European Green Deal and Climate Exemption in EU Antitrust Law

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I. Introduction

The new EU Commission under President *von der Leyen* assumed office in December 2019 for a term of five years.

The most important policy of this new Commission is the "*European Green Deal*", with a goal of **making Europe the first climate neutral continent**.

This is an excellent idea, for various reasons. The most pressing is that it is way past time to scale up efforts to reduce fossil fuel use. Another one is that the necessary investments will be a motor for economic growth in the EU.

And the transition to a renewable energy system is actually a race for the energy market of the next ten thousand years of human history.

When oil was distributed between different countries as it is now, that was a random deal of the cards with no relation to any efforts of humans. Saudi Arabia does not enjoy its oil resources because humans living there a couple of hundred million years ago wisely decided to enable later oil production by planting trees. It received those resources by random luck. Japan just happened to draw a zero in the oil resources distribution.

In contrast, whoever wins the race to get to a renewable energy system first will be able to sell their surplus energy to other countries who have been less alert. That translates into security of energy supply and extra income from the energy sold. This *European Green Deal* is also a new deal of the energy resources cards.

To achieve the goal of becoming the first climate neutral continent, the Commission plans to mobilize funds at the order of one trillion euros until 2030[1]. This is not only the central

[1] Nicolas, Commission's €1 trillion bet on green deal financing, Euobserver.com, 14.1.2020, k-lenz.de/e13。

policy of the new Commission, but also a policy that will receive very large funding.

In December 2019, the EU Parliament adopted a resolution declaring "climate emergency"[2]. That resolution is very short. The main point is a **declaration of emergency**, asking for urgent measures to keep the temperature increase from global warming below 1.5 degrees. The resolution asks the Commission for far-reaching reform of all relevant policies.

Radical emergency measures coming to mind are an immediate prohibition of gasoline cars, using all available military resources of EU member states for a massive and rapid renewable energy deployment and tree planting drive, or even a drastic policy like actually abolishing all subsidies for fossil fuels, as opposed to only promising to do so since 2009[3]. But this resolution does not contain any call for specific measures.

While the EU was trying to solve the climate problem actively earlier as well, this is a new level of commitment. And this article will discuss some ideas on what the EU and especially the Commission can do to achieve their goal.

The Commissioner in charge is *Frans Timmermans*, also one of the Vice Presidents. He remarked[4] that the situation is like **a big comet was scheduled to hit Earth a decade later and destroy humanity** without sufficient deflecting efforts. And he asked for the efforts to solve the climate crisis to have a similar level of urgency. Having used the exact same rhetorical device in a book about how to solve the climate crisis in one week[5], I thought it remarkable that the EU Commission would engage in such strong language, but I agree completely with the sense of urgency.

The new Commission has presented[6] the basic concepts of the "*European Green Deal*" on 11 December 2019, only two weeks into the new term. That presentation is more of a timetable for the work ahead and a collection of topics to be discussed than a final result, but it clearly shows that the Commission intends to put serious efforts into finding a solution.

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[2] European Parliament resolution of 28 November 2019 on the climate and environment emergency, k-lenz.de/e01.
[3] Mason/Ennis, G20 agrees on phasing out fossil fuel subsidies, Reuters, 26 November 2009, k-lenz.de/e25.
[4] Timmermans, Tweet of 5 December 2019, k-lenz.de/e02.
[5] Lenz, Last Week, 2013, k-lenz.de/lastweek.
[6] European Commission, Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, 11. 12. 2019, COM(2019) 640 final, k-lenz.de/e12, cited as "The European Green Deal" below.

The *European Green Deal* is also at the center of the EU Commission 2020 Work Programme adopted on 29 January 2020[7]. That document identifies six headline ambitions, with the *European Green Deal* coming first. It starts out with this:

"The most pressing challenge, responsibility and opportunity for Europe is keeping our planet and people healthy. This is the defining task of our times. The increase in global temperature, the depletion of natural resources and continued biodiversity loss, together with increasing forest fires, floods and other natural disasters undermine our security and prosperity."

Framing the problem like this as a "most pressing" and as a "security" issue is interesting, since it might lead to using all means available, including military assets. There has been a period of "Cold War" in the history of the 20th Century. In contrast, one might think of this issue as a "Hot War", a war against the planet heating up more. If so, one might consider using military assets. Give soldiers a role in deploying renewable energy at scale. Or planting some trees.

China is already doing that, having ordered 60,000 soldiers to plant trees over an area roughly the size of Ireland[8].

The Commission Work Programme does not propose using military assets yet. It goes on like this:

"The European Green Deal is that response. It will drive us forward to climate neutrality by 2050."

What exactly does "climate neutrality mean" here? There are two ways of understanding that.

The ambitious one would be absolute neutrality. Make sure that the EU does not emit more than what extra efforts to remove CO2 (like planting new forests or starting carbon capture projects) take out.

The much easier goal would be net neutrality. Make sure that the EU does not emit more than existing natural sinks like forests and oceans take out. Since carbon sinks have removed over half of CO2 emissions from the atmosphere in the last couple of decades (and

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[7] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2020, k-lenz.de/e20.

[8] Osborne, China reassigns 60,000 soldiers to plant trees in bid to fight pollution, Independent, 13 February 2018, k-lenz.de/e29.

remarkably that share has been constant for over 50 years)[9], that latter goal would be much easier to achieve. Getting to the existing goal for 2030 of a 40 percent emission reduction compared to 1990 would actually be already almost enough to at least avoid increasing CO2 concentrations in the atmosphere.

As I understand the goal, it is one of absolute neutrality. That would mean reducing to emissions to levels way below of the capacity of carbon sinks. Which in turn would mean removing CO2 from the atmosphere at whatever amount the carbon sink capacity exceeds the emissions.

To achieve that goal of climate neutrality, the work programme wants to enact a European Climate Law, with a binding target for reducing emissions by 2050. The Commission will propose a new EU ambition to reduce greenhouse gas emissions by 2030. That goal is standing at 40 percent domestic reduction compared to 1990 since 2014[10].

While the work programme does not yet say what new goal will be proposed, it will probably be set higher than the existing one. It is not very clear why the point about the "binding" target in the European Climate Law is supposed to be new. The 2014 decision on the 2030 target was declared to be binding by the European Council as well already at the time.

When discussing the "*European Green Deal*", it is worth pointing out what that term actually means. The first two words are obvious choices for a climate policy package. But why call it a "Deal"?

Historically, the term "deal" was used by *Roosevelt* in his "New Deal" legislation package. That was not a deal in the sense of a contract between two parties with opposing interests, but rather a deal in the sense of a "new deal of cards", a radical transition to a different society. More recently, politicians from the United States Democrat Party have proposed a "Green New Deal" policy framework[11] to address the climate crisis. This precedes the EU Commission *European Green Deal*, though not by much time.

So the "Deal" part means something like "radical transition". The scale of the problem it wants to solve requires a scale of action similar to *Roosevelt*'s "New Deal".

This paper assumes that the reader is already familiar with most of the ideas presented

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[9] National Oceanic and Atmospheric Administration, Ocean-Atmosphere CO2 Exchange, k-lenz.de/e21, Global Carbon Project, Tweet of 4 February 2020, k-lenz.de/e30.
[10] European Council 23/24 October 2014, Conclusions, k-lenz.de/e24.
[11] House Resolution 109 of the 116th United States Congress, 2019, k-lenz.de/e14.

by the Commission in the *European Green Deal*. Also much of that policy is a work in progress. Therefore I will not take much time to explain or discuss them. The main purpose of this paper is to present a couple of my own ideas on what the Commission and the EU could do to actually reach the goal of climate neutrality by 2050.

Doing something about the fossil fuel overdose is actually not easy even if you choose it as your top priority. Therefore it may be useful to discuss a wide range of ideas.

I will also discuss some of the past efforts of the Commission. Those may leave room for improvement. The first thing the Commission needs to do is to stop contributing to the problem, as they realize themselves with their new *Green Oath* policy. There are several ways it may have done so in the past. I will start with pointing out those potential problems.

Then I will go on to propose several solutions not already in the *European Green Deal*.

One of them is central to this paper. **Introduce an exemption from EU antitrust law to enable industry efforts for a coordinated solution.** Make sure that EU Commission enforcement of antitrust law does not stand in the way of achieving the *European Green Deal* goal.

II. Possible Improvements on Commission Policy

Readers of "How to Win Friends and Influence People"[12] know that the first mistake one should avoid is criticism of the person you want to influence. That makes it an exercise of dubious value to point out where the policy of the Commission should be examined and possibly changed.

For example, I should refrain from pointing out that the law on priority for renewable energy in Germany[13] was opposed by Commission President *von der Leyen's* party, the German CDU, when it was first enacted in 2000.

Fortunately, the "*European Green Deal*" actually asks for criticism. It contains a "*Green Oath"* as a new concept[14]. That seems to be modeled on the principle of *primum non nocere* (first, do no harm), which is taught to physicians (Commission President *von der Leyen* has qualified as a physician). Indeed, if the Commission intends to solve the climate crisis, the first step is to stop digging the hole deeper.

This new principle will require that all new legislation proposals discuss whether the

[12] Dale Carnegie, How to Win Friends and Influence People, 1936, Wikipedia article k-lenz.de/e03.
[13] Gesetz für den Ausbau erneuerbarer Energien (Erneuerbare-Energien-Gesetz – EEG 2017), k-lenz.de/e17.
[14] European Green Deal, 19.

proposal harms the climate effort.

So while I am well aware of the fact that criticism is not a good strategy when trying to influence people, I take the situation is different under this "*Green Oath*" principle. **Criticism should be welcome**, if that principle is true and can be taken at its face value.

There are two main points where I think the Commission may need to consider changing. One has resulted in a lawsuit filed by the German government and lost by the Commission in March 2019[15]. The other one is rather my own idea. It is one of the main themes of this paper.

1. Auction Policy on Renewable Energy

The first thing that the Commission needs to reconsider and possibly change is their policy on renewable auctions.

Not necessarily as a result of that policy change but following this change in a way suggesting causation at first glance, deployment has gone down. **Deployment of renewable energy in Germany is way down now just a couple of years after the change to an auction policy system.**

That happened just as prices of renewable energy have come down because of the success of the German law on priority for renewable energy enacted in 2000. With prices down and the sense of emergency for the climate crisis up, reducing deployment does not make much sense.

The previous policy in place since 2000 was wildly successful. Changing this successful formula to an auction policy was a risky experiment. The results of that experiment seem to indicate that it may have not been successful.

The Commissioner in charge of antitrust policy in the old as well as the new Commission is *Margrethe Vestager*. Here is what she had to say about this policy[16] in 2019:

"The state aid rules have helped to bring down the cost of subsidies for renewable energy by making sure that governments use competitive tenders to distribute those subsidies. In Germany, the cost of supporting solar power has been cut in half. Some offshore wind projects are now happening without any public subsidy at all."

It is not clear from that in which time frame which costs are supposed to have gone down

[15] Judgment of the Court (Third Chamber) of 28th March 2019, C-405/16 P, k-lenz.de/e15.
[16] Vestager, Competition and sustainability, GCLC Conference on Sustainability and Competition Policy, Brussels, 24 October 2019, k-lenz.de/e04.

by 50 percent, so it is difficult to fact-check this statement. The costs to rate payers are measured best in the surcharge under the Law on Renewable Energy (EEG), which stood at 6.24 cents euro in 2014 and since then changed to 6.405 cents per kWh for 2019[17]. That is not a significant change and certainly not one of halving costs.

In contrast, it is clear that deployment of solar in Germany has gone down after 2014. One look at the relevant graph is enough[18]. It shows a steep increase from about 7 to about 38 GW installed from 2008 to 2014 (over 30 GW in seven years) followed by a much slower increase from 38 to 45 GW (about 7 GW in four years) from 2014 to 2018. The average went down from over 4 GW to less than 2 GW a year.

So clearly **deployment has been cut in half**. Not what you want to achieve if you have ambitious climate targets in the *European Green Deal*.

One recent comment by Green Party politician *Hans-Josef Fell*[19] states that wind deployment in Germany has gone down 85 percent in the last year. And he blames the new policy of auctions replacing the previous successful system.

Fell's numbers are sourced from SPIEGEL magazine[20]. And his analysis is correct if there is no other reason for this drastic decline. The change to an auction based model looks like the main driver of this reduction. So this may be a case where the Commission has done harm to the climate effort and needs to reconsider under the new *Green Oath* guideline.

Going back to *Vestager's* assertion, even if it was true that costs came down by half, that does not show they came down because of anything the EU Commission did. Solar gets cheaper all the time because more deployment worldwide means progress on the learning curve. It got cheaper by 75% since 2006, with an average reduction of 13% per year[21]. Recent projects show that costs are down to well under 2 cents per kWh in locations with good solar resources[22].

If anything, EU Commission policy *increased* prices of solar panels for Europeans,

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[17] Fraunhofer, Recent Facts About Photovoltaics in Germany, compiled by Harry Wirth, version of October 14 2019, k-lenz.de/e06, 15-16.
[18] Fraunhofer, (previous note), 14.
[19] Fell, Kompromiss zum Klimapaket zementiert Blockade der Bürgerenergiewende, 18.12.2019, k-lenz.de/e07.
[20] Schulz, Ausbau der Windenergie sinkt um 80 Prozent, SPIEGEL 11.10.2019, k-lenz.de/e08.
[21] Fraunhofer, (note 17), 8.
[22] Bellini, Qatar's 800 MW tender draws world record solar power price of $0.01567/kWh, PV Magazine, January 23, 2020, k-lenz.de/e16.

because the Commission placed an antidumping tariff on imports, leading to prices of between 10 and 20 percent over world market prices in Germany[23].

This is remarkable in this context mainly because the Commission decided to let the temporary antidumping measures run out in 2018. They changed their mind partly "taking account of the new renewable energy targets"[24].

So I think there is hope that the new Commission does not insist on continuing their policy of trying to lower costs with their auction model. If they are serious in the *Green Oath* policy of changing things that have turned out to be harmful, **how is it not harmful to have a large reduction of deployment?** Or can they explain that this reduction was caused by other factors, not the change to auctions?

When you have declared an emergency, **when your house is on fire[25], do you worry about the price of the water the fire engine pumps** to put that fire out? Would you want to wait for an auction to start pumping water or would you rather start immediately?

Cost is of course important. But smooth and quick deployment is more important by orders of magnitude. Costs will come down anyway from the learning curve effect. There is no need to step on the brakes for the European markets.

Proponents of renewable energy like *Hans-Josef Fell* see the Commission as a delaying force[26], based on this record. Therefore he warns against the latest compromise decision in Germany which would use taxpayer funds to lower the EEG surcharge. That in turn might make the EEG a subsidy under the 2019 decision of the Court of Justice[27] and lead to another situation where the Commission has the right to veto any German legislation in the sector, a right they asserted because they said the feed-in tariff was state aid.

The Court of Justice decision took the view that the surcharges in the German feed-in tariff system are not state aid. So *Vestager* talking about getting the costs for "subsidies" for renewable energy down looks like she is ignoring that decision of the Court of Justice in this case.

I recall that the right wing "Alternative für Deutschland (AfD)" party in Germany was

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[23] Fraunhofer, (note 17), 8.
[24] EU Commission, Commission decides not to extend trade defence measures on solar panels from China, News release of 31.8.2018, k-lenz.de/e09.
[25] Thunberg, 'Our house is on fire', Greta Thunberg, 16, urges leaders to act on climate, Guardian 誌, 2019 年 1 月 25 日, k-lenz.de/panic
[26] Fell, (note 19).
[27] Note 15.

founded in the first place by academics disagreeing with the EU policy on the Euro and the idea that German taxpayers should fund Greek fiscal deficits[28]. If you want to spread distrust of the EU in Germany, one excellent way to do so is to assert legislative powers to decide about German renewable energy law for the Commission, which consists of people elected by no German voter. This is incompatible with basic values of democracy. The procedure in this case, where the German government felt the need to get Commission approval for their projects of reforming German renewable energy law under state aid rules, might be defensible if the Commission had not overextended its powers. The European Court of Justice said it did.

But the Commission could change. They could actually learn from the track record of the auction model and stop pushing for that. At least they **promised to try to reexamine all existing policy** with the *Green Oath* in the *European Green Deal*.

So maybe now that the consequences of the auction model are clear for anyone to see, they might reconsider, just like they changed their minds on solar antidumping tariffs. The *European Green Deal* says that the environmental and State aid guidelines are evaluated now and up for change in 2021[29]. The 2014 guidelines pushing for the move to auctions were set for the time until 2020 in the first place anyway.

Of course **I may be wrong** and the fact that renewable energy deployment is down massively in Germany after the change to new policy may be just a coincidence. There may be a different explanation. But at first sight, this does not look like a successful change. If the Commission concludes in its evaluation that they want to stick to the auction policy, they should explain what has caused that unfortunate development if the change to an auction policy is not to blame. In doubt, they should just revert to the previous model which has been shown to work very well.

And the fight for low costs is over anyway. Renewable has won decisively already in 2000, when the German law on priority for renewable energy was enacted. No fossil fuel power plant can compete with solar at less than 2 cents per kWh. So while it would be nice to have an EU Commission renewable energy policy that helps renewable energy deployment in Europe instead of leading to 80 percent less wind in Germany, the battle to make renewable cheaper than fossil fuel was won in 2000. **Nothing can undo that success now.**

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[28] Fiedler, Es herrschte eine enorme Aufbruchsstimmung, 14.4.2018, Tagesspiegel, 14 April 2018, k-lenz.de/e10.

[29] *European Green Deal*, 2.2.3 Greening national budgets and sending the right price signals.

Anyway, that is the first thing that comes to mind when talking about the *Green Oath* and policy the Commission should consider changing. But the second point is actually more important and the main idea of this paper.

2. Antitrust

The second point is much less obvious.

Imagine for a moment that **fossil fuel companies started to come to their senses and coordinate their production, with a view on reducing it.**

They could take a hint from the European ETS system (Emission Trade System) and decide collectively that production will go down by 2.2% each year, which is the reduction factor for allowances under Article 9 Paragraph 2 of the ETS Directive now[30]. Alternatively, they could look at production in 1990 and reduce each year by whatever percentage is needed to get to an overall reduction of 40% compared to 1990 by 2030.

Whatever oil stays in the ground because of such reductions will not be burned. There would actually be no need for any other measures by any public authority if producers decided to reduce their production in a way compatible with the goals of the Paris Agreement.

Once you stop overdosing on fossil fuel by limiting production, it does not matter if renewable or energy savings take the place of former fossil fuel use. The harmful part is using fossil fuel, not the lack of renewable use. The focus should be on limiting production, since that is actually an absolutely sure way of keeping emissions down in a market based economy. If you don't produce more than the carbon budget allows, it does not matter who burns whatever is left.

Another alternative for **fossil fuel producers would be to reduce their exports to the EU**. Coordinate policy to make sure that oil exports to the EU are reduced each year, again setting the numbers so that the EU emission goals are reached.

What has the Commission to do with such an industry decision?

As things stand right now, industry actually agreeing on such a reduction may well be violating EU antitrust rules. Such violations are threatened with fines going into the billions of euros.

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[30] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC (consolidated version), k-lenz.de/e39.

So even if industry decided to do the right thing and reduce their production, **it might actually be illegal under current antitrust law to do something about the climate emergency** in this way. That in turn means that the EU Commission might actually stand in the way of solving the issue.

Antitrust law is a rather recent invention. It has a history of about one hundred years in the United States and about half of that in Europe.

In the United States, the *Standard Oil* case of 1911 explained that antitrust law is necessary to avoid giving someone the power of limiting production, raising prices in the process[31]. That may have been a valid concern over a hundred years ago.

Now it is exactly the opposite. **We urgently need exactly that power given to industry.** Of course gasoline prices will go up if you allow industry agreements reducing production. But the climate emergency requires those production limits.

I will leave the discussion of this in detail for a later section. It is enough now to just point out that the most serious way the Commission may be harming the effort to control the climate emergency may well be their enforcement of antitrust law. **Without even noticing.**

Fortunately, the solution to that is easy. The EU has the power to enact and enforce antitrust law. It also has the power to create exemptions. The main purpose of this paper is to **propose creating an exemption allowing producers of fossil fuel to agree on production reductions**.

III. Phaseout Profit Theory

Before discussing why the Commission should get out of the way and allow industry to coordinate reducing production, it might be of interest to discuss the incentives for industry to do so.

One incentive is the one shared by the EU Commission and climate activists. **Humanity needs to reduce burning fossil fuels. One way to do this is to reduce production. Any oil staying in the ground will not be burned.**

This incentive may be especially powerful for the fossil fuel owned by nation states. Everyone except the United States is on board with the Paris Agreement effort. Member states of that Agreement have to explain how they plan to reduce CO2 emissions under

[31] Standard Oil Co. of New Jersey v United States, 221 U.S. 1 (page 52) (1911), k-lenz.de/e26.

that framework.

The usual way to think about such commitments is based on consumption. The EU has an existing goal of reducing CO2 emissions by 40 percent until 2030. That works if all parties of the agreement set their consumption commitments to a sufficiently ambitious high level and then proceed to actually meet those goals. Both of these conditions are open to doubt right now.

For one, it is open to doubt if present commitments are enough to achieve the goal of the Paris Agreement, even if all of those commitments were actually met with sufficient action. Experts estimate[32] those commitments to result in 2.8 degrees of warming until 2100, while the goal of the Paris Agreement is “well under 2 degrees”.

And for example Germany has set an ambitious goal of reducing by 40 percent until 2020, which it is unlikely to actually meet[33].

But exactly the same reduction goal could be achieved by limiting production. Again, any oil that stays in the ground for future generations will not be burned now. **If you limit production, it does not matter who burns what is left.** And while all countries still burn some fossil fuel, only a much smaller number of countries are producing it, which makes it easier to get everyone on board for a production limit.

So if the parties to the Paris Agreement are serious about solving the problem, reducing supply would be an obvious strategy. Unfortunately, a recent report by the UN Environmental Programme (UNEP)[34], the first report addressing the gap between what countries plan to produce and what they can produce under a responsible framework, shows **that governments have not paid enough attention to reducing supply.** For coal, current estimates show that in 2030 countries plan to produce 150 percent more than would be consistent with a pathway to two degrees warming and 280 percent more than would be consistent with a pathway to 1.5 degrees.

But those incentives are for the short term (less than a thousand years of time frame). If you think in longer terms like tens of thousands of years, one other motivation becomes

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[32] Climate action tracker, Global update: Governments still showing little sign of acting on climate crisis, 10 December 2019, k-lenz.de/e31.
[33] Appunn/Wettengel, Germany’s greenhouse gas emissions and climate targets, Clean Energy Wire 23 January 2020, k-lenz.de/e27.
[34] United Nations Environmental Programme, The Production Gap, The discrepancy between countries’ planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C, 2019, productiongap.org。

more important.

That is, once you dig out and burn fossil fuel, it will be gone. Consuming all of the treasure now and leaving none for future generations 5000 years in the future is a selfish way to proceed.

For governments, there should be ample incentives to stop digging the hole deeper. What about oil companies?

Oil companies also have to pay attention to the public interest, to some extent. Recent EU law requires all big companies to report not only on their financial results, but also on their social responsibility, including climate change[35]. So it may be possible that they may be motivated by the public interest in avoiding the worst climate change scenarios.

And being painted as the villain in the climate emergency hurts their stock prices. It turns out that less and less people want to own stock in companies that contribute to the fossil fuel overdose problem. There is a "divestment movement" encouraging people to sell their fossil fuel stocks. It gains more and more influence.

But on the other hand, maybe oil companies are mainly motivated by profit. In that case, they will do whatever results in the most short term profits for shareholders. If that happens to be catastrophic for human civilization, their leaders may not care about what happens a couple of decades or millennia down the road, when someone else is in charge. They may care more for the profits of the next quarter, which have a direct influence on their own income.

Right now, **oil and gas producers plan to invest $1.4 trillion in developing new resources over the next five years**, from 2020 to 2024[36], with most of the projects in the United States. That is exactly the wrong direction, and it is also more than the *European Green Deal* has as a funding plan. If they develop new resources with that massive investment, the oil in those new fields will be burned. If in contrast they refrain from investing those $1.4 trillion and reduce production, the oil staying in the ground will not lead to any extra CO2 emissions.

This looks like short term profit motivated action that does not care about the climate emergency. Dealing with that, something I call "*Phaseout Profit Theory*" becomes relevant.

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[35] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, k-lenz.de/e32.

[36] Environmental Defense, Oil, Gas and the Climate, December 2019, k-lenz.de/e28.

That theory says that **fossil fuel companies should be motivated to reduce production because those production reductions raise prices.**

Absent any antitrust restraints, oil companies could agree on a **fixed schedule to phase out production similar to the Bitcoin schedule to phase out issuing of new coins.** That one is determined in long terms, it is entirely predictable, and it has drastic reductions by half every four years as its mechanism. The third such reduction is coming up in May 2020.

If the climate emergency is really so urgent, oil companies might start to listen to the climate activists and the governments participating in the Paris Agreement. They might introduce a **production schedule which goes down fast and goes down reliably.**

Of course that would lead to higher prices for gasoline, imposing an economic burden on car drivers. That burden would in turn lead to higher revenue per unit and less units sold for the oil companies.

While maybe some people might argue that it would be unfair to consumers of gasoline to allow for this kind of extra price increases, it would be very hard to argue that such price increases are not in the interest of oil companies. Of course they want higher prices.

For one, their profit depends on selling oil at higher prices per unit than whatever it costs them to produce that unit. Higher prices will lead to either higher profits or to turning a loss into a profit.

But even more importantly, there are more than 1.5 trillion barrels of known oil reserves[37]. The valuation of these reserves rises for 1.5 trillion dollars for every dollar the market price of one barrel rises.

Having a higher valuation for oil reserves makes a company richer without even selling one barrel. It is just like someone who bought 1000 bitcoins 10 years ago for a couple of dollars and did not sell them until now. That person will be richer from the higher valuation even before selling the first bitcoin out of that stash.

If the people in charge at the oil companies understand this simple fact, the last thing they would want to do is delaying climate measures. They should **join forces with the climate activists and the responsible governments and ask for the production reductions needed to save the climate.** They would actually make vastly more money by doing the right thing.

That in turn would mean a change of direction of their lobbying efforts. They would stop

[37] Wikipedia, Oil Reserves, k-lenz.de/e33.

to rely on disinformation campaigns. Frankly, the strategy of trying to fool everybody all the time becomes unsustainable fast, with the whole continent of Australia burning right now. It also may lead to legal liability for the vast damages caused by such disinformation campaigns down the road.

If **climate activists, governments and the fossil fuel industry all pull on the same rope (and in the same direction),** things might get done much quicker than if the fossil fuel industry feels threatened and tries to lie, stall, and delay. These companies have economic clout, which translates into political influence, especially in the United States. Getting them on board with the effort would be a huge change with enormous impact.

Right now, **oil and gas companies are not profitable.** The oil price has gone down recently, and the gas price has gone down too. Big oil companies like Exxon are massively in debt and need to worry about additional stress from lower Chinese demand as a consequence of the coronavirus there, as *Hans-Josef Fell* explains[38]. Exxon's valuation has gone down by $184 billion since 2014 because of lower oil prices, with gas prices down also because of mild winters caused by global warming[39].

If so, a **production schedule raising prices may be the only way to avoid a global fossil fuel industry crash.** This option would become a solution to the climate crisis and the fossil fuel industry crisis at the same time.

IV. Proposals

I have some proposals for the EU to help achieve the goal of making Europe the first climate neutral continent.

1. Antitrust Exemption

The first proposal was already mentioned above. Get out of the way of industry, if they want to agree on production limits. Grant an exemption from antitrust law for that purpose.

a) Scope

There are two possible variations.

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[38] Fell, Die fossile Energiewirtschaft in der Krise – Kommt bald der große Crash?, 5 February 2020, k-lenz.de/e34.
[39] Egan, Exxon's market value has crumbled by $184 billion, CNN Business, 5 February 2020, k-lenz.de/e40.

One would be to **allow the oil industry to restrict production worldwide.** That would be the same thing OPEC has been trying to achieve. It would also be the same thing the *Texas Railroad Commission* has done on a national level in the United States between 1930 and 1971[40].

The problem with this approach would be that industry would not be safe from antitrust law that way. That is because antitrust is a monster with many heads. Even if the EU gets out of the way, that leaves antitrust authorities of the United States, Japan, and many other countries still clinging to the old outdated model of making it illegal to reduce fossil fuel production in a concerted industry effort.

That in turn means that granting such an exemption would remain a move without practical consequences until other antitrust authorities join in the effort. With much of the oil industry having strong relations to the United States, nothing will happen until antitrust law of that country is updated to the new situation.

That in turn actually means that it is easier for the EU to go ahead and introduce the exemption. Just like the EU Charter of Fundamental Rights was first adopted as a text without legal binding force, such an exemption would have only symbolic value as long as other antitrust systems don't join in. It is of course easier to agree on something with only symbolic value that does not actually raise gasoline prices than on something that would work immediately.

The other variation would be to **allow industry to set export quotas to the EU.** That way, only the EU market would be affected, so other antitrust authorities would have no jurisdiction on the matter.

If for example the oil industry goes ahead and reduces the exports to the EU in a way consistent with the Commission's goals of reducing CO_2 emissions, that would lead to higher gasoline prices in the EU, but if there is any effect on other markets, it can only be to reduce prices. That is because there is more supply left for those other markets after the share going to the EU is reduced.

One might argue that actually it would be in bad faith for the Commission to enforce antitrust law against any such industry agreement to reduce exports to the EU even under existing rules. **If industry tries to help with the most important goal of the Commission in this way, would it be adequate to fine the companies involved?**

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[40] Lenz, Texas Railroad Commission, blog article, 18 March 2013, k-lenz.de/e35.

But even if such an argument was successful in court in the end, this question should be solved in either direction before there even is an attempt made to get such an agreement done.

One way to settle this question before actually trying to get to an agreement might be to get a finding of inapplicability under Article 10 of the Procedure Regulation[41]. The Commission notice on guidance letters[42] requires that the question is new and not already solved by looking at precedent, and that it is important, for issuing a guidance letter. This kind of agreement would be new and it would certainly be an important issue, concerning the priority policy of *European Green Deal*.

On the other hand, it may not be enough to just ask the Commission if it wants to fine industry for trying to help with the climate emergency. It may be necessary to amend existing regulations or even the Treaty on horizontal agreements.

The Treaty on the Functioning of the European Union allows for exemptions under Article 101 Paragraph 3. That has four conditions, all of which need to be met.

The first condition is:

"The agreement must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress, that is to say, lead to efficiency gains[43]."

This kind of agreement would certainly contribute to a very important public interest. Limit the effect of the fossil fuel overdose going on right now. Having a production schedule compatible with the Paris Agreement goals is a public interest of security of production. Just as fossil fuel producers should face limits on environmental impacts like poisoning of ground water from fracking, they also should face limits on causing the climate crisis.

So one would need to argue that **limiting production is an improvement of production in this case, just like limiting other possible environmental hazards of fossil fuel production.**

The second condition is, again in the words of the relevant Commission Communication:

"The restrictions must be indispensable to the attainment of those objectives, that is to

41 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, k-lenz.de/e36.
42 Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), 27 April 2004, k-lenz.de/e37.
43 Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 14 January 2011, k-lenz.de/e38, 49.

say, the efficiency gains."

That question turns on whether other measures (like the existing pledges to reduce consumption) are sufficient to deal with the climate emergency. In my opinion they are not.

The third condition, again in the words of the relevant Commission Communication:

"Consumers must receive a fair share of the resulting benefits, that is to say, the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers so that they are at least compensated for the restrictive effects of the agreement; hence, efficiencies only accruing to the parties to the agreement will not suffice; for the purposes of these guidelines, the concept of 'consumers' encompasses the customers, potential and/or actual, of the parties to the agreement."

There may be a problem with this condition. Any production restriction leads to higher prices for consumers. If you look only at the price of energy, there is no "benefit for consumers". Antitrust law is in principle consumer protection law, protecting consumers against artificial price increases resulting from cartels.

But of course every consumer also has an interest in dealing with the climate emergency. In my opinion, that interest is far more important than a low price of gasoline. **Would you want cheap energy if using that gasoline gave you a potentially deadly virus like the new China coronavirus?** Of course not. Increasing the safety of energy supply is a huge benefit for consumers, trumping the price interest.

The last condition is also a problem. Again, in the words of the relevant Commission Communication it is:

"The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question."

If you think restricting output is "eliminating competition", that condition will not be met. The aim of such an agreement would of course be to include not only a substantial part but all of production.

Actually fossil fuel is different from all other products. Overdosing fossil fuel makes the climate emergency worse. **There is no other product where producing more as such is extremely dangerous.** There is no other product where addressing that emergency means by definition addressing all of the output. That in turn means that this standard may work for all other products, but it fails for fossil fuel.

So it may be difficult to pass this test under existing rules. In that case, **those rules must be changed to deal with the climate emergency.** Coming back to the rhetorical device mentioned before: The climate emergency is like a big asteroid heading for Earth and threatening annihilation of humanity. With stakes like that, should you insist on priority of pure competition?

It may be open to debate at exactly what level an exemption would need to be enacted. Could the Commission just go ahead and decide on their own that they will not fine industry for helping to deal with the climate emergency? If not, would having a Council regulation under Article 103 of the Treaty on Functioning of the European Union be enough, or would we need to append a new Paragraph 4 to Article 101 granting that exemption?

But anyway, the Commission would need to support such an exemption. Then it would need to get political support in Parliament and the Member States. With the necessary political support, the rest would be details easily figured out. The easiest procedure assuming unanimous political support would be to have all of the above.

As a first step, have the Commission declare they will not fine industry for helping in a Communication on the issue. As a second and third step, have the appropriate Council Regulation and new Paragraph four enacted later, confirming that guidance and removing any doubt that the climate emergency is more important than low gasoline prices for consumers and that nobody will be fined for helping with achieving the most important goal of the EU.

b) Real Impact and Enforcement

One potential problem with any industry agreement on limiting production is enforcement. Producers may agree on ambitious limiting goals and then proceed to ignore them, hoping that other participants comply.

That would leave participants violating the agreement with a larger market share at the cost of honest participants.

As long as this kind of agreement is only a contract as opposed to a scheme enforced directly by the government, all enforcement action would need to come from the honest participants in the form of civil lawsuits.

The problem with such a lawsuit is that it may be difficult for honest participants to know exactly how much other participants actually produce. Since the dishonest

participants are cheating the system in the first place, they might easily be tempted to underreport their production.

I am not sure if this problem can be solved. If there is a solution, it might involve the Bitcoin network in some form or other. That again would need to solve two problems. Find a way to link the remaining bitcoin production (less than 15 percent of all bitcoins ever scheduled to be issued right now) to the remaining fossil fuel production. And then find a way to make sure that only fossil fuel can be sold and burned which is backed by this new asset in some way.

I am not sure if this kind of thing can work. I leave figuring details out as a problem for later research.

If this solution does not work out, we are stuck with relying on the honesty of the fossil carbon industry. Of course, since **oil tankers are bigger than packs of cigarettes, smuggling black oil production around the system may be more difficult than smuggling cigarettes is.**

c) Existing Exemptions

There are many exemptions in EU antitrust law. One of them is the patent system.

The patent system works by giving patent holders a monopoly for 20 years in exchange for disclosing their invention to the public. That in turn means that the price for patented drugs does not depend on how much it costs to make the drug in question. It only depends on how much consumers are willing to pay for it.

The difference in the first and second price is the extra profit the patent holder receives from his monopoly. All such extra profit comes at the expense of consumers. And since consumers in many cases don't have a choice of not buying the drug in question, those profits can become large.

In the case of patents, the public interest in avoiding extra burdens for patients and insurers is a valid concern, but the public interest in motivating research into new drugs is seen as more pressing.

It may be open to debate if this is a good idea. Maybe society would be better off if we closed all the patent offices and abolished the patent system. I am quite convinced that is true at least as far as patent law has overreached to include software patents, which in

turn enable limitless patent inflation[44].

But the point here is that other public interests may be seen as more pressing as the public interest in low costs for consumers. In the case of proposing an exemption for fossil fuel production, the public interest is realizing the goal of the *European Green Deal*. I think it is fair to say that this is probably the most important public interest of all. The *European Green Deal* certainly can be described as the central policy of the new EU Commission.

In the case of higher prices for drugs, consumers don't have a choice. If some drug is necessary to protect their life or their health and the patent holder has a monopoly on that drug, the decision to just not buy that drug because it is too expensive is not possible. Of course patients will pay anything to keep alive.

In the case of higher prices for gasoline, consumers do have a different choice. They can either stop driving cars completely or just switch to an electric car.

Driving a car is a very inefficient way of transport in the first place. It consumes enormous amounts of road space per person compared to using a bicycle or public transport. **No one ever died or had their health damaged from not driving a car.**

And fortunately electric cars now are cheaper in maintenance and fuel cost than gasoline cars, and their production costs come down all the time since there is a steep learning curve for batteries.

So the public interest in having low cost gasoline is certainly in no way as urgent as the public interest in having low cost drugs. But in the latter case we don't only allow monopolies and the resulting extra burdens on consumers, society actively creates those monopolies by having a patent system and requiring all countries in the WTO to extend it to drugs (Article 70 TRIPS).

If patients have to pay extra for drugs they need to keep their lives or health, why should we not require gasoline car drivers to pay more to stop catastrophic global warming? If there is an urgent need to do something about this emergency comparable to an asteroid scheduled to hit our planet, **isn't asking car drivers to switch to an electric car just about the least one could imagine,** considering these stakes? We should immediately prohibit gasoline cars completely in this emergency, but making fuel more expensive is the very least we should do.

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44 Lenz, Grenzem des Patentwesens, Konkrete Maßnahmen gegen die Patentinflation, 2002.

d) OPEC

OPEC has been in the business of limiting oil supply for quite some time. They have their headquarters in an EU Member State.

EU antitrust law does not apply to OPEC, since Article 101 of the Treaty on the Functioning of the European Union only is addressed to undertakings. OPEC Members are all sovereign states.

It may be open to debate if it is advisable to extend antitrust law to international organizations like OPEC. The "NOPEC" draft law in the United States wants to achieve that[45]. It was first introduced twenty years ago but never became law, partly because the oil industry resisted the idea.

Why would the oil industry resist proposals to get rid of limiting production?

As I noted above, limiting production raises their profits. That in turn means they might be interested in doing something like OPEC themselves too.

But from an antitrust public policy view, why should OPEC be free to limit production (and help doing something about the climate emergency), while at the exact same time private companies are not allowed to agree on a production schedule?

Why should Saudi Arabia be allowed to discuss a production schedule in the OPEC framework and prohibited to have the exact same discussion acting through the state owned oil company Saudi Aramco, which just recently started selling stock to the public in the 2019 IPO?

Since most of the fossil fuel reserves are owned by sovereign states, the influence of an organization like OPEC on the market may be bigger than that of a private company joint production schedule. So it does not make much sense to allow them to fix production quotas, but prohibit industry from doing the exact same thing.

e) Japanese Oil Cartel Case

In Japan, there were criminal cases for violating antitrust as a consequence of the industry's reaction to the 1971 to 1973 oil crisis. That case was litigated up to the Supreme Court[46] and ended with acquitting some of the defendants, but confirming the sentences

[45] Wikipedia, No Oil Producing and Exporting Cartels Act, k-lenz.de/e18.
[46] Supreme Court, 24 February 1984, k-lenz.de/e19.

of most of them.

As a consequence of actions of oil producing countries, oil prices went up sharply at the time. And the reaction in Japan was determined in large part by government policy. Government enacted guidelines on how industry was supposed to deal with the new prices set by producers, with a view on keeping the burden for consumers low.

The ministry in charge called in February 1971 on industry not to decide passing on possible higher prices to consumers on their own, but rather to coordinate any such move beforehand with the ministry.

In March and April, the ministry told industry that it should absorb 10 cents per barrel of the price hike and developed a standard for price increases. Industry agreed to these requests.

In October and November, the ministry ordered industry to keep the price of heating oil used in the coming winter season under that of the previous year.

In February 1972, industry demanded a lifting of the rule that they have to absorb 10 cents per barrel and permission for further price increases. Those demands were successful, after some negotiations. In the following months there were several coordinated price increases, all of them communicated to and approved by the ministry.

In the opinion of the Supreme Court, it was not a violation of antitrust law for industry to coordinate their negotiations with the ministry on the allowed maximum price increase. But it was in violation of antitrust to actually increase prices in a coordinated manner after such negotiations lead to a result.

It is open to debate if such a theory is reasonable. If the ministry sets standards for industry on their prices in the first place, why should it be a crime for industry to actually follow them?

Exactly in the same way, **if the EU Commission proclaims that CO2 emissions need to go down and go down fast, why should it be a violation of antitrust law for industry to study the issue and actually reduce oil production in a coordinated way?**

I for one think that even under current law with no specific exemption enacted for fossil fuel production, it would be in bad faith for the Commission to open any antitrust case against the oil industry for agreeing on how to phase down production.

2. Import Quota

a) Basic Idea

The antitrust exemption proposed above would work if industry decided to agree on a production schedule. If that does not happen, the EU may decide to let only a certain amount of fossil fuel in and to reduce that amount by a predictable and certain schedule.

Fossil fuel is bulky and easily identified at borders. If the EU decides to set up an import quota system, such a system would be relatively easy to enforce and hard to circumvent. Smuggling in oil tankers is more difficult than smuggling in packs of cigarettes.

Such a system would work basically the same way as the existing ETS (Emission Trade System). **Have a base amount of fossil fuel that may be imported to the EU, starting out from past records. Reduce that amount each year** by the percentage needed to achieve whatever your emission reduction goal is.

That would depend on the amount of domestic production. For a country like Saudi Arabia, which does not import oil in the first place, this kind of scheme would not make much sense. But the EU depends on imports for most of its fossil fuels. Putting a ceiling on those imports works in principle just as well as putting a ceiling on consumption.

One interesting side effect of this kind of policy would be that in the long term it reduces the EU's substantial fossil fuel bill, which might help getting such a scheme adopted. The *European Green Deal* wants Europe to become the first climate neutral continent. A climate neutral continent obviously will pay much less for fossil fuel to oil and gas exporters than the EU is paying now.

Of course actually doing so may need some discussion under Article 11 of the GATT agreement, which prohibits quantitative restrictions of international trade.

b) GATT

There are several possible answers to this particular point.

For one, just ignore that obligation. **Saving humanity from catastrophic warming is much more important than the international trade law system.**

In that case, some other government might start a dispute resolution procedure. A panel may be formed and said panel may decide against the EU. It may be necessary to live with that.

On the other hand, Article 11 is not absolute. There are exceptions allowed under Article

20, one of which is for measures "necessary to protect human, animal or plant life or health". The climate emergency certainly has impacts on these interests, so this may be one way to justify an import quota system.

Another exception is for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

Fossil fuels certainly are exhaustible natural resources. It takes more than 5 million years to form the oil humanity is burning in one year now[47]. And the EU already has a system of restriction on domestic consumption in place, the ETS.

Yet another way to justify such a system would be under Article 21, which says that nothing in the Agreement shall be construed to prevent any contracting party from taking any action which it considers **necessary for the protection of its essential security interests.**

Countermeasures against the climate emergency certainly qualify as actions necessary for the protection of the EU's essential security interests. The threat from the climate emergency is at least as serious as the threat from traditional military conflicts was in the last century, when the GATT was set up in the first place.

Anyway, if the EU decides to set up an import quota system for fossil fuels, there is nothing much any other government can do about it. A WTO dispute solution procedure challenging such a system may be successful. But as any number of disputes under that system shows, winning at the WTO level certainly does not mean that the measure in question will be repealed automatically.

WTO law has no direct effect in the EU. Any decision at the WTO level remains without consequence on EU law, as long as the EU does not decide to comply with that decision. It may be open to debate if this lack of real impact of the WTO rules is a good idea, but since the United States has the exact same approach, the EU will not go ahead and allow direct effect of WTO decisions while the United States reserves the right to ignore them.

c) OCIC

OCIC would mean "Organization of Oil Consuming and Importing Countries", which would be an expansion of the OPEC (Organization of Oil Producing and Exporting

[47] Elger/Schwägerl, Leading Climatologist on Fukushima, 'We Are Looting the Past and Future to Feed the Present', SPIEGEL Online March 23, k-lenz.de/m040

Countries).

As of now, no such organization exists.

But if the above idea of having the EU putting a ceiling on fossil fuel imports is shown to be effective in the fight against the climate emergency, the next step would be to get other oil consuming countries on board. For the very least, other countries should look at the EU and model their own import restrictions on that. Put this kind of restrictions into their plans under the Paris Agreement.

Or one could go one step further and allocate import quotas at the OCIC level, just as OPEC allocates production and export quotas.

d) European Green Deal and potential border adjustment mechanism

The *European Green Deal* communication says[48]:

"Should differences in levels of ambition worldwide persist, as the EU increases its climate ambition, the Commission will propose a carbon border adjustment mechanism, for selected sectors, to reduce the risk of carbon leakage. This would ensure that the prices of imports reflect more accurately their carbon content."

At this time, this is only a potential policy which may or may not be proposed later on down the road. It depends on how much cheaper it is to produce abroad because other countries do not take sufficiently ambitious measures placing extra costs on fossil fuel. That in place depends on the level of ambition elsewhere, mainly in China.

Since the idea of placing a lid on fossil fuel imports to the EU would work to make said fuel more expensive in the EU, implementing it would increase the need for such a border adjustment mechanism.

And the fact that the Commission floats this idea already at this early stage shows that the Commission is well aware of the potential impact of trade policy on climate change. As the *European Green Deal* communication also notes, recent bilateral trade agreements contain clauses on making the Paris Convention binding, and future trade agreements are expected to contain them too. If you insist on making the climate emergency worse, as the United States government right now does, you will get no trade agreement with the EU done.

It is not so far a leap from this line of thought to introducing a ceiling on fossil fuel

[48] At point 2.1.1.

imports.

3. Desert Energy Projects and Hydrogen

I recall having written a book about large scale renewable energy generation in the Mongolian Gobi desert[49]. Generating renewable energy requires a lot of space, which may not always be available easily.

One potential explanation for the reduction in German wind energy deployment is that it is more difficult than before to secure the locations necessary for new projects. If so, **building large scale projects in the desert makes sense.**

One would need to solve the problem of how to transport the energy. As long as worldwide powerlines are not built yet, one might need to use hydrogen or quicklime as an energy carrier. And even before the necessary infrastructure for hydrogen transport becomes available, one could deliver the energy to China or start mining for bitcoins in the desert.

Anyway, exploring this kind of project again ten years later may make sense, especially in the context of the Economic Partnership Agreement with Japan that came into effect in February 2020.

But I am out of space for this article, so I will leave this as a topic for further research.

[49] Lenz, Energy from the Mongolian Gobi Desert, 2012, k-lenz.de/gobi.