

## (Re) Conceptualising a Social Market Economy for the EU Internal Market

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### 1. Introduction

It feels like ancient history when in December 2009 the Lisbon Treaty came into force and suggested numerous novelties with respect to the socio-economic goals of the EU. Many heralded the new wording of the objectives of the EU in Article 3 of the Treaty on European Union (TEU), a ‘highly competitive social market economy, aiming at full employment and social progress’. Although the inclusion of social categories was mostly the result of a political compromise, given that, in parallel, one of the goals proposed originally, i.e. that of free and undistorted competition, was excluded from the integration objectives, many commentators assumed that the Lisbon Treaty would significantly strengthen the social aspects of European integration. This expectation has not materialised. In fact, some would argue that, due to EU induced austerity policies, the reverse is true.

Despite the increased attention for the ‘social’ in the Lisbon Treaty, through a commitment to a ‘competitive social market economy’, the recognition of ‘social rights’ in the Charter of Fundamental Rights of the Union (Charter) and new ‘soft law’ mechanisms for the coordination of social and labour market policies, controversial case law from the Court of Justice of the European Union (CJEU) and the austerity policy from the European Commission has resulted in a culmination of social critiques that consider fundamental social objectives such as the right to strike and collective negotiating/agreements to be subordinate to economic rights of free movement.<sup>1</sup>

In the 2010 Mario Monti Report, addressing ‘tensions between market integration and social objectives’, it was stated that:

These are even more vividly exposed, now that the Lisbon Treaty has introduced, even formally, the objective of achieving a ‘highly competitive social market economy’. If the market and the social components do not find an appropriate reconciliation, something has to give in. Following the crisis, with the declining appetite for the market and the increasing concern about inequalities, it is by no means clear that it would be the market, i.e. the single market, to prevail.<sup>2</sup>

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1 See, as a selection: C. Barnard, ‘Viking and Laval: An Introduction’, (2007-2008) 10 CYELS, p. 464; A. Dashwood, ‘Viking and Laval: Issues of Horizontal Direct Effect’, (2007-2008) 10 CYELS, p. 525; A. Davies, ‘One Step Forward, Two Steps Back? Laval and Viking at the ECJ’, (2008) 37 ILJ, p. 126; S. Deakin, ‘Regulatory competition after Laval’, (2007-2008) 10 CYELS, p. 581; C. Kilpatrick, ‘Laval’s Regulatory Conundrum: Collective Standard-Setting and the Court’s New Approach to Postal Workers’, (2009) 34 ELRev, p. 844; C. Joerges & F. Rödl, ‘Informal Politics, Formalised Law and the “Social Deficit” of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval’, (2009) 15 ELJ, p. 1; J. Malmberg & T. Sigeman, ‘Industrial Action and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice’, (2008) 45 CMLRev, p. 1115; T. Novitz, ‘A Human Rights Analysis of the Viking and Laval Judgments’, (2007-2008) 10 CYELS, p. 541; S. Sciarra, ‘Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU’, (2007-2008) 10 CYELS, p. 563; P. Syrpis & T. Novitz, ‘Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation’, (2008) 33 ELRev, p. 411.

2 Monti Report, 2010, 23 Communication COM (2010) 608 final.

Given the continued debate and dissatisfaction with the role of the social within the internal market, the ‘appropriate reconciliation’ between the market and social components remains a topic of much academic salience and the need for a continuing dialogue remains. However, what is the nature of the conflict between the social and the market in the EU? More specifically what is the ‘social’ and the ‘market’? A better understanding of the nature of the conflict between the two spheres may inform the basis and legitimacy for European law to influence or contain the social within the Member States. This contribution to the Special Issue reflects on this and connects this reflection to the historical and current concept of a social market economy as a normative concept within the EU multi-layered legal order. It proposes that the meaning of this concept essentially instructs that socio-economic diversity between the Member States should be cherished and even accommodated in the legal framework of the EU.

The following first reflects on the nature of the conflict between the social and the market (Section 2) and the underlying normative basis for the concept of a social market economy (Section 3). I will then discuss the negative and positive emanations of the social sphere within the internal market and reflect to what extent those emanations align with a particular normative principle (Section 4). Section 5 proposes a mechanism to reconcile the social and the market on the basis of a rationale of mutual responsiveness. I trace elements of this approach to the case law of the CJEU which, contrary to claims in many social critiques, has in fact introduced the basic elements of a reconciliatory framework between the market and the social in its case law. One that aspires to achieve a balance of mutual responsiveness and not necessarily a triumph for either the social or the market.

## 2. The social and the market within the economy

What is the meaning of the ‘social’ within the EU? The social is a fuzzy concept and is often assigned different meanings depending on different contexts. The social as understood in this contribution is by its nature dynamic because it is always connected to particular spheres where, for example, the norms of a professional group provide meaning, value and understanding regarding a certain economic activity that is prescriptive.<sup>3</sup> From this perspective social spheres are abundantly varied within the Member States and can be found in styles of governing such as redistributive governance as an expressive relationship of solidarity between citizens, or a choice for market enabling regulation of industrial relations. However, meaning and context of a social sphere can be understood and limited in operational terms as a sphere that determines the *underlying normative infrastructure of (a segment of) the economy*. Importantly, these normative underpinnings and the underlying rationales may for example determine the nature of a social sphere in terms of being embedded within a market (commodity) or non-market logic.

For example, labour market rules may sometimes fulfil a market enabling function by reducing transaction costs and information asymmetries in wage setting, and, consequently, are not necessarily antithetic to market making.<sup>4</sup> However, this is not the rule; a major tension can exist between the right to strike and market interests. Depending on the normative orientation of the social sphere that regulates this relationship, the very essence of the right to strike may shield workers from the power that capital owners can exercise as holders of capital (and thus of economic freedoms). The underlying normative infrastructure of the social sphere of both types of labour market rules may be fundamentally different. One may be qualified as being embedded within a commodity logic since the underlying rationale follows the allocative logic of the market whilst the other is entrenched in non-market rationales and involves a structure of negotiated deliberative coordination.<sup>5</sup>

From a broader historic perspective, the right balance between the social and the market is an inherently contestable debate. In particular, the concept of a social market economy brings with it a history of socio-economic thought that reaches back into the very fundamentals of the European project. Starting from the

3 See for a similar approach D.J. Galligan, *Law in Modern Society* (2010).

4 A. Ebner, ‘Transnational Markets and the Polanyi Problem’, in C. Joerges & J. Falke (eds), *Globalisation and the Potential of Law in Transnational Markets* (2011), p. 28.

5 The understanding of the social in these terms is inspired by Polanyi and shall be further contextualised below.

introduction of the idea of a social market economy in post-war Germany until today there have roughly been two fundamentally different and seemingly irreconcilable conceptualisations on the relationship between the social and the market within the economy.

Within one conceptualisation the social market economy is primarily reflective of a tension between unfettered free markets and the adverse consequences this can have on social relationships. This can be linked to the idea of embedded liberalism. Those embracing the idea of embedded liberalism propound a clear division between international free trade and national social policies. Within the ideal type of embedded liberalism the social and the market are separated in different spheres and the social is insulated from market forces. This can be juxtaposed with a (German) neoliberal understanding of the social market economy. The neoliberal mould envisages essentially one sphere in which the social and the market act as communicating vessels and the social market economy is approached holistically. Accordingly, adherents to this mould will propose that the 'social' be engineered as a 'beneficial constraint' on the functioning of markets.

Based on this logic many social critiques consider that the social has been largely sacrificed on the altar of EU free movement law.<sup>6</sup> The argument runs roughly as follows. As a result of a trade bias in the legal framework there is a structural preference in favour of deregulation that is targeted against forms of social regulation and interest at the Member State level. Moreover, privatisation of public sectors is pushed through internal market legislation and the application of the competition rules, targeting sectors that were previously in public hands.<sup>7</sup> Unsurprisingly, according to these critiques, the internal market set-up has not resulted in a strong publicly supported EU but rather, to a situation where it seems that scepticism directed towards the EU is distributed unevenly among social groups, between those who have the capability to benefit from the supremacy of the free trade objectives and those who do not.<sup>8</sup> Negative public sentiment is fed through the impact of case law of the CJEU that often appears to set aside social objectives whose impetus originates from a long-standing Member State context.<sup>9</sup>

In the next section I will discuss how looking at the historic origins of the social market economy gives reason to understand the concept as an essentially (German) ordoliberal concept. In this German understanding the social sphere must indeed be approached as something to be *engineered* as complimentary and supportive to the functioning of the market. However, such a neoliberal understanding of the social market economy can and should be juxtaposed with the ideal type of a social market economy in embedded liberalism. Embedded liberalism is also a clear part of the socio-economic legal construct of the EU internal market and the way that EU internal market law is applied and interpreted by different actors. I will discuss that both ideas are in themselves insufficient for an internal market in the EU that should be socially responsive to accommodate both Member States' variegating social systems *and* the objectives of market integration.

### 3. The normative basis of the social market economy

#### 3.1. Embedded liberalism as the basic EU internal market construct

The relationship between the social and the market has a specific meaning within the multilevel governance context of the EU, particularly with respect to the areas of law that are concerned with internal market

6 Most prominently argued by F. Scharpf. See 'The asymmetry of European integration, or why the EU cannot be a "social market economy"', (2009) 8 *Socio-Economic Review*, pp. 211-250; F. Scharpf, 'The European Social Model: Coping with Challenges of Diversity', (2002) 40 *JCMS* 4, pp. 645-670. In contrast, J. A. Caporaso and A. Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets', (2009) 63 *International Organization*, pp. 593-620; K. Lenaerts & T. Heremans, 'Contours of a European Social Union in the Case-Law of the European Court of Justice', (2006) 2 *European Constitutional Law Review*, pp. 101-115.

7 M. Höpner & A. Schäfer, 'Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting', (2012) 66 *International Organization* 429, p. 11.

8 L. McLaren, 'Explaining Mass-Level Euroscepticism: Identity, Interests, and Institutional Distrust', (2007) *Acta Politica* 42, pp. 233-251; H. Kriesi, *West European Politics in the Age of Globalization* (2009).

9 Frequently referred to examples in CJEU case law are cases such as *Centros*, *Überseering* and *Inspire Art* that allow companies to circumvent, for example, national codetermination procedures in Germany by establishing themselves in the UK (C-212/97, *Centros* [1999] ECR I-01459; C-208/00, *Überseering* [2002] ECR I-09919; C-167/01, *Inspire Art* [2003] ECR I-10155), or the *Viking*, *Laval* and *Rüffert* cases (C-438/05, *Viking* [2007] ECR I-10779; C-341/05, *Laval* [2007] ECR I-11767; Case C-346/06 *Rüffert* [2008] ECR I-01989) that frame the right to strike as a narrow exception to the free trade rules, or the *Cadbury Schweppes* and *Marks & Spencer* cases (C-196/04, *Cadbury Schweppes*; C-446/03, *Marks & Spencer*) that, similarly, allow tax-avoidance practices by companies.

integration. To specify this it is necessary to take a step back and look at the post-1945 world economy, which has been described and is generally understood as embodying a particular social bargain.<sup>10</sup> Policymakers were looking to reinvigorate the world economy on the basis of increased international trade within and between open markets. This was, however, to be accompanied by institutional contexts that would explicitly allow for the mitigation of the potential adverse social consequences of increased international trade and competition.<sup>11</sup> It was a shared concern that the absence of such a compromise had led to the collapse of international cooperation in trade and macroeconomic policy during the 1920s and 1930s.<sup>12</sup>

A driving notion behind this was the idea that market systems, which are not considered legitimate within societies, are not sustainable. It would appear that the post-1945 US and European policymakers agreed to some extent with this basic concern.<sup>13</sup> It was considered a necessity to reconcile the need for open markets and unhindered trade with the prevailing values of the social-economic systems that such increased activity affected. In (over)simplified terms: a reconciliation of markets and politics. This reconciliation was pursued within the post-war economic institutions and has been famously coined by John G. Ruggie as a reconciliation on the basis of the compromise of ‘embedded liberalism’:

Unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism.<sup>14</sup>

The idea behind the ‘social bargain’ of embedded liberalism was that through domestic interventionism the socially disruptive effects of transnational free trade would be mitigated without, however, eliminating the economic gains that could be derived from open and transnational markets. This compromise of embedded liberalism has also been to some degree an aspiration for the multilateral construction of the EU internal market project.<sup>15</sup> The EU internal market infrastructure shares an explicit concern for reconciling freedom of (economic) movement and competition objectives with the social structures of Member States. It does so specifically by integrating a dual commitment within its legal infrastructure. The internal market laws determine that, although there is a commitment to intra-European free trade within open markets that accommodate the free movement of goods, capital, services and workers, Member States retain control over domestic interests that are able to override these market integration objectives.

At the time of inception of the European Economic Community (EEC) there existed therefore some clarity with respect to the social impact that the European project would entail. Most importantly, a division was envisaged between what would later be coined in academic quarters as the Economic Constitution and nationally embedded social law and policies.<sup>16</sup> Not only would the EEC be limited in terms of its competences to create social (redistributive) policy, the national social sphere would also largely be insulated from the

10 J.G. Ruggie, ‘International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order, *International Organization*’, (1982) *International Regimes* 36, pp. 379-415 at p. 392: ‘[To] say anything sensible about the content of international economic orders and about the regimes that serve them, it is necessary to look at how power and legitimate social purpose become fused to project political authority into the international-system. Applied to the post World War II context, this argument leads me to characterize the international economic order by the term ‘embedded liberalism.’

11 *Ibid.*, p. 388. See also R. Nurkse, *League of Nations Report: International Currency Experience: Lessons of the Inter-War Period* (1944).

12 Ruggie, *supra* note 10, p. 392. See also S. Marglin & J. Schor, *The Golden Age of Capitalism: Reinterpreting the Postwar Experience* (1990). One of the proponents of this idea was Karl Polanyi. In his 1944 book, *The Great Transformation*, he introduced the idea of ‘embedded’ versus ‘disembedded’ socio-economic orders: K Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (2001).

13 J. Ruggie, ‘Taking Embedded Liberalism Global: The Corporate Connection’, Institute for International Law and Justice Working Paper (New York University School of Law 2003/2); J. Ruggie, ‘Multilateralism: The Anatomy of an Institution’, (1992) *International Organization* 46, pp. 561-598.

14 Ruggie, *supra* note 10, p. 393.

15 Confirmed by the historical reconstruction of Giubboni who coined this as a ‘historical compromise’ in S. Giubboni, *Social Rights and Market Freedoms in the European Constitution. A Labour Law Perspective* (2006), p. 7; more recently see R. Dukes, *The Labour Constitution. The Enduring Idea of Labour Law* (2014), p. 130 ff.

16 M. Streit & W. Mussler, ‘The Economic Constitution of the European Community: From Rome to Maastricht’, (1994) 5 *Constitutional Political Economy*, p. 319; M.P. Maduro, *We the Court. The European Court of Justice and the European Economic Constitution: a Critical Reading of Article 30 of the EC Treaty* (1998); W. Sauter, ‘The Economic Constitution of the European Union’, (1998) 4 *Columbia Journal of European Law*, p. 27; C. Joerges, ‘What is Left of the European Economic Constitution? A Melancholic Eulogy’, (2005) 30 *European Law Review*, pp. 461-489; Giubboni, *Social Rights and Market Freedom in the European Constitution*, *ibid.*, pp. 15-29; K. Tuori & K. Tuori, *The Eurozone Crisis* (2014), p. 13; C. Joerges, ‘The European Economic Constitution and its Transformation through the Financial Crisis’, ZenTra Working Papers in Transnational Studies No 47/2015; H. Hofmann & K. Pantazatou, ‘The Transformation of the European Economic Constitution’, University of Luxembourg Law Working Paper 2015-01.

supranational market order.<sup>17</sup> Thus came into existence the idea of a ‘de-coupled’ supranational market order that was largely separate from the national democratic social constitutions of the Member States.<sup>18</sup> The idea behind de-coupling the economic from the social was in part envisaged to secure the social embeddedness of market liberalisation and can be traced to a commitment to fulfil the post-war Ruggian notion of embedded liberalism.<sup>19</sup> In addition, the national welfare states were, at that time of their short-lived golden age, providing post-war European citizens with not only much needed financial support, but also the governing methods to strengthen and repair the fragile bonds between citizens and national institutions.<sup>20</sup> The paradigmatic example of this de-coupling has always been the insulation and preservation of the ‘autonomy’ of national labour law.<sup>21</sup> Labour law was considered to provide the fundamental shielded separation of the weaker party against the more powerful capitalist owner and modes of mass production that would commodify labour within its efficiency rationales.<sup>22</sup>

Originally, therefore, the choice for de-coupling was made with the intention to strengthen national welfare states from supranational market forces and the economic benefits that would be derived from the establishment of an integrated market would in time provide increased financial means to ensure the maintenance of higher social standards.<sup>23</sup> It is pertinent to understand that what can be considered as the autonomy of the national social sphere allowed for the existence and development of insulated nationally embedded organisational rationales. These were largely based on a logic of *closure*<sup>24</sup> that could develop separately from the integrating European market, which logic was concomitantly being progressively interpreted by the CJEU as one of *opening* up national markets. A fundamental clash was therefore always long in the making, a clash that was arguably catalysed by the revealed flaws in the design of the welfare state during the crisis of the 1970s.<sup>25</sup> Although the fundamental aspects of national social law and policy such as collective action and national solidarity have historically been preserved and shielded from the dynamics of the internal market, today this de-coupling is no longer maintained.

In addition to processes of globalisation, a significant challenge to the social insulation of Member States has come in the form of an extension of the interpretation of the scope of the internal market rules by EU institutions, most notably the CJEU. The classic conflict in the area of internal market law is one of a Member States measure that restricts cross-border economic movement. In non-harmonised contexts this type of ‘classical conflict’ scenario is generally perceived as *vertical*. That is to say, the national measure will need to be justified within a higher order rule that simply has precedence on the basis of the supremacy of EU law. From the moment that the CJEU began to approach social structures within Member States as potential restrictions and *vertical* conflict constellations, the mediation of these conflicts started to raise fundamental questions with respect to the legitimacy of internal market law. The CJEU has started, at times, to reach deep into the fundamental structures of nationally embedded and differentiated social structures. This has been characterised as the steady ‘infiltration’<sup>26</sup> of internal market rules towards the social spheres of Member States. An infiltration the CJEU started, albeit tentatively, in

17 See also M Dawson, *New Governance and the Transformation of European Law* (2011), p. 39.

18 For e.g. F. Scharpf, ‘The Asymmetry of European Integration’, supra note 6; Joerges and Rödl, supra note 1, pp. 1-19.

19 S. Giubboni, *Social Rights and Market Freedom in the European Constitution*, supra note 15, pp. 15-29.

20 F. Costamagna, ‘The Internal Market and the Welfare State: Anything New after Lisbon?’, in M. Trybus & L. Rubini (eds.), *The Treaty of Lisbon and the Future of European Law and Policy* (2012), pp. 381-400.

21 Giubboni, *Social Rights and Market Freedom in the European Constitution*, supra note 15. See also further S. Giubboni, *Diritti sociali e mercato. La dimensione sociale dell’integrazione europea* (2003).

22 R. Dukes, *The Labour Constitution – The Enduring Idea of Labour Law* (2014).

23 Costamagna, supra note 20, p. 386.

24 S. Liebfried & P. Pierson, ‘Semisovereign Welfare States: Social Policy in a Multitiered Europe’, in S. Liebfried & P. Pierson (eds.), *European Social Policy: Between Fragmentation and Integration*, (1995), pp. 43-77.

25 See further e.g. B. Lange et al. (eds.), *Regulatory Transformations: Rethinking Economy-Society Interactions* (2015). One of the soon to become dominant organisational rationales that developed in response to the 1970s crisis was that of new public management. This movement sought to replace the national welfare rationales inspired by public-spiritedness and collectivity with market-enabling rationales that installed managerial standards of efficiency. It was at the time part of a wider programme which seeming ambition was to expediently install economic efficiency and cost-benefit rationales as the main consideration for the development of socio-economic policy. This rationale has been adopted with some fervour by the European Commission as well.

26 G. Lyon-Caen, ‘L’infiltration du droit du travail par le droit de la concurrence’, (1992) *Droit ouvrier*, pp. 313-359.

the 1990s,<sup>27</sup> at that time still employing a skilful self-restraint to assess the compatibility of previously isolated Member States social spheres with the functioning of a competitive internal market. It did so at first with respect to the potential application of competition law to health insurers that were operating in environments based on solidarity principles and reviewing compulsory membership rules with respect to pension schemes.<sup>28</sup> It is today, however, commonplace to see EU state aid rules applied with respect to the national compensation schemes for welfare services' providers.<sup>29</sup> Moreover, and paradigmatically, the CJEU in the area of free movement law today simply considers that Member States' social law and policy may qualify as measures taken by a Member State which affect access to the market for companies from other Member States and have to be justified within a proportionality mould that often employs market-enabling rationales.

On this basis, the two once separated spheres have become connected in the case law of the CJEU and many consider that the connection has been made at the cost of the social.<sup>30</sup> This has become, again, particularly visible in the case law. Methods of hierarchical balancing that are employed by the Court suggest national social law and policy can only exist insofar as it can be considered a reasonable correction to the functioning of the market.<sup>31</sup> Case law in recent years has interpreted minimum social rights as ceilings<sup>32</sup> and has given pre-emptive effects to partial-social-harmonisation directives within the internal market by forbidding more favourable national treatment for workers.<sup>33</sup> However, it might very well be argued that this conceptualisation of the Treaty of Rome originated from German ordoliberal scholars who from the start envisaged a very specific socio-economic paradigm with normative implication for the scope of European law.<sup>34</sup>

### 3.2. German ordoliberalism

The idea of a social market economy (*Soziale Marktwirtschaft*) was entrenched and promoted in West Germany by the Christian Democratic Union (CDU) under Chancellor Konrad Adenauer in 1949. The central idea being that free market capitalism is combined with social policies, which establish both fair competition within the market and a welfare state. Its intellectual foundation lies in the works of the ordoliberals in Germany: Walter Eucken, Franz Böhm, Alexander Rüstow, Wilhelm Röpke and Alfred Müller-Armack.<sup>35</sup> In the face of Weimar economic crisis and political turmoil that followed it, they advanced a programme of liberal-conservative transformation that focused on the strong State as the locus of social and economic order. They reject the idea of the weak State as tantamount to disaster and argue that the free economy is fundamentally a practice of government.

Although both concepts (embedded liberalism and the social market economy) appear perfectly reconcilable there exist some important nuances and differences that distinguish and eventually juxtapose these ideas. This becomes apparent in particular when looking closer at the historical and intellectual roots of the concept of a social market economy in Germany, in particular when looking at the historical reading that Michel Foucault gives in this respect.<sup>36</sup> Firstly, the idea of a social market economy served primarily as a means to provide new legitimacy to the German State directly after the Second World War. In a speech in

27 Augustin Menéndez traces this 'positive standard of constitutionality' back to *Cassis de Dijon*, Case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* [1979] ECR I 00649. Menéndez provides a compelling argument that this shift explains much of the abrasiveness of post 1970s CJEU case law and that from this moment internal market conflicts have become relevant, primarily, in policy substantive terms. A Menéndez, 'United they Diverge? From Conflicts to Constitutional Theory? Critical Remarks on Joerges' Theory of Conflicts of Law', RECON WP 2011/6 (2011), p. 24.

28 Case C-67/96, *Albany*, [1999] ECR I-5751; Case C-160/91, *Poucet and Pistre*, [1993] ECR I-637; Case C-218/00, *Cisal and INAIL*, [2002] ECR I-691; Case C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband*, [2004] ECR I-2493; Case C-355/00, *Freskot*, [2003] ECR I-5263.

29 Case T-289/03, *BUPA*, [2008] ECR II-00081.

30 See e.g. Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence', (2015) 21 *European Law Journal* pp. 2–22.

31 Cf. specifically L. Niglia, 'Eclipse of the Constitution', (2016) 22 *European Law Journal*, pp. 132–156.

32 Case C-341/05, *Laval*, [2007] ERC I-11767; Case C-346/06 *Rüffert* [2008] ERC I-01989.

33 Case C-426/11 *Alema-Herron*, ECLI:EU:C:2013:521. See further Kilpatrick, supra note 1.

34 Further on this, see C. Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart 2016).

35 C.L. Glossner, *The Making of the German Post-War Economy – Political Communication and Public Reception of the Social Market Economy after World War II* (OUP 2010).

36 M. Foucault (translated by M. Senellart), *The birth of biopolitics: Lectures at the college de France, 1978-1979* (OUP 2011).

1948 Erhard (a crucial figure in post war infrastructure of the German State, first as minister of economic affairs and later of course as chancellor) said:

We must free the economy from state control (...) We must avoid both anarchy and the termite state [because] only a state that established both the freedom and responsibility of the citizens can legitimately speak in the name of the people.<sup>37</sup>

The idea of an institutional framework that would guarantee economic freedom as a source of legitimacy of state power resolved the difficult question of legitimacy for the German State in the aftermath of the war. The economy would produce the legitimacy that was necessary for the German State that would be its ultimate guarantor: 'History had said no to the German State, but now the economy will allow it to assert itself.'<sup>38</sup> Therefore, economic freedom would become both the foundation and the limitation of the German State. Although the movement coined itself as ordoliberalism, Foucault coins this moment as the original birth of neo-liberalism. Liberalism no longer as just a question of where the State ends and the market begins and vice-versa but redefined as a question with respect to not only the limitation but also the *internal existence and rationale* of the State itself.

This was indeed the fundamental innovative idea of the '*ordoliberals*': from this moment the market becomes the flag-bearer of many truths and thus goes far beyond the potential ascribed to the market in the liberal thought that was shaped in the 18th century.<sup>39</sup> Here the market was called upon to say to the State: beyond these limits regarding such and such questions and domains you will no longer intervene. The ordoliberals argue that this is not enough. The ordoliberals, strengthened by the direct experience of fascism and Nazism, assess that the State is the bearer of intrinsic defects and concomitantly establish that there is no convincing proof that the market has these defects. Therefore, they propose 'let's ask the market economy itself to be the principle of the States' internal regulation from start to finish of its existence and action'. So instead of accepting a free market that is defined by the State and kept as it were under State supervision the ordoliberals intention is to establish a space of economic freedom and construct a State around it that will be responsible for its functioning.<sup>40</sup>

An opinion of Advocate General (AG) Bot illustrates how this idea potentially translates into a governmentality in the Scottish Whiskey case. In order to reduce the consumption of alcohol, the Scottish Parliament passed a law prohibiting the sale of alcohol at a price below a minimum price that was calculated on the basis of the content in alcohol. AG Bot considered that this measure unnecessarily restricted the free movement of goods and that measures were available that could achieve the same aims but would restrict less the free formation of prices. He reasoned: 'the objective of protecting public health might be adequately pursued by the increased taxation of manufactured tobacco products, which would safeguard the principle of free formation of prices',<sup>41</sup> thus favouring taxation over the imposition of a minimum price so as not to interfere with the free formation of prices. The essence of ordoliberalism thus perceived is exactly how the overall exercise of political power can be modelled on the principles of a market economy.

For the ordoliberals the social question poses a very central concern. Social policy for the ordoliberals (with the exception of Eucken who takes an overall more progressive stand) is essentially a counterweight to unrestrained economic processes which will induce inequality and destructive effects on society if left to themselves. This corrective is necessary in order to let the market function better. Within this conceptualisation of the economy social policy has become at most a corrective rationale and ideally a form that allows the individual to participate in the economy to its fullest potential. The formalisation of society

37 Ibid., p. 162.

38 Ibid., p. 86.

39 Ibid., p. 180.

40 However, see e.g. the work of P. Behrens, 'The 'consumer choice' paradigm in German Ordoliberalism and its impact upon EU Competition Law', (Europa-Kolleg Hamburg, Institute for European Integration, Discussion Paper No 1/2014), who would argue that the ordoliberal concept has evolved.

41 Opinion AG Bot in Case C-333/14, *The Scotch Whisky Association*, para. 44.

on the model of the enterprise. This is what Muller-Armack around 1952-1953 called 'the social market economy'.<sup>42</sup>

Crucially, all of this is to be achieved through the rule of law, the entrenchment of an economic constitution binding on the State and enabling and coercing the State to act as a guarantor of these principles. The question I will now reflect on is how this resonates within the EU legal order.

#### 4. Positive and negative emanations of the social sphere in the internal market

There are various ways to look upon the way that internal market law conditions the emergence of Member States' social spheres within its legal framework. Within the multilevel context of the EU, the social sphere as understood here is influenced in at least two ways that are relevant to distinguish from each other for the purpose of conceptualising a social market economy. On one level the EU produces legislation that influences the social sphere. This can be said to be the 'positive' form of influence on the social sphere. On another level the social sphere is contingent on the fulfilment of requirements that flow from the internal market rules. This can be said to be the 'negative' form of influence on the social sphere.<sup>43</sup> The positive form exists on the level of EU policy and within specific EU institutional and legal contexts. Its sources are found in the legal provisions that govern the competence of different institutions to enact legislation for the functioning of the internal market.<sup>44</sup> Regulations, directives and non-legislative acts including new forms of governance fall under this heading of the positive social sphere.

The negative provides a conditional form for the social sphere that is deemed contingent on the fulfilment of specific EU internal market requirements. Here adjudication of the CJEU, in determining the conditions under which certain policy within Member States is restrictive, becomes a form of social ordering.<sup>45</sup> It determines how the relationship between the social and economic sphere is to be governed and the adjudicative determinations of the Court regarding this relationship will normally enter in some degree into the future relationship between these two spheres in the internal market.

##### 4.1. The 'positive' social sphere in the internal market

In 1957 the principle of equal pay for men and women was part of the Treaty of Rome. Although undeniably of social content, this did, however, not influence concretely the social sphere within Member States, nor did the Social Charter of 1986, which was at that time, only declaratory.<sup>46</sup> The first, more concrete positive influence concerned the Social Protocol of the Maastricht Treaty, which added social provisions on workers' safety and health and introduced obligations for the Commission to consult management and labour when proposing legislation.<sup>47</sup> It also established the Social Dialogue.<sup>48</sup> The so-called European Employment Strategy was introduced with the Amsterdam Treaty in 1997, which also established the Employment and Social Policy Titles.<sup>49</sup> The Treaty of Nice (2001) also established some joint rights for the Community to take action in tackling social exclusion.<sup>50</sup> More generally, one can see a trend from the 1990s onwards of an increase of 'minimal standards' introduced at the EU level.<sup>51</sup> Moreover and in particular, the environmental

42 Alexander Rüstow, 'Die geschichtliche Bedeutung der sozialen Marktwirtschaft', in E. Beckerath, F. Meyer, A. Müller-Armak, (ed), *Wirtschaftsfragen der freien Welt* (1957 Keip Verlag)

43 Cf. Scharpf's distinction of positive and negative integration. F. Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States', in G. Marks et al. (eds.), *Governance in the European Union* (1996), p. 15.

44 Arts 114, 115 and 352 of the Treaty on the Functioning of the European Union.

45 L.L. Fuller & K.I. Winston, 'The Forms and Limits of Adjudication', (1978) 92 *Harvard Law Review*, p. 353.

46 M. Savevska, 'Polanyian Reading of the Socio-Economic Transformations of the European Union', (2014) 22 *Journal of Contemporary European Studies*, pp. 395-410.

47 See further J. Goetschy, 'Taking Stock of Social Europe: is there such a Thing as a Community Social Model?', in M. Jespen & A.S. Pascual (eds.), *Unwrapping the European Social Model* (2006), p. 66.

48 See further C. De Gryse, 'Historical and Institutional Background to the Cross-industry Social Dialogue', in A.D. Dufresne & P. Pochet (eds.), *The European Sectoral Social Dialogue* (2006), p. 31.

49 J. Goetschy, 'The Lisbon Strategy and Social Europe: Two Closely Linked Destinies', in M.D. Rodrigues (ed), *Europe, Globalization and the Lisbon Agenda* (2009), pp. 74-90.

50 P. Watson, *EU Social and Employment Law* (2009).

51 See further the extensive overview in Savevska, supra note 46: minimum rules concerning gender equality, part-time regulation, fixed-term work, parental leave, consultation of labour, work councils, health and safety at work and transfer of social benefits.

policy output over the years has been impressive,<sup>52</sup> with directives on a variety of topics. Importantly, the ‘Lisbon Strategy’ in 2000 introduced and set out the Open Method of Coordination (OMC) in social policy. Environmental policy was added to the OMC one year after. The OMC introduced ‘close coordination’ between the Member States in areas that fall outside the exclusive competence of the EU.<sup>53</sup> The OMC is also used for the implementation of the new 2020 Strategy, which ‘consists of quantitative targets aimed at securing smart, sustainable and inclusive growth’.<sup>54</sup>

These examples of a positive, constitutive impact on the social sphere have to be contextualised within the specific function and context that they emerge on the EU level. Simply said, it is often social content that can be seen as something ancillary to wider economic objectives, precisely as the ordoliberalists would like to see the social be engineered towards a beneficial constraint on market processes.<sup>55</sup> An example is the definition of social inclusion as an employment objective such as employability, empowerment and the enablement of the individual.<sup>56</sup> The Lisbon Agenda that was continued in the new Europe 2020 Agenda equates social cohesion (normally defined as the bond that brings people together in a given society) with activation, lifelong learning and flexicurity. Social cohesion is therefore sought not through protecting labour from market forces but to include labour in the market as much as possible.<sup>57</sup> Discourses are created that equate social cohesion with people’s potential to participate in the labour market. Importantly, the discourse that is established in the pursuit of social cohesion and inclusion does not consider that there may exist a tension between transforming the EU into ‘the most competitive and dynamic knowledge-based economy’ and the development of social cohesion and inclusion policy.<sup>58</sup> Social policy is supposed to assist people into becoming successful market participants.<sup>59</sup> In this way the social objective of inclusion is ‘regulated’ in order to channel this interest through an institutional mechanism that makes it controllable with the ultimate objective to allow sectors of an economy to perform better. Take, by way of illustration, the discourse on ‘sustainable development’. A discourse that *recontextualises* external nature, first, in terms of an ecosystem and, second, as an area in which rights to pollute can be traded. Thereby, previously untapped areas are being opened in the interest of capitalisation and chances for commercial exploitation. To dramatise things once could posit that, thereby, nature and life itself are being drawn into the economic discourse of efficient resource management. As this process adopts primarily a shift in *representation* whereby, in this case, previously untouched aspects of nature and society become *internal* to a process of marketisation. Arguably this emanation of the social within the internal market is largely in accordance with the original neoliberal German understanding of the social market economy.

This trend at the EU level followed a wave of reforms during the 1980s in many Organisation for Economic, Co-operation and Development (OECD) countries that were inspired by market informed measures, that led to liberalisation of labour markets, capital markets, deregulation of industry and the privatisation of State enterprises.<sup>60</sup> Importantly, during this time, many public sector departments were restructured and downsized through outsourcing and the instalment of so called ‘new public management’ tools.<sup>61</sup> This basically installed a new rationality with respect to public management, introducing a move towards entrepreneurial systems of public management that were largely market informed. Although, over

52 See further J. McCormick, *Environmental Policy in the European Union* (2001); S. Oberthür & M. Pallemmaerts (eds.), *The New Climate Policies of the European Union : Internal Legislation and Climate Diplomacy* (2010).

53 L. Tholoniati, ‘The Career of the Open Method of Coordination: Lessons from a “Soft” EU Instrument’, (2010) 33 *West European Politics*, pp. 93-117; C.F. Sabel & J. Zeitlin, *Experimentalist Governance in the European Union towards a New Architecture* (2010).

54 European Commission, *EUROPE 2020: A Strategy for Smart, Sustainable and Inclusive Growth* (COM(2010) Brussels).

55 See further also the brilliant analysis of A. Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (2011).

56 For e.g. B. van Apeldoorn, ‘The Contradictions of “Embedded Neoliberalism” and Europe’s Multi-level Legitimacy Crisis: The European Project and its Limits’, in B. van Apeldoorn et al. (eds.), *Contradictions and Limits of Neoliberal European Governance: From Lisbon to Lisbon* (2008), pp. 21-43.

57 Ibid.

58 Ibid.

59 See on this also D. Ashiagbor, ‘Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration’, (2013) 3 *European Law Journal*, pp. 303-324.

60 See further e.g. F. Toth, ‘Healthcare Policies over the Last 20 Years: Reforms and Counter-Reforms’, (2010) 95 *Health Policy*, p. 82; T. Judt, *Postwar: A History of Europe since 1945* (2006), p. 556.

61 J.E. Lane, *New Public Management* (2002), p. 147.

the course of the 1990s this trend became less radical through counter-reforms, today, a lot of public policy is still informed by and measured in terms of success through a market-based metric.<sup>62</sup>

Overall, it may very well be argued that within the context of EU internal market legislation a social sphere is mostly engineered instrumentally for the purpose of, essentially, economic objectives.<sup>63</sup> This is policy that is created mainly with the purpose of making markets work better by channelling social concerns within a model that renders the social sphere more *manageable*.<sup>64</sup> Hence, this emanation of the social sphere is generally considered as reconcilable with the EU's economic objectives:<sup>65</sup> if the social is engineered to function as a measure of increased productivity it qualifies as a *beneficial constraint* on the market because it actually lets the market function better than it would function without the constraint.<sup>66</sup>

The legislative powers conferred on the EU to harmonise laws for the purpose and benefit of the functioning of the Internal Market have been largely employed to pursue the creation of what may be called a commodified social sphere. There may be a reason for this since the EU legislature can often only seek recourse to a harmonisation measure at the moment that there are differences between national rules 'which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market'.<sup>67</sup> Normative concerns over the functioning of this positive impact on the social sphere may exist on the basis of the fact that they are largely established on the basis of a covert technocratic process that depoliticises the formulation and pursuit of social objectives and disregards the normative infrastructure of the economies within the Member States. This leads to concerns about its democratic legitimacy and can be seen as an encroachment on the constitutional space for Member States to develop social policy. This commodified social content can in many ways be critiqued as being unresponsive to the idea of social plurality and diversity.

#### 4.2. The internal market rules as a negative contingent form for the social sphere

European law strives to create an internal market it may want to change or modify the behaviour of a profession or style of government and, consequently, enter the 'social sphere' within a Member State and confront the embedded conventions and value systems and understandings. In some cases EU law will render the social sphere compatible, at times reinforcing the conventions and understandings, for example by holding that competition restrictive practices of law associations may be considered to be legitimate when the integrity of the law profession is at stake.<sup>68</sup> In other cases the object of internal market law can be seen to function so as to expressly change the conventions and understandings, for example by holding that the right to strike within a Member State is only allowed if it is exercised in a proportional manner.<sup>69</sup> Between these two examples there exist of course different shades of compatibility and incompatibility, depending on the normative interpretation of the law. The positive influence on the social sphere should be differentiated from this more covert and contingent emanation of Member State social spheres within EU internal market law. The latter refers to situations where the internal market rules are functioning in their evaluative role and govern Member State social rules and structures by virtue of the fact that these social contexts can be considered as restrictive of the free circulation of economic factors and, from that point onwards, can only be considered to be in accordance with EU internal market law if they can be considered

62 E.g. OECD, *Public Administration after 'New Public Management': Value for Money in Government*, vol 1 (2010).

63 Ibid.

64 See more generally N.S. Rose, *Governing the Present: Administering Economic, Social and Personal Life* (2008).

65 See also C. Kaupa, 'Maybe not Activist Enough? On the Court's Alleged Neoliberal Bias in its Recent Labor Cases', in B. de Witte et al. *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (2013), pp. 56-75.

66 On the concept of beneficial constraints, see originally W. Streeck, 'Beneficial Constraints: On the Economic Limits of Rational Voluntarism', in J. Rogers Hollingsworth & R. Boyer (eds.), *Contemporary Capitalism: The Embeddedness of Institutions* (1997), pp. 197-218. Further discussion in T. Dobbins, 'The Case for "Beneficial Constraints": Why Permissive Voluntarism Impedes Workplace Cooperation in Ireland', (2010) 35 *Economic and Industrial Democracy*, p. 497; W. Streeck, 'Educating Capitalists: A Rejoinder to Wright and Tsakalotos', (2010) 2 *Socio-Economic Review*, p. 425; E. Tsakalotos, 'Market Constraints, Economic Performance and Political Power: Modernizers versus Leftists', (2004) 2 *Socio-Economic Review*, p. 415.

67 See Case C-58/08, *Vodafone and Others*, [2010] ECR I-4999, para. 32.

68 E.g. Case C-309/99, *Wouters and Others*, [2002] ECR I-1577.

69 E.g. Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779.

as ‘legitimate’ and ‘proportionate’ or, in the case of the competition rules, if they fulfil a set of efficiency criteria. These rules can be said, from an EU perspective, to be constitutive of ‘legitimate’ social spheres.

A good illustration is provided by the policy of the European Commission towards regulating the liberal professions. In the course of the 1990s, the European Commission adopted a new policy with respect to the liberal professions in the Member States. Liberal professions are occupations requiring special training in the liberal arts or sciences, for example lawyers, notaries, engineers, architects, accountants and pharmacists. The sector is usually characterised by a high level of regulation, in the form of either State regulation or self-regulation by professional bodies. This regulation can affect, *inter alia*, the numbers of entrants into the profession; the prices professionals may charge and the permitted charging arrangements (e.g. contingency fees); the organisational structure of professional service undertakings; their ability to advertise; and the tasks which are reserved for the members of the profession. The European Commission acknowledged early on that some regulation in this sector is justified but, as part of the more economic approach, it started to pursue an agenda on the basis of the idea that in some cases more pro-competitive mechanisms can and should be used instead of certain traditional restrictive rules.<sup>70</sup> Former Commissioner of Competition Mario Monti explains the liberalisation policy of the Commission in this regard as follows:

The present level of rules and regulation of liberal professions owe some debt to historical convention. How many are still needed in the modern world? Do they hinder or favour the development of the sector? Let me be provocative: Do they protect the consumers or the professionals? I propose to assess whether existing rules and regulations, which, remember, were devised and enacted in a very different economic context to that which exists today, continue to serve the legitimate purposes of the protection of the public interest. I would also like to assess whether they are the most efficient mechanisms available in the current market situation. It is clear that across the [EU] there are different regulatory mixes. As the study shows, different regulatory choices produce different outcomes in the market and it is possible that some regulatory mixes have more beneficial market outcomes than others. *It should be difficult to argue against those that have the least distorting effect on the workings of the market, while delivering the same, or even higher, turnover.*<sup>71</sup>

On the one hand, in the first part of the speech, competition law is perceived as a constructive tool of European law, testing old conventions and requiring renewed articulation of the pursuit of public interests. On the other hand, in the second part of the speech, the idea emerges that self-regulatory systems should, however, be tested on the basis of their ‘efficiency’ merits: ‘It should be difficult to argue against those that have the least distorting effect on the workings of the market, *while delivering the same, or even higher, turnover.*’ Competition rules, in particular Article 101 of the Treaty on the Functioning of the European Union (TFEU) as interpreted by the European Commission, place great emphasis on the benefits that consumers accrue from the process of competition. Solely by virtue of this fact, social relations between producers, which collectively pursue interests on the supply side of the market, are on the back footings.<sup>72</sup> The adoption of this efficiency-based rationale has been pushed in the incorporation and ‘soft’ review of national regulatory systems which has largely been incorporated by national competition authorities. Here we see the beginnings of the mobilisation of a specific economic rationality – one that is capable to change the socio-economic face of the Member States.

If the test is passed then social policy, although restrictive of trade interests, can be considered to exist in accordance with EU internal market law. The importance of this conditioned emanation of the social sphere within the legal frameworks of the EU internal market should not be understated. The increase of the scope of application of the EU free movement rules has led to a situation where, theoretically, all social policy measures that are capable of restricting access to a market of an economic operator, that are restrictive of competition or provide a selective economic advantage, are captured and in that sense the EU legal frameworks can to a large extent be seen as a constitutive framework of social realities that originate

70 See further I. Wendt, *EU Competition Law and Liberal Professions: An Uneasy Relationship?* (2012).

71 M. Monti, Commissioner for Competition: European Commission, *Competition in Professional Services: New Light and New Challenges*, Bundesanwaltschaftskammer Berlin (2003), available at <[http://europa.eu/rapid/press-release\\_SPEECH-03-149\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-03-149_en.htm)> (last visited 12 June 2019) (emphasis added).

72 See J. Whitman, ‘Consumerism versus Producerism: A Study in Comparative Law’, (2007) *Yale Law Journal*, p. 340.

from a Member State level, targeting a wide variety of Member States' political regulations as obstacles to European law and not only political regulations but also the actions of private bodies such as firms or trade unions.<sup>73</sup> Moreover, the decentralised enforcement of the EU competition rules, which require self-assessments from undertakings, have the potential to significantly influence the content of 'private sphere' rules that are constitutive of local social spheres within the Member States.

## 5. Reconciling the social and the market on the basis of mutual responsiveness

At the heart of the earlier paraphrased social critiques on European market integration lies a fundamental tension and irreconcilability between market integration and 'social values'. Somehow, enabling the market and enforcing principles that would allow for its smooth functioning threaten the social fabric of the Member States. It is this fundamental tension between 'the market' and 'the social' that was also identified by the German ordoliberalists who proposed to engineer the social into the realm of the market in order to contain the fundamental tension.

Within the idea of embedded liberalism the problem would be resolved through a complete separation of the two spheres. However, instead of perceiving the market and the social as *necessarily* requiring one to trump the other in situations of conflict, or to perceive the social merely as *ancillary* to economic objectives (as is the case with regards to flexicurity and so forth), it is perhaps possible to advance a more reconciliatory approach that conceives the market and the social as 'communicating vessels'.<sup>74</sup>

As conceived by Christian Joerges, it is important to note that, in principle, the divide between Member State social policy and the supranational 'economic constitution' has always been intentional and very much a part of the constitutional model of the EU:

This was its constitutional-supranational *raison d'être*. Social policy was treated as a categorically distinct subject. It belonged to the domain of political legislation, and, as such, had to remain national. The social embeddedness of the market could, and, indeed, should, be accomplished by the Member States in various ways (...)<sup>75</sup>

The EU's economic objectives were therefore to be seen as transnational and apolitical whereas the social remained national and political. This dichotomy led Joerges to conceptualise the EU internal market in terms of 'deliberative supranationalism'.<sup>76</sup>

The argument of deliberative supranationalism is, roughly, that the 'post-national' legitimacy of governance within constitutional States is flawed to the extent that it is unable to include 'foreign' identities and their interests within national decision-making processes. Therefore, the legitimacy of supranational institutions can be derived from this compensatory function:

We must conceptualise supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state's constitutional legitimacy, but, at the same time, clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimised states and with the supranational prerogatives that an institutionalisation of this interdependence requires.<sup>77</sup>

Joerges' argument developed in what is now mostly, and arguably more aptly, coined as the 'argument from containment' or the 'argument from transnational effects'<sup>78</sup> and instructs to qualify the process of

73 Supra note 69. See on horizontal effect H. Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law', (2012) 18 *European Law Journal*, pp. 177-200.

74 Cf. C. Crouch, *Making Capitalism Fit for Society* (2013), p. 37.

75 Joerges & Rödl, supra note 1.

76 C. Joerges & J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes', (1997) 3 *European Law Journal*, p. 273.

77 C. Joerges, "'Deliberative Political Processes" Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making?', (2006) 44 *Journal of Common Market Studies*, p. 779, at p. 790.

78 Joerges & Neyer, supra note 76. See also A. Somek, 'The argument from transnational effects I: Representing outsiders through freedom of movement', (2010) 16 *European Law Journal*, p. 320; M.P. Maduro, *We the Court* (Hart 1998), who then proceeded to popularise the argument.

integration as an exercise whereby traditional, out-dated, unrepresentative manifestations of national defected forms of decision making are removed on the basis of the idea that these are hostile towards transnational interests and inappropriate within an integrating European market, at least the one to which Member States have committed themselves in the treaties. For example in the case of *Corbeau* the CJEU reviewed the Belgian postal monopoly created by laws in the 1950s and 1970s.<sup>79</sup> Demand for the courier service offered by Corbeau did not exist to the same extent and the monopoly was considered to exclusively serve a privileged and entrenched group of interests. However, in 1993 societal developments had outgrown the basis for the law at that time and needed to be reconsidered and modernised. Similarly, in the *Albany* case, certain individuals were concerned that they would be forced to join compulsory industrial pension schemes, despite the fact that the free market offered better deals.<sup>80</sup>

Miguel Maduro popularised this impact of the argument of transnational effects with respect to the fundamental internal market freedoms and applied this idea to demonstrate, in a structural manner, why and how the argument from transnational effects can be read into the application of the internal market rules and require States to internalise their choices that affect outsiders.<sup>81</sup> Maduro notes for example, with regard to free movement case law, that even where the CJEU has adopted a wide interpretation of the scope of free movement provisions, it has done so in the belief for a need to place constitutional limits on State interventions in the market, not for the purpose of the market but for considerations related to the accommodation of interests that are not part of national democratic governance structures.<sup>82</sup> In other words, the ambitions of the EU free movement rules are not ‘market’ oriented but aim to achieve integration amongst otherwise defunct national democracies. The larger point here is that internal market law potentially allows reconsideration and emancipation from out-dated, unrepresentative forms of institutions and schemes. Modern perspectives on life (no ‘job for life’, mobility and flexibility) have influenced people’s identity, ‘depending on their geographical proximity, collective history and experiences, common values and ambitions’.<sup>83</sup>

Within this view the EU internal market is or should be a subtle and constructive means towards a new transnational *more responsive* democratic nation State, one that is sensitive towards the interests of entities that fall outside of its direct political reach and procedures. The traditional internal market obligations for Member States fit within this perspective: they cannot implement their interests or laws without restraint, but are:

obliged to respect the European freedoms; they are not allowed to discriminate and can pursue only legitimate regulatory policies; they must, in relation to the objectives that they wish to pursue through regulation, harmonise with each other, and they must reform their national systems in the most community-friendly way possible.<sup>84</sup>

In other words, the value of internal market integration is exactly to constrain national self-expression, ‘so as to mitigate what are regarded as its potential excesses: the exclusion of certain interests from the political process, and its capacity for sovereign violence in limiting permissible behaviour’.<sup>85</sup> Hence, the argument from containment conceptualises the intentions of the EU internal market not necessarily as ‘pro trade’ but as a means to engage in a dialogue with Member States on how their national systems can and need to be adjusted in order to accommodate the out of nation State interests that are to be made part of national processes of governing or governance structures. As such, this view is informed by the most obvious empirical facts that characterise the EU today: the diversity of socio-economic constellations of the

79 Case C-320/91, *Corbeau*, [1993] ECR I-2533.

80 Case C-67/96, *Albany*, [1999] ECR I-05751.

81 M. Maduro, ‘Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights’, (1997) 3 *European Law Journal*, p. 55–82.

82 Maduro, *supra* note 78, p. 150.

83 E. Horváth, *Mandating Identity: Citizenship, Kinship Laws and Plural Nationality in the European Union* (2007), p. 126.

84 Joerges & Rödl, *supra* note 1, pp. 1-19.

85 F. de Witte, ‘Sex, drugs & EU law: The recognition of moral and ethical diversity in EU law’, (2013) 50 *Common Market Law Review* Issue 6, p. 1551.

Member States and the increasing asymmetry of interests amongst Member States.<sup>86</sup> Such diversity results in a need for communication and internalisation of their extraterritorial effects.

This is based on the idea that internal market law is foremost a means to start a conversation with Member States on the normative choices of restrictive laws and regulatory schemes, which requires on one side a responsiveness within the application of internal market law to the social context within Member States and, on the other side, a clear understanding and articulation of restrictive objectives that are pursued on a Member State level. That is to say, how responsiveness can be integrated within the legal framework of the internal market and what the proxies and requirements are for the articulation of restrictive regulatory choices. The expressive function of internal market law is to unveil these normative conflicts in order to illuminate what is at stake. Questioning and demanding articulation of restrictive regulatory choices within legal frameworks may be an excellent starting point for a dialogue that aims to increase the distinct articulation of regulatory objectives and thereby assists in the identification of embedding organisational principles on the Member State level. That is a conceptualisation much like the first part of the cited speech of Monti: ‘to assess whether existing rules and regulations, which, remember, were devised and enacted in a very different economic context to that which exists today, continue to serve the legitimate purposes of the protection of the public interest’.

In order to illustrate what this ‘mutual responsiveness’ could look like I will reflect shortly on some socially salient cases from the CJEU where traces of this rationale can be detected.

The *Viking* case is of course best known as the quintessential case that illustrates the CJEU’s willingness to subordinate fundamental social rights to economic freedoms.<sup>87</sup> The central question to address in *Viking* was how to balance the right of trade unions to initiate strikes with the right to reflag a ship for the purpose of acquiring lower wage employees. The judgment is slightly ambivalent because the Court emphasised, firstly, that the EU not only has an economic but also a social purpose and that the rights under free movement must be balanced against the objectives pursued by social policy.<sup>88</sup> The Court, however, did not reflect deeply on this balance and simply considered that the strike had ‘the effect of making less attractive, or even pointless (...) Viking’s exercise of its right to freedom of establishment’,<sup>89</sup> thus necessitating an assessment whether no less restrictive measure was available. This framing of the conflict, therefore, suggested the possibility of a *substantive reconciliation* of market access with the right to strike, looking for the least restrictive policy alternative.

Paradoxically, in part of its analysis, the CJEU was concerned with a question of procedural good governance. In its referral, the Court indicated that the necessity of collective action was significantly hampered by the fact that the policy rules combating the use of flags were *misconstrued*. The *design* of the policy rules would, if triggered by one of its members, *always* lead to solidarity action against the owner of a vessel, irrespective of whether or not the flag owner’s exercise of its right of freedom would actually be liable in a specific circumstance to have a harmful effect on the work or conditions of employment of its employees.<sup>90</sup> In other words, the design of the system of collective action was flawed, which consequently made the broader regulatory context inappropriate as a genuine means of worker protection. Therefore, the CJEU, in part of its assessment applied a broader procedural review of the regulatory framework that led to the restriction. It is interesting in this respect to refer to a passage of the *Laval* judgment, which points in the same direction:

(...) collective action (...) cannot be justified in the light of the public interest objective (...) where the negotiations on pay (...) form part of a national context characterised by a lack of provisions (...) which *are sufficiently precise and accessible* (...) to determine the obligations with which it is required to comply (...)<sup>91</sup>

86 P. Beramendi, ‘Inequality and the Territorial Fragmentation of Solidarity’ (2007) 61 *International Organization*, p. 783.

87 Leone Niglia has provided a new and quite innovative perspective highlighting the use of ‘hierarchical balancing’ by the CJEU. Niglia, *supra* note 31. For a selection from other discussions on *Viking*, *supra* note 1.

88 Case C-438/05, *Viking Line*, [2007] ECR I-10779, para. 79.

89 *Ibid.*, para. 72.

90 *Ibid.*, para. 89: ‘[required to] initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national, irrespective of whether or not that owner’s exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees’.

91 Case C-341/05, *Laval un Partneri*, [2007] ECR I-11767, para. 110 (emphasis added).

These considerations of the CJEU seem to imply that the balance in these cases might have turned out differently *if* the wider regulatory context within which the collective action was exercised would have been ‘more transparent’, in line with what could be considered as good governance requirements. Arguably, this is also the rationale put forward by the Court in the recent and important *AGET Iraklis* case.<sup>92</sup>

AGET Iraklis wanted to reorganise its business and shut down one of its three cement plants. It sought ministerial authorisation to carry out collective redundancies as required under Greek law, which provided that the Minister of Labour could refuse to authorise some or all of the projected redundancies on the basis of ‘the conditions in the labour market’, ‘the situation of the undertaking’ and ‘the interests of the national economy’. With reference to the socio-economic crisis in Greece, the Minister of Labour refused to provide the requisite authorisation. In turn, AGET Iraklis argued that the national rule was *inter alia* not compatible with Articles 49 (freedom of establishment) and 63 (free movement of capital) of the TFEU. This case is interesting from many perspectives. The main point for the purpose of illustrating the good governance trend is that the CJEU (Grand Chamber) held that when pursuing social policy Member States are justified in considering the existence of a mechanism that imposes a framework to ensure enhanced levels of protection of workers provided that criteria are formulated in concrete and precise terms:

(...) it is clear that, in the absence of details of the particular circumstances in which the power in question may be exercised, the employers concerned do not know in what specific objective circumstances that power may be applied, as the situations allowing its exercise are potentially numerous, undetermined and indeterminable and leave the authority concerned a broad discretion that is difficult to review. Such criteria which are not precise and are not therefore founded on objective, verifiable conditions go beyond what is necessary in order to attain the objectives stated and cannot therefore satisfy the requirements of the principle of proportionality.<sup>93</sup>

Although I have presented it in a simplified manner, the CJEU’s message is clear: Member States have the option to introduce socio-economic governance mechanisms that ensure high levels of workers protection and significantly restrict the freedom of establishment provided that a standard of good governance is met.

On the basis of applying margins of discretion, areas that are considered sensitive or important, Member States are provided with a certain space they can determine regulatory objectives and ways to get there without infringing the internal market rules. This is completed with standards of procedural good governance through which the CJEU has progressively provided yardsticks that require integration-restrictive interests to be pursued on the basis of transparency, consistency and coherence. Thus, an idea of mutual responsiveness is given concrete potential. The market serves as a means to test old conventions and the need to modernise but Member States are allowed to transparently and coherently pursue policy that would allow their embedded and variegating value systems to be accommodated in the social market economy of the internal market.

## 6. Conclusion

To what extent can European law legitimately influence the socio-economic orientations of the Member States towards one particular model and to what extent should it allow or even stimulate a diversity in socio-economic outcomes? The *European economic constitution* has been argued to be in principle neutral in this respect.<sup>94</sup> European law should not make a normative choice between competing socio-economic paradigms. This can be argued based on the fact that the TFE incorporates an explicit concern for reconciling freedom of (economic) movement with the social structures of Member States. It does so, specifically, by integrating a *dual commitment* within its legal infrastructure. The internal market laws determine that, although there is a commitment to intra-European free trade within open competitive markets that accommodate the free movement of goods, capital, services and workers, Member States retain control

92 Case C-201/15, *AGET Iraklis*, EU:C:2016:972.

93 *Ibid.*, para. 100.

94 Maduro, *supra* note 78; Kaupa, *supra* note 34.

over domestic social interests that are able to override these market integration objectives. In fact it could be argued that European law should strive to accommodate various socio-economic models. A multitude of socio-economic projects may be pursued within the framework of the TFEU. From a doctrinal perspective such openness can be derived from enabling provisions (such as Article 114 of the TFEU) as well as in the fact that the Treaty provisions are often ambivalent, and allow for different interpretations. Additionally there exists the obligation based on Article 4 of the TEU to respect national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. Indeed, the CJEU has provided abundant interpretations of internal market rules that allow for various socio-economic paradigms to exist within the internal market, depending on the social system it has chosen to implement in segments of its economy. For example, social schemes designed on the basis of the principles of solidarity, have been considered by the Court to be incompatible with the functioning of a sector on the basis of a normative principle of capitalisation. Therefore, EU competition rules do not apply in full to sectors that are primarily organised on the basis of solidarity principles, provided that there are some guarantees of institutional design that guarantee transparency and a coherent, active form of State supervision. In these cases, the Court explicitly recognises legitimate social structures within Member State level that do not 'fit' within the normative order of the competition.<sup>95</sup>

This builds on the idea that the diversity of preferences and orientations in the EU is the product of specific historical experiences, political contestation, societal learning and continuous political decision-making.<sup>96</sup> As such, despite globalising trends Member States vary deeply in terms of institutional preferences and structural policy differences. This is then the quintessential trait of the social market economy in Europe: a concept that recognises that market behaviour can be embedded in variegating social contexts and the EU internal market should therefore be able, explicitly, *to accommodate this multiplicity*. ■

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95 See for an overview T.K. Hervey, 'Social solidarity: a buttress against internal market law', in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (2000), pp. 31-47.

96 As submitted by C. Joerges, 'Market Integration and Europeanisation of Private Law', Jean Monnet Project Conference Paper (May 2015), on file with author.