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SPECIAL ISSUE ARTICLE

The EU's strategic autonomy in times of politicisation of international trade: The future of commission accountability

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Abstract

Trade relations face unprecedented challenges, which has led to an increased politicisation and contestation of trade rules. In response, the EU has changed its trade policy under the motto 'Open Strategic Autonomy' towards a more assertive policy. The EU seeks to significantly expand its room of manoeuvre and to gain more autonomy by strengthening the enforcement of its trade rights and by ensuring more effectively, including unilaterally, a level playing field. This re-orientation engenders several new or amended trade policy instruments, but meets with reservations as the renewed politicisation of EU trade policy will have internal consequences and raise demands for more democratic accountability of the European Commission. The new policy instruments will enlarge its leeway in trade policy. The future of the EU's multilateral, rule- instead of power-oriented political stance becomes unclear, which might undermine its negotiation position in WTO reform and collide with the EU's respect for international law. The tensions of the EU's new hybrid approach with its international commitments even more fuel demands for increased accountability of the Commission as a safeguard against employing the new powers for protectionism and disrespect to international law. The contribution analyses the need for increased Commission accountability in the redirected trade policy.

1 | INTRODUCTION

The contemporary economic and political context of global trade relations has been under stress for several years, unprecedentedly so due to simultaneous, intertwined, partly fundamental economic, institutional, political and technological shifts in world trade. The major lines of development can be identified with the economic and also political rise of China, the crisis of the World Trade Organisation (WTO), the idiosyncratic trade policy of the US Trump administration and the technological change through digitalisation. The

upheavals triggered thereby have been exacerbated by the Corona crisis that prompted unilateral and protectionist measures. Climate change also challenges states to give greater weight to environmental protection and sustainability issues in their trade relations. These developments have also reached the general world order that is becoming multipolar. The longstanding transatlantic dominance has been shattered. New actors, above all China, are trying to significantly determine the development of international political and trade relations. In the midst of all these global processes, the European Commission has committed itself to a

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geopolitical role.¹ Global climate change and technological challenges are reflected in core projects of the Green Deal and Digitalisation that affect also trade policy. Consequently, the EU has changed its trade policy focus under the motto of an 'Open Strategic Autonomy' towards a more assertive policy which aims at allowing the EU to reap the benefits of international rules-based trade, while having the right unilateral, bilateral and multilateral tools to more assertively enforce its trade rights and to protect its economy against unfair practices. The EU seeks to significantly expand its room of manoeuvre in trade policy and to gain more autonomy by strengthening the enforcement of its trade rights within both multilateral and bilateral settings and by ensuring more effectively, including unilaterally, a level playing field. This turn towards increased assertiveness, however, meets with concerns as the new approach gives rise to new problems and challenges in the EU. The new turn of the EU trade policy will raise demands for a more accountable European Commission. The new trade policy instruments will enlarge the Commission's executive leeway in trade policy. Furthermore, the future course of the EU's trade policy might be blamed for neglecting its multilateral, rule- instead of power-oriented political stance.

Against this backdrop, the current contribution will analyse the inherent challenges posed by the new trade policy legislation for the EU's institutional balance and propose ways to raise Commission accountability. To this end, the article will first recall the EU trade policy's recent turn by explaining the currently more politicised than ever before state of trade relations and trade policy at international level which adds to the domestic politicisation of EU trade relations stemming from increased globalisation critique, fierce opposition of the public (Eliasson & Garcia-Duran Huet, 2019; Rodrik, 2018; Young, 2019) and the strengthened actorness of the European Parliament in this policy field since Lisbon (II.). It will then briefly explain the redirection of EU trade policy (III.), before Commission accountability in the new context will be explored with a view to identify the weaknesses which will even be exacerbated in the implementation of the redirected trade policy (IV.).

2 | TRADE RELATIONS AND TRADE POLICY AT PRESENT: MORE POLITICISED THAN EVER BEFORE

2.1 | Current challenges for global trade relations

Trade law continues to be at the centre of debates on global governance, climate protection, sustainability and distributive justice, even though the importance of the WTO is under contestation due to the rift between the different interests of its heterogeneous

membership and the crisis of multilateralism, which has found its most visible expression in the paralysis of the WTO Appellate Body since the end of 2019 after many years of (in particular) US criticism (Glöckle & Würdemann, 2018; Vidigal, 2019a). Current challenges pose a deeper threat to the multilateral trade regime than ever before because they challenge the liberal consensus of WTO law and change the reality of world trade. The effects of the US unilateralism under Trump and its trade wars² that endangered the function of the WTO on several levels still linger. Even though US criticism of the Appellate Body precedes Trump (Barfield, 2001), the blocking of Appellate Body appointments only came about under Trump (Pauwelyn, 2019). The Trump administration also undermined compliance with fundamental trade rules by a policy of arbitrary, differential 'additional tariffs', in order to extract concessions from trading partners (Hoekman & Puccio, 2019; Vidigal 2019b). The US trade policy under Trump deviated from multilateralism to an extent far beyond earlier tendencies (Williams, 2019). US trade policy since President Obama is also driven by the geostrategic goal of isolating China (van Grastek, 2019a). China became the target of particular unilateralism (Charnovitz, 2019; Felbermayr & Steininger, 2019; Glöckle & Würdemann, 2020).³ Even after Trump, his trade policy continues to impact as action against China gained bipartisan support in the US Congress.

Besides these political shifts, the realities of trade have also changed fundamentally. Major shifts towards Asia are ongoing. Asia's economic expansion is most visibly reflected in the rise of China, whose economic output and share of world trade is rising. Its economic output accounts for almost one-fifth of global economic output; in e-commerce the share is as high as 40 per cent (WTO, 2018). Asia has emerged stronger from the Corona crisis. In contrast, the EU is facing a halving of its share in world economy from 2008 to 2050 (Bradford, 2020). China's rise poses a fundamental challenge to traditional multilateral trade rules, even though it currently does not question their basic principles. The 'Made in China 2025' plan represents a strategic orientation of the Chinese economy to become a world leader in key technology areas in a few years' time (Malkin, 2018; Zenglein & Holzmann, 2019). The complementary Belt and Road Initiative (Frankopan, 2019). advances cross-border infrastructure projects and networks in Asia, Africa and Europe. China strategically uses advantages of its different economic system of state capitalism, which relies to a considerable extent on state guidance, support and accompaniment of Chinese companies (Wu, 2016), while refusing to open up its market. This strategic orientation, together with its state capitalist economic model, is the origin of China's threat to liberal trade rules, and this threat was not adequately reflected when acceding to the WTO. Contrary to expectations, China's accession did not lead to its

transformation into a market economy. China's foreign policy in recent years has been geared towards securing a respected position by its own efforts and on its own terms. China is developing from a rule-taker to an influential rule-maker (Alden & Large, 2015; Wang, 2020) that wants to shape the rules according to its own ideas and interests (Callahan, 2012; Oh, 2021; Shaffer & Gao, 2020). While it used open markets to maintain national economic growth, which implied a commitment to a rules-based liberal trade law, China's economic system provokes a particular challenge for its implementation of trade rules (van Grassek, 2019b; WTO, 2017). China's conscious geostrategic, even geo-economic behaviour of systematically expanding its world market position challenges other WTO members to behave geo-strategically and geo-economically themselves and not to leave their own world market position solely to the assertiveness of economic efficiency and of international rules (which often are deemed helpless against China's practices). Geo-economics denotes a policy approach that uses industrial and economic policy, but also instruments of trade policy and trade defence in order to strategically strengthen a country's (i.e. its leading companies') market position on regional and world markets and to create sectors of influence (Roberts et al., 2019). This strategy amends and partly even replaces the development of trade relations along the lines of economic efficiency and market forces (as effectuated by the liberal trade order under WTO rules) by actively designing markets according to political prioritisation. China's deliberate political shaping of its world market position affects the very foundations of international trade, because the geostrategic orientation is at odds with a rules-based trade law where individuals decide autonomously on their trade within a general legal framework (Chaisse & Matsushita 2018; Hedge et al., 2020; Roberts et al., 2019; Shaffer & Gao, 2020; Weng, 2020). A solution to this Chinese challenge will require a new fundamental consensus on the role and extent of state influence on economic processes, which will be difficult to reach.

The danger of using, or even deliberately abusing, multilateral rules to enforce geostrategic goals to counter the systemic problems posed by China can be studied by looking at the US. The geo-economic temptations led to an increased recourse by some states to the national security exception (Art. XXI GATT/Art. XIVbis GATS/Art. 73 TRIPS) to justify trade measures adopted in the pursuit of geo-economic objectives. In the practice of some states, national security no longer is confined to conflicts or terrorism, but comprises critical infrastructures and technologies. Furthermore, the economic security needs of states that want to maintain their socio-economic system are on the rise due to shifts in global trade (Weiß, 2020). This quite new geo-economic orientation towards strengthening one's own market power by political means is a very fundamental

challenge to international economic relations (Roberts et al., 2019)⁴ as it replaces the liberal logic of trust in market forces with the use of state intrusion.

Simultaneously, new regulatory challenges to international trade arise from a sustainability re-direction of trade policies, from the diversified proliferated global supply chains (Baldwin, 2012; Dür et al., 2020), the technological shifts in digitalisation (Bluth, 2020), and the associated trend towards servicification of trade (Lanz & Maurer, 2015; WTO, 2019), making trade in services more relevant (WTO, 2019). Climate change, environmental protection, and safeguarding human rights and social standards pose fundamental issues to trade policy formulation. In the absence of global rules in that regard, the realignment of national policies will inevitably lead to trade restrictions, for example, as a result of border adjustment measures for internal regulatory instruments. Agreeing solutions for balancing climate protection and trade interests may succeed at best in the framework of bilateral or plurilateral trade agreements of like-minded states. In particular bilateral agreements increasingly become linked to non-commercial policy objectives (Bilal & Hoekman, 2019; Borchert et al., 2020). As interdependence has been growing, trade relations became more vulnerable to shocks (as observed during the Corona pandemic), which triggered considerations of political resistance to dependencies, leading as well to protectionist measures (WTO, 2020).

2.2 | Trade policy's growing politicisation

As a consequence of the above developments, and at the same time as a cause thereof, trade policy increasingly became politicised also at the international level. Politicisation is driven by an increase of issues, which either means that long-standing issues become more salient, or that new salient issues arise in a policy field. Politicisation is further deepened by a rise of actors involved and a polarisation of their opinions (De Wilde et al., 2016). These drivers of salience of issues, expanded actors, and diversity of opinions are effective also in the current challenges and the international responses thereto described above. An early layer of politicisation became effective at domestic level with the turn of trade policy since around the 1980s beyond tariff and market access issues (which are far away from domestic policies, Woolcock, 2012) to non-tariff barriers (Stiglitz, 2006), bringing trade policy closer to domestic policies. Disciplining the so-called behind the border issues of technical and regulatory barriers directly affects domestic legislation and regulation (Hoekman, 2018). With the material expansion of free trade agreements (FTAs), domestic regulatory policies became subject to international disciplines by including chapters on policy areas such as consumer or environmental protection or

product safety. Hence, trade policy impacts on domestic regulatory policies and becomes more of an internal policy of market regulation, which attracts the attention of more domestic actors and gives rise to more polarised opinions. Regulatory depth and comprehensiveness thus adds to trade policy politicisation as new salient issues were affected and new actors, in particular domestic parliaments, became interested (De Bièvre & Poletti, 2020; Roederer-Rynning & Kallestrup, 2017). This turn to non-tariff barriers has accelerated in the last couple of years by the new digital reality of greater importance of services than goods, rendering the regulation of trade and trade-related policies an even more complex endeavour of scrutinising domestic behind-the-border political issues. This has also increased with recent issues such as climate change and sustainability which made trade policy and other international policies more interdependent, but at the same time contested. Global Sustainable Development Goals (SDGs) impact domestic regulation not least via the gateway of trade policy. Additionally, regulatory cooperation chapters, the most recent new issue in trade agreements, may in the long run exacerbate the repercussions of addressing behind the border issues to domestic policies (Alemanno, 2015; Meuwese, 2015), which gives even more salience to trade and cause for polarised opinions.

Besides fostering the long-standing causes for politicisation of trade policy, the above-mentioned challenges add an international layer to growing politicisation. The recent turn of global trade powers to geo-economics involves new actors in trade policy formulation as China turns from a rule-taker to a rule-maker, and brings with it a salience to new issues for trade policy formulation. Trade powers have to also consider economic power politics' concerns and objectives when determining trade policy. Trade is no longer about embedded liberalism; trade rules become contested from the new power politics perspective. This leads to increased contestation and hence polarisation of opinions about how to shape trade rules.

Specifically in the EU, the Lisbon Treaty added to the domestic politicisation of trade policy, not least by the increase of powers for the European Parliament, but also due to the altered constitutional setting for trade policy that became more value-driven than ever before. EU trade policy is intended to serve EU founding principles and the principles and objectives of EU external action (Commission, 2015) and must conform with internal EU policies.

3 | THE EU TRADE POLICY'S ASSERTIVENESS TURN

In face of the global challenges, the EU too found itself forced to rely more on unilateral measures to ward off what it perceives as unfair treatment (Hoffmeister,

2020). The EU commitment to multilateralism and reforming the WTO has now been embedded in an 'open strategic autonomy' and a more assertive new trade policy.⁵ The EU commits to more robust assertion of its economic interests, values and objectives, in particular in response to China. Due to the inadequacies and failures of the multilateral trade order, the EU, starting with the Global Europe Communication in 2006, had become more directed towards self-centred motives of improving EU market access and shifted towards bilateralism in the form of deep and comprehensive free trade agreements (FTAs) (Gsthöhl & De Bièvre, 2018; Melo Araujo, 2016; Siles-Brügge, 2014; Smith, 2018). In view of new challenges, the EU changed its trade policy focus again, with a view to allowing the EU to reap the benefits of the international rules-based trade, while having the right multilateral, bilateral, and unilateral tools to more assertively enforce its trade rights and to protect a level playing field. The new approach translates the pragmatist turn of the EU's 2016 Global Strategy on Foreign and Security Policy into trade politics. The Global Strategy complemented its tribute to a 'rules-based global order' and multilateralism with geopolitical realism (Juncos, 2017, p. 1). 'Open strategic autonomy' now strives for balancing the fundamental openness of EU markets with protection for its businesses, which requires the EU's ability to take the enforcement of trade rules into its hands more robustly. Trade policy is also aligned with other strategic political priorities. The EU, therefore, seeks to significantly expand its room for manoeuvre in trade policy, to gain more autonomy in enforcing its trade rights and to more effectively ensure a level playing field.

The new determination to robustly enforce trade rights and to get a fairer treatment goes far beyond the enforcement objectives of the 'Trade for All' communication of 2015. With a new intensity, the EU uses, amends or adopts enforcement tools unilaterally as well as internationally. The EU introduced an alternative WTO Multi-Party Interim Appeal Arbitration Arrangement (MPIA), in order to ensure that dispute settlement under the WTO will not be blocked by appealing into the void. The EU has also adopted or announced new legislative initiatives. First, the Trade Enforcement Regulation was amended⁶ to enlarge the scope for EU countermeasures in case trading partners undermine multilateral or bilateral dispute settlement proceedings. A new anti-coercion instrument⁷ will offer the EU more leeway to react to increased unilateralism and clear violations of international trade agreements by establishing a mechanism to deter and counteract coercive action. The EU has also drafted a Proposal for a Regulation on Foreign Subsidies distorting the internal market.⁸ As part also of the Green Deal, the Commission presented a proposal for a mechanism that addresses carbon leakage and ensures equal market opportunities.⁹ The EU's new focus on stronger enforcement and ensuring a

level playing field therefore affects the EU trade policy at all levels: multilateral, bilateral, and autonomous.

4 | THE EU'S ASSERTIVENESS TURN AND COMMISSION ACCOUNTABILITY

The reorientation of EU trade policy triggers internal concerns as to the consequences of the above-mentioned legislation for the internal separation of powers and the institutional balance between the EU institutions. This is already illustrated by the consideration that different mechanisms for decision-making and accountability in trade policy and in the Common Foreign and Security Policy are increasingly difficult to explain given the growing politicisation of trade policy in an era of geopolitical and geo-economic rivalries.¹⁰ The new rules of autonomous trade policy give the Commission considerable new powers, whose implementation may lead to trade restrictions with third countries. Under the rules for trade restrictions in the Common Foreign and Security Policy, however, the Council decides. Thus, stakeholders expressed the view that it should also be the Council's competence to implement the new instruments as they might produce foreign policy effects.¹¹ Transferring implementing powers to the Council in the area of autonomous trade policy, however, collides with Art. 291 (2) TFEU according to which it is generally the Commission which adopts implementing acts, and this became the rule also in trade policy in the aftermath of Lisbon. Therefore, the focus of the present analysis is the Commission's role in implementing trade policy, and its accountability to the EU legislative. It will be shown that, while the Council and the European Parliament (EP) are the decisive powers in defining trade policy, either by entering into trade treaties or by legislating in autonomous trade policy, the Commission in that regard has limited autonomy (De Bièvre, 2018; Meunier, 2005). This allocation of power completely turns around when it comes to trade policy implementation, which raises demands for stronger Commission accountability; all the more as the new instruments under the redirected trade policy grant even more autonomy to the Commission.

4.1 | Executive powers and accountability deficits in trade policy post Lisbon

The balance of powers in trade policy formulation had been re-directed by the Lisbon Treaty and subsequent decisions of the Court of Justice of the European Union (CJEU), with the overall effect of the EP gaining powers in treaty negotiation and treaty making, both formally and informally (Van de Putte et al., 2015). Hence, the

EP was made almost the equal of the Council in this respect. (Weiß, 2020, 2021). Also in autonomous trade policy, the fundamental rules have to be adopted in the ordinary legislative procedure so that the EP has a full say. However, the picture changes when looking at the implementation level, that is, when trade measures are adopted based on the basic regulations. In this, the Commission is mandated to take the concrete implementing measures. Also trade policy nowadays basically follows the Lisbon reforms regarding executive rule- and decision-making. This gives the Commission considerable power to determine EU trade policy measures on a case-by-case basis and to enforce EU objectives, determining in each individual case what they require in a given situation. Previously, the powers of the Commission, for example in trade defence, were not as comprehensive because it was the Council which adopted definitive antidumping measures, based on a Commission draft.¹² Under Lisbon, implementation became the task of the Commission; implementing powers may only be conferred on the Council 'in duly justified specific cases' (Article 291 (2) TFEU; Bourgeois & Chamon, 2021, p. 512).¹³

The Commission's implementation of trade policy instruments, however, is subject to – only limited – supervision by Council and the EP. The latter's control powers are particularly scarce. The EP is not part of the comitology mechanism, whereas member states (MS) representatives – and thus more or less the Council – usually sit in the relevant committees and in the appeal committee. The EP can only review the Commission's draft implementing act by notifying that the draft exceeds the implementing powers provided for in the legislation. The Commission then is under an obligation to review the draft, taking account of the EP position, and inform whether it maintains, amends or withdraws the draft (Art. 11 Regulation 182/2011). The EP therefore cannot force the Commission to reassess its draft measure in case the EP disagrees on the strategic implications of the measure (Willems et al., 2019). This lack of control is quite serious, if the basic acts use vague terms in formulating comprehensive implementing powers of the Commission and entrusts it with the adoption of decisions in complex situations as this bestows considerable leeway in decision-making to the Commission. The more complex a decision-making power is, the more accountable a decision-maker should be. Consequently, substantive issues of decision-making (determining the level of leeway granted to the Commission) impact on the procedural legitimacy benchmarks and thus on the level of accountability effectuated in decision-making procedures. Therefore, procedures and substantive issues have to be taken into account simultaneously in the next section.

The call for more accountability and democratic control over Commission decision-making in trade policy has already been raised as a consequence not only of the greater role of the EP in trade policy

determination, but also as a consequence of their increased politicisation. As explained, trade policy has become more intertwined with domestic legislation and moves in a changed geopolitical context. Since Lisbon, EU trade policy has become embedded in both external and internal policies, their values and objectives. Transnational governance has also increased in trade policy as international bodies also have relevant decision-making powers. The need for raising democratic legitimacy of trade policy in this respect has been identified (Petersmann, 2012), in conformity with long-standing demands for remedying the legitimacy problem of global governance by greater transparency, more inclusiveness and strengthened accountability (Kaiser, 1971; Stiglitz, 2006; Zürn, 2004).

Globalisation led to altered ways of rule formulation in trade policy, too. These mechanisms, which cannot be discussed in detail here, prompt new regulatory structures in international organisations or in bilateral treaty bodies (Bradley & Kelly, 2008; Dunoff, 2015; Guzman & Landside, 2008; Slaughter, 2005), where rule-making takes place in sometimes biased and non-transparent structures. As they differ from domestic procedures, they challenge traditional notions of democratic legitimacy of executive actors; internationalised decision-making regularly expands the power of the executive at the expense of parliaments, democratic accountability and participation (Benvenisti, 2016; Joseph, 2011; Mitchell & Sheargold, 2010). Consequently, calls were raised to give parliaments more capacities to determine trade policy for democratic legitimacy reasons (Jančić, 2016; Petersmann, 2017; Young & Peterson, 2006), including greater scrutiny over implementation. With regard to EU trade policy, thus the need for more effective EP involvement in internationalised decision-making by treaty bodies established in bilateral agreements has already been recognised (Alemanno, 2015; Weiß, 2018, 2021). Even the Commission became a proponent of strengthened EP monitoring, announcing an 'enhanced partnership' *inter alia* with the EP to implement trade agreements better (Commission, 2015, p. 15).

As the subsequent section will show, the call for stronger parliamentary control in trade policy implementation must now be raised even louder in view of the most recent reorientation of EU trade policy. Additionally, the new tools intended to ward off foreign protectionism themselves are in danger of serving protectionist goals or of unduly affecting trade. At least, they are particularly vulnerable in this respect. For the new legislation, implementing the trade policy reorientation aims at flexible measures adequate to counter new forms of protectionism and unfair trade by third countries occurring in the present challenging context and geo-economic rivalries described above. Consequently, the Commission's countermeasures no longer represent mere technical issues, but must be

assessed against the contemporary politicised and geo-economic context of rivalries between US, China and the EU. The Commission moves in a novel context which requires its strengthened accountability to the EU legislative.

4.2 | Commission's powers and accountability in a new context and in new tools

Assessing the decision-making powers of the Commission in the new regulations in view of Commission accountability requires determining the powers' comprehensiveness, the Commission's leeway and the mechanisms for control by Council and EP. The analysis starts with the current antidumping rules in order to show the already existing lack of Commission accountability and its causes, which is exacerbated in the new trade policy context, and will be even more so with the new instruments. Hence, the antidumping analysis prepares the ground for subsequently exploring the even more problematic Commission accountability in the recently amended trade enforcement regulation (b) and the proposed third country subsidies regulation (c), with their expanded, but at the same time more vaguely drafted powers, giving more discretion to the Commission, and their weaker Comitology control procedures.

4.3 | Antidumping in new context

Already regarding the existing rules in antidumping, the Commission's power increased with the adoption of the Comitology Regulation 182/2011. The position of the MS was weakened overall, while the Commission got more room for manoeuvre in its decision-making (Bourgeois & Chamon, 2021; Daiber, 2012), also due to the basic antidumping regulation employing rather indeterminate formulations and concepts (such as Union interest, injury to an EU industry, notion of dumping). Trade countermeasures such as antidumping tariffs are adopted by the Commission in the form of implementing measures in accordance with Art. 291(2) TFEU as foreseen in the basic legislation. The accountability of the Commission in adopting implementing acts to MS representatives and the EP is foreseen in the Comitology Regulation 182/2011 under which the EP has almost no control powers, as explained. Also the control by the MS representatives in the Comitology committees is not intense. Provisional anti-dumping or countervailing measures are adopted by the Commission *ex officio* under the urgency procedure of Art. 8 Regulation 182/2011 so that a Commission implementing act applies immediately, which subsequently is submitted to a committee under the examination procedure. Other

comitology rules provide for *ex ante* scrutiny, but do not alter the Commission's power increase. Art. 5 (5) Regulation 182/2011, for example, prescribes, regarding definitive anti-dumping or countervailing measures, that if no opinion in the comitology committee is delivered, but a simple majority opposes the Commission's draft implementing act, the Commission then can consult the MS and submit the implementing act to the appeal committee, which can prevent the adoption of the measure only by a negative vote adopted with qualified majority (Art. 6 (3) Regulation 182/2011). Thus, the Commission's draft implementing measure can only be blocked by a qualified majority of the national representatives in the committee, which is rather difficult to achieve (Bourgeois & Chamon, 2021; Dordi & Forganni, 2013).¹⁴ Overall, the Commission enjoys considerable procedural flexibility to push through its draft (Willems et al., 2019). Even though Commission implementation is subject to MS control, they need a qualified majority to block the Commission from adopting its draft. As a consequence of this high decision-making threshold, the Commission can go forward uncontrolled as a consequence of the MS's inability to achieve a qualified majority.

The present procedures of Comitology could lead to a certain de-politicisation, which could allow a stronger focus on mere economic factors in the adoption of trade defence instruments (Dordi & Forganni, 2013), but would not fit easily to the new context of EU trade policy. As explained, it is the Commission now which effectively assesses the legal requirements for adopting antidumping measures, including the requirement of Union interest, for which it has great interpretative leverage. Even when trade matters become more political, there is no guarantee that it will be easier for national representatives to find a qualified majority in the committee/appeals committee to block Commission measures (Bourgeois & Chamon, 2021). The present politicised context of trade might make it even more difficult for the Council to determine a clear direction of trade policy or to find a qualified blocking majority (Weiß & Furculita, 2020a). The constitutional question of the balance of power between the Commission and Parliament, already raised in face of the Commission's power increase under the post-Lisbon Comitology rules for trade policy (Bourgeois & Chamon, 2021), is now exacerbated due to the much more politicised context of trade.

4.4 | Expanded trade enforcement powers

In the recent *amendment to the trade enforcement regulation 654/2014*, the EU extended its material scope. The legislator expanded Commission powers to adopt countermeasures in situations in which bilateral or

multilateral trade dispute settlement is either blocked (as in the WTO appellate stage) or otherwise not available due to non-cooperation of the third country.¹⁵ Then, the EU should be able to suspend or withdraw concessions or obligations under trade agreements in order to rebalance them, when an altered treatment accorded to EU goods/services affects the Union's interests (new Art. 1 b) Regulation 654/2014. Therefore, the pre-existing powers of the Commission to adopt appropriate measures were expanded to two new situations: first, when a WTO panel report upholds the claims brought by the EU, but an appeal to the Appellate Body cannot be completed and the third country has not subscribed to the alternative interim appeal arbitration mechanism (MPIA), new Article 3 (aa) Regulation 654/2014. Second, when adjudication in bilateral dispute settlement outside the WTO is not possible because the third country does not take steps necessary for a dispute settlement to function, including unduly delaying the proceedings amounting to non-cooperation (new Art. 3 ba), Art. 4 (2) ba Regulation 654/2014. The powers of the Commission in these two situations, which have to follow the comitology examination procedure, require comprehensive assessments, not only of the appropriateness of measures, and of their necessity for safeguarding the Union's interests, but also of the prevalence of the above requirements which are drafted in rather vague wording: When does the behaviour of a third party amount to non-cooperation? This is also significant under international law, as a departure from a dispute settlement mechanism foreseen in an international treaty by adopting unilateral countermeasures might only be in conformity with international rules on countermeasures if the other party acts in bad faith, that is, obstructs the proceedings (Weiß & Furculita, 2020b). Thus, the Commission gained broad leeway in its decision-making under the amendment, but is not subject to stricter control in comitology procedures. Even though the comitology committee can block a draft Commission implementing act already by not agreeing on an opinion, the Commission may then consult the appeal committee, which can block the Commission proposal only with a qualified majority (Art. 8 (2) Regulation 654/2014 i.c.w. Art. 5 (4) third subparagraph Regulation 182/2011). As mentioned above, such a blocking qualified majority is difficult to reach, so that the Commission gets away with its draft effectively uncontrolled, and this against the new context of greater politicisation.

4.5 | Third country subsidies regulation

An example of novel Commission powers giving it broad discretion under the new trade policy comes with the *draft regulation on foreign subsidies* distorting the internal market. This new regulation is intended

to ensure the level playing field in the EU as regards companies which received subsidies from third countries that finance economic activities in the EU (recitals 2, 3 and 5 of proposed regulation).¹⁶ These foreign subsidies may distort the competition as they improve the competitive position of the recipient, affecting negatively the equality of competitive conditions in the EU. The adoption of the regulation will lead to EU scrutiny over companies benefiting from third country subsidies. In the Commission's view, the need for such rules results from the limited scope of EU state aid rules in Art. 107 TFEU as the Commission only controls subsidies granted by MS, not by third countries. With regard to the import of subsidised products, current trade defence rules allow for countermeasures, but there are allegedly no rules addressing foreign subsidies in investments, services or financial flows (recital 4). The Commission therefore will get new powers to accept commitments or to impose redressive measures remedying the distortion on the internal market (Article 6 proposed regulation). Measures may include a reduction of market presence, a prohibition against certain investments, mergers or the award of a contract, an order of divestment or of dissolving a merger, or to repay the subsidy (Arts. 9, 24 (3), 30). In adopting such decisions, the Commission may not only undertake in-depth investigations about the presence of third country subsidies, but must also assess the competition distortion on the EU market. Such impact determination and quantification is difficult; therefore the regulation provides for a non-exhaustive list of indicators to which the Commission has to have regard, in particular the amount and nature of subsidy, its purpose, its conditions and its use in the internal market (Art. 4). Besides the assessment of negative competitive effects, the Commission is also required to balance them with positive effects on the development of the relevant economic activity in the EU (recital 16 and Art. 5). It appears that in contrast to the White Book preceding the draft regulation, the balancing test no longer pertains to considering the positive effects for public welfare interests, such as job creation, consumer, climate and environmental protection, which would render the balancing exercise a trade defence like EU-interest test (Schaus, 2021).¹⁷

This brief review of the provisions of the new regulation demonstrate that its implementation requires very complex analyses from the Commission that enjoys broad discretion (Luja, 2021; Schaus, 2021). And these analyses may, as they concern third country matters, have to be carried out in view of a rather meagre amount of information. Despite the investigative powers provided in the regulation, the Commission's assessments are particularly demanding and extensive compared to state aid supervision where the Commission only has to confirm the favouring effect of the aid.

In adopting the implementing acts, comitology again applies, but the Commission only is subject to the advisory procedure, which gives the MS representatives no final say. In the case of provisional measures, no comitology is foreseen at all. The Commission is uncontrolled in its decision-making even though it is mandated to exercise broad powers in a highly politicised context. The proposed regulation justifies (recital 46) the choice of the mere advisory procedure by referring to the meagre role of the MS in EU competition law where the relevant regulations only provide for an advisory committee indeed.

One may, however, question whether this limitation of the role of and supervision by the MS really does justice to the importance of the Commission's far-reaching decision-making powers under the proposed regulation. The decisions necessarily extend beyond the territory of the EU as they concern operations in third countries. This is also the case in antitrust and merger control, but those areas are an internationally recognised area of extraterritorial application of domestic law with clear guidelines for Commission practice. In contrast, the new powers of the Commission break novel ground. They entail considerable interference with the activities of third-country companies in the EU, such as exclusion from a tender or reduction of market presence. Repayment of subsidy to the third country even goes beyond. The powers thus tread new paths, raise novel issues and may engender significant interferences with foreign trade relations. The Commission's measures thus achieve an external economic effect that can easily come out of sight in a purely competition-oriented examination. The required balancing does not include consideration of possible trade conflicts with third countries, as the requirement of Union interest is not present. Hence, compared to trade defence decisions such as in antidumping, the Commission's leeway in adopting measures under the new regulation is without any effective control as only the advisory procedure applies. This is in tension with Art. 2 Regulation 182/2011 providing for the application of the examination procedure in trade policy implementation (Terhechte, 2018). One may justify this by the fact that the proposed regulation on third country subsidies is an instrument of competition policy. However, the proposal sits between trade and competition policy as can be concluded, first, from the legal basis (the proposal is based both on Art. 114 and Art. 207 TFEU), and second, from the legal requirements foreseen in the proposal which oscillate in their design between standards from competition/state aid law and trade defence instruments (Trapp, 2020). Consequently, the use only of the advisory procedure for the decision-making under the proposed regulation undermines effective control of the Commission which is all the more necessary as the Commission was granted enormous discretion in its decision-making.

4.6 | The need for expanding commission accountability

The above analyses have shown that the Commission has considerable leeway in its decision-making in the implementation of the new autonomous trade policy instruments; it is subject to no effective control by the EP and only very limited control by the MS in the comitology procedures due to the high threshold of a blocking majority. Despite this, the new instruments even expand the Commission's decision-making powers and the leeway it has. The Commission's control will be further reduced in the regulation on third-country subsidies by the choice of the Comitology advisory procedure instead of the examination procedure. Thus, the Commission gains even more autonomy to steer the direction of trade policy through its measures in a complex trade context, without being subject to effective supervision. With its decision-making powers, the Commission can significantly influence whether the EU contributes to a further aggravation of international tensions and uses its strategic autonomy in trade policy and the rich possibilities inherent in its new instruments rather for a trade-defensive, industrial policy-oriented (Kühling et al., 2020), even protectionist design of economic relations, or whether it uses them in a balancing manner.

Overall, in view of the changed political environment and stronger politicisation of trade, the new Commission decision-making powers might undermine the position of the MS and even more of the EP as a political actor in trade policy, which became considerably strengthened by Lisbon. Possible remedies for the lack of scrutiny over the Commission's exercise of comprehensive implementing powers for the MS would be to amend Comitology rules or use at least the examination procedure and not the advisory procedure. For the EP, one should strengthen its involvement in the Comitology procedure for reasons of political consequences of a draft implementing act; or provide an observer status of MEPs in the comitology committees, as had been demanded by the EP in the legislative procedure leading to Regulation 182/2011 (Willems et al., 2019). Such a shift could be justified by the fact that the Commission under the new tools takes decisions on matters of considerable political importance, and enjoys considerable discretion in need of monitoring (Willems et al., 2019). Replacing implementing acts by delegated acts is not a further remedy. Even though the EP has more intensive rights to scrutiny because it can withdraw the delegation, or block the adoption of the Commission's measure (Article 290 (2) TFEU), the use of delegated acts legally is not possible because delegated acts cannot be used for single-case decision-making. Delegated acts by definition are acts of general application, Art. 290 (1) TFEU.

5 | CONCLUSION

The redirection of EU trade policy towards a more assertive stance takes place in a highly politicised context of trade rules. The redirection already is about to be implemented by new legislation that adds to the existing accountability deficit resulting from the high level of Commission autonomy in the implementation of trade countermeasures. Already the existing antidumping rules require a blocking majority of MS for effective control of Commission implementation, and the EP even though a powerful actor in trade policy determination, has hardly any influence on implementation despite its more politicised context. The amended trade enforcement powers grant considerable substantive leeway to the Commission without being subject to stricter control. And the novel third country subsidies regulation gives even more discretion to the Commission in its decision-making with less control as only the comitology advisory procedure applies. The EP has no effective control at all. Thus, the simultaneity of low accountability through high procedural control requirements and the choice of mere advisory comitology procedures on the one hand and an extended decision-making leeway of the Commission through vague substantive requirements and complex assessments on the other hand meet a more politicised context of trade policy than ever before. In this situation, a Commission independent of political oversight can make important implementation decisions that may reinforce the contestation of international trade relations, all the more as these decisions engender the risk of breaching WTO law. However, the new context and the Commission's extended autonomy in trade policy require a stronger responsibility of the Commission towards the political actors, that is, the Council and the EP. Otherwise, there is a risk that the political guidelines will be undermined by an independent Commission in implementation. In the above-mentioned mixture of challenges and control deficits, the Commission needs stronger control by the Council and the EP. In particular, the role of the EP must be expanded in order to eliminate the contradiction between its strong position in the formulation of trade policy and its lack of effective supervision of its implementation in a time of its strong politicisation. Thus, the implementation of the new assertiveness in trade policy requires strengthened accountability of the Commission, needed as a credible safeguard against uncontrolled policy-making.

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ENDNOTES

- ¹ Ursula von der Leyen, "Speech in the European Parliament plenary session," Strasbourg, 27 November 2019, https://ec.europa.eu/info/sites/info/files/president-elect-speech-original_1.pdf.
- ² For the facts see the Peterson Institute for International Economics, <https://www.piie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide>.
- ³ The WTO panel WT/DS543/R – US tariff measures on certain goods of China, did not hold them justified (under appeal).
- ⁴ Choer Morges, ejiltalk.org/the-turn-to-managed-interdependence-a-glimpse-into-the-future-of-international-economic-law.
- ⁵ COM(2021) 66 final: Trade policy review - an open, sustainable and assertive trade policy.
- ⁶ Regulation 2021/167 of 10 February 2021 amending Regulation 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, 2021 OJEU L 49, p. 1.
- ⁷ COM(2021) 775 final.
- ⁸ COM(2021) 223 final.
- ⁹ COM(2021) 564 final.
- ¹⁰ Verellen, verfassungsblog.de/unilateral-trade-measures-in-times-of-geopolitical-rivalry.
- ¹¹ See e.g. the results of the open public consultation on an EU anti-coercion instrument (https://trade.ec.europa.eu/doclib/docs/2021/september/tradoc_159792.pdf), replies to question 18.
- ¹² Article 9 (4) former Antidumping Regulation 1225/2009, 2009 OJ EU 343/51. The Omnibus Regulation 37/2014 brought the procedures for the adoption of decisions into conformity with the new Lisbon rules on implementing powers. Prior to Lisbon, Art. 133 (2) ECT-Nice was the legal basis for Council implementation.
- ¹³ Specific rules remained, see Art. 5 (4) subparagraph (2) Regulation 182/2011.
- ¹⁴ Under Art. 9 (4) former Anti-Dumping Regulation 1225/2009, OJ L 343, 51 the Council could reject the Commission proposal already with a simple majority.
- ¹⁵ Recital 2 Regulation 2021/167 amending Regulation 654/2014, 2021 OJ L 49/1.
- ¹⁶ COM(2021) 223 final.
- ¹⁷ White Book, COM(2020) 253 final, 17. For a balancing instead of an EU interest test see Impact Assessment, SWD(2021) 99 final, 48.

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