

The Relevance of the Concept of the Social Market Economy: Concluding Observations on the Contributions in this Special Issue

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1. A comparison of the approaches to the social market economy in this Special Issue

1.1. The introduction of the term *social market economy*

The term *social market economy* was introduced by the Lisbon Treaty (Article 3 of the Treaty on European Union (TEU)). The reconciliation of social and economic values had already been mentioned as an objective for the Community/Union in preceding Treaties,¹ but *social market economy* was a new term (for the EU Treaties), combining the social and economic dimensions of European values in one and the same noun phrase. Its inclusion in the Lisbon Treaty raised expectations for a stronger emphasis on the social dimension of the internal market.

As described in the contributions by both Mulder and Gerbrandy, Janssen and Thomsin in this volume, some authors consider the introduction of *social market economy* in the Lisbon Treaty as a start for paying attention to the social dimension of European integration, at least to a greater extent than before. In contrast, other authors, such as Jacqueson and Pennings, refer to legislation and case law of the preceding decades to show that the EU had already given shape to the social dimension of its projects, a long time before the Lisbon Treaty.

However, none of these authors seem to conclude that the introduction of the concept of social market economy has made a big difference for enhancing the social dimension of the EU. There are, however, differences in the approaches towards the relationship between the social and economic dimensions of integration. These differences will be discussed below.

Mulder starts his contribution by dissecting the promise and meaning of the social market economy concept. He discusses the claims that and explanations why the expectation that the social aspects of integration would be strengthened as a result of the social market economy clause has not been fulfilled.

Firstly, the *austerity* measures imposed by the EU in order to save the Euro zone after the crisis of 2008 are pinpointed as a major reason for the EU being a key driver in actually making social rights subordinate to economic rights. Mulder, however, gives this reading an optimistic twist by remarking that the economic growth after the crisis may lead to a renewed balance of the social and economic dimensions of integration.

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1 Art. 2 of the Maastricht Treaty, for instance, provides that 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.'

Secondly, Mulder points to the criticisms on the *case law* of the Court of Justice of the European Union (CJEU) that give a pessimistic assessment of the promise of the social market economy concept. This case law is frequently interpreted as treating social rights as inferior to economic rights (e.g. the *Viking*² and *Laval*³ judgments).

Mulder, thirdly, also mentions the deregulation in the social policy domain following from free market rules, which may lead to less protection for workers and citizens at Member State level. As a fourth reason for being slightly pessimistic, he recalls that social policy is organised by the Member States at the national level, while the EU is inhibited from putting forward legislation in the social domain. This asymmetry in power means that proponents of the social dimension have to direct their demands to the national level, while proponents of (cross border) economic interests can invoke the free market rules guaranteed by the treaties ('treaties' here refers to the treaties establishing and governing the European Economic Community (EEC), the European Community (EC) and the EU).

However, Mulder points out that a more in depth analysis of the economic and social values and their relationships shows that there are differences. This also provides *opportunities* to shape the relationships between social and economic values in different ways. This conclusion is in line with the introductory article of this Special Issue, in which the development of social policy and social interests in the EU, from the establishment of the EEC in 1957, is described. I will come back to these conclusions, but first will analyse how the contributions differ in their interpretation of the balance between economic and social dimensions that are at stake in the EU.

1.2. How is the social market economy perceived?

In his contribution, Mulder sees the social dimension of European integration as a form of solidarity between citizens. As an example he refers to the right to strike, which is restricted as result of the case law of the CJEU (the *Viking* and *Laval* judgments). Mulder refers to literature in which the 'essence of the right to strike is [seen as] to shield workers from the power that capital owners can exercise as holders of capital', which is different from a social right as a market logic, when it fulfills a market enabling function by reducing transaction costs in wage setting.⁴

Labour lawyers see, however, the essence of the right to strike as *always* embedded in the market logic, as it is intended to give negotiation power to trade unions in wage-setting and other employment conditions. It could then be argued that it is the market logic itself in which, for instance, competition law would not prohibit striking for better wages, as collective bargaining and collective labour agreements are immune from competition law (the *Albany* judgment).⁵ However, at the same time it might be argued that it is precisely the *Albany* judgment that shows that protection is necessary *because* of the different logics.

The CJEU itself has hardly used the term social market economy (explicitly) in its judgments and thus leaves it open which approach it follows. Still, in the *AGET Iraklis* judgment⁶ it considers that as is apparent from Article 3(3) of the TEU, the objective of the EU is not only to establish an internal market, but also to strive for a sustainable development of Europe, which is based, in particular, on a highly competitive social market economy aiming at full employment and social progress, and it is to promote, *inter alia*, social protection. The Court then refers to the *Viking* judgment to support this argument.⁷

This is remarkable, as *Viking* has been severely criticised for its serious restriction of fundamental social rights. Secondly, in the latter judgment the term social market economy is not used, but instead it contains a reference to Article 2 of the Treaty Establishing the European Community (EC), the predecessor of Article 3 of the TFEU on the social market economy. Article 2 was still in force at the time of delivering the *Viking*

2 Case C-438/05, *Viking*, ECLI:EU:C:2007:772.

3 Case C-341/05, *Laval*, ECLI:EU:C:2007:809.

4 K Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (2001); A. Ebner, 'Transnational Markets and the Polanyi Problem', in C. Joerges & J. Falke (eds.), *Globalisation and the Potential of Law in Transnational Markets* (2011), p. 28.

5 Case C-67/96, *Albany*, ECLI:EU:C:1999:430; see also Case C-115/97 and 117/97, *Brentjens*, ECLI:EU:C:1999:434; Case C-219/97, *Drijvende Bokken*, ECLI:EU:C:1999:437.

6 Case C-201/15, *AGET Iraklis*, ECLI:EU:C:2016:972, para. 76.

7 *Ibid.*, para. 78.

judgment. Apparently, the CJEU finds its considerations on the relevance of the fundamental rights more important than the final outcome of the balance of the social and economic rights and considers the concept of social market economy as already present in the preceding Treaties.

In their contribution Barnard and De Vries examine the situation of persons making use of the right to free movement who are confronted by barriers of an economic nature restricting this right. They compare the rights of workers (in which an economic interest is (often) involved for the receiving Member State) and that of economically inactive persons.

This difference in approach – is it ‘social’ that workers in the host State are not confronted by migration, or is it ‘social’ that persons have the right to move freely and are treated equally? – shows that the perception of what is ‘social’ depends on choosing a certain perspective. The ‘social’ dimension can both be found in the position of the host State, to be protected (in order to restrict extra costs for social benefits) and in the position that citizens of the sending State must have the possibility to improve their situation by making use of the right to free movement. Not one ‘true’ answer is possible, it seems, all interests involved in a particular dilemma will have to be taken into account.

Of course, it must be pointed out that the traditional view is that preventing a decline in social protection has been the basic principle underlying the rules on the free movement of workers. For that reason, equal treatment is required (Articles 48 of the EEC, 39 of the EC and 45 of the TFEU successively): if competition is given room in the area of employment conditions, a race to the bottom would take place because of a continuous contest to become cheaper than others (sometimes called *social dumping*). On the basis of these arguments it has to be concluded that the response to Member States that do not want equal treatment in posting since they want to improve their economy is that their economic activities must not lead to deterioration of social protection elsewhere. Equal treatment in the working conditions in the State of employment is essential. If such equal treatment is ensured, free movement is a value that is both essential to the EU and is a social value in itself, since it enables persons to improve their situation and to explore their capacities.

Following this line of reasoning one has to conclude that if social systems of Member States are threatened by free movement and equal treatment rights, these systems need to be made more robust. An example might be found in the financing of health care. If a system of health care is organised in a way that it is difficult to send invoices to persons (including non-nationals) who make use of it, the system is more vulnerable in comparison to a system based on an insurance model which can invoice the visiting patients. The latter system may see free movement as a business model, the former system may see this as a threat.

This example also shows that, although Member States have retained the freedom to organise their own social systems, they must not only take EU law into account, but also consider what is the best organisation of their system in reaction to EU developments in order to prevent undesired effects. This may mean that they have to change their system, even if they would rather not.

This analysis shows that the confrontation of the economic and the social has many dimensions. It is not simply a battle of two different rights, but strategies are necessary – in particular at the national level – in order to reconcile the two.

The Posting of Workers Directive⁸ shows that the relationship between social and economic interests is not simply a battle between two rights, as is discussed by Jacqueson and Pennings. The social rights of posted workers, in particular the wages, were restricted to the minimum level of the host State in order to facilitate the free movement of services. Where the posted workers themselves might not always object to this, as they might be better off than staying at home, workers in the host State expressed their fear of social dumping and losing their jobs. In 2018 a Directive was adopted to revise the Posting of Workers Directive that will require in principle equal pay of posted and national workers. This is in line with the argument mentioned in the previous paragraph, that in social affairs equal treatment in the host State is essential, and a different approach is a dead-end street. Also here the effect of EU law means that although Member States are not obliged to change their system, in order to protect themselves against developments made

8 Directive 96/71/EC, [1997] OJ L 18.

possible by EU law, they may have to do so. After all, the Directive still allows imposing wage rules of the host State according to the rules of the Directive, i.e. statutory law, collective labour agreements declared universally binding or a declaration that the collective labour agreement is generally binding. If a national system has no such rules, it cannot protect itself against wage competition.

As a result of the revised Posting of Workers Directive equal treatment is also required in posting situations. This is an appropriate response to the presumption that wage competition can only lead to negative effects. Still, it is important to also mention that the problems related to free movement of persons and services, which are already old freedoms in the treaties, result from the large inequalities between the Member States that became much greater after the accession of 10 Member States in 2004. The posting rules have been used in order to benefit from the wage differences between the Member States and these wage differences are a major, if not the only, reason for posting. If the wage difference is no longer a competitive factor due to the equal treatment rules, the opportunity of making business by posting may disappear.

The inequalities between countries sometimes also have the result that persons move from the low wage countries to countries where better perspectives are expected. These inequalities, and the perceived dangers for social systems of the host countries, have had an impact on the case law of the CJEU on free movement of persons (see Jacqueson and Pennings in this issue).

A second example of where social values are confronted by economic interests mentioned by Barnard and De Vries is that of the *gig economy*. New technologies are making work increasingly precarious. The gig economy is a phenomenon that can have cross border effects, it is difficult for Member States to organise social protection and in some areas EU law actually prohibits interference (e.g. if platform workers are seen as real self-employed, they cannot make price arrangements or a collective labour agreement). Therefore, this is a complicated issue. However, before it can be concluded that EU law does not give the room to protect platform workers, it is important to identify *which* social protection is desirable. Only after that is done, is it possible to answer the question what the role of the EU can be.

Several measures are possible to improve their position. Most of these measures will not have problems with EU law, but it is exactly at the EU level where it will not be easy to reach consensus on the measures. For instance, one could think of compulsory insurance for sickness, disability and old age pensions of all platform workers, applicability of working times and health and safety rules, and an hourly rate that is no lower than the minimum wage level. The problem lies in technicalities (how define the platform workers, how define how many hours s/he is working, who pays for the insurances? etc.), but not in EU law.

A third example of the social dimension concerns social return as a condition of public procurement law. Requiring social conditions in procurement law has not been without problems (see the European Commission's opposition to this in the *Max Havelaar*⁹ and *Beentjes*¹⁰ judgments). However, after pressure by the European Parliament the award criteria in procurement procedures were adjusted to allow to pursue social and environmental objectives. State aid regulation has an exception for employment for workers with disabilities and disadvantaged workers. In this way social objectives are included in economic instruments.

More generally, Gerbrandy, Janssen and Thomsin discuss which tensions can occur when authorities aim to pursue social objectives within the remit of public economic law. They argue that the economic provisions have important economic objectives that cannot be neglected. They have to ensure fair competition, prevent (unjustified) state aid and that procurement procedures favour particular parties. Still these instruments have a remarkably different impact on the social dimension. In competition law full immunity is given to collective labour agreements, i.e. for the improvement of working conditions reached on the basis of collective bargaining of both sides of industry. In the other two areas it is more complicated to connect social objectives to economic ones. However, the authors argue that there is some room for interpretation of the economic objectives and also in enforcement of the instruments, which indeed appears from the examples given so far. The room for social objectives in these areas is not absolute, but depends on interpretation and

9 Case C-368/10, *Max Havelaar*, ECLI: EU:C:2012:284.

10 Case 31/87, *Beentjes*, ECLI:EU:C:1988:422. This judgment was given under an earlier public procurement directive, Directive 71/305/EEC [1971] OJ L 185/5.

the way of enforcement. The authors are rather optimistic when it comes to a reconciliation of economic and social values.

1.3. The weighing of social and economic interests in the case law

In the judgments of the CJEU that are frequently mentioned as proof of the failure of the social market economy, the social rights 'lost' from the economic ones in the balancing of economic and social rights.

This weighing of rights is not unproblematic. There are three main aspects to be mentioned that are relevant for assessment of this weighing.

The first aspect is that the economic rights are taken as the starting point in this procedure. For this there is an easy explanation: the economic rights are ensured in the Treaty (currently the TFEU), whereas social rights are not laid down in this Treaty, but have to be derived from the Charter of Fundamental Rights (the Charter)¹¹ or the fundamental principles of the legal order. The CJEU has also derived economic rights from the Charter, i.e. Article 16, that ensures the right to pursue an enterprise. It has used this to restrict particular interpretations of adopted social rights directives (the *Alemo-Herron* judgment¹², for instance). This is remarkable, as the balance between social and economic rights was already made when the Directive was adopted; therefore it is unclear why it was necessary to reinforce the weight of the economic rights.

A second aspect of the balancing is that the CJEU does not refer, when it mentions the fundamental labour rights laid down in International Labour Organization conventions or Council of Europe treaties, to the interpretation of these rights by the supervisory bodies of these institutions. Although the Court may have good reasons not to be able follow these in the EU framework, it would have been more convincing to spell out why the interpretations connected to these fundamental rights cannot be followed. Instead, it gives a broad test for the weighing of the economic and social rights, and this can have a large impact in other cases before national courts.

A third aspect is – as pointed out by Mulder and in the introductory article – that in the balancing of social and economic rights, the CJEU came to the conclusion that the disputed social legislation or activity at stake *excluded* the exercise of the economic right *fully* or almost fully. If we assume that this conclusion is correct, we can conclude that this is not a complicated balancing procedure. The Court could limit itself to concluding that the economic right involved was superseded by the social right. In other words, the economic right had become obsolete and therefore this infringement of the economic right was not allowed.

The considerations *in abstracto* of the CJEU on balancing the economic and social rights by the Court mean that a social right can lose from an economic right or even principle, such as the right to establish an enterprise. However, in the concrete decisions the social right only lost against the economic right since the former made, in the view of the Court, the economic right completely meaningless.

This makes it unclear how to assess this case law. Does the social dimension have more room in the internal market than is often thought? Are only 'the bad cases' brought before the CJEU? How will the balancing work out in cases where a real weighing of the interests has to take place?

2. What is the relevance of the 'social market economy' concept?

Mulder points, in his contribution, to the time of establishment of the EEC, when the national social sphere was largely insulated from the supranational market order. In other words, the social and the market were decoupled. There were very few social provisions, but these were primarily instigated by economic considerations. In this period national markets remained separate. Subsequently, however, the markets gradually opened and internal market rules infiltrated the social sphere.

Mulder sees a development in the case law of the CJEU, where it still respects insulation in *Albany*, but in later case law does not accept insulation and instead starts a balancing process.

11 COM(2017) 251, OJ 2017, L 113/56; Article 6(1) recognises the rights, freedoms and principles set out in the Community Charter and makes its provisions legally binding.

12 Case C-426/11, *Alemo Herron*, ECLI:EU:C:2013:521.

In this issue we have seen a different explanation, i.e. that the difference between *Albany* and *Laval* is not a matter of development but lies in the nature of the economic rights. Whereas in *Albany* no economic rights laid down in the Treaty (EC Treaty, but this is also true for the TFEU) were involved (the applicants were not infringed in their right to free competition), a fundamental right was involved in *Laval*.

So if there are economic rights involved, social law and policy of Member States may be assessed as measures that affect access to that economic freedom and a balancing process is followed.

In Mulder's view the social context can be seen as something ancillary to wider economic objectives. Its purpose is to include labour in the market; social policy is meant to assist people into becoming successful market participants.

This analysis is true from a very broad perspective, i.e. that for maintaining trust of the population in the EU institutions also social policy and social protection is required. However, social policy is not limited to shaping persons in successful market participants only, but also provides protection against economic developments, against particular decisions of employers, against discrimination, against unfair competition (social dumping).

The concept of social market economy is not decisive to solve conflicts between economic and social rights. However, the CJEU uses it as an argument to involve labour fundamental rights in its interpretation of EU law. The fact that balancing of social and economic rights in the actual decisions meant the 'loss' of the social right does not mean that there is not a real social market economy.

The relevance of this analysis is that it puts emphasis exactly on the possibilities to involve and defend social rights in the internal market and does not adopt a Calimero position,¹³ in which social rights always lose from economic rights. The relationship between social and economic rights and principles is not a fixed one, as we can learn from the Posting of Workers Directive developments. This should be a good basis for continuing research on the interaction of economic and social rights. ■

13 For those who are not familiar with this, this was an Italian-Japanese animation about a charming, anthropomorphised chicken, that remarked, in all unfortunate situations it found itself: 'They are big and I is (sic) little, and that is not honest, oh no'.