Democratizing Draghi

Why the "Competitiveness Report" Demands Treaty Reform

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The Draghi Report is now published, outlining the "existential challenge" of European competitiveness going forward. In view of the geopolitical developments of the last several years, the scale of the challenge is difficult to deny, and the need for collective action at the EU level is commensurately intense. Mario Draghi's headline price tag for competitiveness investment over the next five years (both public and private) is approximately EUR 800 billion *annually*. As Draghi himself stresses in the Foreword to the Report: "The reasons for a unified response have never been so compelling", adding hopefully that "in our unity we will find the strength to reform" (Part A, p.5).

Despite these "compelling" reasons and the hoped-for "strength", however, the Report is hesitant on one crucial point: the EU is apparently not strong enough to undertake Treaty change to fulfill the Report's ambitious objectives. The Report instead continues the strategy of NextGenerationEU (NGEU) to avoid the messy democratic politics of Treaty change and instead rely on existing (though updated) governance modes along with reinterpretations of existing Treaty provisions to achieve the programme's goals.

We believe this approach is legally dubious, politically unwise and, eventually, helps constructing a diffused governance architecture that will fail to tackle the very real challenges the continent indeed faces. We therefore call for *re-politicizing* these putatively political matters, discussing them in the open and facilitating evidently needed Treaty reform.

Treaty change and democratic legitimation

Given the scope and scale of the programme that this Report envisions – economic, legal, and institutional (both national and supranational) – it is difficult to see how such a strategy can be successful without Treaty change. The Report calls for reforms and investments across numerous sectors – in energy, automotive, defence, space, pharma, advanced technology, and transport, just to name a few. It also calls for numerous "horizontal" (i.e., cross-sectoral) reforms aimed at "accelerating innovation", "closing the skills gap", "sustaining investment", "revamping competition", and "strengthening governance." In other words, the Report contemplates a deep and comprehensive transformation of economy and society in Europe, not to mention the inevitable side effect this would entail: a further transformation of the power relations and modes of governance between EU institutions, especially the Commission, and the Member States. Remarkably, yet unsurprisingly, all of this is supposed to occur without Treaty change. To be fair, Draghi's assignment was to write about competitiveness and not about Treaty reform. But it is difficult to envisage the Report being published without significant background work already taking place in the Commission Legal Service, paving the way for future legislative proposals.

The constitutional transformation suggested by Draghi requires proper politics to ensure its democratic legitimacy. Discussions triggered by Treaty reform would not alone suffice, but would trigger a process of political mobilization on a constitutionally significant scale. The Draghi Report, however, opts for another route. It remains loyal to the functionalist logic of EU governance to replace traditional national politics by a different, European-level politics that, however, pretends to be apolitical. To its credit, the Report at least recognizes –albeit in a set of buried passages at the end of each part – that "[s]trengthening the EU requires Treaty changes;" nonetheless, the Report proceeds on the assumption

that such change "is not a precondition for Europe to move forward" (Part A, p.63; see also Part B, p.307). In a classically functionalist move, the Report argues that Treaty change is a "long and burdensome process" and, consequently, Europe should instead adopt "a small number of overarching, targeted institutional changes" to reach its goals (Part A, p.14; see also Part B, p.307).

Count us among the sceptics on this crucial point. The governance changes contemplated by the Report only seem "small in number" because the Report describes them in such sparse and vague terms. Just a moment of deeper reflection shows that they are in fact profound and hardly "targeted" at all.

Competence and governance

The Report builds its envisioned programme around various kinds of "partnerships" – whether public and private, or between the EU and Member States. Even as it pursues an ambitious industrial policy, the references to partnerships give the program a transactional feel that has the effect of blurring traditional divisions of national and supranational competence (or the lack of supranational competence at all). The key driver here is the improved access to investment capital, a variant on the "money for reforms" under NGEU but with expanded sourcing, scope, and reach.

At a general level, the programme would rely heavily on the coordination authority of Article 121 TFEU (Part B, p.311, n.5), the emergency powers of Article 122 TFEU (Part B, p.316), and a range of other unspecified legal bases that would likely need to be reinterpreted to implement the plans that the Report envisions (see, e.g., Part A, p.63, and Part B, pp. 313-14). As for specific legal bases, the Report mentions expanded use of qualified majority voting under the *passerelle* clause in Article 48(7) TEU, which enables the European Council to authorise the Council to act by qualified majority instead of unanimity (Part A, p.64; Part B, p.315), as well as "enhanced cooperation" under Articles 20 TEU and 329 TFEU (Part A, p. 64; Part B, p.315). Finally, "in the clear absence of the required conditions" for enhanced cooperation, the Report proposes reliance on intergovernmental cooperation on the model of the Fiscal Compact (Part B, p. 315). Either way, the plan would rely on "coalitions of the willing" to build new "concentric circles" in the integration project (Part B, p.309), again enhancing its transactional feel.

From a governance and budgetary perspective, in particular, the Report seeks to eventually convert the emergency planning model developed under NGEU into a permanent mode of EU governance. National Resilience and Recovery Plans (NRRPs) under the Recovery and Resilience Facility (RRF) would now become the "Competitiveness Action Plans" within the "Competitiveness Coordination Framework" (Part A, p. 63; Part B, pp.311-13). These plans would pursue "EU Competitiveness Priorities" formulated and adopted by the European Council (presumably to conform to the demands of Article 121 TFEU). We wonder if the NRRPs really are the most suitable model for promoting EU priorities, keeping in mind that the RRF model involves Member States running their own national projects in their own national silos, under light Commission scrutiny, with no effective peer-scrutiny by other Member States.

The plans themselves would be public – as are also, in principle, the NRRPs, for what that's been worth. The Commission, moreover, would again almost certainly play a role in the plans' negotiation, assessment, and implementation, whether supranationally, nationally, or across the public-private divide. The Commission's interlocutors, however, would no longer be just national executives and administrators, as under the NRRPs, but instead "all relevant stakeholders, Member States, experts, the private sector, EU institutions and agencies" (Part B, p.312). It is hard to imagine that the process would be any more transparent than the NRRP process has itself proven to be, and would entail massive outsourcing of rule-making and rule-enforcement power to private entities. Moreover, it contemplates, in effect, delegation of power to a range of entities beyond the Commission – including to private entities – which raises constitutional concerns of its own.

The role of parliaments, national and European

As with NRRPs, moreover, essentially absent from the "Competitiveness Action Plans" or the "Competitiveness Coordination Framework", at least in any meaningful sense, are national parliaments (NPs). Their role, rather, is reserved to enforcing subsidiarity in the general legislative process – more actively, it is hoped (Part B, pp.310-11). In this way, the programme envisions NPs as agents of legislative simplification, pushing the European legislator to focus on implementing competitiveness priorities and less on what could just as easily be regulated nationally (or not at all). This is a laudable aim, of course, but it expresses a quite marginalized vision for NPs in the European system.

To the extent the programme envisions a role for an elected assembly at all, that job is given to the European Parliament (EP) in an unspecified (non-Treaty-based) reform of the operation of emergency powers under Article 122 TFEU. The Report alludes, in effect, to ongoing debates around the need "to clarify [Article 122's] emergency procedure …, ensuring full democratic legitimacy by involving the European Parliament" (Part B, p.316). But the Report then lamely asserts: "To avoid Treaty changes, an Interinstitutional Pact at the beginning of each legislature would allow the codification of past successful practices, and the establishment in advance of clear "rules of the game" to deal with emergency situations" (Part B, p.316). In this way, the contemplated "reform" of Article 122 TFEU circumvents national constitutional requirements for Treaty change, whether involving NPs, national apex courts, or popular referenda, as the case may be.

The unclear role of Article 122 TFEU

The prominence of the discussion of Article 122 TFEU in the Report also raises a host of other questions. What precisely is the provision's role in the proposed reforms? To refresh the memories of our readers, Article 122 TFEU is an emergency clause originally devised to deal with "severe difficulties", "natural disasters" and the like. The Report is unspecific about the role, aside from a few more pointed references in the energy context (Part B, pp.16, 35). But the prominence of Article 122 TFEU in the governance chapter may evoke that, perhaps, all Europeant politics is now somehow emergency politics, including overcoming investment deficits that stretch back decades.

Would Article 122 TFEU provide the basis for some kind of framework regulation only, as it did for the European Union Recovery Instrument (EURI)? This model would then require a separate legal basis for any actual spending, such as the (highly questionable) role served by Article 175(3) TFEU—the cohesion flexibility clause—in the RRF. (The Report in fact makes reference to cohesion financing at few key junctures, e.g., Part B, pp.161, 200, 219, 245, and 312, as well as to the RRF, e.g., Part B, pp.101, 125, 200, 266-67, and 312) Or, more radically, does the programme contemplate a more "flexible" interpretation of Article 122 TFEU, perhaps going so far as serving as the legal basis for an autonomous economic policy competence at the EU level? Might this new programme look to a reinterpretation of Article 122 TFEU as a legal basis beyond emergencies or mere coordination, perhaps even as a basis for spending or borrowing?

If the latter were the position of the Report, then it would be a radical reinterpretation of Article 122 TFEU indeed. No less than the Court of Justice of the European Union (CJEU), has made clear that Article 122 TFEU, more specifically its second paragraph, only provides a legal basis for non-permanent, *ad hoc* measures in situations of severe difficulties, thus holding it could not be used to set up a permanent mechanism (*Pringle*, para. 65 and paras. 105 et seq.). Defenders of the new competitiveness programme might argue that it relies on the two paragraphs of Article 122 TFEU in an undifferentiated manner, a practice also used in the SURE and EURI instruments (though contrary to what *Pringle* requires). The undifferentiated use of Article 122 TFEU, however, is also in tension with the judgment of the German Federal Constitutional Court (FCC) in December 2022. There, the Court stressed that Article 122 TFEU "must generally be interpreted narrowly" (para 174), not least "to avoid turning [it] into a general blanket clause with

hardly any restrictions that could be invoked to authorise virtually any type of measure …" (para 176).

Article 122 TFEU may also have an impact on the EU's budgetary rules, notably the broadly recognized requirement of a balanced budget under Article 310(1) TFEU. The Commission argued regarding NGEU in 2020 that "Article 122 TFEU allows for targeted derogations from standard [budgetary] rules in exceptional crisis situations". That is despite the fact that Article 122 TFEU specifically opens with the proviso "[w]ithout prejudice to any other procedures provided for in the Treaties". But this is besides the point here. The Commission justified derogations from ordinary budget law based on Article 122 TFEU because an Own Resources Decision (ORD) under Article 311 TFEU – essential in these circumstances – would be "of *quasi-constitutional* nature" (emphasis in original) as it "only enters into force after approval by all Member States in accordance with their national constitutional requirements". As a reminder, albeit just short of popular referenda, ORDs regularly require approval by national parliaments. This allowed the Commission to suggest regarding NGEU: "This provides for the necessary democratic legitimacy … necessary to fulfil the Union's objectives."

The Draghi Report does not discuss own resources or ORDs except in passing, and only as a source of frustration and budgetary impediment (see, e.g., Part B, p. 289; see also Part A, p.60). The treatment is nonetheless suggestive. The Report notes that, starting in 2028, the EU will need to devote roughly EUR 30 billion per year to repaying NGEU debt. It then laments,

> *in the absence of a decision on new own resources, effective spending power at the EU level would be mechanically reduced by interest and principal payments. Member States would have to increase their GNI-based contributions to maintain current levels of spending or spending cuts would have to be applied to programmes under the next MFF (Part B, p.289).*

So the question arises: Does the Report see Article 122 TFEU as offering a basis to adopt "targeted derogations from standard [budgetary] rules" as the Commission put it in 2020? Would such "targeted derogations" also fall within the category of "overarching, targeted institutional changes" (Part A, p.14; see also Part B, p.307) on which the Report purports to rely? Afterall, the Report argues that "any possible increase in [own] resources or delay in repayment should be accompanied by reform of the EU budget" (Part B, p.289). Might then Article 122 TFEU be called upon to support "a profound change to the structure and implementation of the EU budget" (Part B, p.308), notably through the creation of a "Competitiveness Pillar" to "direct EU funding towards EU public goods and multi-country industrial projects, as defined under the Competitiveness Coordination Framework" (Part B, p.294)? Among the tools to finance these projects, the Report argues "the EU should continue – building on the model of NGEU – to issue common debt instruments to finance joint investment projects that will increase the EU's competitiveness and security" (Part B, p.296).

Just as with NGEU, this would require a new ORD, perhaps again supported by "targeted derogations from standard [budgetary] rules" under Article 122 TFEU. Time will tell.

Conclusion

In raising these questions, we are saying nothing about the *political expedience* of the programme defined by the Draghi Report. The challenges Europe faces are real, grave, and, partly, self-made. The Report advances a rigorously defined economic policy programme for addressing these challenges. We will leave it to the economists and policy specialists to debate those merits.

As lawyers, the issue here is not about what is politically expedient but whether and to what extent the programme has a solid basis in EU law. We are currently writing a book on the NGEU model and, unfortunately, what our research suggests is that, without Treaty change, the NGEU model is simply too flimsy to bear the weight that permanent regime would place on it. In many respects, this is what this Report seeks to do, building on some of the most

legally questionable features of the NGEU model to alter the nature of EU governance in a permanent way.

Our concern here is not only legal. We are equally concerned about more fundamental tenets of democratic and constitutional legitimacy. There is much in the Draghi Report that is worthy of support, not least on the need to ensure European added valued as a cornerstone of the competitiveness programme (see, e.g., Part B, p.245). But we need to recognize that the Report envisions a transformational set of reforms that demands something more than vague talk of "partnerships", adapting existing modes of governance, or even more strained reinterpretation of existing Treaty provisions. It requires Treaty change. Europe should have the courage to recognize that reality and act accordingly. If done right, re-politicizing these putatively political matters will be for the better – both economically and legally.

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