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DIGITAL TRANSFORMATION

EDITORIAL

Chères lectrices, Chers lecteurs,

Le semestre de printemps est terminé. Alors que les étudiants examinent leurs résultats et, pour certains, ont assisté à la cérémonie de diplôme qui a marqué la fin de leur scolarité, ce troisième numéro de la Revue d'Affaires Publiques de Sciences Po vous propose un aperçu de certains grands thèmes qui ont animé leurs réflexions ces derniers mois.

Le comité scientifique a sélectionné dix-huit articles parmi les nombreux travaux qui nous ont été transmis, treize en anglais et cinq en français.

Quelques semaines à peine après les élections européennes, pas moins de sept contributions illustrent la diversité des enjeux auxquels fait face l'Union. Sur le plan juridique, l'article de Cristina Durlesteanu et Céline Pont analyse les conséquences du Brexit sur le droit de la concurrence tandis que Cyrille Amand pose la question de l'avenir de la langue anglaise au sein des institutions européennes. Autres sujets d'actualité, Anna Nordnes Helgøy présente l'impact de la crise des réfugiés syriens sur les politiques d'intégration en Suède et Sonam Kotadia décrypte l'essor des populismes d'extrême droite en Autriche et en Allemagne à travers les exemples de l'AfD et du FPÖ. Ediane de Lima propose un retour sur les erreurs commises par David Cameron, lesquelles permettent d'éclairer l'engrenage ayant mené tout droit au Brexit. Concernant l'enjeu écologique, Zoe McGowan et Anna Nordnes Helgøy s'intéressent à l'impact de la fixation d'un prix du carbone en Europe sur les inégalités. Enfin, l'article d'Oliver Unverdorben propose une redéfinition de l'identité de l'Union européenne en tant qu'acteur sur la scène internationale.

Ce numéro ne se limite toutefois pas aux frontières européennes : l'article de Martin Takács analyse le rôle d'interface joué par l'Ukraine dans les relations commerciales qui unissent l'Union et la Russie à travers le gaz. Rachel Harrington-Abrams présente une comparaison des enjeux et solutions propres à l'Afrique de l'Ouest et à l'Indonésie en matière de lutte contre la pêche illégale, non reportée et non régulée (« IUU Fishing »). Par ailleurs, Cécile Fraysse propose une analyse économique des effets potentiels du réchauffement climatique sur la stabilité financière. Charles-Hugo Lerebour nous plonge quant à lui dans les méandres du cadre juridique de l'exploitation des fonds marins. Dans un autre registre, la contribution d'Ophélie Patin permet de comprendre les défis auxquels fait face l'Etat de droit en Arménie.

Sur le plan des politiques publiques nationales, Manon Berriche illustre les difficultés propres au processus d'élaboration d'une politique éducative à partir d'une expérimentation sociale. Sciences Po se fait fort de former des acteurs engagés : Camille Leboeuf et Floriane Lauron, membres de l'association Services Publics plaident dans leur contribution pour un changement de cap du programme de réformes Action Publique 2022.

Nous avons également choisi de consacrer une partie de ce numéro aux enjeux du numérique pour les affaires publiques. Après une brève introduction générale du comité éditorial, l'article d'Alexander Crean et Julian-Bela Joswig fait écho à l'actualité en s'attaquant au contrôle des « fake news » dans l'Union européenne. Salih Isik Bora analyse quant à lui le rôle joué par l'Europe dans la protection des données. Ricardo Zapata Lopera propose une réflexion critique sur la « démocratie digitale » tandis qu'Alexandra Dimitrova interroge les outils permettant de favoriser l'innovation dans le secteur financier à travers l'exemple des fintechs.

Nous espérons que ces contributions riches et variées permettront aux lecteurs, tant internes qu'externes à Sciences Po, de se faire une idée de ce qui occupe et intéresse ses étudiants, mais surtout qu'elles contribueront au débat d'idées et à la réflexion publique dans lesquels notre école entend jouer un rôle.

Ce numéro doit sa parution aux efforts de plusieurs dizaines de personnes. A cet égard, nous tenons tout particulièrement à remercier le comité scientifique pour son travail d'analyse et de sélection des contributions, ainsi que l'ensemble des étudiants et professeurs qui nous ont transmis des articles. Nous voulons également remercier l'administration de Sciences Po pour son soutien.

Enfin, nous tenons à remercier l'ensemble des membres du comité éditorial et tous ceux qui se sont succédé en son sein depuis septembre 2017 pour permettre à ce projet de naître, perdurer et s'étendre.

Il ne nous reste qu'à vous souhaiter une bonne lecture et vous inviter à nous transmettre vos commentaires et éventuelles contributions pour les prochains numéros.

Galaad Defontaine
Joanna Lancashire

Rédacteurs en chef

Éditorial

Dear Readers,

The spring semester has come to an end. While students ponder their results following the graduation ceremonies that have marked the end of their studies, this third edition of the Review of Public Affairs of Sciences Po presents to you an overview of some of the subjects which have animated their reflections during the past months.

The Scientific Committee has selected eighteen articles among the many papers we received, thirteen in English and five in French.

Only a few weeks after the European elections, no less than seven contributions illustrate the diversity of the issues the European Union is facing. On the legal side, Cristina Durlesteanu and Céline Pont's article analyses the consequences of Brexit on competition law, while Cyrille Amand questions the future of English language in European institutions. On other topical subjects, Anna Nordnes Helgøy presents the impact of the Syrian refugee crisis on integration policies in Sweden and Sonam Kotadia describes the rise of extreme right-wing populism in Austria and Germany through the examples of the AfD and the FPÖ. Ediane de Lima proposes an analysis of the mistakes committed by David Cameron, looking to understand what might have directly led to Brexit. On environmental issues, Zoe McGowan and Anna Nordnes Helgøy study the impact of a carbon price on inequalities. Finally, Oliver Unverdorben's article proposes a redefinition of the identity of the European Union as an actor on the international scene.

However, this edition is not limited to European borders: Martin Takács's article analyses how Ukraine is an interface for commercial relations which are uniting the European Union and Russia through gas. Rachel Harrington-Abrams presents a comparison of the issues and solutions in West Africa and Indonesia when it comes to IUU Fishing. Cécile Fraysse gives an economic analysis of the potential effects of global warming on financial stability. Charles-Hugo Lerebour plunges us in in the legal framework of deep-sea exploitation. Of another vein, the contribution of Ophélie Patin allows to understand the issues the rule of law is facing in Armenia.

When it comes to French national public policies, Manon Berriche describes the difficulty in elaborating an education policy through the example of a social experiment. Besides, Sciences Po is proud to train committed public actors: Camille Leboeuf and Floriane Lauron, members of the association of "Services Publiques", plead in their article for a course alteration of the national program of reforms Action Publique 2022.

We also have chosen to dedicate a part of this edition to the issue of digital in public policy. After a short general introduction by our editorial committee, Alexander Crean and Julian-Bela Joswig's article echos current events by tackling the issue of "fake news" regulation in the European union. Salih Isik Bora analyses the role the EU has played in data protection. Furthermore, Ricardo Zapata Lopera proposes a critical reflection on "digital democracy" while Alexandra Dimitrova questions the tools fostering innovation in the financial sector, using the example of FinTech startups.

We hope these rich and diverse contributions will not only allow readers - whether they are internal or external to Sciences Po - to gain an idea of what its students do and are interested in, but also contribute to the reflections on the ideas and public debates with which our university is involved.

This edition could not have been published without the efforts of a dozen of people. With that in mind, we would like to thank the Scientific Committee in particular, for its work in analysis and selection of the articles, as well as all the students and professors who submitted papers. We also thank the administration of Sciences Po for its support.

Last but not least, we are personally grateful to all present and past members of the editorial committee who have been working on the Review since 2017 and permitted the project to be born, sustain and grow.

What remains for us is to wish you a pleasant reading and to invite you to send us your opinion and contributions for the coming editions.

Galaad Defontaine
Joanna Lancashire

Editors-in-Chief

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The consequences of Brexit on competition law

You said you want a revolution?

CÉLINE PONT & CRISTINA DURLESTEANU -
Master Droit Économique, Global Governance Studies

Abstract:

As negotiations remain open and all exit scenarios possible after the extension of the Brexit deadline to the 31st of October, this article explores short and long-term implications of Brexit on the UK and EU competition regime. Overall, the draft deal negotiated in 2018, at the time of writing, attempts to maintain a regulatory status-quo until a free trade agreement is agreed upon, providing for key transitional arrangements and work-sharing mechanisms for ongoing and future procedures. Absent of a deal, and consistent with UK businesses' interest to keep close ties with the EU, most of pre-Brexit EU competition rules are planned to be incorporated into domestic law. Yet, effective public and private enforcement of the EU and UK competition laws would be immediately threatened by parallel proceedings and investigations, leading to inconsistent decisions and legal uncertainty for businesses. In any event, the alignment of UK and EU competition and State aid laws is likely to be required by the EU as a precondition for the conclusion of the ambitious future economic partnership ambitioned by the UK.

Habemus pactum? While no white smoke was spotted coming out of 10 Downing Street, the long-awaited Draft Withdrawal Agreement ("DWA") was technically agreed on by European Union ("EU") and United Kingdom ("UK") negotiators on 14 November 2018.[1] The deal was then endorsed on a political level on 25 November 2018[2] by EU Members, and has now to be approved by the British Parliament scheduled on 11 December 2018.[3]

Yet, both sides of the channel are still preparing for the worse. The European Commission ("EC") just published a Contingency Action Plan in the case of a no deal scenario.[4] This possibility is also being contemplated by the UK government,[5] which recently issued draft amendments to the existing national competition law framework for the transition to a standalone competition regime.[6]

This cautiousness is explained by the political isolation of Prime Minister Theresa May within the Conservative Party and Parliament, unlikely to ratify the deal as it stands. May's halfway Brexit plan to leave the Single Market while preserving the closest possible ties with the EU discontents Brexiters and Pro-Europeans alike. Most tellingly, Eurosceptic leader Boris Johnson and his Europhile brother Jo Johnson both resigned from the government[7] in protest over the terms on which May hopes to secure Britain's exit. Both reached the conclusion that the proposed arrangements are "*substantially worse than staying in the EU" and amount to "vassalage*", as the UK would be "*out of Europe, yet run by Europe, bound by rules which [it] will have lost a hand in shaping*".[8] After the publication of the draft deal, three more cabinet members resigned, including the Brexit secretary.[9]

What the future of competition law will look like post-Brexit heavily depends on May's Government delicate trade-off between contradictory political and economic objectives. Brexit vote is generally analysed as a popular demand to take back sovereign control of UK laws, borders and money.[10] It undoubtedly entails opting out of the Single Market to end the supremacy of Union law and European Court of Justice ("ECJ") oversight over domestic courts. This so-called "*hard Brexit*,"

"Incentives for policy innocation have clearly been outweighed by the pragmatic necessity to provide legal certainty to businesses."

stemming from political imperatives would allow for change and innovation in all fields of law on which full sovereignty is to be recovered. Arguably, the UK would be free to implement a completely different set of competition rules that it considers to be a best fit to its specific national interests. Legislative reforms could endorse a protectionist approach that fosters public interest considerations over market competition,[11] or, to the contrary, the UK could go further in the economic analysis of competition law and develop a more efficient-based approach.

In fact, this is very unlikely to happen. Incentives for policy innovation have clearly been outweighed by the pragmatic necessity to provide legal certainty to businesses operating cross-borders, and to secure "*as frictionless trade as possible with European markets without being a member of the Single Market*".[12] As a result, the government's current plan for post-Brexit competition law is to depart as little as possible from existing rules on mergers, antitrust and State aid as to preserve UK's economic interests and attractiveness to foreign investors. Also, EU Members have made crystal-clear that any future trade deal to be negotiated must ensure fair and open competition so that UK and EU businesses compete on the same level. Thus, "*fundamental changes to the UK competition framework*" are not to be expected "beyond the changes necessary to *ensure [its] competition regime remains fully operational when [UK] leave[s] the EU*".[13] It is also undisputed that EU competition law has been substantially shaped by the UK itself,[14] which undermines the argument for a significant shift of paradigm. Besides, the application of EU competition laws is fairly uncontroversial in the UK, as opposed to the Common Agricultural Policy or the Common Fisheries Policy, on which taking back control was seen as an important Brexit goal.

Thus, it is clear that Brexit should not have a meaningful impact on existing substantive rules governing merger, state aid and antitrust, which for the most part are planned to be entirely transposed into UK national law. But beyond that, new legislative arrangements must be found in order to protect the effective enforcement of competition law. It is notably in the interest of the EU, which wants to continue to ensure that EU and UK businesses will compete fairly on a "*level playing field*"[15] in the context of the Free-Trade Agreement ("FTA") to be negotiated during the transition period, if a deal is finally secured.

Following a brief recap of UK and EU pre-Brexit competition regime, this paper will first address the short-term implications of Brexit for competition law and procedures as provided by the DWA during the transition period and under the "backstop" mechanism (I). Overall, the deal attempts to maintain a regulatory status-quo until an FTA is agreed upon. As a result, EU competition disciplines as well as ECJ jurisdiction will continue to apply for two years at least. The deal also provides for key transitional arrangements and work-sharing mechanisms for ongoing and future competition procedures, as to ensure smooth jurisdictional articulation and avoid post-Brexit parallel investigations and enforcement gap. Yet, chances are that the draft will never

make it into force, resulting in the UK leaving the EU on 29 March 2019 without any transitional arrangements (II). The UK has drafted regulations and published measures and guidance to be applied absent of a deal. Consistent with May's strategy and UK businesses' interest to keep close ties with the EU, The European Union Withdrawal Act 2018 ("EUWA") incorporates most of pre-Brexit EU competition Rules into domestic law. Also, pre-Brexit ECJ related interpretations would continue to be binding on domestic courts to a certain extent. However, effective enforcement of the EU and UK competition laws would be immediately threatened in the absence any cooperation agreement between EU and UK competition agencies. Parallel proceedings and investigations of mergers and antitrust infringement cases could lead to inconsistent decisions, create uncertainty and supplementary costs for businesses, and weaken public and private enforcement of competition rules. In any event, the alignment of UK and EU competition and State aid laws is likely to be required in the long run by the EU as a precondition for agreeing on an ambitious economic partnership, in order to guarantee that UK and EU business compete on a level playing field for open and fair competition (III). The FTA or a separate bilateral agreement could also provide for cooperation procedures limiting Brexit adverse effects on public and private enforcement of competition law.

Current competition provisions in EU and UK law - a short introduction

A. Antitrust

Presently, antitrust is regulated in the UK both by EU primary and secondary legislation, as well as by UK national law. Both are substantially identical.[16] At the European level Article 101 of the Treaty on the Functioning of the European Union ("TFEU") prohibits vertical and horizontal concerted actions agreed amongst two or more independent market operators which could result in a restriction of competition;[17] whereas Article 102 of the TFEU prohibits companies benefiting of a dominant position on the market to abuse it.[18] At the national level, antitrust law is organized by Chapters I and II of the Competition Act enacted in 1998 ("CA98") as well as by the disposition on criminal cartels under section 188 of the Enterprise Act 2002 ("EA02"). Regulation 1/2003 of 16 December 2002 defines in its Article 3 the relationship between EU Member State's national law on antitrust and the EU law. Thus, when the competent authorities or jurisdictions of a Member States apply national dispositions to agreements or concerted practices between corporations which could hinder competition between Member States under Article 101 TFEU, they have also to apply Article 101 TFEU. In the same spirit when they apply national law to a case of abuse of dominant position prohibited by Article 102 TFEU they have to apply both sets of laws.[19] Finally when UK national courts deal with antitrust cases they are required by Section 60.2 of CA98 to interpret Chapter I and II of the same Act consistently with the jurisprudence of the ECJ, whereas Section 60.3 requires for the national court to have regard to the decisions issued by the EC on the same subject.

For the purpose of reducing the costs of antitrust law supervision the EC has adopted several Block Exemption regulations which authorise and validate ex ante a certain number of agreements falling under their scope. Currently Section 10, Chapter I of the CA98 on parallel exemptions introduces these exemptions created by the EU regulations into the national law.[20]

Regulation 1/2003 also organizes the distribution of competence between the Competition and Market Authority ("CMA"), and the EC.[21] There are no rigid rules allocating the review of certain cases to the CMA and of some others to the EC. Usually the CMA would take care of the cases in which the breach of UK national and EU antitrust laws affects exclusively its own market, whereas the EC would take care of the bigger cases in which the markets of several Member States are affected. When the CMA applies Articles 101 and 102 TFEU it has to inform the EC before or soon after having initiated the first step of its investigation.[22] If the EC considers that it is best suited to treat the said case, after a discussion with the CMA, the case can be transferred under its jurisdiction.

Like most EU Member States, the UK has strived to ease private enforcement of EC's decisions on breaches of Articles 101 and 102 TFEU. It has done so through the adoption of Sections 47A and 58A of the CA98. Section

47A enabled "*a person who has suffered loss or damage [to] make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of*" Chapters I and II of CA98, Articles 101.1 102 TFEU.[23] Since March 2017, Section 47A has been replaced by Section 47F and Schedule 8 of CA98 as a consequence of the transposition of Directive 2014/104/EU.[24] The UK already met some essential requirements set by this directive, but some significant changes were still introduced by the latter especially in domain of cooperation and recognition of decisions within the EU. The most important of them being the introduction of a rebuttable presumption of loss caused by cartels.[25] Another significant evolution is the fact that from the moment of the introduction of Section 47F, decisions given by competition authorities of other Member States constitute prima facie evidence of an infringement of competition law in front of the UK courts. Section 58A of CA98 established and continues to establish the binding character of the CMA, EC and of the ECJ decisions on antitrust matters once they have become final.

Finally, UK courts are competent to review CMA antitrust decisions, and when they have doubts concerning the interpretation of the related EU law, they can ask the ECJ for clarification through preliminary rulings. At the EU level the ECJ has the power to review the decisions taken by the CMA and the EC.

B. Mergers

In the UK, mergers are regulated by the EU Merger Regulation ("EUMR")[26] when they are of a "Community dimension", and by the UK Enterprise Act of 2002 ("EA02") in any other configuration. The EUMR defines a Community dimension merger as a concentration reaching a certain amount of combined aggregate turnover worldwide and a certain amount of Community wide turnover which is evenly distributed amongst the Member States. Typically, the mergers which impact several EU Member States fall under the scope of the EUMR, whereas the mergers having mostly a national impact fall under the UK EA02.[27] The EC takes in charge mergers submitted to the review of the EU law whereas at national level the same task is taken care of by the CMA.[28] Unlike in antitrust matters the CMA is not bound by ECJ jurisprudence or by the EC's decisions in assessing the merger cases which fall under its scope.[29]

The major difference between the EUMR and the UK EA02 is that the EUMR imposes a mandatory notification of the merger when the thresholds laid out in the Regulation are reached by the entities involved. It enables the EC to proceed to an ex ante verification of the compatibility of the merger to EU law.[30] The UK prefers a voluntary notification and practices an ex post validation.[31] However these different ways of functioning do not hinder the efficiency of the "one-stop-shop" system in which these two entities take part. It consists in the fact that the EC and the CMA are able to refer each other cases for review depending on their size and nature. Thus, the EC has exclusive jurisdiction under the EUMR to assess the conformity of a merger to EU law and will also treat the effects of such merger on the UK domestic market. Once the transaction is validated directly or on the condition of the implementation of certain requirements, the entities which take part in the said merger don't need to undergo an identical process with the CMA. Similarly, if a merger does not reach the thresholds set by the EC to qualify as a Community wide merger, it is consequently examined by the CMA, and its decision does not need to be backed by the EC to be final and binding.[32]

However, Article 21 EUMR allows Member States to take measures aimed at protecting legitimate interests which are not related to competition and susceptible to apply in the evaluation of mergers which fall under the scope of the EUMR. As a result, financial stability, public security and plurality of the media may be taken into account.[33] The measures made can be adopted without prior validation of the EC, even if it distorts competition, under the condition that it is proportionate and non-discriminatory.[34] Other types of arguments have to be submitted to the scrutiny of the EC for an evaluation along the lines of the principles of Union law. In a large majority of cases, the EC does not allow Member States to intervene in merger cases placed under its authority on other grounds than the three set in Article 21.[35]

C. State aid

To this date, just as for the other pillars of UK's competition law described above, State aid has been shaped by the EU competition law laid down in the TFEU. The specificity of State aid being that currently the UK has no national dispositions re-

gulating State aid. The only legislation applying to UK State aid issues is European, and contained in Articles 107 to 109 TFEU. These articles prohibit Members States to provide State aid in order to favour the development of companies incorporated on their national soil. They also provide some exceptions which enable for instance a Member State to give a financial impulse to an economically disadvantaged region by subsidising its companies.

Up until today, every time the UK wanted to provide State aid, it had to notify the EC, which in turn had to assess whether this particular State aid presented the risk of "*distort[ing] or threaten[ed] to distort competition by favouring certain undertakings or the production of certain goods*".[36] Because the EC was receiving many notifications on this matter, it decided to put in place in 2008 a General Block Exemption Regulation ("GBER"). It is a list of State aids deemed to be compatible with the EU legislation on competition and which do not require a prior notification.[37] For the same purpose the EC issued a set of guidelines and the de minimis Regulation, which exempts State aid the amount of which is below a certain threshold from notification.[38]

The ECJ has jurisdiction to legally assess the decisions and the fines that the EC issues in relation with State aid, but not of the CMA as the later has not authority whatsoever on State aid. Preliminary rulings are not used in the field of State aids for the same reason.

I. Short-term implications of Brexit for competition law and procedures as provided by the Draft Withdrawal Agreement - *Turn and face the strange*

On Thursday 14 November 2018, the DWA on the withdrawal of the UK from the EU and the European Atomic Energy Community was agreed by UK and EU negotiators.

This agreement crucially provides for a transition period aimed at ensuring a smooth exit of the UK from the Union and avoiding a regulatory "*cliff-edge*"[39] for businesses. During transition, the UK will not participate in the governance of the EU, but EU law will remain applicable in the UK until a new relationship is negotiated between the Parties. The UK will thus continue to comply with certain EU laws, including competition laws. Any breach will continue to fall under the jurisdiction and scrutiny of the EC and of the ECJ[40] for a period which will start at UK's official exit date on 29 March 2019 and end on the 31st of December 2020.[41]It is important to note that Michel Barnier - chief Brexit negotiator for the EU - is prepared to extend this period until the end of 2022, should the UK make a specific demand in that sense pursuant Article 132 of the DWA. For now in the UK this proposition was welcomed with hostility by the UK MPs because of the supplementary costs that it would imply.[42] If the deal is adopted, EU laws including competition laws will continue to apply as usual for a maximum of 4 years as of 29 March 2019: the DWA thus provides predictability and legal certainty called for by businesses on the rules to be complied with until a new economic partnership is agreed on. Most importantly, it sets out key transitional and jurisdictional arrangements on ongoing competition law procedures, which ensure that ongoing and future investigations can run smoothly after the UK leaves the EU.[43]

No Surprises during the transition period

A. Antitrust

EC antitrust investigations typically last several years, even before appeals are taken into account. It means that investigations concerning conduct affecting UK markets will have been started well before Brexit takes effect and some will still be pending at the point of exit. The transition period is therefore particularly useful to determine which competition authority will have jurisdiction and to ensure a clear allocation of cases between the EC and the CMA.

The DWA provides that "*institutions, bodies, offices and agencies of the Union shall continue to be competent for administrative procedures which were initiated before the end of the transition period concerning: [...] (b) compliance with Union law relating to competition in the UK*".[44] Thus the EC will be entitled to initiate new antitrust proceedings during the transition period. This measure gives time to the UK to progressively adapt its legislative framework to the separation and its future independence towards the EU. When should it be considered that the EC has initiated antitrust proceedings? Several answers could have been envisaged: at a very early stage when the EC starts to investigate informally on a case, or much later when a Statement of Objection ("SO") detailing the Commission's con-

cerns is sent to the companies concerned. The DWA settles this issue and considers that for antitrust matters the moment when a procedure has been initiated is "*the moment at which the European EC has decided to initiate proceedings in accordance with Article 2(1) of EC Regulation (EC) No 773/2004*". The EC's decision to initiate proceedings may be issued after it conducted investigative actions, but no later than the date on which its preliminary assessment of the case or it's SO is released to involved undertakings.

In principle, the EC will continue to "monitor and enforce commitments given or remedies imposed in, or in relation to, the United Kingdom" in antitrust matters. However, the DWA also allows, upon an agreement between the EC and the CMA, for a transfer of this function to the CMA.[46]

B. Mergers

Just as for antitrust cases, the EC will be entitled to initiate new merger proceedings until the end of the transition period. In the specific context of mergers, the DWA sets three cumulative conditions for the determination of the moment when a procedure is deemed to be initiated. First, "*a concentration of Union dimension has been notified to the European Commission*". Second, no Member States "*competent to examine the concentration under their national competition law hav[e] expressed [their] disagreement*" to refer the case to the EC. Third, "*the European Commission has decided or is deemed to have decided to examine the concentration*". [48]Approximately, more than one month can pass between the notification of the merger to the EC and its decision to examine the merger.

In a similar way as for antitrust matters, even though the EC will continue to be in charge of monitoring merger related activities within the UK, the CMA could request the transfer of this function.[49]

C. State aid

Regarding State aid, transitional measures also provide that EC authority to review UK subsidies will continue during the transition period, with the procedure deemed to have been commenced when the case has been allocated a number.[50]

Yet, the EC will be able to initiate State aid procedures for a much longer period than the other two pillars of competition law. Indeed, the EC will be competent to initiate new procedures as far as "4 years after the end of the transition period" for aid granted by the UK before the end of the transition period, so nearly 6 years in total. [51]

One might wonder why the EC wants to maintain control over State aid related procedures longer than over other areas of UK competition law. It could be explained by the fact that EU and UK leaders are currently considering the possibility of a very bold FTA envisioning a tax free policy on the exchanged goods and very slim tariffs on services.[52] In this context, the EC and Union Members probably fear that the UK, no longer constrained by EU State aid legislation, would grant generous subsidies to companies incorporated on its territory, which would gain unfair competition advantages on EU-based companies. This is probably why the EU has made clear that it would only enter into such an inclusive FTA on the condition that the UK tightly regulates its State aid regime. By extending control over UK State aid beyond the transition period, it is possible that the EU tries to set the tone on the subject for the future FTA negotiations, in line with the European Council guidelines for Brexit negotiations.[53]

Under pressure of the "backstop" mechanism

If an agreement on the future EU-UK relationship is not applicable by the end of the transition period (31 December 2020), two courses of action are available. First, the UK may ask for an extension of the transition period,[54] so that Parties will have more time to agree on their future economic partnership. Alternatively, the backstop mechanism contained in the Protocol on Ireland and Northern Ireland ("Backstop Protocol") may come into force and remain applicable until the future FTA is negotiated.

This solution was designed to avoid a hard border between Ireland and Northern Ireland once the UK is out of the EU, with the view to protect the 1998 Good Friday peace agreement[55] and the island economy. The insurance policy was very much criticized by both camps, but as simply put by UK Prime Minister, "*there is no deal that comes without a backstop, and without a backstop there is no deal*".[56] Brexiteers are particularly unhappy because the backstop keeps the whole UK in a single customs territory with the EU[57] for an arguably indefinite period, as the UK cannot leave this agreement without EU's consent.[58] In addition, the UK will still abide by most of the EU's rules. EU Members pushed for alignment as to

ensure that there will be no regulatory dumping. UK and EU businesses shall continue to compete on a level playing field, "*given the establishment of the single customs territory with no tariffs, quotas and checks on rules of origin between the EU and the UK*".[59]

In this view, Annex 4 to the Backstop Protocol binds the UK to substantive rules on competition and State aid "*based on international and EU standards*".[60] It is worth noting that these competition rules can be modified over time by a UK--EU Joint Committee "i*n order to lay down higher standards for these level playing field conditions*".[61]

A. Antitrust and mergers

Substantive rules on antitrust and mergers have been agreed on and set out in Articles 17 to 24 of Annex 4 to the Backstop Protocol. They are based on the principle of non-regression from the current levels of protection under international and EU standards. In brief, the Parties agreed that certain agreements between undertakings,[62] the abuse of dominance,[63] and certain concentrations of undertaking[64] distorting or restricting competition must be prohibited "*in so far as they affect trade between the Union and the United Kingdom*".[65] Overall, these provisions ensure that the UK will continue to abide by the material rules contained in Articles 101 and 102 TFEU and EUMR as before Brexit. The Backstop Protocol clearly imposes a duty of non-regression and alignment of UK competition law standards, stating that "*in particular, the United Kingdom shall adopt or maintain a competition law which addresses in an effective manner, all of the practises set out in Articles 17 to 20*".[66] Furthermore, UK courts will still have to apply these standards "*using as sources of interpretation the criteria arising from the application of Articles 101, 102 and 106 TFEU as well as all relevant acts adopted by the institutions bodies, offices or agencies of the Union, including frameworks, guidelines, notices and other acts applicable in the Union*".[67]

In addition to this alignment of regulations on merger and antitrust, the Backstop Protocol imposes a duty to enforce effectively these rules in their respective territory. To this end, the UK must ensure that administrative and judicial proceedings are available to permit effective and timely actions against the violations of competition rules, and provide for effective remedies.[68] The UK considers in this regard that the CMA "*has a proven record of effective competition enforcement*," and more broadly that its legal system already "h*as the key components the EU expects: it has a robust framework for merger control, and prohibits abuse of a dominant position and anti-competitive agreements. The UK's markets regime contains significant powers to investigate potential market failure and prevent, remedy or mitigate any adverse effects on competition*".[69] However, and as discussed in the second part of this paper, effective enforcement of UK and EU competition laws risks to face multiple problems such as jurisdictional overlaps and gaps due to uncoordinated unilateral enforcement by the CMA and the EC. This challenge could be solved in the long-term by enhanced cooperation between competition authorities and dynamic adjustments of competition laws. As suggested by the Backstop Protocol, the EU and the UK "*may enter into a separate agreement or agree on a separate framework on cooperation between the competition authorities*".[70]

B. State aid

As it was mentioned earlier, the UK has no legislation concerning State aid. Should the UK be compelled to apply the Backstop Protocol following the two-year transitional period, it will be urgent to establish a full domestic legal framework able to effectively regulate this issue.

Indeed, the Backstop requires for the UK to establish an independent authority in order to take over EC's responsibilities over State aid in the UK.[71] According to the announcements made by the UK Government up until today, the CMA will play the part of this independent authority.[72] UK Government argued it is perfectly suited for such an function thanks to its legal and economic expertise, its considerable experience on analysing the impact of competition law and in conducting investigations and finally because its independence has been internationally recognized.[73] However, enforcing State aid is also recognized as a big challenge by the CMA, which is not used to make "*decisions on questions that are often politically charged and contentious*".[74] This might be why the Backstop Protocol imposes tight cooperation between the CMA and the EC in the application of the EU State aid related legislation[75], that could almost be seen as a guardianship. It is telling that the CMA will be required to consult the EC on all draft decisions it intends to make regarding UK subsidies and to "*take utmost account of [its] opinion before adopting the decision*".[76] UK courts will have to ensure the enforcement of CMA's de-

cisions in relation to State aid, but again, the EC will have the right to intervene as a party in the proceedings.[77] In addition, the EU may challenge UK's implementation of State aid if it "*threatens to seriously undermine the equal conditions of competition between the parts of the single customs territory*"[78] before a Joint Committee co-chaired by the UK and the EU.[79] In the event that a compromise is not reached, the EU is even entitled to apply interim remedial measures.[80] In parallel the issue can be submitted to an arbitration panel.[81] Once again, it can be inferred from all these provisions that State aid is clearly a politically sensitive issue for the EU, and that it has strived in the deal negotiations to lock as much as possible UK's policy freedom on this matter.

Let's remind that the backstop solution described above was designed as a last-resort solution and that neither the UK nor the EU wishes to ever apply it. It is highly probable that the UK will at least do everything that is within its power to shorten its implementation if it ever comes into effect. It is worth mentioning that all the provisions on competition provided in the Backstop Protocol are likely to serve as a baseline for the negotiation of the future FTA level playing field requirements,[82] as developed in part III of this paper. The precedents, in other words, may have lasting effect.

II. No deal scenario: *You can't always get what you want*

The DWA is undeniably a big step forward, but the deal has still to be backed by a vote of the British Parliament on 11 December 2018. As recalled in the introduction, Prime Minister Theresa May is stuck in the middle of Brexiteers and Pro-Europeans visions of Brexit. More than 90 Tory MPs have pledged publicly to reject the deal,[83] while The Labour Party has announced it would not vote for the deal either. In addition, EU leaders affirmed that the DWA has been negotiated on a "take it or leave it" basis, which means that there is no room for any redrafting or renegotiation.[84] On the other hand, this political turmoil could be overcome by the fear of the dramatic economic consequences forecasted should the UK fail to agree on a deal with the EU before 29 March 2019. The Bank of England warned on 28 November 2018 that such a disorderly exit could trigger a deep and damaging recession with worse consequences for the UK economy than the 2008 crisis.[85]

In the case of a no deal scenario, all primary and secondary EU law will cease to apply to the United Kingdom and the effects of the withdrawal would materialise as of the date of the withdrawal,[86] including on competition and State aid rules. UK Government published highly-anticipated technical guidance on merger review and anti-competitive activity on 13 September 2018 applicable in this scenario. It can already be underlined that the UK does not plan for substantial changes to its competition regime: the main goal is in fact to remain aligned as far as possible to EU competition law as to provide legal certainty for businesses, in ongoing or future competition cases.

A. Antitrust

The impact of Brexit on UK antitrust laws has been clarified by the UK Government this year. On June 2018, the UK adopted the EUWA. This legislation ensures that laws and regulations made over the past 40 years while the UK was a member of the EU will continue to apply after Brexit by means of statutory instruments.[87] In doing this, the Act creates a new category of UK law: EU retained law. As a result, EC current set of Block Exemptions Regulations on antitrust should be incorporated into domestic law[88] and parallelly applied by the EC and the CMA. This copy-paste of existing EU law ensures the substantive alignment of rules related to antitrust

even in a no deal scenario. In addition, Chapter I and II of the UK Competition Act 1998 already mirror Article 101 and 102 TFEU[89]. Overall, UK competition law dealing with antitrust infringements will remain aligned on EU current framework.

Yet, divergence could result from UK courts' interpretation of these antitrust rules and could lead to inconsistent decisions on the same infringements. Under a no-deal scenario, draft statutory amendments to competition laws ("Competition SI")[90] confirm that Section 60 of CA98 would be replaced by Section 60A that would be applicable on the date of Brexit irrespective of whether the facts of the case arose before or after 29 March 2019.[91] While this new provisions puts an end to UK court's duty to follow ECJ's case law on antitrust matters, it also limits the possibility to depart from pre-exit EU competition case law. UK courts would continue to be bound by an obligation to ensure no inconsistency with pre-exit EU case law, unless it is "*appropriate in the light of specified circumstances*". One might think that it could allow British courts, not necessarily to diverge, but to align dynamically with the potential evolutions of ECJ's interpretations. In this regard, the EUWA specifies that UK courts "*may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal*". [92] Once again, the intention seems to remain closely in touch with EU competition laws, even in their interpretation, as to ensure maximal legal predictability even in the event of an abrupt no deal.

Yet, effective enforcement of these antitrust rules raises more difficulties post-Brexit without any agreement. The CMA would take on the role of enforcement and supervision of antitrust laws for the whole of the UK, including for complex multi-jurisdictional cartel cases which would previously have been dealt with by the EC.

It is likely that public and private enforcement of UK and EU antitrust laws will be weaker as a result of a lack of coordination and cooperation between EU and UK competition agencies investigating in parallel on the same cartel cases. The CMA after the exit date will no longer be a member of the European Competition Network ("ECN") as a result of the revocation of Regulation 1/2003[93] and the Network Notice.[94] This close cooperation framework between EU agencies is particularly crucial in antitrust cases, because it allows for information sharing on ongoing cases, including confidential information, without the need of a waiver from the parties involved in the cartel.[95] Out of the ECN, the CMA will face a double challenge: investigating more complex cases while having no access to information collected by National Competition Authorities ("NCA"). Moreover, it is unsure whether the CMA will be provided enough resources to deal with this extra case-load resulting from the revocation of Regulation 1/2003 under the EUWA.

Cooperation is also crucial for the effective enforcement of EU competition law. It is worth remembering that EU antitrust laws have an extra-territorial scope of application under the "*effects doctrine*". It means that the EC would still have jurisdiction on anticompetitive practices committed by UK businesses provided that they have foreseeable, immediate and substantial effect on the Single Market.[96] However, Regulation 1/2003 allowing the EC to conduct inspections, or to request from NCAs to conduct inspections in firms registered within their jurisdiction[97] would no longer apply to the UK. Cross-border cartels involving multinationals that operate in numerous EU countries especially require fast and coordinated "*dawn raids*" to collect critical evidence on the alleged infringements. After Brexit, the EC will no longer be able to rely on British authorities to conduct inspections of business and private premises located in the UK suspected to be involved in anti-competitive agreements.

Lack of cooperation between UK and EU courts on competition cases could also have serious impact on private antitrust enforcement, and therefore reduce the deterrent effect of competition law on businesses. Competition SI[98] confirms the revocation of sections 58A et 47F stating that EC infringements findings of articles 101 and 102 TFEU are binding on UK courts on the issue of liability[99]. Therefore, "d*ecisions of the European Commission reached after exit day are no longer binding on UK courts in follow-on claims for damages*". [100]Section 60.3 of CA98 under which UK courts must have regard to any EC decision, including decisions as to "*civil liability of an undertaking for harm caused by its infringement of Community law*" will also be entirely repealed. As a result, UK consumers and business will only be able to pursue private follow-on damages claims based on CMA decisions under UK competition law. [101] By contrast, antitrust infringements to EU competition law investigated and decided by the EC after

Brexit will not serve as a legal basis before UK courts. UK claimants harmed by infringements to EU competition law will have to bring a stand--alone claim for damages before UK courts, with the burden to prove a breach of competition law and the damage they have suffered as a result. One might think that private actions could be pursued before EU courts after Brexit so that UK claimants would beneficiate from binding EC infringement decisions as a legal basis and from the Directive 2014/104/EU.[102] However, Brussels I (Recast) providing for mutual recognition and enforcement of EU judgements will no longer apply once the UK ceases to be a Member State. Most worryingly, the DWA does not address the issue of civil judicial cooperation. In the absence of a bilateral agreement on this matter agreed between the EU and the UK during the transitional period, enforcement of EU judgements in the UK and vice versa will be costlier and more time-consuming as each national exequatur rules would have to apply. It could furthermore discourage businesses and consumers to bring private actions following cross-border antitrust infringements with a UK component.

B. Merger

Absent of a Brexit deal, businesses will not be able to rely on the abovementioned transitional provisions for ongoing merger cases set out by the DWA. The UK Government warns that in "a 'no deal' scenario, businesses should be aware *that it is possible that there will be no agreement on jurisdiction over live EU merger and antitrust cases to the extent that they address effects on UK marke*t".[103] It means that businesses whose concentration is currently reviewed by the EC under EUMR would potentially have to parallelly notify their merger to the CMA if the operation may affect UK markets and meet UK national thresholds for notification. At least, the UK Government announced that the UK would have no jurisdiction under Section 23 of EA02 over concentrations on which the EC has issued a decision on or before 29 March 2019, unless subsequently annulled.[104]

Similarly, once the UK leaves the EU, it will lose the benefit of the EUMR one-stop-shop which was useful to limit the risk of divergent outcomes and the costs of multiple notifications for businesses. After Brexit, these complex multijurisdictional mergers will be notifiable both to the EC and the CMA as long as the operation reaches UK and EU respective merger thresholds. It would increase the risk of parallel reviews and contradictory decisions on commitments to be implemented by businesses in order to get the authorization from both jurisdictions to pursue with the merger. Besides, a significant number of mergers reviewed by the EC could cease to have an EU dimension after Brexit because the UK turnover of the parties will be stripped from EC threshold calculations.[105]

As for antitrust cases, the CMA's workload would be dangerously increased as a result of Brexit, and it is doubtful whether it will be able to properly investigate on all new cases falling under its jurisdiction. Some estimates suggest that an additional 30 to 50 transactions annually would fall for review by the CMA.[106] It is true that unlike most EU Member States and the EC, the UK has adopted voluntary notice scheme for mergers. [107] It means that businesses may complete the concentration without a green light from the CMA. In any case, the CMA intervenes *ex post* to monitor un-notified merger case.[108] Arguably, voluntary notification system requires less financial resources than mandatory notification since the CMA transfers the burden of assessing the potential competition of the merger on the UK markets to businesses. As a result, CMA only intervenes on mergers that are more susceptible to effectively restrict fair competition within the UK market.

The UK Government announced that the voluntary regime will continue to apply after Brexit,[109] and the CMA underlined that it would especially monitor un-notified cases "*falling under the jurisdiction of the European EC over which the UK may obtain jurisdiction over the UK aspects of the merger after 29 March 2019*".[110] Even if the CMA claims that there will be no change in this regard, it still urges businesses which merger is notifiable both in the EU and the UK and "*which transaction may raise potential competition concerns in the UK*" to "*begin pre-notification discussions with the CMA*".[111] But, would it look like a lot like mandatory notification in the end? Besides, it is very possible that businesses engaged in a merger of EU dimension post-Brexit will notify their transaction to the CMA just in case, in order to avoid the risk of *ex post* investigations.

To the contrary, it has been argued[112] that the UK's voluntary scheme would disincentivize businesses to proactively notify their merger to the CMA for mergers requiring dual notification. Indeed, the parallel jurisdictions of the CMA and the EC to investigate such cases work on di-

fferent time frames. Businesses will have in any case the duty to comply with EUMR mandatory notification regime. Therefore, they could wait to contact the CMA only after the merger has been cleared by the EC or after commitments have been agreed with the EC.[113] In this scenario, the CMA authority is undermined since "[*p]arties may judge it to be legally, procedurally and reputationally difficult for the CMA to seek to unwind a transaction that has completed subject to remedies by the EC*".[114] Alternatively and for the same reasons, companies could choose not to notify at all their operation to the CMA, even if specific competition issues arise from the concentration on the UK market. In that event, CMA's ex post monitoring work of un-notified merger cases is likely to skyrocket after the Brexit and impose considerable workload on the agency. Consequently, some transactions allowed under EUMR but requiring UK specific commitments may not be detected by the CMA because of suboptimal cooperation from businesses.

More generally, parallel investigations on the same cases almost inevitably results in divergence in the assessment of concentration cases, even more in the absence of a cooperation framework between agencies. The CMA argues that "*the many practical similarities and synergies between the EU and UK merger review processes*" might "*mitigate the extent to which businesses must carry out significantly different work for the two investigations*".[115] It is generally considered that "*the CMA has increasingly aligned its approach with the EC in recent years, and now requires a significant amount of data and documentation at the outset of a merger investigation*".[116]

Furthermore, the CMA and the EC apply the same substantive test to mergers under their jurisdiction. Both tests rely on "*economic-based and analytical approaches*",[117] which reduce the likelihood of diverging decisions on the same case. It has been suggested that the UK criteria for merger scrutiny could change after Brexit, as the UK Government would be free to reinforce the public interest test in merger control provided under Section 58 of EA02.[118] The aim would be to protect UK's economic interests and businesses, particularly in relation to foreign takeovers.[119] However, this opportunity for substantive divergence, evoked for a while by the UK Government,[120] appears to have been abandoned since. As of now, the UK Government does not plan to move away from a regime driven by economic analysis.[121] Just as for antitrust regime, Competition SI confirms that EA02 and especially Section 58[128] will not be substantially amended after exit date, and that the UK will "*preserve the existing legislative framework as far as possible and only amendments that are necessary to enact EU exit*".[123]

C. State aid

The debates currently going on in the Commons testify to the fact that the adoption of the DWA by the UK Parliament is not yet a given, even though Michel Barnier has affirmed that the deal obtained on the 14 November 2018 is the best that can ever be and that the EU will not enter into another round of negotiations. If the Parliament rejects the DWA in December 2018 and the EU refuses to undertake new negotiations, the UK will be compelled to leave the EU without a transition period. In that context will State aid legislation be very different?

It appears that in the urgency implied by a no deal situation, the UK government will not have the time to elaborate original and brand-new State aid provisions. The UK will probably have to transpose very quickly EU State aid provisions into its national law so that national business isn't disturbed and confronted to uncertainty. The WTO Agreement on Subsidies Countervailing Measures ("ASCM") won't be sufficient to regulate UK's market on its own, as it does not provide national State aid provisions at all. Therefore, they can only be considered as a very temporary backup solution.[124]

Then the fact that today the UK and the EU have not found a cooperative solution to proceed through their divorce does absolutely not mean that there will nevermore be cooperation between those two entities as the EU represents 48% of UK's exports.[125] Even after a hard Brexit, there will probably come a time when the UK and the EU will consider an inclusive FTA because of the ties which already exist between their two markets and because of their geographic proximity. Pressures for a more interventionist State which would subsidise its companies will not further the UK into becoming a powerful trading nation on the global level. The Prime Minister has assured that the Government will not aim at beating other countries' industries by subsidising its own.[126] Therefore, taking into account UK's liberal economic culture, it is almost sure that the government will not adopt a nationalist

State aid policy even in a situation of hard Brexit. This element coming on top of a necessity to continue to commercially cooperate with the EU.

For its part, the EU has taken contingency measures based on State aid aimed at limiting disruptive effects on EU businesses in case of a no deal, that can be found in the Rescue and Restructuring Guidelines. One of the short-term solutions which will be put in place will offer "t*emporary restructuring support schemes for SMEs, which could be useful to address their liquidity problems caused by Brexit*".[127]

III. Long-term implications of Brexit on EU and UK Competition law in the context of FTA negotiations - *With or without you?*

On 22 November 2018, the EU and the UK published a draft Political Declaration ("PD") setting out the framework for a future relationship between the two parties. It is worth remembering that this 26-page document is not legally binding and may or may not be complied with in future talks. Still, it is the most up-to-date document reflecting Parties' positions on how the UK and EU might work together beyond the transitional period, and in what areas.[128]

The PD repeatedly emphasizes that any ambitious future trade deal with the UK, including a "*free trade area*" must be "*underpinned by provisions ensuring a level playing field for open and fair competition*".[129] This way, EU Members underline that a country leaving the EU cannot benefit from continued access to the Single Market, while having a competitive advantage over EU members once the membership is terminated.[130] It follows that the future FTA should include "provisions to ensure that should cover state aid, *competition, social and employment standards, [...] building on the level playing field arrangements provided for in the Withdrawal Agreement and commensurate with the overall economic relationship*".[131] Likewise, European Competition Commissioner Margrethe Vestager recently reasserted that as a result of the comprehensive trade deal to be negotiated, "*the UK economy will be integrated with other European businesses and this is why the level playing field is so important*".[132] She reportedly affirmed that EU Member States would remain very vigilant that Britain play by the same rules as Europe on business after Brexit and said that the UK would still be "*Europe one way or another*".[133] France in particular has been reported to ask for more clarity on the so-called level playing field standard[134] and for tough safeguards on UK compliance to EU policies post-Brexit, including competition, which would go further than those included in the "*backstop*" plan.[135]

This approach holding rights and responsibilities in balance had been anticipated by the UK's White Paper published on July 2018 dealing with "*the future relationship between the United Kingdom and the European Union*" ("*White Paper*"). It confirmed UK's intention to sign a very ambitious trade deal with "*reciprocal commitments that go beyond those usually made in FTAs [...] to support the breadth and depth of the future UK-EU economic partnership*".[136] The paper shows UK Government's plan to align in the long-run with a number of EU policies in that view, including competition, in order to secure the most preferential FTA possible. As noted in the White Paper, "a relationship this deep will need to be supported *by provisions giving both sides confidence that the trade it facilitates will be both open and fair. So the Government is proposing reciprocal commitments that would ensure UK businesses to continue to carry on competing fairly in EU markets and EU businesses operating in the UK could do the same*".[137]

However, as of now, the PD remains vague on how this "*level playing field*" will be enforced and how far the alignment of UK and EU rules in the area of competition and State aid should go. It is unclear whether it only involves non-regression

of the current framework or dynamic alignment. The PD indicates that the UK and the EU would be "*separate markets and distinct legal orders*",[138] which means that May's promise that the future FTA would ensure "*frictionless trade*" is compromised. As a result, British access to European markets will depend on the UK respecting EU standards, including in competition. The PD provides that in this field, "*these commitments should combine appropriate and relevant Union and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement as part of the future relationship*". [139]

In the area of competition law, the UK has already committed to remain closely tied by EU competition regime standards. As considered by the UK in the White Paper, it has "*much to gain from maintaining disciplines on subsidies and anti-competitive practices*".[140]

A. Antitrust

In light of these potential problems, it appears that the mutual interest of the EU and the UK is to agree on cooperation instruments on the matter of competition law enforcement.

As to the form of such agreement, it could either be enacted in formal treaties, in a section of the future trade deal or in a separate bilateral agreement such as the EU-Swiss Cooperation Agreement on Competition Matters.[141] It would ensure that competition decisions rendered by the UK, NCAs or the EC are compatible and would reduce the risk of cartel enforcement gaps and overlaps. The UK is also prepared to sign cooperation agreements "*at an agency to agency level or undertaken informally as long as this is allowed in the national laws of the States concerned*".[142] However, it is obvious that a bilateral agreement which involves all EU competition agencies would be far more convenient and efficient than individual relationships between the CMA and each NCA. The Backstop Protocol keeps all options open, by stating that "*the Union and the United Kingdom, or the competition authorities of the Union and the United Kingdom may enter into a separate agreement or agree a separate framework on cooperation between the competition authorities*".[143]

As to the content of a possible EU-UK cooperation agreement, the intention of the UK Government to "*build on established cooperative arrangements, such as those found in existing FTAs, to manage parallel merger and antitrust investigations*".[144] The PD does not address the issue of cooperation per se but generally indicates that Parties will build on what was agreed in the DWA.[145] In this regard, Article 23 of the Backstop Protocol acknowledges that it is in the common interest of both the EU and the UK to "promote cooperation with regard to competition *policy development and the investigation of antitrust and merger cases*".[146] However, there are very few details on the conditions under which this cooperation would effectively work. The Backstop Protocol is very carefully drafted in this regard an only provides that Parties will coordinate their enforcement activities relating to the same or related cases "*where this is possible and appropriate*"[147] and "*may exchange information*" in this view. It is therefore very uncertain that UK and EU agencies will be able to exchange confidential information in the future without a waiver from cartel members involved. Yet, as previously explained and as remarked by the UK Government, a cooperation agreement "*is more important for antitrust investigations than in merger cases, as undertakings subject to the former are unlikely to facilitate information sharing through confidentiality waivers*".[148] Also, the language of Article 23.2 appears to be non-binding on competition authorities. It is questionable whether this provision sets out real duties upon the EU and the UK, because cooperation will depend solely on the interpretation by the Parties of the cases where coordination of enforcement activities "*is possible and appropriate*". It is therefore difficult to determine to what extent UK's wish to include "*provisions on sharing confidential information and working together on live cases*" will be satisfied.[149]

However, it is our understanding that the UK and EU will finally come up with an ambitious cooperation agreement during the transition period, should the DWA be ratified by the British Parliament. The CMA crucially needs it due to its limited enforcement resources, and the EC as well if it does not want to undermine the effectivity and deterrence of EU competition law. Moreover, cooperation would be greatly facilitated by the substantive alignment of UK and EU legislations on antitrust as a result of the concept of "*EU retained law*" set out by the EUWA.

Of course, in any case, the UK will have less access to information on ongoing cases than NCAs as part of the ECN under Regulation 1/2003 that applies also to EEA members such as Norway.

It is now clear that the UK refuses to join the EEA because this path would not be consistent with the Brexit vote imperative to "*take back control*" on British laws and immigration. As members of the Single Market, EEA members are notably required to comply with the EU four freedoms,[150] and with EU directives and regulations without a say on their shaping,[151] which are then enforced by supranational authorities. The PD provides that in the context of a future FTA, "[*p]arties will form separate markets and distinct legal orders*". [152] This undoubtedly rules out for now any possibility of soft Brexit through UK accession to EEA membership.

In all likelihood, the UK will no longer be part of the ECN after the Brexit, but there is still a strong possibility to negotiate a so-called "*second generation*" cooperation agreement along the lines of the EU-Swiss Cooperation Agreement on Competition Matters entered into force on 1 December 2014.[153]

First, unlike any former EU cooperation agreement signed with third countries,[154] the EU-Swiss agreement allows competition authorities to "*transmit for use as evidence information obtained by investigative process that is already in its possession to the competition authority of the other Party*", even in the absence of an express consent in writing.[155] Second, investigative measures on behalf of the other party are not authorised, but the agreement ensures coordination of the timing of dawn raids in both jurisdictions. [156] The Agreement also provides for positive comity to a certain extent, as competition authorities may request each other to carry out enforcement activities on a voluntary basis. [157] It is clear that this deal provides for less cooperation than within the ECN: express consent is still needed for exchange of information obtained in leniency applications and settlement procedures.[158] Besides, information sharing is subject to strict requirements: confidential information can only be used if the authorities are investigating on same or related infringements [159] and may only be used for the purpose set out in the detailed request of information.[160] Finally, the treaty provides to competition authorities broad discretion to limit cooperation enforcement and to implement positive or negative comity. Still, the exchange of confidential information without consent may be considered as a big step forward in competition cooperation and be desirable for the CMA post-Brexit.

In a press release, the EC justified the innovative depth of the EU-Swiss Cooperation Agreement on Competition Matters by the fact that "[*t]he EU and Switzerland are two very important economic partners, whose economies are deeply integrated. As a result, many anticompetitive practices have cross border effects on trade between the EU and Switzerland*".[161] It is not crazy to think that the UK is exactly in the same situation, after "*more than 45 years of economic integration*" and considering "*the sizes of the two economies and their geographic proximity which have led to complex and integrated supply chains*". [162] This deep economic integration will not disappear after Brexit and is sought to be preserved in the context of the future UK-EU FTA as contemplated by the PD. In particular, as mentioned earlier, the UK and the EU currently ambitions to create a free trade area [163] with no tariffs on goods.[164] It is also stated that liberalisation in trade in services would go far beyond Parties WTO commitments and would be inspired by recent Union FTAs. [165] It is thus clear from the reading of the PD that even if the UK and the EU will have separate markets, their economic integration and partnership will continue to be at least as equally important as the one between the EU and Switzerland. As a result, the EU and the UK should negotiate a cooperation agreement on competition no less ambitious.

To the contrary, cooperation between the EU and the UK in the field of private enforcement for decisions given by civil and commercial courts seems more difficult, even if it would greatly ease the enforcement of competition related decisions for victims both in the EU and in the UK. Indeed, the UK is as of today one of the most used EU *forums* for private enforcement of competition law decisions given by the Commission.[166] However, it is doubtful whether the EU will consent to such an agreement. One might suspect that the EU Member States will work on redirecting these cases to their own national courts with the view of developing their own legal market. Brexit and the fact that the UK will not be submitted anymore to Regulation Brussels I (*Recast*) providing automatic recognition of judgements given within the EU is the great opportunity for them to do so. In that context, the new International Chamber of the Court of Appeal of Paris working both in English and French was expressly designed as to attract international commercial cases before French forums[167] and similar initiatives have been taken in the Netherlands, Belgium and Germany. [168]

Moreover, the conclusion of such a comprehen-

sive cooperation agreement on civil and judicial cooperation would have an impact which would go way beyond the simple enforcement of competition decisions and the implications of which would be unwelcome both to the UK and to the EU.

B. Mergers

In the same way as for antitrust laws, the alignment of EU and UK merger regulatory standards is important to ensure that the future economic partnership provides for open and fair competition between UK and EU businesses after Brexit. In this view, the PD makes clear that deep economic integration requires strong regulatory alignment in all fields of competition law and indicates that the future trade deal will be built on the level playing field arrangements provided in the DWA.[169]

In this regard, Article 19 of the Backstop Protocol provides that concentrations which are notifiable to the UK or the Union which *"threaten, significantly impede or substantially lessen effective competition [...] shall be declared incompatible, in so far as they affect trade between the Union and the UK"*.[170] Article 22 requires for the UK to *"adopt or maintain a competition law which addresses in an effective manner" this concern*.[171] As previously analysed, the substantive tests applied by the EC and the CMA for the purpose of merger control are likely to continue to be aligned post-Brexit. Also, the UK Government does not plan for any substantial change to its merger policy.

As for antitrust law, it is not the substantive alignment of merger regulations that will be difficult post-Brexit, but the effective enforcement of such laws. The PD requires *"adequate mechanisms to ensure effective implementation domestically"*[172] of relevant competition law standards as part of the future relationship between the UK and the EU. Likewise, Article 24 of the Backstop Protocol strongly requires from the UK that it "*shall ensure effective enforcement*" and "*shall not reduce the effectiveness of public and private enforcement of its competition laws*", including of EA02.

However, it has been demonstrated above that substantive alignment of competition regimes does not totally erase the possibility of inconsistency between the commitments and decisions reached in future dual notification cases. First, the CMA may identify *"UK specific concern which the EU does not identify."*[173] Second, misalignment of timing in notification resulting from the difference between UK voluntary and EU mandatory regimes makes divergence simply arising from poor timing and not genuine differences more likely to happen.[174] This would make the application of EU and UK merger control regulations less effective and less predictable when dual notification is required.

For the purpose of limiting these enforcement overlaps and gaps, the EU and the UK could agree on a cooperation framework in this area. As for antitrust cases, the UK notably *"hopes to negotiate a close relationship of cooperation with the European EC and NCAs to allow for information sharing in merger cases"* [175] where dual notification is required. Similarly, Article 23 of the Backstop Protocol provides that the UK and the EU shall endeavour to cooperate on the investigation of merger cases.[176] Considering the deep economic integration existing between the EU and UK markets, which is likely to be preserved as far as possible by the future FTA to be negotiated, it is clear that both the EU and the UK need to cooperate on the numerous cross-border merger cases having an impact on both jurisdictions. The EU-Swiss Cooperation Agreement[177] may, again, serve as possible template, as it organizes merger control cooperation between the EU and one of its closest trading partners. As previously stated, this agreement provides for sharing of confidential information on ongoing merger investigations without businesses' consent and would undermine the possibility of parallel reviews and diverging decisions. While this feature is crucial in the field of antitrust law, it is less the case in merger cases. Companies involved in merger transactions will be far more inclined to authorize broad disclosure of all relevant information as long as it secures fast clearance from all jurisdictions reviewing the merger. In fact, close cooperation and articulation between agencies conducting investigations on the same merger substantially reduces businesses' transactional costs. Keeping this in mind, the CMA suggests that absent of a formal EU-UK cooperation agreement, businesses could "*help streamline the merger review process by agreeing confidentiality waivers to allow confidential information to be shared between enforcement agencies*".[178]

Extensive sharing of information and mutual notification of ongoing merger cases between the CMA and the EC would particularly enable the CMA to identify at an early stage whether a merger notified to the EC is likely to raise specific

competition concerns in the UK and affect UK market.[179] Negative comity provisions similar to those contained in the EU-Swiss treaty could also help undermine the possibility of conflicting commitments and remedies.[180] Under this provision, the CMA and the EC would have to take consider the interests of the other agency when issuing a decision of clearance or commitments regarding a transaction.[181] It would also give competition agencies an opportunity to comment on such decision.[182] Cooperation would then result in mutually supportive decisions on merger remedies rather than inconsistent decisions.

It has also been argued that coordinated investigations on dual notification merger cases especially in their timing would secure more effective enforcement of EUMR and EA02. The House of Lords in its report on competition laws and State aid advocated for the enactment of measures "*to reduce the impact of differences between the statutory timelines for CMA and EC reviews.*"[183] It is the view of certain commentators that the UK should even depart from its voluntary regime and implement a sort of a mandatory pre-notification to the CMA[184] for mergers that meet the global financial thresholds under EUMR and qualify for UK jurisdiction.[185] The CMA would then have to decide if it wants to investigate the case and require a full merger notice, or to the contrary stay the proceedings. The CMA in its technical notice related to merger enforcement in the case of a no deal already implicitly implement this idea, as it urges businesses which transaction is currently reviewed by the EC to engage in pre-notification discussions with the CMA.[186]

C. State aid

As previously mentioned, there are no State aid provisions among the British Acts.[187] In the White Paper, the UK made an upfront commitment to maintain a common rulebook with the EU.[188] Thereby, the UK Government seemed prepared to revoke the possibility to implement a more interventionist State aid framework as a result of Brexit. This opportunity to be independent from the EU State aid regime has been an important issue debated during the Brexit referendum campaign. Brexiteers argued that State aid could be used in a way that offers more support to UK corporations and boosts the UK economy.[189] On the other hand, most of the scholars and competition professionals had expressed reservations against such use of State aids, underlining that up until today, the UK was not hindered in its use of State aid by EU law, but simply chose not to make the best of them.[190] Some striking figures showed that "*UK spent on average €100 per capita on State aid between 2009 and 2015, compared to €181 per capita in Belgium, €224 per capita in France, and €266 per capita in Germany over the same period*".[191] The UK Government also confirmed that EU State aid rules did not hinder the support of major projects. UK negative responses rate for validation of State aid by the EC ranges amongst the lowest of the largest Member States.[192] Moreover, some members of the civil society have expressed the concern that if the UK will use Brexit as an opportunity to offer a wider support than today to its national industry it may create 'rent seekers' interested in securing themselves a monopoly.[193]

Taking into account UK's government possible willingness to remain in step with the EU laws in the competition field, one can consider that in that context a solution to shape UK's future State aid would be for it to integrate the European Free Trade Association ("EFTA") and follow the path of other EFTA countries in that area. However, we have already established that current negotiations of a future FTA exclude this possibility. In line with UK's current political plan to take back control on its laws, borders and money, it would not accept to remain in the Single Market.

An alternative model would be the one adopted by Ukraine, which follows a "parallel" State aid system. Following Ukraine's Association Agreement with the EU [194], in absence of any Ukrainian State aid provisions, Ukraine had to adopt a State aid legislation in compliance with the rules in force in the EU on the same matter. [195] Also, Ukrainian courts became bound by the jurisprudence of the ECJ on the matter. However, it is highly probable that the UK will not agree to the same kind of deal. Indeed, as opposed to Ukraine, the UK is engaged in a "hard Brexit" is very unlikely to accept supranational institutions' authority such as the ECJ.

Switzerland adopted another kind "parallel" system organised under multiple bilateral agreements with the EU. The FTA[196] shaped the way the two States handled State aid regulation. It is worth mentioning, however, that the EU was very unsatisfied by the FTA it negotiated with Switzerland especially in regard to the State aid provision. Indeed, Article 23.1.iii says that State aid which presents the possibility of distorting competition is incompatible with the FTA

but does not provide for any remedies or consequences to sanction such incompatibility. In addition, the Swiss Federal Supreme Court provided a very restrictive interpretation of the FTA in its early case law. [197] The fact that the FTA does not put in place any State aid control was especially displeasing for the EU considering that Switzerland has no national State aid regulation, except in the air transportation field. [198] Therefore it is highly unlikely that the EU will agree to organize State aid as loosely with the UK. It is highly probable that the provisions on State aid in the future UK-EU FTA agreement will be much more detailed and clearly outline the consequences of their breach to achieve an effective control of State aid. [199] This is confirmed by the provisions contained in the Backstop Protocol, as previously analysed.

Another solution would be for the UK to rely on the WTO State aid provisions in addition to the national legislation it committed itself to adopt after Brexit, the WTO taking care exclusively of the international dimension of State aid. We have to keep in mind though that this structure does not aim for a market integration as deep as the one that the UK desires to obtain from the EU. The framework offered by the WTO is quite limited. The WTO Agreement on Subsidies and Countervailing Measures ("ASCM") only applies to goods. It does not provide an *ex ante* approval. It implies a State-to-State enforcement. It does not define a concept of subsidies which could be possibly approved under certain conditions. Finally, the threshold of complaint is very high. Following this path, the UK would close itself the doors to a tighter integration into the EU market. Such possibility has been for now excluded by the DWA.

A last possibility would be a specific to the UK: tailored for and created by the UK. Moved by a strong motivation to keep a large access to the EU market and understanding that the EU could need strong guarantees in exchange for such an access, the UK would have transposed through the EUWA EU State aid provisions during the transition period.[200] Then the UK will perhaps even be willing to transpose the GBER.[201] As today 90% of the UK State aid is given under the EU GBER, such a transposition could be very useful, especially as to what concerns cost savings.[202] The Government will have to consult the CMA, in order to decide whether to issue a domestic Block Exemption Order to similar effect. [203] As claimed by the UK Government, it wouldn't result in a submission of the UK to the EU legislation considering the fact that the UK has been major European influence on the elaboration of the EU competition law, including State aid regime.[204] As noted by several observers, one may reasonably believe that in the near future, i.e. in the next 5 years, the UK will practically not differ from the EU law in State, and perhaps even after that. This tendency will strongly depend on the kind of FTA achieved between the EU and the UK and the degree of access the UK will have to the Single Market.

Conclusion: Brexit, British Oddity?

As recalled in the introduction, the impact of Brexit on competition law will heavily depend on political considerations that largely transcend the subject of this paper. Despite the agreement on a draft deal, everything may still happen, including no-deal at all, or a second referendum which would simply annul Brexit. In this paper, we chose to focus our analysis on the latest developments and on what they allow to foresee. In the latest survey, 28 November 2018, 52% of the British population declared that the negotiated deal was the best that could be achieved.[205]

In any event, it is our understanding that UK competition laws will remain closely aligned to EU standards, in the short-term to limit disruption for businesses, and in the long-term as to negotiate a substantial access to EU market in the context of a future FTA. In the end, whether a deal is agreed or not as of March 2019 will only substantially impact the enforcement and not the substance of UK and EU competition regulations and calls for ambitious cooperation in this field.

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The Future of the English Language in European Institutions : A LEGAL PERSPECTIVE

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Abstract:

A far less debated and perhaps more unexpected issue has been raised by the United Kingdom's likely exit from the European Union: what shall be the future of the English language in the European institutions? This article proposes to tackle this issue from a legal perspective, though the question is practically unlikely to be merely one of an administrative character. The central claim is that the permanence of English as an official language of the EU will probably be subject to a decision of the ECJ. The article will also stress the large autonomy of the institutions themselves regarding their internal linguistic regime, meaning that a strong political willingness not to use English could well work either separate or inclusive of legal considerations. The article will then dive into considerations of how choice of language may impact relations in Europe, arguing that it could be a source of further divide between East and West in the coming multi-speed Europe.'

A far less debated and perhaps more unexpected issue has been raised by the United Kingdom's exit from the European Union, which will become effective likely two years after the triggering of Article 50 of the Lisbon Treaty: what shall be the future of the English language in the European institutions? I propose to tackle this issue from a legal perspective, though I am well aware that the developments of a language are rarely simply matters of administrative fiat. My argument is that the permanence of English as an official language of the EU will probably be subject to a decision of the ECJ. I will also stress the large autonomy of the institutions themselves regarding their internal linguistic regime, meaning that a strong political willingness not to use English could well work. This, I will conclude, may be a source of further divide between East and West in the coming multi-speed Europe.

Since the Council Decision of 1 January 1973, on the Since the Council Decision of 1 January 1973, on the Act of Accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, which amended the Regulation No 1 determining the languages to be used by the European Economic Community of 1958, English has been an official language of the EU.

As of today, English is an official language in three Member States: The United Kingdom, Ireland (Constitution of Ireland, Art. 8.2) and Malta (Constitution of Malta, I.5 (1)). However, it must be noted that only The United Kingdom has accredited English to the European Union. Indeed, Ireland (which joined the EU in the same year) chose to accredit Irish. Malta (which became a Member State in 2004) accredited Maltese.

The essential framework under which language politics operate in the European institutions is Regulation n°1, mentioned above. Its preamble reads that the unanimity of the Council is required to determine the rules governing the languages of the institutions. Article 1 does not formulate the principle according to which each Member State could have the right to have one or several of its domestic official languages recognised as official languages in the EU. Rather, it enumerates which languages bear the status of official and working languages – which includes English.

A first teaching could be that, despite The United Kingdom exiting the European Union, English could remain an official language of the EU. De facto, it would be surprising for all Member States to agree on the eviction of the English language, mostly for reasons of pragmatism. If French was the lingua franca of the European Communities at the beginnings, the accession of the UK and Ireland, of the Scandinavian countries and especially of the Eastern countries in 2004 meant that English took over as the dominant language.

The eviction of the English language would also create a situation regarding the right of every EU citizen to communicate with the EU institutions in one of the official languages of the EU, pursuant to Article 24 TFEU. What about Ireland, where at most 10% of the population speaks Irish?[1] Though European institutions would not be formally compelled to answer to an Irishman in English, the European Charter of Human Rights - rendered binding by the Lisbon Treaty - could throw in its two cents with

"..it would be surprising for all Member States to agree on the eviction of the English language, mostly for reasons of pragmitism..."

Article 11 (right to information), Article 41 (right to be heard and right of access to documents relating to oneself) and Article 42 (right of access to the documents of the European institutions).

However, could it not be argued that the permanence of the English language in the EU institutions, despite t the exit of the EU of the only country having accredited English as an official language, would be against the spirit in which Regulation n°1 was drafted? This view would make sense in light of other issues brought up by Brexit, as far as the EU institutions are concerned. For instance, Art. 49 of the EU Staff Regulations stipulates that a civil servant may be required to resign if he breaches the obligation of being a national of one of the Member States of the Communities.[2] Derogations are rendered possible by Art. 28 (and have been used in the past, when Danish civil servants were hired before the accession of Denmark) but, as their name suggests, remain exceptional and do not reflect the spirit of the legislation.

The Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 12 July 2001[3] sets out interesting perspectives on the issue we are currently considering. Originally a petty procedural linguistic problem, the case turned out to be a much broader assessment of the linguistic regime in the EU. The Court ruled first that "It is the legality of the rule in Article 115(3) of Regulation No 40/94, whereby the applicant must accept that she does not automatically enjoy the right to participate in all proceedings before the Office in the language of filing, which constitutes the direct basis for the decision of the Board of Appeal to which the plea of illegality raised by the applicant is directed". Most crucially, the Court then claimed that, "it is therefore for the Court of First Instance, on foot of the plea of illegality raised by the applicant, to rule on the legality of the rules governing languages established for the Office by the Council" (para 56). The Court finally concluded that "it must first be pointed out that Regulation No.1 is merely an act of secondary law, whose legal base is Article 217 of the Treaty. (...) Secondly, the Member States did not lay down rules governing languages in the Treaty for the institutions and bodies of the Community; rather, Article 217 of the Treaty enables the Council, acting unanimously, to define and amend the rules governing the languages of the institutions and to establish different language rules. That Article does not provide that once the Council has established such rules they cannot subsequently be altered. It follows that the rules governing languages laid down by Regulation No.1 cannot be deemed to amount to a principle of Community law" (para 58).

This case teaches us three things:
1. Regulation N°1 is merely an act of secondary law, not a principle of Community law.

2. Linguistic rules can be altered.

3. The ECJ has the final word.

It does not seem totally insane therefore to imagine a scenario in which the ECJ would rule in the following way: no membership, no language - to be maintained as an official language, the unanimity of the Council is required.

Now, back to Ireland and Malta; could we imagine these States accrediting English? It is understood from Article 8 of Regulation N°1, "if a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law," that first of all, only one language may be accredited. Even if we put aside the politically and symbolically unlikeliness to see Ireland giving up Irish for English or Malta Maltese for English, the expression "governed by the general rules of its law" may add to the difficulty. According to the Irish Constitution, Irish is supreme to English. According to the Maltese Constitution (Art 5), both English and Maltese are official languages, but only Maltese is the national language.

A relevant question to ask is whether the act of exiting the EU annuls the act of accession, and therefore, with it, the demand for an official language to be accredited. Luxembourgish is not an official language of the EU, because Luxembourg never asked for it to be accredited in 1957: membership and language are logically considered as separate but, if membership can go without language, the reverse is not true (Turkey could not ask for Turkish to become an official language of the EU). The more precise question would therefore be whether the demand of accreditation is admissible without a valid act of accession.

Interestingly, taking a step back and adopting a more historical view, there have been circumstances in the past where English has been used formally, whilst no Member State was English-s-

"This point reaffirms the relative autonomy of EU institutions in terms of linguistic regime."

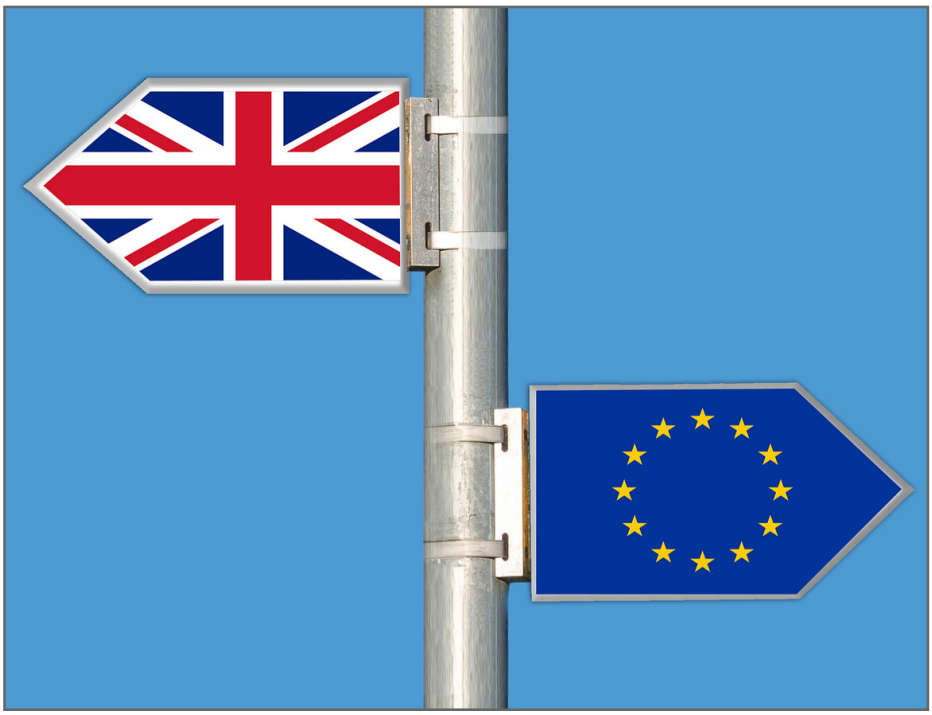
peaking at the time. In 1953, there 32 translators and copy editors in the Linguistic Service, allocated in four groups (French, German, Italian and Dutch). Without being an official language of the ECSC, English was a working language of the organisation, because of the agreement concluded between the United Kingdom and the ECSC on 21 December 1954. The same phenomenon occurred at Euratom where, in a field dominated by the United States, English-speaking translators were hired. In 1962, these translators officially became civil servants of the European Community.[4]

This point reaffirms the relative autonomy of the EU institutions in terms of linguistic regime. In fact, Regulation N°1 does not claim that all official languages of the EU should be used in all circumstances by all institutions as working languages. The wording of the english version of the Regulation suggests that the use of certain languages instead of others is the exception rather than the norm: "the institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases" (Art. 6). However, the French version (which is the original) gives much more freedom to the Institutions, by not including the expression "in specific cases": Les institutions peuvent déterminer les modalités d'application de ce régime linguistique dans leurs règlements intérieurs". The French version is the view that was adopted by the conclusions of the ECJ in 2003.[5]

Indeed, some variations are to be found amongst different institutions. The European Commission has set out three procedural languages, French, German and English. The European Central Bank has opted for English as its working language, whereas the European Court of Justice deliberates in French. Today in the European Parliament, interestingly, Art. 117 of the Rules of Procedure specifies that any language can be used if deemed necessary (Rules of Procedure of the European Parliament, 14th edition, June 1999, OJ L 202, 2/8/1999). That could potentially include English, if it ceased to be an official language.

The reverse could also be true; if the Council failed to repel English as an official language of the EU (and provided that the ECJ would not eventually contradict the Council), English could still cease to be used as a procedural and working language of the institutions. In this case, it would simply bear the status of a "treaty language", like Irish today. In accordance with an agreement found between Ireland the Community in 1971, and valid until 31 December 2006, Irish was considered an official language but not a working language, both parties having agreed that only primary legislation would be translated into Irish. Irish became an integral official language on 1st January 2007, though a derogation was permitted until 2021, due to the difficulty of hiring skilled interpreters.[6]

Today, the work carried out in the European institutions is done mostly in English. As of 2014, 82.5% of the original administrative and legislative documents were produced in English. Similarly, 261,000 pages were translated into English, 150,000 into French and 136,000 into German.[7] In other words, English is the most used language both in terms of writing and translating.



However, this is a relatively recent trend. in 1997, only 45% of documents in the Commission were written in English, and the rest mostly in French[8] - in a Commission still haunted by the shadow of Jacques Delors. In the European Parliament, the use of French has been increasing since 2008, to reach 23.77% in 2014. Above all, one should not undermine the importance of having most European institutions based in French-speaking cities: Brussels, Luxembourg and Strasbourg.

In sum, the possibility to substantially abandon English exists; this is a question of strong political willingness more than a utopian French narrative. Politico reports that Danuta Hübner, head of the European Parliament's Constitutional Affairs Committee (AFCO), claimed that English "will not be one of the European Union's official languages after Britain leaves the EU".[9] The Wall Street Journal warned that the Commission "has already started using French and German more often in its external communications". [10] A senior MEP stated, 'If we don't have the UK, we don't have English' Another tweeted, 'English cannot be the third working language of the European parliament'.

In conclusion, if the whole issue of the future of the English language has, of course, been determined by Brexit, I will stress the point that it must also be viewed in light of the emergence of a multi-speed Europe – a new framework which has been enshrined by the recent Rome Declaration (We will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later). What could arise from this new policy is also a two-fold linguistic bloc. In the East, the lingua franca – pardon the pun - would remain English. In the West (taking into consideration Italy's push for a reinforced status for the Italian language,[11] which should not be undermined), a politically-motivated reorientation towards the use of languages other than English.

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11. Meanwhile, the president of the regional council of Tuscany, Eugenio Giani, called for Italian to become one of the official languages of the EU. "We have not defended ... our language as we should have, both on the European continent and in the world," Giani said following the British referendum result. (Politico)

The Syrian Refugee Crisis in Sweden: A Historically Multiculturalist Country Forced to Turn to Civic Integration Measures?

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Abstract:

In 2015, 162,877 migrants reached Sweden during the height of the European refugee crisis, making the country the largest receiver of refugees per capita. With Sweden's historically open immigration policy and multiculturalist integration policy, migrants were welcomed with a rights-based approach. This included opportunities to freely choose where in the country to settle, to access native-tongue education in public schools, and to benefit from the Swedish welfare state on the same universal basis as citizens. A few months later, the government reformed its historical policies when reverting to the EU minimum quota of refugees and introducing "indirect deterrence" measures to make their borders harder to reach. Moreover, their integration policy was made more stringent: shortening residence permits and limiting social benefits in family reunification became part of a strategy to lessen the burden on the welfare state. This article examines whether the measures taken by the Swedish government following the refugee influx in 2015 constitute a shift in policy paradigms from their historically multiculturalist approach to the European trend of civic integration, thus fulfilling Joppke's "liberal convergence thesis" (2007). It subsequently finds that despite increased conditioning of immigration and integration policy, both in concrete policy and in the normative realm, the temporary nature and small reach of the measures and the political refusal to accept civic integration rhetoric render it too soon to place Sweden in the civic integration paradigm.

Starting in the summer of 2015, Europe experienced the height of an influx of Syrian refugees, headed from a war-struck Middle East to Western safety. Despite obstacles along the way, many – 162,877 to be exact (Swedish Migration Agency, 2017) – made it to Sweden. With a population of about 9.5 million at the time, Sweden accepted the highest number of refugees per capita in Europe. The Social Democratic government stuck to their open immigration policy until late November the same year, when Deputy Prime Minister Åsa Romson tearfully announced that Sweden simply could not do any more and would revert to the EU minimum quota of refugees (Crouch, 2015). In order to enforce the more closed immigration policy, the Swedish government did not stop accepting asylum seekers per se, but instead implemented various policies that can be characterized as "indirect deterrence", or efforts to make the country seem as unattractive as possible to asylum seekers (Gammeltoft-Hansen, 2017: 105). This paper examines whether these measures constitute a shift in Swedish integration policy from a multiculturalist approach focused on immigrant's rights, to a more civic integration approach focused on immigrant's obligations to the state (Borevi, 2012: 709). First, a historical analysis of Sweden's integration policy is called for, before looking into the civic integration trend occurring across the European continent. Second, an analysis of Sweden's new integration policies brought about by the refugee crisis follows, arguing that the crisis has prompted both practical and normative changes that can be linked to the civic integration paradigm.

Swedish integration policy: a multiculturalist approach

Swedish history concerning their treatment of the indigenous Sámi people, the focus of the country's integration policy when the first immigration influx came in the 1970s was to avoid "Swedifying"

“Sweden has had a tradition of open-door immigration policy"

new minority groups (Borevi, 2012: 711). Instead of emphasizing the need for immigrants to assimilate into society, Sweden transferred the universalist and egalitarian values from their social democratic welfare state into their integration policy, granting immigrants' respective cultures the right to exist on the same terms as native Swedish culture (ibid.: 712). Specific policies related to this were government support and promotion of immigrants' organizations, funding of newspapers in immigrant languages, and native tongue education in public schools. Furthermore, it was explicitly expressed by the Swedish government that the welfare state's universal nature pertained to immigrants on equal basis as natives. Thus, Sweden's multiculturalist approach to integration can be seen as the promotion of a national identity in which immigrants are granted means to stay in touch with their home culture, which then becomes a part of the new country's make-up. This has been done through top-down policies led by the state, accommodating for a welfare state that drives integration through social inclusion and equal treatment (Ibid.: 7).

The granting of these rights came with certain conditions. “Activation policies”, or a focus on getting people into employment as productive members of the labor market, have been historically prominent in Sweden (Breidahl, 2017: 2). In Swedish society, there is an expectation of self-sufficiency, leading to the condition of having to find an adequate job before applying for permanent residency (Borevi, 2012: 711). However, neither the acquisition of further immigration statuses, nor the obtaining of social assistance, have had formal requirements found in many European counterparts such as knowledge tests of Swedish society or language (Borevi et al., 2017: 2). A premise for the mildly-conditioned provision of social assistance was tight monitoring of immigration. The Swedish state's objective was to be consistent with their generous policies, which required regulation of immigration influxes in accordance with the welfare state's capacity (Borevi, 2012: 710). Nonetheless, Sweden has had a tradition of an open-door immigration policy accompanied by a largely rights-based integration process, with both widely uncontested among mainstream political parties (Bergmann, 2017: 170).

The long-term paradigm of multiculturalism likely contributed to the substantial volume of refugees made their way to Sweden. According to Brekke (2004), asylum seekers usually do not have in-depth knowledge about immigration and integration policies of possible destination countries, but do have a general image of certain countries' immigration and integration narrative. Seeing that Sweden has led such liberal policies over a long-term period, certainly allowing for an outward narrative that frames the country as generous and accepting of new cultures, Sweden has gained an appropriate reputation among asylum seekers, which led large volumes of Syrian refugees northward (Ostrand, 2015: 267).

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Civic integration and its European adoption

Broadly speaking, the term "civic integration" constitutes measures utilized by national governments, aiming to "condition, incentivize, and shape through socialization, immigrants into 'citizens'" (Borevi et al., 2017: 1). More specifically, there is a divide between defining civic integration in terms of a particular series of policies such as tests and conditions related to language, employment, knowledge about the host society, etc., or in terms of a broader normative approach in which you define civic integration as the dominance of the idea that immigrants should be integrated by an active state on the basis of duties and obligations as opposed to rights and freedom of choice (Ibid: 3). Measuring the degree to which a country employs a civic integration model naturally depends on choice of definition. Nonetheless, a clear European trend has been observed using both definitional aspects. Joppke (2007) has proposed a 'liberal convergence thesis' on the European continent, claiming that a civic integration approach has prevailed to a large enough extent to make the traditional nationalist assimilation versus multiculturalist integration policy paradigms obsolete. This has been contested by several individual case studies, as well as more broadly by Borevi (2012), claiming that the Swedish model of integration cannot be included in this paradigm despite ideational influence of the trend.

One of Borevi's counter arguments to Joppke is presented through a comparative analysis between Sweden and Denmark. According to Borevi et al, if Joppke's liberal convergence thesis is true, one should be able to see it particularly clearly in the Scandinavian countries due to their similar, intertwined history and political and economic conditions (2017: 2). However, Denmark is at the opposite end of the integration policy spectrum compared to Sweden; with a strong national assimilationist tradition, Denmark has one of the most conditioned integration processes on the continent (Ibid: 2). The Danish micromanage their immigrants from entry to naturalization, enrolling them in mandatory courses pertaining to language, customs and values, require them to obtain employment within certain time limits, and control the dispersion around the country in order to ensure an even spread of the weight put on municipal welfare agencies that comes with newcomers (Myrberg, 2017: 323). Furthermore, Denmark has also been historically different to Sweden in terms implementation of "indirect deterrence policies" towards immigrants, meaning that they have engaged in negative nation branding in order to make themselves seem as unattractive as possible to migrants and refugees (Gammeltoft-Hansen, 2017: 100). This likely further contributed to the burden imposed on Sweden during the European migrant crisis, reinforcing the argument that a country's long-term narrative concerning immigration and integration matters in refugees' destination choices (see Brekke, 2004).

Sweden has implemented neither the conditioning policies Denmark has imposed on newcomers, nor have they historically turned to indirect deterrence policies. In fact, both policymakers and public opinion have showed strong reluctance about introducing policies that are demanding and conditioning of newcomers even in the slightest sense (Borevi et al., 2017: 5). That is not to say that the country has been completely untouched by the widespread European paradigm. Sweden first seriously questioned their multiculturalist approach to integration in the 1980s, when politicians became concerned that the model did not ensure an efficient integration into society (Borevi, 2012: 712). A decade later, in 1997, the issue was again up for discussion, now with the concern that a multiculturalist approach deepened the cleavages between "us" and "them" (Ibid). However, none of the instances brought forward concrete policy changes of substance, and multiculturalism continued its reign outside the rhetorical sphere. Thus, one can argue that Sweden has been an outlier in Europe concerning the wide shift to civic integration using the practical policy definition of the term, although the normative influence is apparent in the political and public discourse.

Practical impact of the civic integration trend following the refugee crisis: policy outcomes

After about five months of a pressing refugee influx in the second half of 2015, the Swedish government announced in late November a revert to the EU minimum refugee quota. A visibly upset deputy prime minister held a press conference outlining Sweden's new policy towards refugees. The policy would consist of various elements, first and foremost tighter border control with a significant increase of police presence at the southern border and a requirement of valid identification documents at all entry points

into Sweden, which many refugees do not have (Crouch, 2015). Furthermore, in terms of integration policy, refugees would generally only be granted temporary asylum with the exceptions of quota refugees provided by the EU, accompanied by tight regulations and increased requirements regarding family reunification (Ibid). The policy package was set to last for three years.

When analyzing the renewed policies, it is easy to place them into the realm of indirect deterrence, as they share evident similarities with the previously discussed Danish approach of negative nation branding towards migrants. Several deterrence policies were implemented by the Swedish government following the immigration stop; shortening residence permits and cutting social benefits to newcomers arriving through family reunification – in the exceptional cases where reunification was approved in the first place – both match traditional Danish deterrence policies (Gammeltoft-Hansen, 2017: 106). The news about the Swedish immigration stop spread at fast rates. According to theory about refugee destination choice, indirect deterrence policies only work if the potential asylum seekers are informed about the conditions (Gammeltoft-Hansen, 2017: 108). Sweden's neighboring countries of Denmark and Norway had both run extensive communication campaigns in the Middle East in order to deter refugees from heading their way, running negative ads on their own

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domestic policies in Arabic newspapers and on social media (Ibid). Sweden did not engage in such a campaign, but arguably didn't need to with the substantial attention attracted by the immigration stop, enabling Sweden to make a U-turn in their own immigration and integration narrative and subsequent outward image.

In terms of integration policy, the changes put forward also have features in common with the previously discussed civic approach. The removal of accessible pathways to permanent residency and citizenship can be interpreted as a civic integration characteristic, as can the move to reproach rights in the family reunification realm. However, the policy measures were not only explicitly temporary – they also did not have a particularly wide reach from a macro perspective. The traditional Swedish integration policy and the benefits accompanying it was still made available to previously-arrived refugees, and the government intended to return to that practice in 2018 for new asylum seekers. Moreover, although the so-called immigration stop was followed by a drastic decrease in the number of new asylum seekers (from 162,877 in 2015 to 28,939 in 2016 according to the Swedish Migration Agency) and Swedish politicians quickly sought reward for their success, other external factors may have been the true cause of the downturn in applications. EU policies that blocked entrance to the continent as a whole, such as the EU-Turkey agreement and closing of the Balkan borders, likely contributed substantially to stopping the refugee influx (Gammeltoft-Hansen, 2017: 112). This argument is further reinforced by the fact that Germany – without a similar "immigration stop" – also experienced a drastic drop in asylum claim numbers (Ibid: 114). Thus, in terms of policy impact, it is difficult to argue for a permanent paradigm shift in the Swedish integration model at this point, due to the temporary timeline and the relatively slim reach of the changed policies, despite clear civic integration characteristics.

Normative impact of civic integration ideas following the refugee crisis

Although the refugee crisis did not lead to substantial permanent policy change in terms of immigrant integration, it is possible that the normative definition of civic integration may have ingrained itself more in the public and political spheres in Sweden. This can be seen in through the far-right party the Sweden Democrats' (Sverigedemokraterna) recent rise in the

political arena. The party had been largely ignored and stigmatized in Swedish mainstream politics until the financial crisis of 2008, after which they had a successful campaign on the importance of the native Swedes taking back control and ownership of their own welfare state, vowing to protect it from foreign infiltration (Bergmann, 2017: 160). In the national elections of 2010, they passed the threshold for parliamentary participation with 5.7% of the Swedish vote. In 2014, this more than doubled to 13% (Ibid: 171), and in 2018 they garnered 17.53%, a large enough part of the electorate to provoke political chaos in Sweden, as mainstream parties were left without a clear majority on either side of the aisle (NRK, 2019). In their current politics, the Sweden Democrats is criticizing the mainstream parties for the volume of refugees they accepted, claiming it made Swedish society segregated and filled with racial tension (Ibid: 173).

They are specifically calling out the government's lack of dispersion policy; with the so-called EBO legislation of 1994, asylum seekers in Sweden have the opportunity to opt out of the Immigration Board's housing program, allowing them to choose freely where they want to settle provided they find housing (Myrberg, 2017: 326). More than half of all newcomers choose to do so (Ibid). This has put high pressure on certain regions in Sweden, notably the city of Malmö, which now has areas associated with high crime rates and social unrest (Bergmann, 2017: 170). In Denmark, the city of Aarhus had a similar problem in the 1990s, but the Danish government took action and introduced a policy where asylum seekers were dispersed evenly throughout the country without being given the option to move for three subsequent years (Myrberg, 2017: 323). This has led to a more stable integration process in Denmark with each municipality's social service capacity taken into account before dispersing of newcomers, putting Denmark in front of Sweden in rankings concerning integration outcomes (Ibid: 325). Hence, the multiculturalist tradition in Sweden is still standing strong, exemplified by the substantial resistance of mainstream political parties to introduce a more regulated dispersion policy due to immigrants' freedom of choice on the same grounds as all other citizens (Ibid: 327). However, the Sweden Democrats, who have explicitly stated their opposition to the multiculturalist approach, are gaining ground in Sweden's political sphere (Bergmann, 2017: 173). This process started in the aftermath of the 2008 financial crisis and not per se with the refugee crisis, but the mass influx of asylum seekers did fuel the far-right party's anti-immigration rhetoric (Ibid). It is, however, important to point out that similar protests against the Swedish integration model have surfaced before, as discussed previously in this paper. Thus, it remains to be seen how long-term the normative impact of the civic integration approach will be.

Conclusion

The European refugee crisis imposed an immense immigration influx on Sweden, prompting a drastic "immigration stop" response that contained short-term policies contrasting the country's historically multiculturalist integration model. The changes bore resemblance to civic integration policies in which newcomers are expected to assimilate into a host culture to a much larger extent than before. Seeing that Sweden has been a European outlier in terms of integration policy since the 1990s, it is natural to question whether or not the changes brought about by the refugee crisis are symptoms of a shift towards a civic integration model, moving closer to fulfilling Joppke's liberal convergence thesis (2007). However, the changes made by the Swedish government are too short-term and narrow in reach to say that there has been a definite shift in policy paradigms. Moreover, although there are signs of normative impacts of the civic integration trend in the political sphere, it is too early to tell whether this will blow over like it has in similar situations in the 80s and 90s, or if the refugee crisis will fuel Sweden into a normative shift in integration paradigms.

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The Emergence of Right-Wing Populism in Austria & Germany:

A COMPARATIVE ANALYSIS OF THE FPÖ & AFD

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Abstract:

In the past few decades, populist parties have pushed themselves to the forefront of the political scene in Europe. Two parties that have attracted particular attention are the Freedom Party of Austria (Freiheitliche Partei Österreichs; FPÖ) and the Alternative for Germany (Alternative für Deutschland; AfD). The FPÖ is one of the most prominent populist parties in Europe, often referred to as a poster child for the movement. The AfD, on the other hand, is one of the newest parties and the first successful one of its kind in postwar Germany. This paper analyzes the reasons behind the discrepancies in the rise of these two parties, offering three potential explanations: differences in electoral systems, timing of electoral breakthroughs, and changes in social and political cleavages. Through qualitative case study analysis, it concludes that although all three play a role, shifting cleavages played the most significant role in the differentiated rise of the two parties.

In the past few decades, populist parties have pushed themselves to the forefront of the political scene across the globe, leading scholars to speak of a "populist Zeitgeist."[1] This movement is perhaps most evident in Europe, where such parties, especially those on the right, have entered the mainstream. Two parties that have recently attracted attention from worldwide media are the Freedom Party of Austria (Freiheitliche Partei Österreichs, or FPÖ) and the Alternative for Germany (Alternative für Deutschland or AfD). The FPÖ is one of the most prominent populist parties in Europe - in fact, many scholars consider it to be the poster child of modern European right-wing populism.[2] The AfD, on the other hand, is one of the newest populist parties. To the surprise of many political analysts,[3] it shows promise to be the first relatively successful right-wing populist party in postwar German history.

Although these parties are often grouped together, they differ in many key ways. One of the most notable is their age. First founded in 1955, the FPÖ began to gain substantial ground in the late 1980s. The AfD, on the other hand, was only founded in 2013. Given the similarity between the history, cultures, language, and political systems of Austria and Germany, this discrepancy is surprising at first glance. This paper seeks to determine the main reasons for the gap between the development of a successful right-wing populist party in Austria and Germany. I begin by providing a cultural context for how the far-right are perceived in both countries. With this in mind, I then propose three potential explanations for the time lag. These are the differences in: 1) electoral systems, 2) the timing of the electoral breakthrough of the respective party, and 3) the culmination of new social and political cleavages. After providing the theoretical background for each of these explanations, I apply them to each of the countries. Through a comparative qualitative analysis, I ultimately conclude that the development of new structural cleavages is the most useful explanation for this trend.

Cultural Background

World War II set the foundation for the modern political environment in most European countries. This is perhaps most obvious in Germany, which shouldered the majority of the blame for the war. Devastated by years of war, partitioned into two states, and antagonized worldwide, Germany had little choice but to confront the atrocities committed by the Nazi regime. As a result, a sense of Kollektivschuld – "collective [German] guilt," a term coined by Swiss psychoanalyst Carl Jung in 1945 – prevailed. The corresponding movement of Vergangenheitsbewältigung – literally, coming to terms with one's past – dominated the cultural, societal, and, to a certain extent, political spheres until the end of the post war century.[4] Even today, there is a strong distaste for and resistance to right-wing extremism in German society.[5]

The effect of this movement on German politics is clear. The political and legal system constructed by the current constitution which was put into effect in 1949 with the approval of the Allied Powers, is a "defensive democracy."[6] This means that government and state institutions are not only allowed but also obligated to defend against a devolution back into far right-wing extremism, which is equated with the National Socialist regi-

"World War II set the foundation for the modern political environment in most European countries."

me. The Constitutional Court is perhaps the best example. It has the power to outlaw any organization, group, or political party deemed to be "hostile to the constitution" due to its extreme rightist discourse and/or ideology[7]. Another notable example is the prohibition of all references to Nazi symbols and language. Politicians and public figures are often tried and convicted on such charges[8].

This "culture of contrition" has made it very difficult for far-right parties to gain a footing in Germany.[9] Even if a party evades censure from the Constitutional Court, it still must face the public. Germans tend to regard far-right parties with suspicion, fearing that they veer too close to National Socialism.[10] The AfD, especially in its early days, managed to avoid being associated with Nazism, very likely due to its primarily Eurosceptic platform. By presenting itself as a single-issue party focused on the Eurozone crisis and avoiding xenophobic and strongly anti-immigrant rhetoric, it side-stepped the cultural resistance to the far right and earned the favor of a notable proportion of the public[11].

Austria had a strikingly different experience. Characterized as the "first free state to fall victim to Hitlerite aggression" by the Allies' Moscow Declaration of 1943, it evaded the war guilt that haunted Germany.[12] Political, social, and economic elites gladly adopted a "culture of victimization," thereby dissociating Austria from Nazism. This is far from true – Hitler himself was Austrian, and many Austrian politicians were complicit to the Nazi regime. At the end of World War I, many Austrians called for unification with Germany, a proposal the Allies rejected. The republic that was instituted instead dissolved into civil war and fascism. Although there was some resistance to the annexation by Germany, many Austrians welcomed the advance and collaborated with the National Socialist regime throughout the war[13].

As a result of this national myth of innocence, Austria never went through a Vergangenheitsbewältigung. Since it never had to critically reexamine its past and its relationship to right-wing extremism, no significant resistance to the far right exists.[14] In fact, many former Nazis were able to reinvent themselves and become prominent politicians in the two major parties – the center-left Social Democratic Party of Austria (Sozialdemokratische Partei Österreichs, SPÖ) and the center-right Austrian People's Party (Österreichische Volkspartei, ÖVP) – directly after independence.[15] As a result, the FPÖ could present itself as a legitimate political actor with little to no protest. The most significant obstacle to the party's ascension to power was the traditional dominance of the SPÖ and ÖVP.[16] Once it was able to attract a considerable following, it has consistently been a key party in Austrian politics.

Potential Explainations

Explanation 1: Electoral Systems

Beginning around the turn of the twentieth century, many European states moved to reform their electoral systems. One of the most notable trends was the transition away from majoritarian systems in favor of those based on proportional representation (PR).[17] The most common majoritarian systems are plurality-based. This means that voters typically cast a single ballot for one candidate running in their district, and the candidate that receives the highest proportion of the vote is elected into office.[18] In PR systems, on the other hand, voters usually cast a ballot for a party list, and the proportion of the votes each party receives translates into the proportion of seats they are allocated in the elected body.[19] Many states impose minimum percentage thresholds, meaning that only parties that surpass this minimum are allocated seats.[20] Austria is an example of a state that uses PR with a minimum threshold. Other states, like Germany, utilize mixed electoral systems, which combine aspects of majoritarian and PR formulae in the election of a single body.[21] Specifically, Germany follows a mixed-member proportional system (MMP), in which half of the national parliament, known as the Bundestag, is elected directly through plurality and the other half through PR.[22]

The type of electoral system utilized by a state greatly impacts the dynamic between the political parties within it. This concept was perhaps most famously expressed by Maurice Duverger in his seminal book on political parties. In this work, he presents what is now known as Duverger's law: "the simple-majority single-ballot system favors the two-party system."[23] In other words, he postulates that majoritarian formulae encourage the development of two-party systems as they provide significant electoral and representative benefits to the most successful party and penalize the others, especially small parties. He also introduces what is now commonly refer-

"Since populist parties are - at least initially - on the fringes of the political spectrum, most need to experience... a breakthrough.."

red to as Duverger's hypothesis: "the simple-majority system with second ballot and proportional representation favor multi-partyism."[24] Simply put, he conjectures that both mixed electoral and PR systems tend to produce multiparty systems, for they aim to include minority parties.

The influence of Duverger's work cannot be understated. Indeed, the arguments in favor of or against the adoption or employment of these three major categories of electoral systems are largely based upon these two theories. The prevailing case in support of majoritarian systems is that they promote stability by forcing an effective working majority party in the parliament.[25] In contrast, proponents of PR contend that since minority views are taken into account, these systems this encourages fairer, more democratic representation of the attitudes and preferences of the electorate.[26] Accordingly, PR systems present more favorable climates for smaller parties, making it easier for extremist parties, such as right-wing populist parties, to acquire seats.[27] Mixed electoral systems employ some elements of PR, indicating that this conclusion can logically be extended to them as well. It is important to note that mixed systems tend to favor either majoritarian or PR formulae; as a result, some may present a more favorable climate to minority parties than others. The more proportional an electoral system is, the fewer barriers exist to impede smaller parties from gaining representation. I hypothesize that Austria's electoral system is more proportional than that of Germany, which allowed the FPÖ to gain seats more easily and earlier than right-wing extremist parties in Germany.

Explanation 2:
Timing of the Electoral Breakthrough

In multiparty systems, parties attract attention not when they are initially formed, but instead when they win a portion of the vote significant enough to impact and vary support bases for other parties. The literature refers to this phenomenon as an "electoral breakthrough." Since populist parties are – at least initially – on the fringes of the political spectrum, most need to experience such a breakthrough before gaining any considerable amount of influence. Schain argues that this can be achieved in two ways: 1) through converting voters who had previously supported another party, and 2) through mobilizing previous non-voters. [29] Goodwyn coined the term "populist moment" to describe the "societal crisis constellations" that are often a prerequisite to the breakthrough of such parties and/or movements, regardless of which of the two tactics they utilize.[30] Though he focused on American politics, the general principles of his analysis prove valuable in the case of Western Europe. Howard asserts that there are three societal crisis constellations generally responsible for the rise of populism in the region: "increasing economic uncertainty in the new global economy; ...the increasing influx of people from other countries and regions...; and ...the gradual erosion of the elite consensus between the major parties on the center-left and center-right of the political spectrum to isolate and exclude extremist parties."[31]

The concept of elite consensus is valuable in my analysis. Katz and Mair present arguably the most influential framework for understanding this idea in their seminal work on cartel parties. They trace the development of different party types throughout the history of Western European democracies. These parties differ based on their relationship with civil society on the one hand and the state on the other. They contend that the contemporary era is dominated by "cartel parties," which they define as a phenomenon "in which colluding parties become agents of the state and employ the resources of the state (the party state) to ensure their own collective survival."[32] In other words, instead of representing the wishes and priorities of the electorate, the large, established mainstream parties work together in order to eliminate competition and ensure that they maintain power. To achieve this, they typically employ resources offered by the state apparatus, such as funding and media access. As a result, the mainstream parties essentially become a part of the state, and thereby more or less abandon their role as agents of civil society. Their political platforms converge, and competition between them, though it exists, becomes increasingly muted.[33]

Although this collusion limits competition from outside parties, it of course cannot completely suppress political opposition. In recent years, right-wing populist parties have become perhaps the most successful protest parties. These parties attack the tradition of elite consensus, contending that the parties no longer represent the interests of the people.[34] As mentioned earlier, this situation is one of the three societal crisis constellations that contribute to the likelihood of an electoral breakthrough. I hypothesize that, though both Austria and Germany began to grapple with these constellations around

the same time, they were perceived by the electorate as more acute in Austria earlier than in Germany. Since the FPÖ was active and able to both detect and capitalize on these concerns, it could achieve its electoral breakthrough earlier.

Explanation 3:
Changes in Social and Political Cleavages

Globalization has profoundly impacted the ways in which states, societies, and individuals interact. This process has introduced increased competition in a number of sectors, including the economic (in terms of a larger world market and internal diversification), cultural (in terms of increased immigration, most notably from non-European ethnic groups into the West), and political (in terms of tensions between states and supranational organizations). In response to these changes, Rokkan postulates that globalization is a new "critical juncture" that will lead to a restructuring of political and social cleavages. In other words, globalization is redefining the concerns and priorities of citizens and thereby the social and political groups with which they identify.

The traditional understanding of the political space classifies parties, movements, and attitudes along the left-right spectrum. Before World War II, there were two main dimensions in which the left and the right differentiated: 1) socio-economic, defined by class, and 2) cultural, defined by religion. The socio-economic dimension mainly focused on government regulation of the economy and social welfare policy, with the left advocating for stricter regulation and strong welfare and the right for the opposite. In Europe, the cultural dimension was dominated by the conflict between Catholics, represented by the right, and Protestants, represented by the left. Post-industrialization, secularization, technological progress, and rising education levels, among other things, ushered in a series of political, social, and economic changes that led to the development of new structural conflicts beginning in the 1960s. These so-called "New Socialist Movements" revitalized the class conflict, shifting the focus from the working class to the middle class. Perhaps more importantly, these movements redefined the cultural dimension: Instead of a conflict based on religious identity, it became one between those who advocated for cultural liberalism and social reforms (the left) and those who called for the protection of traditional, often Christian values and institutions (the right).

Globalization has brought about another shift in priorities. Kriesi et al. present a particularly interesting and comprehensive theory of this new phenomenon. They classify the new structure as an opposition between the "winners" and "losers" of globalization. The winners benefit from the intensified competition and likely include "entrepreneurs and qualified employees in sectors open to international competition as well as all kinds of cosmopolitan citizens." The losers, which likely include "entrepreneurs and qualified employees in traditionally protected sectors [as well as] all unqualified employees and citizens who strongly identify themselves with their national community," feel threatened by the increased competition. The priorities of these two groups do not fit neatly into the old left-right classifications in either dimension. The losers tend to support "demarcation" – the protection of national boundaries and sovereignty – while the winners support "integration" – the opening of national borders and increased international integration. In terms of socio-economic positions, the losers are likely to back pro-state, protectionist policies that favor national markets, while the winners will advocate for pro-market policies that increase national competitiveness on the global market.

As in the New Socialist Movements, the cultural dimension has changed far more dramatically. Immigration, nationalism – which is increasingly expressed and defined by ethnic identity – and, in Europe, integration into the European Union (EU), are now the most salient cultural issues. The losers tend to espouse ethno-nationalist, even xenophobic values, calling for restrictive immigration policies and limited (if any) integration into the EU. The winners support a more cosmopolitan approach, supporting more open immigration policies and continued integration into the EU. It is important to note that the cultural dimension has grown, and continues to grow, in its significance for the electorate and thereby for political parties.

Indeed, as the winner-loser divide becomes more prominent, appealing to the opposing groups becomes increasingly relevant for parties. Kitschelt and McGann were among the earliest to argue that the axis of party competition has shifted, cutting across the traditional left-right positions on both the cultural and socio-economic dimensions. The mainstream parties of the cen-

"Instead of the traditional left-right divide, we now see one between the winners nad losers of globalization."

ter-left and center-right have largely failed to adjust to these new axes. Although the exact positions vary between countries, both the mainstream left and right generally support increased economic denationalization, the maintenance of current immigration policies, and European as well as (to varying degrees) international integration. The mainstream parties have taken, however conservatively, the winners' side.

The convergence of these positions bolstered the development of new fringe parties on both the left and the right that advocate for the losers. Kriesi et al. characterize these parties as the "radical left" and the "populist right." The policies of the radical left tend to concentrate on socio-economic protectionism, while those of the populist right focus on cultural protectionism. Specifically, the populist right in Europe adopts a xenophobic, even racist position that vehemently denounces the presence of immigrants. Due to the rising importance of cultural concerns, the populist right has fared far better electorally than the radical left. In hopes of countering the success of right--wing populists, mainstream parties have begun adopting more culturally protectionist policies, demonstrating the transformation of the political landscape.

In short, globalization has led to the development of new political and social cleavages. Instead of the traditional left-right divide, we now see one between the winners and losers of globalization. The tendency of the mainstream centrist parties to opt for the priorities of the winners encouraged the entrance of new types of fringes parties to the political stage: the radical left and the populist right. The former concentrated on the socio-economic dimension, opposing economic liberalization, while the latter emphasized the cultural dimension, speaking against immigration and integration on both the European and international level. The populist right has proved to be more influential, causing mainstream parties to adopt more culturally protectionist policies. This has redefined the political spectrum: it is now structured as an opposition between the mainstream center parties (on the "left") and the populist right (on the "right"). I hypothesize that this shift culminated earlier in Austria than it did in Germany, allowing the FPÖ to come to prominence earlier than any similar party in Germany.

Analysis

Explanation 1: Electoral Systems

World War II strongly influenced the development of electoral systems in a number of European states, including Germany and Austria. This is perhaps more evident in the former. For the election of its main parliamentary body, the Weimar Republic, the interwar government in Germany, employed a PR system with no minimum threshold. Accordingly, any party that earned even one seat was granted representation. Crippling political fragmentation resulted, as numerous small extremist parties were allowed to enter the Reichstag.[48] Hoping to avoid repeating this problem, the authors of the postwar constitution in West Germany instituted an MMP system for the election of the new primary parliamentary body, the Bundestag. They sought to combine the advantages of both majoritarian and PR systems by having half of the Bundestag elected through plurality and the other half through PR. [49]

This is achieved through a split-ballot system. In parliamentary elections, each voter casts two ballots: one for an individual candidate in their electoral district and the other for a party list. The first votes, those for the candidates, are evaluated based on plurality, that is, the candidate that receives the highest percentage of the vote in her or her respective district wins the seat. The second votes, those for the party lists, are pooled together, and each party receives the number of seats that corresponds to its percentage of the vote. Importantly, the constitution imposes a 5% minimum threshold for parties. The specific calculations that determine the exact number of seats allocated to each party are complex and bear little relevance for my analysis.[50] It is, however, worth noting that, in 2013, the Constitutional Court ordered a change in the allocation calculation. These new regulations provide additional safeguards to ensure that no party receives less seats than its share of the vote indicates.[51]

Austria, on the other hand, did not establish a mixed electoral system for the election of its primary parliamentary body, the Nationalrat, opting instead for one based solely on principles of PR. When electing the Nationalrat, voters cast one ballot, which holds up to three votes: one for a party list and up to two "preferential votes" for specific candidates on these lists. If a candidate receives enough preferential votes, he or she may move higher on the party list and therefore become more likely to gain a seat in the parliament. It is important to note that these preferential votes cannot translate into majoritarian formulae, so the Austrian electoral system cannot be

considered a mixed one. Each party that receives at least 4% of the total vote or one seat in a regional district will be apportioned seats based on the percentage of votes it gained.[52] The calculations for determining the exact number of seats assigned to each party are perhaps even more complex than those in Germany and, as in the German case, are not significant for my analysis.[53]

If we consider electoral systems to be placed on a spectrum with pure PR on one side and pure majoritarian on the other side, it is logical to infer that the Austrian system is further on the PR side than the German one. The primary basis for this conclusion is the formulae used by each state: Austria exclusively applies PR ones, while Germany employs both PR and majoritarian ones. Moreover, the lower minimum percentage threshold in Austria (4% as opposed to 5% in Germany) makes it easier for parties to qualify for representation. Since Austria has a more proportional system than Germany, it presents a more favorable environment for smaller parties, like right-wing extremist parties, than that of Germany. This is in accordance with my hypothesis: the FPÖ could gain seats in the Nationalrat more easily than similar parties in Germany could in the Bundestag, allowing it to enter the parliament earlier.

Explanation 2: Timing of the Electoral Breakthrough

Politics in postwar Austria were dominated by a cartel party. The SPÖ and ÖVP established an informal system of "neo-corporate consociationalism," in which they cooperated not only with one another but also with "social partners," that is, corporate institutions and labor unions, to exclude competition.[54] In this system, called Proporz, mainstream politicians and leaders from these institutions would meet almost exclusively out of the public sphere and negotiate a consensus on social and economic policy. [55] This system operated with little opposition until the late 1970s, when the contemporary SPÖ-led government enacted a set of social and political reforms. A number of corruption scandals came to light, stirring public outcry against Proporz.[56] At the same, the SPÖ attempted to weaken the ÖVP by supporting the FPÖ, which was a weak, relatively moderate party at the time.[57]

This tactic backfired. Participating in government, even marginally, legitimized the FPÖ on the local and national stage.[58] When Jörg Haider assumed the party leadership in 1986, he recognized the developing opportunity structures. Working almost unilaterally, he completely transformed the FPÖ in terms of ideology, target voter base, personnel, etc. in order to appeal to the changing concerns of the Austrian people. At the time, the primary concerns were the increased migration and threats to economic stability that followed the fall of the Iron Curtain.[59] By directly addressing these concerns and attacking the SDP and ÖVP, Haider established the FPÖ as the only "real" alternative. Electoral support skyrocketed, rising from approximately 5% in 1986 to 16.6% in 1990 and 26.9% in 1999.[60] The combination of remarkable leadership, economic uncertainty, migratory pressures, and the weakening of the cartel party secured the FPÖ its electoral breakthrough in the early 1990s.

These conditions took longer to form in Germany. The German postwar political system, much like its counterpart in Austria, was dominated by an elite consensus between the Christian Democratic Union (CDU), the Social Democratic Party of Germany (SPD),and, to a certain extent, the Free Democratic Party (FDP).[61] Unlike in Austria, however, this consensus was reinforced institutionally through the Constitutional Court. This is not to say that Germany has been free of off-the-table negotiations; however, formal structures and regulations have played a key role in contributing to the dominance of these parties. As detailed before, the Court has the power to outlaw any organization, movement, or political party it deems to be too close to Nazism. Though several far-right parties have existed with varying levels,[62] the vigilance of the Court has proved to be a significant impediment to them gaining power or public support.[63]

The AfD could achieve electoral success due to a number of factors. The atmosphere for populist discourse had already been established a few years prior due to the "Sarrazin debate." In 2010, Sarrazin, a SPD politician, wrote Deutschland schafft sich ab ("Germany does away with itself"), a book that sharply criticized immigration and integration policies adopted under the Merkel government. The book attracted significant attention in political and public spheres, sparking a national debate that paved the way for right-wing populist discourse.[64] Although the AfD adopted some populist rhetoric,[65] it evaded censure from the Court because it did not introduce itself as a far-right party; in fact, during its early stages, it aggressively dissociated itself from Na-

"..the dominance of cartel parties in both postwar Austria and Germany set the foundations for an anti-establishment backlash."

tional Socialism.[66] Instead, the founders presented it as a single-issue party focused on the Eurozone crisis. Specifically, the AfD criticized the policies adopted by the government in the crisis and called for an exit from the Euro.[67]

During the 2013 elections, the three mainstream parties as well as the left-wing liberal Green Party skirted around the crisis, either supporting the current policies or completely ignoring it in their campaign platforms. The AfD therefore had the opportunity to fill this gap in the discourse, characterizing itself as the only real alternative. This attracted the attention of voters from both sides of the political spectrum who were disgruntled with the policies of the current government, allowing for a breakthrough.[68] Due to the institutional safeguards against far-right movements, the AfD could attract a notable amount of support by initially classifying itself as a critical, but not extremist party.

In summary, the dominance of cartel parties in both postwar Austria and Germany set the foundations for an anti-establishment backlash. As the elite consensus between the mainstream parties of the center-right and the center-left began to erode, alternative viewpoints, voiced most notably by populist parties and thinkers, came to light. This erosion culminated earlier in Austria than it did in Germany: the Proporz system collapsed in the late 1970s, while the Sarrazin debate only began in 2010. This discrepancy lends support to my hypothesis, as the FPÖ had the opportunity to challenge the mainstream parties and be taken seriously earlier than any far-right party did in Germany.

Explanation 3: Changes in Social and Political Cleavages

Austria touts a long history of cultural protectionism, beginning arguably around the end of WWII. Its desperation to dissociate itself from Germany as well as its geographic position between Western Europe and the Iron Curtain afforded it a welcomed and, to a certain degree, self-imposed isolation. The permanent neutrality clause in its constitution, which had been demanded by the Allied powers, further contributed to this isolation.[69] This exclusionary sentiment fostered stark opposition to immigration as well as a healthy sense of Euroscepticism. It is interesting to note that immigration only became a salient issue following the fall of the Berlin Wall in 1989. As the Iron Curtain hastened towards collapse, fears of an influx of poor migrants from the former Communist bloc grew.[70] A few years later, the Yugoslav wars heightened these fears, as refugees began to arrive in increasing numbers.[71] With regards to the European question, Austria has consistently ranked amongst the most hesitant towards deeper integration.[72]

In terms of the socio-economic dimension, Austria has long tended towards economic protectionism. In the Proporz system, major corporations, labor unions, and other economic powerhouses cooperated heavily with the mainstream political parties. Private, under-the-table negotiations ensured that their interests would be represented by government policies, which resulted in a stable economy characterized by heavy government intervention.[73] Even after Proporz fell apart, the Austrian public maintained their favor for a regulated economy and welfare state.[74] On a related note, support for increased economic integration with other European states also remained high, as indicated by the minimal opposition to Austria joining the European Free Trade Association in the 1960s and the European Economic Community in the 1980s.[75] Although the specifics of their positions varied, political parties across the spectrum – including those in the center and those on the fringes – reflected these attitudes, supporting economically conservative policies.[76]

With these trends in mind, it is hardly a surprise that, in their analysis of the effect of globalization on the structure of the political space, Kriesi et al. determine that while the socio-economic dimension lost salience throughout the 1990s and early 2000s, the cultural dimension did the opposite. Furthermore, their data indicates that the cultural dimension did indeed shift from an opposition between cultural liberalism and a restrictive budgetary policy in the 1970s to one between cultural liberalism and immigration beginning in the 1990s. On the other hand, the opposition structure for the socio-economic dimension remained characterized by an antagonism between support for a welfare state and support for economic liberalism throughout this period.[77]

This provided an ideal opportunity structure for Haider's FPÖ, which arose as the primary voice of cultural protectionism. Its infamous "Austria First" slogan, xenophobic rhetoric, and demands for more restrictive immigration and asylum policies are but a few examples of their cultural protectionist approach.[78] Furthermore, the FPÖ called for the maintenance of a strong welfare state, mirroring the attitudes of the majori-

ty of the electorate. Interestingly, the FPÖ did not only attract blue-collar workers, who are typically considered the archetypal losers of globalization, but also members of the middle class, especially during the late 1980s and early 1990s.[79] This can be explained by Austria's extended and extraordinary isolation. Being so accustomed to the status quo afforded by this isolationism, Austria was especially ill-equipped for the sudden impact of globalization. Like the losers, groups that would typically be considered members of the winners were unprepared for the sudden change in the status quo. However, as the reality of integration outside national borders set in, a clearer rift formed between the winners and losers, as reflected by the decreasing levels of support for the FPÖ amongst middle class voters beginning in the mid- to late-1990s.[80]

The German case is noticeably different. Unlike Austria and even other Western European countries, the socio-economic dimension has remained consistently salient in Germany. In fact, in the six countries analyzed by Kriesi et al., economic issues lost salience in every country except for Germany from the 1970s through the early 2000s.[81] The fall of the Berlin Wall and unification explains this trend in part, as the country struggled to consolidate the differing levels of industrialization, wealth, and unemployment.[82] It is also worth noting the German economy – both in the West and East – has been integrated into markets outside of its national borders since WWII. Accordingly, the German electorate does not overwhelmingly favor a strong welfare state or economic liberalism, and political parties assume economic positions across the spectrum.[83]

The cultural dimension is perhaps more interesting. The analysis performed by Kriesi et al. indicates that, in the 1970s, this dimension was characterized by an opposition between support for cultural liberalism on one hand and support for a restrictive budgetary policy and a strong army on the other. At first glance, this appears similar to the Austrian case;[84] however, the data indicates that these two poles are insignificantly related to one another. It can therefore be concluded that the cultural dimension had very little relevance in Germany at this time. This did indeed change throughout the 1990s and early 2000s. As in Austria, the cultural dimension shifted towards the cultural liberalism-immigration opposition structure. That said, relative to parties in the other five countries evaluated, German parties have only cautiously flirted with anti-immigration sentiment.[85]

Considering these trends, it is logical that the AfD first came to prominence as a single-issue party focused on the Eurozone crisis, an economic issue. The higher salience of the socio-dimension suggests that the party's calls for economic protectionism attracted more positive attention and support than calls for cultural protectionism would. Interestingly, the middle class and academics, typical winners of globalization, composed most of the supporters for the AfD just prior to the 2013 elections.[86] However, the party's shift towards increasingly culturally protectionist policies following the 2013 elections, attracted a different voter base. In the 2014 European Parliament and regional elections, there is a notable correlation between ultimate voters for the AfD and the typical losers of globalization in these elections.[87] This suggests that the cultural dimension is rising in salience in German politics, implying that the winner-loser structural divide is as well.

The restructuring of the political space from the traditional left-right spectrum to one between the winners and losers of globalization can be seen in Austria and Germany. In both countries, the cultural dimension has been transformed into an opposition structure between cultural liberalism and restrictive immigration policies. This a relatively new phenomenon in Germany, which has historically focused more on the socio-economic dimension. Austria, on the other hand, has historically tended towards protectionist policies, both in the socio-economic and cultural dimension, allowing the FPÖ the opportunity to rise in power before a similar party could in Germany.

Discussion

As evidenced in the preceding section, each of my proposed explanations is valid to some degree. In this section, I seek to compare these explanations in order to see which is (or are) the most significant. I will begin with my first explanation, the differences in electoral systems. Since Austria has a more proportional system than Germany, it seems logical to conclude that extremist parties would fare better in this atmosphere. Indeed, an ample number of empirical studies provide tentative support for Duverger's hypothesis: electoral systems closer to pure PR tend to produce more parties than systems that are more majoritarian.[88]Furthermore, analyses

indicate that more proportional systems tend to support parties with a larger ideological range.[89] However, this does not mean that extremist parties actually fare better in these systems. As Carter's thorough comparison of far-right party success in different electoral systems indicates, these parties have had starkly different levels of success in countries that employ strikingly similar electoral systems. Even in PR systems that use the same seat allocation formulae have had vastly different experiences.[90] Therefore, I conclude that this explanation, though worth noting, holds relatively little weight.

My second explanation appears more promising. This explanation provides a particularly interesting lens for analysis, as the situation in both countries is strikingly similar. As explained above, both Austria and Germany were dominated by cartel parties – composed of a more conservative yet centrist Christian Democratic party and a more liberal yet centrist Social Democratic party – in the postwar period. The Proporz system in Austria was perhaps a more extreme version than the consensus in Germany, as it included powerful actors outside the political sphere. Nevertheless, these systems provided strong foundations for anti-establishment backlash. It is important to note that although this system has more or less collapsed in Austria, it still exists in Germany. The CDU, though under an increasing amount of pressure, is indeed still in power, and likely may stay there. With this in mind, I conclude that, although this explanation holds more weight than the previous one, it still is not the best of the three.

This leaves the third explanation, which deals with globalization and the development of new social and political cleavages. I find this explanation the most interesting, as both Austria and Germany have taken very different paths, yet ended in similar places. Austria has traditionally tended towards culturally and economically protectionist policies. The sudden dissolution of the status quo following the fall of the Berlin Wall and the Iron Curtain shook the country, leading to increasing support for policies favoring the losers of globalization. Germany, on the contrary, has historically had a more cosmopolitan approach; indeed, cultural protectionism had low salience throughout much of the postwar period. However, recent challenges, notably the Eurozone crisis, increasing immigration, and the influx of refugees, has led the cultural dimension to rise in salience. As a result, a far-right party finally had the opportunity to rise to prominence. With this in mind, I argue that this explanation is the most significant.

Conclusion

This paper sought out to determine the primary causes for the thirty or so year gap between the rise of the FPÖ, the first prominent right-wing populist party in Austria, and the AfD, one of the first right-wing populist parties in Germany with the potential to enter the government. I proposed three potential explanations: 1) differences in electoral systems, 2) a lag in the timing of the electoral breakthrough of each of the parties, and 3) the development of new political and social cleavages. Through a qualitative analysis, I concluded that of these three hypotheses, the third best accounts for this trend.

It is important to note that the analysis presented here is limited in scope. For results that would be easier to compare over time and to other countries, further research should pursue quantitative analyses of each of my hypotheses. One possible method of analysis for the third explanation is a comparison of public opinion data concerning immigration, cultural liberalization, and economic liberalization for both of the countries. Eurobarometer, the World Values Survey, and the European Social Survey are possible sources of data. A repetition of Kriesi et al.'s methodology for determining the impact of globalization with more recent data could also prove valuable.

Recent changes in the political atmosphere of Germany and Austria may also have a profound impact on the information presented here. The loss of support for the CDU and, more markedly, the SPD in regional elections in the German states of Bavaria and Hesse as well as the increase of support for the AfD indicate that the German political landscape is changing dramatically.[91] Merkel's decision to step down from the chancellorship signals that a new era is likely to come. Furthermore, the fact that the FPÖ is currently in a ruling coalition with the ÖVP will impact how the FPÖ is perceived by the Austrian electorate, for voters will now be able to see how the party performs in a governing position.[92] These developments indicate that the AfD and the FPÖ will continue to be important players in both the internal political field of their respective countries as well as the European one.

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Three key miscalculations of David Cameron regarding the EU Referendum & how he could have addressed them

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Abstract:

Brexit and its ramifications have become some of the main subjects discussed in British politics. Today, years after the referendum took place, many questions regarding the administrative process for Britain to leave the EU, 'remain' unanswered. Generally, it has been a scrutinising and complex endeavour. But, how did Britain get here? One may give a variety of answers to this question, ranging from the country's political culture, to its politics after the 'enlargement of the EU'. This paper will attempt to discuss the question from the perspective of three significant miscalculations made by David Cameron before and during the referendum.

Recently, we have observed the struggles of Theresa May, in trying to pass her Brexit proposal, and much like for David Cameron before her, challenges and sources of antagonism have emerged from many sides, including from her own Conservative Party, the Opposition, the European Commission, and British society (Stewart and Walker, 2018; Thomas et al., 2018). Of course, conceiving, designing and implementing such a plan is not trivial, but the ways in which the last two British prime ministers gone about it has been paved with considerable miscalculations, which one may argue could not have been completely avoided, but are nonetheless not entirely dismissible. Theresa May's government has not fallen, and the Brexit conundrum has not been resolved. Consequently, one may wait to see what she might achieve in the next few months or even years. David Cameron, on the other hand, is clearly finished with contributing to this agenda (BBC, 2018), so for now this essay will only analyse some of his key miscalculations.

A diverse array of narratives have been put forward regarding the European Union (EU) membership referendum in the United Kingdom (UK), concerning its purposes, process, outcomes and the miscalculations of David Cameron, his party, the Remain Campaign, the opposition and even the EU. In this essay I have chosen to discuss a few of the arguments offered to point out three miscalculations and the alternatives that could have been adopted, not only by David Cameron and his government, in the first case, but also by the Remain campaign. I also considered, more broadly and in a less intensive manner, the role of the EU. I will touch upon the very decision/pledge of adopting the referendum, the EU identity/brand within National States, and the (mis)treatment of the immigration issue, in a context of the immigrant crisis during the actual referendum campaign.

Specific miscalculation: 22nd of January 2013 - Pledge to hold a referendum

On January 22nd 2013, in a long awaited speech, the then Prime Minister David Cameron, running for re-election, declares that if the Conservatives win the coming election, in 2015, they would seek to renegotiate the terms of the UK's relationship with the EU and give the British people a "simple choice," between staying in the EU under the terms established, or leaving (BBC, 2016a). This was a miscalculation of the implications of this statement for the country's future stability, a miscalculation of a referendum outcome, and presumably a misinterpretation of how it would play out within the Conservative Party.

According to David Cameron:

(...)"disillusionment" with the EU was "at an all-time high" and "simply asking the British people to carry on accepting a European settlement over which they have had little choice" was likely to accelerate calls for

"...the UK referendum design...may become a tool for a political party or representative to gain a political advantage..."

the UK to leave.(BBC in 2013)

Despite this declaration there were concerns that the prime minister was actually just making an electoral gamble due to the growing support of the UK Independence Party (UKIP) in the polls, at the expense of the Conservatives (Helm, 2013). Simultaneously, in hindsight, one might also consider the 2010 general election, which brought a new generation of Eurosceptic Conservatives to Parliament. This should not be overlooked - in a vote for a motion to call for a referendum on Britain's relationship with the EU in 2011[1] and a rebellion against the EU's multiannual financial framework (MFF)[2] in 2012, Eurosceptic backbenchers were rebelliously exerting growing pressure on the Prime Minister.

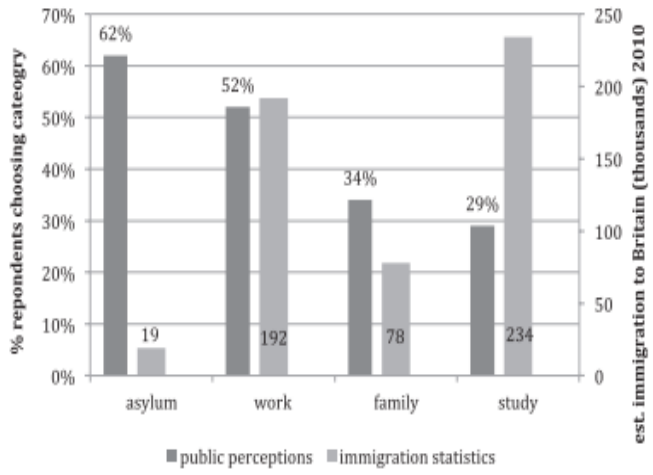
There are reasons to support Cameron's decision. Andrew Glencross (2016) has associated the perceived need for a referendum on such a matter with the 'post-democratic dilemma' of Western liberal democracies which have pushed governments to take decisions that reinforce the people's true sovereignty or direct democracy, as opposed to the now in crisis, government sovereignty, within representative democracy. Lacey (2018), discusses the support national referendums have among Europeans as a legitimate device to ratify treaties, but also the specific design of these referendums and their implications. Hence, the UK Referendum design, which is ad hoc, is one that may become a tool for a political party or representative to gain a political advantage or alleviate pressures (Lacey, 2018). These referendums, as opposed to mandatory ones, "are not legally required, but rather called at the will of political representatives" (Lacey, 2018 p. 531)

Consequently, the decision may have been framed as a need for the British people, given that the last referendum regarding the EU was held in 1975 and referendums have become part of the norm in discussions regarding EU membership in other member-states (Beach, 2012; Lacey, 2018). However, growing conflict within the Conservative party in relation to the EU membership, as well as the pressure to win the general election which was being overturned by a party whose existence was established by anti-EU feeling, was not trivial. Furthermore, the 22nd of January 2013 is the key moment to be considered because it hooks the referendum proposal to the new, possible, winning candidacy of the Conservatives. Arguably, this makes the proposal stronger than considerations associated to previous promises on a referendum on the Lisbon treaty, for example.

The alternative could have been a broader involvement with the different actors inside and outside the UK and addressing the issues concerning Eurosceptics, instead of telling conservatives at home to stop "banging on about Europe" (Matthijs, 2013; Bale, 2016). Arguably, the decisions taken by David Cameron were both isolated at the level of the EU, and isolating of Eurosceptics at the national level.

David Cameron seemed to have disregarded the importance and relevance of alliances within the EU block to put forward concerns present not only within UK politics, but also in other member states. Euroscepticism is not an

Figure 1: Public Perceptions of Immigration by Reason for Migrating, Compared with Statistical Estimates of Immigration to Britain in 2010



Sources: Ipsos MORI/Migration Observatory; Office of National Statistics.

SOURCE: BLINDER, S. (2015) 'IMAGINED IMMIGRATION: THE IMPACT OF DIFFERENT MEANINGS OF 'IMMIGRANTS' IN PUBLIC OPINION AND POLICY DEBATES IN BRITAIN', POLITICAL STUDIES, 63(1): 80-100

exclusive feature of UK politics (Hooghe & Marks, 2007), and the issues put forward by them should have been considered at a more institutional level. Ex-ante coordination is of great importance in such political arrangements, and David Cameron seems to have made little to no use of such a tool. In 2012, for example, European Council tried (unsuccessfully) to reach a deal concerning the EU's multiannual financial framework (MFF). Britain was completely out of touch in trying to put forward its own agenda at the expense of agreements to take the continent out of the crisis unleashed in 2008.

Furthermore, Euroscepticism within the UK and the conservative party is not new. Alexandre-Collier (2015) has associated this Euroscepticism within the party to the strength of Margaret Thatcher's rhetoric on the EU, and endurance of her ideas and ideals within the conservative party. Hence, she may not have been a Eurosceptic in the way one sees it manifested today within the party, but she nonetheless contributed to what it has become today.

Similarly, within UK borders, an opportunity was missed to engaged Eurosceptics in government and discuss their concerns before adopting the referendum alternative. David Cameron may have underestimated the relevance of anti-EU feelings in his party and the Conservative electorate. Governance strategies require compromises and adaptation (Auel & Benz, 2005)outside and inside one's party. Simply offering roles to Eurosceptic backbenchers and engaging them in government could have changed the scenario of EU membership discussion. Concurrently, bringing the debate to government in the form of a committee or even a team to renegotiate the terms of the British EU membership could have guaranteed more support to any British prime ministerial proposals with the EU. The conditions David Cameron managed to secure on occasions, such as his 2015 letter to the European Council, were not trivial but were downplayed by the perception of their outcomes, not only by Tory Eurosceptics, but the media in general.

Timeless miscalculation: The problem of perception of the EU

A structured and well-designed positive case of the EU was lacking in the referendum campaign, because of decisions made by David Cameron and the Remain campaign as a whole. Albeit, one might argue that the EU does not have a positive case in general, because of its lack of identity and brand of communication. Andrew Glencross (2016) discusses the 'missed opportunities' committed during the referendum campaign, when the Remain camp failed to communicate a positive message for staying in the EU or to 'discuss Britain's contribution to shaping European integration.' In this section I argue that despite the identity crisis of Britain as well as the EU itself, Remain should have engaged in a more positive campaign of the institution.

The current identity crisis Europeans are facing, which seems to have escalated recently is not confined to Britain and it is also not restricted to the timing of the British referendum. The construction of, and challenges around the EU's identity, have often been subjected to scrutiny (Stråth 2002; Blokker, 2008). Currently, the EU no longer benefits from its post-war period purpose relating to unity, prosperity and peace, which also provided for a more structured identity. Today, its goals have become more ambiguous (Ham 2005). At the same time, it is not a nation state, which means it lacks characteristics such as indivisible sovereignty and a clear identity (Schmidt, 2004). Hence, the EU has failed to offer a consistent identity with which citizens can identify, because of reasons such as its lack of defined purpose and complex organizational structure. Moreover, one may also argue that it lacks a clear leadership, or even structure, within its complex network of institutions (Tömmel and Verdun 2017) which often confuses citizens.

Additionally, the EU is often associated with excessive bureaucracy and elites (Ivaldi et al., 2017, Moore 2017). Most people do not know all the dimensions in which the EU affects their lives and how their countries contribute to, but also benefit from, the EU. The concept of the "Brussels bubble", constrains both the engagement of Europeans citizens and the credibility around the EU's representation (Santis 2014; Baygert 2015, 146).

Those are massive problems to be resolved in one referendum campaign. However, they could have been addressed incrementally through a positive case of the EU. The UK has been an important leader within the EU. It has been a main actor driving policies and has enjoyed over-representation within its public administrative bodies, but this has not been made clear to British citizens.

When these feelings seem to have started to escalate as well as during the campaign, British governments from 2001 until today could have mentioned that the EU is about a study exchange, and freedom of movement for work, as examples. According to the EU website between 2012-2013, 14 572 British students studied and worked abroad, and received grants from the EU to contribute towards the costs of living. Simultaneously, figures from the Office for National Statistics (ONS) have shown that most people living outside the UK, within the EU (2/3) are of working age and not retirees living in sunny destinations. These people have benefited from great mobility, state benefits and public services because of the EU agreements. The EU is also a major investor in research - as an example, it invests "over GBP 151.2 million (EUR 180 million) per year in cancer research" (EU, 2018). The UK, as a major player on cancer research within Europe, has benefited from the advancements put forward.

There are many examples that could have been used, and may have brought the EU closer to people's daily lives, not as an elitist and bureaucratic project, but as an institution that is also providing goods and services through its collaborative nature. Simultaneously, the UK is not merely a spectator, but in many instances a leader of the EU project and its policies.

Understanding the EU, its purposes and contributions was a key variable missing during the referendum, but it is also a key variable in general in support of the EU. One might be, or become, sceptical of it after getting to know it better, but misunderstanding it remains a crucial variable driving Euroscepticism. David Cameron seems either to have overestimated people's knowledge of the EU, or underestimated the potential damage a lack of knowledge of its funding and benefits could cause. As we saw during the campaign, it was possible to capitalise on this lack of knowledge by putting forward discourses which associated the EU with an investment with no returns. As such, the assumption was that if this investment was interrupted, other areas within the country could be benefited without disturbance to policy and services inside the UK.

Campaign miscalculation: Seriousness and Relevance of the Immigration issue

Lastly, concerning the actual referendum campaign, one of the main miscalculations discussed is the adopted (mis)treatment of immigration (Portes, 2016; Gavin 2018), as citizen's perceptions of it became a decisive component of their decision-making (Hobolt, 2016). One might argue that Nigel Farage made immigration the defining issue of the campaign (BBC, 2016b), and its mishandling was very costly to the Remain camp. The poster featuring Syrian and other refugees and immigrants walking towards diverse European countries epitomized the issue in the referendum campaign. Yet, this is not a recent controversy considering that "immigration has long been a salient and disputed issue in British politics" - from the influx of Indian refugees in the middle of the nineties, to the influx from India, the Middle East and Africa today. At the same time within the EU, immigration has become a central economic and political salient issue since the enlargement (Portes, 2016 14), even though free movement was a founding principle.

After the recent immigration crisis, which started in 2015, the issue has again escalated and categories such as refugees, asylum seekers, migrants, as well as EU and non-EU influx (which can be permanent or not), have been muddled within the political discourse and British citizen's perceptions (Blinder, 2015). As demonstrated by Blinder (2015) even before the crisis, 'imagined immigration' had an impact on British citizen's perceptions of the issue, with overestimation and underestimation of the different reasons for migration [See Figure 1].

Simultaneously, the idea that refugees and non-EU immigrants could just 'walk into' Britain, which is very misleading, inflicted terrible consequences in conversations concerning freedom of movement within the EU. It has not been made clear that the freedom of movement which has been fostered is the freedom to work and study, a right which is also for UK citizens. A positive case for immigration would have attempted to clarify these misunderstandings. However, it could not have been restricted to the narratives suggested above, as support for the EU was already higher among demographics who were particularly more likely to benefit from these freedoms, such as university graduates and higher earners (Ashcroft and Bevir, 2016). Arguments would also have had to appeal to the so called 'losers of globalizations' (Hobolt, 2016), as the Leave option "was systematically higher in regions hit harder by economic globalization" (Colantone & Stanig, 2018). It would have been interesting to have made a positive case for immigration by highlighting

its benefits for Britain's research towards health issues, as well as showing how highly skilled a large portion of the influx of immigration from inside and outside of the EU is, as British people seem to "make clear distinctions between types of migrants with the highly skilled preferred to the unskilled" (Blinder and Richard, 2019, p. 2)

Finally, while immigration was a strong predictor for opposition to UK membership in the EU, today, post-Brexit, Leavers as well as Remainers have softened their view towards immigration according to a Briefing done by the Migration Observatory at Oxford University (2018). It is no longer considered Britain's 'most important issue', as it was the case between 2001 and mid-2016. Now Europe/EU as well as the NHS are more likely to be mentioned in this category. This is important because it probably demonstrates that the issue really escalated to its "limits", during the Referendum campaign. Certainly, David Cameron could not have predicted the refugee crisis, but could have maybe foreseen its implications to a nation such as Britain. Furthermore, this is probably not a finished discussion in British politics, the report 'Immigration policy: Basis for Building Consensus', from the House of Commons Home Affairs Committee 2017/2019 stresses the need for government to provide a clearer explanation of "the different types of immigration and the policy frameworks that govern them", as well as to actively contest misconceptions around immigration.

Conclusion

In this essay I have chosen to focus on three key miscalculations or mishandled situations of David Cameron; the pledge to hold a referendum assuming its outcome could have been predicted and beneficial for him and probably for the management of his party; underestimating the importance of Euroscepticism for the present and future of Britain within the EU; and underestimating the relevance of the immigration issue for the outcome of the EU referendum. This list is not exhaustive, and within the suggestions made, other aspects could have been considered. Finally, the Prime Minister seems to have mishandled and misread the why's, how's and what's in the framework provided regarding the EU referendum.

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The Carbon Price Floor in Europe: What Impacts for Inequality?

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Abstract:

The current carbon pricing mechanism in the EU insufficiently addresses the need to incentivise greener industrial practices in the region. A carbon price floor has been suggested as an alternative to the current system, in order to provide a stronger price signal and ensure higher overall cost to carbon emissions. The measure effectively makes carbon-heavy industry costlier, the expense of which may be passed on consumers. This article examines how this dynamic affects inequality in the EU by reviewing household expenditure on products of carbon-heavy industries. It subsequently finds that an EU-wide carbon price floor will have at least a short-term perpetuating effect on inequality, both within and between countries. However, an argument is ultimately made in favour of the measure based on environmental necessity, with the condition that it is part of a wider policy package to account for the short-term impact on inequality.

Reaching the Paris Agreement goal of keeping global warming below 2oC is massively challenging, but not impossible (Intergovernmental Panel on Climate Change 2018, 14). As a global climate frontrunner, the European Union (EU) has established ambitious environmental objectives with targets of a 40% emissions reduction by 2030 relative to the 1990 level and an 80-95% reduction by 2050, led by decarbonisation of the electricity sector and followed by the broader market (Newbery et al. 2019, 1). The EU is not only leading by example, but also claiming rightful responsibility for the region's historical and current high emissions-per-capita level (Chancel and Piketty 2015, 11, 15). In order to fulfil its ambitions, carbon pricing plays an essential role in incentivising desirable investment, production and consumption patterns (Stiglitz and Stern 2017, 1).

Because the current system for carbon pricing in the EU has failed to deliver sufficiently low carbon prices and a clear price signal to facilitate investment in low-carbon technology, a carbon price floor (CPF) has been one of the policy measures debated in the reform process. In short, a CPF would raise the effective price of carbon in the EU, making it more expensive to run a high-emission enterprise. The policy has several potential benefits: economists and environmentalists largely agree that a CPF is an efficient tool for the EU to reach their climate objectives (see, for example, Taschini, Dietz, and Hicks 2013; Jenkins 2014, 486). However, the CPF remains controversial due to potential distributional effects of increased costs on carbon-heavy industries that may be borne by consumers (Moorey 2012; Hirst 2018, 15). The additional costs may be regressive, hitting lower-income households relatively harder than higher-income ones because of the former's higher proportional spending on fossil fuels and the "income-blind" or flat-rate nature of a CPF without supplementary policy measures (Wang et al. 2016, 1127).

In this paper, we review the current carbon pricing mechanism in the EU and consider the effects of implementing a CPF within this framework. Our overall research question is as follows: first, what are the effects of an EU-wide CPF on inequality in the short term and in the long term, and can the latter justify the former? Second, do measures exist to account for potentially negative impacts on inequality that are feasible in an EU context? We start by providing an overview

"This has raised questions regarding the ETS' ability to incentivise low-carbon practices."

of the current EU carbon pricing mechanism and how a CPF may be implemented. This is followed by a literature review, before we dive into our analysis of the effects of an EU-wide CPF.

Carbon Pricing Policy in Europe

The current mechanism for carbon pricing in the EU is the Emissions Trading System (ETS): a cap-and-trade system of quantity control that sets a cap on total carbon allowances, trade of which is permitted between regulated firms (Newbery et al. 2019, 4). In the first phase of the policy (2005-7), all allowances were freely traded without restrictions. After these first two years, the total emissions cap was tightened and up to 10% of allowances were auctioned. Still, there has been a major surplus of allowances, particularly after the 2009 recession when emissions fell (Clò et al. 2013, 478). This has made the policy incapable of fulfilling its purpose, namely to increase carbon prices and the costs associated with a carbon-heavy production accordingly (Clò et al. 2013, Newbery et al. 2019, Brink et al. 2016). Rather, the carbon price in the EU has been continuously low at around €5-10/$^{t}CO_2$ since its implementation (Newbery et al. 2019, 2). This has raised questions regarding the ETS' ability to incentivise low-carbon practices, as the weak price fails to stimulate greener investment (Brink et al. 2016, 603). There has been one recent agreed-upon attempt to address the structural issues: starting in 2019, the Market Stability Reserve (MSR) mechanism will go into effect. This new measure is the result of years of ETS reform negotiation, and works as follows: as long as the allowance surplus is above €833 million (it was €1.7 billion as of late 2016), 24% of those will be removed annually until 2023 and placed in a reserve. After 2023, 12% of excess allowances will be removed (Newbery et al. 2019, 4,5). Although any reasonable reform to the current system may be warmly welcomed, scholars argue that the MSR increases the system's complexity and may still not ensure a clear and durable carbon price signal (ibid, 2).

Reforming the ETS has proved to be difficult, as a sufficient number of Member States to prevent a qualified majority have a coal-intensive energy sector that benefits substantially from the low carbon price (Newbery et al. 2019, 4). However, a number of policy changes have been put forth in the discussions, including the CPF. As mentioned in the introduction of this paper, a CPF would raise the effective price of carbon allowances under the ETS, making high-emission business more expensive to run, and potentially also to buy. A CPF can take several forms. It can be a mechanism whereby the government commits to buy back carbon allowances at the floor price, restricting the allowances available in the market (see Hepburn, 2006). Alternatively, an auction reserve price could be set, below which the government withholds all allowances (Clò et al 2013, 480). Finally, a "top-up" carbon price may be designed, where firms have to pay the difference between the ETS allowance price and the set floor, either through a carbon tax or a fixed fee (Newbery et al. 2019, 7).

There are several good reasons for implementing a CPF in the

EU. Perhaps most importantly, it adequately addresses the ETS' problem with price signalling: the current system is structurally rigid on the supply side, as the ETS cap is known and fixed, while the market price of carbon varies and is vulnerable to demand shocks, resulting in the above-mentioned weak price signal (Clò et al., 2013: 478). A signal, along with regulatory certainty, would encourage investment in low-carbon technology (ibid). In addition to ensuring higher certainty for investors, a price floor can provide revenue for governments, and of course, heighten incentives for industries to operate on lower emissions. It also follows the "polluter pays principle", in which polluters themselves are charged for their social costs on the climate (Newbery et al., 2019: 11). In other words, the CPF contributes to internalising the cost of the key market failure that is "the climate externality" (Stiglitz and Stern, 2017: 3), and thereby functions as a Pigouvian tax (see Pigou 2013 (1920)). Finally, there is empirical evidence that a CPF helps transition away from carbon-heavy industries such as coal-powered energy, exemplified by the UK's national CPF leading to a 90% reduction of coal-sourced emissions between 2012 and 2017 (On Climate Change Policy, 2018). However, such national CPFs may result in a "waterbed effect", meaning they may indeed reduce national emissions, but as long as the ETS cap remains the same, they simply frees up carbon allowances for others to use and thus have a minimal EU-wide effect (Maxwell, 2011).

Despite these advantages, the CPF remains a controversial policy proposal. The opposition often stems from concerns about distributional effects, raising, for instance, energy and fuel prices, which would likely be harder for a low-income household economy to absorb than high-income ones (Wang et al. 2016, 1123). This widely-held (and also, according to vast literature, correct) belief makes implementing a CPF politically difficult. The challenge is well-exemplified by the "Gilets jaunes" in France, a national movement violently outraged by increased fuel prices (Dianara 2018). An oft-cited agitating factor of the "Gilets jaunes" is the group's feeling of distance to the French decision-makers (Nossiter 2018). With the so-called "democratic deficit" of the EU (see Miklin 2014), there is a risk that an EU-wide CPF could lead to protests across the continent if the measure is introduced standing alone. However, as this paper will show, there are supplemental policies that can be co-introduced alongside a CPF that may lighten the impact on inequality.

Literature Review

In their simulation study of a CPF in 12 EU member states, FTI Consulting finds that a CPF in combination with the current EU ETS would reduce CO2 emissions, support coal-to-gas switching, and stimulate investment in renewable energy production (2018, 14–17). However, it should be noted that this study was backed by energy firms calling for the EU-wide CPF (Simon 2018) and an earlier study on the price floor in five European countries concludes that the reduction in CO2 emissions differs greatly between countries (Lin and Li 2011, 5144). Moreover, to examine the impacts on inequality, we must consider the economic distributional effects. The literature in this area is vast and includes economic models of carbon taxes to estimate effects in certain countries and regions, as well as difference-in-difference studies using cases where a CPF or carbon tax has already been implemented. The key findings can be simplified into three main conclusions.

Firstly, many studies assume that carbon pricing makes carbon-intensive goods more expensive and that this burden weighs most heavily on lower-income households as they spend a larger fraction of their budget on fuel-intensive basic goods like heating homes and using cars (Grainger and Kolstad 2010, 373; Wang et al. 2016, 1126). Recent studies on CPFs in developed economies such as Canada, Ireland and the United States confirm this, even where richer households pay more in absolute terms (Grainger and Kolstad 2010, 368; Harrison 2016, 44; Farrell 2017, 32). In other words, a CPF would be regressive if the price burden is passed on to consumers. Some studies also identify distributional use-of-income impacts along other socioeconomic lines. In his study on Ireland's CPF, Farrell finds that education levels affect types of home-heating and therefore energy bills: the more educated a household is, the more likely is it to have lower-carbon home--heating (2017, 43). Rausch et al. find that black households feel a heavier burden on budgets than white households, as black people tend to have higher expenditures on electricity and natural gas (2011, 26–7). While these differences are mitigated when incomes are controlled for, they do perhaps indicate a problem of access to low-carbon technology among underprivileged groups that would have to be tackled alongside a CPF, especially if its incidence is regressive.

Secondly, some studies find that the effect of carbon taxes on sources of income – rather than uses – is important (Dissou and Siddiqui 2014, 88). Instead of being passed on to consumers, the increase in carbon prices may weigh on production factors i.e. labour or capital. The distributional impact of the possible decrease in wages and/or capital returns will depend on from where different income groups derive their income (Rausch et al. 2011, 20). In Harrison's above-mentioned study of the CPF in Canada, she finds that where increased carbon prices lead to decreased wages, richer households lose a larger share of their income than poorer households (2016, 44). This is because poorer households tend to derive a larger share of their income from government transfers than from labour, in comparison to middle-class and richer households. Dissou and Siddiqui argue that fuel-intensive industries are capital-intensive and therefore an increase in carbon prices would lead to a fall of the relative price of capital to labour (2014, 99). Again, this would be at greater detriment to wealthier households who derive a larger share of their income from capital than lower-income households. In these cases, contrary to the bulk of the literature, a CPF leading to an increase in the price of carbon may be progressive.

Thirdly, many studies agree that the way in which carbon tax revenue is used can have a major impact on the economic distributional effects (Fay et al. 2015, 141; Harrison 2016). Income-based redistribution such as cash transfers can counteract the regressivity of carbon taxes (Wang et al. 2016, 1128; Farrell 2017, 42). In their study of the CPF in Ireland, Callan et al. argue that even small increases in welfare payments would offset the negative impacts that high energy prices have on lower-income households (2009, 411). Padilla and Jordi reach similar findings using their model of a CPF in the EU, arguing that the worry about equity impacts ought not to deter efforts for a minimum carbon price in Europe (2004, 292). In the US context, studies indicate that lump-sum rebates to households would offset regressivity, but that this is an inefficient way of recycling carbon tax revenue in comparison to labour or capital income tax cuts (Rausch et al. 2011, 31; Williams et al. 2015, 210). However, in comparison to many EU countries, the US has a more stringent tax system that might make it difficult to incorporate these cash transfers. Here, we note that there is no EU-wide system of tax revenue redistribution directed to households, which may be an administrative point of contention should a European CPF be implemented. While we have now only scratched the surface of the wealth of literature, we have outlined the central conclusions that a CPF that results in increased prices for consumers is regressive, a CPF that results in lower factor prices is progressive, and that the way in which revenue from a carbon tax is recycled is important for distributional impacts.

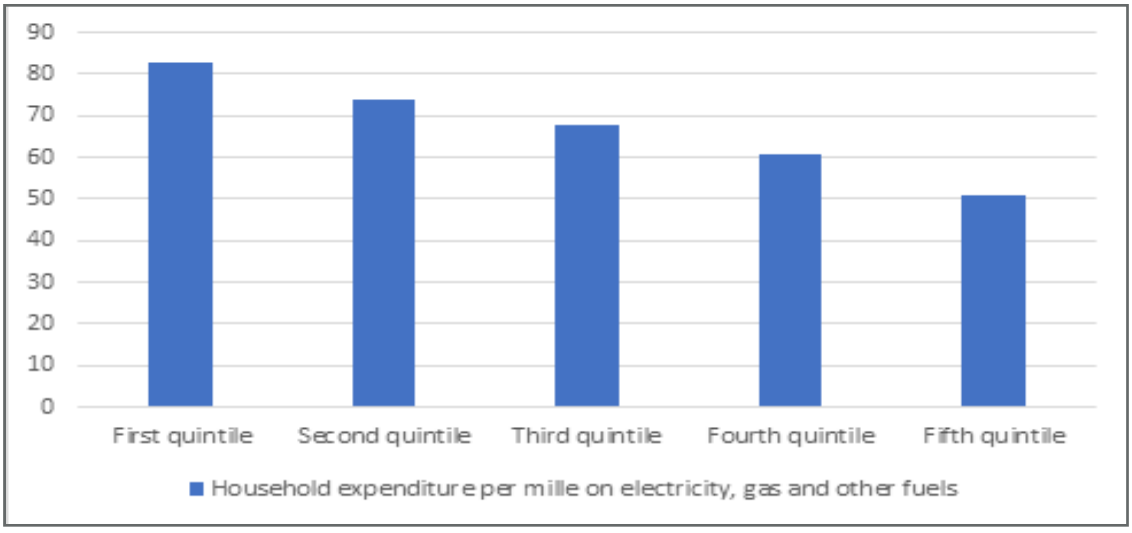
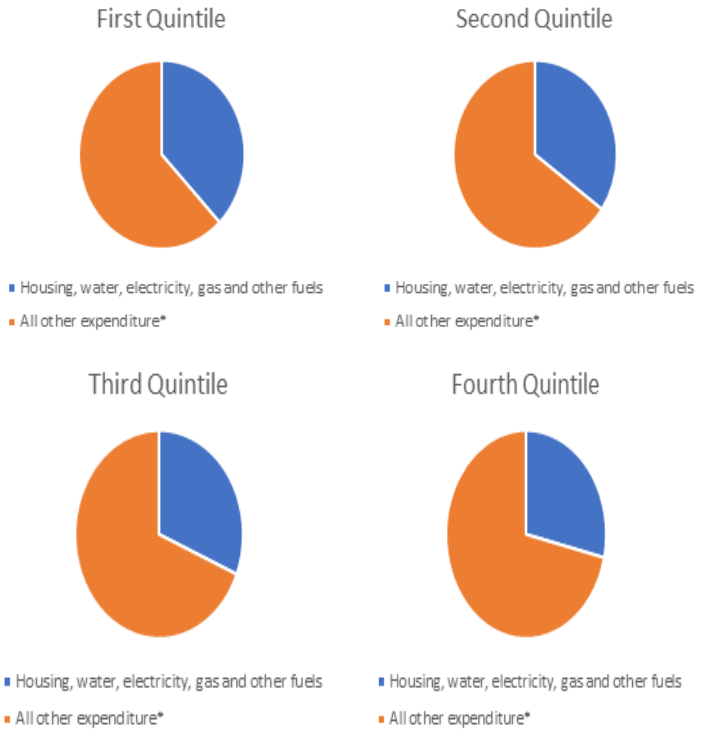


FIGURE 1: EU HOUSEHOLD EXPENDITURE ON ELECTRICITY, GAS AND OTHER FUELS (PER MILLE) BY INCOME QUINTILE FOR 2015 [OR LATEST AVAILABLE DATA]. (EUROSTAT 2018)

Impacts on Inequality

In light of the theory and evidence reviewed in the literature, we shall examine recent data to discuss the possible distributional impacts of an EU-wide CPF. The current ETS covers power and heat generation, energy-intensive industries like oil refineries and steel works and commercial aviation. Indeed, these kinds of industries are vital for entire economies and, therefore, carbon pricing would be expected to have direct and indirect effects on all businesses, consumers and investors. However, when exploring direct effects on consumers, possible increases in household energy bills are often the focus. Extending the ETS to road transport has been discussed (European Commission 2013) and applying a CPF to this sector would affect consumers through rising fuel prices which studies have found to be regressive (Speck 1999; Wier et al. 2005; Liang and Wei 2012). As mentioned, it was the environmentally-driven fuel-tax rise that sparked the explosive Gilets Jaunes movement among lower and middle-class individuals in France (Dianara 2018).

FIGURE 2: THE PROPORTION OF EU HOUSEHOLD EXPENDITURES ON HOUSING, WATER, ELECTRICITY, GAS AND OTHER FUELS BY INCOME QUINTILE FOR 2015 [OR LATEST AVAILABLE DATA].



*All other expenditure includes: Food and non-alcoholic beverages; Alcoholic beverages, tobacco and narcotics; Clothing and footwear; Furnishings, household equipment and routine household maintenance; Health; Transport; Communications; Recreation and culture; Education and Miscellaneous goods and services.

Using Eurostat consumption data, Figure 2 shows the proportion of EU household expenditure that goes towards housing, water, electricity, gas and other fuels by income quintile. As expected, lower-income households – those falling in the first and second income quintiles – spend much larger portions in these areas. Indeed, we must recognise that this includes, for example, rent and water that would not be directly affected by the CPF. However, when looking at proportions spent on electricity, gas and other fuels, we still see regressivity, albeit less extreme (Figure 1). It should be noted that Figure 1 does not include home heating, for which Eurostat does not have specific data.

Data confirms that if high carbon prices were passed on to consumers through increased household bills, the burden would likely weigh heavier on lower-income groups across Europe. However, there also exists inequalities within inequalities. For example, even in the lowest income quintile, the proportion of household expenditure on electricity and gas is 10% in Poland, but only 5% in France. Indeed, while the EU operates a single market and monetary union, the resulting distributions of income and wealth continue to differ both within and between countries. Well-documented is the economic differences between the rich "North and West" and poor "East and South" of Europe. The between-country equity impacts of a CPF must be considered. Indeed, Brink et al. (2016) warn of between-country inequalities in EU-wide carbon pricing due to the different industry and energy mixes, pointing out that poorer, newer member states tend to have more carbon-heavy industry and power generation. To illustrate: in 2017, nearly half of Poland's energy generation was from coal, compared to 23% in Germany and only 4% in France and Sweden (Enerdata 2018).

These unequally-distributed burdens not only between income groups but also between nationalities are akin to other socioeconomic inequalities outlined in the literature that signal a lack of access to low-carbon technology among under-privileged groups. As previously mentioned, climate change opponents suggest that the revenue generated from a carbon tax could be used to offset regressivity and may even make carbon pricing progressive (Stiglitz and Stern 2017, 39). While this could be achieved through cash transfers, it could also be done through, for example, through retrofit policies whereby energy firms are required to install energy-efficient systems in lower-income homes. In Sweden, where a CPF has been in place since 1991, the government has recycled revenues through public investments in updating infrastructure, insulating houses and making electric cars cheaper (Government Offices of Sweden, n.d.). Given that the EU has no pre-existing system of cash transfers directly to households, channelling revenues through national governments while earmarking them for low-carbon transition may be a palatable solution. Moreover, while cash-transfers may be better for equity in the short-term, a key goal of the CPF would be to encourage people reduce their carbon emissions and receiving payments that come ultimately from carbon usage may eliminate the incentive to switch.

While the direct impacts on inequality and how to tackle them seem clear, many cost-benefit analyses fail to consider the co-benefits that a reduction in CO2 emissions – which, it has been agreed, CPFs achieve – would bring (Budolfson et al. 2017, 493). In the long-run, the CPF alongside the ETS would make low-carbon and renewable energy more competitive and affordable. It is argued that the "merit order effect" causes the price of energy to be depressed as more is generated by renewables because the operating costs are low in comparison to fossil fuels (for evidence of the merit order effect, see, for example, Sensfuß et al. 2007). What is more, investment in renewable energy alongside the retreat of fossil fuels has been found to have a net positive impact on job creation (Quirion and Demailly in Chancel 2018, 52). If played out alongside proactive policies, the increased use of renewable energy stemming from the CPF could improve equality and welfare in the EU.

Similarly, more co-benefits will emerge indirectly from the reduction of CO2 emissions. In their literature review on the distributional impacts of carbon pricing, Wang et al. describe previous studies' tendency to overlook environmental co-benefits as a "loophole" (2016, 1129). Climate change mitigation will, in the long run, have an impact on the poor, who tend to be the most vulnerable to the disasters and damage that climate change causes (Chappell 2018). Moreover, a reduction in CO2 emissions will have positive impacts on air and water quality and therefore health and wellbeing. Indeed, it is almost impossible to quantify these co-benefits in line with economic distributional impacts, and this may be an area for further research among climate economists. Nevertheless, we have seen that while a CPF has the capacity to increase inequality through the regressive nature of the tax, there are ways to counteract this negative impact through recycling revenues and improving the environment. This is certainly a positive outlook for the EU, however, cleverly-designed policy and high-level cooperation are required in order positively and constructively impact both the environment and equality.

Conclusion

In order to reach the goals of the Paris Agreement and its environmental objectives, there is an urgent need to reduce carbon emissions beyond the current rate in the EU. The measures included in the ETS do this insufficiently, largely because they fail to maintain a high carbon price. Even with the newly-implemented Market Stability Reserve, the ETS falls short of sending a clear price signal that would stimulate investment in low-carbon technology and realistically incentivise an emissions reduction. A CPF could address this shortcoming by guaranteeing a minimum price on carbon. However, this measure is controversial due to the flat-rate tax' potential impacts on inequality. Using the most recent data available from Eurostat, our findings support that if the CPF is introduced in sectors that will increase household expenditure on electricity, gas, and other fuels, it will have a regressive effect by hitting the lowest income quintiles hardest due to their relatively higher proportional spending in this area.

Although there are studies claiming that the CPF could be progressive in itself, the vast majority of researchers in the field agree that the direct effects of an EU CPF, at least in the short-term and especially without being co-introduced with corrective policies, will place a heavier

burden on the poor compared to the rich. Our findings support this. What is more, we also find that a CPF may not only increase inequality between income groups, but between, for example, the richer and poorer countries of the EU. However, this known effect does not remove the need for a higher price on carbon in the EU in order to adequately and appropriately address climate change and reach set goals. A CPF is a solid candidate to drive that process, and the fact that there is wide agreement on the effects on inequality should be seen as an advantage in the negotiation process in order to develop a policy package that takes it into account. Specifically, ex-post measures that utilise newfound tax revenue from the CPF may be of particular good use. Here, the Swedish government's investments in greener infrastructure, housing insulation, and transportation alternatives should be used as a best-practice model, especially as in the long run, decreasing carbon emissions will have positive effects on lower-income groups' health and wellbeing.

Recycling the CPF revenue directly towards households requires significant structural reform of the EU tax system, as there is currently no distributional mechanism directed at households. This could, however, be an avenue for future research, and potentially be linked to the broader goal of an enhanced cooperative effort between social and environmental policy in the EU. For now, this article has shown that implementing an EU-wide CPF would be an effective tool in increasing carbon prices and thus would address the current lack of progress in decreasing carbon-heavy industry in the region. It would also have a damaging effect on inequality by hitting lower-income quintiles the hardest. This should therefore be accounted for in a broader policy package that corrects the inequality effect ex-post in a timely manner, making up for the short-term direct impacts. In the long-term, if these ex-post measures targeted at inequality are included in the implementation, an EU-wide CPF will likely have an overall positive effect both on the climate and on inequality in the region.

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Redefining the EU's Identity as an International Actor Through the EU Global Strategy

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Abstract:

This paper approaches the EU's security and foreign policy strategies as exercises of self-narration that give insights into how the EU articulates the world around it and positions itself therein. By comparing the 2016 EU Global Strategy with the 2003 European Security Strategy, it traces how the EU redefines its identity, while inquiring into the impact on EU policies this implies. The analysis reveals a shift in the EU's self-construction from an optimistic and outward looking actor with transformative ambitions toward a more inward-looking one, anxious about its relevance and legitimacy for its own citizens. This renders logical a certain retreat from the EU's norms-based outlook in favour of a more pragmatic approach that merges the EU's internal and external policy, as well as its values and interests, and is embodied in the emergence of resilience as new 'leitmotif' of EU external action.

The role of the EU as actor on the international stage has long sparked comprehensive debates, with characterisations of the EU ranging from "normative power Europe" to "fringe player" or "tragic actor".[1] In this context, the EU's security and foreign policy strategies – the 2003 European Security Strategy (ESS) and the 2016 EU Global Strategy (EUGS) – have oftentimes served as analytical starting points, while giving rise to extensive analyses and debates in and of themselves.[2] In a similar spirit, this paper traces how the EU defines its identity as global actor now through the EUGS versus previously through the ESS, and how this shift may impact EU policy.

Before comparing the two strategies it is, however, necessary to shortly consider what kind of conclusions an analysis of such documents allows us to draw. As such, the ESS and EUGS are meant to outline broad priorities and objectives but do not constitute operational action plans.[3] Hence, attempting to trace shifts in concrete policies based on a reading of these strategies would confer power upon those documents that they do not have. Much more, the ESS and EUGS can be approached as "exercises in ordering the outside world, [...] making the world intelligible for the EU and positioning the EU in the world in turn."[4] Put differently, these documents can be seen as exercises of self-narration and identification.[5]

Consequently, the aim of this paper is not to meticulously contrast the specific challenges and objectives identified by the EU's strategies. Rather, it suggests a macro-reading that analyses how the EU's understanding of the world has changed; what this implies for the EU's identity and the consequences and opportunities these identity changes may have for EU policy; and, how these grand strategies can explain or obscure motives behind concrete policies.[6] The following is divided in two sections; the first pertaining to the ESS and the second to the EUGS. It is argued that the ESS paints the EU as optimistic about its own success as a polity, rendering logical an outward-looking, transformative ambition. Conversely, the EUGS produces a much more anxious Union, whose existence is seen as threatened, making possible a shift toward more inward-looking actions that merge the EU's values and interests; in particular by introducing resilience as new guiding theme.

I. The European Security Strategy: Establishing the EU as global actor

The adoption of the ESS in 2003 marked the emergence of the EU's first common and comprehensive security strategy. It defines major

"This conception of security as an attainable state and …successful polity are essential for the kind of global actorship that the EU confers…itself "

challenges and threats to the EU and develops strategic objectives, while calling for the EU to take a more active role on the international scene.[7] In fact, the ESS can be read as "the coming of age of the EU as [a] strategic actor", as it constitutes the first extensive expression of the EU's aspiration to become a global security actor and hence an essential step in establishing itself as such.[8] Drafted in a mere few months by a small team of High Representative Javier Solana, it is argued that this development was stimulated by the Iraq War. Following this reasoning, the EU's definition of a common strategic vision served the goal of overcoming intra-European divisions and the crisis of the CFSP provoked by the US-led invasion of Iraq.[9]

However, to understand how the EU constructs its identity through the ESS, it is necessary to embed the document in a broader context. The ESS comes at a time in which the international liberal order appears undisputed, with the EU's soft power being at its maximum.[10] This "liberal optimism" is clearly reflected in the ways the EU represents itself and the international context.[11] As such, the ESS starts with the emblematic opening "Europe has never been so prosperous, so secure nor free" and attributes itself a central importance in bringing about this "period of peace and stability unprecedented in European history".[12] In fact, it propagates the idea that the mission of achieving peace in Europe has been accomplished, amongst others through spreading democracy and the rule of law.[13] This conception of security as an attainable state and the self-understanding as successful polity are essential for the kind of global actorship that the EU confers unto itself. After all, it renders logical a transformative ambition that seeks to foster peace and prosperity in the world by promoting the EU's norms; *remodelling its environment according to its own example*.[14] More specifically, this is done by establishing effective multilateralism as an overarching objective of the ESS, as well as by emphasising the importance of good governance, human rights and – in particular – of democratisation.[15]

II. The EU Global Strategy: Transforming the EU's identity?

Thirteen years later, the EUGS of 2016 emerges in a fundamentally different political and historical context. As such, the crises in Ukraine, Syria, Libya or Mali, the terrorist attacks in several European cities and the perceived failure of interventions in Afghanistan or Iraq stand in stark contrast to the "unprecedented period of peace and stability".[16] This conception is further reinforced by the drafting of the strategy taking place in the context of the Eurozone and migration "crisis" and its publication falling just few days after the Brexit referendum[17]. Consequently, the EUGS can also be seen as serving to construct a sense of unity in times of profound internal divisions.[18]

Yet, it is not only the historical context that exhibits fundamental differences to the ESS. In contrast to the small working group of 2003, the drafting of the EUGS constituted a lengthy process that took more than a year, engaging a broad spectrum of stakeholders.[19] Moreover, the

TAKEN FROM EUROPEAN UNION NAVAL FORCE MEDIA

EUGS covers a much broader variety of policy areas than the ESS, thereby making it more than a mere security strategy.[20] On a more technical level, the EUGS sets out five key priorities and a suite of guiding principles for EU external action.[21]

II.I Principled pragmatism in an uncertain world

The political and historical evolutions are clearly reflected in the way the EU articulates the world around it. As such, the EUGS paints an image of an international environment in disorder, with the world being "more connected, contested and complex".[22] Yet, it is not only the world that is increasingly uncertain but also the EU's role within it. Hence, the EUGS states that "we live in times of existential crisis, within and beyond the European Union" with the "purpose, even existence, of our Union [...] being questioned".[23] These concerns about the EU's capacity to maintain peace and security at home represent a significant shift away from the idea that peace in Europe constitutes an accomplished task.[24]

This image of the EU as being in an existential crisis renders intelligible a different way of acting and being. Thus, the EUGS implies a more cautious approach, to a certain extent retreating from its transformational ambition of building a world of "well-governed democratic states".[25] Conversely, the EU shows itself as much more inward-looking, being concerned with demonstrating the relevance of the Union to its citizen.[26] In fact, this merging of internal and external policy can be seen as new guiding theme of the EUGS.[27] However, this does not translate to a renouncement of the EU's liberal ideals, with many elements retaining a central importance. Much more, the EUGS blends its "idealistic aspiration" with a "realistic assessment" under the notion of "principled pragmatism".[28, 29] This finds its clearest expression in the EUGS's claim that "we have an interest in promoting our values", merging the realistic advancement of its interests with the idealistic insistence on its values.[30]

II.II Resilience: A policy response to a new international context

The understanding of the world and of the self put forward in the EUGS, renders intelligible the emergence of resilience as another new leitmotif of the EU's external action. As Wagner and Anholt argue, it embodies the principled pragmatism by providing a middle ground "between over-ambitious liberal peacebuilding and under-ambitious stability".[31] On the one hand, the concept allows to continue embracing EU principles by representing resilient societies that feature "democracy, trust in institutions and sustainable development" as lying "at the heart of a resilient state".[32] On the other hand, resilience also partly moves away from the ESS's focus on democracy promotion – rendered somewhat naive through the representations of the EUGS – by emphasizing that there is no universal way toward resilience.[33]

On a more theoretical level, the emergence of resilience can also be understood as policy response to global governance problems in the context of an increasingly complex international sphere. As the world is seen as constantly changing in unpredictable ways, instrumental cause-and-effect rationalities that impose policy prescriptions from the "outside" are rejected, while a focus on the existing capabilities of societies through resilience is rendered logical.[34] Against this backdrop, the prevalence of resilience in the EUGS also points toward a shift in the EU's conception of security; from an attainable state toward a more relative view that accepts the inevitability of crises and focuses on strengthening capacities to respond to them.[35] However, the consequences of adopting a resilience approach are subject to a fierce academic debate. While some emphasize resilience's convening power and its potential to shift the focus from externally developed solutions to local knowledge, others caution that it places the brunt of responsibility on local actors, legitimising a retreat of the international community and contributing to uphold global structures of inequality.[36]

Conclusion: What impact on EU policies?

Marking the self-constitution of the EU as global security actor, the ESS fell into the 'golden era' of the EU, producing an identity of a Union that is optimistic about its own success and its capability to promote this success in the world. [37] Hence, it renders logical an outward-looking, transformational ambition that seeks to share and promote the EU's norms and experiences in the world, fostering peace and security through effective multilateralism and democratisation. Conversely, the EUGS is situated in a fundamentally different context. As such, it paints an image of an increasingly complex and contested world, in which the base survival of the EU is being threatened. Con-

sequently, the EU constructs itself as increasingly inward-looking, with the self-understanding that emerges from the EUGS being characterised by a greater anxiety with regards to its legitimacy as security framework for its own citizens.[38]

While it is not possible to deduce how precisely these changes will impact concrete EU policy, the EUGS does provide a discursive context that structures the conditions of possibility for EU external action; rendering some courses of actions logical and precluding others. In particular, we can expect a certain retreat from the exhaustive transformational ambitions of the ESS, toward more pragmatic, issue-based and inward-looking actions that advance the EU's immediate needs by blending its ideals and interests. [39] As this notion is embodied by the emergence of resilience as the *leitmotif* of the EUGS, a significant influence of this concept on EU external action can equally be expected. However, the political consequences of adopting such a resiliency approach are arduous to foresee from a mere reading of the EUGS and will ultimately depend on how the concept is concretely understood and implemented, as well as to what extent and in what manner it is put into action.

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31. Wagner and Anholt, "Resilience as," 415.
32. High Representative, Shared Vision, 24.
33. Wagner and Anholt, "Resilience as," 415-16.
34. Claudia Aradau, "The promise of security: Resilience, surprise and epistemic politics," Resilience: International Politics, Practices and Discourses 2, no. 2 (2014): 73-87, http://dx.doi.org/10.1080/21693293.2014.914765; David Chandler, Resilience: The governance of complexity, (Abingdon: Routledge, 2014).
35. Wagner and Anholt, "Resilience as," 424.
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A Shotgun Wedding in Eastern Europe

UKRAINE IN THE EU-RUSSIA GAS TRADE: PAST, PRESENT, FUTURE

MARTIN TAKÁCS -
MASTER IN INTERNATIONAL ENERGY

Abstract:

The relationship of the EU-Russia-Ukraine triangle is contentious by nature and has therefore been closely followed by both policymakers and analysts for more than a decade. Currently the Ukrainian corridor constitutes one of the weakest links in the security of Europe's gas supply, and the pressure is increasing as the transit contract between Moscow and Kiev expires on 31st December 2019. This paper argues that Ukraine will, in the medium term (3-5 years), remain an important transit country in the EU-Russia gas trade, although its transit volumes will decrease. Following a brief historical overview, this argument is underpinned by both qualitative and quantitative analysis with the former highlighting the importance of the European Commission's efforts to maintain the Ukrainian transit corridor and the latter assessing the various infrastructural scenarios and financial implications. Preceded by some potential counterfactuals the main findings of the paper are assessed in the conclusion.

Partners with a complicated pedigree

The question of Ukraine's role in the EU-Russia gas trade has been closely followed by both policymakers and analysts from all concerned parties, for more than a decade. As demonstrated by the 2006 and 2009 crises [Stern (2006); Stern et.al. (2009)] the transit security of the Ukrainian corridor has been among the weakest dimensions of European gas supply security in the 2000s. [Pirani-Yafimava (2016)] Most recently, the Stockholm Chamber of Commerce (SCC) ruling raised concerns as to the status of this triangle as it ordered Gazprom to pay Naftogaz Ukrainy $2.56 billion, ending a 2.5 year-long judicial process between the two companies. [Reuters (2018)] Although both parties claimed that the transits to European countries will be uninterrupted, Gazprom's decision to launch the process to terminate its gas supply contract with Ukraine, [Deutsche Welle (2018)] as well as the transit contract between Moscow and Kiev expiring in 2019 and governing almost half of Russian exports to Europe, [Henderson-Sharples (2018)] enhance the risk of a possible disruption, and raise questions on the future of the transit of Russian gas through its Eastern neighbor. However, the situation is far more complex than the popular discourse tends to be, with several factors insufficiently mentioned.

The importance of gas transits between the two countries cannot be overemphasized. On the one hand, as underlined by Berschidsky, despite the all-time low political relations, Russia and Ukraine managed to remain business partners, "joined at the hip by Ukraine's gas transit system," [Bloomberg (2018)] supported by the mediation of the European Commission. Therefore, gas trade remains one among the few areas where agreement, based on the mutual interest of both countries, could be achieved since the annexation of Crimea in 2014 and the eruption of the crisis in Eastern Ukraine. On the other hand, financial aspects play an important role, as the transit fees paid to Naftogaz amount to $3 billion, whereas Gazprom's revenues from gas export reached $25 billion. [Henderson-Sharples (2018)] Finally, gas imports from Russia constitute a notable share of the EU's own energy mix.

"The importance of gas transits between the two countries cannot be overemphasized. On the one hand...despite the all-time low political relations, Russia and Ukraine managed to remain buiness partners..."

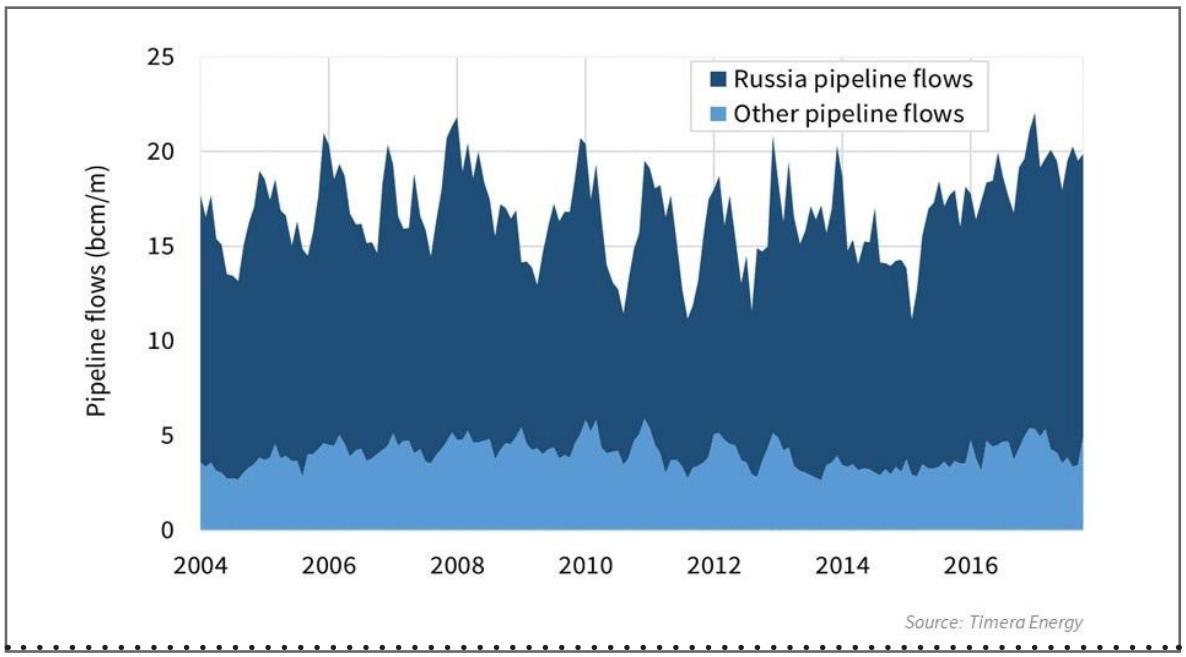

FIGURE 1: RUSSIAN PIPELINE FLOWS OT THE EU COMPARED TO OTHER FLOWS (BCM/MONTH) SOURCE: TIMERA ENERGY

For this reason, this paper argues that Ukraine will remain an important transit country in the EU--Russia gas trade after 2019 for the medium term, although its transit volumes might decrease. Furthermore, it underlines that the European Union is currently undertaking considerable efforts to ensure this is indeed the case for Kiev. Following a brief historical overview of the Russia-Ukraine gas relationship between 2009 – signing of the current transit contract – and 2018, as well as some basic data on the ratio of gas within the EU's energy consumption, this paper will analyze the main aspects of Russian exports to Europe. This section concludes that the future of those exports is mainly influenced by external factors, rather than by the Kremlin. Therefore, the paper focuses on the EU's most recent maneuvers regarding its gas imports from Russia, as well as outlines some scenarios, should new infrastructure be put in place. Finally, it assesses some possible counterarguments to the hypothesis outlined above. The main findings of the paper, as well as some recommendations resulting therefrom, are summarized in the conclusion.

Bumpy start, altering conditions

Most recent history

As indicated above, the two Russia-Ukraine winter gas disputes of 2006 and 2009, leading to a complete cut off of Russian exports for several weeks, severely damaged the image of Russia and Ukraine as credible partners.[Stern et.al. (2009)] They also shed light on the possible consequences of unrest between the two countries for the EU. The transit and supply contracts signed by Prime Ministers Putin and Timoshenko in 2009, attempted to resolve the crisis, reestablished a supporting system of underpinning intergovernmental agreements, and introduced a host of other significant changes. As underlined by Pirani, the 10-year supply contract provided for delivery of an annually contracted quantity (ACQ) of 52bcm of gas, with a take-or-pay requirement of 80% and oil-indexed prices, with an unfavorably calculated netback principle for Ukraine. [Pirani (2014)] In 2010, following a renegotiation, Naftogaz received a 30% discount, however only in exchange for significant political concessions. Nonetheless, the past nine years completely transformed both the European gas markets and the Russia-Ukraine relationship.

On the one hand the adoption of the Third Energy Package (2009) and European Energy Security Strategy (2014), as well as the establishment of the Energy Union (2015) [European Commission (2014)] induced the transition of Gazprom towards a gas-to-gas based hub-pricing system. The growing interconnectedness of European countries, the fluctuations in the European gas demand, the increasing competitiveness of US LNG, as well as DG Comp's investigation on Gazprom's business practices in Central and Eastern European countries [DG Comp (2012-17)] necessitated a strategic change from the Russian gas export monopoly. Hence, although one third of its contracts are still oil-linked, one third are now hub-price linked and another third are hybrid contracts which effectively offer the lower of oil or hub-linked prices. [Henderson-Sharples (2018)]

On the other hand, as emphasized by Pirani, Gazprom demonstrated reluctance to amend its contracts with Ukraine, and showed preference for short-term concessions in return for favorable political changes. [Pirani (2014)] The situation was complicated by the accumulating debt of Naftogaz, as well as by the eruption of a political crisis in November 2013 leading to the election of a new, pro-EU president and government in Ukraine. The annexation of the Crimea by Russia and the civil war between government and separatist forces backed by the Kremlin in Eastern Ukraine, resulted in EU sanctions against Russia [BBC (2014)] and in a deteriorating political relationship between the two sides. The question of responsibility for the crisis is debatable. [Mearsheimer (2014)] Nonetheless, the present situation has to be addressed. As indicated by Pirani and Yafimava, the political crisis between Kiev and Moscow resulted in a new system, where the existing supply and transit contracts have been underpinned by tripartite agreements between the parties, with active mediation by the European Commission, ensuring the uninterrupted transit of Russian gas in 2014-15 and 2015-16 through 'winter packages' consisting of gas purchase commitments from Ukraine and a guarantee for discounted price from Russia. [Pirani-Yafimava (2016)] [EU Observer (2015)] Nonetheless, the most recent ruling of the SCC outlined above, raises questions on the future outline of this fragile triangle.

Forced path cooperation: Russian gas exports

Although the common discourse tends to depict Russia's gas export as one of the leverage-enhancing political tools of the Kremlin, the Rus-

"...the stability of the Russia-Uktraine relationship is important for the European union to ensure its security of energy supply."

sian gas is in fact "no longer an issue of necessity, but one of convenience" [Luciani (2015)]. The global oversupply, as well as the suitable conditions[1] for a competitive diversification, [Franza (2016)] creates a buyer's market where Moscow needed to make notable concessions and adapt new marketing strategies in order to secure its most important market. The result of this has been two years of record gas export sales to Europe. (167bcm in 2017)[2] [Henderson-Sharples (2018)] Nonetheless, as highlighted by Henderson and Sharples, this achievement has been facilitated by favorable external factors, including delays in new LNG start-ups, higher coal prices, declining European production and a recovery in overall European gas demand. [Henderson-Sharples (2018)] Russian gas is competitive both in short-term and long-term vis-á-vis US LNG, and due to its enormous (80-100bcm) spare capacity is able to influence hub prices as well. [Franza (2016)] Nevertheless, a slower tempo of the on-going switch from coal to gas, or unfavorable changes in the aforementioned aspects may impact these results negatively.

(See Figure 1)

Finally, the increasing volume of Russian export can enhance the bargaining power of the EU and Ukraine vis-á-vis Moscow, due to infrastructure limitations. Gazprom's diversification options are also limited, since the Power of Siberia pipeline (38bcm) requires a green field investment in Eastern Siberia, [Gazprom (2017)] and thus does not guarantee the company an opportunity for arbitrage between the European and Chinese markets. The construction of the Altai pipeline meanwhile, is delayed due to significant problems. [Henderson (2014)]

Due to the above outlined aspects, the Ukrainian transit route will continue to be of strategic importance. Although Gazprom's transit diversification strategy – through the construction of the Yamal, Blue Stream and Nord Stream pipelines – has achieved notable results in the past 15 years, the resistance of the European Commission is growing considerably, as will be demonstrated in the next chapter through the case study of Nordstream-2. To conclude, gas exports were and continue to be an important foreign policy tool of the Kremlin. Nonetheless, its application is far more complicated than it was a decade ago, owing to several external factors.

The importance of natural gas for the EU

Apart from ensuring security in its Eastern neighborhood, the stability of the Russia-Ukraine relationship is important for the European Union to ensure its security of energy supply. With a share of 14% in its primary energy production, [Eurostat (2015)] as well as being the biggest importer in the world, natural gas constitutes a top priority for the EU. As highlighted by Franza, the Union remains to be the world's sink market, with a central role in balancing global supply and demand. [Franza (2016)] After peaking in 2007-2008 around 550bcm the European gas consumption crashed by 100bcm below 450bcm in 2014, with slow recovery in the past three years driven mainly by extremely low prices. Nevertheless, there is consensus among analysts that

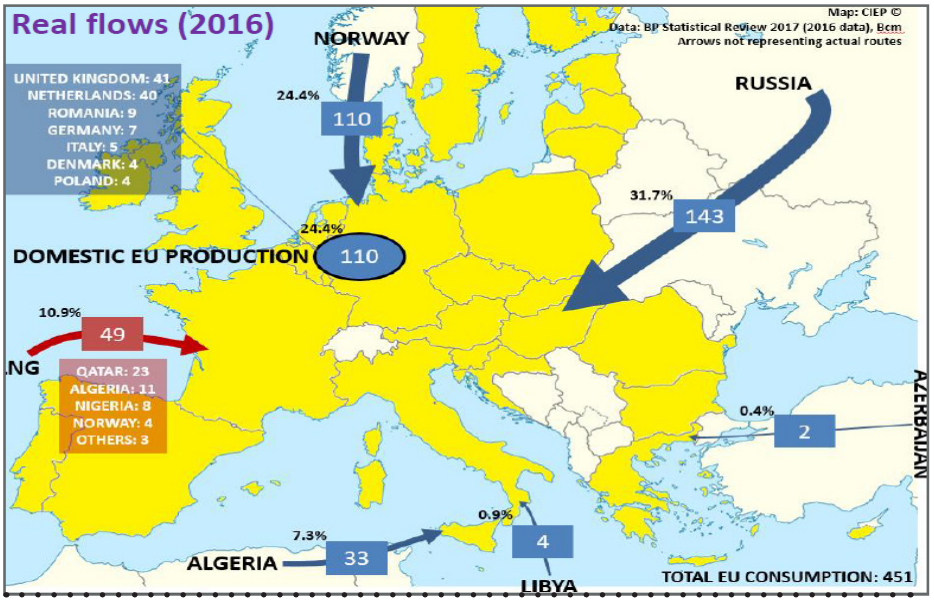

FIGURE 2: REAL FLOWS OF NATURAL GAS TO THE EU (2016; BCM) SOURCE: CIEP, BP STATISTICAL REVIEW 2017

1 Surplus production and delivery capacity; liquidity of the lng market; competing external suppliers; surplus import infrastructure; open and accessible market [franza (2016)]

2. on the divergence between russian and european data regarding natural gas flow see [henderson-sharples (2018) p.6.]

the demand is going to increase by 30-35bcm by the end of the next decade. [Henderson-Sharples (2018)] Natural gas can also play a notable role as a transition fuel over the medium term, in fulfilment of the EU's carbon emission targets of -40% and -80% until 2030 and 2050, respectively.

See FIGURE 2

For this reason, considering a declining internal production – a historical low of 110bcm in 2017 [Eurostat (2017)] – the EU has to increase its imports from external suppliers to meet its energy needs. Although its LNG infrastructure with an aggregate import capacity of 221bcm/year is substantial, its utilization rate remains below 25% [GIIGNL (2017)] due to the surging Asian LNG demand. Furthermore, the European prices are converging towards short-term marginal costs, thus undermining the perspectives of investment in new supply capacities and hindering diversification. [Franza (2016)] Under these conditions, as the most competitive producer, Russia managed to increase its share of the European market from 27 per cent in 2011 to 35 per cent in 2017, and delivered 40 per cent of the overall EU-imports, [Gazprom (2018)] 45 per cens of which came through the Ukrainian transit corridor. As underlined by several studies, by 2022-24 Gazprom's export volumes to Europe are likely to increase. Therefore the EU needs to carry out intensive energy diplomacy in order to resolve the overlapping challenges of increasing Russian gas volumes, as well as the insurance of its security of supply in a competitive sustainable way.

Why still Ukraine?

Political and legal efforts: The case study of Nord Stream 2

Given the above outlined market tendencies, the European Commission and certain member states, are worried about the expansion of Gazprom's dominant market position and thus attempt to hinder the construction of new pipeline projects (e.g., South Stream). This tendency is clearly identifiable in the discussion around Nord Stream 2,[3] which according to Lang and Westphal, addresses a three-fold consistency and coherence test on the rules for the internal energy market in terms of its foreign policy and security objectives towards Ukraine, and regarding to the internal cohesion of the EU which Nord Stream 2 could erode given the rift between the supporting and the opposing countries. [Lang-Westphal (2017)] Although the project does have a commercial rationale, underpinned by geo-economic factors, it nonetheless tests the EU's stance towards Ukraine and raises concerns as it overstepps purely economic aspects infringing on broader security concerns of Eastern European member states.

As an indication of the issue's gravity, the European Commission decided to directly intervene and requested a mandate from the European Council to negotiate an agreement with Russia concerning the operation of Nord Stream 2, [Council (2017)] as well as proposed amendments to the 3rd gas directive. [Henderson-Sharples (2018)] Although the legal service of the Council has concluded that the jurisdiction of the EU cannot be applied on Nord Stream 2, [Vedomosti (2018)] some questions remain regarding the pipeline. On the one hand, the Danish parliament granted the government the right to block the construction of pipelines in the country's territorial waters on grounds of foreign policy, national security, and defense interests. [Euractiv (2017)] On the other hand, the issue of transport pipelines remains to be discussed. The example of Nord Stream might provide guidance: although the pipeline's construction was carried out without serious rifts, Gazprom has been able to use first 50 and then 80 per cent (from 2016) of the transporting pipeline's (OPAL) capacity under an exemption decision achieved after several years of disputes. [Lang-Westphal (2017)] The same process might hinder the construction of Nord Stream 2's onshore extension. (EUGAL)

To conclude, although the regulatory powers of the European Commission are not absolute, they are strong enough to delay new, primarily onshore infrastructural projects for Russian gas exports, thus buying time for negotiation regarding the transit through Ukraine. As proved through the case of Nord Stream 2 the EC's strategy is focused on the one area – export pipeline capacity – where a bottleneck can be created and implemented in practice. [Henderson-Sharples (2018)]

3. Nord Stream 2 is an offshore pipeline project ensuring a direct export of an annual 55 bcm of natural gas from Russia to Germany. Apart from Gazprom (50%) the financiers of the project are Uniper, BASF/Wintershall, OMV, Shell and Engie. The pipeline is planned to start operating by the end of 2019. [Nord Stream 2 (2018)]

A quantitative underpinning

Apart from the diplomatic and political struggles, financial and infrastructural realities underpin Ukraine's role as a transit country, notwithstanding Gazprom's announcements on termination of contracts. On the one hand, as underlined by Molnár, in the case of immediate cessation of transits, the Russian company would have to pay Naftogaz Ukrainy the contracted transit fees – amounting to $6.5 billion – by the end of December 2019, in addition to the $2.56 billion resulting from the SCC ruling. [RIAN (2018)] The company's financial opportunities are limited to a certain degree, as the aggregate cost of all its announced gas-related projects could be as high as $200 billion, almost a fifth of Russia's nominal GDP in 2016. [Franza (2016)] On the other hand, a detailed calculation on all possible pipeline scenarios carried out by Pirani and Yafimava, concluded that even if both strings of Nord Stream 2, as well as its onshore extensions are built by 2020 and 100% of their capacity is used, Russia would have to continue to serve Turkey and South-Eastern Europe through the Ukrainian network. Hence, according to the authors, the infrastructural limitations in South-Eastern Europe, as well as the growing Russian exports necessitate Gazprom's continued usage of the Ukrainian corridor, most likely in the range of 40-60bcm. [Pirani-Yafimava (2016)] With the delay of the new infrastructural projects this volume might increase.

Counterarguments to consider

Finally, some aspects which have the ability to negatively influence Ukraine's transit status, need to be addressed. One of those is the controversial negotiating strategy of Naftogaz, aiming at increasing its transit fees for Russian gas. Although the potentially lost transit revenues might be partially covered by the lower price of reverse-flow-gas, [Goldthau (2016)] the approximately $3 billion received for gas transit in 2017 [Interfax (2017)] is an important

See Figure 3

Therefore, as highlighted by Bros, Naftogaz could make Nord Stream 2 financially less attractive by reducing the price of its own transit, thus making the participation of European partners in the financing of the project less justified. [Bros (2016)] Nonetheless, by proposing an increased tariff now, Ukraine is sending the opposite message to stakeholders, who will be reluctant to invest in the country's transit network, the capacity of which has decreased to 105-110bcm, and requires at least $4.3 billion over the next 7 years for modernization, while at least $2.8 billion would need to be spent to keep that in operational condition. [Pirani-Yafimava (2016)] Full compliance with the rules set by the Energy Community through the adoption of primary legal acts might be an important step forward. [Energy Community (2017)]

Additionally, the Eastern European countries are making significant progress to reduce their dependence on the Ukrainian transit route. The final investment decision[4] (FID) on the construction of the BRUA pipeline, connecting Romanian gas fields with the Baumgarten delivery point in Austria has been published in December 2017. [EBRD (2017)] According to the schedule, by 2020 1.75bcm of natural gas can be transported to this region,

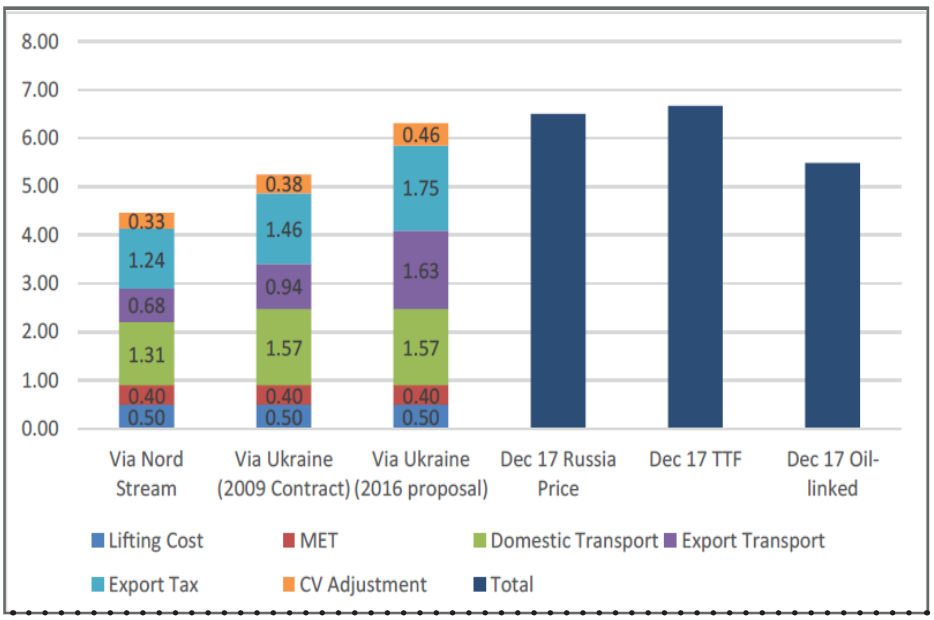

FIGURE 3: COST STACK FOR GAZPROM'S EXPORT SALES TO EUROPE (US$/MMBTU) SOURCE: [HENDERSON-SHARPLES (2018]

4. As a PCI-project, the BRUA pipeline will be financed by the Connecting Europe Facility, EBRD and Transgaz. (Romanian TSO)

gradually increasing to 4.4bcm by 2022. [Ministry of Foreign Affairs and Trade of Hungary (2018)] Furthermore the possible materialization of the Eastring pipeline connecting Turkish and Austrian hubs could also undermine Kiev's position. [Financial Observer (2017)]

Conclusion

To sum up, the ruling of the SCC and Gazprom's reaction to it signal the start of a very tense period in the EU-Russia-Ukraine energy triangle, with a possible culmination in 2019 when a number of events ranging from the scheduled completion of Nord Stream 2 and TurkStream, to the renegotiation of the Ukrainian transit contract occur, with a further complication being that elections to the European parliament and elections in Ukraine are also due in 2019. [Henderson-Sharples (2018)] The analysis concluded that volume of Russian gas exports to Europe is mainly influenced by external factors, as a result of which, the Kremlin needs to be in line with EU regulations and accept the Commission's diplomatic initiatives in this regard. Furthermore despite market tendencies, the EC is opposed to the expansion of the Russian market share, has the ability to delay the construction of new onshore infrastructural projects, and, as proved in the analysis, is attempting to create a bottleneck in terms of Russian export infrastructure. For this reason, as concluded in the paper, the most likely scenario is that Ukraine will remain a transit country in the medium run, albeit at reduced volumes of 40-60bcm/year.

A grand bargain might be achieved if all parties focus on common interests and commit to certain policies. The EU should not sacrifice its unity, as well as its stance vis-á-vis Ukraine for security meant to assuage supply-related fears and should support Kiev's energy market reforms. On the other hand, Russia is unlikely to risk its most important market and is therefore likely – as demonstrated in the case of other European customers – to accept a compromise and play by the rules. Finally, Ukraine should commit itself to a full completion of its energy market reform, as well as modify its negotiating strategy. If these aspects are fulfilled, a notable diplomatic achievement might be reached by the end of the next year.

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Combatting IUU Fishing: Comparing Governance Challenges and Solutions in West Africa & Indonesia

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Abstract:

Illegal, unreported, and unregulated fishing (IUU) represents a significant threat to ecosystem conservation, and equally to a State's sovereign ability to protect its territory. This paper compares the responses to IUU fishing in West Africa, and Indonesia. Though far apart and governed very differently, Indonesia and the West African region face similar obstacles in addressing IUU fishing, including the influence of powerful developed States, a lack of accountability in transshipments, corruption and limited transparency, and challenges in financing for Monitoring, Control, and Surveillance (MCS) systems. They can equally benefit from common solutions including market-based mechanisms like tariffs on countries exploiting flags of convenience, and better labelling practices on catch. IUU is not only a manifestation of profit-driven interests but also a derivative of weak governance systems. Thus, curtailing it will also require more robust standards on market access and restrictions on transshipments, sufficient funding for capacity building, and a strong political will to create effective regulatory bodies.

Illegal, Unreported, and Unregulated (IUU) fishing represents a significant challenge to fisheries' resiliency, biodiversity, food security, and economic development. This problem persists because there is high economic incentive for operators to compete, and there is insufficient regulation to stop it. It poses a serious threat to ecosystem conservation and challenges the sovereign ability of States to control their own territories.

The myriad of fisheries exploitation practices are covered under the umbrella term 'IUU', but more specifically include: 'illegal fishing', when commercial boats operate in violation of fishery laws, such as without a license or in a manner inconsistent with the license they have; 'unreported fishing', where operators inaccurately or altogether fail to report their catches to national or regional authorities; and, 'unregulated fishing', which is conducted by either vessels with no nationality or those using a 'Flag of Convenience' not part of a regional organization, or where there is a lack of sufficient information about the resource being fished.[1]

From a policy and diplomacy standpoint, this issue is particularly difficult to manage because there is no supranational or regional authority with the mandate to ensure universal application and adequate enforcement of fishing standards. Under the United Nations Convention on the Law of the Sea (UNCLOS), all States enjoy freedom of movement within Exclusive Economic Zones (EEZs), but only the coastal State can exercise sovereign rights over the exploitation and conservation of the resources below the surface of the water.[2] They are responsible for resources in their own EEZs and can also participate in Regional Fisheries Management Organizations (RFMOs) to ensure the sustainable use and conservation of species on the High Seas. Ultimately, while UNCLOS manages maritime behavior and transactions between States, fisheries regulation happens at the State and regional levels. Thus, practical management of IUU fishing falls to a combination of RFMOs, other regional governance organizations, and domestic fisheries and law enforcement departments.

This global problem is particularly acute for developing countries where local communities

are more directly reliant on subsistence fishing and there is less financing for Monitoring, Control, and Surveillance (MCS) systems. This is complicated by the fact that developing States with particularly biodiverse coastlines are most at risk for IUU. A country's risk of IUU fishing is "positively related to the number of commercially significant species found within its territorial waters…".[3] It is thus unsurprising that IUU fishing remains a significant challenge to many coastal developing States (and regions).

This paper compares the impacts, governance challenges, and responses to IUU fishing in Indonesia and West Africa. This State and region, respectively, face similar management challenges but contrasting governance circumstances. They have extensive coastlines, exceptionally high amounts of IUU fishing, very productive ecosystems, and to some extent the political will to resolve the issue. However, they also lack the means to do so alone. Geographically, both have large maritime areas to patrol, but Indonesia is one State with a massive array of over 17,000 islands, while West Africa is a collection of independent States which share one very large, continuous coastline and maritime economic zone. Though Indonesia's territory is diffuse, it operates as one unified State under a central government (working with subnational authorities). In contrast, West Africa has a more continuous territory to patrol, but faces sovereignty challenges when trying to collectively operate. By examining these cases together and comparing the challenges they face, it is possible to identify operational solutions which are more universally applicable.

West Africa

I. Background

IUU is a particularly visible challenge in West Africa. West African countries lose over $1.3 billion in total revenues every year from IUU fishing.[4] One half to one third of the total regional catch is obtained through IUU.[5] While regional in scope, the problem is particularly acute in Senegal, Ghana, Sierra Leone, Liberia and Mauritania.[6] The main problematic IUU practices in West Africa involve activity of unlicensed foreign vessels, fishing in prohibited areas –i.e. too close to shore– or with illegal methods –such as illegal nets.[7]

In West Africa, transshipments and Flags of Convenience (FOCs) enable IUU fishing. Transshipments involve the use of large refrigerated commercial 'reefer' vessels which receive, process, and freeze fish directly at sea before bringing them to port. Though legal, the practice is frequently manipulated for IUU fishing. Reefers are used for 16% of West African exports, and of the 35 operating off the coast in 2013, most operated under FOCs from Vanuatu, where restrictions are low, and punition is weak.[8] IUU vessels can use reefers to bring their illegal catch for processing at sea. There, fish are mixed with legal catch from other vessels before arriving at port, making it nearly impossible to separate out legal from illegal catch.[9] Use of these vessels enables operators to evade port State inspection measures, as a loophole in EU law exempts refrigerated container ships from inspections at EU ports.[10] In practice, this means that IUU fishermen can

load their illegal catch at sea and it is then transported directly to Europe without entering West African ports for inspection. There are a few hubs for transshipment off the coast of West Africa, including near Guinea and Guinea Bissau, as well as in the Gulf of Guinea near Ghana, Togo and Benin.[11] This is an issue for neighboring States, as transshipment leads to a significant loss of revenue for receiving ports along the West African coast.

FOCs are also used to circumvent restrictions. In many cases registration for these flags is cheap and easy to obtain. Flag states with low regulations ignore international law obligations or fail to enforce local regulations on vessels under their jurisdiction operating in foreign territories. This practice weakens the rule of law and challenges the enforcement power of local authorities.

These practices cause severe impacts on local populations. In West Africa, the fisheries industry accounts for 20% of primary sector employment; the industry provides revenue to communities which might otherwise be reliant on subsistence fishing, enabling them to also purchase more expensive food goods. Decreased intake in port cities impacts the overall GDP, regional development, and individual economic resiliency.[12] While most artisanal fishermen are men, the vast majority of workers in processing plants are women. Not only is their livelihood tied to the level of intake in port cities, but also criminal activities associated with IUU fishing often target women and other vulnerable populations. In West Africa –and Southeast Asia– *de facto* slavery and forced labor including exploitation of women and children on boats and at the ports is a serious issue.[13] The region also struggles with human trafficking associated with these activities.

II. Governance Challenges

The only RFMO present in West Africa is the International Commission for the Conservation of Atlantic Tunas (ICCAT), which monitors tuna stocks, as well as over 30 different species of concern in the region. As such, national governments are the main mechanisms for control of IUU fishing in the region. These structures are only as effective as the State's capacity to monitor activities in their territory. In West Africa, implementation capacity is often weak, and many States struggle with government corruption, a lack of transparency, and low enforcement including limited revenues for patrolling and follow-through on punishments. But these States are also limited by size. Fishing agreements between States can be negotiated at the bilateral or multilateral level; between a host government and an intergovernmental organization like the EU, between individual States, a host country and a flag State government, or a company and a host State. Yet when individual West African States negotiate these agreements with larger entities like the EU or China, they operate from a much weaker position. As individuals, their EEZs are limited and if they compete with one another, the parties they negotiate with can play them off one another or threaten to move their business elsewhere. There is very little transparency in these negotiations, which complicates enforcement and limits accountability.[14]

This individual versus collective approach has enforcement consequences as well. Without a global register of high seas vessels, there is little information on deep sea catches entering their ports. Even if States establish effective monitoring of vessels in their EEZ, if they fail to share information about illegally operating vessels it is relatively easy for operators to relocate to the next EEZ. Some States have tried to resolve this problem by passing similar laws. Senegal and Cote d'Ivoire joined forces to ban transshipments in their territory.[15] But without a contiguous restriction zone (there are four other countries with EEZs between them) and greater cooperation from their neighbors, reefers can reestablish in nearby EEZs (as they have in the Gulf of Guinea for example).

Internal politics also plays a significant role in facilitating IUU fishing. Corruption is a major problem in the fisheries sector worldwide, and especially in this region. In Senegal, for example, high level government figures have been prosecuted for selling illegal permits to foreign operators for their personal gain.[16] Some of these countries themselves also issue FOCs without monitoring the practices of their operators. In 2014, the EU issued a warning to Ghana for IUU fishing by vessels operating under their FOC.[17] Ships with West African FOCs also are found to conduct IUU fishing elsewhere. Many ships use Liberian FOCs or commercial registries are registered to the country because it is known to not enforce regulations on ships bearing its FOC.[18]

Even when monitoring does exist, there is little agency towards enforcement. Though

many West African States require observers onboard fishing vessels, they are paid by the operators themselves. Thus, there is little incentive to discover corruption on these boats.[19] Equally, when exposed, fines are insufficient to disincentivize repeated behavior.[20]

The greatest IUU fishing threats in West Africa come from China and the EU. From 2000 to 2010, the EU only reported 29% of its total catch from West Africa, while China reported only 8%.[21] The impacts of this underreporting are significant, as for instance West Africa provides 25% of Europe's fish supply.[22]

The relationship between West African countries and China and the EU highlights the magnifying role that fisheries agreements and FOCs play in IUU fishing. In recent years, China has begun using 'second generation agreements', including vessel charters and transfer of fishing vessels to the FOC of a third country (in some cases another West African one).[23] This means that Chinese IUU reports do not reflect the volume produced by these vessels under secondary agreements.

Inequalities in political and economic bargaining power have also enabled China and the EU to dominate domestic fleets in some West African countries via these secondary agreements. For instance, most of the Mauritanian industrial fleet are Chinese and Mauritanian joint ventures.[24] Additionally, a large share of Senegal's fishing fleet are reflagged EU vessels.[25] Through this practice, IUU fishing is attributed to these ships rather than Chinese or EU enterprises. Additionally, these fleets pay domestic port and licensing fees rather than foreign ones, leading to lower revenues for the receiving country than if they were registered as foreign fleets.[26]

Foreign overfishing decreases food security and inhibits local poverty reduction. It leads to increased competition between West African fishermen, inhibiting cooperation and motivating IUU fishing from artisanal fishermen; in Senegal for instance, artisanal pirogues fish illegally in Mauritanian waters.[27]

III. Solutions

A number of West African States have adopted robust Monitoring, Control, and Surveillance systems (MCS), but deploying these systems at the individual level does not always lead to impactful reductions in IUU fishing. Current MCS measures in the region only recovered $13 million out of $2.3 billion total losses in revenues.[28] Funding for these systems is limited and effectiveness is tied directly to corruption levels. Research demonstrates that domestic crises can inhibit MCS enforcement. For example, the countries hit hardest by the Ebola crisis, Guinea and Sierra Leone, experienced the highest rates of IUU fishing in the region during that time period.[29] However, Sierra Leone is consistently rated as having one of the strongest MCS systems in the region.[30] This correlation is partially based on the fact that these States catch the most offenders and enforce the strongest charges for these crimes. In contrast, Senegal's stricter legislation in 2015 has failed to produce expected reductions in IUU.[31] Together, these outcomes point to the need for adequate funding and implementation structures. To produce real results from MCS measures to combat IUU fishing in West Africa it is imperative that these efforts are sufficiently funded, with adequate transparency measures to ensure follow-through.

Enforcement of MCS is most effective via a regional approach. However, ICCAT is the only regionally operating instrument on fisheries in the area. Both the majority of West African States, and foreign States with the highest rate of fishing in the region (including the EU and China) are 'Contracting Parties' to ICCAT.[32] These States must follow the guidelines and restrictions established by the RFMO, including regional observer programs, and the policy that ICCAT species must be transferred for processing from transshipments to port.[33] Yet ICCAT has limited capacity to curtail overall IUU fishing in West Africa. The RFMO only protects around 30 species, and its jurisdiction is limited to the high seas. While the organization can influence IUU fishing of these critical species on the coast via the ports in Contracting Parties, it has no control over practices within States' EEZs.

To resolve this dearth of regional cooperation, States in the region have formed the West African Sub- Regional Fisheries Commission to coordinate surveillance and information sharing.[34] They developed the 'Surveillance Operations Coordinating Unit' to coordinate joint patrols by air and sea, as well as protocols for when patrols in pursuit cross into another State's territorial waters.[35] Though this Commission successfully apprehended some IUU vessels, it was significantly underfunded and in practice began to represent an informal network based arou-

nd rhetoric.[36] Largely supported by international funding, it was forced to disband when its original financial backers including the World Bank ended their support, resulting in a significant increase in IUU after the program ended in 2013.[37] Despite some cases of corruption, there is broad political will for renewed regional cooperation. Yet an absence of funding and limited data sharing remains a serious impediment.[38]

Indonesia

I. Introduction

Indonesia experiences significant levels of IUU activity. Over 30% of IUU comes just from Indonesia, and the country loses over $2 billion per year in profits as a result.39 Foreign boats from across Asia, including Japan, Taiwan, South Korea, China and the Philippines come to Indonesia to fish there, and operators from these countries, as well as from Indonesia, also engage in significant levels of IUU fishing. The problem is most acute in the Straits of Malacca near Northern Sumatra, where illegal commercial trawlers intrude upon the 3-mile zone reserved for artisanal fishermen.[40] IUU fishing in the region impedes conservation programs in this important, biodiverse zone, and makes it difficult to establish enforceable, necessary quotas for high value species such as tuna.

IUU fishing is a significant challenge for Indonesia as in West Africa, because a large portion of the population is heavily reliant on fish as a subsistence food source. IUU fishing impacts the economy of the region, the sustainability of local fisheries and individual species, and also challenges Indonesian sovereignty. Violent conflicts have erupted between commercial trawlers and local fishermen, and over the past 15 years over 200 people have died from these encounters.[41] Beyond frequent incursions into areas reserved for traditional fishermen, the other main manifestation of IUU in Indonesia involves the incursion of foreign vessels into State territory without bilateral agreements between Indonesia and their flag state.[42] Finally, transshipments resulting in unreported catch, and use of illegal fishing gear are also pervasive within Indonesia's maritime territory.[43]

Indonesia also faces non-compliance within its own fleet, both domestically and abroad.[44] Like many West African States, Indonesia is under international political pressure because of illegal fishing activities of its operators in other areas.[45] However, while oftentimes vessels operating under a West African State flag do not actually originate from there (and as discussed above, e.g. from China, the EU or elsewhere), Indonesian vessels themselves have been found operating in RFMOs.[46]

II. Governance Challenges

Though Indonesia experiences significant issues with IUU fishing both in its EEZ from foreign vessels and abroad by its own fishing fleet, recent political developments demonstrate the impactful manifestations of a strong will towards enforcement. In contrast to West Africa, Indonesia avoids challenges associated with regional interstate collaboration because it is one State managing a diffuse territory. But this is no small feat; Indonesia has 4.8 million square kilometers of ocean territory spread across its 17,000 islands.[47] Thus, even with political leadership dedicated to aggressive action, financing and implementation remain challenging. For example, commercial trawling has remained illegal in Indonesia since it was banned by presidential degree in 1980, but the law remains unenforced.[48] In fact, recent anecdotal evidence from artisanal fisherman suggests trawling may be on the rise again.[49] It is likely that this increase is related to connected to corruption of officials.[50]

Though Indonesia has ratified a number of international agreements important in combatting IUU such as UNCLOS, the UN Fish Stocks Agreement, and the 2001 FAO International Plan of Action for IUU (IPOA-IUU), its implementation efforts fall short of these standards.[51] Indonesia is party to both the Indian Ocean Tuna Commission (IOTC) and the Western & Central Pacific Fisheries Committee (WCPFC). These RFMOs, which border the country's EEZs on both sides, manage 'tuna and tuna-like species' and 'highly migratory fish stocks', respectively.[52] [53] The commissions have both MCS schemes and port-state measures to ensure compliance in party States. While these groups closely monitor IUU fishing of tuna and large migratory species on the high seas (and at the ports), their jurisdiction is restricted to enforcement of species protection in these areas. Thus, as in West African States, Indonesia's membership in these RFMOs does not minimize IUU in their EEZ.

III. Solutions

Domestic momentum towards MCS implementation shifted dramatically in 2014 when President Joko Widodo ('Jokowi') was elected. Hailed as a new democratic force, President Jokowi expressed a commitment to 'protect Indonesian Sovereignty' and crack down on IUU fishing.[54] He appointed former entrepreneur Susi Pudjiastuti as fisheries minister.[55] The popular minister has taken aggressive action to ensure follow-thru, by blowing up confiscated foreign vessels caught committing IUU fishing. Since October 2014, the ministry has blown up 317 ships, from Vietnam, the Philippines, Malaysia, and China.[56] These ships are largely caught by a special maritime task force established by the fisheries ministry known as 'Satgas 115'.[57] This strategy is hugely popular in Indonesia, but volatile abroad.[58]

In addition to this more demonstrative enforcement measure, the Indonesian fisheries ministry relies heavily on surveillance to support these actions. The government has committed significant resources to ensure all Indonesian vessels are equipped with Vessel Monitoring Systems (VMS), in compliance with Article 18 of the UN Fish Stocks Agreement, and the requirements of the IPOA-IUU.[59] The ministry also requires that all large commercial foreign-flagged vessels operating in Indonesian waters must have a transmitter as a condition of holding a fishing license.[60] These systems enable monitoring of all vessels within Indonesia's territorial waters and can be used to identify vessels acting in violation and bring IUU catch to port.[61]

In 2018, the fisheries minister began a partnership with Google to use Vessel Detection Systems (VDS) satellite data –known as Automatic Identification Systems (AIS)– to more effectively monitor IUU activity.[62] This new strategy attempts to address VMS tampering, which is an inherent flaw in this system; because VMS are onboard their ships, operators can turn these systems off or use them to falsify their location in certain instances.[63] VDS and VMS systems together enables the ministry to both externally detect vessels engaging in IUU fishing early on and continue to monitor their activities to ensure they are reprimanded. This system seems promising for improved enforcement, but as with other MCS measures requires funding and coordination to ensure effective execution.

Comparing Solutions

At the international level, IUU activity perpetrated by operators using Indonesian or West African flags is difficult to address without direct action by national governments, or the existence of a high seas agreement to regulate their behavior. Until such an agreement is negotiated, IUU action outside of State jurisdiction is limited only by RFMOs.

When it comes to fighting IUU within their own territories, both Indonesia and West African States are guided by the FAO's IPOA-IUU, which is the main international agreement addressing this problem. In 2009 the FAO passed the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA), which entered into force in 2016. This agreement is the main mechanism managing this problem at the local level and creates binding obligations for inspection of foreign vessels trying to enter another States port.[64] It also allows for blocking of ships suspected of IUU fishing, and includes measures like trade restrictions, catch documentation, and vessel registration and licensing systems to ensure accountability.[65] While port inspections are already standardized, problems arise due to a lack of universal information sharing, and enforcement to ensure vessels do not just move to another port in a neighboring State.[66]

The PSMA can provide an important shared framework for policy implementation moving forward, as Indonesia and a number of West African States including Senegal, Gambia, Ghana, Cabo Verde, Guinea, Mauritania, and Gabon are all party to it.[67] These States may be across the world from one another, but they share key challenges when it comes to IUU: influence of powerful developed States, lack of accountability in transshipments, corruption and limited transparency, and challenges of financing for MCS mechanisms.

Because of these shared challenges with controlling IUU, as well as mutual cultural and economic value for ocean protection, certain solutions may be universally beneficial despite their differing political circumstances. Past impacts and efforts towards developing strong MCS indicate that West African States could benefit from the joint VMS-VDS approach similar to the one Indonesia is implementing. However, this remains inhibited by inadequate financing, and a need for coordination to ensure effective im-

plementation. Renewed efforts towards collaboration must be supported by sufficient funding, as the West Africa's prior regional project ended not due to lack of interest in collaboration but because of the end of funding for the project. EU policy actually requires allocation of funding for MCS in all of their bilateral fishing agreements, yet they often fail to follow through with this financial support. The OECD's Rome Declaration on IUU fishing called on developed countries specifically to provide funding for MCS measures. Better EU financial support could ensure VMS measures are successfully implemented.

Market-based mechanisms can also provide effective monitoring in both case studies, including tariffs on countries exploiting flags of convenience, and better labelling practices on catch.[68] Universal standards on market access, including a global record of fishing vessels or shared use of 'blacklists' beyond the sub-regional level could increase cooperation and support among developing States. Finally, restrictions on refrigerated transport and container vessels not only while at sea, but also in the ports of developed countries could help close the legal loophole that makes transshipment a hub of IUU activity.

Conclusion

Ultimately, IUU fishing is not a question of individual actors subverting the system, but of complex power dynamics. The States discussed in this paper are both victims of IUU fishing and perpetrators of it both at home and abroad. They are both taking aggressive action to put a stop to it and subverting this action via corruption and underhanded dealings. Yet on the other hand, powerful developed States often lament the pervasiveness of IUU in diplomatic fora and produce legislation to stop it, yet support long- distance fleets using the FOC system to perpetrate IUU abroad.

At the international level, commitments to support capacity building to implement global policing of commercial fisheries are imperative. Support from developed States, in both funding for MCS and in improving their own accountability can ensure that Indonesia, and the countries in West Africa have the means to implement and enforce their own policies. These States in turn can benefit from greater implementation of new MCS technologies, accountability within their own government structures, and follow-through on policy action to ensure enforcement measures come to fruition.

Fundamentally, IUU is not only a manifestation of profit-driven interests but also a derivative of weak governance systems. Because of this, curtailing it depends on promoting sustainable fishing, producing the political will to create effective regulatory bodies, and ensuring adequate funding to implement policies.

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Le cadre juridique de l'exploitation des fonds marins

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Abstract:

Au début des années 1960, du fait du progrès continuel des techniques d'exploration maritime et des velléités expansionnistes de certains Etats, la définition d'un cadre global pour la gouvernance des océans et plus particulièrement des fonds marins est apparue aux yeux de la communauté internationale comme une nécessité. Issue de la Troisième conférence de codification du droit de la mer, la Convention des Nations-Unies sur le droit de la mer (CNUDM), signée à Montego Bay en 1982, a consacré un système de découpage de l'espace maritime en zones correspondant, pour chacune d'entre elles, à un régime juridique distinct. Cette convention a eu alors pour objectif d'établir une « Constitution des océans », dans laquelle les fonds marins et leurs ressources, définis comme « patrimoine commun de l'humanité » (art. 136 CNUDM), seraient « exploités dans l'intérêt de l'humanité ». Cependant, si l'exploitation des fonds marins est désormais encadrée par cette convention (i), de vifs débats doctrinaux ont animé la communauté internationale notamment autour de la notion de « patrimoine commun de l'humanité », des obligations environnementales des Etats et de l'étendue de leurs responsabilités en cas de manquements aux obligations conventionnelles (ii). Ces débats ont connu un regain d'intérêt depuis la récente augmentation du nombre de contrats d'exploitation de ressources minérales.

L'existence de dépôts minéraux dans les parties les plus profondes de l'océan est connue du grand public depuis les années 1860, grâce l'œuvre Vingt mille lieues sous les mers de Jules Verne. Mais ce n'est qu'au début des années 60, du fait du progrès continuel des techniques d'exploration maritime et des velléités expansionnistes de certains Etats, que la nécessité de définir un cadre global pour la gouvernance des océans et plus particulièrement des fonds marins est apparue aux yeux de la communauté internationale comme une nécessité.

Issue de la Troisième conférence de codification du droit de la mer, la Convention des Nations-Unies sur le droit de la mer (CNUDM), signée à Montego Bay en 1982, a ainsi consacré un système de découpage de l'espace maritime en zones correspondant, pour chacune d'entre elles, à un régime juridique distinct. L'espace maritime échappant au contrôle des Etats côtiers est alors divisé entre la haute mer (partie VII CNUDM) et la Zone internationale des fonds marins (partie XI), dénommée, la Zone, qui comprend « les fonds marins et leur sous-sol au-delà des limites de la juridiction nationale » (art. 1 §1 CNUDM). La Troisième conférence et la Convention de Montego Bay ont eu alors pour objectif d'établir une « Constitution des océans », dans laquelle les fonds marins et leurs ressources, définis comme « patrimoine commun de l'humanité » (art. 136 CNUDM), seraient « exploités dans l'intérêt de l'humanité ». [1] Cette ambition, à certains égards, révolutionnaire, répondait à la nécessité de déterminer un régime juridique des fonds marins et de créer un mécanisme institutionnel permettant l'exploration et l'exploitation régulée des richesses minérales qui s'y trouvaient. Cependant, si l'exploitation des fonds marins est désormais encadrée par cette convention (i), de vifs débats doctrinaux ont animé la communauté internationale notamment autour de la notion de « patrimoine commun de l'humanité », des obligations environnementales des Etats et de l'étendue de leurs responsabilités en cas de manquements aux obligations conventionnelles (ii). Ces débats ont connu un regain d'intérêt depuis la récente augmentation du nombre de contrats d'exploitation de ressources minérales.[2]

« Le principe fondamental dont les Parties à la CNUDN ne peuvent déroger par aucun accord est celui de l'affetation de la Zone et de ses richesses au 'patrimoine commun de l'humanité'. »

I.L'institutionnalisation progressive de l'exploitation des fonds marins

La Convention de Montego Bay a dégagé des principes fondamentaux régissant l'exploration et l'exploitation des fonds marins

Le principe fondamental dont les Parties à la CNUDM ne peuvent déroger par aucun accord est celui de l'affectation de la Zone et de ses richesses au « patrimoine commun de l'humanité » (art. 136). Ce principe, forgé par A. PARDO,[3] se définit comme « un bien appartenant dans l'indivision à la Communauté internationale ».[4] Il implique que les ressources de la Zone soient inaliénables, que nul État ne puisse ni revendiquer, ni exercer de souveraineté ou de droits souverains ni même s'approprier « une partie quelconque de la Zone ou de ses ressources » (art. 137) et que l'exploration de la Zone et l'exploitation de ses ressources se feront dans l'intérêt de l'humanité toute entière (art. 140).

La Convention comprend des dispositions environnementales importantes transposant les principes de prévention (art. 194 §1), de protection, de préservation, et une approche du principe de précaution, ce qui implique que l'exploitation des grands fonds marins doit s'effectuer en conciliant la préservation de l'environnement et un usage équitable et raisonnable des ressources.[5] Ces dispositions comprennent également l'obligation de collecter des données scientifiques et de recherche, la réalisation d'une étude d'impact environnemental dans le cadre des demandes de projet, et l'obligation de notification en cas de dommage.

La régulation des activités d'exploration et d'exploitation des ressources de la Zone est confiée à l'Autorité internationale des fonds marins.

L'Autorité internationale des fonds marins (art. 156 à 186 CNUDM) partage ses prérogatives entre une Assemblée, où tous les Etats parties sont représentés, un Conseil de 36 membres élus par l'Assemblée et un Secrétariat. L'Autorité a pour fonction d'organiser et de conduire les activités d'exploration et d'exploitation des ressources minérales de la Zone (art. 157, § 1er). Elle dispose à cet effet d'un pouvoir de contrôle et de surveillance de toutes les activités menées dans la Zone notamment en ce qu'elle délivre les autorisations de production (art. 151 §2) et a le pouvoir de limiter la production (art. 151 §9). Ainsi, toute entité souhaitant exploiter la Zone doit présenter une demande comportant un plan de travail à l'Autorité. Ce plan est transmis à la Commission juridique et technique qui l'analyse. La demande doit être précise et comprendre, notamment, les moyens techniques et financiers prévus, le personnel employé et le secteur choisi. Une fois approuvé, le plan de travail devient un contrat d'exploitation ou d'exploration d'une durée de 15 ans. L'Autorité contrôle alors l'exécution de ce plan de travail et l'opérateur lui remet annuellement un rapport répertoriant les dépenses engagées, essais et mesures prises. L'AIFM mène aussi ses propres activités d'exploration et d'exploitation avec une entité nommée Entreprise, même si celles-ci demeurent résiduelles.

L'Autorité est également compétente pour l'adoption de règles et de procédures. Ainsi, depuis la signature de l'accord de New-York du 29 juillet 1994 qui modifia la XIe partie de la Convention et redéfinit les compétences de l'AIFM, cette organisation internationale a adopté des textes relatifs à l'exploration de la zone et à l'exploitation des nodules polymétalliques, a reconnu 13 investisseurs pionniers et a ciblé les zones d'exploitation les plus prometteuses. L'Autorité est également investie de pouvoirs subsidiaires (art. 157 §2) tels que la création de normes environnementales visant notamment la protection du milieu marin profond et la protection de la biodiversité (art. 145).

II. Trente ans après la Convention de Montego Bay, les ambitions nées de la Troisième conférence ont-elles été satisfaites?

La notion de patrimoine commun de l'humanité incarne un idéal plus qu'une réalité juridique.

Au début des années 1990, seuls soixante États étaient parties à la Convention, la grande majorité des nations développées ayant finalement refusé de la ratifier en raison des ambitions jugées trop solidaristes de la Partie XI – notamment en ce qui concernait l'obligation de transfert de technologies et le système de redistribution des revenus tirés de l'exploitation des ressources – et de l'importance des mécanismes de supranationalité.[6] Ce n'est qu'après l'adoption, en juillet 1994, de l'Accord relatif à l'application de la partie XI de la Convention, abrogeant informellement les dispositions les plus contestées, que le nombre d'États signataires est devenu significatif. Rares étaient les pays qui, à l'image de la France, s'étaient dotés d'une législation nationale instituant une redevance sur la valeur des produits bruts extraits de la Zone allouée à un *fonds pour la participation des pays en développement aux ressources des grands fonds marins*.[7] De nos jours, si l'objectif de redistribution des revenus tirés de l'exploitation des ressources aux pays en développement ne s'est pas concrétisé,[8] l'Autorité perçoit néanmoins une « redevance sur la production commerciale » atteignant 12% la 11e année de production, ainsi qu'un droit annuel d'un million de dollars par contrat d'exploitation, auquel viennent s'ajouter 500 000 dollars au titre des dépenses administratives (Annexe III, art. 13.4). Elle reverse désormais une partie de ces redevances à un fond de dotation créé en 2006 pour promouvoir la recherche scientifique marine dans la Zone. Cependant, une très grande majorité des contrats d'exploitation signés avec l'Autorité concerne encore directement ou indirectement des États développés. Enfin, les États-Unis, n'ayant toujours pas ratifié la Convention, sont dans l'impossibilité de contracter directement avec l'Autorité.

Le régime de responsabilité des États qui patronnent des opérateurs menant des activités dans la Zone en application de la Convention connaît des limites.

La Convention impose que les entités désirant explorer ou exploiter les ressources minérales soient patronnées par un État (Annexe III, art. 4). Les États doivent aider l'Autorité dans ses fonctions de contrôle de l'opérateur qu'ils patronnent, doivent mettre en place les dispositions législatives internes afin de faire respecter les obligations leur incombant dans le cadre des activités d'exploitation dans la Zone et ont l'obligation de prévoir les voies juridictionnelles permettant une juste indemnisation des dommages causés par ces activités. En effet, en cas de dommages dus aux manquements d'un opérateur, celui-ci devra être condamné par les tribunaux de l'État ayant patronné.

A la fois force et limite de ce système, le mécanisme de responsabilité repose entièrement sur le droit interne de l'État patronnant. L'Autorité se trouve, en effet, en retrait à partir du moment où le Conseil a accordé un droit d'exploration ou d'exploitation. Autre difficulté, si l'État patronnant est responsable des dommages dus à ses manquements, il n'est pas responsable des manquements du contractant, dans le cas où il aurait pris toutes les mesures « nécessaires » et « appropriées » pour assurer le respect effectif de ses obligations conventionnelles.[9] En cas d'insolvabilité de l'opérateur, l'applicabilité des principes généraux du droit international de la responsabilité civile permettrait cependant de retenir l'insolvabilité de l'opérateur comme un manquement de l'Etat à assurer les mesures nécessaires et appropriées.[10]

Enfin, si la Chambre pour le règlement des différends relatifs aux fonds marins du Tribunal international du droit de la mer (partie XV annexe VI), est saisie par la Conseil, au nom de l'Autorité, dans les cas d'inobservations de la Convention (art. 162 u.), les différends relatifs à l'interprétation ou à l'application d'un contrat peuvent être soumis à la demande de toute partie à un arbitrage. L'organe arbitral saisi ne peut cependant interpréter la Convention de 1982 et doit renvoyer le point à la chambre pour décision (art. 188, § 2).

La capacité de l'Autorité à assurer le respect de la Convention demeure limitée.

D'une part, si les activités d'exploration et d'exploitation dans la Zone devaient se généraliser, l'Autorité, compétente en principe pour le contrôle des activités menées dans la Zone, ne serait plus en mesure d'effectuer pleinement ses obligations. En effet, les moyens dont est dotée cette organisation apparaissent insuffisants face au développement de ces activités.[11]

D'autre part, si l'Autorité peut prendre « à tout moment toute mesure » afin d'assurer le respect de la Convention (art. 153 §5), la doctrine s'interroge sur la possibilité et le fondement juridique d'une intervention devant la Cour internationale de justice en cas de manquement d'un acteur aux règles qu'elle a imposé en matière d'environnement.

Notes:

1. Note verbale de A. PARDO, 22e session de l'Assemblée générale, 17 août 1967 (Doc. off. ONU A/6695)

2. Fin 2016, l'Autorité avait signé des contrats d'exploration d'une durée de 15 ans avec 26 contractants.

3. Représentant permanant de Malte, lors de son discours prononcé à l'Assemblée générale des Nations-Unies le 1er novembre 1967 (Doc. off. ONU A / 6695)

4. Jean-Pierre Beurier, L'autorité internationale des fonds marins, l'environnement et le juge, VertigO, sept. 2015

5. CIJ, affaire relative au projet Gabcikovo-Nagymaros (Hongrie c/ Slovaquie), 25 septembre 1997

6. Mer, La gouvernance des mers et des océans, entre mythes et réalités juridiques, Etude par Nathalie ROS, Journal du droit international (Clunet) n° 3, Juillet 2017, doctr. 8

7. Quéneudec Jean-Pierre. La position française sur le problème de l'exploitation des fonds océaniques, Norois, n°121, Janvier-Mars 1984. La France et la gestion du milieu marin et côtier. pp. 9-13

8. Lévy Jean-Pierre, La Commission préparatoire de l'Autorité internationale des fonds marins et du Tribunal international du Droit de la Mer, Annuaire français de droit international, volume 34, 1988. pp. 735-763

9. Avis du 1er février 2011 rendu par la Chambre pour le règlement des différends relatifs aux fonds marins du Tribunal international de droits de la mer

10. Observations de l'UICN dans le cadre de la consultation organisée dans le cadre de l'Avis du 1er février 2011

11. « L'AIFM est (…) légère de quelques dizaines de fonctionnaires (au lieu des 5000 souhaités par les 77 États au cours des débats) » (Jean-Pierre Beurier, L'autorité internationale des fonds marins, l'environnement et le juge, VertigO, Hors-série 22, septembre 2015)

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Les défis de l'Etat de droit:

LA SUITE LOGIQUE DE LA RÉVOLUTION ACCOMPLIE EN ARMÉNIE

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Abstract:

Au printemps 2018, un soulèvement populaire pacifique fait accéder à la tête de l'Arménie l'ancien journaliste et opposant politique Nikol Pachinian, suivi par la victoire flagrante de son parti aux autres scrutins. Grâce à une stratégie originale, cette révolution « de velours » a permis de rompre avec l'élite politique issue du système soviétique, sans pour autant soulever l'ire de Moscou. Il appartient maintenant aux institutions et au peuple de construire un Etat de droit durable, malgré les pressions géopolitiques et les difficultés sociales propres au pays.

Si 1991 correspond à la sortie officielle de l'Arménie de l'ère soviétique, 2018 est sûrement l'année de sa sortie du post-soviétisme. Le 8 mai 2018, l'arrivée au pouvoir de Nikol Pachinian, le « candidat du peuple » comme il se désigne lui-même, a fait entrer l'Arménie et ses moins de trois millions d'habitants dans une nouveau paradigme politique, en rupture avec des dirigeants reliques du système communiste. L'année 2018 a consacré cette rupture alors que le parti « Mon Pas » de Pachinian a raflé les sièges du Parlement à plus de 70%. Ces législatives anticipées étaient les premières élections justes réalisées dans le pays, et plus largement dans la région du Sud Caucase[1], au regard des standards internationaux. Le cas arménien ne semble cependant pas répondre aux « modèles » des révolutions de couleur géorgiennes et ukrainiennes, ni à une montée populiste. En effet, « Mon Pas », c'est avant tout celui des Arméniens qui se sont mobilisés contre l'oligarchie au pouvoir en ménageant la Russie, en utilisant les réseaux sociaux comme stratégie de mobilisation, et en impliquant toutes les régions du pays. Alors que des manifestations avaient déjà eu lieu en 2008, c'est en 2018 que la rupture se réalise. « Mon Pas » a désormais toutes les cartes institutionnelles en main pour faire valoir la démocratie, l'Etat de droit, la prospérité économique et, peut-être, la refondation de ces relations extérieures. Cependant, cet optimisme doit être modéré par le jeu des puissances internationales, qui, depuis plusieurs siècles, investissent le Caucase, mais aussi par des logiques internes qui grèvent les finances publiques et affectent la société.

En 2015, la révision de la Constitution substituant au régime présidentiel un système parlementaire a permis à Serge Sarkissian et à son parti républicain (HHK[2]) majoritaire de rester la classe dirigeante du pays. Ce tour de passe-passe politique n'est pas un cas à part dans l'espace post-soviétique si l'on repense au duo Poutine-Medvedev en Russie, au renforcement des pouvoirs du Président géorgien sous Saakachvili en 2004, et en 2010 avec le même jeu de rôle entre Premier Ministre et président. Citons enfin dans cette liste non exhaustive l'Azerbaïdjan dont son Président Ilham Aliyev a fait réviser la constitution en 2016 pour étendre le mandat présidentiel de cinq à sept ans. Dès lors, en Arménie, la réélection truquée de Sarkissian à la tête du pays, non plus en tant que Président mais comme Premier Ministre, a déclenché une vaste protestation à travers tout le pays.

A cet élément déclencheur faut-il encore ajouter des causes plus profondes. Depuis la montée en puissance du HHK, les leaders du parti ont fait en sorte d'éradiquer toute alternative politique. Les institutions, les médias, les grandes entreprises, l'éducation, ont été aux mains des partisans de ce parti. Economie et politique se sont retrouvées aux mains des mêmes hommes. De fait, la société arménienne a été dépolitisée et contrainte dans ses libertés économiques, subissant la corruption. Face à ces dérives, les citoyens s'étaient déjà mobilisés en 2008 pour rejeter la présidence de Sarkissian, mais la révolution a été violemment réprimée par un bilan de dix morts.

L'année 2018 a intégré un nouveau facteur ayant certainement permis la réalisation de cette Révolution de Velours. Il s'agit de la jeune génération, celle qui n'a jamais connu l'URSS, celle qui parle anglais et russe, celle qui voyage, celle qui utili-

« Ce tour de passe-passe politique n'est pas un cas à part dans l'espace post soviétique »

se les nouvelles technologies pour contrer les médias officiels dont la ligne éditoriale est dictée par le pouvoir. Les réseaux sociaux ont donc constitué un formidable moyen de faire circuler les informations, d'avertir des points de rassemblements et des mouvements de police, et ce au-delà même de Erevan, la capitale-Etat, puisque toutes les régions ont joué un rôle clef dans le changement de pouvoir. Cette jeune génération est peut-être aussi celle qui veut construire son pays, qui veut promouvoir sa culture, et qui ne souhaite pas se voir attribuer l'étiquette « pro-russe » ou « pro-occidentale ».

Aussi, la forme même des protestations fut originale. Si la voie des urnes n'a pas fonctionné, celle de la désobéissance civile fut efficace. Cette stratégie fut décrite dès le XIXème siècle par David Thoreau. Selon lui, « ***le droit à la révolution est celui de refuser fidélité et allégeance au gouvernement et le droit de lui résister quand sa tyrannie ou son incapacité sont notoires ou intolérables*** ». En Arménie, les citoyens ont cessé d'être l'instrument de ce gouvernement injuste en refusant le contrat social fallacieux qui consistait à participer à la corruption. La confiance entre le peuple et le gouvernement a été rompue dès lors que ce gouvernement n'était plus un intermédiaire du peuple mais un organe autonome détaché du peuple. Concrètement, les citoyens ont cessé de travailler, ils ont bloqué les routes menant à Erevan, ils ont dénoncé la corruption quotidienne qui prévalait pour se rendre chez le médecin, pour obtenir un diplôme, pour détenir un monopole économique. Loin d'utiliser la violence pour se faire entendre, l'ambiance était plutôt à la danse et aux barbecues en pleine rue. La pensée révolutionnaire a été renouvelée, tirant les leçons des manifestations précédentes.

Pourtant, les Arméniens eux-mêmes mettaient peu d'espoir dans cette révolution, surtout ceux qui ont participé aux manifestations de 2008. Pachinian a disséminé la révolution en marchant dans ce petit pays montagneux de 29 700km^2 pendant plus de six semaines, accompagné de quelques cinquante personnes. Ce groupe contestataire s'est démultiplié en arrivant à Erevan, puis dans les autres régions du pays sans que Sarkissian ne les arrête fermement. La police, d'abord aux ordres de l'État, a finalement pris le parti de la société. La stratégie d'immobilisation du pays par des dizaines de milliers d'Arméniens de manière décentralisée et sans violence a désarmé le Premier Ministre, qui a finalement démissionné le 24 avril en admettant la contestation dans un communiqué officiel : « Et moi, je me suis trompé ». Cette affirmation n'apparaît pas comme une esquive pour échapper à une quelconque sentence, mais plutôt comme un réel aveu : il n'est pas possible de soumettre le peuple. D'ailleurs, comme 48,6% des Arméniens, il s'est rendu aux urnes lors des législatives du 9 décembre et reste le dirigeant du HHK. Le taux de participation a pourtant diminué de 12% par rapport à 2017 pour les mêmes élections. Les soutiens de Pachinian affirment que les listes sont à réactualiser du fait de la forte émigration, tant mondiale que nationale, mais surtout que les citoyens ont cette fois pu voter en leur âme et conscience, sans le couperet de la corruption. Mais on pourrait d'autre part se risquer à affirmer que cette faible participation serait l'expression d'une opposition unique, et donc certaine de l'emporter. En effet, cette révolution est la volonté de rupture avec l'ancien système post-soviétique, et moins celle d'une adhésion complète à une politique réformiste.

Contrairement aux autres pays de la région, cette révolution a fait table rase de tout le système post-soviétique qui mélangeait incestueusement les pouvoirs politique et économique. Les citoyens se sont fédérés autour de la figure de Pachinian en tant que représentant de cette rupture. Un véritable candidat « hors système » issu de la société civile. Nikol Pachinian est né dans le nord-est de l'Arménie, son engagement civil se manifeste lorsqu'il participe au mouvement de soutien d'un Haut-Karabagh sous juridiction arménienne en 1988, alors que ce territoire à majorité ethnique arménienne est enclavé en Azerbaïdjan et source de nombreuses tensions entre les deux pays. Pachinian fait de brillantes études de journalisme mais ses critiques politiques sont le motif d'exclusion de son université. Il dirige ensuite un journal d'opposition Haykakan Zhamanak. Ses écrits détracteurs du pouvoir le conduisent à une peine de prison, finalement jamais purgée grâce au soutien massif d'autres journalistes. Il passe cependant deux ans incarcéré pour sa participation aux manifestations de 2008 en tant que leader pour rejeter la présidence de Sarkissian. Il devient en 2012 député dans l'opposition Yelk dont est membre son parti « Contrat civil ». Il devient ainsi la figure dirigeante des manifestations de 2018 en marchant à travers tout le pays et en promouvant la désobéissance civile. La rencontre organisée en avril entre Sarkissian et Pachinian pour sortir de cette crise a tournée court. Ce fut la rencontre du conservateur attaché à son

« ... la démocratie est une chose fragile au regard de la manière dont les dirigeants (...) ont réussi à mettre à leur profit des réformes économiques et politiques." »

pouvoir caché derrière une apparence de démocratie, et celle de l'opposant hors système refusant de se plier aux règles d'un gouvernement injuste. Car avant de reconnaître ses torts et de démissionner, Sarkissian a voulu sauver sa place en se faisant la figure de la démocratie. Il a souligné dans ce bref échange l'illégalité des actes de Pachinian, c'est-à-dire d'un opposant prétendant représenter le peuple avec 8% obtenus aux législatives de 2017. Mais rappelons que de nombreuses infractions avaient été commises lors de ces élections et que la corruption menait bon train. Aussi, cette démocratie de papier n'a pas fait long feu après que le peuple a poursuivi sa protestation dans la rue, alors même que son leader fut arrêté. En définitive, Pachinian a été élu Premier Ministre fin avril. Quand bien même Sarkissian avait démissionné, restait encore sa majorité parlementaire à l'Assemblée. Les Républicains ont été pris dans la panique : fallait-il élire un autre membre du HHK pour se maintenir au pouvoir, mais au risque de faire face à la contestation populaire, ou bien ne fallait-il pas mieux laisser le poste à Pachinian et suivre une période de cohabitation ? C'est seulement le second dimanche que les députés ont élu Pachinian, sous la pression de la rue, et surtout parce qu'une seconde indécision aurait fait éclater le Parlement selon la Constitution.

En dépit de la mise au ban des anciens dirigeants par la protestation populaire, cette révolution n'a pas jusqu'alors bouleversé les relations internationales alors que la région du Caucase a toujours été le lieu d'affrontements des empires perse, ottoman, russe, turc, puis des forces états-uniennes, européennes et enfin l'investissement croissant des nouvelles puissances comme la Chine.

Les révolutions de couleurs en Ukraine ou en Géorgie rendent le cas arménien bien singulier. En effet, contrairement à ses voisins, l'Arménie a opéré sa révolution sur des principes de politique interne. Les slogans brandis et chantés rejetaient la génération soviétique en tant que corrompue, autoritaire, dénuée de tout sens de développement du pays bénéfique à l'ensemble de la population. Ainsi, faire partie de l'Union Économique Eurasiatique (UEE) depuis 2015 ou avoir signé l'Accord de partenariat avec l'Europe en 2017 profitait en définitive aux monopoles économiques appartenant aux membres HHK. Ainsi, loin de prôner une lutte géopolitique en faveur de la Russie ou de l'Europe, la population s'est soulevée pour reprendre le pouvoir confisqué, affirmant que les individus constituent la base de l'État.

En outre, les ONG n'ont pas profité d'un soutien matériel et financier tel qu'elles ont pu en bénéficier en Ukraine ou en Géorgie. L'affrontement qui avait lieu en Arménie n'est pas celui d'un combat pour l'Europe ou pour la Russie, mais véritablement une question de politique intérieure. D'ailleurs, aucune hostilité n'a été lancée à l'encontre de la Russie. Il s'agit d'un partenaire majeure tant pour des questions économiques que pour des questions de sécurité dans un environnement conflictuel avec la Turquie et l'Azerbaïdjan. De ce fait, l'Arménie accueille sur son territoire des bases militaires russes et tempère les tensions qui peuvent ressortir du Haut-Karabagh par sa présence et par la vente d'armes. Face au double blocus sur les frontières est et ouest de l'Arménie, la Russie apparaît comme un partenaire commercial privilégié et indispensable avec 28% de parts de marché en 2017[3]. L'Arménie est membre de l'Union Eurasiatique et de l'Organisation du Traité de Sécurité Collective, toutes deux orchestrées par la Russie. Ces organisations régionales qui sont les pendants du marché commun européen et de l'OTAN rendent l'Arménie fortement liée à la Russie. En matière énergétique aussi la dépendance au "grand frère russe" est grande. En 2017, 80% de ses besoins en gaz étaient couverts par la Russie. D'autre part, l'importante diaspora arménienne en Russie, entre 1,5 et 2,5 millions d'individus, est un facteur indéniable de maintien de bonnes relations.

Enfin peut-être, le climat international a pu être un facteur d'observation et non d'intervention directe de la Russie ou de l'Europe sur le terrain arménien. En effet, les tensions à l'est de l'Ukraine, l'annexion de la Crimée et le conflit en Syrie opposant les russes aux Atlantistes pourrait expliquer le comportement presque passif des puissances internationales. Pour autant, la Russie s'est astreinte à une veille active des événements sud-caucasiens. Le ministre des affaires étrangères russe a ainsi rappelé au nouveau gouvernement arménien son engagement à ne pas poursuivre des individus pour raison politique. Cette intervention du Kremlin répondait notamment à l'arrestation de Robert Kotcharian, ancien Président de la République arménienne, et dont les liens avec Moscou sont très étroits. Cette défiance envers la nouvelle Arménie n'a cependant pas eu d'effet négatif. Ainsi Vladimir Poutine a-t-il félicité la victoire du nouveau Premier Ministre Nikol Pachinian. Plus marquant encore, après une rencontre mi-mai des chefs d'Etat de l'Union

Eurasiatique à Sotchi, l'Arménie a pris en ce début d'année 2019 les rennes de cette organisation. En Arménie donc, la stratégie de l'intervention armée doublée de la manipulation des médias n'est pas adaptée. Au contraire, la Russie a souligné les relations étroites et indispensables qu'elle entretient avec l'Arménie, et renforcé son intégration dans sa sphère d'influence en la plaçant à la tête de l'UEE.

L'élection de Pachinian suivi de la victoire de son mouvement aux municipales d'Erevan et des législatives annoncent de réels changement politiques, économiques et sociaux. Mais la démocratie n'est pas acquise, elle se construit. Le « candidat du peuple » doit répondre à des défis de taille. La politique internationale semble actuellement suivre celle de Sarkissian, mais les affaires domestiques doivent être réformées. La nouvelle équipe gouvernementale veut rompre avec la corruption endémique, créer un climat de solidarité nationale entre l'Arménie, la diaspora et le Haut-Karabakh, mettre fin aux fraudes dans les élections pour instaurer un gouvernement légitime, restaurer la souveraineté de la loi et qu'elle soit la même pour tous, et abolir les monopoles économiques pour développer la croissance du pays, et en faire bénéficier la population, qui, pour un tiers, vit sous le seuil de pauvreté. Il s'agit donc bien des outils permettant l'instauration de la démocratie et de l'Etat de droit comme l'indique Florent Parmentier: « un processus compétitif visant à la création d'un cadre politique régulé et cohérent permettant la gestion des affaires publiques ». « Compétitif » puisque plusieurs acteurs interviennent : des élites politiques, des membres de la société civile, des acteurs économiques, les citoyens, le soutien de la diaspora. « La gestion des affaires publiques » et « un cadre politique » régulé puisque la nouvelle Arménie combat la corruption et assoit effectivement la force de la loi.

La démocratie et l'Etat de droit ne font cependant que commencer. Les effets d'annonce concernant les anciens hommes du pouvoir et la corruption qu'ils entretenaient ne peuvent durer qu'un temps. Le changement à opérer n'appartient pas seulement à la sphère étatique : les mentalités et les pratiques systémiques de corruption demandent un effort long et par le bas. A dire vrai, la mise en œuvre de l'État de droit prendra plusieurs décennies. Mais les Arméniens semblent en bonne voie de changement. Les jeunes qui jusqu'alors étaient enclin à grossir les rangs de la diaspora veulent désormais rester. C'est une réelle fierté pour le peuple que d'avoir réalisé cette révolution.

Cependant, outre la dépendance à la Russie, les dépenses allouées à la défense avec le conflit qui oppose l'Arménie à l'Azerbaïdjan dans le Haut-Karabakh depuis la chute de l'URSS grèvent les finances de l'Etat. La Guerre de quatre jours qui s'est déroulée en 2016 démontre que ce conflit est encore palpable. A ce titre, les dépenses militaires sont croissantes et constituent 4% du PIB national (2,3% pour la France par comparaison), tandis que la recherche et le développement représentent 0,25% du PIB (2,23 pour la France) (World Bank, chiffres respectifs de 2017 et 2015)[4]. Ces dépenses sont autant en moins attribuées à l'amélioration des infrastructures ou au développement de l'éducation par exemple. Ces obstacles de défense nationale peuvent donc être un facteur d'entrave au développement des projets de la nouvelle Arménie.

Enfin, des facteurs proprement politiques pourraient également mettre à mal les ambitions du pays. Puisque les anciens politiciens du HHK ont été expulsés des centres de décision politique, ce sont les agents de la société civile qui se retrouvent sur les bancs du Parlement. Leur manque d'expérience politique et leur indépendance plus grande à l'égard de Moscou peuvent affecter la stabilité des relations internationales et des affaires intérieures. A cet égard, l'élection des porte-paroles du parlement à la mi-janvier a déjà été marquée par des différends dans la coalition. Au-delà de ce manque d'expérience, il semble bien que l'euphorie légitime exprimée après les victoires de « Mon Pas » soit retombé au bout d'un certain temps. Pachinian l'a emporté en raison de son opposition à l'ancien régime, pour la rupture qu'il incarnait. Or, il représentait le seul candidat de cette rupture. De cette manière, la formation d'une nouvelle opposition dans la fibre réformiste qu'a constitué Pachinian est à attendre, sûrement doublé d'une chute de popularité de l'opposant devenu Premier Ministre. Les conservateurs ne sont alors pas bannis à vie de la vie politique. Le parti Républicain de Sarkissian pourrait tout-à-fait réapparaître sous une autre forme et contester les réformes instaurées par le gouvernement de Pachinian.

La mobilisation des arméniens dans les deux dernières décennies pour évacuer les leaders politiques issus du système post-communiste a finalement abouti par une révolution de

velours, c'est-à-dire sans violence et par la solidarité de tous les citoyens. La génération née durant la chute de l'URSS a véritablement été un élément tangible de la réalisation de cette révolution. Quoique les institutions et la population soient entreprenantes dans la construction de l'Etat de droit et de la démocratie, il n'en reste pas moins que des obstacles d'ordre politique et géopolitique risquent de complexifier ce processus.

S'il est encore trop tôt pour évaluer l'efficacité de cette révolution – car la démocratie ne se construit pas en un jour, considérons-la plutôt comme exercice quotidien – elle démontre d'ores et déjà à quel point la démocratie est une chose fragile au regard de la manière dont les dirigeants tel que Sarkissian ont réussi à mettre à leur profit des réformes économiques et politiques. Il ne va pas sans dire que ces manoeuvres ne sont pas propres à l'espace post-soviétique si l'on regarde les réformes entreprises dans des pays de l'est de l'Union Européenne[5]. Le vote n'avait plus aucune force sur ces dirigeants. Il appartenait donc aux arméniens de s'engager personnellement dans une lutte pour l'Etat de droit. Toutefois, cet engagement individuel était motivé par un refus clair et partagé de l'ancien régime, et il paraît naturel que, sur le chemin de l'Etat de droit, cette coalition soit amenée à se diviser, à faire émerger de nouveaux partis politiques, en somme à créer une véritable démocratie faisant vivre la liberté d'expression.

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Climate Change & FINANCIAL (IN)STABILITY

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MASTER POLITIQUES PUBLIQUES [ECONOMICS & PUBLIC POLICY]

Abstract:

Climate change is likely to impact financial stability through different channels. We aim at assessing if those channels are already operating, and how they may operate in the near future. The data and assessments we provide would have to be refined and expanded in order to assess causal relationships, but we nevertheless give a broad picture of the issues at stake. We first focus on physical risks. Climate change, for instance is expected to translate into an increased number of natural catastrophes and weather events that will, if on a sufficient scale, translate into financial instability. We focus on the case of hurricanes in the USA and their impact. We then focus on transition risks. Transition risks should happen when environmental transition policies are implemented. If such a transition is too fast or too abrupt, it may trigger financial instability. Such risks may also materialise when policy announcements are made, since financial agents react to collective anticipations. We investigate the rationale behind this risk, and show the impact on average stock value of big polluting firms of the Paris Agreement. We then explain why climate-related financial risks will remain difficult to assess due to the intrinsic uncertainties of all climate phenomenons. This leads us to the conclusion that climate change might be considered as a "systemic risk" for the financial system. We conclude our analysis with a review of potential public policies that a central bank might want to undertake. While a "green quantitative easing" would imply a change in central banks' mandate, we argue that climate stress-tests and disclosure of risks should become increasingly important in the future.

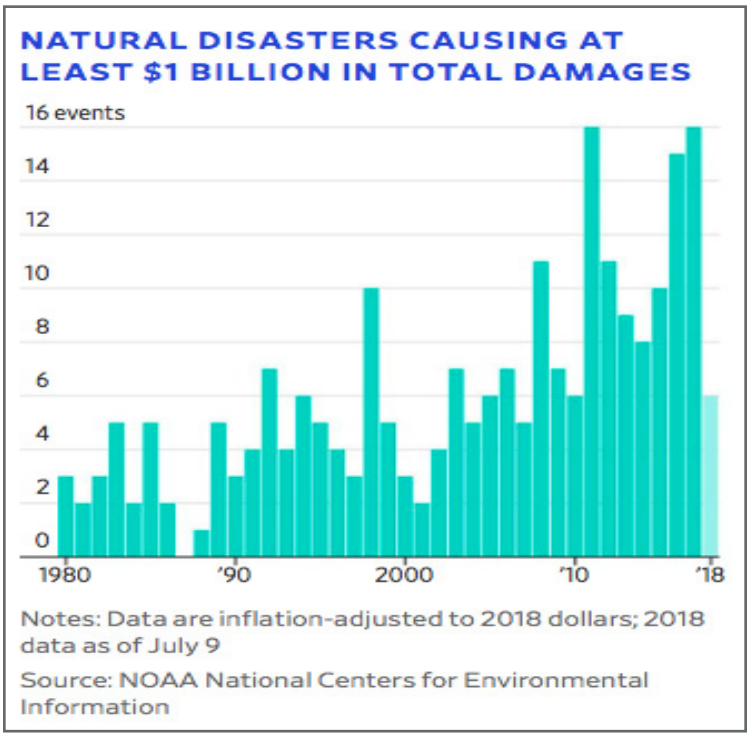
On November 8 2018, Benoit Coeuré, Member of the Executive Board of the European Central Bank, addressed for the first time the responsibility of the ECB concerning climate change. He concluded his speech by saying: "The best the ECB can do is to concentrate its efforts on creating the right conditions for supporting the flow of capital into sustainable sectors. This way, it will remain faithful to its primary objective of price stability (...), while supporting environmental objectives".[1] This seems to be a turning point, with a clear recognition of the link between climate events and monetary policy. Benoit Coeuré is thus following Mark Carney, Governor of the Bank of England, who explained in 2015 the challenges posed by climate change for central bankers. Businesses', politicians' and administrative authorities' short-termism leaves the climate ticking bomb to the next generation. This is what Mark Carney calls "The Tragedy of the Horizon."[2] Nonetheless, this does not come without risks, which have yet to be identified. Therefore, regarding central banking, the first question to ask is whether we have enough theoretical foundations and empirical evidence that climate change might undermine financial stability. If yes, what is the responsibility of a central bank? Is it possible and legitimate to change market incentives for a more sustainable financial system? In our analysis, we will mainly focus on physical and transition risks linked to climate change, excluding other types of risks from our analysis (such as "liability risks", that is "the impact of lawsuits by the ones who suffered from natural catastrophes, aimed at those who are considered responsible for these events"[3]). We will conclude our analysis by listing the tools a central bank could use to mitigate those risks.

The insurance sector and climate change

What are the "physical risks" posed by climate change to the financial system?

Physical risks can be defined as "those risks that arise from the interaction of climate-related hazards (including hazardous events and trends) with the vulnerability to exposure of human and natural systems, including their ability to adapt". (Batten et al., 2016).

There is growing evidence that climate change is likely to have an impact on meteorological events, such as storms, floods, droughts, forest fires and snow. In 2014, the IPCC estimated that "freshwater-related risks of climate change increase significantly with increasing greenhouse gas concentrations (robust evidence, high agreement) (...). The fraction [of the global population] affected by major river floods increases with the level of warming in the 21st century". In Europe, there is "high confidence" that there will be "increased economic losses and people affected by flooding in river basins and costs, driven by (...) coastal erosion and peak river discharges".[4] Concerning hurricanes, in 2012, the IPCC stated that "it is likely that there has been a poleward shift in the main Northern and Southern Hemisphere extratropical storm tracks". Eventually, "drought coupled with extreme heat and low humidity can increase the risk of wildfire". Hence, there is a "high confidence" of "wild-fire induced loss of ecosystem integrity, property loss, human morbidity and mortality as a result of increased drying trend and temperature trend" in North America.[5]



SOURCE: NOAA NATIONAL CENTERS FOR ENVIRONMENTAL INFORMATION

"In Europe there is 'high confidence' that there will be "increased economic losses and people affected by flooding in river basins and costs, driven by costal erosion and peak river discharges.'"

Therefore, a quite substantial number of environmental indicators are expected to change. With the rising number of climate hazards, we might also expect the number of economic losses to increase.

Torsten Jeworrek, a Munich Re[6] board member, explains: "We don't discuss the question anymore of 'Is there climate change' (...) For us, it's a question now for our own underwriting".[7] Indeed, after hurricane Andrew hit the United States in 1992, generating $15.5 billion of insured losses, 13 insurance companies went bankrupt.

What are the challenges related to an increasing number of insured losses?

The number of insured losses is rising over time, with $135bn in 2017 (Munich Re), a record-breaking year. This can be notably explained by hurricanes Harvey, Irma and Maria. Torsten Jeworrek, of Munich Re board, adds: "even though individual events cannot be directly traced to climate change, our experts expect such extreme weather to occur more often in the future".[8]

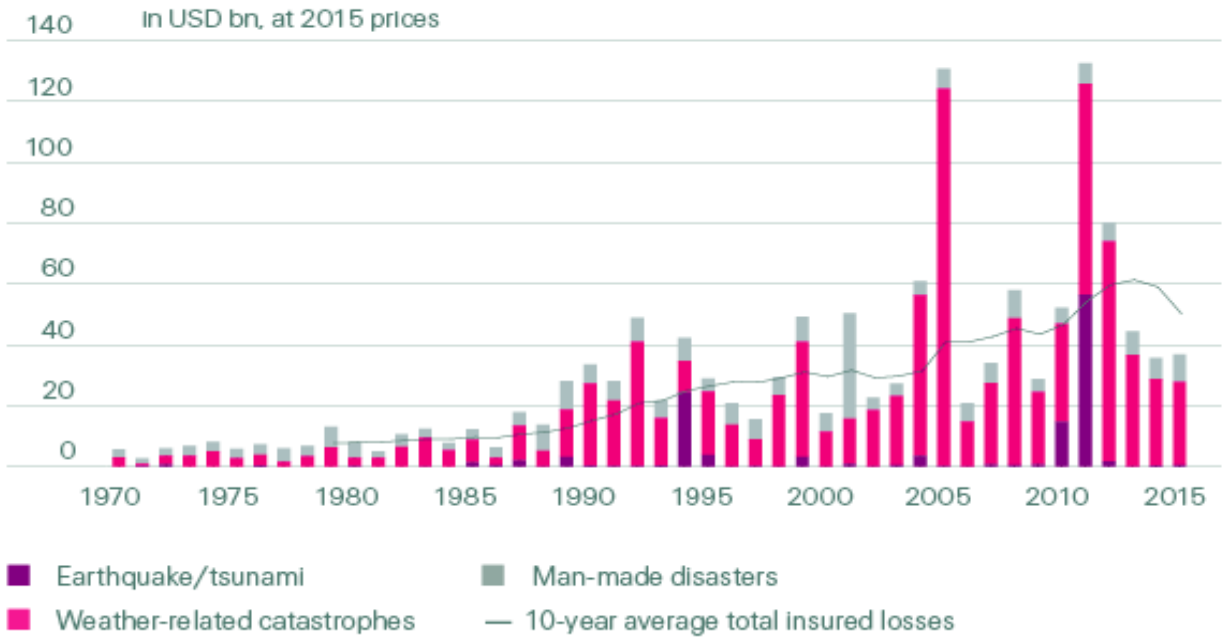
If losses are insured, climate change could potentially affect the balance sheet of insurance companies.

The International Association of Insurance Supervisors (IAIS, 2018) identifies some potential effects of physical risks on underwriting activities, such as: "pricing risks arising from changing risk profiles to insured assets and property (non-life), changing mortality profiles (life and health)", "claims risk arising from confluence of unexpected extreme events". The IAIS highlights that: "Lloyd's market reports to have paid out $5.8bn in major claims, most of which were climate-related. The claims burden disasters in 2017 and has have strong financial impact for non-life insurers, with industry Return on Equity dropping from 11% in 2016 to -4% in 2017".

There are also risks concerning investment activities due to "impacts of physical climate events and trends on assets, firms and sectors, affecting profitability and cost of business, leading to impacts on financial assets and portfolios". The capacity to pay back future claims would be diminished, whenever investments of insurers become less profitable.

Moreover, if insurance premiums are above consumers' willingness to pay, physical risks

Insured catastrophe losses, 1970–2015



SOURCE: MUNICH RE

"Digital democracy is opening possibilities to solve long standing problems of governance"

might lead to market contraction. The US total gross insurance premium went from $0.30 million in 1985 to $2.62 million in 2015 (OECD).[9] We could make the hypothesis that this trend is partly driven by the increasing number of losses. If some consumers cannot afford increasing insurance premiums, the number of customers would decrease. As Thomas Buberl, CEO of AXA, pointed out during the One Planet Summit: "more than four degrees Celsius of warming this century would make the world uninsurable".[10] Some areas might thus not be covered by the insurance market. For instance, "in the US National Flood Insurance Program alone, over $600bn of property within one mile of the beach is covered, much of it will not be viable in coming decades".[11] There are historical examples where coverage decreased after some climate events. For instance, after Hurricane Iniki, "the Hawaiian Insurance Group ceased trading and announced the non-renovation of existing policies, which led to a "climatic domino effect" where other insurers felt obligated to withdraw from the Pacific and Caribbean island nations" (Bank of England, 2015).

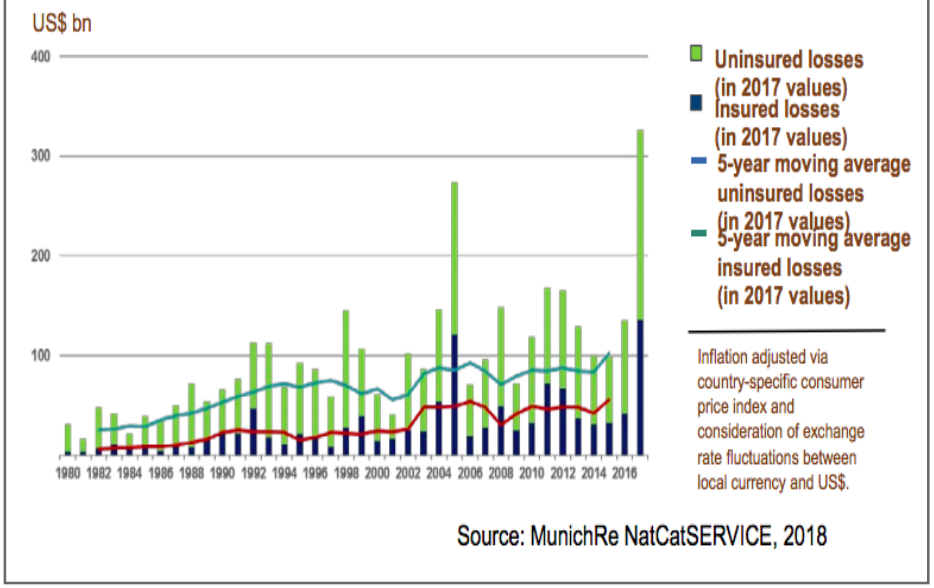
Physical risks are a major concern for the balance sheets of insurers, but for the balance sheets of banks, as well. They might lead to "disruptions to critical insurance services and systemically important financial markets, such as securities lending and funding transactions. Large-scale fire sales of assets by distressed insurers could reduce asset prices which would affect the balance sheets of other financial institutions, such as banks." (Batten et al., 2016). The channel from insurance companies to other financial institutions can work through different mechanisms: funding transactions (if insurers hold large shares of debt securities issued by financial institutions), securities lending activities and reinsurance contracts (if a reinsurance company is in default).

What does the "insurance protection gap" means for the financial system?

If we also include uninsured losses, the amount of weather--related losses reaches $330bn in 2017. Therefore, beyond threats regarding the insurance sector, there is also a concern with "the insurance protection gap."

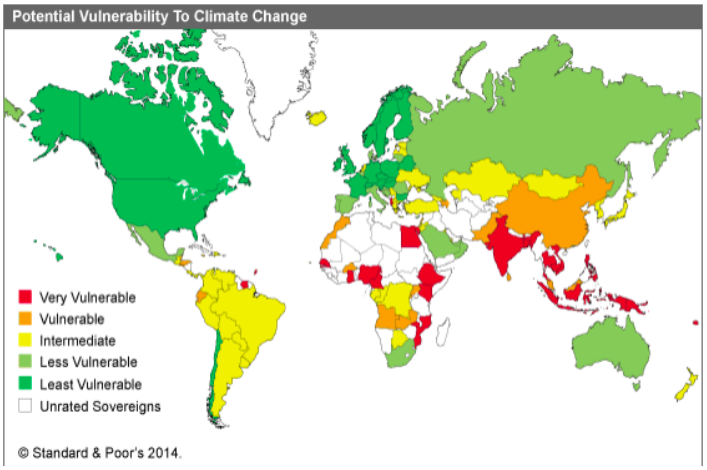
In 2016, ClimateWise estimated at $100bn the gap between "total economic loss and the value of assets that were covered by insurance policies". Nonetheless, this gap has quadrupled over the last three decades (from $23bn). What's more, Swiss Re estimated that "30 percent of catastrophe losses have been covered by insurance in the 10 years prior to 2014. Therefore, the gap is partly falling on governments' shoulders, who are acting as the "insurer of last resort" (Climate Wise, 2016). Hence, according to the American Federal Emergency Management Assistance (FEMA), the National Flood Insurance Program has more and more trouble covering the losses induced by a greater severity of hurricanes or flooding in the past 10 years. The inability of this public insurance program to address uninsurable areas' needs has created a large public deficit. In October 2017, Donald Trump signed a bill forgiving $16 billion, out of $25 billion debt (before servicing).[12]A 2017 report from the American Congress established that: "CBO's estimate of expected claims exceed FEMA's estimate by $1.0 billion. Because of FEMA's estimate is its basis for premium setting, the difference between the two estimates causes premiums to fall $1.0bn short

Figure 3: The Insurance Protection Gap for Weather-related losses



SOURCE: MUNICH RE

of CBO's estimate of expected claims." Therefore, physical risks might affect the credit ratings of sovereigns or municipalities.[13] For instance, due to cyclones, "government finances would deteriorate following the cyclone, leading to an increase in government debt in the most affected sovereigns from 2016 to 2020 by between 7% in Taiwan and a maximum of 18% of GDP for the Dominican Republic, compared with the non-cyclone simulation" (Standard & Poor's, 2015). However, physical risks will fall disproportionately on some regions, especially in the developing countries, that is, the ones who are the least insured. According to Standard & Poor's, there is already a ratings impact of 0.5 up to 2.5 notches for some countries such as Vietnam, Bangladesh or Dominican Republic, concerning the risk of cyclones.



Therefore, physical risks could be transmitted to the financial system through credit risks, for sovereigns, businesses or individual agents. In this case, when goods and property are used as a collateral, or if climate events are linked to decreases in revenues, this could threaten the financial situation of some financial institutions. Physical risks would both increase the probability of default, and create a higher loss given default. Indeed, it is mainly the "uninsured losses that drive the subsequent macroeconomic cost, whereas sufficiently insured events are inconsequential in terms of foregone output" (Von Peter, van Dahlen and Saxena, 2012). These authors find that "a typical median catastrophe causes a drop in growth of 0.6-0.1% on impact and results in a cumulative output loss of two to three times this magnitude (...) well insured catastrophes, by contrast, can be inconsequential or positive for growth over the medium term as insurance payouts help fund reconstruction efforts". Klomp (2014) also shows that out of 160 countries in the period 1997-2010, meteorological and geophysical disasters increase the likelihood of bank default: "Geophysical and meteorological disasters reduce the distance-to-default the most due to their widespread damage caused".

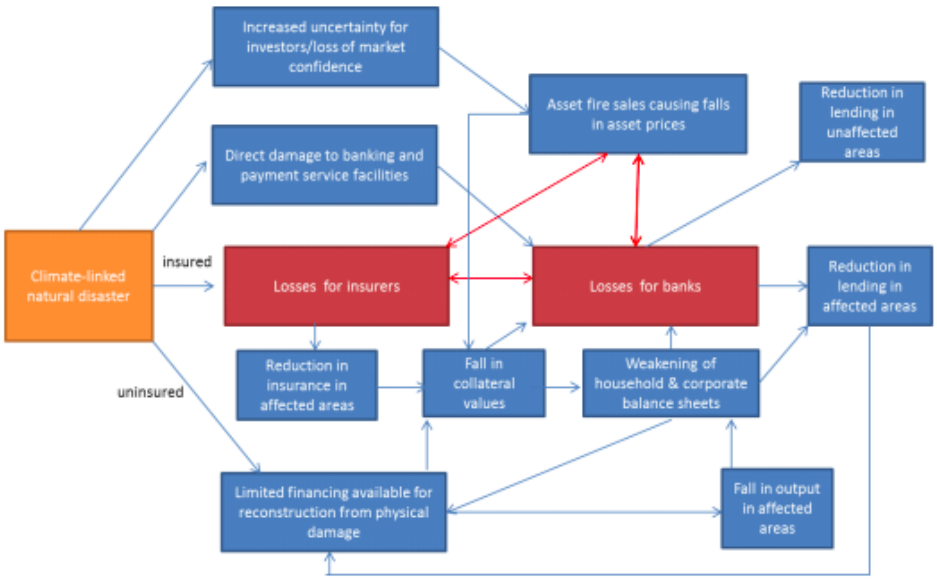
In addition to a rising probability of default, a natural disaster can trigger a reduction in lending activities. Lambert, Noth and Schüwer (2014) find that the Hurricane Katrina in 2005 "increased their risk-based capital ratios after the hurricane". Indeed, "high-capitalized banks react to the lower asset quality through the hurricane by shifting investments from commercial and industrial loans to US government securities and thereby increase their risk-based capital ratios". However, this decrease in bank lending could be associated with a fall in output, which might itself induce losses for banks. A credit contraction, at a time when it is necessary to rebuild a region would also weaken the balance sheets of households and corporates. A reduced insurance coverage would amplify this phenomenon, since collateral values would fall. Therefore, economic agents would have an even tighter access to credit.

What are the theoretical channels explaining how physical risks would result in economic losses for financial institutions?

The Bank of England clarified all the ways through which a natural disaster could induce both losses for insurers and banks (see figure below). The first major transmission channel will depend on the resilience of insurers. If market agents misconceived the probability of a catastrophe to happen, we might expect a fall in asset prices. Nonetheless, uninsured losses are also a concern for the financial sector, with the reduction in creditworthiness of some economic agents.

We must stress that it does not necessarily need a catastrophe to happen in a given region, for a financial crisis to occur. Market sentiment might play a substantial role, even when a natural disaster is not happening directly. For instance, there can be a re-evaluation of risks linked to a specific sector, or region. This might generate "high volatility and trigger an abrupt decline in the value of securities held by the banking sector". In extreme cases, "if investors reassess a bank's balance sheet quality with respect to physical risks, they may decide to no longer refinance that bank"

Figure 2: A transmission map from a natural disaster to financial sector losses and the macroeconomy



(Trésor - French Treasury, 2015).

Physical risks might potentially lead to vicious circles, due to the "financial accelerator". Indeed, Nobuhiro Kiyotaki and John Moore (Kiyotaki, Moore, 1997) explained how an exogenous shock aggravated by credit restrictions would amplify and lengthen business cycles, giving rise to large output fluctuations. The model assumes two types of identical agents: farmers (firms or borrowers) and gatherers (households or lenders). Farmers are good at producing but have a fixed quantity of land at time t, gatherers are less good at producing and possess land. Farmers consume an incompressible share of their production and sell the rest. In order to maximize profit, farmers want to produce more. Thus they want to borrow land from gatherers. A key feature of the model is that lending is collateralized in this economy, i.e. backed with an asset of the same value of the lending, that will be seized by the lender in case of default. Assuming everything else constant, if the price of land is rising, the same amount of land will be more expensive in t +1 compared to t. So the farmer can borrow a lot since his collateral is highly priced. The key point lies in the fact that land is both a collateral and a production factor. As a farmer borrows land, he increases both his production and borrowing capacity. There appears a leverage effect. The increase in production he gets through the increase in capital (namely, land) will in turn increase his net worth, and if prices of land keep increasing, his collateral values too. In t +1 he will have no problems borrowing more (as his borrowing constraint loosened). Eventually, his productive capacity will have increased a lot. This virtuous circle can also happen in the reverse way. Assuming everything else being constant, if estate prices are decreasing, a farmer will not be able to borrow and will even have to sell part of his land in order to reimburse previous debt. Production capacity decreases and so does net worth as well as the value of collateral, and the story repeats itself. We note that the price of land may not be already increasing or decreasing for such dynamics to start. This model enables us to understand how a natural catastrophe (through a lowered value of physical assets) would lead to credit contractions and output fall. This in turn, would weaken households and corporate balance sheets, leading to losses for banks.

The analysis of natural catastrophes on stock prices:

We look at the evolution of financial quotation from regional insurers (and other companies) surrounding the happening of hurricane Harvey in 2017.[14] These preliminary results must be further documented, nonetheless we do see a decrease in the stock exchange values of the main insurers involved in Texas. We could think this drop in value is due to a change in investors' expectations. Indeed, insurers' losses were documented in the media (such as the Financial Times), as well as risks regarding airline companies or major Texan firms (such as ExxonMobil), late August this same year. [15] We find again evidence, suggesting a direct harm to companies we selected. Therefore, further research is needed to know if this downward trend in stock prices is driven by hurricane Harvey. If this is proven to be true, it would mean that physical risks could potentially trigger fall in asset prices, leading to losses for financial institutions or private investors.

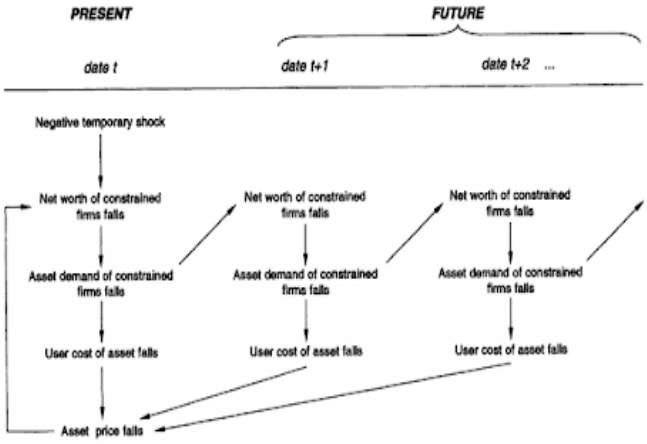
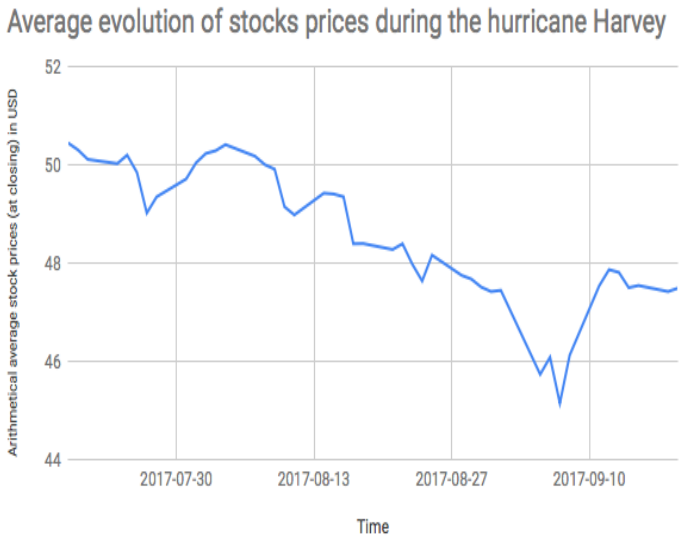
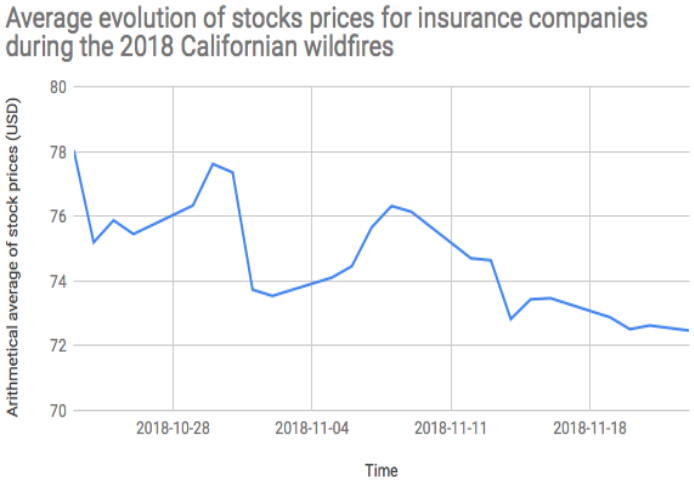


FIG. 1



We now look at the stock prices of three major Californian home insurance companies (All State, State Farm and Farmers Trading Company Ltd), in the aftermath of the California wildfires which happened in November 2018. We find a downward trend, even though we cannot infer any causal relationships from this result. We see a somewhat less clear pattern.

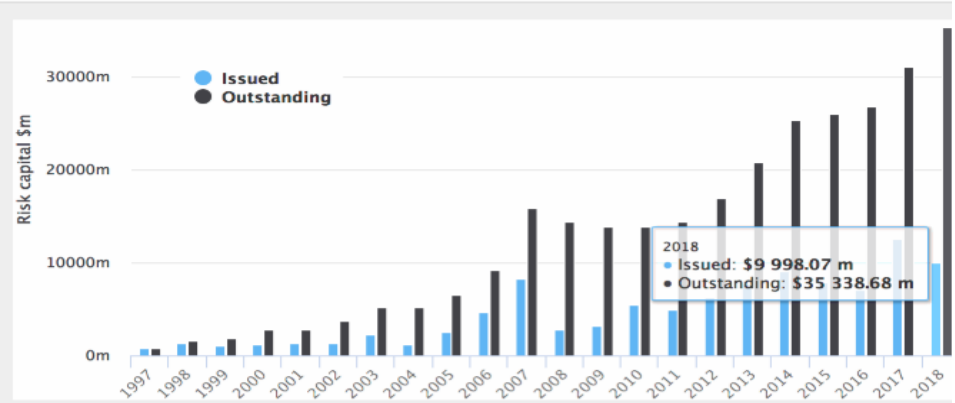
As said earlier, risks will not be distributed in the same way all around the world. The French Directorate General of the Treasury together with the Prudential Supervisory and Resolution Authority identified that "sectors potentially exposed



to physical risks represent 56% of total 'corporate exposure'. The highest exposure appears in the real estate and construction sectors (22.3%), followed by transport (10%) and wholesale trade (9.7%)". For the French banking sector, the risks seem to be relatively low (Trésor – French Treasury, 2015).

The rise of "catastrophe bonds":

A worth noting market reaction to physical risks is the replacement of insurance companies by catastrophe bonds. They are an "example of insurance securitization to create risk-linked securities which transfer a specific set of risks from an issuer to investors. In this way, investors take on the risks of a specified catastrophe or events occurring in return for attractive rates of investment. Should a catastrophe or event occur, the investor will lose the principal they invested and the issuer will receive that money to cover their losses". When a catastrophe occurs, the number of claims sharply increases in a short period of time. Insurance companies usually use third parties, namely reinsurance companies, to spread their risks. However, in that case, bonds replace insurance contracts. Their attractiveness is explained by a high rate of return and their relative disconnection from other macroeconomic variables. Nonetheless, this comes at a price, investors cannot be sure to preserve their principal. On the other side, this reduces the cost of raising capital, in the event of a huge financial loss. Catastrophe bonds could reduce the rise of premiums or the limitation of coverage. Nonetheless, the increasing number of such risky financial assets also



Catastrophe bond issuance and outstanding by year through 2018 (Click the image for an interactive chart)

show that traditional instruments to hedge against risks might become less relevant in +2°C world.

"Transition risks", how public announcements related to climate change influence financial markets

What do we actually mean by "transition risks" and how could some assets become "stranded"?

Transition risks can be defined "as the risks of economic dislocation and financial losses associated with the transition to a lower-carbon economy" (Batten et al., 2016). There is a possibility of a quite substantial loss in the value of assets related to carbon-intensive environments.

The hypothesis of a carbon bubble states that some financial assets might be overvalued. Indeed, the Carbon Tracker Initiative estimates that to "reduce the chance of exceeding 2°C warming to 20%", the global carbon budget for 2000-2050 is around 880 GtCO2 (Carbon Tracker Initiative, 2011). Nonetheless, the total carbon potential of earth's known fossil fuel reserves is estimated at 2795 GtCO2, that is five times the budget planned for the next 40 years. According to the IEA, the carbon budget would be reached in 16 years' time, if consumption does not slow down.

Moreover, the top 100 oil and gas companies can potentially emit 745 GtCO2. "his exceeds the remaining carbon budget (...) by 180 GtCO2". Hence, "using just the listed proportion of reserves is enough to take us beyond 2°C of global warming". If we want to still stick to that limit, considering reserves held by governments, "only 149 of the 745GtCO2" can be used. This leads to the conclusion that there is a possibility of some assets of these companies to become "stranded", if carbon becomes 'unburnable'. The report from the Carbon Tracker Initiative further explains: "up to 80% of declared reserves owned by the world's largest listed coal, oil and gas companies and their investors would be subject to impairment".

A carbon budget depends on analytical assumptions. The future amount of stranded assets is not fully certain.

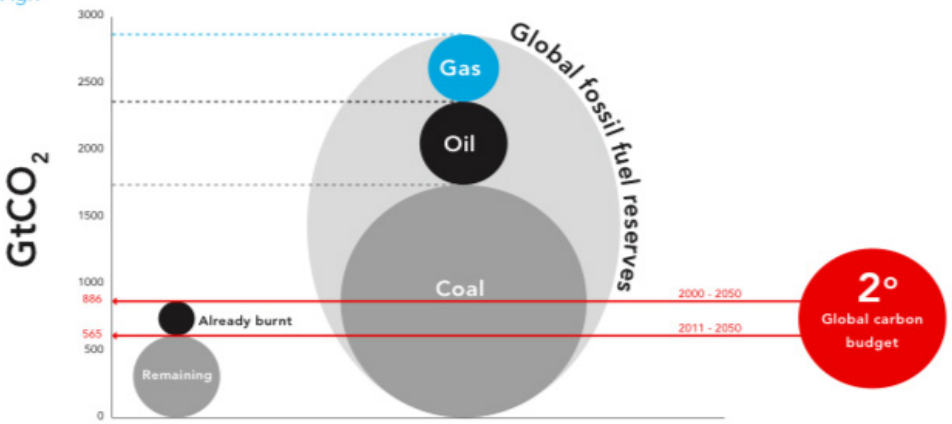
However, even with full investment in CCS (carbon capture and storage technology), a carbon budget would not increase by far more than 12-14%, since it is a new technology which has yet to be developed. In any case, only 20 to 40% of current proven reserves could be used.

What does that mean for the financial sector?

The Carbon Tracker Initiative quotes a report from McKinsey and Carbon Trust demonstrating that 50% of the value of oil and

Comparison of the global 2°C carbon budget with fossil fuel reserves CO_2 emissions potential

Fig.1

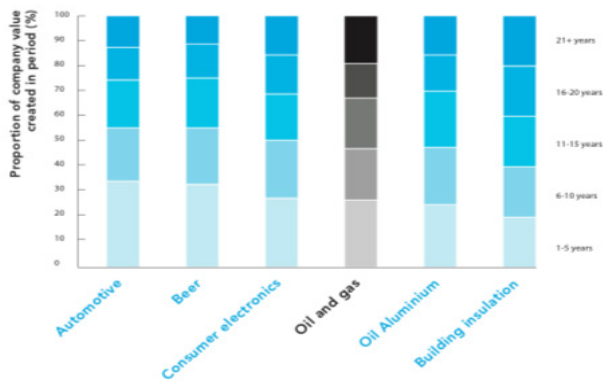


gas companies "resides in the value of cash flows to be generated in year 11 onwards". Market agents seem to react to a company's future reserves. For instance, when in 2004, Shell announced that its level of reserves would be 20% lower, its share price decreased by 10% in a week (resulting in a loss of £3 billion).

The energy transition impact on the expected loss of carbon-intensive companies will depend on the policy scenario chosen by governments. A study from Kepler-Cheuvreux (Lewis, 2014) takes the IEA scenario ("450 Scenario") consistent with a + two degree world, and estimates that "fossil--fuel industry stand to lose USD28trn (in constant 2012 US dollars) of gross revenues over the next

Maximum temperature rise (°C)	Fossil fuel carbon budget 2013-2049 ($GtCO_2$)	
Probability of not exceeding temperature threshold	50%	80%
1.5	525	-
2.0	1075	900
2.5	1275	1125
3.0	1425	1275

Fig.7



Source: Carbon Trust and McKinsey & Co. analysis
Note: Analysis based on discounted cash flow valuations of hypothetical but typical companies, using typical company discount rates.

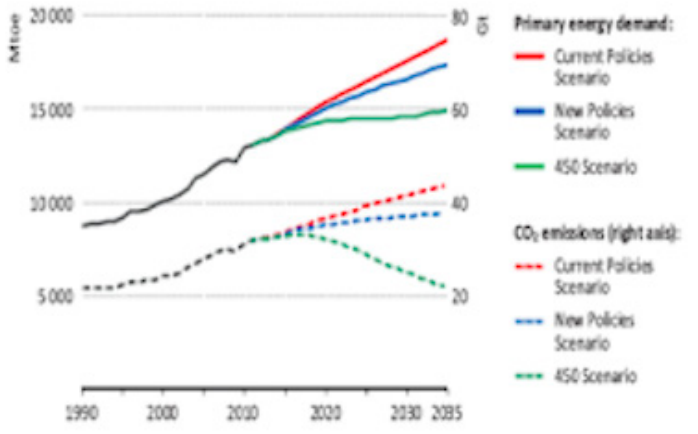
two decades, compared with business as usual (...) the revenues most at risk would be concentrated in the high-cost, high-carbon sources of production [namely] deepwater, oil-sands and shale-oil plays". While the Current Policies Scenario only considers "policy firmly enshrined in legislation", the 450-Scenario is more ambitious. The 450-S also implies lower volumes in order to reach carbon neutrality by 2050[17].

Compared to this baseline scenario, fossil fuel prices are projected to be lower, if countries implement more stringent regulations in order to diminish their carbon emissions. This will reduce the profitability of heavy projects with a high cash cost per barrel.

Lower demand accompanied by lower price explains why fossil-fuel companies could face substantial financial losses. The global market capitalisation of fossil-fuel companies was a $5trn in 2014. HSBC (Robins, 2012) looked at the effect of US$50 price for oil and gas barrel, and estimated that the impact on equity valuations is "in the range of 40-60% for most companies". However, not only fossil fuel industries would be impacted by stranded assets, but also other economic agents using fossil fuels such as car producers.

A sudden shift to more pro-environmental policies would trigger a stronger repricing of carbon--intensive assets such as fossil fuel reserves, but also of all assets related to the use of fossil fuel. (European Systemic Risk Board, 2015). A late transition would not be without risks for the financial system. According to the European Systemic Risk Board, "fossil-fuel firm and electricity utilities

Chart 1: Global demand and emissions by scenario



Note: Mtoe = Million tonnes of oil equivalent; Gt = gigatonnes.

Source: IEA, 2013 World Energy Outlook (© OECD/IEA)

Table 6: Fossil-fuel import prices under the 450S in real terms (constant 2012 USD per unit)

Fuel	Unit	2012	2035	2035
Oil	bbl	109	100	-8.3%
Natural Gas				
US	*mmbtu*	2.7	5.9	118.5%
Europe	*mmbtu*	11.7	9.5	-18.8%
Japan	*mmbtu*	16.9	11.7	-30.8%
Steam coal	tonne	99	75	-24.2%

Source: IEA, 2013 WEO (© OECD/IEA)

are substantially debt financed, exacerbating the potential financial stability impact of a sudden revaluation of stranded assets".

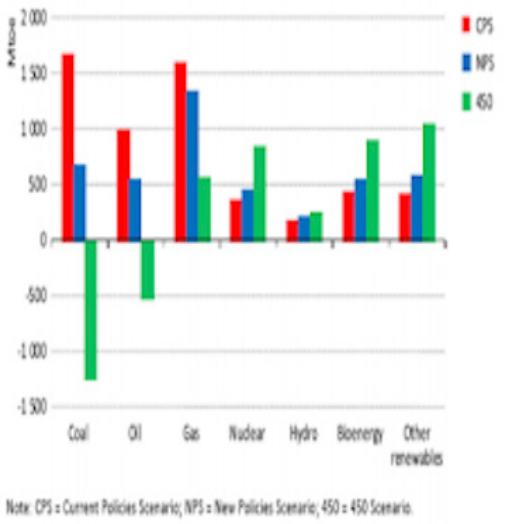
In 2015, fossil-fuel and carbon-intensive companies represented one third of the $2.6trn leveraged loan market. In the European Union, total exposure of the financial system (banks, hedge funds, insurers) exceeds €1trn, and losses would be ranging from €350 to €400bn under "an orderly transition scenario" (Weyzig, 2014). The first-order impact seems relatively small, relative to the overall size of the financial sector, but feedback loops are a source of concern. At a global level, losses could be more or less substantial, depending on substantial technology diffusion (with higher energy efficiency and lower fossil fuels demand) or on a steady continuation of investment in fossil fuels. Under the first assumption, a two-degree scenario means that the discounted cumulative fossil fuel value loss to 2035 could reach US$4 trillion (with a 10% discount rate). If instead, there is some technology diffusion, the potential loss decreases to US$3 trillion. We can identify two channels which could threaten financial stability: "wealth losses and value of fossil fuels companies" and "macroeconomic change (GDP and structural change)". OPEC countries, Russia and the US would be the most heavily impacted by the economic losses due to stranded assets (Mercure et al., 2018).

The possibility of a late transition

One can explain the transition risks using game theory. Carbon-intensive companies will invest in CCS or other technologies reducing carbon emissions, if and only if they believe that at time t +1, government will "shut down unabated electricity production". Then, their investment will be worthwhile. However, if the government does not decide to invest in the ecological transition at time t, there might be a "high carbon equilibrium" where, it will be anyway too late to invest in carbon-reducing technologies, since the costs would be too high.

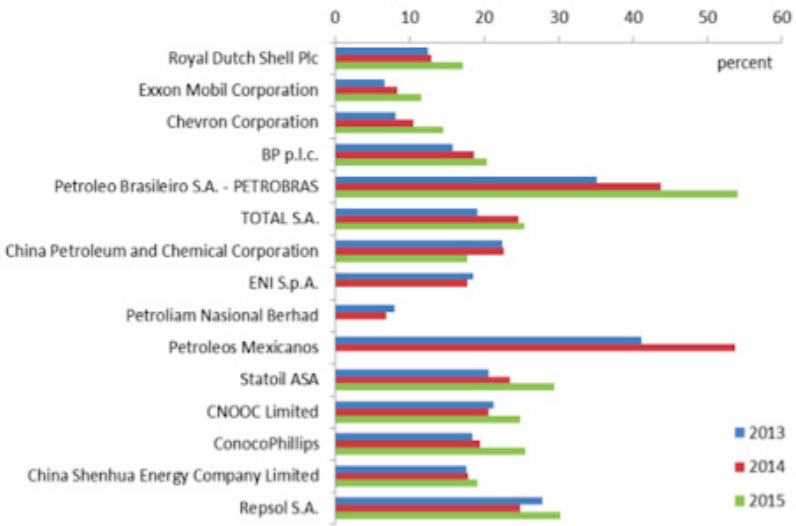
Nonetheless, one cannot rule out a sudden change in gover-

Chart 2: Change in global demand by fuel and scenario



Source: IEA, 2013 World Energy Outlook (© OECD/IEA)

Figure 4: Debt-to-asset ratios of major oil companies, 2013-2015



Sources: Moody's and authors' calculations.
Note: The ratio is calculated as short-term plus long-term debt as a percentage of total assets. 2015 figures are presented where they were available.

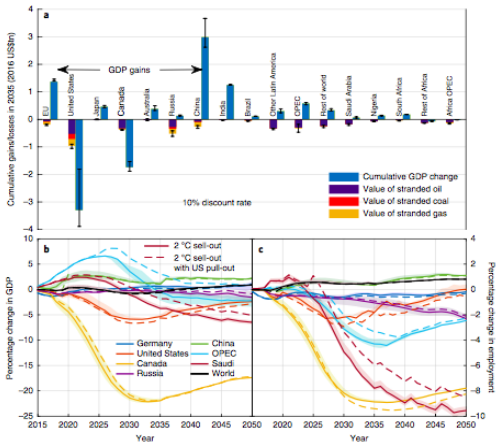
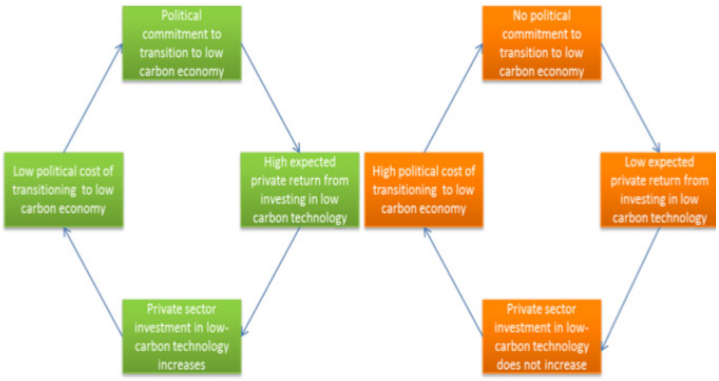


Fig. 3 | SFFA losses and impacts across countries. a, Discounted cumulated fossil fuel value loss to 2035 for oil, gas and coal, and GDP changes up to 2035, between the 2 °C sell-out scenario and the IEA expectations scenario (see Supplementary Table 2 and Supplementary Fig. 4 for other scenarios and aggregation methods). Negative bars indicate losses. Error bars represent maximum uncertainty on total SFFA generated by varying technology parameters (see Supplementary Table 3 and Supplementary Note 2; Supplementary Table 4 provides a breakdown for individual fuels). **b**,**c** Percent change in GDP (**b**) and labour force employment (**c**) between the 2 °C sell-out scenario and our Technology Diffusion Trajectory non-sell-out scenario (solid lines), and between the 2 °C sell-out scenario with a US withdrawal from climate policy and our Technology Diffusion Trajectory non-sell-out scenario (dashed lines).

Figure 3: 'Low carbon emission' and 'high carbon emission' equilibria



nments' policies. If a government was to force a sudden reduction in the amount of carbon emissions, then the value of a firm could decrease quite dramatically. In that case, one ends up in a bad equilibrium where "some fossil fuels and unabated power plants become stranded."

This late transition would in turn trigger financial instability with repricing of financial assets. As said earlier, major carbon-producing companies rely on debt to finance themselves.

The analysis of COP 21 and the "One Planet Summit" on stock prices

In order to construct the following graph, we took the average of all stocks from the below-mentioned companies (which gather car-producing

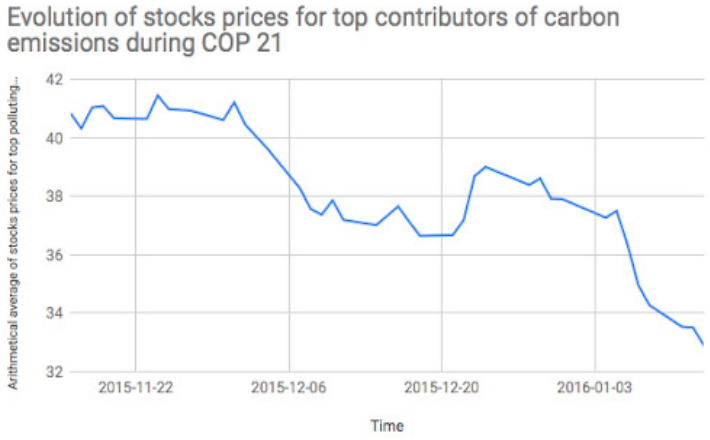
Table 1: Stylised payoffs of electricity companies under different scenarios about climate change policy

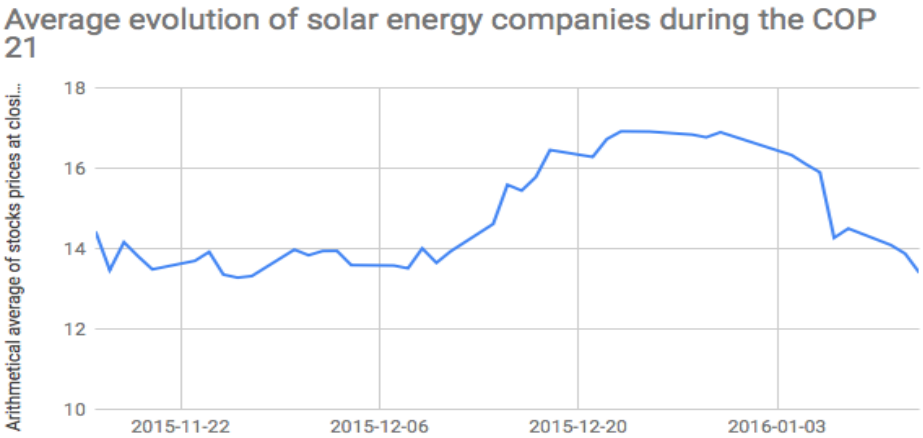
	Government shuts down unabated electricity production at T+1 (low emission)	Government continues to allow unabated electricity production at T+1 (high emission)
Invest in CCS at T	$(P_H\text{-}A)R\text{-}i_T>0$ 'low-carbon equilibrium'	$(P_L\text{-}A)R\text{-}i_T<0$ 'low-carbon investment becomes loss making'
Don't invest in CCS at T	0 'some fossil fuels and unabated power plants become stranded'	$P_LR>0$ 'high-carbon equilibrium'

companies, as well as some of the top 100 most polluting firms listed in the Carbon report).[18] For non-US-based companies, we converted stock prices by using the yearly exchange rate. Then, we plotted values for each day, and observed that indeed, the value of stock prices for these major companies is, on average, decreasing.[19]

If we compare our first estimation with the evolution of prices with three major companies involved in the solar energy (7C Solar Paken, Atlantica Yield, Canadian Solar), we observe, on the other hand, that stock prices increased quite substantially. These first striking results demonstrate for us the need to further investigate these findings, with an expanded database, and controls for sample heterogeneity.

The One Planet Summit[20] was co-organized by the French government, as well as the World Bank and the United Nations. It has been officially supported by 89 top French companies, which released public statements of their strategic action to tackle climate change. Our hypothesis is that





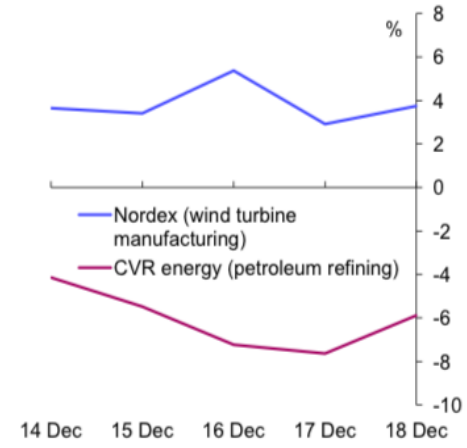
these announcements worked as a temporary "signalling effect" during that time. Indeed, if we take the average of stock prices at that time, we can see a local pinnacle on December 12th 2017. Nonetheless, the overall impact, if ever there is one, seems relatively limited.

Are investors already taking into account transition risks?

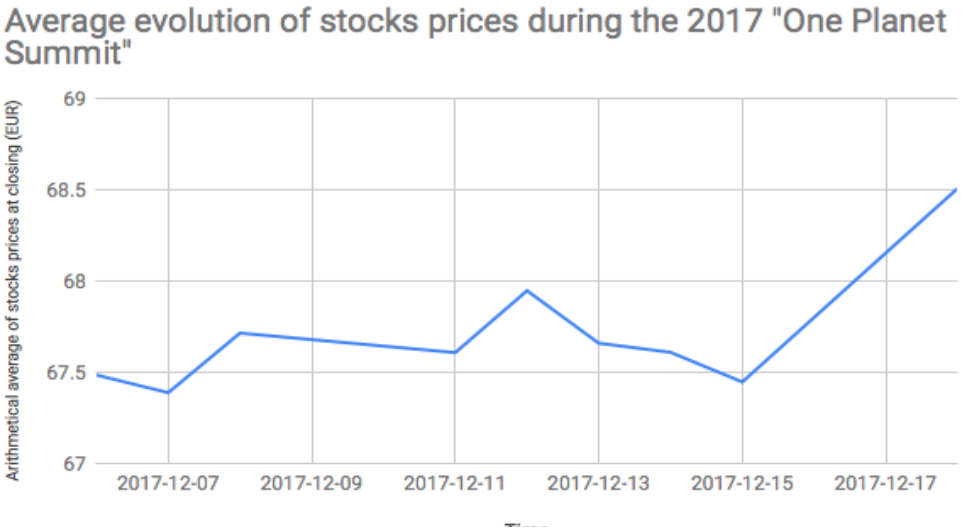
Vikash Ramiah, Belinda Martin, and Imad Moosa (Ramiah, Martin, Moosa, 2013) looked at the impact of 19 announcements of environmental regulation on the Australian Stock Exchange equities over the period 2005-2011. They see an "abnormal return of -31%" in the energy sector after Australia submitted its target range to the Copenhagen Accord. They point out that "60% of the Australian stock market was influenced by these policies". It is primarily the oil and gas, real estate and the general industrial sectors which experienced abnormal negative returns, especially the electricity companies which saw a -2.84% abnormal return. The authors understand "abnormal return", using a capital asset pricing model. Nonetheless, this enters in contradiction with the analysis of COP 21, conducted by the Bank of England (Batten et al., 2016). The authors computed "cumulative abnormal returns experienced by a petroleum refining company (CVR Energy) and a wind turbine manufacturer (Nordex)" in the aftermath of the Paris Agreement. They find negative, but insignificant results, concerning CVR Energy. However, the return on this specific renewable energy company is both positive and significant.

Corroborating this finding, the publication of a paper in the Nature journal of science highlighting that only part of oil, coal and gas reserves could be emitted not to go beyond the 2°C threshold, triggered little market reactions. This took place, despite the fact that this article is considered as "one of the most cited environmental science studies in recent years" (top 0.1% of science papers in 2009). Researchers find an "average price drop of 1.5% to

Figure 5: Cumulative abnormal returns after the Paris Agreement, December 2015



Sources: Thomson Reuters Datastream, Bloomberg and authors' calculations.



2%" in their sample of the 63 largest US oil and gas firms in the two weeks after publication, that is an aggregate loss of $16.5 billion in price drop. Nonetheless, they find no impact on stock prices (in 2012-2013), due to news related to the carbon bubble (Griffin et al., 2015).

Why don't we see a sudden movement in stock prices? It might be because investors are expecting some public compensations for their stranded assets. Another study, based on a German climate policy case, suggests that investors do care about stranded asset risk (Sen, von Schickfus, 2017). This policy intended to target lignite assets, and the authors find that "investors did not react to the announcements of the initial (...) extra fee on carbon emissions". "Only announcements that the compensation mechanism may not go through due to violating state aid rules resulted in a significant and negative reaction". Indeed, investors did not react to the first proposal of taxation, but only to the news that there will be no compensation mechanism from the German state : "only on the publication dates of the media reports of the assessment do we observe a significant reaction" on the three main German utility companies (RWE, E.ON, EnBW). The authors conclude that investors "do price in the stranded asset risk, but with an expectation of compensation". Therefore, it implies that a clear strategy to fight climate change, with a credible announcement that carbon-intensive companies will not be compensated, would incentivize investors to consider transition risks in their valuation procedures. This limited reaction might also be explained by the fact that investors actually integrated CCS. It has been shown that there has been "significant positive reactions to CCS breakthroughs" between 2011 and 2015 (Byrd et al., 2016). Other explanations would state the fact investors are skeptical about the demand for oil and gas to decrease in the following years. (Griffin et al., 2015). Moreover, we cannot rule out the fact that investors lack the appropriate information to value some firms. Indeed, Griffin and his co-authors find "no mention of unburnable carbon or an equivalent phrase" in the 10-K filings of top US carbon-emitting companies, which are required by the Security and Exchange Commission.

Nonetheless, there is also growing evidence that "green" assets are more highly valued (Baker et al., 2018). The authors find that "green bonds will sell for a premium". Hence, "after controlling for numerous fixed and time-varying factors, [they] find that green bonds indeed are issued at a premium, with yields lower by several basis points". Indeed, "overall average after-tax yields are somewhat lower for green bonds than ordinary bonds, at 2.28% versus 2.50%". Green bond are priced as if they were 'half a notch' more highly rated". Concerning the CBI certified bonds, authors demonstrate that they have "yields 26 basis points lower than ordinary bonds with similar characteristics and timing". Even with the addition of several controls and interactions, "the average difference between the after-tax issue yield on CBI certified green bonds and ordinary bonds amounts to 15 basis points per year". This is why, even if there is a cost to pay for a bond to be certified, the premium that an issuer can obtain could be a substantial incentive for divestment. They also find that "green bond ownership is more concentrated, with a subset of investors holding them at higher weights, particularly when the par value is small or the bond is especially low risk". The fact that both pricing and ownership effects are stronger for certified green bonds, emphasized the need for a reliable taxonomy (see section IV).

The cost of inaction

The cost of inaction can be identified through the "climate value-at-risk" (Dietz et al., 2016). A value at risk can be defined as: "the size of loss on a portfolio of assets over a given time horizon, at given probability". This estimate can also be seen as "a measure of the potential for asset-price corrections due to climate change". The authors use an aggregated Integrated Assessment Models, in order to get the "probability distribution of the present market value of losses on global financial assets due to climate change". For this, they consider the present value of future interest payments (which is a discounted cash flow). The climate value at risk is then estimated, taking into account GDP projections depending on climate change (since corporate earnings represent a given share of GDP and since part of these earnings ultimately benefit to the ones who own financial liabilities), the stock of global financial assets, and a discount rate. They use the Dynamic Integrated model of Climate and the Economy (DICE), developed by Nordhaus. It is a neoclassical growth model, where individuals trade off their consumption today with their consumption in the

Table 2 Probabilities of exceeding $T = 5°C$ and $T = 10°C$ for given $G =$ ppm of CO_2e

G:	400	500	600	700	800	900
Median T	1.5°	2.5°	3.3°	4.0°	4.5°	5.1°
$Prob_P[T \geq 5°C]$	1.5%	6.5%	15%	25%	38%	52%
$Prob_N[T \geq 5°C]$	10^{-6}	2.0%	14%	29%	42%	51%
$Prob_P[T \geq 10°C]$	0.20%	0.83%	1.9%	3.2%	4.8%	6.6%
$Prob_N[T \geq 10°C]$	10^{-30}	10^{-10}	10^{-5}	0.1%	0.64%	2.1%

future. The DICE model includes natural capital as an additional kind of capital stock. This model might include a constraint over a certain limit in temperature rise. The authors explain that their Integrated Assessment Model leads them to estimate a climate value at risk of 1.8%, representing an amount of $2.5 trillion. This result comes from a scenario where the increase in global mean temperature in 2100 is 2.5°C above pre-industrial levels. They also see that risks are heavily concentrated: "the 95th percentile is 4.8% and the 99th percentile climate VaR is 16.9%". The most interesting element in this analysis is that results differ depending on the scenario chosen. If we want to limit warming to no more than 2°C with a probability of ⅔ , then "the expected VaR is [only] 1.2%, the 95th percentile is 2.9% and the 99th percentile is 9.2%". The estimated present value of a loss to 2100 (using the current sock of global financial assets) is about $2.5 trillion (but $24.2 trillion at the 99th percentile). It can be reduced to $1.7 trillion ($13.2 trillion at the 99th percentile), under a two-degree scenario. However, according to these authors, most of the costs will arise in the second half of the century. Depending on the discount rate that is chosen, losses can vary quite substantially. In the event of a 5°C warming, the present value of potential losses would reach US$7trn to 2100 (and $13.8trn with 6°C warming), that is "more than the total market capitalization of the London Stock Exchange". However, if the authors choose the same discount rates as the Stern Review, the present value of losses jumps to US$43trn, with a 6°C degrees warming.

Therefore, under a pure cost--benefit analysis, it makes sense to mitigate the rise in global temperatures, since the latest this transition happens, the higher the transition risks (and so the costs for the economy) will be.

Fat-tail probability distributions,radical uncertainty & the hypothesis of a climate related systemic risk

The essential problem with climate change is the radical uncertainty of its consequences. Weitzman argues that we have to take into account the possibility of extreme values, due to probability distributions of climate events. The probability that temperatures will rise dramatically does not follow a normal distribution, but rather a fat-tail distribution, with still a substantial likelihood that one observes a radical increase in temperatures. "What is especially striking to me is the reactiveness of high-temperature probability to the level of GHGs." He further emphasizes: "Deep structural uncertainty about the unknown unknowns of what might go wrong is coupled with essential unlimited downside liability on possible planetary damages".

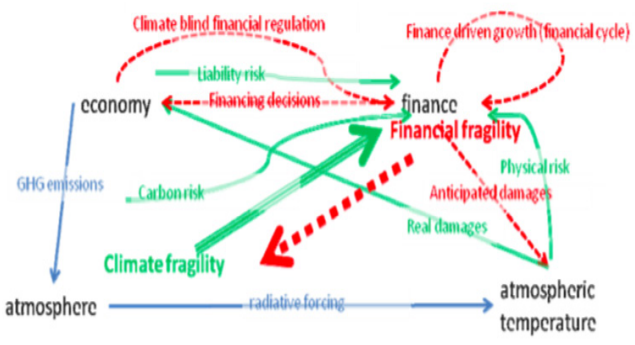
Weitzmann identifies a long chain of structural uncertainties, among which: "unknown base-case GHG emissions", "how available policies and policy levers will affect actual GHG emissions", "how and when GHG stock concentrations translate into global average temperature", "how global average temperature decompose into specific changes in regional weather patterns", "what discount rate should be used" and which utility function to apply (Weitzmann, 2011). Indeed, beyond the uncertainty about the political cycle, there is also a question of economic modelling which remains quite difficult to solve. Nordhaus explained: "there has been virtually no work applying Weitzman's insights in empirical IAMs (...) the question is particularly demanding because it requires estimating the shape of the tails of distributions for events, such as damages to future consumption, where there is very sparse experience on which to estimate the distribution" (Nordhaus, 2013). The fat-tail distribution implies nonetheless that market agents cannot rely on historical data to measure their future risks. Therefore, the question of modelling dynamic interactions becomes particularly important. There is a need to develop complex and adaptive systems, as climate is itself a complex sys-

tem. In mathematics, this is defined as a system with multiple interactions, and characterized by some features such as: nonlinearity, spontaneous order (with no leader but only local interactions), or feedback loops. In order to forecast the future impact of climate-related risks on the financial system, it becomes necessary to develop models with "network effects that stem from the interactions between agents" and where "disequilibrium phenomena play a key role". For now, models used in central banks or private entities, such as dynamic stochastic general equilibrium (DSGE) do not take integrate climate change or environmental policies (Campiglio, 2018).

This is why Michel Aglietta and Etienne Espagne (Aglietta, Espagne, 2016) argue that the "systemic risk approach arises in concrete economies with incomplete and imperfect markets". Indeed, "the combination of increasing uncertainty on critical climate parameters with the complex political economy of climate policy action cannot be apprehended in a satisfying manner through this traditional first/second-best policy nexus". Therefore, what a climate-related systemic risk means for financial markets is that it could result in "a potential financial turmoil and this in turn can increase the tension around the provision of the ultimate liquidity". They also identify another source of concern, which is that "the power of ultimate liquidity to restore confidence into the payment system can potentially be put into question", since the risks are not confined to the macroeconomic environment, but also affect the "fundamental support of life".

Moreover, when we depart from the hypothesis of static Arrow-Debreu economy with complete financial markets, uncertainty on the value of assets plays a substantial role. For instance, we might not rule out the hypothesis of "sunspots" on financial markets, where the variation of stock prices is disconnected from fundamentals, and only rely upon market sentiment (Cass, Shell, 1983). A report from the Inter-American Development Bank (Caldecott et al., 2016) shows that the financial system did not take well into account climate risks in their strategy. "There is a lack of knowledge of climate issues, particularly in the mainstream investment industry, and a need for easier-to-digest information to assist in the decision-making process." There is also an heterogeneity of awareness: "in Latin American countries, it appears to be a clear gap (…) there is a significant omission, given the region's exposure to environment-related risk factors, [and] the presence of extensive fuel resources that may become "unburnable" given carbon budget constraints".

Figure 5

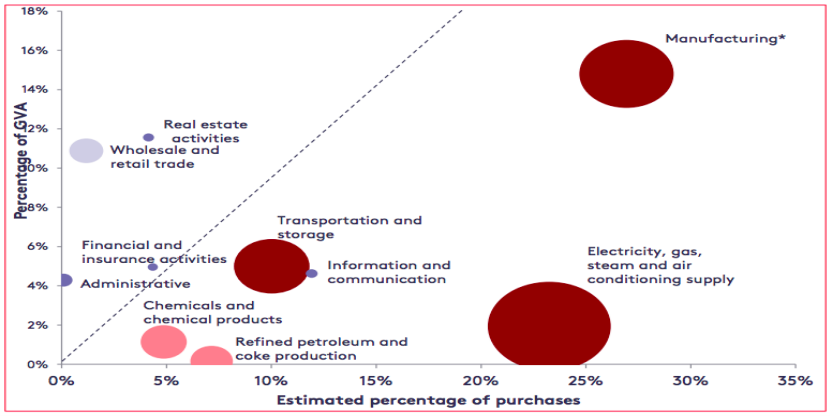


Which financial regulation for climate change?

The debated proposition of a "green quantitative easing"

The supporters of a European finance pact advocate for a monetary policy which would encompass sustainability goals. Recent research highlights that there is indeed a climate impact of quantitative easing. Theory would predict a priori that the effect of QE is neutral and would stimulate the economy as a whole. The law of supply and demand implies that investors would sell assets in high demand to buy other ones, and so asset prices would increase overall. In fact, transmission channels are not perfect and the ECB asset purchasing program apparently is not neutral. To be eligible to the corporate bond purchase program (CSPP) of the ECB, a corporate bond must be denominated in euros, rated "investment-grade" and with a maturity of between 6 months and 30 years. Hence "renewable energy companies, already at a small portion of the bond market to begin with, are not represented at all in ECB purchases, while oil and gas companies make up an estimated 8.4 per cent of its portfolio". Moreover, the CSPP market does not represent the real economy. Hence, "the sectoral contribution of purchases appears to be inconsistent with the sectoral distribution of the euro-area economy in terms of contribution to gross

Figure 3. ECB Corporate Sector Purchase Programme purchases, contributions to euro-area gross value added (GVA) and to greenhouse gas emissions (carbon dioxide equivalent), by NACE sector



value added, and skewed towards sectors characterised by high greenhouse gas emissions" (Matikainen, 2017).

What does that mean? The ECB could ease financial conditions more favourably for carbon-intensive companies. For instance, Henkel and Sanofi demonstrated negative yielding bonds, while their bonds were purchased by the ECB. There has also been an increase in debt issuance. It seems that CSPP-eligible bonds were relatively more favoured than other types of bonds. Therefore, when a central bank buys some assets in large quantities, this might send a signal to market participants that this one is relatively less risky, or more liquid. We might consequently fear some long-lasting consequences of quantitative easing, which could favour incumbent industries.

One could imagine the implementation of a "green quantitative easing" by the ECB, expanding purchases in green bonds. This proposal remains highly controversial. This would mean a change in the mandate of the central bank, which remains price stability in the eurozone. Moreover, low-carbon assets tend to be riskier ones, and this could reduce the quality of a central bank's portfolio. In addition, the number of purchasable assets would decrease, if the ECB had to take into account environmental standards. Jens Weidmann, President of the Deutsche Bundesbank advocated for instance that: "some observers are actually calling for monetary policy to take climate risks into account. However, neutrality is an important principle of the Eurosystem's operational framework. (...) to avoid opening Pandora's box, we should not award preferential treatment to green bonds (...) monetary policy should not be overburdened by other policy objectives".

What remains today is indirect forms of green quantitative easing, as the ECB dedicates 10% of its public sector purchase program to European institutions such as the European Investment Bank, which itself gives 25% of its lending facility to environmental projects.

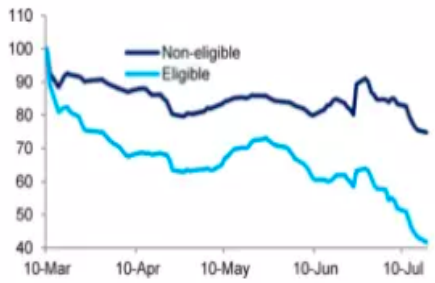
Should we aim at a financial regulation taking into account environmental constraints?

Even if they did not implement a green "quantitative easing", some central banks have chosen to go further. Emerging markets are the ones which went the furthest in climate-related financial regulation. For instance, the Reserve Bank of India "requires that commercial banks allocate a certain proportion of lending to a list of "priority sectors", which now includes renewable energy" (Campiglio et al., 2018). Banque du Liban also already incentivized commercial banks to "increase the share of green lending projects of their loan

Figure 4. CSPP-eligible bonds, spread performance of those bought so far vs. those that haven't, Indexed

Source: Citi Research, ECB, Markit 100=June 8th

Figure 5. € iBoxx Corp, CSPP-eligible vs ineligible constituents, Indexed,



Source: Citi Research, ECB, Markit 100=March 10th

portfolio" through the allowance of lower reserves". The People's Bank of China is about to implement such measures in its Macro-Prudential Assessment framework (Campiglio et al., 2018). The Bangladesh Bank (Barkawi, Monnin, 2015) "provides a BDT 2 billion refinancing line to promote green finance. (...) Bank loans for projects in [solar energy, biogas and effluent treatment projects] can be refinanced by Bangladesh bank at 5% provided that the interest charged to bank customers does not exceed 9%". In addition, the Bank provided US$200 million in a longer-term refinancing window to "green initiatives including water and energy efficiency measures in the textiles industry". There is also a credit quota of 5% for green loans. The Bank of Japan (Bank of Japan, 2010) has adopted a relatively similar financing scheme, offering preferential rates to financial institutions which finance "green" businesses.

In Europe, the EU High-Level Expert Group on Sustainable Finance published a proposal to create different capital requirements, depending on the direction of loans towards a greener economy or to carbon-intensive sectors: "a well-identified "green" and, potentially "brown" asset class is needed to which differential capital requirements could be applied" (HLEG, 2018). However, this requires creating an appropriate taxonomy of what should be denominated as a "green" or "brown" asset. Therefore, the HLEG recommends developing "taxonomies with definition, together with screening criteria, thresholds and metrics covering the complete scope of the sustainability taxonomy framework". The European Commission advised the European Supervisory Authorities to "take into account the environmental, social and governance (ESG) factors arising within the framework of their mandate". They suggest to "provide guidance on how sustainability considerations can be effectively embodied in relevant EU financial legislation". Banque de France is already incorporating the ESG criteria in its investment decisions. If it does not finance environmental projects, a central bank could still stop purchasing assets with high-risk profiles (among which climate-related risks).

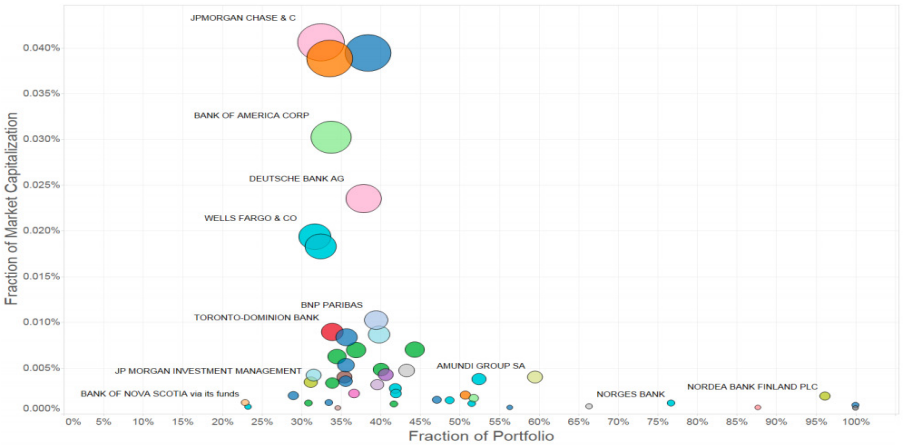
	1st Round Relative Equity Loss	2nd Round Relative Equity Loss
Fossil-fuel	2.55%	(6.08±0.10)%
Fossil-fuel + Utilities	3.79%	(9.75± 0.15)%
Fossil-fuel + Utilities + Energy-intensive	13.18%	(27.91 ± 0.45)%
Fossil-fuel + Utilities + Energy-intensive + Housing + Transport	15.09%	(30.24 ± 0.40) %

Some of these measures are again subject to ontroversy (such as the creation of different capital ratios for "green" and "brown assets"). First, restraining credit access to carbon-intensive companies might increase their cost of finance, and therefore delay their investments in emissions-reducing technologies. Moreover, easing credit requirements might trigger a "green bubble", and have a negative effect on the soundness of banks. There is also the question of the screening of projects, which comes at a cost. Indeed, banks may not be accustomed to judge if an investment should fall under a green label or not. Eventually, nothing would prevent major carbon--emitting companies to finance themselves on financial markets where this type of prudential rules isn't applied. There would be thus a need for an international coordination.

Climate stress-tests and disclosure of risks:

There is still a consensus over mitigating climate-related risks. In order to assess those risks, it is necessary to develop "climate stress-tests". Thanks to the Orbis database, some researchers pointed out that, although the exposure of banks regarding fossil fuels is quite low (3-12%), 40% of equities would be considered at-risk, if we integrate all sectors (Battiston et al., 2017). In order to do this, they use the "top sectors by direct GHG emissions according to Eurostat", as well as the "carbon leakage risk classification", defined by a 2015 European Commission Directive, as the list of activities which would be impacted by a carbon price. This way, they are able to run a 100% shock in the market capitalization of climate--sensitive sectors for the top 50 EU banks. They also estimate a second round amplifying shock, taking into account the interconnection between financial institutions.

The researchers also look at the types of investors which might be the most heavily impacted by a shock (see figure below). On the one hand, the fraction of market capitalization helps to



RELATIVE EQUITY EXPOSURES OF MAJOR BANKS TO FOSSIL FUEL, ENERGY-INTENSIVE AND HOUSING COMPANIES. BUBBLE SIZE PROPORTIONAL TO TOTAL EQUITY HOLDINGS IN EU AND US COMPANIES

understand the "size of the equity exposure in climate-sensitive sectors" (investment funds hold a greater fraction of the market capitalization of carbon-emitting companies than banks). On the other hand, the fraction of equity portfolio (of the shareholders) quantifies "which actors are potentially more exposed to the climate sensitive sectors" (the authors find that this mainly concerns industrial companies, governments and some credit institutions). Such methodologies could be more and more developed by central banks.

Beyond climate stress-tests, disclosure of risks in various domains is of a critical importance. The Financial Stability Board created a Task Force for Climate-related Financial Disclosures. It identified several areas of disclosure such as: "governance" ("the board's oversight of climate-related risks"), "strategy" (risks related to the "organization's business, strategy and financial planning"), "risk management" (processes to assess risks) and "metrics and targets" (methodologies of risks metrics). With continuing research on how to assess risks, this should lead to a more standardized methodology. Investors must not only have access to information, but also take advantage of metrics, which are relatively easy to compare across businesses. This is in line with the recent steps taken by the Bank of England, which told banks and insurers "to identify a senior executive to take charge of managing climate-change risks and report to the board". The Bank of England, with the ones of Germany, France, Japan and China, considers the risk of climate change as "system-wide and potentially irreversible if not addressed". According to the Bank of England, only "10 percent of banks were taking a long enough view of climate-related risks and on average the banks questioned were found to have a four-year planning horizon". In France, Article 173 of France's Energy Transition Law "requires all major institutions (listed companies but also banks and institutional investors) to evaluate, report and address their exposure to long-term climate--related financial risk" (HLEG, 2018). Haldane, Bank of England's Chief Economist demonstrated that finance is more and more prone to short-termism with the shortening of performance assessment intervals and an increasing frequency of corporate reporting (Haldane, 2010). "In 1940, the mean duration of US equity holdings by investors was around 7 years (…) by 2007, it was around 7 months". This is why the HLEG suggests a comprehensive reform of the financial system from accounting standards (non-financial information, presentation of a more "long term value" rather than a "mark-to-market valuation") to investors duties (investors need to understand ESG criteria and provide relevant information to their clients) and governance ("supervisory manuals should be updated to include sustainability as a risk against which the skills and competences of the members of the governing bodies of companies should be addressed").

Climate change is likely to have an impact on monetary policy, not only because changes in commodity prices would affect inflation expectations, but also because it might heighten financial risks. By including more and more physical and transition risks into their analysis, central banks would remain faithful to their mandate. Further economic research will be needed more than ever, with the development of climate stress-tests, asset-level databases or appropriate frameworks for risks disclosure, in order to design the right financial regulation to adopt, which might include macro-prudential measures in the future. To break "the Tragedy of the Horizon", it becomes imperative to influence assets pricing and to support an accurate understan-

ding of long-term risks by investors. In the end, to be in a world where "every company, investor, and bank that screens new and and existing investments for climate risk is simply being pragmatic[34], information and credible policy commitments will be key.

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D'une expérimentation sociale à une politique publique éducative: un long chemin

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Abstract:

Alors qu'il touche au moins 10% des élèves, le harcèlement scolaire est un enjeu éducatif majeur qui concerne la majorité des écoles et collèges français. Cette importante prévalence justifie donc la nécessité d'avoir un programme de lutte qui puisse être généralisé à l'échelle du territoire national. Toutefois, il n'existe à ce jour pas de preuve solide concernant l'effet des différents dispositifs de prévention sur le déclin de la violence à l'école et du harcèlement scolaire car la majorité des évaluations de ces programmes ne sont pas de nature expérimentale. Afin de répondre aux limites soulevées par la littérature scientifique, le réseau national France Médiation a mis en place un programme de Médiation Sociale en Milieu Scolaire (MSMS) évalué par une équipe d'économistes du Laboratoire Interdisciplinaire d'Évaluation des Politiques Publiques (LIEPP) de Sciences Po et soutenu par le Fonds d'Expérimentation pour la Jeunesse (FEJ). Il s'agit du plus grand essai contrôlé randomisé d'une intervention scolaire pour réduire le harcèlement. À partir d'une étude de cas de ce dispositif, cet article explique quels sont les pré-requis nécessaires à la généralisation d'une expérimentation sociale et quelles sont les difficultés qui peuvent arriver et doivent être surmontées afin d'aboutir à terme à la conception d'une politique publique.

Créé en 2008, le Fonds d'Expérimentation pour la Jeunesse (FEJ) soutient de nombreuses innovations sociales en faveur de la réussite scolaire et de l'insertion professionnelle des jeunes de moins de vingt-cinq ans afin d'éclairer in fine la conception de politiques publiques. La célébration de ses dix ans, le 6 décembre 2018, était ainsi l'occasion de dresser un bilan de ses différents programmes d'expérimentation. Parmi les projets portés par le FEJ, ces dernières années, certains se sont par exemple concentrés sur la question de la prévention et de la lutte contre le harcèlement et la violence à l'école, un problème largement répandu, avec une prévalence d'au moins 10% (Olweus, 1993 ; Debarbieux, 2011), mais qui reste pour autant très mal identifié par les communautés éducatives. C'est pour répondre à cet enjeu crucial que le FEJ a lancé, en partenariat avec l'Éducation nationale, en 2012, un appel à projet afin de mettre en place et d'évaluer simultanément différentes interventions avant de les généraliser. L'une d'elle consistait notamment à faire intervenir en milieu scolaire des tiers (i.e. des médiateurs sociaux) pour développer un climat positif au sein des écoles, faciliter la prévention et l'identification des situations de violence, ainsi que réduire l'absentéisme et l'exclusion. Ce programme de Médiation Sociale en Milieu Scolaire (MSMS), porté par le réseau national France Médiation et évalué par une équipe d'économistes du Laboratoire Interdisciplinaire d'Évaluation des Politiques Publiques (LIEPP) de Sciences Po, est à ce jour le plus grand essai contrôlé randomisé d'une intervention scolaire pour réduire le harcèlement. Il s'agit ainsi d'une étude de cas riche en enseignements pour mieux appréhender les étapes nécessaires au passage d'une innovation sociale à une politique publique éducative, tout comme les difficultés pouvant accompagner ce long processus. Cet article montrera ainsi que (1) si le MSMS remplit les conditions indispensables au bon déroulement d'une expérimentation sociale afin que celle-ci puisse éventuellement être généralisée, (2) les résultats actuels de cette intervention invitent à conduire d'autres expérimentations avant de pouvoir la déployer sur l'ensemble du territoire français.

« au-delà du biais de sélection, d'autres obstacles peuvent semer d'embûch-es le chemin allant d'une expérimentation sociale à sa généralisation. »

I. Le MSMS, une innovation sociale soutenue par le Fond d'Expérimentation pour la Jeunesse (FEJ) et rigoureusement évaluée par une équipe de chercheurs…

Pour pouvoir être généralisée à grande échelle, une mesure éducative doit d'abord démontrer son efficacité et son impact sur le problème qu'elle vise à résorber. Or, la littérature scientifique sur les programmes de prévention et de lutte contre le harcèlement scolaire révèle qu'il n'existe à ce jour pas de preuve solide concernant l'effet de ces différentes expériences sur le déclin de la violence à l'école. A contrario, la rigueur du protocole du projet MSMS est telle qu'elle permet de mesurer une potentielle relation causale entre son intervention et son impact sur le taux de harcèlement et l'amélioration du climat scolaire. En effet, alors que les évaluations conduites jusqu'à présent étaient essentiellement non expérimentales ou quasi-expérimentales — comme le montre la méta-analyse de Ttofi et Farrington (2011) — le design de l'expérience MSMS repose sur la mise en place d'un essai contrôlé randomisé à une très large échelle ; ce qui lui permet d'éviter de souffrir de biais méthodologiques, comme le biais de sélection (i.e. des échantillons qui ne sont pas sélectionnés de manière aléatoire risquent de ne pas être représentatif d'un ensemble plus large de la population), et de garantir ainsi la validité interne comme externe de son évaluation (Karthik et Niehaus, 2017). Au cours de l'expérience MSMS, les 40 territoires de l'échantillon ont en effet été divisés en 2 sites scolaires comprenant chacun 1 collège et 2 ou 3 écoles primaires. Chacun des sites était ensuite placé aléatoirement soit sous une condition contrôle (i.e. non bénéficiaire de l'intervention), soit sous une condition expérimentale (i.e. bénéficiaire de l'intervention). Un tel design permet ainsi de construire un "contrefactuel" et dès lors de comparer les effets d'une intervention à ce qui serait advenu dans un "état de nature" (Gurgand, 2014). Autrement dit, cela signifie qu'une quelconque différence observée entre les deux groupes ne peut qu'être le résultat de l'intervention et non de facteurs externes, et que par conséquent des enseignements fiables et pertinents peuvent être tirés de l'expérience MSMS pour éclairer la décision publique. Une revue systématique sur le recours aux expériences contrôlées randomisées pour les questions d'éducation confirme d'ailleurs qu'un tel design permet bien de démontrer l'effet causal d'interventions éducatives (e.g. 80,8% des expériences passées en revue ont pu générer des preuves des effets des interventions éducatives évaluées) (Connolly, Keenan et Urbanska, 2018).

Mais au-delà du biais de sélection, d'autres obstacles peuvent semer d'embûches le chemin allant d'une expérimentation sociale à sa généralisation. L'un deux est notamment la dépendance au contexte. Autrement dit, quand bien même un impact est démontré à la suite d'une expérimentation, il se pose toujours la question de savoir si les effets obtenus se reproduiront sur d'autres territoires, dans d'autres contextes, dans le cas d'une éventuelle généralisation. Particulièrement difficile à surmonter totalement, comme le rappelle Banerjee et ses collègues (2017), cette limite fondamentale à tout travail empirique (Gurgand,

2018) peut néanmoins être en partie neutralisée par la conduite d'expérimentations à de très larges échelles (Karthik et Niehaus, 2018). Or, là encore, le programme MSMS respecte cette condition indispensable à l'essaimage et tend ainsi à garantir la validité externe de son étude d'impact. En effet, ayant été déployé dans pas moins de 80 collèges et 226 écoles, répartis sur 66 communes et 12 académies, le projet MSMS est en effet la plus grande expérience contrôlée randomisée d'une intervention scolaire pour prévenir et lutter contre le harcèlement. Ainsi testé dans une diversité de contexte, le programme MSMS augmente donc ses chances de réplicabilité sur différents territoires. Au-delà de son rôle d'évaluation, la fiabilité d'un protocole expérimental permet aussi de jouer un rôle instrumental pour favoriser l'acceptation de l'intervention par le gouvernement (Banerjee et al., 2017). Du fait de la rigueur méthodologique de ses expérimentations, le FEJ peut donc être considéré comme un laboratoire d'innovations publiques fondé sur des preuves (McGann et al., 2018 ; Fuller et al., 2016), dont la singularité dans le paysage institutionnel français est en effet de reposer sur des méthodes quantitatives. Or, le cadre organisationnel même dans lequel s'inscrit l'expérimentation est également d'une grande importance afin d'aboutir à terme à une éventuelle généralisation. En effet, il peut, par exemple, être pertinent que l'expérimentation soit conduite telle qu'elle pourrait l'être dans la réalité ; autrement dit, qu'elle ne soit pas mise en place par l'équipe d'experts qui l'évalue mais bien par les acteurs qui pourraient en être également chargés à l'avenir si l'intervention devait être mise à l'échelle afin de se confronter dès la phase d'expérimentation aux obstacles de pilotage. Or, en suivant une logique ascendante de partenariat-public-privé (Kerivel & James, 2018), le projet MSMS s'inscrit dans cette idée de collaboration et de distinction des rôles entre une équipe de chercheurs externes, en charge de l'évaluation, d'une part, et des acteurs des terrains responsables de la coordination du projet, d'autre part (i.e. en l'occurrence, l'association France Médiation devait s'occuper du recrutement et de l'entraînement des médiateurs ; de la recherche de financements et partenaires supplémentaires ; etc.). En partie financé par le FEJ, l'intervention MSMS, a par ailleurs bénéficié du soutien d'un panel d'acteurs très variés — tels que le Ministère de l'Éducation nationale et celui des Affaires Urbaines — qui appartenaient tous à un comité de pilotage auquel France Médiation et l'équipe de chercheurs de Sciences Po devaient rendre des comptes tant sur la mise en place du programme que sur son évaluation. Ainsi, la collaboration avec des partenaires gouvernementaux, dédiant des fonds au projet, peut apparaître comme un atout considérable pour faciliter le bon déroulement d'une expérimentation tout comme pour accroître la fiabilité des résultats de son évaluation. Néanmoins, cela ne garantit pas pour autant la possibilité de passage à l'échelle.

II. ... qui nécessite toutefois davantage d'expérimentations avant de pouvoir être déployée à l'échelle.

La généralisation d'une intervention requiert de comprendre avec précision les mécanismes sous-jacents au phénomène qu'elle cible. Or, à partir des observations empiriques engendrées par l'expérimentation MSMS, est-il possible d'appréhender totalement la théorie du changement conduisant à la réduction du harcèlement ? Alors que les résultats agrégés ne permettent pas de tirer de conclusion générale sur l'efficacité du programme, en regardant de plus près l'hétérogénéité qui s'en dégage — notamment selon l'âge des médiateurs et des enfants — deux effets significatifs peuvent être observés : (1) une diminution de 46% de la probabilité de se sentir harcelé sur la catégorie d'enfants qui était la plus vulnérable à la question du harcèlement scolaire (i.e. les garçons de 6ème) ; (2) les interventions ayant eu lieu avec un médiateur âgé de plus de 25 ans ont eu plus d'effets que les autres (Algan, Guyon & Huillery, 2015). Mais, malgré la robustesse de ces résultats, plusieurs zones d'ombre restent à élucider, notamment sur la question de l'efficacité du programme selon son intensité, ainsi que sur l'âge idéal auquel il vaudrait mieux intervenir. L'absence d'effet notable au niveau des écoles primaires pourrait être dûe, par exemple, au fait que les médiateurs ont passé moins d'heures dans ces établissements que dans les collèges. Une autre hypothèse pourrait être celle de la moindre maturité des enfants de primaire par rapport aux collégiens, plus susceptibles de développer des capacité de self-contrôle (Ttofi et Farrington, 2011). Aussi, pour éclairer ces incertitudes, d'autres expérimentations pourraient être menées en mettant par exemple en place des interventions d'une plus grande intensité. Par ailleurs, d'autres méthodes de recherche pourraient être employées, telles que la passation de questionnaires, d'entretiens qualitatifs ou de tests psychométriques, pour com-

plémenter les résultats des essais randomisés contrôlés et mieux capturer la cause ultime derrière le phénomène du harcèlement scolaire.

A partir des observations empiriques issues de l'intervention MSMS, il n'est donc pas possible pour l'heure d'orienter les politiques publiques sur la question du harcèlement scolaire. Mais peut-être cela sera-t-il possible au terme d'autres expérimentations et des enseignements qui leur seront subséquents. Le problème est que la conduite d'autres expérimentations demande prosaïquement du temps et de l'argent. L'exemple de passages à l'échelle réussi de certains programmes comme "La Mallette des parents" (i.e. des outils pour encourager l'implication des familles dans la scolarité de leurs enfants) ou "Teaching At the Right Level" (i.e. une approche pédagogique pour enseigner à des enfants répartis dans différents groupe de niveau) montrent en effet que ceux-ci ont nécessité plusieurs expérimentations, échelonnés sur plusieurs années. Il leur a donc fallu bénéficier de soutiens financiers et institutionnels importants car comme le souligne Duflot, la généralisation est souvent moins une question de technique que de "volonté politique" (Duflot, 2018). Afin de pouvoir éventuellement être généralisé à une échelle nationale, le programme MSMS va dès lors devoir relever plusieurs obstacles qui dépassent la seule démonstration rigoureuse de son impact. En effet, de nombreuses difficultés sont intervenues pendant la phase d'expérimentation, telles que l'hostilité de certaines écoles à l'accueil de médiateurs venus de l'extérieur ; l'irruption de dépenses imprévues ; le délais de la mise en place des interventions (réduites alors à 13 mois au lieu de 18) ; la nécessité d'inclure d'autres sites comme la Martinique ; etc. En conséquence de ces aléas, l'expérimentation a dû subir quelques modifications par rapport à ses plans initiaux, qui certes permettent de tirer des enseignements sur les obstacles que le programme pourrait rencontrer à l'échelle, mais qui questionne dans le même temps la capacité de France Médiation par exemple à coordonner un programme d'une telle envergure. Aussi, pour réussir l'essaimage du programme MSMS, les équipes en charge de ce projet devront non seulement conduire d'autres expérimentations susceptibles d'apporter des preuves fiables et rigoureuses de son effet sur la réduction du taux de harcèlement, mais également parvenir à surmonter des obstacles organisationnels et institutionnels en faisant preuve de conviction et de persuasion pour communiquer leurs résultats.

Enfin, il peut-être souligné que le temps induit par la conduite de multiples expérimentations peut à terme mener à la conception de politiques publiques inadaptées au nouveaux contexte social dans lequel elles s'inscrivent. Comme la majorité des enjeux sociaux, le harcèlement scolaire est en effet un problème évolutif, dès lors susceptible de se manifester sous d'autres formes au gré des évolutions sociotechniques. En témoigne d'ailleurs le récent appel à projets lancé par Facebook pour juguler le problème du discours de haine en ligne et du 1 cyber-harcèlement. Sans doute, peut-il être ainsi avancé que les phénomènes de harcèlement se produiront dans les années à venir davantage au sein d'espaces virtuels plutôt que dans des milieux scolaires, et qu'ils prendront de plus en plus la forme d'agressions verbales plutôt que physiques. Aussi, est-il nécessaire d'anticiper ces possibles évolutions pour rendre l'intervention MSMS non pas seulement scalable mais aussi durable, c'est-à-dire capable de s'adapter à un nouveau contexte social.

En définitive, la plus grande difficulté du passage à l'échelle d'une innovation sociale à une politique publique éducative semble moins être un problème de spatialité que de temporalité, du fait d'un décalage important entre le temps lisse et long nécessaire à la recherche et l'expérimentation, et le temps court et chaotique dans lequel s'inscrit la conception de politiques publiques. Dès lors quelle leçon en tirer pour de futurs décideurs ? Peut-être celle que la généralisation d'une innovation sociale est un long processus pour lequel il faut s'armer de patience, et duquel on tire sans doute moins d'enseignements mécaniques et reproductibles à l'identique, qu'une meilleure compréhension des difficultés à contourner et des obstacles à surmonter.

Aussi, bien que les résultats issus de l'expérimentation MSMS ne permettent pas à l'heure actuelle de généraliser le dispositif à l'ensemble du territoire française par la mise en place d'une politique publique éducative, plusieurs étapes pour aller vers cet objectif peuvent néanmoins être suggérées à partir des enseignements issus du déroulement de l'expérience et des accrocs qui l'ont ponctuée. En effet, celle-ci a montré que : (1) l'efficacité du programme était accrue lorsque les médiateurs étaient plus expérimentés ; (2) le programme était particulièrement bénéfique pour la catégorie d'enfants qui était la plus vulnérable à la question du harcèlement scolaire (i.e. les garçons de 6ème). Ces deux résultats

prometteurs invitent ainsi à assurer la qualité et la formation du recrutement des médiateurs sociaux et à réaliser un travail de communication sur leur métier ainsi que sur les apports et résultats du dispositif pour permettre une adhésion plus large au programme au sein des professionnels de l'Éducation Nationale qui y ont parfois été réticents.

Toutefois, des zones d'ombre restent à éclairer en déployant d'autres expérimentations avant de pouvoir garantir un essaimage du programme sur l'ensemble du territoire français. La question de l'absence d'effet significatif dans les écoles primaires pourrait notamment être élucidée en conduisante une nouvelle expérimentation dans laquelle la présence des médiateurs au sein des écoles primaires serait aussi soutenue que dans les collèges. Une des limites des méthodes d'évaluation aléatoire est en effet parfois de ne pas tenir compte des effets potentiellement différentiels de l'intervention à l'étude selon les contextes et sur différents sous-groupes d'élèves. Conduire d'autre expérimentation permettraient ainsi d'identifier non pas des relations causales générales mais de discerner plus finement pour quelles catégories d'élèves le programme a un impact et sous quelles circonstances.

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POUR UN CHANGEMENT DE CAP

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MASTER POLITIQUES PUBLIQUES [ADMINISTRATION PUBLIQUE]

Abstract:

Officiellement annoncé en octobre 2017 par le Premier Ministre, le programme Action publique 2022 vise à refonder la fonction publique et la gestion des services publics pour améliorer l'efficacité de leur action -et réaliser des économies au passage. Pour la fonction publique, sa concrétisation dans le projet de loi de transformation de la fonction publique présenté le 13 février 2019, se traduit par une volonté d'élargissement du recours au contrat, par la souplesse des recrutements ou encore par des rémunérations plus individualisées liées à la performance. La modernisation des services publics s'apparente quant à elle à la poursuite des efforts de numérisation engagés par le précédent gouvernement et à une réorganisation de l'action publique territoriale, notamment via la fusion de services et une externalisation croissante vers les personnes privées des missions de service public. Certes, l'action publique est souvent critiquée pour son conservatisme, et l'impératif de transformation de ses modes d'action apparaît faire consensus tant auprès des usagers que des décideurs politiques. Néanmoins, envisager une réforme d'ampleur des structures et modes d'action administratifs sous le seul prisme de la baisse de la dépense publique apparaît problématique, tant au regard des investissements nécessaires à une telle transformation, qu'aux besoins de proximité et d'accompagnement exprimés par les citoyens lors des débats récents. Un autre prisme d'analyse de la réforme de l'Etat est possible, en partant du besoin de tous les citoyens et en considérant le service public comme une chance pour la France.

L'État n'est qu'une coopération de services publics ».[1] En ce sens, ce sont les services publics qui légitiment la permanence de l'action de l'État. Si les services publics viennent à être modifiés, la fonction même de légitimation de l'État est alors atteinte.

Officiellement annoncé en octobre 2017 par le Premier ministre, le programme Action publique 2022 vise à refonder les services publics ainsi que la fonction publique pour améliorer l'efficacité de l'action publique. Pour les usagers, cette réforme vise à améliorer l'accessibilité aux services publics via notamment la numérisation et la dématérialisation des procédures. Pour les agents, cette réforme entend « bâtir un nouveau contrat social » entre eux et l'administration, en instaurant plus de souplesse dans la gestion de la fonction publique. La démarche initiée se défend de ne pas privilégier l'approche budgétaire ; toutefois, des déclarations de l'exécutif en matière de réduction des dépenses publiques laissent entendre que le but ultime, et peut-être primordial, vise à réaliser 30 milliards d'économies. Et, si quelques doutes subsistaient, la suppression de 120 000 postes de fonctionnaires a également été proposée dans la même veine, conformément aux propositions du candidat Macron. D'abord gardé pour secret, le rapport du comité Action publique 2022 a finalement été publié en juin 2018 et s'est doublé de deux comités interministériels de la transformation publique (CITP), de février et d'octobre 2018.

Les transformations afférentes aux services publics ont été au cœur du grand débat national au sein des territoires lancé par le président de la République en décembre 2018. L'approfondissement du débat sur la question des services publics offre donc la possibilité de questionner l'acceptabilité par le corps social de ces réformes du service public et de la fonction publique proposées par Action publique 2022. L'organisation d'une consultation des citoyens sur les adaptations nécessaires et attendues du service public aux grandes transformations qui affectent la société (numérique, migrations, démographie) est une revendication récurrente de l'Association Services Publics, association loi 1901 créée en 1981 (voir encadré), qui s'est donnée pour objet d'engager des réflexions autour du service public, et dont sont membres les deux contributrices de cette note.

I. Transformer la fonction publique : vers un « contrat social » rétréci entre l'administration et ses fonctionnaires ?

Les deux CITP ont tous deux étayé la stratégie de réforme de la fonction publique souhaitée par le Gouvernement dans le cadre d'Action publique 2022, avant la présentation du projet de loi de transformation de la fonction publique au conseil commun de la fonction publique le 13 février 2019. Telle que présentée,[2] cette réforme s'articule autour de quatre axes principaux : la refonte du dialogue social dans la fonction publique, la mobilité des agents publics, qui va de pair avec un élargissement du recours au contrat pour donner davantage de souplesse aux recrutements, ainsi que l'instauration d'une rémunération plus individualisée des agents liée à leur performance. S'agissant du dialogue social, le projet de loi prévoit d'une part la promotion

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d'un dialogue social « plus stratégique, dans le respect des garanties des agents publics ». Concrètement, il s'agit de fusionner les comités techniques (CT) avec les comités d'hygiène, de sécurité des et conditions de travail (CHSCT) et de développer la négociation collective dans la fonction publique à travers la création d'un comité social d'administration. Le projet de loi prévoit en outre de recentrer les missions des commissions administratives paritaires (CAP), en supprimant par exemple l'avis préalable de cette instance sur les questions liées aux mutations et aux mobilités entre fonctions publiques, ou sur les questions liées à l'avancement et à la promotion dans le but de doter les managers d'une plus grande souplesse de gestion des RH. Concernant la mobilité et l'accompagnement des transitions professionnelles dans la fonction publique et avec le secteur privé, le projet de loi prévoit la portabilité des droits du compte personnel de formation en cas de mobilité entre public et privé, ou encore de favoriser la rupture conventionnelle de relation de travail. Alors que le 2e CITP d'octobre 2018 prévoyait que l'Etat se dote d'une structure dédiée à la reconversion et à la mobilité des agents, confiée à la Direction générale de l'administration et de la fonction publique, celle-ci ne semble pas être reprise dans le projet de loi. S'agissant du recours à la contractualisation, elle a pour objet d'être élargie pour « les métiers ne relevant pas d'une spécificité propre au service public ». Les embauches sous contrat de droit privé deviendraient ainsi progressivement la voie « normale » d'accès aux emplois du service public, puisque le projet de loi permettra d'une part le recrutement par contrat privé sur des emplois permanents dans les catégories A, B et C, par dérogation au principe de l'occupation des emplois permanents par des fonctionnaires, et d'autre part la possibilité de nommer des personnes n'ayant pas la qualité de fonctionnaire sur des emplois de direction de l'Etat, des collectivités territoriales et des établissements de la fonction publique hospitalière. De plus, le projet de loi créera un nouveau « CDD de projet » dans les trois versants de la fonction publique pour permettre la mobilisation de compétences externes. Enfin, il est question dans le cadre de ce nouveau « contrat social » entre l'administration et ses agents, d'assouplir le statut des fonctionnaires, pour offrir des possibilités d'évolutions différenciées, via d'une part les rémunérations, et d'autre part la généralisation de l'évaluation individuelle en lieu et place de la notation dans les trois versants de la fonction publique.

Force est de constater que ces projets de réforme s'inscrivent dans la mouvance du paradigme managérial qui innerve la majorité des fonctions publiques en Europe. Il suffit de traverser les Alpes pour observer l'impact du New public management sur la fonction publique italienne. Cette dernière a en effet connu plusieurs vagues de privatisation, en 1993 et en 1997, avec une extension aux fonctionnaires de l'application de dispositions du Code du travail. La « réforme Brunetta » de 2009 a instauré un cycle de gestion de la performance pour toutes les administrations, avec une évaluation à trois niveaux : l'organisme administratif dans son ensemble, les équipes et les individus. Les performances des administrations étaient censées être associées à des récompenses monétaires, mais le champ d'application de cette rémunération aux résultats est resté limité. La raison principale demeure le manque de confiance entre les différents acteurs de ce système, et des attaques répétées de la part du milieu politique envers la fonction publique.[3]

Dès lors, la mise en œuvre en France d'une telle réforme impliquerait tout d'abord nécessairement une application diversifiée au sein du secteur public, car toutes les missions ne peuvent pas être soumises raisonnablement à des objectifs de rendement. De plus, une différenciation implique nécessaire plus de transparence. Mais surtout, récompenser la performance nécessite de payer davantage les agents. Or, non seulement les rémunérations des agents publics ont connu une progression bien timide ces dernières années, mais l'obsession des réductions budgétaires à très brève échéance qui affecte le gouvernement ne laisse guère de doute sur le montant des sommes qui devront remplir ces promesses. Et quand bien même, la motivation principale des fonctionnaires n'est pas la rémunération, y compris, dans les pays les plus engagés sur la voie de la nouvelle gestion publique.[4] Les revendications des fonctionnaires sont plus souvent liées à de meilleures conditions de travail plutôt qu'à une hausse des rémunérations, comme en témoigne les manifestations de policiers en décembre dernier suite aux annonces du ministère de l'Intérieur de revalorisation des traitements pour les gardiens de la paix. L'autre trait de la réforme d'Action publique 2022, à savoir un recours accru à la contractualisation, a été porté avec un enthousiasme réformateur en Italie. Toutefois, le mirage du recours aux contractuels n'a pas réduit l'endettement public, ni amélioré la qualité du service public

pour les usagers.[5] En France, le coût d'un agent contractuel est d'ailleurs estimé entre 20 et 30% de plus que celui d'un fonctionnaire car, à niveau équivalent, un contractuel sera rémunéré plus, et, les cotisations sociales patronales portent sur l'ensemble de sa rémunération alors que celles des fonctionnaires ne portent que sur leur traitement.

La contractualisation de la fonction publique suppose de « déterminer où placer la frontière entre contrat et statut » [6] ou bien de tendre vers une « fonction publique de coexistence » sans chercher à établir une cloison étanche entre espaces statutaire et contractuel, au risque de générer une certaine insécurité juridique. Dans son rapport sur les perspectives de la fonction publique de 2003, le Conseil d'État relevait les problèmes techniques d'un découpage des fonctions régaliennes pour limiter l'application du statut de la fonction publique à ces seules missions, ainsi que leur acceptation par le corps social. Le Conseil d'État notait d'ailleurs « qu'il serait illusoire de penser que, quels que soient le critère de choix et l'importance numérique de la population en cause, il suffirait de soumettre une partie des agents publics à un statut de droit privé pour déboucher sur un régime pleinement adapté aux besoins des collectivités publiques ». En effet, les besoins de l'administration peuvent justifier une soumission au statut de la fonction publique de façon pérenne alors même que la nature de la mission en cause ne relèverait pas d'une spécificité propre au service public. Par exemple, dans son rapport public annuel de février 2018, la Cour des comptes a proposé d'intégrer au sein de l'administration les meilleurs profils dans le domaine de l'informatique. De tels emplois permanents au sein de l'administration permettraient de lever les freins à la transformation numérique de l'État, qui ne peut s'opérer en externalisant trop largement les compétences informatiques. Par ailleurs, il est permis de douter du caractère salvateur et simplificateur du recours au contrat. L'application du droit du travail engendrera la multiplication des conventions collectives et la fragmentation des contrats de travail. En outre, importer la culture gestionnaire du secteur privé après les désastres de la crise économique et financière de 2008, mais aussi de l'aggravation des tensions dans le monde du travail,[7] dont certaines conséquences se retrouveraient dans le mouvement social de ces dernières semaines, [8] ne peut que laisser sceptique.

Au-delà de ces mesures et du discours lissé relatif à l'idée de « bâtir un nouveau contrat social entre l'administration et ses collaborateurs », il convient de s'interroger d'une part, sur le sens de cette réforme, et d'autre part, d'imaginer quelle fonction publique pourrait résulter de ces transformations. En effet, si les moyens de la réforme sont clairement affichés, il est plus difficile de saisir la logique sous-jacente. S'agit-il de circonscrire la fonction publique de carrière aux seules missions ayant trait à l'exercice de la puissance publique, dans la logique allemande de « Berufsbeamtentum » visée à l'article 33 de la Loi fondamentale ? Dans ce cas-là, « on nous change notre État »[9] car une telle définition de la fonction publique induit nécessairement une refonte vers un État plus gendarme que providence. Il peut également s'agir d'un prélude au basculement d'une fonction publique de carrière vers une fonction publique d'emploi, dans la droite lignée de ce qui avait été proposé par le Livre blanc sur l'avenir de la fonction publique de Jean-Ludovic Silicani en 2008. Ce dernier entendait décloisonner les corps des fonctions publiques pour favoriser la mobilité des agents. Cette logique s'inspire largement du système des dépouilles aux États-Unis, qui nécessite un lien de confiance entre les dirigeants politiques des administrations et leurs employés directs, politisant ainsi la fonction publique. Or, l'intérêt du statut est justement d'engendrer « la subordination complète des intérêts privés et des intérêts partisans à l'intérêt général » selon les termes de Gaston Jèze.

Si un constat partagé de la nécessité de faire évoluer le statut émerge, il apparaît plus opportun de maintenir celui-ci en le modernisant. Le statut permet de protéger la continuité, la neutralité et l'impartialité des services publics, tout en assurant un traitement équitable de tous les citoyens-administrés. Des axes de modernisation concrets doivent donc être développés, comme une ouverture de la fonction à la diversité de la société française .[10] Sans remettre en cause le principe des concours, ceux-ci pourraient être adaptés dans un sens moins académique et plus orientés vers le projet professionnel. Par ailleurs, il convient de permettre toute la souplesse nécessaire à la gestion de la fonction publique. À ce titre, le recours au contrat peut permettre de répondre aux besoins du service public sans se substituer aux emplois titulaires. De plus, la mobilité inter-fonction publique doit être encouragée pour promouvoir des carrières moins linéaires. Enfin, le traitement des fonctionnaires pourrait être simplifié et évoluer pour développer et

mieux prendre en compte un intéressement collectif. Les rémunérations pourraient ainsi varier en fonction de la réussite d'un projet par l'ensemble d'une équipe, de façon à responsabiliser les agents de façon collective dans leur travail.

Le débat sur la fonction publique est loin d'être anodin car ce qui se joue derrière est la mise en œuvre de la politique démocratique.[11] Ce sont en effet les fonctionnaires qui font vivre le service public pour tous les citoyens. Celui-ci fait également l'objet du projet Action publique 2022.

II. Transformer le service public, peut-on faire mieux avec moins ?

Le service public apparaît trop souvent présenté comme encalminé dans son conservatisme, alors même que le principe d'adaptation en constitue la ligne directrice, recouvrant à la fois qualité, efficacité, coût. A cet égard, CAP 2022 se veut avant tout l'engagement d'une réflexion globale sur la recherche d'efficacité dans la mise en œuvre l'action publique à travers trois principaux axes : la dématérialisation des procédures administratives, la réorganisation territoriale de l'action publique associée à une plus grande « agilité » de gestion qui ne s'interdit pas le recours accru à des personnes privées. Si l'impératif de transformation de l'action publique est largement partagé, force est de constater que CAP 2022 s'inscrit avant tout dans une volonté de baisse de la dépense publique. En effet, dès sa première partie intitulée « nos convictions » le rapport postule que « la dépense publique n'est pas soutenable » et se conclut sur la nécessité d'« éviter les dépenses inutiles ». A cet égard, il apparaît, en premier lieu, problématique d'envisager une réforme d'ampleur des structures administratives sans y associer un investissement de départ. Plus fondamentalement, il semble qu'une réflexion sur l'efficacité de l'action publique peut difficilement avoir pour origine la baisse de la dépense publique sans engager au préalable un questionnement inclusif et profond sur les moyens de l'action publique en partant des « besoins » identifiés.

Il s'agit d'abord pour CAP 2022 de rechercher une plus grande efficacité dans la mise en œuvre du service public à travers une transformation des modes d'action.

L'utilisationaccrue du numérique par l'administration et le recours à la dématérialisation constituent sans doute l'axe le plus abouti de la réflexion. Au cœur des réflexions sur la modernisation de l'action publique, elle est pourtant « à la fois terriblement démocratique et potentiellement excluante » pour reprendre les mots de Jean Deydier, fondateur et directeur d'Emmaüs Connect, qui lutte contre l'exclusion numérique.[12]

Terriblement démocratique, car elle est associée en premier lieu à une démarche de transparence et de recherche de qualité, à travers le développement d'indicateurs de performance associant l'usager,[13] tels que le taux de satisfaction pour le service des impôts aux particuliers,[14] les délais de traitement des procédures et la satisfaction des usagers concernant l'accueil dans les tribunaux de grande instance, les délais de remboursement et de traitement des dossiers ou la réponse au téléphone dans les caisses de sécurité sociale, etc. En second lieu, cette démarche de numérisation du service public est indubitablement associée à une volonté d'accessibilité, comme en témoigne l'engagement pris sur l'accès de tous les services publics en ligne, y compris via un téléphone mobile, d'ici le 1er janvier 2022. Des mises en œuvre concrètes ont déjà vu le jour, par exemple pour les inscriptions des enfants dans les collèges avec DossierSco. Sur ce point, le deuxième CITP formule des objectifs ambitieux de dématérialisation, notamment les ordonnances chez le médecin ou l'inscription en ligne sur les sites électorales. Cette démarche est aussi associée à la création de nouveaux services en lignes (demandes de CMU-C/ACS, aide juridictionnelle, permis de construire, démarches d'urbanisme). Néanmoins, il est fondamental de garder à l'esprit les risques associés à une dématérialisation accrue. En effet, elle peut s'avérer excluante du fait de démarches qui peuvent apparaître désincitatives (créations de comptes et identifications multiples) ou qui nécessitent en tout état de cause un encadrement ou un accompagnement pour certains publics fragiles, loin de la numérisation. A ce titre, le risque de non-recours pour des prestations uniquement accessibles en ligne (la prime d'activité à partir de 2019, par exemple) est important. Mounir Mahjoubi, alors secrétaire d'Etat en charge du numérique, avait rappelé lui-même que 13 millions de Français n'utilisent pas ou peu Internet et 6,7 millions ne s'y connectent jamais. Cela souligne aussi l'enjeu d'équipement des usagers puisque le Défenseur des droits, Jacques Toubon, a fait valoir qu'en cas de dématérialisation complète des démarches administratives, entre 20 et 25% de la population fran-

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çaise se trouverait en difficulté.

Le deuxième point de la réflexion concerne la réorganisation de l'action publique territoriale, dont les principes ont été dégagés par la circulaire du 24 juillet 2018 et qui doit faire l'objet de propositions de réformes possibles par les préfets. L'idée est de développer des guichets multiservices et polyvalents communs à l'Etat, aux collectivités territoriales et aux opérateurs, dans la continuité des actions déjà engagées autour des maisons de l'Etat et des maisons de services au public (MSAP) sous le précédent quinquennat. La réflexion sur l'Etat et sur les collectivités territoriales comme acteurs de la production de service public dans l'ingénierie locale est à saluer au regard de la multiplication des niveaux d'action administratifs sur certaines politiques publiques comme l'éducation. La fusion de certains services est également à envisager pour en simplifier le fonctionnement (rapprochement des organismes de recouvrement fiscal et social et transfert du recouvrement social aux URSSAF). Cependant, lorsque la réorganisation s'apparente en réalité à une fusion de services elle peut amener à un retrait des services publics au niveau local sur certains territoires. Actuellement, le « taux d'administration », rapport entre le nombre de fonctionnaires et le nombre d'habitants, est en moyenne de 72 agents publics pour 1000 habitants en métropole en 2016. Néanmoins, si l'on met à part à part les régions qui présentent des taux atypiques du fait de la présence d'administration centrale (DOM, Corse, Ile-de-France), l'écart est presque de 20% entre la région la plus pourvue en fonctionnaires civils de l'Etat (PACA) et moins pourvue (Pays-de-la-Loire) et il est de 50% entre la région la plus dotée en fonctionnaires publics locaux (PACA) et la moins dotée (Grand Est), il est enfin de 45% entre la région la plus pourvue en fonctionnaires hospitaliers (Bourgogne-Franche-Comté) et la moins pourvue (Ile-de-France). [15]

En dernier lieu, il ressort tant du rapport que des CITP la volonté d'une action publique plus « agile », qui accroîtrait l'externalisation vers des personnes privées. Il s'agirait tout d'abord de promouvoir une plus grande autonomie pour les opérateurs et administrations de réseau via une approche pluriannuelle et contractualisée, ou encore une transformation du contrôle budgétaire, internalisé auprès des gestionnaires, avec une transformation du contrôleur budgétaire comme conseil et contrôleur de gestion, une fongibilité asymétrique des crédits de masse salariale, une automaticité du report de crédits d'investissement non employés. Cette gestion transformée de l'action publique, déjà largement engagée sur le terrain depuis plusieurs années, implique ensuite le recours accru à des personnes privées, par exemple concernant le service public de l'emploi (en l'espèce, l'exemple montre que non seulement les résultats du privé sont moins bons,[16] mais que les dérives n'ont su être prévenues). Le rapport propose un « redimensionnement » des effectifs de Pôle Emploi en fonction du cycle économique (avec l'hypothèse d'un taux de chômage abaissé de 7% d'ici 2022) et une « ouverture » à des acteurs privés, avec un recentrage sur des missions régaliennes d'indemnisation, de contrôle, et d'accompagnement des moins autonomes. A cet égard, il apparaît que, si une réflexion est à mener sur la pertinence de l'intervention publique, elle devrait l'être sur la base de choix rationnels partant des besoins constatés, qui ne sont pas nécessairement adaptés à un recours au secteur marchand. La vigilance, dans ce domaine pourrait être de privilégier la voie de l'expérimentation ou de l'innovation sociale avec un objectif de retour au droit commun à terme, comme l'a révélé récemment le succès de l'expérience « Territoire Zéro Chômeurs », qui constitue bien une évolution de l'action publique répondant à une économie des besoins, se passant d'intervention privée.[17]

III. Transformer le service public en fonction des besoins de tous les citoyens, une chance pour la France

L'Association Services Publics dont sont membres les contributrices de cette note, partage bien sûr la volonté d'évolution de l'action publique mise en avant par CAP 2022. Néanmoins, il nous apparaît qu'une réflexion restant centrée sur le prisme d'une réduction des dépenses publiques ne permet pas de dégager une ligne directrice sur les valeurs, les objectifs et les modes d'action du service public de demain. Celui-ci nécessite une volonté d'investissement de départ et un changement de paradigme vers son inscription dans une « économie des besoins ».[18]

Tout d'abord, une transformation du service public centrée sur une volonté de réduction des dépenses publiques n'apparaît pas de nature à répondre à un besoin d'investissement de départ conforme aux objectifs affichés et consubstantiel à toute réforme d'ampleur. Il nous est apparu que le rapport initial mentionne a minima 15 milliards d'économies réalisées, sans préciser la manière dont elles sont calculées ni leur échéancier prévisible. En contre-

point, les 2 milliards d'investissement annoncées par les CITP, sans autre démonstration, apparaissent mineurs. Ils correspondent tout d'abord à la mise en œuvre d'un Fonds pour la transformation de l'action publique de 700 millions d'euros sur 5 ans annoncé lors du grand plan d'investissement lancé par le Premier Ministre le 25 septembre 2017. Il vise à financer des réformes structurelles par des appel à projets[19]. Les autres investissements concernent l'accompagnement des guichets multiservices et la mise en œuvre de l'université de la transformation publique. Ces montants nous paraissent bien insuffisants au regard des ambitions annoncées. En tout état de cause, la réussite d'une transformation publique ne peut être limitée à la baisse de la dépense publique. Par exemple, la réforme « Préfecture nouvelle génération » portée par Bernard Cazeneuve alors ministre de l'Intérieur a assumé des investissements de départ en formation visant une montée en compétences des agents: la généralisation du traitement dématérialisé des demandes de délivrance de titres (passeports, cartes, permis de construire, certificats d'immatriculation) devait permettre une réaffectation des agents sur des missions prioritaires telles que la gestion de crise, la lutte contre la fraude ou le contrôle de légalité. Autant d'investissements qui seront lourds s'ils veulent aboutir.

Enfin, il nous apparaît nécessaire de réinventer le « service public de demain » en l'ancrant dans l'économie de ses besoins et non sous le seul prisme de la dépense publique. Nul ne conteste l'intérêt d'une réduction des coûts mais il apparaît dangereux de se fixer comme préalable à la réflexion un niveau de dépense « acceptable » (ou un objectif de réduction de 3%), sans une réflexion tout aussi profonde sur les ressources, c'est-à-dire sur notre système de prélèvements en volume comme en équité. La problématique de la « réforme » est trop souvent instrumentalisée à d'autres fins alors qu'elle n'a d'intérêt qu'en ce qu'elle doit permettre de déterminer collectivement les objectifs et moyens dont entend se doter le pays pour accompagner efficacement le développement d'une société de plus en plus complexe.

L'Association Services Publics entend tout particulièrement s'inscrire dans une réflexion autour de ce que certains de ses membres ont pu théoriser sous le terme d'« économie des besoins ». Celle-ci englobe deux méthodes de réflexions :

(*1) La réforme doit partir de l'analyse des besoins de la société.* A ce titre, l'association se donne pour préalable à toute réflexion l'analyse de la couverture de ses besoins et de son évolution, qui semble parfois faire défaut dans les réformes de l'Etat. Elles apparaissent administrativo-centrée au lieu d'engager de réels débats de fond incluant l'évolution démographique, la transition migratoire ou encore l'aménagement du territoire.

Créée il y a trente ans, l'association Services Publics a été dans tous les combats pour que soient posés sereinement les termes d'un juste débat sur les services publics:[20] quels sont les besoins sociaux que la collectivité doit prendre en charge ? Si l'on considère que des activités peuvent être confiées à des acteurs privés, est-on en mesure de définir avec précision les attentes de la puissance publique à leur égard ? Comment associer les citoyens à l'administration de leurs services publics ? Discuter de la place et du rôle du service public comporte inévitablement un risque de dispute « idéologique », que l'on peut d'ailleurs aisément repérer derrière les formulations du Président de la République dans sa « Lettre aux Français »[21] destinée à alimenter le Grand Débat National : « Faut-il supprimer certains services publics qui seraient dépassés ou trop chers par rapport à leur utilité ? A l'inverse, voyez-vous des besoins nouveaux de services publics et comment les financer ? ».

(2) Elle doit être pilotée par l'autorité publique, dans ses différents modes d'exercice, entre l'administration d'Etat, celles des collectivités territoriales comme des administrations sociales.

Le pilotage des services publics par les autorités publiques, démocratiquement désignées, reste un enjeu majeur. Or, les objectifs et méthodes d'action des opérateurs privés à but lucratifs et des opérateurs à but non lucratifs diffèrent profondément. A ce titre, la remise en cause permanente des services publics par des acteurs politiques entraîne le risque de les évincer dans la définition des objectifs assignés aux politiques publiques car elle rend un pouvoir de direction et de contrôle difficile à maintenir : le secteur de la santé apparaît tout particulièrement représentatif de la difficulté de piloter une dépense socialisée du fait d'activités largement assurées par des acteurs privés. Pour prendre un autre exemple, dans le domaine des services publics pénitentiaires, les partenariats publics-privés

n'ont pas permis d'améliorer le fonctionnement de ce service public ; au contraire, la Cour des comptes a relevé dès 2011 l'insoutenabilité budgétaire de ce modèle, liée au paiement de loyers élevés par l'Etat, qui peut avoir un effet boule de neige. De surcroît, les usagers contraints de ce service public sont dans une situation inégalitaire selon que la gestion de la prison a été déléguée à des acteurs privés ou non.

Pour le dire de manière triviale : l'autorité publique n'est pas ringarde, et doit se réinventer dans ses méthodes plutôt que dans ses compétences.

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The Future of Digital Transformation: Présentation du Dossier

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Digital, from the latin *digitus* meaning digits or fingers, and transformation - to change the shape of, or metamorphose.

Touted by some as the Third and Fourth Industrial Revolutions, the Age of Information and Telecommunications, or the Second Machine Age, Digital Transformation refers to the integration of digital technologies into all areas of the economy, government, and society. Fundamentally, the issue of digital transformation remains a human one in terms of how the public sector and private individuals, companies, and groups are weaponizing, employing and integrating technological systems both into pre-existing processes, and novel developments. Taken in the context of widespread technological development and acceleration, affaires publiques remain both a key lense and key opportunity for digital innovation. Where the private sector has traditionally had both the financial and innovative advantage in building technological capacity, the public sector is progressively becoming the foreground for a new wave of digital integration that aims at improving access, efficiency, transparency and the success of public processes. In this introduction from our editorial team, we look broadly at the penetration of digital transformation into specific sectors of public policy - politics, the economy, and social welfare - as we introduce our focus section of articles on digital transformations from our authors.

Economy 2.0

Nowhere, perhaps, is the impact of digital transformation more clearly visible than within the economic processes of national and global economics. In the economic sphere, there is no universal definition of the digital economy. What is clear, however, is that the economy itself is becoming more and more digitised, due to the transition to new technologies in virtually every sector, and the blurring of boundaries between industries. Digitisation now touches most of the economy, with a higher share of IT spending in the operating costs of most firms, the digitisation of physical assets, and a digitally upskilled workforce.

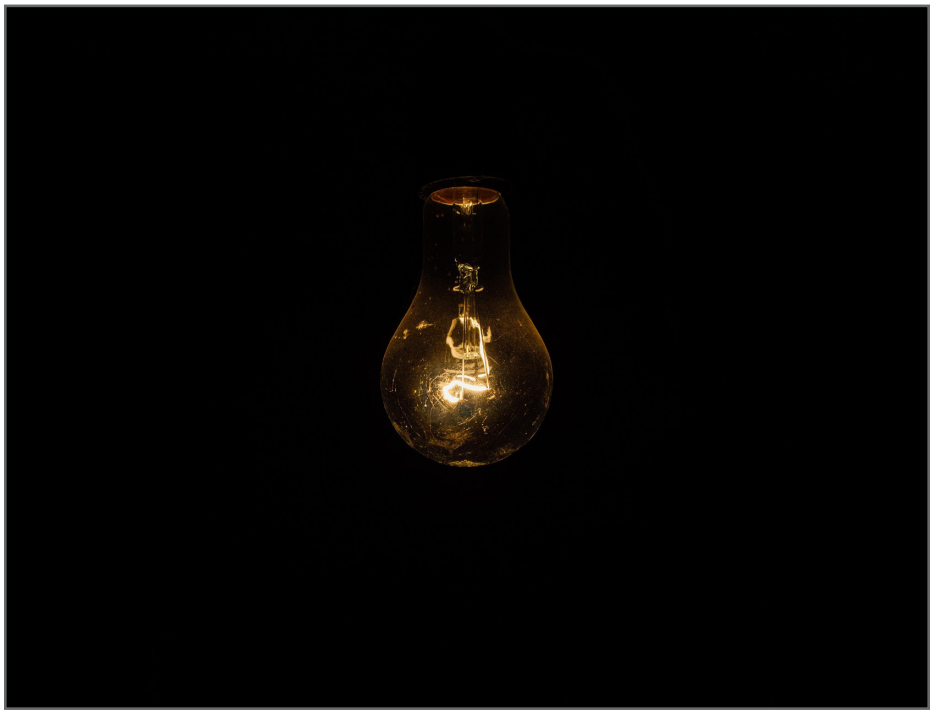
From a regulatory standpoint, the digital economy poses a number of challenges. New business models based on multi-sided markets, powered by network effects which give an incumbency advantage to large firms, economies of scale, and the growing irrelevance of permanent establishment along with the prevalence of intangible assets upset the balance in our regulatory mechanisms. In digital markets, the benchmark of perfect competition does not apply so well anymore because they tend towards market concentration. The cost structure of large upfront costs, but low variable and average costs in general leads to large economies of scale. In the digital economy, bigger is actually better. Internet giants enjoy profits far beyond their costs, resulting in the extraction of economic rent and anti-competitive behavior. For competition policy the challenge is to find new ways of defining market boundaries in the digital

economy, new ways of measuring consumer harm, and identifying anti-competitive strategies.

Data is also central to the digital economy. Besides economies of scale, the large amount of data gathering also helps to produce economies of scope where companies gain an efficiency advantage by offering a wider variety of products and services. Data allows for scale in one type of activity to create benefits in another, as well as tracking consumer preferences automatically to facilitate product and service personalisation. Personalisation allows companies to extract economic surplus from consumers by tailoring prices to fully capture the surplus that their market participation offers. Data is also increasingly becoming the currency of the digital economy. Data flows may support monetary transactions such as generating ad revenue or creating revenue streams by selling or renting it. Alternatively, companies might offer their services for "free" in exchange for user data as social media and other platforms often do. From a policy perspective, issues related to data ownership, data protection and privacy need to be addressed. Information asymmetries also need to be accounted for in the way data is gathered and used.

The digital economy is increasingly becoming the economy itself, and this raises challenges for international governance as well. In terms of taxation, existing tax treaties are not tailored for the digital economy. Businesses can now centralize infrastructure in one tax jurisdiction, while carrying out substantial market activity in another with no physical presence and minimal use of personnel, thereby avoiding tax in that jurisdiction. Thus, the definition of permanent establishment, which is based on physical presence under current tax treaties, is not appropriate. The fact that companies can engage in substantial business activity in a market country while operating remotely exacerbates the risk for base erosion and profit shifting (BEPS) through the fragmentation of physical operations to locations where they are taxed at lower rates or not at all. One famous example of this is the use by large tech companies of two BEPS structures, the "Double Irish" with a "Dutch Sandwich", to shield their international profits from taxation. The setup involves routing revenue through an Irish company to a Dutch subsidiary and then again to another Irish company that is headquartered in a tax haven. Addressing the tax challenges of the digital economy is currently one of the main issues being discussed across the world and the OECD is making considerable efforts in dealing with it as part of the OECD/G20 BEPS project.

Network externalities, economies of scale and scope, and the growing irrelevance of permanent establishment in carrying out substantial market activities across jurisdictions are all some of the most pressing matters for public policy brought by the advent of the digital economy. This brief survey has not , however, touched upon other serious challenges such as automation, platformisation, and the changing nature of work itself in the digital economy. The shift in the economy will bring with it major changes in our governance structures as well, be they market-ba-



sed or state-centered, and will impact everything from economic regulation to our welfare states. This will require finding alternative models of regulation, overriding rules written for the industrial economy, and finding new ways of sharing value in the digital world.

Politics 2.0

Beyond substantial impacts on both national and global economies, the digital transformation trend has, and will have, increasingly profound, long-lasting consequences for political and democratic processes, public administration and defence.

Within the domain of democratic processes, electronic voting is perhaps the most salient topic. The advent of the internet has led to calls for voting to move from the analogue to the digital – a notion which has sparked wide-spread controversy due to specific concerns regarding both security and privacy. One the one hand, substantially facilitating the process of voting by allowing it to occur online could give voting opportunities to the disenfranchised. In particular it could also attract younger generations of voters, and work to render democracy a less cumbersome and more efficient process. On the other hand, however, it hazards disconnecting voters from reality by making voting an enterprise undertaken in the solace of one's own house, detached from the rest of reality.

Beyond this, technology has enabled elected officials to communicate directly with the population by way of such platforms as Twitter, Facebook, Instagram and others. This has significantly altered the political paradigm - politicians' actions and statements are more widely and more directly broadcast as well as achieving better demographic targeting. Social media technology thus allows politicians to more frequently and intensively interact with their audiences – purportedly a boon for the transparency of political processes. The other edge of the sword, however, is that the ability to do so has conjured up a demand to do so, and politicians unable or unwilling to regularly communicate with the people may be disadvantaged. What's more, scrutiny of their actions has become far simpler and more immediate, and the things they unwittingly do or say can very easily find their way before a large public audience. As a result, the rise of new technologies and digitalisation in the political sphere finds its culmination in the creation of a set of wholly new conditions and challenges for the conduct of politics and democracy in the 21st century.

As concerns public administration, digitalisation has become both a device to push bureaucratic institutions towards efficiency, ease-of-access and overall modernisation, while at the same time exposing a key weakness of the public sector when it comes to any new innovative technology: an inability to keep up. In effect, the digitalisation of information, processes and similar in government institutions, has certainly been a big help to their functioning, but it has also meant that the privacy and secrecy of that information can now be far more easily compromised – as has occurred time and time again when either white or black hat hackers breached government databases and extracted massive amounts of data. This and other impacts mean that traditionally slow-to-change institutions and agencies must suddenly not only catch-up to their private sector homologues, but actually seek to mitigate adverse conditions and rapid, unforeseeable changes.

Finally, the defence sector is already undergoing sea-changes as a result of the wave of digital transformation, and will certainly continue to do so far into the future. Most tellingly, the Pentagon has recently opted to construct JEDI, a US Department of Defence cloud service (the benefits and drawbacks of which are very much debatable), in a surprising move to modernise by the world's largest bureaucracy. Beyond this, the introduction of AI into the defence domain has sparked endeavours such as Project Maven (an intelligent algorithm meant to analyse drone footage), the Advanced Targeting and Lethality System (ATLAS – an autonomous light-armoured tank), as well as on-going projects on autonomous drone swarms, soldier-enhancement (e.g., via deep machine integration) and others. Such developments constitute substantial alterations to the operating environment of national armed forces, and are likely only a foreshadowing of what technology and the trend of digital transformation will do to them over the course of the 21st century.

Welfare State 2.0

Particularly given the context of widespread social and political change, welfare process remains a critical component of public policy. In being so, public administration has rapidly sought to look for a method to keep up with the high demand

to have efficient and timely access to processes of the welfare state while balancing the concerns of method and privacy that naturally accompany the integration of digital and social welfare projects. In this context, digitisation is emerging as a significant challenge and opportunity in areas of health and social care, taxation, benefits and other elements of complex welfare states. Perhaps due to its deep diversity and complexity across not only jurisdictions but departments of activity, the welfare state reflects both a prime opportunity and a significant challenge to the processes of digital transformation.

Most obvious among the issues facing the integration of digital processes into the welfare state is that of migrating traditionally paper-based records and processes into digital ones. This bears with it a number of both practical issues - the bulk of record keeping in the majority of public administrations, identity authentication and privacy protection, and theoretical ones - what are the most effective designs for the technological processes that must be used in high scales by the average citizen and are critical to their well-being. Digitising such a 'people-centric' set of processes also necessitates an increase in the skills and technical capacity required to make such a system usable to the average individual. As such, the development of the weflare state in the digital world, requries an accompanying reaction in other sectors such as public sector recruitment and technical education. If effective however, the digitisation of public processes has the possibility to dramatically improve access and efficiency of welfare state processes, particularly overcoming prior concerns such as techincal centralisation and geography.

New changes to the labour market brought on by the digital economy may also have an impact on the shape of the welfare state. Bringing elements such as social security, taxation and worker benefits into line with the new shape of a workforce relying heavily on remote work, digital freelancing and new forms of labour outside the traditional frames of previously regulated activity. The welfare state will require increased flexibility in keeping pace with an increasingly flexible regulatory and work environment, and to absorb the risks that may put people at risk of skipping through the cracks.

Conclusion

What remains to fill in the world of digital transformation? Balancing how elements of the digital can not only ensure efficiency, but clarify and progress in public affairs remains of paramount importance in managing a rapidly accelerating phenomenon. In essence, even where digital transformation is automating or integrating pre-existing processes, the design of public systems to meet the expectations of a digital world are profoundly decisions that must be made by policy makers themselves. Indeed, managing the scope of digital transformation in the sectors most key to public life - the economy, the political, and the welfare state - is likely to continue to a major challenge to policy processes and capacity. In the following pages, the authors seek to unpack specific elements of digital transformation's impact on public affairs and public life, and how digital transformation is set to interact with the issues we face.

A Joint Approach to Mitigating Fake News and Rewarding Sound Journalism in the European Union

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Abstract:

The paper offers an analysis of the critical issues facing today's media and providesa policy proposal to safeguard the future of the media within the European Union (EU). The two existential problems identified in the analysis are (1) the proliferation of 'fake news' and, (2), the decline of suitable revenue models for media outlets. This paper subsequently offers a solution to both problems in the form of a dual-purpose EU agency. The envisaged agency would act as both a guardian and a financial supporter of quality news. As such, it would identify and sanction those entities found to be spreading false or misleading information. Moreover, it would also act as an accreditation service and provide financing to quality news outlets to better guarantee the provision of information as a public good within the EU.

The global media industry is in severe crisis. This crisis does not have a single cause and cannot be described with one sole characteristic. In fact, the whole system has been continuously disrupted and shaken by several interconnected developments such as the advent of the internet, the rise of online news, and the subsequent issues with financing news and questionable quality due to decreasing incentives to create original content. These developments increasingly put the media industry under heavy pressure; they threaten thousands of jobs as well as the public level of information, which itself is strongly related to the political sentiment and democratic environment of societies. Hence, not only the media, but our overall political system is at stake.

It is time to pull the handbrake and design adequate policies that make the future of the media a brighter one. More concretely, two strategic levers shall be targeted with our policy proposal: First, the further rise of so-called 'fake news' must be impeded such that citizens are able to trust their media without questioning the legitimacy and accuracy of information. Second, sound and original journalism must be rewarded to ensure the survival of journalistic talent and the drive for fact-based debates.

In the following, the two broad concepts of 'fake news' and financing of journalism are analysed more closely to derive precise issues which shall subsequently be tackled. In order to counter these issues, concrete policy measures are proposed to ensure a consequent and long-lasting amelioration of journalistic content within the European Union. Finally, limitations and concerns are expressed to flesh out the contextual frame for how the European future of the media may be designed by policy means.

Problem Assessment

Information and (fake) news

Classification

Just as water in the sea and air in the atmosphere, information is a public good. This odd comparison is not based on the virtual infinity of the three goods but on the shared characteristics of being (1) non-rivalrous (consumers do not suffer detrimental consequences if other individuals consume the same good) and (2) non-excludable (individuals cannot be excluded from consuming the good). Moreover, information is a crucial ele-

ment of political participation and different scholars (e.g. Drago, Nannicini, & Sobbrio 2014; Gentzkow, Shapiro, & Sinkinson 2011; Strömberg 2004) have shown that access to media, and hence to information, increases electoral participation by raising awareness and increasing knowledge about relevant issues at stake.

However, the nature of information has been increasingly challenged over the last years, with ‘fake news’ making headlines and calling for public attention. The term itself became a buzzword and particularly gained wide prominence after potential connections to the infamous Brexit referendum and the 2016 US Presidential Election. So what are these ‘fake news’? According to Allcott and Gentzkow, they are “news articles that are intentionally and verifiably false, and could mislead readers” (2017, p. 213). More technically, the two economists describe them as “distorted signals uncorrelated with the truth” (p. 212), causing both private and social costs by making it difficult for consumers to assess the true state of affairs. Based on this definition, ‘fake news’ appear to be inevitably negative and bad for society. But is this always the case? Tambini (2017) created six clusters of news that have been labelled as ‘fakes’ in the past: (1) Wrong information distributed with a political goal (e.g. to promote/impair candidates); (2) false information distributed for financial gain; (3) parody and satire; (4) poor journalism based on groundless rumours or claims that were made up; (5) news that is correct but ideologically opposed or that challenges consensus; (6) news that challenges orthodox authority.

Implications

Tambini’s clusters amplify the fact that one cannot easily speak of one kind of ‘fake news’ and that even correct facts and claims can be subject to this allegation. So what counts as the truth and how easily can it be assessed? It certainly depends on the context and data. For example, the claims “more than two million refugees entered our country” (quantitative) and “our president was not born in our country” (objective) could be more easily factually assessed than the claims that “economic future is promising“ (qualitative) or “our president is stubborn” (subjective), which may hardly be subject to falsification. Nevertheless, investigation of this topic is crucial, given the high relevance of media quality on democratic systems and the grave developments in some societies where the majority of citizens lack the capacity to correctly differentiate fake news from verified content (Barthel, Mitchell, and Holcomb 2016). Moreover, it was found that teenagers even reject journalistic objectivity and rather prefer opinionated journalistic content (Marchi 2012). Low media literacy and preferences for partisan opinions are two alarming characteristics. Another key issue, is that citizens increasingly tend to distrust media, and the internet in particular (51% of EU citizens do not trust it) as well as social media platforms (62% of EU citizens do not trust it) (European Commission 2018c).

The main reason why one could term the contemporary period “the age of fake news” is indeed the rise of the internet as a platform for online news and the

connected simplicity to share (mis)information at low cost and build ideological 'echo chambers' on social media (Williamson 2016). This spread of ideologically-biased views which often find no grounding in facts is a dire situation, especially given that last year 62% of European citizens consumed news online, whereas only 48% did so in 2013 (Eurostat 2017; Eurostat 2018). Moreover, the share of European citizens consuming news to derive insights about European political matters has increased from 26% in 2011 to 42% in 2017. On the contrary, consumption of printed news for such topics has decreased from 47% to just 36% during the same period (European Commission 2018a).

Policy reactions

Unfortunately, fighting 'fake news' is not an easy effort and there is a narrow line between impeding the spread of misinformation and undermining the freedom of speech, which should per se allow for the dissemination of opinionated news. However, it is questionable how far originators of fake messages could and would go and at which point public intervention will be inevitable. Let us consider the extreme scenario of 'news' that deliberately misinform consumers in the attempt to undermine elections. In the age of cyberpower and information warfare, such a scenario is no longer fantasy and could pose an actual threat to national security.

This short paragraph leads to a quick conclusion: 'Fake news' is dangerous, however, free speech must be guaranteed and thus shutting down media outlets and networks spreading misinformation once is not an option. So, what are realistic options and which actors could intervene? For example, the Italian draft law (introduced in February 2017) obliges social media platforms to monitor their news services and imposes monetary fines for individuals spreading 'fake news' as well as prison for very serious offenses, e.g. ones that incite crime or violence (Tambini 2017). Another interesting case is China, whose government consequently penalizes the spread of 'online rumours' to impede consequent mobilizations of citizens that could pose a threat to the State Party's approach (Ng 2015). While Italy indirectly intervenes by obliging media platforms and only penalizes grave infringements, China goes a radical judicial way that is highly questionable from a democratic standpoint.

As of today, the EU engages in different media-related projects within the Commission's Directorate-General for Communications Networks, Content and Technology (DG CONNECT), which has a joint section for culture and media. In May, the Commission convoked a multi-stakeholder forum on disinformation, which consisted of a working group of representatives from relevant sectors (e.g. major online platforms and advertising firms as well as academia, media and civil society organisations in the role of fact-checkers). The aim of the working group was to draft a self-regulatory practice code on disinformation for online platforms and the advertising sector; however, it did not consider regulatory instruments that exceed self-governance (European Commission 2018b). Moreover, some dedicated EU organizations have started to work on solutions fighting the rise of 'fake news'; for example, the East Stratcom Task Force of the European External Action Service (EEAS) has published the EU vs Disinformation campaign that addresses disinformation, in particular that originating from pro-Kremlin activists. Lastly, the Commission supports the European Centre for Press and Media Freedom (ECPMF), a non-governmental organization that wants to prevent malicious media developments for which it published the European Charter on Freedom of the Press, another instrument that is purely self-regulatory (ECPMF 2018).

Before elaborating an innovative transnational solution to the rise of 'fake news' that augments existing EU efforts, let us consider the second aspect our solution aims to alter: the financing of media.

No money, no reliable news?

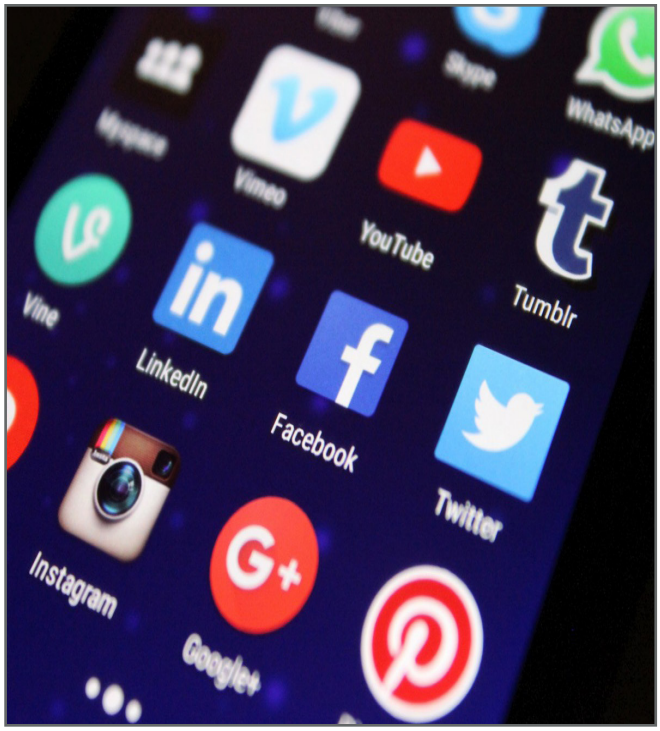
Classification

The media industry has been suffering for a long time as a result of declining revenues. The trend towards digitalisation over the last decade has severely affected the industry. This has been to a large extent, a global event. In the US, advertising revenue plummeted from 65 billion dollars at the start of the millennium to 19 billion in 2016 (McLennon and Miles 2018). In Germany, more than 1000 media jobs were cut in 2013 (Cagé 2016). Similarly, in Britain, over 200 regional and local newspapers have closed since 2005 (McLennon and Miles 2018).

The reduction in the media industry's revenues is having far reaching effects on the output

of the industry. Newspapers worldwide are learning to cut costs, forgoing what is seen as unnecessary expenditure. The results of this are manifold. Firstly, in absolute terms, less journalists means less journalistic content gets produced. Without the willingness to invest in specialised reporters, many media outlets are showing an indifference to covering the same breadth of news they once did. Furthermore, media firms are refocusing on covering on the main national news. Many firms now see foreign bureaus, localised coverage and investigative reports as excessive expenditure. As such, the sheer quantity of quality news being produced has been steadily decreasing, with less varied output and less plurality of unbiased journalistic content.

The trend towards online news also has had other harmful effects. Journalism is an industry which requires a large initial investment. It has a high fixed cost with increasing returns to scale. In simpler terms, this means that the news outlets cost largely arise from the quality they invest in the output. Better and more varied content requires higher investment and hence more expenditure. However, costs remain rather static in relation to the size of the market served. In the digital sphere, this strongly disincentives the costly creation of original content. Instead, articles are often replicated ad infinitum from other news sources, often with little or no changes (Cagé 2016).



Furthermore, it is an illusion that the online advertising revenue streams can support media outlets in the long-term, despite the large amount of readership. Advertising revenue online has been steadily decreasing for years. This has been unfortunately timed with a huge increase in advertising supply, as the social media giants expand their portfolios. The combination of this demand and supply dynamic has led to a collapse in the price of advertising, diminishing the revenues of media firms further.

Implications

There are many implications arising from this negative assessment of the media's fortunes. Firstly, trust in the media is receding, as a multitude of factors diminish the public's faith in unbiased news. The fall in revenue from advertising online has led to the emergence of questionably ethical practices such as native advertising, which is the use of advertisements as part of the normal user experience. It is often poorly labelled and blurs the line between objective news and paid content. Such native ads now constitute 10% of the New York Times revenues from online advertising, illustrating how even the most prestigious publications are subject to such financial needs. It has been argued that the reliance of publications on practices such as native advertising diminishes public trust in the media (Carr 2013). As we envisage the survival and growth of the media in future years, we must formulate alternative methods for publications to support themselves, without risking the trust they possess with their readership.

This breakdown in trust between media companies and their readership has been accentuated by the increasing power of social media companies in the journalistic world. Companies such as Facebook, Twitter and Snapchat now decide who publishes what, to which audience, and how they get paid for it. We have entered a new era where news is filtered through opaque and unregulated algorithms. However, as the social media giants are generating high traffic, many publishers have decided to focus solely on them as a distribution channel (Bell 2016). In essence, this has led to a few unaccountable companies having significant control over the distribution of news. The combination of this unregulated and non-transparent field with the proliferation of fake news online has furthered the distrust which the public has in the media.

The decline of the media's economic model has undoubtedly led to a reduction in the quality of the news. The media has clearly not adapted to the new economic forces and global trends facing them. The implications of this stretch far past the failure of any singular media entity. Instead, it poses a threat to democracy itself, as its foundation of a well-informed public dissipates. A well-functioning democracy requires a well-informed electorate, who have access to objective unbiased news on which upon to make their electoral decisions. If left unchecked, the decline in the media's economic model threatens the continued functioning of our political system.

Policy Reactions

Public support for the press is widespread around the world. However, these subsidies are often insignificant in the context of their overall revenues. Subsidies as a percentage of gross newspaper revenues are no greater than 10% anywhere, and in general less than 5% (Cagé 2016). When placed in the context of overall net contribution to the economy, media companies generally pay more in taxes than they receive. This contrasts strongly with other participants in the knowledge economy such as research institutions and universities. As such, when formulating our responses to such a crisis in media, we must consider is the media as important to our society as those other participants. The authors of this paper believe so and argue that a greater government intervention into the sector is required.

On a European level, there have been several initiatives to provide quality news about European affairs. The EU has initiated projects wherein they support quality journalism while respecting the editorial independence of the project. In recent times, they have supported a European Data News Hub, created by Agence France-Presse (AFP), Deutsche Presse-Agentur (DPA) and Agenzia Nazionale Stampa Associata (ANSA). In addition to this, they have helped support the European Data Journalism Network (EDJNet) which aims to produce, share and publish data-driven content on European affairs (European Commission 2017).

While this support is important, we believe that Europe needs a solution that goes beyond disparate initiatives. We envisage a plan that will provide a healthy foundation for the flourishing of the media all around Europe. As such, we will detail our bold plan for the renewal of the media in Europe.

Solution: An EU initiative to ensure a bright future for journalism

Project Description

In a nutshell, we propose to set up a European body that (1) provides a 'fact-checking service' by investigating potential 'fake news' and their effect on EU citizens, and (2) evaluates the quality of European journalism on the basis of news samples for the purpose of rewarding outstanding work with dedicated EU funds. This European body will further serve as an accreditation board for the media industry, comprising different kinds of people from society as well as political representatives from the transnational level, i.e., MEPs. The goal is to include all socio-economic classes and political tendencies, thus citizens of different age and social classes as well as politicians of all large parties (those in the European Parliament) must be represented. For simplicity, we shall from now on utilise the imaginative title of European Media Institution (EMI).

Scope of application and responsibilities

Commission's DG CONNECT and complement the existing role with the twofold responsibility of fighting the dissemination of disinformation and allocating dedicated funds for selected media outlets. By adding the two roles, already existing objectives such as the promotion of democratic principles and the support of investigative research could be further augmented.

The EMI will work as an independent 'single source of truth' for the following tasks:

- The legitimacy of publicly disseminated information shall be assessed based on randomly selected media samples as well as news communicated by citizens (every EU citizen may report potential 'fake news' via online participation tools).

- An exhaustive data bank for media outlets shall be set up that classifies media firms into categories based on evaluations and reports of consumers.

-Media outlets from all EU member states as well as accession states may apply in order to receive potential funding, accreditation ('EMI seal of quality') as well as dedicated awards, e.g. journalist of the month.

-The funding per country shall be based on a fair and objective allocation key which considers the number of inhabitants (of a country), and perceived transparency and freedom of speech (e.g. based on rankings of NGOs).

-The intrastate allocation of EU funds shall be based on subjective quality of journalism, which will be assessed by the EMI's jury.

-The jury shall consist of several hundred people (MEPs will hold 50% of voting rights for funding, a group of media researchers 25% and the public another 25% by participating online).

-In addition, special funding dedicated to outstanding investigative journalism can be provided to corresponding media outlets – this funding shall be allocated by an independent jury of media researchers, thereby incentivising the proliferation of investigative journalism.

-A monthly report detailing all known 'fake news' media outlets and media outlets spreading misinformation shall be widely published in all EU member states.

-The EMI will be granted sanction power to fine outlets it finds to be spreading fake news that harm society (based on EMI's framework for media quality).

Potential Shortcomings

Even in the case of perfect objectivity and impartiality, those media outlets, interest groups or political parties who are not satisfied with a specific rating and consequent money allocations could criticize the European media institution as being partial. Although there isn't always a legitimate reason, such critique has proven to be a natural element whenever public administrations intervene in the media industry. Another key question is whether it will be technically possible to consider social media algorithms, given that they are the root of filter bubbles and hence the reason 'echo chambers' exist. Based on this proposal, such an assessment is not technically possible and would demand an enlargement of the EMI.

Another problem noted during the policy formulation phase, was possible dispute settlement mechanisms to be included in the EMI. For example, processes would have to be included in case a media outlet contested its label as 'poor quality news', or 'fake news'. The sheer plurality of voices in the modern-day media would ensure that disputes arise often. The independence and impartiality of such a settlement panel would have to be unquestionable.

Similarly, the granting of MEPs of 50% of the voting rights would also be susceptible to criticism. MEPs operate on a five-year term mandate, and there are ideological shifts in the European parliament with each new election. Ideally, the EMI would be impervious to ideological changes, however, it is not unreasonable to suspect that the rotation of the MEPs operating in the EMI would change its outlook. We hope that the inclusion of academics and public participation in the EMI process will suppress this fear somewhat. Regardless, we consider the impartiality of, and public trust in the EMI to be of paramount importance and would consider adjustments to the proposal to guarantee this.

Concluding Remarks

Our analysis has shown that the rise of 'fake news' and their direct impact on electoral outcomes as well as the issue of financing journalism are two key deficiencies within a large crisis. Further adequate solutions to this crisis must be found, critical media literacy must be promoted with further means, e.g., a cohesive approach by educational institutions and the media industry could improve the situation. Similarly, we have investigated the funding issues within the media and found that the industry is suffering from a funding crisis. This is reducing the range of news covered, the depth in which they are covered and ultimately, the quality-level of our public discourse. In addition to this, it is contributing to a diminishment of public trust in the media. While both national and EU-level policy solutions exist, we believe these are not enough.

Our plan for the EMI will provide a holistic solution to the current woes affecting the media in Europe. It will provide a source of funding to quality newspapers. It will also act as a barrier against the creation and proliferation of fake news. We envisage that over the long term, it will allow media outlets to work with greater independence, and flourish throughout

the EU. Moreover, the Commission should include the role of the media in its upcoming political priorities for the post-electoral agenda of the 2019-2023 period. Within the current 2015-2019 framework, one of the ten priorities regards democratic change, however, it solely focuses on administrative transparency and accountability.

As of today, we are less than six months ahead of the next European elections. Together, let us all aim to ensure the great future of journalism that European citizens deserve.

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La question des données : « UNE EUROPE QUI PROTÈGE ?»

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Abstract:

L'essor des technologies numériques doit mener à une transformation économique comparable à la Révolution Industrielle du XIXe siècle. Un des vecteurs principaux de l'ère numérique est les corpus de données, essentielles pour le développement "d'intelligences artificielles" et la création de valeur ajoutée. Le Règlement Général sur la Protection des Données (RGPD), aujourd'hui en voie de devenir un standard global démontre que les décideurs européens se saisissent des enjeux éthiques du numérique et prennent des mesures pour protéger la vie des citoyens. L'ampleur de la transformation numérique n'est pourtant pas considérée dans son ensemble. Comme la première Révolution Industrielle, elle mène aujourd'hui à une nouvelle distribution internationale du pouvoir. Cet article aborde la dimension (géo) politique des données personnelles, à travers la notion de "souveraineté numérique". Il s'agit de faire un état des lieux des politiques actuelles à l'échelle européenne.

Lors de la visite du Président Obama à Berlin en 2013, la chancelière allemande Angela Merkel avait estimé qu'"Internet était un territoire inexploré pour nous tous".[1] Cette remarque était pourtant loin de la réalité, du moins pour l'hyper-puissance américaine. Juste quelques mois auparavant, Edward Snowden avait révélé que la NSA (Agence Nationale de Sécurité) collectait les données de millions d'internautes dans le monde entier et les analysait en employant des instruments informatiques. Cette utilisation du Big Data à l'échelle mondiale s'effectuait en étroite coopération avec Google qui détient par ailleurs plus de 90% de la part de marché pour les moteurs de recherche en Europe. Ce "moment Snowden" marquera le début d'une fragmentation ou d'une "souverainisation" d'Internet dans le monde entier. "La souveraineté numérique" est venue à l'ordre du jour et les acteurs publics du monde entier ont consacré une attention politique et juridique particulière à la question des données. Dans ce contexte, l'Union européenne a mis en place le Règlement Général sur la Protection des Données (RGPD), entré en vigueur en Mai 2018. Cependant, un rapport récent de l'IFRI (Institut français des relations internationales) constate qu'encore aujourd'hui, les acteurs publics européens abordent le sujet à travers une perspective presque exclusivement focalisée sur la protection des individus. Si cette protection est désirable et même nécessaire, la collection des données est un enjeu stratégique majeur qui devrait être traité comme tel. Nous constatons à travers l'exemple de la France qu'en l'absence d'une stratégie d'ampleur de la part de l'Union européenne, les Etats membres n'hésiteront pas à mobiliser des moyens à l'échelle nationale.

Un enjeu stratégique majeur du XXIe siècle

Le scandale récent lié à Cambridge Analytica et son rôle dans la campagne présidentielle de Donald Trump a, dans une certaine mesure, familiarisé l'opinion publique avec le sujet du Big Data. Depuis la naissance de ce concept dans les années 1990, sa définition a constamment évolué en parallèle avec l'explosion quantitative du nombre de données et la sophistication des instruments qui permettent de l'analyser. Au delà du volume, ces données se caractérisent par leur variété et leur vélocité. Elles sont donc très diversifiées et évoluent à des vitesses conséquentes. L'entreprise Cambridge Analytica employait notamment des données illicitement collectées sur 87 millions de comptes Facebook pour constituer des échantillons d'électeurs lors de la campagne présidentielle de 2016.[2] D'autres outils peuvent permettre de prédire le résultat des élections ou l'évolution d'actions sur la bourse à travers une analyse algorithmique des tweets partagés par les utilisateurs.[3] La tendance croissante de l'informatisation et l'expansion du nombre d'utilisateurs d'Internet ne feront qu'accroître le volume des données. Shoshana Zuboff considère même que cette tendance mènera à une grande transformation polanyienne et l'avènement d'un "capitalisme de surveillance" qui succèdera au capitalisme industriel. Zuboff, une précurseure dans le domaine des humanités digitales, constate que la valeur de marché des GAFAM (Google, Apple, Facebook, Amazon, Microsoft) qui atteint 3 trillions de dollars peut être attribuée à leur possession "de ressources de surveillance" ("surveillance assets").[4] Ces instruments qui dépendent souvent de leur capacité

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de traiter et d'analyser le Big Data, permettent à ces entreprises de "surveiller" mais aussi de modifier les comportements. Le filtrage de contenu peut notamment être un outil qui permettra non seulement d'analyser mais aussi de façonner l'opinion publique. Dans ce domaine en pleine expansion, l'échelle est essentielle pour créer et maintenir un écosystème, ainsi les plus grands groupes comme Google peuvent exercer un "impérialisme d'infrastructure".[5] D'autre part, comme le souligne le rapport Villani, les progrès actuels en intelligence artificielle dépendent en grande partie de la capacité à collecter une masse critique de données.[6] Evidemment, les usages du Big Data ne se limitent pas à la sphère privée. La modernisation et la numérisation du secteur public repose sur les mêmes instruments. En outre, le Big Data est considéré comme un enjeu de sécurité nationale. Les agences de renseignement adoptent ces "mégas-données" comme un outil d'analyse indispensable, en témoigne le centre de traitement de données construit par la NSA dans le désert de l'Utah pour une valeur de 1.7 milliards de dollars.

En 2013, Edward Snowden a révélé l'existence de PRISM, un programme de surveillance au sein de la NSA qui collectait des données dans le monde entier, notamment en Europe. Les ressortissants non-américains étaient davantage vulnérables à cette collection de données car contrairement aux citoyens et aux résidents permanents, leurs droits ne sont pas protégés par la Foreign Intelligence Surveillance Act de 1978. Depuis 2000, les échanges trans-atlantiques de données étaient régis par les principes de "safe harbour" qui estimait que le transfert de données vers les Etats-Unis ne posait pas de problème car la protection américaine était adéquate selon les standards européens. Ces standards étaient définis par la directive de 1995 sur la protection des données. Cependant une protection équivalente n'existait pas aux Etats-Unis où les entreprises exerçaient plutôt une forme "d'auto-régulation". Cette attente d'auto-régulation n'avait pas vocation à restreindre les entreprises. Au contraire, la stratégie américaine consistait à laisser une marge de manoeuvre importante aux entreprises et d'encourager la libre circulation des données afin de favoriser l'innovation et la concentration dans la perspective de leur intérêt national. Comme l'a révélée l'affaire Snowden, des grands groupes comme Google peuvent être en étroite coordination avec des agences gouvernementales. Depuis ce scandale, les GAFAM ont pris davantage de mesures pour protéger les données de leurs utilisateurs et ont été plus réticents à collaborer avec la NSA en ce qui concerne les "zones grises" de la loi américaine sur ce sujet.[7] Malgré les assurances des grands groupes, le "moment Snowden" a conduit les institutions européennes et les Etats à manifester davantage de vigilance sur ce sujet. Le processus d'élaboration du Règlement Général sur la Protection des Données déjà abordé en 2012 sera influencé par les révélations de Snowden sur PRISM. En Mai 2016, le règlement prend sa forme définitive. D'autre part, la Cour de Justice de l'Union Européenne décide en Octobre 2015 que les principes de "safe harbour" n'offrent pas une protection adéquate et le "bouclier de protection" actuel sera établi en Février 2016. L'approche que l'Union européenne a eu à l'égard de l'affaire Snowden divergeait de celles adoptées par la Chine et la Russie. Là où Bruxelles a vu un enjeu éthique lié à la protection des droits individuels, Beijing et Moscou ont perçu une menace stratégique de la part de l'hyper-puissance américaine.

Une logique de puissance prééminente dans le monde mais peu présente en Europe

Dès les années 1990, le gouvernement chinois avait manifesté une méfiance particulière vis-à-vis d'Internet. Graduellement, cette méfiance s'est cristallisée en une notion qui traduit à la fois une nouvelle norme juridique et une ambition: la cyber-souveraineté (网络主权).[8] La vision d'un Internet ouvert et décentralisé promue par les Etats-Unis a été perçue comme une forme de néo-impérialisme par Beijing même avant les révélations de Snowden. Au delà même de servir les intérêts américains, un internet mondial était perçu comme une menace pour la survie du régime en place. Par conséquent, Beijing a isolé son écosystème informatique et favorisé l'émergence d'acteurs nationaux capables de rivaliser avec les GAFAM. Au-delà même de la volonté de contrôler et surveiller sa population, la Chine déploie une stratégie industrielle. Comme nous l'avons précisé, le Big Data constitue une ressource essentielle pour les progrès en intelligence artificielle. Beijing est en compétition avec Washington dans ce domaine et parvient souvent à tirer un avantage de sa vaste population. Dans cette perspective, la Chine a passé une loi sur la cyber-sécurité en 2017. Cette loi permet au gouvernement chinois d'exiger des entreprises de stocker toute "donnée sensible" sur le territoire national. Ces contraintes imposées par la Chine visent à avantager les entreprises nationales en imposant des coûts ad-

« Cette insistance sur la dimension stratégique (…) est une conception plus approfondie que la 'souveraineté numérique' »

ditionnels à leurs compétiteurs dans l'indispensable marché chinois. Les lois adoptées par la Russie en 2016 puis en 2017 visaient également à obliger les entreprises à garder leurs données sur le territoire, au moins pendant une durée de quelques années.[9] Cependant, ces lois se focalisent principalement sur le contre-terrorisme et la surveillance policière de Moscou est d'une ampleur bien plus limitée que la Chine. En 2018, le Parlement indien a également voté une loi sur la protection des données régulant ainsi ce domaine longtemps négligé dans le pays. Cette loi s'inspire en partie des standards européens mis en place par le Règlement Général sur la Protection des Données (RGPD). Pourtant, la protection des données individuelles est beaucoup moins poussée et les agences gouvernementales bénéficient d'une marge de manoeuvre importante pour leur obtention. Les entreprises ont également l'obligation de garder une copie de chaque donnée qu'elles collectent sur le territoire indien. Finalement, le projet de loi indien ne permet pas aux citoyens de demander l'effacement de leurs données contrairement au RGPD.[10] Si l'Inde reste une démocratie et prend des mesures pour sauvegarder les droits individuels, la nouvelle régulation s'inscrit surtout dans une logique de puissance promue par la politique ambitieuse du premier ministre Narendra Modi.

Contrairement à ces exemples, la régulation européenne dans le domaine du Big Data s'est focalisée sur la protection de droits individuels contre les gouvernements et les grandes entreprises. Depuis récemment, les décideurs supranationaux et nationaux se montrent également déterminés à combler le retard des entreprises européens. En 2018, la Commission européenne a publié un communiqué qui appelle à la consolidation d'un espace européen de données.[11]Au-delà de la protection des données individuelles, des logiques d'efficacité économique apparaissent donc dans l'agenda européen. Pourtant, la vision stratégique et géopolitique qui encadre ces efforts reste limitée. Le terme "souveraineté numérique" apparaît dans le programme présidentiel d'Emmanuel Macron.[12] L'interprétation donnée à la "souveraineté numérique" doit cependant être clarifiée. Dans le contexte français, ce terme avait été utilisé pour la première fois dès 2006 par Bernard Benhamou,[13] aujourd'hui secrétaire général de l'Institut de la souveraineté numérique. Elle n'a pourtant été introduite au grand public que dans les années 2010 par les essais de Pierre Bellanger sur le sujet (2011, 2014). Celui-ci élabore la notion de "synétat" pour désigner la convergence des intérêts publics et privés autour des objectifs communs. L'Etat et les entreprises d'un pays développent donc une stratégie commune. Ces objectifs sont politiques avant d'être commerciaux. Bellanger compare la souveraineté numérique aux stratégies employées par la France dans les domaines de l'aéronautique, de l'énergie et les transports. La souveraineté numérique serait "la maîtrise de notre présent et de notre destin tels qu'ils se manifestent et s'orientent par l'usage des technologies et des réseaux informatiques".[14] Cette insistance sur la dimension stratégique et par extension la nécessité d'une intervention publique évoquée par Bellanger est une conception plus approfondie que la "souveraineté numérique" évoquée par Macron ou par la Commission européenne qui se focalisent sur la protection des utilisateurs et les mesures pour augmenter l'ef-

ficacité des entreprises dans le cadre du marché.[15] Comme l'indique le rapport de l'IFRI, les données sont avant tout prises dans leur dimension juridique et commerciale au niveau européen. La composante stratégique de l'enjeu est donc peu abordée. Seule cette composante permettra de justifier une politique publique de grande échelle pour bâtir une véritable souveraineté numérique, notamment des entreprises capables de rivaliser les GAFAM. Pourtant, le droit de l'Union Européenne restreint les possibilités d'intervention publique dans l'économie tandis que le budget supranational dont celle-ci dispose n'est pas à la hauteur de l'effort. Le rapport de l'IFRI sur le sujet insiste sur la "nécessité d'exploiter les données dans un écosystème strictement national". Un patron de start-up interrogé par le think tank explique le refus de l'Union européenne à procéder ainsi par "l'attachement à l'idéologie néo-libérale".[16] Il convient de préciser que les deux leaders dans le domaine du Big Data, les Etats-Unis et la Chine, ont atteint ce succès grâce à des interventions publiques massives.

Convergence des intérêts privés et des considérations souveraines: les cas américain et chinois

Si l'image véhiculée par les grands groupes est celle d'une histoire de succès individuels liés à la libre-entreprise, il ne faut pas négliger le rôle des agences gouvernementales américaines dans le développement et l'encadrement des services liés au Web. Il faut notamment préciser que l'invention d'Internet même dérive d'un projet de l'armée américaine appelé DARPANET. Encore aujourd'hui, la CIA dirige le très influent fonds d'investissement In-Q-Tel qui cible les entreprises développant des technologies de surveillance et d'intelligence au Silicon Valley et ailleurs.[17] Concernant les méga--données, le gouvernement américain a rapidement saisi les enjeux stratégiques de cette technologie. Dès 1993, le projet Massive Digital Data Systems(MDDS) a été créé sous la supervision de la CIA et la NSA afin d'investir dans les technologies liées à l'exploitation du Big Data. En 1995, Larry Page et Sergey Brin, fondateurs de Google, qui étaient à l'époque étudiants à l'Université de Stanford, ont également obtenu des financements considérables dans le cadre de ce programme.[18] Encore aujourd'hui, Google, qui est le leader incontesté dans le domaine du Big Data, entretient des relations parfois difficiles mais très proches avec le gouvernement américain. Au cours des révélations d'Edward Snowden, il a été reproché à la NSA d'avoir espionné Joaquim Almunia, vice-président de la Commission européenne responsable de la concurrence. Face aux accusations, l'agence américaine a déclaré qu'elle ne poursuivait pas ses activités pour avantager Google qui avait été engagé dans un litige de 3 ans avec la Commission de M.Almunia.[19]Les convergences d'intérêts réciproques entre les GAFAM et le gouvernement sont peu transparents mais si l'on croit Peter Thiel, milliardaire et soutien de Donald Trump, l'influence de Google auprès de l'Administration Obama était comparable à celle d'Exxon Mobile auprès de l'Administration Bush. Si l'on ne dispose pas toujours d'assez d'informations publiques pour conclure sur ce sujet, il est clair que le gouvernement américain place des attentes stratégiques dans les entreprises du pays et n'hésite pas à les articuler. Quelques mois auparavant, Google poursuivait le projet "Dragonfly", un moteur de recherche censuré pour le marché chinois. Le chef de l'Etat major américain Joseph Dunford et le vice-Président Mike Pence[20] ont exprimé leur insatisfaction sur le sujet et ont dit que Google "devrait plutôt travailler avec le Pentagone".[21] Cet épisode parmi d'autres témoigne du fait que le gouvernement américain investit considérablement dans les entreprises qui traitent les méga-données et attendent un retour de leur part. Nous sommes donc proches du modèle du "synétat" décrit par Pierre Bellanger.[22] Dans son livre, celui-ci se focalisait davantage sur la Chine, où les intérêts publics et privés sont beaucoup plus explicitement et profondément liés, notamment par le biais du parti communiste qui est présent dans l'administration de tous les grands groupes. Le système de "crédit social" que Beijing souhaite mettre en place reflète le rôle qu'elle accorde aux méga-données comme outil de gouvernance.

Conceptions européenne et française: entre conflit et complémentarité

Comme nous l'avions constaté à travers l'exempComme nous l'avions constaté à travers l'exemple des Etats-Unis, les capacités colossales de surveillance que ces instruments permettent n'intéressent pas uniquement les gouvernements autoritaires. Une des entreprises spécialisées dans le Big Data qui avait été soutenue par le gouvernement américain, à travers le fonds d'investissement de la CIA, est Palantir. Celle-ci est spécialisée dans la "mathématisation des comportements humains" afin de repérer - notam-

ment - les activités terroristes. En 2016, face à l'urgence de la menace terroriste pesant sur la France et dans l'impossibilité de trouver un équivalent national, la DGSI a signé un contrat très controversé avec Palantir.[23] L'ampleur du retard accumulé dans le domaine du Big Data était telle qu'un secteur si sensible a dû être confié à une entreprise étrangère. Durant les deux années suivantes, la collaboration de 22 sociétés françaises a permis la mise en place du Cluster Data Intelligence qui permettra à la DGSI de ne plus être contrainte à partager ses données avec une entreprise américaine.[24] Depuis cette question posée par le contrat avec Palantir, des solutions exclusivement nationales sont explorées dans plusieurs secteurs. Les acteurs publics n'hésitent donc pas à adopter une approche plus approfondie de la souveraineté numérique que celle défendue au niveau européen. Le gouvernement français définit une stratégie de "cloud souverain" où les données sensibles seront stockés comme l'avait promis Emmanuel Macron dans son programme. Le rapport Villani évoque la nécessité de bâtir une souveraineté numérique et technologique. Finalement, la volonté affichée d'utiliser le moteur de recherche Qwant dans le secteur public révèle une tendance à vouloir constituer une autonomie technologique. Comme nous l'avons précisé, "la souveraineté numérique" telle que nous l'entendons au niveau européen est une conception plus limitée qui ne saisit pas entièrement les enjeux stratégiques de la question. A défaut d'une initiative publique d'ampleur au niveau européen, la souveraineté numérique restera un sujet principalement abordé à l'échelle nationale.

Comme l'estime Antoine Petit, directeur du CNRS, les questions éthiques sur le numérique sont importantes mais les "privilégier outrageusement" peut "laisser la création de valeur et d'emplois à l'Asie et aux USA".[25] Il faut néanmoins admettre qu'au niveau européen, l'enjeu stratégique est davantage saisi dans les dernières années et une réelle importance a été accordée à atteindre l'objectif de souveraineté numérique. En décembre 2018, les institutions européennes se sont accordées sur le Cybersecurity Act qui inclut un système de certification et un renforcement du mandat de l'Agence Européenne de Cyber-sécurité. D'autre part, une pression considérable s'exerce sur les institutions européennes pour qu'elles adaptent les règles de concurrence à la rapidité de l'économie numérique. La "proposition de résolution européenne" par le Sénat français du 5 Juillet 2017 reflète cette attente.[26] Si la réalisation de telles étapes est essentielle et permet de créer un environnement favorable, le degré d'intervention publique que nous avons évoqué à travers les exemples des Etats--Unis et de la Chine est beaucoup plus important et pro-actif. Il ne s'agit pas simplement de créer un framework mais de façonner des entreprises par une volonté politique et des moyens considérables. Une organisation supranationale rencontrera des obstacles importants à mobiliser de tels moyens mais l'urgence du sujet préoccupe les acteurs nationaux comme nous l'apercevons en France. Il n'est pas sûr que la régulation avancée par l'Union européenne sur la protection des données ou le développement d'un espace de données européen suffiront à mettre en place une souveraineté numérique. Le "bouclier de protection" actuel que l'Europe a établi avec les Etats-Unis ne permet pas réellement de vérifier le respect des standards européens. Par ailleurs, le CLOUD Act qui est récemment passé par le Congrès américain oblige toutes les entreprises du pays à fournir leurs données à la NSA si une demande légalement justifiée est réalisée. Ainsi les buts recherchés par la RGPD risquent d'être compromis.[27] Quant au sujet de la taxation et de la régulation des GAFAM, il n'est pas évident que Bruxelles soit en position de force. En 2014, le Président de Google, Eric Schmidt, avait mis en garde l'Europe sur le risque de "devenir un désert d'innovation" si "une volonté de régulation forte se manifestait".[28] Les GAFAM disposent de certains ensembles de données et d'instruments d'analyse tellement essentiels au fonctionnement d'une économie moderne qu'ils peuvent négocier en grande confiance avec des acteurs publics. Si les Etats-Unis ont un accès à ces acteurs et disposent des moyens légaux et politiques pour les réprimander, l'Union européenne a des possibilités plus limitées.[29]

Comme l'énergie, la défense ou le secteur agricole, le Big Data aussi est un domaine stratégique essentiel. Ce constat est partagé par une partie considérable des experts et des décideurs en France. Le rapport de l'IFRI plusieurs fois évoqué illustre cette conception. Sans autonomie dans la gestion des méga-données, une société risque d'être la proie d'autres acteurs que ce soit des entreprises ou des Grandes Puissances.[30] L'autonomie numérique passe par une intervention publique considérable au delà de la mise en place d'un framework légal. Avec un PIB de 19 trillion de dollars et une population de 512 millions d'habitants, l'Europe est l'échelle la plus appropriée pour une telle interven-

tion. Que ce soit par le soutien à des champions européens du numérique ou par l'encouragement des partenariats publics transparents avec les GAFAM, une stratégie de long terme devrait être envisagée.[31] Dire que des obstacles et des divergences importantes empêchent l'émergence d'une telle stratégie serait un euphémisme. En l'absence d'une telle approche européenne, les Etats membres dont la France développeront leurs propres moyens. Dans le futur prévisible, une régulation supranationale parfois désavantageuse et une stratégie nationale plus approfondie vont donc coexister. Les modalités et le succès de ce modus operandi demeurent en suspens.

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Rational Democracy:

A CRITICAL ANALYSIS OF DIGITAL DEMOCRACY IN LIGHT OF RATIONAL CHOICE INSTITUTIONALISM

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Abstract:

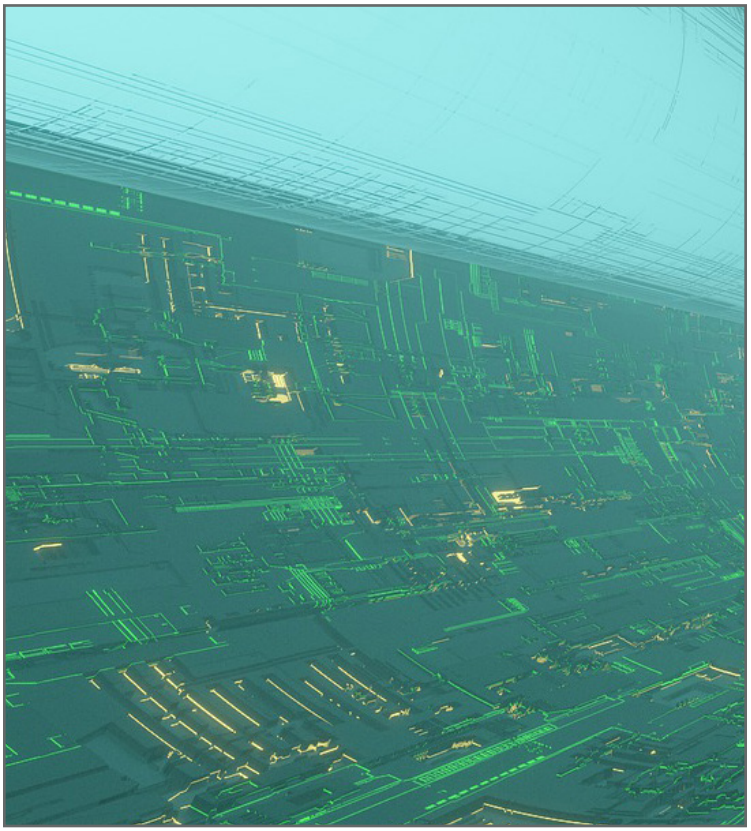
This paper analyses how a theoretical approach like rational choice institutionalism (RCI) may help understand the conceptual bases and future challenges of digital democracy (DD). It distinguishes three main characteristics of DD, in the light of RCI: the use of quantitative empirical data to measure and trace public activity to provide more perfect information to actors it assumes are rational; the creation of liquid contexts that allow permanent reconfiguration of institutional settings; and a state-skeptic heritage from techno-libertarianism. The final section elaborates a critique of the rational assumptions of DD and stresses that the governance of the technological devices it creates may still be dependent on more 'analogous' politics.

Since its beginnings, digital technologies have increased the enthusiasm for the realisation of political utopias about a society capable of achieving self-organisation and decentralised governance. The vision was initially brought to concrete technological developments in mid-century with the surge of cybernetics and the attempt to automatise public processes for a more efficient State, taking its most practical form with the Cybersyn Project between 1971-73. Contemporary developments of governance technologies have learned and leveraged particularly from the internet, the free software movement and the increasing micro-processing capacity to come up with more efficient solutions for collective decision-making, preserving, in most cases, the same ethos of "algorithmic regulation". This essay examines how rational choice institutionalism has framed the scope of digital democracy, and how recent supporting technologies like blockchain have made more evident the objective of creating new institutional arrangements to overcome market failures and increasing inequality, without questioning the utility-maximisation logic. This rational logic of governance could explain the paradoxical movements towards centralisation and power concentration experienced by some of these technologies.

Digital democracy will be understood as a heterogeneous field that explores how digital tools and technologies are used in the practice of democracy (Simon, Bass & Mulgan, 2017). Its understanding needs to go in hand however with the use of supporting technologies and practices that amplify the role of the people in the public decision-making process, either by decentralisation (of public goods) or aggregation (of opinions), including blockchain, data processing (open data and big data), open government, and recent developments in civic tech (Knight Foundation, 2013). It must be noted that the use of digital democracy as a category to describe the use of these technologies to support democratic processes remains contended and requires further debate.

Dahlberg (2011) makes a useful characterisation of four common positions in digital democracy, where the 'liberal-consumer' and the 'deliberative' positions dominate mainstream thinking and practice, while other alternative positions ('counter publics' and 'autonomous Marxist') exist, but mostly in experimental or specific contexts. The liberal-consumer position conceives a self-sufficient, rational-strategic individual who acts in a competitive-aggregative democracy by "aggregating, calculating, choosing, competing, expressing, fundraising, informing, petitioning, registering, transacting, transmitting and voting" (p. 865). The deliberative subject is an inter-subjectively rational individual acting in a deliberative consensual democracy "agreeing, arguing, deliberating, disagreeing, informing, meeting, opinion forming, publicising, and reflecting" (p. 865).

Practice has been more homogeneous adopting the 'liberal-consumer' and 'deliberative' positions. Examples of the former include local and national government e-democracy initiatives; media politics sites, especially the ones providing 'public opinion' polling and 'have your say' comment systems; 'independent' e-democracy projects like mysociety.org; and civil society practices like Amnesty International's digital campaigns, and online petitioning through sites like Change.org or Avaaz.org (Dahlberg, 2011, p. 858). On the



"Practice has been more homogenous adopting the 'liberal-consumer' and 'deliberative' positions."

other side, examples of the deliberative position include online government consultation projects (e.g. Your Priorities app and DemocracyOS.eu platform), writing and commentary of online citizen journalism in media sites; "online discussion forums of political interest groups; and the vast array of informal online debate on e-mail lists, web discussion boards, chat channels, blogs, social networking sites, and wikis" (p. 859). Recent developments not only include a mixture of both positions, but a more dynamic online-offline experience.

Freedom as a function of digital infrastructure?

The development of cybernetics in the mid-twentieth century was influenced by anarchist ideas of freed organisation and decentralisation of power (Duda, 2013). Colin Ward expressed that "anarchy is a function, not of a society's simplicity and lack of social organisation, but of its complexity and multiplicity of social organisations. Cybernetics, the science of control and communication, throws valuable light on the anarchist conception of complex self-organising systems" (1973: 50). It was during Allende´s socialist government in Chile that this idea became a reality with the development of the Cybersyn Project (Loeber, 2018). It was a primitive form of what O'Reilly (2013) defined as "algorithmic regulation", aimed at an efficient control of state-owned industries. The project was led by Stafford Beer, an expert in management cybernetics, who had the idea of creating a liberty machine, "a system that operated in close to real time, facilitated instant decision making, and shunned bureaucracy (…) [preventing] top-down tyranny by creating a distributed network of shared information" (Loeber, 2018: 3).

The enthusiastic vision of the time has had a huge influence on the development of digital technology and governance mechanisms during the last 50 years. A paradoxical situation might be perceptible if one compares the critical perception of the present state of technology (see Colin, 2018) with the ideas that inspired it. After a historical recount of the relation between cybernetics and anarchism, Duda (2013) concludes that "the larger trajectory of transformation to a more free and just society has been disappointing" (p. 70). Freedom as a function of digital infrastructure continues to be a popular idea, but practice does not match it yet. Massive surveillance and the appearance of new unaccountable and hidden elites pose to be the biggest challenges left by the present model. And although anarchy and democracy are different concepts, the shared principle of horizontal decision-making has paved the way for the absorption of initial developments and learnings in cybernetics into digital democracy.

A light from Rational Choice Institutionalism

To shed a light on the understanding of this situation, it might be important to consider how rational choice institutionalism (RCI) explains the inherent logic of digital democracy. Rational choice institutionalism is a theoretical approach of 'bounded rationality', that is, it supposes rational utility-maximising actors playing in contexts constrained by institutions. According to Hall and Taylor (1996), this approach assumes rational actors to be incapable of reaching social optimal situations due to insufficient institutional configurations. The actors play strategic interactions in a configured scenario that affects "the range and sequence of alternatives on the choice-agenda or [provides] information and enforcement mechanisms that reduce uncertainty about the corresponding behaviour of others and allows 'gains from exchange', thereby leading actors toward particular calculations and potentially better social outcomes" (p. 945). RCI focuses on the reduction of transaction costs and the solution of the 'principal-agent problem', where "principals can monitor and enforce compliance on their agents" (p. 943).

As we have seen, the parallels between digital democracy and RCI are quite high. For instance, open government is one recent branch of digital democracy entirely devoted to solving the principal-agent problem through the design and implementation of transparency, participation and co-creation measures (OECD, 2017). The specific field of data analytics, including open data and big data, serves two objectives: more informed decision making and much radical accountability from political agents. Derived from these, 'algorithmic regulation' stands as a new institution capable of executing norms without the interference of human biases. Much of the developments of the growing civic tech field aim to reduce transaction costs by improving trust between actors while providing the tools for improved collective decision making.

“Digital democracy is opening possibilities to solve long standing problems of governance"

The most explicit form of RCI approach is found in the recent book Radical Markets by Posner & Weyl (2018). Radical Markets is an approach based on the rejection of a central regulator (i.e., the State), the adoption of power decentralisation mechanisms, and the radical need for new institutional arrangements that prevent inequality and undermining of collective action. The abolition of private property through the implementation of a self-assessed tax and the use of quadratic voting for collective decision making are its more radical proposals. "In particular, [quadratic voting] relies heavily on the notion of verifiable, separate human identities, because a community member could multiply her effective influence dramatically by misrepresenting herself as multiple individuals” (Buterin & Weyl, 2018).

We could say, then, that three general characteristics stand out of digital democracy in its relation to RCI. In the first place, the use of empirical information for building models is a key feature of digital democracy. It is highly dependent on quantitative methods. It models political and human behavior as statistical variables and draws conclusions and predictions mainly out of data. This is particularly strong when there are continuous sources of data available, and when that data corresponds to real life and real-time situations.

A second characteristic, made possible by the digital technologies, is the adoption of a ‘liquid’ context, useful for a permanent reconfiguration of institutions, norms, and algorithms. For example, Hardt and Lopes (2015) describe how a new experimental institution (a liquid democracy) was tested, where votes can be delegated, but how they are used needs to remain visible.

Finally, a third characteristic is the state-skeptic heritage much digital technology inherited from techno-libertarians and the American libertarians, highly influential schools, especially in the United States. The development of digital democracy is a response to the will of reducing the intermediation and ‘inefficient’ role States and bureaucracies have in public affairs. This trend is in line with the rise in new public management described by Hood (1991), although the contemporary developments that directly respond to it are in the related field of GovTech (Accenture & Public, 2018).

We see then how digital democracy has developed in line with RCI. In brief, it is a field of practice that aims to resolve two questions: first, how to measure and trace (public activity) to provide more perfect information to rational actors (including, governments, enterprises, and citizens); and, second, once action and information are digitised, how to build a flexible environment to easily vary and execute new institutional settings.

Challenges and questions

Digital democracy is opening possibilities to solve long-standing problems of governance, but its approach is not free of (unintended) consequences. As Hay (2004) points out, the rational choice approach is both deductive and parsimonious. It values the simplicity of the assumptions upon which it is modeled, and the deduction of predictive or explanatory inferences. Hay rejects its claims of “a universal theory of human conduct – or, indeed, a theory at all", proposing it is "more as a set of analytical strategies for exploring the logical consequences of a given set of heuristic or imported assumptions" (p. 45). One will need to ask about the consequences of creating new political infrastructure, like digital democracy, with such bases.

The assumption behind the most collaborative approaches of digital democracy is that with the reduction of transaction costs, social actors can achieve social optimal results by themselves, without the need for the State to verify compliance and enforce punishments. This situation is problematic in a way and insufficient in another. In the first place, it supports the conception of humans as utility maximising actors and provides an institutional context to legitimise and reinforce it. However it is also insufficient because it depends on the definition of certain rules that still need to be decided politically.

Another challenge posed particularly by distributed technologies like blockchain is that it is not yet clear if this technology is taking power out of existing power structures (central banks, for example), and reconstructing the same top-down model in the digital space. The risk is that we face the tyranny of structurelessness (alluding the famous essay written by Jo Freeman in 1971 after the author’s participation in various feminist movements that called for a “leaderless, structureless (…) organisational form”), where new unaccountable and unrecognisable elites appear.

Di Filippi (2018) comments that the real decentralised government structure that we know is the free market, although, without an institution that exerts control, market failures appear.

She goes on to ask: will market dynamics ensure decentralisation? Is the market mechanism more legitimate than the central institution? How we are going to govern decentralised infrastructures without relaying in market dynamics or central operator? Will the RCI approach in digital democracy find a way to bypass these challenges without questioning its most basic assumptions?

One would also have to ask, as does Duda (2013), if self-organisation impulses of the present keep coming from outside, is it then self-organisation? Given the great majority of reasons for which many Digital Democracy projects are developed, they could be serving the purpose of legitimising a participatory model and/or opening a way for a new market of democratic solutions, rather than serving the people's will to organise.

Even if the current progress of digital democracy towards a free and self-governing society seems blurred, recognising its most problematic assumptions helps illustrate the debate. Practitioners could center their efforts in developing more 'deliberative', 'counter publics' and 'autonomous Marxist' forms of digital democracy. Additionally, documenting and reflecting on past projects is a necessary endeavor, as Medina (2015) does on the lessons from the Cybersyn Project concerning the fields of open and big data.

What might be certain is that today's revolution will not appear if revolutionaries expect that the first step comes from the institutions and through their transformation. One lost element in RCI is the agency of human beings to transform their context, despite an adverse institutional context. If we all remain convinced that the homo œconomicus is the only political spirit in all of us, there might not even be enough impulse to organise ourselves to change the institutions.

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FinTech:

HOW TO FOSTER INNOVATION IN THE FINANCIAL SECTOR?

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Abstract:

The financial services have been central to people's life for centuries, with many of the same banks dominating the market and its development. Yet, the past 10 years have seen the birth of a new sector – the Financial Technology or FinTech which contradictorily requires traditional banks to exist, while also externally fuels innovation and competition in finance. Understanding better the role and importance of FinTech start-ups across the globe, we must consider innovation in the banking sector as a whole. This article entails to do just that by examining the relationship between law and FinTech innovation. Seven relevant areas – commercialisation, intellectual property (IP), public policy, open innovation, economic development, competition law and proactive vs reactive approach, are presented in order to identify what practices are needed for sustainable, client-oriented banking innovation to be fostered.

The banking sector has existed for centuries, but never has it faced so many different uncertainties. From the 2008 financial crisis, to the rise of the financial technology start-ups (hereafter called FinTech), today more and more diversified factors are driving change within the industry. The post-2008 world is marked by a fall in consumers' trust in the big banks. This has gone hand-in-hand with rising consumer expectations. Millennial demand more personalised and simplified services, while giving less loyalty. More importantly, for the first time in the banking's development, technology has penetrated every aspect of the financial services. This entails that the context in which the financial sector must develop is evolving at an extremely fast pace (EY, 2018). On the one hand, such changes make, for instance, the need for a bank account numbers, cash machines and bank branches feel obsolete (Lyons et al., 2018). On the other hand, this means that banking firms are forced to continuously innovate or be left behind.

Today, FinTech innovation grows at an intensely high pace. Between 2014 and 2015 the sector grew by 212% in the United States (US) and by 92% in Europe (Hernæs, 2018). Due to banks' inability to foster innovation, the FinTech sector is seen as a separate industry which fuels innovative practices amongst traditional banking institutions, but also necessitates their existence. To understand better the FinTech development, this essay will examine innovation in the banking sector. It will present the relationship between law and FinTech innovation to identify what practices are needed for sustainable banking innovation to be fostered. To do so, the essay will discuss seven relevant area – commercialisation, intellectual property (IP), public policy, open innovation, economic development competition law and proactive vs reactive approach.

Translation and Commercialisation

Innovation is expensive and timely to develop. The creation of a novel product or service is related to higher risks, as success is hard to predict. Many innovative products struggle to commercialise due to lack of finance, governmental support and legal, business and market knowledge. To begin with, I will discuss how the commercialisation of financial innovation could be facilitated.

The financial sector is almost as old as contemporary society itself, and even though as any other industry banking has been continuously innovating, the penetration of technology throughout every aspect of the financial services is a novel phenomenon. It has mostly been driven by a newly formed sector dominated by start-ups, called FinTech, aiming to solve old-school financial problems with new-fangled technological solutions. This sector has caused disruption in the traditional banking sector and has put extra pressure on big banks to digitalise and adapt in order to satisfy their clients. As such, FinTech innovation is bringing societal benefits by improving the speed and price of some of the world's most essential services. In fact, it is predominantly consumers' rising expectations, fuelled by the personalised, simplified and consumer-centric services big tech companies, such as Google, Amazon, Facebook, etc. that drives the change. It is then not surprising that most FinTech innovation is done in consumer banking and payments (PWC, 2016).

For that reason, to be successful at commercialising their innovation, FinTech start-ups should recognise the personal spot finance holds in people's lives. This makes the subject extremely personal, and thus, security and privacy should be taken very seriously. Here, the status quo has the advantage in commercialisation of pre-existing trust. Nevertheless, this is declining, following the 2008 financial crisis mostly being blamed on the big financial institutions. In order for FinTech innovations to successfully translate to the real world, they must respect pre-existing data-protection laws and invest in cybersecurity. Otherwise, they risk facing public opposition. An example of how damaging security beaches could be to FinTech technologies is that when Bitfinex, a Hong Kong-based digital currency exchanged was hacked in 2016, the price of bitcoin fell by 20% overnight (Nunns, 2016).

For FinTech innovators to be successful in the development of their novel approaches to

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finance, they should take into account the needs of consumers. Their effective launch depends on the market, as well. Hence, for successful commercialisation, it is vital that the FinTech sector is given access to consumer and financial data. How this could be facilitated will be discussed under the open innovation section of this essay.

Additionally, after the 2008 financial crisis, financial services have been labelled as irresponsible. Yet, compared to other innovation areas such as biomedicine and biotechnology, financial innovation is rarely discussed together with the term responsibility – in the sense of corporate social responsibility (businesses self-regulating to follow ethical and regulations standards) and socially responsible investment (for instance, environmental responsibility). Thus, an engagement with responsibility before the commercialisation process could ensure the innovation receives the public support and reaches critical mass quickly. One way to guarantee new services are compliant and responsible is through the creation of New Product Committees or New Product Approval. These are processes through which opportunities and risks are assessed, and legal compliance ensured before the innovation's launch in the market. This could protect FinTech start-ups from societal backlashes. For FinTech start-ups however, going through such a process might be harder due to limited finance, knowledge and time. Receiving a green light from outside committees might impair innovation when technology is not well understood, too (Muniesa and Leglet, 2013).

Moreover, innovation will be successful only when commercialisation is promoted throughout the whole ecosystem of traditional financial institutions, research facilities at academic instructions, governments and entrepreneurs. How can academia help FinTech innovation and what steps should universities take to incentivise commercialisation? Top-tier research on technology is done in academic institutions, but to promote its translation into the financial sector and further commercialisation, supportive FinTech culture should be created within academia. Education in financial innovation could also give young entrepreneurs the knowledge and confidence they need to launch their FinTech start-ups. Lastly, it is within academia that technology talents are nurtured (Accenture and McMillan LLP, 2017, 23). The Massachusetts Institute of Technology's (MIT) involvement in FinTech innovation is an example of how FinTech should be fostered and academic commercialisation motivated. MIT offers a module on financial technology, mentorship scheme and a FinTech club. The university hosts an annual conference and a financial technology hackathon with $13,000 in prizes (Burton, 2017). Another positive example is the University of Edinburgh's innovation incubator, which offers support to students with novel FinTech ideas (Cyrus, 2018). These two universities show what is needed for new ideas born in academia and students' minds to be translated into the financial market successfully.

Just as universities struggle with the problems of not only coming up with an innovation, but also commercialising it, so do entrepreneurs. FinTech start-ups lack expertise and money to launch their ideas, to protect their IP and to ensure regulatory compliance. To facilitate the translation of their products, FinTech start-ups have the incentive to cooperate with other stakeholders. Next, I will discuss why cooperation with big financial institutions and the public sector will aid FinTech innovators in the commercialisation process.

The two PPPs: Private-Private partnerships and Public-Private partnerships

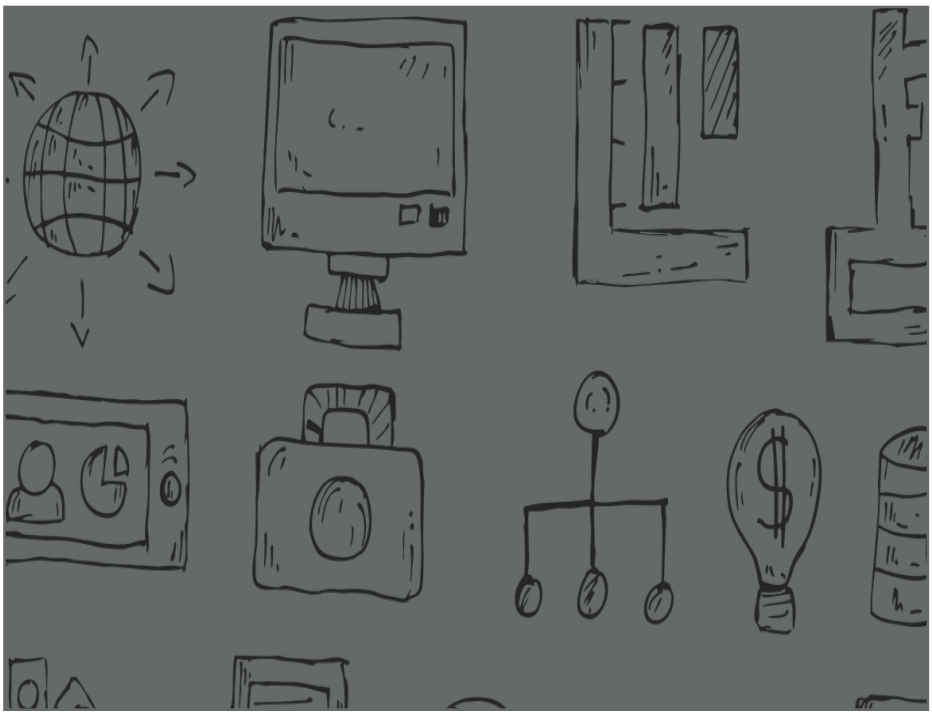
The financial status quo has the advantage of critical mass and larger financial networks, but this could stop them from innovating and being consumer-centric. A main aspect that prevents this innovation is their outdated culture. In its research on financial innovation in New Zealand, PWC (Symons, 2017) emphasises the importance of culture in promoting the innovative process. A sector that wants to innovate must support innovation and talent. Corporations which want to improve their innovation to meet consumers' expectations should have a top-down approach to technology, accepting new developments throughout its structure and ensuring there is an understanding of the stakes and opportunities by all employees so opportunities are not missed (PWC, 2016). For instance, Scarbrough and Lennon's (2010) research evidence that the lack of IT knowledge throughout the Bank of Scotland resulted in limited ability to spot innovations needed. Overall, today's financial services providers are faced with increasing consumer expectations but lack the culture of technological innovation placed at the centre of their corporations.

“This open innovation initiative allows for the bank to have its issues addressed by the start-up sector”

Therefore, big banks cannot solely rely on innovation created within their teams. This is where FinTech companies could be useful (PWC, 2016, 12). Big financial institutions are unable to innovate by themselves, so they need cooperation. In fact, 40% of the banks worldwide have already recognised this necessity (BNP Paribas, 2016). Similarly, FinTech companies are struggling with the scaling-up of their projects as they are unable to get as many users as they need for efficiency. Furthermore, they do not have enough knowledge of the law and regulations to use those to their advantage. On both points, big banks can help. Hence, both sides benefit from working together (Burton, 2017). For instance, in 2016, the French bank BNP Paribas started its cooperation with a Silicon Valley FinTech start-up incubator - Plug-and-Play. This open innovation initiative allows for the bank to have its issues addressed by the start-up sector and for some of the best international FinTech companies to gain access to the French market. In this situation, the banking partner offers financial and information resources, as well as clients to the FinTech innovators. Meanwhile, the incubator participants solve the bank’s problems, bringing an external, young, and innovative view-point. These partnerships might also take the form of Public--Private Partnerships in countries where the biggest banks are still private. Yet, only 20% of the global banks have engaged in similar practices. Such collaboration clearly benefits commercialisation by providing direct access to the market for innovators. It also advances Research and Development within whole financial sector, both on a start-up and on traditional levels. Thus, it should be further promoted by government.

Secondly, Public-Private Partnerships (PPPs) could too facilitate the success of FinTech innovations on the market. Governments worldwide necessitate financial services to execute many of their activities. However, in this area, many of the services they provide are falling behind. Not to mention that if corporations are struggling with creating innovative culture, then governments have barely even started discussing the question. Partnering with the FinTech industry, the public sector could solve the troublesome service gap, increasing citizens’ satisfaction with the services offered, as well as lowering its operation costs. Take for example Bahrain’s FinTech Bay, a government-sponsored incubator, which besides providing financial support for FinTech start-ups, connects government agencies with the FinTech innovation (Summers, 2018). Such PPPs permit public entities to discover new ways for innovation or find a technological solution to a financial problem they face. They help the innovators in a similar way as Private-Private Partnerships, giving them backing and clients. Lastly, PPP could take the form of RegTech cooperation. These are agreements between the private sector and a FinTech company, where the latter provides the former with the data needed for the creation of a certain regulation.

Nevertheless, for both types of collaborations a similar problem might ppear. According to PWC (2017), the majority of FinTech start-up partnerships with the traditional banks fail because the latter are not flexible enough to adopt the changes. This is once again a result of the missing innovative culture. Similar challenges apply for the Public Private Part-



nerships. Finally, this sort of collaboration entails data sharing amongst different entities. This in itself poses security and privacy risks which will be discussed in the Open Innovation Section.

Intellectual property (IP)

Traditionally, innovation and commercialisation are incentivised by the possibility to receive exclusive patent/IP rights on one's invention which guarantees a financial benefit in the long run. IP also permits for the innovation knowledge to be shared with all other interested parties to further advance R&D in the sector. However, the IP process is complex. This is especially true for the FinTech sector.

Firstly, IP laws often cannot keep up with innovation. To facilitate FinTech development, they should be effectively enforced, should give clearly defined rights to the IP owners and should protect the inventor for a longer period (Shiao, 2017)[1]. If an inventor believes that their creation would not be protected under the law and thus they will not benefit financially from it, they are less likely to undertake the research or want to commercialise it in the first place. Moreover, they are less likely to apply for patent protection and share their knowledge with the industry. By offering the possibility of IP protection, corporations, incubators and academic institutions could attract better talents, too. Therefore, to incentivise FinTech innovation, better IP laws should be introduced. The creation of those should benefit from discussion between all stakeholders – from lawyers to entrepreneurs, from governments to corporate partners.

This leads to the second problem with contemporary IP rules – often they designate FinTech inventions as unpatentable. As they rely on technology, FinTech creations are often characterised as 'business method patents', making them non-patentable subject matters (Hinton et al., 2017). Hence, IP laws must be revised to clarify what FinTech inventions are patentable and what not. They should also make the IP-application process more hassle-free (Medeiros and Chau, 2016). For example, after the Alice Corp v. CLS Bank (2014) US Supreme Court case, in the US a software patent application goes through a two-step applicability-evaluation system. First, the invention should fall within one the statutory categories. Then, it should be decided if the claim involves an abstract idea, which is traditionally not patentable. If so, it should be decided whether the patent offers "significantly more" than the abstract idea. However, US patent law does not provide a clear definition of what qualifies as more than abstract. Consequently, huge inconsistencies in the application of software patents granting in the US FinTech sector have appeared (Singer, 2014).

Similarly, Medeiros and Chau (2016) point out that although the Canadian IP office (CIPO) has provided guidance documents, attempting to clarify the patent office's practices, Canadian IP laws have stayed very unclear. In fact, after the text was released, even more inconsistent decisions were produced. Even though the guidelines underline that business methods are not excepted from patentability, the CIPO still imposes a very strict approach when granting IP to FinTech/software inventions. The inability of IP laws to clearly define what protection software inventions qualify for, as well as the immense insecurity and complexity of the patent-granting process dis-incentivises IPR applicants and ultimately innovators. It also puts FinTech start-ups in a disadvantageous position because they lack the knowledge needed to fight for patent protection in the sector.

Furthermore, FinTech innovations are struggling with finding locally the demand needed for their successful scaling up. Yet, international IP laws' disparity hurdles global expansion (Burton, 2017). Here, better international cooperation between international IP offices and the introduction of standardised protocols on IPR protection in the FinTech sector could help. In the US although difficult, a software could be grated patent rights. Europe, on the other hand, offers much weaker copyright protections for digital inventions. This could be problematic as only the text, but not the process of the code is protected. Thus, if someone else offers the same function with slightly different code, they will not be infringing on right of the IPR-holder (Arrowsmith, 2017). This EU-US difference in itself signifies that patents are weaker internally, too. To address the complexity of the patent granting process for digital inventions and set a positive example to be used in the standardisation the Singaporean government has set its IP Hub Master plan (GoS and IPOS, 2013). The programme entails simplifying, refining and strengthening the software protection process by 2023.

[1] The role of the length of the protection is debatable. On the one hand, longer period of IP right given to the inventor might give them bigger incentive to innovate. On the other hand, if the protection period is too long it might hurdle innovation in the sector as it prevents other players to utilise the innovation.

"..FinTech innovation lowers financial sector operation costs..."

Finally, as mentioned, many FinTech innovators are small start-up which do not have the resources and knowledge on how to protect their IP rights. Academic and private partners must provide more incentives, subsidies and information to inspire an increase in participation in the IP commercialisation community. Standardisation of international IP offices' practices in relation to FinTech could simplify the process for the smaller players and give them the opportunity to compete on the same level as bigger competitors. Additionally, this is where incubators and partnerships might benefit the innovators. The former could give their IP knowledge and expertise in exchange for a part of the invention's future success. Governments, too, should assist entrepreneurs and innovators in extracting value from their IPs. Finally, another challenge which might cause FinTech partnerships fail issues from conflicting IP rights interests (Bobeldijk and Agini, 2017). Hence, it is key for policy-makers and IP offices to encourage and facilitate IP cooperation. Consequently, all stakeholders in the FinTech sector will be incentivised to cooperate and innovate, and there will be better trust between the partners.

Public Policy

As shown, IPRs offer the benefit of financial gains to innovators and could be used to attract talent, innovation and promote cooperation. If properly constructed, IPR could incentivise innovation itself. In addition, IP law could be a policy approach of governments which want to attract more FinTech innovation. For example, as part of its IP Master Plan in 2018 the IP Office of Singapore launched an initiative for FinTech patent applications to be fast-tracked and received within 6 months instead of the usual two years. The FinTech Fast Track programme allows faster monetary gains and scaling-up opportunities for FinTech innovators. It also enables the Singaporean government to attract more FinTech innovation and the economic benefits it brings to the country (Fintech Innovation editors, 2018).

Furthermore, FinTech innovation lowers financial sector's operation costs, B2C costs and B2B dynamics. Business-wise, it diversifies the services provided, brings in new clients and improve consumer retention. From a governmental perspective, FinTech creates new jobs and income. For instance, according to the Scottish government, the FinTech sector has the potential to create as many as 15,000 jobs in the next decade (Cyrus, 2018). Additionally, the FinTech sector has been recognised as beneficial for Small and Medium Enterprises (SMEs). SMEs are usually riskier to invest in and since they go through the same lending application processes as big companies, SMEs have a lower chance of receiving a loan from the traditional banking institutions. Studies in the UK and the US show that almost four-fifths of the SMEs attempted to borrow money from a bank, but only a fifth were successful. This could get in the way of their development or even their creation (FSB and BIS, 2017). Thus, the FinTech which makes loans more accessible for SMEs could facilitate business development. FinTech innovation in the credit market has the potential to bring about better financial inclusion, lower prices for borrowers, better risk-adjusted returns for investors and diversification of credit sources.

Motivated by the economic benefits which would result from blooming FinTech sector, governments could finance incubators which support FinTech start-ups financially and legally, and facilitate the conversation between corporate world and the startup world. For instance, in 2016 the Australian government financed the establishment of the Sydney FinTech incubator – Stone and Chalk[2]. The not-for-profit assists FinTech start-ups throughout the launching process. Such initiatives also permit the state to give the information FinTech start-ups need to comply with regulations.

Policy-makers could also provide direct subsidies to the sector. For instance, once again the Singaporean government has combined its FinTech fast-track IP programme with a S$225 million Financial Sector Technology and Innovation (FSTI) funding scheme (Fintech Innovation editors, 2018). Similarly, countries like China, France and the UK have allowed preferential tax policies for the FinTech sector[2].

However, FinTech practices bring with them certain risks, too. In terms of the lending market, FinTech start-ups have lower liquidity than big banks and questionable ability to evaluate properly the credit risks. They might cause a reduction in lending standards and a credit rating system dependant on investors fad-like behaviours, risking the system's stability. Moreover, since FinTech does not face the same regulations as banks they could have lower respect for individual's privacy and are more prone to cybersecurity mistakes. Due to lower regulations, authorities have limited knowledge of the dealing of FinTech companies. As a consequen-

ce, they are less capable of monitoring their activities, enhancing the information asymmetry within the banking system. In fact, this obscurity is bound to deepen. Popular approaches to FinTech, such as blockchain and RegTech[3] essentially remove the possibility for monitoring, by solely relying on confidential algorithms. Consequently, the sector is exposed to unmitigable and unregulatable risks (Ducas & Wilner, 2017; Magnuson, 2018). Current approaches to policy-making would not allow for these risks to be monitored because of the automation of the compliance process.

Likewise, PPPs and Private-Private collaborations entail data-sharing which might put at risk the privacy of the individuals. FinTech do not access public safety nets either, so are more likely to crash if an economic crisis hits the industry again (FSB and BIS, 2017). Lastly, similarly to IP law, financial regulations lack clarity on which laws apply to FinTech and which do not.

So, the FinTech sector advances consumers' and the market's interests, but the regulators must balance those benefits and the incentives for innovation with the risks FinTech companies bring. If all banking rules apply to the FinTech start-ups, but they do not get a banking licence, they will be forced to exit the market or demotivated to enter in the first place (Didenko, 2018). However, letting FinTech start-ups stay unregulated poses risks to the end-users and the financial system. To balance the pros and cons of the FinTech sector in the financial credit system, regulations dedicated to FinTech credits in the form of licenses were introduced in numerous countries in Europe, such as Switzerland, the UK, the Netherlands, France and Spain. These licences are much easier and cheaper to acquire than a banking licence so as not to stifle innovation. Yet, they put forward certain financial standards FinTech companies must meet to be allowed to lend money, like following anti-money laundering rules, insurance protections guaranteed standards, capital requirements and so on (FSB and BIS, 2017). Thus, the consumers are protected from scams, the market from failure and the FinTech start-ups are guided in the direction of responsible innovation.

Another positive practice which could both promote innovation and allow for cooperation between the private and the public sector in the formation of the regulations are the so called regulatory sandboxes in the UK. The British sandboxes permit for FinTech innovators to test their programmes in a controlled environment for a limited time and number of users, reducing the time-to-market, the costs to entry and the risks and facilitating access to finance. These protect the consumers, too. According to the UK Financial Conduct Authority (FCA) 90% of the participants launched successful FinTech businesses (Zuckerman, 2018). Moreover, the Sandboxes permit the FCA to maintain contact with and an eye on the sector. This it can provide regulations needed to balance risk and innovation and embraced by both the traditional financial industry and the new companies. Regulation consultations are facilitated through the PPPs and incubator initiatives.

Finally, as already discussed FinTech start-ups face the challenge that local demand might not suffice for FinTech companies to build efficient and sustainable businesses (Didenko, 2018). Therefore, it is important for regulators to facilitate the international development of FinTech Start--ups. Apart from international standardisation of IP laws for FinTech start-ups, mire international cooperation on the topic in general is essential. Similarly, governments should make sure to increase the local demand for the technology. For instance, the UK FCA unveiled its plans to promote the sandbox practice on a global level next, cooperating with other governments to allow for international diffusion of the FinTech innovation (Zuckerman, 2018). Moreover, the Sandbox approach heightens consumers' trust in the platforms and, thus, attracts more users. A step in the right direction were also the G20's recognition that FinTech regulation should be on the block's agenda (Becker, 2017).

Public Policy and Compeition

Furthermore, FinTech in the credit market, as well as overall FinTech companies, could lower the power concentration in the banking sector. Currently, the financial services industry is extremely concentrated. As seen in Figure 1, in 2012, the five largest Canadian and Australian banks held more than 90% of the assets. The numbers in the UK, US and Italy, although lower, are equally worrying (IMF, 2014). The existence of a monopoly/oligopoly entails lower competition in the market and lowers the incentive to innovate. In Finance, FinTech aids increased access and decentralisation of the financial system, serving the underbanked and unbanked, enhances market

[2] For example, China allows local government to lower taxes for credit FinTech start-ups.

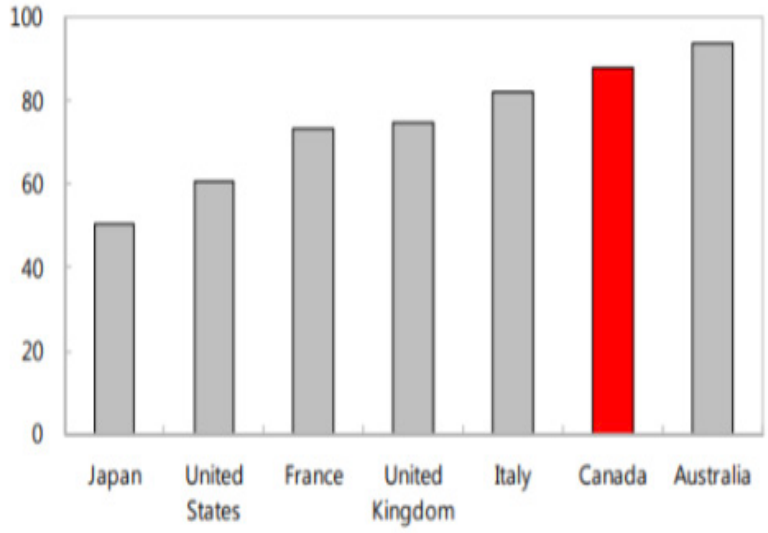
[3] RegTech is the usage of automated technology and big data to comply with a given regulation and hedge risks within the financial sector.

integrity and might be the source for some early warning signs of systemic financial problems (Herweijer et al., 2018). Therefore, policy-makers have the motive to decrease the barriers to entry for the FinTech entrepreneurs as those could re-introduce innovation in financial services. Also, lower concentration of the financial market has the potential to bring more stability.

Still, the existence of those monopolies means that banks have a beneficial position compared to the new-comers. They already have all the clients and data, as well as the trust. Furthermore, through the already discussed collaborations and possible acquisitions of FinTech start-ups by the bigger players, the market competition could be stifled. Not to mention that big tech companies have already expressed interest in disrupting the financial sector themselves. They, too, have enormous knowledge of the consumers and might put smaller FinTech start-ups, as well as banks at an advantageous position. After all, due to network effects and economies of scale the tech sector is vulnerable to market power concentration. The fact that data is concentrated in the hands of a few could facilitate the formation of cartels and of price-fixing practices. Big financial or tech companies might, also, abuse their dominant positions and sabotage innovators. Considering the positive effects FinTech innovation could bring to the individual, society, business and society, governments have in their interest to protect the FinTech innovators (Van Der Beek, 2017, Hinton et al., 2017, FSB and BIS, 2017, Didenko, 2018). Hence, those dangers should be considered by national and international competition authorities when regulations for the FinTech sector are created and when acquisitions are allowed to protect consumers' interests. Moreover, policy-makers should ensure FinTech entrepreneurs are protected when they enter into a collaborative agreement with bigger player.

Open Innovation

In breaking up the imbalance of power in the financial sector, policy-makers must also confirm that FinTech start-ups are given access to bank infrastructure. Importantly, FinTech start-ups are disadvantaged by the data disparity in the financial services market. Usually, the banking leaders hold exclusively financial and user data collected on consumers for years. As newcomers, they lack access to the data necessitated for R&D, testing and compliance, which is the fuel of the technological innovation. Since openness and international interoperability between systems increase to scale FinTech businesses, it should be incentivised through open innovation policies (Didenko, 2018). When banks are reluctant or uninterested to share their information, regulators should implement rules on open data to eradicate barriers to innovation. A step in this direction is the Revisited Directive on Payment Services (PSD2) in the EU, the New Payments Platform (NPP) in Australia and the Open Banking Standard in the UK. The EU's policy asks of banks to open access to consumers account via APIs. The British Open Banking Standard standardised the processes for use and setting-up of shared through APIs banking data accesses. Lastly, the NPP compels FinTech start-ups to collaborate with incumbents on "overlay services by limiting the open system access to authorized institu-



Sources: Bankscope; and IMF staff calculations.

FIGURE 1: BANK CONCENTRATION IN SELECTED OECD COUNTRIES (ASSETS OF FIVE LARGEST BANKS AS A SHARE OF ASSETS OF ALL COMMERCIAL BANKS, 2012)

tions (Hinton et al., 2017, Herweijer et al., 2018).

These Open Innovation practices, nonetheless, are accompanied by challenges and risks, as they ask of banks to part with their proprietary data. The perils circle around increased cybersecurity threats, privacy worries and probable negative outcomes of data misinterpretation. When data is opened one loses control over its use and reading. Moreover, bad news can diffuse through the system resulting in harmonised behaviour which threatens the financial systems' stability. Last but not least, an increase in data permits algorithmic discrimination on factors which might appear legitimate, but in fact cause further economic divide. Consequently, these risks are important and should be well-understood and monitored by regulators.

Proactive or Reactive Law

The final problem with regulations which must be considered is whether those should be proactive or reactive. Traditionally, the law has worked mostly reactively, because of the difficulties to predict the future and the fact that people are uncomfortable with regulating something that does not already exist. At the same time this 'wait and see tactic' could fail to protect the market and the consumers from the risk of innovations or could result in a missed growth opportunity. Yet, badly designed proactive regulation could hurdle innovation. Moreover, the FinTech sector as all other technological industries are seeing breath-taking speeds of innovation which could make written law feel obsolete or irrelevant altogether very quickly.

Creating a regulation sooner is a positive development to protect the users and avoid reputational risk or total loss of trust in the industry due to 'a few bad apples'. Waiting to regulate the FinTech sector might incentivise heavily regulated entities to engage in harmful arbitrage, using FinTech as an excuse to avoid regulations in certain markers (Didenko, 2018). Thus, there are arguments for a reactive regulation to be created to ensure that the FinTech market continues developing.

Then again, FinTech innovation could benefit from reactive regulation, as well. Regulators should have a proactive approach, as usually FinTech companies are very small start-ups which lack the habit of engaging in dialogue with regulators and generally stay under the radar unless approached by policy-makers (Didenko, 2018). Once again, great examples of such proactive steps being taken are the regulatory sandboxes and PPP incubators. As already stated, these let governments regulate the market without risking stopping innovation or scaring off start-ups. Thus, it is important that the regulations created are not too strict and limiting to the development of financial technology. A priority for the regulators should be the technologies which pose higher risks to the financial system and the end-users.

Conclusion

What practices are important to ensure sustainable and efficient innovation in the financial sector through FinTech start-ups? Firstly, it is important that commercialisation is incentivised and facilitated. This could be done by promoting financial innovation in universities and amongst entrepreneurs, as well as by increasing the public's trust in the newly formed sector. To do the latter, the customers interests should be considered and FinTech innovators should engage in responsible investments and social responsibility. Moreover, Public-Private and Private--Private Partnerships could promote innovation and enable commercialisation and scaling-up.

Public policy plays an important role in the financial services innovation, too. Since FinTech offers clear economic and societal benefits, policy-makers should support financially and through information and regulations its development. This should also be done through modernisation, simplification and clarification of the existing intellectual property laws. Nevertheless, since FinTech brings with itself certain risks and challenges, regulators must consider those when creating new regulations and must monitor FinTech start-ups activities continuously.

Lastly, governments must consider supporting FinTech innovators because they would allow for the breaking up of the concentrated financial market and more equal power balance. Thus, new FinTech policies should follow for anti-competitive practices by the power-holders. Furthermore, to allow for the innovation to continue growing at the current levels, regulators must guarantee FinTech start-up access to the financial infrastructure and data. To do this, policy--makers must force open innovation in the sector by introducing compulsory API data opening and by helping cooperation between stakeholders.

FinTech innovation is important for societies,

businesses and individuals. As such, it should be supported by policy and law-makers. Yet, they should also continuously evaluate the risk FinTech start-ups could cause the financial system. Importantly, to prevent the stifling of innovations, regulations must bring a balance of promotion of innovating practices in the financial sector, ensuring fair competitive practices and protecting consumers. One way of doing this is through continuous consultations and a combination of reactive and proactive law practices.

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