ILLUSTRATION: JAMES STEINBERG

The CHANGED EU LANDSCAPE

The pandemic has altered the future of Europe, says Brunswick's **SIR JONATHAN FAULL.**

After a tumultuous year wrestling with the implications of a global pandemic, the "post-confinement" period we are entering brings a set of critical issues that together may shape the European Union for a generation or more.

Of particular note is a recent initiative to create EU financing to allow member states to address the economic crisis caused by the pandemic. This deal was led by President Emmanuel Macron of France and Chancellor Angela Merkel of Germany in a highly significant show of cooperation and brings with it the possibility of strengthening the EU in ways far beyond the immediate concerns it is addressing.

As after 9/11, the EU will be reopening cross-border travel for EU residents, with restrictions to stave off a new wave of infection. COVID-19 has also changed the evolving patterns of international competition, cross-border mergers and trade.

The complexity of this effort is compounded not only by the immediate economic concerns of the member states but also by the challenges of the shifting relationships between the US, UK, Europe and China.

It will of course be comforting to see workers returning to offices and tourists flocking to the Champs Élysées and cycling along the Rhine. But it is safe to say the world they are entering is not the one they left in February.

FRANCO-GERMAN RENAISSANCE?

There is a well-established tendency in European Union circles to hear voices and see signs suggesting that the fabled Franco-German machine is sputtering to life, propelling a healthier EU. Every election, every crisis, every issue is regarded as a new opportunity.

As always, the good old days were never quite as marvelous as people think they were. De Gaulle-Adenauer, Schmidt-Giscard, Mitterand-Kohl had their moments, but also their differences. A wily Commission President can make a real difference and the alchemy works best when other member states play constructive roles as well. After all, there is more to the EU than Paris, Berlin and Brussels, even after Brexit.

So what should we think this time? Is it a breakthrough? Well, it might be. If the Commission steps up and brokers a compromise building on the Macron-Merkel deal that can satisfy the other 25 countries, east and west, north and south, new and old, then perhaps a new beginning is under way—even, perhaps, the most significant progress since the 2004 enlargement.

Without question, what is proposed in the agreement by Macron and Merkel is extraordinary. The Commission would borrow money on behalf of the EU and so create a new class of EU bonds. There would be new EU-wide taxes, for example on carbon emissions or financial and digital transactions.

This combination of borrowing power and tax revenues is potent. Alongside its economic impact, it would boost the standing and confidence of the European Union as it contemplates the task of sustainable reconstruction at a time of heightened international tension. Financial Times writer Martin Wolf noted that "in terms of the longer-term future of the EU, it is symbolically and practically transformative."

The three foundations of the EU remain the single market, the euro and Schengen Area, but variation among the members is taken for granted. All states share the single market. Most but not all have the euro as their currency.

Another group, with a different composition, has the Schengen system of open internal borders and shared responsibility for external frontiers. It may not be neat and beautiful but it works. Ironically, it resembles the British constitution more than the great founding texts of the member states.

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The success of the Franco-German agreement can help solidify that foundation. The recovery fund is not merely economic, but is about reconstituting European solidarity among countries who have had time during the Brexit and COVID crises to think about what belonging to the Union means to them. And it can lead to new ways of managing crises together.

ON THE ROAD AGAIN IN EUROPE

International borders are being reopened amid hopes of recovery and fears of a second wave, beginning with the EU/Schengen Area and later including regions with similar public health policies. As after 9/11, countries will organize resumption of travel first locally, then regionally and nationally. It is expected that friction in international movements will remain for longer and be subject to a slower process of coordination.

For most of Europe, the Schengen system provides the mechanisms for this process. Two conditions will be essential: strengthened controls at external borders and data collection and sharing between members. Those external border controls spell complications for travel to and from the EU countries not in the Schengen area. That includes travel to and from the United Kingdom, which is further complicated by the ongoing re-negotiation of its relationship with the EU.

The development of tracing apps by or in the hands of governments will be presented as crucial for movements within and between countries and will offer a test of the EU's data protection rules and policies, which have been a source of pride in recent years. Public acceptance will depend on levels of confidence in governments, data protection authorities and tech companies, as well as the performance of the systems.

The incentives to use such smartphone apps will be strong. Move around, see friends and relatives, go back to work, attend religious, cultural and sporting events—all the unfulfilled dreams of the currently confined will be tantalizingly close. All we have to do is download the app, tick the consent box, and let our phone provide the data to the gatekeeping authorities.

Which authority or company gets the data? With whom do they share it and how long do they keep it? May I see and challenge my data and records? Will my data be used exclusively for clearly defined COVID-19 purposes? May I have irrefutable proof that my data have been destroyed once this is over? Who decides when it is over? Which court has jurisdiction over any dispute that might occur? There are more questions than answers for the moment. Governments will be preoccupied with these issues against a wider background of digital policy challenges that existed before COVID-19.

WHAT NEXT IN COMPETITION POLICY?

The digital economy, climate emergency, Brexit, populism, trade tensions and now COVID-19 have all come together to shake the foundations of a consensus in competition policy carefully established over the last 50 years. There has never been a uniform view about the purposes and details of competition policy, and it remains constantly under debate. But recent concerns have thrown that debate into high gear.

In an effort to provide "a level playing field in the global market," the Commission in recent weeks has proposed new obligations on companies controlling digital platforms ("gatekeepers") and new powers to prevent markets from becoming uncompetitive by imposing behavioral or structural remedies even before any illegal conduct has taken place. In addition, measures will be proposed to take account of foreign subsidies granted to companies whose activities are subject to competition analysis in the EU.

The latter has a long history. Competition can appear distorted when a subsidized, state-owned or otherwise state-backed foreign entity seeks to acquire a European company. In 1997, the European Commission scrutinized Boeing's purchase of McDonnell Douglas, paying close attention to the advantages the merged entity would have as a result of R&D funding from the US Department of Defense, NASA and other public bodies. The Commission approved the merger once it had secured commitments relating to licensing of government-funded patents and transparency of research and development funding.

Given the complex and often subtle interplay between law, politics, economics and trade, it is not surprising that there is no science of competition policy ready to be handed over to artificially intelligent algorithms fed with rules and case law, armed with theories of harm and the econometrics needed to apply them. Equally unsurprisingly, calls to change competition law are met with dire warnings about opening Pandora's box, coupled with reassuring references to the flexibility of the language of the current law.

Some issues are specific to individual jurisdictions and their particular politics, while others, such as the age-old question of market definition, are of universal concern. Peering into the microscope, we adjust the focus until we see clearly who is competing with whom and where.

Let's say a company based on Mars seeks to merge with a Belgian one. The initial EU focus is rightly on Belgium. But what's happening back on Mars? How relevant is that? If the roles were reversed, could the Belgian company enter the Martian market? Does the Martian company have support from its government bolstering its domestic position and giving it the firepower to maraud other planets?

Competition authorities responsible for what happens in Belgium need to worry about the prices for Belgian consumers, but should they also be concerned about where and under what conditions the goods are made, or about opportunities for Belgian companies in those foreign markets? Is it legitimate to oppose a merger on the grounds that a foreign party's home market is impenetrable? Or if the domestic party's activities are deemed "strategic" and must therefore remain located in the domestic territory?

In addition to the legal and economic analyses underpinning competition policy, we also need an understanding of political science and the incentives and interests of agencies and professions involved in enforcement and administration. The roles of parliaments and courts in the various jurisdictions need to be considered with regard to enforcement. Ultimately, we must answer the question, to whom are competition authorities accountable?

To take a recent example, if bank resolution rules are missing, should state aid rules be used to approve state support? In the absence of tax rules at EU level, should a country's favorable tax arrangements for a company in return for local investment be considered a distortion of competition within the EU's "single" market?

These considerations go beyond arguments about what parameters of competition should be included in the analysis of competition effects. Output, price, research and development, innovation, nipping future competitors in the bud, predatory behavior and foreclosure are all legitimate concerns. New theories of harm may need to be developed to deal with concerns about competitiveness as they emerge, or reemerge, into political consciousness.

Competition policy will have an important role to play in the sustainable reconstruction of post-confinement economies. Public affairs will join law and economics as the disciplines needed to understand what is going on and how to achieve desired outcomes. ◆

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JONATHAN FAULL is Chair, European Public Affairs, Brunswick Group and formerly Director General of the European Commission. This article draws on pieces previously published via the Jean Monnet Network BRIDGE at Dublin City University (http://dcubrexitinstitute.eu/2020/06/recovery-fund-reasons-to-be-cheerful/) and in Concurrences (https://www.concurrences.com/en/).