensions" *CNBC*, June 28, 2020, accessed December 28, 2021, <https://www.cnn.com/2020/06/18/no-imminent-threat-against-nato-allies-stoltenberg-on-russia-china.html>.

<sup>6</sup> Dasha Litvinova, "Kremlin: Xi supports Putin's pursuit of guarantees from West" *Associated Press*, December 15, 2021, accessed December 28, 2021, <https://apnews.com/article/europe-russia-china-ukraine-xi-jinping-63dc1765177fd2fb2a94ade690d32c27>.

At the military level, both countries are still far from an alliance. Admittedly, Russian President Vladimir Putin surprisingly announced in 2020 that a future alliance could not be excluded, but this constitutes to date more of an announcement effect, especially since this would contradict China's principle of non-alignment.<sup>7</sup> The increasing military cooperation is nevertheless a reality.

In this article, three areas of Sino-Russian military cooperation will be discussed in order to assess the extent to which the two countries together can pose a challenge for NATO. These are political agreements enabling military cooperation, joint military exercises and arms trade. Finally, some concluding remarks are made.

### Political agreements

Several agreements have been signed since the end of the Cold War between the two countries, even though the last decade has marked a peak for Sino-Russian cooperation. In 2021 alone, the twenty-year-old *Treaty of Good-Neighborliness and Friendly Cooperation* was renewed for five years and a roadmap for closer military cooperation was adopted, which includes an increase in joint exercises and a plan for military cooperation for 2021-2025.<sup>8</sup> In the area of defense, the Treaty's peculiarity lies in the fact that it provides that the two parties will not develop policies or alliances that undermine each other's interests (Article 8), as well as that they will consult each other when a state faces a threat of aggression in order to eliminate that threat (article 9).<sup>9</sup> It is surprising to find these articles in the Treaty of Friendship as such types of clauses are "*typically associated with alliances*"<sup>10</sup>, although both parties have clearly stated that the Treaty cannot be regarded as an alliance. Although it is difficult to estimate the application of these articles in practice, the Treaty goes quite far on paper.

The above elements show that the political context is favorable for increased Sino-Russian cooperation in military matters as high-level documents and pluriannual plans are developed. Such documents could well include actions that are, even indirectly, aimed at NATO or the West. The development of political agreements as such does not necessarily pose a threat to the transatlantic alliance, but their implementation could.

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<sup>7</sup> Vladimir Isachenkovo, "Putin: Russia-China military alliance can't be ruled out" *Associated Press*, October 22, 2020, accessed December 28, 2021, <https://apnews.com/article/beijing-moscow-foreign-policy-russia-vladimir-putin-1d4b112d2fe8cb66192c5225f4d614c4>

Una Aleksandra Bērziņa-Čerenkov, "The People's Republic of China and the Russian Federation as Strategic Allies" Riga: NATO Strategic Communications Centre of Excellence, 2020, <https://www.stratcomcoe.org/peoples-republic-china-and-russian-federation-strategic-allies>.

<sup>8</sup> Vladimir Isachenkovo, "Russia, China sign roadmap for closer military cooperation" *Associated Press*, November 23, 2021, accessed January 3, 2021, <https://apnews.com/article/europe-russia-china-moscow-sergei-shoigu-0363dd9e12e6285d36ac5c82413bbbf1>.

<sup>9</sup> "Treaty of Good-Neighborliness and Friendly Cooperation Between the People's Republic of China and the Russian Federation" Ministry of Foreign Affairs of the People's Republic of China, July 24, 2021, accessed January 3, 2022, [https://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/zzjg\\_663340/dozys\\_664276/gjlb\\_664280/3220\\_664352/3221\\_664354/200107/t20010724\\_557285.html](https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/dozys_664276/gjlb_664280/3220_664352/3221_664354/200107/t20010724_557285.html).

<sup>10</sup> David Shambaugh, *China Goes Global: The Partial Power*. (Oxford: Oxford University Press, 2013: 65.

## Increasing joint military exercises

Joint military exercises have unprecedentedly increased in the Sino-Russian neighborhood, be it bilaterally or multilaterally.<sup>11</sup> Bilaterally, the two countries have been conducting exercises since 2005, such as the *Sibu 2021* operations that included more than 10,000 troops.<sup>12</sup> It notably had the aim to “*demonstrate the firm determination and strength of the two countries to jointly safeguard international and regional security and stability*”<sup>13</sup>. Moreover, it had the peculiarity of allowing Russian troops to handle Chinese weapons for the first time.<sup>14</sup>

Multilaterally, both have participated in activities based on invitations or regional organizations. The Russian operation *Vostok 2018* is illustrative as it gathered more than 300,000 Russian and 3,000 Chinese soldiers, and even featured the participation of observers from NATO member state Turkey, despite complaints from transatlantic officials.<sup>15</sup> Some analysts argue that the goal of the exercise was to send a signal to NATO but also to divide the Alliance thanks to the Turkish involvement.<sup>16</sup> Moreover, both countries play a central role in the activities of the Shanghai Cooperation Organization (SCO). Created in 2001, its membership includes China, Russia, India, Pakistan, Kyrgyzstan, Kazakhstan, Tajikistan, and Uzbekistan, and was primarily intended for military cooperation, even if the mandate has been expanded since.<sup>17</sup> Although it is not a competing military alliance for NATO, the organization has been coordinating annually joint military operations since 2002, with Russia and China being at the center of them.<sup>18</sup>

Sino-Russian military exercises are therefore on the rise and may pose a challenge to NATO, either directly (e.g. dividing NATO by inviting Turkey to several joint exercises and its incorporation in the SCO as a dialogue partner, or operating near Japan and South Korea, two key *partners across the globe* of NATO<sup>19</sup>) or indirectly (e.g. strengthening their ability for joint action). Nevertheless, the fact that Russia has generally been more active in inviting its counterpart rather than the other way around and the fact that SCO operations are limited by China's reluctance to cooperate with the

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<sup>11</sup> John Watts, Sofia Ledberg and Kjell Engelbrekt, “Brothers in Arms, Yet Again? Twenty-First Century Sino-Russian Strategic Collaboration in the Realm of Defence and Security.” *Defence Studies* 16, no. 4 (2016): 429, <https://doi.org/10.1080/14702436.2016.1238747>.

<sup>12</sup> Tom Balmforth and Maria Kiselyova. “Russia, China hold large-scale joint military drills” *Reuters*, August 10, 2021, accessed January 4, 2022, <https://www.reuters.com/world/russia-china-hold-large-scale-joint-military-drills-2021-08-10/>.

<sup>13</sup> “China and Russia hold large-scale joint military drills” *Al Jazeera*, August 10, 2021, accessed January 4, 2021, <https://www.aljazeera.com/news/2021/8/10/china-and-russia-hold-large-scale-joint-military-drills>.

<sup>14</sup> *Ibid.*

<sup>15</sup> Jan van der Made, “Russia war games aim to split Nato, court China” *Radio France Internationale*, September 10, 2018, accessed January 4, 2022, <https://www.rfi.fr/en/20180910-russia-war-games-aimed-splitting-nato>.

Uğur Ergun, “Turkey deploys observers to giant Russian-Chinese military exercise Vostok” *Hürriyet Daily News*, September 12, 2018, accessed January 4, 2022, <https://www.hurriyetdailynews.com/turkey-deploys-observers-to-giant-russian-chinese-military-exercise-136729>.

<sup>16</sup> van der Made, *op. cit.*

<sup>17</sup> “The Shanghai Cooperation Organisation” Shanghai Cooperation Organisation, n.d., accessed 4 January 2022, [http://eng.sectsco.org/about\\_sco/20170109/190857.html](http://eng.sectsco.org/about_sco/20170109/190857.html).

<sup>18</sup> Marc Lanteigne, “Russia, China and the Shanghai Cooperation Organization: Diverging Security Interests and the ‘Crimea Effect’” in *Russia’s Turn to the East: Domestic Policymaking and Regional Cooperation*, ed. Helge Blakkisrud and Elana Wilson Rowe (Cham: Palgrave Pivot, 2018), 124-128.

<sup>19</sup> “Relations with partners across the globe” NATO, August 25, 2021, accessed January 4, 2021, [https://www.nato.int/cps/en/natohq/topics\\_49188.htm](https://www.nato.int/cps/en/natohq/topics_49188.htm).  
Lanteigne, *op. cit.*, 127.



Collective Security Treaty Organization<sup>20</sup>, despite Russia's insistence, mitigates this common challenge. Military integration remains at a very low level.

### **Increasing arms trade**

Arms trade is a very sensitive area of cooperation and, to a certain extent, an indicator of trust between countries. Just because China and Russia have certain shared interests, including the containment of the United States and the West, does not mean they do not remain competitors. The increase in arms trade, and even more so in advanced systems, is an indicator of a Sino-Russian rapprochement, as both states would have in theory an interest in maintaining their technological advantages.<sup>21</sup>

China was Russia's largest client between 1999 and 2006 (34-60% of Russia's exports) but has evolved since then as a manufacturing country itself.<sup>22</sup> Indeed, Chinese President Xi Jinping aims to modernize the Chinese army so as to become "world class" by 2049.<sup>23</sup> In this mindset, 2015 marked a turning point when Russia agreed to sell Sukhoi 35 (Su-35) combat aircraft and S-400 SAM missile systems, which are among the most advanced Russian weapons.<sup>24</sup> Such goods represent a juicy market for Russia, whose arms companies' sales have been declining since 2015, while China's sales grow continuously and are now just behind the United States.<sup>25</sup> Moreover, armaments cooperation has gone so far as to include the joint development of new weapons.<sup>26</sup>

Therefore, although arms trade is not as big as in the nineties due to considerable investments in China, another level was reached with the trading of sophisticated weapons. The Alliance could therefore be confronted with two states that are becoming materially stronger and politically closer to each other as they see themselves less as competitors. The joint development of weapons also sends a strong signal. However, competition remains important to this day and the closing by the Chinese of the arms gap strongly reduces dependency from Russian weapons.

### **Conclusion**

This article did not contradict NATO Secretary General Jens Stoltenberg's statement that China and Russia are two very different challenges for the Alliance, in that they pose very different

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<sup>20</sup> The Collective Security Treaty Organization is a regional international organization and military alliance between Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russia and Tajikistan created in 1992 after the collapse of the Soviet Union.

<sup>21</sup> Watts, Ledberg and Engelbrekt, *op. cit.*, 428.

<sup>22</sup> Siemon Wezeman, "China, Russia and the shifting landscape of arms sales" *Stockholm International Peace Research Institute*, July 5, 2017, accessed 4 January 2022, <https://sipri.org/commentary/topical-background/2017/china-russia-and-shifting-landscape-arms-sales>.

<sup>23</sup> Catherine Wong, "China is estimated to be the world's second largest arms maker after US" *South China Morning Post*, January 27, 2020, accessed 4 January, 2022, <https://www.scmp.com/news/china/military/article/3047814/china-estimated-be-worlds-second-largest-arms-maker-after-us>.

<sup>24</sup> Wezeman, *op. cit.*

<sup>25</sup> "Business as usual? Arms sales of SIPRI Top 100 arms companies continue to grow amid pandemic" *Stockholm International Peace Research Institute*, December 6, 2021, January 4, 2021, <https://sipri.org/media/press-release/2021/business-usual-arms-sales-sipri-top-100-arms-companies-continue-grow-amid-pandemic>.

<sup>26</sup> Alexander Gabuev, "Neighbors, Partners, Competitors: Drivers and Limitations of China-Russia Relations" *Carnegie Moscow Center*, December 31, 2021, accessed January 4, 2021, <https://carnegiemoscow.org/commentary/86104>.

difficulties for the Alliance if taken individually. However, when they are not viewed as stand-alone threats, it is possible to see common challenges through their growing military cooperation.

The areas of cooperation discussed in this article are not exhaustive, and attention should be paid to other areas that may impact European and transatlantic security where both states are active (e.g., hybrid activities, Arctic policy, joint patrols). Nevertheless, it was shown that political agreements have been made to foster and consolidate military cooperation and that this cooperation was indeed happening notably through increasing joint bilateral and multilateral exercises and the sale of advanced weapons. Hence, it is needed to map Sino-Russian cooperation, as it could reshuffle the cards in some areas where NATO, its member states, or NATO's partner states are active. Besides, Russian and Chinese joint operations increase the likelihood of contact with NATO members and the potential risk of confrontation. The strengthening of the respective and aggregate capabilities of two rivals of the transatlantic Alliance also constitutes a direct challenge for NATO.

Nevertheless, while the potential does exist, it should not be overestimated as many obstacles to Sino-Russian cooperation remain and mitigate the common challenges for NATO: asymmetry between the two countries, competition for influence in their region, border disputes, cultural differences, lack of trust, Chinese economic interests in the EU, etc. Considering the widening gap between the two states, one can wonder if their cooperation is sustainable.

Furthermore, it is important to keep in mind that some of the main drivers for Sino-Russian cooperation are the actions of third-party actors such as NATO, the United States, or the European Union themselves. Many analysts argue that the opposition to the United States and its perceived aggressive policies was a key point of rapprochement between the Bear and the Dragon. This is perhaps something that the Europeans should keep in mind when discussing strategic autonomy and the relationship they want to have with China and Russia.



We frequently hear about NATO in this period of time. The Atlantic Alliance remains one of the most influential players in the international arena, even though the new global environment has radically transformed its role. NATO is a political and military alliance that seeks to guarantee the freedom and security of its members. Yet, it is a *sui generis* alliance. The purpose of this article is to highlight its exceptional character, while presenting its history and present.

### What are alliances?

Alliances have always been a constant phenomenon throughout history and as a matter of fact “*it is impossible to speak of international relations without referring to alliances*”<sup>1</sup>. Even if it is inevitably their ultimate goal, victory seems to constitute a critical juncture for every alliance. History is full of this evidence, just think of the Peloponnesian War between Greek city-states of Athens and the winner Sparta or “the allies” of World War II: no one has come through unscathed as the major backlash arrives when alliances lose their initial aim and shape. Nonetheless, some of them succeed in revitalizing themselves.

The theoretical framework behind alliances also asserts that they “*are against, and only derivatively for, someone or something*”<sup>2</sup>. Oftentimes this determined enemy is evident, in some other cases it is more hidden, yet exclusivity remains the key factor of alliances. They indeed exist because are based on a discrimination between who is in and who is out and they survive as long as this discrimination persists<sup>3</sup>.

To conclude this theoretical roundup, another point that must be considered is the fact that alliances remain a “*mutual promise to act in a specified way in a specified future*”<sup>4</sup>: the recognition of the centrality of the promise represents an intrinsic quality of every alliance. This means that alliances exist not because two or more States *act* as allies, but because they *expect* this will happen. Stressing the promise is also helpful to underline other two characteristics of alliances: the orientation towards the future and the credibility, meaning that the mutual promise must always remain credible. Therefore, allies will experience a strategic problem: that of confirming the credibility of their engagement, without encouraging others to do something for fear<sup>5</sup>.

<sup>1</sup> George Liska, *Nations in Alliance: The Limits of Interdependence*, Baltimore: Johns Hopkins Press, 1962, p. 3.

<sup>2</sup> *Ibid.*, p. 12.

<sup>3</sup> Alessandro Colombo, *La lunga alleanza: la NATO tra consolidamento, supremazia e crisi*, Franco Angeli Editore, 2001, p. 36.

<sup>4</sup> Arnold Wolfers, *Alliances*, International Encyclopedia of the Social Sciences V.1, 1968, pp.268-271.

<sup>5</sup> Alessandro Colombo, *La lunga alleanza*, p. 39-41.



### **A *sui generis* case: why does NATO still exist?**

Aware of this framework, every student of international relations wonders how and why the Atlantic Alliance can still exist in the XXI century. Its initial enemy, the Soviet Union<sup>6</sup> was defeated; its credibility has suffered some setbacks; the hegemon has appeared less inclined to shoulder the entire world's security problems; last, the Europeans have been less and less pleased about their lack of autonomy.

The Atlantic Alliance, highly institutionalized through the North Atlantic Treaty Organization (NATO) is an alliance of countries from Europe and North America. It provides a unique link between these two continents, enabling them to consult and cooperate in the field of defense and security, and conduct multinational crisis-management operations together. It continues to be a *sui generis* alliance, that can be described as a wheel, where the United States are at the center and all the other members at the margins<sup>7</sup>. The Atlantic Alliance represents thus a typical sample of an “*unequal alliance*”, in the sense that allies do not promise each other the same thing. The strongest ally provides security, while everyone else renounces some prerogatives. In other words, the strongest command, the weaker obey. This also means that an unequal alliance never ceases to be a mechanism of foreign policy of the strongest. This is true for the Atlantic Alliance as well, which is still an instrument of the United States.

Different factors explain why NATO has survived even after it reached its initial purpose to “*keep the Soviet Union out, the Americans in, and the Germans down*”<sup>8</sup>. The first is that it was able to undergo a series of new political and military adaptations, witness in this time the NATO2030 process<sup>9</sup>, a forward-looking reflection process to strengthen it. Over time, the Alliance had to adapt to a new international system and a new form of it; had to experience both internal and external adaptations. But it did in the right way.

Second, scholars emphasize the existence of common interests between States. Briefly, after the collapse of the Warsaw Pact, NATO has survived due to its ability to prevent a conflict in Europe: when referring to this common interest, the Atlantic Alliance was still able to provide what it provided in the past, as put in the Strategic Concept 1999<sup>10</sup>. Additionally, the Alliance was the only possibility towards an undivided security of Europeans<sup>11</sup>.

As a consequence, another reason which explains why NATO still exists is the lack of alternatives. No one is capable of providing security as reliable as NATO, not even when Europeans try to deviate from them. Its efficiency also explains what it is called an “*institutional inertia*”: the allies are now used to live with it, almost automatically<sup>12</sup>.

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<sup>6</sup> However, the Soviet Union is never mentioned in the North Atlantic Treaty.

<sup>7</sup> Arnold Wolfers, *Alliances*.

<sup>8</sup> Lord Hastings Lionel Ismay, NATO's first Secretary General.

<sup>9</sup> Thierry Tardy, *For a New NATO-EU*, Egmont Royal Institute for International Relations in Security Policy Briefs, 2021. <https://www.egmontinstitute.be/for-a-new-nato-eu-bargain/>.

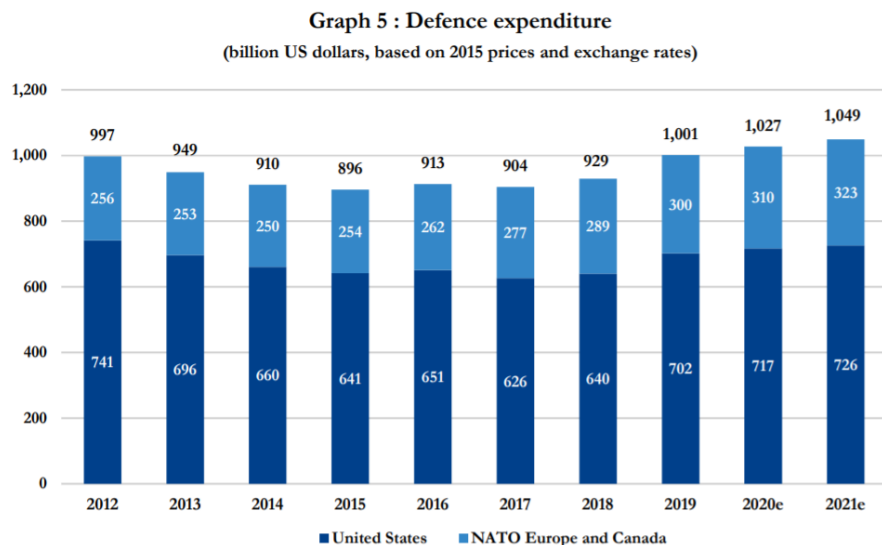
<sup>10</sup> NATO, The Alliance's Strategic Concept Approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C., 24 April 1999, point 3. [https://www.nato.int/cps/en/natohq/official\\_texts\\_27433.htm](https://www.nato.int/cps/en/natohq/official_texts_27433.htm).

<sup>11</sup> Alessandro Colombo, *La lunga alleanza*.

<sup>12</sup> Ibid.

The Atlantic Alliance is furthermore an international source of legitimacy: its partnership provides with the status of “*democratic country*” those who obtain it. This link between democracy and NATO produces also few incentives to leave<sup>13</sup>.

Last, the ultimate reason relies on the fact that the United States still dominates the international order. Militarily, the U.S. armed forces are unequal, and the NATO military expenditure is further evidence. The only difference with the bipolarity era is that the United States are not obliged to play every game anymore: they can decide which and how dedicate themselves to each one of them<sup>14</sup>.



Notes: Figures for 2020 and 2021 are estimates. The NATO Europe and Canada aggregate from 2017 onwards includes Montenegro, which became an Ally on 5 June 2017, and from 2020 onwards includes North Macedonia, which became an Ally on 27 March 2020.

[Graphic 1: Defence expenditure in billion US dollars, NATO Press Release “Defence Expenditure of NATO Countries (2014-2021)”, 11 June 2021]<sup>15</sup>

### NATO’s Eastern flank and Russia’s security dilemma.

Despite the reasons above mentioned, the end of the Cold War represented a hard moment for clarifying the role of the Alliance. In order to survive beyond the victory, NATO was forced to change, to adapt its military instruments and to challenge its space perimeter<sup>16</sup>. It happened with the enlargement to the East, prior to Balkan and then to the Baltic, up until the borders of Russia.

Since the Warsaw Summit (2016), NATO has increased its presence towards the East, placing multinational forces across the Alliance’s frontline, always with the same aim: deterring Russia through its closeness<sup>17</sup>. New strategic objectives have emerged, such as enhancing their presence

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

<sup>14</sup> *Ibid.*

<sup>15</sup> NATO, *Defence Expenditure of NATO Countries (2014-2021)*, 11 June 2021. [https://www.nato.int/nato\\_static\\_fl2014/assets/pdf/2021/6/pdf/210611-pr-2021-094-en.pdf](https://www.nato.int/nato_static_fl2014/assets/pdf/2021/6/pdf/210611-pr-2021-094-en.pdf).

<sup>16</sup> Alessandro Colombo, *La lunga alleanza*.

<sup>17</sup> NATO, Brussels Summit Communiqué Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels 14 June 2021, 14 July 2021. [https://www.nato.int/cps/en/natohq/news\\_185000.htm](https://www.nato.int/cps/en/natohq/news_185000.htm).

and reassuring countries on NATO's eastern flank<sup>18</sup>. Ukraine is not part of it, yet NATO needs to boost that border. The United States has done it with several military exercises and rotated service members throughout the region, especially after the annexation of Crimea.



[Fig 2: NATO Enhanced Forward Presence, Source: NATO  
“Boosting NATO’s presence in the east and southeast”, 7 January 2022]<sup>19</sup>

If we suppose States are rational actors, it is inevitable for Russia to consider a further enlargement of NATO a mortal threat, according to the security dilemma formulated by R. Jervis. Despite several assurances about the defensive character of the Alliance, Russia has recently massed tens of thousands of soldiers and troops on the Ukrainian borders<sup>20</sup>. The long-looming prospect of an attack against Ukraine has resorted to new bilateral consultations between Russia and the United States, including through a summons of NATO-Russia Council<sup>21</sup>.

The complexity of the issue requires long-term strategic solutions, but in the meanwhile Russian soldiers and arms are threatening Ukrainian borders and the United States, from their part, are transferring military equipment to Kyiv, even though for defensive use<sup>22</sup>. What is clear is that President Joe Biden and President Vladimir Putin’s positions are not highly compatible.

<sup>18</sup> NATO, *Boosting NATO’s presence in the east and southeast*, 7 January 2022. [https://www.nato.int/cps/en/natohq/topics\\_136388.htm?utm\\_source=twitter&utm\\_medium=smc&utm\\_id=220121%2Befp](https://www.nato.int/cps/en/natohq/topics_136388.htm?utm_source=twitter&utm_medium=smc&utm_id=220121%2Befp).

<sup>19</sup> *Ibid.*

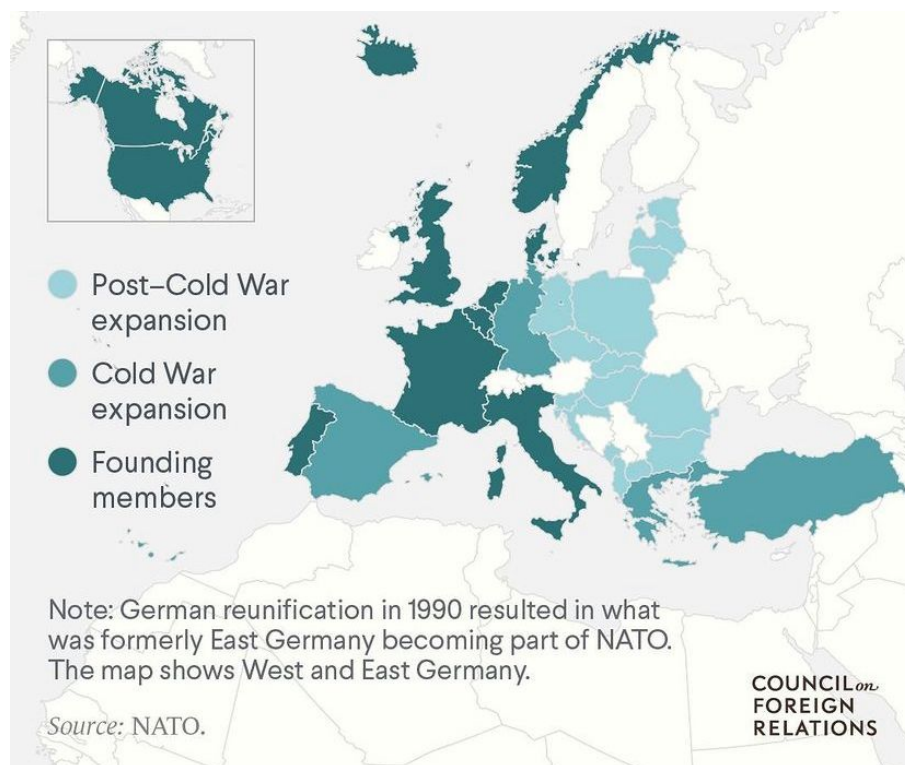
<sup>20</sup> Michael Schwirtz, Scott Reinhard and Josh Holder, *How Russia Has Increased Its Military Buildup Around Ukraine*, The New York Times, 27 January 2022. <https://www.nytimes.com/interactive/2022/01/27/world/europe/russia-forces.html>.

<sup>21</sup> The NATO-Russia Council (NRC), was established at the NATO-Russia Summit in Rome on 28 May 2002; It is a mechanism for consultation, consensus-building, cooperation, joint decision and joint action, in which the individual NATO member states and Russia work as equal partners on a wide spectrum of security issues of common interest. <https://www.nato.int/nrc-website/en/about/index.html>

<sup>22</sup> Aljazeera, *First US troops arrive in Romania amid Ukraine-Russia tensions*, 8 February 2022. <https://www.aljazeera.com/news/2022/2/8/first-us-troops-arrive-in-romania-amid-ukraine-russia-tensions>.

What Putin requires is the recognition of some “buffer zone” that will avoid the encirclement of Russia. In this effort, it is crucial that Ukraine remains out of NATO<sup>23</sup>. Nonetheless, this is something not imminent, so that troops and soldiers at its borders have different aims, then explicated in two draft documents<sup>24</sup>: the permanent ban on new enlargements of NATO; the withdrawal of allied armed forces from countries that joined NATO after 1997; a Western commitment to not place them in other neighboring countries for military exercises.

On its side, the U.S. wants to maintain the “open door policy” towards those who desire to establish a dialogue with NATO<sup>25</sup>. This is more a question of principle: no one is seriously thinking of admitting Ukraine to the Alliance now, but self-determination must always be protected.



[Fig 3: NATO's Expanding Membership, Source: Council on Foreign Relations "Why NATO Has Become a Flash Point With Russia in Ukraine", January 2022]<sup>26</sup>

<sup>23</sup> Andrey Kortunov, *Is There a Way Out of the Russia-NATO Talks Impasse?*, Carnegie.ru, 25 January 2022. <https://carnegiemoscow.org/commentary/86250>.

<sup>24</sup> The Ministry of Foreign Affairs of the Russian Federation, *Draft documents on legal security guarantees from the United States and NATO*, 17 December 2021. [https://www.mid.ru/ru/foreign\\_policy/news/1790809/?lang=en](https://www.mid.ru/ru/foreign_policy/news/1790809/?lang=en).

<sup>25</sup> Denis Balibouse, *In Talks on Ukraine, U.S. and Russia Deadlock Over NATO Expansion*, The New York Times, 10 January 2022. <https://www.nytimes.com/2022/01/10/world/europe/russia-us-ukraine-talks.html>.

<sup>26</sup> Jonathan Masters, *Why NATO Has Become a Flash Point With Russia in Ukraine*, in Council on Foreign Relations, 20 January 2020. [https://www.cfr.org/background/why-nato-has-become-flash-point-russia-ukraine?utm\\_source=ig&utm\\_medium=social\\_owned&utm\\_campaign=later-linkinbio-cfr\\_org&utm\\_content=later-23992498](https://www.cfr.org/background/why-nato-has-become-flash-point-russia-ukraine?utm_source=ig&utm_medium=social_owned&utm_campaign=later-linkinbio-cfr_org&utm_content=later-23992498).

## Will the European Union remain just a spectator?

It may be believed that an enlargement of the European Union to the East, and not that of NATO, represents a graver danger for Putin's Russia<sup>27</sup>. The EU-Ukraine Association agreement seems indeed more credible than the promise made by NATO allies in 2008, and a more concrete proof of Ukraine's detachment from Russia's orbit.

However, when it comes to the crisis between Russia and Ukraine, the European Union is just a spectator. The lead role is being played again in Washington. Clearly, the EU is not a military actor, even if it is inspired to be so. Yet, such a core issue related to European security cannot be solved through these passive behaviors.

Joe Biden has repeatedly reassured all the partners that he is acting according to the principle of *"nothing about you without you"*<sup>28</sup>. But Josep Borrell, the High Representative of the European Union, has insisted that *"in this dialogue there are not two actors alone, not just the U.S. and Russia. If we want to talk about security in Europe, Europeans must be part of the table"*<sup>29</sup>.

Structural weaknesses of the EU's common foreign and security policy are evident; moreover, the EU cannot speak with one single voice when it comes to defense issues. Nonetheless, it is up to Member States and European institutions to compensate for it with awareness and determination as their security is at stake.

Europeans may yet be unable to manage their security alone, but this doesn't necessarily mean they can let others decide in their place<sup>30</sup>. In this context, it would be desirable for the European Union to take the next step, putting to rest the accusations of being just a passive spectator.

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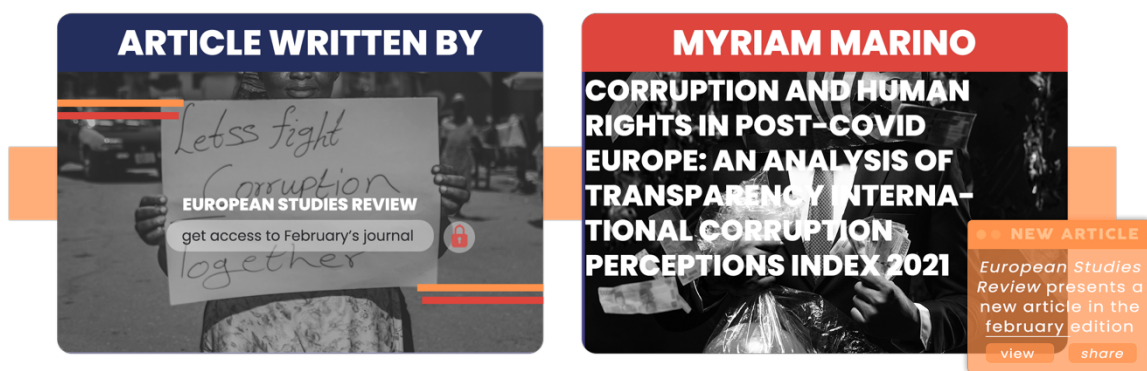
<sup>27</sup> Bruno Tertrais, *Of Ultimatums and Ukraine - And Why NATO Enlargement Is Not the Problem*, Institut Montaigne, 7 January 2022. <https://www.institutmontaigne.org/en/blog/ultimatums-and-ukraine-and-why-nato-enlargement-not-problem>.

<sup>28</sup> The White House, *Statement by Press Secretary Jen Psaki on President Biden's Call with President Volodymyr Zelenskyy of Ukraine*, Statements and releases, 2 January 2022. <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/02/statement-by-press-secretary-jen-psaki-on-president-bidens-call-with-president-volodymyr-zelenskyy-of-ukraine/>.

<sup>29</sup> Jacopo Barigazzi, *EU's Borrell: Europe cannot be left out of Russia, US talks*, Politico, 5 January 2022. <https://www.politico.eu/article/eu-josep-borrell-ukraine-us-russia-china-talks-border-troops/>.

<sup>30</sup> Nathalie Tocci, *Europe is missing in action on Ukraine — it doesn't have to be*, Politico, 11 January 2022. <https://www.politico.eu/article/europe-ukraine-us-russia-diplomacy-normandy-format/>.





## Introduction

The yearly-released Corruption Perceptions Index<sup>1</sup> elaborated by the international non-governmental organization (NGO) Transparency International seeks to emphasize the strict and indivisible link between transparency and human rights. Nowadays, this is particularly the case, since a number of negative socio-political effects derived from the COVID-19 pandemic are still impacting our societies.

The present article aims to take the 2021 Corruption Perceptions Index as a starting point to investigate the relations between corruption and human rights, and to compare levels of perceived corruption in Central Europe, Western Europe and Central-Eastern Europe, on the one hand, and Eastern-Europe and Central Asia, on the other.

## Transparency and human rights

Transparency acts as a precondition for human rights to be respected, fulfilled and safeguarded. Without effective transparency in the public sector, governments are unable to guarantee the protection and defence of fundamental rights to their populations. Simultaneously, a lack of state transparency results in violation and disrespect of citizens' human rights by the state itself, since it fails to promote and fulfill them. As a consequence, corruption practices, freely emerging in non-transparent public sectors, strongly threaten people's ability to exercise human rights and benefit from them. Thus, transparency, corruption and human rights appear to be strictly interlinked. Government transparency, accountability and a corruption-free environment are essential prerequisites for fundamental rights such as freedom of expression, freedom of information, freedom of assembly and freedom of association to function. For this reason, the relationship between corruption and human rights is oftentimes referred to as a vicious cycle, where corrupt practices lead to decreased transparency and, in some cases, to further authoritarian developments. This, in turn, results in the citizens' inability to enjoy fundamental rights and consequent impossibility for civil society actors to deter possible violations. It is, therefore, not surprising to notice how a decline in transparency, increased corruption and worsening democratic and rule of law standards go hand in hand.

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<sup>1</sup>Transparency International, "Corruption Perceptions Index 2021", <https://www.transparency.org/en/cpi/2021>.

## The Corruption Perceptions Index

Each year the NGO Transparency International compiles the Corruption Perceptions Index (CPI).<sup>2</sup> By elaborating data on corruption perceptions across states, the NGO accordingly establishes a yearly ranking. In order to determine a score for each specific country, the inquiry relies on a minimum of three data sources derived from thirteen surveys and assessments.<sup>3</sup> A conversion of the variety of measuring scales into a standardized rate allows to estimate an average score obtained from data retrieved from all considered sources, and ranging from 0 (perceived as highly corrupt) to 100 (perceived as very clean), for the examined countries.<sup>4</sup> The main objective is to investigate how the public sector of the 180 scrutinized countries is perceived in terms of corruption. The Index takes into account forms of corruption that include, amongst various manifestations of the phenomenon, bribery, governments' ability to fight corruption, civil society's access to public information, meritocracy and nepotism in the field of civil service appointment.<sup>5</sup> By relying only on perceptions about countries' public sector corruption, the Index does not however claim to provide the exact and true state of corruption levels in societies,<sup>6</sup> due to the impossibility to capture the whole phenomenon in its illegal expressions and shadow nuances.

### Levels of corruption in 2021

Perceived corruption levels have remained almost unchanged for the past two years, in line with a trend that has registered stagnancy in anti-corruption progress for the whole past decade. More precisely, between 2012 and 2021, 131 amongst the 179 countries considered made little or no progress in terms of the score.<sup>7</sup> For the 2021 Index, the countries under analysis registered an average rating of 43/100.<sup>8</sup>

Levels of perceived corruption in the world in 2021 display continuity with 2020. The deterioration of democratic standards that followed the introduction of restrictive measures, aimed at countering Covid-19, was reflected in the 2020 Corruption Perceptions Index. One year after, the results that emerged from the 2021 Index can be representative of an overall climate where, even when restrictions were partially or fully lifted, the implications and effects of basic rights' suspension enacted by governments are still visible within societies. Through the excuse of the pandemic, a number of governments deployed highly limiting measures - intended and expected to be in force only temporarily - for an indefinite period of time. Over the past two years, constraints to the exercise of fundamental rights have created a fertile environment for corruption to spread in the

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<sup>2</sup>Ibid.

<sup>3</sup>Transparency International, "The ABCS of the CPI: how the Corruption Perceptions Index is Calculated", December 20, 2021, <https://www.transparency.org/en/news/how-cpi-scores-are-calculated>.

<sup>4</sup>Transparency International, *Corruption Perception Index 2021*, (Berlin, 2022), 4, [https://images.transparencycdn.org/images/CPI2021\\_Report\\_EN-web.pdf](https://images.transparencycdn.org/images/CPI2021_Report_EN-web.pdf).

<sup>5</sup> Transparency International, "Corruption Methodology, Perceptions Index: Frequently Asked Questions", 2, available at <https://www.transparency.org/en/news/how-cpi-scores-are-calculated>

<sup>6</sup> Ibid.

<sup>7</sup>Transparency International, *Corruption Perception Index 2021*, (Berlin, 2022), 7, [https://images.transparencycdn.org/images/CPI2021\\_Report\\_EN-web.pdf](https://images.transparencycdn.org/images/CPI2021_Report_EN-web.pdf).

<sup>8</sup>Ibid., 4

public sector, a field that enjoyed the common and widespread neglect of transparency standards. Overall, this contributed to enhanced public distrust towards governments.

The Regional Maps of the Corruption Perceptions Index allow for a regional analysis and comparison of the phenomenon. The present study will, most precisely, focus on the Western Europe and European Union Region and on the Eastern Europe and Central Asia Region.

### **Western Europe and the European Union**

The area of Western Europe, including members of the European Union (EU), shows an average score of 66/100. The highest rate belongs to Denmark, with 88/100, while, on the other hand, the lowest score, 42/100, is attributed to Bulgaria. A difference in scores is noticeable between Central-Eastern/ South-Eastern Europe and the other areas within the region. In fact, Slovakia, Greece, Croatia, Romania, Hungary and Bulgaria represent the six lowest ranked countries in the whole geographical area. On the contrary, states belonging to Northern and Central Europe obtained higher scores<sup>9</sup>.

While presenting an overall better performance in comparison with other regional areas, Western European countries show strong signs of stagnation in terms of progress, mostly maintaining last years' rates, with extremely slight decreases and increases in score. The overall trend shows how some among the highest ranking states in the region - Finland, Norway, Switzerland, Luxembourg - generally tend to maintain or increase their ranking. On a different note, worse performances are particularly the case for a number of low-ranking countries, namely Bulgaria, Hungary, Romania, Greece, Slovakia, which present unchanged or decreased points. The highest decline registered in the region between 2020 and 2021 is visible in regards to Cyprus, Italy, Slovenia and Belgium, which dropped all by three points.<sup>10</sup> Most notably, Slovenia scored its historically low rate of 57/100. Similar to other national cases, between 2020 and 2021 the Slovenian government launched restrictions on peaceful assembly and freedom of expression under the pretext of the pandemic response.<sup>11</sup> Simultaneously, numerous threats to media freedom were registered, most notably in relation to a high number of Strategic Lawsuits Against Public Participation (SLAPPs), namely lawsuits aimed at intimidating and silencing dissenting voices, and in regards to corruption cases in the appointment of state prosecutors.<sup>12</sup>

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<sup>9</sup>Transparency International, "Corruption Perceptions Index 2021: Western Europe & European Union", available at: <https://www.transparency.org/en/cpi/2021>.

<sup>10</sup> Transparency International, "Corruption Perceptions Index 2020".<https://www.transparency.org/en/cpi/2020>

<sup>11</sup>Council of Europe, Commissioner for Human Rights, "Memorandum on Freedom of Expression and Media Freedom in Slovenia", Strasbourg, June 4, 2021, <https://rm.coe.int/memorandum-on-freedom-of-expression-and-media-freedom-in-slovenia/1680a2ae85>

<sup>12</sup> European Parliament, Press Releases, "Slovenia: MEPs Discuss Threats to Media Freedom and Democracy", November 24, 2021, <https://www.europarl.europa.eu/news/it/press-room/20211118IPR17626/slovenia-meps-discuss-threats-to-media-freedom-and-democracy>

In the Western European region, declines in scores are mostly attributable to insufficient anti-corruption policies at the national level, as well as to frequent procurement scandals.<sup>13</sup> In October 2021, the region was invested by the worldwide scandal of the Pandora Papers,<sup>14</sup> a journalistic investigation which revealed activities carried out by international figures, including politicians and public officials, exposing offshore business assets, money laundering, and tax evasion. The leaked data exposed the illegal businesses carried out by former and current political figures from the whole Continent.<sup>15</sup>

### **Eastern Europe and Central Asia**

Within the area of Eastern Europe and Central Asia, Georgia takes the highest score, namely 55/100, for the 2021 Index, whereas Turkmenistan ranks lowest with 19/100. This results in an overall average score of 36/100. Along with Turkmenistan, five other Eurasian countries received a score equal to or less than 30/100 points. These include Azerbaijan, Russia, Uzbekistan, Kyrgyzstan, Tajikistan.<sup>16</sup>

In comparison with the 2020 Corruption Perceptions Index, the highest declines in scores in the region are visible in Belarus, with a six-point drop, and Kyrgyzstan, by four points.<sup>17</sup>

Between 2020 and 2021, the Belarusian government strongly obstructed civil society's attempts to denounce abuses of power and human rights violations. International watchdogs emphasized how freedom of speech and freedom of assembly were highly restricted and hampered. This occurred through, among a relevant number of interventions, increased instances of detained, ill-treated and criminally charged protesters - particularly between November 2020 and October 2021<sup>18</sup> -, a law on mass gatherings and journalistic activity introduced in June 2021<sup>19</sup> and continuous intimidations and violence against journalists, human rights activists and civil society organizations.

As far as Kyrgyzstan is concerned, an over-extension of Covid-19 restraining initiatives mostly targeted freedom of assembly, as well as free speech and information, by obstructing independent

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<sup>13</sup>Transparency International, "CPI 2021 for Western Europe & European Union: Trouble ahead for Stagnating Region", January 25, 2022, <https://www.transparency.org/en/news/cpi-2021-western-europe-european-union-trouble-ahead-for-stagnating-region>

<sup>14</sup> International Consortium of Investigative Journalists, "Offshore Havens and Hidden Riches of World Leaders and Billionaires Exposed in Unprecedented Leak", October 3, 2021, <https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/>

<sup>15</sup> Alecci, Scilla, McGoey, Sean. "Pandora Papers Reporting from across Europe". December 21, 2021. <https://www.icij.org/investigations/pandora-papers/pandora-papers-reporting-from-across-europe/>

<sup>16</sup>Transparency International, "Corruption Perceptions Index 2021: Eastern Europe & Central Asia", available at: <https://www.transparency.org/en/cpi/2021>.

<sup>17</sup> Transparency International. "CPI 2021 for Eastern Europe & Central Asia: Democratic hopes in the Shadow of Growing Authoritarianism", January 25, 2022, <https://www.transparency.org/en/news/cpi-2021-eastern-europe-central-asia-democratic-hopes-growing-authoritarianism>

<sup>18</sup>Human Rights Watch, "Belarus. Events of 2021", <https://www.hrw.org/world-report/2022/country-chapters/belarus>

<sup>19</sup>OSCE Parliamentary Assembly, Press Releases, "OSCE PA Human Rights Leaders Raise Alarms over New Legislation on Mass Events and Media in Belarus", Copenhagen, June 4, 2021, <https://www.oscepa.org/en/news-a-media/press-releases/press-2021/osce-pa-human-rights-leaders-raise-alarms-over-new-legislation-on-mass-events-and-media-in-belarus>

media outlets' activities,<sup>20</sup> and thus increasing corruption levels and lack in transparency. Just to mention one example, in 2020, the Organized Crime and Corruption Reporting Project (OCCRP) denounced how the country demonstrated to be unaccountable in providing details on how the funds aimed at fighting Covid-19 were spent.<sup>21</sup>

On the other hand, North Macedonia displays an increase by four points, from 35/100 to a 2021 score of 39/100,<sup>22</sup> reflecting the country's commitment to improve national democratic standards by strengthening the State Commission for the Prevention of Corruption and the Prosecutor for Organised Crime and Corruption. Moreover, a National Strategy for the Prevention of Corruption and Conflict of Interest for the 2021-2025 period was adopted by the national Parliament in April 2021.<sup>23</sup>

Particularly within this regional framework, instrumentalizations of anti-Covid provisions and authoritarian moves resulted in a deterioration in the respect and protection of civil liberties. Freedom of expression and information were highly targeted and restrained by local governments, through attacks, intimidation and censoring of journalists and media workers, human rights activists, as well as opposition politicians and even ordinary citizens.

The revelations obtained through the Pegasus Project investigation represent an instance of how intensely freedom of speech was threatened and dissenting voices were silenced in the past years in the region, allowing for corrupt practices to take place undisturbed. The Project revolved around an instrument, the Israeli NSO Group's Pegasus spyware, produced for anti-criminal and anti-terroristic purposes, that allows to obtain access to any device and consequently spy the victims' activities. The investigation exposed how around 180 journalists from 20 countries could have become potential victims of the spyware between 2016 and 2021.<sup>24</sup> Moreover, among numerous figures from this regional area, particularly from the Russian Federation,<sup>25</sup> the President of Ukraine Volodymyr Zelensky was exposed, as well, in the context of the Pandora Papers investigation.<sup>26</sup>

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<sup>20</sup> International Partnership for Human Rights, "Kyrgyzstan: Briefing paper documents Covid-19 restrictions on free speech, civil society and access to justice", July 24, 2020, <https://www.iphronline.org/kyrgyzstan-briefing-paper-documents-covid-19-restrictions-on-free-speech-civil-society-and-access-to-justice.html>

<sup>21</sup> Satke, Ryskeldi, The Foreign Policy Centre, "Corruption in Kyrgyzstan healthcare blamed for disastrous response to COVID-19", March 1, 2021, <https://fpc.org.uk/corruption-in-kyrgyzstan-healthcare-blamed-for-disastrous-response-to-covid-19/>

<sup>22</sup> Transparency International, "Corruption Perceptions Index 2020". <https://www.transparency.org/en/cpi/2020>

<sup>23</sup> European Commission, Question and Answers, "Key findings of the 2021 Report on North Macedonia", Strasbourg, October 19, 2021, [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_5280](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5280)

<sup>24</sup> Amnesty International, "Massive Data Leak Reveals Israeli NSO Group's Spyware Used to Target Activists, Journalists, and Political Leaders Globally", July 18, 2021, <https://www.amnesty.org/en/latest/news/2021/07/the-pegasus-project/>

<sup>25</sup> International Consortium of Investigative Journalists, "Pandora Papers: An Offshore Data Tsunami", October 3, 2021, <https://www.icij.org/investigations/pandora-papers/about-pandora-papers-leak-dataset/>

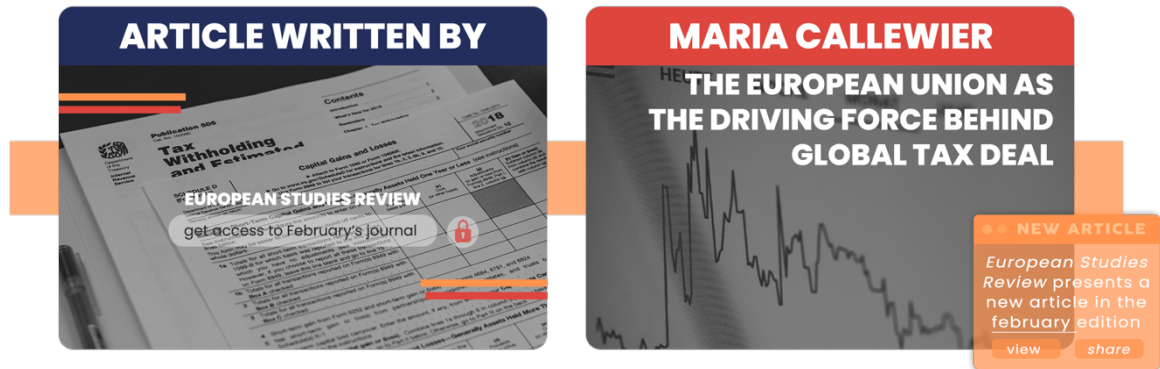
<sup>26</sup> Organized Crime and Corruption Reporting Project, "Pandora Papers Reveal Offshore Holdings of Ukrainian President and his Inner Circle", October 3, 2021, <https://www.occrp.org/en/the-pandora-papers/pandora-papers-reveal-offshore-holdings-of-ukrainian-president-and-his-inner-circle>



## **Conclusions**

Despite visible differences in terms of scores, one could say that the corruption threat has spread all over the Continent, boosted by the COVID-19 pandemic. While low-scoring countries in Central Asia suffer from a history of corruption and low accountability at the government level, even top-ranking countries were hit by pandemic-related socio-political implications, which favored an infiltration of forms of corruption. Thus, in spite of discrepancies in transparency and democratic standards, COVID-19, in a way, “allowed” world governments to neglect human rights, always at the expense of citizens. The more human rights are neglected, the more fertile the ground is for corruption to spread.

In the end, the fight against corruption goes along with the overall objective of the fight against authoritarianism and of the preservation and fulfillment of human rights. Therefore, without a strong democratic environment and rule of law standards, countries which experience high corruption rates, will be unable to recover and to establish accountable, trustworthy and transparent governance.



The start of France's European Union (EU) Presidency also signifies the start of a greater push towards implementing the rules for a global minimum corporate tax of 15%. French Finance Minister Bruno Le Maire stated that the EU had been the driving force behind the global tax reform and should be the first to adopt it. France has been a long-time proponent of a digital tax and putting a stop to the practice of enticing foreign investment through low tax rates<sup>1</sup>. Ideally, they would like to see both these reforms operationalized by 2023<sup>2</sup>. A quick win on this deal would not only improve Macron's political stature<sup>3</sup> ahead of French elections, but would also move towards his dream of the EU as a global standard setter<sup>4</sup>.

However, multiple European countries are warning that the agreed timeline is too ambitious, while the deal is being stalled in the US Senate<sup>5</sup> <sup>6</sup>. It still remains to question if the international tax overhaul will meet this deadline and also if the EU will move forward when US deliberations remain at a standstill.

### What is the Global Tax Deal?

In October 2021, over 130 countries agreed to an overhaul of international tax rules to combat the race-to-the-bottom of corporate tax rates, which incentivized companies to shift their profits to low-tax regions. Together the countries behind the accord account for over 90 percent of the global economy<sup>7</sup>. The deal consists of two pillars. The first Pillar focuses on where large companies, who

<sup>1</sup> Michael Klein, "EU Members Push Back against Fast Adoption of Minimum Tax," Cayman Compass, January 19, 2022, <https://www.caymancompass.com/2022/01/19/eu-members-push-back-against-fast-adoption-of-minimum-tax/>.

<sup>2</sup> Maïa de La Baume et al., "A Wonk's Guide to the French EU Presidency Policy Agenda," POLITICO (POLITICO, December 30, 2021), <https://www.politico.eu/article/france-eu-presidency-2022-policy-agenda-guide/>.

<sup>3</sup> William Horobin, Jorge Valero, and Christopher Condon, "Macron's Push for EU to Implement Global Tax Deal Hits Hurdles," Bloomberg.com (Bloomberg, January 17, 2022), <https://www.bloomberg.com/news/articles/2022-01-17/macron-s-push-for-eu-to-implement-global-tax-deal-hits-hurdles>.

<sup>4</sup> Eddy Wax and Barbara Moens, "Macron's Fair Trade 'Crusade' Faces Enemies Within," POLITICO (POLITICO, January 20, 2022), <https://www.politico.eu/article/emmanuel-macron-france-crusade-to-make-fairer-food-imports-trade-environment/>.

<sup>5</sup> "Macron's Push for EU to Implement Global Tax Deal Hits Hurdles," Luxembourg Times, January 17, 2022, <https://www.luxtimes.lu/en/european-union/macron-s-push-for-eu-to-implement-global-tax-deal-hits-hurdles-61e55217de135b923634d45c>.

<sup>6</sup> Laura Davison, "Treasury Prods Congress for Global Tax Accord," Treasury & Risk, January 26, 2022, <https://www.treasuryandrisk.com/2022/01/26/treasury-prods-congress-for-global-tax-accord/>.

<sup>7</sup> Alan Rappeport and Liz Alderman, "Global Deal to End Tax Havens Moves Ahead as Nations Back 15% Rate," The New York Times (The New York Times, October 8, 2021), <https://www.nytimes.com/2021/10/08/business/oecd-global-minimum-tax.html>.

meet certain criteria, pay taxes. It would allow for a partial redistribution of tax revenue from the current system where large multinationals are being taxed on their profits at their headquarters to taxing a portion of profits based on the country where they have sales<sup>8</sup>.

Pillar Two is more commonly known as the global minimum tax. This part of the deal stipulates an effective 15 percent global minimum corporate tax to firms with a revenue over 750 million euros. This is aimed at cracking down on the usage of tax havens and low-tax jurisdictions by multinational firms. There are two main rules of importance in Pillar Two, which ensure that multinationals pay an effective tax rate of 15 percent over all jurisdictions they operate in. The first is the 'income inclusion rule' (IIR) which decides when the foreign profit of a firm should be included in the taxable income of the mother company. Certain deductions to the foreign profit apply for tangible assets and payroll costs, but these will be gradually reduced over a 10-year period<sup>9</sup>. The other rule is the 'under-taxed payments rule', which is a backstop for the IIR when the jurisdiction of a parent company has an effective tax rate below 15% or if it has a less comprehensive implementation of the IIR. These rules will increase the tax burden on cross-border investments around the world<sup>10</sup>.

This deal would require governments to update their national tax rates, but would generate an 150 billion USD in additional global tax revenue per year, as is estimated by The Organization for Economic Cooperation and Development (OECD)<sup>11</sup>. Recent documents by the OECD propose a timeline of integration in domestic tax laws by 2022 and full implementation by 2023<sup>12</sup>.

### **Washington giving up the driver seat**

Although the efforts on a global minimum tax mostly stem from international organizations such as the OECD and G20, the official tax proposal by the Biden administration has inherently linked the policy to the United States in the eyes of many<sup>13</sup>. The US proposal has often been credited to be the 'breakthrough moment' in a previously deadlocked negotiation<sup>14</sup>. Throughout 2021 the Biden Administration often set the tone of the tax talks, led by the OECD. For instance, when discussion about the exact rate were still centered around 12.5 percent, the US Treasury Department proposed that 15 percent should be the floor and negotiations should be ambitious and push an even higher rate<sup>15</sup>. Moreover, Washington eagerly protected their extremely profitable

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<sup>8</sup> Daniel Bunn, "What's in the New Global Tax Agreement?," Tax Foundation, October 25, 2021, <https://taxfoundation.org/global-tax-agreement/>.

<sup>9</sup> Ibid.

<sup>10</sup> "Pillar Two: Model Global Minimum Tax Regime Revealed: Insight: Baker McKenzie," Baker McKenzie, December 23, 2021, <https://www.bakermckenzie.com/en/insight/publications/2021/12/model-global-minimum-tax-regime-revealed>.

<sup>11</sup> Alan Rappeport and Liz Alderman (The New York Times, October 8, 2021)

<sup>12</sup> George Salis, "Three Hurdles to Implementing OECD's Global Minimum Tax," BloombergLaw, January 25, 2022, <https://news.bloomberglaw.com/tax-insights-and-commentary/three-hurdles-to-implementing-oecd-global-minimum-tax>.

<sup>13</sup> Alan Rappeport and Liz Alderman (The New York Times, October 8, 2021)

<sup>14</sup> Anne-Sylvaine Chassany, "Biden's Global Tax Plan 'Breakthrough Moment', Canada's Freeland Says," Financial Times, April 28, 2021, <https://www.ft.com/content/9f2b2b9d-fd7a-4431-a826-a86567c586b4>.

<sup>15</sup> "Biden Administration Starts Negotiating a Global Minimum 15% Corporate Tax," Daily Mail Online (REUTERS, May 20, 2021), <https://www.dailymail.co.uk/news/article-9602169/Biden-administration-starts-negotiating-global-minimum-15-corporate-tax.html>.

Tech industry from being targeted by morphing the deal to include all industrial champions, not just Big Tech<sup>16</sup>.

Nevertheless, what is seen as a triumph of economic diplomacy finds its end at the hands of national politics. The international accord is part of the Build Back Better legislative package, which at the moment is stalled in the Senate. While Republicans disagreed from the start with the contents of the global deal, it is now swing vote Democratic Sen. Joe Manchin that is withholding his support. It is unlikely that the bill pass after midterm elections 2022, as Republicans are projected to retake the House<sup>17</sup>.

### **European roadblocks ahead**

In an Economic and Financial Affairs Council on January 17th, multiple EU member states expressed their concerns on key aspects of the global tax deal. French Finance minister Le Maire noted in the Council that all EU member states had agreed on the OECD tax deal and as the proposed directive to implement the agreement has been drafted as close as possible to OECD model rules, the states would have no genuine reason to object it<sup>18</sup>. Nevertheless, Estonia, Hungary and Poland protested out of concern that other countries, namely the United States, would not live up to their political commitment and leave the European Union at an economic disadvantage. They further proposed to link the two pillars as a hedge against the US<sup>19</sup>. Finance Minister of Hungary, Varga, claims that finalizing the directive in the first quarter is too ambitious and would not leave sufficient time to analyze the directive. This argument can be validated by the fact that the OECD has not finished its technical discussions on Pillar One<sup>20</sup>. Even so, their call fell on deaf ears as the pillars are legally independent from one another. However, they did muster up some support from states such as Sweden and Bulgaria for the practical hurdles linked to writing the pillars in national laws in such a short time<sup>21</sup>.

This opposition could throw a wrench in Macron's plans, as tax agreements require unanimity to be passed in the European Union. We can expect to see intensified efforts in the following two months from France to convince the skeptics<sup>22</sup>. Considering their solid track record lined with successful negotiations concerning the tax deal, such as was the case with Ireland<sup>23</sup>, it is reasonable for the Commission to still plan on moving forward as soon as possible.

### **No escaping the rules**

When it comes to the European Union the tax deal is not a question of if but rather of when. Whether the United States can make good on their political promises, is only something time will

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<sup>16</sup> Mark Scott and Emily Birnbaum, "How Washington and Big Tech Won the Global Tax Fight," POLITICO (POLITICO, July 4, 2021), <https://www.politico.eu/article/washington-big-tech-tax-talks-oecd/>.

<sup>17</sup> Laura Davison (January 26, 2022)

<sup>18</sup> Doug Connolly, "EU's Path Forward on Global Minimum Tax Is under Debate," MNE Tax, January 18, 2022, <https://mnetax.com/eus-path-forward-on-global-minimum-tax-is-under-debate-46651>.

<sup>19</sup> Bjarke Smith-Meyer, "Europe's Veto Threatens to Stall Global Tax Reform," POLITICO (POLITICO, January 18, 2022), <https://www.politico.eu/article/europes-veto-threatens-to-stall-global-tax-reform/>.

<sup>20</sup> Michael Klein (January 19, 2022)

<sup>21</sup> Bjarke Smith-Meyer (January 18, 2022),

<sup>22</sup> William Horobin, Jorge Valero, and Christopher Condon (Bloomberg, January 17, 2022)

<sup>23</sup> "France Hints That Global Corporate Tax Compromise with Ireland Is Possible," Irish Examiner (REUTERS, September 10, 2021), <https://www.irishexaminer.com/business/economy/arid-40695713.html>.

be able to tell. In essence it won't stop the EU from upholding the global minimum tax rate for multinationals. Under the 'under-taxed payments rule', foreign governments will be able to charge additional taxes if the domestic income of multinational firms is an effective tax rate below 15 percent. Say for instance a US company has operations in Germany, if through various tax incentives the US effective tax rate would be brought below the global minimum, then the domestic profits could be targeted by Germany through the rules of Pillar Two. This means that Germany would have the ability to collect tax on the US company for their share of the company's assets and employees<sup>24</sup>.

No matter what happens politically, the momentum of the Global Tax Deal signifies the start of the new era in international tax law, and era focused on a fairer global economy.

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<sup>24</sup> Daniel Bunn, "U.S. Tax Incentives Could Be Caught in the Global Minimum Tax Crossfire," Tax Foundation, January 28, 2022, <https://taxfoundation.org/us-global-minimum-tax-build-back-better/>.





### Introduction: The energy crisis

As Germany deals with the ongoing pandemic, changes in the Franco-German alliance, and continuing problems with the Nord Stream 2 pipeline, 2022 looks set to present further challenges to the country. Energy prices, which skyrocketed in 2021 amid supply shortages, affect every citizen and pose a serious problem to the German industry. Inflation on everything from food to energy, with gas being a main contributor to the soaring prices, is now “running at its highest level since the creation of the Euro”.<sup>1</sup> In anticipation of supply shortages, construction of the controversial Nord Stream 2 pipeline was completed in 2019, aiming to deliver 55 billion cubic meters of gas a year from Russia, through the Baltic Sea, into Germany.<sup>2</sup> With 25% of Germany’s existing gas supply coming from Russia,<sup>3</sup> this pipeline has been hailed by its supporters as the lifeline for German industry, which needs the gas as a substitute for coal and nuclear power. Coal is due to be phased out by 2050 in a bid to reach climate targets. As fuel and energy make the wheels of the economy turn, Merkel’s Chancellery endorsed the project, with continuity characterizing the Chancellery of Olaf Scholz, the leader of the Social Democratic Party (SPD) who assumed office on December 8<sup>th</sup>, 2021.<sup>4</sup>

At the core of German foreign policy regarding the Nord Stream 2 pipeline has been the firm (and perhaps naïve) belief that this is a mere “commercial project”.<sup>5</sup> However, as certification is delayed and Russia has increased its activity at its western border with Ukraine, as well as continuing military exercises off the coast of Ireland,<sup>6</sup> the project looks set to be embroiled in further controversy. As we begin to celebrate the year of defence, the possibility of a land war in Europe has not been ruled out. These are but a few of the challenges faced by one project for Germany this year. Germany must now see this project as part of the bigger picture of geopolitical change

<sup>1</sup> Politico. “Politicians sweat as Europe’s inflation time bomb ticks”, accessed January 26, 2022, <https://www.politico.eu/article/europe-inflation-time-bomb/>.

<sup>2</sup> Gazprom. “Nord Stream 2”, accessed January 26, 2022, <https://www.gazprom.com/projects/nord-stream2/>.

<sup>3</sup> Euractiv. “German government row over Nord Stream 2”, accessed January 26, 2022, <https://www.euractiv.com/section/energy/news/german-government-row-over-nord-stream-2/>.

<sup>4</sup> Euractiv. “New German government repeats old fallback positions on Nord Stream 2”, accessed January 26, 2022, <https://www.euractiv.com/section/energy/news/new-german-government-repeats-old-fallback-positions-on-nord-stream-2/>.

<sup>5</sup> Reuters. “German SPD official defends pro-Nord Stream 2 policy”, accessed January 26, 2022, <https://www.reuters.com/markets/commodities/german-spd-official-defends-pro-nord-stream-2-policy-2022-01-08/>.

<sup>6</sup> Politico. “Irish fisherman plan to disrupt Russian navy exercises”, accessed January 26, 2022, <https://www.politico.eu/article/irish-fishermen-plan-disrupt-russia-navy-exercise/>.

in 2022, which is not only causing ripples in the European Union (EU), but also bringing the North Atlantic Treaty Organization (NATO) and the United States (US) back into European territory as tensions rise.

### **A headache for Scholz?**

Just one aspect of the problem presented by this project is its domestic opposition within the ‘traffic-light’ coalition. While the SPD have been firm advocates of *Wandel durch Handel* (“change through trade”) with Russia, Green Party leader Anna Baerbock is vehemently opposed to the pipeline project.<sup>7</sup> As the bigger coalition partner (in comparison to the Free Democratic Party (FDP)), the opinion of the Greens matters, and as a result, this project looks set to linger like a bad headache for Scholz. Furthermore, the project still awaits passage through the Federal Network Agency and the European Union,<sup>8</sup> with delays in certification both preventing Scholz from moving forward and giving him leeway to dither as the fate of the project is left in the hands of regulators. However, markets hate uncertainty, and prices have tended to jump in the face of delays, putting Scholz in an increasingly difficult position.<sup>9</sup> With domestic opponents within his coalition, going forward with the project could polarize the new government, impeding the progress made by the SPD, which emerged victorious from the election after years of trailing behind the Conservative Christian Democratic Union (CDU). However, stalling the project, while buying Scholz time, irks the Russian president. In the age of energy shortages, where Putin could easily turn off the gas supply from Russia, this is also dangerous.

However, with the events of the last few weeks, as the US and the United Kingdom (UK) get their troops ready for a possible war,<sup>10</sup> the question remains as to whether Germany can still allow this project to go through at all. Despite a lingering sympathy among some Berlin diplomats for the Kremlin,<sup>11</sup> the possibility of a war on the eastern borders of Europe must surely show Germany that this is no longer a project taking place in a geopolitical vacuum. Promises from the Merkel chancellery that the project would be halted if Russia threatened Ukraine must now be proven to have been genuine.<sup>12</sup>

### **A geopolitical storm**

Domestic divisions are only the tip of the iceberg of the opposition this project faces. Scholz has called this a “private sector project”, a statement which has been scorned by many as blatantly

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<sup>7</sup> Euractiv. “German government row over Nord Stream 2”, accessed January 26, 2022, <https://www.euractiv.com/section/energy/news/german-government-row-over-nord-stream-2/>.

<sup>8</sup> Delfs, Arne. “Germany’s new chancellor may let red tape delay Nord Stream 2 start”, accessed January 26, 2022, <https://www.worldoil.com/news/2021/12/13/germany-s-new-chancellor-may-let-red-tape-delay-nord-stream-2-start>.

<sup>9</sup> Bloomberg. “Germany says no decision on Nord Stream 2 before July”, accessed January 26, 2022, <https://www.bloomberg.com/news/articles/2021-12-16/german-regulator-says-no-decision-on-nord-stream-2-before-july>.

<sup>10</sup> Politico. “Good work, Volodya! Putin resurrects NATO”, accessed January 26, 2022, <https://www.politico.eu/article/vladimir-putin-resurrect-nato-russia-ukraine/>.

<sup>11</sup> *Ibid.*

<sup>12</sup> Politico. “Top diplomat Borrell: EU must reduce energy dependency on Russia amid Ukraine conflict”, accessed January 26, 2022, <https://www.politico.eu/article/eu-josep-borrell-russia-ukraine-crisis-energy-security/>.

untrue, if not dangerously naïve. While fellow SPD members have called for an end to mixing up this project in debates about human rights and European security,<sup>13</sup> Germany cannot ignore the fierce opposition to this project by its American allies.

Despite Merkel signing an agreement with the US in 2019 conceding that the project would be halted if Russia attempted to use the energy supply as leverage amid rising tensions in Ukraine,<sup>14</sup> fresh controversy in the US Senate from both Republicans and Democrats leaves Biden in a precarious position. He needs Germany on his side in the fight against China, but with Germany taking a position of cooperation with Russia (possibly as a result of its history),<sup>15</sup> President Biden found himself tiptoeing around sanctions as Russian troops increased their presence at the border with Ukraine, putting pressure on the country to deter it from ever joining NATO.<sup>16</sup> Some questioned whether or not Biden was being too soft with Putin.<sup>17</sup> He maintained this stance until the events of the last few weeks, which has seen the US start preparations for war.<sup>18</sup> Germany knows it has an ally in the US, but it is also predisposed to stand up for its national interests.<sup>19</sup> Putin, who knows this too well, may not react so well to the news that the deliveries are being delayed and that the European Union may sanction the project.<sup>20</sup> Emboldened by uncertainty in Europe, he may also not look too kindly on US intervention, which may heighten tensions. Once again, foreign policy shows itself to be a game of timing.

However, the heightened tensions in the Ukraine represent a huge geopolitical challenge for Germany in selling the Nord Stream 2 project for approval. Snaking under the Baltic Sea, this pipeline will allow Russia to bypass the Ukraine in delivering supplies to European markets, effectively isolating it, while also depriving it of transit fees. As an immense producer of natural

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<sup>13</sup> Reuters. “German SPD official defends pro-Nord Stream 2 policy”, accessed January 26, 2022, <https://www.reuters.com/markets/commodities/german-spd-official-defends-pro-nord-stream-2-policy-2022-01-08/>.

<sup>14</sup> See: Euractiv. “German government row over Nord Stream 2”, accessed January 26, 2022, <https://www.euractiv.com/section/energy/news/german-government-row-over-nord-stream-2/>. See also: Wintour, Patrick. “Nord Stream 2: how Putin’s pipeline paralysed the West”, accessed January 26, 2022, <https://www.theguardian.com/world/2021/dec/23/nord-stream-2-how-putins-pipeline-paralysed-the-west>.

<sup>15</sup> It is difficult for Germany to be too harsh on Russia given its Nazi past and Russian willingness to negotiate reunification in 1989 when the Soviet Union fell.

<sup>16</sup> The Guardian. “Biden threatens Putin with personal sanctions if Russia invades Ukraine” accessed February 10, 2022, <https://www.theguardian.com/world/2022/jan/26/biden-threatens-putin-with-personal-sanctions-if-russia-invades-ukraine>.

<sup>17</sup> Bosotti, Aurora. “Joe Biden slammed after UK gives green light for Russia to ‘hold the EU hostage’”. Accessed February 10, 2022, <https://www.express.co.uk/news/world/1476432/Joe-Biden-news-Russia-Nord-Stream-2-energy-pipeline-European-Union-hostage-latest-VN>. See also: WSJ, “Biden’s gift to Putin on Nord Stream 2”, accessed February 10, 2022, <https://www.wsj.com/articles/bidens-gift-to-putin-on-nord-stream-2-11621452707>.

<sup>18</sup> Dixon, Robyn, Stern, David L., Khurshurdyan, Isabelle, Hudson, John, and Pannett, Rachel, “Russia sends troops and U.S. sends weapons as fear of war in Ukraine mounts”, accessed February 10, 2022, <https://www.washingtonpost.com/world/2022/01/25/ukraine-russia-nato-biden/>.

<sup>19</sup> Reuters. “U.S. senators say Cruz sanctions on Nord Stream 2 could harm Germany”, accessed January 26, 2022, <https://www.reuters.com/markets/commodities/us-senators-say-cruz-sanctions-nord-stream-2-could-harm-relations-with-germany-2022-01-11/>.

<sup>20</sup> Reuters. “Nord Stream 2 won’t go live in first half of 2022, German regulator warns”, accessed January 26, 2022, <https://www.reuters.com/business/energy/german-regulator-says-nord-stream-2-launch-not-expected-h1-2022-2021-12-16/>.

gas, Russia needs the markets, and Europeans need the gas, especially Germany.<sup>21</sup> However, critics have viewed the project as a gift to the Russian President,<sup>22</sup> who has been there since the start of the project, giving him the ability to hold the EU hostage, by controlling its supply when its customers threaten its national security.<sup>23</sup> Such problems completely debunk the idea that this is a small project with no negative externalities. It is not the project itself that is dividing Europe, but rather the context in which it is being devised.

### **The challenge for Europe, a challenge for Germany**

The project also poses a significant obstacle for a European Union that would prefer to speak with one voice as talks take place between Russia and the Ukraine. Germany remains an outlier in its reluctance to agree to halt the Nord Stream project once and for all. It is very difficult to come to a consensus when Germany seems set on using the gas, a cleaner alternative to coal, to reach emission reduction targets set by the Member States themselves. Germany has argued that it is ensuring energy security through this deal with Russia, especially as European sources in Scandinavia dry up.<sup>24</sup> While Europe may condemn Russian actions toward the Ukraine, it cannot turn a blind eye to the effects of this project on its bargaining power. Even as Russia grits its teeth at the Ukraine's desire to join NATO, which the EU agrees it is perfectly entitled to do, the Union has very little control over affecting Ukrainian membership, given that some Member States are not members of NATO.<sup>25</sup> NATO is a separate organization with the US as a member. As the Allies prepare to launch sanctions, disagreements in the EU prevent it from exercising its potential as an organization that aims to maintain peace.<sup>26</sup> Furthermore, Germany's claims that the pipeline is in its national interest would be backed up by grateful consumers all over Europe who just want to heat up their homes, and the nature of the European Union must always allow for Member States to act in their national interests. In addition, Germany is not the only Member State who will rely on this gas, with Italy also needing the supply.<sup>27</sup> This places a question mark over how much leverage the European Union will really have over Russia if it invades Ukraine, and what the consequences will be for the energy market.

As France takes over the rotating presidency of the Council of the European Union, while it may put pressure on Germany if the situation worsens in the Ukraine, it has previously signalled that the decision remains Germany's.<sup>28</sup> While outright war is not inevitable, for now it seems that war is already being waged along the supply chain and across the diplomatic table, and both going

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<sup>21</sup> Wintour, Patrick. "Nord Stream 2: how Putin's pipeline paralysed the West", accessed January 26, 2022, <https://www.theguardian.com/world/2021/dec/23/nord-stream-2-how-putins-pipeline-paralysed-the-west>.

<sup>22</sup> Herbst, John E. "Not the time for Nord Stream 2 nonsense", accessed February 10, 2022, <https://www.atlanticcouncil.org/blogs/ukrainealert/not-the-time-for-nord-stream-2-nonsense/>.

<sup>23</sup> Wintour, Patrick. "Nord Stream 2: how Putin's pipeline paralysed the West", accessed January 26, 2022, <https://www.theguardian.com/world/2021/dec/23/nord-stream-2-how-putins-pipeline-paralysed-the-west>.

<sup>24</sup> See: Nord Stream 2. "Facts and Myths", accessed January 26, 2022, <https://www.nord-stream2.com/media-info/facts-myths/#germany-undermines-eu-energy-solidarity-by-supporting-nord-stream-2>.

<sup>25</sup> Politico. "EU maintains unity on Russia – but only just", accessed January 26, 2022, <https://www.politico.eu/article/eu-foreign-ministers-russia-debate-weapons-training-ukraine/>.

<sup>26</sup> *Ibid.*

<sup>27</sup> Politico. "Politicians sweat as Europe's inflation time bomb ticks", accessed January 26, 2022, <https://www.politico.eu/article/europe-inflation-time-bomb/>.

<sup>28</sup> Deutsche Welle. "France presses Germany to ditch Nord Stream 2 over Navalny", accessed January 26, 2022, <https://www.dw.com/en/france-presses-germany-to-ditch-nord-stream-2-over-navalny/a-56411291>.

ahead with the project and cancelling it will cause an avalanche of consequences. With Russia sending clear messages in its ability to meddle in energy security,<sup>29</sup> Germany faces a very difficult decision with far-reaching consequences this year.

### **Concluding remarks**

The slogan of the Nord Stream 2 pipeline project, “Committed. Reliable. Safe.”<sup>30</sup>, belies the current geopolitical climate in the continent of Europe. Delays on the pipeline are only a part of the reason why tensions have risen in the first weeks of 2022, but it cannot be denied that they are part of the story, and separating them seems to be too innocent a move. Naivety must be left behind as the situation evolves. The European Union could play a much more decisive role if it were allowed to speak with one voice. As diplomacy breaks down, and efforts at negotiation seem to be ending in frustration, with differences of opinion emerging as to what Russia’s intentions are, the increased uncertainty is unhelpful for placating a European public plagued by rising energy costs. Tanks and guns are no longer the only weapons that Russia can use to divide and conquer others – fostering uncertainty and inciting indecision can also work in today’s world.

The prospect of war could certainly delay the project for the foreseeable future, which causes its own difficulties for Germany, as well as many other European states who are reliant on Russian gas to fuel parts of their economies. The continued focus on procuring gas as a form of energy is fraught with geopolitical difficulties, and only serves to highlight the urgency with which we must work as a European Union toward diversifying our energy supplies. By turning toward cleaner energy, Europe would be able to sustain itself from other sources in the event of gas shortages, and nations such as Russia would have far less impact when they decide to cut off the supply. This would work as a preventative measure, shielding the EU from the worst effects of energy inflation. Cleaner energy would also allow Europe to make progress on its climate goals, moving away from fossil fuels, which will not last forever anyway. If Europe wants less dependency, it can start by diversifying its energy sources. Whatever the outcome for the Nord Stream 2 pipeline project, it is clear that it poses many challenges for Scholz’s new chancellery, and indeed for Europe as a whole.

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<sup>29</sup> New Eastern Europe. “Moldova’s fragile energy security”, accessed January 26, 2022, <https://neweasterneurope.eu/2018/03/14/moldovas-energy-security/>.

<sup>30</sup> Nord Stream 2. “A European Pipeline”, accessed January 26, 2022, <https://www.nord-stream2.com/?page=factsfigures>.





## Introduction

On October 30, 2021, the United States and the EU concluded a deal on steel and aluminum imports following years of antagonism. The Union was not particularly fond of the terms, but several EU officials conceded it was worth it, in order to shift focus to the common enemy, China, a logic that suited U.S. President Joe Biden's vision of a global front against Beijing.<sup>1</sup> Only six weeks later, on December 8, 2021, EU Commissioner for trade Dombrovskis introduced a new tool to counter the use of economic coercion by third countries. He stated that *"at a time of rising geopolitical tensions, trade is increasingly being weaponized and the EU and its member states are becoming targets of economic intimidation."*<sup>2</sup>

This phenomenon of trade weaponization, which basically means using trade as a tool of foreign policy rather than as an economic goal in itself, is not new but has been taken to new heights by the United States and China in the last decade. Examples are President Trump's trade sanctions since 2018, resulting in a full-scale trade war or China's aggressive trade policies targeting Australia when it investigated the origins of the COVID-19 pandemic.<sup>3</sup> Such threats are not new, as states have always used economic instruments to further their interests. Yet, these emerging threats supposedly must be addressed by new 'trade weapons', have been accompanied by military rhetoric and have justified proposals that would once be considered extraordinary such as circumventing the unanimity rule on foreign policy for the use of the anti-coercion instrument. This article attempts to explore how such a change in EU trade policy came about by drawing upon the concept of collective securitization.

## Everything is security

According to Buzan, such a formulation of threats to a state of security has expanded from a narrow military focus to other policy fields such as migration or counter-terrorism. In his approach, security is understood as a type of politics defined by reference to existential threats and calls for emergency action. Securitization theory's central claim is thus that security is merely a

<sup>1</sup> Lau, Stuard and David Herszenhorn, "EU and US look to gang up on China after trade war truce." *Politico*, October 31, 2021. Accessed January 15, 2021 from <https://www.politico.eu/article/eu-us-trade-war-truce-import-tariffs-steel-aluminum-g20-summit-2021-china>.

<sup>2</sup> European Commission. "EU strengthens protection against economic coercion." Press release, December 8, 2021. Accessed January 15, 2021 from [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_6642](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6642).

<sup>3</sup> Reinsch, William, "Weaponizing trade," *Center For Strategic & International Studies*, (2021). Accessed January 15, 2021 from <https://www.csis.org/analysis/weaponizing-trade>

specific way of framing an issue in any given policy field.<sup>4</sup> Consequently, as Waever argues, the choice of selecting a specific threat to security, as well as presenting the threat and its potential solutions to an audience, is thus a political one. Such a decision is called a securitizing move.<sup>5</sup>

When applied to the EU's trade policy, the understanding is that the increase in (political) trade restrictions and geopolitical tensions undermines EU economic interests in a rules-based international order. The EU trade policy review of 2021 confirms this by stating that *"if this continues, it will impact economic relations and trade, and also the security and stability that we take as normal (...) the EU will need to operate in a new multipolar global order marked by growing tensions between major players (...) and the EU needs to equip itself with tools to operate in a more hostile international environment if necessary."*<sup>6</sup>

### **Collective securitization and the six-stage model**

Based on the concept of securitization, Sperling and Webber, conceived a stylized model of collective securitization, which, for this article's purpose, will be applied to the EU's trade policy. It outlines six distinct stages in the process of collective securitization.

The first stage represents the status quo security discourse and practice. The second stage is a precipitating event of sufficient gravity that disrupts the status quo and creates a perception that security has worsened. The third and fourth stages consist of the securitizing move and the audience's response. Although these stages can be distinguished analytically, they are co-dependent as a powerful share of the audience are member state representatives and form a constituent part of the EU. Consequently, the Union can only issue statements if these are supported by the member states, which is why these two stages are analyzed together. The fifth stage represents the creation of new policies and strategies to address the securitized threat. The sixth and final stage routinizes these new policies into a new status quo.<sup>7</sup>

### **Status quo security discourse and practice – Trade for all (2015)**

Under the Juncker Commission (2014-2019), EU Trade Commissioner Malmström, presented the Trade for All Strategy for a more responsible trade and investment policy. Following a public consultation, the European Commission aimed at projecting both EU interests and values. Contrary to the future Trade Policy Review, the strategy does not list a set of key challenges for EU trade interests. When looking at its major pillars, it is clear that the EU focuses on the traditional aspects of trade. Whereas the EU intended to stand firm against unfair trade practices, no new defense instruments were announced as the Union used the existing toolbox of anti-

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<sup>4</sup> Buzan, Barry. "Rethinking security after the Cold War." *Cooperation and conflict* 32, no. 1 (1997): 5-28. Accessed January 15, 2021 from <https://doi.org/10.1177/0010836797032001001>

<sup>5</sup> Waever, Ole. "Politics, security and theory." *Security Dialogue* 42, no. 4 (2011): 465-480. Accessed January 20, 2021 from <https://doi.org/10.1177/0967010611418718>

<sup>6</sup> European Commission. *Trade Policy Review: An open, sustainable and assertive trade policy* (Brussels: European Union, 2021). Accessed January 15, 2021 from [https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc\\_159541.0270\\_EN\\_05.pdf](https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159541.0270_EN_05.pdf)

<sup>7</sup> Sperling, James and Mark Webber. "The European Union, Security Governance and Collective Securitization." *West European Politics* 42, no. 1 (2019): 228-260. Accessed January 15, 2021 from <https://doi.org/10.1080/01402382.2018.1510193>.

dumping and anti-subsidy instruments or the dispute settlement mechanism of the World Trade Organization.

The strategy is clearly inspired by the EU's normative power and mentions that trade policy must support EU values and standards or promote inclusive growth in developing countries. Furthermore, traditional trade partnerships are being envisaged rather than broader alliance building to further interests and common objectives. With regard to China, the EU prioritizes deepening relations in a mutually beneficial way rather than deterring its unfair trade practices. The ongoing negotiations of the investment agreement supposedly should facilitate Chinese participation in the Commission's investment plan for Europe as well as EU participation in China's One Belt, One Road projects.<sup>8</sup>

### **Precipitating event**

In 2018, the global economic context changed significantly. President Trump started a trade war with China and American allies, when he unilaterally and steeply raised tariffs on steel and aluminum for major traders. Both the EU and China responded by adopting traditional countermeasures.<sup>9</sup> Even though trade disputes, such as the longstanding Boeing-Airbus dispute, between the United States and the European Union have existed before, the character of these threats seemed to be changing. Trump's actions, leading to a full-scale trade war with China, confirmed the existing (but because of the popular normative discourse hidden) reality that trade had to serve a state's geopolitical interests, as the U.S. at that point was already in fierce competition with China, and encouraged a tough stance in trade policy both rhetorical and practical.

Furthermore, it was now clear that these interests, using trade restrictions justified by national security reasons, could also be defended against U.S. allies. Rhetoric increased on both sides accordingly, such as Trump's statement that "*Europe threatens us worse than China*" or the legal basis for U.S. trade sanctions, which, up to this day, is the 'European security threat to America'.<sup>10</sup> In all this, dispute settlement within the World Trade Organization remained paralyzed, strengthening ideas for reform, whereas existing instruments only aggravated tensions between the great powers.

### **Securitizing move and audience response**

European Commission President Juncker responded to Trump's actions by stating that such a move "*can only aggravate matters*" and that "*the EU will react firmly and commensurately to defend its interests*". He also made it clear that the EU would not negotiate under threat.<sup>11</sup> European Commission Vice-President Katainen gave the rhetoric a military dimension by warning that Trump could "*trigger a global trade war*" and that the EU "*could end up fighting on two fronts, both in the U.S. and Asia*". He

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<sup>8</sup> European Commission. *Trade for all: towards a more responsible trade and investment policy* (Brussels: European Union, 2015). Accessed January 15, 2021 from [https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)

<sup>9</sup> Bown, Chad and Melina Kolb, "Trump's trade war timeline: An up-to-date guide," *Pieterseon Institute for International Economics*, (2021). Accessed January 15, 2021 from <https://www.piie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide>.

<sup>10</sup> Dallison, Paul, "Trump: Europe treats us worse than China." *Politico*, June 26, 2019. Accessed January 15, 2021 from <https://www.politico.eu/article/trump-europe-treats-us-worse-than-china>.

<sup>11</sup> European Commission. "European Commission reacts to the US restrictions on steel and aluminum affecting the EU." Press release, May 31, 2018. Accessed January 15, 2021 from <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1851>

created a clear sense of urgency by announcing that it is easier to avoid war than to stop war.<sup>12</sup> President Trump too blurred the line between a trade dispute and a more general conflict. When referring to the EU at the beginning of 2020, Trump stated that “*we have allies, we have enemies and sometimes the allies are enemies but we just do not know it*”.<sup>13</sup>

Later in 2020, the European Parliament and Council of the EU agreed on a deal to revise the EU’s instruments to enforce international trade rules, which was clearly inspired by the American unilateral actions. The biggest political group in Parliament, the European People’s Party, stated in a press release titled “*Trade war: EU ready to strike back*” that “*Ensuring Europe’s strategic autonomy in an increasingly unstable world must be an absolute priority*”.<sup>14</sup>

## Policy output

The EU moved from condemning statements about U.S. unilateral economic sanctions in 2018 to adopting countermeasures in that same year, revising EU instruments to enforce international trade rules in 2020, creating the anti-coercion instrument in 2021 and participating in a global ‘economic alliance’ against Beijing in that same year. The rationale behind these new initiatives and the perceived causes translated into a new, more assertive trade strategy based on defending the Union’s geopolitical interests and securing its status as the world’s leading trade power.

During a Q&A session about its anti-coercion instrument, the European Commission stated that rising geopolitical tensions and increasingly weaponized trade and investment undermine the interests of the EU. The instrument is the most concrete example of policy output resulting from the collective securitization of EU trade policy as it supposedly contributes to the EU’s strategic autonomy in trade, and was necessary due to the existing toolbox’s lack of deterrence.<sup>15</sup>

## The Emergence of a new status quo – Assertive Trade (2021)

Under the Von der Leyen Commission (2019-2024), EU Trade Commissioner Dombrovskis presented the Open, Sustainable and Assertive Trade Policy in 2021, which has been clearly influenced by the 2018 trade war events, as it now focuses less on the traditional aspects of trade, and aims at supporting the EU’s geopolitical ambitions and its strategic autonomy. According to the European Commission, a new strategy was required due to growing international tensions,

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<sup>12</sup> Von der Burchard, Hans, “EU’s Katainen warns Trump against ‘global trade war’ on two fronts.” *Politico*, March 1, 2018. Accessed January 15, 2021 from <https://www.politico.eu/article/eus-katainen-warns-trump-against-global-trade-war-on-two-fronts>.

<sup>13</sup> Shalal, Andrea and David Lawder, “As Trump takes aim at EU trade, European officials brace for fight.” *Reuters*, February 11, 2020. Accessed January 15, 2021 from <https://www.reuters.com/article/us-usa-trade-europe-analysis-idUSKBN2051AK>.

<sup>14</sup> European People’s Party. “*Trade war: EU ready to strike back*.” Press release, October 28, 2020. Accessed January 15, 2021 from <https://www.eppgroup.eu/newsroom/news/trade-war-eu-ready-to-strike-back>.

<sup>15</sup> European Commission. “*Questions and Answers: Commission proposal for an Anti-Coercion Instrument*.” Press release, December 8, 2021. Accessed January 15, 2021 from [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_6643](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_6643).

greater recourse to unilateralism and the current undermining of the international economic governance framework.<sup>16</sup>

Political and geo-economic tensions, growing unilateralism and the rise of China demonstrating global ambitions are identified as key challenges for EU trade policy and are grouped in a broad category of geopolitical instability. The strategy mentions its readiness to combat unfair practices and to pursue its interests where needed. Trade is confirmed as one of the tools to further the Union's geopolitical interests.

However, this time, these interests are being protected by new autonomous tools. The strategy states that “*the EU needs to equip itself with tools to operate in a more hostile international environment*” and wants to address unfair trade practices or hostile acts, not just with traditional anti-dumping/anti-subsidy instruments but with a strengthened and revised toolbox. With regard to China, contrary to the trade for all strategy of 2015, the strategy seeks to protect EU interests and values based “*on the development and implementation of autonomous instruments*”, which could be a reference to the future anti-coercion instrument. Stimulating a mutually beneficial relation has apparently been replaced by ensuring that China fulfills its international obligations.<sup>17</sup>

## Conclusion

This article attempted to explore why EU trade policy has become more assertive and uses military rhetoric and new tools to combat old challenges. By using the six stages of collective securitization, the article argued that the previous status quo trade policy, embodied in the trade for all strategy of 2015, which focused on normative power, securitized into a more assertive policy, embodied in the trade policy review of 2021, in which Trump's trade war with China and American allies in 2018 served as a precipitating event. By securitizing EU trade policy and creating a sense of urgency, the Commission revised trade strategies, such as entering into an economic alliance against China, and proposed new instruments, such as the anti-coercion instrument, which resulted in a new emerging status quo security discourse in EU trade policy.

States have always used economic instruments to further their interests and will continue to do so. The EU should therefore continue to tackle unfair trade practices and deter economic coercion by third states. However, that should not necessarily have to be accompanied by military rhetoric, as a clear distinction between war and peace is important. Without a clear line, confusion will be spread about the objectives a state is pursuing and the instruments that are permissible. Not hard to imagine how such behavior one day could go terribly wrong.

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<sup>16</sup> European Commission. “*Questions and Answers: An open, sustainable and assertive trade policy.*” Press release, February 18, 2021. Accessed January 15, 2021 from [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_645](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_645).

<sup>17</sup> European Commission. *Trade Policy Review: An open, sustainable and assertive trade policy* COM (2021) 66 final (Brussels: European Union, 2021). Accessed January 15, 2021 from [https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc\\_159438.pdf](https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf)





The European Union's institutions play an important role in ensuring the presence of healthy competition and efficient consumer markets across the EU. The protection of competition, and the prevention of anti-competitive behaviour, ensure European consumers are not paying more than is necessary for goods and services and that these goods and services are provided to the highest possible standards. The basis of public enforcement against cartels in the EU is derived from Article 101 of the Treaty on the Functioning of the European Union (TFEU)<sup>1</sup>. Part one of the Article outlines a prohibition on activity if there exists collusion which appreciably restricts competition and has an appreciable effect on trade between Member States<sup>2</sup>. The powers enabling the Commission to carry out its task of enforcing competition rules are contained in Council Regulation 1/2003<sup>3</sup>. This essay will examine and evaluate the significant elements of public enforcement, namely fines, leniency and criminalisation.

## Fines

Article 23.2 of the 2003 Regulation<sup>4</sup> sets out the basic fine that can be imposed upon an undertaking that is found to be in breach of EU competition law. This basic fine amounts to a maximum of 10% of global turnover from the preceding year from which a breach is found. Article 23.3 outlines a number of factors that the Commission shall consider in deciding the extent of the fine, namely the gravity of the breach and the duration for which the breach took place.

This allows for an element of flexibility in the issuance of fines by the Commission. Additionally, it provides for fines to be dependent on the size of the undertaking which may prove an important consideration. Harrington explains that if a fine is excessively punitive with regard to the size and financial capabilities of an undertaking, then this may lead to that undertaking exiting the market and thus causing pernicious effects on post-cartel competition<sup>5</sup>.

Walsh notes that any fines collected from an undertaking is given directly to the Community budget, thus reducing the tax burden on European citizens<sup>6</sup>. However, while the Commission is entitled to consider any additional amount that would make good the illegal gain made by the

<sup>1</sup> Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/01, Article 101.

<sup>2</sup> Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials*, 7<sup>th</sup> ed. (Oxford: Oxford University Press, 2016) at 114.

<sup>3</sup> Council Regulation (EC) 1/2003 [2003] OJ L1/1; see also: *Ibid.* at 873.

<sup>4</sup> *Ibid.*

<sup>5</sup> Joseph Harrington, "Comment on Antitrust Sanctions," *Competition Policy International* 6, no. 2 (2010): 41.

<sup>6</sup> Declan J. Walsh, "Carrots and Sticks – Leniency and Fines in EC Cartel Cases," *European Competition Law Review* 30, no. 1 (2009): 30 at 35.



undertaking, it is still restricted by the 10% maximum limit set by the 2003 Regulation. As such, it is still possible, albeit in exceptional circumstances, for an undertaking to earn a profit even if the Commission imposes the maximum fine. An example of which is duly noted by Harrington<sup>7</sup> and Lande<sup>8</sup>, in the case of the “vitamins cartel” where despite significant fines and damages, the various undertakings appear to have earned additional profits exceeding those of the financial penalties imposed.

The EU approach to fines based on turnover can be contrasted with the United States, whereby the Sherman Act provides for a maximum fine of \$100 million, however, these fines can be increased under federal law to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime<sup>9</sup>. As a result, the maximum fine in the US can be based upon the profit derived from the illegality rather than the EU approach of a fine based on turnover.

This also raises the question as to whether a larger fine will ensure increased deterrence against anti-competitive practises. Ginsburg and Wright appear to suggest caution in such an approach<sup>10</sup>. They explain that any increase in fines should merely render the expected profit, from an undertaking engaging in anti-competitive activity, equal to zero. The pair also note that any over-deterrence through increased fines may result in “excessive corporate deterrence” by the undertaking, and any related additional costs would ultimately be passed onto the consumer, a group which is unlikely to influence the undertaking’s conduct<sup>11</sup>.

In contrast, Harrington notes that collusion is under-deterred, there is little risk of over-deterrence and that all price-fixing is welfare reducing<sup>12</sup>. As such, fines should be increased. Harrington also explains that shareholders hold a significant concern for the potential imposition of fines and as a result of their strong influence in the conduct of an undertaking, illegal activity can be heavily deterred by the EU with the increasing of fines<sup>13</sup>.

### **The Leniency Notice**

Whish and Bailey explain that undertakings engaging in anti-competitive behaviour will go to great lengths to ensure secrecy and the avoidance of detection. As such, these undertakings are naturally challenging for the EU to detect<sup>14</sup>. The introduction of the leniency notice allows for an incentive whereby participants in a cartel can “blow-the-whistle” and expose anti-competitive activities in exchange for reduced fines.

The current leniency notice came into force in December 2006 and provides for total immunity to the first undertaking that makes a decisive contribution to the opening of an investigation or to

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<sup>7</sup> Harrington, *supra* note 5 at 42.

<sup>8</sup> Robert H. Lande, “Are Antitrust ‘Treble’ Damages Really Single Damages,” *Ohio State Law Journal*, 54 (1993): 115.

<sup>9</sup> Federal Trade Commission of the United States, available <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (date accessed: January 26, 2022).

<sup>10</sup> Douglas H. Ginsburg & Joshua D. Wright, “Antitrust Sanctions,” *Competition Policy International* 6, no. 2 (2010): 3.

<sup>11</sup> *Ibid.* at 5.

<sup>12</sup> Harrington, *supra* note 5 at 42.

<sup>13</sup> *Ibid.* at 47.

<sup>14</sup> Richard Whish & David Bailey, *Competition Law*, 9<sup>th</sup> ed. (Oxford: Oxford University Press, 2018) at 289.

the finding of an infringement of competition law<sup>15</sup>. Additionally, other undertakings may receive a reduction in fines where evidence of “significant value” is provided<sup>16</sup>.

Walsh describes the relationship between the leniency notice and fines with reference to a carrot and a stick. He describes that “leniency would act as the carrot to attract the relevant evidence and fines would be the stick to remind cartelists of the economic punishment that awaited cartelists”<sup>17</sup>. This suggests an interdependent relationship between leniency and fines whereby the carrot can only function with the effective use of the stick, that is to say, the leniency policies can only function with the effective deployment and use of fines. As such, the imposition of fines upon an undertaking, and the avoidance thereof, is central to the effectiveness of the leniency notice.

Beaton-Wells and Tran outline that as a result of the leniency policy, the average and total fines issued to undertakings have increased by around €16.5 million and €30.9 million respectively<sup>18</sup>. Zingales explains that the primary function of leniency programmes, both in the EU and US, is not just to ensure the initial and otherwise unknown exposure of cartels, but also to shorten the time necessary for prosecutors to compile all the relevant evidence to make a finding of a breach of competition law<sup>19</sup>.

Zingales describes three underlining assumptions required for a cartel to successfully exist. Firstly, the cartel must be difficult for authorities to detect. Secondly, the cartel must be maintainable in the long-run and thirdly, there must exist psychological assumptions of reciprocal behaviour among its members<sup>20</sup>. The leniency policies challenge these assumptions. Leslie explains that the leniency programme disseminates distrust among cartel members, weakening “their bond” and therefore, increasing the probability of detection or confession<sup>21</sup>.

Nevertheless, the leniency notice is not entirely virtuous in the effective enforcement of competition law. Van Uytsel describes how in Japan, leniency policies do not fit with the “prevailing national sentiment” and along with plea bargains, have long been considered “unethical” in the country<sup>22</sup>. This is because with leniency policies, the undertaking reporting its illegal activities can escape liability and in doing so, be “rewarded” while other members of the cartel are nevertheless punished. This, as Van Uytsel describes, is seen in Japan as “selfish conduct by the entrepreneur”.

Nevertheless, Van Uytsel suggests that these challenges of public scepticism and distrust, particularly in Japan, could be ameliorated with ensuring leniency policies are “transparent and

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<sup>15</sup> Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases*, 3<sup>rd</sup> ed. (Oregon: Hard Publishing, 2012) at 444.

<sup>16</sup> Whish & Bailey, *supra* note 14 at 291.

<sup>17</sup> Walsh, *supra* note 6 at 32.

<sup>18</sup> Catarina Marvão & Giancarlo Spagnolo, “Effectiveness of Leniency Policies: A Survey,” in *Anti-Cartel Enforcement in a Contemporary Age*, ed. Caron Beaton-Wells & Christopher Tran (Oregon: Hart Publishing, 2015), 57 at 65.

<sup>19</sup> Nicolo Zingales, “European and American Leniency Programmes: Two Models towards Convergence,” *ComplRev* 5, no. 1 (2008): 5 at 6.

<sup>20</sup> *Ibid.* at 7 and 8.

<sup>21</sup> Christopher Leslie, “Antitrust Amnesty, Game Theory, and Cartel Stability,” *Journal of Corporation Law*, no. 31 (2006): 453 at 465.

<sup>22</sup> Steven Van Uytsel, “Anti-Cartel Enforcement in Japan: Does Leniency Make the Difference?,” in *Anti-Cartel Enforcement in a Contemporary Age*, ed. Caron Beaton-Wells & Christopher Tran (Oregon: Hart Publishing, 2015), 81 at 86.

objective”<sup>23</sup>. However, as Walsh notes, that while the foregone fine in the case of Bayer is significant, this must have been a leading influence in its decision to notify the Commission under the leniency notice and the resulting identification of the cartel<sup>24</sup>.

### **Criminalisation**

The harmonisation across the EU of the criminalisation of breaches of competition law has been described by Jones and Sufrin as “not being an imminent prospect”<sup>25</sup>. This is despite the fact that cartel criminalisation serves a number of enforcement objectives, namely enhancing deterrence, increasing trans-national co-operation in law enforcement and the enhancement of leniency policies<sup>26</sup>. Harding explains that leniency has “driven” a move towards criminal sanctions because such policies comprise of a further incentive to “blow-the-whistle” as a result of the “valuable prize” of personal immunity from criminal sanctions<sup>27</sup>.

Harding also makes use of the proverbial “carrot and stick” example, whereby in this case, the carrot represents legal immunity in exchange for information, and the stick represents the criminal sanctions being truly and realistically feared<sup>28</sup>. This is successful in placing the potential whistleblower in the “prisoner dilemma”, whereby the cartelists are aware that the “carrot” has been offered to other cartelists and it is simply a matter of defecting from the cartel in order to receive the full and certain security from criminal sanctions. As a result, Harding argues the relationship between criminalisation and the leniency policies can be effective at the exposure of cartels and the enforcement of EU competition law.

Nevertheless, Harding describes how doubts remain, particularly in Europe, of criminalisation. He describes how there has been judicial reluctance of imposing such sanctions, as in the case of Ireland where there is a “tendency” to impose suspended prison sentences and in Belgium, where an amendment of the Competition Act in 2013 fell short of any criminal sanctions<sup>29</sup>. Similarly, in Switzerland, the Swiss Parliament rejected the introduction of criminal sanctions on cartels in September 2014 during a proposed amendment of the Swiss Cartel Act<sup>30</sup>.

The primary rationale for this hesitant approach can be explained through differences in the administrative and criminal procedures. Weishaar explains this issue through the “error cost”, whereby despite administrative procedures being time-efficient and cost-effective, they fail to involve “impartial judges”, nor are they based on detailed investigation<sup>31</sup>. As such, the “error cost”, that is to say, the likelihood of convicting an innocent person, is high in administrative procedures. As a result, in criminal matters, most legal systems require a criminal procedure with a higher

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<sup>23</sup> *Ibid.*

<sup>24</sup> Walsh, *supra* note 6 at 33.

<sup>25</sup> Jones & Sufrin, *supra* note 2 at 1024.

<sup>26</sup> Christopher Harding, “Leniency and Criminal Sanctions: Happily Married or Uneasy Bedfellows?,” in *Anti-Cartel Enforcement in a Contemporary Age*, ed. Caron Beaton-Wells & Christopher Tran (Oregon: Hart Publishing, 2015), 233 at 238.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* at 239.

<sup>29</sup> *Ibid.* at 237.

<sup>30</sup> The Publication Platform for Federal Law (Switzerland), available Federal Law of October 6, 1995, on Cartels and Other Restraints of Competition (the Cartel Act) (date accessed: January 28, 2022).

<sup>31</sup> Stefan E. Weishaar, *Cartels, Competition and Public Procurement: Law and Economics Approaches to Bid Rigging* (Edward Elgar Publishing Limited: Cheltenham, 2013).

burden of proof. This, while reducing the “error cost”, is a cost-inflating means of public enforcement of competition law.

O’Loughlin notes that theoretically, fines should be preferred over custodial sentences as they impose less of a cost on society<sup>32</sup>. However, effective deterrence with fines requires knowledge by the prospective carteliser that the expected cost of price fixing will outweigh the potential profit. Furthermore, in the US, investigators found that only 13-17% of price-fixers were ultimately prosecuted successfully for criminal charges<sup>33</sup>.

The evidence on the effectiveness of criminalisation appears contradictory and uncertain. Nevertheless, harmonisation across the EU of criminalisation has appeared to be met with optimism by the Commission. Former Commissioner Neelie Kroes, during a panel session in Brasilia, explained how the artificial divide between criminal and administrative systems can be successfully abridged and that the European Competition Network is a living example of how criminal and non-criminal systems can work together harmoniously<sup>34</sup>.

## Conclusion

It is clear from this essay that there are many perspectives on how EU competition law could be effectively enforced against cartels. Fines in the EU are based on turnover; however, some critics argue this should be based directly on the profit derived from the illegality itself. Additionally, there are contrasting opinions on the prospect of increasing fines as a means of further deterring anti-competitive behaviour. The leniency notice has generally proven to be a success in uncovering otherwise elusive cartels, despite public scepticism particularly in the case of Japan. Furthermore, criminalisation has been met with hesitancy in Europe, as described in the examples of Ireland, Belgium and Switzerland, particularly in light of difficulties in harmonising criminal and administrative procedures.

Therefore, these public methods of enforcing EU competition law display a diverse range of options and opportunities at the EU Commission’s disposal to ensure that competition is protected for the benefit of EU consumers. Nevertheless, it is clear that these methods of public enforcement, namely, fines, criminalisation and leniency must be met with caution and prudence in ensuring a delicate balance between enforcement, deterrence and sanction for cartels engaging in anti-competitive activities.

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<sup>32</sup> Peter O’Loughlin, “The Criminal Enforcement of Antitrust Law – The Importance of Building an Enforcement Culture and How to Create It” *UCL Journal of Law and Jurisprudence* 5, no. 1 (2016): 116 at 122.

<sup>33</sup> Peter G. Bryant & Edwin W. Eckard, “Price-fixing: The Probability of Getting Caught,” *Review of Economics and Statistics*, no 73 (1991): 531.

<sup>34</sup> Nellie Kroes (former EU Competition Commissioner) [2009] “Tackling cartels – a never-ending task Anti-Cartel Enforcement: Criminal and Administrative Policy” Brasilia, 8 October 2009, available <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/454&format=HTML&aged=0&language=EN&guiLanguage=en> (date accessed: January 28, 2022).

