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EDITORIAL COMMENTS

Paying for the EU's industrial policy

There are two EU-related 30th birthdays this year. One is the Single Market, which was acknowledged by the EU institutions as a success in need of further progress.[1] The other is the EU's industrial policy, controversially inserted in the Maastricht Treaty in what is now Article 173 TFEU.[2] A policy that risks clashing with the very essence of the internal market based on openness and non-intervention by States. And a policy that the Commission has tried to do something with since then.[3] After the austerity policies following the Great Financial Crisis, the Commission promised a European Industrial Renaissance in 2014.[4] However, the von der Leyen Commission felt it necessary to announce yet another "new industrial way" in 2020,[5] only for this to be modified twice in response to the "politics of events".[6] First, the Covid-19 pandemic provoked a reflection on how to build measures for better cooperation during crises.[7] Second, the Commission had to respond to the US Inflation Reduction Act (IRA) signed in August 2022, which promised large subsidies and tax breaks for firms based in the US that invest in green technology and energy security.[8] This created risks that firms would leave the EU and led to "A Green Deal Industrial Plan for the Net-Zero Age" announced in February 2023,[9] as well as some long-term discussions on how to handle the

1. European Parliament resolution of 18 January 2023 on the 30th anniversary of the Single Market: Celebrating achievements and looking towards future developments, P9_TA(2023)0007; COM(2023)162 final, European Commission, "The Single Market at 30" (16 March 2023).
2. Sawada, "Controversies on EC industrial policy", (1994) *EC Studies in Japan*, 117, available at <www.jstage.jst.go.jp/article/eusj1981/1994/14/1994_14_117/_pdf/-char/ja>.
3. Pelkmans, "European industrial policy" (BEEP briefing no. 15, July 2006), available at <aei.pitt.edu/58448/1/beep15.pdf>.
4. COM(2014)14 final, "For a European Industrial Renaissance".
5. COM (2020)102 final, "A New Industrial Strategy for Europe", p. 1.
6. van Middelaar, *Alarums and Excursions: Improvising Politics on the European Stage* (Agenda Publishing, 2019), p. 11.
7. COM(2021)350 final, "Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery".
8. H.R.5376 – Inflation Reduction Act of 2022, 117th Congress (2021–2022). For discussion and a comparison with the EU's current policies, see Kleimann, Poitiers, Sapir, Tagliapietra, Véron, Veugelers and Zettelmeyer, "How Europe should answer the US Inflation Reduction Act", *Bruegel*, Policy Contribution 04/23 (Feb. 2023).
9. COM(2023)62 final, "A Green Deal Industrial Plan for the Net-Zero Age" (1 Feb. 2023).

climate crisis and digital revolution.[10] This latest iteration of the EU's industrial policy aims to develop so-called net-zero industries, which go from the generation of energy in cleaner ways reducing reliance on fossil fuels to a transformation of industry based on clean technologies (developing manufacturing capacities for solar, wind and batteries, for example). It tallies with the digital agenda which was part of the 2020 industrial policy by focusing on the raw materials necessary to power digital devices.[11] Is this policy sufficient to meet the challenges posed by increased funding offered by China first and now the US?

This challenge is hard to meet because the EU operates its industrial policy under a series of constraints. Article 173 TFEU created a modest space for it: mandating coordination among Member States and the Commission, the deployment of other policies with an eye to the competitiveness of the Union's industry, all in accordance with a system of open and competitive markets.[12] No competences are conferred for harmonization of laws, nor for any tax provisions. Consequently, various overlapping national industrial policies remain that are poorly coordinated,[13] most recently the Franco-Dutch Pact for innovation and sustainable growth.[14]

Moreover, there is no clearly specified notion of EU industrial policy to work with. At one extreme, nearly any policy can be referred to as industrial: the rule of law and political stability facilitate investment and economic development, for example, something the EU notes in its external relations.[15] In this light, some of the competences the EU has can be read as delivering industrial policy by opening markets to competition and ensuring economic and financial stability via monetary policy and banking regulation. Here, the challenge is persuading Member States to agree to policy initiatives they have accepted only grudgingly. In particular, the Commission is keen to facilitate more private funding of EU industry, but many initiatives falling under the heading of the Capital Markets Union, which was a policy priority in the aftermath of the Great Financial Crisis, remain proposals. In March 2023, the

10. COM(2023)168 final, "Long-term competitiveness of the EU: looking beyond 2030" (16 March 2023).

11. In this light the Chips Act seeks to increase the EU's capacity in this vital sector and the proposal for a Critical Raw Materials Act and a Critical Raw Materials Club seek to secure availability of primary sources.

12. Rossi dal Pozzo (Ed.), *Politiche di concorrenza e politica industriale, sinergia o conflitto?* (3 April 2023), available at <rivista.eurojus.it>.

13. Defraigne and Nouveau, *Introduction à l'économie européenne*, 3rd ed. (De Boeck Supérieur, 2022).

14. Signed on 12 April 2023, available at <www.government.nl/documents/publications/2023/04/12/franco-dutch-pact-for-innovation-and-sustainable-growth>.

15. Eastern Partnership Policy Beyond 2020, JOIN (2020)7 final, at 4.2. More generally, Acemoglu and Robinson, *Why Nations Fail* (Penguin Random House, 2012).

Commission installed a sense of urgency about these initiatives: "The time to act is now."[16] Conversely, some Member States and firms appear to be keen on the disapplication of internal market rules as a means of pursuing industrial policy, as may be seen by regular calls to allow anticompetitive mergers to create EU champions.[17]

However, what the proponents of "real" industrial policy really wish for are deliberate measures to orient industry development in a specific manner.[18] This is what the "Green Deal Industrial Plan for the Net-Zero Age" seeks to do by stimulating efforts in technologies necessary for greening and digitizing the economy. The Net-Zero industrial policy has four pillars: (i) regulatory reform premised on making market entry of new technology easier, suggesting lighter regulatory burdens; (ii) better access to public and private funding for industry; (iii) an education policy so as to have a workforce able to contribute to the development of new technologies; and (iv) open trade based on a mix of cooperation and deployment of trade defence mechanisms. While the first and fourth pillars are aspects where the EU has competences, education policies are dependent on cooperation with Member States and the EU has limited funds to pay for industry. The Commission now proposes a European Sovereignty Fund,[19] but this may well end up nowhere or may take years to agree. How can the EU pay for its industrial policy today?

Finding funds

The EU has incrementally managed to find money for an EU industrial policy in five ways.[20] This is a recognition that because of what both China and the US are doing, "EU industry's market shares are under strong pressure, to a great extent because subsidies abroad are unleveling the playing field. This calls for access to funding for net-zero industry to be extended and accelerated."[21]

First, by coordinating national spending. Already before the Great Financial Crisis, the Commission had achieved a mechanism to rein in State spending via the State Aid Action Plan,[22] which had two consequences: one was to limit

16. COM(2023)168 final, cited *supra* note 10, p. 6.

17. Editorial Comments, "Think big? Think twice! EU competition law in the face of calls for European champions", 56 CML Rev. (2019), 329.

18. Bianchi and Labory, "European industrial policy: A comparative perspective" in Oqubay, Cramer, Chang and Kozul-Wright (Eds.), *The Oxford Handbook of Industrial Policy* (OUP, 2020), pp. 593–620.

19. COM(2023)62 final, cited *supra* note 9, p. 13.

20. A sixth is the Just Transition Fund under the Cohesion Policy for 2021–2027.

21. COM(2023)62 final, cited *supra* note 9, p. 7.

22. COM(2005)107 final, "State Aid Action Plan: Less and better targeted State aid: A roadmap for State aid reform 2005–2009" (7 June 2005).

the amount of wasteful money States spend in subsidizing projects for electoral returns, the other was to create incentives for States to spend money on worthy causes where State aid would address proven market failures. In this way, State aid disbursements would contribute to the competitiveness of the EU.[23] This policy has now been carried forward – the Temporary Crisis Framework (TCF) that resulted from Russia's invasion of Ukraine is now amended and transformed into a Temporary Crisis *and Transition* Framework, applicable until 31 December 2025, which simplifies the grant of aid for renewable energy deployments, decarbonizing industrial processes, and strategic net-zero technologies.[24] The Commission indicates a willingness to allow Member States to match the aid similar projects receive in other jurisdictions, signalling a willingness to avoid firms relocating to the US because of the IRA funding. This is further reinforced by the openness to allow these subsidies to take the form of tax breaks, which are much simpler to operationalize by national ministries and thus more quickly beneficial to firms.[25] Finally, there is a willingness to extend State aid for Important Projects of Common European Interest (five currently have been approved in fields like microelectronics, batteries, and hydrogen) which allow Member States to pool resources to deliver on a specific project.

Second, with the euro crisis came the European Semester by which the Commission surveys national policies and nudges States to spend money to foster the interests of the EU, extending beyond the controls exercised by State aid policy.[26]

Third, with the Covid-19 pandemic the EU managed to secure agreement on the Recovery and Resilience Facility (debated in the pages of this Review)[27] and REPowerEU amends this by adding EUR 20 billion of funding to pay for energy-related projects,[28] some of which aim at sustainability, but some might

23. Blauberger, "Of 'good' and 'bad' subsidies: European State aid control through soft and hard law", 32 *West European Politics* (2009), 719.

24. Communication from the Commission, "Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia", O.J. 2023, C 101/3.

25. COM(2023)62 final, cited *supra* note 9, p. 9.

26. For discussion, see COM(2022)780 final, "Annual Sustainable Growth Survey 2023", section 3.

27. Council Regulation 2020/2094 of 14 Dec. 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, O.J. 2020, L 433 I/23. Guest Editorial, "EU emergency law and its impact on the EU legal order", 59 CML Rev. (2022), 3, and Leino-Sandberg and Ruffert, "Next Generation EU and its constitutional ramifications: A critical assessment", 59 CML Rev. (2022), 433.

28. Commission Notice, "Guidance on Recovery and Resilience Plans in the context of REPowerEU", O.J. 2023, C 80/1.

also "assist energy-intensive industries in the face of high energy prices"[29] which sounds a little more brown than green.

A fourth way of paying for the EU's Industrial policy has been the European Fund for Strategic Investment which started in 2015 and was substituted by the InvestEU Programme in 2021.[30] Both programmes work in a similar manner: the EU budget creates a guarantee (EUR 26.2 billion under InvestEU) which is designed to make it easy for the EIB Group (composed of the European Investment Bank and the European Investment Fund) to identify investment projects with an environmental, climate, or social impact and where a guarantee can be issued to attract private investment. InvestEU guarantees are covered by some national banks as well, and some 70 projects have been approved in research, innovation and digitization, SMEs, social investment and sustainable infrastructure.[31] The present industrial policy foresees simplification of this scheme and alignment with other funding initiatives.

Fifth, through innovation funds, paid for by the revenue generated by auctioning greenhouse gas emission allowances under the Emissions Trading Schemes Directive.[32] This funds projects to "stimulate the construction and operation of projects that aim at the environmentally safe capture and geological storage (CCS) of CO_2, as well as of innovative renewable energy and energy storage technologies".[33] It is foreseen that in 2023 this will be used to support the production of renewable hydrogen. The design of this support scheme is said to "have a similar impact as the production tax credit in the US IRA",[34] but it is also said to have advantages: the Commission will assess competing bids, ensuring that the best project is financed.

At what cost?

Harnessing various funding sources to pay for an active industrial policy raises a number of questions that merit debate.

29. COM(2023)62 final, cited *supra* note 9, p. 10.

30. Regulation 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017, O.J. 2021, L 107/30.

31. See <investeu.europa.eu/about-investeu_en>.

32. Commission Delegated Regulation (EU) 2019/856 of 26 Feb. 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council with regard to the operation of the Innovation Fund, O.J. 2019, L 140/6, as amended by Regulation 2021/1204, O.J. 2021, L 261/4.

33. Recital 8, Directive 2003/87/EC of the European Parliament and of the Council of 13 Oct. 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC, O.J. 2003, L 275/32, as amended (consolidated text available at <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02003L0087-20230301>).

34. COM(2023)62 final, cited *supra* note 9, p. 13.

Tensions: there is no consensus on EU-based funding *tout court*, but by accumulating sums from different quarters there is a recognition that EU-wide spending initiatives are key. Does this, however, come at the expense of budgetary prudence? In State aid, we have lived in a state of emergency since Covid-19; on 23 March 2020, the escape clause to the Stability and Growth Pact was triggered and remains even post-pandemic while Member States haggle on how to reform the Pact.[35] Is there a risk that while allowing more spending, the EU loses its grip on monitoring economically harmful measures by Member States?[36] There is also a legal tension: in relaxing rules to facilitate better and quicker access to funds, is industrial policy undermining the integrity of the internal market rules?

Management: the sheer volume of initiatives and legal frameworks makes one worry about how all these packages can be handled coherently and whether the cost of processing these for industry, Member States, and the EU institutions is worthwhile. InvestEU addresses this by centralizing a number of disparate funding instruments, and the ex-ante assessment of funding applications often draws on similar criteria first found in State aid law (e.g. the identification of a market failure and an account for how the funding contributes to EU interests).[37] It is recognized that Member States should also "align national fiscal incentives . . . and create a common scheme offering greater transparency and predictability to business actors across the EU",[38] but it seems difficult to realize at the best of times, and tricky if States compete to attract investment. At the same time, industry leaders complain that the US hands out money without the same kind of bureaucratic hassle found in the EU.[39]

35. Council of the EU, Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis (23 March 2020), available at <www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/>, based on COM(2020)123 final, "Communication from the Commission to the Council on the activation of the general escape clause of the SGP" (20 March 2020). Debates on the reform are said to be ferocious: van Gaal "Germany pushes 'one-size-fits-all' EU spending rules", *EU Observer* (6 April 2023).

36. Commission's consultation on State Aid Crisis Framework: Joint non-paper by Denmark, Finland, Ireland, the Netherlands, Poland and Sweden (23 Dec. 2022), expressing reservations about too much loosening of State aid. On file with the Review.

37. E.g. Invest EU Regulation, Art. 22(3) and Commission Delegated Regulation 2021/1702 supplementing Regulation (EU) 2021/523 of the European Parliament and of the Council by setting out additional elements and detailed rules for the InvestEU Scoreboard, O.J. 2021, L 339/4.

38. COM(2023)62 final, cited *supra* note 9, p. 9.

39. "EU industrialists attack Europe's counter to Biden green bonanza", *Financial Times* (21 March 2023).

Accountability: third parties face some impediments in challenging State aid awards in the EU courts.[40] How justiciable are spending decisions under the other frameworks? This remains to be explored. The Aarhus Convention facilitates access to justice for environmental matters and might offer inspiration. It was relied on in *ClientEarth* v. *European Investment Bank*, for example. The NGO challenged a resolution to grant a loan for the construction of a biomass power generation plant in Galicia, considering that the assessment of the impact of this plant for renewable energy production, energy security, and environmental objectives was mistaken and that none of the forecast benefits would result.[41] The General Court held that the EIB must carry out an internal review of its decision in light of the evidence obtained by the NGO. Whether this opens the way for meaningful ways of securing accountability about all sorts of funding decisions irrespective of their legal basis remains to be seen. Nevertheless, it privileges accountability of one social welfare parameter (the environment) over others (e.g. possible adverse effects industrial policy might have on workers or on competition). Conversely, one might worry that there is that risk that investors may not be willing to co-invest with the EIB if the latter's decisions can be subjected to review by NGOs. Difficult balances to be struck.

Equity: the lion's share of State aid is awarded by large countries which can afford it,[42] and EU-based funds can hardly compensate for such disparities. Even if the Commission were to allow greater aid in certain geographical areas and the Next Generation EU funds are targeted to relatively poorer States, differences are likely to persist also because the richer States have greater infrastructure to attract advanced industrial projects.

There is another aspect to equity: a citizen that reads about complaints from firms like Sanofi, Dow and Merck about how hard it is for them to obtain taxpayer money to fund R&D,[43] or that innovation funds are paid to giants like ENEL and Air Liquide,[44] has a right to be shocked that public money is used to fund private risks without any clear mechanisms to make sure that those firms give something back, not least since the citizen likely faces higher taxes or receives fewer social services to pay for industry. In State aid, no

40. Pastor Merchante, *The Role of Competitors in the Enforcement of State Aid Law* (Hart, 2020).

41. Case T-9/19, *ClientEarth* v. *European Investment Bank*, EU:T:2021:42. An appeal is pending, A.G. Kokott having confirmed the GC judgment: Joined Cases C-212 & 223/21 P, *EIB and Commission* v. *ClientEarth,* EU:C:2022:1003.

42. Letter to Ministers from Margarethe Vestager, 13 Jan. 2023, Annex Graph 1, available at <www.politico.eu/wp-content/uploads/2023/01/16/Letter_EVP_Vestager_to_Ministers__Economic_and_Financial_Affairs_Council__Competitiveness_Council_aressv398731.pdf>.

43. *Financial Times*, s*upra* note 39.

44. C(2022)1571 final, Annex to the Commission Decision on the award of grants under the Innovation Fund – first call for large-scale projects (10 March 2022).

consequences are meted out if results of State support are not delivered, and the EU should have systems in place to monitor how well money has been spent, possibly with some punitive measures.[45] Moreover, private investment can be attracted only if this is made worthwhile and questions may legitimately be raised about whether, in an effort to attract private funding, the Commission is also encouraging Member States to depreciate labour via national productivity boards.[46] Competitiveness has a dark side.

In an epoch characterized by geo-political rebalancing of powers, a climate crisis requiring a major shift in industrial production and increased reliance on digital technology, a Union policy like that set out in February 2023 is necessary and complements the Green Deal. Some will complain that the EU's means of financing industrial policy causes constitutional ruptures, others will worry that this industrial policy risks running against an internal market with free competition and that large incumbents will benefit at the expense of stimulating new entry. Others will observe that we might pay for this industrial policy in more material ways. Visible and credible outputs and a more robust governance structure may well legitimize this spending spree.

45. For other suggestions see ZOE, "A 5-point plan for EU Industrial Policy" (27 March 2023), available at <zoe-institut.de/en/publication/5-point-plan-eu-industrial-policy/>. See also European Court of Auditors, Special report 07/2023: Design of the Commission's control system for the RRF (8 March 2023).

46. These are independent institutions that vet how total factor productivity may be improved (*inter alia*, how workers may be asked to work more for less). See Wigger, "The new EU industrial policy: Authoritarian neoliberal structural adjustment and the case for alternatives", 16 *Globalizations* (2018), 353.