
European Journal of Legal Studies

Title: Inroads to Social Inclusion in Europe's Social Market Economy: The Case of State Aid Supporting Employment of Workers with Disabilities

Author(s): Delia Ferri and Mel Marquis

Source: European Journal of Legal Studies, Volume 4, Issue 2 (Autumn/Winter 2011), p. 44-73

Abstract:

Since the 1990s if not earlier, the asymmetry in the European Community/European Union between market-making free trade rules and distributive mechanisms sometimes known as 'the social' has been perceived by many as at least a potential factor contributing to a legitimacy crisis in European integration. There are no easy solutions to this state of affairs, but the European Union can take small steps toward an enhanced equilibrium. A small but potentially important step was taken in the Lisbon version of the Treaty on European Union, when the notion of a 'social market economy' was explicitly embraced. But what do these alluring words mean? They are left formally undefined and they have been freed, we submit, from their historical and conceptual moorings. It is up to European practice and scholarship to determine whether and how the idea will take on a life of its own in its new context. In this paper we consider a narrow but not insignificant policy field that suggests itself as a possible example of Europe's social market economy principle in action, namely, the use of state aid rules to encourage Member States to support the hiring and accommodation of persons with disabilities. In exploring the legal norms and policy in this area, we put forward some tentative suggestions about how the idea of a social market economy for Europe might be framed as the EU passes through the next phase of the integration project.

ESSAY

INROADS TO SOCIAL INCLUSION IN EUROPE'S SOCIAL MARKET ECONOMY: THE CASE OF STATE AID SUPPORTING EMPLOYMENT OF WORKERS WITH DISABILITIES

DELIA FERRI AND MEL MARQUIS*

TABLE OF CONTENTS

1. Introduction	47
2. ‘A highly competitive social market economy, aiming at full employment and social progress’	50
3. State aid control and its role in Europe’s social market economy	57
4. Aid supporting employment of persons with disabilities	62
5. A test-bed for Europe’s social market economy	69
6. Concluding remarks	72

* Delia Ferri has a Ph.D in Italian and European Constitutional Law; she is a practicing attorney and a member of the Verona Bar. Mel Marquis is a part-time professor of law at the European University Institute, professore a contratto at the University of Verona and a member of the New York and New Jersey bars. The text of this article was improved thanks to comments kindly provided by two anonymous referees.

1. Introduction

A fundamental part of the original and enduring mission of European Union is to focus on preventing obstacles to competition and to ensure the smooth functioning of the internal market. As a consequence of decades of negative integration and certain positive initiatives such as the Treaty-based monetary union (beleaguered of late, to be sure), European economic integration has progressively reduced the relative capacity of the Member States to influence the course of their own economy and to reach self-defined policy goals, even if the constraints placed on purely autonomous state action are seen as part of the price for a generally positive process of system-building, institutional coordination, mutual support and so on.

With reduced policy space at the national level, which may be exacerbated in times of painful economic adjustment, we suggest that it is increasingly incumbent on the EU to pursue its various objectives and tasks in a manner that is consistent with, and supports the aims of, adequate social protection and correction of market failures. The imperatives of a ‘highly competitive social market economy’, now explicitly incorporated in the Treaty on European Union,¹ require the EU to play a more active role in pursuing goals of social

¹ Article 3(3) of the Treaty on European Union. These five pregnant words are immediately followed by a reference to the goals of full employment and social progress. The wording of Article 3(3) suggests that a highly competitive social market economy is one of the elements together with economic growth, price stability and environmental protection which constitute the basis for Europe’s sustainable development. Within that context of sustainable development, the syntax of Article 3(3) indicates that full employment and social progress are to function as guideposts for the interpretation of the social market economy concept. Other guideposts undoubtedly include Article 119 of the Treaty on the Functioning of the European Union (TFEU), which requires the Member States and the Union to respect the principle of an open market economy with free competition; and Protocol 27 on the Internal Market and Competition, which confirms that the Union’s internal market necessarily includes a system of undistorted competition. On the vitality of Protocol 27 and the continuity between the Protocol and its predecessor, Article 3(1)(g), see Case C-52/09 *Konkurrenzverket v Telia Sonera Sverige* (ECJ, 17 February 2011), paras 20-22. The latter judgment seems to lay to rest somewhat alarmist notions that the formal ‘demotion’ of the once-sacrosanct Article 3(1)(g) may have signalled a fundamental decision to shift from a competitive order toward a more ambiguous regime embracing, for example, industrial policy and the establishment of ‘European champions’ as being among the Union’s central occupations. For discussion, see, eg, Josef

equity in tandem with its other tasks. The fact that the meaning of the words ‘social market economy’ is contested,² sometimes misunderstood,³ and laden with specific historical associations⁴ does not mean that its development at a new, supranational level is either foreclosed or predestined.

In what appears to be a lapse of drafting, the Lisbon Treaty only introduced a single reference to the idea of a social market economy. Nevertheless, this reference should be seen in light of a general trend toward a more serious commitment on the part of the EU to becoming more socially oriented. Some

Drexl, ‘Competition Law as Part of the European Constitution’, in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing and Verlag CH Beck 2009) 661-69.

² See, eg, Constanze Semmelmann, ‘The European Union’s economic constitution under the Lisbon Treaty: soul-searching among lawyers shifts the focus to procedure’ (2010) 35 *European Law Review* 516, 521-22, with references; Constanze Semmelman, *Social Policy Goals in the Interpretation of Article 81 EC* (Nomos Verlagsgesellschaft 2008) 148-53.

³ As Christian Joerges and Florian Rödl have explained, the conceptual content of the social market economy, which is to a large extent a product of German neoliberal philosophy (with an emphasis on the idea that social protection measures had to be *marktkonform* and thus consistent with the competitive order), albeit an emphatically humanistic brand of neoliberalism, was generally lost on those at the European Convention of 2002-2003 who secured its inclusion in the Constitutional Treaty. Joerges and Rödl, “‘Social Market Economy’ as Europe’s Social Model?”, in Lars Magnusson and Bo Stråth (eds), *A European Social Citizenship? Pre-conditions for Future Policies in Historical Light* (Peter Lang 2005) 125. At the level of the EU, the term was reduced essentially to a slogan that not many could disagree with. In a way, this might recall how, in the history of German party politics the term had cross-partisan appeal despite its close association with Ludwig Erhard and the CDU. See Jan Zutavern, ‘Just Liberalization? Ideas, Justification and Rhetorical Choice in 30 Years of German Employment Policy Making’ (Ph.D thesis, European University Institute 2011) 165.

⁴ It is not our intention to discuss this history in great detail, or to trace the genealogy of the concept of the social market economy or analogous concepts such as ‘social capitalism’. For further discussion, see, eg, Mel Marquis, ‘The Collocation of “Social” and “Market” in the Economy and Europe’s Elusive Social Identity in the Stardust of the Economic Constitution’, in Andrea Caligiuri, Giuseppe Cataldi and Nicola Napolitano (eds), *La tutela dei diritti umani in Europa: Tra sovranità statale e ordinamenti sovranazionali* (CEDAM 2010) 419. See also Christian Watrin, ‘The Principles of the Social Market Economy: Its Origins and Early History’ (1979) 135 *Zeitschrift für die gesamte Staatswissenschaft* 405. For a sharp critique of how the social market economy concept has in fact been (mis)implemented in Germany, with results contrary to what some of its progenitors might have hoped, see Ulrich Witt, ‘Germany’s “Social Market Economy”. Between Social Ethos and Rent Seeking’ (2002) 6 *The Independent Review* 365. For an extended analysis of Germany’s experience with the social market economy, see Umut Devrim Özbideciler, ‘Social Market Economy: An Inquiry into the Theoretical Bases of [the] German Model of Capitalism’ (Masters thesis, Graduate School of Social Sciences, Middle East Technical University 2003), available at <<http://etd.lib.metu.edu.tr/upload/1041896/index.pdf>> accessed 15 September 2011.

might find it hard to believe that such a trend has taken hold at EU level, such as those feeling the squeeze of austerity programmes in Member States with unsustainable public debt. But while slow reaction and ambivalence often dilute the effectiveness of its initiatives, the EU is responding, in some measure and with all its idiosyncrasies, to the sovereign debt crisis. In particular, it has set up temporary support mechanisms for the Member States, to be replaced by a permanent ‘European Stability Mechanism’ (ESM) in 2013, that is, if an amendment to Article 136 TFEU is approved. Second, the EU, and more specifically, the Commission, has taken significant steps to ratify, as it were, aid measures adopted by Member States to address the crisis afflicting the real economy.⁵ The number of cases where aid was legally granted grew from 202 in 2003 to 636 in 2007 and to 964 in 2009.⁶ Moreover, in the throes of the crisis the Member States provided substantial support for the financial sector, with 300 billion euros in capital injections and almost 3 trillion euros’ worth of guarantees.⁷ If we look at the so-called ‘Europe 2020’ areas⁸ (ie, research and development and innovation, environmental protection, regional development, broadband, SMEs, employment and training), we observe that, between 2004 and 2010, the Commission approved several aid measures (eg, with respect to R&D&I measures, 413 measures were approved as compatible, an additional 12 measures were declared not to contain state aid and only one measure was subject to a negative decision with recovery).⁹ We do not intend to discuss here the handling of the crisis, or the controversies surrounding it. But we note the heightened activity in the field of State aid as a contextual feature and propose to examine a more specific policy development that we hope can shed some

⁵ For discussion of the effects of the financial crisis on the application of competition rules, see, eg, Jürgen Kießler, (2010) ‘Rethinking Competition: State Aids and Competition Rules in the Age of the Financial Crisis’, in Harold James, Hans-Wolfgang Micklitz and Heike Schweitzer (eds), *The Impact of the Financial Crisis on the European Economic Constitution*, EUI Working Paper Law 2010/05 <<http://cadmus.eui.eu/handle/1814/14055>> accessed 15 September 2011.

⁶ See also the pending cases charted at <http://ec.europa.eu/competition/elojade/isef/dsp_reg_main_3.cfm#pending> accessed 15 September 2011.

⁷ See Christoph Bertsch, Claudio Calcagno and Mark Le Quement, ‘State aid and tacit collusion’, EUI Working Paper ECO 2009/36 <<http://cadmus.eui.eu/browse?value=CALCAGNO%2C+Claudio&type=author>>; also available at <http://www.christophbertsch.com/wp-content/uploads/2011/01/STATE_AID_AND_COLLUSION_30092010.pdf> accessed 10 September 2011.

⁸ COM(2010) 2020 final.

⁹ COM(2011) 356 final.

light on what the notion of a social market economy might mean for the European Union.

In this article we suggest that the development of EU rules on state aid targeted to promote the active inclusion in the labour market of persons with disabilities, ie, one of the most vulnerable groups in society, provides some basis for assessing the EU's early steps toward establishing a European social market economy. Our investigation also provides us with an initial glimpse of how the latter concept might come to be understood. Of course, we recognise that the 'social market economy' may be interpreted in ways quite different from the suggestions we make here. It might even lie dormant well into the future. But we think it better to grapple with the idea than to let it be, since it seems to reflect an affirmative choice with regard to the EU's aspirations and constitutional identity.

The remainder of this discussion is divided into six sections. Section 2 reviews the meaning and the main features of the traditional concept of the social market economy, and then considers how the social market economy has emerged in the EU legal context. Section 3 provides a general overview on the Treaty rules on state aid and how they relate to the social market economy, taking into account that, in the last couple of decades, they have assumed increasing importance and impact on national economic policies. We then analyse the EU's General Block Exemption Regulation (GBER), as well as other guidance documents and Commission decisions in the field of state aid policy, insofar as they aim at an enhanced recognition of the rights of persons with disabilities (Section 4). In light of this analysis, Section 5 discusses the use of State aid to protect and promote the rights of persons with disabilities as a 'test-bed' for Europe's social market economy. Section 6 concludes.

2. 'A highly competitive social market economy, aiming at full employment and social progress'

We will contend, in this article, that encouraging Member States, via the state aid rules, to create conditions favourable to the employment of persons with disabilities is a means to promote a *social market economy*. But this begs the question of how the latter term should be understood. We begin with the

proposition that the social market economy is a problematic notion, and unless it is handled with care it is liable to invite confusion. For example, for the uninitiated the term may evoke the ‘socialist market economy’, a completely different creature found in, among other things, the Chinese constitution.¹⁰ But the social market economy should be seen as a concept with rich potential, a concept unburdened by its own historical and cultural legacy, and ripe for substantive development. It is likely to mean different things to different people based on, for example, whether stress is laid upon the word ‘social’ or, by contrast, on the words ‘market economy’. Hermeneutic cleavages may be an intrinsic risk of institutionalising these seductive, expansive words. And indeed, the various meanings of the ‘social market economy’, even within the German tradition, where the popular notion of the concept took on associations independently of and divergent from the original intellectual design, have complexified the term, making it ripe for misinterpretation. We do not propose a lengthy investigation into the fascinating intellectual, historical and cultural legacy of the social market economy. Much of the terrain has already been explored retrospectively in various academic treatments.¹¹ We condense the basics into the following summary.

The starting point for the social market economy is the conscious choice in favour of a system based on voluntary market transactions, in which competition, price signals and private law mechanisms such as contract and tort law are fundamental. This system – with constitutional safeguards against the excesses of power in both private and public form – is the competitive order famously advocated, with varying points of emphasis, by German intellectuals such as Walter Eucken, Franz Böhm and Wilhelm Röpke. But markets are invariably imperfect and incapable, in and of themselves, of meeting all the requirements of a socially just society that attaches value to the fulfilment of

¹⁰ Following reforms dating back to 1978 under Deng Xiaoping, Article 15 of the Constitution (as amended in 1993) declares that the State practices a ‘socialist market economy’. China’s brand of (problematic) state capitalism need not be elaborated on here; suffice it to note that the socialist market economy in China leaves ample room for intervention in markets, and it is still characterised by weak independence of market regulators and a host of other structural difficulties left behind by Maoist reforms.

¹¹ For details and further references, see Semmelmann (n 2) and Marquis (n 4).

basic human needs.¹² The market was regarded as a necessary foundation for the (German) post-War society, but it had to be supplemented by adequate social policies. This realisation prompted Alfred Müller-Armack, a figure well-known from the folklore of European integration and of EU competition law, to observe in 1956 that ‘in a system of free competition it is possible for the social duties of modern society to be carried out better than in the past’.¹³ According to Müller-Armack, ‘[t]he concept of a social market economy may therefore be defined as a regulative policy which aims to combine, on the basis of a competitive economy, free initiative and *social progress*’.¹⁴ However, what is not always obvious is that in advancing the notion that the ‘market’ and the ‘social’ can work side by side in harmony, where conflicts arose there was to be a hierarchy: in principle, measures of social protection were not permitted to violate the principle of well-functioning markets. Such measures were thus subject to a test of ‘market conformity’. It is this hierarchy that is not easily visible from the term ‘social market economy’ taken in isolation and out of context.¹⁵

The nuances of the social market economy, as originally understood, were made still more obscure by the use of the term, in Germany, as a malleable political slogan. The popular version of the social market economy combines ‘ideas from liberal thought, social welfarism, and corporatism’, and allowed a wide berth for ‘bilateral labor-market cartels’.¹⁶ With the concept of the social market economy absorbing such extraneous impurities, and with the general erosion of the distinction between that concept and the proverbial ‘welfare state’, many of those more in tune with the origins of the social market

¹² The idea of social justice has of course been the object of deep-cutting critiques, based notably on the danger of ‘social justice’ being used as a means to consolidate the incumbency of privileged classes. On the other hand, we do not think that it follows from such critiques that an open market economy has no need for humane supplementary devices that include (involuntary) redistribution of wealth. On this latter point we think there is at least a patch of common ground between our point of view and that of the critics of social justice (or at least some influential ones), who seem to accept the state’s role in providing for certain minimal social welfare needs.

¹³ Müller-Armack, ‘The Meaning of the Social Market Economy’, in Alan Peacock and Hans Willgerodt (eds), *Germany’s Social Market Economy: Origins and Evolution* (Macmillan 1989) 83.

¹⁴ *ibid* (emphasis added).

¹⁵ cf Joerges and Rodl (n 3).

¹⁶ Witt (n 4), at 366 and 374 respectively.

economy regard its implementation in Germany as a history of profound disappointment.¹⁷

But we now leave history to one side and propose to offer our tentative suggestions as to how a *European* conception of a social market economy, decoupled as far as possible from its specific cultural-national tradition, might develop and be interpreted and applied. We do not presume to present a complete framework; indeed, such an endeavour would comport poorly with our sense that the idea of a social market economy for Europe requires time for reflection, for further concrete action and for dialectic evolution – before its essence and boundaries can be fully understood. Here we merely suggest some building blocks that might be used for further construction and refinement.

We would start by recalling that the EU still has limited competences with regard to the establishment of a socially progressive and socially inclusive supranational polity. Yet it does not follow that the EU is powerless to pursue and achieve social aims; furthermore, the Union should not be seen artificially as a detached entity but as a key partner in a complex collaborative enterprise (not a frictionless one, surely) in which national and supranational competences and initiatives interact and can potentially reinforce each other. In addition, for all its fits and starts the ECJ has made progress in striking a better balance between free trade and national (social) rights,¹⁸ and the Court has at times

¹⁷ The failures of the social market economy as implemented in Germany are described concisely by Witt (n 4). According to his account, the social market economy was essentially hijacked by rent-seeking German trade unions, who failed to take full account of the consequences of their wage demands on the national labour market, which grew increasingly rigid. The systemic moral hazard induced by a generous taxpayer-funded social safety net exacerbated these externalities, which in combination created a vicious circle since the side payments necessary to cover the needs of the excluded were largely funded by ever-increasing wage demands which in turn reinforced the rigidities in the German labour market. The high and persistent rate of unemployment, as Witt points out at page 373, was certainly not what the original promoters of the social market economy (Eucken, Müller-Armack, Erhard, etc.) had aimed for.

¹⁸ We do not suggest that there has been a sudden transformation of the EU's objectives and competences. Rather, we see recent developments as a continuation of and confirmation of an emerging social dimension to European integration. Much has been made of, among other things, the *Laval* judgment of the Court of Justice (Case C-341/05 *Laval un Partneri* [2007] ECR I-11767), which has been decried by some prominent observers as a reassertion of the primacy of a European integration project biased in favour of negative integration and against social protection. We think that erroneous conclusions may be drawn from that jurisprudence if it is read in isolation, and unless it is seen in the light of other notable efforts by the ECJ to

shown itself willing to give precedence to such rights, particularly where the values protected are shared by a large number of Member States.¹⁹ Nevertheless, given the EU's well known limitations in relation to taxation and spending powers, the Union simply cannot be expected to be the focal point of a grand wealth redistribution system, regardless of whether or not such a system is to be desired. Despite the progressive recognition of social rights,²⁰ and despite achieving at least some degree of success with the open method of coordination and with soft governance in the field of social policies,²¹ the EU still lacks the capacity to deliver a wide range of social protection measures according to a criterion of distributive justice, and this constraint presents a fundamental challenge to idealistic notions of the social market economy.²² Thus, if Europe is to be a 'more social Europe', it will have to be so first within the confines of its powers and prerogatives, acting incrementally and depending on and expecting Member States to participate within their own spheres of (constrained) action and capacity. The notion of a European social market economy must likewise be modulated so as to fit the ambitions, capacities and constraints of supranational action.

integrate the EU's concerns for social protection into its economic policies. Illustrative in this regard, and to name but one example, would be the *Albany* judgment (Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751), where the Court disapplied the Treaty competition rules in circumstances where a collective bargaining agreement was concluded for the purpose of improving employment conditions.

¹⁹ We won't venture here to critically discuss the ECJ's case law on employment and social provisions, or to examine the principle of solidarity in the Court's judgments. Suffice it to note that, in many cases, the Court has simply interpreted the relevant EC/EU provisions in a way that permits the realisation of the social objective in question. See, eg, Case 31/87 *Gebroeders Beentjes BV v Netherlands* [1988] ECR 4635. For discussion of many of the pertinent issues, see, among others, Miguel Maduro, *We the Court: The European Court of Justice and European Economic Constitution* (Hart Publishing 1998) (emphasising the 'majoritarian' principles that tend to guide the thinking of the Court's judges in their application of free movement rules).

²⁰ See, among others, Pasquale Costanzo, 'Il sistema di protezione dei diritti sociali nell'ambito dell'Unione europea', in Fernando Facury Scaff, Miguel Revenga and Roberto Romboli (eds), *Problemi e prospettive in tema di tutela costituzionale dei diritti sociali* (Giuffrè 2009) 103; Stefano Giubboni, *Diritti sociali e mercato* (Il mulino 2003); Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart Publishing 2003).

²¹ See Milena Büchs, *New governance in European social policy: the open method of coordination* (Palgrave Macmillan 2007).

²² On the limited competences of the Union in this context, see, eg, Loïc Azoulai, 'The Court of Justice and the social market economy' (2008) 45 *Common Market Law Review* 1335, 1337.

Bearing in mind the limitations just described and the need for realistic expectations, we would further emphasise the need for an ahistorical and *forward-looking* approach as Europe's social market economy incrementally materialises, and as it is dialectically conceptualised by observers. In that regard, we would put forward three general remarks before we proceed, in the following sections, to consider how the state aid rules have been used to support employment of persons with disabilities.

First, the term 'social market economy' in the Treaty on European Union introduces, we think, more than a rhetorical flourish with which to embellish political speeches. The authors of the Treaty have in fact constitutionalised the concept of a social market economy in Article 3 TEU. The latter Article should be also be considered in conjunction with the horizontal clause contained in Article 9 TFEU, which provides that: 'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.'²³ These concerns, embedded within the TFEU, may constitute useful indicators of what the *social* component of a 'social market economy' might mean. It may also be significant that, after Lisbon, for most Member States and absent an 'opt-out', fundamental social rights are now firmly protected by the European Charter of Fundamental Rights, which has been elevated to primary law and given binding force. Conceptually at least, as EU law now stands, the 'market economy' and the 'social' are on what appears to be equal footing; and this *footing* is at the highest rank of law, even if by nature the social market economy is not fit to be endowed with direct effect under principles of EU law. Since both aspects of the concept have been given constitutional rank, it may be concluded that in situations where a conflict between 'market' and 'social' arises, neither can be permitted to extinguish the other. Instead, an effort must be made to apply a kind of practical concordance to these elements in order to give them a coherent co-existence. The notion of practical concordance in turn implies that

²³ For discussion, see, eg, Giuseppe Bronzini, 'Il modello sociale europeo nel Trattato di Lisbona', in Franco Bassanini and Giulia Tiberi, *Le nuove istituzioni europee. Commentario al nuovo Trattato europeo* (il Mulino 2008) 109.

the co-interpretation of ‘social’ and ‘market’ should be regarded as a dynamic undertaking, or as an ongoing dialogue.

But in other situations, and this is the second point, it should not be assumed that some hermetic shield separates the ‘social’ and the ‘market economy’. Scholars have long understood that the market is a socially constructed and inherently social institution; and while different models emerge to describe and influence the modes in which things of ‘value’ are exchanged – from command economy, to mixed economy, to the dreaded *laissez-faire* and all shades in between – those modes of exchange are fundamentally social, even if normatively they may or may not be attractive. A market is an institution in which participants express desires and in which those desires are fulfilled totally, partially or not at all. Moreover, to the extent that the modes of exchange accord with one’s conception of an edifying ‘good life’, they may also be said to have an ethical character. The market economy has thus been said to be not just a social institution but an ethical one, even if this perspective has obviously also been contested.

Third, not only is the social market economy, as it appears in the TEU, liable to be distinct from the concepts associated with the same term in the specific historical frame of the German experience, the authors of the Treaty also qualified the term and referred not just to a social market economy but to a *highly competitive* one. What conclusions could be drawn from this? It seems clear enough that among at least some of the drafters there must have been some lingering anxiety in importing the term ‘social market economy’ into the Treaty, and a feeling that it would be prudent to subject that notion to an implicit proviso: the adoption of the social market economy as a defining model is *not* to be construed in a manner contrary to the objective of a competitive economy. This already provides another prism through which to consider the meaning of Article 3(3) TEU, and it underlines once again that the social market economy concept that has been entrusted to the EU need not and should not be tied to past custom and usage. The words ‘highly competitive’ seem to reflect a recognition that a well-functioning economy producing value in a rivalrous system of international economic activity is desirable, and that robust economic performance should be preserved notwithstanding the express commitment to a market economy that responds to ‘social’ needs. It is axiomatic, given the context, development and imperatives of European

integration, that such economic performance is to be pursued in an economy organised as a competitive order – this is made clear, as if it were necessary, by Article 119 TFEU and by Protocol 27 on the Internal Market and Competition, not to mention by the more detailed internal market and competition rules themselves. On the other hand, it is equally clear from the words that immediately follow ‘social market economy’ that the concept is one that aims at ‘full employment and social progress’. Taking ‘full employment’ as perhaps a telling sign of dissatisfaction with Germany’s own failure to implement a successful version of a social market economy, the structure of the overall expression – ‘highly competitive social market economy, aiming at full employment and social progress’ – appears to have teleological and dynamic content, and appears (to us) as pleading at least implicitly for an autonomous character in EU law. Finally, we recall that this highly competitive social market economy is portrayed as one of the essential bases for Europe’s sustainable development, the latter concept evoking the multiplicity of Europe’s constitutional objectives and, again, the dynamic process of construction that is to be guided by those objectives.

3. State aid control and its role in Europe’s social market economy

According to Article 107(1) TFEU, any aid granted by a Member State or through state resources, in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is in principle, in so far as the aid affects trade between Member States, incompatible with the internal market.²⁴ The consistent case law of the Court of Justice unequivocally holds that the aim of a certain measure, even if it

²⁴ The Treaty does not contain any definition of State aid, and it is obvious that not every form of State intervention in the market can be regarded as State aid. However, the ECJ has developed a very broad notion of State aid, and it has clarified that aid is to be defined in relation to its effects, even if the measure must satisfy all the requirements of Article 107(1) TFEU: economic advantage, selectivity, State imputability, transfer of resources, distortion of competition, and effect on trade between Member States. See, among others, Richard Plender, ‘Definition of Aid’, in Andrea Biondi, Piet Eeckhout and Joe Flynn (eds), *The Law of State Aid in the European Union* (OUP 2004) 3; Jens-Daniel Braun and Jürgen Kühling, ‘Article 87 EC and the Community Courts: from Devolution to Evolution’ (2008) 29 *Common Market Law Review* 465; Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (OUP 2009) 149ff.

is a social aim, is irrelevant when it comes to classifying it as state aid.²⁵ In other words, the social character of the measure is not sufficient to exclude it outright from the scope of Article 107. Hence, the ‘third sector’ does not enjoy any special dispensation based on organisational structure or charitable purpose. In the *Maribel bis/ter* case,²⁶ the ECJ ruled that state aid covers measures which, in various forms, mitigate the charges normally included in the budget of an undertaking and which, although they are not subsidies in the strict sense, are similar in character and have the same effect.

State aid is prohibited unless it has been notified to and approved by the Commission, in compliance with Article 108 TFEU. A measure must be considered compatible with the internal market if it: (i) has a social character and is granted to individual consumers, provided that such aid is granted without discrimination as regards the origin of the products; or (ii) makes good the damage caused by natural disasters or exceptional occurrences.²⁷ These categories, which are listed in Article 107(2), are automatically exempted from the prohibition of Article 107(1) TFEU; they are sometimes called *de jure* derogations. By contrast, and of greater practical importance, Article 107(3) TFEU provides that some other forms of aid *may* be considered to be compatible with the internal market.²⁸ In this regard, the Commission has significant discretion to carry out an assessment of economic, technical and policy considerations, and where appropriate, the Commission has room for

²⁵ Andrea Biondi and Luca Rubini, ‘Aims, Effects and Justifications: EC State Aid Law and Its Impact on National Social Policies’, in Eleanor Spaventa and Michael Dougan (eds), *Social welfare and EU law* (Hart Publishing 2005) 79.

²⁶ Case C-75/97 *Belgium v Commission (Maribel bis/ter scheme)* [1999] ECR I-3671.

²⁷ Article 107(2) TFEU also mentions ‘aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division’. This exemption is of limited practical relevance, and indeed it sows the seeds of its own destruction, providing that ‘[f]ive years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point’.

²⁸ Aid to promote the economic development of areas where the standard of living is abnormally low or where there is underemployment; aid to promote the execution of a project of common European interest; aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; and aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

manoeuvre to take into account the necessity of the aid as a means of achieving not only goals of a predominantly economic character, but also relevant social objectives.

Article 109 TFEU is the legal base for the adoption of secondary legislation in the field of state aid. By complementing the fundamental substantive rules with legislative acts that provide for certain exemptions and *de minimis* thresholds,²⁹ a rather elaborate system of rules has been established. Council Regulation 994/98³⁰ has given the Commission the power to adopt individual regulations in which it declares certain types of aid to be lawful (ie, ‘compatible’ with the Internal Market), and to exempt them from the obligation of prior notification.³¹ From 2001 to 2006, the Commission exercised this power by adopting a series of regulations,³² and in 2008 the Commission adopted the General Block Exemption Regulation (GBER),³³ which replaced previous acts and harmonised all horizontal aspects applying to specific types of aid.³⁴ The GBER has also

²⁹ Consistent with the generally flexible posture toward state aid, the Commission has taken the view that *de minimis* aid does not have a significant effect on competition or trade between Member States, that they fall outside the scope of Article 107(1) TFEU, and that they do not require notification. Originally, *de minimis* aid was addressed in a soft law instrument (see [1996] OJ C68/9), but now such aid is covered by Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of [Articles 107 and 108 TFEU] to *de minimis* aid [2006] OJ L379/5.

³⁰ [1998] OJ L142/1.

³¹ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 [now Articles 87 and 88 TFEU respectively] of the Treaty establishing the European Community to certain categories of horizontal State aid [1998] OJ L142/1. The Commission can also adopt guidelines in this respect. In Case C-110/03, *Belgium v Commission*, the ECJ stated that the wording of Article 1 of Regulation 994/98 did not limit the Commission to laying down only compatibility criteria that conformed to past practice; the Commission thus has discretion to allow for some evolution of its policy, and may lay down new criteria, including criteria of a stricter character. On the move from the prior notification rule to the block exemption model, and on the economic consequences of this model, see Frederic Lossa, Estelle Malavolti-Grimal, Thibaud Verge and Fabian Berges-Sennou, ‘European competition policy modernization: From notifications to legal exception’ (2008) 52 European Economic Review 77.

³² Commission Regulations (EC) 68/2001 ([2001] OJ L10/20), 70/2001 ([2001] OJ L10/33), 2204/2001 ([2002] OJ L337/3) and 1628/2006 ([2006] OJ L32/29).

³³ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty - General Block Exemption Regulation [2008] OJ L214/3.

widened the array of exemptions, covering several categories of aid in areas which are particularly relevant for the Europe 2020 Strategy:³⁵ regional aid, investment related to small and medium sized enterprises (SMEs) and employment aid, aid for the creation of enterprises by female entrepreneurs, aid for environmental protection, aid for consultancy in support of SMEs and SME participation in trade fairs; aid in the form of risk capital; aid for research, development and innovation; training aid; and, most importantly for present purposes, aid for the employment of disadvantaged or disabled workers (Article 1(1) GBER).³⁶ Aid not covered by the GBER remains subject to the notification

³⁴ In light of the need to revise State aid policy relatively frequently, the Commission also limited the GBER's period of application: the Regulation will expire on 31 December 2013 (Article 45 (2)).

³⁵ COM(2010) 2020 final. The new Europe 2020 Strategy puts a clear emphasis on social objectives: the EU should become 'a smart, sustainable and inclusive economy'. There has been an apparent and progressive shift from the 2000 'Lisbon Strategy' to the new 'Europe 2020'. In 2000, the European Council stated that Europe should commit itself to becoming the world's most competitive and dynamic economic area by 2010. To create the knowledge economy, the Lisbon Strategy provided for the enhancement of the working and living conditions of the European population. However, this social element is considered only a means to an end. In the Strategy it is asserted that a flexible social protection system not only does not impede growth but facilitates it. According to the new Strategy, 'Europe needs to make full use of its labour potential to face the challenges of an ageing population and rising global competition'. The 'social element' has been made more visible and more insistent. It seems clear that this shift of emphasis poses growing challenges for Europe's traditionally dominant ethos of market-building and free trade, movement and investment.

³⁶ The GBER does not apply to aid to export activities, aid contingent on the use of domestic products, aid in the fisheries, aquaculture, agricultural or coal sectors, regional aid for steel, shipbuilding, or synthetic fibres (Article 1(2)(3)). Nor does the GBER apply to *ad hoc* aid to large enterprises or undertakings in difficulty. Measures which are listed in the GBER and which comply with the conditions and criteria set forth therein benefit from an exemption from the notification requirement. Member States are free to implement them without a Commission assessment. However, the GBER exempts only aid which has an 'incentive effect' as provided in Article 8. According to Article 8, aid is deemed to have an incentive effect if the beneficiary submitted an application for the aid to the Member State concerned before work on the project or activity started. However, in the case of aid granted to large enterprises, the granting authority is required to verify the incentive effect by ascertaining that, as a result of the aid, there has been: a material increase in the size or the scope of the project/activity; a material increase in the total amount spent by the beneficiary on the project/activity; or a material increase in the speed of the completion of the project must be verified. As regards aid compensating for the additional costs of employing disabled workers, referred to in Article 42, the incentive effect is established if the conditions of Article 42(3) are fulfilled. In particular, an incentive effect is assumed if the aid leads to a net increase in the number of disadvantaged/disabled workers employed. For details on the application of the principle of an incentive effect, see Lowri Evans and Harold Nyssens, 'Economics in state aid: soon as routine

requirement. The GBER is thus closely linked to many objectives of common interest, and can also be considered as a means to promote equal opportunities and social inclusion for certain vulnerable groups, eg, persons with disabilities and disadvantaged workers (including people belonging to minorities). The GBER thus encourages Member States to focus their resources on aid that will directly promote targeted job creation and a more inclusive social environment while seeking to boost the EU's competitiveness.

In addition, in April 2009, a new *Simplification Package* for State aid with a *Best Practice Code* and a *Simplified Procedure Notice* was adopted.³⁷ Both aim at improving the effectiveness, transparency and predictability of State aid procedures at each step of an investigation, and at encouraging better co-operation between the Commission and the Member States.

Beyond the regulatory framework we have roughly described, the distinctiveness of EU state aid law and policy is tied to the functions they perform. State aid is certainly one of the most politicized EU fields, and it is a field in which the Commission, in the exercise of its supervisory powers and wide discretion, may take account of social considerations and find ways to reconcile efficiency-oriented goals with other objectives such as solidarity, all within the context of its broader mandate, that of pursuing the common European interest.

The main objective of state aid rules, as confirmed by many decisions taken by the European Commission and by soft law documents, is to contribute to the maintenance of undistorted competition in the EU system. EU law aims to ensure a level playing field for companies doing business in Europe, and to prevent Member States from engaging in subsidy races, which are unsustainable and detrimental to the EU as a whole, not to mention costly to taxpayers. An important policy goal, notwithstanding the spike of aid seen during the economic crisis, has been to reduce the general of state aid and to shift the emphasis from supporting individual sectors or companies towards

as dentistry?', <http://ec.europa.eu/competition/speeches/text/sp2007_14_en.pdf> accessed 15 September 2011, at 4-5.

³⁷ Commission Notice on a Simplified procedure for the treatment of certain types of State aid [2009] OJ C136/3; Commission Notice on a Best Practices Code on the conduct of State aid control proceedings [2009] OJ C136/13.

horizontal objectives of common interest ('less and better targeted state aid').³⁸ At the same time, the Commission has sought, through state aid policy, to balance the potential inefficiencies caused by state intervention (inefficient allocation of resources, moral hazard, etc.³⁹) against the potential gains, whether they be related to the correction of market failures or to the promotion of enhanced social equity. In pursuit of a coherent balance, the application of the state aid rules has become more complex through an evolution which has related, at least indirectly, to significant reforms in other areas of competition policy within the framework of Articles 107-109 TFEU.⁴⁰

It is evident that, in recent years, the Commission has recognised the need of Member States to grant much greater volumes of state aid as a means of softening the effects of the financial crisis.⁴¹ Based on the principle of 'less and better targeted State aid',⁴² the central objective of the Commission is still to encourage Member States to reduce their overall aid levels, while permitting and encouraging grants of aid that address concerns social and political objectives that are not always served by market mechanisms.

4. Aid supporting employment of persons with disabilities

With the adoption of the GBER and related guidelines, the Commission has moved beyond a general commitment for 'social objectives' by devoting specific attention to persons with disabilities. In this section we consider some of the

³⁸ In 2005, the Commission identified the aim of less and better targeted state aid as one of the pillar of a comprehensive reform package. See State Aid Action Plan. Less and better targeted state aid: a roadmap for state aid reform 2005-2009, COM(2005) 107 final (State Aid Action Plan).

³⁹ For discussion of the potentially undesirable economic impact of state aid, see, among others, David Spector, 'State Aids: Economic Analysis and Practice in the EU', in Xavier Vives (ed), *Competition Policy in the EU: Fifty Years On from the Treaty of Rome* (OUP 2009) 176.

⁴⁰ For details, see Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EC State Aids* (3rd edn, Sweet and Maxwell 2006); Connor Quigley, *European State Aid Law and Policy* (2nd edn, Hart Publishing 2009); Alison Oldale and Henri Piffaut, 'Introduction to State aid law and policies', in Kelyn Bacon (ed), *European Community Law of State Aid* (OUP 2009) 3; Ornella Porchia, 'Aiuti di Stato', in *Digesto delle discipline pubblicistiche*, vol. 'Aggiornamento' (*ad vocem*, Utet 2010) 1.

⁴¹ See, eg, COM(2011) 356 final.

⁴² See the State Aid Action Plan (n 38).

detailed rules governing state aid granted for the purpose of promoting the inclusion of such persons in the work force, which in our view is a necessary (not to say sufficient) condition of meaningful participation in society. If this enhanced level of social participation is to be achieved, it is essential to encourage national measures which address unemployment, especially structural unemployment, and which ameliorate social exclusion, which is both degrading to individuals and costly to society.⁴³

We first consider the GBER and, in particular, Articles 41 and 42, which set forth the basic rules on aid granted for the employment of disabled workers⁴⁴ in the form of wage subsidies, and on aid that helps to offset the additional cost of employing disabled people.⁴⁵ The relevant policy objective in facilitating the grant of aid in this context is to boost the demand of employers for this category of workers (Recital 64 GBER). Some boldness can be detected here in

⁴³ On the (contested) notion of social exclusion, see, eg, Amartya Sen (2000), ‘Social Exclusion: Concept, Application and Scrutiny’, Social Development Paper No. 1, Asian Development Bank <http://www.adb.org/documents/books/social_exclusion/social_exclusion.pdf> accessed 15 September 2011. For a legal perspective, see, among others, Lara Trucco, ‘La nozione di “esclusione sociale” fra ordinamento interno e ordinamenti nazionali’, in Pasquale Costanzo and Silvana Mordegia (eds), *Diritti sociali e servizio sociale dalla dimensione nazionale a quella comunitaria* (Giuffrè 2005) 122.

⁴⁴ A ‘disabled worker’ is anyone who is recognised as disabled under national law or who has a recognised limitation resulting from physical, mental or psychological impairment (Article 2(20)). The definition of disabled workers does not cover *aged* workers. In Decision No. 210/2009 ([2009] OJ C162/7), where the Commission examined a Spanish scheme for the reduction of social security contributions for aged workers in the furniture sector (‘Article 41 of the GBER is also not applicable to the present scheme, because the aged workers targeted by the measure do not qualify as “disabled workers” in the sense of the definition provided by Article 2.20 of the GBER.’ para 15 of the public version). The conditions to be satisfied in the case of aid for employment of disabled workers in the form of wage subsidies are set out in the Regulation; they substantially modified the conditions provided for in Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment [2002] OJ L337/3.

⁴⁵ Section 9 GBER is dedicated to disadvantaged and disabled workers. Article 40 sets forth rules on aid granted for the employment of disadvantaged workers in the form of wage subsidies. A ‘disadvantaged worker’ is anyone who: has not been regularly employed in past six months; does not have an upper secondary educational or vocational qualification; is over the age of 50; lives as a single adult with one or more dependents; works in a sector/profession that has a strong gender imbalance, and belongs to the underrepresented group; or is a member of an ethnic minority and needs to develop their linguistic knowledge/vocational training/professional experience. A ‘severely disadvantaged worker’ is anyone who has been unemployed for at least 24 months. See Domenico Garofalo, ‘La nozione di svantaggio occupazionale’ [2009] *Diritti lavori mercati* 569.

that, by way of exception to its general scope, the GBER allows employment aid (including aid for disabled and disadvantaged workers) even in the fisheries and aquaculture sectors, and for the primary production of agricultural products (cf Articles 1(3)(a) and 1(3)(b)).

The GBER sets a notification threshold of 10 million euros per undertaking per year for the employment of disabled workers and to compensate for any additional expenses of employing persons with disabilities (Article 6). The notification threshold has thus been doubled compared to the 2002 Regulation.⁴⁶ The decision to raise the threshold is a subjective and fully ‘political’ choice in the sense that the threshold does not derive from any empirical analysis. It does not reflect an amount calibrated to address specific market failures, and furthermore the degree of competitive distortion caused by grants of less than 10 million euros remains unknown and, indeed, undeterminable.⁴⁷ In short, the notification threshold reflects a subjective ranking of the perceived gravity or importance of the corresponding policy objective.

Coming back to the substantive provisions, the first category provided for is aid granted for the employment of disabled people in the form of wage subsidies. Pursuant to Article 41(2), aid intensity must not exceed 75% of the eligible costs. The Commission has thus decided to implement a significant increase of the aid intensity: from the 60% ratio that applied under the previous rules to the current figure of 75%. Eligible costs are the wage costs over any given period during which the disabled worker is employed. If the period of employment is shorter than 12 months, the aid is reduced *pro rata* (Article 41(5)). The GBER has thus removed the minimum requirement of a 12-month contract, which discouraged hiring choices. The employment must represent a net increase in the number of jobs or, if that number declines, the posts must have fallen vacant following voluntary departure, disability, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for

⁴⁶ For the purpose of calculating aid intensity, the aid and the costs are expressed before taxes. Notification thresholds and ceilings apply to aid from all sources (Article 7(1)).

⁴⁷ See Christian Buelens, Gaëlle Garnier and Roderick Meiklejohn (2007) ‘The Economic Analysis of State Aid: Some Open Questions’ <http://ec.europa.eu/economy_finance/publications/publication9549_en.pdf> accessed 15 September 2011.

misconduct, and not as a result of redundancy.⁴⁸ Furthermore, employment must be maintained for at least the minimum period consistent with national legislation or collective agreement.

The second category – aid for compensating the additional costs of employing workers with disabilities – is set forth in Article 42. The aid intensity must not exceed 100% of the eligible costs (Article 42(2)). Eligible costs are additional costs directly linked to the employment of a disabled worker: they include the costs of adapting premises, of employing staff solely to assist the disabled worker(s), and of adapting or acquiring equipment for disabled worker(s); if the beneficiary provides ‘sheltered’ employment,⁴⁹ eligible costs also include the costs of constructing, installing or expanding the establishment and any administration and transport costs resulting directly from the employment of disabled workers (Article 42(3)).

According to the GBER, accumulation of different categories of aid measures is possible as long as the measures concern different identifiable eligible costs. With respect to the same eligible costs, accumulation is not allowed for partly or fully overlapping costs if it would result in an amount exceeding the highest allowable aid intensity. However, aid in favour of disabled workers may be combined with aid exempted under the Regulation in relation to the same eligible costs above the highest applicable threshold (ie, 10 million euros). Such accumulation must not result in an aid intensity exceeding 100% of the eligible costs over any period for which the workers concerned are employed (Article 7(4)).

In addition, the GBER recognises that the promotion of training of disabled workers constitutes a central objective of the economic and social policies of the EU and of its Member States. The GBER generally covers public support for training, ie support which favours one or more firms or sectors of industry by effectively reducing the relative costs they would otherwise have to bear if

⁴⁸ See Article 41(4) GBER.

⁴⁹ Sheltered employment programs assist individuals who are regarded as unable to work in a competitive employment setting. The work activity may be carried out, for example, in special work areas or at home. Such programs have not been free of controversy, since there is at least some risk that they may perpetuate the social divisions they are designed to overcome.

they want their employees to acquire new skills. It applies to training aid irrespective of whether the training is provided by companies themselves or by public or private training centres. The GBER fixes the notification threshold at 2 million euros for training aid projects. Article 38 distinguishes between specific training and general training. The first involves tuition directly and principally applicable to the employee's present or future position in the undertaking. The latter concerns tuition for training which is not only or principally related to the employee's present or future position in the undertaking but which provides skills largely transferable to other undertakings or fields of work. The distinction between specific and general training is unlikely to be clear-cut in all cases, and some line-drawing may be expected, but the line will have significant consequences: where aid is granted for training, its intensity must not exceed 25% of eligible costs for specific training and 60% of eligible costs for general training. Eligible costs include trainers' personnel costs; trainers' and trainees' travel expenses including accommodation; other current expenses (materials, supplies, etc.); depreciation of tools and equipment, to the extent that they are used exclusively for the training scheme in question; the cost of guidance and counselling services with regard to the training project; and trainees' personnel costs and general indirect costs (administrative costs, rent, overheads) up to the amount of the total of the above eligible costs. The aid intensity may be increased, potentially by 10 percentage points if the training is given to disabled or disadvantaged workers, subject to a maximum combined aid intensity if cumulated with other 'bonuses' available for SMEs (10%) and small enterprises (20%).

The GBER is remarkable in that it expressly recognises a more 'flexible' approach to state aid targeted to a particularly vulnerable group that experiences significant, and often severe, social exclusion. The GBER itself cannot produce an immediate effect on the employment level of persons with disabilities but it facilitates state measures, and in doing so both accommodates the Member States and puts an implicit onus on them to take advantage of the possibilities available to them.

To what extent are they doing so? The number of block exempted state aid measures for employment and training introduced by Member States, during the period 2004-2010, was 1,005. Of this total, 147 correspond to measures put

in place under the block exemption regulation on employment,⁵⁰ 420 correspond to measures established under the block exemption regulation on training,⁵¹ and 438 of the aid measures were granted under the GBER.⁵² Within the latter category, 66 measures were adopted for the employment of disabled workers in the form of wage subsidies (Article 41) and 50 measures granted compensation for the additional costs of employing disabled workers (Article 42). We may take these numbers as an encouraging sign insofar as they suggest that the opportunity to grant exempted aid is not simply languishing in disuse. More recently, in the year 2011, new measures were adopted by the Member States, including, for example, aid packages in Sicily⁵³ and Calabria,⁵⁴ in Valencia,⁵⁵ and in Yorkshire.⁵⁶

Outside the scope of the GBER, individual aid measures involving large aid amounts are not prohibited by the Commission; rather, they are subject to the standard obligation of prior notification. In 2009, the Commission set out the criteria used to assess the compatibility of notified aid measures for disadvantaged and disabled workers (ie, of individual aid targeted to combat unemployment of persons with disabilities, granted either *ad hoc* or as a part of a scheme where the grant exceeds 10 million euros).⁵⁷ This Communication on the ‘Criteria for the compatibility analysis of State aid to disadvantaged and

⁵⁰ Commission Regulation No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment [2002] OJ L337/3 (in force prior to the introduction of the GBER).

⁵¹ Commission Regulation No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid [2001] OJ L10/20 (in force prior to the introduction of the GBER).

⁵² See COM(2011) 356 final.

⁵³ *Aiuti all'occupazione per l'assunzione a tempo indeterminato di lavoratori svantaggiati, molto svantaggiati e disabili*. ex Titolo VI L.r. 9/2009 e CAPO II L.r. 11/2010 ex Reg. UE 800/2008, 2011/X [2011] OJ C/118.

⁵⁴ X13/2010 [2010] OJ C/15.

⁵⁵ See SA.32893 *Fomento del empleo protegido para personas con discapacidad en centros especiales de empleo y enclaves laborales para 2011*, 2011/X [2011] OJ C/171.

⁵⁶ See SA.33140 *Changeworks - wage subsidy scheme*, 2011/X [2011] OJ C/224.

⁵⁷ [2009] OJ C188/6 (Communication).

disabled workers subject to individual notification’, as noted by others,⁵⁸ reflects the ‘refined economic approach’ introduced by the Commission’s State Aid Action Plan in 2005. The core instrument of this refined economic approach is the ‘balancing test’. The Commission looks at the purpose of state aid and, on the other side, Member States must demonstrate that the aid will address the equity objective in question. In its analysis, the Commission considers the number and the categories of workers concerned by the measure, the employment rates of the categories of workers concerned by the measure and the unemployment rates for the categories of workers concerned on the national and/or regional level. The Commission evaluates whether the aid measure is an appropriate and proportionate policy instrument, and finally balances the negative effects, considering whether the aid may result in a change in behaviour of the beneficiary.⁵⁹ In other words, the Commission employs two related principles: the compensatory justification principle and the principle of proportionality. It considers whether the aid measure can be justified on the basis that it pursues important aims which correspond with the common interest and whether, without the aid, market forces would be unable to achieve such aims. In addition, the Commission examines whether the measure is necessary and is the least distortive method of pursuing the relevant objective of common interest.

The Commission has ample room for manoeuvre, and the ‘criteria set out in this guidance will not be applied mechanically’.⁶⁰ The evaluation of the extent to which the positive effects of the aid outweigh its negative effects is done on a case-by-case basis.

The experience with the Communication is still limited, and with limited data it is too early to assess the impact of this instrument. Nevertheless, the adoption of the Communication is another positive step in this policy area insofar as it

⁵⁸ See Justyna Majcher-Williams and Juergen Foecking, ‘State aid for disabled and disadvantaged workers: compatibility criteria for big cases’ [2010/1] Competition Policy Newsletter 20-22.

⁵⁹ The aid characteristics which may affect the likelihood and the size of the distortion are: selectivity and asymmetry; size of aid; repetition and duration of aid; and the effect of the aid on a firm’s costs. The Commission in its assessment considers the structure of the market, and the characteristics of the sector and of the national labour market.

⁶⁰ Point 4 of the Communication.

contributes to predictability with regard to the Commission's methodology. Enhanced predictability should lead, in principle and *ceteris paribus*, to greater levels of investment.

5. A test-bed for Europe's social market economy

The rules contained in the GBER and the guidelines contained in the 2009 Communication described above expressly recognise that people with disabilities are a particularly vulnerable group, and that they still experience social exclusion and acute difficulties in seeking to enter the labour market. These represent a renewed commitment by the Commission to the promotion of equality and full employment through EU state aid policy. The enhanced threshold of 10 million euros per undertaking per year for the employment of disabled workers (see previous section) is a positive sign indicating that the welfare of persons with disability is becoming a matter of greater priority.

In portraying the rules on state aid in support of employment of persons with disabilities as a 'test-bed' for a new concept of a social market economy, we should be careful not to be swept away, or overstate the point. We acknowledge, for example, that the provisions of the GBER contribute to the fulfilment of the international obligations assumed by the EU⁶¹ under the UN Convention on the rights of persons with disabilities (the 'UN CRPD', or the 'Convention'),⁶² and this development is worth highlighting for a moment here. Indeed, the signature and conclusion of the UN CRPD has had important legal effects, as the Convention commits the EU to higher standards of non-

⁶¹ The European Community, as it was then called, having signed the UN Convention on the Rights of Persons with Disabilities, acceded to the Convention with Council Decision 2010/48/EC, formally adopted on 26 November 2009 under the EC Treaty. The ratification process was formally concluded in December 2010, when the EU deposited the instrument of formal confirmation, in accordance with Articles 41 and 43 of the UN Convention. On the ratification of the UN CRPD by the EC/EU, see Delia Ferri, 'The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective', in Lisa Waddington and Gerard Quinn (eds), *European Yearbook of Disability Law*, vol 2 (Intersentia 2010) 47.

⁶² The UN CRPD (together with its Optional Protocol) was adopted by consensus by the UN General Assembly on 13 December 2006. It was opened for signature on 30 March 2007 and entered into force on 3 May 2008, as did its Optional Protocol. See, among others, Sergio Marchisio, Rachele Cera and Valentina Della Fina, *La Convenzione delle Nazioni Unite sui diritti delle persone con disabilità. Commentario* (Aracne 2010).

discrimination, accessibility and inclusion, and sets forth, as a general principle, 'equality of opportunity'. The GBER can also be considered as an instrument that promotes equal opportunities and the removal of barriers that impede full participation in society, as envisaged in the UN CRPD. In particular, Articles 41 and 42 of the GBER seem to contribute to the fulfilment of the international obligations laid down in Articles 4 and 27 UN CRPD.⁶³ They may also be regarded as a means of complying with Article 19 UN CRPD, which imposes a general obligation on the Parties to recognise the 'equal right of all persons with disabilities to live in the community, with choices equal to others', and to 'take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community'.⁶⁴ The 2009 Communication, which explains how the Commission assesses aid for disabled workers where the aid must be notified, can also be regarded as a means of compliance, notwithstanding its soft law character.

Furthermore, developments in the field of state aid are linked to the evolution of the EU's general disability policy.⁶⁵ Disability issues are of growing

⁶³ Article 4 UN CRPD refers broadly to a variety of measures intended to combat discrimination against and to promote the rights of persons with disabilities. Article 27(1) UN CRPD provides, *inter alia*, that 'States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to [...] (h) [p]romote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.'

⁶⁴ However, there seem to be two significant weaknesses in the GBER. First of all, the definition of 'disabled workers' (Article 2(20)) appears to refer to the out-of-date medical model: emphasis is placed on the limitation which results from the impairment. Secondly, the GBER does not mention aid for research in the field of accessibility and universal design.

⁶⁵ In the last decade, the EC/EU has developed a significant disability policy. The EC's activities regarding disability were relaunched in 1996, with the *European Community Disability Strategy*. This was a typical soft law instrument. From a strictly legal point of view, the EC competence to take action to address disability discrimination was found primarily in Article 13 EC, which was added in 1997 by the Treaty of Amsterdam (ie, after the *Strategy* of 1996). The Charter of Fundamental Rights represented a new step towards more comprehensive action. Article 21 of the Charter lists disability as one of the grounds on which discrimination must be prohibited. Article 21 is supplemented by Article 26, according to which 'the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'. At present, the principal EC/EU antidiscrimination legislation in the field of disability is Directive 2000/78 establishing a General Framework for Equal Treatment in Employment and Occupation, which is based on Article 13 EC ([2000] OJ L303/16). This is not a disability-specific legal instrument. The Directive aims at facilitating the integration of

importance in the EU's sphere of activities, and this trend has been reinforced by the adoption, last November 2010, of the new EU disability Strategy for 2010-2020.⁶⁶ The GBER is thus not an isolated instrument but rather supplements broader efforts by the EU to mainstream disability rights issues across the entire range of EU policies. Such efforts – which are also called for in the UN CRPD – were previously reflected in the *EU Disability Action Plan 2003-2010*, and today they are highlighted in the Strategy adopted in 2010.

But the foregoing points do not diminish the contribution of the GBER and the 2009 Communication, particularly given the rather more specific and operative character of these instruments. The contribution of those instruments to enhanced inclusiveness provides a useful lens through which to consider Europe's social market economy. On the one hand, like the EU's broader policy efforts, the GBER and the Communication recognise, explicitly and implicitly, that persons with disabilities face social exclusion and impoverished access to goods, services, rights and political voice. But they also link this concern (one of

persons with disabilities, not simply by the prohibition of direct and indirect discrimination against them but also by imposing a duty of *reasonable accommodation*. Other pieces of EC/EU legislation also address disability, albeit indirectly. In addition to the inclusion of provisions in general directives such as these, the Council of Ministers has adopted a variety of non-binding instruments addressing the need to mainstream disability issues in particular fields. These non-binding instruments, which take the form of Resolutions and Communications, call on the Member States, the Commission and occasionally the Social Partners and civil society to take action to improve the lives of persons with disabilities in various ways. Such initiatives have addressed fields as diverse as employment and social integration, culture and education (non-extensively), the knowledge-based society and a barrier-free society. The *EU Disability Action Plan 2003-2010* (COM(2003) 650) carried forward the *1996 Strategy* and continued in the direction already traced by the preceding initiatives. On 15 November 2010, a new Disability Strategy was adopted (see COM(2010) 636 final). The Disability Strategy 2010-2020 outlines how the EU and national governments can empower people with disabilities so they can better enjoy their rights.

⁶⁶ COM(2010) 636 final. This new EU Strategy identifies actions at EU level to supplement national ones, and it determines the mechanisms needed to implement the UN Convention at EU level, including inside the EU institutions. It also identifies the support needed for funding, research, awareness-raising, statistics and data collection. The Strategy focuses on eliminating barriers across eight main areas: accessibility, participation, equality, employment, education and training, social protection, health, and external action. For each area, key actions are identified and a timeline is provided. These areas were selected on the basis of the overall objectives of the EU Disability strategy, the UN CRPD (discussed above), related policy documents of the EU institutions and of the Council of Europe, the results of the EU Disability Action Plan 2003-2010, and a consultation of the Member States, stakeholders and the general public.

a fundamentally social nature) to the more historically familiar dimensions of growth, jobs and improved welfare that have driven European economic integration ever since the days of Monnet, Beyen and Spaak.

6. Concluding remarks

The original European Economic Community, closely associated with some of the venerable names mentioned above, was primarily concerned with trade liberalisation (ie, the removal of obstacles to flows of goods, persons, services and capital), efficient resource allocation and global competition, particularly given the onslaught of large American companies. In 1972, that is to say, once the EEC's customs union was up and running, the Heads of State and Government of the Community countries, meeting in Paris, affirmed the 'social dimension' of the construction of Europe. Two years later, this was given a more tangible form in the Community's first *Social Action Programme*. This brought together social policy objectives across a wide range of areas, and provided for specific actions to be taken at Community and national levels to secure improved living and working conditions across the Community. Following on from this Action Programme, and from later programmes specifically aimed at developing strategies in the equality and health and safety fields, a body of EEC-level social legislation gradually developed throughout the 1970s and 1980s. Treaty amendments significantly expanded the Community's competence in the social sphere to include, initially, a broader range of employment matters.

The evolution continues. Under the Lisbon Treaty, while the EU's competences in the social field are still limited, and while European social legislation reflects these limits, a new comprehensive social agenda has been launched. But more significantly, social aims have also been reflected to some extent, as we have seen, within the field of competition policy, broadly understood.⁶⁷ Our suggestion is that the rules on state aid supporting the

⁶⁷ For purposes of this article we have obviously left aside other matters of competition law, including, for example, an intriguing and long-running debate with regard to the breadth of Article 101(3) TFEU and of the expression 'technical or economic progress'. We merely note that attempts to determine the scope of Article 101(3) must take account of a number of significant institutional factors and of the evolved structure of European antitrust enforcement in modern times.

employment of persons with disabilities may reflect a somewhat more robust version of social Europe, and a new way to reconcile the principle of an open market economy with certain forms of solidarity.

The fact that the social market economy concept now appears in the TEU as a basis for Europe's sustainable development is no guarantee that the concept will play a significant role in defining Europe's identity or shaping the interpretation and application of European law. Nevertheless, the social market economy has significant potential as an interpretive guideline for the EU as it carries out its activities within the limits of its competences.

In this paper we have pointed to the congruence between the ideal of a social market economy, in which social protection and social inclusion are assigned roles of equal dignity with market values, on the one hand, and the use of the EU's powers in the field of state aid as a means to support the employment of persons with disabilities, on the other. In this respect, the aims of full employment and social progress are advanced in a collaborative effort between the EU and its Member States through measures addressing market failure and social exclusion. These may be seen as small but significant steps in a 'formative' period whereby a more social Europe asserts itself and whereby the EU gains, perhaps, greater legitimacy in the eyes of its citizens.