

HIDDEN TREASURES: BUILDING ON EUROPE’S LEGAL, ECONOMIC AND SOCIAL INFRASTRUCTURE IN SUPPORT OF THE NEW EU INDUSTRIAL STRATEGY

Donald Kalff, Andrea Renda and Malorie Schaus

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In two recent Communications adopted on 10 March 2020 on *A New Industrial Strategy for Europe* and *An SME Strategy for a sustainable and digital Europe*, the European Commission highlighted its ambitions regarding Europe’s transition towards climate neutrality and digital leadership. The “twin transitions”, as those climate and digital agendas have been called, are defined as essential to Europe’s “competitive sustainability”, its economic and technological sovereignty, and its resilience to external shocks. Both strategies appear nested in Europe’s competitive advantages: these include a strong internal market, an unprecedented large number of modern trade agreements, a vibrant and successful competition policy, a world-leading industry, and a large number of innovative SMEs. These are European strongholds that rely on a rules-based system and a balanced approach to the social market economy.

In the fall of 2019, we launched the *Hidden Treasures* project, which aims at uncovering additional European sources of competitive advantage.¹ These are potential advantages that are not recognised as such, or covered in dust, and would deserve to be uncovered and nurtured. In this document, we present a number of policy recommendations that in our opinion make a significant contribution to the effective implementation of the New Industrial Strategy and the SME Strategy.

1- INDUSTRIAL ECOSYSTEMS: PROMOTE CIVIL LAW AND PROTECT SMES FROM UNFAIR TRADING PRACTICES

We strongly support the Commission’s focus on industrial ecosystems, which promotes the collaboration of large companies, SMEs, research institutions and universities. As we pointed out in the “Hidden Treasures” book, forging market-shaping coalitions is one of the key features of Europe’s approach to innovation and industrial policy, and perfectly match the emphasis on “data spaces” outlined by the Commission in its Data Strategy, adopted on February 19.

In our opinion, industrial ecosystems should be characterised by trust between participating players, underpinned by good faith requirements, a typical feature of the legal system in the EU’s 24 civil law countries. Reasonableness and fairness in contract formation and pre- and post-contractual obligations help to build, maintain and (after completion of the task) break up complex coalitions. Post-Brexit, Europe’s civil law can become a distinctive trait, as well as source

¹ Donald KALFF and Andrea RENDA, *Hidden Treasures – Mapping Europe’s sources of competitive advantage in doing business*, CEPS, 2019. Available at www.hiddentreasures.eu.

of competitive advantage. **Defending and promoting civil law would also be a suitable way to generate enhanced social responsibility on the side of all players involved**, in particular large corporations, and would help to create ecosystems of values and rules, which would set standards also for non-EU players.

Another relevant, and intimately related, condition for such ecosystems to flourish is adequately protecting SMEs from the superior bargaining power of larger players. This typically takes the form of abuses of economic dependence and abuses of superior bargaining power. We suggest that the Commission **expands and strengthens its provisions on B2B and P2B unfair trading practices, extending them to all sectors, possibly as part of EU competition law**. These rules are indeed already present in several Member States and are enforced by competition authorities or by *ad hoc* institutions. National experience on the implementation of these rules also shows that effective protection requires that SMEs be able to lodge confidential complaints with a central authority, which in the case of the EU could be DG COMP.

In this respect, we regret the decision of the Commission to repeal its 2011 *Proposal for a Regulation on a Common European Sales Law*, which covered unfair trading practices.

2- EUROPEAN COMPANY 2.0

We strongly support the Commission's initiative to assess "the need for additional company law measures to facilitate cross-border expansion and scale-up by SMEs." In this respect, we recommend **establishing a European Company 2.0 for SMEs in the form of a revamped *Societas Privata Europaea***.

The new framework should be open to a variety of possible corporate governance and management arrangements. In general, the Commission should promote alternative enterprise models, since both the "shareholder model" and the "stakeholder model" are insufficient to foster a transition towards sustainability (Kalff 2009; Mazzucato 2017; Raworth 2017; Kalff and Renda 2019). This is due to the fact that vested interests, both shareholders and stakeholders, act as barriers to true innovation and structural change. Moreover, the governance, management, decision making, and control features of both models are not fit for the sustainable economy, which requires *i.a.* attention for long-term impacts and inter-generational altruism.

3- INNOVATION – MAKING IT A REALITY FOR EUROPE AND ITS SMES

In both strategies, the Commission mentions its upcoming *Communication on the Future of Research and Innovation and the European Research Area* and refers to a new political initiative, the *EU Start-up Nations Standard*, to make Europe a more attractive Start-up and Scale-up continent. This should be designed to usefully complement existing initiatives, such as the creation of the European Innovation Council, which are specifically dedicated to helping innovative companies scale up. Innovation is needed also in view of the Commission's ambitious sustainability agenda, which entails the transformation of entire sectors.

In support of innovation, we have identified the following steps in *Hidden Treasures*:

- **Consolidate** the many existing **funds at national and EU levels** that provide financial support to innovative SMEs. This would allow for the improvement of the quality of the fund

managers, would save cost, would introduce more flexibility in the size of the grants and provide better access to SMEs.

- Introduce an additional value creating phase in **evaluating grant proposals** by combining (parts of) projects and forcing applicants to cooperate.
- Include as part of funding applications an **‘early market test’**, to smoothen the transition from innovation to the creation of economic value.
- Better link start- and scale-up initiatives to the **industrial ecosystems**, as well as large public-private partnerships and Horizon Europe Missions. Large corporations should be made responsible for locating and nurturing talent in innovative smaller enterprises.
- Together with national governments, provide SMEs with **infrastructures for innovation**, i.e., laboratories, ICT facilities, office buildings, legal and IP support, which, at adequate levels, would substantially lower the threshold for start-ups and open up the field for part-time entrepreneurs.
- Incentivize government agencies to provide **experimental settings** to SMEs for testing their prototypes, thereby facilitating the financing of innovative SMEs by reducing the technical risk for investors. Having obtained deep insight in the value of a prototype, these agencies could become first customers and thereby reduce the commercial risk of investors.

In addition, sustainable innovation should also become a central input to the policymaking process. The **better regulation agenda** currently takes innovation more as an afterthought than as a fundament in crafting policies. **The “innovation principle” and “innovation deals” should be reformed** to better involve stakeholders and civil society, in the spirit of social innovation.

We strongly support the Commission’s encouragement of place-based innovation and experimentation as a powerful demand-side tool to stimulate innovation; competition rules would have to be clarified in this respect.

Incorporating **experimentation as a key driver of sustainable development** also requires that the better regulation agenda abandons traditional cost-benefit analysis and adopts the sustainable development goals as the “North Star” when gauging the impact of alternative policy options.

4- EU PATENT SYSTEM – IMPROVEMENTS TO AUGMENT EU’S LEADERSHIP

In its strategies, the Commission announces an upcoming “Intellectual Property Action Plan”. This is most welcome to strengthen the many steps already taken in this domain over the past years, including most notably the unitary patent and the copyright reform. The quality of European patents is higher than US patents, and there is every reason to defend this competitive advantage by providing additional funding. In this context, it would be wise **not to concentrate on the number of awarded patents but on the number of patents in use**, either by the owners or by licensees. Whereas the accessibility of the EPO data bases is up to standards, more attention could be paid to the patent summaries to facilitate searches by entrepreneurs.

We would recommend that the Commission works with Member States and the European Patent Office to **expand patent application services for SMEs, including financial support** for the engagement of patent lawyers and patent registration fees. This should be complemented by **access to justice** in case of patent infringement or frivolous patent attacks. The Commission could for example sponsor a **“before-the-event” insurance system** which could act as a barrier to these

forms of abuse. Moreover, the Commission could support a **redesign of the EPO appeals process**. As things stand, this route is *de facto* closed to SMEs as the procedure is lengthy and, more importantly, of uncertain duration.

5- TRUSTWORTHY DIGITAL TECHNOLOGY – DATA AND AI STRATEGIES

The European Data Strategy presented on February 19 bears important synergies and complementarities with the two more recent Strategies presented on March 10. It is in our opinion essential that value created by all European industry players, and particularly SMEs is retained in Europe. This chiefly requires a well-structured data policy, as most of the value today is in the data generated by industrial production. We therefore urge the **Commission to reconcile the governance of future data spaces with that of industrial ecosystems, and place data at the core of the latter. This requires that the institutions that will govern data spaces fully respect the needs and prerogatives of smaller players**, often dwarfed by the overwhelming power of large cloud providers.

The **governance of data spaces**, subject to a proposal foreseen for Q3 2020, should incorporate elements of trust, fairness and cooperation between all players involved, as well as an enhanced approach to competition as outlined above (see Section 1). Particularly important for SMEs is the provision of services to help smaller players access connectivity, cloud and edge infrastructure. Even more important is the forthcoming public administration data space, which could promote innovation by granting SMEs (and all other firms and researchers) access to valuable data held by the public administration through Application Programming Interfaces (APIs), along with the experience of individual Member States (Estonia), which moved in the direction of “government as a Service” or GaaS models. Once access to data is provided, alongside with adequate infrastructure within a managed data space, smaller players can compete with larger ones without being defeated from the outset.

We further recommend that the **European Strategy for Data concentrates more on the safety of data and data transmission**,² creating thereby trusted relationships necessary for Europe to enhance its competitiveness and its vocation towards sustainability.

In this perspective, we strongly favour Europe’s move towards stepping up as a **global leader of ethical and sustainable use of digital technologies** in setting a balanced approach to the regulation of the digital economy and ensuring its adequate enforcement. This is also correctly reflected in a very assertive position towards cooperating with other global powers, often less attentive to the protection of fundamental rights and to the economic, social and environmental objectives nested in the Sustainable Development Goals.

We also recommend, along the same lines, that the Commission **incorporates the same approach towards industrial ecosystems, nurturing entrepreneurship and forging data spaces when it provides assistance to developing countries**. This would also help the “geopolitical Commission” become a stronger player in light of China’s Silk and Belt Road strategy, and especially the Digital Silk Road.

² Donald KALFF declares that he has a significant commercial interest in this field.

6- COMPETITION POLICY – NECESSARY REVISIONS WITH CLARIFICATIONS AND NO POLITICIZATION

We strongly support the Commission’s current review of the EU competition framework. We consider it a great opportunity for the Commission to clarify its position as to the **interplay between economic efficiency, fairness and market integration** as part of the revised EU competition policy. We recommend in this respect a more SME-centric policy leading to a less concentrated market structure and thus more choice for consumers; the idea of loosening antitrust rules to promote innovation has in fact not proven its full worth in decades of antitrust history. On the other hand, we caution against the use of the current review of the EU competition framework, specifically merger controls, for the achievement of industrial policy goals. We consider of utmost importance that the competition rules remain essentially a **technical field** independent from the achievement of any industrial policy goal. In fact, achieving size by artificially creating large players that would end up capturing massive market shares is not the best way to serve the interests of European citizens, consumers and SMEs.

More specifically, we recommend the Commission to adapt and broaden EU competition policy to the specific features of **digital markets**, in particular:

- to take example on the *Act on Digitalisation of German Competition Law* by introducing a new category of market power relating to digital platforms that have acquired paramount importance for competition across markets, and by adding the “intermediation power” factor in the assessment of dominance. As underlined by the Commission itself, some platforms having acquired significant scale may act as private gatekeepers and put in danger the fairness and openness of EU markets;
- to modernize and expand the “essential facilities” doctrine to the age of big data and artificial intelligence in providing for mandatory access and interoperability requirements to vertically integrated players as a competitive remedy for competing platforms;
- to enhance attention to anti-competitive behaviour of digital platforms on the labour market;
- to provide guidance on the anti- and pro-competitive effects of acquisitions of small companies by large digital platforms, as such operations may be strategically pursued to avoid the emergence of competing platforms over time.

7- EUROPE IN THE WORLD – FOR A GLOBALLY COMPETITIVE AND WORLD-LEADING INDUSTRY

We strongly support EU’s ambition to uphold a **global level playing field based on free and fair trade**.

With respect to EU’s reform of its **trade defence instruments** (TDIs), we recommend the EU to continue its efforts towards greater transparency and closer cooperation with the EU industry as a whole during TDIs investigations and to facilitate access of SMEs to TDIs. Moreover, we recommend the EU to adapt its anti-subsidy instrument to the realities of state-trading economies notably as part of its up-coming *White Paper on an Instrument on Foreign Subsidies*, and to provide for an effective instrument against dumping in the *services* sector based on an appropriate adjustment of the revised methodology of the EU basic anti-dumping regulation integrating labour and environmental standards.

On the other hand, we strongly support EU's efforts to leverage its single market to set global standards. In fact, as the frontrunner with respect to "competitive sustainability", the EU may importantly contribute to shaping **global high-quality standards** in this respect.

Similarly, we strongly support EU's efforts to uphold, update and upgrade the **world trading system**. Specifically, regarding the enforcement of international trade rules, we recommend the EU to focus its efforts towards a reasonable reform of the **WTO dispute settlement system** based on good faith and in the perspective of maintaining to the greatest extent possible its rules-based approach, which has proven essential to the security and predictability of the multilateral trading system that is also importantly beneficial to smaller players like SMEs, the backbone of the EU economy. The realization of the EU project for a *Multi-Party Interim Appeal Arbitration Arrangement* represents an important first step in that regard.