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"Social Market Economy" as Europe's Social Model?

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I. Introductory Remarks

Europe's "democratic deficit" has long been widely discussed. A second European problem, which we name the "social deficit", gradually receives ever more attention. These deficits are generally understood to be separate issues of contention. This practice has unfortunate side-effects. It tends to obscure the interdependence of the issues. Our insistence on the importance of this interdependence would need more systematic explanation than we can offer here. We are, nevertheless, not content with the invocation of a political or common sense sociological plausibility when arguing that Europe cannot hope to resolve its democratic deficit without addressing its social *problématique.* We believe that Europe's social model(s), coupled with democratic governance and welfarism are so deeply engraved into European cultures that they cannot be simply eliminated and that the European project would be plagued by a fundamental crisis were that to take place. This is an admittedly wagered statement and has challenging implications. It follows that those engaged in the writing of Europe's constitution need to understand the "Constitution" of the economy ("*Wirtschaftsverfassung"*), the "Constitution" of industrial relations and of social security ("*Arbeits- und Sozialverfassung"*) as issues of constitutional necessity in democratic societies. A political science version of this thesis is Fritz Scharpf's well known contention that democracies which prove to be unable to resolve problems of economic and social stability risk the loss of social legitimacy,[1] a thesis closely linked to Scharpf's famous analysis of Europe's "political deficit".[2] We claim that Europe's social deficit cannot be successfully addressed by an exclusively economic agenda and an institutionalization of purely economic rationality criteria. In a Polanyi-inspired interpretation: "The economy requires social institutions which disseminate skills, distribute knowledge and preserve the status of human beings and nature as something other than objects produced for sale on the open market".[3] We must restrict ourselves to confrontation with this bundle of empirical and normative assumptions.[4]

These were the assumptions that directed our interest in documents and debates of the European Convention. As is widely known, the Convention process began in a rather conventional manner. The project of designing a constitution for Europe which was envisioned at the outset of the proceedings[5] included the establishment of a Working Group on "Economic Governance" (in German: "*Ordnungspolitik"*, a core concept of German ordoliberalism[6]). "Social Europe", however, was not part of the original agenda – an untenable act from our point of view and wide

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1 See e.g. his "Economic Integration, democracy and the welfare state" in *Journal of European Public Policy* 4 (1997), p. 18-36 (= "Jenseits der Regime-Debatte. Ökonomische Integration, Demokratie und Wohlfahrtsstaat in Europa" in St. Lessenich/I. Ostner, eds*., Welten des Wohlfartskapitalismus. Der Sozialstaat in vergleichender Perspektive*, Frankfurt a.M., Campus, 1998, p. 321-349).

2 "The Joint-Decision Trap: Lessons from German Federalism and European Integration" in *Public Administration* (1988) 66, p. 239-278 (= "Die Politikverflechtungs-Falle. Europäische Integration und deutscher Föderalismus im Vergleich" in *Politische Vierteljahresschrift* 26, 1985, p. 323-356.)

3 M. Glasman, *Unnecessary Suffering. Managing Market Utopia*, London/ New York, Verso, 1996, p. 5 f.; *cf*. K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, Boston, Beacon Press, 1957, esp. Part 2 Chapter 2.

4 On the latter see *Ch. Jetzlsperger, Legitimacy through Jurisprudence? The Impact of the European Court of Justice on the Legitimacy of the European Union*, European University Institute Working Paper Law 2003/12, Florence, shortened version in E.O. Eriksen, Ch. Joerges & and Jürgen Neyer, *European Governance, Deliberation and the Quest for Democratisation*, EUI-RSCA/Arena (Arena Report 2/2003, Oslo), p. 553-608. On the empirical dimensions see the comprehensive programmatic of the *Sonderforschungsbereich* on "Transformations of the State", German version available at http://www.sfb597.uni-bremen.de/download/de/forschung/01_2003_Forschungs programm_gekuerzt.pdf

5 Cf. U. Liebert *et al.*, *Verfassungsexperiment. Europa auf dem Weg zur transnationalen Demokratie?*, Münster/Westfalen, Lit 2003; A. Maurer/ J. Schild, *Der Konvent über die Zukunft der Euopäischen Union. Synoptische Darstellungen zur Konventsdebatte*, 2 Vol.s, Berlin, Stiftung Wissenschaft und Politik, 2003.

6 On this discourse see Sections II.A.1. and III.B. below where we explain that "*Ordnungspolitik*" has almost nothing in common with "economic governance".

concern for Europe's democratic deficit in the course of the Convention process was necessary to bring Europe's social deficit to the fore. The Working Group on "Economic Governance" was complemented by an additional Working Group on "Social Europe". Not only that: A second core concept of the Federal Republic's foundational period, namely the term "*soziale Marktwirtschaft*" ("social market economy") was later adopted in Part I of the Convention.[7]

But what happened and what is its significance? Our analysis has limited objectives. It is a hermeneutical exercise: We seek to understand the text of the Draft Constitutional Treaty through analyses of the documents related to its preparation, and a reconstruction of the original meaning of the key concepts that have attracted our attention, namely the terms *Ordnungspolitik* and *soziale Marktwirtschaft*. We have already indicated that our analysis will focus on the linkages of the economic and social with the political constitution of the European Union. The following, Section II will substantiate this theoretical framework distinguishing among three stages in the development of the European integration project, namely its foundational period, the completion of the internal market and the present turn to new modes of governance. Section III is devoted to reconstructions of the meaning of our key concepts. On that basis Section IV will examine the commitment of the Draft Constitutional Treaty to the "social market economy"; following our distinctions among three stages of the integration process in Section II, our analysis will include the incorporation of the "Charter of Fundamental Rights of the Union" and of the "Open Method of Coordination".

II. Europe's Disengagement of the Social from the Economic Constitution

One of the best known dichotomies in European integration studies is the distinction between negative and positive integration. References to that distinction are generally linked to critical observations concerning the impact of the integration process on the national polities: The integration process is systematically biased towards "negative" integration. It fosters market building through the prohibition of trade barriers and the exercise of the directly applicable economic freedoms, whereas market correcting interventions need be based on "positive" measures which were difficult to achieve under the old unanimity rule and remain disadvantaged even under the qualified majority regime as introduced by the Single European Act of 1987. This disadvantage has since steadily increased. Although this narration of the negative/positive story is overly simplistic, it offers an advantageous point of departure for the presentation of the interpretative framework that informs our analysis. This has two interdependent reasons:

First, the dichotomy of negative and positive integration, of "constitutive" (market-making) and "regulative" (market-correcting) policies is related to but only partially encompasses the range of policies the European welfare states have established. It neglects the most "political" of policies, namely "(re-)distributive" ("market-braking") policies as defined by Theodore Lowi.[8] Europe's preference for "negative" as opposed to "positive" integration need not be such a negative harbinger for the proponents of welfare interventionism. On the contrary: The defence of state competencies in the fields of social policy and the restriction of the integration project to primarily economic objectives may lead to a reordering of Europe's economic and social constitution that permits differentiation motivated by political preferences and the economic wealth of individual Member States.

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[7] An important German academic observer noted: "Damit legt der Verfassungstext im Gegensatz zur herrschenden Auffassung nach dem Grundgesetz die Union auf eine bestimmte Wirtschaftsordnung fest" (Unlike Germany's Basic Law the constitutional text prescribes a specific economic order for the Union"), J. Schwarze, "Ein pragmatischer Verfassungsentwurf" in *Europarecht* 38 (2003), p. 535-573 at 540.

[8] See his "Four Systems of Policy, Politics and Choice" in *Public Administration Review* 32 (1972), p. 298-310. In a very similar vein G. Majone distinguishes between economic and social regulation on the one hand and social policy on the other, see e.g. his "Nonmajoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach" in *Journal of Institutional and Theoretical Economics*, 157 (2001), p. 57-78. See II.B.1. below.

Lamentations on European bias are usually accompanied the will to strengthen competencies and promote "positive", market-compensating policies. Reinforcement of the European level of governance, however, must be accompanied by its democratisation and will also, so we assume, provoke more determinate quests to overcome Europe's social deficit. This is the second reason why we find the positive/negative dichotomy an advantageous starting point for our enquiries into the Convention process. The appearance of social Europe on the agenda of the Convention can be interpreted as an unavoidable implication of Europe's envisaged deepened constitutionalisation; but then, we would expect enhanced politicisation of the integration project, a new constitutional design, which would respond to the transformation of regulative into distributive policies. Did the architects of the Convention acknowledge such challenges? Are the responses the Convention process has generated convincing?

In our distinctions among three phases in the integration process we follow widely used patterns:[9] (1) In a first phase which ranges from the founding of the EEC (1958) up to the Single European Act (1987), Europe established a "supranational" body of law that claimed primacy over national law. This hierarchical, "vertical constitutionalism", J.H.H. Weiler has observed, was compensated and softened by the intergovernmentalist political decision-making processes.[10] (2) A second integration period, rooted in the Commission's 1985 "White Paper on completion of the Internal Market"[11] and the Single European Act (SEA, 1987), and further consolidated by the Maastricht Treaty (1992), attracted intense attention in political scholarship. The key political question was (widely) perceived as follows: Can the internal market be completed only at the cost of the (national) welfare/social state? Should national constitutional law be invoked as a shield against the erosion of the national welfare state? (3) The third phase, our current state of affairs, is characterised by an increase of European "governance" which the Commission sought to promote and to structure in its White Paper of 25 July 2001.[12]

We will adhere to this periodization,[13] but use it with a specific interest in the changing conceptualisation and structure or form ("*Gestaltwandel*"[14]) of "social Europe" in the integration process, i.e. we seek to describe the configurations that have shaped and transformed national social models.

II.A. Phase 1: A European Economic Constitution and a National Social State

"Legal supranationalism together with political intergovernmentalism" – this is the framework which J.H.H. Weiler has used in his reconstruction of Europe's formative era.[15] The absence of social Europe in the framework is illuminating. A European "social model" was not on the agenda. More positively speaking: The "social" remained in the political sphere – and hence a matter of national concern. This observation is as simple as it is correct. We will, however,

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[9] See esp. J.H.H. Weiler, "The Transformation of Europe" in *Yale Law Journal* 100 (1991), p. 2403-2483.

[10] J.H.H. Weiler, "The Community System: The Dual Character of Supranationalism" in *Yearbook of European Law* (1981) 1, p. 257.

[11] Commission White Paper to the European Council on completion of the Internal Market, COM(85) 310 final, 14 June 1985.

[12] "European Governance. A White Paper", COM(2001) 428 final of 25 July 2001 in *Official Journal of the European Union* 2001, C 287/5; http://europa.eu.int/comm/ governance/index_en.htm.

[13] As in earlier work, esp. Ch. Joerges, "The Law in the Process of Constitutionalising Europe" in: E.O. Eriksen, J.E. Fossum & A.J. Menéndez, *Constitution Making and Democratic Legitimacy*, Arena Report No. 5/2002, Oslo, p. 13-48; "'Good Governance' in the European Internal Market: Two Competing Legal Conceptualisation of European Integration and their Synthesis", in: A. v. Bogdandy, P. Mavroides & Y. Mény, *European Integration and International Co-ordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, Den Haag *et al.*, Kluwer Law International, 2002, p. 219-242.

[14] This is a term which links the normative with the empirical dimension of the integration project and, in addition, seeks to capture its dynamics (the term "*Wandelverfassung*", invented by Hans Peter Ipsen, the *doyen* of Germany's *Europarechtswissenschaft*, would be an equivalent).

[15] See notes 10 and 9.

reconstruct it in another terminology that reoccurred in the German title of the Working Group of "Economic Governance", namely in terms of "*Ordnungspolitik*". This corresponds with the conceptual logic of the term and is in line with the logic of the integration process. It is not in line with the weight of these terms in the deliberations of the Convention.[16] There the renaissance of *Ordnungspolitik* is a story for a footnote[17] – our reference to its original importance is nevertheless and for just that reason instructive.

II.A.1. Ordoliberal Economic Constitutional Theory: Europe a 'Market without State'

Ordoliberalism's core message concerned the taming of discretionary politics. Politics and law should establish a "system of undistorted competition", Article 3 g Treaty on the European Community (TEC). These constraints upon political discretion together with the guarantee of economic freedoms constitute an "economic constitution". This message never became the dominant view in Germany's post-war democracy. The great majority of German Constitutional lawyers insisted upon the primacy of the legislature elected in accordance with majoritarian democratic values, even in instances where its policies have appeared opportunistic and unprincipled.[18] These controversies were often heated yet they remained academic. The "contradiction and paradox" noted by Nörr,[19] namely the coexistence of Ordnungstheorie and pragmatism in economic policy proved to be remarkably successful in practice and the young Federal Republic managed to thrive under its incoherencies.

The European integration project altered the context. As a concept ordoliberalism appeared particularly apposite to integration. The freedoms guaranteed in the EEC Treaty, the opening up of national economies, and anti-discrimination rules and the commitment to a system of undistorted competition, were interpreted as a "decision" supporting an economic constitution that matched ordoliberal conceptions of the framework conditions for a market economic system (at least to the degree that the many departures from the system might be classified as exceptions, and a blind eye could be turned to the original sin of the common agricultural policy). The fact that Europe had started its integrationist path as a mere economic community lent plausibility to ordoliberal arguments – and even required them: In the ordoliberal account, the Community acquired a legitimacy of its own by interpreting its pertinent provisions as prescribing a law-based order committed to guaranteeing economic freedoms and protecting competition with supranational institutions. This legitimacy was independent of the state's democratic

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16 See in more detail Section IV below.

17 The term cannot be translated into English according to its *connoisseurs* in Germany and elsewhere. We therefore assumed that the title of Working Group VI constitutes an effort to introduce an English equivalent, not a bad one, as "economic governance" can be interpreted as referring to non-interventionist (self-) regulatory patterns. But our assumption was thoroughly wrong, as Andreas Maurer, Head of the Research Group on European Integration of the German Institute for International and Security Affairs in Berlin explained. Even our second assumption that Germany might have sought to defend part of its intellectual and political heritage was inaccurate. This was not the expansion of German policies. Responsible for the introduction of the term is the Secretariat where someone remembered the fierce controversies between "*Ordnungspolitik*" and "industrial policy" in the Maastricht Intergovernmental Conference. A case of "linguistic-discursive path-dependency", according to A. Maurer, which became definite when Joschka Fischer and Domenique de Villepain submitted a common position on *Ordnungspolitik* just before Christmas 2002 (The European Convention, CONV 470/02) after Working Group VI had closed its files. We remain puzzled over this resuscitation of *Ordnungspolitik* following decades of disagreement between its German proponents on the one hand, and the French defenders of *planification* on the other.

18 Their reservations were endorsed by the well known Judgment *Investitionshilfegesetz* of the German *Bundesverfassungsgericht* in *BVerfGE* 5, p. 7 ff.; see *infra* Section IV A.2.

19 Knut W. Nörr, *Die Republik der Wirtschaft. Teil I: Von der Besatzungszeit bis zur Großen Koalition*, Tübingen, Mohr, 1999, p. 84.

constitutional institutions. By the same token it imposed limits upon the Community, discretionary economic policies seemed illegitimate and unlawful.[20]

II.A.2. Social Policy

In the ordoliberal view, the European level of governance can and should not be burdened with political tasks that require the legitimation provided by the institutions of constitutional democracies. Regardless of one's affinity for the argument, it is coherent and compatible with the institutional order of the European Economic Community as it was originally conceived.[21] The ordoliberal European polity has a twofold structure: At the supranational level it is committed to economic rationality and a system of undistorted competition. At the national level re-distributive (social) policies may be pursued and developed further.

We have used the term "social deficit" to illustrate the imperfect characterisation of the European *problématique* as deficient in terms of political democracy. But this is not to say that the original European construct was anti-social. Ordoliberalism had a coherent response to both concerns. The "economic constitution" was by definition un-political in the sense that it was not subject to political interventions. This was its supranational *raison d'être.* Social policy was treated as a categorically distinct subject. It was a domain of the legislature and had hence to remain national. The social embeddedness of the market could and should be accomplished by the Member States in differentiated ways. The whole construct has structural affinities with J.H.H. Weiler's equilibrium of legal supranationalism and political intergovernmentalism[22] – and for a decade or so it seemed stable.

II.B. Phase 2: Completion of the Internal Market and Renaissance of Regulatory Politics

The now legendary 1985 Commission White paper on completion of the Internal Market signalled the advent of a new era. It is an era of surprises. What started out as a collective effort to strengthen Europe's competitiveness and accomplish this objective through new (deregulatory) strategies led to the entanglement of the EU in ever more policy fields and the development of sophisticated regulatory machinery.[23] All we need to sketch here are the constitutional perspectives which emerged in that process – and their responses to Europe's social deficit.

II.B.1. Europe as "Regulatory State"

One influential and sophisticated response was developed by Giandomenico Majone. Market building did not require "de-regulation", it depended upon "re-regulation" – this was the message Majone first brought to Europe in 1989 and has since refined in a number of studies.[24] He invented a surprising label: Europe was about to become a "regulatory state". Majone's regulatory state is neither interventionist nor social. It is rather concerned with – and restricted to – the correction of market failures. That "state" seeks to increase the economically defined welfare of consumers/citizens. It institutionalises a "fourth branch of government" which guards

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[20] Significant here is A. Müller-Armack, "Die Wirtschaftsordnung des Gemeinsamen Marktes" (1964) in: *idem*, *Wirtschaftsordnung und Wirtschaftspolitik*, Freiburg i.Br., Verlag Rombach, 1966, p. 401 ff. For an topical restatement *cf.* J. Drexl, "Wettbewerbsverfassung", in: A. v. Bogdandy, *Europäisches Verfassungsrecht*, Berlin *et al.*, Springer, 2003, p. 747-802.

[21] For a summary cf. A. Hatje, "Wirtschaftsverfassung", in: A. v. Bogdandy, *op. cit.*, p. 683-746 at p. 719-723.

[22] See note 10.

[23] For a particularly comprehensive account cf. V. Eichener, *Entscheidungsprozesse in der regulativen Politik der Europäischen Union,* Opladen, Leske + Budrich, 2000.

[24] G. Majone, "Regulating Europe: Problems and Perspectives" in *Jahrbuch zur Staats- und Verwaltungswissenschaft* 3 (1989), p. 159-177 – and since then continuously and consistently; see note 19 *supra* and most recently "European Regulatory Agencies. The Dilemma of Delegation of Powers in the European Union", contribution to the Workshop on *Good Governance in Supranational Market Regulation*, University of Bamberg, 16-17 January 2004.

against possible "regulatory failures" through its insulation from majoritarian and political influence. Majone's answers to Europe's "social deficit" rephrase the ordoliberal responses. The non-majoritarian institutions managing European regulatory politics and the majoritarian institutions of the Member States complement each other. In particular, distributive politics are in his view dependent on majoritarian legitimation and must hence remain the domain of the Member States.

II.B.2. The German Maastricht Judgment: Completing the Ordoliberal Edifice

Although the European regulatory state does not have comprehensive competencies, it is tantamount to the disempowerment of the Member State. This leaves us to question whether a thus disempowered state is a democratic constitutional state. The German Federal Constitutional Court (*Bundesverfassungsgericht*) addressed this issue in its judgment on the Maastricht Treaty of 12 October 1993.[25] It promised to defend constitutional democracies against the perpetual erosion of competencies. Ultimately, it legalised European integration, confirming the constitutional legitimacy of ordoliberal institutional concepts and curtailing the control of Member States over their economies.

How was this achieved and why did it occur unnoticed? The essential paradox in the Court's reasoning seems apparent. True, the *Bundesverfassungsgericht* calls it a constitutional must that the German Parliament retain "essential" competencies. But then the Court takes its ordoliberal turn: Economic integration is perceived to be an apolitical phenomenon occurring autonomously to states, and European Monetary Union is granted functional legitimacy based upon the commitment to a politically-neutral notion of price stability. Economic integration, in this reading, would not be subject to on-going constitutional review for its democratic qualities. Europe may hence become a "market without a state" and the so-called "masters of the Treaties" ("*Herren der Verträge*") would be left as "states without markets".

This thesis,[26] has found scant support among the community of the Court's critics. The *Bundesverfassungsgericht*'s defence of national democracies has instead been accused time and again of echoing Schmittian ideas.[27] Be that as it may, the defence of national competencies by the German court confirmed the old disengagement: The economic constitution was perfected at the European level; the social constitution remained a national prerogative.

II.C. Phase 3: The Turn to Governance and the Erosion of the Rule of Law

The two constitutional alternatives just sketched have much in common. One common feature is their confirmation of the inherited disengagement of the "social" from the "economic constitution", (re-)distributive policies remain national. A further communality is their conceptual neglect of many European practices. But there are, especially in that second respect, also important differences in the type of failure that we can observe. Majone's insight and prediction that the completion of the internal market would require the strengthening and reform of regulatory policies, proved to be right, even though Europe did not establish the type of institutions which would have constituted Majone's "regulatory state". The German Federal Constitutional Court must be credited with provoking an intense and overdue debate on the legitimacy of the integration project. But the Court's quest for compliance of Europe's fiscal politics with the legal regime of the Maastricht Treaty (and the Court's interpretation of it)

[25] *Bundesverfassungsgericht*, Judgment of 12 October 1993, 2 BvR 2134/92 and 2 BvR 2159/92, *BVerfGE* 89, 155 in *Common Market Law Review* 1 (1994), p. 57.

[26] See in more detail Ch. Joerges, *States without a Market. Comments on the German Constitutional Court's Maastricht-Judgment and a Plea for Interdisciplinary Discourses*, NISER Working-Paper, Utrecht, 1996, also at http://eiop.or.at/eiop/texte/1997-020.htm.

[27] See J.H.H. Weiler, "Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision" in *European Law Journal* 1 (1995), p. 219-258 (also in O. Due, M. Lutter & J. Schwarze, *Festschrift für Ulrich Everling,* Vol. 2*,* Baden-Baden, Nomos, 1995, p. 1651-1688).

proved to be illusionary.[28] We do not discuss the reasons for this shortsightedness.[29] But we would like to underline that, failures of the grand conceptual efforts notwithstanding, Europe continued to function. It proceeded to work pragmatically and incrementally on all fronts and at all levels. It also continued to reflect its practices and find new perspectives. This happened most visibly with the turn to governance the Commission initiated in February 2000 and has since advocated. In our context, another particularly noteworthy "new mode" of European governance, the "Open Method of Coordination" (OMC) was introduced at the European Council on the Lisbon Summit in 2000.

II.C.1. 'Good Governance'

President Romano Prodi, in his speech of 15 February 2000 to the European Parliament in Strasbourg,[30] announced far-reaching and ambitious reforms of European governance. This message was delivered in a new vocabulary, with a fresh reform agenda and a novel working method. The rhetoric of the speech was followed up by the Commission. A "Governance Team", composed of Commission officials under the leadership of Jérôme Vignon, the former director of the Forward Studies Unit, was entrusted with elaborating the reform agenda.[31]

The adoption of the term "governance" by the European Commission reflected lessons learnt during and after the "completion" of the internal market, and above all an awareness that the internal market programme called for pro-active initiatives in ever wider areas, and that permanent management of market integration was necessary to supervise its unforeseen economic and social implications. The term "governance" does indeed open up new perspectives. "Governance" can neither be simply equated with governmental or administrative acts, nor with legal practice. It is all these things. But increasingly, particularly in all realms of regulatory politics, it has become apparent that political activities have to build upon a societal-wide knowledge base and the management capacities of enterprises and non-governmental organisations. Politics in general – and the Commission in particular – cannot simply implement objectives through command and control policy making and policy implementation; however, to describe the co-operative arrangements between public and private actors as a "delegation" of regulatory tasks to non-governmental actors would be misleading. Governance arrangements are a response to real social problems and to bottlenecks within the political system and its administrative machinery.[32] "Governance" rather than "government and administration": this is

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[28] See the *Bundesverfassungsgericht*'s own retreat in its Order of 31.3.1998 – 2 BvR 1877/97, 2 BvR 50/98 in *BVerfGE* 97, p. 350 and Order of 7.6.2000, 2 BvL 1/97, in *Neue Juristische Wochenschrift* 2000, p. 3124.

[29] Here it is sufficient to mention those offered by an American observer: Barry Eichengreen who argues that the 3% rule is economically unsound and points out that the concerns for price stability and the strength of the Euro proved to be unfounded (see e.g. his *Institutions for Fiscal Stabilty*, Working Ppaer, University of California at Berkeley, May 2003, accessible at http://emlab.berkeley.edu/users/eichengr/ policy/ stabilitypactmunich5sep16-03.pdf and his *After the Stability Pact*, November 2003, accessible at http://emlab.berkeley.edu/users/eichengr/reviews/die-zeitnov20-03.pdf). If Eichengreen is right (his language is at any rate strong: the 3 per cent ceiling on deficits he calls "at best silly and at worst perverse"), the quest for compliance is unrealistic and unlikely to generate new legitimacy – and even the authority of the European Court of Justice which the Commission has invoked in its complaint against the Council for its (mis-)treatment of the stability pact is highly unlikely to overcome the political disobedience of Europe's leaders.

[30] http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/41|0|AGED&lg=EN.

[31] "Enhancing democracy in the European Union. Working Programme", SEC (200) 1547, 7 final of 11.10.2000; http://europa.eu.int/comm/governance/work/en.pdf.

[32] The definition by the Commission is extraordinarily vague: ("'Governance' means rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence"); see European Commission (2001): "European Governance. A White Paper", COM(2001) 428 final of 25.07.01, http://europa.eu.int/comm/governance/index_en.htm, note 1.

the outcome – but it is also the problem. We cannot discuss this multifaceted problem here,[33] but simply underline the legally and constitutionally challenging implications of the turn to governance. These new practices involve politically non-accountable actors and cannot respect the division of powers foreseen in constitutional states or the institutional balance in the EU. They will have to be subjected to a new type of constitutionalisation, namely one that strives for law-mediated legitimacy through procedures ensuring deliberative modes of problem solving.

II.C.2. Good Governance Through "Good Coordination"?

The governance debate President Prodi instigated responded to failures of the European regulatory machinery. The intent was not to address Europe's "social deficit". But Europe has taken up that challenge. The Treaty of Amsterdam had seen the insertion of a new Title (VIII) on employment as well as a novel mode of governance, namely a national and Community co-ordination of employment strategies (Article 125). Since the European Council in Lisbon in 2000 also recommended this method for social policy, OMC has become the object of intense discussion. This has inspired and motivated political scientists on both sides of the Atlantic.[34] OMC does indeed envisage a mode of governance that seeks to avoid the institutional bottlenecks in European law-making and administration, and which simultaneously opens up new perspectives for legitimising the Union.

Thus far, the effects of OMC have not been easy to grasp in any of the fields in which it has been applied, and this is particularly true of employment policy.[35] It remains difficult to find any conclusive and reliable information on the mechanisms that constitute the method: can we trust that the autonomy member states continue to enjoy in their efforts to achieve agreed targets will really be used innovatively? Have criteria, credible to concerned actors and stakeholders, that enable "benchmarking" been discovered and operationalized? Do political and societal actors really expose themselves to learning processes that they then convert without further pressure? These are questions the proponents of OMC should take seriously. They concern core principles of constitutionalism.

II.D. Crossroads

Our short story did not have a happy end. The old economic constitution eroded. New governance arrangements were established. A "social Europe" was not achieved. Must we content ourselves with the plethora of pragmatic and incremental activities that characterize European praxis? Should Europe not address both of its deficits more comprehensively? The advent of the Constitutional Convention and its completion on 10 July 2003[36] nurtured such hopes.

III. The Promised Land: "Soziale Marktwirtschaft"

One might think – and some Conventionists may really have thought so – a good candidate for a definite solution of the social deficit would be the introduction of a fundamental norm in the constitution, a constitutional principle. A constitutional principle should, after all, express the

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[33] *Cf.* Ch. Joerges & M. Everson, "Law, Economic and Politics in the Constitutionalization of Europe" in E.O. Eriksen, J.E. Fossum & A.J. Menéndez, *Developing a Constitution for Europe*, Routledge, Londen / New York, 2004, p. 172-178.

[34] *Cf.* with many references Ch.F. Sabel & J. Zeitlin, *Active Welfare, Experimental Governance, Pragmatic Constitutionalism: The New Transformation of Europe*, Manuskript, Madison,WI/ New York, 2003; J. Zeitlin & D.M. Trubek, *Governing Work and Welfare in a New Economy: European and American Experiments*, Oxford, Oxford University Press, 2003, G. de Búrca & J. Zeitlin, *Constitutionalising the Open Method of Co-ordination. A Note for the Convention*, Manuscript, Madison/WI-Florence 2003.

[35] See Section IV.B.3. below.

[36] "Draft Treaty Establishing a Constitution for Europe" in *Official Journal of the European Union* 2003, C 169/01.

character of the whole constitutional order, thereby articulating structures already inherent in the constitution and stating an abstract aim for which the constitutional order is intended to work in the future.[37]

The valid Nice-Treaty of the European Community contained no such constitutional principle for the social sphere. But it listed at least some broad aims in the social field: high level of employment, high level of social security, the promotion of well-being and of the quality of life, social cohesion and solidarity among the Member States, Article 2 TEC. The Convention largely overtook those aims in Article I-3 Constitutional Draft Treaty (CDT), reformulated them gradually, e.g. "full employment" instead of a "high level of employment", and adapted to rhetorical tropes, e.g. the aim to "combat social exclusion" in addition to "solidarity" and "social cohesion". Yet, one concept is a real innovation: The Convention wants the Union to "[…] work for […] a social market economy", Article I-3 paragraph 3 CDT. But in contrast to "full employment" or "improvement of the quality of the environment", "social market economy" does not easily fit the list of political aims or tasks. This is so as there is neither common nor clear picture of what the world could be in a "social market economy" nor what constitutes appropriate steps to advance towards it.

Our assumption is that the term "social market economy" was indeed intended by many conventionists to function as a constitutional principle. It was considered to articulate the wanted character of the new European constitutional order. This assumption could explain why the concept was so contested in the Convention, why several attempts were required to enter the concept into the text[38], and why conventionists, who see themselves as promoters of a social Europe, are quite proud of it.[39]

III.A. From 'Social State' to 'Social Market Economy'?

The model might have been the German constitutional "principle of social statehood" (*Sozialstaatsprinzip*), contained in Article 20 paragraph 1 of the German Basic Law (*Grundgesetz*) which characterises Germany as a "social federal state".[40] Of course, this concept of a "social state" – the term "welfare state", as it will turn out below, is not fully adequate – could not be shifted to the European level as it stands. This would have led to the conception of the European Union as a "state" something that was obviously impossible on condition of the chosen consensus commitment of the Convention. Accordingly, the controversy over a potential

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[37] Compare R. Herzog in Th. Maunz & G. Dürig *et al.*, *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland*, München, C.H. Beck, February 2003, Artikel 20 para. 8 f.; A. v. Bogdandy, "Europäische Prinzipienlehre" in *idem*, *Europäisches Verfassungsrecht*, Berlin *et al.*, Springer, 2003, p. 156; R. Alexy, *Theorie der Grundrechte*, Frankfurt/Main, Suhrkamp, 1986, p. 71 ff.

[38] It did not appear in the first draft of 6 February 2003 (The European Convention, CONV 528/03) *against* the consensual recommendation of the Working Group on "Social Europe" (see the final report sub 2 of the summary, The European Convention, CONV 516/1/03 REV 1). An amendment to include "social market economy" was demanded by number of groups from very different political camps (cf. the document "*The Reactions to draft Articles 1 to 16 of the Constitutional Treaty - Analysis*", The European Convention, CONV 574/1/03 REV 1 p. 27 ff.: The Convention members Farnleitner, Santer *et al.* (2 further members), Voggenhuber & Lichtenberger, Duhamel *et al.* (9), Nagy, Fischer, MacCormick, Arabejiev, Paciotti & Spini, Kaufmann, Floch, Meyer, Lopez-Garrido, Brok *et al.* (23) demanded the addition of "social market economy". The issue was stressed by "a large number of Convention members" in the plenary debate on 27/28 February 2003 (cf. the Summary Report, The European Convention, CONV 601/03). In fact, the next draft version contained "social market economy" (draft version of 28 May 2003, CONV 724/1/03 REV 1), but the text was amended again for the next version by the classification as "highly competitive" (draft version of 10 June 2003, CONV 797/03).

[39] „Les tenants d'une Europe social se félicitent de quelques avancées – la référence à 'l'économie social de marché', au plein emploi, aux service publics" notes Le Monde on 10 November. See the report by Th. Albrecht & G. Müller, "Der Verfassungsentwurf des Europäischen Konvents" in the German Unionist *Gewerkschaftliche Monatshefte* 2003, p. 472 ff.

[40] Article 20 paragraph 1 of the German Basic Law reads: "Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat".

of the European Union to become a federal state was carefully excluded by the Convention. In the quest for a linguistic alternative to "social state", the promoters of a social Europe may have come across the concept of "social market economy" and begun to fight for it with considerable enthusiasm.

In what follows we will examine whether this choice was a wise one. We wonder whether the conventionists were aware of all the implications of "social market economy". "Social market economy" is, after all, not a fresh invention of the Convention at the outset of the twenty-first century, but a concept with a long German history. Some conventionists may have regarded "social market economy" to be equivalent to "social state" and therefore fully adequate to express the desired fundamental social character of the future European Union. Yet, this equivalence does not exist in the light of the German dispute on these two concepts over the last fifty years. In the German constitutional literature, "social market economy" was and is understood to be an approach to fulfil the task of the German state to perform as a "social state".[41] Some commentators, most of them in a liberal-conservative tradition, have argued that the approach "social market economy" was the only one which was constitutionally compatible with other central fundamental rights and principles of the Basic Law, such as the freedom of contract, the guarantee of property rights and the freedom of occupation.[42] The latter view has long been and remains highly contested.[43] For many scholars, however, the concept of a social state primarily purported a normative view on the relation between state and society: The state's task was intervention into the sphere of society with social aims.[44] The elaborated conception of Helmut Ridder[45] is exemplary. In his view, the significance of the implementation of the concept of a "social state" into the German Basic Law was the declaration that state and society, though based on the same personal *substratum*, were actually functionally differentiated but not impermeably separated. Instead, state and society were declared to be influencing each other reciprocally. On the one hand, the functional differentiation and the influence of the society upon the state should guarantee the liberality (*Freiheitlichkeit*) of the democratic order as a whole against a totalitarian threat and danger of state usurpation of society. On the other hand, the possibility of the state to influence the sphere of society should establish and secure the democratic character of society against the undemocratic consequences of a society, shaped and guided according to the classical liberal imperatives. This conception was located in a marked oppositional relationship with the idea of "social market economy". [46]

Therefore, we believe that it receives political and constitutional significance, when the Convention makes the intended social character of the European Union explicit with a reference

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[41] H. Zacher "Das soziale Staatsziel" in J. Isensee & P. Kirchhof, *Handbuch des Staatsrechts*, 2nd edition, Heidelberg, C.F. Müller Verlag, 1995, § 25 p. 1045-1111, esp. para. 51 ff. – Surprisingly, "social market economy" was legalized in the Treaty on the Unification of Germany 1990 as the basis of the economic unification (*Grundlage der Wirtschaftsunion*), see Article 1 Section 3 of this Treaty.

[42] H.C. Nipperdey, *Soziale Marktwirtschaft und Grundgesetz*, 3rd ed., Köln, Heymann, 1965; K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Vol. 1, München, C.H. Beck, 1977, p. 705; cf. P. Badura, F. Rittner & B. Rüthers, *Mitbestimmungsgesetz 1976 und Grundgesetz. Gemeinschaftsgutachten*, München, C.H. Beck, 1977.

[43] For a critique see . M. Kittner in *Alternativ-Kommentar zum Grundgesetz der Bundesrepublik Deutschland*, Vol. 1, Neuwied & Darmstadt, Luchterhand, 1985, "Artikel 20 Absatz 1-3" Section IV paras. 22 ff.

[44] K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th edition, Heidelberg, C.F. Müller Verlag, 1995, para. 209 ff.; H. Zacher, quoted, para. 26. This position followed a Judgment of the German *Bundesverfassungsgericht* in *BVerfGE* 8, p. 329 ff.

[45] H. Ridder, *Zur verfassungsrechtlichen Stellung der Gewerkschaften im Sozialstaat nach dem Grundgesetz der Bundesrepublik Deutschland*, Stuttgart, Gustav Fischer Verlag, 1960; *idem*, *Die soziale Ordnung des Grundgesetzes. Leitfaden zu den Grundrechten in einer demokratischen Verfassung*, Opladen, Westdeutscher Verlag, 1975.

[46] Admittedly, a more radical conservative approach existed as well. This denied any normative significance to the characterisation of Germany's constitution as a "social state": E. Forsthoff, "Begriff und Wesen des sozialen Rechtsstaates" in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 12 (1954), p. 8 ff.

to "social market economy", the key concept of an influential but still specific line of thought in the young Federal Republic of Germany. We are concerned that this choice may implicitly and possibly involuntarily exclude, with constitutional weight, alternative conceptions of how the state, the sphere of society and their reciprocal interference should be understood in general. Europe, of course, is not a state and the Constitutional Draft Treaty would not have made it one as we pointed out in the above. Nonetheless the difficulty in understanding and articulating the idea of a political and democratic guidance of social progress in society remains. In consequence, attempting to avoid a commitment on a specific solution to this problem, namely "social market economy", the Convention should have proclaimed a "social European legal order" or a "social Union", or, alternatively, should have trusted in the force of the concept of "solidarity" in the list of the Union's values in Article I-2 CDT.

After this short detour about the conceptual curtailing inherent to the choice for "social market economy" from the beginning, we want to discuss the German heritage of the concept in further detail. The term was invented by the German Professor of economics, Alfred Müller-Armack in 1946.[47] In an article he presented the "social market economy" as a third way between "laissez-faire liberalism" and "planned economy" with the inherent threat of socialisation.[48] However, Müller-Armack's "social market economy" was grounded in and deeply interwoven with another concept referenced in the above (sub II.A.1): the concept of "ordoliberalism". Ordoliberalism was and is still considered the solution for the complex problem of how to maintain a stabile liberal market economy, to guarantee its inherent individual freedoms and to avoid both, "market failures" and "state failures". Before sketching the original idea of "social market economy", we would like to introduce the main ideas of ordoliberalism.

III.B. The Ordoliberal Fundament

The concept of ordoliberalism was developed in the late twenties of the last century. It was conceived in a circle of political economists in Freiburg that would come to be called the "Freiburg School". Its most prominent proponent was Walter Eucken,[49] the head of "Freiburg School". Other protagonists were Alexander Rüstow[50] and Wilhelm Röpke,[51] together with the lawyer Franz Böhm.[52] The birth of ordoliberalism in the late twenties should be understood as a response to the economical, social and constitutional crises of the Weimar Republic. In particular, it was envisioned as a liberal answer to the obvious failure of nineteenth century economic liberalism, or in a word for Rüstow "Paläoliberalism".[53] A specific liberal response to the crisis was needed in view of the two predominant state-centred alternatives in the political arena, statism on the one hand, which was originally promoted by the Historic School of economics, and

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47 A. Müller-Armack, "Wirtschaftslenkung und Marktwirtschaft" (1946) reprinted in: *Wirtschaftsordnung und Wirtschaftspolitik. Studien und Konzepte zur sozialen Marktwirtschaft und zur europäischen Integration*, Freiburg i. Br., Verlag Rombach, 1966, p. 19-170.

48 A. Müller-Armack, "Die Wirtschaftsordnungen sozial gesehen" (1948) reprinted in: *Wirtschaftsordnung und Wirtschaftspolitik*, quoted, p. 171-199.

49 W. Eucken, "Staatliche Strukturwandlungen und die Krisis des Kapitalismus" reprint in *Ordo* 48 (1997), p. 5-25; *idem*, *Die Grundlagen der Nationalökonomie*, 1st ed., Jena, G. Fischer, 1940; *idem*, *Grundsätze der Wirtschaftspolitik*, 1st edition Berlin, Francke *et al.*, 1952.

50 A. Rüstow, "Interessenpolitik oder Staatspolitik?" in *Der Deutsche Volkswirt* 6 (1932), p. 169 ff.; *idem*, "Freie Wirtschaft – starker Staat" in *Schriften des Vereins für Socialpolitik* 187 (1932), p. 62 – 69.

51 W. Röpke, *Die Lehre von der Wirtschaft*, 1st edition Vienna, Springer, 1937; *idem*, *Die Gesellschaftskrisis der Gegenwart*, 1st ed., Erlenbach-Zürich, Rentsch, 1942; *idem*, *Civitas Humana*, 1st edition Erlenbach-Zürich, Rentsch, 1944.

52 F. Böhm, *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung*, Stuttgart *et al.*, Kohlhammer, 1937, *id.*, "Privatrechtsgesellschaft und Marktwirtschaft" in *Ordo* 17 (1966), p. 75-151.

53 One of his essays is entitled "Paläoliberalismus, Kollektivismus und Neoliberalismus in der Wirtschafts- und Sozialordnung" (in E. Mende *et al.*, *Christentum und Liberalismus – Studien und Berichte der Katholischen Akademie in Bayern*, München, Karl Zink Verlag, 1960, p. 149-178).

socialism on the other hand, which was the program of the labour movement.[54] The old liberal conviction that a social order was simply and necessarily the consequence of individual freedoms was no longer accepted. Consequently, ordoliberalism acknowledged that the state had an important function in ordering the economic sphere. In contrast to the old liberal ideology, it was not the idea of state intervention in itself, but the fundamental character of any state intervention that would make the difference with regard to the etatist and socialist alternatives. This new function of the state was called 'liberal interventionism' and was probably most coherently articulated by Wilhelm Röpke.[55]

In the ordoliberal view, the state had to build and enforce a legal regime representing an *ordo* intrinsic to economic life[56]. This regime had to guarantee private contract autonomy, individual property rights, freedom of occupation and trade, free movement of persons and also effective legal protection of these rights and freedoms. To this end, a very important and permanent task of the state became the dissolution of monopolies and cartels, because such entities tend to undermine market freedoms and thereby the autonomy of the individual. Obviously, to impose such a legal regime on the existing corporatist society in Germany of the early twentieth century 'liberal state intervention' was necessary. Furthermore, having once achieved this new liberal order, economic and societal development would perpetually trigger the need for 'liberal state intervention' against accumulated economic power. Yet, from the perspective of the ordoliberals, the modern pluralistic and party-dominated state could not shoulder this task. What was needed instead was a "strong" state that acted above the political and social quarrels. Otherwise its normative neutrality would easily, if not necessarily, be endangered by political opportunism under the pressure of socio-economic forces exerted by parties, trusts and cartels, all kinds of interest groups, which were seeking "extra rents" from unjustified state subsidies of all kinds or monopoly-status.

The ordoliberal critique of modern social and political pluralism was shared with the intellectual leaders of the conservative revolution. Consequently, even before the National Socialists' seizure of power, Hermann Heller criticised ordoliberalism as an "authoritarian" concept.[57] The ordoliberal quest for strong authority[58] should, however, not to be equated with the "strong state" that Carl Schmitt, in one sense, identified and, in another sense, called for in his famous 1932 speech[59] and was subsequently realised under National Socialism. Schmitt's strong state claimed the political primacy of politics over the economy, whereas the ordoliberals sought to impose a stable legal framework on the economy which the political system, for its part, was to respect.[60]

It was this very core idea that lent ordoliberalism significance in the formative stage first of the Federal Republic and later of the European Economic Community. At the national level, the

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[54] W. Abelshauser, *Kulturkampf. Der deutsche Weg in die neue Wirtschaft und die amerikanische Herausforderung*, Berlin, Kadmos, 2003, p. 158 ff.

[55] See W. Röpke, *Die Lehre von der Wirtschaft*, *quoted*; *idem*, *International Economic Disintegration*, London, Hodge and Co., 1942.

[56] Cf. Ph. Manow, *Modell Deutschland as an interdenominational compromise*, Minda De Gunzburg Centre for European Studies, Working Paper 003/2001; more recently: *idem*, "Ordoliberalismus als ökonomische Ordnungstheologie" in *Leviathan* 2001, p. 179 ff. and W. Abelshauser, *quoted*, p. 158 f.

[57] H. Heller, "Autoritärer Liberalismus" in *Die Neue Rundschau* 44 (1933), p. 289 ff.

[58] A. Rüstow in 1932 before the *Verein für Socialpolitik*: „Einen starken Staat, einen Staat oberhalb der Wirtschaft, da, wo er hingehört" („a strong state, a state situated at a level above the economy, as appropriate"), cited in W. Abelshauser, quoted, p. 159.

[59] *Starker Staat und gesunde Wirtschaft. Ein Vortrag vor Wirtschaftsführern* (transl.: "A Strong State and a Healthy Economy. A Lecture for Business Executives") held on 23 November 1932, published, for example, in *Volk und Reich. Politische Monatshefte* 1933, p. 81 ff.

[60] This difference exists despite the affirmative references which were made to Schmitt's "strong" or even "total state" by Rüstow and Eucken (see Ph. Manow, *Modell Deutschland*, quoted, p. 8 with references). The affirmative references are made with regard to the anti-pluralistic and anti-democratic implications, not regarding Schmitt's concept as a whole.

economic constitution was set alongside the political constitution, in an effort to protect the market economy from discretionary political encroachment.[61] The ordoliberal theory of economic governance at the same time – as set out above (sub II.A.1) – answered the question of the legitimacy of European "governance". But at this point, we should underline the hybrid epistemological status of the ordoliberal message: ordoliberalism is an amalgam of legal and economic premises and contentions. Its theoretical weakness ensures its political survival: as economic historians,[62] political scientists[63] and lawyers[64] have repeated so often, the ordoliberal argument perpetually immunises itself: Its promises would be fulfilled if the political system, the law and economic actors would comply with the imperatives of ordoliberalism.

They never fully complied.[65] We refrain from discussing the causes. They constitute just one, albeit critical, dimension of ordoliberalism. A second concern is normative and constitutional. Ordoliberalism presents economic policy as a cognitive exercise, deriving its legitimacy from the respect for the *ordo* which it seeks to uphold.[66] This trans-positive framework does not need any further legitimacy, especially not the one constitutional democracies have to offer. This is why ordoliberalism was so attractive to lawyers who sought to understand European law.

However, ordoliberalism was only the core of the concept of "social market economy". What we would like to explore now, is the inclusion of a social dimension into the ordoliberal construct.

III.C. The Social Dimension in Germany's Post-War "Social Market Economy"

As mentioned in the above, the invention of the term "social market economy" is ascribed to Alfred Müller-Armack. Although he took part in the discussions of the "Freiburg School", he did not belong to its inner circle; his chair was in Cologne. In the young Federal Republic of Germany, Müller-Armack served as the first section chief of the planning section (*Grundsatzabteilung*) in the Ministry of Economic Affairs. Later on, from 1958 to 1963, he became state secretary (*Staatssekretär*) of the famous Minister of Economic Affairs, Ludwig Erhard, the so-called father of the German economic miracle (*Wirtschaftswunder*). In addition and remarkable in the frame of our examination, Müller-Armack represented the German Federal government as chief negotiator for the Treaty of Rome on the European Economic Community.

Although his position was based on ordoliberalism and incorporated the ordoliberal principles related in the above, Müller-Armack expressed repeatedly a clear difference between his own position and the ordoliberal program, which he usually referred to as "neoliberalism"[67]. According to Müller-Armack, the ordoliberal focus on the legal framework for a market economy was too limited. He urged an additional "system of social and societal measures, geared to market requirements"[68], thereby consequently extending the function and the resulting tasks for the state.

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[61] For a representative example that indicates the tone see F. Böhm, *Wirtschaftsordnung und Staatsverfassung*, Tübingen, Mohr, 1950.

[62] W. Abelshauser, *Die Langen Fünfziger Jahre. Wirtschaft und Gesellschaft in Deutschland 1949-1966*, Düsseldorf, Schwann, 1987.

[63] D. Haselbach, Autoritärer Liberalismus und soziale Marktwirtschaft. Gesellschaft und Politik im Ordo-Liberalismus, Baden-Baden, Nomos, 1991, p. 117 ff.; Ph. Manow, *Modell Deutschland*, quoted.

[64] R. Wiethölter, "Franz Böhm (1895-1977)" in B. Diestelkamp & M. Stolleis, *Juristen an der Universität Frankfurt a. M.*, Baden-Baden, Nomos, 1989, p. 215 ff.

[65] W. Abelshauser (1987), quoted; but see also *idem* (2003), *quoted*, p. 160 ff.: *produktive Ordnungspolitik* rather than Keynesianism was the German *Sonderweg* in economic policy.

[66] St. Okruch, *Globale Wirtschaftsverfassung – gesetzte oder gewachsene Ordnung?*, typescript, Bonn, Max Planck Institute for Research on Collective Goods, 2001, 3.

[67] *E.g.*, A. Müller-Armack, *Wirtschaftsordnung und Wirtschaftspolitik*, quoted, p. 10; *idem*, "Die Soziale Marktwirtschaft nach einem Jahrzehnt ihrer Erprobung" (1959) reprinted in *Wirtschaftsordnung und Wirtschaftspolitik*, quoted, p. 252-254.

[68] A. Müller-Armack, *quoted*, p.10.

The political function of the term "social market economy" was basically to present an alternative to the socialist or at least interventionist ("mixed economy") spirit of the era dominating public opinion and conforming to the practical predominance of planning elements in Germany's economy during the occupation period. A pure ordoliberal program could never have achieved sufficient support. It was simply too difficult to convey the conceptual differences between bad old "paläoliberalism" and good new ordoliberalism. Against this background, Müller-Armack presented his idea as a synthesis, at first to combine "more socialism (sic!) with more freedom"[69] later to combine "the principle of market freedom with the principle of social balance"[70]. In the political arena, the term "social market economy" was – semantically and not conceptually – adopted by the Christian Democratic Party (CDU) in 1949 in their guidelines from Düsseldorf (*Düsseldorfer Leitlinien*),[71] and it achieved a breakthrough in the same year becoming the slogan for the economic policy of Ludwig Erhard as the first Minister of Economics Affairs under the chancellorship of Konrad Adenauer.

For a better understanding, we can distinguish three ways in which, according to Müller-Armack, the realisation of a "social market economy" leads to the infusion of market economy with social fabric.

III.C.1. Presupposed Social Effects of Undistorted Market Competition

Firstly[72], Müller-Armack argued that a market economy which was structured and maintained according to the principles of ordoliberalism generated social effects automatically and directly. Compared to any kind of planned economy, such a market economy was, in the first instance, more able to satisfy the needs and interests of consumers. Furthermore, the permanent growth of productivity as a result of undistorted economic competition provided for goods with high quality and led to higher real incomes. Both must be understood as social achievements of markets. Another social result of the free competitive mechanism in itself was, finally, that undeserved economic positions were practically put into question.

In brackets we should mention that another line of thought about "social market economy" was developed from the pure variant of ordoliberal school. It was radicalised by Eucken's successor in Freiburg, Friedrich August v. Hayek. Hayek shifted the scientific focus from market failures, which were to be compensated by a strong state, to the problem of state failures resulting thereof. Today, this approach is occasionally referred to as "institutional" or "constitutional economics". Its protagonists often continue to use the term "social market economy" as well, ascribing implicitly beneficial social effects to the undistorted markets.[73] Yet, any necessity for further state

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[69] A. Müller-Armack, *Genealogie der Sozialen Marktwirtschaft. Frühschriften und weiterführende Konzepte*, Bern *et al.*, Haupt, 1974, p. 46.

[70] A. Müller-Armack, Article "Soziale Marktwirtschaft" in v. Beckerath *et al.*, *Handwörterbuch der Sozialwissenschaften*, Vol. 9 (1956), reprinted in: *Wirtschaftsordnung und Wirtschaftspolitik*, quoted, p. 243-249.

[71] Documented in O.K. Flechtheim, *Dokumente zur parteipolitischen Entwicklung in Deutschland seit 1945*, Vol. 2, Berlin, Wendler, 1963, p. 58ff.: "Nachdem die Kritiker durch die Entwicklung der Ereignisse widerlegt worden sind, melden sie sich erneut mit dem Vorwurf, unsere Wirtschaftspolitik führe zurück zu kapitalistischen Formen und zu altem Liberalismus unsozialer monopolitischer Prägung. Nichts liegt der CDU ferner als ein solcher Weg. Aufbauend auf dem Ahlener Programm erstrebt sie die soziale Marktwirtschaft." (Freely translated: "After the critics were proven wrong by the chain of events, they again reproach us with the assertion that our economic policy would lead back to capitalisms, the old unsocial and monopolistic liberalism. This is far from what the Christian Democrats seek to achieve. Building upon the Ahlen Programme, they strive to create a social market economy"). The adoption was only semantical as the program itself focused on competition and monopoly-control in pure ordoliberal terms.

[72] Article "Soziale Marktwirtschaft", quoted, p. 245; "Wirtschaftslenkung und Marktwirtschaft", quoted, p. 131.

[73] See e.g. the current director of the Walter Eucken Institut in Freiburg, V. Vanberg, "'Ordnungstheorie' as Constitutional Economics – The German Conception of a ‚Social Market Economy'" in *Ordo* 39 (1988), p. 17-30. F.A. v. Hayek, in contrast, criticised openly any integration of a concept of social justice for its lack of meaning in liberal thinking, e.g. in "The Political Order of a Free People" in his *Law, Legislation and Liberty*,

measures and policies, which were intrinsic to Müller-Armack's concept – and which will be exposed immediately – is rejected. We abandon this tangent here as, on the one hand, the use of "social market economy" by scholars from "institutional economics" seems usurped, and, on the other hand, an assessment of the Convention's achievement to have anchored this radicalised strain of thought of economic liberalism in the Constitutional Draft Treaty would provoked cynical comments.

III.C.2. Constrained Policies of Social Balance

According to Müller-Armack, the outlined empirical effects of well-ordered markets were only the first part of the social dimension of a "social market economy", and not sufficient at all. Therefore, he argued that the concept of "social market economy" promoted additional interventionist state measures and policies which were to serve the social balance in society.[74] Among those state interventions, policies which aimed at preventing economic fluctuation (*Konjunkturpolitik*) were deemed highly important.[75] Müller-Armack did not hesitate to call an "approximate full employment" ("approximate" to leave room for systemically needed "reserves of capacities" of workforces) an "elementary necessity" and the aim of those policies;[76] he didn't deny the extension of state demand as an appropriate instrument.[77] Apart from that, he suggested redistributive policies by taxation of all income, out of capital or work, and subventions for those in need, be it welfare, pensions, subsidies for homeowners, tenants etc. Further more, he declared other social instruments as at least compatible with the "social market economy", e.g. the fixation of minimum wages.

At this point, Müller-Armack's program appears to be extremely ambitious – an unsuspicious model for "social Europe". But we omitted the characteristic constraint for social policies in Müller-Armack's "social market economy". According to him, the difference between his "social market economy" and mixed economies with elements of planning were not the social goals, but the instruments which were permitted to achieve these goals. In a "social market economy", all social state policies were subordinated to the functionality of market mechanisms. Social policies which threaten to distort market competition and its core, the price mechanism, are excluded from the socio-political agenda. Thereby, state policies can effectively be guided and constrained, notwithstanding that the concept of distortion of competition is nothing but clear: e.g. taxation might be progressive but not excessive, rents may not be fixed but only subsidised, guaranteeing the owner's profit, social security has to be organised in the first instance by way of private insurance markets, and so on. Müller-Armack's assertion that the constraining principle of market-conformity that should guide the choice of social policy-instruments would not rule out some social objectives is simply inconclusive; suffice it here to mention the idea of a state guaranteed general minimal income.

III.C.3. Market-Conformist Societal Policies to Protect Liberal Attitudes

The third manner in which Müller-Armack intended to infuse market economy with a social dimension may surprise the reader. It was the result of an explicit enlargement of the concept,

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Vol. 3, London, Routledge *et al.*, 1978, p. 136 or in "Wissenschaft und Sozialismus" from 1979, reprinted in: *idem*, *Die Anmaßung von Wissen*, edited by W. Kerber, Tübingen, Mohr, 1996, p. 277.

74 A. Müller-Armack, Article "Soziale Marktwirtschaft", quoted; *idem*, "Wirtschaftslenkung und Marktwirtschaft", quoted , p. 129-134 and p. 162-167.

75 His professorial inaugural dissertation (*Habilitation*) from 1929 had already focused on this issue: *Konjunkturforschung und Konjunkturpolitik* reprinted in *Genealogie der Sozialen Marktwirtschaft*, quoted, p. 197-255.

76 A. Müller-Armack, "Wirtschaftslenkung und Marktwirtschaft", quoted, p. 162-67.

77 A. Müller-Armack, "Gedanken zu einem Kodex des richtigen konjunkturpolitischen Verhaltens" (1961) reprinted in: *Wirtschaftsordnung und Wirtschaftspolitik*, quoted, p. 357.

introduced in the sixties in an article entitled "The Second Phase of Social Market Economy".[78] The intent was that after the post-war problems of productivity and of a serious lack of employment had been solved, the focus of "social market economy" should be shifted from economic and social policy problems to social problems in a wider sense, in other words: societal problems. Thereby, Müller-Armack's understanding of societal problems underlay his concerns about the stable pertinence of a liberal society under – as he perceived them – "modern" conditions. The most threatening factors were "mass society" as a whole and its general tendency to proletarianization, as well as specific institutions of mass society, namely large business concerns and mass organisations.[79] In Müller-Armack's view, these factors resulted in "social isolation" of the individual and the feeling of uncertainty in view of the complex market mechanism; this could ultimately lead to a susceptibility to anti-liberal or even totalitarian movements.

To compensate for traditional structures as guilds, status or class in modern mass society and support the strength of the individual, Müller-Armack called for societal policies. These policies were highly differentiated and their concrete form can be understood only in the context of contemporary socio-economic conditions, those of the early sixties in Germany. Müller-Armack proposed increased public investment in higher education, currency stability to protect employee's savings, legal incentives for the distinction of staff in big firms to open career possibilities, centralised regional and urban planning and the expansion of public services in general.[80]

Although this is a notable list of state policies, it should again be affirmed, that none of these policies were permitted to disturb the functioning of market-mechanisms nor could these policies justify any exception to the imperative of state budget discipline.[81] Finally, they were based on, and directed by, specific normative opinions about the ethics of society, which are scarcely shared by an overwhelming consensus.

IV. "Social Market Economy" in the Constitutional Draft Treaty

IV.A. "Social Market Economy": Constitutional Objective for the European Union?

After having recalled the main characteristics of the original conception of a "social market economy" as developed by Müller-Armack, and propagated by the German government in the fifties and sixties, we can focus anew on the choice of the Convention to incorporate "social market economy" as an objective the Union "shall work for" in the Constitutional Draft Treaty. Against the background of the contents of the original concept as described in the above, we discern three major problems. The first deals with "the simultaneity of the non-simultaneity" (*Gleichzeitigkeit der Ungleichzeitigkeit*) of the term's appearance on the European level in 2003, the second concerns the choice of "Union's objectives" as a category for "social market economy", the third is related to the suitability of the European Union as an institutional framework to perform as a "social market economy".

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[78] A. Müller-Armack, "Die zweite Phase der Sozialen Marktwirtschaft. Ihre Ergänzung durch das Leitbild einer neuen Gesellschaftspolitik" (1960) reprinted in *Wirtschaftsordnung und Wirtschaftspolitik*, quoted, p. 267-291.

[79] This was actually the basis of his choice for market economy as a whole. For the Christian-Protestant roots of Müller-Armack and the Freiburg School's thinking, see Ph. Manow, "Ordoliberalismus als ökonomische Ordnungstheologie", quoted.

[80] Müller-Armack, "Die zweite Phase der sozialen Marktwirtschaft", quoted, p. 275-287.

[81] Cf. A. Müller-Armack, "Thesen zur Konjunkturpolitik" in *Wirtschaftspolitische Chronik* 24 (1975), p. 7-16; *idem*, "Die fünf großen Themen der künftigen Wirtschaftspolitik" in *Wirtschaftspolitische Chronik* 27 (1978), p. 9-34 – according to his follower H. Willgerodt "an indictment of social state interventionism" (H. Willgerodt, "Die Liberalen und ihr Staat" in *Ordo* 49 (1998), p. 69).

*IV.A.1. "*Gleichzeitigkeit der Ungleichzeitigkeit*" of the Term's Renaissance*[82]

Common knowledge dictates that "social market economy" is in the first instance, before being a concept or principle or objective, a linguistic symbol for the German model (*Modell Deutschland*) which flourished during the fifties and sixties of the last century. It is widely seen as both, economically successful and stabile as well as socially protective and progressive.

We suggest that this symbolic linkage of the term with the fabric of Germany's former social and economic conditions[83] fostered its reappearance in the Constitutional Draft Treaty. The protagonists of this move seem to have appealed to the good memories and reputation of the "social market economy". There is certainly nothing wrong with the quest for good interaction of the economic and the social spheres in Europe. What is problematic is the promise and expectation that the German model might orient the strive for such aims. This is so for two interdependent reasons. .

Firstly, Germany's economic policy in practice never really followed the imperatives of its "model-symbol". Even before the integrative turn to Keynesianism in 1967,[84] i.e. from the beginning in the late forties and the early fifties, economic policy was interspersed with infringements upon the requirements of "social market economy". The "German miracle" cannot be attributed to the compliance of German political actors with the prescriptions of the model. It was Germany's much more complex and pragmatic praxis that managed so impressively the promotion of economic growth, full employment, steadily rising wages and price stability. The disregard of what the model required concerned in particular all kinds of corporatist arrangements in the widest sense. These were by no means limited to the field of industrial relations.[85] The protagonists of the model, including Müller-Armack himself, have argued that most of these infringements were just exceptions.[86] Methodologically speaking, this kind of defence is simply inconclusive. And its substantive assertion, namely that Germany could by and large be characterized as a "social market economy" as designed by Müller-Armack and his adherents, seems unfounded. Germany's markets can with at least equal plausibility be characterised by their embeddedness in corporatist structures.[87] The authors of the Draft Constitutional Treaty were hardly aware of these tensions between the model and the praxis. And if they were, their reference point would become even more opaque and its Europeanisation simply inconceivable.

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[82] This theorem in historical thinking on the non-simultaneity of different but chronological (hi)stories – non-simultaneity in view of the totality of historical progress in time – was developed by R. Koselleck to demonstrate a new understanding of the idea of time in historical thinking in the late eighteenth century, namely the temporalising of history (*Verzeitlichung von Geschichte*). In our use, of course, we subscribe to this understanding. Cf. R. Koselleck, "Neuzeit" in *idem*, *Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten*, Frankfurt/Main, Suhrkamp, 1989, p. 300-348; see also: R. Koselleck / Ch. Meier, Article "Fortschritt" in O. Brunner, W. Conze & R. Koselleck, *Geschichtliche Grundbegriffe*, Vol. 2, Stuttgart, Klett-Cotta, 1975, p. 391-402.

[83] The economic historian Volker Henschel assumes that this formidable linkage still exists in German public opinion: "Ask a dozen Germans whether they know the concept of 'social market economy', what they think of it and what it stands for. I am sure, everybody will know the words, nearly everybody will hold it a recommendable thing and almost no one will be able to say, what it means. The few who will have an opinion, probably won't have the same opinion." V. Henschel, *Ludwig Erhard, die „soziale Marktwirtschaft" und das Wirtschaftswunder. Historisches Lehrstück oder Mythos ? / Ludwig Erhard, „l'économie sociale de marché et le miracle économique. Leçon historique ou mythe?*, Bonn, Bouvier Verlag, 1998, p. 25/68.

[84] Cf. G. Brüggemeier, *Entwicklung des Rechts im organisierten Kapitalismus*, Vol. 2, Frankfurt a.M., Syndikat, 1979, p. 294-299.

[85] W. Abelshauser (2003), *quoted*, p. 172 and p. 102-107: the new social production regime after 1945 was the old one, developed in the end of the 19th century.

[86] A. Müller-Armack, "Die Soziale Marktwirtschaft nach einem Jahrzehnt ihrer Erprobung" (1960) reprinted in *Wirtschaftsordnung und Wirtschaftspolitik*, quoted, p. 255 and 258.

[87] Glasmann, *quoted*, p. 56 ff.

Secondly, an account of Germany's success story in the post-war period cannot restrict itself to factors endogenous to the German polity and the policies designed by its leaders.[88] A plethora of further factors would have to be taken into account. To name just a few: Technological transfer from the U.S. and a quick restoration of sufficient capital stocks allowed for technological resurgence. Germany's economy profited from its comparatively low wage level and the steady immigration of highly qualified blue and white collar workers from the East; the synergetic effect of these two factors was extraordinary growth of productivity. After the suppression of Germany's communist and more radical leftist trade unions during the III. Reich, the new unions had become much more cooperative. The Korean War in the early fifties caused an expansion of demand for industrial products on the world market. Thereafter, Germany's economy had become strong enough to allow for higher wages which in turn stimulated the internal demand in particular for mass-products, allowing a production regime with profitable economies of scales. Last but not least, the national economy was functionally closed and not under pressure of global markets.

We conclude that it is misleading to identify Germany's 'social market economy" as the cause for Germany's miraculous performance, release it from its institutional and socio-economic context and present it as a potential cure for Europe's present problems in general and its social deficit in particular.

IV.A.2. A Constitutional Objective?

We presented the contents of the concept "social market economy" as it was developed by Müller-Armack. We described that this concept contained an ordoliberal basis which was complemented by social and societal policies, whose aims and instruments were supposed to rely on market mechanisms. Can such a concept serve as an objective? In the above, we have pointed to an intuitive difference to other objectives which were chosen by the convention for Article 3 CDT, e.g. "full employment" and a "high level of environmental protection". After our examination of the term's significance, we can articulate the difference more precisely: categorically, "social market economy" is no objective at all.

One may even doubt whether a "market economy" might serve as a constitutional objective. Being taken as an objective, it loses a clear sense of meaning, at least after once a socio-economic order characterised by privileges and status has been abolished by way of the guarantee of liberal rights. Although fundamental rights are certainly guaranteed, a market economy requires continuous protection against anti-competitive practices including, especially in the case of the European Union national protectionism. The specifics of a competitive economy, however, cannot be defined in advance. Such a commitment to permanent interpretative adaptation is characteristic of a legal or constitutional principle rather than of an objective.

Be that as it may, as far as the social dimension of the European economy is concerned, our collusion seems unavoidable. Müller-Armack himself never presented "social market economy" as an "objective". He used to speak obtusely of a "model" (*Leitbild*) or "integration formula" (*Integrationsformel*) or with added obscurity of a "style", e.g. of a "style of behaviour in our world, a specific way to approach the solution of social problems"[89]. Similarly, German commentators who endorse the concept of "social market economy" don't refer to it as a constitutional objective, but a "strategy in economic policy" to achieve the social goals addressed in the social state-clause.[90] A "strategy" is not an "objective", nor should a specific strategy in economic policy be anchored in a democratic constitution. The latter was after all the widely

[88] Volker Henschel, *quoted*, p. 42-45/83-87. *Cf.* J. Hirsch, *Der nationale Wettbewerbsstaat. Staat, Demokratie und Politik im globalen Kapitalismus*, Berlin, Edition ID-Archiv, 1995, p. 75-82

[89] E.g. A. Müller-Armack, "Das gesellschaftspolitische Leitbild der sozialen Marktwirtschaft" (1962) reprinted in *Wirtschaftsordnung und Wirtschaftspolitik*, quoted, p. 293-315, esp. p. 299-301.

[90] Cf. H. Zacher, quoted, para. 51.

shared opinion based on a judgment of the Federal Constitutional Court (*Bundesverfassungsgericht*) stating that the economical order prescribed in the German Basic Law was "neutral"[91], thereby giving way to the widest legislative discretion for any strategy in social and economic policies.

One might oppose to our reasoning. Presupposing that social balance could be categorised as an objective – as we admit here for the sake of the argument – one might suggest that, however, "social market economy" entails the demand for a kind of social balance. But, for we have seen, the opposite is true. "Social market economy" consists of a clear restriction of instruments to achieve any social objective at all. Briefly, "social market economy" is conceptually not an objective, but a restriction for social objectives.[92]

IV.A.3. The European Union a Proper Framework?

In no way do we intend to disparage the intentions of the conventionists. We acknowledge that the appeal of "social market economy" was related to a desire to anchor the claim to develop and extend policies of social balance. This was similarly directed against a strong bias towards free markets and undistorted competition on the European level. Admittedly, against this background such an explicit claim in the constitution could be seen as a step towards social progress, even though this conceptually restricts instruments and goals of social policies. But we should take a closer look on the social policies of "social market economy". According to Müller-Armack, a "social market economy" presupposes redistributive policies through taxation and subsidies, as well as measures against economic fluctuation geared to maintain a high rate of employment. In addition, Müller-Armack accepted laws on minimum wages and called for welfare aid and tenant subsidies, as well as, for the second phase of "social market economy", investments in higher education, public services as well as a host of additional government actions. Let us assume that the conventionists fighting for the concept of "social market economy" had a similar list of social policies in mind. Now, can writing down "social market economy" in the Conventional Draft Treaty trigger the social policies of a "social market economy"?

Those familiar with the European legal order will answer without hesitation: No. To enact this type of productive policy, the European level would require competencies in the field of social policy and taxation. An adoption of such measures seems conceivable only in the shadow of majority voting. Neither the present Treaty nor the Draft Constitutional Treaty provide for such possibilities. The legal basis for social policies is miniscule and was exhausted during the Delores-Commission in the nineties. This has received in depth treatment elsewhere.[93] The fundamental problematic – in our terms still: the disengagement of the social from the economic constitution – cannot be solved by a constitutional commitment to the objective "social market economy". Constitutional objectives are intended to guide the policies performed on the basis of given competencies; they cannot generate new ones. The demand for a clearer and more controllable line between the Unions competencies was one core issue of European constitutional politics over the last decade and with particular intensity as the Convention process approached.[94] Against this background, any hope that the lack of Union competencies in the social field may be circumvented, appears to be in vain.

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[91] *Bundesverfassungsgericht*, Judgment of 20 July 1954, *Investitionshilfegesetz*, *BVerfGE* 5, p. 7 ff.

[92] In this paragraph, we focused on the categorical aspect. But the last steps of our reasoning should also show how the well-meant but much less well-reflected choice of "social market economy" may return as a boomerang in constitutional proceedings – should they come to pass on this issue.

[93] For an example see the sharp-tongued description of W. Streeck, "Vom Binnenmarkt zum Bundesstaat?" in St. Leibfried & P. Pierson, *Standort Europa. Sozialpolitik zwischen Nationalstaat und Europäischer Integration*, Frankfurt/Main, Suhrkamp, 1998, p. 369-421.

[94] See A. v. Bogdandy & J. Bast, "Die vertikale Kompetenzordnung der Europäischen Union" in *Europäische Grundrechtezeitschrift* 2001, p. 441 ff.

Ultimately, we believe that the socially engaged conventionists were victims of their own trap: omitting a reference to an equivalent of a European "social state", they choose "social market economy" – "to get at least something social in". But that model can only be realised in the contrafactual framework of state-like federalist competencies – so finally, "we won't get anything social out at all".

IV.B. Innovative Approaches to "Social Market Economy"?

Our conclusion may be too rash and overly negative. Even though the invocation of the "social market economy" may not help to overcome Europe's social deficit, alternative ways towards social Europe may be available and be opened up. This is indeed the expectation of many observers and actors. Their hopes rest upon "The European Charter of Fundamental Rights" which includes fundamental social rights, and the cautious constitutionalisation of the "Open Method of Coordination".

IV.B.1. The Late Emergence of "Social Europe"

The Convention process proceeded on well-known paths. Working groups were established after – as the Presidium reported it following two days of large general debates in plenary[95] on the future of the Europe Union – "a discussion has begun inside the Convention on matters of substance".[96] But, surprisingly enough, no Working Group on "Social Europe" was formed. The issue of "social Europe" was only greased tangentially in the establishment of a Working Group on "Economic Governance". This is the case insofar as some suggest that a veritable economic government (*Wirtschaftsregierung*) on the European level could help to answer the European social question at least in parts. But the mandate of the Working Group was formulated very restrictively. The Group was asked to consider the implications of Monetary Union for economic policy making: "The introduction of the single currency implies closer financial and economic cooperation. What forms might such cooperation take?"[97] With the isolated reference to single currency in the mandate, rather than a social dimension of Europe, the European framework for national social policy could not be addressed. The final report of the Working Group proves this assumption true.[98] While Klaus Hänsch, the chair of the group and member of the European Socialists, in his opening questionnaire had at least asked the group to consider "to what extent the coordination of social and employment issues" should be treated as "an element of economic policy of 'common concern"',[99] the Working Group's final report did not even mention this issue. When the issue was raised in the proceedings, the Group, after brief deliberations, concluded that it lay outside its mandate. Discussion on the Union's social values and policy objectives was relegated to a plenary session.[100]

Tension between the narrow scope of the Group's work on "Economic Governance" and the broader expectations the convention process had nurtured became ever more apparent. The Working Group itself and the critics of its narrow mandate therefore sought a *deus ex machina* solution: a new Working Group on "Social Europe" was established. This was widely perceived to be an important success.[101] It seems to us that all of the actors directly involved were not fully aware of the depths of the schism between Europe's economic and social "constitution" and that they have underestimated the political, legal and technical dimensions of that problematic. But

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[95] For the minutes of the Convention's plenary sessions see the web-page of the European Parlament http://www.europarl.eu.int/europe2004/index_en.htm.

[96] The European Convention, CONV 52/02.

[97] The European Convention, CONV 52/02.

[98] The European Convention, CONV 357/02.

[99] The European Convention, CONV 76/02.

[100] The European Convention, CONV 357/02.

[101] *Cf.* J. Falke, "Auf dem Weg zu einer sozialen Marktwirtschaft?" in U. Liebert *et al.*, quoted, p. 120.

this is not to say that the proponents of social Europe should have remained silent. They have sought to exploit the potential of the two new opportunities they had – and we will briefly examine what they achieved.

IV.B.2. Fundamental Social Rights

Admittedly, we cannot review the issue of fundamental social rights extensively in this context. Our observations will focus on the difficulties we have identified in our analysis of the surprising rebirth of "social market economy" on the European level. We will hence try to find the extend to which the Charter can be expected to cure these deficiencies.

The Draft Constitutional Treaty has adopted the Charter on Human Rights as solemnly declared in Nice in December 2000. Its Article 51 has inherited that Declaration's widely discussed "horizontal clause". Most of the social rights in the title on "solidarity" are guaranteed or recognised "in accordance with Union law and national laws and practices". This provision restricts the normative force these rights might possess. Moreover, the multiplicity of legal sources invoked by the Charter's preamble itself[102] provides for a cornucopia of material for methodologically unguided juridical argumentation – a "lawyer's paradise"[103] and the opposite of constitutional normativeness. Finally, a red line is drawn in the Charter between "principles" and "rights" and many apparent social rights are declared to be "principles".[104] According to the new Article 52 paragraph 5, "principles" "shall be judicially cognisable only in the interpretation of such acts" – i.e. acts that are adopted to implement the principles – "and in the ruling on their legality". This is a deliberative break with the traditional concept of a constitutional principle, which is characterised in particular by the quest for respect in any case of legal interpretation or review.[105]

Much hope is currently focused upon expected rulings of the European Court of Justice. Many observers formulate their commentaries to suggest innovative and sometimes inventive interpretations of the Charter that would overcome the obstacles and promote the progressive application of the Charter by the Court of Justice. The expectations are as high as they seem unsurprising. It was the Court that had transformed the EC Treaty into an autonomous European legal order, thereby creating the unprecedented supranational character of European Community Law. Why not trust that this Court will now be able to establish a "social Europe", to shape a "European social citizenship" and thereby give new meaning to the notion of a "social market economy"? If this were so, European citizens, European civil society, could simply wait and see. But is that expectation normatively attractive, let alone realistic? Should the Court take over where the citizens' representatives in the Convention and elsewhere failed to produce clear constitutional guidance? These are puzzling and, to an extent, worrying consequences, which are hardly reconcilable with the inherited notions of democracy and of the normativeness of constitutional norms. Would the Draft Constitutional Treaty be a sufficiently stable basis for such daring activism? The manner in which the Charter was incorporated into the Constitutional Draft Treaty seems to render that delicate task extremely difficult, even for a willing Court. Last but not least, would the European Court be able to manage the complexities an implementation of social rights in the European multi-level system entails?

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[102] The list reads: "constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights".

[103] Christoph Engel, "The Charter of Fundamental Rights" in *European Law Journal* 6 (2001), p. 167.

[104] According to the explanations of the Praesidium of the Charter-Convention, which the Constitutional Draft Treaty provides with a constitutional weight: The Charter shall be interpreted by the courts "with due regards" to these explanations (see Preamble of Part II of the Constitutional Draft Treaty).

[105] R. Alexy, *quoted*, chapter 3.I.; R. Dworkin, *Taking rights seriously*, London, Duckworth, 1987, chapter 2.

IV.B.3. "Open Method of Coordination"

The OMC was an achievement of the European Council in Lisbon in 2000. There OMC was recommended as a tool to realize the European employment strategies as projected in Article 125 adopted in Amsterdam as well as other social policy objectives. OMC broke with the old "Community method" for three reasons: first, it permitted the taking of action even outside the area of competences that had been expressly transferred to the Community; second, it upgraded the Council; third, it renounced the conventional "juridification" of Community policies. OMC has become the object of intensive discussion and hopes. OMC recommended itself as a new chance to overcome Europe's "social deficit" – and very considerable efforts were undertaken to exploit this opportunity.[106]

Was OMC "constitutionalised"? We find a first reference in Article I-14 paragraph 4: "the Union may adopt initiatives to ensure coordination of Member States' social policies". In Part III, OMC appears four times, of these it is employed once in the section on Social Policy (Article III-107 CDT) and once on Public Health (Article III-179 CDT): here, the European Commission shall act by taking "initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practise, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed." Some might interpret the information of the European Parliament as a step toward a full participation and, in a long-term perspective, towards pertinent European powers.[107] For the time being, i.e. given after an adoption of the Constitutional Draft Treaty, the scope of the method, the proceedings envisaged and potential of decision making remain weak. And even assuming these mechanisms will be established, they would represent a dubious achievement.[108] These are primarily normative concerns with Europe's constitutional culture. Equally important (and normatively significant) are queries with the potential of OMC to overcome the disengagement of the social from the economic constitution. What is the basis for this hope? The final report of the Working Group on "Economic Governance" stated "The Working Group considers that the open method of coordination has proved to be a useful instrument in policy areas where no stronger coordination instrument exists." – "Proved to be useful"? The Working Group has not published the basis of its optimism.[109] An American observer comments:

> We are now amidst of a fluorescence of literature on the "open method of coordination" in social policy. We now have extensive analysis of the functioning and potential system, and have generalized it to a mode of constitutional order. This is a classic example of subjective evidence, Commission hype, and wishful thinking about the future taking precedence over concrete empirical analysis of current policy outputs. When we focus on the latter, it is clear that the system has, to date, generated few if any measurable policy outputs, and has little realistic hope of doing so.[110]

As pointed out at the beginning of this section, the OMC was adopted by the Lisbon Council in March 2000. The primary concern of this Council was with the global competitiveness of the European Union. Thus, we find OMC embedded in the master discourse of competitiveness. No consideration was given to the tension that exists between the quest for competitiveness on the world-market and the idea of social balance.[111] When the latter results in the former, it is a lucky

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[106] See the final report of the Working Group on "Social Europe" (The European Convention, CONV 516/1/3 REV 1), subtitle 4; also the Note for the Convention by G. de Búrca & J. Zeitlin, *Constitutionalising the Open Method of Coordination*, quoted.

[107] *E.g*. the Convention's Vice-President Giuliano Amato in a speech at the European University Institute, Florence, 15 December 2003.

[108] See Section II.C.2. above.

[109] Needless to add that critical accounts were not mentioned. And they are available. See recently S. Smismans, *EU Employment Policy: Decentra;lisation or Centralisation through the Open Method of Coordination?* EUI Working Paper LAW No. 2004/1 with many references.

[110] A. Moravcsik, *Interests, Power, Delegation: The Deep Structure of EU Politics*, Manuscript, New York, 2004.

[111] C. Radaelli, *The Open Method of Coordination: A New Governance Architecture for the European Union?*, Report for SIEPS (Swedish Institute for European Policy Studies, Stockholm), p. 20-23.

coincidence. Second, we should not forget, that social policy is defended by the states as competitive advantage not only on the world market but in the first line in the European market. This is a structural obstacle to a united quest for social progress in Europe through mere coordination. It is difficult to imagine, how this antagonist structure might be overcome by a simple soft law-shaped "mutual learning"-process, the fundamental hope enshrined into appraisals of the OMC.

In conclusion, we cannot believe that the traces of OMC one finds in the Draft Constitutional Treaty will bridge the gap between economic and the social constitution of Europe. What the Convention promises looks like a step sideways rather than forward.

IV.B.4. Mirroring the Historical Development

We are not unaware of the political balance of power inside the Convention. The defenders of the "European social model" were active and productive. The obstacles they faced[112] were, however, predictable and their failure to achieve consensus unsurprising. The narrative of "social Europe" in the Convention is striking insofar as it reflects the history of Europe's social deficit in microcosm. The Convention began, as the Union did, with a focus on the economic constitution, nowadays semantically predominated by the idea of "cooperation" and "governance". In time, it became a necessity to set the social dimension on the agenda – with the Working Group on "Social Europe" on the one hand, the introduction of the 1992 social protocol (Articles 136 ff. TEC) and of the new chapter on employment (Articles 125 ff. TEC) in Amsterdam on the other. Considerable effort has been invested, many forces are involved, great rhetoric is used. Ultimately, no greater and often only symbolical advances, if any at all, have been made due to the lack of consensus. In the political arena, the bias of negative economic over positive social integration persists. With the Union's decisive institutions, the proceedings for constitutional change and the coming enlargement in view, there is little hope that this will change in the near future.

V. Concluding Remark

Does all this mean that we are witness to the end of social Europe? Caution is the resume of our observations. Neither the premises nor the implications of that plea for caution can be developed here systematically. A few summary phrases will have to suffice. The European postnational constellation in general and the *problématique* of social Europe in particular are in our view too complex to be comprehensively addressed in a document on which so many people work over such a short period of time. Europe has historically constituted itself only partially through treaties. It has been dependant on an incrementalist exploration and learning process. There is no guarantee that these processes can resolve Europe's enormously complex challenges. Europe will nevertheless have to further pursue its Third Way between constitutionalisation "from above" and blind pragmatism. It has to build in its constitutionalisation on a legal structuring of the processes of political opinion-formation, on the legally-secured "deliberative" quality of political processes.[113] This may not look like an attractive alternative and is certainly cumbersome route. But it could be the only one available in the transformation of an enormously complex polity.

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[112] In particular from the part of the Praesidium; see Jo Shaw, *A Strong Europe is a Social Europe*, Manuscript, Manchester, February 2003, p. 3.

[113] E.O. Eriksen & J.E. Fossum, Democracy in the European Union. Integration through Deliberation, London/ New York, Routledge, 2000; Ch. Joerges, "The Law in the Process of Constitutionalising Europe", in: E.O. Eriksen, J.E. Fossum & A.J. Menéndez, *Constitution Making and Democratic Legitimacy*, Oslo (Arena Report No 5/2002), p. 13-48; M.P. Maduro, *Where to Look For Legitimacy,* accessible at http://www.ieei.pt/images/articles/674/PaperMPM-IEEucp.pdf; idem, "Europe and the Constitution: *What if it is As Good As It Gets*?", will be published in J.H.H. Weiler & M. Wind, *Rethinking European Constitutionalism*, Cambridge/Ms., Cambridge University Press, 2003.

There is a potential of this a cumbersome route to achieve a programmatic re-attachment of the European project to the ideals of deliberative democracy. A formal constitutional text would neither be sufficient nor indispensable to achieve this objective. And the Convention? It may well be that much less would have been more helpful.