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TOWARDS A RENEWED APPROACH TO THE EU SINGLE MARKET AND ITS COMPETITIVENESS: LAST CALL FOR THE EUROPEAN INTEGRATION

After decades when the European Union was providing social and economic prosperity and peace to its Citizens, the last years marked a sort of setback for the integration process. The financial crisis, the massive migrations, Brexit, the pandemic, and the invasion of Ukraine underlined all the weaknesses of the European Union. Anyway, the lack of responsiveness towards these exogenous negative inputs is caused by endogenous limitations of the institutional framework of the same EU. In particular, the procedures and the praxis adopted during the foundational stage of the Union cannot now take the pace of the enlarged Union in a global context characterised by instability and huge transformations, such as the advent of AI or the termination of the globalised world as it was known. In such a context, the Union is called to react in order to preserve its space of freedom, and, in particular, to keep in place the features that transformed the Single Market in a model characterised by high levels of competitiveness and economic development, thus without lowering the social protection guaranteed by the EU Treaties. For the purpose of suggesting the necessary lines of reform, the present paper will analyse the two recent reports issued by Mr. Enrico Letta and Mr. Mario Draghi, so as to better fine-tune the reforms proposal needed by the EU to keep its relevance in the international political, social and economic scenario.

Key words: European Union, single market, candidate member States, fundamental freedoms, European integration

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INTRODUCTION: EUROPEAN STATES HAVE BECOME
A HISTORICAL ANACHRONISM

[...] I wrote in 1917 and I repeat now thirty years later: European states have become a historical anachronism.

[...]

As rail communications and navigation, steam and motor, took the place of sailing, and the peoples were approached by telephone, by telegraph with and without wires and by air navigation, this little European flowerbed of ours openly showed its ineptitude to endure so many different sovereignties. In vain, sovereign states elevated around them; high customs barriers to maintain their economic self-sufficiency.

Barriers only help to impoverish peoples, to slander them against each other [...]

If we do not know how to bring a human and modern ideal to a lost and uncertain Europe on the way forward, we are lost and Europe is lost with us. There is a frightening ideal vacuum on this continent of ours. (That atomic bomb, which we fear so much, unfortunately lives in each of us. Above all, we must not be afraid of the atomic bomb, but of the evil forces that triggered its use. We must oppose this unleashing; and the only way forward is the preaching of the good news.)

[...]

In a Europe where rabid returns to pestilent nationalistic myths are observed everywhere, where suddenly patriotic currents are discovered in those who until yesterday professed internationalist ideas, in this Europe in which at every turn are seen with horror to reform war tendencies, it is urgent to carry out a work of unification. Work, I say, and not preaching.

It is a vain thing to preach peace and harmony when Hannibal urges at the gates, when nationalistic passions are once again burning in the minds of too many Europeans. It is not enough to preach the United States of Europe and to hold congresses of parliamentarians. What does it matter that the parliaments of these tiny states which make up the uniform Europe, renounce part of their sovereignty for a parliament in which the peoples of Europe are directly represented in an elected chamber in their unity, without distinction between state and state and in proportion to the number of inhabitants and in the chamber of states, the individual states are represented for the same number.

This is the only ideal worth working for; the only ideal capable of saving the true independence of peoples, which does not consist in weapons, customs barriers, the limitation of railway systems; in river, port, electric and similar to the national territory, but in schools, arts, customs; cultural institutions, in everything that

gives life to the spirit and makes each people know how to contribute something to the spiritual life of other peoples.

[...]

We must not be afraid to defend the ideas that will only save Europe. The power of ideas is still today – that Europe is not, fortunately, totally barbaric and is not yet a supine worshipper of material things – the power of ideas is still the force that in the long run the world.¹

Luigi Einaudi, former President of the Italian Republic, but also previously President of the Italian Central Bank, Dean of the University of Torino and one of the most influential economist in Italy and Europe, pronounced the quoted lines in 1947. However, this speech seems tailored for the current economical and geopolitical scenario, and, for sure, an affirmation keeps echoing: *European states have become a historical anachronism.*

The present era has something in common with 1917, when Einaudi first outlined this concept, years before the creation of the European Coal and Steel Community, and with 1947, when the whole speech was pronounced in favour of the adhesion of Italy to what were, at the time, the European Economic Communities.

The European Union has probably represented one of the most ambitious political and legal experiment in history: Twenty-seven Countries united in some of the most sensitive legal fields, constituting a Single Market and promoting a subset of key common values and fundamental rights. Moreover, historically these Countries or were fighting against themselves (the two World Wars are never to be forgotten, but also the wars conducted during the XIX century) or were part of completely different legal and cultural traditions (think of the Western and the Eastern part of Europe: Not so long back in time there was a real wall – an ‘iron curtain’ – between them).

The EU project dates back exactly after the devastation left in Europe by the Second World War, in a very complex geopolitical context, when the two blocks that characterised the Cold War scenario of the following decades were taking shape. The six founding Countries (and, among them, three of the protagonists of the just ended conflict: France, Germany, and Italy) decided to cooperate, and, in particular, to put together the production of coal and steel, some of the materials which were at the basis of the war industry.² Today, after decades of peace and prosperity,

¹ Luigi Einaudi, Speech delivered on Tuesday 29 July 1947 before the Constituent Assembly of Italy, available at (in Italian) <https://www.fondazioneLuigiEinaudi.it/einaudi-perche-non-possiamo-non-dirci-europei/>, accessed 2 September 2024, free translation by the Author.

² David J. Gerber, *Law and Competition in Twentieth Century Europe*, Oxford University Press, Oxford, 1998, 336.

this could be taken for granted, but at the time, it was not. The shaping of this 'Community' was designed and pondered wisely: The founding fathers understood the importance of first integrating the economical aspects (as the name European Economic Communities was underlining) among the member States, and then, after the realisation of this objective – already very ambitious – a strengthened political union would have followed. This was exactly what happened, with the succession from the EEC to the EC and, finally, to the EU.³ The same progressive integration occurred also in the market, and here, as well, the terminology adopted is telling: From a 'Common Market', the Member States reached an 'Internal Market' in the Single European Act of 1986.⁴

This integration process flowed smoothly, and the Community delivered peace and economic progress to the involved Countries' citizens and entrepreneurs. Indeed, during the first decades, the main objective was exactly the creation of the Single Market by means of eliminating all the barriers to trade among the member States. Central in this process was the articulation of the so-called 'Four Freedoms': The free movement of goods, capitals, services, and people.⁵ However, the described integration's path occurred in such a way also because the Countries involved were historically and legally part of the same tradition, rooted in the Roman heritage, and rules were based upon the two main codification models, the French *Code Civil* and the German BGB. Moreover, part of this project were the three main European economies plus three other smaller Countries, but sharing a very close tradition and characterised by a high level of economic development.

The real 'test bench' for this ambitious union occurred when the geopolitical scenario was shaken by the disaggregation of the socialist block, both with regard to the Soviet Union and the Balkans socialist Countries. Then, the true enlargement of the Union took place, with the integration of Countries which were characterised by completely different legal systems, property conceptions, and economic conditions.⁶ Anyhow, also after this events the expansion of the Union – coupled

³ For a history of the development of the EU see Steve Peers, Catherine Barnard, *European Union Law*, Oxford University Press, Oxford, 2023, 10–31.

⁴ Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press, Oxford, 2022, 17–19.

⁵ S. Peers, C. Barnard, op. cit., 20–21.

⁶ Gian Antonio Benacchio, "Jugoslavia: evoluzione e crollo di un modello", *Rivista di diritto civile*, Vol. II, 1991, 361 ff.; Gian Antonio Benacchio, "National Courts and Comparative Law – The States of Former Yugoslavia (Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Macedonia and Montenegro)", *Judicial Cosmopolitanism, The Use of Foreign Law in Contemporary Constitutional Systems* (ed. Giuseppe Franco Ferrari), Brill Nijhoff, Leiden, 2019, 745 ff.; Gianmaria Ajani, *Il modello post-socialista*, Giappichelli, Torino, 2008.

with the parallel definition of the monetary union in quite a large number of Member States – proceeded quite regularly, and the integration into the EU brought significant advantages to the new Member States, as we had the opportunity to show in another work.⁷

However, this apparently almost untroubled flow was soon challenged by various events, among which a prominent role was for sure played by the financial crisis started in 2008 in the U.S. The fact that the EU structure was passing from a solid achievement to a castle of glass started to appear evident when the project of a Constitutional Treaty for the Union was rejected by France and the Netherlands in the respective referenda.⁸ This showed a sort of change in the enthusiasm towards the European integration, and the importance of this ‘alarm bell’ was probably underestimated. The following events are part of the recent history, but for sure they showed the ‘heaviness’ of the EU structure and, probably, an excess of formalism in a fluid geopolitical reality, which is in continuous evolution. In fact, the just mentioned reject of the constitutional Treaty showed exactly the EU’s burdensome and rigid decision-making process, characterised by crossed vetoes and the need to always find compromises, which then bring to immobilism. The problem is that in a fast-moving world, immobilism is synonym of irrelevance.

The reaction to the economic crisis, the management of the Greek debt situation, the total incapability of managing the flux of migrants, the Brexit, and the excessively regulatory approach towards innovation led to a stagnation that is impacting the competitiveness of the EU, with all the related consequences on the social sphere.⁹ This led, *inter alia*, to the rise of inequality rates, to a growing unemployment, which, in turn, favoured the ascent of anti-European and populist movements, that leverage the dissatisfaction of people to their advantage, by proposing protectionist and nationalistic solutions, which, by quoting again Einaudi, are *anachronistic*.

In addition, the ‘last’ certainty of the European project, which was the delivery of peace for decades in the European continent after WWII, fell with the wretched invasion of Ukraine in 2022, which – unfortunately – showed again the divisions inside the EU and, at a certain extent, its irrelevance in the geopolitical scenario.

⁷ Andrea Piletta Massaro, “Market Integration and Competition as a Way to Strengthen the Rule of Law and Democracy in the Enlarged European Union”, *EU and comparative law issues and challenges series*, Vol. 8, 2024, 333 ff., available at <https://hrcak.srce.hr/ojs/index.php/eclic/article/view/32282/16412>, accessed 14 October 2024.

⁸ S. Peers, C. Barnard, *op. cit.*, 27.

⁹ *Ibidem*, 31–35.

This article aims at analysing the reasons that led the EU to the current precarious situation, in order to offer policy solutions directed at revamping the propulsive force of the European project. In order to do so, particular attention will be paid to the Single Market – *i.e.*, the economic dimension of the EU – especially by relying on the recent reports issued, respectively, on the status of the Single Market and on the competitiveness of the EU by two former Italian Prime Ministers, Mr. Enrico Letta¹⁰ and Mr. Mario Draghi.¹¹

THE ROOTS OF THE EU MODEL'S CRISIS: INSTITUTIONAL UNSUSTAINABILITY

In the introduction multiple reasons behind the crisis of the EU model, and in particular of the Single Market, have been enlisted. However, the majority of them, such as the reliance on other Countries for energy or raw material supply, or the changed geopolitical landscape, are *exogenous* factors which impacted and are impacting the development of the EU. These issues need to be addressed, but in a second stance. What is needed to be first understood are the *endogenous* factors which led the Union to be like 'unarmed' in front of the mentioned societal and economic transformations. These endogenous factors refer to the institutional structure of the Union. In fact, the configuration envisaged by the Treaties was conceived for a restricted group of Countries, sharing quite similar economic and social structures and objectives. The various enlargements brought with themselves

¹⁰ Enrico Letta, "Much more than a market. Speed, security, solidarity. Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens", April 2024, available at <https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf>, accessed 14 October 2024. See also Enrico Letta, *Molto più di un mercato. Viaggio nella nuova Europa*, Il Mulino, Bologna, 2024.

¹¹ Mario Draghi, "The future of European competitiveness. Part A – A competitiveness strategy for Europe", September 2024, available at https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20-%20A%20competitiveness%20strategy%20for%20Europe.pdf, accessed 14 October 2024; Mario Draghi, "The future of European competitiveness. Part B – In-depth analysis and recommendations", September 2024, available at https://commission.europa.eu/document/download/ec1409c1-d4b4-4882-8bdd-3519f86bbb92_en?filename=The%20future%20of%20European%20competitiveness_%20In-depth%20analysis%20and%20recommendations_0.pdf, accessed 14 October 2024; see also Address by Mr. Mario Draghi at the presentation of the report on the Future of European competitiveness in the European Parliament, 17 September 2024, available at https://commission.europa.eu/document/download/fcbc7ada-213b-4679-83f7-69a4c2127a25_en?filename=Address%20by%20Mario%20Draghi%20at%20the%20Presentation%20of%20the%20Report%20on%20the%20future%20of%20European%20competitiveness.pdf, accessed 14 October 2024.

a progressively increasing weight on institutions which were not able to sustain it, bringing to a sort of collapse of the equilibrium built during the foundation years. The structure resulting from the Treaty of Lisbon formally incorporated the European Council into the EU Institutions,¹² but did not change its nature, since it remains a venue where decisions are taken according to the traditional international law method of consensus, which means that a compromise needs to be reached among the positions of 27 States. It is also true that the European Council does not participate in the EU ordinary legislative procedure, but it is the place where the more genuinely political decisions, addressing the development of the Union, are taken. In addition, the weight of the 27 Member States' instances influences the ordinary legislative procedure through the Council of the European Union, where decisions are now taken according to a qualified majority vote, which ponders the vote of Member States according to the size of their population, plus certain cases, such as in relation to taxation or environmental law, where unanimity is required.¹³ The shift from unanimity to a qualified majority in the ordinary legislative procedure was adopted exactly in order to ease the functioning of the Council of the EU after the various enlargements, and for sure it has to be regarded as positive. However, in a framework composed by 27 Member States (with all the differences already mentioned) also a qualified majority represents a significant hurdle. This is proven by the level of compromise that is required in order to pass legislative acts and also by how lengthy the legislative *iter* is. The Draghi report affirmed that in order to pass a piece of legislation the EU takes on average 19 months from the Commission proposal,¹⁴ which is a timeframe absolutely inadequate for dealing with the mentioned challenges that the Single Market and the EU itself are called to face. This, in turn, brings to a potential overregulation, reached through compromise solutions and overlapping or not coordinated policies. An example of this can be seen in the framework constituted by Directive (EU) 2014/104,¹⁵ on private actions for damages in the context of infringement of competition law, together with Directive (EU) 2020/1828,¹⁶ on a representative actions for consumers and Regulation (EU)

¹² S. Peers, C. Barnard, op. cit., 70.

¹³ *Ibidem*, 60–63.

¹⁴ M. Draghi, op. cit. (Part A), 63.

¹⁵ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for the infringements of competition law provisions of the Member States and of the European Union, published in OJ of the EU 5 December 2014, L 349/1.

¹⁶ Directive (UE) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, published in the OJ of the EU 4 December 2020, L 409/1.

2022/1925, the so-called Digital Markets Act (DMA).¹⁷ If the first Directive aims at creating a level playing field for consumers in the context of private antitrust enforcement, it lacks to introduce a harmonised collective redress regime. This, given the widespread, but ‘small claim’ nature of competition law infringements, represents a particularly relevant deficiency of the Damages Directive. However, when the subsequent Directive 2020/1828 was in discussion, it was almost given for granted that the lack of the 2014 Directive with regard to collective redress would have been solved by the introduction of the EU-wide representative action regime.¹⁸ These expectations were frustrated when Directive 2014/104 did not figure into the scope of Directive 2020/1828, as enucleated in its Annex 1. However, last but not least, the recently adopted DMA Regulation amended Directive 2020/1828 by adding the DMA itself into the scope of the latter Directive. This example shows how what for sure was a compromise position, that hindered the creation of a proper level playing field in the context of antitrust private enforcement by not including this subject into the scope of the most useful tool for consumers damaged by a mass tort arisen from the violation of general competition rules. On the contrary, violations of the DMA, which for sure entail a very difficult degree of evidence (already in the quantification of damages, since reference is made to services which are almost often offered for a zero-price consideration) can be enforced by consumers through the representative action mechanism introduced by Directive 2020/1828. In addition, not having introduced Directive 2014/104 into the scope of Directive 2020/1828 leave the field of collective redress in antitrust private enforcement to the regulatory competition among Member States, hence creating the contrary of what a level playing field should be, both for consumers and enterprises.

Under another perspective, the need for an unanimous vote in subjects quite delicate for the future of the Union, such as taxation, brings to the result of not reaching a complete and matured evolution of the Single Market, since certain key aspects are not harmonised, thus leading to differences among Member States who can attract companies with a more generous fiscal policy and Member States which observe the transfer of these companies towards the more favourable fore, with all the consequent, respectively, advantages for the State of destination and disadvantages for State of departure.

¹⁷ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act) published in the OJ of the EU 12 October 2022, L 165/1.

¹⁸ See, *inter alia*, European Consumer Organisation (BEUC), *Proposal for a Directive on Representative Actions*, available at https://www.beuc.eu/publications/beuc-x-2018-094_representative_actions_beuc_position_paper.pdf, accessed 14 October 2024.

Having regard to the more prominently practical viewpoint, the described scenario shows an Single Market which for sure does not lack the necessary competences and talents, but which is not able to give real shape to the innovations and inventions that European researchers found out.¹⁹ By using a metaphor, it is like if European researchers develop a perfect chassis for a Formula One car, but the European Union is not able to provide this chassis with the adequate engine to express its full potential. In this case what a chassis constructor would do? Changing the engine supplier, which is exactly what happens, since – out of the metaphor – a plethora of EU startups moved to the United States, where their project had the opportunity to be funded and fully realised. Indeed, the Draghi report shows that *between 2008 and 2021, close to 30% of the “unicorns” founded in Europe – startups that went on to be valued over USD 1 billion – relocated their headquarters abroad, with the vast majority moving to the US.*²⁰ Therefore, as suggested by Enrico Letta’s report, the creation of a *fifth freedom* to enhance research, innovation and education in the Single Market.²¹

All these factors, here briefly summarised, have a detrimental impact on the global competitiveness of the EU and on its foundational values, since a Union without the propulsive force of a healthy and completed Single Market is unable to provide the objectives that lie at its the ‘constitutional’ core.

THE WAY FORWARD: FLEXIBILITY, SIMPLIFICATION, AND RELIANCE ON THE COMMON VALUES

Given the considerations laid down in the previous paragraph, a further enlargement of the European Union, such as the one planned in the Western Balkans,²² requires a quite profoundly redesigned institutional and policy setting. In fact, for the Single Market to provide all the positive outcomes that the entrance of new Countries could bring both to themselves and to the Union, an improved and more sustainable institutional framework appears needed. In particular, if the Single Market – especially in perspective – will be unable to deliver prosperity, innovation, economic growth, and all the subset of rights which are part of the *acquis communautaire*, it would lose its propulsive and attractive force. Just to be

¹⁹ M. Draghi, op. cit. (Part A), 2.

²⁰ *Ibidem*.

²¹ E. Letta, “Much more than a market...”, 19–22.

²² European Commission, *Enhanced EU engagement with the Western Balkans*, available at https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/enhanced-eu-engagement-western-balkans_en, accessed 14 October 2024.

clear, notwithstanding all the issues mentioned in this article, the Single Market remains a point of reference and a sure flywheel for new entrant Countries' growth, as demonstrated in another work.²³ However, what is needed is not to exhaust this positive feedback loop with what we can call stagnation or, worse, dependency and irrelevance vis-à-vis other geopolitical and economic actors, such as China or the United States.

From a theoretical point of view, the suggested recipe for a 'revamping' of the European Union is first that of coming back to its roots, which appeared to have been partially lost. This means, in other words, to come back to what is the most precious heritage of the EU and which always distinguished it as a model. Reference is made to the Treaties, and especially the more 'constitutional' part of them. For this purpose, the main Treaty provision which comes at stake is Article 3 TEU. Paragraph 1 proclaims that *the Union's aim is to promote peace, its values and the well-being of its peoples*. This constitutes a foundational affirmation, since mention is made to peace, but – unfortunately – the promotion of peace (as the Cold War taught) passes through a high level of deterrence (*si vis pacem para bellum*), which, currently, and with a war at its borders, the EU is not capable of offering, since only ten Member States spend more than or equal to 2% of their GDP in defence, as required by the NATO commitments.²⁴ In other ways, historically, the EU 'outsourced' its defence to the United States, and this task was not coordinated among the Member States, at the point that, as illustrated by the Draghi Report, the provision of military items to Ukraine showed how every EU Country had different operational standards, which in most of cases were not interoperating among them.²⁵ Therefore, the Union is already not complying with this first part of the provision above reported, because in such a fluid geopolitical scenario it has not the necessary strength to promote Peace through deterrence (as, in a way, the invasion of Ukraine showed). Therefore, much more efforts and convergence are needed by Member States on this point. Already since the foundation of the EU, a defence union (European Defence Community, EDC) was envisaged,²⁶ but, like many other times in the EU's development, it remained on the paper, as national jealousies prevailed. Moreover, after having reached coordination in the field of defence, more efforts are needed by the Union to improve independency and innovation in the defence field. To do so, extraordinary ways of financing, such as common debt,

²³ A. Piletta Massaro (2024), op. cit.

²⁴ M. Draghi, op. cit. (Part A), 50.

²⁵ *Ibidem*, 55.

²⁶ S. Peers, C. Barnard, op. cit., 14–15.

must be taken into consideration, since we are referring to a vital interest of all Member States, which can be achieved just through a joint effort at the EU level.²⁷

The just made mention to innovation leads to the second part of the analysed Article 3, paragraph 1, TEU, where the well-being of EU's citizens is declared as a goal of the Union. This represents a quite 'challenging' statement, since it can almost be compared with the *pursuit of happiness* proclaimed in the U.S. Declaration of Independence. Anyhow, according to our general constitutional subset, well-being is delivered when the dignity dimension of the person, intended as the right to self-determine its existence, both economically and socially, is granted. This passes through freedom but also economic well-being or independence. The latter, in our system, is provided by the market, which in the European Union is conceived along the lines of the *highly competitive social market economy* portrayed in Article 3, paragraph 3, TEU. According to the same provision, this concept develops along *balanced economic growth, full employment, social progress, quality of the environment, technological advance*. Moreover, the Single Market shall also deliver *social justice, economic, social and territorial cohesion, solidarity among Member States*.

Although at a first sight the abovementioned concepts may appear disentangled, they are not, and they form part of an *unicum* (which, banally, we can call Single Market) where all of them are linked, and the failure to deliver one of them will impact the satisfaction of the other ones. In fact, for instance, the pursuit of the green transition necessarily passes through innovation and technological advance efforts, and only a successful transition will guarantee social progress and economic growth. The question is whether the Single Market is currently capable of delivering these outcomes. The answer, appears to be negative, or at least not as it should. Indeed, the green transition, especially with regard to electric vehicles, is almost 'backfiring', since the price of EVs is particularly high, not allowing a great part of the European population to afford them, with the effect of showing this transition as a sort of 'elitist' will (surfaced by almost all the populist parties). Moreover, differences in innovation levels among Member States remain,²⁸ notwithstanding the solidarity requirement set out above, and cohesion appears far to be reached, leading a large number of especially young and talented Europeans to migrate from less developed Member States to the richest ones, thus leading to a negative feedback loop where the former sustain the education of these individuals but then the latter take

²⁷ M. Draghi, op. cit. (Part A), 62.

²⁸ European Commission, Europe's innovation performance steadily improving but at different speeds between Member States, 8 July 2024, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3666, accessed 14 October 2024.

advantages of it, and the development gap between these Countries keeps increasing (in what is called a ‘development trap’).²⁹ This represents a sort of distortion of the fundamental freedom of movement of people (and workers), and it is addressed in an impeccable way by the Letta Report. In fact, the right to seek better opportunities in another Member State represent a cornerstone of the European project and of the Market. Anyhow, as suggested by the Letta Report, alongside the right to migrate, the Union must guarantee to a Member State’s citizen the *right to remain* in her/his community of choice.³⁰ This is without any doubt part of the cohesion requirement provided for by Article 3, paragraph 3, TEU, but also of the well-being of a citizen, since migrating to another Member State should be a choice and not a forced necessity, given the poor development conditions of certain areas of the Union.

The reasoning reported above pretended to be a sort of summary of the main open issues regarding the EU Single Market, which cause discrepancies with the requirements set out by the Treaties. Anyway, the question is how to better align the reality of the Single Market with such provisions. The simple answer is by fully realising the Union, a Union which is really as such, and not just with regard to certain situations or policies. A quite huge list of recommendations is contained in the Draghi and Letta Reports, and it is not the aim of this work that of ‘competing’ with them, especially given the prestige of the two Authors. Therefore, the following part of the present paper will synthetically provide some suggestions.

First and foremost, the Single Market ought to be completed. With the latter term is meant to really become a unique market, since until there will be huge differences in taxation, wages, social security conditions, etc., deep differences among Member States will remain, leading always to a Union based on different paces. To do so, more joint initiatives are needed, especially in the fields of innovation and the green economy. These efforts need to be financed and the innovative ideas developed in European Universities must find an opportunity to be implemented in the EU, without having the need to move to the U.S. to make these ideas reality. In this context, a much coordinated effort is needed at the EU level, in order to have a really unique market and not 27 national markets unified. The implementation of this task passes also through common debt, this must be said plain and straight. As the Draghi Report observed, this is part of the common evolution of the Union as such, and it is not directed at financing temporary needs of some Member States. The response to the COVID pandemic through the implementation of the Next Generation EU fund constituted a positive example in this sense, but this must become a structural ‘weapon’ of

²⁹ E. Letta, “Much more than a market...”, 92–93.

³⁰ *Ibidem*, 91; E. Letta, *Molto più di un mercato*, 169.

EU's policy, which also needs to be revamped as a unified one, and not as the merger of various national instances.³¹ The current scenario teaches that there is no more space for competition among Member States, because the competition – and strong – is outside the EU, and it can be handled just through a deeply unified response.

Additionally, for the purpose of achieving all the goals and objectives listed above, as already mentioned, the decisional process and the institutional structure of the Union ought to be redesigned, with the objective of finally switching from the intergovernmental decisional process to an almost fully unified one. In doing so, an amendment of the Treaties appears necessary, in order to confer more powers to the Commission and the Parliament, and to dilute the possibility of vetoes in the two Councils. This should lead to a faster procedure in answering to the competitive instances that the Union will face, especially by means of a less burdensome legislative procedure, which should also produce legislative acts less influenced by the need to reach compromise positions, which usually decrease the degree of effectiveness and applicability of the approved legislation. The Draghi report also enlist the instrument of enhanced cooperation among Member States provided for by Articles 326–334 TFUE to implement certain policy objectives in case some Countries are unwilling to do it. It can represent for sure a good instrument in some specific situation, especially because it does not require a reform of the Treaties and it is already available, but the risk is that of creating an even more fragmented Union, with tier A and tier B Countries in the level of development. Therefore, only the suggested institutional changes may lead to a structure which is capable of directing the future development of the Union, by providing the view necessary for developing an sustainable and effective industrial policy which can increase the EU's competitiveness and, as a result, the well-being of European citizens.

Finally, having regard to the normative framework, often constellated by Directives or lately or not perfectly transposed into the national legal systems, the Letta Report affirms that *EU Institutions should unequivocally prioritise the use of Regulations in the formulation of Single Market binding rules. When the use of directives remains unavoidable or preferable, it is imperative to make two key choices to ensure their effective implementation.*³² Furthermore, the same Report suggests what may be a disruptive innovation in the full implementation of the Single Market, which is the creation of a European Code of Business Law. This should work as the 28th legal system of the EU, parallel to the national ones, that businesses can choose to regulate their operations withing the Single Market.³³

³¹ M. Draghi, op. cit. (Part A), 61–62.

³² E. Letta, "Much more than a market...", 10.

³³ *Ibidem*, 108.

COMPETITION AND COMPETITIVENESS: SYNONIMS OR OPPOSITES?

It might seem a *jeu de mots*, but essential in achieving the necessary level of competitiveness of the Single Market is a proper competition policy. First, it is necessary to disentangle the question regarding whether competition is an obstacle for the EU's competitiveness or if, contrarywise, it is a propulsive force. There is not a straightforward and plain answer, but, generally, competition must be seen as a positive feature, also required by the Treaties, through the adjective *highly competitive* positioned exactly before the expression social market economy in Article 3, paragraph 3, TEU. However, an excess of competition or a competition regime which is not linked with the other Union's policy, will not provide the hoped advantages, and, also, it can be detrimental for the Single Market's development. This is why, as required also by Article 7 of the Treaty on the Functioning of the European Union, all the Union's policies must be aligned, and no exception is made for competition law.

In particular, the big trade-off regarding *internal* competition in the European Market and *external* competitiveness of the Single Market has regard to the conception of industrial policy. The point is that of finding the right equilibrium between the maintenance of contestability of the various markets composing the Internal one, thus avoiding excessive concentrations of economic power which can turn to be detrimental for consumers and for the society in itself, but, at the same time, to implement the industrial policy decisions needed to scale-up some European companies which face fierce external competition in sectors where scale constitutes a necessary requirement (the best example is represented by the aviation industry, with Airbus).³⁴ This is particularly important with regard to merger control or cooperation agreements among firms. Having regard to the latter, the Treaties already provide for instruments aimed at allowing firms to cooperate for the purpose of developing new innovative products. This discourse has been revamped by the debate around the role that competition policy should play in the green transition and the decarbonisation process.³⁵ The instruments already available are especially research and development agreements³⁶ and the newly introduced sustainability

³⁴ M. Draghi, op. cit. (Part B), 299.

³⁵ Andrea Piletta Massaro, "Back to the Treaties: Towards a 'Sustainable' Competition Law", *Revija za evropsko pravo*, No. 25, 2023, 13 ff.; Simon Holmes, "Climate change, sustainability and competition law", *Journal of Antitrust Enforcement*, 2020, No. 00, 1 ff.; Julian Nowag (ed.), *Research Handbook on Sustainability and Competition Law*, Edward Elgar, Cheltenham, 2024.

³⁶ Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, published in OJ of the EU 2 June 2023, L 143/9.

agreements.³⁷ Moreover, and for more general innovation purposes, an important road can be represented by the exemption clause contained in Article 101, paragraph 3, TFUE.³⁸ However, more guidance and the development of praxis in this field by the Commission are particularly needed for European firms to cooperate and reach a critical scale in certain sectors without fearing to be sanctioned for the violation of competition provisions.

Contemporarily, the degree of concentration in the Single Market must be controlled, in order to keep markets contestable and to deliver to consumers and citizens the positive by-products that only form a noble kind of competition can flow.³⁹ In particular, great attention should be paid to *de facto* monopoly positions in the digital sectors, which can, through abuses of dominance behaviours or by means of predatory acquisitions, stifle innovation in these markets. In the interest of the EU, especially, it is important to avoid that foreign dominant companies could hinder the innovation efforts performed by domestic companies. Steps in this direction have been taken through the application of existing competition rules both by the Commission and the National Competition Authorities. In particular, important precedents were set with the *Google Shopping*⁴⁰ and *Google Android*⁴¹ cases by the Commission and with the *Facebook* case decided by the German

³⁷ 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, published in OJ of the EU 21 July 2023, C 259/1 (for sustainability agreements, see Chapter 9).

³⁸ Gian Antonio Benacchio, *L'Unione Europea e il diritto privato*, CEDAM, Padova, 2024, 314–316.

³⁹ About the concept of noble competition, see Maurice Eitel Stucke, Ariel Ezrachi, *Competition Overdose. How Free Market Mythology Transformed Us from Citizen Kings to Market Servants*, HarperCollins, New York, 2020, 254 ff.

⁴⁰ European Commission, decision 27 June 2017, case AT.39740, *Google Search (Shopping)*, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf, accessed 30 September 2024. The relevant press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784 (accessed 30 September 2024) and a summary of the decision has been published in the Official Journal of the EU, 12 January 2018, C 9/11. See also General Court, decision 10 November 2021, case T-612/17, *Google LLC and Alphabet, Inc. v. Commission (Google Shopping)*; Court of Justice, decision 10 September 2024, case C-48/22 P, *Google and Alphabet v. Commission (Google Shopping)*.

⁴¹ European Commission, decision 18 July 2018, case AT.40099, *Google Android*, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, accessed 30 September 2024. The relevant press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 (accessed 30 September 2024) and a summary of the decision has been published in the Official Journal of the EU, 28 November 2019, C 402/19. See also General Court, decision 14 September 2022, case T-604/18, *Google LLC and Alphabet, Inc. v. Commission (Google Android)*.

Bundeskartellamt⁴² and the *Android Auto* case concluded by the Italian Autorità Garante della Concorrenza e del Mercato (AGCM).⁴³ Anyhow, the imposition of pecuniary fines and the length of proceedings makes these decisions less effective in restoring competition, since a pecuniary sanction is like the *cost of running business* for the tech giants and this does not revive companies which were pushed out of the market as a result of the incumbent's anticompetitive behaviour. A step in the sense of solving these issues has been taken with the adoption of the mentioned DMA Regulation, which established a sort of quasi-regulatory *ex ante* framework directed at digital gatekeepers. Anyhow, doubts about the real effects of the DMA's enforcement can be casted, since the capillary surveillance task required to the Commission appears particularly burdensome.⁴⁴ Moreover, the main sanctions remain pecuniary and behavioural ones, with structural remedies relegated in a defiled position, whilst they could have played a more prominent role, at least for the sake of increasing the level of deterrence.

Probably, the solutions introduced in Germany with the tenth amendment to the Competition Act (GWB)⁴⁵ could have proved more effective, since they constitute a more tailored mixture of *ex ante* regulation of competition and proper

⁴² Bundeskartellamt, decision 6 February 2019, *Facebook*, available (in English) at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf%3F__blob%3DpublicationFile%26v%3D5, accessed 30 September 2024. The relevant Bundeskartellamt press release is available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.pdf?__blob=publicationFile&v=2 (accessed 30 September 2024), whilst a summary of the decision is available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4, accessed 30 September 2024. See also Court of Justice, decision 4 July 2023, case C-252/21, *Meta*.

⁴³ Autorità Garante della Concorrenza e del Mercato, decision 27 April 2021, case A529, *Enel X – Android Auto*, available at (in Italian only) https://www.agcm.it/dotcmsdoc/allegati-news/A529_chiusura.pdf, accessed 30 September 2024. The relevant press release (in Italian only) is available at <https://www.agcm.it/media/comunicati-stampa/2021/5/A529>, accessed 30 September 2024.

⁴⁴ Andrea Piletta Massaro, “The Rising Market Power Issue and the Need to Regulate Competition: A Comparative Perspective Between the European Union, Germany, and Italy”, *Concorrenza e Mercato*, No. 29, 2022, 2023, 40.

⁴⁵ The relevant Bundeskartellamt press release, *Amendment of the German Act against Restraints of Competition*, 19 January 2021, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html, accessed 14 October 2024. See also OECD, *Annual Report on Competition Policy Developments in Germany*, 10 June 2021, 5, available at [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR\(2021\)11&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2021)11&docLanguage=En), accessed 14 October 2024; Jens-Uwe Franck, Martin Peitz, “Digital Platforms and the New 19a Tool in the German Competition Act”, *Journal of European Competition Law & Practice*, No. 7, Vol. 12, 2021, 513 ff.

competition law tools.⁴⁶ Moreover, particularly important is the single degree appeal mechanism envisaged by this reform, aimed at reducing the times of competition proceedings. However, the overlap with the DMA and the supremacy clause contained in the latter could in a way have defused much of the German reform's potential, although the German act – conversely to the DMA and, in our opinion, correctly – can be applied also to companies which operate in markets other than the digital ones.

Furthermore, and especially thanks to the German *Facebook* decision, the need for a 'multi-tool' approach to competition law, therefore based upon policies such as data protection or consumer protection, is much needed.⁴⁷ In this direction, it must be positively welcome the use of the abuse of economic dependence, as strengthened by the Italian Legislator in 2022⁴⁸ and present also in France.⁴⁹ This tool allows to sanction the subjugation of a company along the supply chain perpetrated by an economically powerful firm without having to demonstrate the dominance on the market and the harm to competition, instead required in case pure competition rules would be applied.

Additionally, a very powerful instrument could be represented by the market investigation tool, recently introduced in the German GWB, but also present, in different shapes, in the DMA, and part of the UK Competition and Market Authority (CMA)'s toolbox since years.⁵⁰ Synthetically, this proceeding allows the relevant competition Authority to investigate a market where there are signals of competition concerns, for the purpose of conducting an investigation and to apply tailored measures directed at restoring competition in such a market.

Finally, a renewed approach, based upon *fairness* in the market as a conceptual lodestar, should be inaugurated, in the sense of providing competition enforcement with a 'multi-value' subset,⁵¹ which allows for the flourishing of a sustainable

⁴⁶ A. Piletta Massaro, *The Rising Market Power Issue and the Need to Regulate Competition...*, 30–35.

⁴⁷ *Ibidem*, 40–42.

⁴⁸ Law 5 August 2022, no. 118, published in the *Official Journal of the Italian Republic* 18 August 2022, No. 188, Article 33, amending Article 9 of Law 18 June 1998, no. 192, published in the *Official Journal of the Italian Republic* 22 June 1998, No. 143.

⁴⁹ Code de Commerce, Article L420-2, alinéa 2. See A. Piletta Massaro, *The Rising Market Power Issue and the Need to Regulate Competition...*, 39.

⁵⁰ Enterprise Act 2002, Part 4, Chapter 1. See Richard Whish and David Bailey, *Competition Law*, Oxford University Press, Oxford, 2024, 498 ff.

⁵¹ Andrea Piletta Massaro, "Il diritto della concorrenza tra obiettivi di policy e proposte di riforma: verso un approccio multi-valoriale", *La Cittadinanza Europea Online*, 2021, No. 0, 65 ff.

kind of competition, in line with the values underlying the EU Treaties and not only with the aim of favouring economic interests only. In particular, such a competition parameter should be tailored by the Commission and the competition Authorities in a way that the healthy degree of competition is always maintained in the various markets, in order to provide the fair ratio of quality, prices, choice and innovation to the consumers, but also to the society as a whole. Innovation, in particular, needs to be promoted through a correct balance of competition forces active on the market, by finding the right equilibrium between the inverted U shape that commonly is used to describe the interaction between competition and innovation.⁵² For this purpose, a strengthened market investigation tool could represent the right solution for competition Authorities, and especially for the Commission, to correct – when and if needed – the movements of the Smithian *invisible hand* in the market.

CONCLUSION: NOTHING IS LOST, BUT IT IS NOT FOR GRANTED

The scenario portrayed in this work and in the reports prepared by Mario Draghi and Enrico Letta for sure poses more than one concern about the future developments of the European integration process. In particular, it shows what we can define as a sort of ‘ineffectiveness’ of the EU’s actions (of course, this must be taken as a general observation, and not with regard to every specific sector). In particular, it seems that the EU has lost its propulsive force, in particular for ‘grounding’ in the economy all the innovative potential it has. The strength of the EU model has always been the social market economy concept, where at a strong innovation rate and economic performance was paired a very high level of social protection and welfarism. This made the EU Single Market model attractive at the point that in few decades the Union passed from 6 to 27 (they were even 28) Countries, with a quite long list of candidate States on hold waiting for joining. The strength and the societal impact of the social market economy model cannot be abdicated because it would simply be contrary to the social contract that we, as European, signed by entering the EU, with all the values that the EU collected also from the various national Constitutions.⁵³ However, we have to be aware that

⁵² Philippe Aghion, Nick Bloom, Richard Blundell, Rachel Griffith, Peter Howitt, “Competition and Innovation: An Inverted-U Relationship”, *The Quarterly Journal of Economics*, 2005, No. 120, Vol. 2, 701 ff. On the relationship between competition and innovation see also Ariel Ezrachi, Maurice Eitel Stucke, “Digitalisation and its impact on innovation”, Report for the European Commission, 24 August 2020, available at <https://op.europa.eu/en/publication-detail/-/publication/203fa0ec-e742-11ea-ad25-01aa75ed71a1/language-en>, accessed 14 October 2024.

⁵³ On the influence of the various Member States’ constitutional traditions – although with regard to property – see Court of Justice, decision 13 December 1979, case 44/79, *Hauer*.

we reached a point, where a very high degree of integration in the Single Market has been reached, but it is not enough anymore, and it is not enough because the international scenario changed and it now requires the EU to 'grow' and to be independent, to be *faber sui quisque fortunae*. In order to do so, Europe has to rely on its own values, on the capabilities of European researchers and companies, on its strong cultural roots, and reshuffle its institutional background accordingly. Until now the EU's structure can be described through the same metaphor that Juillot de la Morandière used to describe the continuously reformed (but on the old structure) French *Code Civil*, i.e., like an old building, with signs of refurbishments, but which cannot hide the age.⁵⁴ By continuing this metaphor, the EU has now to build a brand new building (for instance through the adoption of the mentioned European Code of Business Law), but without changing its foundations, which has to constitute the value basis for a new, more inclusive and sustainable European Union, fit for the challenges that the current times present. Only like this the values contained in the TEU, in the Charter of Fundamental Rights of the EU, and in the Member States' Constitutions can provide again a long period of innovation, prosperity, social, institutional and economic sustainability, and peace.

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KA OBNOVLJENOM PRISTUPU JEDINSTVENOM TRŽIŠTU EU
I NJEGOVOJ KONKURENTNOSTI: POSLEDNJI POZIV
ZA EVROPSKE INTEGRACIJE

Rezime

Posle decenija u kojima je Evropska unija svojim građanima pružala socijalni i ekonomski prosperitet i mir, poslednje godine su obeležile neku vrstu nazadovanja procesa integracija. Finansijska kriza, masovne migracije, Bregzit, pandemija i invazija Ukrajine istakli su slabosti Evropske unije. U svakom slučaju, nedostatak odgovora na ove negativne egzogene inpute je uzrokovan endogenim ograničenjima institucionalnog okvira same EU. Konkretno, procedure i prakse usvojene u fazi osnivanja Unije danas ne mogu da idu u korak sa proširenom Unijom u globalnom kontekstu koji karakteriše nestabilnost i velike transformacije, kao što je pojava veštačke inteligencije ili kraj globalizovanog sveta kakvog smo poznavali. U tim okolnostima, Unija je pozvana da reaguje kako bi sačuvala svoje područje slobode i posebno, da bi zadržala osobenosti koje su transformisale

⁵⁴ Leon Juillot De La Morandière, "The Reform of the French Civil Code", *University of Pennsylvania Law Review*, No. 97, Vol. 1, 1948, 6.

jedinstveno tržište u model koji karakteriše visok nivo konkurentnosti i ekonomskog razvoja, bez umanjenja socijalne zaštite, garantovane ugovorima EU. U cilju predlaganja neophodnih pravaca reformi, ovaj rad analizira dva nedavna izveštaja Enrika Lete i Marija Dragija, kako bi se precizirao predlog reformi neophodan da EU zadrži svoju relevantnost u međunarodnom političkom, društvenom i ekonomskom scenariju.

Ključne reči: *Evropska unija, jedinstveno tržište, zemlje kandidati, osnovne slobode, evropske integracije*

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