European Union as a Highly Competitive Social Market Economy

Legal and Economic Analysis

Václav Šmejkal
Stanislav Šaroch
Pavel Svoboda

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The authors consider creating highly competitive social market economy, as referred to in Article 3 Paragraph 3 of the Treaty on the European Union, a highly topical goal which should not become merely a dead provision of the Lisbon Treaty. They analyse its economic and legal aspects in view of the current course of the European integration.

They pose the following questions: How shall we understand this goal in today's world? What sense does it make in the conditions of the 21st century globalized economy? Do the EU bodies still define and exploit this goal? And, does the EU have enough powers to pursue it?

Despite their critical views of the way the EU bodies have approached this issue in the post-Lisbon era, the authors are seeking to show what internal changes in the EU could help remove the asymmetry and establish balance of the current European integration, in accordance with the basic concept of the social market economy, and make it more apt to mitigate the clashing economic pressures and social needs.

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CONTENTS

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Abbreviations

AET	Associated Employment Tresthold
AG	Advocate General
AGS	Annual Growth Survey
AMR	Alert Mechanism Report
CDU	Christlich Demokratische Union Deutschlands (Christian Democratic Party of Germany)
CEPR	Centre for Economic Policy Research
CFREU	Charter of Fundamental Rights of the EU
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the EU
CSR	Country Specific Recommendations
CSU	Christlich-Soziale Union in Bayern (Christian-Social Union in Bavaria)
CT	Constitutional Treaty (Treaty establishing a Constitution for Europe)
EC	European Community
ECB	European Central Bank
ECOSOC	Economic and Social Committee
EEC	European Economic Community
EMU	Economic and Monetary Union
EP	European Parliament
ESM	European Stability Mechanism
ETUC	European Trade Union Confederation
FRG	Federal Republic of Germany
GDR	German Democratic Republic
GC	General Court of the EU
GDP	Gross Domestic Product
HSC	Horizontal Social Clause (Art 9 TFEU)
ILO	International Labour Organization
IMF	International Monetary Fund
KAS	Konrad-Adenauer-Stiftung (Foundation)
MIP	Macroeconomic Imbalance Procedure
OCA	Optimum Currency Area
RQMV	Reverse Qualified Majority Voting
SME	Small and Middle-sized Enterprises
SPD	Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

VAT	Value Added Tax
WEF	World Economic Forum
WGSE	Working Group „Social Europe“

FOREWORD

ON THE PROSPECTS OF SOCIAL MARKET ECONOMY IN THE RESTLESS EU

If we inquire about the prospects of social market economy,[1] we must first remind ourselves of the main pillars of the content of this concept, which – owing to the division of powers between the EU and Member States – must be examined both at the level of the Member States (in this text, somewhat restricted to references to the Czech and EU reality) and at the level of the whole EU.

The social market economy concept is an economic one, connecting the ideas of economically free capitalism and social order. To some experts, it represents the "most brilliant invention in the history of economic policy" (Vogt 2011:1). Where this concept has taken Germany is self-evident.

Social market economy positions itself in the midstream between *laissez-faire* capitalism and mixed economy. Its breadth and flexibility, however, enable placing different accents within its framework, e.g. putting greater emphasis on the social aspect or, conversely, on individual responsibility, thus making it acceptable for a greater number of political subjects.

The prospects of this concept would be worse if, in terms of the economic programme, extreme subjects dominated the political spectrum, whether left-wing or right-wing. In the *realpolitik* of recent decades we have seen some closing of the gap between the left and right (see what nuances distinguish SPD and CDU in Germany); if we speak about extremism, it is rather in the nationalist than economic sense. Therefore, the space for the midstream concept of social market economy is available here, too.

Indeed, the mere look at the fundamental principles of social market economy evokes this breadth of political spectrum. This is because the basis of social market economy is the interconnection between individual freedom and social solidarity. The state does not take part in the immediate management of the economy, but using legal tools focuses on safeguarding free competition and social justice. The pillars of social market economy include state-protected competition, monetary stability and social security, e.g. pension insurance or insurance in unemployment. This economic model rejects blanket transfer of personal responsibility to the collective à-la socialism; instead, social certainty must primarily arise through an individual's effort, and the obligation of the state only arises where this is not possible. Nothing like "to each according to his needs", therefore, as proclaimed by Communists during the times of non-freedom. I point this out because in 2017 we will commemorate a 100- year anniversary of the Bolshevik revolution in Russia, which had ushered in an entirely different concept than social market economy – the concept of the dictatorship of the proletariat, suppressing private ownership, and a centrally managed economy without economic competition, with results that require no commentary.

[1] The term social market economy was coined by the leading representative of the so-called Freiburg School, the neoliberal sociologist and CDU member Alfred Müller-Armack (1901-1978) in his book *Wirtschaftslenkung und Marktwirtschaft* (1947).

Without having to go too deep into the Czech situation, the finding that the social market economy model is claimed by both social democracy[2] and Christian democracy[3] is itself sufficient. However, what of the word "restless" in the heading? The present times are restless indeed, to put it optimistically. Although we enjoy unprecedented living standards, live in a peaceful environment and benefit from political freedom, we feel threatened. It is not my aim to examine to what extent this feeling is based on reality or compounded by some political forces and "their" media thriving on the sense of fear. Equally, it would be a task for sociologists, psychologists and also theologians to demonstrate to what extent the restlessness of the present time is related to the feeling of non-fulfilment, lack of vision of the future and taking our living standard, peace and political freedom for granted – simply put, that we do not value the good life we have. Moreover, this restlessness is fuelled by the nagging feeling that we constantly need to be getting better off ("sustainable growth"); everything else – stagnation or slight decline – is presented as tragedy. This might bring me to the subject of true solidarity and the solution to the migration crisis, etc., yet this is not my intention here.

This restlessness undermines our trust in ourselves, in the world around us, in our own institutions. As mentioned on one occasion[4] by Herman van Rompuy, fear does not allow us to see things in proportion; it exaggerates the negatives.

We do not keep the consequences of this restlessness to ourselves. In searching for the root causes of this often exaggerated fear, it seems ideal to have an outer enemy at hand, such as when Russia, for instance, uses the image of the decadent Western world to justify its own imperialism. For many people, such an outer enemy and a suitable whipping boy is the European Union, especially because they lack the required awareness of its functioning and the division of powers between it and the Member States.

Why is it necessary to deal with the European Union in the context of social market economy? Because the European Union explicitly embraces the social market economy concept; in other words, this concept has been embraced especially by the Member States. The Lisbon Treaty (2007) newly defined, among others, the goals of the European Union in Art 3 of the Treaty on the European Union (TEU) (Lenaerts and Van Nuffel 2011:108). For the first time, the numerous EU goals explicitly included social market economy, although it was a goal de facto followed from the onset of post-war integration owing to Germany's influence.[5]

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[2] For the Czech Social Democratic Party's embrace of this model, see the statement of its Chairman B. Sobotka, available at: https://www.cssd.cz/ke-stazeni/videogalerie/video-novinky/bohuslav-sobotka-nasi-zakladni-vizi-je-socialne-trzni-ekonomika/

[3] Namely Christian-Democratic Union-Czechoslovak People's Party, cf. the Articles of Association § 2, point 5: available at: http://www.kdu.cz/o-nas/dokumenty/stanovy. By membership in the European People's Party, the concept of social market economy was also embraced by the Czech right-wing party TOP09, but its programme documents, available online, contain no mention of this concept.

[4] In particular, 3 December 2015 in the European Parliament at a conference on the launch of the book by Jos J. van Gennip: Ethics and Religion, published by Wilfried Martens Centre, Brussels 2015.

[5] For the introduction of the concept of social market economy in primary EU law cf. the report of the working group of the XI Convention preparing the Treaty Establishing the Constitution for Europe Convent, CONV 516/1/13, p. 10. For the criticism of entering this goal into TEU se Joerges and Rödl 2004: 10-11.

However, social market economy is not referred to just by the Lisbon Treaty, but, above all, by top politicians, including President of the European Commission Jean-Claude Juncker[6] and Commissioner for Employment, Social Affairs, Skills and Labour Mobility Marianne Thyssen[7]; in one instance even by the Court of Justice of the European Union.[8]

As mentioned above, social market economy is a relatively wide concept; therefore, it may be useful to see what accents are currently being assigned to the social market economy principle by the European Union. Let us repeat that the pillars of social market economy include state-protected competition, monetary stability and social security. As there have been no recent attacks on economic competition,[9] it is monetary stability and social security that are placed at the centre of attention. Despite the two areas being closely related, in terms of powers transferred to the EU by the Member States they represent completely different situations: whereas monetary policy is within the exclusive competence of the EU for Eurozone members (Art 3 TFEU), social security is, on the other hand, an area where the EU can at most coordinate member states in exercising this competence that they have not transferred to the EU (Art 5 TFEU).

The stimuli for these accents can be traced in the aftermath of the financial crisis of 2008–2010, one cause of which is seen by President of the Commission Juncker in ignoring the principles of social market economy: "One of the factors which caused the crisis was that the persons primarily responsible breached the cardinal virtues of social market economy."[10] The other stimuli also include globalization, relatively high unemployment and the widening symbolic gap in private sector remuneration.

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6 See Juncker 2016: "The financial crisis did some good in that we were able to do two things: one, to remember the values – you spoke of Gaudium et Spes – that are the truly fundamental values of the European social market economy. One of the factors that brought about the crisis was because those primarily responsible disregarded the cardinal virtues of the social market economy. We know that now."

7 Cf. e.g. Thyssen 2014a: "My motivation will remain the same for the next five years: devoting myself to the welfare and well-being of all Europeans, and promoting the social market economy as envisaged by Article 3 of the Treaty … The social market economy should also include an adequate safety net with a strong social protection for people who cannot work (anymore) due to illness, disability, age, temporary or permanent care responsibilities… In the meantime I also see that during the crisis the number of Europeans living in poverty has sharply increased and inequalities have been on the rise, calling into question the fairness and effectiveness of our social market economy." Also Thyssen 2014b: "The President-elect Jean-Claude Juncker has asked me to ensure that the word "social" regains its full meaning and effectively completes our "market economy". I gladly take on this challenge, as a convinced supporter of the social market economy, where freedom, responsibility and solidarity go hand in hand."

8 Cf. judgment of the General Court T-565/08 *Corsica Ferries* EU:T:2012:415, para 82.

9 Let us recall that at the time of the financial crisis, the then President of France Nicolas Sarkozy nevertheless enforced in the Lisbon Treaty the removal of the explicit reference to economic competition from the EU's goals and its move to Protocol No. 27 on the internal market and economic competition; this, however, only has symbolic, not legal, meaning, because (1) the protocols are simultaneously a binding part of the founding treaties of the EU and (2) protection of economic competition is a part of social market economy, which, on the contrary, was added as a goal by the Lisbon Treaty.

10 See Juncker 2016: "… Second, the crisis made us move forward with Economic and Monetary Union – something we had to do – so that today banks and the banking sector and the real economy are better prepared to withstand external shocks than they were in 2008, 2009 and 2010. Banking Union is making progress, though not as much as I would like. Banking supervision works. Everything we have achieved over the years is working well, although more must and will be done to complete Economic and Monetary Union."

As far as monetary stability is concerned, the subject of discussion is both non-compliance with the so-called convergence criteria and the role of the ECB in dealing with the financial crisis of 2008–2010. Therefore, along with others, Juncker says that partial failures and limited legitimacy of the Eurozone's governance should have the following consequences (i) it is not ECB's task to govern the Eurozone; this should be the task of the Commission and the Eurogroup with a full-time President, (ii) structural reform programmes and stability support of the Eurozone should be measured not only by fiscal sustainability but also by social impacts. It is incompatible with social market economy, he argues, that ship-owners and speculators should see their wealth increase during a crisis while pensioners are unable to look after themselves; finally, (iii) to strengthen the outer dimension of the Eurozone by enshrining the common representation of Eurozone's members in the IMF, as a result of which the Eurozone would become the IMF's biggest shareholder (Juncker 2014).

Social security as another pillar of social market economy is, as already mentioned, fundamentally within the competence of the Member States, and the EU only performs certain coordination measures in this area. Nevertheless, social security constitutes a part of a wider social policy, some aspects of which fall within the competence shared by the EU and the Member States. In this broader area, today's main accent at the Union level – moreover with overlap to EMU – is the European Commission's proposal for the European Pillar of Social Rights of 8 March 2016.[11] It is an initiative aimed at deeper and faired EMU and the strengthening of its social dimension. This is also related to the consequences of the economic crisis, namely for the single-currency countries in particular, because the Commission maintains that the Eurozone's future success depends to a great extent on the effectiveness of labour markets and social security systems, as well as on the economy's ability to handle and respond to fluctuations.

The content of the document is divided into three chapters: (1) equal opportunities and access to the labour market including the development of skills and lifelong learning and active support of employment; (2) fair working conditions; (3) appropriate and sustainable social protection and access to quality basic services, including childcare, healthcare long-term care, with the aim to safeguard dignified life.

The European Pillar of Social Rights is primarily focused at Eurozone countries, with other EU Member States able to join if they express an interest in doing so. On a side note, it is around this pillar, i.e. around the Eurozone, that the boundary between the hard core of European integration and other Member States might arise.

From the viewpoint of the new Member States, the social sphere and its relation to the EU's single market is related the issue of the so-called social dumping, which primarily involves criticism of unfair practices – misclassification of employees as independent contractors, etc.[12] Although such unfair practices deserve criticism, we

[11] Cf. Thyssen 2016b: "To address these changes in the world of work, the European Commission is proposing to bring forward a European Pillar of Social Rights. This will be a reference framework based on the values and principles that mark the essence of the 21st century social market economy."

[12] Cf. European Parliament's resolution of 14 September 2016 (2015/2255(INI)), item 1: the concept of social dumping "…covers a wide range of intentionally abusive practices and the circumvention of existing European and national legislation (including laws and universally applicable collective agreements), which enable the development of unfair competition by unlawfully minimising labour and operation costs and

cannot overlook the fact that the use of the word dumping is manipulative, as dumping requires two territories separated by a border, which does not apply for the borderless single market for goods and services. In this context, old Member States not only propose enforcing the minimum wage, but both Commission President Juncker and Commissioner Marianne Thyssen call for the principle of the same pay for the same job at the same place.[13] In the case of workers posted under Directive 96/71 concerning the posting of workers in the framework of the provision of services, this results in eliminating the competitive advantage of companies posting their workers to provide services on the territories of other Member States. The practical effect of the social dumping concept in the EU is applying the minimum wage on the so-called posted workers – employees of undertakings who obtain their wages according to the country of their origin. In the framework of the internal EU market, undertakings from countries with a lower wage levels (i.e. more or less the Eastern EU Member States) will lose their competitive advantage over undertakings from the so-called old Member States, because their wages are lower.

The authors of this concept do not acknowledge that the freedoms of the internal market are one package. Free movement of goods, services and the capital has its counter-performance in the freedom of movement of workers. If business boundaries are removed, domestic production cannot be protected against the more competitive products from abroad, so domestic production can become limited or cease to exist. In return, workers who have lost their jobs at home due to this can go and work in a different country, and the undertakings can also move to do business in the same place. Now, however, the differences in wages, i.e. the main competitive advantage of such undertakings, are to be removed. These undertakings will certainly have thought: "we have opened the markets to your undertakings, but you are closing the door on us and our workers". The new Member States could, therefore, start the debate on restricting other advantages to the undertakings of old Member States. The concept of social dumping in the EU is toxic for the functioning of EU's single market.

Thus, I do not regard the concept of social dumping as a healthy foundation for the building of Europe, especially not from the representatives of old Member States, who have their mouths full of solidarity – but the concept of social dumping follows the path of disturbing the single market.

Thus, to conclude, if we ask about the prospects of the social market economy concept in Europe, they are certainly there. The promise thereof consists not only in

lead to violations of workers' rights and exploitation of workers;… the use by certain economic actors of illegal practices such as undeclared work or of abusive practices such as bogus self-employment can lead to major market distortions which are detrimental to bona fide companies, in particular SMEs; …"

[13] Cf. Juncker 2015b: "En matière de droit du travail, il faudra en Europe que nous arrivons avec une dose de bon sens, sachant que le bon sens est distribué d'une façon très inégale en Europe, nous devons nous mettre d'accord sur un principe simple: un même salaire, pour un même travail, au même endroit…" or Juncker 2014a: "Fairness in this context means promoting and safeguarding the free movement of citizens as a fundamental right of our Union, while avoiding cases of abuses and risks of social dumping. Labour mobility is welcome and needed to make the euro area and the single market prosper. But labour mobility should be based on clear rules and principles. The key principle should be that we ensure the same pay for the same job at the same place."

its enshrinement in legal texts but also in the political demand, often voiced both by national politicians and high-ranking EU officials. Moreover, these officials are aware that in recent past, some social market economy principles were sacrificed in crisis situations at the altar of the effort to achieve fast solutions, the results of which, however, did not confirm the correctness of such a deviation. Similarly unsuccessful will be the attempt to misuse the so-called social dumping in order to undermine the freedom of movement of services and workers unless the awareness of the four freedoms of the single market as a single package is drowned out by the interests of the old Member States.

However, due to the division of powers and the lack of consensus, the EU cannot enshrine social market economy as a Union-wide social economic model. Contrary to post-war Germany, where both Christians, Liberals and Socialists participated in one concept for a certain period of time, there is no consensus in the EU. Therefore, the Commission itself refers to social market economy in some documents in the plural, in the sense of various social market models of EU Member States, as allowed by the flexibility of this concept. This, however, does not rule out the EU supporting some social market economy elements centrally, such as some expenditure items of the EU's budget, e.g. funds preventing asymmetrical shocks in the social area or support for migrating job-seekers, etc. Similarly, the CJEU could adjust its proportionality tests applied in the event of conflict of social rights with the freedoms of the internal market and could make much greater use of the horizontal social clause (Art 9 TFEU),[14] both in checking the compliance of secondary law with the Treaty and in the clash of EU-protected equivalent values, etc.

It is the announced European Pillar of Social Rights that is to be the current principal bearer of social market economy at the EU level. It will be compatible with social market economy in so far as the social accent and its consequences (taxation and business regulation) do not undermine initiative, which is in fact the key precondition for both market and social market economy.

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[14] Article 9 TFEU: In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

1. INTRODUCTION: WHY STUDY AND PROJECT THE EU AS A SOCIAL MARKET ECONOMY?

A simple answer to the question posed above could be as follows: because the EU is committed to it by the target provision of Art 3(3) of the Treaty on European Union (hereinafter, TEU), which deals with its task to work for a highly competitive social market economy.[15] However, the answer will be unsatisfactory for the mere reason that it is far from clear what the value of such a Treaty provision exactly is. It can be easily contested by asking whether we are dealing with a realistic provision or just another cry of mythological Europeanism, i.e. a mere part of "those illusory goals that characterize many declarations and programmes of the Union's leaders" (Ricceri 2014: 84).

Although the analysis of the legal value of the goals set out in the programme provisions of the founding Treaties of European integration has its place in formulating the answer to the question posed, it is impossible to leave it at that and not attempt to answer the following questions: Why and how did the EU set such a goal? What content does it fill it with? How best should it fulfil this goal if genuinely wanting to accomplish it? These are in fact questions not only for legal but, equally, for political and especially economic analysis. Without searching for an answer in the present initiatives, legal decisions, as well as economic projects and results of the EU, it will be impossible to dispel the aforementioned scepticism regarding the fact that the social market economy goal might involve a mere glossy catch-all declaration of general interest without practical meaning … not worth spending much time on.

Analytical works performed in the years 2014–2016, however, led the authors of this text to the belief that the goal of social market economy does deserve attention and could be – when handled correctly – a useful guideline for the present and future effort of the EU. The resulting book summarizing these results is, in its own way, another contribution to the Europe-wide debate on whether and how the EU should become more social at this very stage – which appears necessary amidst the present crisis in order to convince citizens that the EU is not a non-democratic machine to enforce the interests of investors and entrepreneurs in the liberal business environment, stable currency and a flexible labour market (Monti 2010:68; Contouris and Freedland 2013:493-494; Lehrndorff 2015:30). The calls for EU's socialization, often discussed in the media, are no doubt legitimate as they contain the truth about the current perception of the EU by its citizens. But anger alone, as we know, does not by any means constitute a programme leading to a goal. Therefore, in addition to the analysis of the causes of disillusionment

[15] The wording of Art 3(3) of TEU is in reality much more developed and also complicated as will further be explained. It says in full: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."

with the current EU, attention will be paid on the pages of this book to the possibilities of tackling structural problems causing such a situation.

Today's EU has found itself between a rock and a hard place as, in the eyes of many of its citizens, its current state of affairs – especially in the social field – is in total contradiction to what the EU is supposed to deliver. Ordinary voters largely perceive the EU as a machine that has done everything necessary to open up the European gates to globalization but has failed to organize the necessary compensation towards losers of the globalisation and, at the same time, has reduced the capacity of national governments to take on the role of protector of these losers (Collington 2015; De Grauwe 2016). The single currency project without single political leadership has put the governments and societies of the Eurozone countries at the mercy of financial markets (De Grauwe 2015: chapter 10). Some would even argue more strongly that the EU of today is presiding over an essentially *Hayekian* economy where interest in the functioning of the single market and in the trust of financial markets prevails over social rights and needs of Europeans (Streeck 2014). Simultaneously, however, as revealed by Eurobarometer surveys over recent years, the EU's "social dimension" consisting in genuine harmonization of welfare and pensions has been seen by Europeans as the first among measures that would strengthen the most their European identity, their feeling of being European (European Commission 2013b). European citizens thus directly expect from the EU that it will give them, especially in the social field, what it currently fails to give them, being even accused of taking it away from them by the destruction of welfare systems developed at the level of individual Member States (ETUC 2008; Barnard and De Baere 2014:23).

This almost perfect counteraction of expectations and reality inside the current EU is a result of the effect of many circumstances and factors which call for at least a brief outline in order to explain the possibilities of achieving the social market economy goal (although these circumstances and factors are not the subject of research itself in this book).

1.1 Crisis of Post-war Welfare States and Policies

The first group of causes of the perceived "social deficit" of the current EU consists of those causes that are not directly related to the process of European integration and its form. From a wider perspective, they involve the underlying problems of Western civilization and its development in the last decades of the twentieth century and the beginning of the twenty-first century. Western Europe has been grappling with them since the early 1970s, which saw the end of the period of "trente glorieuses" of the post-war economic boom and social rise. Roughly from 1973, Western Europe had been looking for ways of overcoming low rates of economic growth and structural problems connected with the irreversible change of conditions on which the economic and social rise of the post-war years rested,[16] and, no less importantly, with the gradual

[16] The changes of the 1970s are difficult to summarize in a few sentences. For the Western welfare states, their most important aspects was that the industrial era was replaced with the service sector economy with all the impacts on mass employment, nature of work, character of employment contracts, power of trade unions and the family model, and also – significantly in the given context – that the traditional programme and social basis of the mass left-wing movement, i.e. social-democratic, socialist and communist parties, had depleted itself. The decade also marked the end of the post-war financial and economic foundations of

deindustrialization brought about by Asian competition and offshoring to cheaper countries (Crouzet 2000:362-372). It is this period that marked the beginning of chronic unemployment at the average level of 10% and growing difficulties in financing the post-war welfare state. The subsequent wave of neoliberal trust in markets and kick-starting growth based on deregulated supply-side economy brought only a temporary solution. The indebtedness of countries in the 1990s showed that many problems were only covered up and postponed by ever more sophisticated tools of the financial market and debt financing (Rogers 2014:67-69). The hopes of the so-called New Labour/ Neue Mitte of the turn of the millennium (Blair and Aznar 2000) that it is possible to reconcile the requirements of global markets and multinational companies with socially inclusive society by the countries as well as the EU purposefully investing in workforce that is more educated, flexible and thus inspiring the confidence of markets, were not fulfilled. The real incomes of about two thirds of households in 25 advanced economies were flat or fell between 2005 and 2014 (McKinsey 2016). There is a spectre of a generation growing up poorer than their parents, nowadays strengthened by the consequences of the financial and debt crisis after 2008, which produced millions of young, educated and jobless losers (Becker 2014).

The analysis of long time sequences carried out and especially publicized by T. Piketty in his popular *Le capital au XXIe siecle* has shown that the 1970s did indeed see the end of the post-war anomaly in the development of Western market economy, characterized by the relatively smaller role of private capital and, on the contrary, a higher role of public capital. Since the crisis of the 1970s, European countries have seen the stagnation of public expenditure, while private capital revenues are rising and the social gap between the haves and have-nots is widening again (Piketty 2013: chapter 13). The so-called trickledown effect of the ideologues of neoliberalism, promising the enrichment of those "below" thanks to lifting the tax burden off those "above" either did not show up or was insufficient to stop the widening of the social gap (Varufakis 2013:143; Habermas 2013:108).

However, the fact that unemployment, working poverty and precarity of unstable small jobs became a chronic and widespread phenomenon did not cause any shift of development in Western countries towards greater responsiveness to social expectations and demands. This is because the mainstream of the European left, which, even in the crisis, failed to find a different recipe than better adaptation and flexibilization in the name of growth and jobs, replaced the missing vision of the model of society with calls for ensuring the economic and social rights for various groups of disadvantaged individuals and minorities (Rodrik 2016). The belief that a higher degree of redistribution and social equality automatically undermines economic growth and competitiveness has not so far been replaced with a vision of a different ratio of the functioning of the relationship between politics and economics, between the state and market (de Grauwe 2015:92-94).

However, regardless of this or that economic and social policy, the increase in social expectations and demands represents an entirely obvious self-enforcing tendency,

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the stability of long-term and non-inflationary growth, i.e. the Bretton-Woods system and the economic policy derived from the teaching of J. M. Keynes (Judt 2011: chapter 3; Keller 2011: chapter 2; Varufakis 2013: chapter 4).

as almost everyone in the West – thanks to the standard of living achieved – nowadays has more to lose (Van Suntum et al. 2012:28). As a result of the successes of the welfare state of the second half of the twentieth century, the twenty-first century society has entirely different ideas about its inalienable rights, about healthcare, provision for the family and dignified old age, about cultural life, leisure time, etc. than in the immediate post-war decades. Notwithstanding the current growth of social divisions and the austerity policy, it is a fact that more and more people are now used to obtaining a substantial part of their welfare from public sources as individual social rights and entitlements, which has loosened the links to the family and community and strengthened individual claims towards the state and its welfare system (Keller 2014:31). In other words, the modern liberal secular state reaps the fruits against which E.-W. Böckenförde prophetically warned in the 1970s in his much-quoted essay *The Rise of the State as a Process of Secularization*: "The state which does not trust the internal links or has lost them is pressed to raise the realization of social utopia to its own programme … What will such a state fall back on in a moment of crisis?" (Böckenförde: 2005).

This prophetic warning is true for the EU, an artificially created regulatory body, to a far greater extent than for individual modern states, in which it is still possible to depend on shared tradition, experience, language and, in some cases, perhaps national or even religious revival. However, in addition to this general problem, the combination of ever higher demands on the performance and flexibility of individuals on the one hand, and the legitimate expectation of the same individuals regarding the welfare state and rights on the other hand, inherent to every modern state-like organization, the EU also has its own problems in the sphere at issue. These are caused by the conflict between what powers and institutional structure the EU was historically endowed with and, in proportion to that, how deep and wide it has grown and what expectations it has raised in its citizens by its promises. Frequently, they are referred to in short as "constitutional asymmetry" and "deficit of democratic legitimacy" of the EU.

1.2 Crisis of the Social Minimalism of the European Integration Project

The founding fathers of the then EEC made the compromise of entrusting the supranational bodies of the EEC with tasks of "negative integration" that could be solved by impartial technocrats on the basis of economic rationality, while the politically sensitive decisions requiring broad social consensus had been left to the Member States. This division of competences, expressed sometimes in shorthand "Keynes at home, Smith abroad" (Micossi and Tosato 2009:36), meant that policies, legislation and case law developed at the EU level have been focusing first and foremost on market freedoms. On the contrary, the protection of workers and their social rights, with the exception of safeguards against non-discrimination and of certain harmonization in the field of working conditions facilitating labour migration, have been left in charge of the individual Member States and their historically embedded models of social protection, social dialogue and social services (Bücker and Warnecke 2010; Lenaerts and Van Nuffel 2011). Art 177 of the Treaty of Rome mentioned the improvement of working and living conditions and also anticipated a certain harmonization of social systems, but without conferring any specific legislative competences on the newly established EEC,

which, compared to the detailed and competence-backed programme of removing obstacles to trade and business on the common market, came across as "evident social minimalism" of the original EEC (Schütze 2015:816).

According to some, this split of competences was based on a compromise between German and French approaches to the integration project when, during negotiations on the Treaty of Rome, the French allegedly made concessions in the social question to the Germans, on whose side especially the Minister for Economic Affairs L. Erhard was firmly opposed to the "common market also having a social dimension", which, on the other hand, was called for by the French Prime Minister G. Mollet (Grass 2013:7; Veldman and de Vries 2015:72). At the same time, the so-called *Ohlin report* produced in 1956 by a group of experts for the International Labour Organization asserted that the creation of the EEC and its common market did not require the harmonization of labour standards (ILO 1956:99-123; Rocca 2016:55). It was a shared belief that a higher efficiency and faster growth generated by integrated markets would generate more or less automatically a sufficient well-being of workers (Benlolo and Carabot 2012; Devoluy and Koening 2011).

This asymmetry of European integration consisting in the decoupling of economic and social policy was thus an expression of a certain ideological concept for some and at the same time a temporary compromise which had to pass the politically sensitive debate on the "social question" at the European level on to future generations for the others (Joerges 2010:71). The ideology behind the German position was an ordoliberal belief in an "economic constitution" whose constitutive principles were not to be subjected to interventions of discretionary policies (John 2007:6-7; Joerges 2012:10). Its main principles of market freedoms, undistorted competition and (later on) of monetary stability were considered to be an objective fundament of free and prosperous Community to the extent that they did not require democratic legitimization.

Social welfare measures, on the other hand, were treated as a necessary but a categorically distinct subject that had to remain within the domain of political legislation and as such be confined to national democratic consensus. In this, the "constitutional asymmetry" found its linking point to the "deficit of democratic legitimation" as the original pattern of European integration was not launched as "an experiment in supranational democracy" (Joerges 2010:69-70). In its core, it was a technocratically defined compromise that was supposed to be later on legitimated by its contribution to peace, economic prosperity and ultimately also to the social well-being of Europeans. But never was the EU able, within its set of conferred powers and institutional structure, to perform the role of Member States that remained democratically legitimated to socially embed the market (de Witte 2015:20).

This "founding compromise" did indeed work at least during the first two decades of European integration. The difficult 1970s were critical, however, having plunged even this process into the so-called "Eurosclerosis" and bringing a loss of optimistic faith in the integration solution of economic troubles. European integration only overcame this period with Delors' projects of the single market and, subsequently, single currency, which – in accordance with the then predominant belief "there is no alternative" to market driven efficiency – subjected the further development of integration to the

imperative of market competitiveness and financial stability (Joerges 2012:7; Veldman and de Vries 2015:75). In the course of years, this inevitably swung the integration towards deregulation and liberalization of until then nation-specific and preponderantly closed sectors and systems. J. Delors, a French socialist at the head of the Commission, was well aware that a new step forward in economic integration and liberalization needed the support of Europeans and promoted its social dimension. He invited representatives of social partners to negotiations on the internal market programme and the EEC symbolically accepted the (legally non-binding) Community Charter of Fundamental Social Rights of Workers in December 1989. The following decade saw the introduction of amendments of the treaty basis of Maastricht integration with the annexed Social Policy and Amsterdam Protocol, where this Protocol was included in Title XI of EC Treaty on "social policy, education, vocational training and youth".

Strict division of tasks between the EU and the Member States' levels was thus blurred, but there was no real change of the original pattern (Vedlman and de Vries 2015:76). By its measures, the EC was only able to "complement and support" policies of Member States in the social sphere, its harmonization power was still excluded from sensitive issues or tied to unanimity in the Council. Owing to the political sensitivity as well as traditional national specificity of models of social peace and welfare, the Member States were not prepared to transfer to the EC powers enabling "positive integration" in this sphere (Joerges 2010b:16; Schellinger 2015:4-6). Treaty provisions on social policy expressed rather general values, principles and objectives or rules of competence and procedure, than to make affirmative statements or to give claimable rights (Rosas and Armati 2010:188).

The "social" measures of the 1970s, necessary at the European level to safeguard social security of migrating workers and self-employed persons (Regulation 1408/71) and to harmonize the social obligations of employers where competitive environment would be deformed without a common standard (Directive 75/129 concerning collective redundancies, Directive 77/187 concerning the safeguarding of employees' rights in the event of transfers of undertakings, Directive 80/987 concerning the protection of employees in the event of their employer's insolvency) were joined in the 1990s by directives whose conditions included a higher mobility of services and capital and, with the prospect of the imminent "eastern" enlargement of the EC, making sure that no social dumping and delocalization of production took place between Member States with a different degree of worker protection. Among the characteristic measures of this period were Directive 93/104 concerning certain aspects of the organization of working time, Directive 94/45 on the establishment of a European Works Council or Directive 96/71 concerning the posting of workers, as well as a directives harmonizing the protection of pregnant workers, entitlement for parental leave or the employees' right to part-time work (de Witte 2015:9-11).

However, not even the aggregate of all the partial measures meant a turn towards "social Europe". The EU's social dimension was not given the same status as the internal market fundament, i.e. free movement rights and competition law (Rosas and Armati 2010:188). In addition to the difficult debating of Member States about the transfer of new competencies to the EC level (or, possibly, the increase of its budget from the

relatively insignificant level of around 1% of the aggregate EC GDP), this can be ascribed to the pro-market optimism of the neoliberal years of the end of the last century with its rejection of the market-nonconforming and costly social protection. Even the smooth enlargement with the former Eastern bloc countries required not clinging to the common increase of social standards in the EU, and the Copenhagen criteria, formulated by the European Council in June 1993 as specific conditions of the applicants' readiness for EU membership, did not contain the attainment of a certain standard of social rights or social protection (Grass 2013:11).

The twenty-first century, however, exposed this persisting social minimalism of the EU to new tests, originating both in the on-going globalization, whose pace began to be set by deregulated financial markets together with technological sectors of the new economy, and the EU-inherent project of the single currency, which had created non-optimal currency area without a political umbrella and composed of countries with different economic dynamics, competitiveness and fiscal policy. This was complemented by the Eastern enlargement of the EU, which extended the freedoms of the single market to countries with much lower absolute levels of wages, social services and the overall quality of life. All this together put growing pressure within the EU on national welfare systems based on local solidarity or directly on national corporativism even at a time when there was still no idea that the financial system of the West was heading for a profound crisis.

1.3 EU of Market and Fiscal Discipline or EU of Social Welfare?

In the crisis years after 2008, the EU paid the price for all the asymmetries and deficits which it had accumulated during its development and which it was unable to get rid of effectively. Historically, it was summoned and endowed with powers to protect market freedoms, undistorted competition and later on monetary stability. These principles and powers are understood not only as objectively and vitally necessary to maintain what integration is and what it has achieved, but they also represent the core of the supranationally created and enforced EU law, which, in the case of conflict with the provisions of national law, is endowed with application primacy. The single market and currency-oriented EU therefore constitutes a common framework, unchangeable from the Member State level, to which even those national rules and systems that are otherwise not subject to the harmonization powers of the EU must adjust (Rosas and Armati 2010:191; Veldman and de Vries 2015:66). Although Member States are thus still responsible for how they are going to safeguard social peace and welfare to their citizens, they must not do so at the expense of free movement of services, freedom of establishment of companies or open competition for public contracts and fair conditions undistorted by state aids to undertakings. If they are simultaneously members of the Eurozone, they must not jeopardize the stability of the single currency with their social expenditure (Veldman and de Vries 2015:75).

Respect for the EU law and the necessity to maintain national competitiveness as well as budget and debt discipline subsequently take their toll in the form of labour market flexibilization, social expenditure cuts and the limitation of the scope and influence of social bargaining (*austerity* in short). Social policy – in the wider sense of the word – becomes the variable with which EU Member States must work, despite the

resistance of a considerable number of their citizens, in order to honour their European obligations (Becker 2014:94). These obligations stem from ordoliberal-neoliberal principles that are not subject to direct democratic legitimization, for they are embodied in specific measures "approved by Brussels", very distant and little influenceable by the will of the voters in the Member States (Habermas 2013:127). Thus, especially in the countries of the southern wing of the EU and some new Member States of Central and Eastern Europe, the social standard of workers, the unemployed as well as pensioners has significantly suffered in recent years, even to the extent of being in conflict with the ILO Conventions and principles of the European Social Charter (Rocca 2016:53).

It is no surprise that in the given situation, the socially affected perceive the EU as an organization which took the side of global markets without itself having the instruments for their regulation, stabilization and legitimization and without enabling the Member States to tame or balance their externalities on their own terms, at the national level and in accordance with the interests of their citizens (Lehrndorff 2015; De Grauwe 2016; Rodrik 2016). The EU, in the words of the President of the European Commission, did acknowledge that "there was a lack of social fairness" in the measures taken during the crisis and called loudly for supporting the EU with a new Pillar of Social Rights thanks to which the EU will achieve the Social Triple A' rating (Barnard 2015). Simultaneously, it is therefore a fact that after reading any strategic document of today's EU, no one could assert that the Union is blind to social issues. Nevertheless, given its present powers, size, budget structure and the dominant market-building ideology, the EU just cannot but urge Member States to make more use of the existing possibilities within the "straitjacket" of the EU law and the single currency, i.e. to better target their social expenditure and adopt best practices from Scandinavia and some other countries of Northwest Europe that managed to maintain their social standards, competitiveness as well as financial stability (Siekel 2016).

However, what EU citizens seem to expect from the EU – at least judging by the European citizens' initiatives proposed so far (pursuant to Art 11(4) TEU and Art 24(1) TFEU) – is rather EU-guaranteed unconditional basic income (initiative of the same name), efficient fight against social exclusion (*For a socially fair Europe!*), reduction to 3% the number of persons living under the threshold of poverty (*Vite l'Europe sociale! Pour un nouveau critère européen contre la pauvreté*), a public investment plan to help Europe get out of the crisis (*New Deal 4 Europe*), establishment of a EU bank for social, ecological and solidarity-based development (*Création d'une Banque publique européenne axée sur le développement social, écologique et solidaire*), approval and enforcement of the fundamental right to human dignity by guaranteeing on a lifelong basis adequate social protection and access to quality, sustainable long-term care above and beyond health care (*Right to Lifelong Care*), of human right to water and sanitation (*Water and sanitation are a human right! Water is a public good, not a commodity!*), elimination of educational inequity (*Teach for Youth*), etc.[17] Regardless of the lack of legal possibility or practical feasibility of some of these initiatives, they express needs and expectations that look quite alien to the agenda that is and could be dealt with by EU bodies. The existing

[17] For information about the so-called European Citizens' Initiatives addressed to the EU see http://ec.europa.eu/citizens-initiative/public/welcome.

Union's institutional settlement "is simply not sufficiently sensitive to its citizens". Its systemic asymmetries and deficits plus its historical and ideological path dependency prevents the EU to respond positively to almost any of such requirements (de Witte 2015:20).

This short description of a trap in which the EU is caught nowadays perhaps sufficiently explains why fulfilling the TEU social market economy goal is worth considering, why the EU should strive for political reform that will transform the currently unpopular austerity and deregulation machinery into a socially acceptable project. There is simply an acute need to strengthen the EU's social dimension to compensate for the effects of European and global market freedoms, for the effects of the European monetary union and for the lack of legitimacy of the EU and its institutions in the eyes of Europeans (Schellinger 2015:3). The present pro-market orientation of European integration needs to be balanced with a significantly more substantial social orientation, which, in summary, can be referred to as the search for the social market trajectory of EU's future development.

EU is at least partly aware of this need. This is indirectly illustrated by the statement of the social market economy goal in the TEU, but also by an entirely explicit admission in the EU's New Strategy for the Single Market (so-called Monti report from 2010) that *"the EU system has accumulated internal asymmetries between market integration at supranational level and social protection at national level, which generate frictions and are a source of disenchantment and hostility towards market opening … this divide has the potential to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration."* (Monti 2010:68). In short, thinking about whether the EU has, from the legal and economic perspective, an option to choose a more social face, what such a choice might look like and whether it should have the form of some normatively defined social market economy, is of profound and urgent significance at present.

1.4 Structure and Aim of Further Analysis

The individual parts of this book will first elucidate issues relating to the genesis of possible legal and economic significance of the social market economy goal after the adoption of the Lisbon Treaty. Although the need for a more social EU may be widely perceived and embraced, it is not clear how such a need is fulfilled, or could be specifically fulfilled, by the concept of the social market economy – unless we satisfy ourselves with the explanation that it is a mere declaration which offends no-one but which would remain without any practical consequence. This approximation of the possible content of the Treaty's goal of the social market economy is dealt with in the chapter *Social market economy as the goal set by the EU Lisbon Treaty.* The subsequent chapter, called *Modern interpretation of the social market economy concept* focuses on the question of what significance is currently given to this concept by the European Commission and, in contrast, by modern economic theory.

The Court of Justice's approach toward the complex aim of building a highly competitive social market economy will be dealt with in the chapter *European Court of Justice and the social market economy goal of the EU*. The next chapter called *Economic*

and monetary union through the lens of the social market economy will analyse, through the prism of modern understanding of the normatively defined concept of social market economy, the present and possible future parameters of economic and monetary union of the EU. The view of what instruments the EU is specifically using not using while it should in order to draw closer to the ideal of the social market economy in the sphere of further development and application of its law, is then contained in a chapter called *Other tools and ways to build the EU social market economy.* The last chapter, dedicated to the resulting *Conclusions,* finally describes and summarizes what was established in the preceding analysis regarding new competencies and resources for the EU in order to build its social market economy.

In the following text, the legal view will be complemented with the economic view. Analysis will be applied to both legal regulations and decisions and soft-law and programme documents of the EU, specialized works from the field of economic and legal theory and normative economy, and, last but not least, numerous commentaries, position papers and manifestos relating to the present crisis of the EU and its social dimension. All of this will be viewed through the prism of the building of a more social or directly social market EU of tomorrow. The main aim and ambition of the authors is to contribute, by logically and pragmatically argued conclusions and suggestions, to the debate on why and how today's EU should aim for the fulfilment of its goal of building a social market economy. The authors believe that the text will offer a number of answers as well as new follow-up questions that will bring all of the readers involved closer to one of the great and challenging tasks of European integration of these days. Finally, the authors are thankful to the Czech Science Foundation as their research has been financed by the project GA CR registration number 14-23623S.

2. SOCIAL MARKET ECONOMY AS THE GOAL SET BY THE EU LISBON TREATY

2.1 Current EU and the Necessary Competences to Achieve the Objective of Social Market Economy

Among the many changes brought about by the Lisbon Treaty, it redefined the objectives of the European Union,[18] especially in Article 3 TEU.[19] This provision contains a large number of desirable objectives which at a first sceptical glance may seem hard to reconcile, *e.g.* the objectives of a high level of competitiveness and full employment. Amongst the objectives we see for the first time the explicit objective of having a social market economy[20] which has been described as one of the 'most ingenious inventions in the history of economic policy making.'[21] Given that, in parallel, one of the originally proposed goals of the EU, 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 (Barnard and Deakin 2012:551; Damjanovic 2013; O'Gorman 2011; Weiss 2013).

As is evident from the list of Union objectives in Article 3, the TEU conceives the social market economy rather as a desirable outcome, which is to be attained through

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[18] For a general overview of the objectives of the EU, see Lenaerts and van Nuffel 2011:108 et seq.

[19] "Article 3 TEU

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties."

[20] For an introduction to the concept of the social market economy in EU primary law, see Convention 2013:10. For a criticism of the inclusion of this objective in the Constitution for Europe, see Joerges and Rödl 2004:10-11.

[21] See Vogt 2011:1.With this superlative the author refers to the German economic miracle of the 1960s, achieved using the doctrine of the social market economy as its basis.

effort, which the EU (or the EU hand in hand with Member States) is summoned to develop within the scope of its activities. As far as the question of the relationship between the concept of the social market economy and the competences of the EU is concerned, it will first be necessary (1) to define the content of the concept of the social market economy, (2) to determine how the individual components of that content correspond to the EU's competences listed in Articles 2 to 6 of the TFEU and other provisions of the Treaty (specifically conferred powers), having regard also to the Charter of Fundamental Rights of the EU (hereinafter CFREU), and (3) to determine whether the component parts of the social market economy that are not covered by Articles 2-6 of the TFEU can be realised using the so-called flexibility clause in Article 352 of the TFEU, which provides a supplementary legal basis for Union action for which specific provision is not made in the Treaties but which is necessary to attain one of the objectives set out therein. Lastly, for the sake of completeness, we shall examine whether those elements may be implemented through enhanced cooperation in the event that not all Member States are willing to participate in legislating for a social market economy.

An inquiry into the existence of the powers of the Union to attain the objectives of the social market economy makes sense only if we understand the EU as a legal entity, distinct from the Member States. It is worth bearing in mind, because the unusual range of EU objectives formulated in Article 3 of the TEU may also evoke a vague political understanding of the Union as a set of Member States and their umbrella organisation, the EU;[22] with such a political understanding of the Union, however, it becomes futile to consider the question of competences because if the Union lacks certain of them, then at least the Member States have them.

2.1.1 Content of the concept of the social market economy

It should be noted above all that neither the TEU nor the TFEU defines the concept of the social market economy and that this shortcoming has not even been eliminated by CJEU case law. For purposes of an academic analysis we can find an escape in many expert studies dealing with the content of the social market economy.[23] Further on we have decided to divide the content of the ten components of the social market economy in accordance with a relatively recent study published by the Konrad-Adenauer-Stiftung (KAS), which is dedicated to the long-term and systematic exploration of this concept (Franke and Gregosz 2013).

According to that study, the social market economy consists of the following components, which can be summarised in ten main points: (1) private ownership of the means of production, including economic freedom, professional freedom, both necessarily linked to liability; (2) competition as a goal that ensures freedom and that includes free consumer choice, (3) a stable and workable monetary system with price stability, (4) high employment, (5) external balance with high export quota, (6) steady and commensurate economic growth, (7) fair distribution of income, (8) the possibility

[22] We should bear in mind that until the adoption of the Lisbon Treaty (2007), the EU did not have explicitly recognised legal personality.

[23] Among the abundant literature on this topic see, for example Eisele 2011; Eucken 2013; Franke and Gregosz 2013 or Zweig 1980.

of income from capital stock (fair distribution of wealth), (9) environmental goal-setting and (10) European integration within a peaceful world order.

For the purpose of this review of EU competences we have adopted this apparently broad definition of the social market economy, since in our opinion it renders this work applicable also to situations where the definition of the social market economy will be less comprehensive. By comparison, the Treaty establishing a monetary, economic and social union between the FRG and the GDR (1990) contains a different and indeed less comprehensive definition of the social market economy: 'The Economic Union is founded on a social market economy as the common economic order for the parties. It is characterised by private ownership, loyal competition, free formation of prices and the principle of free movement of labour, capital, goods and services, without excluding special forms of ownership and enabling the participation of public or other entities to exchange economic goods, without discriminating against private interests. It takes into account the demands of environmental protection' (Barbier 2012:6).

In the light of the provisions of the TEU, the following Union objectives are relevant for present purposes: balanced economic growth, price stability, full employment, social progress, a high level of environmental protection, promotion of social justice, gender equality, solidarity between generations and protection of the rights of the child, free and fair trade.

2.1.2 The division of competences between the Member States and the EU and the concept of social market economy

The EU's competences are primarily defined in Articles 2 to 6 TFEU. Some of the competences of the EU for the achievement of a social market economy will however also need to be sought out in other provisions of the Treaties or other acts of Union law.[24] The EU works on the principle of conferral,[25] so that an appropriate legal basis for each component of the social market economy must be found; otherwise, it must be concluded that the EU has no competence in the area in question.

EU competences differ in nature: They are either exclusive, shared or supporting – coordinatory, based on the conferral thereof by the Member States. Non-conferred competences remain with the Member States (Lenaerts and van Nuffel 2011:112 et seq).[26] Below we will discuss the various components of the concept of the social market

[24] The term 'Treaties' refers to the founding treaties of today's EU, i.e. the TEU and the TFEU, as well as the EAEC Treaty.

[25] See Article 5(2) of the TEU: 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.' See also Articles 4(1) and 5(2) TEU: 'Competences not conferred upon the Union in the Treaties remain with the Member States'. See CJEU C-2/94 Denkavit International and Others EU:C:1996:229, para. 24: 'The principle of conferred competences must be respected in both the internal action and the international action of the Community.'

[26] Exclusive EU competence includes five areas that affect economic growth, but are mentioned elsewhere separately within the EU catalogue: customs union, the establishment of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy, and common commercial policy (Article 3(1) TFEU).

economy by first briefly summarising their contents, followed by a comparison with the EU's competences in the given area.

2.1.2.1 Private ownership of the means of production

The basis of the social market economy is the free market that allows decentralised decision making by business operators through a functioning price mechanism and which rejects the subordination of these subjects to central planning.

Private ownership of capital goods is thus a prerequisite for the social market economy. Private ownership brings a greater level of responsibility and it is also a prerequisite for the emergence of a strong middle class and small businesses, which are the foundation of a healthy functioning economy. A middle class can only exist if it is guaranteed private ownership of capital goods (money/capital, buildings, equipment, and supplies) that lead to the production of goods and services by private entities.

Private ownership, however, is mentioned only as one element in a coherent system whose individual elements cannot be arbitrarily selected but which are relevant only as a whole. Here private property, inter alia, comes into play hand in hand with the principle of accountability and the principles of competition regulated by law. In this first section we have already arrived at the main feature of the social market economy – the interdependence of individual aspects, which are both its objective and the means to achieve this objective.

Private ownership of the means of production is not disputed by the Treaties. However, Article 345 TFEU confirms that issues governing the system of ownership are in the competence of the Member States: *'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.'* This provision could be interpreted such that this component is not an EU competence. The question could be asked whether this neutrality set out in Article 345 TFEU might not permit a government to adopt a widespread policy of nationalisation of the means of production. However, it appears from the literature and the case law that Article 345 TFEU limits, but does not prevents, the application of the TFEU as a whole to the way in which rules of a Member State deal with the right of ownership of undertakings. Consequently,

Regarding shared competences, the method of sharing specific competences depends on whether the competence is shared concurrently, or in parallel. The majority of shared competences are shared concurrently; the Member States exercise their competences (1) to the extent that the EU has not exercised its competence or (2) has decided to cease exercising its competence (Articles 2(2) and 4(1) of the TFEU; which is known as the principle of 'occupied fields' – or pre-emption).

Concurrently shared EU competences are mainly listed in Article 4(2) TFEU: (a) internal market; (b) social policy, for the aspects defined in the TFEU (i.e. mainly social aspects of free movement); (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy…

By contrast, parallel shared competences prevail in certain enumerated areas – research, technological development, space, development cooperation and humanitarian aid: here, the EU may act only to the extent that it is not prevented from doing so by the Member States in their activities.

The EU has coordinating, supporting and complementary competences in the field of economic and employment policies. The EU has these competences to support the exercise of the competences of the Member States, including in the following areas: health, industry, culture and tourism (Article 2(5) and Article 6 TFEU).

Article 345 TFEU concerns only the private or public ownership of undertakings, with which the Union is not to concern itself and which can thus be regulated by the Member States themselves (Akkermanns and Ramaekers 2010).[27]

The provisions of Article 345 TFEU should be read in light of Article 17 of the Charter of Fundamental Rights of the European Union (hereinafter, CFREU): everyone has the right to own property, including capital goods. The guarantees given in respect of private ownership under Article 17 CFREU should be read in the light of Article 52(1) CFREU: fundamental rights may be limited, but only by law provided that their essence is respected and that the limitations are necessary and genuinely meet objectives of general interested recognised by the Union or the need to protect the rights and freedoms of others.

Article 17 CFREU corresponds to other European standards, in particular Article 1 of the Additional Protocol to the European Convention on Human Rights (1950).[28] The relationship to this Convention is additionally regulated by Article 52(3) CFREU that guarantees the coherence of the two instruments. EU law thus guarantees the protection of private property, including private ownership of capital goods. However, it does not mean that EU law has the competence to force the Member States into a particular system of property ownership, if their systems are in line with Article 17 CFREU.

This component also includes Article 16 CFREU, which guarantees the freedom to conduct a business for otherwise the right to protection of private property in connection with capital goods would be nugatory.[29]

We can therefore conclude that EU law sufficiently protects private ownership of the means of production in terms of the scope of application of EU law.[30] For other purely domestic situations this is not the case.

2.1.2.2 Regulated competition law

As noted above, the socio-economic concept of the social market economy is characterised by the interdependence of individual components. As with private property, economic competition regulated by law is both an objective and a means. Competition releases the creative forces of individuals and is applied on the basis of freedom of contract, thereby ensuring the most efficient use of the competitive environment. It is therefore an essential feature of the concept of the social market economy.[31] The State's role is here 'simply' to provide a framework for the proper functioning of these principles and to

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[27] See also CJEU C-105/12 *Essent and Others* EU:C:2013:677.

[28] See Article 1 of the Additional Protocol to the Convention on the right of peaceful enjoyment of possessions. According to the explanation to Article 17 CFREU, this is a fundamental right common to all national constitutions, which has been repeatedly recognised in the case law of the CJEU and for the first time in Case 44/79 *Hauer* EU:C:1979:290.

[29] Cf. Article 16 CFREU; the explanation to Article 16 CFREU highlights the CJEU case law which recognised the freedom to exercise an economic or commercial activity (Case 4/73 *Nold* EU:C:1974:51, para. 14; Case 230/78 *Eridiana* EU:C:1979:216, para. 31) and freedom of contract (*e.g.* Case 151/78 *Sukkerfabriken Nykøbing* EU:C:1979:4, para. 19; C-240/97 *Spain* v. *Commission* EU:C:1999:479, para. 99), and Article 119(1) and (3) TFEU, which recognise free competition.

[30] Cf. Article 51(1) CFREU.

[31] For a lesser-known commentary on the concept of competition, see Krabec 2006.

establish penalties in case of violations. Confidence in the clear rule of law is essential to the functioning of market principles.

The relationship between the EU and competition is based on ordoliberalism, *i.e.,* amongst other things, the finding that unregulated competition harms the market. Legally regulated competition was an objective of the EU until the adoption of the Treaty of Lisbon; in the Treaty of Lisbon this objective was moved at the initiative of France to a Protocol (No 27) on the internal market and competition. However, Article. 3(1)(b) TFEU ranks 'the establishing of the competition rules necessary for the functioning of the internal market' as an exclusive competence of the EU. Details on these rules are governed by Article 101 et seq. TFEU and the secondary legislation based thereon. The above protocol even explicitly foresees the use of the so-called flexibility clause of Article 352 TFEU (see below). Article 119(1) of the TFEU then, in the context of coordination of the economic policies of the Member States, speaks about free competition.

The EU has, however, the competence to regulate competition in cases affecting intra-Union trade. Regulation of the purely domestic aspects of competition is left to the Member States. The EU is thus not theoretically able to ensure that every aspect of the competition is properly regulated by itself. In practice, however, doubts as to whether competition is already regulated everywhere in the EU Member States do not arise.

2.1.2.3 A stable and functioning monetary system with price stability

A reliable monetary system with price stability is a prerequisite for the development of the principle of private ownership and competition regulated by law. Only a stable currency can serve as a generator of information for all entities acting in the market. Here there is a 'market' factor. Price stability, i.e. a stable level in the 'consumer basket', allows conflict-free development. Here there is a 'social' factor. In such a stable society the medium of exchange is money as a public good, which is the product of the central bank and commercial banks. An independent central bank is a prerequisite for a properly functioning system.

Pursuant to Article 3(4) TEU, the EU's objectives include the fact that 'The Union shall establish an economic and monetary union whose currency is the euro'. Article 3(3) TEU states that the EU 'shall work for the sustainable development of Europe based on balanced economic growth and price stability'. The price stability objective in monetary policy is confirmed by Articles 127(1) and 282(2) TFEU. Achieving the objective of monetary union falls, according to Article 3(1)(c) TFEU, within the exclusive competence of the EU in the area of monetary policy for the 'Member States whose currency is the euro'.

The EU therefore has overall authority over the common currency, but it does not have authority over economic and budgetary discipline, even when it comes to the Eurozone countries, which is essential for the stability of the current common currency. Furthermore, the EU has no jurisdiction over the currencies of Member States that do not use the euro. The EU may influence such currencies using instruments which should lead to fiscal responsibility, for example the Stability and Growth Pact so that

even they do not jeopardise the objectives of the EU. The past and present show us, however, that these EU instruments are relatively weak and are unable to wield sufficient influence over the economic policies of the Member States. The EU competence to create a truly stable and functioning monetary system is inadequate.

2.1.2.4 High employment

High employment is again an understandable example of a factor that is both an objective and a means to achieving a social market economy. In accordance with the principle of freedom, individuals ensure their existence through their activities on the labour market, thereby also contributing to the prosperity of society as a whole. High unemployment is undesirable, not only because of its negative social consequences, but also because it disproportionately affects the entire social system.

To achieve high employment, it is necessary to create conditions enabling the rapid adaptation to changing conditions in the labour market of both employees and employers. It is a complex task that requires the articulation of policies in the fields of education, science and research, competitiveness and regional development. In this regard it requires action by private and public entities with a high degree of flexibility and above all an understanding of current trends and the ability to use them to achieve (the objectives of) the social market economy.

The EU also seeks the objective of 'full employment' (Article 3 TEU) which is, owing to current problems in this area, somewhat utopian, and also the objective of a 'high level of employment' (Article 9 TFEU). This objective of a high level of employment is – unlike full employment – placed in Title II of the TFEU – provisions having general application. This objective has to be taken into account in all EU policies.[32] The objective of the social market economy – high employment – conforms to this second formulation of the objective.

In this area the EU has only coordinating powers (Article 5(2) TFEU; for the details see Articles 145-150 TFEU). They were introduced by the Amsterdam Treaty in order to promote structural reform, *i.e.* to change the structure of workforce skills so as to correspond to the needs of the labour market, create good fiscal conditions for job creation and organise multilateral surveillance of the employment policies of the Member States.[33]

The fact that the EU can only coordinate some aspects of the employment policies of the Member States means that it does not have adequate competence in order to achieve the objective of high employment alone. Reality confirms this.

2.1.2.5 External trade stability with high export quotas

External trade stability is a prerequisite for internal stability. Only in a stable environment is it possible to ensure the prosperity of all parties involved, who subsequently benefit from a greater diversity of products, lower costs and greater market opportunities

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[32] The inconsistency in the wording of the Lisbon Treaty is given credence by the former Director General of the Legal Service of the Council of the EU, who pointed out that the Lisbon Treaty was formulated by diplomats, and not lawyers. For more on this see Piris 2010:15-15.

[33] See Council Decision of 4 October 2004 on guidelines for the employment policies of the Member States, OJ L 326, 29. 10. 2004, p. 45-46.

in general. In the context of the social market economy, it is necessary to take into account also the hidden costs e.g. cross-border production chains arising in the context of globalisation. This mainly concerns environmental damage or drastic requirements for worker mobility, etc. In this broad context, of course, the capacities requirements go beyond the specific powers conferred on the EU as an autonomous actor.

2.1.2.6 Stable and moderate economic growth

Stable and moderate economic growth is a prerequisite for conflict-free development. We understand stable growth to be growth that excludes significant fluctuations. Reasonable growth under the concept of the social market economy constitutes growth that does not involve drastic structural changes of a drastic nature. It can be said that such growth is reasonable that does not measure prosperity only using standard economic aspects, which not only brings economic prosperity, but also high living standards in the broad sense of the term.

The TEU uses different terms when anchoring the EU objectives, not 'stable and moderate economic growth', but 'balanced economic growth'; we shall not examine the difference between these two apparently related concepts here.

It is a central constituent of the social market economy and the aspect of European integration to which the European citizen attaches particular importance.

Economic growth depends greatly on economic and industrial policy as well as employment policy, the social system, taxes and the budget, all of which are areas of essentially national competence; here the EU has only supporting and coordination competences. It is therefore impossible to conclude that the EU's competences in this crucial area are sufficient, in fact the opposite is true.

2.1.2.7 Equitable income distribution

Basic material security is a precondition for the real use of the value of freedom. Also, in the social market economy environment, it is a major aspect of rewarding individuals for their efforts. In the long term it is not possible to maintain a healthy economic environment, should the needs of individuals be largely saturated by rents in a broad sense, without direct reference to personal output.

This objective of the social market economy in the area of fair distribution of income within the EU mainly concerns *remuneration for work performed*. As a matter of course we shall leave aside the prohibition of slavery and forced labour (Article 4 CFREU): this especially concerns gender equality (Article 2 i.f., Article 3(3)(2) TEU, Articles 8 and 157 TFEU, Protocol No 33 to Article 157 TFEU, Articles 21 and 23 CFREU, Directive 2006/54,[34] Directive 2000/78[35]). These provisions derive from Article 20 of the revised European Social Charter of 3 May 1996 and from point 16 of the Charter of Fundamental Social Rights of Workers.

[34] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26. 7. 2006, p. 23.

[35] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2. 12. 2000, p. 16.

As far as Article 157 TFEU is concerned, the Court of Justice has acknowledged that it has direct effect[36] and the concept of pay is always interpreted broadly: *e.g.* a calculation of severance pay, which takes into account the duration of military service, but ignores maternity leave, is lawful;[37] *part time work* for women is statistically significant; if when performing such work a woman is paid less than a man, it is a violation of EU law, unless the employer proves that there are '*objectively justified factors to which discrimination on the basis of gender is entirely unrelated*';[38] also *failure to provide compensation for overtime* of up to 3 hours per month affects more part-time workers than full-time, and thus affects women more.[39]

Non-discrimination on grounds of sex in relation to the fair distribution of income includes *pension conditions* (Directive 2000/78[40]) or *equal access to goods and services* (*e.g.* insurance; Directive 2004/113[41]).[42]

EU *promotion of equality of opportunity* for men and women then leads to '*the elimination of inequalities, and to promote equality, between men and women*' (Article 8 TFEU; Declaration 19 on Article 8 of the TFEU), namely '*in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.*' (Article 157/3 TFEU – see above).

The EU therefore achieves justice, especially in the area of pay, by developing the principle of non-discrimination between employed workers for equal work; competences in this regard are sufficient. However, the proportion of salaries in various stages of production, from raw material extraction, production and trade, remain unaffected; this area is not within the competence of the EU.

2.1.2.8 Equitable wealth distribution

Solidarity in the field of distribution of social wealth is regulative of the absoluteness of private property. Under the new classification of fundamental rights in the CFREU it is worth noting that just one section directly bears the title 'Solidarity'. The Treaties focus on EU policies, therefore it is not the Treaties, but the CFREU that especially respects

– 'the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life' (Article 25 CFREU);

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36 CJEU Case 43/75 *Defrenne* EU:C:1976:56 (*"Defrenne II"*).

37 CJEU C-220/02 *Österreichischer Gewerkschaftsbund* EU:C:2004:334.

38 CJEU C-70/84 *Bilka* EU:C:1986:204.

39 CJEU C-285/02 *Elsner-Lakenberg* EU:C:2004:320.

40 See CJEU C-231-233/06 *Jonkman* EU:C:2007:373; C-411/05 *Palacios de la Villa* EU:C:2007:604; C-267/06 *Tadao Maruko* EU:C:2008:179, for the relationship between marriage, registered partnerships and widow's pension; C-144/04 *Mangold* EU:C:2005:709, for the relationship between fixed-term contracts and elderly workers; C-388/07 *Age Concern England* EU:C:2009:128; C-555/07 *Kücükdeveci* EU:C:2010:21 and C-229/08 *Wolf* EU:C:2010:3 on exceptions to the prohibition of discrimination on grounds of age.

41 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 02/12/2000, p. 16.

42 C-236/09 Test Achats EU:C:2011:100 on the risks arising from differences in gender in pension insurance, discrimination of men against women was eliminated.

- 'the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.' (Article 26 CFREU);
- the right of 'everyone' 'to a free placement service' (Article 29 CFREU);
- the right of every worker to 'working conditions which respect his or her health, safety and dignity', including the right to the 'limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave' (Article 31 CFREU);
- 'the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.' (Article 33 CFREU);
- 'the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment … ', 'the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources,' (Article 34 CFREU);
- 'the right of access to preventive health care and the right to benefit from medical treatment' (Article 35 CFREU);
- the right of access to services of general economic interest … (Article 14, 106(2) TFEU, Article 36 CFREU; Protocol (No. 26) on services of general interest; Commission Decision No 2012/21; Communication from the Commission of 11 January 2012, OJ 2012/C 8). Where a service of general interest may be unprofitable but necessary for the functioning of society (post, electricity …); or
- a high level of consumer protection (Article 4(2)(f), 12, 169 TFEU, Article 38 CFREU) as the weaker element of the company – consumer relationship; therefore, it is required across the board in all other policies (Articles 12 and 114(3) TFEU), specifically in agriculture (Articles 39, 40 TFEU) and competition (Article 101(3), 102(4) and 107 TFEU).

These provisions of CFREU mostly refer to the Member States' legislations and the Treaty. The CFREU is additionally applied only in the application of other EU regulations, and not purely national regulation (Article 52 CFREU). The EU's own competences in these areas therefore mainly concern situations relating to the harmonised prohibition on discrimination. Since the above rights relate primarily to the employment and social fields, which are in the coordinating competence of the EU relating to Member States (Art. 5 TFEU), the achievement of this objective is far from being within the competence of the EU.

2.1.2.9 Care for the environment

The emphasis on a healthy environment falls under the concept of quality of life measured not only on the basis of purely economic indicators. Here the term 'social', in the broadest sense of the social market economy, places an emphasis on responsibility towards future generations and, above all, tries to eliminate environmental damage

incurred in the past and current impacts of economic activity whilst seeking to minimise the use of the principle of precautionary prudence and the application of the 'polluter pays' principle.

When anchoring the objectives of the EU, ecology is placed in a direct connection with the social market economy objective: 'The Union … shall work for the sustainable development of Europe based on … a social market economy … and a high level of protection and improvement of the quality of the environment' (Article 3 TEU). Ecology must also be taken into account horizontally – in all other EU activities.[43]

Caring for the environment is a concurrently shared competence of the EU (Article 4(2)(e), 191-193 TFEU) and was even included in the catalogue of fundamental rights in the CFREU.[44] Shared and cross-sectional environmental policy aims for sustainable development, the rational use of natural resources and solutions to global environmental problems. It pursues a high level of environmental protection, which must be part of all other policies across the board. The competence to conclude so-called external treaties in this area is, however, reserved for the EU Member States. This policy/competence is closely linked with health policy. Harmonisation undertaken in this field is a minimal level of harmonisation; more stringent measures by the Member States are therefore admissible.

The principles set out in this article are based on Article 3(3) TEU and Articles 11 and 191 TFEU.

2.1.2.10 European integration in the world order of peace

As already indicated above, a prerequisite for the successful implementation of the concept of social market economy is a stable internal and external environment. Thus, in short, a peaceful environment. It can certainly be said that European integration contributes to the peaceful existence of the communities concerned. It is not only goods that flow through open borders, but also individuals who, through knowledge of different societies, subsequently contribute to tolerance and peaceful coexistence within their home societies.

The objective of the EU to promote international cooperation and peace in the world arises from numerous provisions of the TEU.[45] Achieving these objectives depends on the competences expressly conferred or enhanced cooperation because the use of 'subsidiary competences' is, at least for the Common Foreign and Security Policy (CFSP), expressly excluded.

Explicitly conferred powers should be divided into two areas: external (non-EU) aspects of intra-EU competences/policies and purely external competences/EU policy. The following areas can be considered to be purely external policies: expansion and association, neighbourhood policy, development aid, humanitarian aid and the Common Foreign and Security Policy (hereinafter CFSP). The external aspects are of particular significance for the following intra-EU policies: trade, environment, immigration and asylum, duties and taxes (in so far as they are not covered by commercial policy), trans-

[43] Cf. Article 11 TFEU.

[44] Cf. Article 37 CFREU.

[45] Cf. Article 3(1), 21 TEU.

European networks (telecommunications, transport, energy), competition. The EU promotes the development of external relations also in other areas dominated by the competences of the Member States, for example science and research, etc.

This division is particularly important in this regard, as to whether we should emphasise the peace aspect in the contextual component of the social market economy in question, which brings us mainly to the CFSP, or the aspect of international cooperation, which can include all of the policies described above. This distinction is legally significant in the fact that whilst the CFSP works in a specific, more interstate scheme (specific types of secondary acts, unanimity as the basis for decision-making processes, etc.), the other outside areas tend to be under the supranational ('Community') method of cooperation.

The international CFSP scheme is indeed suitable for the adoption of various kinds of measures, including military missions, but the basic legal act essentially requires unanimity in the Council. It therefore depends on which areas of international relations the Member States decide to address jointly. The limiting factor in the military field is also the fact that the EU does not have its own army, so it cannot make use of this, even if it had the competence to do so. The current security crisis in the vicinity of Europe (Ukraine, Syria, Palestine etc.) clearly show that the willingness to use existing EU competences as an effective remedy is actually very poor.

2.1.3 The possibility of reaching parts of the social market economy not falling under explicitly conferred competences, by means of subsidiary competences

It follows from the above that all objectives from the aforementioned ten points of the social market economy fall more or less beyond (exclusive or shared) competences conferred on the EU: (1) private ownership of the means of production, unless if in an area that falls under EU law, (2) legally regulated competition, if there is no cross-border effect, (3) stable and functioning monetary system with price stability, if regarding national currencies and budgetary discipline, (4) high levels of employment, (5) external stability with high export quotas, (6) steady and moderate economic growth, (7) equitable distribution of income, (8) equitable distribution of assets, (9) care for the environment, unless if in an area that falls under EU law and (10) European integration in the world peace order.

Above we provided links not only to the competence of the EU, but also to its objectives. This is because the express inclusion of specific targets in itself may be established by the subsidiary competence of the EU, sometimes the flexibility clause.[46] Subsidiary competences (Articles 352-3 TFEU) are those competences that are necessary to achieve the objectives set down in the Treaties, but the Treaties have neglected to accompany such objectives with appropriate competences. This creates an emergency situation as regards competence. The flexibility clause is therefore – within the limits of the delegated competences and the objectives of the EU – a blanket rule, which allows

[46] This should not be confused with flexibility – enhanced cooperation, see Section 2.1.4 below.

the expansion of the executive powers of the EU, without the need to formally revise the Treaty.[47]

It follows from the conditions of application of Article 352 TFEU that whilst the extent of EU objectives and social market economy does not hinder their achievement with the help of Article 352 TFEU, there is an obstacle in the form of *prohibition of harmonisation* in some areas of supporting, coordinating and supporting competences: employment (Article 149(1) TFEU), the basis for social protection systems (Article 153(4) TFEU), education, youth and sport (Article 166(4) TFEU), culture (Article 167(5) TFEU), health (Article 168(6) TFEU, except in cases of Article 168(4) TFEU), industry (Article 173(3) TFEU), economic policy (indirectly Article 175(1) TFEU), tourism (Article 195(2) TFEU). Article 207 TFEU also reminds us that the EU must not circumvent the prohibition on harmonisation by entering into international trade agreements in the areas where harmonisation is prohibited.

If harmonisation is not possible, it is possible to issue only binding acts establishing support programmes and projects, or non-binding acts; both types are too weak to achieve the objectives of social market economy through regulation by the EU. However, it does not rule out the fact that the Member States themselves may, with the help of support and coordination of EU competences, reach these goals together.

Overall, the areas of social market economy, which cannot be achieved on the basis of specific provisions in EU primary law, cannot be achieved even with the help of Article 352 TFEU.

2.1.4 The possibility to implement parts of the content of the concept of the social market economy, not covered explicitly by conferred competences, through enhanced cooperation

Enhanced cooperation (i.e. the principle of flexibility[48]) provided for in multiple places in the Treaties,[49] allows at least nine Member States together in non-exclusive competences or the CFSP to cooperate more closely to promote the objectives of the EU, which the EU cannot achieve as a whole; other Member States may join later, which prevents the rise of a 'hard core'.

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[47] The strict conditions of application of Article 352-3 TFEU therefore conform with flexibility: (i) the absence of an explicit legal basis for the given competence in the Treaties; (ii) the existence of an EU objective except for the CFSP (this area is excluded from the application of Article 352 TFEU) and the most general objectives of the TEU, (iii) the need for measures to achieve it, (iv) the appropriateness of the measures, i.e. its proportionality, (v) respect for the principle of subsidiarity, including the obligation of the Commission to notify the national parliaments (Article 352/2 TFEU), (vi) there is no harmonisation if this is forbidden, i.e. in the area of coordinatory or complementary competences (vii) it does not circumvent Article 48 TEU on amendments to the Treaties (viii) by a unanimous vote in the Council, (ix) on a Commission proposal (x) with the consent of the EP.

[48] This should not be confused with flexibility – subsidiary competences, as described above (Article 352 TFEU).

[49] Cf. Article 20, 42(6), 44-46 TEU, Article 82(3), 83, 86, 87, 326-334 TFEU; Protocol No. 10 on permanent structured cooperation established by Article 42 TEU; Protocol No. 11 to Article 42 TEU; 40. Declaration to Article 329 TFEU.

There are already examples of enhanced cooperation, which fall under the areas of social market economy (broadly understood): we can mention for example the area of patent protection[50] or the proposal to introduce a tax on financial transactions.[51]

It is logical that enhanced cooperation is not in the exclusive competence of the EU, decided upon by the EU and not the Member States. In the context of social market economy enhanced cooperation in the EU cannot therefore be used – either because it is an area of exclusive competence, or it is a competence of the Member States – in the following areas: (1) private ownership of the means of production, (2) regulated competition, (3) stable and functional currency system (euro) with price stability, (5) external stability with high export quotas, (7) equitable distribution of income, (8) fair distribution of wealth. Conversely, it can be used for the objectives (4) high levels of employment, (6) continuous and moderate economic growth, and (9) care for the environment. It follows that there is a need to remedy the lack of explicit competences of the EU in the first group of the aforementioned areas. It should also be noted that enhanced cooperation can bring the achievement of the social market economy closer in the co-operating Member States, but the given area must be a shared or coordinatory/supporting competence. This tool therefore has no influence over the division of competences between the EU and its Member States.

2.1.5 Has the EU the competence to achieve the objective of social market economy?

The fundamental problem of this topic is primarily the fact that the concept of the social market economy, although it figures among the objectives of the EU, has no legally binding definition and the content of this concept must be sought out in doctrinal studies, which cannot fully replace this *lacunae* regardless their level of conviction. Social market economy is otherwise a flexible concept and it must be adapted to the political realities of individual countries. It follows that only a small part of the social market economy can be governed by legislation, which would then serve as a common basis for the entire EU.

From this another question arises: who should define the social market economy? The EU? The Member States separately? Given the division of powers, as described in this chapter, it is evident that the definition of the concept of social market economy itself is not fully within the competence of the EU, and therefore the Member States must participate even if using the minimum definition of this term. Our analysis, however, revealed a further problem: defining the substantive component of social market economy does not coincide with the areas of EU policies and competences. Even individually these categories are not always clearly defined. It is therefore not possible to determine with absolute precision whether a particular contextual component is covered by the appropriate authority on the part of the EU, making it difficult to achieve the

[50] Cf. Council Decision 2011/167, authorising enhanced cooperation and the related implementing Regulations 1257/2012 and 1260/2012.

[51] Cf. Proposal for a Council Directive of 28 September 2011 on a common system of financial transaction tax and amending Directive 2008/7/EC (COM/2011/594 final).

objectives of this analysis – to determine whether the EU has the competence to achieve the objectives of social market economy.

Nevertheless, such a difficulty does not mean, practically speaking, that the EU should not, at the same time, make an active use of the competences it already has to take measures and develop policies that would contribute to a socially and economically well balanced Europe.

2.2 The Origins and Possible Interpretations of the Social Market Economy as a Goal Set by the Treaty of Lisbon

The comparison between the set of competences conferred to the EU and the likely content of the social market economy concept made in the previous part revealed the need for further clarifications of the meaning of this particular Treaty aim. Looking back on the origins of the Lisbon Treaty, it is, however, not easy to judge what exactly the drafters of the Treaty had in mind when they adopted the objective of social market economy.

Historically, the expression "a highly competitive social market economy" appeared for the first time in the third paragraph of Article I-3 of the draft Treaty Establishing a Constitution for Europe (hereinafter CT). Although the wording was not fully identical to that of the current Article 3(3) TEU, its segment "based on balanced economic growth and price stability, a highly competitive social market economy aiming at full employment and social progress …" reads in both documents exactly the same. The notion of "social market economy" was introduced into the debates of the Convention in charge of the CT drafting by the then German foreign minister J. Fischer together with his French counterpart D. de Villepin in their common motion on "economic governance" of the Union just before Christmas 2002 (Joerges 2004:34). The text of the provision was then negotiated within the Working Group XI "Social Europe" of the Convention, as confirmed by its Report from February 4, 2003 (Final Report 2003).

The fact that the objectives of the Union for the first time made reference to "social market economy" was the fruit of a compromise not only between the German and French approaches to economic policy but between also those who lobbied for the reference to European social model and those who pushed for maintaining the reference to an open market economy with free competition (as already contained in Article 4(1) of the existing EC Treaty). Therefore, to satisfy both sides and to underscore the link between the economic and the social, as well as the EU efforts to ensure greater coherence between economic and social policies, this reference was adopted (Final Report 2003:12). It was not easy to insert this goal into the final draft of the CT as its wording from February 6, 2003 still contained no mention of it, but the subsequent version of May 28, 2003 already did, and, finally, in the next draft from June 10, 2003 the whole expression "a highly competitive social market economy" appeared for the first time ever (Joerges and Rödl 2004:10).

According to analysts, this wording reflected a clear compromise in the corridors of power and strictly speaking, it was even a meta-compromise, as the wording proposed

by the Working Group "Social Europe" (WGSE) had already included a concession made by those who pleaded for much social Europe (Craig 2013:313). Members of WGSE could not agree on proposing any extension of EU competences in the social field, thus describing them as "adequate" and merely emphasizing the requirement of equivalence between economic and social objectives of the EU.[52] Therefore, the WGSE Report did not propose a "social Union", but a social market economy, thus ceding ground to proponents of open market with free competition. Thereafter, in the compilation of the final draft of the whole CT yet another re-balancing compromise had to be struck and the social market economy became "highly competitive". Commentators appreciated it as a catch-all expression, good for giving simultaneous recognition to both social and economic interests at stake (Costamagna 2011:7) or as an attempt to balance the EU goals when one goal with a right-wing focus offsets another goal with a rather leftist orientation (Syllová et al. 2010:15). The target itself was commented upon as vaguely defined (Bücker 2013:12) and most likely not intended as an appeal to copy the post-war German economic policy. Most probably, the drafters just borrowed the ideal of a possible compromise between the economic growth and competitiveness on the one hand, and social-oriented redistributive measures on the other (Blanke and Mangiameli 2013:173; Joerges and Rödl 2004:11).

The transcription of the third paragraph of Article I-3 CT into the paragraph 3 of Article 3 TEU took place in the European Council's documents without any noteworthy discussion, just with a footnote that the wording was taken from the results of the 2004 Intergovernmental Conference which approved the CT draft. A fierce debate erupted on the contrary about its second paragraph that in the draft CT's Article I-3 ranked among the EU objectives the "internal market where competition is free and not distorted". Under pressure from the then French President, N. Sarkozy, the European Council meeting in Brussels on June 21–22, 2007 decided to drop the reference to free and undistorted competition, stressing nevertheless its importance in a new Protocol 27 "On internal market and competition" added to the Treaty. This symbolic swap can also be read as the expression of resistance by a more balanced Europe proponents, not just in France, against too (neo) liberal direction of the European integration (Spiegel Online 2007).

It has to be borne in mind there that among the "social" innovations of the Lisbon Treaty there was also the Article 9 of the Treaty on the Functioning of the European Union (hereinafter TFEU) containing the so-called "horizontal social clause", a general obligation of the EU to take into account in all its measures, policies, and decisions "promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection

[52] Description of social competences of the EU as "adequate" was simply an escape from any assessment that might provoke a clash in the Convention. At the same time when the CT was drafted, experts assessed the EU social competence as follows: "A wide range of socio-political regulations, special legal anchor of social policy in the EC Treaty, as well as the policy of economic and social cohesion, give rise to the belief that the EC is of considerable importance in relation to establishment of a European social order. These appearances are deceptive, however. Analysis of the relevant provisions of Community law shows that the EC has in the social field only fractional and limited powers. The main part of the social rights and the social policy as such remain a matter for Member States. In contrast to e.g. agriculture or transport, in social matters the Community has no extensive powers to set the detailed structure of the European social order". Quote from Dauses, 2002:219.

of human health". Moreover, the Lisbon Treaty in Article 6, paragraph 1 has made a part of primary EU law the Charter of Fundamental Rights of the European Union, which includes Title IV "Solidarity" containing provisions on workers' right to information and consultation, right of collective bargaining and action, protection in the event of unjustified dismissal or right to social security and social assistance. All in all, the term "social" was repeated 167-times in the text of TEU and TFEU. Although it has always been understood even by supporters of social Europe that by the Lisbon Treaty, neither new specific powers accrued to the EU in the social field[53] nor any directly claimable social rights were given to European workers, the belief that the social aspects of the Lisbon Treaty would "open up opportunities for further strategic development of social Europe" was nevertheless widely shared (Špidla, 2009).

2.2.1 Possible interpretations of the social market economy goal: a wish list, a frame for single market features or a gate open to social harmonization?

It is quite difficult to dispute that the inclusion of the objective of social market economy, however vaguely defined, into the legislative text of the highest legal force and into its opening provisions (which the legal doctrine classifies as "core provisions", or even as "Constitutional" and "overreaching directive principles"), should have some practical significance and weight (Blanke and Mangiameli 2013). The rule says, at least since the judgment of the European Court of Justice (hereinafter CJEU) in Case 1973 6/72 *Continental Can,* that these target provisions of the Treaty are not "provisions that merely contain general program devoid of legal effect". They must be understood as "indispensable for the achievement of the Community's task" and must therefore be followed by policies of EU bodies.[54] In practice, this means not only that all the institutions forming and implementing EU policies must properly take them into account (Blanke and Mangiameli 2013:167). The most important consequence is that if a certain measure of the EU or a Member State acting in the field covered by EU law denies or openly ignores these objectives, it could be declared contrary to EU law by a decision of the CJEU, which in the case of an EU legal act would lead to its annulment (Falkner 2008:61; Blanke and Mangiameli 2013:161). It is, therefore, of utmost importance to examine whether the TEU or TFEU give some more specific content to the goal of social market economy and whether they authorize the EU to implement it.

Regarding direct clarification of the term, neither the TEU nor the TFEU offer any indication as to its content. Outside the Art 3(3) the Lisbon Treaty never uses the

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[53] In this respect the Declaration No 31 to the Treaties "On Article 156 of the Treaty on the Functioning of the European Union" expressed truly the prevailing will of the Member States: "The Conference confirms that the policies described in Article 156 fall essentially within the competence of the Member States. Measures to provide encouragement and promote coordination to be taken at Union level in accordance with this Article shall be of a complementary nature. They shall serve to strengthen co-operation between Member States and not to harmonize national systems. The guarantees and practices existing in each Member State as regards the responsibility of the social partners will not be affected…"

[54] See CJEU Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* EU:C:1973:22, para 23.

term "social market economy" and does not thus provide any definition explaining its meaning for Europe of the 21st century. One can try to construe it using the wording of Article 3(3) TEU, as well as other provisions of the Treaties, especially those that are of general importance for the balancing between the economic and the social or directly for the building of social Europe. In addition to the term "social market economy" Article 3(3) TEU contains 17 other targets. Of these, a maximum of 4-5 can be classified as market-oriented objectives: the internal market, balanced economic growth and price stability, scientific and technological progress and, of course, the very requirement that the social market economy (which already contains within itself a market component) must be highly competitive. The other objectives (to aim at full employment and social progress, to combat social exclusion and discrimination, to promote social justice and protection, etc.) are either explicitly social and solidarity-oriented, or cultural and ecological (safeguarding cultural heritage, high level of protection and improvement of the quality of the environment, etc.).

Some commentators assess this enumeration of targets as a mess with no clear guidance for political or legislative activity. On this issue, the analytical report of the British House of Lords quoted Sir David Edward's opinion that the objectives of the Treaty "might be said to amount in some respect to little more than a wish list" and that such a "proliferation of objectives, without any very clear indication of which are to take precedence over others, is going to create difficulty" (House of Lords 2008:21). In order to infer some specific mission from the wording of Article 3(3) TEU, some authors point out that this entire paragraph begins with a short and laconic sentence: "The Union shall establish an internal market". Therefore, everything that follows, i.e. all the other objectives listed in the paragraph, should be understood as characteristics of this historically paramount and eternal goal of European integration (Blanke and Mangiameli 2013:170).

From this perspective, however, the social market economy looks as a somewhat incongruous feature of the internal market. It lacks any explicit command to optimize, similar to more explicit objectives, such as to support economic growth, to work for full employment, to combat social exclusion etc. Compared to them, the social market economy is not, strictly speaking, an objective at all. If understood in its original West German meaning, it constitutes a major strategic approach towards the economic and social order of a society rather than just an amendment to policies that underpin and further develop its "internal market" (Joerges and Rödl 2004:19). As the key protagonist of the concept, Alfred Müller-Armack stressed repeatedly that the social market economy was to provide a "third way" between economic liberalism and socialism, and hence "there was no conditioning of this model by requirement of competitiveness; quite contrary, the governance of market mechanisms were subjected to commands of social justice." (Joerges 2010b:10-11).

A more radical interpretation of the social market economy aim can be found, according to some opinions, in the horizontal social clause of Art 9 TFEU and, more specifically, in the wording of Article 151 TFEU, which opens its Title X Social policy.[55]

[55] The Treaty understands the adjective "social" and uses it fairly broadly. In the EU jargon, in accordance with the scope of Title X TFEU Social Policy (pursuant to Art. 151-153 TFEU), the same adjective

It says that lasting high employment, improved living and working conditions, proper social protection, dialogue between management and labour, etc. will ensue not only from the functioning of the internal market (which at least – as the Treaty framers believed – will favour the harmonization of social systems); there would also be the need for "regulation or administrative action" as provided for in the Treaties as well as the approximation of provisions laid down by law. Although it is not a sufficiently specific and structured expression of objectives and corresponding measures, some take it for the basis from which an EU (social and economic) model can be developed (Bücker 2013:17).

Other authors, however, argue against the interpretation that Article 3(3) TEU points towards stronger EU harmonization and investment in the name of social objectives (Craig 2013:313). They stress the wording of Articles 119-120 TFEU (Title VIII Economic and monetary policy), which directly refer to the implementation of Article 3 TEU by the EU and Member States. In its four paragraphs laying down principles to be followed, the principle of "an open market economy with free competition" is quoted three times (!) and as regards other guiding principles listed there, these include: stable prices, sound public finances and monetary conditions and sustainable balance of payments. The logic of social protection and solidarity and the logic of fiscal austerity and free competition do not match each other easily, even if their marriage should take place in one Member State, under a single authority and based on the same tradition. Difficult power sharing between EU and its members and different national models of social security, social dialogue and social services make any draft of EU policy satisfying the logic of both 119 and 151 TFEU Articles a mission almost impossible, whether just in theory or even more so in practice.

Let's emphasize at this point once again that the strengthening of social aspects of the EU was incorporated into the Lisbon Treaty at a symbolic rather than practical level, as the EU did not receive any substantial powers to build its own social model. First, it is beyond doubt that neither Article 3(3) TEU nor the horizontal social clause in Article 9 TFEU nor the principles[56] set out in Title IV Solidarity of the Charter of Fundamental Rights grant individuals rights which can be claimed directly from the institutions of the EU or the Member States (Blanke and Mangiameli 2013:161). Second, it should be emphasized that the objectives of the EU, despite being codified in the opening provisions of the Treaty, cannot benefit from the rule *ius ad finem dat ius ad media*, i.e. in this case the right to the result does not imply the right to the means. The EU can legislate only if the Treaty provides for corresponding competence to act in a particular area (Joerges and Rödl 2004:20; Blanke and Mangiameli 2013:164).

commonly comprises the issues of employment support, improvement of living conditions, adequate social protection, social dialogue, development of human resources for the purpose of sustained high employment and the fight against social exclusion. This means that EU's social policy in this wide definition exceeds the "social issue" traditionally aiming at securing the individual against the most common life risks (disease, accident, old age, unemployment, loss of a breadwinner, etc.) and extends through employment support and labour law protection, collective defence of workers' rights, re-qualification and professional preparation as far as equal treatment and non-discrimination (Hennion-Morau 2004:41).

[56] Charter provide in some Titles justiciable rights but in others only so-called "principles" that must be observed by institutions when the issue legislative or executive acts and thus become significant for the Courts only when such acts are interpreted or reviewed (see Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) Explanation on article 52.

In order to achieve EU's social goals, Art 153(1) TFEU assigns to EU bodies the task to "support and complement" the activity of Member States. Although the EU can adopt directives ensuring minimum harmonization of certain standards, in the issues of social security and social protection of workers, their protection after the termination of the employment relationship, as well as representation and collective defence of the workers' interests, unanimous decision of Member States in the Council is required (see Art 153(2) TFEU). Moreover, no such decision can affect the Member States' right to "define fundamental principles" of their social security systems or significantly influence their financial balance (Art 153(4) TFEU). The Member States did not fail to stress once more in the Declaration (no 31) annexed to the Lisbon Treaty that the EU should only strengthen co-operation between them and not to harmonise their national systems. The most sensitive issues of remuneration for work, right to associate in trade unions, right to strike and right to impose lock-outs cannot be touched at all by EU's harmonization measures (Art 153(5) TFEU). This does not even allow the use of the so-called flexibility clause in these issues, defined in Art 352 TFEU, which otherwise presents the EU with the possibility to decide where the Treaty contains a goal but not corresponding powers.

On the basis of the powers thus defined, we cannot expect too much from the EU, even under the conditions of the socially more forthcoming Lisbon Treaty. If we assume that the really key issues of regulating labour law and employment relationships are the length of the working time, the remuneration for work, the reasons and conditions of dismissal, the role of trade unions and the right to strike, then the only issue that the EU substantially regulates is the working time (originally by Directive 93/104/EC, currently by 2003/88/EC, adopted on the basis of the power presently set out in Art 153 TFEU). It does not venture into other spheres (protection against unfair dismissal, except for the issues of non-discrimination) due to lack of political consensus or absence of powers, or is unable to do so (all other aforementioned issues).

In the issues of social insurance, the EU has a significant share in the coordination of social security of migrating EU citizens, i.e. the maintenance and transferability of their claim towards national social insurance systems, which, however, is not a social issue in the EU law scheme but an issue of the workers' internal market freedom (see Art 48 TFEU). The structure, income and expenditure of national welfare systems, however, are entirely in the hands of individual Member States. The EU, as indicated in the preceding paragraphs, must not burden them too much with its measures, despite the CJEU having done so until recently by enforcing thorough non-discrimination and granting rights of residence.[57] And even if the EU sought to be a source of support itself in the social sphere, it would come up against the structure and scope of its relatively "negligible" budget, which clearly does not provide it with the possibility of direct payment of benefits or social investments.[58]

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[57] See e.g. the frequently quoted decisions of the CJEU C-85/96 *Martinez Sala* EU:1998:217 or C-184/99 *Grzelczyk* EU:C:2001:458. This expansive tendency, however, is visibly limited, if not directly denied, in the recent EU case law from the years 2014-2016. See the decision of the CJEU C-333/13 *Dano* EU:C:2014:2358, C-67/14 *Alimanovic* EU:C:2015:597 and, most recently, C-299/14 *García-Nieto and others* EU:C:2016:114.

[58] The EU budget is maintained by agreement of member states at the level of 1% of the EU's gross domestic income, and only about one third of it is allocated to so-called cohesion funds, of which 25% goes to the

It is, therefore, obvious that the EU itself is not capable under the provisions of the Lisbon Treaty to implement on its own any ambitious program of social re-orientation of European integration (Blanpain 2013:31; Schömann 2010:5).

2.2.2 Social market economy as an appeal for social-market balance

A way out of this clash of interpretations of the social market economy objective can be found thanks to analysts who claim that rather than being a basis for positive action, this objective is more of a limiting principle or even a brake to any further development of European integration in one-sided direction.

In referring to Germany's post-war economic model, which provides the only historically established content of the social market economy concept, Joerges and Rödl conclude that at its core, there is no one-sided priority of the social (Joerges and Rödl 2004:20). The reason is that the original concept of social market economy contained an ordoliberal basis which was originally hostile to both over-burdening the economy by social protection elements and any mixed-economy directed by state interventionism (Golschmidt 2012:17; Franke and Gregosz 2013:11). The right method, therefore, consisted in balancing, equilibration and compensation of market externalities in the social field, but never in contradiction to the market mechanism (Golschmidt 2012:20). A social market economy is thus about market-compatible corrections of the otherwise free market, not about building more sophisticated welfare state or any Social Union. Quite naturally, the opposite extreme consisting in one-sided subjection of social justice to the requirements of competitiveness or business growth interests would also contradict this German legacy (Joerges 2010b:10-11).

Therefore, F. Costamagna considers the inclusion of the social market economy into TEU in the context of other social clauses and provisions of the Lisbon Treaty, inferring that this objective poses a clear limitation to further liberalization and deregulation measures of the internal market. It is about strengthening social rights against internal market freedoms and so it is a signal not so much for EU legislators as for the CJEU to re-balance social rights and market freedoms in favour of a stronger position of the former (Costamagna 2011:8). One way or another, the objective of the social market economy does not open the door to any deluge of new EU legislation designed to achieve this vaguely defined goal. It should rather be seen as a defensive clause, as a possible judicial brake to prevent the EU from switching to either socialism or neoliberalism (O'Gorman 2011:1853). This interpretation of the social market economy objective as a command to avoid any one-sidedness and to block the way towards both a social EU and its *laissez-faire* opposite looks plausible even after a more detailed legal analysis of the Treaty's provisions preformed in the preceding part of the book.

All thing considered, the interpretation of the social market economy objective not as a green light to a "new beginning" for a EU social model, but rather as a defensive principle intended to enable EU legislative bodies and even more CJEU judges to

European Social Fund (ESF). The sum of the budgets of 28 member states is 45 times higher than the EU budget. The average national budget amounts to 49% of a member state's GDP, whereby an average of 21% of its goes to social purposes. Cf. European Commission 2015b; OECD 2014.

reduce the bias towards the leftist or the rightist solutions of the emerging challenges looks, therefore, very close to reality. The introduction of the social market economy goal into the Treaty should be thus read as an appeal for social market balance in every proposal, act, measure or decision of the EU. Any other interpretation would contradict the existing division of competencies between the EU and its Member States and also, by the way, betray the original meaning of the social market economy concept.

2.3 The Roots of the Concept of the Social Market Economy in German Ordoliberalism, and the Original Meaning of the Term

The concept of the social market economy was born (in the work of Alfred Müller-Armack) as part, or rather as a complement or extension, of the German concept of ordoliberalism. According to Sojka (Sojka 2010) it is often neglected in English and American literature (which dominates the economic theory) (Sojka 2010). One of the most prominent representatives of the original ordoliberalism, Walter Eucken, was also the founder of the so-called Freiburg School, and from the very beginning, together with his collaborators he sought to combine both legal and economic theoretical approaches to the area of market economy and economic policy. From the point of view of the history of economic theory, both ordoliberalism and its extension, the social market economy, lay outside the mainstream and can easily be classified as one of the major directions of institutional economics.

Some authors see the original concept of ordoliberalism as the predecessor to constitutional economics. Rather than an independent part of economic theory, ordoliberalism, which also comprises the concept of social market economy, can be described as "the theory of economic policy", as defined by for example Quéré et al. (2010).

According to the aforementioned authors, the theory of economic policy must combine (in addition to knowledge from other sciences) all the three currently coexisting and mutually complementary economic approaches to analysis and to feasibility of economic policies: the positive approach, the normative approach and the so-called approach of political economics. The following has been written about the first two approaches: *"In positive economics, the economist takes the point of view of an outside observer and aims at determining the channels trough which public decisions affect private behavior,"* while *"in normative economics the economist adopts the posture of an adviser… and examines which set of decisions can best serve explicit public policy purposes."* (Quéré et al. 2010). Instead of assuming that the behaviour of the public policy makers is determined by a broadly defined public interest, the so-called approach of the new political economics sees the policy makers as economic agents maximizing their own utility function. Government institutions are no longer perceived as *deus ex machina* observing and controlling the economy while serving public interest; instead, they are seen as tools used by politicians, the rational players who pursue specific objectives and who are also exposed to specific restrictions. This moves the approach beyond the traditional understanding of the concept of social market economy.

Weberian view assumes that politicians, or their state officials, altruistically act in the interest of the public. This assumption, typical for the period of the onset of ordoliberalism, is completely disregarded by political economics.

In short, the concept of social market economy has always been a distinctive part of a comprehensive theory of economic policy rather than pure economic theory.

Social market economy has been built upon the principles of solidarity on the one and subsidiarity on the other hand. One of its positive features is that it bridges both economics and legal theories, and that it has not developed in isolation. Instead, it has responded to developments in other areas of economic thinking, including the Anglo-Saxon world, integrated specific parts of economic theory and used them as own analytical tools. This is best illustrated by the fact that the school has always emphasized competition and monetary stability as the basic pillars of order.

In the early works of representatives of ordoliberalism, social market economy builds on the so-called policy of order (Ordnungspolitik), according to which the state plays two basic roles: creates the environment and guarantees the quality of formal institutions (constitution, laws). According to Eucken (Eucken 2004) the basic principle of economic order is *a functioning pricing system as a prerequisite for the existence of competitive environment.* Given the interdependence of social and economic order, a functioning pricing system is conditioned by the following six basic principles:

1. Dominating monetary policy as a guarantee for stability of prices,
2. Free market without any restrictions on entry,
3. Private property (with a protected competitive market environment),
4. Contractual freedom (again subject to the protected competitive market environment),
5. Unconditional responsibility for liabilities (and possible damages) arising from transactions performed by economic subjects benefiting from them,
6. Stable economic policy (firm rules reducing the degree of uncertainty – again the argument brings up damages to competition and increased autonomous tendencies towards sector cartelisation in case of a higher degree of uncertainty).

These basic principles correspond to the requirements on regulatory policy, which addresses market failures, and corrective (social) policy, which curbs inequalities arising from the market, corrects the degree of inequality and strengthens social cohesion. The first group of regulatory intervention permitted by this concept include monopoly control, income regulation through progressive taxation, regulation of externalities and control over an extensive degree of competition (e.g. on labour markets). Essentially, social policy should exist side by side with a functioning pricing system and competition, as well as rectify distribution in accordance with the principles of solidarity and subsidiarity. Redistribution should be addressed by progressive taxation and social policy, including various measures in favour of the socially weaker (child allowances, rent supplements, social housing, etc.), along with the principle "only intervene where the problem arose" (subsidiarity) and only in cases where people are unable to take care of themselves. (This condition is sometimes referred to as the legitimate poverty, e.g. Murray 2010).

Under this concept the state sets the basic rules for the economic order and – as Goldschmidt and Wohlgemuth (2008) aptly put it – works as a referee who makes sure everybody follows the rules.

Therefore, the definition of social market economy can be represented through following diagram:

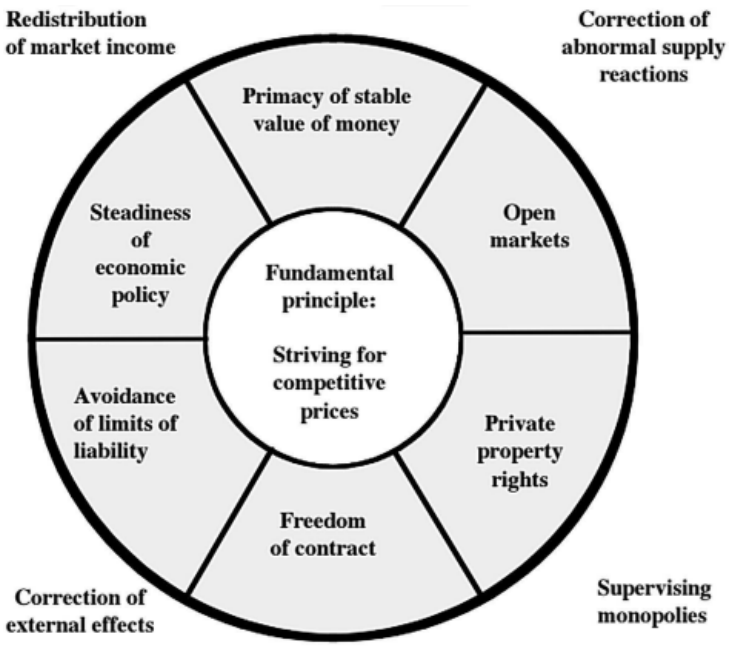

Figure 1: Social market economy (Goldschmidt and Wohlgemuth 2008)

The successful and a relatively quick way of the concept of the social market economy from academic discussions of late 1940s to the real politics in Germany is due to Ludwig Erhard. His speech in the German parliament on April 21, 1948, introduced the concept to the coalition of CDU and CSU and was adopted as their basic doctrine for the upcoming federal election of spring and summer 1949. The basic values of the concept were also adopted by the leftist political wing; nevertheless, the rightist German Christians and their think-tank Konrad-Adenauer-Stiftung (KAS) remain the main proponents of this concept.

3. MODERN INTERPRETATON OF THE SOCIAL MARKET ECONOMY

3.1 How Could Current Economics Help in Interpretation of the Concept of the Social Market Economy

After World War II, when the concept of the social market economy was defined by the School of Freiburg (or Cologne), individual economies existed in relative isolation compared to today. Europe was far from today's economic integration, and was of course not facing the environment of globalized world economy, which is characterized by a completely different type of competition. Even the scope of supranational institutions was considerably different from today.

This chapter aspires to look into the possible modifications and extensions of the concept of the social market economy to make it fit the contemporary globalized economy.

As already mentioned in Chapter 2, the current representatives and promoters of the social market economy among German economists Nils Goldschmidt, Bodo Herzog and Christian Glossner point out that its scope is broader and represents a distinctive normative concept of economic policy.

In Glossner's words: *"However, the Social Market Economy as an extension of neo-liberal thought was deliberately not a defined economic order but an adjustable holistic conception pursuing a complete humanistic societal order as a synthesis of seemingly conflicting objectives, namely economic freedom and social security."* (Glossner 2010).

The social market economy builds upon the school of ordoliberalism, which bridges economics with legal science. Its appeal is in the ability to react to economic developments, even the ones in the Anglo-Saxon environment, and its readiness to integrate certain economic theories and to use them as own analytical tools, as opposed to developing in isolation. Best illustrated are these qualities in the school's promotion of competition and monetary stability as the two basic pillars of the order and the frequent references to specific parts of the international economy. In today's globalized world, developing these ideas is a necessary response to the changing conditions given on the one hand by international liberalization and on the other by technological progress, which brings steep decline in transaction costs due to fundamental changes in international division of labour.

For example Herzog (2010) takes the Heckscher-Ohlin and Stopler-Samuelson theory as a basis for discussing the principles of the ordoliberal order versus globalization. Therefore, we find it legitimate in the following chapters to turn to the teleological parts of economic theory, such as the theory of optimum currency area (OCA) and the various concepts of the so-called global competitiveness.

From the very beginning the concept has been based upon the principles of solidarity and subsidiarity. However, in the context of European integration, where the concept has been implemented, the argument of subsidiarity is used to defend the asymmetric transfer of responsibility and authority to the supranational level. In their understanding of OCA, Baldwin and Wyplosz (2012) even speak about asymmetric

integration, or as they call it *omitted integration* in the area of social policy and taxation. Nevertheless, it may be one of the clues of how to interpret the desired order for social market economy in the European integration.

As described in Chapter 2, in the Eucken's original concept (Eucken 2004) ordoliberalism builds on the so-called "order policy" (Ordnungspolitik) and "process policy" (Prozesspolitik). Order policy ensures a functioning price system and is therefore based on constitutional and regulatory principles.[59] In order for the functional price system, which is the foundation of the market economy and which enables functioning competition and efficient allocation of resources, to play its role, the following requirements need to be met: dominating monetary policy as a guarantee for stability of prices, free market without any restrictions on entry, private property (with a protected competitive market environment, including regulated fusions and acquisitions and monopoly control), contractual freedom (again subject to the protected competitive market environment), unconditional responsibility for liabilities (and possible damages) arising from transactions performed by economic subjects benefiting from them and stable economic policy (firm rules reducing the degree of uncertainty – again the argument brings up damages to competition and growing autonomous tendencies towards sector cartelisation which follows a higher degree of uncertainty).

These basic principles are complemented by the requirements on regulatory policy (regulatory principles), which addresses market failures, and corrective (social) policy, which curbs inequalities arising from the market, corrects the degree of inequality and strengthens social cohesion. The first group of regulatory intervention permitted by this concept include monopoly control, income regulation through progressive taxation, regulation of externalities and control over an extensive degree of competition (e.g. on labour markets).

In essence, social policy should exist along with a functioning price system and competition, as well as correct distribution in accordance with the principles of solidarity and subsidiarity. Redistribution can be delivered by progressive taxation and social policy including various measures in favour of the socially needy (child allowances, rent supplements, social housing, etc.), along with the principle "only intervene where the problem arose" (subsidiarity) and only in cases where people have no capacity to take care of themselves (which is sometimes referred to as "legitimate poverty").

According to this concept the state sets the basic rules for the economic order and works as a referee who makes sure everybody follows the rules (see Goldschmidt, Wohlgemut 2008).

In contemporary theory – as already indicated above – the idea of a social market economy is usually associated with its original instrumental ideals, including correcting excessive inequality arising from market redistribution, or suppressing the phenomenon

[59] In his slightly provoking study, Bofinger (Bofinger 2016b) claims that while this is Eucken's clear positive contribution to the German intellectual tradition of economic policy, it is a rather trivial one. He points to a similar programme developed earlier by the Chicago school and to its explicit presence in the works of Henry Simons. In short, he sees this as widely spread consensus of Euro-American economists on institutional environment ensuring an ideal allocation of resources.

of growing social exclusion. Commonly, the idea is discussed in relation to the challenges of globalization and the European economic integration.

Further inspiration can be seen in the fact that public finance has repeatedly discussed the issue of the so-called international public goods. The term "public goods" indicates both a created and agreed set of rules (here, for example, international agreements), common institutions or common currency.[60] Baldwin (2008) and Blinder (2006, 2008) pointed to new challenges in redefining the role of the state (or the public sector on any – European, national and regional – level), as due to the increasing pressures of globalization, competition transferred from between companies to between departments and individual workers.

A number of the authors of the OCA theory emphasize the need for greater symmetry between monetary integration and centralization of fiscal (or social) policy (the later would include both a European tax and implicit European transfers). Other authors, such as Buti (2013), De Grauwe (2013) and Pisani-Ferry (2012) speak of "post-crisis inconsistent trinities", i.e. about the need for comprehensive regulation of the institutional framework of the EU.

Herzog (2010) states that "…our current challenges and problems originate in the fact that income inequality and financial stability are no longer problems of national economy but rather international issues."

The crucial question is how can the concept of ordoliberalism and social market economy in the EU face the challenges of globalization. It can be argued that if historically the European integration was motivated by the common goal of preventing the return of nationalism after World War II and avoiding further conflict between Germany and France (as explicitly rationalized by the father of the European Coal and Steel Community, Robert Schuman),[61] nowadays it should be driven by the legitimate goal of the EU to succeed in global competition with such players as the US or China, as this is the only way to sustain Europe's high standard of living.[62]

The basic argument for integration is in fact greater microeconomic efficiency of the allocation and the existence of economies of scale, given, among others, by the size of the common market. The greater microeconomic efficiency allocation is also enhanced by the common currency.

European integration, which aims at the creation of a fully functioning common market, the integral part of which are the frequently (especially in connection with the preparation of Brexit) cited "four freedoms" – the free movement of goods, services, capital and labour, now needs to answer the question *what constitutive and regulatory elements of social market economy need to be transferred to one supranational level appropriate to the size of the common market, its four freedoms and the common currency***.**

While contemporary literature does not agree on a unique definition of competitiveness, both in pure theory and in exact studies that seek to regularly measure

[60] Eichengreen and Wyplosz, 2016 cited Buchanan (Buchanan 1965) and his assertion that both providing public goods and creating public institutions is influenced by economy of scale and it is therefore legitimate to establish this right on an international level or to pass it there.

[61] For further information see e.g. Baldwin and Wyplosz, 2013:31-35.

[62] For detailed argumentation see e.g. Lacina and Strejček, 2014.

competitiveness of states and transnational bodies, we can trace a group of prevailing tendencies that define competitiveness. The most significant ideas in this field come from the aforementioned Alan Blinder (Blinder 2006, 2008), or Robert Reich (Reich 1995).

In his work, Reich delivers a revolutionary view of the division of labour in the context of globalization and provides a new insight into the labour market. In his innovatory schematic job classification he divides jobs into three basic groups: manufacture, personal services and symbolic and analytical services. While in the first two categories the actual work mostly fits into relatively clearly defined standards, the highly qualified jobs that fall into the third group do not conform to simple standards. These jobs are defined by high requirements on education, creativity and conceptual approach to problem solving and cannot be performed using standardized procedures. These jobs are rather numerous: according to Reich over the last hundred years their share on labour market increased from eight to twenty per cent. It is in the interest of all that they do not become separated from the rest of the society.

Symbolic analysts are not only people with high earnings; their role is to be the bearers of "positive economic nationalism" supported by political elites. A country's competitiveness that is based on widely shared solidarity of symbolic analysts with the rest of society and that leads to a society of knowledge, is perceived as beneficial not only for the country itself but also for its neighbours, as global welfare does not necessarily have to rise in one country at the expense of another. Reich sees competitiveness as containing a strong element of inclusions secured by a wide network of public services, especially in education and health.

Reich's concept inspired a lot of later means of measuring competitiveness, including the best known and the most common one: the Global Competitiveness Report published annually by the World Economic Forum (WEF). Although the measuring methodology partially changed in the WEF around the mid 2000s, two of the nine sub-indices of the total index of competitiveness put emphasis on the health characteristics of the population and the health system and, similarly, on education and retraining.[63]

Also other cited concepts of national competitiveness take into account, in one way or the other, how available are basic comforts of the welfare state in parts of the society. The following table presents an overview of selected alternatives to the WEF definition of competitiveness, and their characteristics.

[63] The author of the older method is Jeffrey Sachs. Since 2005, the leading approach is the one formulated by the specialist on growth theory, Xavier Sala-i-Martin.

Table 1. Selected features of well-known definitions of competitiveness

A competitive country is one…	IMD	OECD	WIIW	Balassa	Fagerberg	Porter	Tyson	EU 2005	WEF 2013
Which is attractive for investors						□			
With companies of innovative potential						□			
With companies able to use R&D results					□				
With highly productive companies		□	□			□			□
With export able to face international price competition	□	□	□	□	□				
With competitive products and companies	□	□	□	□	□	□	□		
Ensuring prosperity of its citizens	□					□	□	□	□
Offering work to all who are willing to work								□	
Which allows high level of return on investment									□
Predisposed to faster mid- to long term growth									□

Source: Šaroch et al. 2013.

To summarize, when seeking ways of achieving social market economy in today's globalized environment, we can seek inspiration in the theory of public finance, especially in Buchanan's "theory of clubs" and its inherent part, the concept of international public goods (Buchanan 1965). Furthermore, we should consider the institutional aspects of selected parts of international economics with an emphasis on optimum currency area (OCA). Last but not least, we can ponder the broad stream of thinking which seeks to define national competitiveness, especially since its measurements of competitiveness take into account also general social welfare. Here, social cohesion is not a counterpart but rather an integral part of competitiveness with all its aspects in a global environment. In the chapter 5 we discuss how practical policy recommendations can draw conclusions from using the above-mentioned theories in achieving social market economy.

3.2 The European Commission on the Social Market Economy

If we subject to scrutiny the documents of the European Commission as the initiator of both legislative and non-legislative EU measures, as well as the programme statements of its representatives, we find that social market economy has become a relatively frequent term in the post-Lisbon period. Logically, general rhetoric prevails over clear definitions and concrete programme specifications. Therefore, it is not entirely easy to answer the question of what exact content is given by the Commission to the term social market economy as a specific goal and task for the EU of the 21st century.

The difficulty of the answer can be demonstrated on the statements of V. Špidla, former Commissioner for Employment, Social Affairs and Equal Opportunities. Although already in April 2009, i.e. before the Lisbon Treaty came into effect, he clearly expressed the need to develop EU's social dimension, he remained vague on the social market economy goal, using terms such as *social market economy*, *the European social*

model or simply *social Europe* as synonyms. Regarding the path to the realization of such an unspecified goal, he spoke generally about the readiness to overcome conflicts between the "social" and the "economic", about increasing emphasis on social rights in all of EU's activities and about greater perceptiveness towards social needs (Špidla 2009).

3.2.1 A task for the EU, for the Member States or for both?

The concept according to which social market economy constitutes a valid European social model, i.e. that which distinguishes European tradition from the rest of the world, was spearheaded by the then President of the Commission J. M. Barroso. He did not perceive it as a new goal for the EU to re-orient itself at but as a time-tested common model which must be protected, strengthened and developed just like the internal market or the single currency (Barroso 2010, 2012, 2013a). In terms of definition, J. M. Barroso regarded social market economy as a hybrid term, containing not only emphasis on the social dimension, i.e. aiming at a higher level of social protection, but also an effort to achieve higher productivity and competitiveness (Barroso 2013a). Entirely in accordance with the ordoliberal ideological basis of social market economy, J. M. Barroso claimed that there is no insurmountable conflict between a strong social state and an advanced competitive economy. As evidence for this claim, he stated the examples of member countries in which an effective system of social protection and social dialogue functions without posing an obstacle to their prosperity. According to J. M. Barroso, therefore, the EU did not intend to exclusively define the model of social market economy nor uniformly build it from its level. Its role was to help the Member States to share information, experience and solutions resulting from successful national implementation of social market economy (Barroso 2013b).

This understanding, according to which the social market economy goal is not intended for the EU and its own structures and policies as a subject (beyond the scope of support and experience exchange) is also shared by the wording of the document on *Social Protection Systems in the EU*, prepared by the Directorate General for Employment, Social Affairs and Inclusion of the Commission in 2015 (European Union 2015:6).

"In the Lisbon Treaty, EU countries have subscribed to the goal of establishing competitive social market economies that regard social policies as means of securing social justice, social protection and correcting where the market produces negative externalities. Social policies are hence complementary to economic policies, with the investment in human capital and services allowing citizens to participate in the economy and society to their full potential."

The text is very similar to Art 3(3) TEU, except that the EU and the EU's social market economy is not discussed in the singular but in the plural, i.e. it deals with social market economies of Member States. How to make sense of this shift of the goal of social market economy from the EU towards the Member States? This is evidently not about the EU definitively leaving this goal exclusively to Member States and limiting itself to the support and transfer of experience from the more successful national social market economies to those that need help in search of an optimum model.

In fact, the current President of the Commission, J.-C. Juncker, links in his statements the concept of social market economy, or alternatively social Europe, to measures planned at the EU level and aimed at stabilization and unity of the EMU.

The unprecedented measures taken by the EU during the crisis must be, according to him, made socially more legitimate, and this is a task for the EU itself. Among the measures proposed, re-balancing the way in which the EU grants conditional stability support to Eurozone countries in financial difficulties was included. Any support and reform programme should go not only through a fiscal sustainability assessment but simultaneously through a social impact assessment. Even a targeted fiscal capacity at the Eurozone level could be developed to work as a shock-absorber if needed (Juncker 2014). Another part of the same effort should consist in building a fair and truly pan-European labour market where the key principle ensured by the EU should be the same pay for the same job at the same place (Juncker 2015). Such measures, undoubtedly consistent with the social market economy teaching, would suggest that there is a part for the EU itself in the achievement of this goal.

Not surprisingly, both approaches to the goal of social market economy are true. The EU (Commission) has no aim to unify or harmonize the existing national social systems (Thyssen 2016b). On the other hand, it is aware of the necessity of further convergence of national economies and their social models. Therefore, a Europe that deserves a Social triple A' rating must be realized by the EU through its own measures as well, be it the balance of economic and social viewpoints in the recommendations of the European Semester, the inclusion of unemployment-related indicators to the scoreboard of the Alert Mechanism Report underpinning the Macroeconomic Imbalance Procedure, the strengthening of the role of social partners at the European level or the EU's budgetary and investment measures such as its Investment Plan for Europe and Youth Employment Initiative (Thyssen 2016a). This approach, corresponding to the reality of the division of powers between the EU and its Member States but also to the principle of subsidiarity (shared equally by the EU and the social market economy concept) means that there should be a multi-level effort to achieve the goal of social market economy. The EU itself will take measures that correspond to its assigned role and conferred powers, while in the rest it will support and facilitate efforts deployed by Member States.

3.2.2 What does the EU's part of the task consist in?

L. Andor, former EU Commissioner for Employment, Social Affairs and Social Inclusion, considered the social components of the EU's model of social market economy and the corresponding tasks for the EU to be the following: to ensure suitable working conditions, to guarantee individual employment rights and to maintain the role of social partners and their dialogue as the main tool for further development (Andor 2011). It can be regarded as a realistic list of intentions, which is based on the powers and possibilities of the EU, does not contradict the traditional agenda of EU's internal market and does not interfere in the issues of social security or employees' collective rights that the Members States retained within their power. This implies that the EU, or more precisely the Commission, looks for its role in building social market economy where allowed to do so by the present Treaties.

Probably the most up-to-date list of measures which the EU would take or push for on its own in order to come closer to the goal of social market economy is contained in the Commission's documents from March 2016 on the European Pillar of Social Rights

(European Commission 2016). A highly competitive social market economy is given as the first reason for such an initiative. The First preliminary outline of the content of this Pillar lists twenty "policy domains", i.e. areas of measures grouped in three Chapters. Chapter I covers areas involving equal opportunities and access to the labour market; Chapter II deals with fair working conditions and Chapter III is dedicated to issues of adequate and sustainable social protection. The list of measures includes areas where the EU is competent to legislate and also those where Member States are primarily responsible, with the EU having only a supportive and complementary role. Therefore, the Pillar does not challenge the existing division of tasks between the EU and the Member States' levels; it does not re-state or modify existing social rights.

The majority of the proposed activities are rooted in competences conferred today by Articles 151 and 152 TFEU and due to that, the steps to be taken are predominantly soft measures consisting e.g. in paying greater attention to social considerations in the European Semester of economic policy coordination, in the promotion of "social benchmarking" and an assessment of the social impact or in mainstreaming social objectives in flagship initiatives Issuing guidance to the Member States. More specific proposals concern the draft of a European Accessibility Act to facilitate access to essential goods and services for disabled people in the single market and of a Revision of the Posting of Workers Directive to promote the principle of equal pay for equal work at the same place, i.e. both measures well within the range of powers conferred to the EU.

Better and more active use of competencies that the EU already possesses undoubtedly represents move forward, because, as stressed in different parts of this book, the Lisbon Treaty is not short of social accents and the EU as a project is far from being anti-social. The question is whether such a program of building the Pillar of Social Rights (or other promised measures that have been mentioned so far – with the rare exception of an envisaged fiscal capacity at Eurozone level), really do change the trends; whether these specifically targeted efforts within the existing set of powers, structures and budgetary constraints can really deflect the EU from its traditional path. As the European integration was originally created and empowered to focus on market opening measures, one can have doubts whether it can really re-balance itself through a better use of its modest social competencies.

Needless to stress that the champions of a genuine social Europe quickly concluded that the European Pillar of Social Rights "does not contribute anything substantial by way of strengthening the EU's social dimension." Its keen aspirations are not to be enshrined in the Treaties; thus, instead of amending the EU's "social aquis," its purpose is to "operationalise" existing social rights, i.e. it is a mere compilation of social standards that already exist in EU law or other international documents (Seikel 2016).

3.2.3 What kind of social market economy is the Commission talking about?

The statement that the Commission sees the aim of social market economy as a task to be shared between the EU and the Member States' levels of policy-making and that it intends to contribute to its achievement mainly through better use of its existing powers, does not say much about the Commission's own understanding of the concept of social market economy. There is always the risk that the Commission, using

the term social market economy interchangeably with other terms such as social Europe, social dimension of the EU or European social model, understands all these terms as synonyms for the effort to make – as far as possible – the EU more socially acceptable. The question hence arises whether the Commission has ever provided a more elaborated definition of "its own" social market economy.

According to already quoted L. Andor, social market economy is – with clear reference to the post-war economy of West Germany and its effort to find a third way between the laissez-faire economy of the free market and a centrally planned or state-regulated economy – based on two independent but complementary pillars: protection of undistorted competition on the market and social policy measures guaranteeing social justice by correcting negative impacts of market mechanisms and providing social protection (Andor 2011).

A similar definition produced by the European Commission was contained in its *Social Europe Guide Vol. 4* issued in March 2013. Again, with reference to the post-war German authorship (which, however, does not exclude the current broader concept of the term social market economy), the Commission offered the following definition (European Commission 2013:14):

"The social market economy is based on two clearly distinct but complementary pillars of state action: on the one hand, the enforcement of competition to keep prices stable and generate growth and innovation; and on the other, social policy measures to guarantee social justice by correcting negative outcomes and bolstering social protection. In the most basic sense, social market economy means that markets are embedded in society and should function in a way that both economic efficiency and well-being for all are achieved."

Such a concept is clearly not in conflict with the fundamental ideas of the chief representative of the post-war social market economy Alfred Müller-Armack, for whom the social market economy policy was also about balancing and compensation between the conflicting objectives of freedom and social security, i.e. his famous idea of social irenics (Golschmidt 2012:20-21). This general, telegraphic phrasing makes it easy to demonstrate conformity in the basic aspects, all the more so because German ordoliberalism, as repeatedly mentioned in the text, did have a real influence on the process of European integration and the role and scope of the powers of its bodies. However, we will find very little about whether what the Commission is currently proposing and realizing really stems from the philosophy of social market economy.

Although a thorough comparative analysis of the opinions of A. Müller-Armack, West Germany's economic policy and the Commission's current proposals would be of some interest, it does not constitute an objective of this text and would not be very useful anyway due to its theoretical nature. The repeatedly emphasized division of powers between the EU and Member States, unchanged even by the Lisbon Treaty despite its social accents, fundamentally prevents the EU from playing the role of a strong, democratically legitimated state of law which is a key focal point of the social market concept for reconciling the economic and social order, including substantial redistribution of the wealth created (Knigge 2014:14). Ch. Joerges rightfully recalled E.-W. Böckenförde's warning from 1979 that still applies in our post-Lisbon period: "European law cannot but realize a pure market economy because it does not have the

means of establishing a social market economy." (Joerges, 2010a:74). The vision of the European Commission will thus inevitably differ in some ways.

On the other hand, it is expedient to admit that social market economy "is not a precisely outlined theoretical system, but more a cipher for a "mélange" of socio-political ideas for a free and socially just society and some general rules of economic policy concept" and – equally importantly – that it represents a mixture of different roots (Golschmidt 2012:1,5). What aspects of this "mélange" does or can the European Commission choose within the boundaries set by the Lisbon Treaty by the European Commission?

3.2.4 The EU cannot really embed a full-fledged social model

For the clarity of subsequent argumentation, it is necessary, at least in brief, to recall the fact that the West German post-war "societal liberalism" was rich in mutually close but not entirely identical schools of thought usually related to the Freiburg school ordoliberalism (W. Eucken, F. Böhm etc.). Many subsequent researchers distinguished the social market economy of A. Müller-Armack not only from Eucken's ordoliberalism, but equally from the social liberalism of L. Erhard or the economic and social humanism of W. Röpke and W. Rüstow (John 2007:5, Glossner and Gregosz 2011:14). With the knowledge of considerable simplification, it is necessary to emphasize here that A. Müller-Armack did not rely on Erhard's dictum that "the freer an economy is, the more social it is" as he did not share the belief that an essential contribution to "social progress" could come from open markets structured on the model of free competition and therefore in dynamic growth (Golschmidt 2012:18-18, Glossner and Gregosz 2011:14, Felice 2015:79). According to Müller-Armack, there is always the possible incongruence of market process and social justice as the economic and the social are separate, interdependent and also conflictual orders (Franke and Gregosz 2013:11). Hypertrophy of one order can negatively influence the other (Ebner 2006:215, Golschmidt 2012:20).

In Müller-Armack's view the social market economy was rather a holistic concept pursuing a complete humanistic societal order as a synthesis of seemingly conflicting objectives, namely economic freedom and social security (Glossner and Gregosz 2011:13). Although he clearly refused state planification and even mixed systems of economic policy with constant state interventions, it is not easy to situate his concept among schools of post war economic policy (Golschmidt 2012:17). This is because Müller-Armack's social market economy is at the same time a mixture of "enlightened" Catholic social philosophy with its principles of social balance and subsidiarity, combined with the protestant ethos of communal cooperation, socialist concerns for the social question, as well as with liberal principles of progress in liberty (Ebner 2006:215). It is, once more, "a holistic style" of policy striving for social peace and progress through economic means, so deeply embedded socially and culturally in a given society during a given historical period, that it would hardly be achievable to reproduce a purposeful design of a social market economy as a cultural, social and economic whole in Müller-Armack's meaning (Ebner 2006:215). This requirement of social and cultural embeddedness and of the corresponding fundamental consensus of relevant political

and societal forces must therefore be the crucial point in discussion of any social market economy of the EU as such.

Here it becomes crucial that the EU not only lacks competencies in the social field but, even more importantly, that it has neither the capacity nor the possibility to socially and culturally embed any long-standing democratically negotiated and approved consensus on a single model of a society and on the way its social imbalances should be adjusted. To remedy this major deficit, J. Habermas quite logically calls for transnational democracy in Europe (or on a global scale), but quite realistically admits that it would be extremely difficult to build and organize (Habermas 2013:110, Habermas 2016). In the same vein, the vision of "a constitutionally conditioned internal market" proposed recently by the team of D. Schiek in a major study for the Employment and Social Affairs Committee of the European Parliament looks slightly over-optimistic in stating that the EU embraced the concept of a rights-based social state and in proposing a "stringent human rights scrutiny" of all conflicts between market freedoms and social rights (Schiek et al. 2015:84, 92). Such proposals, albeit rationally well-founded (and perhaps the only ones offering an EU-based solution to social tensions that currently tear it apart), can hardly be translated into practice in the absence of a fundamental and sustainable democratic consensus of Europeans.

The 28 or 27 EU Member States still remain highly diverse. There is no European political nation and EU citizens do not feel involved in any European political debate, much less in European policy-making. A steadily declining turnout in European elections (less than 50 % already since 1999) reveals a great deal about this (European Parliament 2014). The EU has a Treaty, not a Constitution. It shares with Member States competencies in many sectors but does not have an economic and social policy on its own. It wants to have at least economic governance, thereby acknowledging the impossibility of having a real government. No wonder that many authors' view is that the current EU has no clearly and uniformly defined socio-economic model or that the welfare model shared by Western Europe in the post-war decade has eroded and lost its distinguishing features (Liikanen 2007; Hermann and Mahnkopf 2010; Giddens 2013:90; Potůček 2014:141).

The EU can thus hardly think of social market economy in Müller-Armack's terms and propose a qualitatively new "third way", the same for all Europeans. It would, on the other hand, more naturally and easily tend to Erhard's belief in well-governed markets' contribution to social progress as well as to Eucken's idea of economic order based on supervised freedom of markets, competition, monetary and fiscal stability. Being unable to embed market forces socially and culturally, the EU can at least provide for a better technocratic regulation of them.

As the then EU competition commissioner M. Monti already explained in 2000, "the concept of Social Market Economy stands for reliance on the market mechanism… It therefore calls for a maximum of free market, for reliance on competition wherever possible… Social Market economy does however not stand *for laissez-faire-capitalism*… For this very reason, the idea is not to leave the economy alone to any development it might take, but to create a strong framework…" (Monti 2000). In practice, at the EU level the social market economy should then be, according to M. Monti, first and

foremost about services of general interest, policy towards small and medium-sized companies, strong competition law and certain common standards in workers' rights, working conditions, etc.

This reading of social market economy is not out of place regarding the different versions of German societal liberalism and also regarding the current wording of Art 3(3) of TEU, where the goal of social market economy is mentioned and which begins "The Union shall establish an internal market". Inevitably, for the champions of social Europe, as emphasized many times so far, such EU would always be too market-oriented and sacrificing social peace and justice to the functioning of the internal market and the stability of the EMU. They are not completely fair to the EU, yet they do have a point, as easily shown on two of the Commission's documents intimately connected with its "vision" of social-market economy.

3.2.5 The social side of the European "growth and competitiveness" model

The Commission's Communication on the very subject of social market economy from 2010 titled *Towards a Single Market Act – For a highly competitive social market economy – 50 proposals for improving our work, business and exchanges with one another*, begins as follows: "The construction of one big market is at the heart of the European project envisaged by the founding fathers". The Commission explains in it that regaining confidence, together, in our social market economy model, means "placing Europeans at the heart of the market once again; propose a new global approach to the single market that embraces all of the players in the market; and increase understanding of and respect for single market rules in the Union and apply them in our day-to-day activities. This is a social market economy approach, based on the assumption that a single market needs to enjoy the support of all market players: businesses, consumers and workers. In this way, the single market will allow Europe to become collectively competitive" (European Commission 2010:3).

Even though the Commission's document recognized that "the single market is not an end in itself", its whole "philosophy" was a market-oriented one: how to improve the single market to make it deliver more to Europeans' needs. No surprise then that on the 45 pages of this document, the term *social market* was used 10 times, just like the term *employment*, but s*ocial policy, social security* or *redistribution* were not mentioned at all. On the other hand, the term *competitiveness* can be traced 13 times, *growth* 39 times and the *single (or internal) market* as many as 160 times! Of the 50 proposed measures or initiatives, 14 were directly pertinent to the balancing in the name of social market economy. They were grouped into sub-sections of *Public services and infrastructure of general interest, Solidarity in the single market, Access to employment and lifelong learning* and also *New resources for the social market economy*. The Commission did promise here to strengthen the social dimension of the single market, albeit in its own way – within the existing conferred powers and budgetary limits and with the optimal functioning of the single market as the core element of the integration project (European Commission 2010).

As for the above-described Commission's initiative on the European Pillar of Social Rights, the style is very similar, though clearly more socially-oriented (references to *security* or *protection* are much more frequent than to *flexibility, competitiveness* or *single market*). "*Modern social policy should rely on investment in human capital based on equal opportunities, the prevention of and protection against social risks, the existence of effective safety nets and incentives to access the labour market, so as to enable people to live a decent life, change personal and professional statuses over the lifetime and make the most of their talent"* (European Commission 2016a: para 2.2). The rationale behind the Pillar is to overcome the crisis and move towards a deeper and fairer EMU – which is "not just a political or social imperative, it is also an economic necessity" (Para 2.3). Therefore, no wonder that the main recipe consists in the creation of performing and inclusive labour markets that would effectively combine elements of flexibility and security … as "*Firms have an interest in a predictable and legally secure business environment, in being able to attract skilled and productive workers but also to adjust to fast-changing market realities. Workers have an interest in job and income security, to be able to reconcile work and private life, but also to take up new challenges and adapt throughout their careers, and to keep accumulating skills, in a lifelong perspective*" (para 2.3).

All in all, the "growth model" discussed by Commission should be highly efficient and high-performing, flexible and adaptable, macro-economically stable, financially sustainable and also socially sensitive, providing chances to succeed, to reintegrate labour market, to combine work and family life, to allow people to participate fully in society (para 2.3). "*Action at EU level reflects the Union's founding principles and builds on the conviction that economic development should result in greater social progress and cohesion and that, while ensuring appropriate safety nets in line with European values, social policy should also be conceived as a productive factor, which reduces inequality, maximises job creation and allows Europe's human capital to thrive"* (para 2.1).

To build such a "growth model", however, the Commission does not need to mention the non-efficiency elements of the EU's social dimension and thus remains silent about *social standards* or *collective rights*. Even the *social economy* and *social entrepreneurship* (also supported by the EU – cf. European Commission 2011) as certain alternatives to profit-oriented business are left unnoticed in this strategic document. It therefore easily attracted criticism that even though the document is labelled Pillar of Social Rights, its first outline does not include so many social rights but rather social policy guidelines and principles outlined in such a way as to serve the traditional economic policy of fiscal sustainability and economic competitiveness (Poulou 2016).

3.2.6 Article 3(3) TEU is not so far a new beginning for European integration

There is still a certain path dependency and a high dose of market liberalism in European Commission's vision of the EU's social market economy. The Commission designs the socially balanced EU within the limits of the conferred powers and the existing budgetary constraints without trying to define a model that would be different from the existing one. Certainly, it proposes modernization and adaptation to modern needs of economy and society, but does not abandon the market-driven philosophy

that the EU first needs a high-performing single market and a stable single currency as necessary preconditions for the satisfaction of social needs. As demonstrated above, the Commission or the EU as a regulatory body cannot socially, culturally and politically embed any alternative "third way" model of society and economy for the 21st century. Its acting in the spirit of social market economy would thus entail more frequent emphasizing of social needs and aspects, looking for better balance between economic and social impacts of proposed measures etc., but hardly any major changes to the traditional status quo defined by the single market and the EMU as the major *acquis* of the European integration. The newly inserted TEU goal of social market economy does not mean, in the Commission's understanding, a "new beginning" for European integration.

4. EUROPEAN COURT OF JUSTICE AND THE SOCIAL MARKET ECONOMY GOAL OF THE EU

It has been emphasized several times in the previous text that there are two major difficulties which the EU must cope with if it wants to pursue the objective of social market economy. The first difficulty is expressed in the question of what exactly is meant by the social market economy in today's EU. The second difficulty stems from the absence of real powers in the social field that the EU could use in order to go through with such a project. Although it may sound counterintuitive, the solution to both of them directs one's attention towards the EU's Court of Justice (CJEU) as the main institutional addressee of Art 3(3) TEU. The reasons for such an assertion, can be – with the reference to the explanations in the preceding parts the book – briefly outlined as follows.

As no specific content was given to the term "social market economy" in the primary EU law and as the historical meaning of this concept involves more of a strategic "third way" approach to economic and social developments than an objective to be attained, it has already been argued above that the practical meaning of this "goal" of the Treaty would consist in the continuous rebalancing of and the compensation for outcomes of spontaneous market developments in the name of freedom and social peace (Joerges and Rödl 2004). The enumeration of liberal or market-oriented aims and principles and at the same time of socially oriented aims and principles without any hierarchy or any basic order of importance in the Lisbon Treaty also leads to the conclusion that the whole Art 3(3) TEU, together with other social accents of the Treaty, conveys the will of EU Member States' leaders to achieve a better balancing between disparate concepts, goals and values (Costamagna 2011; Blanke and Mangiameli 2013).

Such an economic-social balance, however, cannot be provided solely, or primarily, by EU legislative bodies, as the EU can issue harmonizing legislation only if the Treaty provides for a corresponding competence in a particular area. And it has been repeated many times that the Lisbon Treaty, despite its "social potential", compensated for the EU's social deficit only at a symbolic level, because in 2009 the EU did not receive any new substantial competences in the social field (Jacobs, 2009).

Furthermore, the difficulties of the Commission's post-Lisbon legislative proposals support the view that any compromise touching upon the existing balance of competencies and interests would be hard to achieve. Of particular relevance to the issue of balancing between economic and social values was the destiny of the proposal for Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services presented in 2012 (European Commission 2012: Article 3). The Commission attempted to establish the parity between the exercise of the freedom of establishment and the freedom to provide services *vis-à-vis* the fundamental right to take collective action, including the right or freedom to strike. As explained below, this issue had already caused a great deal of tension in the pre-Lisbon period due to the CJEU's well-known

known decisions in *Viking,*[64] *Laval,*[65] *Rüffert*[66] and *Commission v. Luxembourg*[67] cases (the so-called "Laval quartet") which won the CJEU the reputation of a destroyer of trade union rights and social dialogue (Schiek et al. 2015:26). Subsequently, in 2012, the Commission proposed to solve these kinds of clashes between economic freedoms and labour/social rights by access to alternative resolution mechanisms at the Member State level (European Commission 2012). Nevertheless, the proposal was withdrawn after having received a so-called "yellow card" from Member States' parliaments arguing that the right to strike was an issue to be regulated at the national level and that by its proposal, the Commission interfered with their national sovereignty.[68]

Here, the CJEU comes to the forefront as the chief balancing body, summoned by Art 3(3) TEU to be neither too liberal nor too social and to keep the EU in a constant balance between economic freedoms and social rights. It has to be noted in this respect that the CJEU, contrary to EU legislative bodies, quite often steps into areas outside EU powers, because the Member States, even if acting within their exclusive competences, may not counteract EU Treaty rules and principles (Azoulai 2008; Bücker and Warneck 2010). The CJEU is, therefore, a body quite frequently called to decide whether EU market freedoms should or should not be given priority over the still highly nation-specific rules and systems of labour rights, social security and assistance. It is thus important to examine the post-Lisbon case law of the CJEU to find out whether and how has this Court reflected in its argumentation the social market goal and other social novelties of the Lisbon Treaty.

The CJEU's approach toward this complex issue will be further analysed from three different angles. First the CJEU's pre-Lisbon and post-Lisbon case law on the clash between market freedoms and labour/social rights will be compared in order to find whether the social market economy goal has produced any changes there. Next, recent decisions of the CJEU on cases when national social assistance systems were burdened with claims of EU migrants from other countries will be analysed as a potentially new development in this field. Finally, the CJEU's pre-Lisbon and post-Lisbon approach towards potential conflicts between the EU competition rules and social partners' agreements or supplementary social insurance schemes will be dealt with.

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[64] CJEU C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* EU:C:2007:772.

[65] CJEU C-341/05 *Laval un Partneri* EU:C:2007:809.

[66] CJEU C-346/06 *Rüffert* EU:C:2008:189.

[67] CJEU C-319/06 *Commission v. Luxembourg* EU:C:2008:350.

[68] Currently (summer 2016), a targeted revision of the Posting of Workers Directive 96/71 is being debated and the politicians have so far been unable to agree whether the principle of equal treatment of posted workers in the host state (i.e. at the same building site, in practice) should be adopted. This proposal aims to prevent any wage differences in the future between posted and local workers (to the detriment of companies from poorer Member States from Central-Eastern Europe profiting from their price competitiveness in Western Europe) and thus to remove the potential for conflicts arising from the clash between the right to take collective action and the freedom of establishment and the freedom to provide services.

4.1 CJEU – an Enemy of Social Europe?

Building on the assumption expressed above that the social market economy goal does not push the EU towards positive integration measures as its commandment is rather to avoid extremes and seek consensus between "labour and capital", it should be emphasized that the CJEU (as well as the whole EU within its remit) had been attempting to act in this manner even before Lisbon (Piris 2010). It partly explains why the EU finds few champions either at the neoliberal right, for which it is too socialist, or at the social democratic left, for which it is too focused on deregulation and free competition.

The CJEU currently has a bad reputation on the left side of European political spectrum, being seen there as an executor of a technocratic liberal program of the internal market (Khalfa 2008; Devoluy and Koenig 2011; Barnard and Deakin, 2012). Although such criticism can be traced back to the 1990s, it has recently escalated due to popular aversion towards four judgments taken in the period between signing and entry into force of the Lisbon Treaty (Jacobs, 2009). These aforementioned "Laval quartet" decisions spoiled the image of the CJEU among trade-unionists and left-wing forces, especially in Western Europe in general. Since comments and opinions on these judgments are abundant,[69] further analysis will be narrowed down to the issue of how the CJEU has coped with the balance of economic freedoms and social rights.

What all of the four judgments had in common was the conflict between the fundamental freedoms of the internal market (freedom of establishment for business purposes in accordance with Art 49 TFEU or the freedom to provide services under Art 56 TFEU, in particular the posting of workers to provide services in another Member State under Directive 96/71/EC) and the collective rights of employees in host Member States (with labour and wage conditions laid down by collective bargaining and defended by collective action or by public policy if they were converted into statutory requirements for instance into public procurement rules). From the CJEU perspective, there was a clash of values belonging to the constitutional core of EU law. Since the 1970s, CJEU has acknowledged fundamental (human) rights as an integral part of the general principles of EU law. These rights, however, *"should if necessary, be subject to certain limits justified by the overall objectives pursued by the Community on condition that the substance of these rights is left untouched"*.[70] The CJEU interpreting "the overall objectives pursued by the Community" established that freedoms of movement within the internal market were the "fundamental principles of the Treaty". Naturally, they could also be exceptionally limited if the derogation were justified by the general interest and proved to be the least burdening, narrowed to a strict necessity and handled without discrimination.[71] This approach, however, could lead to a paradoxical situation where negative integration, ensuring the free exercise of economic cross-border activities, gains a superior position in relation to nation-specific conditions of the exercise of social

[69] Google search displays 83 500 matches for "CJEU Viking case" and 27 800 for "CJEU Laval case" [20/10/2016].

[70] CJEU case 4/73 *Nold KG v. Commission* EU:C:1974:51, paras 13, 14.

[71] CJEU case 220/83 *Commission v. France* EU:C:1986:461, para 17.

rights, i.e. the rights which are based on local-made social consensus and which often enjoy constitutional protection. (Azoulai 2008; Scharpf 2010; Voogsgeerd 2012)

In the judgments at issue, the CJEU recognized on the one hand that social rights, notably the right to associate and to take collective action, belonged among the fundamental rights recognized by the EU, and in the *Laval* Judgment (paras 104-105) expressly stated that the *"Community thus has not economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy…"*. On the other hand, these fundamental rights of workers were treated by the CJEU in the same spirit as any obstacle placed in the path of freedom of movement by a Member State. This meant that not only the CJEU required that these rights were exercised in the least burdening way for the economic freedoms (so-called proportionality test) but at the same time that they were objectively justified, i.e. that had they not been protected, the existing jobs and labour conditions would have been under serious threat (Azoulai 2008; De Vries 2013).

From the perspective of national and constitutional law and international human rights documents, the CJEU somewhat surprisingly focused there on the objective justification of an exceptional derogation from internal market freedoms and not on the justification of an exceptional derogation from fundamental rights (which can normally only be justified if these derogations are necessary in a democratic society in the interest of national security or public safety or for the protection of the rights and freedoms of others[72]) (Schiek 2013). While in the eyes of the CJEU, the right to enjoy a freedom of movement does not necessitate any justification as the motivation of economically active migrants is irrelevant, the exercise of social rights does not receive the same respect because the CJEU makes their legitimating dependent on an objective public interest. Thus, the CJEU did not apply even the standard proportionality test consisting in mutual optimization as if a constitutional court were bound to balance between two constitutional values of the same rank. The CJEU applied the proportionality test one-sidedly as a requirement addressed just to the defence of (fundamental) collective labour rights while the freedom to provide services it treated as a rule enjoying general priority (Schiek et al, 2015:31-32).

Despite that, some scholars have conceded that the CJEU ruled wisely and in accordance with EU law (Blanpain 2013). It could surely be argued that the Court chose the lesser of the two evils and gave way to the restriction of a fundamental social right, the exercise of which bore traces of collective protectionism, thus negating to a large extent the free exercise of one of the fundamental freedoms of the internal market. If the European integration historically had a specific mission of its own, then it was integration itself (of the internal market, primarily), while as far as the social status of workers was concerned, the Member States were reserving this task for themselves. Thus, the decisions at stake were not incompatible with the spirit and the mission of the EU. At the same time, however, it must be acknowledged that the respect expressed by the CJEU in these judgments for the EU's social objectives and social rights may have been

[72] See the conditions for a derogation as laid down by Art 11 of European Convention for the Protection of Human Rights and Fundamental Freedoms (EHCR) and by Art 31 of European Social Charter.

be perceived as mere rhetoric by the affected workers in Sweden, Finland or Germany. The CJEU's rulings were forcing them to reform their historically established models of industrial relations and social-labour rights protection that used to be based on the consensus between social partners. In addition, there is of course the question, not legal but political, of the impact of these judgments and of the subsequent campaign on social support for further European integration. Employees in rich countries of Western Europe had to ask themselves whether the freedom of movement as understood and promoted by the CJEU did not constitute a Trojan horse of less social future of Europe (ETUC 2010; Devoluy and Koenig 2011).

4.1.1 CJEU and the socio-economic balance in the post-Lisbon period

If in the period preceding the Lisbon Treaty the CJEU fell under suspicion that it valued social rights less than economic freedoms, there was an expectation that this would change after the Treaty and the Charter of Fundamental Rights became legally binding. As De Vries put it, *"The Court should thus proceed, more than it has done so far, to consider fundamental rights as self-standing justification grounds, which similar to the Treaty exceptions of e.g. Art 36 and 52 TFEU, may allow for the adoption of national discriminatory measures if deemed necessary*" (De Vries 2013:188). It was thus assumed that the CJEU would be more likely to conduct standard constitutional balancing of conflicting fundamental rights and freedoms without any questioning whether the defence of social rights pursues any specific valuable goal (Brunn and Lorcher and Schömann 2012). In the study for the Employment and Social Affairs Committee of the European Parliament, the CJEU was even summoned to recognize that the newly binding Charter of Fundamental Rights must gain priority over other law. The CJEU was called to acknowledge "that the solution found in the "Laval quartet" is indeed no longer feasible" and that "from a human rights perspective, mere economic interest can never trump human rights." (Schiek et al. 2015: 85-86).

It is beyond doubt that the CJEU has proved by many of its decisions that it is not anti-social *per se* (Petrlík 2016:159-163). Especially in cases where non-discrimination, equal treatment or individual social-employment rights (paid annual leave, rights of migrating workers and their family members, etc.) or harmonized EU standards (posting of workers and their social security entitlements) have been at stake, its rulings have always prevented any serious encroachment upon them (Scharpf 2010; Voogsgeerd 2012; Schiek 2013). Nevertheless, several of the CJEU's post-Lisbon judgments have made its left-wing critics shout out that it has just been continuing its "dark series" of anti-social decision-making.

In Case C-271/08 *Commission v. Germany*[73] the CJEU ruled against the exemption from EU directives on public procurement of social partners' agreements on the choice of providers of pension insurance services and repeatedly referred to its Viking case law. Then in Case C-45/09 *Gisela Rosenbladt* and C-447/09 *Prigge*[74] the CJEU subjected collective agreements fixing the age of retirement, permitted by the Anti-discrimination Directive

[73] CJEU C-271/08 *European Commission v Federal Republic of Germany* EU:C:2010:426.

[74] CJEU C-45/09 *Gisela Rosenbladt v Oellerking Gebäudereinigungsges.mbH* EU:C:2010:601 and C-447/09 *Reinhard Prigge and Others v Deutsche Lufthansa AG*. Case C-447/09 EU:C:2011:573.

2000/78, not only to a non-discrimination test but also to objective justification, necessity and proportionality tests which considerably limited the autonomy of social partners. Later on in Case C-397/10 *Commission v. Belgium*[75] the CJEU ignored the immunity provided by the Temporary Agency Work Directive 2008/14 to the sovereignty of Member States in defining their national requirements on temporary work agencies and gave priority to the freedom of establishment inferred directly from Art 56 TFEU (Dorsemont 2011). And recently, in Case C-176/12 *Association de médiation sociale*[76] the CJEU held that even a wrong implementation of Informing and Consulting Employees Directive 2002/14 did not allow the direct invoking of either the Directive's provisions or the corresponding article of the EU Charter of Fundamental Rights in an employee-employer dispute. In the same year of 2014 the CJEU (Grand Chamber) confirmed in the ruling C-83/13 *Fonnship A/S*[77] (a case involving a conflict between Swedish trade unions and a Norwegian ship under the flag of Panama wanting to enjoy the freedom to provide services) that the case law *Laval un Partneri* was still valid "relating to the compatibility of industrial action with the freedom to provide services".

Moreover, when the Advocate General (AG) of the CJEU (V. Trstenjak in the aforementioned *Commission v. Germany*[78]), referring to the strengthening of the primary law enshrinement of the right to bargain collectively by the Charter of Fundamental Rights that had become legally binding, proposed that the CJEU should adopt a dual application of the principle of proportionality, the judges did not follow. The AG stressed in her Opinion (para 81) that:

"In the case of a conflict between a fundamental right and a fundamental freedom, both legal positions must be presumed to have equal status. That general equality in status implies, first, that, in the interests of fundamental rights, fundamental freedoms may be restricted. However, second, it implies also that the exercise of fundamental freedoms may justify a restriction on fundamental rights."

This should lead the CJEU to an approach under which (para 84): *"if a conflict between such fundamental freedoms and fundamental rights is established, it must be determined whether, having regard to all the circumstances of the case, fundamental freedoms may justify a restriction on the fundamental right to bargain collectively and the fundamental right to autonomy in that process or, conversely, whether those fundamental rights demand that the scope of those fundamental freedoms and the secondary law based thereupon must be limited."*

The CJEU, however, mentioned the principle of proportionality in just one paragraph of its judgment (para 44), where it stressed that regarding its application, the case law *Laval* and *Viking* had to be followed.

Even more discouraging is the track record of the CJEU's handling of the social market economy target *per se*. So far in all its judgments delivered in the post-Lisbon

[75] CJEU C-397/10 *Commission v. Kingdom of Belgium* EU:C:2011:444.

[76] CJEU C-176/12 *Association de médiation sociale* EU:C:2014:2.

[77] CJEU C-83/13 *Fonnship A/S v Svenska Transportarbetarefonrbundet and Facket for Service och Kommunikation (SEKO)* EU:C:2014:2053, para 41.

[78] Opinion of Advocate General Trstenjak C-271/08 *European Commission v Federal Republic of Germany* EU:C:2010:183.

period, the Court of Justice has never used this term, even in spite of the Advocate General, Cruz Villalón, in Case C-515/08 *Santos Palhota*[79] openly inviting the Court to do so. Again, the case involved the Posting of Workers Directive 96/71 and the request of a Member State (Belgium) for a preliminary agreement with the posting of workers and for maintaining a set of documents related to the posting available in the country of performance. Although the AG did not suggest justifying all the requirements of the Member State, he urged the CJEU to take into account that the Lisbon Treaty had dramatically changed the accents in favour of social rights, including that *"the construction of the internal market is to be realised by means of policies based on a highly competitive social market economy, aiming at full employment and social progress."* (para 51) The CJEU, however, made no mention whatsoever of the Lisbon Treaty, its Art 3(3) or the goal of social market economy in this decision.

In handling the *Santos Palhota* case it was also important that less than a month after AG Trstenjak, AG Cruz Villalón also invited in his Opinion the CJEU to rethink the way it assessed the conflict between economic freedoms and social rights (para 53):

"As a result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality."

The AG proposed that the CJEU should be, in light of changes in EU primary law, *"particularly sensitive to the social protection of workers"* (para 55) and suggested to abandon the one-sided proportionality under which the fundamental rights were treated as possible exceptions to EU market freedoms. The CJEU, however, in its decision delivered in October 2010,[80] followed only the conclusions of the AG, but not his reasoning. The judges left aside the changes of accents brought about by the Lisbon Treaty and stayed strictly factual and technocratic. They applied the standard "breach-justification-proportionality" test, i.e. the test commonly used by them to judge on the obstacles to the exercise of basic freedoms of movement (Dagilyte 2012). Needless to stress that if the CJEU had accepted the proposals of its AGs, the equality between economic freedoms and fundamental social rights would be clearly established for the future.

In July 2012, not the Court of Justice but the General Court of the EU invoked the provision of Art 3 (3) TEU in the Case T-565/08 *Corsica Ferries*.[81] The judges had to decide there on the compatibility of state aid granted to a state-controlled company.

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[79] Opinion of Advocate General Cruz Villalón C-515/08 *Criminal proceedings against Víctor Manuel dos Santos Palhota and Others* EU:C:2010:245.

[80] CJEU C-515/08 *Criminal proceedings against Víctor Manuel dos Santos Palhota and Others* EU:C:2010:589.

[81] General Court T-565/08 *Corsica Ferries France SAS v European Commission* EU:T:2012:415. The appeal

They referred to the comparison with the "reasonable private investor" within the social market economy:

"… in a social market economy, a reasonable private investor would not disregard, first its responsibility towards all the stakeholders in the company and, second, the development of the social, economic and environmental context in which it continues to develop" (para 82) and *"for that purpose, the payment by a private investor of additional redundancy payment is, in principle, capable of constituting a legitimate and appropriate practice."* (para 83).

In the end, however, the General Court (GC) did not adhere to the social-friendly solution of the case and stressed that the social or political goals cannot stand alone and cannot exclusively prevail over the economic logic. A mere fact that a state measure pursues social aims was thus not, according to the GC, sufficient for it to avoid being classified as state aid. The GC annulled the Commission's decision that had been in general much more favourable to the aid granted. The judges thus emphasized that in their eyes the social market economy was not the same as social Europe. The Lisbon Treaty may well urge the EU to take account of other than purely economic considerations but in any case it does not push for a primacy of social considerations over the free market principles. And this was so far the only case in which the GC invoked in its reasoning the social market economy goal.

4.1.2 CJEU – a reluctant balancer

To sum this development up, it is almost spectacular how the CJEU has been avoiding the arguments based on the new "spirit" of the Treaty and its new objective of the social market economy. The Court has not distanced itself from its pre-Lisbon case law on how the social rights and the economic freedoms should be balanced. On the contrary, it has been referring to its pre-Lisbon judgments as to precedents in these matters. Neither has it modified the test applied in cases of conflict between the social and collective labour rights on the one side and the economic freedoms on the other. Fundamental social rights remain in such situations an exception, which may be recognized if it is justified by an objective interest that is promoted in a necessary and proportionate way.

According to some commentators, a tendency can be discerned in the CJEU decisions to conflate the economic freedoms and the prohibition of discrimination into a general "fundamental" freedom to conduct one's business or to be economically active at large in the internal market whilst the cross-border element in such cases could be only hypothetical (Schiek 2013). All that means that up to now the CJEU has neither taken advantage of the new situation and the new opportunities that the Lisbon Treaty has opened up for strengthening of the EU's social dimension nor recognized the Member States' and their social partners' full sovereignty in areas excluded from the EU harmonization (Grimmel 2013).

A question comes to mind whether the CJEU's resistance to the re-interpretation of the long established standards of EU law according to a changed "spirit" of the Treaty, its refusal to base its legal reasoning on such an elusive objective as the social market

against this decision was decided by the CJEU (C-533/12 P EU:C:2014:2142) without any single reference to social market economy goal or to Article 3 TEU being made by the Court.

economy, is not a signal to political leaders that the EU judiciary could not and would not do their job. It is quite obvious that the highly competitive social market economy goal was adopted by the Treaty framers as a catch-all expression that is to be used politically in defence of greater efficiency and free competition, as well as of the increased weight of social rights and justice. Scholars have already pointed out this practice whereby political representations agree on a vague compromise in the hope that sooner or later the EU judiciary would add some practical meaning to it (Grimmel 2013).

In its essence, however, the ratio of economic freedoms and fundamental social rights within the European integration is undoubtedly a far more political than legal issue and the CJEU rightly refuses to become the authority to resolve it in a decisive manner. The politicians, however, were unable – as stressed above – to agree on a solution to the re-balancing of economic freedoms with labour/social rights. It seems that the "Laval quartet" case law will not be relegated to history by the CJEU itself, regardless of the assertion of many experts that the Lisbon changes in the EU primary law should be understood by all EU bodies – including the CJEU – as a considerable consolidation of the EU's socio-economic model which "is now premised on an integrated approach to economic and social politics" and thus "Laval, Viking and any upcoming similar cases would have to be decided differently" already since December 2009 (Schiek et al. 2015:16, 90).

Until EU leaders find a way of laying the foundations of a federalized social protection layer at the EU level, there will remain areas of conflict between the internal market principles and the fundamental social rights and the CJEU will inevitably be called to resolve them – as will be shown in the following part.

4.2 CJEU and its Recent Case Law on the Access of EU Migrants to Social Assistance

Apart from the free movement of services and the freedom of establishment, the EU is now facing a growing problem involving free movement of EU citizens. Although the mass migration into the EU from countries lying beyond its borders has overshadowed this intra-EU migratory problem in the media, the British vote to leave the EU pushed it to the front stage. In the UK it is known as "benefits tourism", in Germany as "poverty migration", and its cause consist in the exercise of the right to free movement and residence of EU citizens pursuant to Article 21(1) TFEU (Benton 2013:1). In February 2016 this problem was given recognition at the meeting of the European Council, in whose Conclusions (European Council 2016) so far unheard formulations can be read. Joint measures limiting not only the flows of those who move to abuse the generosity of certain national social systems or those in a situation of job seekers were declared desirable. The EU summit recognized the necessity of solving the problems caused by the free movement of workers and declared support for the limitation of its scale and for its restriction for specific reasons including reducing local unemployment or protecting the sustainability of social security systems.

Although the EU single market is built on the principle of free movement, the EU social model, built on nation-specific systems of social security and assistance, apparently cannot cope with the relatively modest scale of EU right to freely move and

reside in another Member State.[82] In spite of statistical data about economic benefits of the host states from intra-EU migration, the free movement of Europeans has become, due to the pressure of public opinion, a hot political issue pushing some Member States to propose – in the name of their social systems sustainability – measures aimed against one of the fundamental freedoms of the EU. At the February 2016 EU summit, the European Commission promised to initiate changes to the basic secondary legislation governing the exercise of the rights of EU citizens while staying in other member countries, i.e. to Regulations 883/2004[83] and 492/2011[84] and the key Directive 2004/38.[85] For our present analysis, it is even more interesting to note that the traditional gradual expansion of the rights of EU migrants derived from the status of EU citizens seems to be a thing of the past also for the Court of Justice of the EU. Comments pointing to "vanishing strands of EU citizenship" (O'Brian 2016) or "rolling back EU free movement law" (Peers 2016) have become frequent in posts dedicated to the latest case law development.

The following analysis is thus focused on those changes that already form a part of the applicable EU law as they have recently arisen from judgments of the CJEU. The ambition is not only to explain what novelties were introduced in 2014–2016 by the CJEU in its decisions on EU-migration issues but also to estimate the extent and significance of these changes – in light of the CJEU's approach towards the social market economy goal of the EU.

4.2.1 CJEU as a traditional guardian of the EU citizens' right to move and reside

Descriptions of the origins of the current problems are generally very similar. The right to free movement, originally defined as a freedom for the economically active (workers and self-employed) became under the Maastricht Treaty (1992) the right of every EU citizen (Poptcheva 2014:4; Blauberger and Schmidt 2014:2). Free movement of economically active EU citizens (i.e. the present Articles 45 and 49 TFEU) began to be seen as a special case of freedom of movement derived in general from the EU citizens' rights laid down in the provisions of Part Two of the TFEU on non-discrimination and EU citizenship. The key Article 21(1) TFEU on the right of every EU citizen to move and reside freely within the territory of the Member States (subject to the limitations and conditions laid down in the Treaties and the measures taken to implement them) was found by the CJEU to be directly effective.[86] The Treaty thus gave EU citizens

[82] According to the Eurostat statistics, in 2013 in total 1.2 million EU citizens moved to another Member State. In January 2014 some 17.9 million people lived in another EU Member State than was the Member State of their origin. These numbers are rather insignificant in relation to the total population of the EU.

[83] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 200, 1-49.

[84] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141, 1-12.

[85] Directive (EC) 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158, 77-123.

[86] CJEU C-413/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493, paras 80, 81, 84.

directly claimable rights regardless of their economic status (Schütze 2012:600). The CJEU "strongly supported this fundamental freedom" and stipulated that measures to restrict it should be interpreted narrowly and applied with regard to the principles of proportionality and equal treatment (Maslowski 2013:67).

In its "classic" decisions from the turn of the millennium (*Martinez Sala*,[87] *Grzelczyk,*[88] *Baumbast,*[89] *Bidar*[90]) the CJEU gave an extensive and openly euro-optimistic definition of EU citizenship as "fundamental status of nationals of the Member States".[91] The treatment of economically inactive EU-citizens in a host Member State where they did not get permanent residency but applied there for social aid, was complicated by the CJEU's requirements for their equal treatment and also for the thorough individual assessment of whether they had already built "a genuine link"[92] with the society and the labour market of the host Member State. If it was so, the host Member State was expected to show a "certain degree of solidarity",[93] i.e. not to expel EU migrants in need but rather to provide them with the necessary assistance.[94] The CJEU's decision C-456/02 *Trojani* from September 2004 can be considered as a certain culmination of this trend to expand citizenship rights that were derived directly from the EU Treaty.[95] The CJEU emphasized there that an EU citizen, even if his/her stay in another Member State did not correspond to the conditions laid down by EU law (then Directive 90/364,[96] predecessor of the current Directive 2004/38) but still legally residing in the host Member States from the perspective of its own national law, had the right to equal treatment and may not be discriminated against in access to social assistance to which local citizens were entitled in a similar situation (paras 39-40, 43-44).

In parallel to this, the CJEU also advocated a broad definition of an EU worker. This definition also covered employees with a contract for just a 10-week period,[97] or for a working week shortened to 10 or 12 hours.[98] The CJEU even did not rule out the possibility of recognizing as genuine and effective employment a job for only 5.5 hours

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87 CJEU C-85/96 *María Martínez Sala v Freistaat Bayern* EU:C:1998:217.

88 CJEU C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* EU:C:2001:458.

89 See *Baumbast*

90 CJEU C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* EU:C:2005:169.

91 See *Grzelczyk,* paras 30, 31.

92 See *The Queen, on the application of Dany Bidar ,* para 62.

93 See *Grzelczyk,* para 44.

94 The CJEU also acknowledged in these judgments that "the exercise of the right of residence… can be subordinated to the legitimate interests of Member States" (*Baumbast*, para 90) and that EU migrants should not become an unreasonable drain of resources in their host Member States (*Grzelczyk*, paras 42-44). Nevertheless, these caveats were supposed to be treated as rare and restrictively and proportionally applied exceptions from the primary rights to move freely and obtain equal treatment.

95 CJEU C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* EU:C:2004:488.

96 Council Directive 90/364/EEC of 28 June 1990 on the right of residence, repealed by Directive 2004/38.

97 CJEU C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* EU:C:2003:600.

98 CJEU C-139/85 *R. H. Kempf v Staatssecretaris van Justitie* EU:C:1986:223 and C-444/93 *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz* EU:C:1995:442.

per week.[99] And quite recently, in 2013, in its decision C-46/12 *L. N.,*[100] the CJEU confirmed that the motivation for taking part-time work in another Member State was irrelevant and might stem from a plan to obtain maintenance aid for full-time studies in that Member State. The only condition in these borderline cases remains whether EU migrants pursue effective and genuine employment activities (para 47). Even poorly paid EU workers (and their family members) have always been entitled in the host Member State to equal treatment regarding their access to social assistance.

One can easily understand the growing resentment of several "old" Member States, especially after the EU's enlargement to Central and Eastern Europe in 2004 and 2007 (when not all "old" Member States made use of the possibility to temporarily limit free migration) and then under the pressure of the financial and economic crisis, to grant underpaid migrant EU workers and their family members (and in some cases also job-seekers, pensioners and students) social benefits from their national welfare system to which these beneficiaries contributed little or nothing. The CJEU has become frequently blamed for "overstretching the Treaty's provisions on freedom of movement" "to the detriment of the functionality of national welfare systems" (Poptcheva 2014; Blauberger and Schmidt 2014:2).

It is true that Directive 2004/38, approved two days before the "Eastern enlargement" and in effect in EU countries from May 2006, stressed that those EU citizens who would like to stay in another Member State for more than three months without being economically active there must have sufficient resources for themselves and their families in order not to become a burden on the social assistance system of that State (Articles 7(1)(b) and 24(2)) and expressly allowed for some exceptions to equal treatment.[101] The intention of some Member States to legalize a certain cap on rights derived from EU citizenship, as expressed in the Directive,[102] however, was not somehow fully taken into account by the CJEU, at least during the first years of its application.

On the one hand, the CJEU recognized in its decision C-158/07 *Förster* from 2008 [103] that maintenance grants could be refused to a student during the first five years of residence in another Member State.[104] On the other hand, even after the adoption of

[99] CJEU C-14/09 *Hava Genc v Land Berlin* EU:C:2010:57.

[100] CJEU C-46/12 *L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte* EU:C:2013:97.

[101] Article 24 of Directive 2004/38 allows the host Member State not to confer entitlement to social assistance to EU migrants during the first three months of residence or, where appropriate, a longer period, as well as not to grant maintenance aid for studies consisting in student grants or student loans to persons other than workers, self-employed persons and members of their families prior to the acquisition of the right of permanent residence.

[102] The Commission's draft was more favourable to the expansion of rights based on EU citizen status. Member States in the Council inserted several limitations to it. See for details Maslowski 2013; Shuibhne 2015:895-897.

[103] CJEU C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* EU:C:2008:630.

[104] Facts of the case preceded Directive's 2004/38 coming into force. The CJEU however, in conformity with its provisions, upheld the right of a Member State to refuse a maintenance grant to a student that does not fulfil the requirement of five-year prior residence even though such a requirement was not imposed on the nationals of that Member State.

Directive 2004/38 and the "Eastern enlargement", the Grand Chamber of the CJEU adopted the aforementioned controversial judgment in *Trojani*.[105] Further, e.g. in the case *Vatsouraz and Koupanatze*[106] the CJEU stated that financial benefits intended to facilitate access to the labour market of the host Member State cannot be regarded as social assistance within the meaning of Article 24(2) of the Directive and cannot therefore be refused to jobseekers during the first three months of residence or, where appropriate, a longer period provided (para 45). And recently (2013) in the C-140/12 *Brey*[107] ruling, concerning a retired German couple that moved to Austria without sufficient resources to establish their lawful residence there, the CJEU concluded that EU law did not permit an automatic refusal of a social assistance benefit to them as the competent authorities of the host Member State must always carry out an overall assessment of the personal circumstances and the individual situation of applicants and also of the specific burden placed on the social assistance system and, last but not least, must strictly respect the principle of proportionality in the measures they would adopt (paras 77-78).

The clarity and certainty of EU free movement law were thus left to be desired as the outcome in practice often depended on how the general concepts (genuine activity and link, unreasonable burden, etc.) would be applied to specific cases. And even if it has become more firmly established that social assistance could be (after a thorough individual assessment) refused to economically inactive EU migrants before they obtain their permanent resident status in the host Member State pursuant to Directive 2004/38, it has simultaneously remained completely unclear whether EU-migrant citizens not qualifying for such assistance and falling into poverty can be expelled.[108] The provisions on the right of residence and on the conditions defining the possibility of expulsion have not been harmoniously worded in Directive 2004/38.[109] The CJEU insisted in its case law that expulsion of an EU citizen must remain an exceptional measure requiring an individual examination of the specific case (i.e. how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into that State and the extent of his/her links with the country of origin), even regarding a person convicted of a serious crime.[110] Even though

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[105] The case also fell under the regime of the previous Directive 90/364, whose requirements, however, were quite similar in this respect to the newer legislation.

[106] CJEU C-22/08 and 23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* EU:C:2009:344.

[107] CJEU C-140/12 *Pensionsversicherungsanstalt v Peter Brey* EU:C:2013:565.

[108] Threats to public policy, public security, public health as well as being an unreasonable burden on the social security system of the host Member State have always been reasons for expulsion recognized both by primary (see Article 45 TFEU) as well as secondary EU law (Article 27 of 2004/38 Directive). The problem consisted in the lack of definition of their precise content in EU law and the pressure from the Commission and the CJEU to limit Member States' tendency to apply them disproportionally, collectively, without proper assessment of individual situation or for purely economic ends. See for details Maslowski 2013: 65-67.

[109] Article 14(3) of the 2004/38 Directive stipulates that the expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

[110] CJEU C-348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheid* EU:C:2012:300 (the ruling).

any automatism in refusing support as well as in expelling back to the Member State of origin seemed to be inconsistent with EU law, national practice in many Member States went its own way, sometimes in evident contradiction with EU standards.[111] Therefore the criticism that "judicial-legislative shaping of social rights results in legal uncertainty on the part of Member States Citizens and the EU" (Blauberger and Schmidt 2014:6) was added to the resentment caused by the fact that "national public administrators have lost their role as sole administrative gatekeepers of the welfare state" (Bruzelius and Chase and Seeleib-Kaiser 2013:3).

4.2.2 CJEU and its "new approach"

The CJEU's judgments are sometimes sparse regarding the answers that are expected of them,[112] and often, due to the complexity of the national welfare systems and the factual aspects of the case, leave the assessment of the key criteria fulfilment, i.e. of whether an EU migrant created a real link with the host Member State or whether he or she represents an unreasonable burden for its social system, to national judges. From there comes a certain ambiguity of their content that does not permit to draw a clear dividing line between the "old" CJEU case law that was friendly towards EU-citizenship and the CJEU's "new approach" to the rights of migrating EU citizens. Neither the statement that before 2014 migrating EU citizens "tended to win their cases" nor that now it seems to be the other way around (Shuibhne 2015:894) apply without exception. Even under the "old" case law such ruling as in the C-406/04 *G. de Cuyper*[113] case can be found, where the Grand Chamber of the CJEU stated, among other things, that "the right to reside within the territory of the Member State which is conferred directly on every citizen of the Union by Article 18 EC is not unconditional" (para 36) and applying strictly an EU secondary legal act (Regulation 1408/71 on the application of social security schemes to migrating workers[114]) concluded that a residence clause (i.e. the obligation for Mr De Cuyper not to leave Belgium) could be imposed on an unemployed person as a condition for the retention of his entitlement to unemployment benefit.

A full bias could, therefore, never be blamed on the CJEU. However, it is true that during at least two decades after the inclusion of the right of EU citizens into the Treaty, the CJEU had a tendency to stress the primacy of EU-citizenship rights derived directly from the Treaty over narrowly and proportionally applied conditions of their exercise fixed by secondary EU legislation (Shuibhne 2015: 890). Yet, in the aforementioned case *Brey* (para 70) the CJEU seemed to confirm, in September 2013, such a trend: freedom of movement was stressed as a fundamental principle of EU

[111] See for details Maslowski 2013:73-76. Well known examples are the collective expulsions of Romanian and Bulgarian Roma from France in 2010. Also Dimitrova 2013:33-61.

[112] As the current President of the CJEU, K. Lenaerts, explained: "As consensus-building requires bringing on board as many opinions as possible, the argumentative discourse of the CJEU is limited to the very essential. In order to preserve consensus, the CJEU does not take 'long jumps' when expounding the rationale underpinning the solution given to novel questions of constitutional importance." (Lenaerts 2015:1).

[113] CJEU C-406/04 *Gérald De Cuyper v Office national de l'emploi* EU:C:2006:491.

[114] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] Official Journal L 149, 2-50.

law and due to this fact, any limitations of it provided by secondary EU legislation, had to be construed narrowly. The assessment of personal circumstances characterizing the individual situation of the person concerned was a must for national authorities deciding on social assistance for applicants from another Member State (para 64). The case law from the euro-optimistic 90s (*Martínez Sala, Grzelczyk, Baumbast*) was still quoted as a good precedent. Especially in the light of such a confirmation of continuity, the decisions of the CJEU from 2014-2016 in the cases of *Dano, Alimanovic*, *García-Nieto* and *Commission v. UK* came as a U-turn in its approach.

In Case C-333/13 *Dano,*[115] an economically inactive EU migrant from Romania was legally residing in Germany; nevertheless German authorities refused to give her and her son social assistance consisting in a so-called "basic provision" from the category of "special non-contributory social benefits".[116] The "basic provision" (*existenzsichernde Regelleistung*) was intended to cover subsistence costs of jobseekers and allow them to lead a life keeping with human dignity. However, Ms Dano, having no qualification and no previous work experience, did not really look for a job in Germany. Even though it seems that it was not difficult for the CJEU to confirm the view of German authorities, and the refusal of such benefits was fully in line with the applicable EU law (especially Directive 2004/38), this judgment was surprising in its total disregard of the personal situation of Ms Dano. Already in Germany in July 2009, she had given birth to a son there. Then, hosted by her sister, she had stayed permanently in that country since November 2010 and in July 2011 she received a certificate of residence for an indefinite period of time from German authorities and child benefits were also paid to her there. Although it was clear that under Directive 2004/38, Ms Dano was, as an economically inactive person surviving in a host Member State without sufficient resources, not entitled to demand the EU right of residence, it was at the same time impossible to assert that she resided in Germany illegally and without any bonds or that there were no social solidarity reasons in favour of her receiving social assistance. Moreover, the German court itself was not sure whether Ms Dano had not been treated in conflict with the general EU law provision on non-discrimination (Article 18 TFEU) and with the general right of residence (Article 21 TFEU). Simply, in the light of the traditional CJEU approach towards EU migrants in need in a host Member State, the outcome did not seem so obvious.

The CJEU reasoning, however, was relatively simple. Although the Court recognized its older case law, such as the above quoted *Grzelczyk* or *Brey,* it did so primarily to stress that the fundamental status of EU citizens had never been without limits and they had never been allowed to migrate and obtain social assistance free of any conditions (paras 58, 63). Furthermore, it based its reasoning exclusively on the provisions of Directive 2004/38, especially Article 24(2), allowing for an exception to the principle of

[115] CJEU C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358.

[116] As defined by article 70(2) of Regulation 883/2004. The benefits provided by national welfare systems are usually divided into three types: contributory benefits (based mainly on insurance-type contributions, i.e. social security), non-contributory benefits (based mainly on tax-type contributions, i.e. social assistance) and special non-contributory tax benefits which have characteristics both of social security and of social assistance and their examples are benefits to guarantee the minimum subsistence income or specific protection for the disabled. Regulation 883/2004 governs the availability of "social security" to EU migrants, while "social assistance" is excluded from its scope.

non-discrimination. By consistently applying the terms of the right of residence within the meaning of the Directive, the CJEU concluded that the applicable EU law must be interpreted as not precluding the legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain "special non-contributory cash benefits" although these benefits are granted to nationals of the host Member State who are in the same situation, as long as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State (para 84).

The CJEU remained silent on whether the requirements of the Directive could be softened with respect to the directly effective provisions of Articles 18 and 21 TFEU and to the personal circumstances of Ms Dano. Additionally, the CJEU very briefly rejected the application of the EU Charter of Fundamental Rights, quoting a highly formalistic reason that Regulation 883/2004, which defines the term "special non-contributory cash benefits", was not intended to lay down the conditions creating the right to those benefits, and therefore Germany, by fixing these conditions on its own, did not implement EU law (paras 89, 91).

The CJEU thus surprised legal observers in the *Dano* case, because the solution to apparently difficult questions of whether and how the primacy of great EU principles and Treaty clauses could be limited by narrowly interpreted exceptions laid down in secondary legislation, is to be found in the literal application of the provisions of Directive 2004/38.[117] One who does not under its provisions have any right to reside in another Member State is therefore not entitled to equal treatment in that State (para 81). Especially in the case of an economically inactive EU migrant who does not seek a job, this outcome seems so obvious that the person can be refused social assistance within the meaning of the Directive without assessing their genuine link with the Member State's society. There is no need to consider the application of such concepts as *EU-citizenship* or *solidarity*, because the CJEU has never used these previously highly valued terms in the grounds for its judgment. Even more strikingly, this new tendency of the CJEU to limit formerly unavoidable provisions of the Treaty and fundamental principles of EU law by conditions laid down in secondary EU legislation was demonstrated in its decisions in cases *Alimanovic* from September 2016[118] and *García-Nieto* from February 2016.[119] In those cases, the CJEU made no mention whatsoever of Article 21 TFEU (or any article of the Charter), never mentioned citizenship, solidarity, genuine link, etc., and the quotes of "old" case law such as *Martínez Sala, Grzelczyk, Baumbast* or *Trojani* were replaced by references to… *Dano*.

In the C-67/14 *Alimanovic* case, citizens of Sweden (mother and three children, all born in Germany) unsuccessfully applied for benefits of social assistance nature in Germany, where the family enjoyed a right of permanent residence in accordance with the local rules. The mother and the oldest child had worked for 11 months in Germany (thanks to employment promotion measures). When their jobs ended, they received during the following six months a subsistence allowance for the unemployed, given

[117] For an interesting discussion of this aspect of the ruling, see Shuibhne 2015:935.

[118] CJEU C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* EU:C:2015:597.

[119] CJEU C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others* EU:C:2016:114.

that, in full conformity with Directive 2004/38 (Article 7 (3)), they had maintained the status of EU-worker for exactly half a year after the termination of their employment (had they worked longer than 12 months they would not have lost this status and the right of equal access to all benefits). AG Wathelet had no doubt that Alimanovic, having applied for the social assistance and not for the job-seeking allowance, could not be eligible for such aid under the strictly applied Directive 2004/38.[120] However, given that the applicants had worked in Germany, the AG did not recommend an automatic rejection of their claim but suggested an individual assessment of whether they had already built a genuine link with the host Member State. Among other differences from the *Dano* case, it might be mentioned in favour of the applicants that their minor children attended school in Germany as, being family members of a (former) migrant EU-worker, they enjoyed right of access to education pursuant to EU Regulation 492/2011. The CJEU nevertheless concluded, based on the consistent application of Directive 2004/38, that under the circumstances, the applicants were no longer entitled to social assistance benefits. Surprisingly, however, the judges did not deem any individual assessment necessary (para 59).

This conclusion, which distinguished the *Alimanovic* case from *Brey* and from the older case law in general, was grounded by the CJEU in the provisions of Directive 2004/38, which established a gradual system regarding the retention of worker status and thus took into consideration different factors characterizing the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity (para 60).

Although it is not entirely clear how the general and concise provisions of the Directive could replace the previously required individual assessment, it is on the other hand absolutely clear that the CJEU gave priority to the clarity and certainty of the rules and also to the easing of the burden borne by the national social security system. The judges formulated an axiom that while an individual claim might not place the concerned Member State under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so (para 62). Stipulating this, the CJEU ruled out, for cases similar to Alimanovic's situation, any doubts about the need to take into account the ties and needs of the applicant (who had e.g. worked only one week short of 12 months). The statement that an individual claim would never be a burden but the accumulation of similar claims would always present one, is universally applicable and makes any interest in individual destinies superfluous. Given that the Alimanovic family could not be labelled simply as welfare tourists (contrary to *Dano*) the surprise produced by such approach towards their requests for social assistance was significantly greater (Kramer 2015; Haag 2015).

The third of the recently decided cases, C-299/14 *Garcia- Nieto,* was less ambiguous at first sight. The issue at stake was the request of Spanish immigrants to Germany for social assistance falling once more into the category of special non-contributory cash benefits. The applicants came to Germany to join relatives and to work there and wanted to benefit from this social allowance during the first three months of their residence and

[120] Opinion of Advocate General Wathelet C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic* EU:C:2015:210.

before they found a job. The CJEU applied its conclusions of *Dano* and *Alimanovic* cases regarding the application of Directive 2004/38 to the requests of social assistance of those who do not meet the conditions of this secondary legislation and due to that may not enjoy equal treatment in the host Member State.

The logic that any EU citizen can reside in another Member State for a period of up to three months without any conditions or formalities and that the price for this freedom consists in the fact that s/he must not become an unreasonable burden on the social assistance system of this Member State is compelling (para 42). What makes such a simple solution difficult to accept in the *García-Nieto* case was once more a complete disregard to the individual situation. The CJEU acknowledged but did not take into consideration that Mr Peña-Cuevas (with his son – together applicants for the social assistance) joined in Germany Ms García-Nieto as they had lived previously together in Spain, had a daughter together, and even though they had never married nor entered into a civil partnership, they lived in Germany as a family on Ms García-Nieto's income (para 29) and together lodged an action against the non-granting of social assistance. Even the CJEU frequently referred to them as "members of the Peña-García family" (paras 2, 27, 29, 30 etc.). Contrary to all this information, the question of Mr Peña-Cueva's and his son's entitlement derived from their status as an EU-migrant family was strangely avoided in the judgment as if, without formalization of the Peña-García relationship, their factual situation was totally irrelevant.

Finally, the case C-308/14 *Commission v. United Kingdom*[121] came as no surprise as after the tree above explained decisions, and the Opinion of AG Cruz Villalón in that case, which also followed the "new approach",[122] another confirmation of the limitation of rights of economically non-active EU migrants was largely expected. The CJEU found – contrary to the Commission's position in the case – that the UK was entitled to apply the "right to reside" test, derived once more from the conditions set out in Article 7 of Directive 2004/38, to claimants for the so-called Child Benefit and Child Tax Credit. Even though the Court admitted (para 76) that "a host Member State which, for the purpose of granting social benefits, such as the social benefits at issue, requires a national of another Member State to be residing in its territory lawfully commits indirect discrimination", such discrimination was found necessary and proportionate as "the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such a grant could have consequences for the overall level of assistance which may be accorded by that State." (para 80) Thus, once more, no attention to individual situation of the claimant nor to the existence of his or her genuine link with the society of the host member state but quasi-automatic exclusion from family benefits of those whose residence is not in line with the Directive 2004/38. And as expected: several references

[121] CJEU C-308/14 *Commission v United Kingdom* EU:C:2016:436

[122] In the Opinion of Advocate General Cruz Villalón C-308/14 *Commission v United Kingdom* EU: C:2015:666, the AG confirmed the tendency by concluding, that "when examining claims for social benefits such as child benefit or child tax credit, the Member State's authorities may carry out the checks necessary to ensure that nationals of other Member States claiming those benefits are lawfully resident in its territory" (para 99).

to the *Dano* case law but no reference to EU citizens' rights provided by Article 21 TFEU (O'Brian 2016).

All these cases thus have several features in common (which allows referring to them as the "Dano quartet"). Directive 2004/38 was used in all of them as the basic rule governing the status and entitlements of migrating EU citizens in another Member State. Questions regarding the balance between the Directive and the rights of EU citizens derived from EU primary law or the personal situation of migrant applicants as well as their factual status under the national law of the host Member State (all natural plaintiffs – Dano, Alimanovic, Garcia-Nieto – resided in Germany legally, but not in line with the EU Directive[123]) should no longer complicate the decision-making about the access of economically inactive EU migrants to social assistance. If we stop asking the questions to which the CJEU did not give satisfactory answers in its four recent judgments, then the situation of one category of migrant EU-citizens has undoubtedly been clarified. Instead of trying hard to ponder the appropriateness of exceptions in an individually assessed situation, the relatively straightforward rules imposed by Directive 2004/38 should be strictly applied. They show that EU migrants without the status of an EU worker (or self-employed or their formal family member) cannot claim equal treatment in access to social assistance of host Members States until they become permanent residents there according to 2004/38 Directive (i.e. after five years of continuous legal residence). This outcome is both clear and reasonable, at least for any national social system and its expenditure on applicants from other Member States in dubious situations that would have previously presented "hard cases" to solve without infringing EU law.

From a legal theory perspective, however, the question remains of how the provisions of secondary legislation can push to the side any consideration about EU primary law precedence, especially when reminded about the CJEU's previous usage of Treaty provisions to increase the value of EU citizenship as the fundamental status of Europeans (Shuibhne 2015). The binding EU Charter of Fundamental Rights seems to be completely of no use – regardless of an EU-element of free movement. For legal practice, a question imposes itself about the fate of those EU citizens who, while staying in another Member State, have no right of residence there under Directive 2004/38 but cannot be expelled as the conditions of expulsion pursuant to Article 28 of the Directive are formulated much more strictly than the conditions of equal access to social assistance. If the CJEU does not harden in the near future its approach towards the expulsion of those EU citizens who, without posing any threat to public order, security or health, have been, in line with the Directive, refused social assistance, then unwanted citizens from other EU countries may gather in some Member States (Verschueren 2015b). These people would survive in relative poverty with the help of their relatives, friends or charity, and with some luck would hold on – legally – for five years, after which they would acquire the right of permanent residence and become entitled to all kinds of benefits as nationals of the host Member State. This phenomenon, even though perhaps statistically unimportant, would undoubtedly create a need for further

[123] It must be reminded that in the aforementioned case *Trojani* the CJEU took the legal residence under the national legislation as a ground for equal access to social assistance.

legislative or judicial clarification. The CJEU has thus so far solved only the first of the questions lining the path towards reconciliation between the European ideal of freedom of movement and the inability and unwillingness of the national social security systems to serve all EU applicants without discrimination.

4.2.3 CJEU – a challenge or a support to national social security systems?

Is there a link or, on the contrary, a discrepancy between the CJEU's approach to the conflict between the freedoms of movement (of services and businesses) and labour/social rights systems, as described in the first part of this chapter, and the CJEU's approach to the difficulties caused to national systems of social protection by migrating EU citizens? It may seem that the CJEU tends to be an enemy of national social standards arisen from collective bargaining, i.e. as a destroyer of the hard-won local consensus between capital and labour, i.e. almost as the opponent of balance between economic and social goals of European integration. Simultaneously, however, the current CJEU case law on the issue of the claims of migrating EU citizens to social benefits in the host Member State is evaluated as "pro-State reading of the EU rules on free movement, citizenship and access to social benefits, trying to convey the message that such rules do not impair host States' capacity to keep under control access to their social security systems" (Costamagna 2016). Thus, is the CJEU's case law a challenge or a support to nationally defined social security systems?

Although it may be misleading to compare the decisions of cases whose factual and legal aspects are different, it is conspicuous that in the decisions belonging among the "Laval quartet", the CJEU was biased towards freedoms of movement and insisted on unequivocal, all-pervading priority of primary EU law provisions (Art. 49, 56 and others of TFEU) against the conflicting secondary EU law provisions, rights of Member States as well as autonomous rules and arrangements of social partners. On the contrary, the decisions belonging among the "Dano quartet", the CJEU surprisingly limited its argumentation to the interpretation of secondary EU law (Directive 200/38, Regulation 883/2004) and selective quotation of its older case law while keeping entirely silent on the possible superiority of TFEU provisions (Art 21) and of general principles of EU law. This conflict comes across, especially in the "Dano quartet" decisions, as opportunistic, as an effort to comply with the wishes of the public opinion of Member States that are the most frequent target of intra-EU migration.

However, there is another possible interpretation of this seemingly conflicting CJEU case law, namely the interpretation that finds a common denominator in all of the quoted decisions. The common denominator is the protection of the internal market as a historical and factual foundation of European integration and thus, constant preference of free movement of productive components of this market, whereas in the form of companies, their services or workers within the meaning of EU law. It is in fact symptomatic that only a few months before the *Dano* decision (in June 2014), the Court of Justice adopted a decision in Case C-507/12 *Saint-Prix*,[124] in which it explicitly decided in favour of a broad definition of EU workers and their rights.

[124] CJEU C-507/12 *Jessy Saint Prix v Secretary of State for Work and Pensions* EU:C:2014:2007.

In it, the CJEU did not hesitate to protect – by granting the status of a EU worker – the demand for income support to a woman who had given up work because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth – provided she returned to work or found another job within a reasonable period after the birth of her child (para 47). The important thing was that the CJEU did not fail to emphasize that the concept of a "worker" within the meaning of Article 45 TFEU, in so far as it defines the scope of a fundamental freedom provided for by the FEU Treaty, must be interpreted broadly (para 33). What seems equally important is the CJEU's finding that Directive 2004/38 (which in Art 7 (3) requires the preservation of the status of worker for those who are temporarily unable to work as the result of an illness or accident) cannot by itself limit the scope of the concept of a worker within the meaning of the TFEU (para 32).

In the case of economically active EU migrants, the CJEU therefore continues to apply an extensive approach to their rights in the host Member State. Directive 2004/38, which was in the case of economically inactive applicants – *Alimanovic* – considered by the CJEU to be exhaustive guidance on the questions of preservation or loss of the status of worker of those who worked less than a year, was here interpreted as open to necessary extensions when dealing with the consequences of a job interruption due to physical ailments (paras 40, 44, 46). Even the CJEU's postscript: provided she returns to work or finds another job within a reasonable period after the birth of her child, can be understood as an attempt to emphasize that all EU citizens who want to work effectively in another Member State must continue to enjoy the widest protection by EU law.[125] In the same vein the EU keeps distinguishing the job-seeking allowance (i.e. a support to those EU migrants who genuinely try to find a job in a host member state, from social assistance, which EU Member States are not obliged to provide to economically non-active EU migrants).[126]

In the "Dano quartet" decisions, the CJEU turned its back on the claims of economically inactive EU migrants, while continuously protecting or even extending the rights of EU workers or economically active EU migrants in general. It has been consistent in this attitude by its very support of the rights of companies providing services or sending their employees to other EU countries. This can be perceived as a certain conservatism, a loyalty to the case law honed by the CJEU over the years, which aims to build a common EU market and is therefore biased towards mobility and EU rights carried by mobile companies and workers (as also analysed in the Chapter 6.1 of this book devoted to the application of the EU Charter of Fundamental Rights). Everything that impedes the mobility of these active elements of the common market – such as local results of social dialogue – or that can deprive it of political and social support – such as

[125] The CJEU demonstrated its continuous support for the rights of EU-workers and their family members also in the reasoning of the recent judgments of cases C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*. EU:C:2014:135 and C-457/12 *S. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v G*. EU:C:2014:136.

[126] The job-seeking allowance, i.e. "benefits of a financial nature which are intended to facilitate access to the labour market of a Member State" are still in accordance with the "old" case law, *Vatsouras and Koupatantze*, C-22/08 and 23/08 , available to EU migrants without discrimination. The CJEU also distinguished this type of benefits from "social assistance" in the *Alimanovic* ruling (para 46).

burdening national systems of social assistance by economically non-active EU migrants – meets with considerably less understanding of the CJEU nowadays. The CJEU thus defends the foundation upon which the European integration has historically been built, i.e. equal, non-discriminatory and friendly treatment of those who want to be economically active in another Member State. By adhering to this pragmatic basis of integration, the CJEU appears to be strengthening the principal barrier that the Heads of the EU States and Governments are apparently seeking to cross, if we believe in their Conclusions approved at the European Council in February 2016.[127]

If the conclusion that the CJEU keeps prioritizing the protection of the internal EU market is correct, it is simultaneously true that the Court of Justice has so far not found a way to "pursue socio-economic integration as a holistic aim" (Schiek et al. 2015:16). Its post-Lisbon case law involving the operation on the internal EU market has not yet absorbed the social impulses of the Lisbon Treaty. The CJEU, therefore, is still biased towards of economic goals of integration and against social goals, or, more precisely, it still perceives the latter as conditions which should support (hence the emphasis on the protection of social rights of economically active EU migrants), not block economic integration. It remains to be verified whether the same consistency is shown by the CJEU where undistorted movement on the internal market is not at stake but where free and undistorted economic competition on the same market is involved.

4.3 CJEU on Clashes Between the Protection of Competition and Social Welfare

The fact that there is a potential major conflict between social expectations and the principle of free and undistorted competition was briefly given increased media attention at the time of the finalization of the text of the Lisbon Treaty, in mid-2007. Former French President N. Sarkozy then succeeded in expelling the provision stating that the goal of the Union is "a single market with free and undistorted competition" from the "constitutional", horizontally operating provisions of the Treaties. The reason for was expressed by N. Sarkozy rather emotionally: "Competition as an ideology, as a dogma, what has it done for Europe? Fewer and fewer people who vote in European elections and fewer and fewer people who believe in Europe." (EURACTIV 2007).

Thanks to the addition of Protocol no. 27 on the Internal Market and Competition and then to the conservative approach of the CJEU which refused to question the "fundamental nature of the Treaty provisions on competition",[128] there has been no displacement of the protection of competition on the second track between the EU

[127] At this EU summit the EU supreme leaders, in an effort to make concessions to the UK before its vote on staying or leaving the EU, admitted the necessity to limit flows of workers of a certain scale and also to impose on them some restrictive conditions in relation to certain benefits, in order to ensure first that there is a real and effective degree of connection between the person concerned and the labour market of the host Member State. The "sacrifice" of rights of economically inactive EU migrants in the recent CJEU case law looks like a minor retreat compared to the planned reduction of equal treatment of EU workers who might not be eligible for certain types of benefits for themselves and their family members for several years of employment in another Member State.

[128] See CJEU C-496/09 *European Commission v Italian Republic* EU:C:2011:740, para 60.

policies. Clearly, however, this political event showed that a strong antitrust inspired by neoclassical economics disappointed not only the EU's left and the trade unions, but that there were also right-wing political forces which did not share the enthusiasm for the "Anglo-Saxon" free-market and its spontaneous self-regulation. And what about now, with the objective of the social market economy and other socially oriented provisions of the Lisbon Treaty? Has the EU had to adjust its fight against cartels and abuses of dominance?[129] What is nowadays the standard of application of Articles 101 (prohibition of cartels), 102 (prohibition of abuse of dominant position), and also 106 (services of general economic interest) to situations that involve social protection measures, social dialogue outcomes or other aspects associated with the model of social market economy?

4.3.1 The social market model and free competition

Before analysing the conflicting aspects of social market economy and EU competition law, it is necessary to remember that the historical and also the current interpretation of the social market economy concept is not identical to the interventionist "welfare state", and is not, therefore, hostile to the vigorous enforcement of competition law. The former Commissioner – for Competition – M. Monti, declared already in 2000 that the social market economy "calls for a maximum of free market, for reliance on competition wherever possible" (Monti 2000). It is well-known that the control of monopolies was one of W. Eucken's regulating principles of his Ordnungspolitik and vigorous protection of competition also formed a part of its constitutive principles such as a functioning price system, open markets or freedom of contract (John 2007:6-7). Markets could be free only if supervised by a strong independent authority aiming at "effective and workable" competition, as unregulated competition would inevitably degenerate into its opposite due to unchecked concentration of market power (Crane and Hovenkamp 2013:252-281). In all historical versions of German ordoliberalism including the A. Müller-Armack's social market economy, the functioning market with undistorted competition was considered as a prerequisite for any further measures of social compensation and equilibration.

However, if the EU or any of its Member States sticks today to what L. Erhard and A. Müller-Armack's considered in the post-war West Germany as appropriate social measures, it would have to reject state-guaranteed social and health insurance as well as the enactment of the minimum wage, and, on the other hand, would have to stress the preference for social security built primarily on individual responsibility, not on a mandatory solidarity among social classes and generations (Zweig 1980). It would be then obvious that if social security insurance were individually financed (albeit with mandatory participation), and provided by competing market players while the state reduced its active role to e.g. a negative income tax for low-income families plus limited financial support of the most needy, such a system, by its very nature, would not clash much with the competition rules.[130] The state would offer blanket fiscal reliefs and aids

[129] State aid control is not included in the analysis, partly due to the fact that the European Commission recently clarified the question in European Commission 2013e.

[130] Where the state performs its basic functions (exercise of "imperium") and uses the monopoly of state

of a social nature, granted to individual consumers, i.e. measures in conformity with the rules on state aid (Art. 107 TFEU) that do not affect the scope of Articles 101, 102, or 106 TFEU. It would not create state monopolies or companies entrusted with exclusive rights. Possible cartels between commercial insurance and social services providers would be matters of standard application of Article 101 (1), or, in justified cases, would be exempted from the prohibition under Article 101(3) TFEU.

The development in most countries, however, has gone the other way since the 1960s, and social security systems have taken up precisely those elements that the founding fathers of a social market model warned against: compulsory collective solidarity, generous social security, exclusive rights for entities providing social services, guaranteed minimum wage etc. Should the EU, when seeking now to return to the social market model, act against these elements of social schemes shared by the majority of EU Member States?

To some extent this is so, at least in theory. Contemporary proponents of social market economy are critical of financially unsustainable welfare states, which have developed in their clients a mentality of welfare dependency, a low level of responsibility for their own destiny and a tendency to abuse the benefits provided free of charge. Not only German authors who have been consistently updating the model of a social market economy (Zweig 1980; Eisel 2012; Franke and Gregosz 2013), but also supporters of the welfare state modernization from the UK (Giddens 2013) or the south wing of the EU (Gil-Robles 2014) emphasize that the future lies neither in the leftist defence of universal social security entitlements nor in the right-wing policy of austerity that deepens social divisions and causes social conflicts. Virtually all without exception consider the state-guaranteed system based on compulsory solidarity only a subsidiary "emergency brake" and put emphasis on what Anthony Giddens calls a "social investment state", i.e. on measures that increase the chances of individuals in the labour market or in their individual business. This means measures to encourage individual initiative and to remove the regulatory barriers discouraging it. Redistribution of collected taxes should, therefore, first of all ensure that everyone gets, even repeatedly during his or her lifetime, the possibility of access to education, market and occupation. Only a minor part of the social budget should provide the basic necessities to those who, despite these social investment measures, have become needy.[131] This concept looks closer to free markets and undistorted competition principles than the provision of all-embracing welfare regardless of individual effort and cost to society. However, does this approach to social security also conform more to competition rules?

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coercion in the public interest, then even if it transferred certain powers to an entity distinct from the state, there is no market and there is no potential for competition with private operators (Winterstein 1999:328-328).

[131] Typical social market economy measures include primarily employment policy, support for SMEs and small investors as a way to individual welfare and mandatory participation of all people with private income in social risk insurance, in which employees contribute together with employers. Furthermore, it includes a reasonably progressive income tax in order to finance an education system open to all and social protection for the most needy. The question of wages and employee benefits should not be solved by the state but through collective bargaining between social partners.

Practice shows that the source of tension between social and competition rules has developed hand in hand with the gradual liberalization of state-provided services when, in the interest of greater efficiency, the market and the private initiative were admitted into systems that had been previously fully guaranteed, financed and controlled the state.[132] If the entire system of assistance in situations when a person is not able to help him/herself (injury, illness, age, job loss, etc.) were excluded from the operation of market forces and remained entrusted exclusively to state organizations providing services "from the cradle to the grave", there would be no economic activities carried out by undertakings and the competition law would not be applicable at all. It is no coincidence that the CJEU judgments about who should also be considered as an undertaking within the meaning of competition law began to proliferate from the 1990s, when private commercial initiatives were admitted into a number of sectors that had been traditionally reserved for public power.[133]

In short, it could be argued that the un-sustainability of state-sponsored and organized welfare and the subsequent partial transition to efficiency driven by private initiative and competition has created a new potential for conflict with competition law. Quite understandably, the full transition to the competition-based ideal of individually contracted and financed insurance against all odds of life has proved unrealistic, since the massive "solidarity" redistribution from those with sufficient income to those with low or no income cannot be stopped so simply. Furthermore, the social market economy model also takes into account the role of social partners and their collective bargaining, which would result in binding agreements on labour cost or a sector system of mandatory insurance. Also, it still appears more acceptable to compensate the costs of providing universally accessible public services to one selected provider than creating complex systems of individual aid to consumers who find themselves out of the situation in which the market by itself would provide them with transport, health or education services. These mixed situations in which cartels and monopolies can have a social mission provide far more fertile ground for interesting and complex competition cases than the situation with zero or completely free competition.

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[132] Even the notion of the European Social Model only came into wide currency in the 1980s as a defence of the traditional European approach at the time when free-market thinking was coming into ascendancy and becoming the new orthodoxy. It is obvious that these problems do not occur where European integration harmonizes standards of health and safety at work, or fights discrimination based on country of origin, gender or age, but rather more where some EU Member States themselves let market forces enter a sector that had previously operated free of any competition. Sometimes it is then not easy to draw the borderline between sectors open and closed to competition (Prosser 2010).

[133] See, for instance, CJEU C-41/90 *Höfner and Elsner v Macroton* (employment procurement by public agency) EU:C:1991:161; C-364/92 *SAT Fuggeselschaft* (air navigation) EU:C:1994:7; C-159/91 and 160/91 *a.o. Poucet et Pistre* (social security insurance) ECLI:EU:C:1993:63; C-343/95 *DiegoCali* (anti-pollution services) EU:C:1997:160; C-67/96 *Albany International* (pension funds) EU:C:1999:430; T-319/99 *Federación Española de Empresas de Tecnología Sanitaria – FENIN* (purchase of medical goods and equipment) EU:T:2003:50; C-475/99 *Ambulanz Gloeckner* (ambulance services) EU:C:2001:577; C-264/01 *AOK Bundesverband and others* (sickness funds) EU:C:2004:150.

4.3.2 CJEU's traditional approach to the reconciliation of competition protection with social objectives

The EU itself has so far had no accepted compact methodology of how to "integrate public policy considerations in competition decisions" and numerous exceptions (and exceptions to these exceptions, which limit their scope) must be inferred from certain Treaty provisions and above all from the CJEU case law (Monti 2007:119; Munková and Kindl and Svoboda 2012:112).

First, there is an exemption provided by Protocol 26 to the Treaties for non-economic services of general interest that appears to be full-scale and unconditional. This category of services includes statutory and complementary social security schemes, as well as customized essential services provided directly to the person (European Commission 2013e:22). This does not mean, however, that activities whose declared aim is social, whose functioning is non-profit based and whose clients are individuals requiring support and assistance, are *en masse* excluded from the provisions of the Treaties, including their antitrust articles. The Commission itself notes that a part of social services of general interest are subject to competition regulation. This exception to the exception includes those services which instead of representing the exercise of state monopoly power and regulatory functions meet the definition of economic activity and are therefore carried out by undertakings within the meaning of competition law. CJEU case law long before the Lisbon Treaty inferred that economic activity means offering such goods or services (i.e. not just purchasing them for the needs of hospitals, nursing homes, etc.) that would at least potentially be provided also by private commercial entities.[134] Neither public status alone nor social purpose is sufficient to exclude the activity from being "economic" and the bodies operating them from being "undertakings".

The dividing line, according to the established case law of the CJEU, can be traced around activities that are performed without any consideration by the state or on behalf of the state, as part of its duties in the social field. Non-economic social services will therefore be those provided by a compulsory, solidarity-based system of insurance (health, retirement, social), where contributions as well as benefit payments are fixed by the legislator and distributed benefits thus do not match the size of individual contributions.[135] If these conditions are simultaneously met, the CJEU even admits "some competition" and still considers entities involved not having the status of undertakings. This was admitted in its decision of 2004 regarding German sickness funds,[136] where, according to the Court, the competitive bidding of minor benefits in order to attract clients did not convert health insurance companies into subjects of competition law.[137]

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[134] See, for instance, CJEU C-41/90 *Höfner and Elser v Macrotron GmbH* EU:C:1991:161; C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission* EU:C:2006:453; or the Commission decision 95/364 *Regie des Voies Aériennes* (1995).

[135] See, for instance, the CJEU C-159/91 and 160/91 *Poucet et Pistre* ECLI:EU:C:1993:63; C-244/94 *Fédération française des sociétés d'assurance* (FFSA) EU:C:1995:392; C-238/94 *José García e.a. contre Mutuelle de prévoyance sociale d'Aquitaine e.a.* EU:C:1996:132; C-218/00 *Cisal di Battistello Venanzio & C.* EU:C:2002:36; C-355/00 *Freskot AE v Elliniko Dimosio Freskot* EU:C:2003:298.

[136] CJEU C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others* EU:C:2004:150.

[137] The CJEU reasoning in *AOK Bundesverband and others* was criticized for inconsistency with previously

A second type of approach to behaviour with a social meaning or purpose was adopted by the CJEU in the cases of agreements concluded between social partners in the context of their collective bargaining. The EU Court defined this approach at the turn of the millennium in the judgment C-67/96 *Albany International BV* from 1999.[138] In paragraph 59 of its decision, the CJEU admitted that *"It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment."* Social peace, accepted as a goal of primary importance, may thus outweigh the interest of free competition and exclude the application of Article 101(1) TFEU to collective agreements.

In the subsequent case law relating to cases of agreements exceeding the area of collective bargaining, where the CJEU decided that entities involved were undertakings,[139] the situation evolved towards acceptance of a certain "rule of reason". The solution here, however, is not about assessing the possible exemption from the prohibition of agreements pursuant to Article 101(3) TFEU. The "rule of reason" means that a decision is taken about whether the prohibition of Article 101(1) TFEU would be applied to the agreement itself (Petr a kol. 2010:78).[140] The rule is thus not that every agreement concluded in the exercise of collective self-government of a particular sector should escape the application of competition law in the same vein as collective agreements between workers' and employers' organizations. It is possible, however, as in the cases of obstacles to the free movement of goods or services on the EU Single market, to apply a test of whether the agreement is pursuing an important public goal (or mandatory requirement), and whether the chosen arrangement is a necessary and a proportionate way to achieve such a valuable objective. The quasi-automatic immunity

declared criteria. The CJEU emphasized the importance of social objective and non-profit status, both viewed as irrelevant in other cases, and more consistently also the fact of compulsory solidarity and of the determination of its parameters by the state. On top of this, the CJEU admitted "some competition" which, although it may not fundamentally affect the social goal, must have a supporting role in making the functioning of sickness funds more efficient. See Petr a kol. 2010:96-97; Van de Gronden and Sauter 2011:219.

138 CEU C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430; C-219/97.

139 CJEU C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* EU:C:2002:98, concerning the rules adopted by the Dutch Bar Association and the CJEU judgment C-519/04 P *David Meca-Medina and Igor Majcen v Commission* EU:C:2006:492, about the anti-doping rules adopted by the International Olympic Committee and applied to professional swimmers.

140 Petr 2010 refers to the Opinion of Advocate General Comsas C-51/96 and C-191/97 *Christelle Deliege* EU:C:1999:147, para 110: "Article 85(1) does not apply to restrictions on competition which are essential in order to attain the legitimate aims which they pursue. That exception is based on the idea that rules which, at first sight, reduce competition, but are necessary precisely in order to enable market forces to function or to secure some other legitimate aim, should not be regarded as infringing the Community provisions on competition."

of collective agreements concluded between social partners can be considered in this context as a special case within the broader "rule of reason" approach.[141]

If an undertaking created under such an agreement is acting e.g. as an administrator of an insurance fund into which the companies and their employees have an obligation to contribute, there is a danger of the abuse of dominant position and therefore the need for review pursuant to Article 102 TFEU. Although some authors argue that the same "rule of reason" test can be applied, the situation seems to be somewhat more complicated (Chalmers and Davies and Monti 2010:971). In such cases, EU competition law does not apply the principle of prohibition as against cartels (even the *per se* prohibition in hardcore cases), but rather the principle of abuse when the target of the sanction is not the achievement of a dominant position, or the granting of a monopoly but its concrete manifestations of anti-competitive nature. And as the obligation to contribute to a social scheme cannot be imposed without state approval, there is also the question of the application of Article 106 TFEU, i.e. the question whether entrusting an undertaking with certain exclusivity does not lead to distortions of competition and, if so, whether such interference is necessary for the performance of social services of general interest. This approach has already been adopted by the CJEU in the aforementioned judgments *Albany* (paras 98 et seq.), as well as *Maatschappij Drijvende Bokken* and *Brentjens' Handelsonderneming BV* all of them from 1999.[142] We may ask if a fairly detailed examination of whether the conferred monopoly was an effective and necessary solution to the task of providing a social service is similar to the use of the rule of reason in not applying Art. 101 (1), or whether it tends to resemble the assessment conducted under the Article 101(3) TFEU criteria for the exemption from prohibition.[143] One way or another, the reference to Article 106 (2) TFEU provides a good bridge to another type of socially-motivated exception from the competition rules.

The third type of approach of the EU competition law to the relationship between social and competition rules consists in a looser interpretation of the criteria for exemption from the prohibition under Article 101(3) or, in the case of services of general interest, pursuant to Article 106(2) TFEU. Under this approach, the benefits of an exemptible agreement do not depend on produced efficiencies and benefits for buyers in the same relevant market; instead, a wider variety of positive outcomes, including those in the social field, are taken into account. G. Monti specified four different types of such an extension, which can be found in the previous decisions adopted by the Commission

[141] The fact that "workers" are not "undertakings" represents here another explanation why competition law does not apply to agreements concluded by them.

[142] CJEU C-219/97 *Maatschappij Drijvende Bokken* EU:C:1999:437 and C-115/97 and 117/97 *Brentjens' Handelsonderneming BV* EU:C:1999:434.

[143] It is true that the balancing of the various objectives of the Treaty and therefore of not applying Article 101 (1) TFEU belongs to the EU authorities, while an exception from the ban should be sought by evidential activity of the enterprises themselves. In the case of application of Article 106 (2) the situation is somewhat blurred, as services of general interest are both "value of the EU" (see Article 14 TFEU) and the Commission has towards them a certain harmonization power (Article 106(3) TFEU) while their definition and organization remain in the hands of the Member States and to whom they are supposed to certify with concrete evidence that the performance of these services is efficient enough and that its sustainability requires an exemption from the competition rules. See Schweitzer 2011:40-41.

and the European Court of Justice:[144] i) redefinition of economic efficiency to include other public policy consideration, ii) use of non-economic benefits as factors to tip the balance in favour of granting an exception, iii) granting of conditional exception and use of remedies to achieve the public policy goal, iv) finding that non-competition consequences of the agreement are of such importance that if an agreement is inefficient but contributes to another Community policy, it is exempted (Monti 2007:115-117).

However, during the so-called modernization of EU competition law, i.e. right after the year 2000, the Commission adopted a less accommodative stance and did not take any decision that would further develop this approach. On the contrary, in its Guidelines on the application of Article 81(3) from 2004 (paras 42-43) it refused to take into account the benefits of an agreement which would not fit the efficiency requirement understood in the economic sense, or the benefits that would be located in another market or addressed to another category of beneficiaries (European Commission 2004). In the new millennium the Commission confirmed this narrow standard in its negative attitude towards the so-called "crisis cartels",[145] by which it indicated that "the survival of an industry and employment, it seems, no longer enters into the equation" (Witt 2013:20). Against this view of the Commission stand the decisions of the EU General Court that did not require such rigor and explicitly admitted other benefits.[146] In this regard, it could be expected that the highlighting of social objectives in the EU Lisbon Treaty would push in favour of the extended interpretation of the criteria for exemption under Article 101(3), but also 106(2) TFEU. Last but not least, the Commission has also mitigated its modernization fervour based on neo-liberal economics after the outbreak of the financial and economic crisis in 2008.[147]

Although it is not typical for cases where social goals and impacts are taken into account, two other means of escape from EU competition rules cannot be ruled out. Some agreements between undertakings may fall under limits set for the *de minimis* rule or may be set aside as purely local issues with no impact on trade between EU Member States. These cases of negligible impact on competition, specifically on inter-state trade, would nevertheless be rare in the social field as the effectiveness of social measures usually requires agreements between labour and capital of at least regional scope, or

[144] In the competition law literature the following cases are often quoted as examples of a wider application of article 101(3) TFEU criteria: Commission decisions IV/30.810 – *Synthetic fibres* OJ (1984), IV/34.456 – *Stichting Baksteen* OJ (1994), IV/33.814 – *Ford/Volkswagen* OJ (1993) and CJEU judgments cases 26/76 *Metro SB-Grossmarkte v Commission (Metro I)* EU:C:1977:167, para 43 and 75/84 *Metro SB-Grossmarkte v Commission (Metro II)* EU:C:1986:399, paras 65 and also 42/84 *Remia BV and Others v Commission* EU:C:1985:327, para 42, where it stated that "provision of employment fell within the framework of the objectives to which reference could be made under Art (now) 101(3), because it improved general conditions of production, especially where market conditions were unfavourable."

[145] Commission Decision COMP/C.38279/ F3 – *French Beef* and observations of the Commission in the case C-209/07 *Competition authority v. Beef Industry Development Society Ltd. and Barry Brothers Meats Ltd.* (2008).

[146] For instance the General Court T-86/95 *Compagnie Générale maritime and others v. Commission* EU:T:2002:50, para 130 and T-213/00 *CMA GCM and Others v Commission* EU:T:2003:76, para 227.

[147] See, for instance, the analysis of competition Commissioners' speeches in Šmejkal 2011. It became clear that especially under Commissioner J. Almunia, DG Competition returned to a balance between social fairness and market efficiency, openly referring to social-market economy model.

collective decisions of autonomous bodies of the profession or industry, as evidenced by the above-mentioned cases. For the sake of completeness, however, it is also possible to include these two paths in the outlined methodology.

A table summing up the approaches explained above, accommodating EU competition law with social security schemes and outlining the successive steps of analysis, would look as follows (the subsequent step comes into consideration whenever the exemption is not available in the preceding step):

STEP	KEY ARGUMENT	CRITERIA TO FULFILL
1	No economic activity/no undertaking	Only purchasing and no selling activity OR at the same time: 1. Compulsory participation 2. Redistribution based on solidarity principle 3. State control
2	No appreciable effect on competition/on inter-state trade	Criteria expressed in Commission's De minimis Notice (2014) and Commission's Guidelines on the effect on trade concept (2004)
3	Social goal (of collective agreement/regulation) would be undermined if competition rules applied	Social partners' collective bargaining OR rule of reason test: 1. Legitimate social goal 2. Necessity 3. Proportionality
4	Benefits of general interest	Criteria set by of Art 101(3) and 106 (2) TFEU, interpreted in socially responsive manner

4.3.3 CJEU and the post-Lisbon developments

The conclusions and the table presented in the previous section are based on decisions taken by the EU competition authorities before 2009, i.e. before the Treaty of Lisbon came into effect, thus at a time when the EU did not pursue the objective of a highly competitive social market economy. Although the new socially-oriented provisions of this Treaty may lead to the conclusion that the possibility of exclusion of socially oriented activities from the application of counteracting rules of the EU law could only further expand, the answer can hardly be that straightforward.

It has already been mentioned that CJEU has refrained from using the social market economy objective in its reasoning, even though – unlike their Advocates General[148] – a reference to it has never been made.[149] In the post-Lisbon period the CJEU adopted

[148] See the aforementioned opinion of Advocate General Cruz Villalón C-515/08 *Santos Palhota*, para 51 and also Opinion of Advocate General Kokott C-557/12 *KONE AG and others* EU:C:2014:45, para 66.

[149] The General Court referred to it once in the aforementioned judgment T-565/98 *Corsica Ferries France SAS*, where it accepted that for a reasonable private investor in the social market economy the payment of additional redundancy payment would constitute a legitimate and appropriate practice; nevertheless, it stressed that social or political goals cannot stand alone and cannot exclusively prevail over economic logic. See paras 82-83 of the judgment.

decisions which strengthened the impact of EU measures ensuring non-discrimination, equal treatment and individual social-employment rights (paid annual leave, rights of family members or migrating workers), as well as the decision that earned it criticism from the European Left for anti-social decision-making. This was the case, as explained above, of judgments dealing with a conflict between the liberal freedoms of the EU internal market and the nationally or locally specific (often adopted by social partners) conditions imposing some duties on the winning contractor in public procurement tenders, or setting the retirement age, or regulating temporary agency employment.[150] When dealing with single market issues the CJEU therefore continues the uneasy balancing of economic freedoms and social rights thus being of no help to politicians who inscribed an objective in the Treaty without reaching a specific agreement on its meaning and implementation.

In the competition field, as shown above, the CJEU used to be more social-minded even before the Lisbon Treaty. The judges' approach has suggested that EU rules on free movement and non-discrimination are essentially universal in their application, while EU competition rules are designed to strengthen and complete the single market only where economic activities and profit goals prevail. The Table of exemptions from the rules of competition is certainly not applicable to the freedoms of the EU single market. In the post-Lisbon period, the CJEU has several times been given the opportunity to ponder social rights and undistorted competition requirements when dealing with references for preliminary rulings from national courts. It is quite symptomatic that these cases were first dealt with at a national level, not by the Commission's decision. In the context of decentralization of EU competition law enforcement, the Commission has been focusing on large-scale international cartels and abuses of dominance by multinational companies. For cases with social elements however, it is quite typical that they originate from local disputes about the consequences of social partners' agreements in different sectors of a national economy.

The oldest of these CJEU decisions is the case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft*, adopted in March 2009[151] (i.e. before the actual effect of the Lisbon Treaty). In essence, it was about the legal obligation of businesses operating in Germany to become members, in respect of insurance against accidents at work and occupational diseases, of *Berufsgenossenschaft* (professional association), to which they materially and territorially belong. They are then obliged to pay the association their insurance contributions calculated on the basis of wages and salaries of the insured persons. The Kattner company intended to take out private insurance against the risks involved, which brought them into conflict with the professional association in the engineering and metalworking sector (MMB). The CJEU had, among other things, to address the question whether the MMB was an undertaking subject to Articles 101 and 102 TFEU. On the basis of the standard assessment derived from their previous case law, the Court first explored the nature of solidarity on which the insurance scheme was based and then the question of state supervision over it. It found that:

[150] See for instance the aforementioned judgments in cases C-271/08 *Commission v. Germany*; C-45/09 *Gisela Rosenbladt*; C-447/09 *Reinhard Prigge and others*; C-397/10 *Commission v. Belgium* (2011); and most recently also the CJEU C-549/13 *Bundesdruckerei GMBH* EU:C:2014:2235.

[151] CJEU C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft* EU:C:2009:127.

"… a body such as the employers' liability insurance association at issue in the main proceedings, to which undertakings in a particular branch of industry and a particular territory must be affiliated in respect of insurance against accidents at work and occupational diseases, is not an undertaking within the meaning of those provisions, but fulfils an exclusively social function, where such a body operates within the framework of a scheme which applies the principle of solidarity and is subject to State supervision, which it is for the referring court to verify." (Decision, part 1)

By this decision, the CJEU thus confirmed its earlier established approach towards managing bodies of social insurance systems and repeated the criteria that must be fulfilled to exclude them from the category of undertakings, and therefore from the application of EU competition law. In the spirit of the already cited case law *AOK Bundesverband* the CJEU maintained the stance that: *"the fact that employers' liability insurance associations such as MMB are given that degree of latitude, within the framework of a system of self-management, in order to lay down the factors that determine the amount of contributions and benefits cannot as such change the nature of those associations' activity."* (para 61). In the same vein, the non-undertaking status of MMB was not affected by the fact that providers from other Member States were able to offer similar services.

Another notable decision was taken by the CJEU in Case C-437/09 *AG2R Prévoyance v. Beaudout Pere et Fils SARL* in March 2011.[152] Its factual side was quite similar to the *Kattner* case: a local dispute where the plaintiff, the company Beaudout Pere et Fils SARL, refused to participate in the system of compulsory health insurance managed by a non-profit organization AG2R for the whole sector of artisanal bakery in France. The difference, however, lay in the fact that under French law, the participation of employers in such schemes may be stipulated in the collective agreement between the representatives of employers and employees. By an act of the Minister of Labour, such an agreement could become mandatory for all employees and employers in the given sector. In its decision, the CJEU reiterated its approach to collective agreements of the social partners aimed at improving the conditions of work and employment: they do not fall, because of their nature and objectives, within the scope of Article 101 (1) TFEU. This is true regardless of the fact that accession to such an agreement is made compulsory for companies of a particular sector in a particular Member State. As the Article 101(1) TFEU does not apply to such an agreement, the EU law (namely Article 4(3) TEU – the duty of loyalty) could not prevent a Member State from decreeing the participation in it mandatory without any exemption from this requirement (paras 29-38). Exclusion of collective agreements from the EU anti-cartel law that the CJEU first found in *Albany* has thus been reaffirmed.

Given that the non-profit entity AG2R was chosen by social partners themselves to manage their insurance from companies offering services on the market of health and social insurance, the CJEU came to the conclusion that although the system was endowed with a high degree of solidarity, AG2R showed a remarkable degree of independence. In such a case it was very likely, according to the CJEU, that AG2R was an undertaking engaged in economic activity, albeit in detail it had to be assessed under the particular circumstances by the national court. If AG2R was an undertaking, the question must

[152] CJEU C-437/09 *AG2R Prévoyance contre Beaudout Père et Fils SARL* EU:C:2011:112.

be raised of the application of Articles 102 and 106 TFEU, since this undertaking had been entrusted by the Minister with the exclusive right to collect payments and manage the insurance scheme. The CJEU stayed here with its settled case law from the 1990s and noted that the abuse of a dominant position could occur if the statutory conditions themselves led such an undertaking to abusive conduct, especially if the grant of an exclusive right created a situation in which the monopoly was apparently unable to satisfy the demand for the service.[153] Since the same insurance services, perhaps even on better terms, had been offered on the French market by other providers, the creation of such a monopoly for the whole business sector was likely to restrict competition (although it had not been proved that businesses insured with AG2R were dissatisfied with its services). The CJEU therefore decided to examine whether the exemption from competition constraints may be granted pursuant to Article 106(2) TFEU, addressed to undertakings entrusted with the operation of services of general economic interest (paras 70-73).

The Court itself, based on facts known to it, through relatively brief considerations (paras 74-81), referring to its earlier decisions of cases *Albany, Maatschappij Drijvende Bokken* and *Brentjens' Handelsonderneming BV* from 1999, concluded that the exception of Article 106(2) TFEU was applicable to the insurance monopoly of AG2R. Insurance at an affordable price requires that the system is not abandoned by contributors representing a lesser insurance risk. This requirement can justify the exclusive right of AG2R to manage a system in which participation is made compulsory for everyone in the sector. Without such exclusivity, it would not be able to perform the task of general economic interest in "economically acceptable conditions". Hence the CJEU concluded that: *"Articles 102 TFEU and 106 TFEU must be interpreted as not precluding, in circumstances such as those of the case in the main proceedings, public authorities from granting a provident society an exclusive right to manage that scheme, without any possibility for undertakings within the occupational sector concerned to be exempted from affiliation to that scheme."* (Decision, part 2)

The CJEU approach in this case answers the question of whether admitting more commerce and competition into the provision of social security must lead to a conflict with EU competition rules. A Member State, by supporting the decision made by social partners that choose their exclusive administrator or social insurance scheme from commercial entities, empowered the undertaking with a service of general interest. There would be no complete exemption from the EU rules of competition for such a monopoly as there would have been in the case where the system were managed by a body established under a specific law and subject to regulation and control by the State. Yet the conflict with competition rules still may not occur. The CJEU, undoubtedly aware of "the inevitable tension between social security law and competition law", offered a very friendly interpretation of exception pursuant to Article 106(2) TFEU. Should a solidarity-based mechanism ensuring the attainment of the social objective become unsustainable "under economically acceptable conditions" for a company in charge when it is subject to competitive pressures, then EU competition law grants an exception. This is the

[153] See for instance the aforementioned CJEU C-41/90 *Höfner and Elsner v Macroton*, part 1 of the decision.

conclusion reached by the CJEU in favour of AG2R, without referring to the need to assess specific conditions by the national judge, as the Court did in earlier decisions.

This positive approach by the CJEU to the social partners' collective agreements securing workers' rights was confirmed by the judgment in Case C-413/13 *Kunsten en Informatie Media v. Staat der Nederlanden* adopted in December 2014.[154] In this case, a trade union representing musicians, both employed and self-employed, negotiated a collective agreement with an organisation representing orchestras in the Netherlands. Because the self-employed musicians were also included in the agreement, the Dutch competition authority (in accordance with the European Commission) found that the CJEU jurisprudence exempting collective agreements between representatives of labour and capital was not applicable to the case. The CJEU, in response to a preliminary question from the Dutch court, confirmed that the self-employed should normally be treated as undertakings, and agreements with their participation were therefore potential cartels not falling under the exception created by the *Albany* case law and confirmed by e.g. the recent decision *AG2R Prévoyance* (para 30).

At the same time, however, the CJEU distinguished the self-employed and the false self-employed, using a functional approach: those engaged in paid work, without being able to independently determine their own conduct and without bearing financial and economic risks of their entrepreneurship, fit far more into the category of a "worker", as defined by EU law. Based on this reasoning, the CJEU concluded that the principle of the *Albany* decision could also be applied when dealing with an agreement involving the false self-employed. Article 101(1) TFEU would not therefore be applicable to their agreement. The CJEU even stressed (para 40) the beneficial social effects of such an approach: false self-employed as service providers covered by the agreement will be guaranteed higher basic pay; they will pay higher contributions to pension insurance schemes and will be eligible for a higher level of pension in the future.

The CJEU obviously left it to the national court to determine whether participants in collective agreements were actually false self-employed in the sense as defined in its judgment. It is essential, however, that this judgment responds to another trend of contemporary society, which is the replacing of traditional employment jobs by self-employed persons hired for the same type of work performed in the same conditions as if they were employees. By rejecting the negative opinion of competition authorities, the CJEU took a significantly more accommodating position to the social security of all market participants in the factual position of "workers". In the words of the judgment: *"Service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU."*

4.3.4 Continuity and inconsistency of the CJEU case law

The so far available case law from the post-Lisbon period shows that the CJEU remains faithful to its case law from the 1990s, on which the analytical methodology of this study has been built. *Albany, Berntjens', Poucet et Pistre, AOK Bundesverband and others* case law has remained unsurpassed. The exemption from EU competition rules

[154] CJEU C-413/13 *Kunsten Informatie en Media v Staat der Nederlanden* EU:C:2014:2411.

has been neither rejected nor narrowed. Moreover, the CJEU in its present judgments constantly refers to this case law as the basis of the EU competition law approach to agreements and entities with predominantly social objectives.

On top of this, the CJEU has extended the scope of the exceptions established by the older judgments to new situations occurring in the field of labour relations and social security. Even if the state itself were not the provider or a strict supervisor of social insurance schemes, it must not bring them into conflict with the rules of competition, as was shown by the CJEU in the *AG2R Prévoyance* judgment, where a generous application of exemption pursuant to Article 106(2) TFEU was made, without requiring any detailed evidence from the Member State and its national court. Similarly, the transition of dependent workers from regular employment relationships to self-employed status does not mean their exclusion from collective bargaining, which enjoys exemption from the provisions of Article 101(1) TFEU.

Although the CJEU did not refer in any of the cited judgments to Article 3(3) TEU or to the EU target of a highly competitive social market economy, it seems that its stance on issues of protection of competition is quite helpful towards this new EU goal. Simultaneously, it is interesting to recall that while free competition epitomizes, alongside the freedoms of movement, a key component of the EU internal market, the CJEU quite wisely accepts that a competition-driven solution is not the best one for absolutely every situation that may involve market actors. It is not a trivial finding, as the CJEU's position in the matter of conflict between freedoms of movement and a country specific protection of workers' rights remains far less generous as it was highlighted in the previous text. In such cases, the CJEU still refuses to depart from the "breach-exception-proportionality" test and social rights could exceptionally prevail over market freedoms only if their protection is proportionate and also justified by overriding public interest. The Grand Chamber of the CJEU even stressed this duality of approach in the decision of the case *Commission v. Germany* in 2010[155]:

"Furthermore, the fact that an agreement or an activity is excluded from the scope of the provisions of the Treaty on competition does not automatically mean that that agreement or activity is also excluded from the obligation to comply with the requirements stemming from the provisions of those directives since those two sets of provisions are to be applied in different circumstances…" (para 48)

Although it is certainly possible to find many differing circumstances between barriers that prevent the market entry if they are erected by a Member state or a sectoral trade-union on the one hand, and the barriers erected by the decision of undertakings or social partners on the other hand, from the point of view of a rejected company this difference would not seem so important. In the *Laval* case, a Latvian company was barred from providing services in Sweden by a collective action of a trade-union but eventually won its case before the CJEU. If a hypothetical company had wanted to enter the market of health insurance monopolized by *AG2R Prévoyance*, it would have lost its case against it before the CJEU. In the former case, the defence of social partners' agreement (on wages) had not trumped economic freedom, while in the latter the social

[155] CJEU C-271/08 *European Commission v Federal Republic of Germany* EU:C:2010:426.

partners' agreement (on compulsory insurance scheme) would be immune against free and undistorted competition requirements.

It was concluded at the end of the second section of this chapter that the CJEU remains faithful to the protection of the EU internal market goal, as a result of which it has not yet found a truly balancing approach to clashes between economic freedoms of movement and labour/social rights. Contrary to that, it can be summarized here that thanks to an equally conservative but much more accommodating approach of the CJEU, the EU standard of competition protection corresponds much better to the sought-after social market economy approach to economic and social policies. This continuity and at the same time inconsistency of the CJEU's position concerning the relationship between the economic and the social within the European integration is hardly sustainable in the long term, especially if we admit that social goals and rights included in the EU primary law are now as fundamental as economic freedoms and goals and that their parity should be the rule for all situations of clashes between them.

5. ECONOMIC AND MONETARY UNION THROUGH LENSES OF THE SOCIAL MARKET ECONOMY

5.1 Theory of Optimal Currency Area and the Omitted Integration

The long-term effort of European politicians was to create an economic area the size of which (and indirectly also the economies of scale associated with greater microeconomic efficiency of allocation) would be comparable with other global players such as the US or China. The result of these efforts is the EU and the euro area.

International economics, especially the optimum currency area as its sub-part, offers a number of arguments that stress the benefits of the single currency. However, it also admits that for certain regions or interest groups the single currency may not always be beneficial. Quite the contrary.

For this reason, economics uses a number of partial approaches to define optimal criteria, i.e. the state of economy that minimizes the costs of giving up the country's own currency, especially in periods of low growth and rising unemployment.

So what exactly are the benefits of the single currency? Undoubtedly, the common currency facilitates trade. It eliminates the exchange risk between the previously separated areas, removes the (sometimes significant) exchange costs between currencies, improves price transparency in international economic relations and thereby gives a better opportunity for effective investor choice of location. Improved effectiveness ultimately leads to higher growth, the results of which are distributed across the common economy. By becoming a member in a monetary union, the country pays a price in total loos of its autonomous monetary policy. However, even this can be positive, especially if the home central bank lacked a history of good monetary policy and the jointly managed institution can perform this role better.

The costs of the move to a common currency are described in various ways and examples. Baldwin and Wyplozs (Baldwin and Wyplosz 2013, 2015) present one of the most inspirational thought experiments, the so-called California and Michigan dollar. This is a brief summary of the argumentation:

California is home to high profile sectors, such as manufacturing of computer hardware and software, or high-tech defence industry. Compared to the rest of the US, the state's economy, measured by GDP development, seems very unstable. During the 1990s revolution in the information and telecommunication sectors, the economy of California grew rapidly. In an attempt to meet the huge demand companies desperately searched for employees. After the 2001 dot-com bubble burst California has been hit much harder than the rest of the US, which resulted in a considerable increase in unemployment.

In the first decade of the new millennium, these fluctuations kept re-occurring. After the bursting of the housing bubble California (and later other parts of the world) was hit by recession and unemployment soared more than in other US states.

Now, imagine that the state of California would have its own currency. The pressure on the rapid economic growth would be slowed by the appreciation of the domestic currency, while the decline would be curbed by depreciation of the domestic currency, which would

boost the price competitiveness of the recession-torn country. Unfortunately, although the economy of California differs from the rest of the US substantially, it cannot use the exchange rate as a protective tool against such fluctuations. And still, nobody calls for the introduction of California's own currency.

California's GDP is roughly equivalent to the GDP of Italy and is larger than the GDP of India, Russia and Spain. Yet, all Californians believe that being part of the US dollar currency area brings more benefits than costs. Or maybe a single currency is not an issue simply because most people believe that one country means one currency.

It must be said that in California, Michigan, as well as in other US states, economic downturns are partially compensated by re-distribution – a system of fiscal transfers.

The aforementioned thought experiment is a very good starting point for understanding the costs of single currency.

A diversity of economies is costly, because the common currency needs a common central bank, which is not capable of responding to every local swing. In case of decline in global demand for goods produced in one area (asymmetric shock) a drop in wages and prices is required to restore price competitiveness. This could be done by currency depreciation (if necessary, i.e. if the drop fails to occur directly). However, countries without own currency have only one option: the painful process of reducing nominal wages and prices.

Optimality criteria of a single currency area are therefore derived from two ideas. First, the area should eliminate the probability of asymmetric shocks, and second, the economy should be able minimize the costs of asymmetric shocks. According to the Kenen criterion, countries within a single monetary area are less likely to face asymmetric shocks if they have similar diversified industrial structure. Also, competition in a very open economic environment ensures that prices at home and abroad remain the same regardless of the exchange rate (McKinnon criterion). Lastly, according to Mundell criterion, asymmetric shocks are eliminated if factors of production (not only capital, where mobility is high, but also the workforce) are mobile enough to quickly and without high loss move from the affected area.

As already stated, we can minimize either the probability of asymmetric shock altogether (by fulfilling Kenen and McKinnon criteria), or its costs (Mudell criterion). However, its impact can also be compensated (see the example from the US).

Usually, compensation takes up the form of fiscal transfers. In case of irregular economic shocks, whoever provides assistance today will receive it in the future. Therefore, in an ideal case the transfer is defined implicitly, i.e. for certain situations. For example, if a region suffers asymmetric shock, both incomes and tax payments decrease, while social assistance grow, especially assistance in unemployment. In net terms, the region receives transfer payments from the rest of the union. We call it optimality transfer criterion. Unlike the previous criteria, this is not an economic criterion but one that requires political consensus, a political criterion. The two other political criteria of single currency optimality are the so-called single priority and solidarity criteria.

Agreement on priorities regarding common (e.g. monetary) policy can be successfully tested on consensus among the highest representatives.

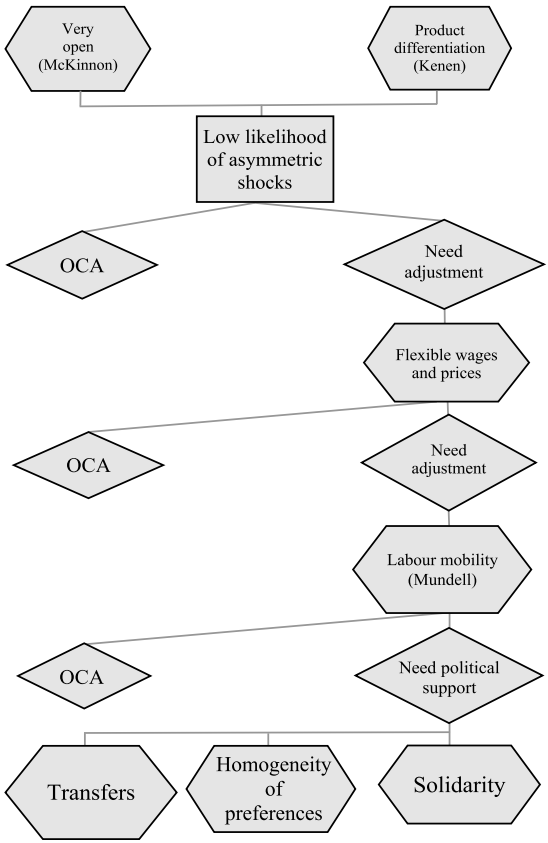
In recent years, the European Central Bank became an example of clashing priorities. Some most prominent German representatives of the management (e.g. the chief economist Jürgen Stark) abdicated or did not accept their nomination for the council of the institution (the former governor of the Bundesbank, Axel Weber) because they did not agree with the Bank's monetary policy. For them it concentrated on short-term stability of the financial system and on maintaining liquidity of the large Member States through loose monetary policy with very low (sometimes negative) interest rates and through indirect monetization of public debt, instead of implementing conventional monetary policy, which would prohibit monetization of public debt and pursue an objective of a reasonable and steady monetary growth.

ECB's loose monetary policy might be following the conduct of other important central banks such as FED, Bank of England or Bank of Japan; nevertheless, a significant part of the German economic and political sphere considers the policy not in line with the long-term objectives of monetary stability and low inflation. The ECB's current president, Mario Draghi, was in past invited to Bundestag to explain the conduct of the institution, and the German constitution court even questioned the legality of the ECB's steps by the so-called reference for a preliminary ruling at the European Court of Justice.

Broadly speaking, the solidarity criterion is the willingness of other members to help the affected state in the name of common objective. Apparently, this is another political criterion, albeit with important economic consequences.

Baldwin and Wyplosz repeatedly argued that while in a number of areas (internal market, monetary integration) the European integration has achieved a high degree, integration in the fields of taxation (i.e. possible income into the common budget) and social policy (transfers) have been omitted. In this situation fulfilling transfer and solidarity criteria in the currency area is more difficult, as it failed to build automatically functioning mechanisms similar to implicit transfers.

The logic of optimum currency area is illustrated below:



It is still not clear if the EU becomes an optimal currency area. The current level of fulfilling of the criteria is presented in the following table:

Tab. OCA scorecard

Criterion	**Satisfied?**
Labour mobility	No
Trade openness	Yes
Product diversification	Yes
Fiscal transfers	No
Homogeneity of preferences	Partly
Commonality of destiny	?

Source: Baldwin and Wyplosz 2015:376.

The following chapter introduces measures that can help the EU establish an optimal currency area.

5.2 Sources of Erosion of the European Social Model and Theoretical Recommendations for Its Sustainability

The European welfare state is gradually losing ground due to a number of measures of fiscal austerity and pressure on structural reforms. The economic community largely agrees (see e.g. Baldwin and Giavazzi 2016; De Grauwe and Ji 2016) that the main immediate reason is not a globalization pressure coming from outside EU but rather the asymmetric way of integration taken by the EU. In accordance with the broadly defined optimum currency area, economists see a clear design failure: the well-known fact that the European Monetary Union lacks adequate mechanisms to mitigate the effects of diverging economic developments or actual divergence during the so-called asymmetric economic shocks. The divergent economic growth in the current institutional settings of the EU leads often to large imbalances, which then cause external deficits or surpluses to pile in various parts of the balance of payments of the Member States.

Elimination or mitigation of such imbalances (which proves to be necessary) in asymmetrical integration can only be achieved by one mechanism: internal devaluation, which entails high costs of giving up growth and employment, and brings frequent social and political tremors.

If a country that has its own currency faces such imbalances, it can simply devalue or revalue its currency. However, member states of a monetary union, which suffer from external deficits, are forced to deep cuts in public spending and this inevitably leads – directly or indirectly – to rise in unemployment. This problem has been recognized by the founders of the theory of the optimum currency area as early as in the 1960s.

The standard recommendation, derived from the traditional theory of optimum currency area, is the implementation of the so-called structural reforms, i.e. changes aimed to increasing mobility and price flexibility of labour markets and products. An increased (downward) flexibility of prices and wages helps the economy (through internal devaluation) in adapting to the change without large drops in employment and output. When it comes to the potential to restore the macroeconomic balance in the member state, more flexibility is an indisputable remedy. However, the social consequences of such recipe can be rather negative. Cuts in wages, unemployment benefits and decreasing minimum wag-labour markets in a country that needs internal devaluation could have serious political consequences. Such decisions may raise social turmoil led by those adversely affected by structural reforms and shift towards parties promising alternative ways of addressing the situation, including the departure from the euro area. While from a purely econo-mic point of view, greater flexibility of markets, especially of the labour market, may be a solution, from a broader, social perspective such simple solution may be problematic.

This is also the reason why the later, supplemented versions of the optimum currency area propose as a solution not only structural reforms but also fiscal transfers, and why they distinguish between economic assessment criteria of the optimum currency area (i.e. flexibility of markets, cycle synchronization, similar industry structure, intensive trading) and political criteria, especially the requirement that countries should be able to compensate part of asymmetric shocks through fiscal transfers (redistribution).

Unfortunately, the latter corrective and redistributive mechanism is missing in the current euro area. In addition to eroding system of regulations, which is seen by voters as an inherent part of a welfare state, centralized monetary policy and decentralized fiscal policy leads to another type of problems: liquidity crisis on government bond markets. The fragility of government bond markets in the euro area is due to the fact that member states issue bonds in a currency they cannot control. This means that on the national level economic policy authorities are not able to guarantee a sufficient amount of cash even to simply roll over the public debt (which is in fact guaranteed in a system of a national bank with a free entry to the secondary market). This drawback causes a situation similar to one of a country with state bonds denominated in a foreign currency, and can trigger a self-feeding crisis of sovereign debt liquidity which may later – through high interest burden – lead to a crisis of solvency. (After all, this danger is well illustrated by the fact that the euro area crisis deprived Spain and Portugal of their access to markets, despite their low ratio of debt to GDP, while Italy and Belgium, both countries with substantially higher public debts, were able to avoid the crisis. This suggests that the main trigger was not the level of public debt but an external imbalance.)

As the banking sector is the main holder of state bonds, the sovereign debt crisis may lead to banking crisis and the other way round. In other words, this situation creates a dangerous link of vulnerability between the sovereign debt markets and banking sector in the EU. (This phenomenon is sometimes referred to as doom loop or negative feedback loop.)

Thanks to the common market and the euro the banking sector in the euro area (as well as in other EU countries) is strongly interconnected and liberalized. However, the institutional integration has been left unfinished.

Thus, as a reaction to the banking, financial and debt crisis in the end of the last decade, many EU-wide banking regulation measures were taken, especially new rules for capital adequacy and the so-called bail-in principle in case of crisis management and consolidation of banks aimed at minimizing the demands on public debts during banking crises. Such measures are now jointly called "the first pillar of the Banking Union".

Second and third pillars have also been implemented in the euro area, establishing the common bodies which supervise banks and which are allowed to intervene in case of banking crises. Moreover, the fourth pillar is currently under discussion: the common deposit insurance.

In addition, gradually since 1990s the euro area member states have introduced a system of rules (implemented by the Commission and Council) with the ambition of a yet tighter scrutiny over national fiscal policies. But the system suffers from two drawbacks: first, the implementation of fiscal policy is left at the national level, and second, at times of macroeconomic troubles its states are hesitant to adhere to its spirit. The introduction of the fiscal portion of the Maastricht criteria was followed by the Stability and Growth Pact and as a response to the debt and financial crisis another set of measures was introduced: the so-called Sixpack, Two-Pack and the European Fiscal Compact. The idea of complete contracts enforced by tight supervision over complying with the rules and the aim to prevent their violations can very simply turn against the originator. Pisani-Ferry put it this way: "The constant adding of new means of fiscal,

economic and financial supervision makes the system of conceptual rules for economic policy incomprehensible even to those who ought to comply with them. This results in the national leaders' little ownership of these rules,[156] which they consider not binding. This feeling is even stronger at members of national parliaments." (Pisani-Ferry 2016). With the increasing disrespect for these rules the legitimacy of the relevant sanctions continues to be doubted and danger grows that governments will refuse to comply with the spirit of the fiscal rules in the euro area. The more complicated the surveillance system, the more ways emerge to avoid it.

The role of the ECB in case of crises of the financial markets is not quite clear, and so is the question of whether it is acceptable for the ECB to be the "lender of the last resort".[157]

To sum up, the pressure on public budgets in the EU and EMU, which produces fiscal austerity and higher cuts in times of economic downturns (pro-cyclicality), and which leads to, among other things, welfare state restrictions, output loss and to higher unemployment, is largely due to asymmetric institutional integration. The measures introduced so far under the EU pressure in the euro area do not completely remove the asymmetry and are often based on political compromises that bring further instability and uncertainty.

Removing these institutional imperfections would reduce the risk of crises and thus the tendencies to excessive pro-cyclicality and austerity of fiscal policies in the EU and in the euro area. For the aforementioned reasons especially the following interrelated areas need to be targeted:

1. Creating instruments (funds) of fiscal policy at the euro area level, complemented with policies of fiscal discipline at the national level;
2. Establishing a system of shared security against shocks at the European level;
3. Cutting the vicious circle of underfinanced European banks which keep buying their own government debts (doom loop);
4. Completing banking union;
5. Restructuring (decreasing) the level of public debt.

In all of the above-mentioned areas institutions and tools can be designed up to the smallest detail.

The current situation in the EU and the argument of economies of scale led us to believe that the number of ideas proposed in the first area should be transferred under the federal system of governance and funding. The clear and often cited examples are the protection of the EU's external borders, asylum policy or common defence. Still, closest to the ideal of federal financing connected with a pan-European solidarity is the frequently discussed idea of European unemployment insurance. Here, the proposal does not rely on a single European fund; instead it comes up with the idea of a system

[156] The term little ownership comes mainly from literature for managers in reference to the use of a specific system of process management.

[157] Article 123 Paragraph 1 of the TFEU prohibits the ECB to enable governments and other public authorities of the Member States to overdraw their bank account, or to provide them with any other type of credit or to directly purchase their debt instruments.

of one European-wide and many national funds interconnected in different ways (loans or transfers). Moreover, instead of a flat rate, the payments would be based on the tested national limit for subsistence, see e.g. Beblavý (Beblavý and Gros and Maselli 2015), Lacina and Kadidlo (Lacina and Kadidlo 2015) and many others. The latter step can be seen not only as a step to a fiscal union, but also as a symbol of pan-European solidarity.

In the second area, the frequently discussed issue (see e.g. Eichengreen and Wyplosz 2016) concerns the need for extending the scope of the ECB, so that it is able to fulfil the role of a backstop on financial markets.[158] In this scenario the role of ECB's counterpart is given to a newly created authority that should oversee European fiscal policy and be entitled to issue own bonds. This body guarantees the stability on the bond markets and works as a fiscal backstop in case of a crisis in the banking sector. Some proponents suggest that the part is taken by the existing ESM; however, e.g. Tabellini (Tabellini 2016) or Bofinger (Bofinger 2016) show that there are also other options.

The third area of the institutional reform requires two sets of measures and is connected with the fifth area. The first group of measures limits the banks' credit exposure when lending money to the state. However, a sudden introduction of this rule, which by definition presses for higher responsibility of states as issuers of debt as well as improves the long-term financial health of banks, could in the early phase of adaptation cause not only another crisis at the sovereign debt markets but also decrease the overall credit exposure of banks and bring problems which could hold back economic growth. Therefore, this set of rules should be accompanied by another set of measures on the European level aimed at restructuring (reduction, partial write-off) of public debt. Many concrete and relatively detailed proposals exist, such as the PADRE Plan by the authors Paris and Wyplosz (Paris and Wyplosz 2014) or the achievements of the team CEPR, a New Start for the Eurozone: Dealing with Debt (CEPR 2015).

Regarding the banking union, more than in the other areas the stability of the system is dependent on the quick and smooth operation of the supervisory and resolution mechanisms. (Under the current configuration of supervisory institutions and powers and the current way of addressing crises, smooth and quick operation is highly unlikely. An emergency management in a systemically important European bank can only be initiated based on quickly expressed consent of many subjects (Consilium 2016). In addition to simplifying the structure of supervisory and resolution authorities, the banking union needs its own fiscal backstop, which cannot be fully replaced by a common resolution fund. It is therefore again highly practical that this role is played by a single European fiscal policy body, be it the slightly adjusted existing ESM, or any other authority.

Completing the institutional architecture of the EU or the euro zone as described above would restore the ability of all countries to maintain an anti-cyclical development of their fiscal policies and thus, during economic downturn, to dampen fluctuations in employment and economic activity. As we explain above, this is difficult in the current

[158] This clearly demonstrates the need of the European Court of Justice to decide on the legality of the so-called "outright monetary transactions" (OMT), which were introduced by the ECB to help stabilize the financial markets in 2012. In its decision of June 2015 (C-62/14 *Gauweiler* EU:C:2015:400) the CJEU stated that under some conditions OMT do not violate the prohibition of direct financing of Member States by the ECB pursuant to Art. 123 TFEU, but rather help fulfilling the objective of maintaining monetary stability, which the TFEU explicitly orders ECB.

institutional arrangement precisely because of the centralized monetary policy and the lack of its usual supplements on the European level. The necessity of moderate, and during economic recession even pro-cyclical fiscal policy, which is in some member states imposed by its little functionality in the existing institutional arrangements, is one of the decisive factors leading to the breakdown of the welfare state.

This balanced architecture also usually features another element: fiscal redistribution, which together with market mechanisms helps in balancing asymmetric developments in individual Member States. The common European unemployment insurance in one of its variations is one of such mechanisms.

5.3 The Evolution of the Tools of Macroeconomic Coordination at the Level of EU Economic Policy with Respect to the Objectives of the Social Market Economy

The financial crisis and the related crisis of public finance in the EU, where most countries use the common currency, confirmed the need to coordinate macroeconomic policies on the European level.

As the first step, in 2011 the revised system of governance, the European Semester, was introduced in order to increase the efficiency of the key measures of macroeconomic stabilization and fiscal consolidation. Gradually, those measures of the European Semester began to assert which draw attention to closer monitoring and evaluation of indicators of social development.

The European Commission declares the following objectives of the European Semester: help creating stability and convergence in the EU, contribute to sound public finances and economic growth, prevent excessive economic imbalances and thereby contribute to the 2020 Strategy. Behind this rather general and all-encompassing proclamation we can read the EU's attempt for coordination in three areas of economic policy, where the EU has long sought to establish a closer connection between the decision-making processes at the level of Member States and a view of the EU's institutions.

These areas include structural reforms aimed at promoting growth and employment, fiscal policies of the Member States with the objective of ensuring the sustainability of public finances in accordance with the rules of the Stability and Growth Pact and the so-called excessive macroeconomic imbalances.

The European semester is launched in November, when the Commission publishes two materials: the Annual Growth Survey (AGS) and the Alert Mechanism Report (AMR). The AGS identifies the main issues and challenges that the EU and the euro area face next year. Simultaneously, the AMR is published within the framework of macroeconomic surveillance.

If necessary, this report is followed by two potential sanction procedures, the so-called *excessive deficit procedure*, which targets large imbalance in public finances, and the newly established and developed *macroeconomic imbalance procedure*, which focuses on the economy in areas such as external imbalance, the related productivity development or indicators of development in workforce and unemployment, as shown in the second diagram below.

Before the end of November, the Commission also examines the euro member states' draft budgets for next year, and their compliance with the obligations of the Stability and Growth Pact. In case of a serious breach of the European budgetary discipline, the Commission may request a revision of the budget proposal.

Two more months are reserved for discussions about the AGS in the EU Council, which adopts conclusions, and in the European Parliament, which issues an opinion.

In March, the Spring European Council is organized. Based on the Commission's analysis, this supreme authority issues the so-called *policy orientation,* which determines the focus of Member States' budgetary and economic policies. In March the in-depth reviews are published concerning countries where the Commission found signs of macroeconomic imbalances.

After receiving the political orientation, the Member States start working on two documents to be presented to the Commission in April. The first set of documents includes the stability programs (members of the euro area) and the convergence programs (the remaining MS) where the medium-term budgetary strategy is introduced. The second set of documents present the national reform programs, which inform about the planned structural measures.

In May, the Commission assesses the submitted documents and prepares one integrated set of proposals for action for every EU Member State. The Country Specific Recommendations (CSR) are concrete, direct and accountable ideas for preparation of budgetary and economic policies, which the Commission believes Member States should implement. CSR are not issued for countries that currently undergo the EU corrective program, as they are already under strict supervision of the program regarding fulfilment of its conditions.

Subsequently, CSR are discussed in the Council, which issues the concluding statement. The final version of the CSR is approved by the European Council.

In the second half of the year, i.e. when the institutions' opinion on the requested measures of budgetary and economic policies is already known, national parliaments discuss and approve their draft budgets for next year and pass related legislation. The Commission continuously monitors how the States comply with the CSR.

The annual cycle of the European Semester is concluded at the end of the year, when the Commission in the new Annual Growth Survey assesses how Member States took into account the recommendations addressed to them.

5.3.1 The European Semester

	European Commission	European Council/Council	Member States	European Parliament
NOVEMBER				
	Commission publishes **Annual Growth Survey (AGS)** and **Alert Mechanism Report (AMR)**	Annual Growth Survey: sets out proposals for EU priorities in the coming year, including the economic fiscal policies and reforms needed to ensure stability and growth		
Autumn Economic Forecast	Commission **recommendations** for the euro area	Alert Mechanism Report: identifies the Member States for which further analysis is necessary in order to decide whether an imbalance in need of policy action exists		
	Commission opinion on **draft budgetary plans**			
DECEMBER/JANUARY		Council **discusses Commission opinions** on draft budgetary plans		Dialogue on the **Annual Growth Survey**
	Bilateral meeting with Member States		Member States **adopt budgets**	
	Fact-finding missions **AMR** to member States	Council **adopts euro area recommendations** and **conclusions** on **AGS +**		
FEBRUARY				
Winter Economic Forecast	**Country Report** per Member State (reform agenda and imbalances)	Country reports: analyse the economic situation and policies of each EU Member State and assess whether imbalances and excessive imbalances exist in those Member States where an in-depth review was carried out		

MARCH

European Council adopts **economic priorities** based on **AGS**

Bilateral meeting with Member States

APRIL

National Reform Programmes:

reforms and measures to make progress towards smart, sustainable and inclusive growth

Stability/Convergence Programmes: plans for sound public finances

Member States present **National Reform Programmes** (on economic policies) and **Stability or Convergence Programmes** (on budgetary policies)

MAY

Spring Economic Forecast

Commission proposes **country-specific recommendations** (CSRs)

Country-Specific Recommendations:

economic and budgetary policy recommendations tailored to each country and designed to boost growth, job creation, training and education opportunities, research and innovation

JUNE/JULY

Dialogue on the proposal for CSRs

Council **discusses the CSRs**

European Council endorses **final CSRs**

SEPTEMBER

Debate/ resolution on the European Semester and the CSRs

Member States present draft **budgetary plans**

OCTOBER

Dialogue on the Annual Growth Survey

Source: http://ec.europa.eu/europe2020/making-it-happen/index_en.htm

In addition to monitoring public finances in Member States, which has a very long tradition dating back to the 1990s and which is constantly hindered by the countries' non-complying with the rules – see e.g. the article by Daniel Gros (Gros 2016), the EU started to evaluate in detail a number of other indicators which reveal different types of macroeconomic imbalances. For this purpose, the EU uses the so-called macroeconomic imbalance procedure (MIP) scoreboard, published within AMR.

MIP Scoreboard and its Development – Headline and Auxiliary Indicators

	Status 2014	**Status 2016**
Current account balance • 3 years backward moving average	Headline	Headline
Net international investment	Headline	Headline
Export market share • 5 years' percentage change	Headline	Headline
Nominal unit labour cost • 3 years' percentage change	Headline	Headline
Real effective exchange rates • 3 years' percentage change	Headline	Headline
Private sector debt	Headline	Headline
Private sector credit flow	Headline	Headline
House prices relative to a Eurostat consumption deflator • year-on-year	Headline	Headline
General government sector debt	Headline	Headline
Total financial sector liabilities • year-on-year	Headline	Headline
Unemployment rate • 3-year backward moving average	Headline	Headline
Activity rate • chance over 3 years	Auxiliary	Headline
Long-term unemployment rate • change over 3 years	Auxiliary	Headline
Youth unemployment rate • change over 3 years	Auxiliary	Headline

Source:
http://ec.europa.eu/economy_finance/economic_governance/macroeconomic_imbalance_procedure/mip_scoreboard/index_en.htm

The current EU developments in this field show that while immediately after the introduction of the revised system of governance the emphasis was mostly on measures of macroeconomic stabilization and fiscal consolidation, now under the procedures of the European Semester, more targeted measures are emphasised that focus on closer monitoring and evaluation of social development indicators. The latest example of the change in approach are the new indicators incorporated into the MIP Scoreboard (for 2014 included only as auxiliary indicators, in 2015 as part of the set of headline indicators), namely: 3 years change in associated employment threshold (AET) of the activity rate, with a threshold of -0.2%, 3 year change in AET of the long-term unemployment rate, with a threshold of + 0.5% and 3 year change in AET of the youth unemployment rate, with a threshold of + 2%. Moreover, one of the procedures of the European Semester, the CSR, has been undergoing a similar transformation. Zeitlin and Vanhercke (2014) provided a comprehensive and convincing explanation of this change in preferences and emphasis. The CSR recommend a series of structural reforms aimed at labour markets, education systems, creation or support of social inclusion and eradicating poverty, and thus undisputedly bear ordoliberal features in terms of creating institutions.

Implementing all measures of the European Semester with the so-called open method of coordination, reveals the limits of the method. Despite the reversed qualified majority (RQMV), which formally strengthened EU's coercive powers in the area of compliance with the fiscal rules, the momentary interests of the large Member States will once again lead to factual violation of the rules (see again Gross 2016).

The MIP proved just as ineffectual in the area of external imbalances. The highest degree of the procedure, threatening the violator with sanctions, has never been imposed on any country. Its lower degrees, reflected in the CSR, can be easily ignored, as nicely illustrated on Germany and its lack of will to reduce its surplus in the balance of payments by an expansive domestic macroeconomic policy. It is therefore questionable whether (and if so, then in what time frame) the open method of coordination can lead to strengthening the social dimension of the EU in the spirit of social market economy and its ordoliberal basis of respecting the rules. And the inevitable follow-up question is whether the EU should not compensate its high demands on management of national budgets by funding certain social measures from its budget (more on this in Chapter 7).

6. OTHER TOOLS AND WAYS TO BUILD THE SOCIAL MARKET ECONOMY IN THE EU

6.1 Charter of Fundamental Rights of the EU as an Instrument to Build Social Market Economy

Since December 2009, the EU has had a legally binding catalogue of fundamental rights, the EU Charter of Fundamental Rights (hereinafter, the CFREU). It has the same legal force as the Treaties (Article 6(1) of the TEU) and is therefore a part of primary EU law, which must, under the principle of primacy of EU law, be given priority use in conflict with the law of a Member State. This change of status was to affirm that "protecting fundamental rights is a founding element of the European Union and an essential component of the development of the supranational European Area of Freedom, Security and Justice" (Ferraro and Caron 2015:3).

Because CFREU contains, especially in Title IV called Solidarity, a series of explicitly social rights,[159] the question arises whether this strong enshrinement of social rights can lay the foundation of the convergence of national social models, policies and systems of social protection, thus fundamentally contributing to the formation of a common (federal) model of EU social market economy. Given that there is a uniform catalogue of rights belonging to the autonomous EU legal system, developed, interpreted and enforced by EU bodies, it would be surprising – at least at first glance – if such an effect did not present itself in some form.

6.1.1 Social rights in the Charter and outside it

In the aforementioned Title IV (Solidarity), the CFREU contains, amongst the broadly understood social rights, explicitly the worker's right to information in the enterprise, to collective bargaining and action, to access to employment services, to protection in the case of unfair dismissal, to decent and fair working conditions, to family and working life, to social security and social assistance, protection of health and access to the services of general economic interest. A ban on child labour and the protection of youth at work have also been included in this Title. Title II (Freedoms) of the CFREU already contains the right to education, the right to free choice of occupation, the right to work and the right to create trade unions in order to protect one's interests. Title III (Equality) was subsequently made to contain equality between men and women (in employment, work and remuneration for work), the rights of the elderly and of persons with disabilities.

Such an extensive social rights catalogue of the CFREU however, was not made to include some rights contained in the European Social Charter and the Community Charter of Fundamental Social Rights for Workers. Especially striking is the complete omission of the right of employees to fair remuneration for work, i.e. a right constituting

[159] The inclusion of social rights among fundamental (human) rights is currently not EU-specific; their principal distinction from the fundamental civic and political rights is also rejected by the UN. See e.g. High Commissioner for Human Rights 2008:8. However, debate continues in specialized literature about exactly which social rights need to be protected as fundamental rights. Cf. Mantouvalou 2012.

a part of the Universal Declaration of Human Rights or the International Covenant on Economic, Social and Cultural Rights of the UN and also present in a number of national constitutional charters (Butt and Kübert and Schultz 2000; Wintr and Antoš 2011:105 et seq.). The area of remuneration is obviously affected by the EU ban on discrimination and it can simultaneously be speculated that the right to fair remuneration falls within the extensively interpreted "fair and just working conditions" of Art 31 of the CFREU. The reality is, however, that already in the late 1990s when the CFREU text was being drafted, there was an absence of political will to include the issue of worker remuneration, to this day falling within the competence of Members States, among the rights contained therein (Hervey and Kenner 2003:54-55). The wording of Protocol No. 30 of the Treaties, where Britain in particular had enforced restriction of the direct applicability of rights under Title IV (Solidarity) of the CFREU on its territory, explains succinctly enough why it was impossible to extend the catalogue of social rights during the negotiations about the Lisbon Treaty.[160]

On the other hand, it should be noted that as early as in the pre-Lisbon period, the CJEU had already treated a number of social rights as general principles of EU law, i.e. postulated their status of a part of primary EU law without it being necessary to wait for the Member States' consent to the legal binding effect of the CFREU. In the widely discussed decisions in Cases C-144/04 *Mangold* and C-555/07 *Kücükdeveci,* the CJEU "recognized" the basic right to non-discrimination on the basis of age enforceable even in a horizontal relationship between the employer and the employee.[161] Already in the 80s and 90s, the CJEU went on to give the weight of a general legal principle[162] to the right to conduct a business and to choose an occupation,[163] to trade union membership,[164] to collective bargaining[165] and even collective action[166] or also the right to freedom of expression at work.[167] But not even in the post-Lisbon period is it necessary for the CJEU to feel restricted by CFREU in finding new social rights as general legal principles of the EU, e.g. because they will arise from common constitutional traditions of EU Member States, as enabled by Art 6(3) of the TEU.

This introductory information already limits the significance of the Charter as "the key" or "the sole" instrument on which the future of social rights of Europeans and the fulfilment the ideal of social or social market Europe should perhaps depend. In no

[160] It is also possible to point out the "Lisbon" complementation of the original CFREU text of Nice (document 2000/C 364/01) in Art 52, whose new para 5 restricted the purpose of "principles" provided for in CFREU (i.e. most of its provisions with social content) to the supervision of the legality of the acts of the EU and Member States implementing these provisions.

[161] CJEU C-144/04 *Mangold* EU:C:2005:709 and C-555/07 *Kücükdeveci* EU:C:2010:21.

[162] For an overview see O'Neill 2015.

[163] CJEU C-44/79 *Hauer v. Land Rheniland-Pfalz* EU:C:1979:290; C-544/10 *Deutsches Weintor eG* EU:C:2012:526, paras 45 and 52.

[164] CJEU in joint cases C-193/87 and 194/87 *Maurissen and others v. Court of Auditors* EU:C:1989:185.

[165] CJEU C-271/08 *Commission v. Germany* EU:C:2010:426, para 37.

[166] CG T-115/94 *Opel Austria GmbH v. Council of the European Communities* EU:T:1997:3, para 108, CJEU C-341/05 *Laval un Partneri* EU:C:2007:809, C-438/05 *Viking Line* EU:C:2007:772.

[167] CJEU C-150/98 P *ECOSOC v E.* EU:C:1999:616, para 13.

way, however, does it disqualify the question of how and to what extent the Charter can contribute to such a path of the EU.

6.1.2 CFREU and the limits of its applicability – when the rights can be claimed

Given the frequently emphasized limitation of EU powers in the social sphere, it is self-evident that here, rather than in other spheres, the "usefulness" of the CFREU will be determined by its "scope of use" laid down in its Art 51(1). According to it, the provisions of the CFREU are intended for the bodies, institutions and other EU subjects, as well as Member States exclusively if they apply EU law. This means that the fundamental rights guaranteed in the CFREU have effect only within the framework of powers laid down by the Treaties (see Explanations relating to the Charter of Fundamental Rights[168] explanation on Art 51(2) CFREU and Declaration No. 1 annexed to Treaties concerning CFREU). The CJEU has rather succinctly expressed the same stressing that the main proceedings must concern the interpretation or application of a rule of the Union other than those contained in the Charter.[169] The automatic application of the CFREU where the EU acting on its own[170] cannot, therefore, apply to Member States that have retained a number of sovereign powers in social matters. The restricted EU power to create its "different rules" in social policy is thus a clear limitation for the use of the CFREU.

According to Explanation on Art 51 CFREU, fundamental rights in the CFREU are binding for Member States only "when they act in the scope of Union law", which, content-wise, means the same – as had to be confirmed by the CJEU – as "if they apply the Union law" or "implements the acts of the Community" (Sarmiento 2013).[171] Logically, ambiguity does not arise where a Member State applies a provision of primary or secondary EU law on subjects under its jurisdiction. We already know from the pre-Lisbon case law that the same category also comprises situations when a Member States uses the possibility of an exception or discretion in its domestic legislation granted in

[168] Art 5 TEU, according to which the EU has only conferred powers and those that are not conferred to it by the Treaties belong to Member States; furthermore, Art 2 TFEU concerning the performance of exclusive and shared powers of the EU (for which Protocol No. 25 is also significant), as well as the doctrine of implicit powers etc., represent essential initial guidelines here. The CFREU in no way replaces national legislation on the protection of Member States' fundamental rights, which will continue extending to all national situations without a relation to EU law. Explanations relating to the Charter of Fundamental Rights OJ C 303, 14.12.2007, p. 17–35, adopted by the Convention Presidium as doc. 2007/C 303/02 is to be "taken into consideration" by the EU and Member States' Courts pursuant to the provisions of Art 52 para 7 of CFREU.

[169] CJEU C-332/13 *Ferenc Weigl* EU:C:2014:31, para 13.

[170] The European Commission has no doubt that CFREU extends to all actions of EU institutions. See European Commission 2015c:20. Debate can perhaps be conducted only concerning the application of so-called principles contained in the CFREU on non-binding acts such as recommendations of the Commission, by which the Commission coordinates economic policies of Member States. Art 52 para 2 CFREU in fact states that principles can be invoked before courts only for the purposes of interpretation and supervision of *legislation* and *executive acts* of EU and Member State institutions. Cf. e.g. Štefanková 2012..

[171] Since the judgment of CJEU C-617/10 *Åkerberg Fansson* it has been beyond doubt that these definitions of applicability of the CFREU are equivalents without differences in meaning.

the given matter by EU law.[172] How to proceed if the interrelation between national and EU legislation is not explicit, had to be specified by CJEU in its judgment in Case C-40/11 *Iida* of 2012.[173] In order to establish whether a Member State implements EU law within the meaning of Art 51 CFREU, it is necessary, according to CJEU, to verify among others: (i) whether the relevant national legislation aims to implement the provisions of EU law (ii) what the character of this legislation is, and (iii) whether it follows other objectives than those included in EU law, despite being able to affect this law indirectly, a (iv) whether there exists a special provision of EU law in this sphere or one with the capacity to affect it.

The fact that these abstract guidelines do not eliminate ambiguous (and contentious) situations has been demonstrated by CJEU's judgment in Case C-617/10 *Åkerberg Fransson* of February 2013.[174] In it, the CJEU decided that acting within the scope of EU law does not require that Member States implement or apply a certain EU law provision by their national measure. It does not even primarily matter whether they intend to regulate a certain issue in conformity with EU or, on the contrary, as an exemption from EU law (Sarmiento 2013:1279). What is sufficient is that the effect of the national measure has impact on the sphere purposefully covered by EU law. In the given case, Sweden imposed tax sanctions on its taxpayer A. Fransson and pursued criminal prosecution against him, which, according to CJEU, was "partially related" to non-compliance with his obligation to submit a VAT return (para 24). Although the Swedish national legislation on which these tax sanctions and criminal prosecution were founded was not adopted for implementing a certain provision of EU law, conduct within the scope of EU law was involved. The EU has issued Directive 2006/112 on the Common System of Value-Added Tax, which imposes the obligation on member states to "to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion", whereby Member States protect the EU's financial interests in accordance with Art 325 TFEU, as the income from using a flat rate for a harmonized VAT base is the income of the EU budget. This constituted the link between the measure of the national and EU law on the basis of which the CFREU was also applicable on the tax sanctions and criminal prosecution of A. Fransson.

A debate ensued in commentary literature about the division of EU law provisions into "implementers" and "triggers" of the CFREU provisions (Lazzerini 2014:929). "Implementers" are those provisions of secondary EU law that directly implement certain a certain right contained in CFREU.[175] The "triggers" are a more complex matter, as demonstrated e.g. by the manual of the French non-profit organization Gisti (*Groupe d'information et de soutien des immigrées*), providing guidance on how to claim entitlement

[172] CJEU C-260/89 *Elleniky Radiophonia Tileorasi (ERT)* EU:C:1991:254; C-5/88 *Wachauf v. Germany* EU:C:1989:321.

[173] CJEU C-40/11 *Yoshikazu Iida* EU:C:2012:691, para 79.

[174] CJEU C-617/10 *Åkerberg Fransson* EU:C:2013:105.

[175] Obvious examples of "implementers" are already provided in the Explanations relating to the CFREU – e.g. Art 31 CFREU, i.e. the right to fair and decent working conditions; implemented especially by the general Directive on occupational health and safety 89/391/EEC and the resulting specific safety decrees, as well as Directive No. 93/104/EC concerning some aspects of the organization of working time.

to housing provision using the CFREU (GISTI 2015). Art 34(3) of the CFREU says that "In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance…". Following on from this, Gisti lawyers recommend referring to Arts 151 and 153 TFEU, which also deal with combating social exclusion, albeit only at the level of general aims and authorizations. And as secondary EU law contains no direct mention of the support of the right to housing, they consider it necessary to relate the refusal of a Member State to provide housing (assistance) to some of the wide range of EU directives, ranging from ensuring the equality of races, freedom of movement, exercise of the right to asylum to e.g. Directive No. 89/106/EC on Construction Products or Directive No. 93/13/EC on unfair terms of consumer contracts!

The CJEU, however, immediately began to put up barriers to the creative search for acceptable "triggers" of CFREU application. In the judgment of C-198/13 *Julian Hernandez and Others* of July, 2014,[176] it inferred that the concept of "exercising" EU law assumes the existence of a certain degree of relation between an act of EU law and the national measure in question, going beyond the framework of relatedness of the given spheres or the indirect impact on one sphere on another (para 34). The given matter involved not a social right but equality before law pursuant to Art 20 of the CFREU; factually, however, the question of the Spanish court concerned the claims of employees and employers towards the state regarding wages payable during the proceeding, in which a dismissal from employment was contested, pursuant to applicable Spanish law. The CJEU admitted that the dispute was related to EU power and examined the applicability of the provisions of Directive 2008/94 concerning the protection of employees in the event of the insolvency of their employer. However, it concluded that the sole fact that a national measure falls within a sphere in which EU has power cannot cause it to fall within EU law as well (para 36). In other words, fundamental EU-protected rights cannot be applied to national legislation when an EU provision in the given sphere does not impose any specific obligation on Member States.

The threshold of applicability was further specified by the CJEU in November 2014 in the decision of C-333/13 *Dano*.[177] The case involved the claim of a migrant, an economically inactive EU member, supported by Arts 1 and 20 of the CFREU (human dignity and equality before the law) for eligibility for a special non-contributory monetary benefit, defined in Art 70 of Regulation 883/2004/EC on the coordination of social security systems. CJEU's position was that the aim of the given Article is to define such a benefit but not to stipulate substantive conditions for the existence of entitlement to it, as para 4 of Art 70 of the Regulation says that these benefits are provided exclusively in the Member State where the persons in question reside, in accordance with its legislation. It is, therefore, solely within the power of the legislator of the Member State, in this case Germany, to stipulate the conditions. Thus, in determining eligibility for special non-contributory monetary benefits and the scope of their provision, Member States do not apply EU law (paras 89-91). Even though a provision of EU law directly defines a certain social benefit and even when it is claimed by a EU citizen who used his/her EU right to free movement, neither "implementer" nor a "trigger" legislation needs

[176] CJEU C-198/13 *Julian Hernandez* EU:C:2014:2055.

[177] CJEU C-333/13 *Elisabeta Dano* EU:C:2014:2358.

to be involved if the provision concerned leaves the specific adjustment of this benefit to the national law of Member States.

In the judgment of C-117/14 *Nisttahuz Poclava* of February 2015,[178] CJEU subsequently confirmed that the "trigger" of CFREU applicability cannot be sought in the enabling provision of the Treaties nor simultaneously in the fact that a certain activity is financially supported by the EU. Factually, the case involved the assessment of the conformity of a probationary employment contract pursuant to Spanish law with EU law, in particular with protection against unfair dismissal pursuant to Art 30 CFREU, as in this type of contract the probationary period during which it was possible to terminate the employment automatically was up to one year. At first, CJEU verified that Directive 1999/70/EEC concerning the framework agreements on fixed-term did not affect the given type of contracts. While admitting that Art 153(2) TFEU does grant the EU certain legal power in the given sphere, it annulled the significance of the finding by stating that this power had not been used by the EU so far, which is why the issue remained outside the scope of the EU for the time being. The fact that the attractiveness of this type of employment contracts might be supported by EU structural fund subsidies (para 42) was of no relevance.

Thus, it seems that under the current status of CJEU case law, the extent of the substantive scope of CFREU-based social rights in Member States is defined on the one hand by the provisions of especially secondary EU law which, by the Member States' will, are "implementers" of a right captured in CFREU as they directly impose a certain type of EU-conforming measure or other conduct. Working from the opposite direction as a bumper are those EU law provisions that exclude a state's conduct from their scope by the EU legislator having directly excluded a certain measure or conduct of Member States from its competence. Between these relatively clear boundaries, the space of EU provisions – potential "triggers" is found, where we must look for "a certain degree of relatedness" between a national measure and "another provision" of EU law, which is, as implied by the aforementioned conclusions of the CJEU, especially the matter of the sameness or difference of aims or the degree of mutual influence of the EU and national legislation. With respect to the extensive approach of CJEU in the *Fransson* case it is necessary to emphasize the importance of the "or" conjunction, because it is obvious that although a Member State did not think of the goals and interests of the EU when adopting its measure yet touched them through its factual effect, the required influence may have happened.

It is the CJEU's note in para 47 of the aforementioned judgment C-198/13 *Hernandez* that can be interpreted as a warning that a "significant influence" on EU law by national legislation will not escape the attention of EU bodies. In it, the CJEU emphasized the significance of protecting the uniformity, precedence and effectiveness of EU law from the threat posed by differences in the protection of fundamental rights depending on the national law involved. Given the fact that the CJEU has so far not concluded in any of its decisions that this is what occurred, we can only speculate whether and what e.g. restriction of employee rights in a sphere not directly regulated by EU law will be found

[178] CJEU C-117/14 *Nisttahuz Poclava* EU:C:2015:60.

to represent such de-legitimisation of the goal of the protection of fundamental rights in EU law that it will put its uniformity, precedence and effectiveness under threat.

On the other hand, this may also be a disappointment for those defenders of rights who believed that the general principles of EU law are always applicable in Member States. It is difficult to conceive that the CJEU would resort to a different approach regarding the applicability of the CFREU provisions and general principles of law that conform to them content-wise. According to a convincing opinion of the CJEU judge A. Rosas, the rules of their applicability must be identical in order to make sure that in the absence of "another EU rule", the CJEU does not identify a CFREU provision as a reflection of a general principle of law and does not automatically begin to enforce it (Rosas 2012:1282). The unified approach to CFREU provisions and general principles of law cannot be considered as surprising, for even in the phrasing of the "Mangold doctrine", which in 2005 represented some breakthrough in the direct application of general principles of law, the CJEU combined the obligation of a Member State's bodies to follow the general principle of EU law with the situation in which "national rules fall within the scope of Community law".[179]

In conclusion to this part of the analysis, it must also be noted that the concept of "national legislation" by which a Member State implements the provisions of EU law (and which, therefore, falls within the scope of the CFREU) comprises not only all binding legal acts in the traditional sense of the term (laws, regulations, decrees, decisions) but also the "programme manual" adopted by the national monitoring committee within a EU-funded operational programme. In the decision of C-562/12 *Liivimaa Lihaveis MTU* of September 2014,[180] the CJEU found that the monitoring committee's adoption of the programme manual concerned was an act falling within the scope of EU law, as EU law had undoubtedly imposed on the Member States the obligation to implement the operational programme, and all the provisions of the relevant EU regulations had to be complied with by all the measures aiming to apply this operational programme, including the programme manual. This implies, among others, that even support programmes funded by the EU and implemented by Member States can play the role of the "triggers" of CFREU application when there is a certain degree of relatedness or effect.

Overall, however, it can be estimated that in the social sphere, where EU law does not lack goals but the authorizations in the Treaties only tend to support and complement Member States' measures, the general phrasing of most CFREU social provisions will not enable practical application without some EU "implementer" act existing for them, as analysed in greater detail in the following chapter.

6.1.3 CFREU and the limits of its applicability – against whom the rights can be claimed

If a Member State acts within the scope of EU law, it is irrelevant whether it does so via its central, regional or local bodies or other subjects having some public power.

[179] CJEU *Mangold* C-144/04 EU:C:2005:709, para 75. Commentary see Rosas and Armati 2010:161-162.

[180] CJEU C-562/12 *Liivimaa Lihaveis MTÜ* EU:C:2014:2229.

This broad definition of the state commonly accepted in EU law is also confirmed by the Explanation on Art 51 of the CFREU. Pragmatically speaking, however, the provisions of the CFREU and Explanations relating to it are silent regarding the binding effect of the CFREU for private law persons if their relationship is affected by EU law.

From this, in her opinion on Case C-282/10 *Maribel Dominguez*,[181] Advocate General V. Trstenjak inferred deliberate limitation of the circle of addressees of CFREU provisions.[182] According to her interpretation, Art 51(1) first sentence of the CFREU unequivocally defines the circle of subjects for whom obligations arise from a fundamental right provided for in the CFREU. These include the bodies of the EU and Member States. Among private persons, however, these rights are not directly applicable (paras 80-83). According to her interpretation, the EU legislator expressed its will to ensure protection to the rights provided for in CFREU through the obligations of the EU and its Member States, not to enable their enforcement in relationships among private persons. The dispute between an employee and her employer involved the entitlement to financial compensation for the annual leave, which the employee was unable to take due to an accident. An employee's entitlement to a leave is protected in EU law by Directive 2003/88 and is also provided for in Art 31 of the CFREU. While AG Trstenjak admitted in her opinion that the entitlement to a leave represents not only a fundamental right but also a general principle of EU law, she nevertheless inferred that if national legislation is in conflict with a fundamental EU right, the national court cannot decide on its direct effect (grant it the so-called exclusionary effect preventing the use of a conflicting national provision) on the relationship between private law persons.

The employee aggrieved by not being granted a right arising from z Art 31 of CFREU and Directive 2003/88 should bring an action for damages against the state, which has not honoured its obligations arising from EU law (para 172). Regarding the enforceability of fundamental rights, the adoption of this opinion of AG Trstenjak would mean a step backwards, before the case law of CJEU in Cases C-144/04 *Mangold* and C-555/07 *Kücükdeveci*, namely on the basis of literal following of the will of the EU legislator expressed in Art 51(1) of CFREU, according to which CFREU provisions are only intended for the bodies of the EU and Member States if they apply EU law. The consequence would the impossibility of direct application of fundamental social rights contained in CFREU in disputes between employees and employers (private law subjects).

The development of EU law, however, did not follow AG Trstenjak's views in the issue concerned. Paradoxically, this did not happen through the CJEU's judgment in Case *Dominguez*, in which CJEU did not make a single mention of the CFREU. The key judgment was the one in Case C-176/12 *Association de médiation sociale (AMS)* of January 2014, in which the CJEU' Grand Chamber was deciding.[183] An opinion worth noting is that of AG P. Cruz Villalón, who refused to infer from the wording of Art 51(1) of the CFREU its inapplicability on relationships between private law persons,[184] namely on the basis of the fact that not even constitutional laws of Member States commonly

[181] Opinion of AG V. Trestenjak k C-282/10 *Maribel Dominguez* EU:C:2011:559.

[182] Opinion of AG V. Trestenjak k C-282/10 *Maribel Dominguez* EU:C:2011:559.

[183] CJEU C-176/12 *Association de médiation sociale* EU:C:2014:2.

[184] Opinion of AG P. Cruz Villalón on C-176/12 *Association de médiation sociale* EU:C:2013:491.

define their addressees and on a case-by-case basis – based on interpretation – address some of their provisions to individuals as well. Quite crucially, he then stated that *"since the horizontal effect of fundamental rights is not unknown to European Union law, it would be paradoxical if the incorporation of the Charter into primary law actually changed that state of affairs for the worse"*.[185] This argumentation is to be agreed with, for it would be near-absurd if e.g. the ban on child labour (Art 32 of the CFREU) were not simultaneously addressed to employers. In addition, the CJEU did not reject "to confer on individuals an individual right" in its judgment but diverged from the AG's opinion in a different issue significant for the use of the CFREU in relations between private law persons.[186]

The dispute between an employer and a trade union, constituting the basis of a preliminary question of a French court in Case *AMS,* involved the right of employees to timely information and consultation within the enterprise. This is covered by Art 27 CFREU, as well as Directive 2002/14,[187] which lays down the general framework for informing employees. Contrary to the employee's right to a leave in the aforementioned *Dominguez* case, which was a subjective right, the provision of Art 27 CFREU is rather a so-called principle, according to the CFREU scheme. The somewhat obscure wording of Art 51(1) CFREU divides its provisions, as generally known, into rights to be respected and principles to be observed.[188] In this respect, Art 52(5) CFREU is more revealing, stating that those of its provisions that contain principles *"may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."* The Explanations relating to the CFREU then explicitly states that direct actions cannot be brought on the basis of principles. As an example of principles the Explanations present the social provisions of Art 25 CFREU (rights of the elderly) and Art 26 (inclusion of persons with disabilities). However, the logic of the matter, as well as the traditional definition of "entitlement" social rights in constitutional documents, makes it obvious that "principles" will predominate over "rights" among them, for their practical application will often be contingent on concretization by specific legislation.

It was on this basis that CJEU, in the *AMS* judgement, differentiated its approach in the *Kücükdeveci* case, involving the right not be discriminated against on the basis of age, which "is sufficient in itself to confer on individuals an individual right which they may invoke as such", from the employees' right to information, which, if it is to "be fully effective, it must be given more specific expression in European Union or national law".[189] The principle contained in CFREU, therefore, cannot be directly

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185 *Ibid*. para 35.

186 CJEU C-176/12 *Association de médiation sociale* EU:C:2014:2, para 47.

187 Directive of the European Parliament and the Council 2002/14/EC of 11 March 2002 laying down the general Framework for informing employees and consulting with employees in the European Community.,

188 For more detail on the categorization of CFREU provisions into rights and principles, see e.g. *Douglas-Scott* 2011:652, also *Fontanelli* 2011:25-26.

189 CJEU C-176/12 *Association de médiation sociale* EU:C:2014:2, paras 45-47.

invoked in a relationship between private law persons; it is necessary to wait for its implementation in specific legislation. In the case concerned, it was Directive 2002/14, which, however, was not adopted faultlessly by France into its national law, thereby giving rise to a situation contradicting EU law in the matter of defining the number of employees relevant for the exercise of the right to information and consultation.

Thus, the most interesting and contentious aspect of the case was the question of how to deal with the insufficiently specific principle contained in the CFREU, concretized by the EU directive, which, however, was not properly implemented by a Member State and its provisions, therefore, did not have a direct horizontal effect despite being sufficiently clear and unconditional in themselves. In his opinion, AG Cruz Villalón argued teleologically with respect to the goal of the high protection of fundamental rights provided for in the CFREU, suggesting that the principle once specified by secondary EU law should not be limited in its effects by a Member State's error in carrying out its implementation. The CJEU, however, gave precedence to formal logic and inner cohesion of EU law: the non-specificity of the CFREU provision combined with the impossibility of horizontal effect of a non-implemented directive which concretizes it does not create a new quality enabling the direct enforcement of a principle provided for in CFREU in a relationship between individuals.[190]

The solution proposed in the case by AG Cruz Villalón would, naturally, be socially more forthcoming. Granting applicability to a CFREU principle in the dispute would result in the victory of the party founding its claim on it (here, the trade union and employees) and the losing party (here the employer) would have no other choice but to sue the state for damages. The CJEU chose a "conservative minimalist" solution; the principle is not applicable in the dispute and the employees who lose at a national court will have to sue the state for damages by themselves. The result can be generally related to all CFREU provisions that are principles, i.e. are not sufficient in themselves to grant individuals a subjective right applicable as such. The EU, if it finds sufficient support in member countries, concretizes them further by directives. If Member States do not adopt these directives properly and in time, the addressees of social rights will have no choice but to complain to the Commission and to keep suing the state for damages until perfect implementation is achieved in the Member State concerned. We cannot but agree with the critics of the CJEU's decision in the *AMS* case that this significantly limits the practical contribution of most social provisions of the CFREU for employees and socially needy persons (Lazzerini 2014; Papa 2015; Lourenco 2013).

By its argumentation in the *AMS* decision, the CJEU raised further speculations by not requiring that those CFREU provisions which are sufficient in themselves to grant individuals subjective rights should simultaneously reflect some general principle of EU law (see paras 47, 49). It can, therefore, be argued that all of the clearly and unconditionally formulated CFREU provisions undisputedly implying what the content of the right is and whom it benefits are directly enforceable, even in – depending on content – relationships between individuals, provided that, naturally, there exists, a relation to another provision of EU law, which will function as a "trigger". N. Lazzerini offers the following formula as a guideline: wherever a CFREU provision refers to specific legislation by

[190] Opinion of AG P. Cruz Villalón on C-176/12 *Association de médiation sociale* EU:C:2013:491, paras 48, 49.

secondary law, the direct effect of the provision will not be possible (Lazzerini 2014:927). Thus, individuals should not have opportunity to directly invoke the right to collective bargaining, action and protection in the event of unfair dismissal, social security and social assistance or health protection and access to services of general economic interest, for all of these CFREU provisions contain reference to their performance "in accordance to EU law and national legislation". Another CFREU provision helps, in terms of the possible direct effect, to sort out the Explanations on CFREU, which directly classifies e.g. rights of the elderly and persons with disabilities as principles and for many other provisions lists the key secondary implementing acts of EU law. However, this is only a "guideline", and a contentious one at that, for only a criterion postulated by the CJEU has a binding effect: is the provision in itself sufficient to grant a subjective right to individuals?

The directly enforceable social rights in accordance with EU case law will undoubtedly include the protection of employees from discrimination in employment. Less clear, however, is the case of entitlement to a paid annual leave, which the CJEU, contrary to AG Trstenjak, calls it "a particularly important principle of EU social law",[191] and which is subject to the Directive 2003/88/EC concerning certain aspects of the organisation of working time. Provided that the Directive is not adequately implemented in some Member State, would its clear and unconditional phrasing be sufficient for the application of the provision of Art 31(2) CFREU in a private law dispute, namely that "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave"? Probably only in the case of complete denial of this right by the employer, but in more complex cases of disputes about the calculation or transfer of certain entitlements it would be inapplicable without concretizing provisions.

Logically the most sensitive issue will be one of the direct effect of those CFREU provisions that were recognized by the CJEU as general principles of EU law; if these are, however, rights (or rather principles in the CFREU language) explicitly placed outside the EU power pursuant to Art 153(4) TFEU, such as the right to trade union membership and the right to strike (collective action) (Delfino 2015:88). Even these can be – judging by the so far unsurpassed CJEU case law *Viking Line* a *Laval un Partneri* – directly invoked in the relationship between private individuals. Type-wise, this will probably always involve a dispute of non-state entities about "whose EU law" is stronger in the given situation, such as when a trade union action clashes with the exercise of the freedom of EU internal market (Rosas and Armati 2010:161). In other situations, the Union "implementer" legislation will be fundamentally missing, and national legislation of the Member State, adopted within the exercise of its sovereign power, will itself define the status and powers of trade unions. The general character of the expression of these principles in the CFREU and, particularly, the requirement of the underlying uniformity of the application of the CFREU provisions and general principles of law in cases of conformity of their content will simply not allow the EU more than to protect the given principles from unreasonable denial in the name of the exercise of another EU law (Rosas 2012:1282). Besides this, it is imaginable that

[191] CJEU C-396/13 *Sähköalojen ammattiliitto* EU:C:2015:862015, para 65.

in extreme situations, in which an individual would be deprived of their fundamental EU right by a brutal negation of the aforementioned principles, the CJEU, required to answer a preliminary question of a national court, would find that it must protect the uniformity, precedence and effectiveness of EU law.[192] Should the scope and intensity of the denial of fundamental rights lead to threat to EU values set out in Art 2 TEU, the EU could also decide to defend them itself by a procedure pursuant to Art 7 TEU (i.e. not in representation of the individuals affected but as a protector of its value legal basis against its violator – Member State).

Finally, this analysis of the applicability of the CFREU in disputes between employers and employees also includes a procedural law question. Neither the Lisbon Treaty nor the CFREU introduced any special "procedure" or "action" specifically for the protection of fundamental EU rights. Therefore, an individual who wants to defend their fundamental right finds it no easier than before to get their case before the CJEU. He can bring actions for inapplicability and inactivity against acts or inactivity of employers-EU bodies if he demonstrates being directly and personally affected, or also for damages (caused by the EU) if he complies with the conditions for their award. In national disputes, he must depend on "his judge" submitting a preliminary question to the CJEU, which is currently also the most common way in which the issue of CFREU application gets before the CJEU, or alternatively, it can complain to the Commission in the hope that the Commission decides to start a proceeding with the Member State for failure to fulfil an obligation.

6.1.4 "Mobile" and "non-mobile" fundamental rights

The statistics of the European Commission show that in the CJEU's decisions referring to the CFREU, the provisions of its Title IV (Solidarity) occur relatively least frequently in proportion to other Titles: once in 2010, four times in 2011, twenty-one times in 2012, ten times in 2013 and fifteen times in 2015 (Commission 2015c:25). Absolute numbers are not the most significant factor, despite implying that the CJEU does work with Title IV of the CFREU, in fact to a significantly greater extent than in the pre-Lisbon period. Experts in the field, such as G. de Búrca, however, criticize the CJEU that it differs from other "human rights courts" by its relatively brief reasoning without dissenting opinions and also without references to sources other than EU acts and its own case law, i.e. without references to the parallel development in international and national theory and practice of human rights protection (de Búrca 2013:170-173). They perceive it as a strong tendency to "continue on the chosen path", which the CJEU has forged since the time of building EU law as an autonomous legal order, and, consequently, as focus on the substantive deciding of disputes about what supports or, on the contrary, threatens the economic integration of Member States.

Specialists on social issues, including those of left-wing leanings, criticize the CJEU for the fact that its traditionally protectionist attitude to the integration of

[192] In such a case, it may be possible to find a parallel with the non-competence of the CJEU in events when a measure of a Member State only has an impeding effect and, in contrast, competence in a situation when it has deprivation impact on the rights of the non-migrating individual derived from the status of a EU citizen. On this matter see Lenaerts 2015:3-5.

markets, i.e. preference for free movement, does not enable it to approach social rights as truly fundamental rights and treat them the same as "classic" fundamental rights of the so-called first and second generation.[193] This is because the aforementioned pre-Lisbon decisions in Cases *Laval un Partneri, Viking Line, Rüffert* and *Commission v Luxembourg* were not revised by the CJEU in any way after the effect of the Lisbon Treaty; on the contrary, the CJEU refers to them, to much annoyance of European trade unions and left-wing forces, as to precedents in situations when it needs to deal with the conflict of social rights with one of the freedoms of the internal market.[194]

The CJEU insists that social rights must be exercised "in accordance with the law of the Union", which corresponds to the definition of the overwhelming majority of social rights in Title IV (Solidarity) of the CFREU. Furthermore, its Art 52(1) allows for proportional limitation of rights and freedoms set out in the CFREU, if, among others, these limitations "genuinely meet objectives of general interest recognised by the Union…". If European integration has economic integration encoded deepest in its genes and even today places free movement second, internal market third and monetary union fourth in the hierarchy of its goals (see Art 3 of the TEU), it is obvious that the limitations to which fundamental rights will be subject in the CJEU case law will not comparable to what constitutes the standard of international human rights conventions as well as many national constitutional documents. These usually refer to limitations necessary in a democratic society to protect public interest and to protect the rights and freedoms of another and perceive any potential limitations as exceptions from the rule laid down by the fundamental right.[195] In the EU, however, fundamental social rights are compared with fundamental (economic) freedoms of movement and can prevail over them only as justified and reasonably asserted exceptions. Whereas the justification of the exertion of the right to movement is not required by the CJEU (the motivation for it can thus be entirely based on "self-interest", with the exception of manifest abuse of law), if it is to prevail over a freedom, it must follow a legitimate goal compatible with the Treaty and be justified by urgent reasons of general interest, must be capable of guaranteeing the implementation of the goal followed and must not exceed the limits of what is necessary to accomplish this goal.[196]

As a result of this, the catalogue of fundamental social rights of the EU breaks down into rights that do not in any way prevent mobility on the internal EU market and then those that have an underlying potential to enter into conflict with it. The first group of "mobile" rights includes all rights addressed to the individual, "following"

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[193] Cf. e.g. Papa 2015. The situation was, to a great extent, already established by the judicial catalogue of general principles – fundamental EEC rights, created by Court of Justice since the 1970s, in which economic and social rights occupied a rather marginal position in comparison with civil and political rights, as well as, naturally, freedoms of movement.

[194] E.g. CJEU C-271/08 *Commission v. Germany* EU:C:2010:426, paras 42-47.

[195] E.g. conditions for an exception pursuant to Art 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Art 31 of the European Social Charter. This issue, i.e. in the name of what a certain fundamental (social) right can be limited, is naturally difference from the realization of specific special rights, which, in the constitutions of Member States, tends to be left to the will of the parliamentary majority and their exacts scope is not defined by court decisions.

[196] CJEU C-341/05 *Laval un Partneri* EU:C:2007:809, para 101 cf. also the argumentation in Schiek 2013.

him/her regardless of state borders, or more precisely, ensuring "level playing field" for cross-border competition on the internal market. These involve the rights for which the EU, thanks to shared powers, has generally already established a uniform or, more often, minimum common standard. First and foremost, it is consistent non-discrimination (especially in the event of economically active migrants-EU citizens or those with the right of permanent residence in another EU state), maintenance of entitlements arising from social security during economic migration, as well as entitlements to safe and decent working conditions and a paid leave, because the EU also regulates the issue of working hours and period of rest as a matter of employee health and safety protection (the original Directive 93/104/EC had, to the annoyance of especially Britain, precisely this legal basis), as a result of which the CJEU's decisions continue to cause controversy here, too.[197]

The second "non-mobile" group of rights comprises rights whose content often involves determination by the national regulatory model of employment relationships via social partnership and dialogue. They are collectively bargained and shared, but not by social partners at the EU level but at the national level or, more precisely, local sector level. This is closely related to the fact that they are either not subject to the harmonisation power of the EU (fair remuneration, trade union rights, binding character of collective agreements), or the EU has not yet attempted at their uniform regulation (termination of employment, except the issue of non-discrimination). This does not mean at all that the CJEU would deny the value and significance of collective bargaining[198] and mandatory solidarity. Pursuant to the CJEU case law, local collective agreements of social partners and their results are traditionally exempt from the application of EU competition protection rules. Local solidarity, however, must not impede the freedom of movement on the internal market nor disturb the harmonized standard where it exists (Voogsgeerd 2012:332; Papa 2015:204). Although both the ban on cartels and the abuse of dominant position and the ban on creating unjustified and unreasonable barriers to movement on the internal market are laid down in the primary law and are included among the provisions of "public order" of the EU, the CJEU evidently follows the line according to which free competition does not always have to be the rule, while free movement definitely does.[199] Therefore, even local specific social rights which do not fall within the EU's harmonisation power are subjected by the CJEU to the requirement of non-limitation and non-impediment to free movement, uniformity and effectiveness of EU law.

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[197] See recent decisions of the CJEU C-539/12 *Lock* EU:C:2014:351, since which employee remuneration in the time of paid leave must be calculated not only from the basic wage but also from the commissions paid, or C-266/14 *Federacion Servicios Privados* EU:C:2015:578, which raised the employers' costs, as employees not starting the working day from the usual workplace but setting out from their homes to see various clients must have the journey time included in the daily working time. For criticism see Robinson and Barkler 2015.

[198] The task of social partners and their dialogue at the EU level is recognized by primary law, see Arts 152, 154 and 155 TFEU. Upon the suggestion of the Committee, and approval by the Council, their general agreements can become binding acts of secondary EU law, and e.g. in the instances of parental leave, part-time work or permanent contracts, this has already happened. However, it is agreements of partners on national or local branch level that are potentially conflicting.

[199] CJEU C-271/08 *Commission v. Germany* EU:C:2010:426, paras 45 and 46.

The most visible "anti-collective" ruling of the CJEU currently seems to be its decision in Case C-426/11 *Mark Alemo-Herron and Others* of July 2013, involving the so-called dynamic protection of employee rights from a collective agreement concluded with an employer after the negotiation of a company's transfer to a new owner, and the resulting question of whether the conditions of such a collective agreement are also binding for this new owner. The CJEU dealt with it surprisingly briefly, by emphasizing the right to free enterprise pursuant to Art 16 CFREU, which would be denied in the new acquirer of the company were also bound by such a collective agreement. Member States, therefore, are not entitled to adopt measures more favourable for employees should they in so doing violate the basis of the right to free enterprise. The rights of "transferred" employees, or more precisely, the CFREU provisions dealing with their rights, were paid no attention whatsoever by the CJEU. Therefore, it is not so much the CJEU verdict itself that is at stake but the straightforward consideration by which the verdict was reached, leaving out any discussion about the significance of collective agreements for ensuring employee rights and about the values of social dialogue and consensus, recognized by the EU. As if the EU's sole mission was to enforce economic freedoms, not fundamental social rights as well.

Although the quoted CJEU decision is rather rare in the language of its reasoning, collective agreements also had to "give way" in other post-Lisbon judgments, such as C-447/09 *Reinhard Prigge and Others* and C-297/10 *Sabine Hennings*. The outlined tendency in CJEU's decision making is thus obvious and long reflected by authors dealing with its case law (Voogsgeerd 2012:332-335). Neither the Lisbon Treaty with its goal of social market economy and the horizontal social clause nor the binding CFREU have led to CJEU's socially aimed re-orientation of the established case law. Some fundamental rights, especially the right to collective bargaining (and respect for its results) are "less fundamental" than others, which resonate better with the internal market and its freedoms, or more precisely, which consequently have a harmonized standard established by EU law. On the contrary, Member States, according to CJEU, cannot strengthen the protection of fundamental rights within their power at the cost of precedence and uniformity of the internal market.[200]

On this issue, V. Papa offers a series of possible explanations, which seem to suggest that the CJEU is unlikely to change its established approach in the foreseeable future : (i) social rights are a sensitive matter of the relations between the EU, Member States and social partners and the CJEU does not wish to lose legitimacy by excessive activism; (ii) CJEU currently does not want to torpedo socially difficult compromises achieved when dealing with the Eurozone's economic and debt crisis; (iii) CJEU's conservatism, with its long-enshrined traditional fundamental rights and unwillingness to change this in favour of "new" fundamental rights; (iv) historically, the entire EU model is biased in favour of individual rights as opposed to collective ones and takes the side of an individual as a worker and consumer than a citizen, member of a social group or trade unions (Papa 2015:211).

[200] CJEU C-399/11 *Stefano Melloni* EU:C:2013:107, paras 55-60.

6.1.5 CFREU and the creation of EU's social market economy model

No doubt, the social market economy model in the full meaning of this term can hardly be developed by the EU if having no corresponding powers and budgetary resources. In this respect Charter cannot produce any qualitative change. Can the CFREU, however, at least facilitate this if its social provisions are reliably applicable only where the EU has already implemented them by secondary legislation and in all other cases the CJEU interprets them with regard to maintaining and enhancing the achieved integration rather than with respect to their own mission and basis?

As demonstrated, the use of the CFREU faces so many restrictions as well as so much ambiguity that after seven years of its binding effect, its social content has not managed to divert the CJEU's decision making practice from the trajectory already drawn up in the pre-Lisbon period, when it was only a non-binding declaration. Thus, while the EU has a catalogue of fundamental social rights, which might even be called its specific model of social rights, its task seems to be to maintain the EU as a functioning integrated market rather than to build a federal social model (Koldinská and Štefko 2011:218). The functioning of the internal market, naturally, requires certain social considerations and coordination in the social legal sphere, and this minimum is ensured in one way or another by the Treaties and the CFREU. The statement that the Charter "does not change the legal situation" therefore applies (Bojarski and Schindler and Wladasch 2014:79).

To expect that the CFREU will aid the creation of a federal level of EU's social market economy model and bring closer its national variants would thus be unsubstantiated, if not downright naïve. Such development is not possible without extending the powers and budget of the EU, which cannot be achieved by more frequent and active application of CFREU but, instead, by further changes in the Treaties. Even partial changes, however, are difficult to achieve due to the absence of awareness of common ground and solidarity among EU nations, absence of the common social basis and political nation of the united Europe. Although many authors (Giddens 2013; Misir 2011; Švihlíková 2014; Habermas 2016) have convincingly demonstrated that if the EU is to have a future, then only with a necessary measure of transnational democracy, mutual solidarity, social investments and, thus, something along the lines of a federalized (not unified) social model, the CFREU does not appear capable of contributing to this ideal in any significant manner.

6.2 The Horizontal Social Clause of Art 9 TFEU and Its Potential to Push the EU Towards Social Market Economy

No evaluation of the social aspects of the Lisbon Treaty has failed to emphasize the inclusion of the so-called horizontal social clause (hereinafter, the HSC) into the introductory part (Title II) of the TFEU, called "Provisions having general application". *"The new horizontal social clause will give prominence to the Union's commitment to employment and social protection, and the role of the regions and the social partners will be confirmed as part of the political, economic and social fabric of the Union,"* predicted the European Commission in its 2007 Communication to the Council entitled *Reforming Europe for the 21st Century.* (European Commission 2007:7). Even independent analysts

found this novelty in the Treaty "promising" in terms of "strengthening the social face of the EU" (Schiek 2012, Schiek et al. 2015:16, Veldman and de Vries 2015:65).

Based on the analysis of the provisions and principles of the EU primary law, other EU documents, as well as the case law of the Court of Justice and evaluations of independent experts, this chapter aims at a deeper "inventory" of the present usefulness and future potential of the HSC for the development of EU's social dimension and, by extension, for building its social market economy. In its first section, it deals with the legal interpretation of the commitment expressed for the EU in the HSC text. In the second section, it provides a critical overview of the present results of the use of HSC in EU practice, and in the final section it proposes changes which would contribute to real utilization of HSC's potential. The common objective of all the sections is to answer the question hidden in the chapter's title: is the HSC a provision so general and non-binding that it has only raised false hopes of the supporters of social Europe, or is it a clause that could become the starting point and common denominator of EU's complex re-orientation towards greater balance between its market and pro-social measures?

6.2.1 The significance of the HSC in the context of the Lisbon Treaty

"Provisions having general application" are a part of the TFEU obliging the EU to ensure consistency of its different policies, taking all of its objectives into account and in accordance with the principle of conferral of powers (Art 7). The horizontal social clause itself, contained in Art 9 TFEU, faithfully copies the wording of At III-117 of the Treaty establishing a Constitution for Europe: *In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.*

The social goals enumerated in the HSC, such as high level of employment, adequate social protection, etc., which always have to be taken into account, are far from being the only "provisions having general application". The same Title II also refers to the promotion of equality between men and women (Art 8), to combating any discrimination (Art 10), to the promotion of environmental protection and sustainable development (Art 11), to consumer protection (Art 12), to animal welfare and respect of traditions (Art 13), to services of general economic interest (Art 14), to principles of good governance and transparency (Art 15), to personal data protection (Art 16), as well as to respect for the status under national law of churches and religious associations (Art 17).

The strength of the obligation of the "general application" of these provisions cannot be unambiguously inferred from their wording. Whereas Arts 15-17 commit EU bodies in a specific enough manner: "the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible", "the European Parliament shall meet in public", "Any citizen… shall have a right of access to documents of the Union" or "Everyone has the right to the protection of personal data concerning them", Arts 8-14, among which the HSC is included, use a much more ambiguous phrasing of the commitment of EU bodies. They shall "aim to", "take into account", "pay full regard to" or "take care that". Thus, the question arises of how their inclusion in the Treaty can affect the operation of the EU and, indirectly, its Member States in choosing the

means to implement EU acts and measures and, entirely specifically, whether the HSC is a provision capable of ensuring greater social-economic balance in the EU.

Some commentators as well as representatives of EU bodies perceive the HSC as a link between the general integration goals set out in the introductory articles of the TEU and the specific tasks and powers conferred to the EU in the following Titles of the TFEU (Dimmel 2014:25-29, Schiek et al. 2015). HSC, therefore, must be read as "instructions" for the practical implementation of the goals of Art 3(3) TEU, including the goal of the highly competitive social market economy aiming at full employment, into all EU activities and acts,[201] i.e. not only into the implementation of provisions of Titles VIII, IX and X of Part III of TFEU, which empowers the EU in the fields of economic, monetary, employment and social policies. "The EU is now premised on an integrated approach to economic and social policies, and pursues socio-economic integration as a holistic aim" (Schiek et al. 2015:16).

The aforementioned implies that the HSC is perceived as some kind of a bolt to strengthen the penetration of the prime goals of the TEU into specific policies laid down in the TFEU; however, only if we accept the explanation that this strengthening effect is already established by the very inclusion of this clause into the TFEU, not by its verbatim content. Because, as noted by a number of analysts, the wording of the HSC is more likely to have a weakening effect in comparison to the unexpectedly strongly formulated EU goals in Art 3(3) (Falkner 2008:14). Art 3(3) TEU directs the EU towards full employment, whereas the HSC only towards a high level of employment; Art 3(3) TEU mentions social justice and social progress, solidarity between generations and among Member States, i.e. social objectives that are not in any way reflected in the HSC. And, of course, there is no mention of social market economy in the HSC.

One cannot be sure, however, if such a linguistic comparison has any positive meaning. For instance, Art 145 TFEU on employment refers directly to objectives of Art 3 TEU (thus to full employment), while the subsequent Art 147 TEFU states that "the Union shall contribute to a high level of employment…" (para 1) and that "the objective of a high level of employment shall be taken into consideration in the phrasing and implementation of Union policies and activities" (para 2). Article 151 TFEU on social policy speaks of "proper social protection", not "adequate" social protection like the HSC, while Art 165 TEU on education uses the wording "contribute to the development of quality education" instead of "high level of education" preferred by the HSC. Yet other wording – similar but not exactly the same – can be found in the Charter of Fundamental Rights of the EU, especially (in Chapter IV "Solidarity") regarding access to free placement services, entitlement to social security benefits, fight against social exclusion and poverty or access to healthcare and medical treatment. It is highly unlikely that the usage of adjectives such as full, high, adequate, proper, etc.,

[201] See for instance the Opinion of AG P. Cruz Villalón C-515/08 *Santos Palhota* EU:C:2010:245 (para 51): "Article 9 TFEU lays down a 'cross-cutting' social protection clause obliging the institutions 'to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.' That requirement is laid down following the declaration in Article 3(3) TEU that the construction of the internal market is to be realised by means of policies based on 'a highly competitive social market economy, aiming at full employment and social progress".

as well as the non-inclusion, for instance, of social justice into the HSC, will have any practical impact as the Treaties use these terms too freely.[202]

If we start from the generally accepted explanation of the role of the HSC in the Treaty as a (mere) link between the EU's general objectives and its specific policies and actions, it logically follows that the HSC itself is a source of neither new integration goals nor powers conferred to it (Barnard and De Baere 2014:36, Dimmel 2014:31). This is, after all, inferable from the systematic of the Treaties, which includes common integration goals into the TEU as *Common Provisions* and specific EU powers in the social economic sphere into Part III of TFEU *Union Policies and Internal Actions.* Provisions having general application belong to the first part of the TFEU called *Principles*, which comprises provisions of a systematizing and generally operative character such as *Categories and Areas of Union Competence*, as well as Arts 8-17 TFEU, i.e. the list of provisions which should be taken into account or taken care of in all further Union policies and actions and which also includes HSC.

The inclusion under the Principles obviously raises the question of whether general principles of EU law could be involved, i.e. a directly applicable part of EU's primary law having direct exclusionary effect (e.g. which can be used in a dispute to claim a non-application of a legal act contradicting the principle). The provisions of Art 8 TFEU on equality between men and women or Art 10 denying discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation undoubtedly reflect such general legal principles, as known from CJEU case law.[203] Equality and non-discrimination, however, are given a separate Chapter III (Equality) of the Charter of Fundamental Rights and are set out in many other provisions of the Treaties (e.g. Part II of TFEU *Non-discrimination and Citizenship of the Union*), international documents and national Constitutions of Member States so that their recognition as general legal principles need not be derived from their inclusion among the Provisions Having General Application of the TFEU which the EU *shall aim to.* The mission, content and general recognition of these principles are so undisputed and unconditional that they can be referred to within EU law as "self-executing", i.e. having a direct effect.

In comparison, the "principles" of Art 9 TFEU – support of high level of employment, of adequate social protection, etc. – are generally program-based and legally indefinite. Such expressions convey neither negative or positive rights, nor measurable objectives or specific enough targets (Dimmel 2014:30-31). In addition, the equivalent of some of them in the Charter of Fundamental Rights has the nature of not rights but principles. These, as we know (see Art 52(5) of the Charter), *"may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law … They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality"*.

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[202] Moreover, if such translation between objectives of TEU and policies provided for in TFEU was based on specific words used in different parts of the Treaties, it would be impossible to look for any social aspects in economic policies of the EU. The articles of TFEU on economic policy (Arts. 119-126) never use terms as *social, protection, employment*, does not mention social-market economy objective but stresses several times the neo-liberal *principle of an open market economy with free competition*.

[203] For instance CJEU Case 43-75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*. EU:C:1976:56 or C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG*. EU:C:2010:21

Article 9 TEU thus does not provide for individual rights, remedies or legal claims; it has no direct effect (either horizontal or vertical) on individuals or Member States (Vielle 2010:2, Rosas and Armati 2010:189, Dimmel 2014: 32-33). All in all, the wording of use in the HSC is not sufficiently determined to establish any specific legal content to include them among general principles of law. There is, therefore, no point to harbour any hopes about HSC enabling e.g. the unemployed or trade unions to derive any specific positive claims towards the EU, Member States or directly employers, related e.g. to job loss, denial of some social benefits, social housing, etc. At best, it is possible to envisage the challenging of the validity of certain EU measures (or implementing acts of Member States) before Courts including the CJEU, if these aimed at denying the principles which the EU stipulated as generally applicable and which it should take into account in all circumstances – but here, too, with limitation based on the general character of the phrasing used in the HSC text.

Therefore, the connecting role of HSC as a bridge between Art 3(3) TEU and the social and economic sphere provided for in the TEU appears as unclear from the practical perspective, and it is necessary to see more specifically in what situations and for what purpose the HSC is referred to by the EU bodies.

6.2.2 HSC and its practical use

If we were to judge by any practical effect the HSC has had since the effect of the Lisbon Treaty, we would probably reach the quick conclusion that it is a "sleeping" provision the potential of which remains untapped, and that it is unclear whether the HSC has brought any change at all into EU policies (Barnard and De Baere 2014:36).

The European Economic and Social Committee (ECOSOC) in its own-initiative Opinion of October 2011 expressed the belief that Art 9 TFEU "can represent a major step forward towards a more social EU only if it is properly applied" and suggested what should be done with the HSC in the future, which can also be interpreted as implying that two years after the Lisbon Treaty coming into force, nothing important happened (ECOSOC 2011). The European Parliament confirmed such an assessment in its report a year later, in October 2012, when it stated that *"whereas the full potential of the Lisbon Treaty regarding employment and social policies has up to now been untapped, first and foremost regarding: – Article 9 TFEU, in accordance with which the promotion of high employment and the guarantee of adequate social protection have to be taken into account in defining and implementing the policies and activities of the Union…"* (European Parliament 2012). The European Trade Union Confederation (ETUC) stressed in its Position on the EU's economic governance of December 2014 that the current system of economic governance does not take into account the social principles of the European Treaties, together with the Charter of Fundamental Rights, referring a.o. *expressis verbis* to Article 9 of TFEU (ETUC 2014). The study of Jacques Delors Notre Europe Institute of 2016 was even more straightforward: "The horizontal social clause of Article 9 has completely been ignored" – especially in the fiscal consolidation imposed on bail-out euro-countries during the recent crisis (Rinaldi 2016:11).

6.2.3 HSC and the approach of the European Commission

One reason for such criticism could be the issue of the perspective from which the assessment is conducted. It must be borne in mind that first in the EU there was nothing intentionally or particularly 'a-social' about the internal market or the goals of European integration at large even before the Lisbon Treaty (Pelkmans 2007:2). Only the division of roles between the EU and Member States was historically formulated stating that the EU took care of the integration of markets and Member States about social consensus (Micossi and Tossato 2009). The Commission in the post-Lisbon period simply did not abandon its market-oriented ideology and adapted the pursuit of much more emphasized social goals to the aim of macroeconomic balance and competitiveness. To implement effective active labour market policy measures, to encourage increased wage flexibility, to enhance the employability of older and young workers, to increase the retirement age and phase out early retirement schemes were the usual recommendations stressed by the European Commission in its country-specific reports in 2011–2014 (Clauwaert 2013). The Commission thus simply continued its social agenda in its own long-established way. It is enough to re-read the Lisbon strategy of 2000 which listed among its major goals "modernising the European social model by investing in people and building an active welfare state". At that time, the EU was dealing with "existing social problems of unemployment, social exclusion and poverty" despite "experiencing its best macro-economic outlook for a generation" (European Council 2000).

Even in the recent Recommendation for a Council Recommendation on the economic policy of the euro area of November 2015 the Commission put accent on (i) flexible and reliable labour contracts that promote labour market transitions and avoid a two-tier labour market; (ii) comprehensive lifelong learning strategies; (iii) effective policies to help the unemployed re-enter the labour market, (iv) modern social protection systems that support those in need and provide incentives for labour market integration and, (v) open and competitive product and services markets and reducing the tax wedge on labour, particularly on low-earners, in a budgetary-neutral way to foster job creation (European Commission 2015).

Therefore, it cannot be said that the measures mentioned above did not aim at a high level of employment or combating social exclusion, as demanded by the HSC. On the contrary, most of the recommended measures aimed at these goals. The problem is that it is no novelty compared to what was here before the crisis and what was perceived by the European left as casting doubt on the existing social rights and standards. Instead of emphasizing that human labour is not a commodity and should never be treated as such and, furthermore, that fundamental social rights cannot make concession to the effectiveness of enterprise and interest in economic growth, the majority of aforementioned measures have been and still are focusing its better adaptation to market needs, namely to enhance social and human capital, to participate in the productive economy, to enhance economic participation and to make a positive contribution to growth and competitiveness (Lechevalier and Laruffa and Salles and Colletis 2014: 12).

Similarly, the expectations that the European Commission will, in a different way – with greater emphasis on social aspects – perform impact assessment of the proposed legislation seemed to ignore the fact that the Commission had already in 2002

adopted the method of integrated impact assessment, which, in addition to economic impacts, also monitored social and environmental impacts of future legislation. And still before entering of the Lisbon Treaty with its Art 9 TFEU into force in January 2009, the Commission had issued updated Impact Assessment Guidelines (European Commission 2009), requiring the examination of the impact of the proposed measures explicitly on the employment and labour market, standards and rights related to job quality, social inclusion and protection of particular groups, equality of treatment and opportunities – non-discrimination, access and effects on social protection, health and educational systems; public health and safety, i.e. basically those very "principles" stated in the HSC. Although the Belgian presidency in the second half of 2010 regarded the "social mainstreaming of the EU" via the HSC as one of its priorities (Belgian Presidency 2010), everything ended in the new decade with the critical assessments of ECOSOC, European Parliament and ETUC, mentioned above. Something can be blamed on the general character of the phrasing of HSC principles, something can be attributed to the financial, economic and debt crisis, while the rest is due to the path dependency of the Commission; however, it changes nothing about the fact that the potential for change represented by the HSC has remained untapped.

6.2.4 HSC and the approach of the European Court of Justice

The European Court of Justice, too, has failed to contribute to the HSC becoming a tool of qualitatively new social – economic balancing of the EU. This is visible from the mere fact that it hardly ever works directly with the HSC in its judgments. In the decision on Case C-544/10 *Deutsches Weintor*, where Article 9 TFEU was exceptionally referred to, it did so in relation to the measures to combat alcoholism as follows: *"the protection of public health constitutes, as follows also from Article 9 TFEU, an objective of general interest justifying, where appropriate, a restriction of a fundamental freedom"* (para 49). Although the quoted decision specifically involved the protection of human health, we can infer from the reference to its treatment in the HSC that the CJEU would also be willing to grant the status of an objective goal of general interest to other "principles" provided for therein. However, this is also something that was taken for granted even long before the Lisbon Treaty. The protection of public security, public policy and public health enshrined in the Treaty, plus respect to other mandatory requirements recognized in the case law, including the fundamental social rights and sustainability of social security system, used to be justified exceptions that could potentially prevail over market freedoms (i.e. over free movement and also over undistorted competition on the internal market).[204] However, they have only had precedence over market freedoms when enforced without discrimination, when justified and really necessary to achieve the declared objective and, finally, when adequate, i.e. the least burdening of the still effective measures. Once more, this is a proof that the CJEU has never been anti-social or socially insensitive, but also that it has not changed its approach due to the inclusion of the HSC into the Treaty.

[204] See for instance the CJEU C-158/95 *Raymond Kohll v Union des caisses de maladie* EU:C:1998:171, also C-120/95 *Nicolas Decker v Caisse de maladie des employés privés* EU:C:1998:167, or C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430.

Such a conclusion can, furthermore, be strengthened by a reference to the (already mentioned) AG Cruz Villalón's Opinion in Case C-515/08 *Santos Palhota*.[205] There, the AG first referred to Art 9 as one of the Treaty's new social provisions that had to be taken into account when interpreting EU law (para 51). He followed from there that in the post-Lisbon period, the protection of workers was no more "a simple derogation from a freedom, still less an unwritten exception inferred from case law" and that the safeguarding of a certain level of social protection that restricts a freedom should not be regarded by the European Union law as something exceptional and, therefore, as warranting strict interpretation (para 53). The AG simply proposed that social protection goals should be treated by the CJEU with particular sensitiveness, which would also require not asking for their justification but simply ascertaining that they are suitable for ensuring the attainment of the objective they pursue and that they do not go beyond what is necessary to achieve that objective (para 54, 55). Unfortunately, the CJEU in its decision[206] of the case made no mention whatsoever of all the new social content of the Lisbon Treaty, did not refer to its Article 9 and simply applied its "objective of general interest" exception test as the usual emphasis of the validity of its pre-Lisbon case law, including the infamous "Laval Quartet",[207] which the European Left and the trade union movement regard as unacceptable superordination of economic freedoms to basic social (employee) rights (Schiek et al. 2015, Veldman and de Vries 2015:83).

6.2.5 How can the Horizontal Social Clause push the EU towards social market economy?

The analysis performed makes it clear that for the time being, the HSC has had no specific impact on the development of the EU towards social market economy. It has not changed in any way the concept of the social agenda as one of the factors of effective and balanced operation of the internal market and the common currency. Even the new European Pillar of Social Rights in its First Preliminary Outline grounded its stronger focus on employment and social performance in the broader process of upward convergence towards more resilient economic structures within the euro area. Therefore, the necessity to have such a pillar "is not just a political or social imperative, it is also an economic necessity" (European Commission 2016). It is thus perhaps no wonder that this Initiative does not refer to the HSC or Article 9 at all, although it mentions a highly competitive social market economy as the first reason why such a pillar should be created.

It seems that after overcoming the critical stage of the financial, economic and debt crisis, the EU has a certain ideological block or suffers from excessive path dependency, as it does not want to admit that the purpose of the HSC – if this provision has any purpose at all – is not to provide the internal market and the EMU with a specific social

[205] Opinion of Advocate General Cruz Villalón C-515/08 *Santos Palhota and others* EU:C:2010:245

[206] CJEU C-515/08 *Criminal proceedings against Víctor Manuel dos Santos Palhota and Others* EU:C:2010:589 paras 45-49, 51-52.

[207] "Laval quartet" refers to pre-Lisbon judgments of the CJEU on the clashes of market freedoms (especially of free movement of services) with social standards (especially based on collective agreements in Germany and Nordic countries): C-341/05 *Laval* EU:C:2007:809; C-438/05 *Viking* EU:C:2007:772*;* C-346/06 *Dirk Rüffert v Land Niedersachsen* EU:C:2008:189 and C-319/06 *Commission v. Luxembourg* EU:C:2008:350.

pillar but to newly envision European integration as a socio-economic whole (Barnard and De Baere 2014:37, Schiek et al 2015:16). This means not only to make better use of the powers given to the EU in Art 151-153 TFEU, not only to apply more intensively the Open Method of Coordination so that all Member States move closer by their national welfare systems to the Scandinavian ideal of the highly competitive but highly social state. The perception of the HSC as an impetus for change requires that there should be parity of social and economic policy on the EU level (Schellinger 2015:1). This means a far more important role of the issues of employment, social security, combating social exclusion, etc. than merely as productivity enhancing factors and possible exceptions to market freedoms in case they can justify themselves as objective of general interest.

To achieve this parity of social and economic policy, to establish socio-economic governance of the EU, is of course a much broader issue than that of wider and deeper application of the HSC. Nevertheless, more active and consequent use of Article 9 TFEU can make a difference in the Commission's legislative proposals and programming documents and in the CJEU's case decisions, especially if the principles of the HSC are used in the interpretation of the EU legal acts and in the ruling on their legality. However, in order to push EU bodies to abandon their long-standing pre-Lisbon approaches, i.e. to make them use fully the potential of the HSC, its wording has to be strengthened, otherwise it is difficult to see the reason or the moment from which they would act differently.

The enhanced wording of the HSC does not need to involve its complete change. Any amendment to the EU primary law requires unanimity and ratification by all Member States, which could be difficult to achieve if the rewording of the HSC was too radical. Thus, although it might seem ideal to the defenders of social Europe to rewrite the HSC is the sense of the ETUC proposed Social Progress Protocol so that the interests of high level of employment, adequate social protection, etc. always prevail in the clash with business interests driven by market freedoms (ETUC 2008),[208] such a change would not seem realistically achievable and also not in line with the balancing approach of the social market economy. As already stressed, the goal is genuine social-economic parity, not a complete reversal from market oriented social policy to social oriented market policy.

The sought-after middle way, which may not seem satisfactory at first glance, could draw inspiration from Article 14 of the same part of the TFEU. This article classifies the services of general economic interest as "the shared values of the Union." Thanks to this, they enjoy a sufficiently accommodating treatment from the EU law under the protection of competition, state aid control and the internal market rules. What if the social principles enshrined in the HSC also gained an undisputed status of the values of the Union? Whether these should be exactly the "shared values" is open to discussion. Given that the CJEU usually refers to economic freedoms of the internal market as

[208] The key section of the ETUC proposal did not aim at parity between social and market principles but a principal priority given to social ones (see its Art 3): *"Nothing in the Treaties, and in particular neither economic freedoms nor competition rules shall have priority over fundamental social rights and social progress as defined in Article 2. In case of conflict fundamental social rights shall take precedence."*

to *fundamental* freedoms or *fundamental principles* of the Treaty [209] and that the parity between the social and the economic is at stake here, it would be preferable to emphasize the values of the HSC by qualifying them as *fundamental* ones. The new wording of Article 9 TFEU should therefore be:

"In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health, as they hold the status of fundamental values of the Union."

The signal from the legislature could not be understood by the Commission and the CJEU (and all other EU bodies) in any other way than as a command for a fully equivalent treatment of market efficiency and freedoms on the one hand and social goals and rights on the other hand in all their activities. The push to get rid of the existing path dependency and to re-consider the balancing between market and social spheres would require – at least – this symbolical change of the primary law, this limited but visible strengthening of the horizontal social clause approved by the masters of the Treaty, the EU Member States. There is, of course, no guarantee that it would be sufficient. It is, however, almost certain that if it were not enough to produce the required accommodation, then the EU would have to acknowledge that it is not adjustable in any simple way and a much deeper crisis and a much more overwhelming rearrangement would be needed to produce the change.

[209] See for instance the CJEU judgments: C-122/00 *Schmidberger* (free movement of goods) EU:C:2003:333; C-281/98 *Angonese* (free movement of workers) EU:C:2000:296; C-341/05, *Laval* (services) EU:C:2007:809; C-36/02 *Omega* (goods) EU:C:2004:614 or C-265/95 *Commission v France* (goods) EU:C:1997:595.

7. CONCLUSIONS: HOW TO BRING THE EU NEARER TO SOCIAL MARKET ECONOMY

To sum up our analysis, obviously in pursuing its goal of establishing the social market economy the EU cannot simply copy the concept of economic and social policy of post-war West Germany in the time of Ludwig Erhard and Alfred Müller-Armack. Their policy was a compromise between ordoliberal, social-christian and social democratic elements, hence a specific product of social consensus in a particular EU country during the 1950s and 1960s. Moreover, it is clear that the former perception of the social needs of citizens, and their effective social rights, cannot be compared with the completely different present standard of consumption, housing, education, leisure etc. However, being a result of a mix of ideas, the social market economy concept is fortunately not embedded in any clear-cut ideology and thus remains open to modern interpretations that reflect the state of markets and of the social needs of the 21st century. At the same time, none of the current interpreters of the social market economy can deny its distinct ordoliberal pedigree, which provides the discussions concerning the concept's role in the current EU with a certain common ground and save the social market economy from degenerating into a meaningless catchword.

It is obvious that this goal does not aspire to promote socialist or social-democratic dominance of politics over the market, or any outright prevalence of social rights over the EU freedoms of movement. An open market with free competition must remain the basis of not only economic freedom, but of freedom as such. Of course, it needs to be subjected to a strict framework of rules designed to ensure that the market is not destroyed by excessive concentration of economic power or by social inequalities, which tend to result from the market economy as its externalities. A model of the social market economy will thus prefer market-sensitive instead of corporatist or protectionist measures.

It is also clear that the sought-after framework of rules will give priority to the ruled-based and not outcome-based solutions wherever possible, as it is supposed to rely on directing independent energies of responsible individuals rather than on the wisdom of a State as an omnipotent manager. This means that the key principles for the constitutional rules of the social market economy should be neither numerous, nor very detailed. A significant role in their interpretation and application will be played by an independent legal authority.

Thirdly, it is evident that due to the first two principles and also with regard to the principle of subsidiarity, enshrined both in the EU construction and in the concept of the social market economy, the principles to be adopted and enforced uniformly by the EU authorities should account for only a small part of what maintaining a functional social market economy would require in everyday practice. A "one-size-fits-all" model promoted through a single set of technocratic rules will never equip the concept of social market economy with the necessary democratic legitimacy, political support and with it the practical effectiveness.

At the same time, it needs to be stressed that while the economic constitutive and regulative principles of the ordoliberal order had been historically built into

the EU foundations, social principles of the social market economy, i.e. income policy, social inclusion, effective labour markets, correction of (social) externalities, are much less clear. The Treaty provisions or the general principles of the EU law clearly state price stability, open markets, private property, freedom of contract, individual liability and protection of competition as its traditional bases but due to the historical division of tasks and responsibilities between the EU and the Member States omits the social aspects of the social market economy. In order to move closer to the model of the social market economy the EU will have to strive for a certain rebalance and in accordance with the outlined principles receive greater powers and duties in the social field.

This need of rebalance the EU is far from being only doctrinal or political and must be addressed also in view of the achieved degree of integration. Not only economic theory but also historical examples, especially from the US, show that it is highly advisable to accompany the introduction of a single currency with a single tax income to a European budget or transferring selected agendas to the supranational level. Therefore, along with the single currency it is necessary to establish a joint income and implicit transfers as an expression of a shared desire for European solidarity and a common destiny. Introducing single currency may be beneficial for some and harmful for others, both on the international level and in the Member States. The task of the European and national political elites is to promote transfers "from winners to losers" to alleviate growing inequality and strengthen social cohesion.

Therefore, we need to ask whether and where the EU law and policies should change in order to help the EU transform its popular image of being a liberalizing, deregulating, socially insensitive entity alienated to ordinary people and enhance its potential of competitiveness and growth of financial and monetary stability by reducing social inequality and exclusion, while keeping in line with the principle of subsidiarity and the basic framework of the division of powers between the EU and the Member States. Within such a limited assignment, the attention must be paid only to those measures whose implementation at the EU level would fit the concept of the social market economy and at the same time would remedy the perceived "lack of social fairness" of the European integration.

7.1 The Proposed Measures

Several measures can be taken to help achieving the social market economy in the EU.

From a lawyer's point of view the CJEU should draw from the changes contained in the Lisbon Treaty and begin to weigh the fundamental market freedoms against the protection of social rights and welfare on a strictly equal footing. If the CJEU finds this impossible under the current wording of the Treaties, we suggest enhancing the provision of key importance for the purpose. The natural way would be to change the Horizontal Social clause, so that social values in the latter gained unquestioned status of the values of the Union. It has been specifically proposed to stress the importance of goals listed in the HSC by giving them explicitly *the status of fundamental values of the Union.*

With this the CJEU receives an unambiguous signal for a fully equivalent treatment of market freedoms and social rights. In case of their conflict, the CJEU

should stop requiring justification and only insist on the proportionality test. Of course, such proposal means an amendment to the EU primary law, which requires unanimity and ratification by all Member States. Under the circumstances created by the euro-crisis and especially by the UK's leave vote it seems that in the foreseeable future the Lisbon Treaty is bound to undergo a change, which opens a good opportunity to attempt such an amendment to the HSC.

A better wording of the horizontal social clause of TFEU can "ease the pressure" exerted by the market freedoms on social rights. However, if the EU wants to independently implement any of the social measures that traditionally form the part of the concept of social market economy it cannot rely on this tool only. Although these measures are not "carved in stone", as pointed out above, all contemporary authors mention income distribution, measures of social compensation, regulation of (social) externalities or intervention in cases of "legitimate poverty" when writing about today's social market economy. Surely, the EU already provides some funds from its budget on social cohesion, in particular through the European Social Fund, and thus tries to promote active employment policy measures; however, its main problem is in the lack of competences and resources for a greater autonomous activity.

The EU may not intervene in income distribution or in balancing the relations on labour markets in any way that would harmonize the minimum wage or the scope of trade union rights to collective action. Even if the EU promotes certain measures in the social area, they cannot restrict the Member States in defining their own principles of social security systems or significantly affect the financial equilibrium of these systems. Should the EU want to invest socially, or offer certain types of social benefits for example to job-seeking or unemployed EU-migrants or to a Member State facing sudden social problems of a certain scale (as nowadays recommended from many sides), the existing financial provisions of the TFEU, which regulate the establishment and use of the EU budget, would restrict any expansion of its size.

In the current situation the EU has no possibility to strengthen the bond between itself and the EU citizens by providing them with some complementary benefits. Also, it cannot support measures proposed under the European semesters by its own social investment of any considerable size. Therefore, it seems that if the EU wants to stabilize itself and enhance its legitimacy in the eyes of its citizens, it needs to increase its fiscal capacity. Unfortunately, despite such reasonable arguments, any new own resources for the EU can be created (according to Article 311 of TFEU) only if unanimously approved in the Council and subsequently ratified by each Member State. No matter how unlikely may be any quick and easy approval of such increase in the EU budget for social purposes, it would certainly be useful and it would correspond to the objective of the social market economy.

Besides that, the list of proposed measures cannot omit further harmonization in the social field. Socially critical authors propose to the EU a wide variety of other measures, such as the introduction of the EU-harmonized minimum wage as a percentage of the median wage in each member state or the EU-guaranteed minimum income. While it is possible that such measures could improve social well-being of some EU citizens, increase popularity of the EU and enhance labour mobility, in terms of the social market economy they would mean highly restrictive harmonization of market

freedoms and would thus reach much further than necessary in balancing the market and social elements in the policies of the EU.

On the contrary, the proposals for further harmonization of minimum social and labour standards are welcome, especially if they revive the trend of the 1990s, when the EU adopted most of the directives on health and safety at the workplace, employees' rights in cases of collective redundancies, transfer of undertakings and insolvency of employer, and even converted into binding directives the agreements reached within the European social dialogue (on parental leave, part time work, fixed-term contracts). Here, the secondary EU law should maximally utilize the limits of the powers already conferred to the EU in order to prevent the sinister race to the bottom between Member States at the expense of social welfare. We can only hope that the planned European Pillar of Social Rights shall bring the EU authorities to contemplate this kind of measures and activities.

From an economist's point of view it should be added that pressure on public budgets in the EU and EMU, which calls for fiscal austerity and larger cuts in times of economic downturns (pro-cyclicality) implemented at the expense of welfare state, economic output and employment is largely due to the institutionally asymmetric nature of integration. Measures that have been so far taken by euro countries under the pressure from the EU have not completely removed this asymmetry; often they are political compromises that bring more instability and uncertainty.

Removing these institutional imperfections would reduce the risk of crises and thus the tendencies to excessive pro-cyclicality and austerity of fiscal policies in the EU and in the euro area. For the aforementioned reasons especially the following interrelated areas need to be targeted:

1. Creating instruments (funds) of fiscal policy at the euro area level, complemented with policies of fiscal discipline at the national level;
2. Establishing a system of shared security against shocks at the European level;
3. Cutting the vicious circle of underfinanced European banks which keep buying their own government debts (doom loop);
4. Completing banking union;
5. Restructuring (decreasing) the level of public debt.

In all of the above-mentioned areas institutions and tools can be designed up to the smallest detail.

The current situation in the EU and the argument of economies of scale led us to believe that the number of ideas proposed in the first area should be transferred under the federal system of governance and funding. The clear and often cited examples are the protection of the EU's external borders, asylum policy or common defence. Still, closest to the ideal of federal financing connected with a pan-European solidarity is the frequently discussed idea of European unemployment insurance. Here, the proposal does not rely on a single European fund; instead it comes up with the idea of a system of one European-wide and many national funds interconnected in different ways (loans or transfers). Moreover, instead of a flat rate, the payments would be based on the tested

national limit for subsistence.. The latter step can be seen not only as a step to a fiscal union, but also as a symbol of pan-European solidarity.

In the second area, the frequently discussed issue concerns the need for extending the scope of the ECB, so that it is able to fulfil the role of a backstop on financial markets. In this scenario the role of ECB's counterpart is given to a newly created authority that should oversee European fiscal policy and be entitled to issue own bonds. This body guarantees the stability on the bond markets and works as a fiscal backstop in case of a crisis in the banking sector. Some proponents suggest that the part is taken by the existing ESM; however, it can be shown that there are also other options.

The third area of the institutional reform requires two sets of measures and is connected with the fifth area. The first group of measures limits the banks' credit exposure when lending money to the state. However, a sudden introduction of this rule, which by definition presses for higher responsibility of states as issuers of debt as well as improves the long-term financial health of banks, could in the early phase of adaptation cause not only another crisis at the sovereign debt markets but also decrease the overall credit exposure and bring problems to banks which could hold back economic growth. Therefore, this set of rules should be accompanied by another set of measures on the European level aimed at restructuring (reduction, partial write-off) of public debt.

Regarding the banking union, more than in the other areas the stability of the system is dependent on the quick and smooth operation of the supervisory and resolution mechanisms. (Under the current configuration of supervisory institutions and powers and the current way of addressing crises, smooth and quick operation is highly unlikely. An emergency management in a systemically important European bank can only be initiated based on quickly expressed consent of many subjects. In addition to simplifying the structure of supervisory and resolution authorities, the banking union needs its own fiscal backstop, which cannot be fully replaced by a common resolution fund. It is therefore again highly practical that this role is played by a single European fiscal policy body, be it the slightly adjusted existing ESM, or any other authority.

Completing the institutional architecture of the EU or the Eurozone as described above would restore the ability of all countries to maintain an anti-cyclical development of their fiscal policies and thus, during economic downturn, to dampen fluctuations in employment and economic activity. As we explain above, this is difficult in the current institutional arrangement precisely because of the centralized monetary policy and the lack of its usual supplements on the European level. The necessity of moderate, and during economic recession even pro-cyclical fiscal policy, which is in some member states imposed by its little functionality in the existing institutional arrangements, is one of the decisive factors leading to the breakdown of the welfare state.

This balanced architecture also usually features another element: fiscal redistribution, which together with market mechanisms helps in balancing asymmetric developments in individual Member States. The common European unemployment insurance in one of its variations is one of such mechanisms.

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The social market economy goal of Article 3(3) TEU is clearly a task for the EU institutions, law and policies as well as for all Member States and their social partners. It does not require creating a unitary EU super-state or any "social revolution". Nevertheless, it shall never be achieved if the EU simply carries on "as usual" and keeps following the path that might have been successful in the first decades of the European integration but has become rather problematic by now. Should the beneficial balance of social and market aspects of the EU be accepted as the condition *sine qua non,* then all or at least the majority of the above-suggested measures and changes need to be thoroughly discussed, planned, approved and implemented. The EU certainly needs more powers, instruments and also financial means to really make a change. Our analysis shows that including the idea of the social market economy into the Treaty was as a wise compromise which outlined socio-economic principles with the potential to guide the EU in the current fight for its survival and further in the 21st century.

ENGLISH SUMMARY

EUROPEAN UNION AS A HIGHLY COMPETITIVE SOCIAL MARKET ECONOMY. LEGAL AND ECONOMIC ANALYSIS

The authors consider creating highly competitive social market economy, as referred to in Article 3 Paragraph 3 of the Treaty on the European Union, a highly topical goal which should not become merely a dead provision of the Lisbon Treaty. They analyse its economic and legal aspects in view of the current course of the European integration. They pose the following questions: How shall we understand this goal in today's world? What sense does it make in the conditions of the 21st century globalized economy? Do the EU bodies still define and exploit this goal? And, does the EU have enough powers to pursue it? Despite their critical views of the way the EU bodies have approached this issue in the post-Lisbon era, the authors are seeking to show what internal changes in the EU could help remove the asymmetry and establish balance of the current European integration, in accordance with the basic concept of the social market economy, and make it more apt to mitigate the clashing economic pressures and social needs.

In the book, the legal view is thus complemented with the economic view. Analysis is applied to both legal regulations and decisions and soft-law and programme documents of the EU, specialized works from the field of economic and legal theory and normative economy, and, last but not least, numerous commentaries, position papers and manifestos relating to the present crisis of the EU and its social dimension. All of this is viewed through the prism of the building of a more social or directly social market EU of tomorrow.

The individual parts of the book elucidate issues relating to the genesis of possible legal and economic significance of the social market economy goal after the adoption of the Lisbon Treaty. Although the need for a more social EU may be widely perceived and embraced, it is not clear how such a need is fulfilled, or could be specifically fulfilled, by the concept of the social market economy – unless we satisfy ourselves with the explanation that it is a mere declaration which offends no-one but which would remain without any practical consequence. This approximation of the possible content of the Treaty's goal of the social market economy is dealt with in the chapter *Social Market Economy as the Goal Set by the EU Lisbon Treaty.* The subsequent chapter, called *Modern Interpretation of the Social Market Economy* focuses on the question of what significance is currently given to this concept by the European Commission and, in contrast, by modern economic theory.

The chapter called *European Court of Justice and the Social Market Economy Goal of the EU* explains the approach of EU judiciary to clashes between social values and market freedoms. Then the chapter *Economic and Monetary Union Through Lenses of the Social Market Economy* analyses, through the prism of modern understanding of the normatively defined concept of social market economics, the present and possible future parameters of economic and monetary union of the EU. The view of what the EU is specifically doing or not doing while it should in order to draw closer to the ideal of the social market economy in the sphere of further development and application of its law,

is then contained in a chapter called *Other Tools and Ways to Build the EU Social Market Economy.* The last chapter, dedicated to the resulting *Conclusions,* finally describes and summarizes what was established in the preceding analysis regarding new competencies and resources for the EU in order to build its social market economy.

ZUSAMMENFASSUNG

EUROPÄISCHE UNION ALS EINE HOCHWETTBEWERBSFÄHIGE SOZIALE MARKTWIRTSCHAFT. RECHTS- UND WIRTSCHAFTSANALYSE

Die Autoren gehen davon aus, dass das Ziel einer in hohem Maße wettbewerbsfähigen sozialen Marktwirtschaft im Sinne von Artikel 3 (3) des Vertrags über die Europäische Union eine aktuelle Bedeutung für die EU hat und sollte daher nicht eine der toten Bestimmungen des Textes des Vertrags von Lissabon bleiben. Deshalb unterzogen die Autoren dieses Ziel, in Hinblick auf den aktuellen Stand der europäischen Integration, einer gründlichen Prüfung aus der rechtlichen und der wirtschaftlichen Perspektive. Sie versuchen die Frage zu beantworten, wie es nach den aktuellen Bedingungen der europäischen Integration möglich ist, dieses Ziel zu verstehen, ob dieses Vorhaben im Hinblick auf die Globalisierung der Wirtschaft des 21. Jahrhunderts sinnvoll ist, ob die EU-Institutionen dieses Ziel irgendwie definieren und verwenden, und ob die EU für dessen Umsetzung über die erforderlichen Fähigkeiten verfügt. Obwohl die Autoren keine Kritik scheuen, wie die EU-Institutionen in der Post-Lissabon-Zeit dieses Ziel wahrgenommen haben, versuchen sie gleichzeitig zu zeigen, was in der EU verändert werden müsste, damit die europäische Integration im Einklang mit dem Grundkonzept der sozialen Marktwirtschaft immer weniger asymmetrisch und ausgeglichener werden würde und die EU damit in der Lage wäre Konflikte des wirtschaftlichen Drucks und der sozialen Bedürfnisse besser zu absorbieren.

In dem Buch wird also die Rechtssicht durch die ökonomische Sicht ergänzt. Die Analysen gelten sowohl für Rechtsvorschriften und Entscheidungen als auch für Soft- und Programmdokumente der EU, spezialisierte Arbeiten aus dem Bereich der Wirtschafts- und Rechtswissenschaften und der normativen Wirtschaftstheorie sowie nicht zuletzt für zahlreiche Kommentare, Positionspapiere und Manifeste im Zusammenhang mit der gegenwärtigen Krise der EU und ihrer sozialen Dimension. All dies wird durch das Prisma der Schaffung eines sozialeren oder direkt sozial-marktwirtschaftlichen EU von morgen betrachtet.

Die einzelnen Teile des Buches erläutern die Frage nach der Entstehung einer möglichen rechtlichen und wirtschaftlichen Bedeutung des Zieles einer sozialen Marktwirtschaft nach der Adoption des Lissabon-Vertrags. Obgleich die Notwendigkeit einer sozialeren EU weithin wahrgenommen und akzeptiert werden kann, ist es nicht klar, wie ein solches Bedürfnis durch den Begriff der sozialen Marktwirtschaft erfüllt wird oder ganz konkret erfüllt werden kann – es sei denn, wir begnügen uns mit der Erklärung, dass es eine bloße Deklaration ist, die niemanden beleidigt, die aber ohne praktische Konsequenzen bleiben würde. Diese Annäherung des möglichen Inhalts des Vertragsziels der sozialen Marktwirtschaft wird im Kapitel *Soziale Marktwirtschaft als Ziel des EU-Lissabon-Vertrags* behandelt. Das folgende Kapitel *Moderne Interpretation des Konzepts der sozialen Marktwirtschaft* konzentriert sich auf die Frage, welchen Stellenwert diese Konzeption derzeit bei der Europäischen Kommission und im Gegensatz zur modernen Wirtschaftstheorie hat.

Das Kapitel *Europäischer Gerichtshof und die soziale Marktwirtschaft – Ziel der EU* erklärt die Bemühung von EU-Justiz den Widerspruch zwischen den Sozialwerten und Marktfreiheit zu beseitigen. Das Kapitel *Wirtschafts- und Währungsunion durch das Objektiv der Sozialen Marktwirtschaft* analysiert durch das Prisma des modernen Verständnisses des normativen Begriffs der sozialen Marktwirtschaft die gegenwärtigen und möglichen zukünftigen Parameter der Wirtschafts- und Währungsunion der EU. Die Ansicht, wie die EU konkret handelt, solange sie sich dem Ideal der sozialen Marktwirtschaft im Bereich der Weiterentwicklung und Anwendung ihrer Gesetze nähern sollte, ist in dem Kapitel mit dem Namen *Werkzeuge und Wege zum Aufbau der sozialen Marktwirtschaft in der EU* enthalten. Das letzte Kapitel, das den *Schlussfolgerungen* gewidmet ist, beschreibt und formuliert zusammenfassend, was in der vorangegangenen Analyse hinsichtlich neuer Kompetenzen und Ressourcen für die EU zum Aufbau ihrer sozialen Marktwirtschaft festgestellt wurde.

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INDEX

M

N

O

P

R

S

T

U

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European Union as a Highly Competitive Social Market Economy

Legal and Economic Analysis

Václav Šmejkal
Stanislav Šaroch
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Europäische Union als eine hoch wettbewerbsfähige soziale Marktwirtschaft

Rechts- und Wirtschaftsanalyse

Die Autoren gehen davon aus, dass das Ziel einer in hohem Maße wettbewerbsfähigen sozialen Marktwirtschaft im Sinne von Artikel 3 (3) des Vertrags über die Europäische Union eine aktuelle Bedeutung für die EU hat und sollte daher nicht nur eine leere Bestimmung des Vertrags von Lissabon werden. Sie analysieren ihre wirtschaftlichen und rechtlichen Aspekte aus der Sicht des gegenwärtigen Zustandes der europäischen Integration.

Sie versuchen die Frage zu beantworten, wie kann man unter den aktuellen Bedingungen der europäischen Integration dieses Ziel zu verstehen, ob dieses Ziel im Hinblick auf die Globalisierung der Wirtschaft des 21. Jahrhunderts sinnvoll ist, ob die EU-Institutionen dieses Ziel irgendwie definieren und verwenden, und ob die EU für seine Umsetzung über erforderliche Fähigkeiten verfügt.

Obwohl die Autoren keine Kritik vermeiden, wie die EU-Institutionen in der Post-Lissabon-Zeit dieses Ziel wahrgenommen haben, versuchen sie gleichzeitig zu zeigen, was sich in der EU verändern müsste, damit die europäische Integration im Einklang mit dem Grundkonzept der sozialen Marktwirtschaft immer weniger asymmetrisch und immer mehr ausgeglichener ist und die EU in der Lage ist, Konflikte des wirtschaftlichen Drucks und der sozialen Bedürfnisse besser zu absorbieren.

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