The Architecture of a 'Social Market Economy'

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Abstract: This paper traces the evolution of the nature of the EU's internal market, from its origin in the 1950s to its current redesign in the aftermath of the Euro-crisis. It suggests that the relationship between 'the market' and 'the social' has shifted multiple times throughout the Union's history. In the first stage, social policy was meant to complement the functioning of the internal market, and tease out potential economic asymmetries in the market. In the second stage, social policy became geared not towards levelling out conditions of competition in the market, but to explicitly protect the capacity of Member States to impose their understanding of 'the social' on the market. Finally, in the last decade, social policy on the Union level has started to move in the exact opposite direction. The EU's institutions now understand social policy diversity throughout the EU no longer as a necessary complement for, but rather as inimical to, a functioning market in the EU. In doing so, however, they overlook a number of institutional asymmetries, normative biases and legal implications, which mean that any attempt to create a 'social market economy' – as Article 3 (3) TEU commits the EU to do – is bound to be distinctively light on 'social' and heavy on 'market'.

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1. THE ARCHITECTURE OF THE MARKET: ECONOMICS, SOCIAL POLICIES AND POLITICS

The fact that most textbooks on the EU's internal market devote only one chapter to social policy is indicative of the nature of the Union's market. While most theorists – coming from different ideological traditions – suggest that 'the market' and 'the social' are conceptually and inextricably linked, and mutually bounded by the political sphere; in the Union these elements that 'make' the market are structurally separated. The integration process was meant to expand the size of the (economic) cake, and the Member States were meant to redistribute that cake internally, after all: one integrated market and many different national social policies. In this way, the national political establishment would ensure that the functioning of the internal market remained sensitive to the social demands of the electorate (section 1). The initial architecture of the internal market indeed sought to preserve this balance. The purpose of Union social policy was to even out potential economic asymmetries in the market, leaving Member States and their political systems with the task of socially embedding the market.

In the early 90s, however, this perspective changed. Partially in response to the Court's case law on free movement, and partially in response to the potentially destabilising effects of mutual recognition and regulatory competition, Union social policy became geared not towards levelling out conditions of competition in the market, but to explicitly protect the capacity of Member States to impose their understanding of 'the social' on the market. This second wave of Union social policy is typified by minimum harmonisation (thus protecting the capacity of Member States to sustain commitments to social protection) and it sought, essentially, to re-articulate a symmetry between 'the market' and 'the social'.

More recently, however, social policy on the Union level has started to move in the exact opposite direction. Partially as a result of the Court's case law, and partially in response to the Euro-crisis, social policy diversity throughout the EU is no longer seen as a necessary complement for, but rather as inimical to, a functioning market in the EU. In the understanding of the EU's institutions, the proper functioning of the internal market and the monetary project require social policy convergence in the EU – which is facilitated through a host of new mechanisms on the European level (section 2). This third wave of EU social policy, however, overlooks a number of structural problems in the EU's institutional set-up. That set-up is, bluntly put, not sufficiently sophisticated to take up the challenge of normatively embedding the market by making it sensitive to its social environment (section 3). In such a set-up, any attempt to create a 'social market economy' – as the Treaty commits the institutions to – is bound to be distinctively light on 'social' and heavy on 'market'. Until the EU takes account of the subtle but meaningful structural asymmetries and (resulting) normative

biases in the process of integration, it can never truly create a social market economy.

A 'market' is a more sophisticated institution than many advocates and detractors of the idea of capitalism suggest. It is not simply a place dictated by the laws of capitalism, competitiveness and efficiency. A market is an institution that situates economic interactions within a specific social and societal context. Most theories on the architecture of the marketplace suggest that its form, shape and rules require a combination between economic logic, social policies, and political choices. Markets that are not socially embedded in this form are structurally and inherently unstable. This social embeddedness of the market – in the sense that economic interactions, social policies and political institutions are inextricably linked in its establishment, functioning and maintenance – can be explained from different perspectives. The bottom line, however, remains the same: political control over the development of the market is the mechanism for the elaboration of the normative boundaries within which economic interaction is to operate.[1]

As Streeck summarily puts it, 'society is not a *product* of competitive contracting but its *precondition*'.[2] In other words, a capitalist market is not the natural state of the world.[3] It is the citizenry, albeit implicitly and indirectly, that decides on the existence, nature, form and structure of the market. The central idea here is that the way in which the market functions is, and should be, a *political* question. It is part of the wider political question that structures the way our society functions: in which type of society do we want to live together? On this view, the purpose of the political sphere is to shape the market. Streeck has traced this process throughout the 20th century, and suggests that it 'entailed the organized working classes accepting capitalist markets and property rights in exchange for political democracy, which enabled them to achieve social security and a steadily rising standard of living'.[4] To put it as bluntly as possible, this understanding of the interaction between politics, capitalism and social policies suggests that the latter makes capitalism acceptable. In the absence of political control over the boundaries of competitive contracting capitalism would either destroy society[5] (think of commodification, exploitation and pressures on the individual's dignity and autonomy) or simply be rejected – whether through political means or revolution. Politics, on this view, seeks to stabilise the market by embedding its functioning within democratically established boundaries of social acceptance.[6] Social policies (widely construed) are the traditional mechanisms for this exercise, whether by imposing limits to the freedom of competitive

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[1] Of course criminal law, property law, contract law and tort law can be understood in similar ways.
[2] W. Streeck, 'Taking Capitalism Seriously: towards an institutionalist approach to contemporary political economy' (2011) 9 *Socioeconomic Review* 154.
[3] See for a legal perspective on this question, S. Deakin, 'Conceptions of the Market in Labour Law' in: A. Numhauser-Henning & M. Ronnmar (eds.), *Normative Patterns and Legal Developments in the Social Dimension of the EU* (Hart 2013) 156.
[4] W. Streeck, 'The Crises of Democratic Capitalism' (2011) 71 *NLR* 10.
[5] M. Höpner and A. Schäfer, 'Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting' (2012) 66 *International Organisation* 429.
[6] E. Wood, *The Origin of Capitalism* (Verso 2002).

contracting, regulating the conditions for employment, by ensuring co-determination in the workplace, rights to industrial citizenship, and structures of social security and social assistance.

On this view, which scholars such as Durkheim and Hyman have defended from different perspectives, social policies serve as a return on the individuals' submission to the authority of the marketplace in deciding their station in life and their conditions of life.[7] Whether couched in terms of solidarity or citizenship, the argument here is that capitalism submits us all to the meritocratic logic of the market. This submission flies in the face of the civic logic that all citizens are equal. Which citizen receives the material resources to become 'more equal' than others depends, in a capitalist system, on their relative skills, their luck, their place of birth. Social policies and political institutions, then, are seen to ensure the general trade-off that lies at the heart of our modern societies: economic logic is allowed to dictate our conditions of life but it must offer a return upon our submission.[8] In this fashion, politics ensures the 're-embedding [of] the market economy to make it compatible with a liveable life.'[9]

A market that is not socially embedded is structurally unstable. Scholars such as Polanyi and Streeck have long highlighted that capitalism is based on a fundamental paradox. It is intrinsically self-destructive, as it will try to consume all environmental and societal factors upon which its stability and survival are dependent: trust between citizens, individual freedom, the environment, a sufficiently wide distribution of expendable income across the citizenry, a functioning infrastructure, and vast pools of educated workers. The logic here is that the capitalist maxims of return upon investment, expansion, and efficiency are insufficiently prescient or sensitive to allow for policies that ensure for its long-term and sustained systemic reproduction. A market that is free from political and social constraints is, in simple terms, deeply destabilising of society and capitalism itself.

The *degree* to which economic transactions should be limited in order to take account of other interests, finally, is open to contestation. Whether social policies should be limited to making the economic transaction more efficient (as neo-liberals would have it), or extended to produce a more ambitious redistributive agenda, then, is a *political* question.[10] The point made here, however, is *not* normative: it is not to emphasise that a particular combination between these three forces makes for the 'best' market, or that any of these prisms is the most convincing. The point made here is structural: a commitment to a stable society and market requires political *control* over the limits of market interaction. Whether

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[7] R. Hyman, *Industrial Relations: A Marxist Introduction* (MacMillan 1975) 22-23.
[8] See also C. Offe, 'The European Model of 'Social' Capitalism: Can it Survive European Integration?', in M. Miller (ed.) *Worlds of Capitalism* (Routledge 2005) 158.
[9] Streeck, *supra* n 3, 158.
[10] See, generally, F. De Witte, 'EU Law, Politics and the Social Question' (2013) 14 *GLJ* 581. See also S. Lukes, 'Invasions of the Market' in M. Miller (ed), *Worlds of Capitalism* (Routledge 2005) 299.

that control is exercised or not is another question, and one that is up to the electorate. The architecture of a market requires, in other words, sophisticated political structures and social institutions to legitimise its nature, scope and (the absence of) limits.

The importance of this structural point is best highlighted by looking at one of its opponents. In the 1930s already, Hayek had appreciated that the most effective way of *preventing* the imposition of limits to competitive contracting, and preventing redistributive policies from interfering in the market, was to structurally separate the 'market' from politics. One of the most efficient ways of doing this, in Hayek's view, was by way of inter-national cooperation, which would structurally separate economic control and spaces of movement (on the supranational level) and political authority (on the national level).

> [C]ertain kinds of coercion require the joint and coordinated use of different powers or the employment of several means, and, if these means are in separate hands, nobody can exercise those kinds of coercion. The most familiar illustration is provided by many kinds of economic control which can be effective only if the authority exercising them can also control the movement of men and goods across the frontiers of its territory. If it lacks that power, though it has the power to control internal events, it cannot pursue policies which require the joint use of both.[11]

What Hayek demonstrates here is that the fusion between the market and political institutions is vital to keep open the potential to control the scope, nature, functioning and externalities in conformity with the desires of the electorate. Once this fusion is challenged, after all, certain types of (more ambitious redistributive policies) are simply impossible to implement. A market, in other words, is only normatively neutral or agnostic as long as it remains within the (potential) control of political institutions.

The architecture of the *internal* and *common* market in the EU was seemingly at odds with this logic. The creation, in 1957, of the internal market, after all, was neither accompanied by the construction of democratic supranational political institutions, nor by a substantive supranational social policy. Instead, the integration process was set up using the logic of 'separate tracks' – in which economic policy would be harmonised centrally to create new transnational modes of economic transaction, while such transactions would be embedded by way of social policy that remained within the domain of the Member States.[12] The Ohlin and Spaak Reports, adopted prior to the conclusion of the Treaty of Rome, suggested that this functional separation would not endanger the capacity of political institutions to socially embed the functioning of the internal market *on the*

[11] F. Von Hayek, *The Constitution of Liberty* (University of Chicago Press 1978) 184-5.
[12] See for a detailed overview, S. Giubboni, *Social Rights and Market Freedom in the European Constitution* (CUP 2006) 7-55.

national level,[13] especially 'when account is taken of the strength of the trade union movement in European countries and of the sympathy of European governments for social aspirations'.[14] The origins of the integration process suggest that the construction of the Union's market was not so much ordo-liberal in orientation (which sought to structurally separate 'the political' from 'the economic'),[15] but rather functionally tiered. The purpose was not to liberate the economy from political constraints, but rather to support and insulate the capacity to constrain the economy on the national level, where sufficiently strong political structures existed. In other words, the only purpose of the internal market was to generate more wealth. The limits, nature and scope of the market, as well as redistributive arrangements, were left to be decided on the national level. Equally, in 1957 it was not considered to be problematic that Member States' social policies might differ. In fact, the economic assumptions that underlay the structure of the internal market suggested that this potential disparity would *contribute* to the automatic levelling-up of the levels of social protection throughout Europe and would lead to gradual convergence of the Member States' social policies.[16] In other words, the lack (then and now) of a sufficiently democratic institutional structure on the European level and of a fully-fledged supranational social policy that complements the internal market was not considered problematic.

2. THE THREE WAVES OF UNION SOCIAL POLICY

While in 1956 the Union's 'social policy' chapter was limited to a commitment to equal pay between men and women (now Article 157 TFEU) and a provision on holiday pay (now Article 158 TFEU); in 2015 the list is simultaneously more ambitious and more incoherent. The Union has legislated extensively in areas of non-discrimination in the workplace, health & safety, working time, workers' participation rights and workers' rights in the event of company restructuring. At the same time, core elements of social policy such as social security contributions, minimum pay, industrial citizenship, and more explicitly redistributive policies such as unemployment protection, housing, living conditions, or education are excluded altogether from the remit of the Union's legislative competences.

This strange evolution of the Union's social policy can best be understood as a result of the evolution of the Union's internal market. This section suggests that

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[13] Ibid, 54-56; and C. Barnard and S. Deakin, 'Market Access and Regulatory Competition' in C. Barnard and J. Scott (eds.) *The Law of the Single Market: Unpacking the Premises* (Hart 2002).
[14] Report by a Group of ILO Experts, 'Social Aspects of European Economic Co-operation' (Geneva, International Labour Office, 1956), para. 210.
[15] See for an excellent historical account D. Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013) 19 *ELJ* 303.
[16] Giubboni, *supra* n 13, 42-3.

three different periods can be distinguished in that process –each of which requires a different institutional architecture. In the first decades of integration social policy was only considered necessary to prevent specific circumstances of unfair competition on the internal market. Social policy in the EU, bluntly put, served an economic purpose. The redistributive or normative elements of social policy were to be decided and implemented on the national level. The second phase, which started roughly upon the completion of the internal market in 1992, understands the objective of social policy coordination on the European level very differently. The legal, economic and technological changes that had occurred since the start of the integration process raised the prospects of regulatory competition and dynamics of mutual recognition that threatened the political capacity of Member States to impose their social policy norms. In response, social policy on the EU level became primarily concerned not with standard-setting across the EU, but with preventing such destabilising dynamics and insulating the capacity of political bodies on the national level to normatively embed the market. The third phase has started since the outbreak of the Euro-crisis. Increasingly, Union institutions are pushing towards social policy coordination and even harmonisation in the EU. The purpose of EU social policy here, again, is very different from the previous two phases. Social policy is now considered as an auxiliary instrument for the stabilisation of monetary and economic policy across the Eurozone. Diversity and national autonomy, on this view, are problematic. Through instruments such as the excessive deficit procedure, the country-specific recommendations within the context of the European semester, and (most explicitly) the memorandums of understanding (MoU), the EU is seeking convergence of social policies across the EU. Logically, this third phase comes with significant constraints on the capacity of representative institutions on the national level to resist the specific normative orientation of the 'new' internal market.

A. FIRST PHASE: SOCIAL POLICY AS ECONOMIC FAIRNESS

In this first phase, as highlighted by Streeck, the purpose of the Union's social policy was to complement the creation of an efficient and functioning market, and not to 'embed' the market and ensure that market interactions conformed to a specific vision of justice.[17] At the same time, Streeck fails to mention that this (limited and economic) objective should not be seen as a commitment to an unregulated or highly liberalised market. Rather, the absence of a distributive understanding of social policy highlights that such task was left to the Member States, which remained completely free to impose more or less ambitious social policy commitments within their territories.

[17] W. Streeck, 'From Market-making to State Building? Reflections on the Political Economy of European Social Policy' in S. Leibfried and P. Pierson (eds.) *European Social Policy: Between Fragmentation and Integration* (Brookings 1995) 399.

The most obvious provision on social policy that was included in the Treaty of Rome saw to the commitment to equal pay between men and women. The context for the inclusion of this provision tells us a lot about the initial approach taken by the Union towards social policy. In 1957, France had the most ambitious legislation in respect of equal pay between men and women. The wage differentials between men and women in France (around 7%) were much lower than in Italy or the Netherlands (between 20-40%).[18] In consequence, certain industries in France that mainly employed women would be much less competitive than their competitors in Italy or the Netherlands, which could decrease their labour costs by underpaying their female employees. As the Spaak report had already highlighted, this constituted a *specific* distortion of the market that needed to be remedied.[19] *General* differences between national legislation and levels of social protection, on this view, were unproblematic: by and large they reflected rates of productivity, and would automatically converge due to the development of the internal market. Specific or sectoral distortions, however, had the potential to lead to unfair economic competition on the market and thereby frustrate the process of gradual and automatic levelling-up of social conditions throughout the EU.[20]

The first wave of EU legislative action in the social policy domain reflected this vision of social policies as serving primarily to prevent specific distortions that endangered fair competition on the market. In the late 60s/early 70s, the deteriorating economic situation and lack of protective national trade barriers had not only led to new opportunities on the internal market but also caused problems for many businesses. In response, the Union harmonised the conditions for business restructuring in the EU. As such, directives were enacted harmonising worker's rights in case of collective redundancies,[21] transfer of undertaking[22] or the insolvency of the employer.[23] These measures – of course – protected the rights of individual workers. At the same time, and arguably more importantly, they sought to ensure 'fair competition' *between* companies, so that the 'casualties' of the internal market would not be dictated by *specific* differences between regulatory regimes.[24] In the negotiations on the Directive on Collective Redundancies, for example, it was argued that disparity in national regulation would:

> create disparities in conditions of competition which are likely to influence the decisions by enterprises, whether national or multinational, on the

[18] C. Barnard, *EU Employment Law* (OUP 2013) 36.
[19] Ibid, 6.
[20] Giubboni, *supra* n 13, 233.
[21] Directive 75/129/EEC on collective redundancies, amended by Council Directive 92/56/EEC, consolidated by Council Directive 98/59/EC; and Council Directive 80/987/EEC on acquired rights, amended by Council Directive 2002/74/EC.
[22] Directive 77/187/EEC on transfers of undertakings, amended by Council Directive 98/50/EC, consolidated by Council Directive 2001/23/EC.
[23] Council Directive 80/987/EEC on acquired rights, amended by Council Directive 2002/74/EC.
[24] G. Mancini, 'Labour Law and Community Law' (1985) 20 *The Irish Jurist*, 2 and 12. See also B. Wedderburn, *Labour Law and Freedom* (Lawrence & Wishart 1995) 388.

> distribution of posts they have to be filled. It must for example be expected that any firm intending to reorganise itself by a plan including the partial or total closedown of certain departments, will decide which departments to close down on the basis, at least in part, of the level of protection offered to the workers.[25]

In other words, the first social policy measures adopted by the EU were aimed at preventing an uneven or skewed distribution of economic hardship throughout the EU, rather than preventing hardship altogether. The strange logic can be partially explained by the rigid internal market legal basis, upon which the European measures had to be based for lack of legislative competences in the social sphere. More importantly, however, it reflects that, for a long time, the role of EU social policy was perceived to be to prevent *specific* distortions on the market. The more explicitly normative rules regulating the nature, context or balance of power in interactions on the market, at the same time, remained within the domain of the Member States, where robust political institutions existed that were sensitive to the social needs and preferences of its electorates.

B. SECOND PHASE: SOCIAL POLICY AS POLITICAL INSULATION

In the early 90s, however, this paradigm changed. The completion of the internal market, and legal changes in its structure made a new problem increasingly visible. Where the 'separate track' approach taken by the Union in 1957 suggested that differences in social policy regulation did not matter, as they would *reflect* relative productivity; in the 90s it became clear that differences in social policy regulation in fact *affected* the Member States' relative competitiveness. The internal market, it appeared, not only put companies in competition with each other, but also Member States (and their regulatory systems). In consequence, it was feared that Member States might be unwilling or unable to impose significant social costs on economic actors. It is impossible to pinpoint the precise cause for these changes. Scholars typically suggest that the Court's case law, in particular in embracing the principle of mutual recognition (or 'home state rule'), economic developments (and the growing importance of services and direct investment), and technological progress (including the increased mobility of capital and the virtual nature of many market interactions) combined to alter the nature of the internal market. The eastern enlargement of the Union, it seems, served to highlight these tensions and make their political implications visible.[26] In short, the standard narrative suggests that mutual recognition and the increased mobility of 'capital' put Member States in competition with each other to attract capital – which is crucial in generating domestic employment and reducing the welfare burden. One of the most effective

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[25] See text in *European Industrial Relations Review*, No. 1 (January 1974) 18, and B. Bercusson, *European Labour Law* (CUP 2009)114.
[26] S. Schmidt, 'When Efficiency Results in Redistribution: The Conflict over the Single Services Market' (2009) 32 *West European Politics* 853.

methods of attracting capital (but surely not the only one)[27] is the reduction of labour costs. After all, this makes any product made cheaper, and therefore more competitive on the internal market. Enter the spectre of regulatory competition. This term suggests that Member States start competing with each other in lowering their regulatory standards, to attract (or prevent exit of) capital. This process, it is suggested, has two victims. First, the worker, whose interests are made subservient to the interests of capital. Secondly, it is the political process that suffers. Regulatory competition suggests that certain political choices, and in particular those that impose too high a burden on 'capital', are off the table.[28] In other words, the flaw in the 'separate track' approach was now exposed: by structurally separating the market from its socialisation through political institutions, the development of the internal market was biased in favour of a particularly unregulated view of the marketplace, and limited the capacity of political actors to impose their alternative visions of the balance between economic pressures and social protection.

The Union's social policy, in this second period, is explicitly aimed at preventing such a threat. Its objective is no longer to harmonise rules across the EU to prevent unfair competition. Rather, its objective is to insulate Member States (and their political actors) from the pressures generated by the functioning of the internal market, and explicitly allow them to impose whatever social policy they consider appropriate. In this second phase, the attention of the Union legislator was focused on new regulatory techniques. Full harmonisation of all labour standards proved too difficult politically, due to the divergence of national legal techniques and political incentives; and economically undesirable, given that certain labour rights – such as minimum wages – reflect, and are therefore inextricably tied to, national (or sectoral) rates of productivity.[29] Moreover, full harmonisation was not *necessary*. The objective of this second wave of labour legislation was, after all, not to protect workers' rights *per se*, but to insulate the political authority on the national level and protect the capacity of the Member States to do so, in accordance with their own national preferences. Rather than prescribing the standard of worker protection to be implemented throughout Europe, then, new legal techniques were introduced, including minimum harmonisation, partial harmonisation or framework directives which left policy discretion to the social partners.[30] Social policy intervention on the European level became squarely aimed at establishing 'minimum standards below which nobody

[27] Political stability, quality of education, judicial systems, infrastructure and geographical location are other potential factors.
[28] Giubboni, *supra* n 13, 82, and F. Scharpf, 'The asymmetry of European integration, or why the EU cannot be a 'social market economy', 8 *Socio-economic Review* (2010) 222-4.
[29] See also S. Deakin and F. Wilkinson, 'Rights vs. efficiency? The economic case for transnational labour standards' 23 *Industrial Law Journal* (1994) 302-303.
[30] Barnard, *supra* n 19, 61.

should be allowed to fall, but on the basis of which those [Member States] who can afford to do so should build their own more ambitious systems.'[31]

In other words, it was thought that Member States would be less inclined to pursue regulatory competition, and companies would be restrained from exploiting the logic of mutual recognition to force the workforce to accept lower standards of protection, if a 'floor of rights' could be agreed. The minimum standards set by harmonisation measures are thus not really meant to serve as a new, default, transnational level of protection, but meant to induce 'second order effects'. By coupling regulation on the transnational level with the re-affirmation of national self-regulation,[32] and indeed encouraging Member States to set higher levels of labour protection,[33] the Union legislator managed to simultaneously prevent the threat of regulatory competition described above, and reinforce the capacity of the national political process to normatively embed the relationship between 'labour' and 'capital' through the adoption of social policies. Much of the labour and company law regulation on the European level can be typified by this approach, from the Directive on information and consultation,[34] the Framework on Parental Leave,[35] to directives on part-time work,[36] fixed-term work,[37] temporary agency work,[38] working-hours,[39] or the protection of pregnant workers.[40] All these measures set 'floors of rights', from which upward deviation is explicitly encouraged, so that national social policy commitments are not undercut by the dynamics of the internal market. Many of these directives also include 'non-regression clauses', highlighting that their implementation may not be used to lower existing levels of protection.

This tiered understanding of social policy in the EU, whereby supranational social norms serve not to set substantive standards, but to insulate the capacity of domestic actors to develop norms of social protection, can also be traced in the role of the social partners in the EU. In respect of the social partners, the Union sets up a tiered system, whereby the exercise of the social dialogue on the European level is not meant to replace national equivalents, but merely supplement the latter's functioning. In other words, the role of norm-setting on the European level is to empower, rather than replace, the social dialogue on the

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[31] M. Shanks, 'The Social Policy of the European Communities' (1977) 12 *CMLR* 380.
[32] C. Barnard and S. Deakin, 'Market Access and Regulatory Competition' in Barnard and Scott, n 14, 219.
[33] S. Deakin, 'Labour Law as Market Regulation: the economic foundations of European social policy', in: P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds.) *European Community Labour Law: Principles and Perspectives'* (Clarendon 1996) 87.
[34] See Articles 1(1) and 9 (3) and (4) of Directive 2002/14/EC on information and consultation of employees.
[35] See Clauses 1, 3 and 8 (1) attached to Directive 2010/18/EU implementing the revised framework agreement on parental leave.
[36] See Clauses 2 (2) and 6 (1) attached to Directive 97/81/EC on part-time work.
[37] See Clause 8 (1) attached to Directive 1999/70/EC on fixed-time work.
[38] See Article 9 of Directive 2008/104 on temporary agency work.
[39] See Article 15 of Directive 2003/88 on working time.
[40] See Recitals 5 and 22 and Article 1 (3) of Directive 92/85 on the protection of pregnant workers.

national level. Directives dealing with issues such as parental leave,[41] part-time[42] and fixed-time work,[43] all adopted on the basis of the social dialogue on the Union level, emphasise this by explicitly allowing more favourable provisions to be negotiated by the social partners on the *national* level, thus leaving the latter in charge of the final substantive decision.[44] This same tiered structure can be traced within the right of co-determination in the management of the workplace. The preamble of the Directive establishing the European Works' Council, and recital 7 of Directive 2009/38, establishing a framework for the information and consultation of workers, for example, highlight that they are 'part of the Community framework intended to *support and complement* the action taken by Member States in the field of information and consultation of employees.'[45] This tiered structure shines through very clearly in both directives, which lay down an organisational structure for information and consultation, and set out a minimum standard of rights for its effective exercise. Both explicitly allow, however, for higher or different standards to be negotiated on the national level.[46] Their main purpose, then, seems to be to bolster the capacity of labour to negotiate better terms on the *national* level by levelling-out any advantage that capital may derive from unchecked dynamics of the internal market.[47]

The same logic applies to areas such as collective bargaining and collective action, where the Union has no legislative competences.[48] The inclusion of these rights in the CFR, for example, comes with the explicit proviso that '[t]he modalities and limits for the exercise of collective action, including strike action, come under *national* laws and practices, including the question of whether it may be carried out in parallel in several Member States.'[49] Equally, within the context of the posting of workers, it appears that the Union legislator had a similar tiered system of social protection in mind, whereby Union legislation merely sought to safeguard the political authority of Member States, and insulate this autonomy from the pressures generated by the dynamics of the internal market. The Posted Workers' Directive ('PWD') was adopted in order to codify rulings in *Seco*, *Rush Portuguesa* and *Van der Elst,*[50] in which the Court reversed the idea of mutual

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[41] See Directive 2010/18/EU implementing the revised framework agreement on parental leave.
[42] See Directive 97/81/EC on part-time work.
[43] See Directive 1999/70/EC on fixed-time work.
[44] See recitals 11 and 12, and Clauses 1 (1) and 8 (1) of the new framework agreement as implemented by Directive 2010/18.
[45] Recital 7 of Directive 2009/38, my emphasis.
[46] See Article 1 (1) of Directive 2002/14 and Recital 18, Articles 6 and 7, and Annex I of the Recast Directive 2009/38.
[47] See also Bercusson, *supra* n 26, 114.
[48] See Article 153 (3) TFEU, and Article 1, and recital 22, of Directive 96/71 on the Posting of Workers. Articles 1 (6), 1 (7) and 16 (3) of Directive 2006/123. See also Article 2 of Regulation 2679/98.
[49] See the Official Explanations relating to the Charter of Fundamental Rights, (2007/C 303/02), 10. Emphasis added. See also Article 1(2) of the Protocol on the Application of the Charter of Fundamental Rights attached to the Treaty of Lisbon.
[50] Joined Cases 62/81 and 63/81, *Seco* [1982] ECR 223, Case C-113/89, *Rush Portuguesa* [1990]ECR I-1417, and Case C-43/93, *Van Der Elst* [1994] ECR I-3803.

recognition and took working conditions, including minimum rates of pay, 'out of competition' in the context of the posting of workers.[51] Its Article 3 lays down a number of areas in which host Member States are allowed to insulate their own social preferences. These cover the fields most sensitive to direct competition, such as maximum hours, minimum paid holiday, minimum wage, health and safety and non-discrimination. Moreover, as Article 3 (7) PWD indicates, Member States may – in conformity with the case law of the Court (at the time) – impose higher standards when they *add* to the protection of labour. On first reading, then, the PWD seems to be another instrument in this second phase of Union social policy.[52]

All EU scholars will know that in these two last areas (collective action and posting of workers) the Court has fundamentally undermined the 'second wave' in EU social policy. Rather than seeing EU social policy as bolstering and protecting national autonomy, the Court now understands EU social policy as *limiting* national autonomy. The cases *Viking*, *Laval*, *Rüffert* and *Commission v Luxembourg* are so widely discussed in EU law that I will not discuss them in depth here.[53] In short, the Court in these cases suggests that social policy norms and employee protection in the area of posting of workers, and in collective action do not serve as a 'floor of rights', whereby upward differentiation is explicitly allowed and encouraged, but rather as a 'ceiling of rights', deviation from which is automatically considered to constitute a disproportionate violation of the free movement provisions.[54] In other words, it does not understand national social policy as being under threat by the dynamics of the internal market, but rather sees national social policy as a threat for the development of the internal market.

C. THIRD PHASE: SOCIAL POLICY AS STABILISING MONETARY POLICY

The Court's understanding of the role of social policy in cases such as *Viking, Rüffert and Laval*, however, reflects a wider reassessment of the role of social policy in the EU and the type of 'social market economy' that is appropriate for the EU. Since the introduction of the Euro, after all, social policy regulation in the EU has had to fulfil an additional objective. The move towards a single monetary policy in the EU sits uneasily with the retention of fiscal, economic, and social competences

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[51] Bercusson, *supra* n 26, 358.

[52] See for example S. Deakin, 'Regulatory Competition after Laval' *CBR Working Paper* 364 (2008) 15-16; C. Barnard, 'The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law' (2009) 38 *ILJ* 126; P. Davies, 'Market Integration and social policy in the Court of Justice' (1995) 24 *ILJ* 49; C. Kilpatrick, 'Laval's Regulatory Conundrum: collective standard-setting and the Court's new approach to posted workers' (2009) 34 *ELRev* 848, or N. Reich, 'Free Movement v. Social Rights in an Enlarged Union – The Laval and Viking Cases before the ECJ' (2008) 9 *GLJ* (2008) 141.

[53] Case C-319/06, *Commission v Luxembourg* [2008] ECR I-4323, Case C-346/06, *Rüffert* [2008] ECR I-1989, and Case C-341/05, *Laval* [2005] ECR I-11767.

[54] S. Deakin, *supra* n 53, 21-22. The recent *Elektrobudowa* case suggests that within the remit of the areas specified by Article 3 of the PWD, the host Member State has more leeway in defining the appropriate level of social protection. See Case C-396/13, *Elekrobudowa* EU:C:2015:85.

on the national level. The reason is that the latter have a direct influence (and potentially produce negative externalities) on monetary performance and stability.[55] Ideally, in other words, a single monetary policy on the European level would be explicitly linked to a single fiscal, economic and social policy. Politically, however, the transfer of such competences to the EU level was (and is) unfeasible: they see to some of the most salient and redistributive policy elements, which can only be legitimised through robust and democratic political structures.[56] The stability and growth pact, the Lisbon agenda, the European Employment Strategy and other OMC processes were meant to square this circle. While nominally leaving social policy competences on the national level, these instruments sought to secure policy convergence around specific 'targets', 'benchmarks', and sought to produce 'best practices' and 'learning processes'.[57] In other words, this third phase understands social policy diversity throughout the EU as problematic: as something that is to be discouraged and managed, rather than as something that needs to be promoted.

The outbreak of the Euro-crisis highlighted the inadequacy of this 'soft-law' approach to social policy convergence in the EU: the stability and growth pact had become a paper tiger (mainly due to the failure of France and Germany to comply with it), the Lisbon agenda served only as a reminder of the vacuous optimism of the 'third way', and OMC processes were discredited as being able to achieve convergence in the absence of domestic political support. The Euro-crisis highlighted the necessity of increased social policy coordination and convergence. This, the argument runs, is necessary for the stabilisation of the monetary project, and a precondition for its future functioning.[58] In this third wave of social policy, the objective is no longer to prevent unfair competition on the internal market; or to insulate the political capacity to normatively embed the market. Rather, social policy is a necessary complement for the stability of the wider project of fiscal union.[59]

This has led to the increased 'hardening' of social policy coordination on the European level. The 'soft-law' process of OMC has been replaced with much harder (i.e. legally or politically binding) commitments. The Commission has been given a wide mandate to secure this, through a number of opaque and mutually interrelated processes meant to 'solve' the Euro-crisis. The objective of this mandate is to create policy convergence in – primarily – labour market regulation throughout the Euro-zone Member States. The first way in which the Commission can secure social policy coordination is through the excessive deficit procedure

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[55] See for a great overview, W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso 2014).
[56] See for more F. De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015).
[57] See generally Mark Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (CUP 2011).
[58] See for an overview of the orthodox reasoning M. Dawson and F. De Witte, 'Self-Determination in the Constitutional Future of the EU' (2015) 21 *ELJ* (forthcoming).
[59] See also J. Snell, 'The Internal Market and the Philosophies of Market Integration' in C. Barnard and S. Peers (eds.) *European Union Law* (OUP 2014) 313.

(EDP), the multi-lateral surveillance procedure (MSP) and the macro-economic imbalance procedure (MEIP).[60] While focusing on different aspects, these procedures share a purpose: they serve to secure convergence of domestic social and economic policies, so that they do not disturb the monetary policy of the EU. Under the EDP, for example, Member States enter an adjustment program when they breach (or risk breaching) the 3% GDP deficit rule, or when they do not comply with the reduction rate when their debt is over 60% GDP. In 2011, 24 out of 27 Member States ran an excessive deficit. In 2015, the EDP still runs for 11 Member States. For these Member States, the Commission issues recommendations suggesting policy changes. If Member States do not comply with these recommendations, the Commission can suggest significant financial penalties that can only be resisted by a reverse QMV in the Council.[61] The purpose of these rules is clear: they serve to force Member States into adjusting their social and economic policies towards a specific model.

Even for Member States that are not supervised under the EDP or MEIP, the Commission has significant powers to secure social policy convergence. The country-specific recommendations within the context of the European Semester are yearly Commission recommendations on policy changes that Member States are to undergo in order either to meet their obligations under the EDP or MEIP, or to facilitate the process of convergence set out in the Europe 2020 agenda. An overview of the 2014-2015 recommendations suggests that the Council adopts all Commission recommendations without amendment.[62] The content of the recommendations varies. For the budgetary year 2014-2015, the Commission issued recommendations for 26 Member States (Greece and Cyprus have to meet adjustment programs under Memoranda of Understanding rather than under the European Semester). For the 26 Member States, the Commission made policy suggestions in the following areas: pensions and healthcare (19 Member States); taxation (in particular in shifting tax bases from labour towards 'more growth-friendly bases' for 22 Member States); labour market participation (19 Member States); active labour market policy (24 Member States); wage setting mechanisms (11 Member States) and labour market segmentation (10 Member States). The Commission's recommendations (as adopted by the Council) are highly specific and prescriptive. The country-specific recommendations for Belgium for 2014-2015, for example, emphasise that Belgium is to

> prepare a comprehensive tax reform that will allow shifting taxes away from labour towards more growth friendly basis, simplifying the tax system (..) stepping up efforts to reduce the gap between the effective and statutory retirement age, bringing forward the reduction of early-exit possibilities, (..)

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[60] Governed by Articles 121 and 126 TFEU; Council Regulations 1466/97, 1467/97, 479/2009; Regulations 1173/2011, 1174/2011, 1176/2011, 473/2013, and 472/2013 and Directive 2011/85.

[61] R. Palmstorfer, 'The Reverse Majority Voting under the 'Six Pack': A Bad Turn for the Union?' (2014) 20 *ELJ* 186.

[62]http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm.

> aligning the statutory retirement age and career length requirements to changes in life expectancies, (..) increase labour market participation, notably by reducing financial disincentives to work, (..) restore competitiveness by continuing the reform of the wage-setting system, including wage indexation.[63]

While these recommendations are not, formally, binding, the Commission itself suggests that the coercive powers under the EDP and MEIP could be used to force recalcitrant Member States to make the suggested policy changes:

> it is primarily in Member States' own interests to implement the reforms that will help them recover from the crisis and create the foundations for sustainable growth. The Commission's recommendations are based on expert analysis of the main challenges in each country. Member States are also responsible to their EU counterparts, as they make a political commitment to reform by endorsing the recommendations at EU leaders' level and formally approving them at ministerial level. As a last resort, there is the prospect of sanctions if Member States repeatedly fail to take action on public finances or macroeconomic imbalances (under the Excessive Deficit Procedure and the Excessive Imbalance Procedure, respectively).[64]

In addition, it seems that the European Semester leaves so little time for national parliaments to pass domestic budgets that the Commission's recommendations risk automatically being copied into them (or pushed through by the national governments).[65]

The most far-reaching power that the Commission (in cooperation with the IMF and ECB) has to secure social policy convergence in the EU is through the Memorandums of Understanding that Member States are asked to negotiate when they demand access to the Union's bail-out funds. The second MoU signed with Greece, for example, lists as Greece's obligations: 'the abolition of most of the budgetary appropriation for the solidarity allowance',[66] 'a reduction of the Easter, summer and Christmas bonuses paid to civil servants',[67] 'reform the wage bargaining system in the private sector, which should provide for a reduction in pay rates for overtime work, enhanced flexibility in the management of working time and allow local territorial pacts to set wage growth below sectoral agreements',[68] 'a reform of employment protection legislation to extend the

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[63] Points 2-5 of Commission recommendation for a Council Recommendation on Belgium's 2014 national reform programme [SWD(2014) 402 final] and points 2-5 of Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of Belgium (2014/C 247/01).
[64] http://europa.eu/rapid/press-release_MEMO-14-388_en.htm.
[65] D. Chalmers, G. Davies and G. Monti, *EU Law: Text, Cases, Materials* (CUP 2014) 748.
[66] Article 2 (1)(d) of Council Decision 2011/734/EU.
[67] Article 2(1)(f) of Council Decision 2011/734/EU.
[68] Article 2 (2)(m) of Council Decision 2011/734/EU.

probationary period for new jobs to one year, and to facilitate greater use of temporary contracts and part-time work',[69] and the 'privatisation of assets … worth at least EUR 50 billion by end-2015; proceeds from the privatisation of assets shall be used to redeem debt and will not reduce the fiscal consolidation efforts to comply with the deficit ceilings'.[70]

This more or less 'hard' power of the Commission to secure social policy convergence in the EU by virtue of all these new mechanisms not only flies in the fact of the division of competences in the EU, but also undermines the stability and legitimacy of the EU.[71] More crucially, for our purposes, it offers a glimpse of the new understanding of the role of social policy in the EU. Social policy is no longer seen as ensuring fair competition in the EU, or as safeguarding a space for political autonomy in social policy setting on the national level. In fact, the differences between the second and third phases of EU social policy could not be more striking. While the second phase explicitly sought to protect and promote policy differentiation and national autonomy; the third phase finds differentiation and policy autonomy deeply problematic. After all, the stability of the monetary project of the EU requires social policy convergence across the EU. Given that, however, most social policy competences have formally remained on the national level, this 'third phase' of EU social policy is deeply authoritarian: it understands the market and social policies as structurally distinct from political and representative processes, and suggests that EU social policy is something to be managed by technocrats rather than decided by political actors.[72] The latter, after all, cannot be trusted to secure the policy convergence required for the stability of the monetary project.

3. THE PLACE OF POLITICS IN THE ARCHITECTURE OF THE 'SOCIAL MARKET ECONOMY'

The most recent developments suggest that the role of social policy in the EU is drastically changing. We are moving in a direction where policy autonomy on the national level is considered problematic. Social policy differentiation throughout the EU, to put it as simply as possible, disrupts both the operation of the internal market and the operation of the economic and monetary union. This understanding of the role of social policy in the EU is deeply problematic. Many scholars have argued that it is deeply problematic for *normative* reasons. The subservience of social policy (and generally market-correcting or redistributive policies) to the economic rationale of free movement and monetary integration

[69] Aricle 2 (2)(n) of Council Decision 2011/734/EU.
[70] Article 2 (5)(k) of Council Decision 2011/734/EU.
[71] M. Dawson and F. De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *MLR* 817.
[72] D. Chalmers, 'The European redistributive state and a European law of struggle' (2012) 18 *ELJ* 667.

introduces a significant bias in favour of neo-liberal understandings of the market. While I do not disagree with that assessment and its undesirability, the more recent understanding of the role of social policy in the EU is also problematic for *structural* reasons, on which this final section will focus. In blunt terms, the current architecture of the EU simply cannot support a '*social* market economy' – which comes with far-reaching implications for the stability of the Union's market and polity.

Three structural processes are at the root of this problem. First, the reorientation of the role of social policy in the EU is based on the fallacy that a 'social market economy' can be constructed without the involvement of politics. Markets, however, are fundamentally unstable and illegitimate without political institutions that can embed them, primarily through the implementation of social policies. Second, the current architecture of the social market economy is based on the idea that the Union's institutions are sufficiently legitimate to make vast distributive choices – such as defining the scope of the right to strike in the transnational context, or the appropriate age for retirement. Instead, the institutional structure of the EU is incomplete and asymmetrical. This has direct implications for the type of market that the EU can sustain. Third, the construction of a 'social market economy' seems based on a misunderstanding of the role of *law* in the EU. Law, in the EU, is not something that reflects political choices but that reflects the absence of political choices. As such, it comes with significant normative implications that must be defended, not assumed. Until we understand and factor in all these biases that EU law introduces in the way we think about the (role of social policy in the) internal market, it can never possibly be a 'social market economy'.

A. SOCIAL MARKET ECONOMY WITHOUT POLITICS?

The Court's interpretation of the free movement provisions as introducing a substantive limit to the social policies that Member States may adopt, as well as the process since the Euro-crisis that sees to the limitation of the social policy autonomy on the national level, are problematic as they paint the picture of a 'social market economy' in which national autonomy is structurally suspect. Policy autonomy and diversity in retirement ages, social protection, or the scope of the right to strike, however, reflect not only different substantive preferences throughout the EU, but also a structural commitment to politics as a process for the articulation of values that 'matter' to a specific group of people, in a specific place and at a specific time. Protecting the role of national political actors in socially embedding the market is, in other words, important to preserve the capacity of citizens and their Member States to express the 'type of life' they want to lead.[73] The protection of this capacity is important *per se* – as it serves to ensure

[73] A. Somek, 'What is a Political Union?' (2013) 14 *GLJ* 561.

that the electorate's shifting social, cultural or democratic preferences are continuously reflected into policies. Removing this political autonomy in the name of free circulation on the market or in the name of austerity is problematic, as it limits the ability of the political process in translating normative choices of its electorate into reality. Bluntly put, it suggests that Member States may only articulate one specific conception of 'the market'.

This is clearly reflected in the shift in the institutional allocation of the power to develop the market. Increasingly, the power to socialise the market is granted to depoliticised and apolitical institutions – whether the Court in its legal development of the free movement provisions, or the Commission and troika in the management of Member State social policies. This is problematic not only from the substantive perspective (the outcome of *Viking* was not in conformity with the substantive preferences of the Finnish social partners or legislator), but also from the procedural perspective (the Finnish social partners or legislator can no longer decide on the appropriate balance between the power of labour and capital). The ECJ, Commission, or troika, needless to say, can never legitimately make such normative choices. Questions relating to the balance between labour and capital, or relating to the appropriate retirement age are distributive and normative questions. The legitimacy of their answer presupposes that it is answered through a representative and democratic process. Allowing apolitical institutions to answer such questions will almost inevitably lead to these being answered *as if they are regulatory questions*. Muir and Somek, for example, have highlighted how the Union's non-discrimination legislation is geared towards securing the employability of citizens throughout the EU rather than securing their dignity or decommodification.[74] The critique of the ILO and ESC after the *Viking* and *Laval* rulings and in response to the Greek MoU suggests a similar problem.[75] Allowing apolitical institutions to make deeply normative choices, as the European Committee of Social Rights suggests, is 'likely to have a significant – and potentially devastating – impact on the industrial relations systems'.[76] The devastation is caused not simply by a substantive dismantling of social protection through negative integration and fiscal consolidation, but also by *structurally* lifting the capacity to normatively embed the market outside the scope of political contestation, and instead transferring it to a level where the basic institutional preconditions for its exercise are lacking. Governing a market without a significant role for political institutions is a Hayekian dream: it is the acceptance of a very specific and normative vision of the interaction between capitalism and the state, society and the electorate.

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[74] A. Somek, *Engeneering Equality* (OUP 2011); E. Muir, *EU Regulation of Access to Labour Markets* (Kluwer 2012).
[75] See M. Rönnmar, 'Labour and Equality Law' in Barnard and Peers, *supra* n 60, 604–9.
[76] Complaint No 65/2011 and Complaints Nos 77-80/2012.

B. EU INSTITUTIONAL SET-UP: FIT FOR SOCIAL PURPOSE?

The limits to the role of political actors on the national level described above become even more problematic when we turn to the EU's institutional set-up. In very simple terms, the EU's institutional structure is incapable of performing the role that is taken away from national political actors: it is incapable of normatively embedding the market. This is for a number of reasons. Most practically, the EU lacks the competences to do so. As discussed above, even if the Union's competences in the social policy domain have steadily increased, core substantive social policies such as employment protection, social housing, social security or collective bargaining fall outside its competences. What is more, as Davies and Garben have recently highlighted, the functional competences that the Union *can* use to 'socialise' the internal market, such as Article 114 TFEU or Article 352 TFEU, automatically relegate the social objectives in the regulation of the internal market to the benefit of economic objectives.[77] Even if the Union *were* to accrue significant competences in substantive domains of social policy, moreover, the vast heterogeneity between the different social models that exist throughout the EU (which are in turn but a reflection of a structural divergence in political economy and welfarist traditions) makes harmonisation night on impossible.[78] Authors such as Höpner, Schäfer, and Scharpf have highlighted that the decision-making thresholds in the Council, in combination with the balance in social models throughout the EU, can only lead to a levelling down of standards in the Member States with the highest levels of social protection.[79] In the simplest terms, this means that *if* the EU were minded to create a 'social market economy' with its current competences, not much 'social' could be included.

More structurally, the Union's institutional capacity to socially embed the market is limited by virtue of its undemocratic (or at least not fully democratic) character. Even presuming that the EU were to have competences in substantive social policy domains, and that the diversity in social models could somehow be overcome, the Union's institutional settlement is simply not sufficiently sensitive to its citizens. Socially embedding a market, after all, is not a regulatory task. It is a redistributive task – for which the only legitimate answer is the one offered by the electorate. Whether to allow much or little leeway for strikes; whether to introduce or abolish minimum wages; whether to increase or decrease the retirement age are *political*, not regulatory questions. The answer to such questions – if it is to be legitimate – must emanate from the desires of the citizenry. In the EU, however,

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[77] S. Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Power' (2015) 35 *OJLS* (forthcoming); G. Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 *ELJ* 2.

[78] F. Scharpf, 'Legitimacy in the Multi-Level European Polity' in M. Loughlin and P. Dobner (eds.), *The Twilight of Constitutionalism?* (OUP 2010) 89ff.

[79] M. Höpner and A. Schäfer, 'Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting' (2012) 66 *International Organisation* 429; F. Scharpf, 'The Asymmetry of European integration, or: why the EU cannot be a 'social market economy'? (2010) 8 *Socioeconomic Review* 212-250.

this link between citizenry and policy choices is obstructed in a number of significant ways, all of which have been discussed in depth by scholars. Three elements stand out. First, the EU's institutional setting (deliberately) insulates the decision-making process from the desires of the citizenry by allocating agenda-setting powers to the Commission.[80] Second, the EU's legislative process requires consensus between the Commission, representatives of the Member States and the EP (as direct representatives of the EU's citizenry). This requirement of reaching consensus between different *sets* of interests obstructs a more straightforward connection between policy and the citizens' voice.[81] Third, the EP (as the most natural site for collecting the political desires of the EU's citizenry) is too weak. This criticism relates not only to its institutional position and the nature of its elections (in which few citizens participate, and when they do participate, tend to vote on national matters), but also more intangible elements such as the absence of a public sphere in the EU, the absence of transnational political parties, media, or civil society.[82] All these issues *could* be solved – but require a fundamental re-writing of the Treaties, the institutional set-up and normative assumptions of the integration project. In the meantime, it appears that the sole institutions that are capable of legitimising the creation of a '*social* market economy' are to be found on the national level. In the absence of a sufficiently thick political sphere on the European level, any attempt at socialising the EU's market will be doomed. At best, it may lead to a rough approximation of the citizens' social preferences. Much more likely, it will lead to redistributive decisions being made as if they were regulatory decisions: how to best 'fit' together social and economic elements to the market. Needless to say, this fundamentally defeats the purpose of redistributive policies, which emerged as explicit limits to and counteracting forces in response of economic pressures.

C. THE ROLE OF LAW IN THE INTERNAL MARKET

The architecture of the 'social market economy' in the EU, finally, needs to be sensitive to the particular role that law plays in its construction. The political vacuum that exists in the EU changes the role and legitimacy of law; and, in consequence, attributes a normative quality to law that is not immediately visible. Generally speaking, a law can be justified in one of two ways: either with reference to the good that it produces, or with reference to the institutional structure within which it operates. The first route is well-known: fundamental rights, minority rights, but also regulatory goods such as good safety or merger control have long been justified with reference to the outcome achieved.[83] The apolitical or countermajoritarian tendencies of courts, agencies or technocrats, in this sense, are

[80] See e.g. S. Hix and A. Follesdal, 'Why is there a Democratic Deficit in the EU: A Reply to Moravcsik' (2006) 44 *JCMS* 533.
[81] Dawson and De Witte, *supra* n 72, 817.
[82] See, generally, S. Bartolini, *Restructuring Europe* (OUP 2007).
[83] G. Majone, *Regulating Europe* (Routledge 1996).

a precondition for the achievement of the good. Vesting too much power in political actors in the attainment of such objectives, after all, would lead to less optimal outcomes.

The second way in which law can be justified is, of course, with reference to the institutional structure within which it operates. Traditionally, this means that when any particular law is adopted by a parliament that represents the citizenry, it is legitimate and its content (*prima facie*) justified. The institutional structure of the nation state is particularly well set up for this purpose: it is not solely centred on a representative parliament, but a more sophisticated support cast including media, civil society, interest groups, integrated political parties, and grassroots movements. All these structures allow the law to be sensitive to what people 'want', and as such serve as a justification for its use as a building block of society.

The role of law, in the integration process, is very particular. It is used to depoliticise political questions, create *de facto* convergence of national rules,[84] and to push forward a messianistic idea of Europe.[85] This depoliticising quality of EU law has often been heralded as a positive attribute: it allows the EU to achieve its objectives – whether peace, prosperity, or austerity – and scholars such as Müller have emphasised that this quality may well have been deliberately built into the EU's *modus operandi*.[86] The problem with this understanding of law, however, is evident: it presumes consensus on the 'good' to be achieved. As such, EU law runs against the problem of legitimacy whenever it engages in redistributive practices (as opposed to regulatory questions). This is very acute in the management of the Euro-crisis, but also in the creation of a 'social market economy', where, bluntly put, EU law is very good as breaking down national rules, but significantly hamstrung in their reconstruction. In consequence, EU law obtains a normative flavour: it is skewed, much like the institutional structure of the EU, towards a more deregulatory or neo-liberal conception of the market. That depoliticisation favours neo-liberal policies should not be particularly surprising: politics emerged exactly to couch or discipline those forces! The EU's use of law as an instrument of integration, simply put, limits the types of market that it can produce. A '*social* market economy' may simply be beyond the capacity of EU *law* to produce.[87]

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[84] See generally the collected edition *Integration Through Law Revisited: The Making of the European Polity*, edited by Daniel Augenstein (Ashgate 2012), and of course M. Cappelletti, M. Seccombe and J. Weiler (eds.) *Integration through Law* (De Gruyter 1986).

[85] Whether in its original conception – see JHH Weiler, 'The political and legal culture of European integration: An exploratory essay' (2011) 9 *International Journal of Constitutional Law* 678-694, or a more recent economic messianism – see M. Wilkinson, 'Economic Messianism and Constitutional Power in a German Europe (2014) *LSE Law, Society and Economy Working Papers* 26.

[86] J.-W. Müller, 'Beyond Militant Democracy?'(2012) 73 *NLR* 39.

[87] See F. Scharpf, *supra* n 24, 8 *Socioeconomic Review*, 212-250. Some have even argued that law as such displays many neo-liberal tendencies: G. Dale and N. El-Enany, 'The Limits to Social Europe: EU law and the ordoliberal agenda' (2013) 14 *GLJ* 613.

4. CONCLUSION

The Treaty of Lisbon offered a new understanding of the internal market, and of the role of social policies in its development. The Union no longer sought to create an 'open market economy with free competition' but a 'highly competitive *social* market economy'.[88] This contribution has suggested that the current legal architecture of the internal market, and the increased political focus on social policies as a complement to the EMU, make it impossible for the EU to create a *social* market economy. In the simplest terms, the EU lacks the institutional sophistication required in order to do so. Only by deferring substantive policy autonomy to the national level, where political institutions can be sensitive to the needs and desires of the citizenry, can the internal market possibly become a *social* market economy. Indeed, this insight seemed to steer much of the Union's social policy legislation since the early 90s. The rulings of the Court in the *Laval*-line of cases, and the push towards social policy convergence in the wake of the Euro-crisis, however, have reversed that trend. Policy autonomy, substantive differentiation and national policy experimentation are no longer seen as a *safeguard* for the political stability of the internal market (in the sense that its development remains sensitive to social and political discontent) but as a *threat* to its economic development.

The architecture of the 'social market economy' that emerges from all this is highly unstable. Markets, as suggested in the first section, are complex institutions, whose stability requires the continuous reiteration of the tension between economic rationale, social desires, and political compromises. Without the latter, the stability between economic power and society becomes precarious – as economic processes are released from their social and political constraints. This leaves the door open for types of social and political contestation that are difficult to control, as they can no longer be mediated through political processes (as the latter has no control over the economy).

The quest to create a 'social market economy' can, however, potentially be saved in two ways. The first looks to the insulation of national competences to socially embed the market. This presumes overturning the current understanding of the scope of the free movement provisions, and overcoming the Union's normative fetishism for complete uniformity and unlimited market access. The second is to understand the Union's regulation of the market as an explicitly political exercise. Maybe the neo-liberal, apolitical market that is currently emerging is the one that we want. But it needs to be *defended* as such, and legitimised through an enfranchisement of the citizen on the European level, not simply *presumed* as the normatively neutral outcome of a range of institutional, normative and legal asymmetries.

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[88] Article 3 TEU.