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Hettne, Jörgen

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EUROPEAN POLICY ANALYSIS

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Jörgen Hettne*

Summary

The European Union (EU) has been entrusted with rather weak powers as regards industrial policy. On top of this, its Member States are prevented from pursuing a national industrial policy with monetary elements as this may distort competition within the EU internal market. At the same time, European companies compete in the global market with state-supported companies from other economically strong regions of the world, including China, Japan and the US. The EU's current successful internal market paradigm, with its state aid prohibition, could therefore become an obstacle internationally.

This analysis argues that the EU presently suffers from a competence mismatch – the absence of a coherent European industrial policy – which risks making European companies weak globally. The EU would benefit from an industrial policy which is adaptive to geopolitical changes in the world, such as the Chinese Belt and Road Initiative and the present US mercantilist approach to trade policy as well as Brexit. A more aggressive European industrial policy might be needed at times when the rule-based international trade system is not working. If there is no global level playing field, trade strategies have to adapt to new realities.

* Jörgen Hettne is an Associate Professor and the Head of Department at the Department of Business Law as well as Director of the Centre for European Studies, both at Lund University, Sweden. His research interests concern the European Union's constitutional law and issues concerning the internal market and competition policy.

1 Introduction

When the EU (or at the time the European Economic Community, EEC) was created, global trade was limited. The aim was, above all, to develop trade and economic integration between the 6 founding members, thereby creating long-term peace and prosperity. Importantly, the EU internal market was not created with the aim of enhancing the competitiveness of European companies globally. On the contrary, far-reaching competition rules were introduced, including a ban on state aid, in order to foster internal competition within the EU. This creation of a common competition policy has been a great achievement in terms of creating an effective internal market. The EU has developed into one of the world's largest free trade blocs. Simultaneously, the Union has contributed to the liberalisation of global trade.

> "[...] the conditions for world trade have not developed in the same way as the conditions for internal trade within the EU."

However, the conditions for world trade have not developed in the same way as the conditions for internal trade within the EU. The World Trade Organisation (WTO), the most comprehensive legal order when it comes to global trade, does not contain a similar competition policy as within the EU and has limited powers to counteract anti-competitive subsidies and other kinds of state aids. Such differences in the regulation of European and global trade have created asymmetries that impact the competitiveness of European companies participating in the global market. The clearest example is the situation for European companies in comparison to Chinese ones. China's authoritarian state-capitalism not only allows for state aid but Chinese companies are also often state-owned.[1] In the past when European companies had supreme production capacity, technical know-how, etc., this problem was limited. Today, however, the situation has changed dramatically; the share of global EU exports has gradually decreased in favour of rapidly growing exports from emerging economies such as China.[2] This in turn poses a threat to European competitiveness on the global level. This development explains why interest in a more comprehensive European industrial policy is gaining increasing political support among the EU Member States.

Some of the Member States, with France being the most outspoken, have voiced their dissatisfaction with the liberal EU approach to industrial policy. As a consequence, an informal "Friends of Industry" group was established in 2012, which consisted of government representatives from several Member States.[3] The group stressed the need for measures improving the competitiveness of European companies. In this context, France claimed the state aid rules were "outdated rules that do not correspond to a global economy".[4] The French Minister explained that "European rules are the rules of the old world" and argued that they prevent the emergence of European champions. He also stated that "in a globalised economy large countries (blocks) support their industry, and the EU should do the same instead of blaming other states who subsidize their industries".[5] This approach was reflected in the joint letter of the "Friends of Industry", urging that the effective monitoring of subsidies granted outside the EU should be established, i.e. arguing that the EU competition policy should ensure that European companies are not discriminated against by global competitors.[6] EU state aid rules should award subsidies to entrepreneurs if similar sectors receive financial support in third countries, regardless of whether a market failure existed in the EU.[7] The French Minister also claimed that the European Commission has accumulated too much power and that it should leave more room for national policy.[8]

However, it is not obvious how to handle this issue as it requires a fine balance between fair competition within the EU, on the one hand, and at the global level on the other. Although a number of Member States have put increasing pressure on the Commission to relax state aid rules and allow them to join the subsidy war in the global market, the liberal approach so far seems to remain steadfast.[9]

2 EU lacks competence as regards industrial policy

A vital question is therefore what kind of industrial policy is possible under the present EU treaties. The Treaty on the Functioning of the European Union (TFEU) contains a specific section on industrial policy, which indicates that the EU can act in this area. On closer reading, however, it is clear that the powers lie not so much with the EU as with the Member States. According to Article 173 TFEU:

1. The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist […].
2. The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.
3. The Union shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States. This Title shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition or contains tax provisions or provisions relating to the rights and interests of employed persons.

> "[…] it is clear that the implementation of this common policy is heavily dependent on concrete actions from individual Member States."

Thus, the objectives of European industrial policy are outlined as a common responsibility of the EU and its Member States. This is also clearly reflected in the EU's policy practice, most notably in the context of the Europe 2020 Strategy of the Commission, which is addressed to both the Member States *and* the EU institutions.[10] However, it is clear that the implementation of this common policy is heavily dependent on concrete actions from individual Member States. In Article 173 TFEU, the following measures are outlined as tools that both the Union and the Member States can use:

- speeding up the adjustment of industry to structural changes,
- encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings,
- encouraging an environment favourable to cooperation between undertakings,
- fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

These actions fall mainly in the area of national competence. In addition, the Article emphasises that this should be carried out *in accordance with a system of open and competitive markets*, i.e. the omnipresent fair competition objective is particularly stressed. The industrial policy of the EU cannot therefore be used as a more precise tool to boost the competitiveness of European companies in the global market. A relatively large European company may still be a small player in the global market and EU competition policy fails to ensure that European companies are not discriminated against by global competitors. As pointed out by Professor of Economics Adam Ambroziak, the amendments introduced into the treaties regarding industrial policy have not changed the market-oriented approach to the economy and have therefore not jeopardised the strength of the state aid ban.[11]

3 The industrial policies of the Member States are circumscribed

The fact that powers lie mainly with the Member States shall of course not be seen as a problem in itself. European companies are established in the Member States of the EU and these "home states" can therefore promote their companies' competitiveness globally. However, as mentioned at the outset, it is not that simple. The fact that a company is financially supported to survive and compete globally normally means that it will also be strengthened in the European market and it is such distortions of competition that EU competition policy, in particular the rules on state aid, is intended to prevent. Article 107.1 TFEU stipulates that:

> Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

Exemptions from this ban are specified in Articles 107.2 and 107.3 in the TFEU. The TFEU rules on state aid form a part of the internal market discipline ensuring inter alia that competition in the Single Market is not distorted. It is an area which forms parts of EU competition policy where the Union has exclusive competence (Article 3.1.b TFEU). State aid schemes shall not give certain companies unwarranted advantages that put market forces out of the running and which in turn are considered to reduce the general competitiveness of the EU. State aid may, above all, not be used to set up barriers hindering access to national markets within the EU. If competition is distorted in this way, there is a risk that customers may have to put up with higher prices, a deterioration in the quality of the products and less innovation.[12] The permissible exceptions to the state aid ban shall therefore always be beneficial to society in a manner that outweighs the possible distortion of competition in the internal market.

"State aid schemes shall not give certain companies unwarranted advantages that put market forces out of the running and which in turn are considered to reduce the general competitiveness of the EU."

For that reason, exemption regulations provide very detailed criteria concerning eligible beneficiaries, maximum aid intensities (i.e. the maximum amount of financial resources in relation to the eligible costs of a project that can benefit from state aid) and eligible expenses. These conditions are based on the Commission's experience in assessing state aid projects notified by Member States. Following the establishment of certain thresholds, a list of eligible costs and expenditures, and the types and size of potential recipients of government interventions, the Commission has created a framework for "good" state aid which does not distort competition within the internal market and therefore does not require prior notification.[13]

Against this background, it is undoubtable that industrial policy decided from a national context is unlikely to be successful and may even be harmful from a European standpoint. If Member States consider industrial policy from a domestic perspective, the public's interests at the national and European levels typically differ. In particular, in times of economic difficulties, demand for action to safeguard national industry will certainly be voiced. At other times, however, the main interest in domestic politics tends to focus on the perceived interest of domestic firms and the strengthening of the national industrial base, even if market failures are absent and competition within the European market will be affected.[14]

Still, the Union has in some policy-oriented cases shown acceptance for such nationally oriented policies. However, this acceptance does not usually stem from the general exceptions in the Treaty, but rather from a special exemption decided by the Council.[15] For example, until the end of 2010, Council rules allowed for the subsidisation of coal mines, even if they were unprofitable.[16] The reason for this was to guarantee access to sufficient coal reserves and hence *securing the supply of energy* in the EU. However, after 2010 the Council changed the policy in light of its new focus on renewable energy sources. A sustainable and safe low-carbon economy no longer justified the indefinite support for uncompetitive coal mines.[17] Instead, the Council adopted a proposal to phase out aid to coal mines and linked the granting of aid to the closing down of inefficient mines, thereby interfering with the policies of some Member States.[18] Similar developments can be discerned as regards the steel[19] and shipbuilding industries.[20]

However, there are also examples where the Union has taken broader industrial interests into account. In the context of the State Aid Modernisation Programme (SAM),[21] the linking of competition to wider political priorities, including industrial policy ones, gained renewed momentum.[22] One of the key goals of the SAM Programme was to support the Europe 2020 Strategy and its flagship initiatives. By overhauling its block exemption and many of its frameworks and guidelines to make them consistent with the principles contained in the SAM Programme, the Commission made clear that one cannot look at the primary importance of the undistorted market within the EU without also looking at its global competitiveness.[23]

4 External policies and the WTO

One additional factor in relation to the evaluation of national and EU competences as regards industrial policy is that aid for exports destined for countries outside of the EU is covered by the EU's Common Commercial Policy (CCP).[24] In this area, the EU has exclusive competence (as is also the case with competition policy, as mentioned previously). The CCP covers export policy, and thus systems of aid for exports, including export credits, insurance and guarantees. After the entry into force of the Lisbon Treaty, the Union also has express exclusive competence over foreign direct investment (FDI). Article 207 TFEU, which defines the CCP, covers State sponsored FDI insurance schemes. The main actor in this field is therefore the EU, not the Member States individually.[25] Moreover, at the international level, the EU is bound by the WTO Agreement on Subsidies and Countervailing Measures (the 'SCM Agreement'), which has to be respected if state aids (subsidies) are involved.[26]

Against this background, in respect of aid for exports the EU has, on the basis of Article 207 TFEU, adopted Directive 98/29/EC[27] on the harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover and Regulation 1233/2011[28] on the application of certain guidelines in the field of officially supported export credits.[29]

> "[...] it is crucial to coordinate the EU's approach to a more comprehensive external trade policy with its direct contribution to the EU's competitiveness, both inside and outside the EU."

The Union has long since favoured a rule-based multilateral trade system. It has supported trade negotiations within the Doha Development Round to further liberalise trade in goods and services, improve market access for developing countries and review trade rules. It is, however, clear that the multilateral approach has not yielded genuine progress over the years.[30] In response, a new EU strategy, launched in 2006, combined the multilateral approach with renewed efforts to forge bilateral trade relations, an approach supported in the Europe 2020 Strategy. Due to numerous declarations on the need for a new commercial policy, it is crucial to coordinate the EU's approach to a more comprehensive external trade policy with its direct contribution to the EU's competitiveness, both inside and outside the EU.[31]

Although there were no direct references to trade policy issues in the Europe 2020 Strategy, the European Council pointed out in its conclusions that all common policies, including the CCP, should support the effective implementation of the strategy.[32] Two years after the adoption of the Europe 2020 Strategy, the Commission also issued the communication "Trade, Growth and Development: Tailoring trade and investment policy for those countries most in need".[33] The communication stresses the pivotal role of the multilateral approach and the need to strengthen the WTO.

However, the WTO has become much weaker of late, as demonstrated by the 2018 'tariff wars' between the US and China, which also included the EU. WTO modernisation is clearly on the agenda (inter alia the need for more coherent competition rules, the promotion of social adjustment to import competition and related technology challenges, and the protection of transnational rule of law and judicial remedies).[34] However, at present, the success of such a process is to say the least uncertain.

Therefore, a pressing issue is whether the EU's CCP should be applied to bolster its foreign policy or to support its industrial goals. The CCP may obviously help meet the objectives of the Europe 2020 Strategy and have major input into the creation of a coherent industrial policy within the EU, but it may also be used as a stimulus for foreign initiatives. The question which arises is whether it can manage all these objectives simultaneously.[35]

5 Is there a concealed European industrial policy?

The EU state aid prohibition is, as explained previously, certainly not without exceptions. Over time, many national aid measures have been classified as “good aids” and compatible with the internal market. The institution which decides on whether an aid is good or bad is the Commission and only exceptionally the Council. Since the 2005 State Aid Action Plan (SAAP),[36] the analysis of the Commission has focused on *market failures*. It has clarified that the criteria for considering if an aid measure is compatible with the internal market are the following:[37]

- Contribution to a well-defined objective of common interest;
- Need for State intervention: it must be targeted towards a situation in which aid can bring about a material improvement that the market cannot deliver itself, by remedying a market failure or addressing an equity or cohesion concern;
- It must be an appropriate policy instrument to address the objective of common interest;
- Incentive effect: the aid must change the behaviour of the undertaking concerned in such a way that it engages in additional activity that it would not carry out without the aid, or it would carry it out in a restricted or different manner or location;
- Proportionality: the aid amount must be limited to the minimum needed to induce the additional investment or activity;
- Negative effects on competition and trade between Member States must remain sufficiently limited, so that the overall balance of the measure is positive; and
- Transparency: the relevant acts and pertinent information about aid awards must be transparent.

These criteria have allowed for some considerations in relation to international competition. Indeed, the Commission has long since recognised that state aid plays a key role in industrial policy, yet in a community rather than a national fashion.[38]

> ”These criteria have allowed for some considerations in relation to international competition.”

One illustrative example is the present guidelines for environmentally motivated state aid.[39] The Commission accepts that in order to prevent indirect carbon leakage and maintain the competitiveness of EU undertakings vis-a vis undertakings based in third countries, both under the EU emissions trading scheme guidelines (ETS guidelines) and the chapter of the new Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG) dealing with energy intensive users, Member States may provide ‘operating aid’ to certain energy intensive users, even though operating aid does not normally fall within the scope of the exceptions outlined in Article 107(3) TFEU. On the basis of the ETS guidelines, Member States are furthermore permitted to compensate certain electro-intensive users, such as steel and aluminium producers, for part of the higher electricity costs due to the ETS.

The concern is here that competitors from third countries do not face similar CO2 costs in their electricity prices.[40] Under the EEAG, limited support is also allowed for energy intensive sectors, such as the manufacturing of chemicals, paper, ceramics or metals. These sectors carry a relatively high burden from levies charged for renewables support because they are intensive electricity users. Finally, the exposure of these sectors to global trade puts them at a disadvantage towards competitors from outside the EU where electricity prices are lower.[41] Hence, by adopting these rules the Commission has accepted that in certain cases one cannot look just at the primary importance of the undistorted market within the EU but must also look at global competitiveness.[42]

These developments demonstrate how the Commission can use its discretionary powers under Article 107(3) TFEU to govern and shape the Member States’ industrial policy, in particular structural changes in relation to climate considerations, and take global competition into account.[43]

Based on a comparatively wide interpretation of Article 107(3)(c) TFEU, these environmentally friendly industrial objectives are considered compatible with the internal market. However, they must contribute to the EU environmental or energy objectives without adversely affecting trading conditions contrary to the common interest.[44]

According to the legal scholar Pim Jansen, state aid policy is in this way instrumental in furthering the objectives of the Europe 2020 Strategy and its ‘Resource efficient Europe’ flagship initiative[45] on the basis of which a number of headline targets have been set, including targets for climate change and energy sustainability, and implementing policies have been developed to support a shift towards a resource efficient and low-carbon economy.

Christian Koening, Professor of Law at the University of Bonn, has on this basis concluded that "State aid law has evolved [in]to a regulatory and policy making tool rather than a mere monitoring and law enforcement tool preventing isolated distortive State aid measures granted by Member States."[46]

6 The IPCEI Communication

The state aid exception which seems to coincide best with the interest of a European industrial policy is the exception for the support of *common European interest*. Pursuant to the first limb of Article 107(3)(b) TFEU "*aid to promote the execution of an important project of common European interest"* could be considered to be compatible with the internal market. As previously demonstrated in the judgment by the Court of Justice of the European Union (CJEU), *Exécutif régional wallon v Commission,* the threshold to make use of this exception is quite high.[47] With the adoption of the IPCEI Communication (now under revision),[48] the assessment of public financing of such projects has been updated and consolidated in line with the Europe 2020 Strategy objectives, including the EU's flagship initiatives. In particular, these guidelines concern large-scale, high risk advanced sectors with a pan-European dimension.

> "It is, however, clear that the IPCEI Communication focuses on the internal market of the EU rather than the global one."

It is, however, clear that the IPCEI Communication focuses on the internal market of the EU rather than the global one. In paragraph 2, the Communication states that IPCEIs may represent a highly significant contribution to economic growth, jobs and competitiveness for the Union industry and its economy in view of their positive spillover effects *on the internal market and the Union society*. Furthermore, an IPCEI must represent an important contribution to the *Union's objectives in general* (para 15).[49] The benefits of the project must not be limited to the undertakings or to the sector concerned but must be of wider relevance and application to the European economy or society through positive spillover effects (such as having systemic effects on multiple levels of the value chain, up- or downstream markets, or having alternative uses in other sectors or modal shift) which are clearly defined in a concrete and identifiable manner (para 17). Projects comprising industrial deployment must allow for the development of a new product or service with high research and innovation content and/or the deployment of a fundamentally innovative production process. Regular upgrades without an innovative dimension of existing facilities and the development of newer versions of existing products do not qualify as IPCEI (para 22). International competition is only mentioned in paragraph 34 where it is stated that:

> In order to address actual or potential direct or indirect distortions of international trade, the Commission may take account of the fact that, directly or indirectly, competitors located outside the Union have received (in the last three years) or are going to receive, aid of an equivalent intensity for similar projects. However, where distortions of international trade are likely to occur after more than three years, given the particular nature of the sector in question, the reference period may be extended accordingly. If at all possible, the Member State concerned will provide the Commission with sufficient information to enable it to assess the situation, in particular the need to take account of the competitive advantage enjoyed by a third country competitor. If the Commission does not have evidence concerning the awarded or proposed aid, it may also base its decision on circumstantial evidence.

The opportunities to take global competitiveness into account are thus rather limited. Moreover, it is only certain costs that can be covered. Eligible costs are mentioned in a special annex.

7 EU funding

Finally, it is important to add that the EU's own resources can be a useful source in financing important industrial policy projects. The ban on state aid in Article 107 (1) TFEU refers only to aid granted 'by a Member State or through State resources.' Aid granted only by the EU itself is therefore not covered by this provision. EU funding managed by EU institutions, agencies or other bodies of the EU, which are not directly or indirectly controlled by the Member States, is therefore a potential industrial policy tool. The IPCEI

Communication mentions that the Commission will take a more favourable approach where a project involves co-financing by a Union fund. One example of relevant EU funding in this context is the establishment of the two satellite programmes, Galileo[50] and Copernicus,[51] which provide funds for research and development activities within Horizon 2020.[52] Other examples are:

- The Programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises (COSME);[53]
- The European Structural and Investment Funds (ESI Funds) inter alia comprising the European Regional Development fund (ERDF), European Social Fund (ESF), Cohesion Fund (CF) and the European Agricultural Fund for Rural Development (EAFRD) and including the overarching Regulation (EU) No 1303/2013,[54] known as the Common Provisions Regulation (CPR);
- The European Fund for Strategic Investment (EFS I);[55] and
- The Connecting Europe Facility (CEF).[56]

The competences on which these initiatives to provide monetary support are based can inter alia be found in the titles in the TFEU on 'Industry', but also under 'Economic, social and territorial cohesion', 'Research and technological development and space' and 'Trans-European networks'.[57] However, in line with the final sentence of Article 173(3) TFEU, the conditions for EU funding are carefully drafted in order to ensure that funding will not lead to a *distortion of competition within the internal market.*

> "[...] the conditions for EU funding are carefully drafted in order to ensure that funding will not lead to a *distortion of competition within the internal market.*"

8 Conclusions

It has often been claimed that industrial policy and competition policy are incompatible with each other, because there would be an inherent contradiction in maintaining competition within the EU whilst at the same time preserving and encouraging the competitiveness of the EU's industry vis-a-vis the rest of the world.[58]

The Commission, by contrast, maintains that competition policy and industrial policy are considered different albeit closely related features of one idea; both would make European firms more efficient and prepare them for EU-wide competition, thereby equipping them for global competition. [59] It has been shown that the system of EU State aid control aims at striking a careful balance between European unity and national sovereignty. This entails that, while decisions to provide aid are in principle made by the Member States, the present EU legal framework generates a number of systemic obstacles that can preclude or limit the adoption and application of national industrial policy measures that entail monetary support, in particular those that are based on the interpretation of industrial policy in a purely domestic sense.[60]

However, while the Commission has always had to balance the general prohibition of State aid against possible exceptions in Article 107(3) TFEU, by inviting Member States to provide "good aid", as opposed to "bad aid", as exemplified by the SAM Programme, which, in turn, has been highly influenced by the Europe 2020 Strategy, the EU increasingly policy-governs the structural industrial change in the Member States.[61] This, in combination with the creation of multiple EU funding possibilities aiming to positively contribute to the objectives of said Europe 2020 Strategy, enables the Commission to increasingly use State aid policy measures as a public governance instrument to create positive European industrial policy in the absence of a powerful European industrial policy in itself.[62]

Nonetheless, this hidden or concealed European industrial policy fits poorly with the Treaty provisions in this area which emphasise the national sphere of decision-making. This begs the question of whether this competence mismatch in Union policy making is sustainable in the long run. Even if an industrial policy becomes increasingly visible, it is mainly based on exceptions (in this context, the focus has been on exceptions to the state aid ban). Facing these realities, it seems that the Member States do not have anything to lose in strengthening the Union's competence regarding industrial policy in Article 173 TFEU, turning the exceptions to the state aid ban (controlled mainly by the Commission) into a more coherent European industrial policy (which would finally be decided upon by the Council and the European Parliament). Indeed, the EU needs a coherent industrial policy which is adaptive to geopolitical changes in the world, demonstrated recently by the Chinese Belt and Road Initiative, President Trump's mercantilist approach to trade policy as well as Brexit. A coherent European industrial policy must also, and to a large extent, include a forward-looking external trade policy, making a stronger contribution to the EU manufacturing sector's engagement in the global economy.[63] It should increase the external competitiveness of EU industries and further the development of trade and investment (also through EU funding), rather than relying on increased protectionist measures and intensified interventions.[64] It is in this context unreasonable to have exactly the same assessment criteria for aid that will benefit the global competitiveness of European companies and aid which concerns only the competitive conditions within the EU. Market failures could also be assessed in a global perspective.

Such a policy may to some extent be adopted under Article 173.3 TFEU as a *specific measure* coordinating and supporting national industrial policies. It should encompass geopolitical strategies, competition and trade considerations, and in light of this define important projects of common European interest. A first step in this direction can possibly be the expected long-term vision for the EU's industrial future requested from the Commission by the European Council in March 2019.[65] However, such a policy would be more solid if the underlying competence of the Union is strengthened, making European industrial policy a key concern of the Union, which would require a change in the Treaty.

> "It is in this context unreasonable to have exactly the same assessment criteria for aid that will benefit the global competitiveness of European companies and aid which concerns only the competitive conditions within the EU."

Finally, a European industrial policy must respect the commitments under the WTO and external trade agreements. The potential use of a more aggressive European industrial policy is higher in times in which the rule-based international trade system fails to work. If there is no global level playing field, trade strategies have to adapt to new realities.

Notes

[1] See Bacchus, J., Lester, S., and Zhu, H., *Disciplining China's Trade Practices at the WTO. How WTO Complaints Can Help to Make China More Market-Oriented*, in: Policy Analysis Cato Institute No. 856 (15 November 2018).

[2] Ambroziak, A. A., *State Aid Policy and Industrial Policy of the European Union*, in Amroziak, A.A. (ed.) The New Industrial Policy of the European Union – Contributions to Economics, Springer 2017 (e-book), loc 4126-4127.

[3] The Friends of Industry are described as a group of likeminded EU Member States that meet once a year to discuss recent developments related to industrial policy at the EU level. The latest achievement, the Vienna Declaration, was signed by Austria, Bulgaria, Croatia, Denmark, France, Germany, Greece, Italy, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden. The group is inclusive and open to any Member State. See https://www.bmdw.gv.at/en/Topics/Europe-and-EU/Austria-in-the-European-Union/Seventh-Friends-of-Industry-Ministerial-Conference.html.

[4] Ambroziak, op cit, loc 2700-2708.

[5] Ibid.

[6] Ibid., loc 2714-2719.

[7] Ibid.

[8] Ibid., loc 2719-2727.

[9] Ibid., loc 2868-2869.

[10] See Jansen, P., *The Interplay between Industrial Policy and State Aid: Natural Combination of Strange Bedfellows*, European State Aid Law Quarterly (ESTAL) no. 4, 2016, pp. 575-602, 576.

[11] See Ambroziak, op cit, loc. 2496-2498.

[12] See the Commission State Aid Action Plan, COM (2005) 107 final, p. 4.

[13] Cf. Ambroziak, op cit, loc 2773-2777.

[14] Jansen, op cit, p. 577.

[15] See Article 107.3 e) exceptions for "such other categories of aid as may be specified by decision of the Council on a proposal from the Commission."

[16] Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry, OJ L 205, p. 1-8. I am grateful to Jansen for having provided this and other examples. See Jansen, op cit, p. 594.

[17] Council Decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines 2010/787/EU, OJ L 336, p. 24–29, recital 3.

[18] Council Decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines 2010/787/EU, OJ L 336, p. 24–29.

[19] See the Communication from the Commission - Rescue and restructuring aid and closure aid for the steel sector (notified under document No C(2002) 315), 0J C 70, 19.3.2002, p. 21–22; Communication from the Commission – Multisectoral framework on regional aid for large investment projects (notified under document No C(2002) 315), OJ C 70, p. 8–20.

[20] See the Framework on State aid to shipbuilding, OJ C 364, 14.12.2011 incl. the Communication from the Commission concerning the prolongation of the application of the Framework on State aid to shipbuilding (2013/C 357/01).

[21] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State Aid Modernisation, COM (2012) 209, para 12.

[22] See Jansen, op cit, p. 577.

[23] Ibid. p. 594.

[24] Ibid. p. 590.

[25] Article 2(1) TFEU. Any other national rules and regulations related to export policy and FDI are by definition incompatible with EU law, irrespective of whether and when the EU exercises its competence. See Dimopoulos, A., 'Foreign Investment Insurance and EU Law', [2012] TILEC Discussion Paper 1, 13.

[26] The SCM Agreement creates two basic categories of subsidies: those that are prohibited and those that are actionable (i.e. subject to challenge in the WTO or to countervailing measures). The first category consists of subsidies contingent, in law or in fact, whether wholly or as one of several conditions, on export performance ('export subsidies'), see Article 3 of the SCM Agreement. A detailed list of export subsidies is annexed to the SCM Agreement.

[27] Council Directive 98/29/EC of 7 May 1998 on the harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover, OJ L 148, p. 22–32.

[28] Regulation (EU) No 1233/2011 of the European Parliament and of the Council of 16 November 2011 on the application of certain guidelines in the field of officially supported export credits, and repealing Council Decisions 2001/76/EC and 2001/77/EC, OJ L 326, p. 45–112.

[29] Jansen, op cit., p. 590.

[30] See Gustyn, J., *The Common Commercial Policy and the Competitiveness of EU Industry* in Amroziak, A.A. (ed.) The New Industrial Policy of the European Union – Contributions to Economics, Springer 2017 (e-book), loc 3563-3568.

[31] Ibid.

[32] Conclusions from European Council 2010.

[33] Communication (COM(2012) 22 final – Trade, growth and development – Tailoring trade and investment policy for those countries most in need.

[34] See Petersmann, E-U, *How should the EU and other WTO members react to their WTO governance and WTO Appellate Body crises?*, RSCAS 2018/71, p. 14.

[35] Gustyn, op cit, loc 3640-3644.

[36] Commission State aid action plan – Less and better targeted state aid: a roadmap for state aid reform 2005-2009 (Consultation document), COM (2005) 107.

[37] Jansen, op cit., 595.

[38] Se López, J. J. P., *The Concept of State Aid Under EU Law: From internal market to competition and beyond*, Oxford University Press 2015, p. 203–204.

[39] I am grateful to Jansen for pointing out these highly interesting examples, see Jansen, op cit, p. 597.

[40] ETS guidelines, para 24.

[41] Communication from the Commission – Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55, par. 3.7.

[42] Jansen, op cit., p. 597 ff.

[43] Ibid.

[44] EEAG guidelines, para 23.

[45] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Roadmap to a Resource Efficient Europe, COM (2011) 571 final.

[46] Koenig, C., *Where is State Aid Law Heading To* (2014) 13(4) European State Aid Law Quarterly 611.

[47] Joined cases C-62/87 and C-72/87, Exécutif régional wallon v Commission, paras 21, 23–25.

[48] Communication from the Commission on criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (EUT 2014, C 188, p. 2).

[49] The Communication mentions, for instance, the Europe 2020 Strategy, the European Research Area, the European strategy for KETs, the Energy Strategy for Europe, the 2030 framework for climate and energy policies, the European Energy Security Strategy, the Electronics Strategy for Europe, the Trans-European Transport and Energy networks, the Union's flagship initiatives such as the Innovation Union, Digital Agenda for Europe, the Resource Efficient Europe and the Integrated Industrial Policy for the Globalisation Era.

[50] Regulation (EU) No 1285/2013 of the European Parliament and of the Council of 11 December 2013 on the implementation and exploitation of European satellite navigation systems and repealing Council Regulation (EC) No 876/2002 and Regulation (EC) No 683/2008 of the European Parliament and of the Council, OJ L 347, p. 1–24.

[51] Regulation (EU) No 377/2014 of the European Parliament and of the Council of 3 April 2014 establishing the Copernicus Programme and repealing Regulation (EU) No 911/2010 Text with EEA relevance OJ L 122, p. 44–66.

[52] See inter alia Regulation (EU) No 1291/2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014–2020); Regulation (EU) No 1290/2013 laying down the rules for participation and dissemination in Horizon 2020; Decision establishing the specific programme implementing Horizon 2020; Regulation (EU) No 1292/2013 establishing the European Institute of Innovation and Technology; Decision No 1312/2013/EU on the strategic innovation agenda of the European Institute of Innovation and Technology (EIT): the contribution of the EIT to a more innovative Europe.

[53] Regulation (EU) No 1287/2013 of the European Parliament and of the Council of 11 December 2013 establishing a Programme for the Competitiveness of Enterprises and small and medium-sized enterprises (COSME) (2014–2020), OJ L 347, p. 33.

[54] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 347, p. 320–469.

[55] Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 – the European Fund for Strategic Investments, OJ L 169, p. 1–38.

[56] Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, OJ L 348, p. 129–171.

[57] See Jansen, op cit., p. 581.

[58] For a discussion of this traditional view, see, for example, Sauter, W., *Competition Law and Industrial Policy in the EU*, Oxford University Press 1997, p. 3. See also Lane, R., *New Community Competences under the Maastricht Treaty* (1993) 30(5) Common Market Law Review 939, 966.

[59] Jansen, op cit., p. 579–580.

[60] Ibid., p. 600.

[61] Ibid., p. 578.

[62] Ibid., p. 600

[63] Gustyn, op cit., loc 4335–4336.

[64] Ibid., loc 4348–4351.

[65] European Council Conclusions 21 and 22 March 2019, EUCO 1/19.