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JUDICIAL ACTIVISM OF THE EUROPEAN COURT OF JUSTICE
AND THE DEVELOPMENT OF THE EUROPEAN SOCIAL MODE
IN ANTI-DISCRIMINATION AND CONSUMER LAW

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*Judicial Activism of the European Court of Justice and the Development of the European
Social Mode in Anti-Discrimination and Consumer Law*

HANS-W. MICKLITZ

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Abstract

My hypothesis, which I try to present in this paper can be broken down into three different affirmations: The ECJ is developing, on the basis of the *acquis communautaire*, a European Social Framework, not a fully-fledged European Social Model. The ECJ's Social Model is based on access justice not on social justice. More recently, the ECJ tends to substitute national social models with its own European Social Model.

Keywords

Judicial activism, social model, access and social justice

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I. Working Hypothesis – How the Argument Goes

The convenors of the conference assigned three significant issues to me¹: ‘judicial activism of the European Court’, ‘development (of the European legal order)’ and ‘the European Social Model’. It is only by combining the three, the otherwise insurmountable task, renders itself feasible.

I will not concentrate here on the judicial activism of the ECJ,² but rather on judicial activism related to the social model. However, even this narrow understanding requires some clarifications. I will firstly have to define what judicial activism actually means and indeed will have to shed light on what might be the ‘social model’. The reference to ‘development’ suggests that the legal order and the social model have undergone changes over time. This infers that I must define the parameters of the developments, against which the progress or backlash of the development of the European social (legal) order can be measured. Whether there is or can be something like a consistent European Social Model is subject to an intensive debate, with contributions from both lawyers and political scientists.³ I will focus my interests on whether the ECJ has developed or is developing a ‘Social Model’ at all and if so, what this ‘Social Model’ looks like.

My hypothesis, which can be broken down into three different affirmations, is the following:

1. The ECJ is developing, on the basis of the *acquis communautaire*, a European Social Framework, not a fully-fledged European Social Model.
2. The ECJ’s Social Model is based on access justice not on social justice.
3. More recently, the ECJ tends to substitute national social models with its own European Social Model.

I will develop my argument in three steps. *First* of all, I will outline what I mean by ‘The Social’. In essence, I am referring essentially to two areas which are of major concern for the establishment of the European Social Model, anti-discrimination law and consumer law, with regard to universal services. Anti-discrimination law is imbedded in labour law. I have been forced here to touch upon the labour law context, since modern anti-discrimination law originates from the law of equal treatment which is much older and subject to differences in the Member States. However, I must clarify that my contribution is not meant to deal with labour law as a whole, with ‘Individualarbeitsrecht’ and ‘Kollektivem Arbeitsrecht’, with ‘Employment Law’ and ‘Labour Law’ or with ‘Droit Social’ in the French sense.⁴ The reference point remains and is anti-discrimination law, which is transforming into a genuine legal field that cuts across various fields of public and private law.⁵ Consumer Law, on the other hand, seems to be a rather homogenous field of law, as it appears to deal with market transactions. However, it is true that consumer law is also losing its contours. It enters more and more into fields outside classical market transactions. Again a disclaimer applies. This is not the place to discuss the concept of consumer law. Therefore, I will concentrate on market transactions via sales and services. Universal services are an upcoming subject affecting private law relations. The ECJ, however, has only become involved to a limited extent. That is why this is not yet a major area of

¹ I would like to thank the participants of the conference, held in Copenhagen, as well as Bruno de Witte, Dagmar Schiek and Norbert Reich for numerous, helpful comments. That being said, the usual disclaimer applies. This article builds on previous research, in particular Micklitz, 2005; 2009, p. 199 ff., 203-208; in Bärlund et. 2009, p. 417; EUI Working Paper 12/2009 and 2008/14, to be published in the Yearbook of European Law, 2009. It will be published under that heading in R. Nielsen et al. (eds.) *The Role of the Courts in Developing a European Social Model – Theoretical and Methodological Perspectives*, 2010.

² de Waele, not yet published.

³ Scharpf, 2002, p. 4.

⁴ I will save this for a later analysis, which is necessary in order to provide a truly full picture of ‘The Social’.

⁵ Schiek/Waddington/Bell, 2007.

judicial activism, even though universal services belong to the social dimension of the EU. ‘The Social’ which is enshrined in these two areas of the legal system, has undergone changes over the decades. I would like to demonstrate these changes and also from where exactly they have emanated. This aim allows me to highlight differences between the national and the European understanding of The Social, as indicated in the heading, with regard to anti-discrimination and consumer law.

Secondly, I will analyse the role of the ECJ in the building of the European social legal order, from its beginning to its current state. I start from the premise that the ECJ has always been an activist court, the driving force behind European integration.⁶ Once it became clear that the European legal order reached beyond economic integration, the ECJ had to face the challenge of how to define its role and function in the shaping of what is termed by the convenors ‘The European Social Model’. I will take a chronological approach in order to demonstrate that the ECJ is operating in a constantly changing legal institutional framework. According to my hypothesis, the ECJ is not operating in a legal vacuum. It is not only bound by the Treaties but is also guided by the spirit behind the Treaty amendments and the subsequently adopted Directives.

Thirdly, I will give shape to what I identify as the judge-made European Social Framework, a legal order based on access justice. I will attempt to illustrate that the ECJ in more recent judgments tends to impose the European Social Framework on the Member States. The Framework would then leave no leeway any more for the Member States and their courts to ‘fill’ the framework with different conceptions of ‘The Social’, if such a tendency continues. Here, my own understanding and my own conviction relates well. A smooth development of European integration depends on the interminglement of a European Social Framework complemented and supplemented by different national social models

In my concluding remarks, I will briefly return to the parameters which are the driving force behind judicial activism: (1) judicial co-operation between the ECJ and national courts as enshrined in the preliminary reference procedure, (2) ‘organised law enforcement’, that is, parties who are instrumentalising the reference procedure in a particular way so as to push the ECJ into action in order to improve national social standards or to strike them down and (3) last but not least legal and political legitimacy. Judicial activism of the ECJ depends on the degree to which Member States, national courts and the peoples of Europe are willing to accept the outcome of the judgments and their impact on national social standards.

II. The Subject Matter: What Are We Talking About, When We Talk About ‘The Social’?

So what is ‘The Social’ or what is the subject matter of my analysis? The answer seems crucial not only for the shaping of the European Social Framework but also for bringing the ECJ’s activism into focus. As a private lawyer, I am thinking from a bottom-up perspective, i.e. from the economic actors to the state as opposed to top-down, from the state to the actors. So you may not be surprised that my approach to the social dimension of EU law derives from a private law perspective.

D. Kennedy distinguishes in his groundbreaking article on ‘Two (Three) Globalisations of Law & Legal Thought: 1850-1968’⁷ between the *Classical Legal Thought* (CLT) 1850-1914 and ‘*The Social*’ 1900-1968. He associates the *CLT* with individual rights, formal equality, the ideal of freedom, legal positivism, the core function of private law, normative ideas like right, will, fault, the unitary state, one people, and the code as a legal instrument in the free market.

⁶ Maduro, 1998.

⁷ 2003, p. 630.

First consequence: CLT is relevant in the context of my analysis only as some sort of a contrast programme against which the social developments of the 20th Century can be measured. CLT governs the European Economic Constitution.⁸

'The Social' focuses on group rights, social rights, on social justice, on solidarity, on legal pluralism, on social welfare, corporatism, on social classes, on special legislation in organising market alternatives. Roughly speaking *'The Social'* arose after World War One with France taking the lead in Europe.⁹ At that time, the major legal field of *'The Social'* constituted labour law. The rise of the consumer society after World War Two yielded a second social dimension – consumer law.

Second consequence: Labour law, broadly speaking, and consumer law combine individual and collective rights, foster solidarity and strive for social justice. They lie at the heart of *'The Social'* and form the core of my analysis. Labour law was rather developed when the European Community was established, quite contrary to that of anti-discrimination law where the situation was/is just the other way round. The underdeveloped Member States' law left room for EU initiatives.¹⁰ Consumer law is different. After a short blossom period in the Member States, the European Community entered the scene and took the lead.¹¹ Understood this way, *'The Social'* shows a peculiar design in the European scenario.

*D. Kennedy*¹² does not analyse the third wave of globalisation of legal thought with the same density. However, he indicates again a shift in parameters which might help to clarify what issues need to be discussed in the aftermath, the erosion, or the decline of *'The Social'*¹³ in the nation states. He calls the third wave *'neo-formalism and adjudication'* and detects a shift from individual rights to human rights, from social justice to anti-discrimination, from solidarity to democracy, from social law to constitutional law, from legal pluralism to multiple normative construction processes, from social welfare to rights and politics, from corporatism to federalism, from social classes to plural identities, from special legislation to constitution, treaty and charter, from alternatives to the market to the pragmatically regulated markets.

Third consequence: These parameters allow me first of all to reconsider the value judgments and the institutional setting of anti-discrimination law as imbedded into labour law and consumer law – the changing patterns of justice, the decline of solidarity,¹⁴ the rise of fundamental and human rights¹⁵ as well as the rise of new modes of governance¹⁶ which deliberately remain outside the jurisdiction of the ECJ.¹⁷ Secondly, the third wave introduces a new domain of formerly public law into the realm of private law – universal services. Here, EU law played a key role from the beginning. *The Social* at the EU level bears much more elements of the third wave than of the second wave.

⁸ See Gerber, 1994, p. 25.

⁹ Demogue, *Les Notions Fondamentale du Droit Privé: essai critique*, 1911.

¹⁰ This conclusion can be drawn from Kennedy's analysis of the Three Globalisations of Legal Thought (fn. 7).

¹¹ Rösler, 2004; Weatherill, 2005.

¹² Kennedy developed his ideas somewhat further in his follow-up article, in Trubek/Santos (eds.), 2006, pp. 19-73.

¹³ Leibfried/Pierson, 1998; Pierson, 2008.

¹⁴ Wunder, LLM Thesis, EUI Florence, 2008; Barnard (ed.), 2007, p. 109.

¹⁵ Discussed under the issue of constitutionalisation of private law, Mak, 2008; Cherednychenko, 2008; Grundmann (ed.), 2008.

¹⁶ Cafaggi/Muir Watt (editors), 2009; the same editors, 2008.

¹⁷ See on social exclusion and OMC latter in the text.

Accordingly, when I consider 'The Social' I have always three fields of law in mind: *anti-discrimination law* originating from labour law,¹⁸ *consumer law* understood as the law of market transactions and the law on *universal services* which emerges out of the privatisation and de-regulation of public services.¹⁹

The role of the ECJ within these three areas differs considerably, as will have to be shown, but all three bunched together constitute what I am calling the European Social Framework. It is strongest and most obvious in anti-discrimination issues. This is a well researched area. It is continuously gaining strength in consumer law. Within the last couple of years the sheer number of judgments dealing with consumer law issues has multiplied.²⁰ This said however, it is still underdeveloped in the law on universal services. I will briefly refer to the third area of 'The Social' as a future testing ground for the potential power of judicial activism. This does by no means indicate that there are no other subjects that could potentially be dealt with under this heading. I will not discuss judicial activism in immigration law – *Metock*²¹ – or in free movement of students – *Bidar*,²² *Förster*,²³ *Bressol*.²⁴ Whilst there is a social element here, immigration law and free movement of students do not belong to the core of 'The Social'. It will have to be shown that the judge-made European Social Framework is not governed by patterns of social justice but by access justice. It is no longer dominated by solidarity and collective rights, but rather by individualisation and fundamental/human rights.

III. The Legal Institutional Framework of Judicial Activism

There is growing controversy concerning the role and function of judges, in particular, under the catchword of judicial activism. Judicial activism bears a pejorative tone. It alludes to judges overstepping constitutional boundaries, taking over and even accepting the role of the legislator. The debate and the parameters are very much dominated by American scholars²⁵ who discuss judicial activism in the context of the American constitution and the role of the Supreme Court. Europe, however, is different. The European legal order is 'judge-made'.²⁶ Europe does not have a constitution comparable to national constitutions. Even if the Constitutional Treaty had been signed, it would not have transformed the European Community into the 'United States of Europe'. I will neither embark on the debate over the legal character of the EU nor on the question whether and to what extent the findings of the US scholars can be transferred to the EU context. This would be a separate paper.

My starting point is different.²⁷ I begin from the premise that the character of the European legal order is unique and so is the role of the European Court of Justice. The two pillars of the judge-made legal order, the supremacy of EU law and the direct effect of primary and secondary Community law, were recognised and confirmed directly and indirectly in numerous Treaty amendments. Member States therefore were willing to provide the EU judge-made order with the necessary legitimacy. Since then, the ECJ is constantly confronted with the boundaries of its jurisdiction. The ECJ received support, but

¹⁸ See Micklitz, 2005; Schiek/Waddington/Bell, 2007.

¹⁹ See Rott, 2007, p. 8; Rott, 2005.

²⁰ Micklitz, 2006, p. 1, 2008, pp. 353-400.

²¹ ECJ, 25.7.2008, C-127/08 ECR I-nyr.

²² ECJ, 15.3.2003, Case C-2009/03 ECR 2005 I-2119.

²³ ECJ 18.11.2008, Case C-158/07 nyr.

²⁴ AG Sharpston, 25.6.2009, Case C-73/08, with annotation Reich, 2009, p. 637.

²⁵ See Green, 2009, p. 101; Kmiec, 2004.

²⁶ This is the common understanding; see Maduro, 1998.

²⁷ Frerichs, 2008; Arnall, 2006; Maduro, 1997; Rasmussen, 1986.

also critique, for overstepping its competencies.²⁸ However, in the aftermath of the *Mangold*²⁹ judgment the tone has become harsh.³⁰ An unusual critical note on the ECJ, written by the former president of the German Republic and President of the German Constitutional Court *Roman Herzog*, and published in a leading German newspaper headed ‘Stop the ECJ’, has found its way into a judgment of the very same court concerning the Lisbon Treaty, indirectly criticising the ECJ for its activism.³¹

There is, however, a new quality in the criticism raised by the German Constitutional Court and also by academics. The ECJ is more frequently under attack because it intervenes deeper and deeper into the *social* legal order of the Member States. *Mangold*, *Laval*³² and *Viking*³³ represent different social issues. All three illustrate the Member States’ concern that the shaping of the social legal order lies in their own hands and that the ECJ has no jurisdiction to deal with matters that so heavily affect the national social welfare systems, whatever that might look like. So in essence what is at stake is the relationship between the *economic* European legal order and the national *social welfare* system. This brings us to the question which I will attempt to answer – is there a European Social Model and what is the role and function of the ECJ in developing the European Social Model and delimiting it from the national social models. I am searching the answer in linking the development of the (a) European social order to the changes to the institutional framework in which the ECJ operates. My focus is on anti-discrimination law as embedded into labour law.

For this purpose, I will distinguish four different steps of development: (1) The Treaty of Rome, where the social dimension remained deliberately excluded (1957-1986); (2) the SEA which introduced the social dimension and paved the way for further Treaty amendments in Maastricht and Amsterdam (1986-1999); (3) the Lisbon conclusions in 2000 which established the prevailing ideological environment for law making and law application at the EU level; (4) the current stage under the Treaty of Nice and the Draft Treaty of Lisbon (from 2000 onwards). I will first give a short account of the social legal order, reconstructed and labelled in *Kennedy’s* categories and then embark on a deeper analysis of the ECJ’s role and function within the different time spans. I will limit my analysis to the landmark judgments of the ECJ, those that repudiate having shaped (and indeed are still shaping) the legal, and later the social, order of the ECJ. My emphasis will be on those judgments which bear an innovative element and constitute building blocks in the judicial edifice, which since the early 1960’s, is called the ‘European legal order’.

Treaty of Rome: The Building of the European Legal Order via the ECJ (1957-1986)

The Legal Order

The European Community was set up in 1957. It laid down the structure of what has been termed, in particular by German lawyers, the European Economic Constitution.³⁴ The latter rests on two pillars, the four market freedoms and competition law, framed in the words of the ECJ as ‘a genuine legal

²⁸ Rasmussen, 1986.

²⁹ ECJ, 22.11.2005, Case C-144/04 2005 ECR I-9981.

³⁰ Translated in the EU Observer 10.9.2008.

³¹ Available online in English and German under

http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html

³² Judgment, 18.12.2007, Case 341-05, *Laval and Partneri* ECR 2007, I-11767.

³³ Judgment, 11.12.2007, Case 438-05, *The International Transport Workers’ Federation and The Finnish Seamen’s Union* ECR 2007 I-10779. Both cases have boosted a highly controversial debate, which I will not enter into.

³⁴ Mestmäcker, 2006.

order' which is characterised by the supremacy of EU law over national law and by the direct effect of EU law to the benefit of individual parties. Private parties, the holders of the rights and the recipients are legally entitled by the ECJ to strike down national laws and regulations which hinder the four freedoms. 'The Social' did not play a role at that stage, with the exception of Art. 119 which provided for equal payment of men and women. The European Economic Community, that established in 1957, was based on a *functional separation of powers* between the EEC as it then was and the Member States. The EEC received enumerated powers only as far as they were needed to institute the Common Market in order to overcome economic nationalism. The establishment and the development of social welfare systems, through which Member States could develop and apply re-distributive policies, were to remain subject to national political processes.³⁵ This does not mean that the European Community did not make any effort at all to get involved in social matters. However, it did so and had to do so exactly within the boundaries of the economic constitution, the distribution of powers and the Procrustean bed of the unanimity principle. The by then adopted, and here relevant, directives on anti-discrimination law 75/117 (equal pay) and 76 /207 (equal access) as well as on consumer law 85/374 (product liability), 85/577 (door-step selling) and 87/102 (consumer credit) found their way into the ECJ, however, with a considerable time-lag of 10 to 20 years.

ECJ

- (1) *The judge-made legal economic order.* These were the heydays of judicial activism. The ECJ 'invented' the European legal order based on supremacy and direct effect.³⁶ It was in essence an economic order shaped within the institutional boundaries of the Treaty of Rome. The legal economic order (the European Economic Constitution) complies perfectly well with what Kennedy termed the Classical Legal Thought.
- (2) *The judge-made legal social order part I.* Within the given frame, the ECJ could not develop a social order. There were simply no means available to it except Art. 141 (then 119). To this end, the ECJ recognised in *Jenkins*³⁷ as early as 1981 that Art. 141 is equally applicable in contractual relations between an employer and employee. In the field of consumer law, the landmark judgment is *Cassis de Dijon*.³⁸ The ECJ established the information paradigm and the most influential Cassis de Dijon logic under which Member States could maintain restrictions to trade only if they were justified for social policy reasons and met the proportionality requirement. The abundant case law lead to a silent Europeanisation of national social policies within Art. 30 and contributed to the reshaping of the responsibilities of Member States and the EU in the European legal order.³⁹ Europeanised social standards could only be reached via harmonisation measures thereby hollowing out or even abolishing Art. 30.

Treaty Amendments between 1986 and 1999: The Unbalanced Introduction of 'The Social' and the Limited Space for Judicial Activism

The Legal Order

The second phase is characterised by the growing importance of 'The Social' in the constitutionalisation process of the EU. This is, at least, the mainstream understanding. Recalling *Kennedy's* time spans, Europe is roughly two decades behind the Member States. Time matters for

³⁵ Dawson, 2009, at p. 34.

³⁶ Stein, 1981, p. 1.

³⁷ ECJ, 31.3.1981, Case C-96/90 *Jenkins v. Kingsgate Ltd* (1981) ECR 911.

³⁸ ECR 120/78, *Rewe v. Bundesmonopolzentralverwaltung*, 1979 ECR 649.

³⁹ Weatherill, in Micklitz/Roethe/Weatherill, 1996, p. 153.

two reasons: first the establishment of ‘The Social’ nearly automatically implied the need to coordinate different social welfare systems⁴⁰ and what is even more important in our context ‘The Social’ reached the European level at a time when the political climate in most of the Member States had already changed.

The starting point is the famous 1985 White Paper on the Completion of the Internal Market,⁴¹ developed under the presidency of *Jacques Delors*, which paved the way for the adoption of the Single European Act. The overall message addressed to the Member States was that the realisation of the Internal Market cannot be achieved without the establishment of minimum standards to protect workers and consumers. One may wonder how it was possible that the Member States agreed to such a far reaching paradigm change which lifted the distribution of economic competences for the EU and the social competences for the Member States, so soundly established in 1957. It should be recalled that the European Community lacked any vision on its future at that time. The Internal Market Programme broke the impasse. The integration of the social dimension might be due to a certain functional logic of the market integration process where the distinction between the economic and the social became more and more difficult to make. The ECJ’s activism in transforming the Treaty into a genuine legal order with individual enforceable rights certainly played a key role in allowing for a re-orientation of the EU policy long before the paradigm change was officially recognised in the SEA.

The new competences Art. 100 a) and Art. 118 a) and the introduction of majority voting boosted the development of secondary community law both in labour and consumer law. The agreement on the European Monetary Union in Maastricht 1991 triggered a debate over the need to compensate the Member States for the loss of their autonomy to use monetary policy for social purposes by the introduction of a Social Policy Agreement. The project to introduce a binding set of rules into the Treaty failed in 1991 due to the resistance of the UK. The 12 Member States could only agree to adopt a Protocol on Social Policy. It was for the remaining 11 Member States to conclude the Social Policy Agreement. The purpose of the Protocol then was to authorise the EU institutions to implement the Agreement.⁴² However, the Amsterdam Treaty did not only integrate the social policy agreement as Art. 137 into the Treaty but also extended the legislative powers of the EU in the field of equal treatment, Art. 13 ET and Art. 141 (3). Consumer policy too was upgraded and received a separate chapter in Maastricht, Art. 129 a) ET⁴³ as amended and slightly adjusted by Art. 153 ET in Amsterdam. The social drive in the constitutionalisation process reached its peak with the introduction of the Social Charter in 1989 and later in 2000 with the EU Charter on Fundamental Rights⁴⁴ which integrated consumer policy, though to a lesser extent than social rights. By the end of the millennium ‘The Social’ had gained weight in what the ECJ had baptised in *Les Verts*,⁴⁵ the European Constitution. However, competence rules in anti-discrimination and labour law are either bound to the completion of the Internal Market or lacking at all. *Rödl*⁴⁶ concludes with regard to labour law and policy, that the more important the social relevance, the less developed the EU competences are, with, however, the exception of anti-discrimination.

⁴⁰ Esping-Anderson, 1990.

⁴¹ COM (1985) 310 final, 14.6.1985.

⁴² Rödl, to be published in Bogdandy (Hrsg.), 2009, will also be published in English by the same editor in the course of the year.

⁴³ Micklitz/Reich, 1992, p. 593.

⁴⁴ OJ C 364, 18.12.2000, 1.

⁴⁵ ECJ, C-249/83, *Les Verts-Parti Ecologist v. European Parliament*, 1988, ECR 1017.

⁴⁶ Rödl, 2009.

Art. 13 and Art. 141 (3) triggered a whole series of directives in the field of *equal treatment*. Both new competences strengthened the role of the EU and led to Directives which formulated a dense network of EU rules, overarching the boundaries of EU labour law and policy and laying down minimum standards in the fight against discrimination, even in private law relations.⁴⁷ Art. 141 (3) was used by the EU to amend Directive 76/207 by Directive 2002/73 and to recast Directive 76/207 via Directive 2006/54. Since the EU's competence base has changed, from Art. 100 (Art. 94) to the more specific rule in Art. 141 (3). Art. 13 initiated three Directives, 2002/43 on equal treatment between persons irrespective of race and ethnic origin, 2000/78 establishing a general framework for equal treatment in employment and occupation and last but not least Directive 2004/113 for equal treatment between men and women on the access to the supply of goods and services.⁴⁸ All Directives required unanimity in the Council which was easy to obtain with regard to Directives 2000/43 and 2000/78 whereas Directive 2004/113 received the necessary support only once certain areas such as the media were exempted from the scope of application.

In consumer law the newly introduced competences were of limited practical importance, as Art. 95 ET remained the key competence rule. In hindsight, the Europeanisation of consumer legal policy occurred in two phases. The first phase, already somewhat overshadowed by the negotiations over the SEA, was determined by a policy of coordination of different national models of justice which purported to root the social connotation into European private law.⁴⁹ From the three directives adopted in this time span, two, the Directive 85/577/EEC on contracts concluded away from business premises and the Directive 87/102/EEC, bore a strong national protective bias. After 1986, the European Commission needed 'only' the support of the majority of the Member States and it benefited from a new competence rule which explicitly referred to consumer protection, Article 95 (then Article 100a).⁵⁰ Within a couple of years the EU managed to get quite a number of directives though the legislative machinery, some which had even been pending for years, Directive 90/314/EEC on package tours, Directive 93/13 on unfair terms in consumer contracts, Directive 94/47/EC on time sharing, 97/7/EC on distance selling, Directive 98/27/EC on injunctions and Directive 99/44/EC on the sale of consumer goods. This set of Directives seems comprehensive at first glance, in substance however, they cover only a rather narrow part of the consumption activities of consumers.

ECJ

- (1) *The limited operational field*: if we take the parameters set out by *Kennedy*, those intended to identify 'The Social', we can easily recognise the very sketchy picture of EU labour and consumer law. The Treaty amendments fostered the integration of social rights but not only within the limits of Art. 118 a) group rights. On the consumer side, the collective dimension is missing, with the exception of the right to establish an association, Art. 153. Moreover, the Member States were not willing to establish a European welfare state with distributive functions. At first hand, the set of directives adopted on the basis of the various competence rules look impressive. However, a closer analysis demonstrates their very limited approach to 'The Social'. The EU understanding of 'The Social' comes much closer to the parameters of the third wave of legal thought. The Member States used and even instrumentalised the EU as a level playing field to test out the regulatory devices needed for the transformation of the national welfare state models.

⁴⁷ Basedow, 2008, p. 230.

⁴⁸ See for a summary of the EC law on anti-discrimination, Rust/Falke in Rust/Falke, 2007, Rdnr. 198 et seq.

⁴⁹ Critical as regards the objectives of consumer law, Calliess, 2003, p. 575.

⁵⁰ Micklitz/Weatherill, 1993, p. 285.

- (2) *The judge-made social order part II.* The ECJ developed the social order in two directions. On one side, the ECJ rejected any efforts to use the market freedoms in order to strike down national protection standards enshrined in the private law systems, thereby enhancing the policy decision of the SEA in that differences between social protection standards in labour and consumer law can only be overcome by harmonisation measures. *CMC Motorradcenter*⁵¹ and *Alsthom Atlantique*⁵² have to be recalled. On the other side, the ECJ was not willing to accept the horizontal direct effect of directives in *Dori*,⁵³ but instead referred the weaker parties to the Member States' liability as developed in *Francovich*,⁵⁴ *Brasserie du Pêcheur*⁵⁵ and confirmed in *Dillenkofer*.⁵⁶ The denial of horizontal direct effect heavily influenced the further development of the European social order as the Member State became the primary addressee of state liability for the non-implementation, insufficient implementation and misapplication of secondary Community law. The ECJ established a (social) legal order of 'rights without duties'.⁵⁷ *Bosman*⁵⁸ did not really change the scenario. The ECJ recognised the horizontal direct effect of the freedom of workers but only with regard to private collective agreements that substitute statutory actions.
- (3) *The judicial shaping of anti-discrimination law.* Anti-discrimination law may be broken down into issues concerning the scope *sedes materiae* and *sedes personae*, on the form of discrimination, whether it is direct or indirect and on remedies. 14 judgments taken on referrals from English courts were taken as sufficient for the ECJ to outline a genuine European anti-discrimination law.⁵⁹ *Barber*⁶⁰ is certainly one of these lighthouse judgments, a case that critics of the ECJ use in demonstrating that the ECJ is 'legislating from the bench'.⁶¹ The same can be said for *P.v.S.*⁶² on the application of the equal treatment rules in cases concerning transsexuals and on the series of judgments on remedies, *Foster*,⁶³ *Marshall I*⁶⁴ and *Marshall II*,⁶⁵ *Levez*⁶⁶ and *Coote*.⁶⁷ *Grant*⁶⁸ represents a more reluctant approach, where the ECJ refused to apply the anti-discrimination rules to homosexuals. However, the ECJ paved the way for the later amendment of secondary EU law via Directive 2000/78 which now prohibits anti-discrimination of homosexuals.

⁵¹ ECJ, 13.10.1993 Case C-93/92 1993 ECR I-5009.

⁵² ECJ, 24.1.1991 Case C-339/89 1991 ECR I-107.

⁵³ ECJ, Case C-91/92 1994 ECR I-3325.

⁵⁴ ECJ, Case C-6 and 9/90 1991 ECR I-5357.

⁵⁵ ECJ, Case C-46/93 1996 ECR I-1029.

⁵⁶ ECJ, Case C-178/94 1996 ECR I-4845.

⁵⁷ This is the heading of an article published by Reich, Working Paper EUI 2009.

⁵⁸ ECJ Case C-415/93, 1995 ECR I-4921.

⁵⁹ For a description of this interplay, with references from German courts, see contributions in Sciarra (ed.), 2001.

⁶⁰ ECJ Case C-262/88 1990 ECR I-1889.

⁶¹ See Kmiec, 2004, what he analyses as the third category.

⁶² ECJ Case C-13/94 1996 ECR I-2145.

⁶³ ECJ Case C-1990 ECR I-3313.

⁶⁴ ECJ Case C-152/84 1986 ECR I-723.

⁶⁵ ECJ Case C-271/91 1993 ECR I-4367.

⁶⁶ ECJ Case C-326/96 1998 ECR I-7835.

⁶⁷ ECJ Case C-185/97 1998 ECR I-5199.

⁶⁸ ECJ Case C-249/96 1998 ECR I-623.

- (4) *The judicial shaping of consumer law.* There is only one major decision which affected consumer law, – *Keck*.⁶⁹ *Keck* triggered the development of a particular European policy on sales promotion and all sorts of selling arrangements which finally led to the development of the Directive 2005/29 on unfair commercial practices. The nineties represent a period of considerable regulatory activism in the EU, but not yet (!) of judicial activism. Not even the set of Directives adopted before the SEA in the mid eighties, the Directives on doorstep selling, product liability and consumer credit, reached the ECJ. It is characteristic for the development of EU law that there is a considerable delay between the time when secondary Community law is adopted and the moment when it becomes crucial in preliminary reference procedures. One possible explanation might be that the early EU consumer law directives were not perceived as European initiatives but as national ones. The level of awareness that the ECJ might be an important player in the development of ‘The Social’, even at the national level, grew over time only. Another explanation might be the missing degree of professionalised organised law enforcement via consumer organisations. I will return to this issue later.

The Lisbon Conclusions and the New Spirit of Judicial Activism

The Legal Order

The Lisbon Conclusions 2000⁷⁰ marked the break even point in the further development of the European legal order in general and the social legal order in particular. Here, the EU developed its rhetoric on the EU becoming ‘the most competitive and most dynamic knowledge-based economy’. Although not an official legally binding document, the Lisbon Conclusions heavily affected and indeed still affects the spirit of the law-making process in the EU, in its content and procedure. Over time, the spirit of the Lisbon Conclusions even seems to have influenced the role and function of the ECJ. Despite its ‘soft’ character the Lisbon Conclusions 2000 must be regarded as the backbone of EU policy, and until today at least, the one which is favoured and advocated for by the European Commission. Its overall importance lies in the EU’s response to the globalisation process. Here, we find the origin of the so-called ‘new economic approach’ which shifts the balance from competition to industrial policy and sets a new tone in social policies.

The impact of the new economic approach can be traced back in all policy fields, including consumer policy. We find the following statement in the Lisbon Conclusions:

“An effective framework review and improvement based on the Internal Market Strategy endorsed by the Helsinki Council, is essential if the full benefits of market liberalization are to be reaped. Moreover, fair and uniformly applied competition and state aid rules are essential for ensuring that business can thrive and operate effectively on a level playing field in the internal market.”⁷¹

The Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on a consumer policy strategy 2002-2006 transformed this mandate into a concrete objective:⁷²

“The Green Paper on Consumer Protection (COM 2001 531 final) set out options for the further harmonisation of rules on commercial practices, either on a case-by-case basis or supplementing this through framework legislation. There is also a need to review and reform existing EU consumer protection directives, to bring them up to date and progressively adapt them from minimum harmonisation to ‘full harmonisation’ measures. The Green Paper and the Commission’s

⁶⁹ ECJ Case C-267 and 268/91 1993 ECR I-6097.

⁷⁰ http://www.europarl.europa.eu/summits/lis1_en.htm.

⁷¹ At p. 5.

⁷² OJ C 137, 8.6.2002, 2.

strategy on services (2000 888) make it clear that the simple application of mutual recognition, without harmonisation, is not likely to be appropriate for such consumer protection issues. However, provided a sufficient degree of harmonisation is achieved, the country of origin approach could be applied to remaining questions”.

The renewed paradigm shift, from the Internal Market to globalisation, signalled the need to respond to social concerns expressed concerning the anxiety of social exclusion, culminating in the worry that those citizens, workers, and consumers incapable of meeting the challenges emanating from the effects of globalisation, would run the risk of being cut off from the labour market and the consumer market. The overall message regarding Social exclusion was that it would be overcome:

“Different means of access must prevent from info-exclusion. The combat against illiteracy must be reinforced. Special attention must be given to disabled people.”⁷³

“The new knowledge based society offers tremendous potential for reducing social exclusions... At the same time it brings a risk of an ever widening-gap between those who have access to the new knowledge and those who are excluded.”⁷⁴

“Investing in people and developing an active and dynamic welfare state will be crucial both to Europe’s place in the knowledge economy and for ensuring that the emergence of this new economy does not compound the existing problems of unemployment, social exclusion and poverty.”⁷⁵

In order to combat social exclusion from the labour market (unemployment), from financial services (financial illiteracy) and from the digital world (digital incompetence), the Lisbon Conclusions introduced a new regulatory device – the *Open Method for Co-Ordination (OMC)*.⁷⁶ The OMC operates in those areas of social policy where the European Community has no competences. National government remain the key actors, capable of controlling the process. The OMC does not produce binding results. *The exclusion of the ECJ was vital for the establishment of the OMC*. The European Commission has set the OMC into motion and is managing a comprehensive website on the ongoing activities of the OMC. There is a rich academic debate on the success or failure of the OMC, on the practical effects, on the role and function of Member States, the European Commission and of NGO’s, and on the impact of the OMC on European integration ‘without law’.⁷⁷ There is, in general, a consensus that the OMC has strengthened the position of the Member States and the European Commission while simultaneously weakening the position of the ECJ and the function of law in the whole area of what is now known as ‘social exclusion’.

ECJ

- (1) *The changing operational field*. Since the Lisbon Conclusions, the social order of the EU has split into two parts. On the one hand, there is the limited set of Treaty provisions and secondary Directives which form the legal part of the social order. On the other hand, there is the growing importance of the OMC as a regulatory device in the very sensitive and highly important field of social exclusion, a field where the ECJ does not have jurisdiction. One may wonder whether and to what extent these two orders belong together and if so, whether they can be governed by a common legal regime. Much of the academic debate is focusing on the process of the constitutionalisation of the OMC. Such a scenario is only partially foreseen in *Kennedy’s* third wave. Constitutionalisation points in the direction of replacing national social welfare regimes

⁷³ At p. 3.

⁷⁴ At p. 10.

⁷⁵ At p. 6.

⁷⁶ http://ec.europa.eu/invest-in-research/coordination/coordination01_en.htm#1

⁷⁷ Dawson, 2009.

by a genuine European Social Model, in which fundamental rights play a prominent role, but there is no clear cut move towards new formalism, either in labour or anti-discrimination law. The OMC points in the opposite direction.

- (2) *The judge-made social legal order part III.* The deliberate exclusion of the ECJ from the field of social exclusion, financial illiteracy and digital incompetence constitutes the break-even point in the conceptualisation of ‘The Social’ at the European level. From a legal perspective it seems as if the European social legal order is weakest in the area where it should in fact be strongest. Since *Hammurabi*, the law and the rule of law were meant to guarantee protection to those in need. The EU is at the crossroads. If the EU legal system does not, or no longer, or only to a very limited extent, guarantee the protection of those who are in the most sensitive position in society, then the whole character of the EU legal system might change in the long run.

The ECJ’s role is restricted to a particular design of a social EU law, one which is not so much guided by the idea of ‘protection’ but by ‘empowerment’ to use one of the current catch words. I would argue that the prominent line the ECJ is pursuing in its case-law follows the ‘empowerment’ doctrine. The rhetoric of the Lisbon Conclusions fits all too well the Leitbild of the worker and the consumer that the ECJ has developed over the years. The consumer Leitbild is better known than the worker Leitbild. The formula of the responsible, circumspect and well-informed consumer emanates from the standard arguments used by the ECJ in justifying all sorts of obligations which are imposed on the consumer. It shows up first in *Cassis de Dijon* and since then dominates the interpretation of primary and to a large extent also secondary Community law.⁷⁸ The prototype of the worker in the ECJ’s rulings is *Mr. Bosman*, the football player who speaks different languages and is accustomed to working in different countries and different legal environments. These are the stylised workers and consumers, essential for the completion of the Internal Market and in making the European Community the ‘most competitive and the most dynamic knowledge-based economy’. Sure, there have been cases where the ECJ took a more protective stance such as in *Christl Schmidt*,⁷⁹ in *Junk*⁸⁰ and in *Océano*, but these are exceptions to the rule and do not change the dominant pattern the ECJ follows, in particular in anti-discrimination and consumer law issues.

The Current Situation – Judicial Activism between Upgrading and Downgrading ‘The Social’

The Legal Order

The current situation comes near to a stand-still, at least if one uses the development of EU integration via constitution building and strengthening ‘The Social’ as the decisive yardstick.

The Treaty of Nice, meant to give the enlarged EU a new institutional structure, turned out to be a complete failure. Minor amendments have been introduced in the field of social policy. Art. 13 (2) grants the European Community an even stronger role in the field of equal treatment and Art. 137 (2) allows the Council to unanimously decide on the extension of the co-decision procedure under Art. 251 to the protection against termination, as well as to rules on the representation and collective defence of the interests of workers and employers. The integration of the OMC, discussed in the context of Art. I-14 (4) of the European Constitution,⁸¹ did not find its way into the Lisbon Treaty. The

⁷⁸ See for a different reading Johnston/Unberath, 2007, p.1237.

⁷⁹ ECJ, 14.4.1994, Case C-392/92, ECR I-1311.

⁸⁰ ECJ, 27.1.2005, Case C-188/03, ECR I-885.

⁸¹ Mayer, Competences-reloaded? The vertical division of powers in the EU and the new European Constitution, <http://icon.oxfordjournals.org/cgi/reprint/3/2-3/493.pdf>

finally agreed version of the Lisbon Treaty will not bring about much change in the field of labour and consumer law.⁸² If any, changes may result from a different set of ‘Leitnormen’ in Art. 2 (new) and Art. 3 (3) of the proposed Treaty amendment and from the formal integration of the EU Charter of Fundamental Rights. Art. 3 (3) introduces the concept of a ‘*highly competitive social market economy*’. Whether or not the newly introduced reference to the *social market* will support the development of a genuine European social model, without any further shift of competences from the Member States to the European Community, is subject to controversy.⁸³ The German Constitutional Court reserves, by way of the Lisbon judgment, competence to check whether European social standards meet the requirements of the German social welfare system.

Underneath constitution building, law making via the European Commission, the Council, the Parliament, policy making via the OMC, Comitology and the Lamfalussy procedure (the modes of new governance) and interpretation of EU law via the ECJ continues, in labour law, in anti-discrimination law and in consumer law just like in all other areas of EU law.

ECJ

- (1) *The changing operational field.* There is a lot of academic discussion on the possible repercussions of the new ‘Leitnormen’ of the Lisbon Treaty on the European Economic Constitution. Depending on the position of the writers, some understand the introduction of the social element into the market order as a nevertheless limited chance for re-orientation, in particular, via the increased importance of the Constitutional Charter, while others fear that the European Economic Constitution might suffer from the insertion of value judgments which run counter to the original ordo-liberal concept of the market economy.⁸⁴ It is hard to predict how and to what extent the ECJ is ready to use the Leitnormen of the now adopted Treaty as a means to overcome the social deficit of the European Union. In *Familapress* and *Promusicae*,⁸⁵ there is ample evidence that the ECJ is ready to use fundamental rights as a legal device for the interpretation of EU law, even though the Charter is not yet formally integrated into the EU legal order. However, the ECJ is coming more and more into the limelight of public awareness,⁸⁶ last but not least due to a series of incriminating judgments as a result of which the ECJ has been accused of having overstepped the boundaries of its jurisdiction.⁸⁷ I will return to this issue.
- (2) *The judge-made legal social legal order part IV.* One characteristic of the EU legal order is that developments take place simultaneously at different levels within different forums. The ever denser network of EU rules, even though they remain limited in substance (labour law as anti-discrimination law and consumer law as mere market law), allow the ECJ to step into sensitive areas of ‘The Social’, thereby paying tribute to its reputation of being an activist court. There

⁸² But not in consumer law, Micklitz/Reich/Weatherill, 2004, p. 367.

⁸³ For a rather pessimistic perspective Joerges, in Neergard/Nielsen/Roseberry (eds.), 2009, p. 42; for a more optimistic view, Damjanovic/de Witte, in Neergard/Nielsen/Roseberry (eds.), 2009, p. 53.

⁸⁴ See Peukert, 2009, p. 536.

⁸⁵ ECJ, 26.6.1997, Case C-368/95 *Familapress*, 1997 ECR I-3689; ECJ, 29.1.2008, Case C-275/06 *Promusicae*, 2008 ECR I-271.

⁸⁶ Most prominently the public attack by the former president of the Federal Republic of Germany and former president of the German Constitutional Court, Roman Herzog in the *Frankfurter Allgemeine Zeitung*. On the 29.6.2009 the German Constitutional Court largely followed the critique, in particular with regard to the consequences of *Viking* and *Laval*.

⁸⁷ See the contributions of a conference which was held in Florence in April 2009, organised by de Witte/Micklitz, The ECJ and the autonomy of the Member States. A publication is being prepared.

are few judgments of the ECJ that have raised as much concern as *Viking*⁸⁸ and *Laval*.⁸⁹ The judgments have been widely criticised by labour lawyers around Europe as destroying national protection standards for workers that reach beyond the minimum standards of EU law. There is, however, another reading which seems enshrined in the conclusions of Advocate General *Maduro*. *Viking* and *Laval* maintain an open policy with regard to the labour markets of the old Member States for those workers from new Member States. They are consequently granted access to the foreign labour markets under the conditions of the home country. In this perspective, the two judgments do not only compensate for the biased enlargement process of the EU, where the new Member States had to open their markets for products and services from the old Member States but the workers domiciled in the new Member States were barred from unrestricted access to the labour markets in the old Member States. Such an interpretation complies with the Lisbon strategy. Competition is established on the labour market as well.

What makes the judgments unique – and even more problematic – is the reading and the effects which result from the interpretation of the posting workers Directive. The Directive 98/71 does not really fit into the minimum/maximum scenario⁹⁰ as it lays down transparency requirements which the Member States have to meet if they intend to restrict the legal position of posting workers. However, the practical effects of *Laval* and *Rueffert*⁹¹ come close to full harmonisation.⁹² In consumer law an even more outspoken trend can be observed. The first generation directives are all based on the minimum harmonisation principle. In *Buet*,⁹³ *di Pinto*⁹⁴ and in *Doc Morris*⁹⁵ the ECJ had confirmed that the minimum harmonisation principle grants the Member States leeway and discretion in maintaining or establishing a higher level of protection. However, in line with *Laval*, the ECJ developed in *Gysbrechts*⁹⁶ a similar approach with regard to consumer law. The ECJ held that the higher national protection standards which reach beyond the EC minimum are violating the proportionality principle. The ECJ has opened up a new battlefield showing a different outlook. It is not the activist court which is taking care of the interests of the weaker parties and which is ready to expand the rules of the Treaty or of secondary community law to establish higher standards than at the national level. Quite the contrary, *Laval* and *Gysbrechts* impose the minimum EU standard of protection on the Member States which supersede the higher national standards. The ECJ is still activist, but it brings to bear the policy enshrined in the Lisbon Conclusions and hammered down in the Consumer Strategy paper 2002.

- (3) *The judicial shaping of anti-discrimination law*: The activist stand the ECJ took in the eighties and nineties paved the way for the adoption of the series of anti-discrimination directives. Anti-discrimination law has become an area where the European Community politically and legally is setting the tone. The adoption of the new series of directives in the new millennium opened

⁸⁸ ECJ, 11.12.2007, Case 438-05, The International Transport Workers' Federation and The Finnish Seamen's Union ECR 2007 I-10779. Both cases have boosted a highly controversial debate, which I will not enter into.

⁸⁹ Judgment, 18.12.2007, Case 341-05, *Laval and Partneri* ECR 2007, I-11767.

⁹⁰ But exactly in that direction AG Mengozzi in *Laval*, 18.12.2007, Case 341-05, *Laval and Partneri* ECR 2007, I-11767 at 171 et seq.

⁹¹ ECJ, 3.4.2008, Case C-346/06, ECR I-1989.

⁹² In this vein, see Deakin, 2008, p. 581; Barnard, Mitchell Working Paper Series 5/2008, p. 25, who stresses that the Services Directive, which lists the matters covered by the Posted Workers Directive, thereby reinforces the idea that the latter has obtained the status of maximum harmonisation. I am grateful to J.J. Kuipers, PhD Researcher at the EUI, for this reference.

⁹³ ECJ, Case C-382/87 1989 ECR I-1235.

⁹⁴ ECJ, 14.3.1991 Case C-361/89 1991 ECR I-1189.

⁹⁵ ECJ, Case C-322/01 *Doc Morris* I-14887, 15008.

⁹⁶ ECJ, Case, C-205/07 nyr.

up new ground and room to manoeuvre for the ECJ. *Coleman*⁹⁷ extends the protection of Directive 2000/78 to children of the employed and *Feryn*⁹⁸ introduces preliminary injunctions in Directive 2000/43 as a remedy in the fight against anti-discrimination. Out of the rich reservoir of judgments, I would like to draw attention to *Mangold*,⁹⁹ in which the ECJ held that the Treaty prohibits age discrimination. The ECJ is accused of having invented a legal principle which is not contained in the Treaty. *Mangold* has raised particular concern in Germany where the Federal Supreme Court on Labour Law was ready to uphold the *Mangold* doctrine. The reason behind the conflict is an amendment of German labour law allowing for the conclusion of labour law contracts which are limited in time if the employee is older than 52 years. The exact rules are slightly more elegantly worded, but the idea behind them was to encourage employers to employ elderly workers without being obliged to give them a contract for an unlimited time.

In *Honeywell* – a German case – the employer brought the question as to whether EC law provides for a general verdict of age discrimination to the German Constitutional Court via a so-called constitutional complaint. The employer argued that the German Federal Supreme Court i.e. in practice the ECJ's verdict on age discrimination, was in violation of the German constitution. In light of the critical stand the German Constitutional Court took in its Lisbon judgment against the ECJ, one might wonder whether the German Constitutional Court is ready to accept the unconstitutionality of the verdict which would bring the German Court into an open conflict with the ECJ. Already the former president of Germany and of the German Constitutional Court had publicly encouraged the German Constitutional Court to attack the ECJ's doctrine on age discrimination. He is heavily supported by his co-author and a group of German academics who just published a little booklet in which they strongly argue that the ECJ had overstepped its judicial powers in the field of age discrimination.¹⁰⁰ The authors declare that they have written the book on their own accord, but the way in which it is written suggests that it could easily be an introduction to the opinion of the pending litigation. One might argue that the ECJ has taken a more cautious stand in *Palacios*,¹⁰¹ *Bartsch*¹⁰² and *Maruko*.¹⁰³ However, the authors of the 'opinion' set the differences aside, which matters insofar as *Roman Herzog* had argued that the 'bold' interpretation of the Treaty in *Mangold* had been remedied by Directive 2000/78.

At first sight *Laval*, *Viking*, *Gysbrechts* and *Mangold* have nothing in common. The former two are overruling national protection standards, the latter are setting European protection standards beyond the national rules. I wonder, however, whether the common element in the series of judgments is the overall idea that the labour market shall be kept open to workers from Eastern Europe as well as to elderly workers having passed a certain age threshold. Both sets of judgments might produce counterproductive effects in that the market will be formally opened up, but materially closed, in that no employee beyond 52, as in the German case, will get a contract for an unlimited time or no employees from Eastern Europe will make use of the formal opportunity as they might meet a strong resistance from colleagues in the old Member States. But this is subject to deeper research.

⁹⁷ ECJ, 17.7.2008, Case C-303/06 ECR I-5603.

⁹⁸ ECJ, 16.7.2008, Case C-54/07 ECR I-5187.

⁹⁹ ECJ, 22.11.2005, Case C-144/04 2005 ECR I-9981.

¹⁰⁰ Gerken/Rieble/Roth/Stein/Streinzi, 2009.

¹⁰¹ ECJ, 16.10.2007 Case C-411/05 2007 ECR I-8531.

¹⁰² ECJ, 23.09.2008, Case C-427/06 2008 ECR I-nyr.

¹⁰³ ECJ 1.4.2008, Case C-267/06 2008, ECR I-nyr.

- (4) *The judicial shaping of consumer law*: Since 2000, the ECJ has been faced with an ever increasing number of opportunities to develop its particular policy with regard to consumer protection law. In light of the paradigm of judicial activism, only those judgments will be looked at which reach beyond the day-to-day work of courts and which, due to their background and/or the particular message of the judgment, will have a longstanding impact. I will group the judgments in two opposite directions: one set of rulings might be read as fostering European consumer protection beyond national standards while the other set might be read as turning down national protection standards.

Oceano,¹⁰⁴ *Simone Leitner*,¹⁰⁵ *Heininger*¹⁰⁶ and *Claro*¹⁰⁷ represent the first variant. In *Oceano* the ECJ declared jurisdiction clauses in unfair contract terms void. In *Leitner* the ECJ read into the package tour directive the obligation of Member States to introduce compensation for pain and suffering as the EU minimum standard. *Heininger* was the springboard for a whole series of judgments which are now known as the *Heininger Saga*.¹⁰⁸ The ECJ held, to the surprise of national observers, that credit financed investment transactions in real estate come under the ambit of the doorstep selling directive and the right to withdrawal may last forever if the consumer had not been properly notified of its existence. These judgments have one element in common. They set mandatory standards on how Member States' courts have to interpret the EU minimum directives on consumer protection. The functional equivalent to these four judgments in the field of anti-discrimination law is certainly *Mangold*. However, none of the four decisions raised similar concern. *Oceano* lost importance because the ECJ clarified in *Freiburger Kommunalbauten*¹⁰⁹ that it did not intend to become the final arbitrator in unfair contract terms litigation in Europe. *Schulte*¹¹⁰ and *Crailshaimer*¹¹¹ reduced the effects of the right to withdrawal in cases concerning credit financed investment transactions in real property. Only *Simone Leitner* remains. So far, the ECJ has not had the occasion to decide the question whether compensation of pain and suffering belongs to the standard level of protection notwithstanding the subject matter concerned.

Claro introduced a new principle of procedural law in consumer litigation. National courts are told that they are obliged to investigate *ex officio* whether contract terms violate unfair contract terms legislation. The ECJ developed this rule in *Pannon*,¹¹² *Asturcom*¹¹³ and *Eva Martin Martin*¹¹⁴ and seems ready to turn it into a general principle under which Member States' courts are obliged to take mandatory EC rules *ex officio* into consideration. The procedural requirement does not mean that the ECJ forestalls a particular result of the application of the mandatory rules in the specific case at issue. As it stands, the principle can easily be generalised and made applicable to all sorts of mandatory rules in consumer law, in environmental and in labour law. It is protective in the sense that the consumer does not have to refer to the mandatory rules in the proceedings but rather that the judge must take care of

¹⁰⁴ ECJ, 27.6.2000, Case C-240/98, 2000 ECR I-4941.

¹⁰⁵ ECJ, 12.3.2002, Case C-168/00, 2002 ECR I-2631.

¹⁰⁶ ECJ, 13.12.2001, Case C-481/99, 2001 ECR I-9945.

¹⁰⁷ ECJ, 26.10.2006, Case C-168/05, 2006 I-10421.

¹⁰⁸ Micklitz, 2007, p. 35.

¹⁰⁹ ECJ, 1.4.2002, Case C-237/02, 2004 I-3403.

¹¹⁰ ECJ, 25.10.2005, Case C-350/03, 2005 I-9215.

¹¹¹ ECJ, 25.10.2005, Case C-299/04, 2005 I-9273.

¹¹² ECJ, 4.6.2009, Case C-243/08, ECR 2009 nyr.

¹¹³ ECJ, 6.10.2009, Case C-40/08, ECR 2009 nyr.

¹¹⁴ AG Trstenjak, 7.5.2009, Case C-227/08.

his/her interests. The message, seemingly, is that the ECJ intends to guarantee that the national legal systems are freed from incriminating practices which are subject to the mandatory rules.

*Gonzales*¹¹⁵ and *VTB*¹¹⁶ set another new tone. Here, the institutional requirements are different insofar as the EU rules are not defining minimum but rather maximum standards. This was relatively unclear in *Gonzales* where the ECJ had to contemplate the question whether the Member States are allowed to maintain stricter national rules on product liability. The respective directive, contrary to the subsequently adopted contract law directives, did not explicitly provide for a minimum harmonisation clause which would allow Member States to maintain or introduce stricter standards. The Directive granted leeway to the Member States only with regard to two particular issues: the development of risk defence and the setting of a ceiling for compensation claims. In *Gonzales*, the ECJ caught the legal, political and academic world by surprise when it ruled that the directive has to be read so as to fully harmonise national product liability rules. *Gonzales* even led to a declaration by the Member States in the Council. The political resistance, however, could not prevent the ECJ from hammering down its understanding in *Skov*,¹¹⁷ although the AG *Trstenjak* has proposed a more cautious approach in *Aventis*.¹¹⁸

VTB deals with the question whether sales promotion measures are fully harmonised by Directive 2005/29 on unfair commercial practices. The clou of the conflict is that the European Commission originally envisaged the adoption of two kinds of measures, one dealing with unfair commercial practices and the other dealing with sales promotion measures. However, the Member States were not ready to fully support the double headed approach of the European Commission and voted in favour of the Directive on unfair commercial practices, which aims at full harmonisation but does not really deal with sales promotion measures. The ECJ took the full harmonisation target literally and held that a national verdict which prohibits sales promotion measures runs counter to the more liberal approach under the Directive, where sales promotion measures are, in principle, legalised provided certain requirements are met.¹¹⁹ Although Belgium stressed the history of the Directive and the original idea of having particular rulings on sales promotion, the ECJ rejected any attempt to accept a general and unspecified verdict of certain sales promotion measures. The ruling reaches far beyond the field of unfair commercial practices, as the European Commission is now revising the consumer acquis with the clear objective, to implement the policy of the consumer strategy 2002, in mind, i.e. to transform minimum harmonisation standards into maximum standards. Full harmonisation detracts competences from the Member States. The key question then is what areas are already fully harmonised and in which areas do EU rules pre-empt the Member States from maintaining or introducing stricter standards. All sorts of scenarios are to be imagined dealing with the scope and reach of full harmonisation.

¹¹⁵ ECJ, 25.4.2002, Case C-183/00, 2002 I-3879.

¹¹⁶ ECJ, 23.4.2009, 261/07, 2009 I-nyr

¹¹⁷ ECJ, 10.1.2006 C-402/03, 2006, I-199.

¹¹⁸ AG 8.9.2009 C-358/09.

¹¹⁹ ECJ, 23.4.2009, Case C-261/07 and 299/07 VTB-VAB ECR 2009 I-nyr.

Gysbrechts fits into the new post Lisbon policy. Member States' standards that reach beyond the EU minimum level can be challenged before the ECJ based on the argument that the higher national standards are violating the proportionality principle. In theory, the new approach of the ECJ allows the minimum standards to be converted into maximum standards. The ceiling and the floor will be the same. The more profound question then, is whether the minimum/maximum standards allow for the protection of those consumers who are incapable of meeting the stylised prototype of the circumspect and all competent consumer. *Gysbrechts* opens the floodgate for a new type of litigation, one which would allow for the striking down of national protection standards. A seemingly minor judgment might mark a break even point in the ECJ's conception of 'The Social'.

Overview of the Legal Order

The following chart sums up the development of EU labour law, with particular emphasis on anti-discrimination law and consumer law, and policy and provides an overview of the institutional legal framework.

	Consumer PCL	Consumer SCL	Labour PCL	Labour SCL
1957 Rome (57) Economic constitution	Art. 100 (Art. 94)	Dir. 85/577 Dir. 85/374 Dir. 87/107	Art. 119 (Art. 141)	Dir. 75/117 Dir. 75/129 (92/50 + 98/59) Dir. 77/187 (98/50 + 01/23) Dir. 76/207 (02/73) Dir. 79/07 Dir. 80/987 (08/94)
1986-1999 SEA (86) Maastricht (91) Amsterdam (99) Emergence of 'The Social'	Art. 95 (SEA) Art. 129 a (Maastricht) Art. 153 (Amsterdam) Art. 36 EU Charter (2000)	Dir. 90/314 Dir. 93/13 Dir. 94/47 Dir. 97/7 Dir. 98/27 Dir. 99/44	Art. 95 (SEA) Art. 118 a) SEA (86) Social Charter (89) Protocol on Social Policy Maastricht (91) Art. 13, 137, 141 (3) Amsterdam (99) EU Charter (2000)	Dir. 89/301 Dir. 91/533 Dir. 92/50 (98/59) Dir. 92/85 Dir. 93/104 (03/88) Dir. 94/33 Dir. 94/45 (97/74) Dir. 96/34 (97/75) Dir. 96/71 Dir. 97/81 (98/23) Dir. 98/59
2000 Lisbon Conclusions Globalisation – 'the most competitive and dynamic knowledge-based economy'		Shift from minimum to full harmonisation Together with Consumer Strategy 2002	Establishment of OMC	

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	Consumer PCL	Consumer SCL	Labour PCL	Labour SCL
Treaty of Nice (04) Lisbon Treaty 'Social Economic Constitution' + 'EU Charter'	Leitnormen Art. 3 (3) 'social economic constitution' Art. 2 'justice'	Dir. 2002/65 Dir. 2005/29 Dir. 2008/48 Dir. 2008/122 Proposal CR COM (2008) 614	Art. 13 (2), Art. 137 (2) Nice (04) Leitnormen Art. 3 (3) 'social economic constitution' Art. 2 'solidarity' Art. I – 14 (4) OMC repealed	Dir. 2000/43 Dir. 2000/78 Dir. 2001/23 Dir. 2002/73 Dir. 2003/88 Dir. 2004/113 Dir. 2006/54 Dir. 2008/94 Dir. 2009/38

Overview of the judge-made legal order

The following chart provides an overview of judicial activism, translated to fit Kennedy's three waves, the building blocks and the particular input into labour and consumer law.

	The Social	Ground rules	Labour law	Consumer law
1957 Rome (57) Economic constitution	First wave: market liberalism functional separation	Van Gend & Loos Costa Enel	Defrenne I-III Jenkins	Cassis de Dijon
1986-1999 SEA (86) Maastricht (91) Amsterdam (99) Emergence of 'The Social'	Second wave: no European welfare state, no distributive functions, no group rights	CMC Motorradcenter Alsthom Atlantiqu Dori Dillenkofer Brasserie de Pêcheur Bosman	Barber Foster Marshall I and II Levez Coote Grant	Keck
2000 Lisbon Conclusions Globalisation – 'the most competitive and dynamic knowledge-based economy'	Third wave A split legal order, hard law and OMC Constitutionalisation?	New spirit The new Leitbilder	New spirit	New spirit
Treaty of Nice (04) Lisbon Treaty 'Social Economic Constitution' + 'EU Charter'	Third wave II New values Fundamental and human rights	Viking and Laval Gysbrechts Feryn	Mangold Palacios, Bartsch, Maruko	Oceano, Leitner, Heininger, Claro vs. Sanchez and VTB

IV. The European Social Model – Framework or Substitute?

The development of ‘The Social’, via the institutional framework as interpreted and read by the ECJ, demonstrates that the European Social Model is a particular one, in substance and in stance. I will elaborate on my initial statement, that the ECJ has been developing a European Social Model which is based on the idea that discrimination, free access to the labour market and access to the consumer society or the market of consumer goods and services, is key.

Access does not mean and should not be confounded with more ambitious models of a regulatory state which accepts a distributive function. All what EU law, what the ECJ is trying to secure is that the labour market is kept open even for outsiders, so that there is, at least, a theoretical chance for each worker and each employee to become engaged in the market. However, EU law does not remedy the discrimination, it does not grant the employee positive action to receive a labour law contract. In the same vein, the ECJ is ready to eliminate distortions in contractual relations between a supplier and a consumer. It is widening and extending the scope of application of EU law, but the ECJ refuses to become the final arbitrator on managing the outcome of the case law. In the light of the foregoing analysis, the reader might feel inclined to argue that there is evidence in *Mangold* or in *Oceano* – or *Christl Schmidt* and *Junk* – that the ECJ sometimes plays exactly this role. I agree, however I understand these judgments as exceptions to the rule. *Oceano* has been overruled by *Freiburger Kommunalbauten* and in *Palacios* and *Bartsch* the ECJ has began to move away from *Mangold*. Therefore, I would stress that the dominating model in the judge-made legal order in general, and in labour and consumer law in particular, is *access*.

Barber and Heininger – Framework

Judicial activism requires a particular legal, political and social environment. The preparedness of national courts in the 1980’s in the UK and Germany to refer matters of labour and equal treatment law to the ECJ was generated by the relatively ‘cold’ social climate within these countries. The national courts, in particular the lower courts, attempted to use the preliminary reference procedure as a lever to overrule national protection standards.

In *Barber*, the ECJ was ready to take a bold step ahead, to submit national pension schemes to Art. 141. *Barber* made national activists dream of levelling up the degree of protection towards the most favourable solution. If women are allowed to retire at the age of 60 then men should also have the same right. Backed by the Equal Opportunities Commission, a whole series of plaintiffs initiated action, some of them even reached the ECJ. The overall question was whether EC law requires Member States, as well as employers, to grant the disadvantaged sex the more favourable solution of the other sex. In the aftermath of *Barber*, UK employers had in fact raised the pension age of women. The subsequent litigation was directed against such a levelling-down strategy. In a clear cut statement, and in line with the opinions of Advocate General *van Gerven*, the ECJ rejected in *Smith v. Advel*¹²⁰ such claims stipulating that EU law does not preclude the reduction of such benefits as long as the benefits are at the same level for both men and women. This means that private and public employers are entitled to choose the more disadvantageous solution as long as equal treatment of sex is guaranteed. *Smith v. Advel* does not represent a unique approach. Quite the contrary is true. By the mid 1990s the ECJ had developed a set of ground rules in anti-discrimination law, which subsequently shaped the European Social Model.

A second issue might confirm my reading of the ECJ. The first two directives 75/117 and 76/207 obliged member states to guarantee effective protection of equal treatment rights. In a whole series of judgments, the ECJ developed the doctrine that national remedies must meet the principle of equivalence and the principle of effectiveness. In my understanding the test is in essence a negative

¹²⁰ ECJ, Case C-408/92, 1994 ECR I-4435.

one. The ECJ tends to eliminate barriers which hinder the effective enforcement of subjective rights in anti-discrimination law (and not here alone). The ECJ, however, is not willing to strive for the availability of *adequate* remedies which would entail the need for upgrading or levelling up the set of national remedies.¹²¹ True, the ECJ has gone far in inventing the remedy of states' liability, of horizontal liability for antitrust injuries, of interim relief and now of preliminary injunctions in anti-discrimination law. However, the ECJ is not willing to establish, as a rule or as a threshold, that Member States have to provide for adequate remedies.

The changes in the realm of labour law during the nineties are presently being mirrored in consumer law. The above mentioned time lag, between labour law and consumer law, reappears at the level of litigation before the ECJ. Since 2000, consumer litigation in Luxemburg is on the increase. *Heininger* must be seen in the context of the German unification. In particular in East Germany, direct sellers approached low income consumers at their homes convincing them to invest in real estate. The interest rates for the credit should have been covered by the rent to be obtained from the lease of the real estate. However, this concept failed. The new land owners could not find tenants who could afford the envisaged rent which was needed to pay the credit instalments. *Heininger* is a 10 Billion Euro story. Politics left it to the courts to resolve these conflicts emanating from claims from consumers who were caught-up in the failed investment. The German Supreme Court took a clear stand and refused to develop innovative means under existing German civil law. So the case ended up before the ECJ, due to the imagination of a local lawyer in Munich. The ECJ held that consumers are allowed to withdraw from the consumer credit contract provided that it fell within the scope of application of Directive 85/577 concerning doorstep selling if he/she has not been notified of his/her right – which had actually occurred in the majority of the mentioned cases. This paved the way for a new wave of litigation before German courts, all dealing with the legal consequences of withdrawal from the credit transactions and the possible effects on the sales contract. Consumers could withdraw from the credit contract but then had to repay the credit d'un seul coup. The right to withdrawal turned out to be useless and German courts referred new cases to Luxemburg in order to inform themselves of how the restitution of linked contracts should be resolved in the light of the consumer acquis. In *Schulte* and *Crailshaimer* the ECJ gave a cryptic answer which did not overcome the barriers in the German national civil law system. So in the end, most of the claims failed after many years of litigation.

What can be learnt from this? The ECJ is supportive in guaranteeing that consumer rights are taken seriously. If the consumer does not know his/her rights, he or she cannot exercise them. *Heininger* secures the possibility that the consumer may invoke his right. *Schulte* and *Crailshaimer*, however, send the same message as *Smith v. Advel*. It is not for the ECJ, nor for EC law, to resolve the substance of the litigation. This has to be done by the national courts, i.e. the national legislators. So all that the ECJ is ready to advocate for is the establishment of a *European Social Framework*. It is for the Member States to fill the gaps that remain within the framework. They must decide whether they want to level up the protection to the most favourable solution, whether they provide for remedies beyond the threshold of effectiveness and equivalence, they have to decide whether the consumer who suffered as a result of failed investments shall be compensated – or not.

Kalanke, Mangold and Gonzales Sanchez, Gysbrechts – Substitute

Judicial activism has two faces. The more sympathetic one is the Framework version. We are all in favour of multi-culturalism, of leaving space for national traditions, national differences. So whilst we might expect 'more' from the European Court of Justice, the more reluctant approach not only frees the ECJ from the reproach of judicial activism, or perhaps reduces criticisms surrounding judicial activism, but it is also very much in line with the origin of the European legal order and the limited importance of 'The Social' within the European legal system.

¹²¹ See van Gerven, 2000, p. 501.

However, times are changing. The Lisbon Conclusions have set a new tone. Whilst it is hard to provide evidence that the ECJ felt inspired in its interpretation of primary and secondary Community law by the Lisbon Conclusions, it is equally clear and well researched that courts are dependent on their political, social and economic environment.¹²² *Kalanke*¹²³ dates back to the mid nineties when the ECJ developed its particular approach to anti-discrimination, mainly from German and English references. *Kalanke* was a hard case. The point at stake was the correct interpretation of Articles 2 and 4 of Directive 76/207 and the extent to which the Articles prohibit 'hard quotas' for women. The ECJ ruled in the affirmative and provoked strong reactions from the Member States and from their respective social environments. Two years later the ECJ softened its approach somewhat by allowing for the application of 'soft quotas'.¹²⁴ *Kalanke* contains two messages: the first is that one's expectations of the ECJ should not be overestimated. The ECJ will not grant women or those discriminated against unlimited support. Secondly, *Kalanke* delineates an early sign that access to the labour market should not be blocked by formal barriers. Qualification is said to rank higher than quotas. I will not embark on the question whether the argument is legitimate or not. What matters in our context is that *Kalanke*, as early as 1995, made clear that the leeway given to the Member States within the European Social Framework is limited. For the good and for the bad, the ECJ took the freedom to finally decide on a highly political issue, here – if I may dare to say this – following the majority opinion in public polls. The outcry might have been even louder if the ECJ would have ruled that Member States are obliged to introduce hard quotas. Whatever way, the ECJ had limited national sovereignty and replaced national considerations on what is socially and societally correct by its own standards. This is the ugly face of the ECJ, at least those whose expectations are not met would subscribe to such a vision.

Gonzales Sanchez, *VTB* and *Gysbrechts* have already been mentioned. The first two provide for an idea of the legal consequences of full harmonisation. Both *Gonzales Sanchez* and *VTB* illustrate an approach where the ECJ does not hesitate to reject national protection standards which are higher than the fully harmonised EU ones. What makes the two decisions fit into the perspective of an activist court is that it is highly arguable whether the ECJ was forced to read the respective directives in the way it did. Full harmonisation certainly enlarges the jurisdiction of the ECJ, as it has the final word on the scope of the secondary Community law that is on the question how far the European Social Model reaches and what leeway remains for the Member States. A narrow interpretation enlarges the leeway, a wider interpretation leads to the replacement of national social standards by EU standards. The European Commission constantly argues that Art. 95 ensures only a high level of protection in labour and consumer law, and that it does not require the 'highest' level of protection. What matters is that the European Commission is advocating a European 'Social' Model in fully harmonised consumer law which is no longer social, at least not in the sense consumer law had developed in the 1960's and 1970's. Fully harmonised consumer law relies on the consumer shopper, the multi-lingual, responsible and well informed market participant whose major objective is 'to reap up the benefits of the market'. The ECJ has no choice other than implementing this new policy resulting in a substitution of national protection models with a particular EU model, which, however, is no longer a social model, since the ECJ has discretion within the limits of sound legal methodology as to how far it goes in stretching the scope.

¹²² In consumer law the European Commission is screening its directives in order to make sure that the key concepts of the Lisbon Conclusions literally show up in the recitals, see with regard to the Consumer Rights directive my analysis in Howells/Schulze, (fn. 1). But this does not mean that the ECJ follows suit.

¹²³ ECJ, Case C-450/93, 1995 ECR I-3053.

¹²⁴ ECJ Case C-409/95 *Marschall v. Land Nordrhein Westfalen* 1997 ECR I-6363.

Gysbrechts is important because it allows for turning minimum standards into maximum standards. Such a policy would definitely affect the core of EU labour and anti-discrimination law which set only minimum standards. *Gysbrechts* and *Laval* read together demonstrate the potential of the new judicial activism in labour and consumer law.

Personally, I have been arguing and will continue arguing that Europe needs a European Social Framework, which complements the economic order. But such a Social Framework should remain a framework and not be silently turned into a trap which Member States would have difficulties to get out of. Judicial activism in the social sphere is walking a fine line between setting incentives for national model building and replacing national models by genuine European ones, which are about to lose the connotation of 'The Social', at least if 'The Social' is still being understood in accordance to the meaning given to it in the last century.

V. Afterword: The Parameters of Judicial Activism in the Social Domain

In 'The Politics of Judicial Co-operation', I identified three parameters for the making of a judge-made European legal order: (1) judicial co-operation between the ECJ and the national courts under the preliminary reference procedure, (2) organised law enforcement and (3) legal and political legitimacy of a judge-made legal order. Implicitly, I have relied on these parameters in this paper.

- (1) All judgments discussed here result from preliminary references of national courts. Quite a number of them came from lower courts in the countries often against the explicit opposition from the highest courts in the countries. National courts then try to instrumentalise the preliminary reference procedure to get national standards upgraded via the detour over Luxemburg. Anti-discrimination law and consumer law litigation is a perfect ground for such a strategy. Whilst national courts sometimes tend to show up as defenders of the weaker parties, the cases can only be set into motion by private parties. Here, organised law enforcement ties in.
- (2) National plaintiffs who want to bring a case to Luxemburg need professional skills in preparing the case, in finding the appropriate lawyers, in financing the case and in presenting it so that the national court is willing to go ahead. The two fields of law which I have analysed, anti-discrimination law and consumer law demonstrate the differences in professionalised organised law enforcement. In anti-discrimination law, lawyers, trade unions and particular entities like the Equal Opportunities Commission developed, over time, the necessary skills to organise the law enforcement in that particular field. Consumer organisations and consumer agencies are lacking behind. The set of references to the ECJ seems to be often erratic and much less the result of careful and determined legal action. There are exceptions to the rule. *Quelle*¹²⁵ may be taken as an example where the German consumer organisation used a particular remedy under German law to test whether the German rules on implementing the consumer sales directive complied with the respective directive. However, an overall strategy to use the EC consumer law rules in a particular context or for a particular purpose is missing. In anti-discrimination law, the targeted initiatives led to the establishment of a rather coherent body of judge-made rules in a relatively short period of time. The difference between the two fields demonstrates what would be required to use the newly introduced set of EC minimum requirements on universal services to shape customer protection beyond the national level. My impression is that national NGO's have not yet even discovered the potential of 'access' of 'affordability', of 'continuity', just to mention a few. I have developed elsewhere that the concept of universal services might become the nucleus of a new social private law.

¹²⁵ ECJ, 17.4.2008, Case C-404/06, 2008 ECR I-nyr.

- (3) Judicial activism, understood here as European order building, depends on legal and political legitimacy. In the social field, legal and political legitimacy is shaky, hard to obtain and easy to lose. It seems that labour law issues are raising more public concern and awareness than consumer law issues. There seems to be only one issue which really matters in consumer law, this is the question of whether a class action is a feasible instrument in defending consumer interests. What is neglected in the debate is the East-West dimension. In *Viking* and *Laval* the Member States were neatly divided over the issue of how the worker rights could be best protected, the old Member States argued in favour of maintaining the social welfare standards, the new Member States argued in favour of turning the minimum standards of protection into maximum standards. A similar demarcation line can be observed with regard to the intended shift from minimum to maximum harmonisation. Support comes from the new Member States which are in favour of common standards all over Europe. The ECJ made tremendous efforts to close the legitimacy gap by introducing rights and remedies into the European legal order. The rights and remedies rhetoric, however, runs into a deadlock when the EU adopts rules in the social domain which are not enforceable at all, or which are so vaguely termed that they cannot be transformed into enforceable rights. The law on universal services provides for a marvellous ground to test judicial activism in the 'new' social domain and to help establish ground rules for a genuine EU social framework.

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