The EU Constitution of Social Governance in an Economic Crisis: in Defence of a Transnational Dimension to Social Europe

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THE EU CONSTITUTION OF SOCIAL GOVERNANCE IN AN ECONOMIC CRISIS IN DEFENCE OF A TRANSNATIONAL DIMENSION TO SOCIAL EUROPE

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ABSTRACT

Conventional wisdom has it that the EU is unable to promote viable social integration, which contrasts with its commitments to improving working and living conditions and to social values and goals such as solidarity, social protection and social inclusion. This article challenges two different standpoints: on the one hand, competitive neoliberalism demands that the EU focuses on economic integration through legally binding internal market and competition rules even if Member States can only maintain a limited commitment to social inclusion, while authors defending the social models unique to the continent of Europe demand that the EU rescinds some of its established legal principles in order to make breathing space for Member States to maintain market correcting social policies. Both positions convene that there should be no genuine social policy at EU level. This article uses scenarios of widely discussed rulings by the Court of Justice to illustrate that legally enforceable economic integration would prevent most Member States from achieving sustainable health services, labour relations and free university education on the basis of national closure. Since the EU has limited legislative competences to create EU level institutions to balance inequalities, it derives a Constitution of Social Governance from the EU's values, proposing that the Court of Justice develops its jurisprudence into an instrument for challenging European disunion induced by new EU economic governance.

Keywords: cross border industrial action; EU social constitutionalism; judicial competences; health funds; study fees

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§1. INTRODUCTION

An enigma emerged from the Treaty of Lisbon: while expanding the values underpinning an EU social dimension, it did not create additional EU legislative competences for pursuing these aims. This article argues that a Constitution of Social Governance can close this gap. Going beyond received wisdom according to which the internal market and economic policy on the one hand, and EU social integration on the other are forever decoupled, it suggests that EU law and policy accept a scope of manoeuvre for transnational social governance, not only by the EU's and Member States' public institutions, but also by the emerging European society.

Until 2009, the Court of Justice of the European Union appeared to be the main stumbling block for social Europe. In academic writing, cases such as *Watts*,[1] *Viking*[2] and *Laval*[3] had been viewed as symbols of the Court's increased threat to national welfare states[4] and as indicating a neo-liberal turn.[5] The concept of an EU Constitution of Social Governance offers an alternative for the EU judiciary to dissolve the apparent stalemate between the EU's 2009 social values and its old case law.

Since 2010, EU currency crisis management has demonstrated that coordination by target setting in new modes of 'economic governance' can be at least as efficient as EU-level legislation and case law in decreasing minimum wages, reducing employment protection and lowering levels of social (security) benefits.[6] It is thus necessary to consider whether a Constitution of Social Governance offers any potential to achieve a balance against this austerity driven governmentality at EU level.

The argument proceeds as follows. Since the Constitution of Social Governance seeks to close a gap between the EU's renewed socio-economic values and its competence regime, these two elements will be elaborated first. The hypothesis that there is a gap between those two is actually contested by those who demand re-nationalization of social policy and labour rights. It will thus have to be defended. This then leads to the conceptualization of the EU Constitution of Social Governance. The practical consequences of the new concept will be shortly illustrated in two dimensions: as a

1 Case C-438/05 *International Transport Workers Federation (Viking)* [2007] ECR I-10779.

2 Case C-341/05 *Laval* [2007] ECR I-11767.

3 Case C-372/04 *Watts* [2006] ECR I-04325.

4 For a recent overview with numerous references, see S. Greer and T. Sokol, 'Rules for Rights: European Law, Health Care and Social Citizenship', 19 *ELJ* 4 (2013), online first.

5 S. Deakin, 'The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's Social Market Economy', in N. Bruun et al., *The Lisbon Treaty and Social Europe* (Hart, Oxford 2012), p. 19; C. Joerges and F. Rödl, 'Informal Politics, Formalised law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval', 15 *ELJ* 1 (2009), p. 1–19.

6 For employment rights see S. Clauwaert and I. Schömann, *The Crisis and National Labour Law Reforms: A Mapping Exercise* (ETUI, Brussels 2012); for social (security) benefits see P. Pochet and C. Degryse, 'Monetary Union and the stakes for Democracy and Social Policy', 19 *Transfer* 2 (2013), p. 103–116.

normative basis for the Court to develop a more socially integrative case law, and as a way to imbue 'new economic governance' with social values.

§2. THE EU'S CONSTITUTIONAL ENIGMA

The starting point of the Constitution of Social Governance is the apparent contradiction between a strong value base supporting social Europe and the minimal legislative competences for furthering this entity.

A. THE EU'S REVISED VALUES AND OBJECTIVES

The EU's value base has, at least since 2009, strengthened its social goals; and its redrafted objectives comprise a constitutional commitment to its unique socio-economic model.[7]

Article 2 TEU complements the EU's traditional values of liberty, democracy and respect for human rights by a second sentence, according to which these values are common to the Member States 'in a society in which (...) solidarity prevails'. In addition, Article 3(3) TEU tasks the EU, among other things, with promoting social justice as well as social cohesion and with combating social exclusion; and Article 3(6) TFEU provides that the Union pursues all its objectives, including the social ones, by 'appropriate means commensurate with the competences conferred on it'. Furthermore, Article 9 TFEU requires the EU to take promoting employment, social protection and combating social exclusion into account in all of its policies. This horizontal social clause has elicited hopes of enhancing the EU's social profile[8] and already informed case law.[9] Taken together with pre-existing provisions, and explicit social rights contained in Titles II and III of the Charter of Fundamental Rights of the EU,[10] the EU's commitment to social justice and social cohesion has been enhanced, with a new emphasis on solidarity and social justice.[11]

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7 See on this D. Schiek, 'The EU's Socio-economic Model(s) and the Crisi(e)s – any perspectives?', in D. Schiek, *The EU Economic and Social Model in the Global Crisis* (Ashgate, Farnham 2013), forthcoming.

8 M. Dawson and B. de Witte, 'The EU Legal Framework of Social Inclusion and Social Protection: Between the Lisbon Strategy and the Lisbon Treaty', in B. Cantillon et al., *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Intersentia, Cambridge 2012), p. 41; M. Ferrera, 'Modest Beginnings, Timid Progresses: What Next for Social Europe?', in B. Cantillon et al., *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy*, p. 17–39.

9 See Opinion of Advocate General Trstenjak in Case 382/10 *Dominguez,* Judgment of 6 October 2011, not yet reported, on the right to paid annual leave, para. 152; Opinion of Advocate General Cruz Villalón in Case C-515/08 *Santos Palhota* [2010] ECR I-09133, posted workers' rights, para. 52, also mentioning Article 3(3) TEU and Case C-544/10 *Deutsches Weintor*, Judgment of 6 September 2012, not yet reported, justifying limits to explicitly label wine with reduced acidity levels with consumer rights.

10 For more detail on this see D. Schiek, *Economic and Social Integration: the Challenge for EU Constitutional Law* (Edward Elgar, Cheltenham 2012), p. 102–106.

11 Ibid., p. 219–224.

Even more importantly, the economic and social aspects of the EU's values and objectives models interrelate: Article 3(3) TEU combines the internal market with 'sustainable development of Europe based on balanced growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, a high level of social protection, promotion of social justice and social cohesion'. While the internal market is now an EU objective in its own right,[12] it must be reconciled with these social objectives,[13] which again are linked to its new social values.

This normative step mirrors the EU's political commitments under the Lisbon strategy to enhance competitiveness of the EU economy. The Treaties do nothing to remedy the potential contradictions[14] between these aims. Accordingly, there is not only an enhanced commitment to social Europe, but also a constitutional demand to reconcile economic and social integration.

B. THE EU'S COMPETENCE REGIME

The question is whether and in how far the EU is equipped to fulfil this constitutional demand.

1. Limited expansion of the EU's legislative competences

Generally, the Treaty of Lisbon did not expand the EU's legislative competences. This was in line with the increased interest in national autonomy and identity of Member States – a sentiment that was particularly plausible for those Member States who emerged from a close attachment to the Soviet Union. Increased constitutional recognition of national identity is mirrored in Article 4 TEU, which reaffirms the principle of conferral and the priority of Member States' competences.

Social policy competences, too, remain limited: the EU can harmonize national law in relation to working environment and working conditions (including those of third country nationals), social security and social protection of workers, and representation and defence of workers' and employers' collective interests (Article 153(1) TFEU). These competences may only be used if coordination of national policies is not sufficient to

12 Before, it only served the Community's objectives. This elevation to an aim in its own right could also be seen as a threat to social values, see S. Deakin, in N. Bruun et al., *The Lisbon Treaty and Social Europe*, p. 38.

13 The term 'social market economy' upon inclusion in the Constitutional Treaty was meant to summarize the EU's commitment to 'greater coherence between economic and social policies' (Working Group XI on Social Europe – CONV 516/1/03/ REV 1).

14 As examples for critique of the contradictory Lisbon Strategy see M. Daly, 'Social Inclusion and the Lisbon Strategy', in P. Copeland and D. Papadimitriou, *The EU's Lisbon Strategy: Evaluating Success, Understanding Failure* (Palgrave Macmillan, Houndsmill 2012), p. 68; K. Dyson and L. Quaglia, 'Economic and Monetary Union and the Lisbon Strategy', in P. Copeland and D. Papadimitriou, *The EU's Lisbon Strategy: Evaluating Success, Understanding Failure,* p. 189.

achieve the aims pursued (Article 153(2) TFEU); and there is no Union competence for matters of pay, the right of association and industrial warfare (Article 153(5) TFEU). The EU can further legislate in favour of equality, equal opportunity and equal pay of women and men.[15] Beyond this, the EU can also use competences designed to help completing the internal market to achieve social policy objectives. Next to specific competences relating to the economic freedoms,[16] general competences for establishing and ensuring the functioning of the internal market[17] can and have been used. The Treaty of Lisbon added competences to legislate in favour of (social) services of general interest[18] and for some aspects of health protection.[19]

In fields covered by Article 153 TFEU, the EU can only use directives and not regulations. Thus, unification is excluded in favour of harmonization (or approximation) of national legislation. However, through harmonization the EU legislator can still determine minimum standards for the protection of certain (social) values, which then can initiate a competition for better standards of protection ('race to the top' instead of a downward spiral).[20]

2. EU judicial competences

Even in the absence of EU legislative competences, the Member States are not free in taking responsibility for most fields of social and economic policy. Based on its monopoly in deciding whether the Treaties have been infringed (Article 19 TEU), the Court of Justice of the European Union (CJEU) derives restrictions from directly effective EU law, which also enjoys primacy over national law.[21] Member States are bound in their

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15 There is some overlap between Article 153(1) letter (i) and Article 157(3) TFEU in this regard, which is not relevant for the argument developed here.

16 These are competences for facilitating workers' mobility among others through coordinating social security systems (Article 46 TFEU), for realizing freedom of establishment for specific activities (Article 50 TFEU), for facilitating the pursuit of self-employed activities (Article 53(2) TFEU) and free movement of services (Article 53(2) combined with Article 66 TFEU), for liberalizing specific services (Article 59 TFEU). Directive 96/71 on the posting of workers was based on the predecessor of Article 53(2) TFEU in combination with Article 66 TFEU, although one of its main aims is the pursuit of workers' rights.

17 Articles 114 and 115 TFEU. Article 114 TFEU was used as legislative base for Directive 2011/24/EU of the European Parliament and the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, [2011] OJ L 88/45.

18 Article 14 TFEU, M. Dawson and B. de Witte, in B. Cantillon et al., *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy*, p. 57–62; U. Neergard et al., *Social Services of General Interest in Europe* (Springer, Vienna 2013).

19 Article 168 (4) TFEU.

20 S. Andredakis, 'Regulatory Competition or Harmonization: the Dilemma, the Alternatives and the prospect of Reflexive Harmonisation', in M. Andenas and C. Baasch-Andersen, *Theory and Practice of Harmonisation* (Edward Elgar, Cheltenham 2011), p. 52.

21 The Court has established these principles in two early rulings (Case C-26/62 *van Gend en Loos* [1963] ECR 00001; Case C-6/64 *Costa v. E.N.E.L.* [1964] ECR 00585), which have given rise to much academic debate (e.g. A. Vauchez, 'The transnational politics of judicialization. Van Gend en Loos and the making

entire national policy making, including in fields where the EU has no competence to legislate.[22] The Court in effect declares national law inapplicable, and consequently retrospectively restricts national policy making.

Without using the term judicial competence, Scharpf has famously described this enigma as the source of negative integration being more forceful than positive integration: a small number of interest groups can challenge any national legislation as infringing EU internal market law, and thus dismantle social regulation at national levels.[23] Whether this must necessarily lead to undistorted competition of national legal orders is open to doubt. For the EU's normative frames before the Treaty of Lisbon it has been argued that the Court has created a framework that would have allowed it to respect the protection of issues of overriding general interest at national level until such a time as EU-level regulation has been established.[24] However, the Court has certainly not always heeded to those principles emanating from its own case law.[25]

3. Coordinative competences

In many policy fields, the EU can only coordinate Member States' policies, but not harmonize their laws (Article 2(5) TFEU), maintaining national-level prerogatives for policy making. These fields include combating social exclusion and modernizing systems of social protection (Article 153(1)(j) and (k) TFEU), public health (Article 168(2) TFEU) and consumer protection (Article 153(2) TFEU). Coordination through the open method of coordination may be successful,[26] but those successes are achieved nationally. Further, it is expected that best practice comparison and various other methods inducing cross-national learning will induce Member States and other actors at national levels to adapt national practice. This may or may not lead to spontaneous harmonization.

The competence regime for employment and economic policy differs slightly: Member States and the Union shall develop a coordinated employment strategy (Article 145 TFEU), while the EU complements Member States' actions and respects their competences (Article 147). The EU may also issue legislative measures 'designed to encourage cooperation between Member States', but must not harmonize (Article 149

of EU Polity', 16 *ELJ* 1 (2010), p. 1–28; R. Münch, 'Constructing a European Society by Jurisdiction', 14 *ELJ* 5 (2008), p. 519.

22 See for example Case C-290/04 *FKP Scorpio* [2004] ECR I-09461, para. 30, relating to tax law.

23 F. Scharpf, 'The European Social Model: Coping with Challenges of Diversity', 40 *JCMS* 4 (2002), p. 645–670; F. Scharpf, 'The Asymmetry of European Integration, or why the EU cannot be a "social market economy"', 8 *Socio-Economic Review* 2 (2010), p. 211–250.

24 D. Schiek, 'The European Social Model and the Services Directive', in U. Neergaard, *The Services Directive – Consequences for the Welfare State and the European Social Model* (DJØF, Copenhagen 2008), p. 46–49.

25 For a nuanced analysis of the Court's case law from 2004 see D. Schiek, *Economic and Social Integration,* p. 113–114, 170–173, 185, 199–200 and 209–214.

26 For an overview of different positions see M. Keune, 'The social dimension of European integration', in L. Burroni et al., *Economy and Society in Europe: A relationship in crisis* (Edward Elgar, Cheltenham 2012), p. 29–32.

TFEU). Economic policy is adopted communally by Member States and the EU (Article 119 TFEU). While the Member States remain responsible, the Union drafts broad economic policy guidelines with the option to issue warnings for non-compliance (Article 121 TFEU). Targets in broad economic guidelines may include employment targets, but there are no sanctions attached to non-compliance in this sector (Article 146 TFEU). If targets are set and surveyed, harmonization of national law and policy may not be quite as spontaneous.

Overall, coordination of national politics maintains and may even pronounce diversity between national orders. It merely complements the workings of the internal market; whether it can also correct market failure, is open to doubt, as is its potential for collective problem solving.

C. IS THERE A GAP BETWEEN THE EU'S COMPETENCES AND ITS ENHANCED SOCIAL VALUES?

The EU's legislative competences may seem rather limited in order to match the new normative commitments resulting from the new Treaty objectives.[27] However, there is more than one answer to the question whether this constitutes a gap between the EU's values and objectives, and its constitution of competences.

1. No gap: (re-)nationalization of social law and policy

First, there are those who consider that the EU is best advised not to meddle with social politics, since the EU citizens, especially after the post 2004 enlargements, are not sufficiently homogeneous to allow the link of solidarity necessary for such policies to be developed in legitimate ways.[28] This corresponds to a liberal approach to international law, according to which any international or supranational organization should not endeavour to engage in social law and policy, but merely provide a framework in which nation states can pursue such policies.[29] Such views coincide with those that could be categorized as competitive neoliberalism: some authors insist that, despite the demise of embedded liberalism, the EU should continue to focus on economic integration through

27 M. Dawson and B. de Witte, in B. Cantillon et al., *Social Inclusion and Social Protection in the EU,* p. 54.

28 W. Lamping, 'Mission Impossible? Limits and Perils of Institutionalising Post-National Social Policy', in M. Ross and Y. Borgmann-Prebil, *Promoting Solidarity in the European Union* (Oxford University Press, Oxford 2010), p. 46.

29 See for example J. Weiler, 'A Constitution for Europe? Some hard choices', 40 *JCMS* 4 (2002), p. 570–571; A. Alkoby, 'Three Images of "Global Community": Theorizing Law and Community in a Multicultural World', 12 *International Community Law Review* 1 (2010), p. 35–79, with reference to J. Rawls, *The Law of Peoples* (Harvard University Press, Cambridge 1999). More recently Weiler has for the first time expressed concern that the Court's law-making may induce social disintegration and subsequent disenchantment of Europe's people with the EU, in J. Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay', 9 *ICON* 3–4 (2011), p. 691.

a legally binding internal market and competition rules – even if this presupposes that Member States can only maintain social policies that comply with the restrictions conditioned by the internal market.[30]

Second, there are those who defend social policies, and indeed a social dimension of EU integration, and criticize the recent EU's neo-liberal and market orientation. The critique of the 'Laval quartet'[31] is paradigmatic. The quartet consists of three cases on the scope for applying statutory or collectively agreed employment rights at the place of work to posted workers, and of one case on the question whether a trade union may call for industrial action in order to defend wage agreements an employer signed before transnational relocation. The Court held in each case that enforcing or defending collective agreements infringed EU economic freedoms, thus confirming that applying internal market rules to employment legislation and wage regimes may induce regulatory competition for lower levels. A growing partition of this critique has focused on defending national social compromises against EU intervention, without promoting EU level social policy. For example, Joerges and Rödl[32] demand that the Court reconfigures its case law along the lines of a new conflict of law conception. While they sympathise with the idea of countering the destabilizing effects of such case law by EU level rules, they consider its realization as not realistic. Consequently, they demand that the Court refrains from viewing national labour law as restriction of EU economic freedoms. Recently, Everson and Joerges have reiterated the plea for conflicts law constitutionalism,[33] proposing a change of direction for EU social policy towards a 'simple compatibility agenda, minimising conflicts between national social constitutions and the openness of European markets'.[34] As a consequence, the EU should maintain Member State autonomy in relation to labour, land and environment and to monetary politics. Ashiagbor has also proposed to seek 'to preserve domestic institutions for social citizenship' while retaining their diversity.[35] Again, this is based on the pessimistic assumption that the EU will not place economic and social integration on a genuinely equal footing. The left-wing critique of the European Union from political science and political economy perspectives has partly been even more radical, with demands for individual states to exit the EU in order

30 See for example A. Moravcsik, 'In Defence of theDemocratic Deficit? Reassessing Legitimacy in the European Union', 40 *JCMS* 4 (2002), p. 618; G. Majone, *Europe as the Would-be World Power* (Cambridge University Press, Cambridge 2009), p. 128.

31 The term 'Laval quartet' refers to four rulings of the Court which related to posted workers and protection of wages under national collective agreements and/or legislation (Case C-341/05 *Laval*, Case C-438/*05 Viking*, Case C-346/06 *Rüffert* [2008] ECR I-01989 and Case C-319/06 *Commission v. Luxembourg* [2008] ECR I-04323).

32 C. Joerges and F. Rödl, 15 *ELJ* 1 (2009), p. 1–19.

33 M. Everson and C. Joerges, 'Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism', 18 *ELJ* 5 (2012), p. 644–666.

34 Ibid., p. 650.

35 D. Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', 19 *ELJ* 3 (2013), p. 324.

to re-establish national autonomy over social and economic policy and acquiring the possibility to maintain or reinforce social standards internally.[36]

Though based on contrasting starting points, both positions relegate the societal value of solidarity to the nation states. From the neo-liberal perspective, it is acceptable to re-entrench national social policies and labour rights regimes because these are no longer efficient. Its underlying assumption is that social policy and labour rights can no longer be sustained if Europe's national economies are to remain competitive. By contrast, the left-wing critique embraces social policy and labour rights, but on national levels only. It thus proposes to unravel EU integration sufficiently to re-establish conditions of embedded liberalism. From both those perspectives, the lack of EU regulatory competences for social policy in the widest sense is not necessarily problematic.

2. A gap: if there is a case for EU level social law and policy

Alternative positions are also being taken in academic writing. Deakin has, in a more recent response to the Laval quartet,[37] criticized this case law as the crystallization of neo-liberal thought in case law, coinciding with the neoliberal position on the EU's alleged economic constitution. While he also supports the case for labour rights being maintained at national level, either in order to embed the internal market or to counterbalance its effects, he concludes that the EU needs to re-conceptualize the link between economic and social policy if it is to realize the new values and objectives of the Treaty of Lisbon. Discussing the EU 'intervention' in national labour law before[38] and after[39] the 'quartet', Phil Syrpis, following Lyon Caen, argues that there is a limited case for EU intervention into national labour. He also demands maintaining some diversity of national labour law regimes, and fiercely criticizes the Court's case law in so far as it seems to imply that such diversity impinges on the internal market. However, his younger publication concludes that especially the recent case law requires the establishing of EU minimum standards on a legislative base.[40] The recent crisis management and the massive critique on Europe's streets against imposed austerity measures have led a number of authors from social sciences other than law to argue in favour of a stronger EU-level social dimension again.[41]

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36 P. Whyman et al., *The Political Economy of the European Social Model* (Routledge, New York 2012), p. 321, from a British perspective; W. Streeck, *Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus* (Suhrkamp, Berlin 2013), p. 235–237, from a German perspective. Streeck's conclusions are more contradictory since he acknowledges the nation states' diminishing ability to govern in a globalized economy, p. 112 and 129.

37 S. Deakin, in N. Bruun et al., *The Lisbon Treaty and Social Europe*, p. 19.

38 P. Syrpis, *EU Intervention in Domestic Labour Law* (Oxford University Press, Oxford 2007).

39 P. Syrpis, 'Should the EU be attempting to Harmonise National Systems of Labour law?', in M. Andenas and C. Baasch Andersen, *Theory and Practice of Harmonisation* (Edward Elgar, Cheltenham 2011), p. 450.

40 Ibid., p. 468–473.

41 I. Begg, 'Are better defined rules enough? An assessment of the post-crisis governance reforms of the governance of EMU', 19 *Transfer* 2 (2013), p. 49–62; J. Habermas, 'Demokratie oder Kapitalismus? Vom

If there is a case for EU-level social law and policy (including labour rights), the discrepancy between the EU's value base and its competences in these fields would indeed constitute a gap. The 'Constitution of Social Governance' rests on the assumption that there is indeed such a gap: it proposes an EU-level recoupling of economic and social integration based on the conviction that re-nationalization of social law and policy cannot be sustained.

The neo-liberal position demanding such re-nationalization acknowledges that not all elements of the European Social Model can be sustained in this way and proposes to downscale commitments to solidarity. Whatever this means from perspectives of political economy or sociology, it certainly clashes with the new value base established by the Treaty of Lisbon, as elaborated above. The pessimistic-left position as sketched above could be viewed as compliant with the Treaties on the basis of a restrictive reading of Article 2 TEU's second sentence.[42] The slight ambiguity of that clause might support an interpretation that only the Member States share the value of solidarity, but that they do not share it with the European Union. Even a grammatical interpretation casts doubt on this, since Article 2(2) only refers to one society, thus indicating that it refers to the (emerging) European society and not to 28 separate ones. This suggests that solidarity is also an EU value. A systematic interpretation of Article 2 TEU and Article 3 TEU supports such a reading. The EU under Article 3 also strives for social justice, an objective that has been introduced by the Treaty of Lisbon alongside the inclusion of solidarity into Article 2 TEU. Social justice as an objective is, however, based on solidarity. Accordingly, we must conclude that solidarity belongs to the Union's values.[43] If solidarity is one of the EU's values and striving for social justice one of its objectives, there is a presumption in favour of EU-level activities for attaining this objective – if the assessment is correct that re-nationalization of solidarity within the EU is unsustainable.

In order to make this assessment, considering clashes between the EU internal market and social values before the Court of Justice is illustrative. From the field of health care, the case *Elchinov*[44] comes to mind – which is at first sight a success story for the social progress flowing from the economic freedoms. Mr Elchinov challenged his health fund's refusal to reimburse surgery in the Berlin Charité hospital, which enabled him to be cured from a malignant oncological disease in his right eye instead of having the eye

Elend der nationalstaatlichen Fragmentierung der kapitalistisch integrierten Weltgesellschaft', *Blätter für deutsche und internationale Politik* (2013), p. 59–70; F. Zuleeg and H. Martens, 'Beyond the Current Crisis: How Should Europe Deal with Government Deficits and Public Debt in Future', in C. Secchi and A. Villafranca, *Liberalism in Crisis? European Economic Governance in a Time of Crisis* (Edward Elgar, Cheltenham 2009), p. 148.

42 Article 2 second sentence TEU states that the values on which the Union is founded are 'common to the Member States in a society in which (...) solidarity prevails'. Since solidarity is not mentioned among the EU's values in Article 2's first sentence, this could be read as relegating solidarity to national levels.

43 M. Dawson and B. de Witte, in B. Cantillon et al., *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy*, p. 55; D. Schiek, *Economic and Social Integration,* p. 219.

44 Case C-173/09 *Elchinov* [2010] ECR I-08889.

removed, which was the only treatment available in his native Bulgaria. The internal market emerges as the saviour, giving a patient from one of the poorest Member States access to the medical expertise available in one of the richest. However, considering the potential consequences of this kind of ruling for the health fund's budget in the long run might render this assessment premature. If the public health system in one of the poorest Member States would have to fund health tourism to one of the richest, this would benefit only the (small) part of the population able to pre-finance travel towards the best surgeons at the expense of funds available for less fortunate ones. Without an EU-level fund for balancing extreme inequalities, such a rule might not be sustainable. Consequently, the Court provided for the health fund to justify a refusal if this fundamentally threatens its financial sustainability.

Similarly, the case *Viking*[45] illustrates the potential for the internal market to be (ab)used in order to drive down wage levels: a Finish shipping company had wished to reflag a vessel to Estonia in order to be able to pay lower wages to its crew serving the same route as before since 2002. This led to conflicts with the Finnish trade union (FSU), which the ship-owner sought to redefine as a conflict with internal market rules after Estonia's accession to the EU.[46] The FSU, supported by the International Transport Workers Federation (ITF) and through its Estonian counterpart, insisted on retaining its position of negotiating wages collectively with the ship owner after the virtual relocation by reflagging.[47] This corresponds to widely accepted trade union strategies within countries, where trade unions also strive to retain recognition – after a change of ownership, for example.[48]

Confronted for the first time with such a transnational use of labour rights, the Court held that by threatening to initiate industrial action in order to remain the negotiation partner of an employer, the trade union infringed the employer's EU freedom of establishment in an unjustifiable way.[49] Going beyond the well-worn critique of this case it is useful to query which other options trade unions would have in a truly integrated

45 Case C-438/05 *Viking*.

46 Ibid. The first event related in the case report itself is the announcement by Viking in October 2003 to reflag its vessel to Estonia or in Norway (para. 11), see further para. 12–24 on the factual background.

47 The ferry served a route between Finland and Estonia, and the employer held its main assets in Finland. Reflagging the vessel would not change the economic centre of its activities, which remained in Finland.

48 Since transport by sea is particularly prone to develop into a transnational social space for interaction of management and labour from different nations, one of the first global collective labour agreements on minimum wages has been concluded in this sector. As a precondition for this success, an agreement between members secured cooperation rather than competition in cases of reflagging. Viking attacked this historical achievement – but while it was successful before the Court, the agreement still exists. On the history of the agreement from the 1980s see N. Lillie, 'Global Collective Bargaining on Flag of Convenience Shipping', 42 *British Journal of Industrial Relations* 1 (2004), p. 47–67; on the continuing difficulties for maintaining solidarity in international trade union cooperation, see M. Anner et al., 'The Industrial Determinants of Global Solidarity: Global Interunion Politics in Three Sectors', 12 *European Journal of Industrial Relations* 1 (2006), p. 1–27.

49 Case C-438/05 *Viking*, para. 68–90.

internal market. If free movement of entrepreneurs (and thus employers) across the whole EU is realized, there are in principle two options: trade unions could force employers into an EU-wide collective bargaining system with diverse local levels of pay and other conditions, or they could at least agree with each other not to enter into wage level competition. The former option has obviously not (yet) been realized. The latter requires that relocation does not affect automatically the bargaining position of the trade union which represented the workforce in negotiations with the employer before relocation. If there is no physical relocation of the entrepreneurial activity, trade unions should be able to use freedom of establishment as well and follow the virtual move of the bargaining unit. The latter option would mean that other trade unions do not negotiate with the employer in question, and possibly also support industrial action aimed at persuading the employer to continue applying negotiated conditions of labour. All this would appear to be perfectly normal in a transnational democracy based on respect for labour rights as human rights.

Finally, it should not be ignored that clashes occur also between EU integration beyond the internal market and national social policy. This has been illustrated in case law on EU citizens' university access:[50] Member States attempted to maintain priority for national citizens to free university education, even in subjects where access was heavily restricted to universities in neighbouring countries with the same teaching language. This, the Court found, clashed with the EU ban on nationality discrimination. In order to protect their national higher education budget, Member States would have to demand fees for university education while withholding grants helping to pay those fees from EU citizens who had not been resident and economically integrated for at least five years.[51]

All three examples illustrate the necessity of cross-border expansion of social interactions in the framework of the EU. Relegating the social question to national levels will not allow their constructive adaptation to the realities of the internal market. If there is only national social policy, the internal market would at best make unsustainable institutions securing social integration within states. In the worst case scenario, actors within national social institutions would be driven into competing against each other on the basis of nationality or locality.

Social actors in Member States with strong economies might be able to defend high wage levels or functioning public health services, and this would of course be preferable to abolishing these social institutions. However, it is not difficult to predict that in weak economies solidarity from beyond those nation states' boundaries may be a requirement for maintaining social services, free university education or functioning industrial relations. This indicates that mere policy coordination without a regulatory

50 Case C-73/08 *Bressol and others* [2010] ECR I-02735 and Case C-147/03 *Commission v. Austria* [2005] ECR I-05969, on these F. de Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe', 18 *ELJ* 5 (2012), p. 674–698; D. Schiek, *Economic and Social Integration*, p. 161–162.

51 As was allowed in Case C-158/07 *Förster* [2008] ECR I-08507.

framework, on a voluntary basis, will not be sufficient to make national level social policy arrangements withstand the pulls of the economic freedoms and competition law.

Since the internal market has been complemented by a currency union, which went into its third stage in 1999, Member States' economies are linked even closer. Except for Member States which negotiated an exception, all EU Member States must introduce the euro once they fulfil the convergence criteria.[52] Entering into a common currency prevents Member States from using currency devaluation in order to cushion an economic crisis, and the focus of the euro currency legal framework on price stability and budgetary discipline (Articles 126(1) and 128(1) TFEU) can restrict the potential for providing public services in the general interest or generous social benefits from the state budget. This obviously further restricts the scope for national closure of social policy.

All this supports the claim that 'reverse ordo-liberalism'[53] by which social law, policy and rights are relegated to national levels is not sustainable in an ever closer integrated European Union. It equals a position of national egotism, which excludes any opportunities for those living in economically weaker Member States to profit from social advantages on the back of the internal market. This again means that realizing the EU's social values also requires EU level action. Accordingly, the gap between those values and the EU's legislative and policy competences in their support constitutes a normative problem.

§3. A CONSTITUTION OF SOCIAL GOVERNANCE AS THE WAY OUT

The concept of a Constitution of Social Governance proposes a teleological interpretation of the Treaties as a way to close the gap between the EU's social values and the limited reach of competences for its institutions in corresponding fields. It also considers that EU integration needs to transcend public spaces, discourses and deliberations and embrace the emerging European society. Given the limits of EU competences for actively shaping social Europe, developing such transnational social spaces appears as a precondition for preventing failure

52 These were first introduced in a protocol annexed to Article 109(j) EC (Treaty of Maastricht) and have only undergone editorial changes since. They are now contained in Protocol 13 to the Treaty on the Functioning of the European Union. They can be summarized as follows: (1) average exchange rate not to deviate by more than 2.25 per cent from its central rate for the two years prior to membership; (2) inflation rate should not exceed the average rate of inflation of the three community nations with the lowest inflation rate by 1.5 per cent; (3) long-term interest rates not to exceed the average interest rate by 2 per cent of the three countries with the lowest inflation rate; (4) government budget deficit not to exceed 3 per cent of its GDP; and (5) the overall government debt not to exceed 60 per cent of its GDP.

53 The term is borrowed from S. Giubboni, 'Social Rights and Market Freedom in the European Constitution: A Reappraisal', in K. Tuori and S. Sankari, *The Many Constitutions of Europe* (Ashgate, Farnham 2010), p. 254.

of the EU integration project and its dissolution into European disunion.[54] This again imposes demands on all the EU institutions, including the Court of Justice.

A. THE NOTION OF 'SOCIAL GOVERNANCE'

The notion of social governance draws on the breadth of academic discourse on both its components.

1. Governance

Concerning governance,[55] the concept embraces all forms of giving direction to society, including economy, maximizing cooperation with those the entity giving directions purports to govern. Within the EU, the complexity of governance is exacerbated by the multiple levels of the Union, Member States, regions and municipalities. Accordingly, a mix of governance styles is needed to achieve any of the EU's objectives,[56] moving on a continuum between hierarchy and markets,[57] involving hybrid forms and different modes of cooperation often labelled 'new governance' or 'soft law'.[58] Law retains a decisive role in that the CJEU increasingly refers to 'soft law',[59] among others because the choice between governance modes is constitutionally constrained.[60]

Such constraints are determined by the EU competence regime, which engenders a particular mix of hierarchical, hybrid and market governance.

Hierarchical governance of the EU over its Member States and their societies is established when and in so far as EU law is directly applicable within Member States and enjoys primacy over national law. This applies to regulations and decisions, whether

54 The notion of disunion is taken from J. Hayward and R. Wurzel, *European Disunion. Between Sovereignty and Solidarity* (Palgrave MacMillan, London 2012).

55 Whose full extent cannot be explored in this article. See on the debate beyond the EU, D. Levi-Faur, *Oxford Handbook of Governance* (Oxford University Press, Oxford 2012); M.-L. Djelic and K. Sahlin-Andersson, *Transnational Governance* (Cambridge University Press, Cambridge 2007); on EU governance see U. Diederichs et al., *The Dynamics of Change in EU Governance* (Edward Elgar, Cheltenham 2011); M. Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (Cambridge University Press, Cambridge 2011); T. Börzel, 'The European Union – a Unique Governance Mix?', in D. Levi-Faur, *The Oxford Handbook on Governance*, p. 639.

56 D.M. Trubek and L. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination', 11 *ELJ* 3 (2005), p. 343–364; G. de Búrca, 'Stumbling into Experimentalism: The EU Anti-Discrimination Regime', in C.F. Sabel and J. Zeitlin, *Experimentalist Governance in the European Union: towards a new architecture* (Oxford University Press, Oxford 2010), p. 215.

57 D. Levi-Faur, 'From "Big Government" to "Big Governance"?', in D. Levi-Faur, *The Oxford Handbook on Governance*, p. 31–32.

58 A. Peters, 'Soft Law as a New Mode of Governance', in U. Diederichs et al., *The Dynamics of Change in EU Governance*, p. 21.

59 S. Smismans, 'From Harmonization to Coordination? EU Law in the Lisbon Governance Architecture', 18 *JEPP* 4 (2011), p. 504–524.

60 A similar approach is taken by H. Schepel, *The Constitution of Private Governance* (Hart, Oxford 2005), p. 28–34.

issued by the EU's legislative institutions Commission, Council and European Parliament or the EU agencies such as the European Central Bank, and to such Treaty provisions to which the Court accords direct effect.[61]

EU legislation, particularly through directives, can engender hybrid governance between hierarchy and cooperation. While enjoying primacy over national law, directives only bind Member States as to their objective, but not as to the choice of modes for implementation (Article 288(3) TFEU). This presupposes communication between the EU and national legal orders, thus adding a cooperative element. Social policy directives frequently allow implementation by social partners, thus adding another dimension of hybridity. Harmonization, now also mentioned in Article 2(5) TFEU, has become the technical term for this form of legislation.[62]

Governance through cooperation between the EU and its Member States thrives where the Treaties exclude harmonization in favour of coordination (Article 2(5) TFEU). Economic, employment and social policy are specifically mentioned in Article 5 TFEU, with the open method of coordination having become the best known form of 'new governance' in employment and social policy.[63]

Finally, the EU also relies on governance by markets. Although markets and hierarchies are juxtaposed in governance theory, in the EU hierarchical governance through judicial competences frequently leads to a reinstatement of market rule: if the CJEU requires removal of national rules, and the EU has no legislative competence, market governance replaces hierarchical governance in the public interest.

2. Social

The term 'social' is used with two meanings. First, it alludes to social policy,[64] though not in a traditional sense of comprising merely 'redistributive'[65] policies. It comprises any governance aiming to shape society including its economic aspects, ranging from securing income in times of temporary exclusion from (labour) markets, providing

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61 Falkner and Scharpf also categorize policy making by EU agencies (including the ECB) and the European Court of Justice as supranational-hierarchical in their discussion of EU decision traps, see G. Falkner, 'Introduction', in G. Falkner and F. Scharpf, *The EU's Decision Traps and their exits* (Oxford University Press, Oxford 2011), p. 11 and 13 with tables 1.3 and 1.4; F. Scharpf, 'The Joint Decision Trap Model, Context and Extension', in G. Falkner and F. Scharpf, *The EU's Decision Traps and their exits*, p. 227–228.

62 M. Andenas et al., 'Towards a Theory of Harmonisation', in M. Andenas and C. Baasch Andersen, *Theory and Practice of Harmonisation* (Edward Elgar, Cheltenham 2011), p. 572.

63 K.A. Armstrong, *Governing Social Inclusion. Europeanization through Policy Coordination* (Oxford University Press, Oxford 2010); M. Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (Cambridge University Press, Cambridge 2011).

64 Social governance is used as synonym to social policy in literature for example by example M. Daly, 'Governance and Social Policy', 32 *Journal of Social Policy* 1 (2003), p. 113–128; O. Treib et al., 'Social Policy and Environmental Policy: Comparing Modes of Governance', in U. Diederichs et al., *The Dynamics of Change in EU Governance*, p. 103.

65 'Redistribution', though frequently used in relation to social policy, is an unfortunate term since it implies naturalization of property allocation when it actually results from market policies.

social services of general interest and regulating markets, either through legislation or autonomous social regulation, for example through collective bargaining.[66]

Second, 'social' or 'societal' also captures the transnational socio-economic activity typical for the connecting of national societies by fledgling transnational social spaces in the EU. Governance of these transnational markets is not necessarily or mainly based on actions of public institutions, but also (or possibly mainly) relies on socio-economic actors distanced from the state.[67]

3. Social governance

Combining those terms into the notion of 'social governance' aims at achieving two goals. On the one hand, the notion highlights that the EU's enhanced commitment to social values should inform each aspect of its governance. On the other hand, it underlines the role and relevance of societal actors. In EU integration processes, societal actors have been empowered to initiate judicial proceedings and use the reference procedure to make their case into an EU case. They frequently provide input into the EU legislative process, in particular based on the EU Commission's longstanding practice to initiate hearings of their 'Green Papers' that eventually grow into legislation.[68] This mixed governance is increasingly complemented by the development of truly transnational social spaces where rules are made by those involved in exchange. This corresponds to and derives from reality at national levels, where sectors of social policy are not governed in the public realm. Wage determination is governed wholly autonomously by trade unions and employer associations in some Member States, while most allow these social partners some role. In many Member States charitable organizations and churches also provide essential social services, and some also protect autonomous policy making by local municipalities, which may also cooperate with civil society, or, *horribile dictu*, across borders.

66 More detail and references in D. Schiek, *Economic and Social Integration,* p. 30–36.

67 This concept is similar to the concept of societal constitutionalism as used from systems theory perspectives in that it stresses the potential of societal rule making, G. Teubner, 'Fragmented Foundations: Societal Constitutionalism Beyond the State', in P. Dobner and M. Loughlin, *The Twilight of Constitutionalism?* (Oxford University Press, Oxford 2010), p. 327; L.C. Backer, 'Collisions of Societal Constitutions', 20 *Indiana Journal of Global Legal Studies* 2 (2013), not yet published; M. Renner, 'Occupy the System! Societal Constitutionalism and Transnational Corporate Accounting', 20 *Indiana Journal of Global Legal Studies* 2 (2013), forthcoming. It also shares some common ground with conceptualizing citizen interactions from jurisprudential perspectives as 'transnational solidarity' (A. Sangiovanni, 'Solidarity in the European Union', 21 *Oxford Journal of Legal Studies* 1 (2013), p. 1–29).

68 This has also been a requirement under Article 19 TEU since 2009.

B. CONSTITUTIONALIZING EU GOVERNANCE FROM SOCIAL PERSPECTIVES

The Constitution of Social Governance reads the EU competence regime – which does not allow EU-level legislation in the fields of wage determination, industrial warfare, health care, social inclusion, education and culture – as keeping open avenues for transnational social spaces to develop. If EU (case) law and policy, while the EU has no competence to legislate, were to constrain processes of transnational governance in these fields this may drive the EU's people into renationalization strategies which will ultimately threaten EU integration.

This, states the Constitution of Social Governance, runs counter to the EU Treaties' value base. The concept thus constitutes mainly a theory of argumentation, offering a way to reconcile social and economic dimensions of EU integration through interpretation of the Treaties. Such interpretation of the Treaties must be coherent and purposive, taking into account those provisions relating to values and objectives. In other words the Treaties (and unwritten principles of law) must be re-read in a way that enables the EU and its Member States to realize social justice while completing the internal market or economic and monetary union.

The gap between values and competences can be addressed by applying this mode of interpretation to all forms of competence, and since competences are aligned to modes of governance, this interpretation will affect all forms of governance as well. In order not to exceed the space for this article, we will focus on the potential to protect scope of action for non-governmental policy making and regulation beyond national borders. In this respect we will focus on judicial competences and coordinative competences as they have developed in the realm of new economic governance.

1. Change options for the Court of Justice

Since the Court has recently been perceived as a veritable barrier to any social embedding of EU economic integration, the question is how the challenge for the Court to comply with the new constitutional demand of integrating economic and social aspects of the EU project can be met. Interestingly, this is possible by using traditional doctrinal techniques which should be appealing to the Court of Justice.

We will consider those doctrinal arguments in relation to societal governance transcending national borders. Presently, such governance is hardly well developed. Even coordination of collective bargaining between trade unions, though now practiced for more than 15 years, is a fragile exercise: exchange of common practices and the development of EU-level wage bargaining principles has led to only cautious

appreciation.[69] Nevertheless, it is certainly not impossible to imagine that cooperation of trade unions goes as far as a boycott of transnationally posted temporary agency workers in cases of industrial action, for example. If their employer, a temporary works agency with multiple establishments in the EU, feels challenged by such boycotts and wishes to obtain punitive damages from those trade unions, the legal problems surrounding European dimensions of trade union activities could again come before the bars of the Court. Referring to our other case examples, it is not unthinkable that health funds in different Member States would agree to establish a transnational compensation fund from which treatments of free moving patients could be reimbursed without endangering the sustainability of any of the affiliated health funds. Further, since there is already a League of European Research Universities,[70] it is possible that these universities would agree on a scheme of refunding expenditure for exchange of students or young researchers.[71]

All these examples imply that societal actors react to EU integration demands on a transnational, but not an all-European base. This would then lead to different experiences of economic actors in the first examples or (consumer) citizens in the last two examples depending on which Member States they seek to make use of their economic or citizen rights. This might lead to 'partitioning of markets'[72] as a consequence of actions by trade unions, health funds or universities.

In the fictional case of industrial solidarity action of temporary agency workers, who, at the request of their trade union, refuse to work as replacements for workers on strike in a different Member State, the Court would have no difficulty to decide in a way that paves the way for such civil society activity. The Court would neither have to give up the notion of supremacy of EU law, or the concept that restrictions of economic freedoms need to be justified. It would merely have to take into account the reality, and desirability of transnational social activity in an internal market. It could consider that being subjected to industrial (solidarity) action once in a while is to be expected when doing business within a legal environment protecting human rights. Accordingly, being subjected to industrial action would have to be treated in the same way as being subjected

69 V. Glassner and T. Pusch, 'Towards a Europeanization of wage bargaining? Evidence from the metal sector', 19 *European Journal of Industrial Relations* 2 (2013), forthcoming.

70 League of European Research Universities (LERU), www.leru.org/index.php/public/home/ (last visited on 2 May 2013).

71 LERU has recently started to develop a policy paper on student exchange which stresses the necessity to complement broad strategies such as ERASMUS by programme specific exchange cooperation (available from the web page above).

72 The notion of partitioning of markets captures the impact of national legislation or conduct of market participants on the internal market. It is a typical effect of cartels (see Case C-70/12 P *Quinn Barlo and other v. Commission*, Judgment of 30 May 2013, not yet reported); on misguided application of public procurement rules or intellectual property rights (Case C-128/11 *UsedSoft*, Judgment of 3 July 2012, not yet reported, para. 62) and has also been considered a potential consequence of transnational collective industrial action (Opinion of Advocate General Maduro in Case C-438/05 *ITWF* [2007] ECR I-10779, para. 62 and 63).

to employment protection legislation.[73] While the resulting legal obligations or factual inhibitions may be experienced as a nuisance, they are not restrictions of economic freedom. There is no need to justify them – except if industrial action is indeed taken with the aim of rejecting cooperation with foreign colleagues.[74] If the Court would be minded to search for a reason to go beyond *Viking*, the Charter of Fundamental Rights as well as the European Convention of Human Rights[75] could be starting points.

The fictional case of transnational cooperation of health funds or universities may trigger challenges based on economic freedoms and EU citizens' rights as well as on competition law. Concerning economic freedoms and EU citizens' rights, there is some dispute whether both education and medical treatment should be considered as services or not. The Court of Justice had classed medical treatment as a service provided against remuneration, even if it is provided by a national health service, while it has classed education as not being a service provided against remuneration so far.[76] For the purpose of the abbreviated discussion here, it is sufficient to state that under both regimes EU citizens from each Member State should be treated equally by states. However, there is as of yet no notion of a horizontal effect of EU citizenship rights, while horizontal effects of economic freedoms have been spectacularly confirmed by the 'Laval quartet'.[77] Under this principle, a citizen who is denied payment from the compensation fund or participation in the scheme of funded research visits could claim discrimination on the ground of nationality, since the scheme does not cover all Member States.

Assuming that the Court would not hesitate to find that private associations established by partly publicly funded health funds and universities are bound by the economic freedoms and citizenship rules, it might be necessary to provide some additional legal arguments to defend those emerging transnational solidarity schemes. The Court's imagination would be challenged more thoroughly than in relation to

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73 See Case C-190/98 *Graf* [2008] ECR I-00493.

74 C. Kilpatrick, 'Laval's regulatory conundrum: collective standard stetting and the Court's new approach to posted workers', 36 *ELR* (2009), p. 864.

75 T. Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments', 10 *Cambridge Yearbook of European Legal Studies* (2007 – 2008), p. 540–561; K. Ewing and J. Hendy, 'The Dramatic Implications of Demir and Baykara', 39 *Industrial Law Journal* 2 (2010), p. 2–51.

76 The *Watts* ruling (Case C-372/04 *Watts*) subjected the NHS in England and Wales, which was free from contractual elements at the time of the reference, to the regime of freedom to provide services, as well as private school education (Case C-76/05 *Schwartz & Grootjes-Schwartz* [2007] ECR I-07001, Case C-318/05 *Commission v. Germany* [2007] ECR I-06957), while it has treated access to and finance for education in state funded universities not under economic freedoms, but 'merely' as a right derived from EU citizenship, which is weaker (younger cases include Case C-158/07 *Förster*). For more details see D. Schiek, *Economic and Social Integration* p. 156–162. For a critical assessment see S. O'Leary, 'Free Movement of Persons and Services', in P. Craig and G. de Búrca, *The Evolution of EU Law* (2nd edition, Oxford University Press, Oxford 2011), p. 531–532.

77 They were established much earlier: a first indication that private associations were bound by economic freedoms emerged in 1974 (Case C-36/74 *Walrave* [1974] ECR 01405), and private employers were explicitly bound to the non-discrimination principle inherent in free movement of workers in 2000 (Case C-281/98 *Angonese* [2000] ECR I-04139).

industrial action, as there is no acknowledged fundamental right to cooperation of health funds and universities. However, it could consider that those schemes go some way to introducing solidarity in the fields of education and health care beyond national borders, which the EU legislator cannot provide due to competence constraints.

The problems of dealing with these schemes would be less severe if they were subjected to judicial review under EU competition law: the Court could avoid treating the associations of universities or health funds as undertakings if it would acknowledge the solidaristic elements of their organization.[78] If that is not possible, it could expand its own cautious steps of acknowledging the doctrine of ancillary restraints in order to exempt agreements that restrict competition in order to achieve a respectable aim.[79] In both contexts, the Court has already referred to solidarity in the application of EU competition law. This case law could be further developed by reference to Article 2 TEU.

2. Reflections on new economic governance

The label 'new economic governance' is used in the EU to characterize a new approach to coordination of economic policies motivated by the euro currency crisis. The EU Treaties only provide coordinative competences in economic policy, while establishing an EU level monetary policy under the supervision of a largely independent European Central Bank. In order to address this inherent imbalance of economic and monetary integration, the EU institutions aim to achieve a more stringent approach to economic policy coordination as well as more coherence between economic and social policy coordination.

The latter coordination has been an element of the Lisbon Strategy,[80] which entailed, initially, the combat of poverty and social exclusion as one of the action fields for the open method of coordination. From 2011, under the follow up strategy Europe 2020,[81] issues closer to the economy, such as expanding employment and furthering education, are higher on the agenda than social inclusion. Furthermore, Europe 2020 provides for

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78 In Cases C-160/91 *Pouce and Pistret* [1993] ECR I-00637) and C-355/01 *AOK Bundesverband* [2004] ECR I-02493, the Court exempted an activity that was characterized by solidarity from the notion of undertaking and thus the scope of competition law. However, in more recent cases the principle of solidarity was not in itself sufficient, it needed to be accompanied by state supervision (Case C-350/07 *Kattner Stahlbau* [2009] ECR I-01513 and Case C-437/09 *AG2R* [2011] ECR I-00973).

79 Case C-309/99 *Wouters and others* [2002] ECR I-01577, para. 97; Case C-519/04 P *Meca Medina* [2006] ECR I-06991, para. 42–43.

80 The Lisbon strategy emerged from the Presidency Conclusions of the Lisbon European Council of 23 and 24 March 2000, and its second phase was initiated by a European Commission policy initiative: European Commission, Working Together for Growth and Jobs: A New Start for the Lisbon Strategy, COM (2005) 24 final. The Lisbon Strategy's second phase had already been characterized by a stronger focus on 'growth and jobs', while the goal of social inclusion was no longer pursued. The Lisbon Strategy has been widely analysed, see for example P. Copeland and D. Papadimitriou, *The EU's Lisbon Strategy. Evaluting Success, Understanding Failure*.

81 European Commission, *Europe 2020. A Strategy for smart, sustainable and inclusive growth,* COM (2010) 2020, adopted by the Council on 27 June 2010 (EUCO 13/10 EUR 9 CONCL 2, 17 June 2010).

close coordination of employment guidelines and broad economic policy guidelines, thus formally integrating social and economic policy coordination. As a response to the sovereign debt and currency crisis in the euro area, Council and Commission have also established the so-called 'European Semester', which subordinates both these coordination processes to the primary aim of budget stability and the containing of sovereign debt.[82]

There is thus the realistic expectation that coordination of national economic and social policies will in the future not only be more closely linked to each other, but also subordinated to the prerogatives of the EU monetary policies. These are focused on price stability, sound public finance and sustainable balance of payments (Article 119 TFEU), in particular through avoidance of excessive government deficits (Article 126 TFEU). Even before the crisis, there was a growing consensus that competitiveness, the core value of the renewed Lisbon Strategy of 2005 as well as Europe 2020, required reducing levels of protection in labour markets, for example. It must be expected that the political aims[83] of promoting lower and more flexible wages as well as decentralized collective bargaining structures will be maintained.

The Constitution of Social Governance can be used to underpin political arguments with constitutional reasoning. In contrast to proposals to enhance the procedures of policy coordination,[84] it focuses on substantive critique. Such a critique can be constitutionally underpinned in two dimensions.

First of all, the constitutional commitment to fuse and balance economic and social aspects of EU integration in all policy fields demands that policy coordination does not lean towards certain economic demands without balancing the social consequences. This underpins the political proposal of a 'social investment pact'[85] with a constitutional argument. However, both 'new economic governance' and the proposed social investment act aim at coordination of national policies. While it is sensible and indeed corresponds to constitutional demands to balance economic and social policy elements in this coordination, this again attracts the critique of being a step towards 'reverse ordoliberalism'. The EU's commitment to solidarity, social justice and social cohesion requires EU-level law and policy in addition to coordination of national policies. As Clauwaert and Schömann observe, EU new economic governance in the global financial crisis has been characterized by the absence of any attempt to legislate at EU level at least

82 M. Hallerberg et al., *An Assessment of the European Semester* (European Parliament, Brussels 2012).

83 The political character of these aims is exposed by P. Pochet and C. Degryse, 'The Programmed Dismantling of the "European Social Model"', 47 *Intereconomics* 4 (2012), p. 212–217.

84 Such proposals include making the procedure more transparent, as well as introducing a more active role for the European Parliament, see M. Dawson, *New Governance and the Transformation of European Law*, p. 265–270 and 280–292.

85 As for example demanded by the European Parliament, see European Parliament Resolution of 20 November 2012 on Social Investment Pact – as a response to the crisis – P7 TA 2012 (0419).

in the field of labour rights, where the EU has competences.[86] The Constitution of Social Governance would require EU action in fields where competition between Member States for the lowest level of employee protection is likely.

Secondly, the demand of lowering wages and promoting decentralization of wage bargaining not only shows limited respect for social justice and the objective of combating poverty, but also intrudes on the prerogative of social partners. The EU is under a constitutional obligation to leave breathing space for transnational societal actors to develop – even if this kind of development is immensely difficult in the field of wage policy coordination at a time of crisis.[87]

In addition to new economic governance relating to all EU Member States, the euro currency crisis from 2010 onwards has induced a number of specific measures concerning Member States whose currency is the euro and who have to apply for support in order to be able to serve their sovereign debt. These policies were initially conducted through emergency Council decisions, then under the European financial stabilization mechanism established by a Council Regulation[88] and are now based on the Treaty Establishing the European Stability Mechanism.[89] The support for individual Member States is always conditional, since commitments made in 'Memorandums of Understanding' must be fulfilled (Article 3 Regulation 407/2010, Article 12 ESM Treaty). This form of governance retains Member States' formal responsibility for implementing the demanded politics, which has arguably led to democratic processes being experienced as farcical. Arguably, there are also contradictions between EU legislation and the Memorandums of Understandings.[90] Here the focus is on the tension between those measures on the one hand and the value of solidarity and the objectives of social justice, social inclusion and social cohesion, which constitute the main elements of the Constitution of Social Governance on the other hand.

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86 S. Clauwaert and I. Schömann, *The Crisis and National Labour Law Reforms: A Mapping Exercise* (ETUI, Brussels 2012), p. 6.

87 V. Glassner and T. Pusch, 19 *European Journal of Industrial Relations* 2 (2013), forthcoming.

88 Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, [2010] OJ L 118/1.

89 This Treaty was concluded by all the Member States whose currency is the euro.

90 For example, the first Memorandum of Understanding concluded with Greece contained the following demand: 'Following dialogue with social partners, government adopts legislation on minimum wages to introduce sub-minima for groups at risk such as the young and long-term unemployed, and put measures in place to guarantee that current minimum wages remain fixed in nominal terms for three years.' (published in European Economy, Occasional Paper 61/May 2010, http://ec.europa.eu/economy_finance/publications (last visited 5 June 2013)). The differentiation in minimum wages by age might be difficult to justify under the prohibition of age discrimination, given the Court's ruling in *Mangold* (C-144/04 *Mangold* [2005] ECR I-09981). Similarly, the initial Council Decision on granting Union financial assistance to Ireland of December 2010 demanded that Ireland introduced a 10% pay reduction for new entrants into the public service (Article 3(7)). Such a clause may introduce indirect wage discrimination based on sex or age, depending on the comparative proportion of women or younger people among new entrants and the general workforce. (Council Implementing Decision 2011/77/EU of 7 December 2010 on granting Union financial assistance to Ireland, [2011] OJ L 30/34).

The Memorandums of Understanding are a vivid illustration of the disadvantages of classical division of labour between international and supranational organizations on the one hand and nation states on the other hand. The EU Member States are burdened with dismantling their established labour law system and retrenching their welfare states in order to access the support of the EU in an emergency. Such conditional solidarity does not, of course, further the value of solidarity in connection to the EU's objectives listed above. The EU's emulation of IMF methods has also left the EU without any means of alluding to those principles that inform the Constitution of Social Governance. Instead, the evaluation of the measures under aspects of social constitutionalism has been left to international organizations[91] or national constitutional courts.[92] This specific form of (re-)nationalization of economic and social policy has thus already led to a legitimacy deficit for the EU, since only national and international legal categories, but not the categories of the EU constitution itself have been used to challenge it. This deficit may be even more serious than the one perceived in the 1970s as a result of a missing catalogue of human rights. However, today there is not only a human rights catalogue, but also an EU Constitution of Social Governance. Accepting the Constitution of Social Governance enables the critical EU legal scholar to offer an EU level critique of these measures, which also contributes to addressing this specific legitimacy deficit. Clearly, the dismantling of institutions for social integration at national levels in the name of more efficient economic integration does not conform to the EU constitutional value of solidarity and the objectives of social justice, social inclusion and social cohesion. These constitutional demands could be activated before national courts to address the validity of the EU demands, if necessary via a reference to the CJEU. Further, there could be an invalidity action by privileged claimants. While not likely, given the urgency of maintaining state liquidity, substantive juridification of the matter is not impossible.

Arguably, this has changed after the support for over-indebted Member States has been 'outsourced' from the EU Treaties by new international treaties such as the ESM. While the TSCG refers to employment and social cohesion,[93] no reference to solidarity, social cohesion, social justice, social protection or social inclusion (compare Articles 2, 3

91 The first Memorandum of Understanding with Greece triggered a complaint to the ILO whose mission identified threats for a number of global labour standards, www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/missionreport/wcms_170433.pdf (last visited 5 June 2013).

92 For example, upon application by the President of the Republic of January 2013, the Portuguese constitutional court held on 9 April 2013 that parts of the legislation issued in order to reduce the public deficit was invalid: singling out public sector holiday pay and redundancy pay and pensioners holiday pay for savings violated the principle of equality of all before the law, and taxation of unemployment benefits and pensions was disproportionate (judgment 187/2013, www.tribunalconstitucional.pt/tc/acordaos/20130187.html (last visited 5 June 2013)).

93 Article 1 states that the 'Contracting Parties (…) agree (…) to strengthen the coordination of their economic policies (…) thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion'.

TEU and 9 TFEU) occurs in the ESM Treaty. This might not contest its validity[94] as long as the EU institutions involved in granting support under the ESM remain bound by the EU Constitution of Social Governance. Accordingly, the acts of the Commission or the ECB in these manoeuvres would remain open to challenge by privileged claimants. In this respect, the Constitution of Social Governance might also offer an EU-level response to the national and international law challenges of conditionality imposed under the ESM Treaty.

§4. CONCLUSION

It has been shown that a Constitution of Social Governance offers jurisprudential arguments that can challenge the European disunion induced by re-nationalizing social law and policy in times of crisis. The placement of such jurisprudential arguments seems straightforward in instances where national or EU courts pose EU economic freedoms against the EU's own social values. The purportedly legal arguments can be countered with an enhanced legal understanding of the European integration process. The predominant mode of impacting upon the social fabrique of Europe is, however, not always the Court's case law. In particular, in engaging with the euro currency and sovereign debt crisis, coordination of policies by non-legally binding measures is dominant, whose coercive force results from Member States' dependency from financial support. These measures support the re-nationalization of social policy, as recently demanded by several factions of scholars. However, the results of such re-nationalization have been alarming, in that the European Union loses the support of even its most faithful citizens. This suggests that developing EU level or at least transnational approaches is the preferable approach to achieve adequate wage development and modernization of labour rights and welfare provisions. Through weak juridification, EU constitutional arguments can be used to support such policies as well as the autonomy of societal actors in implementing them.

94 Which was at stake before the Court already (Case C-370/12 *Pringle*, Judgment of 12 November 2012, not yet reported, see on this P. Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology', 20 *MJ* 1 (2013), p. 3–11).