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EDITORIAL

The long march of competitiveness in the EU legal order

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The much-awaited – and immediately much-discussed – Report prepared by Mario Draghi on the request by the European Commission focuses on revamping European competitiveness. To this end, the document calls for the launch of a new industrial strategy aimed at closing the innovation gap vis-à-vis competing blocs, such as primarily the United States (US) and China, realigning the pursuit of the ambitious decarbonization targets and the European Union (EU)'s technological capabilities, as well as reducing external dependencies and vulnerabilities. The strategy should rest upon several different building blocks such as the completion of the Internal Market, the alignment of industrial, competition and trade policies towards the pursuit of the above-mentioned goals, the massive increase of private and public investment, and, lastly, the reform of the EU's governance even acknowledging the absence of the political consensus to change the Treaties. The Report then identifies a far-reaching list of measures that the EU needs to take in order to face yet another 'existential challenge'.[1]

The need to strengthen the competitiveness of the European economic fabric is certainly not a novel concern in the EU legal order. The first paragraph of Article 173 TFEU – the only provision of the Treaty on the Functioning of the European Union (TFEU)'s title on industry – begins by clarifying that the main task of the EU and the Member States in this context is to 'ensure that the conditions necessary for the competitiveness of the Union's industry exist'. The provision continues by breaking it down into four sub-objectives, which are speeding up the adjustment to structural changes, encouraging the development of undertakings throughout the Union, strengthening the cooperation between undertakings and, lastly, fostering a better exploitation of policies of innovation, research and technological development.

The provision was included in the then Treaty on the European Community by the Maastricht revision and it represents the endpoint of a long and intense debate on the desirability of conferring on the EU the power to develop a proper – or 'interventionist' – industrial policy at supranational level.[2] The answer given by the drafters of the Maastricht Treaty to this question was a resounding 'no': Article 173 TFEU aims primarily at limiting the EU's capacity to intervene in this field from both a procedural and a substantive point of view.

As for the first dimension, suffice it to mention that the provision only grants EU institutions – and the Commission, in particular – the possibility to contribute to the coordination between

[1] *The Future of European Competitiveness – A Competitiveness Strategy for Europe*, 9 September 2024, 1 available at https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en accessed on 16 September 2024 (the 'Draghi Report').

[2] T Käseberg and A Van Laer, 'Competition Law and Industrial Policy' in KK Patel and H Schweitzer (eds) *The Historical Foundations of EU Competition Law* (Oxford University Press 2013) 162–90.

Member States and to the Parliament and the Council the power to adopt measures 'in support of action taken in the Member States' to achieve the above-mentioned objectives.

In addition, the provision also limits the action of EU institutions from a substantive perspective, directing their intervention towards a single objective, ie enhancing competitiveness. This is an example of what has been defined 'purposive competence',[3] a technique used by the Treaty drafters to give constitutional status to specific political preferences and, thus, to prevent future legislators from changing course and pursuing different objectives.[4] In this case, picking competitiveness as the sole reference point marked victory for those, such as the German Government, that were opposed to any form of supranational *dirigisme*, for fear that this could interfere with the functioning of free market forces. To avoid any doubt, Article 173(3) establishes that '[t]his Title shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition'. As clarified in a Communication adopted by the Commission in 1990,[5] and then reiterated in another Communication of 1994,[6] public authorities should resist any temptation of picking winners or helping losers through the adoption of selective measures, resorting instead to horizontal interventions that contribute to creating a 'dynamic environment favourable for industrial development'.[7] Their role is just to enable the market to fully perform – in an allegedly more efficient and less politicized way – its functions of creative destruction.

The EU followed this approach, of strict neoliberal observance, in the years that followed, ushering what has been defined 'the industrial policy winter'.[8] At some point in the mid-90s, the Commission even avoided using the term 'industrial policy', replacing it with the less demanding 'enterprise policy'. The return to the stage of the term did not change much in term of substance. For instance, one of the pillars of the Lisbon Agenda of 2000 was the launch of a new European industrial strategy that should help the EU 'to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'[9]. In laying out its main characteristics, the Commission reiterated that the sole aim of European industrial policy was enhancing competitiveness and that, in this context, public authorities should intervene only in case of market failure and through horizontal measures. Moreover, it confirmed its commitment to avoid that Member States could resort again to 'selective interventionist policies'.[10] Competitiveness was a key concern also in the context of the EU response to what the Draghi Report defines as 'the Great Financial Crisis' and, in particular, of financial assistance programmes. In this context, competitiveness was mostly seen as a function of the cost of labour. Therefore, beneficiary States had to adopt structural reforms fostering internal devaluation,[11] by making individual and collective dismissals easier or even dismantling their wage-setting arrangements in order to reduce wages and other labour costs.

The Draghi Report's choice to refer to competitiveness as the pole star of a radically new industrial policy may sound odd in the light of the above. Admittedly, the Report defines the

[3]G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' 21 (2015) European Law Journal 2–22.

[4]M Dani, 'Openness, Purposiveness, and the Realignment of the EU and the Democratic and Constitutional State' 24 (2023) German Law Journal 1099–126, at 1117.

[5]Commission Communication, *Industrial Policy in an Open and Competitive Environment*, COM(90) 556 def.

[6]Commission Communication, *An Industrial Competitiveness Policy for the European Union*, COM(94) 319 final.

[7]Communication 1994, at 9

[8]A Renda, 'The EU Industrial Strategy: Towards a Post-Growth Agenda?' 3 (2021) *Intereconomics* 133–8.

[9]Presidency conclusions, Lisbon European Council, 23 and 24 March 2000.

[10]Commission Communication, *Implementing the Community Lisbon Programme: A policy framework to strengthen EU manufacturing - towards a more integrated approach for industrial policy*, COM(2005) 474 final, 3–4. See J Pelkmans, 'European Industrial Policy' *BEEP Briefing* No. 15, July 2006.

[11]AJ Menéndez, 'The Crisis and the European Crises: From Social and Democratic Rechtsstaat to the Consolidating State of (Pseudo-)technocratic Governance', 44 (2017) Journal of Law and Society 56–78, at 68–70. See also K Armigeon and L Baccaro, 'Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation' 41 (2012) Industrial Law Journal 254–75.

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notion in a wider-encompassing and, at least in part, innovative way if compared with the past. One of the most visible elements of novelty is the emphasis put on the fact that promoting competitiveness today has more to do with skills and knowledge, rather than with wage repression and lower labour costs. This is a clear attempt to distance itself from the approach that dominated in the past and that shaped the response to the financial crisis.

Conversely, there are other aspects on which the Report is far less innovative or, at least, on which it tries to find a difficult – and often contradictory – middle ground between the orthodox approach and the need to provide the EU with the tools to face what it considers an existential threat.[12]

The first of these aspects concerns the long-lasting tension between public intervention and the preservation of freely competitive markets. On this point, the Report begins by admitting that '[e]vidence that industrial policies can be effective under certain circumstances is growing', but it then immediately feels the need to reassure its audience by stating that this does not mean that public authorities should be allowed to indulge in 'defending incumbent companies or picking winners'. Their intervention is still considered as a second-best option that needs to be rigorously monitored and kept under control, so to 'avoid duplicating what the private sector would already do'. However, the Report also calls for a reconsideration of the relationship between industrial policy and competition policy, by admitting that the latter needs 'to adapt to changes in the economy so that it does not become a barrier to Europe's goals'.[13]

The second aspect on which similar contradictions emerge concerns the financing of the new course of action. The Report is very clear in identifying the massive investment needs that are required to be met to strengthen European industry's competitiveness, while also decarbonizing the economy, pursuing the digital transformation and increasing the EU's defence capacity. According to the proposed estimates, there will be the need of additional investments amounting to EUR 750 to 800 billion per year, which corresponds to almost 5 per cent of EU GDP in 2023. The document also hints to the fact that this need has been caused by the massive decline in both private and public investment that started with the Great Financial Crisis and – but this is an aspect that the Report fails to openly recognise – the austerity-driven response to it. Faced with such an uphill battle, one would have expected the Report to call for greater flexibility in the application of the budgetary rules, or even the shelving of the obsession with fiscal probity, in order to fill the funding gap. Instead, it carefully steers clear from challenging this taboo, by making clear that 'the EU can meet these investment needs without overstretching the resources of the European economy',[14] ie by avoiding a further increase in national public debts. The answer to these needs, according to the Report, is to be found in pushing the financialisation of the economy forward so as to increase the flow of private savings – which in Europe are still higher than in other parts of the world – into capital markets. The uneasy relationship between competitiveness and budgetary discipline also emerges in the Report's chapter on governance. The document calls for the creation of a Competition Coordination Framework that should replace and consolidate all the existing coordination mechanisms, in order to ensure that all efforts are directed towards reaching the 'EU Competitiveness Priorities' to be defined by the European Council at the beginning of each coordination cycle.[15] The only exception in this regard is fiscal policy surveillance that can continue to pursue its own objectives.

Competitiveness has seemingly gone quite a long way since the moment in which it first made its appearance in the EU legal order and, more specifically, when it was incorporated in what it is now Article 173 TFEU. At that time, the choice to have it as the sole objective of EU industrial

[12]For an analysis of this debate from a national standpoint see M Dani, 'Activist Government Redux: Exceptional or Structural?' 2 (2023) European Law Open 1–7.

[13]Draghi Report, (n 1) at 13.

[14]Ibid, at 59.

[15]Ibid, at 63.

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policy was meant to create a hostile environment toward any form of supranational interventionism. Conversely, the Draghi Report takes the relaunching of European competitiveness as a priority that justifies the adoption a wide array of measures that spans across various sectors of the European integration process and even revisiting some of its long-held beliefs, such as the prevalence of competition policy objectives over those of industrial policy. However, the Report does not push this evolution as far as to challenge some of the core components of the EU economic constitution: promoting European competitiveness may well be set to become a priority in the EU legal order, but, just to give an example, budgetary discipline keeps being ahead in this long march.

In this issue

William Phelan's reconstruction of Robert Lecourt's career zooms in on his role as chief architect of two major legal doctrines, namely, Article 49.3 of the French Constitution, which allows the Prime Minister to bypass Parliament and get into force bills which have not been voted by the legislative (as was famously the case with the recent reform of the French pension system), and the EU 'legal revolution' of the 1960s. Phelan argues that both battles were underpinned by a similar constitutional vision, according to which the traditional democratic-legitimacy-generating role of Parliament as 'master' of the Constitution should be limited to ensure the efficiency of the overall political order.

Magnus Esmark's contribution to this issue explores, from a sociological perspective, the strategies which Scandinavian jurists, and in particular Danish ones, have deployed to retain their social power and position in an age of Europeanisation of national legal orders. The article is based on the archives of the Nordic Jurist Meetings, a triennial conference of Nordic jurists dating back 150 years. And a magnificent resource it is, which was in need of a thorough research. The article shows the complex and shifting power games in which players aiming at reinforcing their own might have to play with or against EU law.

Trust among Member States is at the heart of the European Arrest Warrant, among other EU law schemes of cooperation. Yet, despite its undoubted centrality and the interactions between national courts and the Court of Justice over the years, what trust means, and what its legal consequences and its limits are, remain remarkably underdeveloped or contentious issues. This is the cue for the analysis of Bonelli and Correia de Carvalho, who examine how the Court has dealt with the ever-growing gap between 'required' and 'factual trust' in judicial independence cases. They show that the Court of Justice continues to insist on required, albeit not blind, trust. Despite the jusrisprudential elaboration of limits to trust – and variations between what they call 'imposed' and 'negotiable mutual trust', it maintains the mantra that national courts must assume that all Member States share and recognise Article 2 values. Mutual trust '*must*' exist, irrespective of actual trust relationships. At the same time, this assumption is not equally present in all fields of EU law. The court has different approaches to trust in the area of freedom security and justice, in internal market law, asylum law, or execution of the EU budget. Against this status quo, and drawing also on those differences, Bonelli and Correia de Carvalho use existing socio-legal accounts of mutual trust to argue for a 'bidimensional' concept, which recognises the foundational premise that Member States abide by Article 2 *and* acknowledges the possibility of factual distrust. Thus understood, mutual trust would accommodate and guide negotiations by national authorities on acceptable limits to cooperation in the case of pathologies. They map some of the reforms that could bridge somewhat the gap between 'required' and 'factual trust'. Imposed trust, after all, is unlikely to be satisfactory on any account.

Bram Vroege tackles the increasingly relevant topic of arms control, reconstructing the measures which the EU has taken in that regard, not least on what concerns the war in Ukraine. The author briefly considers some of the steps to be taken to transform the Treaties and the policy

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practice of the Union. The difficulty lies, of course, with the tensions between the achievement of coordinated action (that it is argued would ensure a place in the government of the world to the EU) and allowing things to remain as they are at present, leaving national sovereignty 'untouched'.

Our Dialogue and Debate section starts with a provocative piece by Terzis. It is hardly a novelty that law and legal experts have played a role in the consolidation of the power of transnational corporations in the global arena. Lawyers too have sought to tame the overwhelming power that Big Tech exercises in today's societies, namely by applying the lens of constitutionalism to the digital world. In his piece, Terzis takes note of the existing critiques of digital constitutionalism with a view to further expose the fallacies that he diagnoses, the risks and pernicious consequences of digital constitutionalism. (The non-initiated reader will find here much more than an important selected account of the literature.) In his analysis, Terzis exposes the 'purely semantic' similarities on which digital constitutionalism is premised, the material reality it ignores, the oversimplification or anachronistic assessment of the role of the private and the public in the digital world that (in his view) plague the world of digital constitutionalism, and the wrong assumption of the absence of law that enabled the dominance of Big Tech. Timely, he calls for 'a moment of pause and reflection to whomever envisions all-encompassing legal frameworks for the regulation of the digital society'. But he also recognises the reasons why digital constitutionalism is appealing ('it makes sense', he argues) and the merits it can have. If only lawyers would get 'a seat at the product design table and ... production logics' – an unrealistic scenario – or, at the very least, are aware of the risk that a purported Digital Constitution just ends up enshrining existing power asymmetries and, thereby, shields them from meaningful contestation. The risk is only greater if digital constitutionalists fail to theorise power in the digital world in the context of the evolution of the global economy and the political conflicts that permeate that world. Terzis offers us a cautionary tale of 'misleading metaphors and false analogies' that might trigger strong reactions (we hope) from the advocates of digital constitutionalism. It will also resonate with EU public lawyers familiar with the heyday of European constitutionalism and matters of 'constitutionalisation'.

Michal Ovádek offers the reader a description of the shortcomings of research on EU law databases. The latter constitute a resource which is too often approached without realising its limits, from the lack of overlap between academic events and the faculty committee, to the domination of English, the result of the latter being the lingua franca, also when it comes to access to documents.

The symposium on interdisciplinary perspectives in EU Law showcases the merits of drawing on various non-legal disciplines on topics ranging from the Euro crisis to the fate of noble surnames in free movement law. As diverse are the actual approaches employed- from sociological interpretivism to literary theory to network analysis. As Dothan, Mair and Mayoral make clear in their introduction, the point of the symposium is not to launch a *Methodenstreit*, but to render visible what would remain otherwise invisible in EU Law.

To close the issue, Andrea Guazzarotti reviews the edited volume 'Economic Constitutionalism in a Turbulent World', an edited collection which adds to the literature on the economic constitution in English. Guazzarotti finds the vision underpinning most of the chapters a trifle too optimistic, failing not only to provide a convincing account of the transformations of the European economic and political orders in the last forty years but also a theoretical map of the fundamental socio-economic norms in the European legal and political orders.

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