THE POLITICS OF THE CONSTITUTIONALISATION OF CORPORATE POWER IN EUROPE

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Introduction

In mainstream EU studies, '[t]he idea of an "ever closer union" is not something to be questioned'.[1] However, the historical exercise of corporate power in the EU constitutionalisation process raises problems that even fervent supporters of the economic integration project must take seriously. As trust in large corporations deteriorates,[2] the relationship between the European Union (EU) integration project and corporate interests looms larger in the public discourse.[3] This relationship directly impacts the lives of ordinary subjects of the EU constitutional order, as *inter alia* rights-holders, consumers, workers, and ultimately as EU citizens.[4] It is regularly subject to the attention of civil society,[5] sometimes the media,[6] and occasionally political actors and institutions.[7] Yet while '[b]usiness influence in the EU has long been of scientific and public interest',[8] it has been remarkably neglected in the specific field of EU constitutional studies. We intend to contribute to filling this gap.

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[1] Diez, 'Introduction: Towards a Critical Theorising of European Integration', *The Routledge Handbook of Critical European Studies* (Routledge 2020) 15: 'This normative bias has led to a blind spot of European integration theory, which has often displayed a teleological tendency. The idea of an 'ever closer union' (Preamble, Treaty on EU) is not something to be questioned. Instead, scholars often endorsed it and wrote towards its realisation'.

[2] 'Rebuilding Trust in Business' [2019] Saïd Business School 8 <https://www.sbs.ox.ac.uk/sites/default/files/2019-04/Rebuildingtrustinbusiness.pdf> accessed 2 March 2022.

[3] Monbiot, 'Taming Corporate Power: The Key Political Issue of Our Age' (*The Guardian*, 12 August 2014) <http://www.theguardian.com/commentisfree/2014/dec/08/taming-corporate-power-key-political-issue-alternative> accessed 4 March 2022.

[4] See most notably Article 20 TFEU. With Lisbon, Article 3 TEU added that

[5] Balanyá (ed), *Europe Inc: Regional and Global Restructuring and the Rise of Corporate Power* (Pluto Press in association with Corporate Europe Observatory 2000); 'Corporate Capture in Europe' (*Corporate Europe Observatory*) <https://corporateeurope.org/en/power-lobbies/2018/09/corporate-capture-europe> accessed 20 July 2021; 'What Is the Problem with Corporate Lobbying?' (*ALTER-EU*, 27 October 2014) <https://www.alter-eu.org/what-is-the-problem> accessed 5 March 2022.

[6] e.g. 'The Power of Lobbyists Is Growing in Brussels and Berlin' [2021] *The Economist* <https://www.economist.com/business/2021/05/13/the-power-of-lobbyists-is-growing-in-brussels-and-berlin> accessed 5 March 2022; Traynor and others, '30,000 Lobbyists and Counting: Is Brussels under Corporate Sway?' (*the Guardian*, 5 August 2014) <http://www.theguardian.com/world/2014/may/08/lobbyists-european-parliament-brussels-corporate> accessed 5 March 2022.

[7] OECD, *Lobbying in the 21st Century: Transparency, Integrity and Access* (OECD 2021) <https://www.oecd-ilibrary.org/governance/lobbying-in-the-21st-century_c6d8eff8-en> accessed 5 March 2022; 'EU Commission Publishes Legislative Proposal on Corporate Accountability' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies/> accessed 5 March 2022.

[8] Fuchs, Gumbert and Schlipphak, 'Euroscepticism and Big Business' in Benjamin Leruth, Nicholas Startin and Simon Usherwood (eds), *The Routledge Handbook of Euroscepticism* (Routledge 2017) 317.

The EU 'constitutional order' (the Treaties, primary law)[9] is, before anything else, an economic order. The Treaties enshrine the core objective of establishing an integrated liberal market economy (the internal, single, or common market) and set out the architecture necessary for facilitating that objective. Most of the EU's constitutional machinery – institutional organisation, competences, procedures, individual rights, and so on – is mobilised towards the realisation and/or protection of this economic order.[10] In other words, the establishment and continued functioning of an integrated liberal market economy is the core of the EU constitution.

The liberal economic order of the EU constitution was a 'particular ideological choice'.[11] As Section 1 will demonstrate, this choice was to a significant degree constitutionalised and put into effect as a result of corporate involvement in and influence on the EU economic integration project. Section 2 will argue that the consequences of this historical process include the further constitution of corporate power by the constitutional order of the EU and the entrenchment of constitutional obstacles to the EU's democratic legitimacy. Section 3 then shows that the corporate power facilitated by the internal market constitutional project is both largely untethered and, except by developments in the EU constitutional order itself, untetherable.

1. Corporate Interests in the Constitutionalisation of the Internal Market Project

Numerous cross-disciplinary findings concerning the role played by corporate interests in the EU economic integration project merit significantly broader attention in the field of EU constitutional studies than they have so far received. We used this rich body of work to conduct a preliminary interest group analysis of the role of corporate interests in constitutionalising the integrated liberal market economy project and putting it into effect. Here, we present a brief historical narrative of the actors and activities that triggered, sustained, and accelerated the EU constitutionalisation process. Representatives of corporate interests were consistently responsible for returning the European economic integration objective to the political agenda, making concrete proposals for the content of EU constitutional instruments, and exerting pressure on political actors to realise their constitutional obligations once established. This narrative centres on the 1986 Single European Act (SEA), which remains the internal market's defining constitutional framework. The SEA and its surrounding events were the crucial impetus for realising long-standing constitutional goals that were themselves the product of corporate agenda-setting. In other words, the historical process by which the internal market

[9] This piece operates on the understanding that EU primary law is of constitutional status. Whereas the question of whether the EU can be considered a 'constitutional' order is by no means uncontested in academia, it has long been the perspective of the Union itself, including the ECJ, that the primary law of the EU – the general principles of law and treaties with their protocols and the Charter – is widely considered to be of a 'constitutional' status. This was the case long before the Constitutional Treaty saga. See e.g. the infamous reference by the ECJ to the EEC Treaty as the 'constitutional charter' of the Community in Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] EU:C:1986:166 [23]. See similarly Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] EU:C:1991:490 [21]; Joined Cases C-402/05 P and C-415/05 P *Kadi I* [2008] EU:C:2008:461 [281]; Case C-15/00 *Commission v European Investment Bank* [2003] EU:C:2003:396 [75].

[10] The exception being the common foreign and security policy and justice and home affairs policy pillars introduced with the Treaty of Maastricht (1992), which are still a more minor part of the European project. See Article B and Title V Treaty on European Union (TEU) [1992] OJ C 191/1. Moreover, these areas can be understood as being closely linked to the facilitation of the internal market.

[11] Nicol, *The Constitutional Protection of Capitalism* (Hart 2010) 89.

has been constitutionalised and realised – before, during, and after the SEA – has been driven by corporate interests.

1.1: The Treaties of Paris (1951) and Rome (1957)

European federalism was initially a geopolitical project. Following the second World War, US foreign policy officials envisioned a European liberal market economy as a means for communist containment and devised the European Recovery Plan to this end.[12] Other European integration movements had objectives beyond countercommunism, varying in the extent to which they were concerned with non-economic (e.g. social, political, and defence) modes of integration and in their conception of the form that European economic integration should take. The 1951 Treaty of Paris,[13] which established the European Coal and Steel Community (ECSC) and was primarily instigated by the famous European political 'pioneers',[14] was therefore broadly motivated by geopolitical tensions. The ECSC was a largely political endeavour that served an important function in political claims about European peace and the easing of regional tensions.[15] This context partially explains why the Treaty produced no more than limited compliance with or enthusiasm for its economic integration measures.[16]

The Treaty of Rome, which established the European Economic Community (EEC),[17] was more deeply rooted in economic liberalism. It was facilitated in large part by the agenda-setting activities of the informal Bilderberg Group, formed between 1952 and 1954 by the political and business actor Józef Retinger[18] in consultation with the Europeans Paul Rykens (the chairman of Unilever) and Prince Bernhard (the Dutch Prince Consort and at the time a board member for both Royal Dutch-Shell and Société Générale)[19] and the American David Rockefeller (the senior vice-president of Chase National Bank).[20] At its inception, therefore, the Group was primarily an association of business interests. Its

[12] Better known as the Marshall Plan e.g. US Department of State, 'The Truman Doctrine and the Marshall Plan' <https://history.state.gov/departmenthistory/short-history/truman> accessed 2 March 2022 stating that the Marshall Plan 'emphasized the free market economy as the best path to economic reconstruction—and the best defense against communism in Western Europe.' The Marshall Plan also led to the Organisation for European Economic Co-operation (now the Organisation for Economic Co-operation and Development), which itself had the economic objective of trade liberalisation: Council of Europe, 'Congress of Europe (The Hague, 7-11 May 1948)' (1999) 415–417 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806952c2> accessed 2 March 2022. See also Henderson, *The Genesis of the Common Market* (Routledge 2013) 139; O'Connell and Özsu, *Research Handbook on Law and Marxism* (EE 2021) 378. On the Marshall Plan more generally see: NA, *The Marshall Plan: Fifty Years After* (Springer 2016); Leffler, 'The United States and the Strategic Dimensions of the Marshall Plan' (1988) 12 Diplomatic History 277.

[13] *Treaty Establishing the European Coal and Steel Community (1951)*.

[14] e.g. Monnet, Schuman, and Spaak, but see also 'EU Pioneers' (*European Commission*) <https://european-union.europa.eu/principles-countries-history/history-eu/eu-pioneers_en> accessed 3 March 2022.

[15] Henderson (n 12) 139; Diez, 'Towards a Critical Theorising of European Integration' in Didier Bigo and others (eds), *The Routledge Handbook of Critical European Studies* (Routledge 2020) 15; Mueller, 'The Soviet Union and Early West European Integration, 1947-1957: From the Brussels Treaty to the ECSC and the EEC' (2009) 15 J Eur Integr 67; Bebler, 'Peace in Europe and the Nobel Peace Prize' (2013) 7 Isr J Foreign Aff 115, 118.

[16] Gillingham, 'The European Coal and Steel Community: An Object Lesson?' in Barry Eichengreen (ed), *Europe's Postwar Recovery* (CUP 1995) 151.

[17] Treaty Establishing the European Economic Community (1957).

[18] On whom, see Biskupski, *War and Diplomacy in East and West: A Biography of Józef Retinger* (Routledge 2017).

[19] Wilford, 'CIA Plot, Socialist Conspiracy, or New World Order? The Origins of the Bilderberg Group, 1952–55' (2003) 14 Diplomacy & Statecraft 70, 72. On Bernhard see Nollert and Fielder, 'Lobbying for a Europe of Big Business: The European Roundtable of Industrialists' in Volker Bornschier (ed), *State-building in Europe: The Revitalization of Western European Integration* (Cambridge University Press 2000) 189.

[20] Nollert and Fielder (n 19) 190.

ostensible purpose was to address what Retinger 'perceived as the growing menace to the West of Communist expansion'.[21] Its strategy for achieving this goal was the promotion of a European pro-liberal market economic ideology that, given US foreign policy enthusiasm for European economic integration and liberalisation, would strengthen trans-Atlantic bonds. The Group played an essential role in the 'relaunch of European integration' by promoting the idea in élite political circles.[22] This reignited agenda admittedly could have made no progress without concurrent political developments, like the 1956 election defeat of France's protectionist governing coalition,[23] but once these favourable conditions arose, the 1957 Treaty constitutionalised as the core purpose of the EEC the creation of a 'common' integrated liberal market economy.[24]

The Treaty provided for the progressive establishment of the common market over a twelve-year period.[25] It prohibited the introduction of new customs duties,[26] quantitative restrictions on imports,[27] and restrictions on the freedom to establish and provide services.[28] It also provided for the progressive abolition of existing restrictions in these areas,[29] as well as in respect to the mobility of capital.[30] By the end of the first stage of the transitional period customs duties on exports, quantitative restrictions on exports, and restrictions on current payments were to be abolished.[31] Customs duties on imports and restrictions on the free movement of workers and capital had to be abolished by the end of the transitional period at the latest.[32] In these respects, the four freedoms that form the present basis of the EU constitutional order were already present in 1957,[33] owing largely to an agenda set by corporate interests.[34]

1.2: Intermezzo: The Empty Chair Crisis and the Luxembourg Compromise

The Treaty of Rome constitutionalised the *goal* of a common market. Due to the absence of sufficient political will, this envisioned economic order did not materialise. The only substantial step taken towards realising the common market was the 1968 establishment of a customs union.[35] Non-

[21] Wilford (n 19) 72.
[22] Pijl, *Transnational Classes and International Relations* (Routledge 1998) 121.
[23] Lynch, *France and the International Economy: From Vichy to the Treaty of Rome* (Routledge 2006) 110–112. For other relevant developments, see: Felice and Sandonà, 'Italian Values-Grounded Liberalism and the German Social Market Economy: A Transnational Convergence Behind the Treaty of Rome of 1957' (2017) 47 J Eur Econ 95.
[24] Articles 2 and 3 Treaty Establishing the European Economic Community (1957) (n 17).
[25] Article 8 EEC Treaty; van Middelaar, 'Spanning the River: The Constitutional Crisis of 1965–1966 as the Genesis of Europe's Political Order' (2008) 4 EuConst 98, 99.
[26] Article 12 EEC Treaty.
[27] Article 31–32 ibid. They could also only be within the OEEC limits.
[28] Articles 53 (capital) and 62 (services) ibid.
[29] Article 14 (customs duties), Article 33 (quantitative restrictions on imports), Article 52 (establishment), Article 59 (Services) ibid.
[30] Article 67 ibid.
[31] Article 16 (customs duties on exports), Article 34(2) (quantitative restrictions on exports), and Article 67(2) (current payments) ~~EEC Treaty~~ibid.
[32] Article 13(1) (customs duties on imports), Article 48(3) (workers), Article 67(1) (capital) ~~EEC Treaty~~ibid.
[33] Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th edn, OUP 2019) 559.
[34] For agenda-setting as an operation of power, see Lukes, *Power: A Radical View* (2nd ed, Palgrave Macmillan 2004) 20–29.
[35] The customs union abolished customs duties (tariffs) between Member States and introduced a common customs tariff with third countries: 'Declaration by the Commission of the European Communities (1 July 1968)' (*CVCE*, 23 October 2012) <https://www.cvce.eu/en/obj/declaration_by_the_commission_of_the_european_communities_1_july_1968-en-a4f5b96a-1d48-435b-9028-7e98739255d2.html> accessed 5 March 2022. Otherwise, as noted by the Commission, the

tariff barriers to intra-Community trade in goods and to the free movement of the factors of production continued to exist. This delay was a product of the 1965–66 Empty Chair Crisis and its solution, the Luxembourg Compromise.

The Treaty of Rome constitutionalised 1970 as the deadline for realising the common market.[36] Member State action was necessary to achieve this goal. To enable this, the Treaty provided for qualified majority voting (QMV) in the Council from the start of the third stage of the transition, 1 January 1966[37] (though in a limited fashion in the second stage as well).[38] Between the Treaty of Rome and the final stage of the transition, however, a key political development obstructed the realisation of the integration agenda. During negotiations in mid-1965, the French government of Charles de Gaulle clashed with other Member States over proposals for further supranationalisation and financial arrangements, especially the financing of the Common Agricultural Policy.[39] As a result of these conflicting interests, French officials refused to participate in meetings and French permanent representatives were recalled.[40] De Gaulle's later speeches made clear that the 'unspoken goal of the operation was to block the transition to majority decision-making'.[41] In other words, the French government recognised that QMV might facilitate liberal economic integration in ways that ran counter to the specific interests of any given Member State.

The Empty Chair Crisis was resolved following de Gaulle's narrow re-election, in a vote conventionally interpreted as, in part, an expression of domestic opposition to the French government's European politics. New negotiations led to the return of French representatives to the European table by striking the Luxembourg Compromise, which was in effect a veto. The Treaty of Rome's QMV provisions still stood, but by agreed convention Member States were able to declare that any given proposal concerned their 'very important interests' and should consequently only be agreed unanimously, even where majority decisions would be lawful.[42] As a result:

> 'Although the Compromise was only invoked perhaps ten times in fifteen years, it was constantly hanging over everyone's heads. It took only one partner to voice objections for the discussion to swiftly run aground. Hundreds of commission proposals never made the finish line. (A side effect of the veto was that these proposals could never be decisively rejected, which made it appear as if the work

liberalisation project 'had ground to a halt at the end of the 70s': Commission, 'Consolidating the Internal Market' 9 July 1984 COM(84)350 final [1].

[36] In light of the twelve-year deadline established in Article 8 EEC Treaty.

[37] EEC Treaty Articles 14(c); Articles 20, 43(2), 69 and 112; van Middelaar (n 25). 99. Moving from the first stage to the second stage required unanimity (Article 7(3) EEC Treaty), and this happened in 1962 (van Middelaar 99). Movement from the second to the third stage, however, was automatic (van Middelaar 99) and at that point qualified majority voting largely became the rule: e.g. Article 14(c).

[38] EEC Treaty Articles 33(8), 63(2), and 101.

[39] van Middelaar (n 25) 98–102; Ziller, 'Defiance for European Influence —The Empty Chair and France' in A Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values* (OUP 2017) 422.

[40] Wallace and Winand, 'The Empty Chair Crisis and the Luxmebourg Compromise Revisited' in Jean Marie Palayret and Helen S Wallace (eds), *Visions, Votes, and Vetoes: The Empty Chair Crisis and the Luxembourg Compromise Forty Years on* (Peter Lang 2006) 21.

[41] van Middelaar (n 25), 104–105.

[42] Extraordinary Session of the Council [1966] 3 EC Bulletin 5, 9. See also Davignon, 'Foreword' in Jean Marie Palayret and Helen S Wallace (eds), *Visions, Votes, and Vetoes: The Empty Chair Crisis and the Luxembourg Compromise Forty Years on* (Peter Lang 2006) 17–18.

was piling up.) Complaints about European stagnation became commonplace in the seventies.'[43]

The Compromise ensured that the Treaty of Rome's constitutional requirement for the 'progressive' abolition of restrictions was not enacted and therefore that the envisioned common market 'exist[ed] in name only'.[44] As Ziller puts it, 'every Member State would have some "vital interests" which needed the sword of Damocles of a veto'.[45] In these political conflicts of interest, the economic integration project was over its first three decades primarily an agenda set by corporate actors and unrealised by political actors.

1.3: The Single European Act, 1986

The technically unlawful, conventional practice of unanimity struck by the Luxembourg Compromise 'only abated after the entry into force in 1987 of the SEA, which not only broadened the policy fields in which majority voting was legally possible, but also de facto led to majority decision-making.'[46] The SEA re-constitutionalised the objective of establishing a common market, founded on the Treaty of Rome's four freedoms, within a highly concise timeframe.[47] Crucially, the SEA was the site of a re-established political commitment to the use of QMV to achieve the internal market objective, broadening its scope by substituting QMV in respect to rules regarding the common customs tariff, freedom of establishment, and the free movement of workers.[48] The SEA's most important provision for the realisation of the internal market was its introduction of Article 100a SEA, now Article 114 TFEU,[49] which was *the* 'central Treaty provision for harmonising or approximating the laws of EU [Member States]' in internal market matters.[50] It replaced the Court-established mutual recognition principle as the 'primary means for EU market integration'.[51] As Green Cowles recognises, the SEA both 'signaled the end' of the Luxembourg Compromise and substantially reduced the political and procedural hurdles to European integration.[52]

The root cause of this development, which produced both the SEA and the subsequent secondary law measures that gave effect to the internal market, was an extensive collaboration between the

[43] van Middelaar (n 25) 119.
[44] House of Lords European Union Committee, *Re-Launching the Single Market: 15th Report of Session 2010-11* (2011).
[45] Ziller (n 39) 432.
[46] Editorial, 'Not Dead yet. Revisiting the "Luxembourg Veto" and Its Foundations' (2017) 13 EuConst 1, 2.
[47] The SEA required the common market be achieved by 31 December 1992: Article 13 Single European Act 1986 inserting Article 8a EEC.
[48] Article 28 EEC Treaty via Article 16 SEA (common customs tariff); Article 54(2) via Article 6(4) SEA jo. Article 7 amending Article 149 (freedom of establishment); Article 56(2) EEC Treaty via Article 6(5) SEA (establishment by foreign nationals); Article 49 EEC Treaty via Article 6(3) SEA) (free movement of workers); Article 57 jo. Article 149 EEC Treaty via Articles 6(6)–(7) jo. Article 149 (non-wage earning activities)); Article 70 via Article 16(4) SEA (capital); Article 84(2) via Article 16(5) SEA (sea and air transport).
[49] Article 100a EEC Treaty inserted via Article 18 SEA 1986.
[50] Kellerbauer, 'Article 114 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) 1236.
[51] ibid. 1239.
[52] See also Green Cowles, 'The Single European Act' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012) 107: 'The SEA was instrumental in implementing the EU's single market program. The central feature of the SEA was the modification of the Community's decision-making procedures that allowed for majority voting on key internal market matters. This change signaled the end of the infamous 1965 "Luxembourg Compromise" … Indeed, it is difficult to imagine that the European Community could have successfully pursued its "1992 program"… without the SEA.'

European Commission and corporate interest representatives.[53] From 1977, under the auspices of the European Industry Commissioner Étienne Davignon (a Belgian political actor whose career had long been invested in questions of European integration[54] and who would later become a corporate lobbyist[55]), the discussion of economic integration through liberalisation was revived at the Commission. To this end, Davignon pursued close links with industrial business groups. His 1982/83 meetings with the CEO of Volvo, Pehr Gyllenhammar, led to the formation of the European Roundtable of Industrialists (ERT), a multinational body consisting of the chief officials of Europe's largest industrial corporations.[56] Like the Bilderberg Group, the ERT was oriented towards European economic integration through liberalisation.[57] The Commission and corporate actors both had specific interests in realising a supranational common market, the dramatic expansion of competences and the magnification of profit maximisation potential respectively. So too did Member State governments, in the context of the economic 'Eurosclerosis' of the 1970s and early 1980s, perceive possible advantages in realising the common market.[58] Between these actors, sufficient political will to commit to the project was generated. The European Council, and subsequently the Council of Ministers, voted frequently to advance the internal market from the early 1980s.

It is essential to recognise how deeply the economic integration implemented though the SEA reflected and suited corporate interests, as advocated by the ERT. The realisation of the internal market was based on the Commission's White Paper, "Completing the Internal Market", which was drafted

[53] Fielder, 'The Origins of the Single Market' in Volker Bornschier (ed), *State-building in Europe: The Revitalization of Western European Integration* (Cambridge University Press 2000) 75. See similarly Bornschier, 'Western Europe's Move toward Political Union' in Volker Bornschier (ed), *State-building in Europe: The Revitalization of Western European Integration* (CUP 2000) 11: 'The completion of the internal market project was worked out between the Commission and the European Roundtable of Industrialists (ERT).' There is debate about the principal-agency relationship between the Commission and capitalist classes in this respect, but as remarked in e.g. Sandholtz and Zysman, '1992: Recasting the European Bargain' (1989) 42 World Politics 95, 117, it is difficult 'to judge whether the business community influenced Europe to pursue an internal market strategy or was itself constituted as a political interest group by Community action' based on available evidence. Delors acknowledged in respect to the 1992 process that 'business actors mattered; they made a lot of it happen': Green Cowles (n 52) 114. Similarly, according to Doherty and Hoedeman, 'Misshaping Europe: The European Round Table of Industrialists' (1994) 24 The Ecologist 135, 136, claiming that corporate interests were 'one of the main driving forces behind the single market'. See likewise on this consensus Harryvan, 'The Single Market Project as a Response to Globalisation', *Reshaping Europe* (2020) 7 <https://pure.rug.nl/ws/portalfiles/portal/131465934/Hildesheim31012020.pdf> accessed 2 March 2022.

[54] See an overview of the trajectory of Davignon's career (and other instances of the revolving door phenomenon) in Dudouet and others, 'European Business Leaders. A Focus on the Upper Layers of the European Field Power' in Didier Georgakakis and Jay Rowell (eds), *The Field of Eurocracy: Mapping EU Actors and Professionals* (Palgrave Macmillan 2013) 221–223.

[55] ibid. Davignon was part of the ERT when it was lobbying for the implementation of the SEA: Cowles, 'Setting the Agenda for a New Europe: The ERT and EC 1992' (1995) 33 JCMS 501, 518.

[56] Generally the ERT is claimed to be the birthchild of Gyllenhammar (e.g. van Apeldoorn, *Transnational Capitalism and the Struggle over European Integration* (Routledge 2002) 85; Montalbano, *Competing Interest Groups and Lobbying in the Construction of the European Banking Union* (Springer Nature 2021); Cowles (n 55) 503–504; Harryvan (n 53) 5), with Davignon helping Gyllenhammar select ERT members (e.g. Green Cowles (n 52) 112; Greenwood, *Interest Representation in the European Union* (Macmillan International Higher Education 2011) 70). However, there have also been claims that it was Davignon that begun the initiative (e.g. ibid 79).

[57] van Apeldoorn (n 56) 86.

[58] Allen, 'European Union, the Single European Act and the 1992 Programme' in Dennis Swann (ed), *The Single European Market and Beyond* (Routledge 1992) 28 notes that 'Another incentive came from the fact that national attempts to solve the economic problems of the 1970s had all by and large failed and a number of governments, encouraged by their business élites, were turning once again to consider Community solutions.'

by Internal Market Commissioner Lord Cockfield[59] and submitted to the Council on 14 June 1985.[60] In substance, this White Paper was an industry proposal. Its 'conceptual basis' was the plan for establishing the common market drafted in January 1985 by Wisse Dekker, chair of the Dutch multinational electronics company Philips NV.[61] Dekker was a member of the ERT, which then endorsed and reproduced his proposal.[62] His proposal made four overarching recommendations. All survived in effectively unaltered form in Cockfield's White Paper, with respect to physical barriers,[63] technical barriers,[64] and fiscal barriers.[65]

The intertexts between the two documents are consistent and significant.[66] As an illustration, Cockfield specifically endorses the same industry standardisation bodies as Dekker, CEN and CENELEC.[67] These bodies are subject to a 'structural imbalance… that guarantees that they are dominated by corporate interests'.[68] Even though Cockfield took pains to assert that 'arrangements had already been made to ensure the participation of consumer representative bodies in the work of CEN and CENELEC',[69] these 'consumer organisations lack resources to participate fully in CEN committee work' in the way that corporate interests can.[70] The documents also exhibit an array of structural similarities. The first three of Dekker's 'four priority fields', for example, double as the three parts of the White Paper, which subsumes the fourth field, public procurement, into the category of technical

[59] A former UK Conservative minister in the Thatcher government: Bornschier, *State-Building in Europe: The Revitalization of Western European Integration* (CUP 2000) 82.
[60] Commission, '"Completing the Internal Market"' WP COM(85)310 Final.
[61] Bornschier (n 53) 29.
[62] As discussed in e.g. Balanyá (n 5) 21.
[63] Dekker, 'Europe 1990 An Agenda for Action' (1985) 3 Eur Manag J 5, 7–8: 'trade transactions between member states must become as simple and deregulated as transactions within the national borders' through the 'harmonisation of rules and means' and the 'simplification of trade procedures'. Commission, '"Completing the Internal Market"' (n 60) 27–28: 'Our objective is not merely to simplify existing procedures, but to do away with internal frontier controls in their entirety', which in many situations 'will require national policies either to be progressively relaxed and ultimately abandoned… or replaced by truly common policies applicable to the Community as a whole'.
[64] Dekker (n 63) 8–9 wrote that 'a lack of European standards… is an obstacle to European industry' and recommended that 'the Commission, governments and industries should strongly support the standardisation institutes Comité Européen de Normalisation (CEN) and Comité Européen de Normalisation Electrotechnique (CENELEC) in their important task'. Cf. Commission, '"Completing the Internal Market"' (n 60) [66], which required 'legislative harmonization' and recommends that 'the task of defining the technical specifications… will be entrusted to European Standards issued by the Comité Européen de Normalisation (CEN) or by sectoral European Standards in the electrical and building sectors such as CENELEC'. Likewise, on the issue of procurement, Dekker (n 63) 9 recommended the 'opening up' of procurement markets, especially in telecommunications, to ensure a 'liberation' from the 'nationalism' which had resulted in 'practically the entire purchasing volume of national governments [being] supplied by national champions'. He proposed a set of 'transparent European rules for government procurement policies'. Similarly, Commission, '"Completing the Internal Market"' (n 60) [81]–[90] also spoke of 'the tendency of the authorities concerned to keep their purchases and contracts within their own country' and recommended 'wider opening up of tendering for public contracts' and 'to make the awarding process transparent to potential bidders in the whole of the Community' – including in 'telecommunications'.
[65] Dekker (n 63) 8 made a three-stage proposal for removing 'fiscal obstacles to a homogenously structured Common Market' resulting in the 'complete abolition of fiscal VAT frontiers within the EEC territory'. Cf. Commission, '"Completing the Internal Market"' (n 60) [167] 'the harmonization of indirect taxation has always been regarded as an essential and integral part of achieving a true common market', proposes an extensive set of measures for eliminating VAT and excise duty frontiers.
[66] See notes 64-65 above.
[67] Dekker (n 63) 9; Commission, '"Completing the Internal Market"' (n 60) [68].
[68] Nicol (n 11) 100.
[69] Commission, '"Completing the Internal Market"' (n 60) [70].
[70] McGee and Weatherill, 'The Evolution of the Single Market – Harmonisation or Liberalisation' (1990) 53 MLR 578, 585. Hence, the latter were correct in their prediction that 'For financial reasons it is likely that business will capture the standardisation process within CEN.'

barriers.[71] Both documents also propose short timetables for the implementation of the proposals, though the White Paper adjusts Dekker's ambitious 1990 target to 1992.[72] Commitment to a timetable was a key corporate goal in the build-up to the SEA. Cockfield's predecessor as Internal Market Commissioner, Karl-Heinz Narjes, had in 1984 drafted his own set of proposals for completing the common market; these proposals received little support.[73] This was partially because, as a private letter from an Imperial Chemical Industries official to the ERT member Jacques Solvay critically put it, they lacked a 'precise time-table' for implementing the proposals.[74] Within a year, the Commission had produced just such a timetable. It was politically sensitive and responsive to corporate interest concerns around economic integration.

These intertextualities demonstrate the alignment of the ERT's and the Commission's interests and goals. This is significant not only in terms of what was *included* in the White Paper but also in what was *omitted* from it. In 1984, the Council had set up its own Dooge Committee 'to make suggestions for the improvement of the operation of European co-operation'.[75] The committee's report appeared in March 1985 and made recommendations that were as wide-ranging as Narjes's 1984 proposals.[76] They affirmed several of Dekker's liberalising recommendations but also explicitly paired economic integration with, for example, measures against 'pollution', insisting that 'high priority must be given to the protection of the environment and the improvement of working conditions and safety at work'.[77] Cockfield's White Paper, instead 'separated strict internal market issues from other issues such as social and environment policy - a fact that appealed to many industrialists'.[78] The SEA, in the end, paid only lip service to the non-market environmental and social objectives proposed by the Dooge Report.[79] Narjes's proposals and the Dooge report represented more positive forms of European integration. In the end, the SEA constitutionalised a negative form of integration that reflected the corporate interests contained in Dekker's proposals and Cockfield's White Paper.

1.3: Making Sense of the Single European Act

For some analysts, especially intergovernmentalist theorists of EU integration,[80] the similarities between Dekker's industry proposal, Cockfield's White Paper, and the internal market that was realised following the SEA are simply indicative of coincidentally shared interests in facilitating economic integration. Moravcsik, for example, downplays the role of corporate interests in achieving and realising the SEA by neglecting to mention the relationship between Dekker and Cockfield's

[71] Dekker (n 63); Commission, '"Completing the Internal Market"' (n 60).
[72] The 1992 Single Market deadline is contained in Commission, '"Completing the Internal Market"' (n 60), but appears to have been originally proposed in Delors' speech given days after Dekker's proposal: Weatherill, *Cases and Materials on EU Law* (OUP 2016) 242. The 1992 target was then committed to by the European Council, 'Conclusions on the Proceedings of the European Council' (29–30 March 1985) <https://www.consilium.europa.eu/media/20694/copenhagen_december_1982__eng_.pdf> accessed 23 January 2022.
[73] Commission, 'La Consolidation Du Marché Interieur' (1984) COM(84)305 final.
[74] Quoted in Cowles (n 55) 514.
[75] European Council, 'European Council Meeting at Fontainebleau – Conclusions of the Presidency' (25–26 June 1984) 10 <https://www.consilium.europa.eu/media/20673/1984_june_-_fontainebleau__eng_.pdf> accessed 3 March 2022.
[76] Ad hoc Committee for Institutional Affairs, 'Report to the European Council ('Dooge Report')' EC Bulletin Supplement 4/85.
[77] ibid. 19.
[78] Cowles (n 55) 516 note 33.
[79] See Articles 21–22 Single European Act 1986 (n 47).
[80] Cowles (n 55) 523.

documents; he focuses instead on the role of the French president François Mitterrand.[81] Yet the ERT's lobbying influence on Mitterrand is itself well-documented.[82] Key political actors at the Commission have admitted in oral interviews that the ERT played an essential role in the formulation and implementation of the SEA. Cockfield himself acknowledged the influence of Dekker's industry proposal on his White Paper.[83] Jacques Delors, then the Commission president, also acknowledged that 'business actors mattered; they made a lot of it happen'[84] and that the 'continuing pressure' applied by the ERT was 'one of the main driving forces behind the single market'.[85] These are valuable testimonies from political actors with privileged access to the generally opaque negotiations, lobbying, and decision-making processes that surrounded the SEA.

The constitutionalisation of the internal market must therefore be understood as an operation of corporate power. The ERT developed an array of strategies for advancing its integration agenda and for exerting pressure on political actors to realise the new constitutional order. These mobilisation strategies included *inter alia* meetings and other communications with heads of state/government and other senior public actors,[86] holding press conferences,[87] publishing in media fora,[88] and organising conferences.[89] At its most nakedly coercive extent, the ERT's Internal Market Support Committee issued a widely-published press release in 1987 that announced that 'if progress towards the implementation of the European market is as slow as at present, it is unavoidable that European industries might have to reconsider their long-term strategies in order to stay competitive, with the possibility of redirecting industrial investments… outside Europe'.[90] In its movement from the unrealised objective set by the Treaty of Rome to an actually existing economic order, the internal market has historically relied on agendas set and pressure exerted by corporate actors, in private and in public, in the service of realising a constitutionalised integrated liberal market order. Quite apart from any mere ideological alignment between Commission actors (like Davignon) and the ERT, therefore, the SEA and its implementation was the product of multinational corporate power *over* and *with* the Commission and national governments.[91] Our rendition of this narrative is wholly conventional; beyond EU constitutional studies, it is widely and correctly understood that corporate

[81] Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45 International Organization 19, 40 and 45-46 for discussion of White Paper. See a similarly sceptical take by Greenwood, 'Advocacy, Influence and Persuasion: Has It All Been Overdone?' in Jenny Fairbrass and Alex Warleigh (eds), *Influence and Interests in the European Union: The New Politics of Persuasion and Advocacy* (Europa Publications 2003) 21–23.
[82] e.g. Green Cowles (n 52) 112; Cowles (n 55) 509–513.
[83] Doherty and Hoedeman (n 53).
[84] Green Cowles (n 52) 114.
[85] Doherty and Hoedeman (n 53).
[86] See e.g. the series of events chronicled in Table 3.2 in Fielder (n 53) 89.
[87] e.g. Cowles (n 55) 519.
[88] Stratej, 'Big Business Influence on European Union Decision-Making: The Case of the European Round Table of Industrialists' 127, 137.
[89] e.g. Cowles (n 55) 505.
[90] ERT press release cited in ibid. 519.
[91] See Pansardi and Bindi, 'The New Concepts of Power? Power-over, Power-to and Power-with' (2021) 14 Journal of Political Power 51, 66, summarising the contribution of feminist theorist Amy Allen: '"Power-over" refers to an asymmetrical relation between two or more actors… "Power-with" consists in the ability of a group to act together in view of collective outcomes or goals'. On corporate power, see Section 2.1, below. Power-with has often been taken as a normatively *legitimate* form of power, founded on the collective resistance and solidarity of the otherwise disempowered. We note that, since power-with does not have an intrinsically normative component, it may also refer to the concerted action of already empowered actors like the ERT and the Commission: Allen, 'Rethinking Power' (1998) 13 Hypatia 21, 35.

interests played a decisive role in determining the content of the White Paper and in implementing the White Paper's provisions after the SEA.[92]

This has remained the case in subsequent political EU constitutionalisation processes. The establishment of the Economic and Monetary Union in 1992, for example, relied on industrial and financial sector actors as 'strategic partners',[93] as the later Commission President Jacques Santer acknowledged.[94] EU accessions have likewise been routinely influenced by the lobbying of various corporate interests, such as Unilever in the UK's case and numerous western European corporate groups in the case of the Eastern expansion.[95] Again, both the political agenda in the build-up to the 2007 Treaty of Lisbon and the drafting of the Treaty itself were shaped by these interests.[96] One of the European Parliament's three representatives at the Lisbon intergovernmental conference was simultaneously a senior office-holder at Bertelsmann, Europe's largest multinational media company and 'Germany's most influential neoliberal think-tank'.[97] Civil society has extensively chronicled the endlessly varied forms of influential corporate lobbying with respect to EU secondary law-making.[98] These specific histories and issues all require yet more detailed scholarly attention, archival investigations, and oral interviews with key political and corporate actors. Nonetheless, even in their current form, these histories speak to the hegemony of a transnational corporate class empowered over and with political actors, as has been demonstrated by the historical materialists of the Amsterdam School.[99] This dynamic has been overlooked by classical approaches that understand power to cohere

[92] Fielder (n 53) 88; Doherty and Hoedeman (n 53); Cowles (n 55) 503, 514 and 522; Sandholtz and Zysman (n 53) 116–117; Fielder (n 53); Harryvan (n 53); van Apeldoorn (n 56) 24.

[93] Collignon and Schwarzer, *Private Sector Involvement in the Euro: The Power of Ideas* (Routledge 2002) 134; Genschel and Jachtenfuchs, 'More Integration, Less Federation: The European Integration of Core State Powers' (2016) 23 JEPP 42, 51; Georgiou, 'Adjusting to the Corporate Consensus: Corporate Power and the Resolution of the Eurozone Crisis' [2019] University of Geneva Global Studies Institute Working Paper PhD SPO 2019/04 15 and note 30 <https://www.unige.ch/gsi/files/5615/7709/5364/2019_4_PhD_SPO_Christakis_Georgiou.pdf> accessed 2 March 2022.

[94] In a speech to the AMUE board, former Commission President Jacques Santer remarked that 'the association was about the only body which supported us in our firm belief that the single currency would become a reality': Balanyá (n 5) 49; Van Apeldoorn, 'Transnational Class Agency and European Governance: The Case of the European Round Table of Industrialists' (2000) 5 New Political Econ 157, 170; Collignon and Schwarzer (n 93) 5.

[95] Jones and Miskell, 'European Integration and Corporate Restructuring: The Strategy of Unilever, c. 1957-c. 1990' (2005) 58 Econ Hist Rev 113; Bohle, 'Neoliberal Hegemony, Transnational Capital and the Terms of the EU's Eastward Expansion' (2006) 30 Capital & Class 57, 71.

[96] '[T]he European Commission was further developing the Lisbon agenda in close collaboration with European business representatives.': Hilary, 'Challenging Corporate Europe' (2009) 17 Renewal 33, 33, likewise writing that 'the text enshrined the EU's commitment to a 'highly competitive' internal market and to 'the progressive abolition of restrictions on international trade' - neoliberal policies which have underpinned the European programme since its earliest beginnings'.

[97] or instance, it has been highlighted that MEP Elmar Brok, one of the EP's three representatives at the Lisbon intergovernmental conference, simultaneously held a senior position at Bertelsmann Europe's largest media company and 'Germany's most influential neoliberal think-tank' (Beck and Germann, 'Managerial Power in the German Model: The Case of Bertelsmann and the Antecedents of Neoliberalism' (2019) 16 Globalizations 260). See also: 'Bursting the Brussels Bubble' [2010] Alliance for Lobbying Transparency and Ethics Regulation in the EU (ALTER-EU) 98 <https://www.alter-eu.org/sites/default/files/documents/bursting-the-brussels-bubble.pdf> accessed 2 March 2022; O'Donnell, 'How Lobbyists Rewrite Europe's Laws' *Reuters* (18 March 2011) <https://www.reuters.com/article/uk-europe-lobbying-idUKTRE72H21M20110318> accessed 2 March 2022; Karnitschnig, 'The Beginning of Elmar's End' (*POLITICO*, 1 August 2019) <https://www.politico.eu/article/elmar-brok-mep-the-beginning-of-end/> accessed 2 March 2022.

[98] e.g. 'Lobbying the EU' (*Corporate Europe Observatory*) <https://corporateeurope.org/en/lobbying-the-eu> accessed 2 March 2022; 'Integrity Watch' (*Transparency International EU*) <https://transparency.eu/project/integrity-watch> accessed 9 March 2022; 'Bursting the Brussels Bubble' (n 97).

[99] In fact, the most comprehensive analysis of the role of corporate actors (including the ERT) in EU integration has come from this school: van Apeldoorn (n 56) esp. 83–157; see also Bieler and Salyga, 'Historical Materialism and European

in the public institutions of a given constitutional order and are consequently blind to the capacity of other forms of power to act on processes of constitutionalisation.[100]

In describing the history of European constitutionalisation, we have so far limited ourselves to a discussion of the framing of the Treaties. These *political* processes were complemented by *judicial* processes, however. Particularly during the de Gaulle era of political paralysis on the European level, the European Court of Justice (ECJ) took vital steps towards realising the integrated liberal market economy set out in the Treaty of Rome.[101] The ECJ, too, has been a profitable sphere for the operation of corporate power. Through the preliminary ruling procedure,[102] corporate actors and their lawyers have exercised power *with* the ECJ *over* Member State authorities in the implementation of steps towards the negative integration that corporate actors had themselves envisioned.[103] This dynamic was first enabled by the ECJ's establishment of the principles of direct effect and supremacy in the seminal cases *Van Gend en Loos* and *Costa v ENEL* respectively.[104] It is essential to note that these cases were brought on the basis of internal market provisions in the Treaty of Rome by litigants with business interests.[105] These principles rendered supranational liberalisation measures judicially enforceable on the national level.[106] Corporate actors then turned their strategies of influence to securing the recognition of these principles within Member States,[107] leveraging their financial resources to act as 'repeat-players' in both national and supranational courts.[108] Hence, for example, the multinationals Philip Morris and Rothmans brought repeated cases in the French courts that resulted in the Conseil d'État fully accepting the principle of direct effect.[109] ECJ case law has been a supranational constitution-making force[110] but it has depended for this effect on corporate activities in national and European courts as well as in the formulation of primary law.

Integration' in Didier Bigo and others (eds), *The Routledge Handbook of Critical European Studies* (1st edn, Routledge 2020) esp. 24.

[100] Galligan and Versteeg, 'Introduction' in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (CUP 2013) [1.2].

[101] Weiler, 'The Community System: The Dual Character of Supranationalism' 1981 Yearbook of European Law 267, 270. The 'Europeanisation-through-case-law' narrative quickly became the dominant narrative of integration in academia (as noted by Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity' (2010) 16 ELJ 1) but this does not tell the rest of the integration story involving political and private actors.

[102] Article 267 TFEU.

[103] See e.g. Bouwen and Mccown, 'Lobbying versus Litigation: Political and Legal Strategies of Interest Representation in the European Union' (2007) 14 JEPP 422, 434–439; Fligstein and Stone Sweet, 'Constructing Polities and Markets: An Institutionalist Account of European Integration' (2002) 107 Am J Sociol 1206, 1222–1223 For an analysis of the use of this procedure by private litigants see Sweet and Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95' (1998) 5 JEPP 66, 66 and 71–72.

[104] Burley and Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41; Sweet and Brunell (n 103).

[105] Case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] EU:C:1963:1 was about customs duties (Article 12 EEC Treaty) whereas Case 6/64 *Costa v ENEL* [1964] EU:C:1964:66 concerned the right of establishment (Article 53 EEC Treaty).

[106] Sweet and Brunell (n 103) 68.

[107] e.g. Golub, 'Modelling Judicial Dialogue in the European Community' [1996] EUI Working Paper RSC No. 96/58 13 <https://cadmus.eui.eu/bitstream/handle/1814/1473/WP_RSC_1996_58.pdf?sequence=1&isAllowed=y> accessed 23 March 2022.

[108] Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95.

[109] Mattli and Slaughter, 'Revisiting the European Court of Justice' (1998) 52 International Organization 177, 188; Plotner, 'The European Court and National Courts,Doctrine and Jurisprudence: Legal Change in Its Social Context,Report on France' [1995] EUI Working Paper RSC No. 95/28 27 <https://cadmus.eui.eu/handle/1814/1403> accessed 11 April 2022.

[110] Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 Am J Int Law 1.

The present constitutional order of the EU serves above all the functioning of a supranational integrated liberal market economy founded on the free movement of goods, services, persons, and capital. Since Lisbon, the Treaties have identified these rights with 'citizenship',[111] but this is more precisely a 'market citizenship'.[112] It cannot be forgotten who lobbied for and has benefited from the internal market arrangements on which EU citizenship is founded. The constitutionalised internal market is the product of the *past* exercise of corporate power: power to drive political agendas, to participate in political processes, to have expressed concerns taken seriously (as with the need for a timetable for implementing the internal market), and to coerce action, either through privileged access to the national and European court systems or through threats founded on multinational economic power. This is not to say that political will was not a necessary precondition for the constitutionalisation of the integrated liberal market economy.[113] It is merely to point out that the 'particular ideological choice' embedded in the EU constitutional order is, to a remarkable extent, the result of corporate interests articulated and empowered, in both political and legal domains and on both the national and supranational levels, over decades of EU constitutionalisation.[114] Of course, without corporate interests, the internal market may still have come to exist, but it is worth pausing to consider what constitutional status the positive integration proposed in the Dooge Report may have acquired *vis-à-vis* the negative integration implemented through Cockfield's White Paper in the absence of corporate power.

2: Implications of Corporate Involvement in EU Constitutionalisation

Barber's theory of 'positive constitutionalism' shows clearly that constitutions are not only about tethering public authority.[115] They also embed 'a set of principles relating to the institutional structure of the state' that may facilitate and direct its 'capacity to effectively advance the well-being of its members'.[116] On this model, there is no such thing as a neutral or abstract constitution, formulated outside or against the operation of power. Instead, constitutions are only as good as the particular sets of practices that they embed, whether those practices are economic, social, cultural, or so on. Barber makes a compelling case that constitutional orders can be organised to facilitate human flourishing. Conversely, therefore, constitutions may also obstruct human flourishing. Here, we argue that the constitutionalisation of the integrated liberal market economy has not facilitated the flourishing of ordinary European subjects but has instead facilitated the further constitution of corporate power and poses intractable obstacles to the EU's democratic legitimacy.

[111] Article 20(2) TFEU jo. Articles 45, 56,
[112] Kochenov, 'The Oxymoron of "Market Citizenship" and the Future of the Union' in Fabian Amtenbrink and others (eds), *The Internal Market and the Future of European Integration* (CUP 2019); O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Bloomsbury 2017) 91; Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CMLR 1597.
[113] As noted by Fielder (n 53) 91.
[114] Nicol (n 11) 89.
[115] Barber, *The Principles of Constitutionalism* (OUP 2018) 6–19.
[116] ibid 10.

2.1: The EU Constitution Constituting Corporate Power

In Section 1, we presented a narrative of EU constitutionalisation that highlighted how corporate actors exercised power to realise the supranational integrated liberal market economy, through the exercise of power over various European and national political actors and of power with an EU Commission with aligned interests and an ECJ to which well-resourced corporate actors have privileged access. Here, we argue that the consequence of these historical power relations has been the further constitution of corporate power. In other words, corporate power is historically constructed: the *past* exercise of corporate power in the EU constitutionalisation process has expanded and shaped corporate power in the *present*.

By corporate power, we refer not to any quantifiable volume of power possessed by particular corporations.[117] As Davis observes, 'corporate power today, in a globalized economy, is far more ambiguous' than it was 'for most of the twentieth century, [when] corporate power came from large size and holding an oligopoly or monopoly position in industry'.[118] Instead, we refer to a quality of the relationships into which corporate actors enter, in which they might exercise power *to* achieve desired outcomes and power *over* possible countervailing forces.[119] We are therefore concerned with a system of power, the constitutionalised internal market, and how it facilitates corporate interests in general. Nonetheless, we note that, tellingly, the specific corporations that were the major members of the ERT remain the biggest industrial corporations in Europe and that all but two of the ERT's founding members are presently in the Forbes Global 500.[120]

In asking how the constitutionalisation of the internal market has facilitated corporate power, it is necessary to cast a wide net. Epstein reminds us that corporate power can be expressed in a wide variety of spheres: the economic, the sociocultural, the individual, the technological, the environmental, and the political.[121] In the economic sphere, restrictionless access to European capital, labour, and consumer markets has contributed to an identifiable trend towards increased market or industry concentration in Europe.[122] Some analysts insist that industry concentration is a positive or

[117] We do not seek to contribute to the theoretical understanding of distributions, structures, and relations of power. Numerous possible frameworks for the theoretical analysis of corporate power already exist: Grant, 'Measuring Corporate Power: Assessing the Options' (1997) 31 Journal of Economic Issues 453. Whole volumes could be dedicated to such an analyses, which has already been done in the field of institutional economics: see e.g. Sternlieb (ed), *The Economy as a System of Power: Corporate Systems* (Routledge 2017).

[118] Davis, 'Corporate Power in The Twenty-First Century' in Subramanian Rangan (ed), *Performance and Progress: Essays on Capitalism, Business, and Society* (OUP 2015) 395 and 397.

[119] For an overview of these theoretical terms, see Pansardi and Bindi (n 91).

[120] Out of 17 founding members, the two exceptions are Olivetti and ICI: 'Global 500' (*Fortune*) <https://fortune.com/global500/2021/> accessed 3 March 2022.

[121] Economic power; social and cultural power; power over the individual; technological power; environmental power; political power. Epstein, 'Dimensions of Corporate Power, Pt. 1' (1986) 16 Calif Manage Rev 9; Epstein, 'Dimensions of Corporate Power, Pt. 2' 16 Calif Manage Rev <https://www.proquest.com/docview/1301275175?pq-origsite=primo&accountid=9851> accessed 4 March 2022:

[122] See e.g. from Bajgar and others, 'Industry Concentration in Europe and North America' [2019] OECD Productivity Working Paper No. 18 <https://www.oecd-ilibrary.org/docserver/2ff98246-en.pdf?expires=1645772510&id=id&accname=oid007055&checksum=EA537C6AB0B8DD62B78665947905C9CB> accessed 25 February 2022; Koltay, Lorincz and Valletti, 'Concentration and Competition: Evidence from Europe and Implications for Policy' (2021) <https://papers.ssrn.com/abstract=3992591> accessed 3 March 2022. Early in integration see e.g. Allen and others, 'The Competition Effects of the Single Market in Europe' (1998) 13 Economic Policy 441, 443–444.

neutral phenomenon, corresponding to a rise in productivity.[123] However, it has also been associated with both higher price levels and decreases in innovative activity at the industry level,[124] which are expressions of aggregate market power.[125]

An empirical correlation has also been identified between neoliberal policies like the integrated liberal market economy and increased income inequality.[126] The resultant concentration of wealth among a small number of large corporations (and their associated individuals) empowers actors with superior financial resources over stakeholders with competing interests, such as ordinary subjects of the EU constitutional order, in a range of other spheres. Corporate lobbying, dominant involvement in standardisation bodies, and litigative repeat-playing in both the national and European courts are obvious examples of this empowerment over ordinary subjects.[127] Those competing stakeholders include national governments. Corporate actors have been consistently successful at securing liberalising and deregulatory outcomes through the courts, notably in the cases of national company law in areas of corporate control,[128] direct taxation,[129] and the UK Sunday trading saga, in which business actors used preliminary references to lobbied UK courts repeatedly on the basis of EU law and secured a 'near-five year hiatus in the enforcement' of Sunday trading rules.[130] The economic capacity of 'large corporate actors' to 'use… Euro-litigation strategies to achieve gains'[131] has been increasingly facilitated in part by the concentration of wealth that has accompanied European integration.

It has also been facilitated, like corporate lobbying, by the transfer of market-related competences to the supranational level. Lobbying aims to exert influence over visible decision-making power, which in this case has been centralised in one location rather than in 27 Member States. This has a magnifying effect; a given volume of financial resources will achieve greater lobbying success, conceived of as the power of lobbyists to achieve their desired outcome, when concentrated rather than spread out. Corporate interests have been sufficiently empowered by this streamlining to capture a

[123] Bighelli and others, 'Increasing Market Concentration in Europe Is More Likely to Be a Sign of Strength than a Cause for Concern' (*VoxEU.org*, 13 October 2020) <https://voxeu.org/article/increasing-market-concentration-europe-more-likely-be-sign-strength-cause-concern> accessed 3 March 2022).
[124] On technological corporate power, see Epstein, 'Dimensions of Corporate Power, Pt. 2' (n 121)32–35.
[125] Philippon, 'Causes, Consequences, and Policy Responses to Market Concentration' [2019] Aspen Economic Strategy Group 14, 16.
[126] Ostry, Loungani and Furceri, 'Neoliberalism: Oversold?' [2016] IMF Finance and Development Magazine 38, 39. On the increase in wealth inequality in Europe see 'European Wealth Report' [2021] Redesigning Financial Services <https://redesigning-fs.com/wp-content/uploads/2021/12/European_Wealth_Report.pdf> accessed 6 March 2022, which also highlights that the wealth of the very wealthiest Europeans stems from luxury goods and retail businesses: 45–46.
[127] For repeat-players: Galanter (n 108).
[128] Horn, *Regulating Corporate Governance in the EU: Towards a Marketization of Corporate Control* (Palgrave Macmillan 2012) 104–105.
[129] McCown, 'Interest Groups and the European Court of Justice' in David Coen and Jeremy Richardson (eds), *Lobbying the European Union: institutions, actors, and issues* (OUP 2009) 98–101.
[130] Deakin, 'Sunday Trading: Some Uses and Abuses of European Law' [1993] CLJ 364, 367. See also Rawlings, 'The Eurolaw Game: Some Deductions from a Saga' (1993) 20 Journal of Law and Society 309, 314–315, 332
[131] Mattli and Slaughter (n 109) 188–190.

share of decision-making authority. Corporate representatives formally participate in and frequently control official EU institutional committees[132] and European standard-setting.[133]

The economic and political empowerment of corporate actors to achieve desired outcomes is simultaneously an empowerment of corporate actors over other stakeholders, in all of Epstein's spheres. Birchall has shown clearly how corporate power is 'used to profit from impeding the full enjoyment of human rights beyond legally recognized forms of harm', restricting the material possibilities for individual rights-holders to realise their rights and subjecting individual consumers to PR campaigns that misrepresent corporations as meaningful human rights actors when there is a market incentive to do so.[134] Individuals as workers have also suffered from a restrained capacity to achieve their own goals with respect to working conditions, wages, or employment status.[135] We also note how corporate interests, expressed through lobbying and other means, have manifested as an environmental power in the ongoing climate crisis.[136] All of these observed effects speak both to the empowerment of corporate actors to achieve their own profit-maximising outcomes and their empowerment over other actors whose interests are not aligned with corporate interests. These effects have been facilitated by the constitutionalisation of the internal market, which has acquired what might be termed a "paradoxical" quality.

Constitutionalism begins from the idea that constitutions serve as mechanisms for restricting 'the arbitrary power of the state'.[137] They subject public actors to restraints that are relatively difficult to

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[132] Large corporate interests are more likely than other stakeholders to be represented in Commission expert groups because, according to the empirical analysis of Chalmers, 'Getting a Seat at the Table: Capital, Capture and Expert Groups in the European Union' (2014) 37 West European Politics 976, 987, 'there is clear evidence that interest organisations with greater resources also have more expert group seats'. A 2008 civil society group study found that 'Within the sample under study, in 64% (18/28) of Expert Groups with industry representation, there is an unbalanced weighting in favour of industry. Furthermore, our survey findings revealed that 25% (7/28) of the Expert Groups with business involvement are not only unbalanced but corporate controlled.' 'Secrecy and Corporate Dominance - A Study on the Composition and Transparency of European Commission Expert Groups' [2008] ALTER-EU <https://corporateeurope.org/sites/default/files/sites/default/files/resource/published.pdf> accessed 6 March 2022. See also Schilde, *The Political Economy of European Security* (CUP 2017) 63–64; Vassalos, 'European Commission's Expert Groups: Damocles' Sword over Democracy' (2013) 1 Juridikum 87.

[133] See Annex I Regulation (EU) No 1025/2012 on European standardisation [2012] OJ L 316/12. CEN and CENELEC are still two of three core standardisation bodies officially recognised by the EU, and have now merged. The third is the European Telecommunications Standards Institute, which sets standards for information and communications technology. 'CEN-CENELEC' <https://www.cencenelec.eu/> accessed 6 March 2022.

[134] Birchall, 'Corporate Power over Human Rights: An Analytical Framework' (2021) 6 Business and Human Rights Journal 42, 61–63 and 65.

[135] e.g. Overbeek and Bieling (eds), 'European Employment Policy between Neo-Liberal Rationalism and Communitarianism', *The Political Economy of European Employment: European Integration and the Transnationalization of the (un)Employment Question* (Routledge 2003) 52 and 56–61.

[136] For environmental power, see Epstein, 'Dimensions of Corporate Power, Pt. 1' (n 121) 15. See e.g. Michaels and Ainger, 'The Climate Smokescreen' in Jordi Xifra i Triadú and Núria Almiron (eds), *Climate change denial and public relations* (Routledge 2020); Böhler, Hanegraaff and Schulze, 'Does Climate Advocacy Matter? The Importance of Competing Interest Groups for National Climate Policies' [2022] Climate Policy <https://www.tandfonline.com/doi/full/10.1080/14693062.2022.2036089> accessed 9 March 2022; Brock and Dunlap, 'Normalising Corporate Counterinsurgency: Engineering Consent, Managing Resistance and Greening Destruction around the Hambach Coal Mine and Beyond' (2018) 62 Political Geography 33.

[137] Barber (n 115) 2B, citing Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 The American Political Science Review 853. See also Alberts, 'How Constitutions Constrain' (2009) 41 Comparative Politics 127, 127: 'All democratic constitutions aim to regulate the exercise of political power according to democratic norms of behaviour, and all establish institutions to reflect these norms.' Compare the discussion of constitutional *empowerment* by Galligan and Versteeg (n 100) [1.2]: 'Constitutions constrain government: they generate a set of inviolable principles to which future lawmaking and government activity must conform. But constitutions also enable government, by empowering institutions

remove or modify. Constitutions are therefore fundamentally about power. It is generally (and rightly) accepted that state or public power in a given polity should not be absolute nor constrained only by the possibility of extra-legal or extra-constitutional resistance by subjects. The constitutionalisation of an integrated liberalised market economy is certainly a restriction on public power in this sense. It reduces the capacity of national and EU political actors to modify or correct the EU economic order.

This restriction on public power is therefore simultaneously a form of private (corporate) power because it is *negative* integration – a liberalised *lack* of restrictions on business activities – that has been constitutionalised. There are strong arguments that powerful private actors should be subject to constitutional restraints, but these are unapplied arguments in the European context.[138] Instead, constitutional values and principles, including *inter alia* openness,[139] democracy,[140] and the rule of law,[141] are treated as limited to public institutions. This is an invisible operation of power,[142] shaping assumptions about the scope of constitutional values and principles. In the case of the internal market project, restraints on public power have given rise to a largely untethered form of private power.

Scharpf has shown clearly the problems attendant on the constitutionalisation of negative integration, which arise in part out of the governmental structure of the EU. He recognises that 'the institutional capacity for negative integration is stronger than the capacity for positive integration'.[143] The former's privileged position as the basis of the Treaties has enabled the ECJ and, through it, corporate actors to advance internal market provisions against infringements by Member States, whereas the market-correcting policies and regulations that may be established through positive

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and, in some cases, by mandating them to promote social welfare.' They acknowledge, however, that the 'use of the term "constitution" in this way is relatively recent'.

[138] Freeman, 'The Private Role in the Public Governance' (2000) 75 New York University Law Review 543, 576.

[139] The articles containing the principle of openness as listed by the CJ include 'the second paragraph of Article 1 and Article 10(3) TEU, Article 15(1) and Article 298(1) TFEU and Article 42 of the Charter' (see inter alia Case C-160/20 *Stichting Rookpreventie Jeugd* [2022] EU:C:2022:101 [35]). According to the CJ, 'openness enables the EU institutions to have greater legitimacy and to be more effective and more accountable to EU citizens in a democratic system.' This principle has been relied on or raised by the CJ several times in recent years, as seen in respect to e.g. the confidentiality of Commission impact assessments in Case C-57/16 P *ClientEarth* [2018] EU:C:2018:660, the confidentiality of legal opinions of an institution Case C-156/21 *Hungary v Parliament and Council* [2022] EU:C:2022:97 [58]–[61]. It was referred to as a '*fundamental* principle' in Case C-175/18 P *PTC Therapeutics International v EMA* [2020] EU:C:2020:23 [94]. See on this principle Alemanno, 'Unpacking the Principle of Openness in EU Law Transparency, Participation and Democracy' [2014] ELRev 22.

[140] Article 2 enshrines the values of respect for democracy and the rule of law. They are referred to as 'universal' values in the preamble of the TFEU. Moreover, according to the Court's case law Article 10(1) TEU, which provides that 'The functioning of the Union shall be founded on representative democracy', 'gives concrete expression to democracy as a value' (Case C-418/18 P *Puppinck* [2019] EU:C:2019:1113 [64]) 'referred to in Article 2 TEU' (Case C-502/19 *Junqueras Vies* [2019] EU:C:2019:1115 [63]). See also Case C-718/18 *Commission v Germany* [2021] EU:C:2021:662 [129]: 'the principle of democracy… is guaranteed throughout the European Union'.

[141] It appears however that the rule of law as an Article 2 TEU value must be given 'concrete *and* justiciable expression' via over provisions of EU law: Pech and Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case' [2021] Swedish Institute for European Policy Studies Report No. 3 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3850308> accessed 7 March 2022 (their emphasis). See also e.g. Case C-896/19*Repubblika* [2021] EU:C:2021:311 'compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given *concrete expression* by, inter alia, Article 19 TEU' [63].

[142] See Lukes (n 34) 25–29.

[143] Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999) 49–50.

integration rely primarily on the political agreement of Member States and the European Parliament, which are subject to far more routine conflicts of interest.[144]

In this respect, though it was the Treaty of Rome's constitutionalisation of negative integration that enabled the ECJ to begin establishing the internal market, we wish to recall especially how historic corporate power acted to prevent the constitutionalisation of the social and environmental protections that were integral both to the Dooge Report and to Narjes's 1984 proposals. For a brief moment in 1984-85, the possibility of a constitutional order not uniquely founded on an economic ideological choice may have been alive. Corporate interests helped to shut down that possibility and constitutionalise instead a lack of restraints on corporate power. The result has not merely been a *static* institutional imbalance in favour of corporate interests at the European level but a *dynamic* system of power that further and increasingly constitutes corporate power, as greater wealth concentration and fewer obstacles facilitate the achievement of corporate interests over and against the interests of other actors, including at the national level.

Depending on one's view of the desired depth of constitutionalisation, therefore, the EU is either over- or under-constitutionalised. It may be over-constitutionalised in the sense that, by entrenching a specific economic ideological structure for the internal market, the SEA incorporated 'provisions which would be ordinary law in states' into constitutional protections.[145] Since this economic ideology serves corporate interests, its constitutionalisation has placed those corporate interests beyond the reach of the EU's day-to-day political decision-making and legislative authority. Equally, the EU may be under-constitutionalised in the sense that its constitutional machinery is mobilised towards protecting an economic order which frees corporate interests from restrictions and *not* simultaneously towards mitigating the harms that those corporate interests enact and that are briefly catalogued in this section.

2.2: Bringing Democratic Legitimacy into Doubt

Over-constitutionalisation has implications for democratic legitimacy.[146] So too does under-constitutionalisation, as conceived above. Davies has argued insightfully that the constitutionalisation of the internal market has, by virtue of the requirement for European legislation to have a legal base in generally instrumental Treaties that authorise action only for 'a specific and pre-defined purpose', functioned to invalidate the pursuit of various, unconstitutionalised social, cultural, environmental, and human interests except as corollaries to the achievement and protection of open markets.[147] The primary effect of the constitutionalisation of the internal market *without* other, positive forms of integration is to protect the internal market from political intervention. This has an obvious consequence for the EU's democratic legitimacy. Ordinary subjects of the EU constitutional order who identify in it a prioritisation of corporate interests over their own may also consider European democracy incapable of correcting such an illegitimate order.

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[144] ibid.

[145] Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21 European Law Journal 460. See also Höpner and Schmidt, 'Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review' (2020) 22 CYELS 182, 186.

[146] On over-constitutionalisation and legitimacy see Grimm (n 145).

[147] Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart 2015) 266–269.

Political legitimacy is in part a question of representation and perception.[148] In all but the most authority-friendly theories,[149] political legitimacy is a subjective phenomenon that either depends on or is indicated by the consent of the subject body. It is therefore also a socially negotiated phenomenon, since the conditions for generating consent may change over time and vary across communities. In respect of representation, we note the EU's concern to represent its constitutionalisation process as a purely political endeavour, adopting an official silence in its digital presence about its historical relationships with corporate interests and the role of these interests in shaping the content and pace of EU integration, both in the drafting of the Treaties and at the ECJ.[150] Misrepresentation, the manipulation of public memory, and the opacity of the operation of corporate power may combine to preclude a critical mass of subjects from properly, informedly consenting to the constitutional order under which they live. It is well established that corporate interests play an active role in the EU policy-making and secondary law-making process,[151] but this is not true of the origins of the EU internal market and the EU constitutional charter. The very need for greater attention to the involvement of corporate power in the EU constitutionalisation process, which we noted at beginning of this chapter, raises the possibility of a consent deficit in the EU's legitimate right to implement the internal market.

In respect of perception, it must be remembered even on normative theories of legitimacy that subjects who perceive their political and economic régimes to be illegitimate act accordingly, whether or not these perceptions are founded on accurate historical knowledge or rational, informed analyses of EU decision-making processes and outcomes. There exists a widespread perception among ordinary subjects of the EU that their constitutional order favours corporate interests over their own. A clear plurality of subjects of the EU constitutional order consistently report their view that corporate interests have been the 'big winners in the integration project',[152] in particular contradistinction to 'the unemployed, the retired and unskilled workers'.[153] On Schmidt's tripartite model of democratic legitimacy (conceptualised in an EU context), this perception relates to 'output legitimacy', which 'center[s] on the ability of EU institutions to govern effectively for the people'.[154]

We have seen already that the EU constitutional order serves to further constitute corporate power and that the resultant outcomes are detrimental to the interests of 'the people', conceived of as ordinary subjects in their capacities as *inter alia* rights-holders, consumers, workers, and citizens. There are strong reasons to suppose further deficits in democratic legitimacy exist under the other two aspects of Schmidt's model.

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[148] Davies uses the term 'social legitimacy' to mean broadly the same phenomenon: ibid. 261.

[149] According to Estlund, *Democratic Authority: A Philosophical Framework* (PUP 2009), subjects are obliged to consent to democratic authority if certain normative conditions are met (though we note that the involvement of corporate interests in democratic processes would, in any case, preclude the fulfilment of these normative conditions).

[150] See especially 'EU Pioneers' (n 14).

[151] This is in particular in light of the increased scrutiny by media outlets and civil society groups on the role of corporate actors in EU policy- and (secondary) law-making: see notes 5–6 above.

[152] McLaren, 'Opposition to European Integration and Fear of Loss of National Identity: Debunking a Basic Assumption Regarding Hostility to the Integration Project' (2004) 43 EJPR 895, 901.

[153] ibid; Moore, 'Big Business, Banks and Politicians Seen as Main Winners from EU' (3 June 2016) <https://yougov.co.uk/topics/politics/articles-reports/2016/06/03/big-business-banks-politicians-main-winners-eu> accessed 3 March 2022.

[154] Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 Political Studies 2, 4.

'Input legitimacy' essentially consists in democratic political participation.[155] A deficit in input legitimacy requires no assessment of the merits or otherwise of an integrated liberal market economy. If such an economic order were the result of the genuine involvement of a critical mass of ordinary subjects, its input legitimacy would be assured regardless of its outcomes. However, this order was installed, as we have seen, on the basis of decades-long corporate involvement in the EU constitutionalisation process. Due to the opacity of this involvement and lobbying at both the European and national levels, the vast majority of ordinary subjects cannot have had an equal say in the 'particular ideological choice' that now shapes their lives.

'Throughput legitimacy' is 'the efficacy, accountability and transparency of the EU's governance processes along with their inclusiveness and openness to consultation *with* the people'.[156] In this context, we must take account of the often opaque exercise of corporate power over and with the EU Commission during the past EU constitutionalisation process. This stands in clear tension with the constitutional principle of transparency.[157] The inception of the internal market occurred under a lack of rules for limiting conflicts of interest and corruption and a lack of channels for holding the Commission accountable for its relationships with corporate interests. Both accountability and transparency pose significant hurdles for EU democratic legitimacy.

However legitimacy is theorised and assessed, therefore, the constitutionalisation of the integrated liberal market project fails to meet its basic measures and, crucially, is broadly understood by its subjects to do so.

3: Tethering Corporate Power, Reshaping Corporate Power?

Corporate interests, we have seen, often conflict with the interests of other stakeholders in the EU constitutional order but have been structurally empowered by the constitutionalisation of the internal market that those interests had themselves acted to secure. It would be remiss not to ask how corporate power might be tethered and what options might exist for reshaping it within the existing constitutional order. The answer is that no sufficient direct legal mechanism exists for this purpose. We have only a patchwork of provisions, across numerous areas of legislation, that cannot tether corporate power to the extent necessary to rectify the negative implications of corporate involvement in the constitutionalisation of the internal market project.

In terms of internal market provisions themselves, there is an 'economically liberal bias' entrenched in the underlying, general rule.[158] The free movement of the factors of production by definition take precedence over their restriction. As a result, it seems likely that 'the supremacy of free movement over basic social rights implied by the ECJ judgments is leading Europe in a politically and socially unsustainable direction.'[159] Economic justifications are insufficient for derogations (though there is some indication that, where economic grounds can be shown to relate to the public interest,

[155] See Scharpf's numerous works summarised in ibid.
[156] Schmidt (n 154) 2.
[157] The EU principle of openness (which includes transparency) was only later established in the Treaties (see note 139 above).
[158] Höpner and Schmidt (n 145) 182 and 186.
[159] Dølvik and Visser, 'Free Movement, Equal Treatment and Workers' Rights: Can the European Union Solve Its Trilemma of Fundamental Principles?' (2009) 40 Industrial Relations Journal 491, 491. See likewise Lasser, 'Fundamentally Flawed: The CJEU's Jurisprudence on Fundamental Rights and Fundamental Freedoms' (2014) 15 Theoretical Inquiries in Law 229, 246–248.

the ECJ may possibly accept this non-Treaty, case-law justification for derogation).[160] The difficulty of justifying derogations is a product, in part, of the constitutionalised character of EU negative integration.

Likewise, competition law provides no comprehensive solution. Articles 101 and 102 TFEU are simply not designed to catch the kinds of activities described here. EU competition law is concerned only with certain types of harm, most notably harm to *consumer* welfare caused by the exercise of market power.[161] Consumer protection law[162] and other areas of sectoral regulation such as pharmaceutical law[163] are similarly narrow in nature, offering only the potential to protect individuals from specific harms rather than the full variety of harms caused by the exercise of corporate power.

EU lobbying regulation has likewise so far been insufficient to tether corporate power, though increased transparency in lobbying would at least facilitate throughput legitimacy. Until very recently, the EU Transparency Register was voluntary and applicable only to communications with the Commission and Parliament, not with Member States in the Council of Ministers. In mid-2021, all three institutions reached an agreement on the creation of a *mandatory* transparency register.[164] However, the agreement preserves substantial loopholes.[165] Related and significant challenges also exist at the national level.[166] Lobbying regulations nonetheless offer some potential; there is no legal reason why rules aimed at empowering citizens and other stakeholders in decision-making processes and at implementing equity in representation could not be enacted. Such rules could rectify the imbalance in lobbying capacities between corporate interests and other stakeholders like private

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[160] Nic Shuibhne and Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2013) 50 Common Market Law Review 965.

[161] O'Donoghue and Padilla, *Law and Economics of Article 102 TFEU* (Bloomsbury 2020) foreword by Advocate General Wahl (8) and 78; Whish and Bailey, *Competition Law* (OUP) 18–19; Bishop and Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2010) [2-017].See most notably Joined Cases C-468/06 to C-478/06 *Sot Lélos kai Sia EE and Others v GlaxoSmithKline* [2008] EU:C:2008:504 [33] and [68]. EU competition policy has long officially endorsed a consumer welfare objective: See e.g. the Commission explicitly or implicitly identifying consumer welfare as the objective of EU competition law in: Commission, 'Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements' [2014] OJ C89/3 [5], [7], and [235]; Commission, 'Report on Competition Policy 2011' COM(2012)0253 final [2] and Section 2.1; Article 82 Guidance [19], [30], and [86]; Commission, 'A single market for 21st century Europe' COM(2007)725 final [2.1]; Guidelines on the Assessment of Horizontal Mergers [2004] OJ C31/5 [269]; ibid [61]; Commission, 'Guidelines on Vertical Restraints' [2000] OJ C291/1 [7] and [159]; Article 81(3) Guidelines [13], [21], [33], and [104], Commission, 'Productivity: The Key to Competitiveness of European Economies and Enterprises' SEC(2002)528 [25(2)]; Commission, 'Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices' [1999] OJ L336/21 [3].

[162] e.g. the Consumer Rights Directive 2011/83/EU contains provisions related to mere information requirements (Articles 5 and 6); formal requirements (Articles 7–8); the right of withdrawal (Articles 9–16); and delivery (Article 18), passing of risk (Article 20), communication by telephone (Article 21), and additional payments (Article 22)). Likewise, see the Product Liability Directive Article 1; Unfair Terms Directive Article 3; Unfair Commercial Practices Directive Article 5 (unfair commercial practices), Articles 6-7 (misleading commercial practices), and Articles 8–9 (aggressive commercial practices).

[163] See e.g. 'The rules designed to guarantee the quality, safety and efficacy of medicinal products' (recital 20 Directive 2001/83/EC (consolidated) [2001] OJ L311/67). See likewise Article 12 Regulation 726/2004 [2004] OJ L136/01.

[164] Council, 'Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on a Mandatory Transparency Register' No. 5655/21 2021, 21.

[165] E.g. the Register's non-application to the Council permanent representations of the Member States in Brussels. Formal inclusion of industry in expert groups established by the EU institutions are also excluded from the register's scope. See on this the assessment by 'The EU makes the Transparency Register mandatory but we expected better' (*The Good Lobby*, 17 May 2021) <https://www.thegoodlobby.eu/2021/05/17/the-eu-makes-the-transparency-register-mandatory-but-we-expected-better/> accessed 25 February 2022.

[166] European Parliamentary Research Service, 'Transparency of Lobbying in Member States' [2019] PE 649.411.

individuals and civil society organisations.[167] They offer significant (though nonetheless limited) opportunities to improve both input and output legitimacy in contemporary EU decision-making processes, to restrict the future exercise of corporate power over EU decision-making bodies, and to remove the hurdles erected by the outsized financial resources of corporate lobbies to the reversal of the past exercise of corporate power over the EU constitutionalisation process. Nonetheless, they would not in and of themselves execute this reversal; lobbying regulations will only look forward to future harms, rather than deal with those already enacted and entrenched in the EU constitutional order or with the problem of corporate effectiveness at the ECJ.

Other avenues for tethering corporate power warrant further investigation. Existing constitutional principles like openness, democracy, and the rule of law could be applied to the restriction of corporate power, or a set of general rules that are concrete expressions of these principles and applicable to corporate interests could be established. Yet, again, rules designed to limit present and future exercises of corporate power will not account for the present corporate freedom to operate in an integrated liberal market economy, an operation that further constitutes corporate power, if they do not directly confront the past exercise of corporate power that produced this constitutional order. It is time to think seriously about how corporate power might be reshaped in the same sphere of activity that has done so much to engender it: the EU constitution.

Conclusion

We began this chapter by presenting a brief narrative of a historical interest group analysis, showing that corporate interests were consistently responsible for placing the European economic integration objective on the political agenda, for making concrete proposals for the content of EU constitutional instruments, for exerting pressure on public actors to realise their constitutional obligations regarding liberalisation, and for pursuing liberalisation through European and (on the basis of European law) national courts in the absence of political progress. We conceptualised this findings as the *past* exercise of corporate power *to* advance corporate interests and *over* other stakeholders or decision-makers in the constitutionalisation process.

We then elaborated upon two core *present* implications of this past exercise of corporate power. We argued that the constitutionalisation of the internal market project has contributed to constituting corporate power by restraining the capacity of public power to intervene in an economic order that suits corporate interests, while not simultaneously restraining corporate power through constitutional obligations for various economic, political, social, and environmental harms to be avoided. We also argued that, as a result, the constitutionalisation of the integrated liberal market economy fails all three basic measures of EU democratic legitimacy.

[167] In 2016 (under the non-mandatory scheme) it was reported that in-house lobbyists and trade associations and professional consultancies and firms engaged in ~40% more lobbying than all other groups: see Dellis and Sondermann, 'Lobbying in Europe: New Firm-Level Evidence' [2017] ECB Working Paper No. 2071 <https://www.ssrn.com/abstract=2984891> accessed 9 March 20227 chart 1 . The digital industry, which is the biggest current corporate lobbying spender, 'spends over € 97 million lobbying the EU Institutions per year and employs 1452 lobbyists on its behalf': Corporate Europe Observatory and LobbyControl, 'The Lobby Network - Big Tech's Web of Influence in the EU' 10 <https://corporateeurope.org/sites/default/files/2021-08/The%20lobby%20network%20-%20Big%20Tech%27s%20web%20of%20influence%20in%20the%20EU.pdf> accessed 9 March 2022.

Finally, we surveyed the existing patchwork of legal provisions applicable to corporate interests and showed that they are insufficient for tethering the corporate power constituted by the constitutionalisation of the integrated liberal market economy. We nevertheless offered some optimism by pointing to the limited but positive potential effects of lobbying regulation on both the operation of corporate power and the EU's democratic legitimacy.

However, a full solution to the problem of corporate power in the EU constitutional order must take account of the fact that corporate power is historically constructed. That is to say, the structures that empower corporate interests in the present were generated in the past. Confronting the problem of corporate power must therefore entail confronting the historical injustices of the EU constitutionalisation process.[168] It is in the nature of historical injustices to require solutions that step radically outside our existing, historically constructed frameworks. One such solution is nothing other than the deconstitutionalisation of the internal market.[169]

[168] We recommend, for thinking about past-present relationships in a corporate power context, Srivastava, 'Corporate Sovereign Awakening and the Making of Modern State Sovereignty: New Archival Evidence from the English East India Company' [2022] International Organization 1.

[169] See further Scharpf, 'De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe' (2017) 23 ELJ 315.