



## European Social Market Economy

### Conceptualizing the Legal Dimension of Art. 3(3) TEU

Kai Morgenbrodt

Thesis submitted for assessment with a view to obtaining the degree  
of Master in Comparative, European and International Laws (LL.M.)  
of the European University Institute

Florence, [01 October 2019 ]



European University Institute

**Department of Law**

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# Part 1

## *Introduction*

### I. AN EMPTY PROMISE?

The Lisbon Treaty introduced in its Art. 3 new language into primary law that expresses the ambition to give the EU a stronger social dimension.<sup>1</sup> In comparison to its predecessor provision of Art. 4 (1) of the Treaty Establishing the European Community, which solely relied on the ‘principle of an open market economy with free competition’, the basic objectives of the EU were broadened. Art. 3 TEU now includes objectives that come across as a promise to rebalance market and non-market values through the foundational provisions of the European Union. In line with other wide-ranging objectives, like fighting social exclusion, this article includes the eye-catching sentence that the EU aims for ‘a highly competitive social market economy’ that seeks to achieve ‘full employment and social progress’.

However, the mere introduction of social language to the Treaties without delivering the necessary mechanisms to bring this language to life, risks creating more a social mask than an actual social face.<sup>2</sup> This is even more true for such lofty altitude. Being suspect to a level of abstraction

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<sup>1</sup> M Kotzur, Die Soziale Marktwirtschaft nach dem Reformvertrag, in I Pernice (Hrsg.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung* (Nomos) 2008, 197 – 204; V Špidla, *Social aspects of the Lisbon Treaty*, Speech at the Conference of European Churches, European Parliament – Brussels, 29 April 2009, available at <http://www.ceceurope.org/wp-content/uploads/2016/01/CSCsocialconflisbontready.pdf> (last accessed 30.9.2019).

<sup>2</sup> M Dani, The EU transformation of the social state, in D Ferri and F Cortese (eds.), *The EU Social Market Economy and the Law – Theoretical Perspectives and Practical Challenges for the EU* (Routledge), 2019, 31 – 50; A T

that could not be higher, these amendments to the TEU seem largely rhetorical since they are not substantially fleshed out in other parts of the Treaties. Is developing a European social market economy (hereinafter: SME) or the fight against social exclusion not dependant on specific social policy tools that – if activated by the European actors – enable the EU to live up to these promises?

Looking for these tools, the yield is rather scarce. Art. 153 TFEU, the provision that lists the EU's social policy competences, is the most obvious choice to start searching, but in that respect also the most disappointing: The Lisbon Treaty did not bring any new law-making competences in the social policy sector. This already points to the dilemma that arises by promising a stronger role of the EU on the one hand, without being able to deliver on the other. An example is the fight against social exclusion, for which the EU however cannot take legislative action since the EU remains restricted to adopting 'measures designed to encourage cooperation between Member States' in some social policy sectors (Art. 153(2)(a) TFEU). Fighting the fight against social exclusion falls in this category (Art. 153(1)(j) TFEU). Hence, one wonders how the EU plans to take on social exclusion without any regulatory power in this matter and being restricted to the soft tools of 'improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences'. Discontinuity between the highly abstract social language of the Treaties on one hand, and the lack of hard law-making tools on the other, certainly creates the danger of promising much, but failing to deliver in the end. This dilemma is also palpable for the object of investigation of this thesis, the SME. It could be, as a new conceptual framework, highly impactful in all areas of EU law that intersect with social considerations, or mere window-dressing that paints a picture of a more social EU, that is however non-existent the moment one takes a closer look at the Treaties.

At first glance one might agree with the latter. The legal conceptualization of what a SME entails is notoriously difficult. What can be said is that Art. 3 (3) TEU asks for balancing 'the market' with 'the social', but it remains unclear how this should be achieved.<sup>3</sup> Effectively, this

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J.M. Jacobs, *The Social Janus Head of the European Union: The Social Market Economy versus Ultraliberal Policies*, in: J. Wouters, L. Verhey and P. Kiiver (eds.), *European Constitutionalism Beyond Lisbon* (Antwerp Intersentia), 2009, pp. 111 – 128.

<sup>3</sup> E.g. F. Costamagna, *The Internal Market and the welfare State after the Lisbon Treaty*, Research Paper – Observatoire Social Européen No 4/April 2011, 1 – 17; A. Schellinger, *Giving Teeth to the EU's Social Dimension. Dismal Failure and Promising Potential*, International Policy Analysis, Friedrich Ebert Stiftung, 2015; V. Šmejkal, *CJEU and the Social Market Economy Goal of the EU*, Prague Law Working Paper Series No 2014/I/1, 1 – 13.

only eliminates the extremes of free market laissez-faire capitalism on one side and negating any influence of the market on social policies on the other side.<sup>4</sup> Still, almost a decade after the introduction of the SME to the EU's foundational provisions, no clear concept for achieving such a balance appears to be visible.<sup>5</sup> Moreover, there are doubts regarding the factual impact of Art. 3(3) TEU. Since the proclamation of the SME concept, the social dimension of the EU has been significantly under attack.<sup>6</sup> If one looks at how austerity measures have compromised social standards,<sup>7</sup> how economic governance of the European Monetary Union (hereinafter: EMU) narrows the room for the Members States social systems to operate,<sup>8</sup> how one can detect a displacement of the social *acquis*,<sup>9</sup> and how the economic freedoms impacted social rights,<sup>10</sup> the label of Art. 3(3) TEU appears to be undeserved. In this light, the overall critical assessments of the SME, to the extent of the EU's overall incapability to live up to Art. 3(3) TEU, do not come by surprise.<sup>11</sup>

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<sup>4</sup> R. Claassen/A. Gerbrandy/S. Princen/M. Segers, *Rethinking the European Social Market Economy: Introduction to the Special Issue*, *Journal of Common Market Studies* 2019, 57(1), 1 – 7 at 3.

<sup>5</sup> See also the cautious conclusion by D Ferri and F Cortese, Conclusion – Taking stock and looking ahead: the future of the ‘social market economy’ in the European Union, in D Ferri and F Cortese (eds.), *The EU Social Market Economy and the Law – Theoretical Perspectives and Practical Challenges for the EU* (Routledge), 2019, 310 – 313.

<sup>6</sup> C Barnard, *How to Make EU Social Policy Live Up to its Name*, Oct. 8, 2015, available at: <https://www.social-europe.eu/make-eu-social-policy-live-name> (last accessed 30.9.2019).

<sup>7</sup> C Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, *Oxford Journal of Legal Studies*, 2015, 35(2), 325 – 353; C Kilpatrick and B de Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, *EUI Working Paper LAW 2014/05*; R Pye, *The European Union and the absence of fundamental rights in the Eurozone: A critical perspective*, *European Journal of International Relations* 2017, 24(3), 567 – 589; K Tuori and K Tuori, *The Eurozone Crisis – A Constitutional Analysis* (Cambridge University Press), 2014.

<sup>8</sup> P de Grauwe and Y Ji, *Booms, Busts and the Governance of the Eurozone*, in F Vandenbroucke, C Barnard and G de Baere (eds.), *A European Social Union after the Crisis* (Cambridge University Press), 2017, 160 – 191.

<sup>9</sup> C Kilpatrick, *The displacement of Social Europe: a productive lens of inquiry*, *European Constitutional Law Review* 2018, 14, 62 – 74 and A C L Davies, *How has the Court of Justice changed its management and approach towards the social acquis?*, *European Constitutional Law Review* 2018, 14, 154 – 171; S Giubboni, *Freedom to conduct a business and EU labour law*, *European Constitutional Law Review* 2018, 14, 172 – 190.

<sup>10</sup> S Giubboni, *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective* (Cambridge University Press), 2006 and *infra Part 2 II*.

<sup>11</sup> Most outspoken in that respect are F de Witte, *The Architecture of a “Social Market Economy”*, *LSE Law, Society and Economy Working Papers 13/2015*; C Joerges and F Rödl, „*Social Market Economy*“ as *Europe's Social Model?*, *EUI Working Paper LAW No. 2004/8*; C. Joerges, *The Legitimacy Problématique of Economic Governance in the EU*, in *The Governance Report 2015, Hertie School of Governance* (Oxford University Press) 2015, 69 – 94; F Rödl, *Europäisches Verfassungsziel „soziale Marktwirtschaft“ – kritische Anmerkung zu einem populären Model*,

Nevertheless, rendering Art. 3(3) TEU useless would be premature. It needs to be acknowledged that the SME is a legally binding goal.<sup>12</sup> It is the Court's standing case law that also the provisions constituting the 'general programme' for the EU do not devoid of legal effect, but rather establish the objectives which are 'indispensable for the achievement of the Community's task'.<sup>13</sup> Consequently, despite the opacity surrounding content and impact of the provision, pursuing the SME remains binding for all EU actors.<sup>14</sup> The question is therefore not *if* the EU strives to be a SME, but *what* this promise entails. This is the question this thesis will tackle: Can a legal dimension of the SME be conceptualized so that the term does not amount in an empty promise? And if the SME is indeed not just window-dressing, which actors contribute to its architecture and where can we detect the impact of the provision?

## II. SCOPE AND COURSE OF EXAMINATION

As both questions potentially intersect with several areas of EU law, defining the scope is necessary. The following parts focus on scenarios where the dynamics of the internal market collide with social considerations. Art. 3(3) TEU is analysed against the background of how the SME goal impacts this conflict.<sup>15</sup> Narrowing down the scope in this fashion is informed by the framework of the Treaties. Next to many uncertainties surrounding the SME concept, it is evident that the provision is closely tied the internal market. Art. 3(3) TEU mentions the goal of establishing the internal market right before introducing the SME concept in the next sentence of

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Integration 2005, 28(2), 150 – 161; F Scharpf, *The asymmetry of European integration, or why the EU cannot be a 'social market society'*, socio-economic Review 2010, 8(2), 211 – 250; F Scharpf, *Weshalb die EU nicht zur sozialen Marktwirtschaft werden kann*, Zeitschrift für Staats- und Europawissenschaften 2009, 7(3-4), 419 – 434.

<sup>12</sup> D Damjanovic, *The EU Market Rules as Social Market Rules: Why the EU can be a Social Market Economy*, Common Market Law Review 2013, 50, 1685 – 1718 at 1715; V Šmejkal, *The Social Market Economy Goal of Article 3 (3) TEU – a Task for EU Law?*, Prague Law Working Papers Series No. 2015/III/1.

<sup>13</sup> C-6/72, 21.2.1973, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, ECLI:EU:C1973:22, para 23.

<sup>14</sup> The Court also acknowledges that for Art. 3(3) TEU (see C-201/15, 21.12.2016, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:972), provides however no helpful contextualization of the content, *infra Part 2 II 2 ii*).

<sup>15</sup> Areas of the social *acquis* intersect with this approach when those policies balance dynamics of the internal market, *infra Part 4 I 2 i*).

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the same provision. The provision itself therefore creates the connection to Art. 26(2) TFEU, which defines the internal market as an ‘area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.’ Being the only market that is defined in EU law, the internal market is the most promising starting point.<sup>16</sup> A sound concept therefore has to address how this area responds to social considerations as it is the only clear component of EU law attached to Art. 3(3) TEU.

Next to this, broader understandings of a SME are certainly possible, especially those that include the intersection between the aftermath of the financial crisis and social rights.<sup>17</sup> The argument, that pursuing Art. 3(3) TEU is undermined by measures that restrict social considerations in the name of financial stability is certainly worth investigating. However, due to limited time and space, this question has to be excluded from the scope of this thesis, as it would ask for another separate investigation of Art. 3(3) TEU. Notably, questions of the internal market and those of the single currency differ from the outset, as they concern two structurally different European projects. The single currency and the EMU follow their own rationale, involve different actors – such as the European Central Bank – and consequently pose different questions for the social. Investigating the impact of Art. 3(3) TEU through the spectre of the financial crisis is therefore excluded from in this thesis.

The following parts undertake four steps towards conceptualizing the legal dimension of the SME. Part 2 is concerned with providing context to the central conflict of the SME, the opposition of the market and the social. This is done with a particular focus on the available architects of the SME on the European level, the Court and the European legislator. Understanding their relationship to Art. 3(3) TEU, where they struggle with the SME concept, and which tools are available to overcome this struggle, lays the basis for the here advocated focus on EU legislation as means towards the SME. Part 3 puts this to the test by tracing the developments in the area of posting of workers in the internal market. For this, the first section of Part 3 develops the theoretical argument why substantial moves towards Art. 3(3) TEU rely on the cooperation of all European actors. The second section of Part 3 then analyses the back and forth between adjudication and legislation pre- and post-Lisbon for the area of posting of workers. This allows

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<sup>16</sup> See the characterisation as a ‘Market State’ by C E O’Sullivan, *The EU between market state ideals and social market economy objectives. Placing the social market economy within the Union’s constitutional history*, in D Ferri and F Cortese (eds.), *The EU Social Market Economy and the Law – Theoretical Perspectives and Practical Challenges for the EU* (Routledge), 2019, 17 – 30 at 24.

<sup>17</sup> For references see *supra* n. 7.

me to introduce the argument, that under Art. 3(3) TEU more social considerations are implemented in this area of the internal market through legislation. A look towards the general context of labour mobility, with focus on the European Labour Authority (hereinafter: ELA), completes the practical test of my approach. Part 4 then seeks to explore if this development is unique to the area of posting of workers and labour mobility. To outline the potential of the here adopted approach, I will first highlight how the basic patterns of the development in posting of workers are visible beyond this specific area, before then taking a look at EU competition law to find out, if the social gets traction in other areas of the internal market. Part 5 offers the final conclusions.

## Part 2

### *The opposition of the market and the social*

#### I. BALANCING, BUT WHAT, WHO AND HOW?

Understanding the opposition of the market and the social in light of the SME faces several difficulties as the concept remains undefined in EU law. It therefore creates uncertainty on many fronts. Beyond the consensus, that balancing the two elements of the SME is necessary, the concept remains opaque.<sup>18</sup> This especially applies to what the social is and who should be the actor to create social content against the background of the market. Despite being mentioned 172-times in the Treaties, an answer to what the Treaties understand as ‘social’ is missing. A look at how the provision made its way into the Lisbon Treaty also provides no further explanation. The SME first appeared in Art. I-3 of the draft of the Constitutional Treaty (hereinafter: CT) and was then transferred without any further substantial discussion into the Lisbon Treaty.<sup>19</sup> What ended up in Art. 3(3) TEU is therefore the same compromise struck in the CT. In the process of drafting the CT, neither an agreement on strengthening the social policy sector of the EU, nor a commitment to ‘Social Europe’ could be reached. At the same time, it was clear that the social dimension needed some emphasis to appease the voters concern about a

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<sup>18</sup> V Šmejkal, *supra supra n. 12*, 3.

<sup>19</sup> Treaty establishing a Constitution for Europe, 16.12.2004 (Official Journal of the European Union, C 310/11) and Final Report of Working Group XI on Social Europe of the 4.2.2003, CONV 516/1/03 Rev 1, WG XI 9; see C.Joerges and F.Rödl, *Social Market Economy as Europe’s Social Model?*, EUI Working Paper LAW, No. 2004/8.



lacking social dimension of the EU.<sup>20</sup> In that scenario, the SME was – especially because of its vagueness – chosen as a suitable compromise: it emphasizes the market and the social at the same time and leaves room for an interpretation in both directions.<sup>21</sup>

Such interpretations usually define the SME by establishing a hierarchical order between both components. A look at assessments of the SME by those Commissioners in charge of the fields of EU law that are, at least in theory, highly affected by this provision, exemplify how this uncertainty mentioned above is fleshed out in such interpretations of the provision. Already in 2000, Mario Monti, the then commissioner for Internal Market, Services, Customs and Taxation expressed that market interests still have the upper hand in the SME as the ‘market’ remains the point of reference in the concept.<sup>22</sup> According to him, ‘the term ‘Social Market Economy’ was ‘of course designed with care’ as ‘the word ‘market’ takes the central position.’<sup>23</sup> He notes that ‘the concept of Social Market Economy stands for reliance on the market mechanism’.<sup>24</sup> At the same time the SME is, according to Monti, about striking ‘a fine balance’ when ‘the aim of benefiting from the market forces on the one hand and the aim of ensuring social cohesion on the other hand’ collide.<sup>25</sup> In a nutshell, this amounts in balancing both with an emphasis on market interests. In 2011, László Andor, the then commissioner for Employment, Social Affairs and Inclusion, described the SME as a third way between ‘laissez-faire market-based economy’ and one that is ‘centrally planned and State-directed’.<sup>26</sup> This third way, according to Andor, is

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<sup>20</sup> S B Hobolt and S Brouard, *Contesting the European Union? Why the Dutch and the French Rejected the European Constitution*, Political Research Quarterly 2011, 64(2), 309 – 322.

<sup>21</sup> S Civitarese Matteucci, Social rights, social market economy and the European social model: tracing conceptual boundaries, in D Ferri and F Cortese (eds.), *The EU Social Market Economy and the Law – Theoretical Perspectives and Practical Challenges for the EU* (Routledge), 2019, 51 – 66 at 54 – 55; C Joerges and F Rödl, *supra n. 19*, 21.

<sup>22</sup> M Monti, *Competition in a Social Market Economy*, Speech at the Conference of the European Parliament and the European Commission: Reform of European Competition Law, available at [http://ec.europa.eu/competition/speeches/text/sp2000\\_022\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2000_022_en.pdf) (last accessed 30.9.2019). This assessment was given pre-Lisbon but exemplifies the problem since he addressed the identical issue posed by Art. 3(3) TEU.

<sup>23</sup> M Monti, *supra n. 22*.

<sup>24</sup> M Monti, *supra n. 22*.

<sup>25</sup> M Monti, *supra n. 22*.

<sup>26</sup> L Andor, *Building a Social Market Economy in the European Union*, Speech 11/695 at Manchester Business School on 20 October 2011, 2 available at Building a Social Market Economy in the European Union (last accessed 30.9.2019).

composed of balancing the enforcement of competition with social policy measures that guarantee social justice and social protection.<sup>27</sup> Notably, this exhausts itself in yet another rephrasing of the need to balance the social and the market, here only with a stronger emphasis on social interests than what can be deduced from Monti's definition. Both interpretations are therefore just extensions of the problematic mentioned above. Beyond the fact *that* one will have to find some form of balance between the market and the social in the post-Lisbon setup, the *how* remains unclear. Neither one of the definitions provides a resilient argument why the emphasis should be on the social or the market.

For others the decisive question for conceptualizing the SME is who should formulate normative ideals for social protection and who should carry out these social protection arrangements. Consequently, this conceptualization of the SME is concerned with the distinction between the EU level and the role of the Member States.<sup>28</sup> Here, the EU has four potential roles: from a 'Passive Spectator Model' on one end of the spectrum, where social protection is only created and provided on the national level, to a 'Protector of Citizens Model' in which social protection entirely moves to the European level. Between these two models, the EU can either function as a 'Patron of Nations' by safeguarding national social protection, or as a 'Guarantor of Social Rights' in mandating Member States to attain a minimum of social protection.<sup>29</sup> However, even with drawing up these four scenarios of multilevel social policy-making, the contours of the SME remain blurry. The first two scenarios are of pure theoretical value. The EU is, with regards to Art. 153 TFEU and the existing social acquis, a provider of social protection arrangements and therefore not a passive spectator. The other extreme, a situation where social protection moves comprehensively to the European level, is also far from reality, as the set of competences for social policies is limited.<sup>30</sup> The other two models exist, as the EU for example guarantees part of the social acquis via directives that have to be implemented by the Member

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<sup>27</sup> L Andor, *supra n. 26*, 2.

<sup>28</sup> R Claassen, A Gerbrandy, S Princen and M Segers, *M Four Models of Protecting Citizens and Social Rights in Europe: Conclusions to the Special Issue 'Rethinking the European Social Market Economy'*, *Journal of Common Market Studies*, 2019, 57(1), 159 – 174.

<sup>29</sup> R Claassen, A Gerbrandy, S Princen and M Segers, *supra n. 28*, 159 – 174 at 163 – 165.

<sup>30</sup> See also R Claassen, A Gerbrandy, S Princen and M Segers, *supra n. 28*, 159 – 174 at 172.

States.<sup>31</sup> In other areas, the EU only coordinates the Member States' social protection systems.<sup>32</sup> But still, this barley improves the understanding of Art. 3(3) TEU because this conceptualization amounts in a mere description of the EU's competences in social policy matters. When the Treaties allow for EU social policy standards the EU may function as 'guarantor' and where they do not, the EU remains limited to the role of the 'patron'. Moreover, in the last two scenarios one is the other side of the same coin and vice versa. Consequently, both models intersect and become hard to distinguish. One only has to think about the involvement of Member States in drafting EU social policy legislation.<sup>33</sup> This renders conceptualizing Art. 3(3) TEU solely through the lens of the opposition of the national and the European level less promising. Moreover, if, out of four models two are impossible to achieve in the current setup of EU law, and the other two blend into each other, the explanatory power of this conceptualization is overall questionable.

In light of these less promising starting points for understanding the SME an unexplored perspective on Art. 3(3) TEU comes into focus. Neither approach investigates which actors are fit to serve as architects of the SME. However, the distinct European dimension of the SME has to be reflected in some fashion on the European level and, consequently, in the actions of the actors operating at this level. The opposition of the market and the social might be understood better through the footprints that these actors leave behind. This requires a closer look at how the Court deals with Art. 3(3) TEU, as well as an analysis on the potential tools that the legislative avenue possesses in order to take steps towards the SME. Both will be done in the subsequent sections.

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<sup>31</sup> E.g. in the areas of Art. 153 TFEU.

<sup>32</sup> See especially Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, 1.

<sup>33</sup> Cf. R Claassen, A Gerbrandy, S Princen and M Segers, *supra n. 28*, 159 – 174 at 172.

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## II. THE COURT: CONSTRUCTING THE SME THROUGH THE LENS OF SOCIAL RIGHTS

The first potential actor for constructing the SME is the Court and its adjudication on social rights. If scholars investigate which actor is fit to deliver the SME, focussing the Court is usually the first choice.<sup>34</sup> The explanation for this is two-fold. First, the Court carried out crucial judgements on the role of social rights in the internal market, especially in respect to their relationship to the economic freedoms.<sup>35</sup> Naturally those judgements, being at the heart of the social dimension of the EU, shift the focus on how the Court is balancing both. Secondly, the focus on adjudication is closely linked to the absence of the legislator over the last years. Focussing social rights as the key to the SME presents the advantage of providing an immediate solution without being dependent on actions by the legislator or even *de lege ferenda* solutions through treaty amendments. Simply put, the lacking definition of the concept by the Treaties, in combination with a not engaging legislator, the focus will be on the actor who is constantly active through adjudication. Similar observations apply to why the second component, the focus on social rights, provides a popular perspective on Art. 3(3) TEU. Next to the crucial implications of cases like *Viking* and *Laval*, linking Art. 3(3) TEU to the protection of social rights follows a systematic argument. Simultaneously to the SME, the Lisbon Treaty introduced a set of social fundamental rights in the fourth Chapter of the Charter of Fundamental Rights of the European Union (hereinafter: CFR), while – as already mentioned – the social policy sector in the TFEU was not enhanced (Art. 27 – 38 CFR).<sup>36</sup> Systematically, one therefore feels engaged to make the argument that it this new chapter in the CFR, that makes the market social.

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<sup>34</sup> E.g. V Šmejkal, *supra n. 3*, 1 – 13 at 2.

<sup>35</sup> C-438/05, 11.12.2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Essti*, ECLI:EU:C:2007:772; C-341/05, 18.12.2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet advelning*, ECLI:EU:C:2007:809; C-346/06, 3.4.2008, *Rüffert v Land Niedersachsen*, ECLI:EU:C:2008:189; C-319/06, 19.7.2008, *Commission v Luxembourg*, ECLI:EU:C:2008:350.

<sup>36</sup> Charter of Fundamental Rights of the European Union, 26.10.2012, OJ C 326/391.

Beyond these key points that have steered the debate on the SME into a debate on how to effectively protect social rights in the internal market, the question remains if this is a promising avenue to conceptualize the SME goal.

## 1. A brief recap: Structural imbalances through *Viking* and *Laval*

### *i) Structural imbalance*

As this section discusses the possibility of the CFR embodying the social in Art. 3 (3) TEU, a brief recap on the handling of social rights in their relationship to economic freedoms by the CJEU is necessary. *Viking*<sup>37</sup> and *Laval*,<sup>38</sup> both decided in December 2007 before the introduction of Art. 3(3) TEU, are extensively, and almost throughout critically, discussed judgements – a discussion that does not need to be repeated for this thesis.<sup>39</sup> To shed light on the potential role of the SME in this context it is sufficient to point to the outcome, the structural imbalance created by the Court. In *Viking*, a case concerning collective action by a Finnish union against the reflagging of a vessel that runs between Finland and Estonia,<sup>40</sup> as well as in *Laval*, where a Swedish trade union tried by means of collective action to force a Latvian service provider to sign a collective agreement for workers posted on a construction site Sweden,<sup>41</sup> the relationship between the right to collective action and economic freedoms, Art. 49 TFEU and Art. 56 TFEU respectively, was at stake. Both cases pose the question how the right to collective action, as it is granted both times by the national constitutions of Finland and Sweden and extended to EU law through Art. 28 CFR by now, fairs against the economic freedoms of the internal market.<sup>42</sup>

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<sup>37</sup> C-438/05, 11.12.2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Essti*, ECLI:EU:C:2007:772.

<sup>38</sup> C-341/05, 18.12.2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet advelning*, ECLI:EU:C:2007:809.

<sup>39</sup> For an overview C Barnard, The calm after the storm: Time to reflect on EU (labour) law scholarship following the decisions in *Viking* and *Laval*, in A Bogg, C Costello and A C L Davies (eds.), *Research Handbook on EU Labour Law* (Edward Elgar), 2016, 337 – 362.

<sup>40</sup> C-438/05, 11.12.2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Essti*, ECLI:EU:C:2007:772.

<sup>41</sup> C-341/05, 18.12.2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet advelning*, ECLI:EU:C:2007:809.

<sup>42</sup> For an analysis of the aspects of the cases L Azoulai, *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization*, *Common Market Law Review* 2008, 45, 1335 – 1356

While this question is composed of several layers, what interests here is the approach the Court adopted to reconcile economic and social rights. The Court did not opt for a hierarchical approach that favours one over the other in principle, but rather a mode of reconciliation that sees the conflict as partial and not as total.<sup>43</sup> For the Court, balancing social and economic rights is therefore a matter of applying the principle of proportionality. This harks back to previous case law where this method was established,<sup>44</sup> while also the possibility of restricting economic freedoms in the name of labour law protection was already known in the Court's case law.<sup>45</sup> What is noteworthy is that the Court introduces this model with a slight adjustment that is noted most aptly by Azoulai for *Viking*.<sup>46</sup> The Court imposes the constraints of the economic freedom on the trade union, but does not grant the trade union the same freedom in establishing public order as the Court did in prior case law concerning the state. This leads to an imbalance in the sense, that the state enjoys more leeway in the application of the principle of proportionality than the trade union does, even though both are restricted by economic freedoms. This stricter application of the proportionality principle creates a structural subordination of the social right of the trade union under the economic freedom.<sup>47</sup> In the words of Azoulai, the Court connects social and economic rights, but the approach needs a correction in order to truly put both in an equilibrium.<sup>48</sup>

*ii) The expectation towards the Court: rebalancing social rights as potential the step towards the SME?*

The debate on how this correction might look creates the link to a possible impact of Art. 3(3) TEU. The problematic application of economic freedoms on aspects of the Member States' welfare systems and social standards was delivered right before the Lisbon Treaty introduced the

at 1353; C Barnard, *A proportionate response to proportionality in the field of collective action*, *European Law Review* 2012, 37(2), 117 – 135.

<sup>43</sup> L Azoulai, *supra n. 42*, 1335 – 1356 at 1348.

<sup>44</sup> Most prominently in C-112/00, 12.6.2003, *Schmidtberger*, ECLI:EU:C:2003:333.

<sup>45</sup> See cf. C-369/96, 23.11.1996, *Arblade and Others*, ECLI:EU:C:1996: 575, C-49/98, 25.10.2001, *Finalarte and Others*, ECLI:EU:C:2001:564; C-445/03, 21.10.2004, *Commission v Luxembourg*, ECLI:EU:C:2004:655.

<sup>46</sup> L Azoulai, *supra n. 42*, 1335 – 1356 at 1351.

<sup>47</sup> P Syrpis and T Novitz, *Economic and social rights in conflict: political and judicial approaches to their reconciliation*, *European Law Review* 2008, 33(3), 411 – 442.

<sup>48</sup> L Azoulai, *supra n. 42*, 1335 – 1356 at 1355.

already mentioned set of social rights in the CFR. Changing the Treaties therefore led to scholars investigating the imbalance of the Court's case law against the new setup in the Treaties.<sup>49</sup> For example, according to Damjanovic, the EU can be a SME if one (re-)interprets the internal market rules as social market rules: the provisions enshrined in the CFR reinforce, that market interests and social interests are *a priori* of the same rank and in balancing both none can be subordinated to the other.<sup>50</sup> The SME is therefore understood as the inclusion of the Member States' welfare systems in the interpretation of EU internal market law via the transmitter of the CFR's social rights and objectives. A similar idea, even though not directly investigated under Art. 3(3) TEU, was proposed by Schiek as the 'Constitutionally Conditioned Internal Market'.<sup>51</sup> According to Schiek, the internal market is socially conditioned due to the introduction of the new set of social rights. As Schiek argues, the CFR establishes not only that social rights are guaranteed on the same level as economic rights, but moreover a subtle hierarchy in favour of social rights. Her justification, that while all business-related rights (mainly Art. 16 and 17 CFR) are only guaranteed with inherent limitations, while this is not the case for several social rights (as Art. 28 and 31 CFR), might be questionable with respect to the recent dominant application of Art. 16 CFR, especially in its relationship towards social rights.<sup>52</sup> The consequence has however a striking resemblance to the idea proposed by Damjanovic: de facto Schiek's proposal posits that social rights guarantee the shaping of economic integration – as they would if one interprets the internal market rules as social market rules.<sup>53</sup>

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<sup>49</sup> F Costamagna, *supra n. 3*, 1 – 17 at 13; S A de Vries, *Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice*, *Utrecht Law Review* 2012, 9(1), 169 – 192 at 177 and 188; U Preis and A Sagan, *Europäische Sozialpolitik nach Lissabon*, in U v Alemann, E G Heidbreder, H Hummer, D Dreyer, A Gödde (eds.), *Ein soziales Europa ist möglich* (Springer) 2015, 43 – 62; V Šmejkal, *supra n. 3*, 1 – 13 at 7.

<sup>50</sup> D Damjanovic, *supra n. 12*, 1685 – 1718 at 1685 and 1716.

<sup>51</sup> D Schiek, *Towards More Resilience for a Social EU – the Constitutionally Conditioned Internal Market*, *European Constitutional Law Review* 2017, 13, pp. 611 – 640. See however for an at least implicit connection her argumentation with Art. 3(3) TEU on page 637. Similar D Schiek, L Oliver and G Alberti, *EU Social and Labour Rights and EU Internal Market Law*, Study for the EMPL Committee, 2015, 78 – 86.

<sup>52</sup> See S Giubboni, *supra n. 9*, 172 – 190; S Robin-Olivier, *Fundamental Rights as a New Frame: Displacing the Acquis*, *European Constitutional Law Review* 2018, 14, 96 – 113; J Prassl, *Freedom of Contract as a General Principle in EU Law? Transfers of Undertaking and the Protection of Employer Rights in EU Labour Law: C-426/11 Alemo Herron and others v Parkwood Leisure*, *Industrial Law Journal* 2013, 42(4), 434 – 446; for an overall profound critique on the impact of social rights see A Kornezov, *Social Rights, the Charter and ECHR: Caveats, Austerity and Other Disasters*, in F Vandenbroucke, C Barnard and G de Baere (eds.), *A European Social Union after the Crisis* (Cambridge University Press), 2017, 407 – 432, especially 418.

<sup>53</sup> D Schiek, *supra n. 51*, 611 – 640 at 629.

Concluding, among the many propositions to adjust the Courts case law in order to get rid of the imbalance created by the Court, reinterpreting social rights as part of the SME is one potential solution. Both proposals – next to many other variations of this idea – could be understood as a solid step towards Art. 3(3) TEU. They clearly boost the role of the social in the market.<sup>54</sup> The idea behind these concepts is that the application of social rights in the post-Lisbon SME has to differ from the free market scenario pre-Lisbon.<sup>55</sup> The next section will compare the Court's adjudication along these timeframes to see if such a social turn is visible.

## 2. Waiting for the social turn post Lisbon

This focus on social rights adjudication may provide a normative avenue on how the social can be strengthened, but it also relies on the active will of the Court to change its approach developed in *Viking* and *Laval*. Some will critique the Court for these cases and their implications for social rights, while others will praise the stronger emphasis on labour mobility and access to labour markets.<sup>56</sup> Judicial discourse on this is subject to change and the deliberative character of constitutional adjudication is open to arguments from both sides: to those for social rights and to those for economic freedoms. This highlights, what is also noted by Schiek, that the Court's adjudication – especially when it comes to balancing internal market integration and room for national social systems – has a, next to its legal impact, distinct political dimension.<sup>57</sup> This has direct consequences for the second strand of argumentation. Beyond the normative case for 'social market rules' or the 'constitutionally conditioned internal market', the Court has to display the political will to change its approach and adapt it to the new setup of the Lisbon Treaty. Investigating the CJEU's role as an architect of the SME has then however to ask if the Court is ready to follow up on such proposals and actually change his legal reasoning to balancing economic and social rights – and attached to this, his political role in constructing the internal – in the light of Art. 3(3) TEU. To understand how Art. 3(3) TEU impacts EU law, it is

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<sup>54</sup> Under Schiek's approach the mere application of social rights would not even constitute a restriction of an economic freedom, see D Schiek, *supra n. 51*, 611 – 640 at 638.

<sup>55</sup> D Schiek, *supra n. 51*, 611 – 640 at 637.

<sup>56</sup> E.g. H-W Micklitz, *Three questions to the opponents of Viking and Laval Judgments*, OSE Opinion Paper No 8/2012 who stresses the fact that new Member States joined the EU specifically to access the northern labour markets as it happened in both cases.

<sup>57</sup> D Schiek, *supra n. 51*, 611 – 640 at 619, 620 and 640; also G Dale and N El-Enany, *The Limits of Social Europe: EU Law and the Ordoliberal Agenda*, *German Law Journal* 2013, 14(5), 613 – 649 at 645 – 647; V Šmejkal, *supra n. 3*, 1 – 13 at 11: 'much more a political than a legal question'.



insufficient to solely rely on a normative argument that however gets no traction in the Court's adjudication. In order to analyse if the Court sees a new approach to balancing social and economic rights as necessary for the SME, one can compare the time frame before and after the introduction of Art. 3(3) TEU, and pose the question whether the Court explicitly used the provision to reverse its approach of *Viking* and *Laval*.

Scanning through judgements that are linked to the provision, and therefore feasible for this comparison, one comes across three judgements that are directly related to the provision.<sup>58</sup> The first one, *Santos Palhota et al*,<sup>59</sup> is a case, set directly after the introduction of Art. 3(3) TEU, where AG Cruz Villalón makes a strong case for rethinking previous case law through the lens of the SME, while the Court shows no interest in engaging the provision. The other two, *AGET Iraklis*<sup>60</sup> and *Corsica Ferries France SAS v Commission*<sup>61</sup> are the only cases where the Court is mentioning Art. 3(3) TEU explicitly.

*i) The rule: absence in the Court's case law*

In *Santos Palhota et al* the Court had to deal with a case that resulted from a criminal proceeding against Mr dos Santos Palhota for not drawing up the individual accounts necessary under Belgian legislation in respect of 53 Portuguese workers posted to Belgium. The referring court asked whether the Belgian social legislation was compatible with the freedom of services as guaranteed in Art. 56 and 57 TFEU.<sup>62</sup> Of particular interest for investigating the potential impact of Art. 3(3) TEU on this question is the opinion of AG Cruz Villalón.<sup>63</sup> Against the background of the SME he argues strongly for a wider margin of possible restrictions to economic freedoms in the name of social protection.<sup>64</sup> He emphasizes that

<sup>58</sup> T-57/11, 3.12.2014, *Castelnuovo Energia*, ECLI:EU:T:2014:1021 is not included in my comparison because the Court there only quotes Art. 3(3) TEU once (see para 211) without engaging in the provision at all in the actual reasoning.

<sup>59</sup> C-518/08, 7.10.2010, *dos Santos Palhota and Others*, ECLI:EU:C:2010:589.

<sup>60</sup> C-201/15, 21.12.2016, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:972.

<sup>61</sup> T-565/08, 11.9.2012, *Corsica Ferries France SAS v Commission*, ECLI:EU:T:2012:415.

<sup>62</sup> C-518/08, 7.10.2010, *dos Santos Palhota and Others*, ECLI:EU:C:2010:589, para 15.

<sup>63</sup> Opinion AG Cruz Villalón for C-518/08, 5.5.2010, *dos Santos Palhota and Others*, ECLI:EU:C:2010:245.

<sup>64</sup> *Ibid.*, para 3 where he already introduces his opinion by declaring that 'the present case provides, therefore, an opportunity to establish whether the finding that the European Union [also] pursues a social aim'. A

‘since 1 December 2009, when the Treaty of Lisbon entered into force, it has been necessary to take into account a number of provisions of primary social law which affect the framework of the fundamental freedoms.’<sup>65</sup>

This leads him to the conclusion that

‘as result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly.’<sup>66</sup>

Moreover, according to his opinion, in a SME, the restriction of a freedom ‘for the purpose of safeguarding a certain level of social protection’ can be carried out ‘without European Union law’s regarding it as something exceptional and, therefore, as warranting a strict interpretation’.<sup>67</sup> This interpretation of the principle of proportionality deviates from the Court’s prior case law since it is at odds with the structural precedence of economic rights over social rights established in *Viking* and *Laval*. One has to conclude that AG Cruz Villalón demands what many scholars called for post-Lisbon: a reversal of *Viking* and *Laval* in the light of the treaty amendments, from which he explicitly refers to Art. 3(3) TEU, Art. 9 TFEU and the CFR.<sup>68</sup>

In that respect the Court’s decision is telling as it does not address or implement any of the AG’s propositions. Rather, the Court explicitly references *Laval* and the established case-law, that the protection of workers provides a reason for restricting the freedom of services.<sup>69</sup> Notably, those cases represent an argument that existed long before the introduction of Art. 3(3) TEU.<sup>70</sup> Considerations on how Art. 3(3) TEU might affect the standing case law are missing completely. Against the background of the outspoken opinion of AG Cruz Villalón, the Court’s reliance on existing case law – while not considering the changes by the Lisbon Treaty at all – provides a clear hint that the Court does not regard Art. 3(3) TEU as a reason for rethinking its prior case

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similar argument with respect to Art. 28 CFR is made by the opinion of AG Trstenjak in C-271/08, 14.4.2010, *Commission v Germany*, ECLI:EU:C:2010:183 para 79, see V Šmejkal, *supra n. 12*, 8.

<sup>65</sup> Ibid., para 51.

<sup>66</sup> Ibid., para 53.

<sup>67</sup> Ibid., para 53.

<sup>68</sup> Ibid., para 52 specifically refers to Art. 31 CFR; see also V Šmejkal, *supra n. 3*, 1 – 13 at 8 –9. Despite specifics that differ, at heart his proposal aligns with those of Schiek and Damjanovic.

<sup>69</sup> C-518/08, 7.10.2010, *dos Santos Palhota and Others*, ECLI:EU:C:2010:589, paras 27 and 47.

<sup>70</sup> C-113/89, 27.3.1990, *Rush Portuguesa v Office national d’immigration*, ECLI:EU:C:1990:142, para 18.

law.<sup>71</sup> This conclusion is reinforced by studies that show that the introduction of the SME concept had no significant impact on the Court's jurisprudence in other areas of the internal market.<sup>72</sup> Overall, clearly not a sign for substantial moves towards a new conceptualization of the relationship between economic and social rights under this provision.

*ii) The exception: present but ineffective*

What is stated in *Santos Palhota et al* between the lines is confirmed by the two judgements that are the exception to the rule and make direct use of the provision. In 2012, the Court, for the first time, referred to the provision in *Corsica Ferries France SAS v Commission*, a case concerning state aid, and more specifically the Courts interpretation of what can be regarded as 'a reasonable private investor'.<sup>73</sup> This test was necessary to investigate whether that investor could have been prompted to contribute capital to a company active in public transport service.

Although cited, the impact of Art. 3(3) TEU on the 'private investor test' is hardly felt. One may find the Courts assessment that 'in a social market economy, a reasonable private investor would not disregard [...] the development of the social, economic and environmental context in which it continues to develop' promising.<sup>74</sup> The same applies for the statement that 'challenges relating to social responsibility and the entrepreneurial context are, in actual fact, capable of having a major impact on the specific decisions and strategic planning of a reasonable private investor'.<sup>75</sup> However, the Court then backpedals by emphasizing the limits of these considerations as this does not amount in 'an exclusively social, even political, objective, as it would otherwise go beyond the framework of the private investor test'.<sup>76</sup> In other words: Social considerations can be a part of the overall assessment, but the private investor test ultimately has to be carried out

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<sup>71</sup> See also the critique of V Šmejkal, *supra n. 3*, 1 – 13 at 9.

<sup>72</sup> S Pellizzari, Social Services, service providers and non-economic activities in the realm of the EU social market economy, in D Ferri and F Cortese (eds.), *The EU Social Market Economy and the Law – Theoretical Perspectives and Practical Challenges for the EU* (Routledge), 2019, 181 – 195; J J Piernas Lopez, Services of General Economic Interest and Social Considerations, in D Ferri and F Cortese (eds.), *The EU Social Market Economy and the Law – Theoretical Perspectives and Practical Challenges for the EU* (Routledge), 2019, 166 – 180; V Šmejkal, *supra n. 3*, 1 – 13.

<sup>73</sup> T-565/08, 11.9.2012, *Corsica Ferries France SAS v Commission*, ECLI:EU:T:2012:415.

<sup>74</sup> *Ibid.*, para 82.

<sup>75</sup> *Ibid.*, para 82.

<sup>76</sup> *Ibid.*, para 84.

along the lines of an economic rationale. Insofar, the introduction of Art. 3(3) TEU has no effect on the overall approach. Moreover, without any substantial guidelines on how to implement such social considerations, or in the words of the Court the ‘social context’ into the assessment, the impact of Art. 3(3) TEU remains marginal.<sup>77</sup>

The case that got most attention for referring to Art. 3(3) TEU is *AGET Iraklis* which was delivered in 2016.<sup>78</sup> The case deals with the Greek regulation that implements the directive 98/59/EC for the procedure of carrying out mass redundancies.<sup>79</sup> The provision in question, Art. 5 Law No. 1387/1983, goes beyond the requirements of the directive, by leaving the permissibility of mass redundancies to a decision of the Ministry.<sup>80</sup> *AGET Iraklis*, in the business of producing cement and a subsidiary of the French company Lafarge, decided to close one of its three plants in Greece in the process of restructuring its business. The Minister dismissed the execution of the mass redundancy as unlawful, since *AGET Iraklis* failed to provide sufficient evidence for the need of dismissing all employees. *AGET Iraklis* argued that the Minister’s decision was unlawful, since the Greek procedure for mass redundancies violates Art. 49 TFEU and Art. 63 TFEU read in conjunction with the freedom to conduct a business protected in Art. 16 CFR.<sup>81</sup> Consequently, the circumstances of the case pose the question how far economic freedoms can push back social rights, here represented in the provisions for mass redundancies. Notably, the Court references Art. 3(3) TEU to answer that question. It concludes that according to Art. 3 (3) TEU, the EU is not only interested in establishing the single market but also in protecting the sustainable development of Europe on the basis of a highly competitive SME.<sup>82</sup> The Court holds that:

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<sup>77</sup> S Civitarese Matteucci, *supra* n. 21, 51 – 66 at 60.

<sup>78</sup> C-201/15, 21.12.2016, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:972.

<sup>79</sup> Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225/16.

<sup>80</sup> C-201/15, 21.12.2016, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:972, para 10.

<sup>81</sup> *Ibid.*, para 20.

<sup>82</sup> *Ibid.*, para 76.

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‘The European Union is not only to establish an internal market but is also to work for the sustainable development of Europe, which is based, in particular, on a highly competitive social market economy aiming at full employment and social progress, and it is to promote, inter alia, social protection.’<sup>83</sup>

This potentially far reaching statement is then linked to the premise, that such an understanding makes it necessary to weigh the economic freedoms of the single market against the social policy goals enshrined in the Treaties, especially regarding aspects named in Art. 151 (1) TFEU.<sup>84</sup> This, at first glance, looks like a substantial improvement and modification of *Viking* and *Laval*.

Breaking these two paragraphs down does however unveil how little substance there is behind this statement. The Court considers social rights as a common interest that is in principal capable of restricting market and economic freedoms while at the same time simply reiterating where the provisions on social protection can be found. Therefore, the CJEU also mentions Art. 147 TFEU and Art. 9 TFEU, without engaging in concrete effects on the specific circumstances of the case. Furthermore, the actual application of this framework turns out to be highly favourable for the interests of the employer. The Court enforces the employer’s interests by upgrading them into the rank of a fundamental right via Art. 16 CFR, the right to conduct business.<sup>85</sup> This ‘upgrade’ enforces the imbalance to the detriment of social rights in a problematic fashion. Davies precisely concludes that the structure of the argument allows the re-evaluation of any piece of the social acquis or workers’ protection through the lens of the interests of the employer.<sup>86</sup> This is highly delicate if one keeps in mind that the idea of labour law is to impose restrictions on the employers’ interests for the sake of balancing the structural imbalance between both parties – and not allowing labour law protection only where the employers’ interests tolerate them. Along the same lines, Giubboni rightfully concludes that this structurally undermines the idea, that economic integration on EU level does not handicap the Member States social systems.<sup>87</sup> *AGET Iraklis* reverses this logic completely by establishing the necessity for Member States to justify any piece of social protection in the realm of EU law against the employers’ fundamental right of Art. 16 CFR. One might attest the Court a higher sensitivity in applying

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<sup>83</sup> Ibid., para 76.

<sup>84</sup> Ibid., para 77.

<sup>85</sup> Ibid., paras 84 – 90. D Schiek, *supra n. 51*, 11 – 640 at 638 correctly notes the lack of engagement by the Court to address social rights, especially Art. 27 and 30 CFR.

<sup>86</sup> A C L Davies, *supra n. 9*, 154 – 171.

<sup>87</sup> S Giubboni, *supra n. 9*, 172 – 190.

the balancing test,<sup>88</sup> but the framework of *AGET Iraklis* puts immense pressure on social rights.<sup>89</sup> The most obvious remark in that respect can be found in the opinion of AG Wahl who opens his considerations to the case by asking:

The European Union is based on a free market economy, which implies that undertakings must have the freedom to conduct their business as they see fit. What are the limits, then, to Member State intervention in order to ensure the job security of workers?<sup>90</sup>

It is the free market economy where social interests are juxtaposed to market interest, which are at the same time strengthened by upgrading economic freedoms and employers' interests to fundamental right status. For developing a SME however, such a line of reasoning provides little room. So how is the reference to the social objectives of the Court compatible with the actual outcome of the case? The crux of the case becomes understandable by taking a second look at the Court's reference to the provision in paragraph 76. For the potentially far-reaching statement above, the Court references *Viking*, one of the judgements that established the imbalance of social and economic rights.<sup>91</sup> *AGET Iraklis* therefore turns out to be an extension of *Viking* and not its reversal, even though the Court names the social objections introduced via the Lisbon Treaty. What can be seen in the structure of the balancing test then however does not come by surprise. On the opposite, one has to conclude that mentioning Art. 3(3) TEU in *AGET Iraklis* is mere lip-service and has no significant impact on the reasoning in the case. The reference to the SME therefore can also not be seen as the Court's attempt to rethink what was once laid out in the case law preceding the introduction of the SME.

### iii) Conclusion

In sum, we have to conclude that the social turn in Luxemburg post Lisbon did not happen – at least not in the sense that the Court is interested in rethinking the bigger implications behind

<sup>88</sup> K A Polomarkis, *A tale of two approaches to Social Europe: The CJEU and the Advocate General drifting apart in C-201/15 AGET Iraklis*, Maastricht Journal of European and Comparative Law 2012, 24(3), 424 – 437.

<sup>89</sup> On this S Giubboni, *supra n. 10*, 2006.

<sup>90</sup> Opinion AG Wahl on C-201/15, 9.6.2016, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:429, para 1 – my own emphasis.

<sup>91</sup> C-201/15, 21.12.2016, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:972, para 76 with reference to C-438/05, 11.12.2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Essti*, ECLI:EU:C:2007:772, para 78.

*Viking* and *Laval*.<sup>92</sup> To quote Šmejkal, ‘it is almost spectacular how the CJEU has been avoiding arguments based on the new “spirit” of the Treaty and its new objective of the social market economy’, also despite the repeated calling of AGs for revisiting the pre-Lisbon case law.<sup>93</sup> The most striking example is *AGET Iraklis* where the Court references Art. 3(3) TEU and attaches the provision to the balancing approach of *Viking*. Two conclusions can be drawn from this case study that compared the relationship of economic and social rights pre- and post-Lisbon. First, it becomes clear that the Court’s internal market adjudication, also under Art. 3(3) TEU, is mainly concerned with strengthening the economic freedoms. This goes hand in hand with the Court’s role as a political player in constructing the internal market.<sup>94</sup> If one then looks for an internal market architecture that displays a stronger interest of embedding social considerations into the internal market, it seems not promising to wait for the Court to enable Art. 3(3) TEU.<sup>95</sup> To be clear: this is not an objection to the soundness of normative models that ask for a stronger emphasis of social rights, especially regarding the CFR. What I laid out here is however an objection to the willingness of the Court to implement such models with respect to his role as a political player in the internal market architecture.<sup>96</sup> In order to understand how a SME can evolve, it is therefore not feasible to rely on the Court alone. For this thesis, this results in a second conclusion: that the focus on the other actors, those operating in the legislative avenue,

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<sup>92</sup> Clearly in respect to the latter judgement also C-83/13, 8.7.2014, *Fonnship A/S*, ECLI:EU:C:2014:2053 para 41. However, several judgements show that the Court is ready to modify its approach on a smaller scale without refraining from its overall approach to economic freedoms and social rights. The most telling examples are C-393/16, 12.2.2015, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, ECLI:EU:C:2015:86 and C-115/14, 17.11.2015, *Regio Post v Stadt Landau in der Pfalz*, ECLI:EU:C:2015:760 where the Court portrays a wide understanding of what to include as minimum pay and shows more sensitivity towards national wage-setting systems, see Z Rasnača, *First or among equals? The CJEU and the construction of EU social policy*, PhD thesis, EUI Department of Law, 2017, 136 – 142.

<sup>93</sup> V Šmejkal, *supra n. 3*, 1 – 13 at 10.

<sup>94</sup> R Hoffmann and S Wixforth, *Die soziale Dimension der EU – Zwischen Grundfreiheiten und Europäischer Säule sozialer Rechte*, Arbeit und Recht 2018, 1, 4 – 8 at 6; K Tuori, *European Constitutionalism* (Cambridge University Press), 2015, 227 — 237. This fits to the ‘Social Ideal’ of the Court visible in previous case law, see D Schiek, *Is there a Social Ideal of the European Court of Justice?*, in U Neergaard, R Nielsen and L Roseberry (eds.), *The Role of Courts in Developing a European Social Model* (Djof Forlag) 2010, 63 – 96 at 96.

<sup>95</sup> At least in the light of Art. 3(3) TEU depicting the Court as a guardian of social considerations in EU law (K Lenaerts and J A Gutiérrez-Fons, *The European Court of Justice as the Guardian of the Rule of EU Social Law*, in: F Vandenbroucke, C Barnard and G de Baere (eds.), *A European Social Union after the Crisis* (Cambridge University Press), 2017, 433 – 456) turns out to be inaccurate.

<sup>96</sup> Similar V Šmejkal, *supra n. 3*, 1 – 13 at 11.

has to be intensified to make substantial steps towards Art. 3(3) TEU. This is done in the next section.

### III. THE LEGISLATIVE AVENUE: INCAPABILITY TO OVERCOME THE SOCIAL DEFICIT OF THE EU?

The second possible architect of the SME on the European level is the legislator. While the impact of the legislative avenue is already acknowledged in the context of the general architecture of the internal market,<sup>97</sup> its role in constructing the SME is seen far more critical: research that explores the capacity of the legislator to construct Art. 3(3) TEU stresses its incapability to do so.<sup>98</sup> The following section lays out the basic argument behind that assessment, sheds light on its shortcomings and ultimately forms the argument that the legislative avenue is the most promising route to the SME goal.

#### 1. The EU's social deficit and its effect on the legislator's capacity to give teeth to the SME

The alleged incapability of the legislator to substantially contribute to the SME is embedded in the broader notion of the social deficit of the EU. The social deficit describes the imbalance between economic and social rights from the outset of European integration.<sup>99</sup> In the light of Art. 3(3) TEU, especially Scharpf advocates against the possibility of achieving a SME on the EU level with arguments based on the social deficit.<sup>100</sup> Scharpf links the structural imbalance in

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<sup>97</sup> Especially C Kilpatrick, *Internal Market Architecture and the Accommodation of Labour Rights: As Good as it Gets?*, EUI Working Papers LAW 2011/04; also S Garben, *The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union*, *European Constitutional Law Review* 2017, 13, 23 – 61.

<sup>98</sup> See the references in *supra* n. 11.

<sup>99</sup> See extensively F de Witte, *supra* n. 11, 6 – 17; C Joerges and F Rödl, *supra* n. 19; C Joerges and F Rödl, *Informal Politics, Formalised Law and the Social Deficit of European Integration: Reflections after the Judgements of the ECJ in Viking and Laval*, *European Law Journal* 2009, 15(1), 1 – 19; also C Barnard and S Deakin, *Social Policy and Labour Market Regulation*, in: E Jones, A Menon and S Weatherhill, (eds.), *The Oxford Handbook of The European Union* (Oxford University Press), 2012, 543 – 552.

<sup>100</sup> F Scharpf, *supra* n. 11, 211 – 250; F Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, *Journal of Common Market Studies*, 2002, 40(4), 645 – 670.



favour of economic rights to the idea of an asymmetrical involvement of European integration to the detriment of social rights that perpetuates the social deficit of the EU. According to him, the strong emphasis on judge-made law through the CJEU's case law and the expansion of European integration lead to narrowing the corridor for structural legislative reforms in favour of the social on the national and the European level.<sup>101</sup> He argues that, due to the Court's case law, economic rights structurally trump social rights on the EU level which then forces Member States to adjust their social market economies to the economic imperative of EU integration. In terms of coming closer towards the goal of Art. 3(3) TEU, he concludes that without severe structural changes to EU law, the EU cannot be a SME. The SME finds itself in a deadlock: The Court favours market integration over the protection of social rights and deepens the social deficit, which puts limitations on Member States in upholding their own social standards.<sup>102</sup> According to Scharpf, the EU legislator is not capable of reversing this either, since the EU not only overall lacks necessary competences to turn this development around, but also faces high requirements in fleshing out existing ones that potentially allow for beneficial legislation towards Art. 3(3) TEU. This leads to a corrosive downward spiral for the SME: EU adjudication that displaces the social in favour of the market, missing counterweights on the EU level, and no room to replace what is lost on the EU level through the national level.

For the purpose of exploring the legislator's capability of constructing the SME, Scharpf's argument needs to be dissected into three parts. Two of his observations are shared in this thesis. First, it is accurate that the focus on judge-made law, which puts a strong emphasis on the integration of the internal market, is problematic for pursuing Art. 3(3) TEU. As argued above, the Court's adjudication provides no hints for substantial steps towards the SME and therefore deepened the social deficit. Scharpf describes this aptly as negative integration through law since the Court's market friendly adjudication significantly narrowed the corridor for social policies.<sup>103</sup> Secondly, it holds true that the national level is put under pressure by this development. Integrating the market without giving substantial leeway for social considerations comes with

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<sup>101</sup> F Scharpf, *supra n. 11*, 211 – 250.

<sup>102</sup> This is most aptly represented in the cases mentioned above, *infra Part 2 II*.

<sup>103</sup> F Scharpf, *supra n. 11*, 211 – 250 where he draws on this concept first developed in F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press), 1999.

pushing back the diversity of national social systems.<sup>104</sup> In light of this development it is not promising to pursue the SME through national social policies. Such an equilibrium of European market integration and national social policies – what Ruggie once coined embedded liberalism<sup>105</sup> – is lost and cannot be restored.<sup>106</sup> It would also go hand in hand with a further decoupling of economic and social integration, effectively pushing the social to the national level.<sup>107</sup> Against the background of the specific demand of a social component on the European level through Art. 3(3) TEU this is counterproductive. Therefore, as long as Scharpf's argument is tackling the effect of negative integration on national social systems, this is in line with my argument.

What is however contested here is the conclusion that this process permanently limits the possibilities of the European legislator to construct the SME against the background of this development. It might be accurate that the legislator has been so far fairly inactive in pursuing Art. 3(3) TEU.<sup>108</sup> The finality of the assessment regarding the incapability of the EU to achieve the SME is however premature. As it will be shown in the following section, there is still room for manoeuvring towards the SME if one activates the full capacity of the legislative avenue.<sup>109</sup>

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<sup>104</sup> This was reinforced the moment the diversity of social systems became a threat to the stability of the Euro, see V Šmejkal, *supra n. 12*, 2; F de Witte, *supra n. 12*, LSE Working Paper 13/2015, 7.

<sup>105</sup> J G Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, *International Organization* 1982, 36, 375 – 415.

<sup>106</sup> D Ashiagbor, *Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration*, *European Law Journal* 2013, 19(3), 303 – 324; D Schiek, *supra n. 51*, 611 – 640 at 618.

<sup>107</sup> The same critique was made by F Scharpf, *supra n. 100*, 645 – 670 for the European Social Model; see also D Schiek, *supra n. 51*, 2017, 13, 611 – 640 at 618.

<sup>108</sup> However, recently the legislative avenue gained traction and produced several acts that relate to the SME. This will be analysed in detail below, *infra Part 3 and 4*.

<sup>109</sup> G De Baere and K Gutman, *The Basis in EU Constitutional Law for Further Social Integration*, in F Vandebroucke, C Barnard and G de Baere (eds.), *A European Social Union after the Crisis* (Cambridge University Press), 2017, 344 – 384.

## 2. Room for manoeuvring: Are lacking competences in the social policy sector the claimed deadlock for the SME?

### *i) Relying on internal market competences*

Countering the effects of negative integration through positive integration through law asks for competences to act. In that respect the incapability of achieving the SME is being attached to two arguments. First, it is argued, that the lack of competences in the social policy sector prohibits the EU from performing social policies that are necessary on the way to the SME.<sup>110</sup> Secondly, there is the argument that, while negative integration continues, requirements for European legislation are that high, that using the existing set of competences would not result in much progress towards the SME either. As EU legislation is dependent on the Member States' consensus, negative integration is likely to trump positive integration, since installing legislative counterweights is more difficult to achieve.<sup>111</sup>

However, both arguments overlook the possibility of building the SME through the internal market competences. As mentioned already, the Lisbon Treaty left the EU's competences in the social policy sector untouched, but introduced the SME goal as a compromise because there was no consensus on enhancing Art. 153 TFEU. If the social policy sector would be the only tool to implement the social into the market, the post-Lisbon setup would be systematically flawed: asking for a stronger emphasis on social considerations without providing any tools to achieve this goal would render the SME as pure window-dressing of the Treaties.<sup>112</sup> While Art. 153 TFEU was left untouched, such a tool was however installed by adding the mainstreaming clause of Art. 9 TFEU. Art. 9 TFEU asks for the general mainstreaming of social considerations in all areas of EU law when the EU is 'defining and implementing its policies and activities'.

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<sup>110</sup> F de Witte, *supra n. 11*, 20; A T J M Jacobs, *supra n. 2*, 111 – 128; F Rödl, *supra n. 11*, 150 – 161 at 155; V Šmejkal, *supra n. 3*, 1 – 13 at 3 and 4.

<sup>111</sup> F Scharpf, *supra n. 11*, 211 – 250 at 238. This is supported by recent work on legislative efficiency in the EU, especially with respect to the Lisbon Treaty, see J Bølstad and J P Cross, *Not all Treaties are Created Equal: The Effects of Treaty Changes on Legislative Efficiency in the EU*, *Journal of Common Market Studies* 2016, 54(4), 793 – 808 at 80.

<sup>112</sup> This does not exclude the possibility that the existing set of social policy competences can be used to address market dynamics as well. This is the case for the revision of the Written Statement Directive in light of the SME, *infra Part 4 I 2 i*).

Mainstreaming under this provision does therefore not extend the EU's competences, but re-adjusts the application of the already existing competences by ensuring that social considerations are respected.<sup>113</sup> Consequently, post-Lisbon, the moment the EU engages in legislative activity, it has to take in account considerations that are undoubtedly at the core of the social. For example, making sure that the activity of the EU respects 'the guarantee of adequate social protection' effectively safeguards the implementation of social considerations into EU law. By doing so, the provision can also build on a long-standing practice of using internal market competences for non-market purposes.<sup>114</sup> Making effective use of this provision could further be achieved by linking the horizontal social clause to the Commission's general Impact Assessment System.<sup>115</sup> Consequently, the Lisbon Treaty does offer a tool for implementing social considerations into EU law.

However, Art. 9 TFEU would be useless in the context of the SME, if the EU would lack any competences that could be applied to shape the SME. Horizontal mainstreaming of social considerations is only a path to Art. 3(3) TEU if existing competences allow for EU legislation in areas that fall into the realm of the SME. The SME, as put on display by Art. 3 TEU itself, remains however connected to the internal market. And in this area the EU holds a broad set of competences, especially with respect to the economic freedoms, that are, according to Art. 26(2) TFEU the core of the internal market.<sup>116</sup> The general competence for measures that ensure the functioning of the internal market (Art. 115 TFEU) exemplifies how the combination of Art. 3(3) TEU, Art. 9 TFEU and internal market competences creates room for manoeuvring towards the SME. Being bound by the both provisions, the functioning of the internal market is now conditioned by the necessity of taking social considerations into account. Consequently,

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<sup>113</sup> G De Baere and K Gutman (*n. 109*), 344 – 384 at 381 – 382.

<sup>114</sup> See B de Witte, A Competence to Protect: The Pursuit of the Nonmarket Aims through Internal Market Legislation, in P Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press) 2012, 25 – 46.

<sup>115</sup> See European Commission, Impact Assessment Guidelines, 15 January 2009, SEC(2009)92, available at [https://ec.europa.eu/smart-regulation/impact/commission\\_guidelines/docs/iag\\_2009\\_en.pdf](https://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf) (last accessed 30.9.2019) and for the idea of linking this to the usage of Art. 9 TFEU: Opinion of the European Economic and Social Committee on 'Strengthening EU cohesion and EU social policy coordination through the new horizontal social clause in Article 9 TFEU' (own-initiative opinion), 28.1.2012, OJ C 24, pp. 29 – 24, there 1.4.

<sup>116</sup> See generally Art. 4(2)(a) TFEU and Art. 46 TFEU, Art. 48 TFEU, Art. 50 TFEU, Art. 53 TFEU, Art. 56(2) TFEU, Art. 59 TFEU, Art. 64(2)-(3) TFEU. These provisions are fleshed out in more detail below when the thesis proceeds to look at legislative measures in detail, *infra Part 3 and 4*.

the body of internal market legislation, that fleshes out and substantiates the economic freedoms at the same time, has to be more responsive to social considerations post-Lisbon. This applies for any piece of legislation drafted post-Lisbon but also requires the re-evaluation of existing EU law.<sup>117</sup> Overall, this allows for regulating the most substantial aspect of the market economy on the European level in a way that aligns with the promise of the SME. One is therefore not dependent on a broader set of social policy competences to balance the social with the market. Additionally, the argument, that negative integration is likely to overpower positive integration, may be accurate with a holistic look on legislative efficiency in the EU, but cannot hold up to recent developments in the legislative avenue that are of interest for the SME. Relying on internal market competences to shape the SME is not just a theoretical consideration but a possibility that is explored in practice. The revision of the directive in the area of posting of workers, an instrument linked to the freedom of services of Art. 56 TFEU, does not only refer to Art. 3(3) TEU and Art. 9 TFEU, but is also based on the EU's competence of Art. 56(2) TFEU. How to deal with working standards in the case of posting is therefore solved through internal market means. Also, the recent establishment of the ELA, an agency that is designed to ensure fair labour mobility in the market, was carried out through internal market competences.<sup>118</sup> The case of the regulation that sets up the ELA is particularly interesting as it affects several economic freedoms while at the same time referencing the SME and Art. 9 TFEU.<sup>119</sup> Adding more social content to the market is therefore not only done without the social policy sector, but also through the combined application of Art. 3(3) TEU, Art. 9 TFEU and internal market competences. This proves the capability of the legislator to accomplish legislative counterweights against the background of negative integration. Admittedly, those legislative efforts were not available at the time of writing for those that advocate for the incapability of the EU legislator to make moves towards the SME. The possibility was however always available post-Lisbon and is not convincingly reflected in this strand of argumentation. Additionally, it has to be pointed out that Scharpf's argument bases on simplifying the relationship of adjudication and

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<sup>117</sup> For an illustration on the potential impact see P Vielle, How the horizontal social clause can be made to work: the lessons of gender mainstreaming, in N Bruun, K Lörcher and I Schömann (eds.), *The Lisbon Treaty and social Europe* (Hart Publishing) 2012, 105 – 122.

<sup>118</sup> Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 is based on Art. 46 and 48 TFEU.

<sup>119</sup> *Ibid.*, there recital one and two and *infra Part 3 II 2 ii*).

legislation by juxtaposing them in terms of negative and positive integration. Actually, both depend on each other as legislation responds to adjudication and vice versa.<sup>120</sup> Through that lens, it then not about which avenue is more difficult to pursue, but about how both actors work together towards results that align with the goals of EU integration, the SME included.

*ii) Are internal market competences per se unfit to deliver the SME?*

Some have formed the argument that internal market competences are per se unfit to deliver the SME because such an approach would automatically relegate social objectives to the benefit of economic objectives.<sup>121</sup> As de Witte puts it, even if the EU were to create a SME with its current competences, there would not much social included.<sup>122</sup> This line of reasoning exposes a preconception of Art. 3(3) TEU, in which the EU can only be a SME if it overcomes the emphasis on the internal market and regards the social as a (at least) equal goal. Essentially this rules out other possible interpretations of Art. 3(3) TEU without pointing to a hint in the Treaties to back up such a conclusion. However, a more market centred understanding is certainly not excluded in the post-Lisbon setup: no new competences for social policies, no avowal to Social Europe and a set of social fundamental rights with limited impact. Moreover, one finds a socially modified restatement of the existing competences that allow for a comprehensible regulation of the internal market.

And still, the argument made by de Witte, rules out an understanding in which the SME (just) presents the necessity of correcting the dynamics of the internal market when they collide with social considerations. This understanding might take the market as its starting point and limits the ‘highly effective market economy’ only where it becomes a necessity. But it is a possible interpretation of Art. 3(3) TEU, what becomes clear when one looks at the terminological roots of the SME. They hark back to the concept of the ‘*Soziale Marktwirtschaft*’, developed and popularised in post-World War II Germany and originally coined by Alfred Müller-Armack.<sup>123</sup> The

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<sup>120</sup> *Infra Part 3.*

<sup>121</sup> G Davies, *Democracy and Legitimacy in the Shadow of Purposive Competence*, European Law Journal 2015, 21(1), 2 – 22; F de Witte, *supra n. 11*, 20; S Garben, *Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers*, Oxford Journal of Legal Studies 2015, 35(1), 55 – 89.

<sup>122</sup> F de Witte, *supra n. 11*, 20.

<sup>123</sup> See D Ferri and F Cortese, Introduction, in D Ferri and F Cortese (eds.), *The EU Social Market Economy and The Law – Theoretical Perspectives and Practical Challenges for the EU* (Routledge, 2019), 1 – 14 at 6; I Lianos,

original idea behind the concept amounts in balancing a capitalist economy model with a strong government presence that aims at providing a social security net and social justice. Hence, to Müller-Armack, the role of the state in this system is centred around measures that secure the efficiency of the market on one hand, while intervening through social policies, where a free-flowing market alone would create social hardships on the other hand.<sup>124</sup> Consequently, *Soziale Marktwirtschaft* takes the free market economy as its starting point and combines it with social policy measures in order to synchronize both. The state may directly interfere in the market to ensure its awareness and respect towards social considerations. Even though Müller-Armack allows direct state governance to protect the social, the model is at its core concerned with protecting the market. This also becomes clear when one respects that Müller-Armack builds the *Soziale Marktwirtschaft* on the idea of ordoliberalism. According to this economic school of thought, which has its roots in the ‘Freiburg School’, the state’s prerogative lies solely on safeguarding a self-regulating market.<sup>125</sup> In this respect, initiating social policies is only accepted to create a playing field where competition flourishes. Solving existing social problems is therefore strictly part of the preservation of a functioning market. In sum, ordoliberalism and *Soziale Marktwirtschaft* share the common denominator of a strong government that sets out the rules for the market to operate. Müller-Armack’s proposition adds the nuance of active state intervention through social policies beyond purely preserving a market with effective competition. Those terminological roots of the SME provide a profound basis to interpret Art. 3(3) TEU. *Soziale Marktwirtschaft* remains a broad concept that is open for adjustments when transferred to

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Competition Law in the European Union after the Treaty of Lisbon, in D Ashiagbor, N Countouris and I Lianos (eds.), *The European Union after the Treaty of Lisbon* (CUP 2012), 252 – 284.

<sup>124</sup> A Müller-Armack, *Wirtschaftsordnung und Wirtschaftspolitik* (Rombach), 1976; A Müller-Armack, The Meaning of the Social Market Economy, in A T Pecock and H Wilgerodt (eds.), *Germany’s Social Market Economy: Origins and Evolutions* (Macmillan 1989), 82 – 86; more generally on the foundations of the idea see A Müller-Armack, *Stil und Ordnung der Sozialen Marktwirtschaft*, in N Goldschmidt and M Wohlgemuth (eds.), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck Tübingen 2008), 457 – 466 and A Müller-Armack, *The Social Market Economy as an Economic and Social Order*, *Review of Social Economy* 1978, 36(3), 325 – 321; on this also C Joerges and F Rödl, *supra n. 19*, 9. 6

<sup>125</sup> W Eucken, What Kind of Economy and Social System? in A T Pecock and H Wilgerodt (eds.), *Germany’s Social Market Economy: Origins and Evolutions* (Macmillan 1989), 27 – 45. For a broader overview see the composition of texts on this strand of thought in N Goldschmidt and M Wohlgemuth (eds.), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck Tübingen 2008), 43 – 323 and there again especially the text of W Eucken, *Die Politik der Wettbewerbsordnung – die konstituierenden Prinzipien [1952]*, 197 – 222.

the European level.<sup>126</sup> Transferring this model to the European context, Šmejkal and Šaroč aptly identify the *Soziale Marktwirtschaft* with regulatory policies that correct market failures and inequalities that arise from the market system and competition.<sup>127</sup> Therefore, they pursue a version of the SME that will not push for a prevalence of social rights over market interests and remains centred around an open market with free competition, only allowing ‘market-sensitive’ interference.<sup>128</sup>

This shows that there are other possible understandings to Art. 3(3) TEU in which relying on internal market competences is not problematic at all. Ruling out internal market legislation because the SME then turns out less social than desired, is ultimately a matter of preconceptions and not of the legal dimension of Art. 3(3) TEU.<sup>129</sup> Damjanovic rightfully points to this as well, when she observes that the EU is ‘restricted in developing its own redistributive welfare system’, which however ‘does not mean that the EU cannot be based on a social market economy’.<sup>130</sup>

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<sup>126</sup> For such new interpretations see S F Franke and D Gregosz, *The Social Market Economy. What Does It Really Mean?* 2013; U van Suntum, T Bohm, J Oelgemoller, C Ilgmann, *Walter Eucken’s Principles of Economic Policy Today*, in CAWM Discussion Paper No 49, 2011, 1 – 22.

<sup>127</sup> V Šmejkal and S Šaroč, EU as a Highly Competitive Social Market Economy – Goal, Options, and Reality, *Review of Economic Perspectives* 2014, 14(4), 393 – 410; see also the identical definition of a SME of D Damjanovic, *supra n. 12*, 1685 – 1718 at 1689 and there footnote 20: “The definition is widely based upon the main ideas of the German social market economy [...]”. With a similar interpretation of the SME, albeit in a much more critical vein, G Dale and N El-Enany, *supra n. 57*, 613 – 650 at 625, there footnote 55: ‘In our reading, by contrast, Europe continues to evolve as a social market economy, albeit in an increasingly ordoliberal sense of the term’. Notably F Rödl holds that the EU could never perform what Müller-Armack envisioned as *Soziale Marktwirtschaft* (F Rödl, *n. 11*, 150 – 161). This so, because the EU finds itself in a historical different setup than post World War II Germany and because the EU lacks competences to perform redistributive policies as envisioned by Müller-Armack. This misses the point insofar, as interpreting the SME along the lines of the *Soziale Marktwirtschaft* does ask for replicating the German experience on the European level. Measuring Art. 3(3) TEU against the conditions found in Germany essentially draws up a comparison that provides no further insights on the distinct *European* dimension of the SME.

<sup>128</sup> V Šmejkal, *supra n. 12*.

<sup>129</sup> The same critique applies to those who measure the SME against the background of Germany (F Rödl, *supra n. 11*, 150 – 161) or Continental or Scandinavian social welfare states (F Scharpf, *supra n. 11*, 211 – 250 who holds that the EU could never achieve the level of a SME, which he defines on 234 as a ‘Continental or Scandinavian type of welfare state’).

<sup>130</sup> D Damjanovic, *supra n. 12*, 1685 – 1718 at 1716; also C Semmelmann, *The European Union’s economic constitution under the Lisbon Treaty: soul-searching among lawyers shifts the focus to procedure*, *European Law Review* 2010, 35 No 4, 516 – 541. This is again especially true if one respects the terminological roots of Art. 3(3) TEU, since developing a social welfare state in Germany was never a primary product of the *Soziale Marktwirtschaft*, but driven by the German Constitution which holds in Article 20(1) that Germany is a ‘social state’; rightfully pointed out by G Dale and N El-Enany, *supra n. 57*, 613 – 649 and V Šmejkal, *supra n. 3*, 1 – 13 at 2.



*iii) Added value of Art. 3(3) TEU*

Finally, relying on the tools that were already available pre-Lisbon to achieve the SME in the post-Lisbon setup, may invite the question if there is any added value of Art. 3(3) TEU after all. Hypothetically, none of the legislative initiatives is dependent on the introduction of the SME to EU law. Amending the directive on posting of workers, or installing the ELA was also possible prior to Art. 3(3) TEU. Already back then internal market competences were used for non-market goals and also the Court protected such objectives next to economic freedoms.

This however overlooks two aspects where the SME is indeed impactful. Post-Lisbon, such a development is not possible but a legally binding necessity. De facto, exercising internal market competences in interaction with Art. 9 TFEU and Art. 3(3) TEU limits the leeway of the actors involved, as they now have to comply with these norms. For example, drafting a piece of internal market legislation that neglects social considerations completely, cannot be justified under Art. 115 TFEU anymore, as the ‘functioning of the internal market’ now includes respect for social considerations as well.

Secondly, the SME brings structure to the political dimension that lurks behind balancing the market and the social.<sup>131</sup> Deciding on how market integration affects the social systems of Member States has a clearly visible political component to it. Installing the goal of the SME impacts this political discourse on this issue by providing a reference point for those who seek the implementation of social objectives into EU law. For the here advocated focus on the legislator this is essential, since the legislative avenue processes these political impulses. Being able to argue against the background of a binding reference point in the foundations of EU law provides a justification to revise pieces of internal market law,<sup>132</sup> or to create an agency like the ELA.<sup>133</sup> It also allows to break the SME into ‘smaller pieces’ and create more specific reference points that then allow for new legislative initiatives.<sup>134</sup> Explicitly striving for a SME therefore does add

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<sup>131</sup> See G Dale and N El-Enany, *supra n. 57*, 613 – 649 at 645; for the necessity of the political process to bring the social to life see D Sindbjerg Martinsen, The European Social Union and EU Legislative Politics, in F Vandenbroucke, C Barnard and G de Baere (eds.), *A European Social Union after the Crisis* (Cambridge University Press), 2017, 459 – 476. With respect to the question if one wants to let the Court make these political decisions *infra Part 3 I 2 ii) (4)*.

<sup>132</sup> *Infra Part 3 II 2 i)*.

<sup>133</sup> *Infra Part 3 II 2 ii)*.

<sup>134</sup> That is the case with the European Pillar of Social Rights, *infra Part 4 I*.

value, especially to the political discourse on the EU's future path to respecting social considerations. As this political discourse is precondition to triggering legislative action, both aspects are inherently connected. The more the SME is used as a justification to start the political dialogue about remodelling EU law in the name of the social, the stronger the legal dimension of the SME will shine through.

### 3. Conclusion

This section highlighted the potential of the EU legislator to contribute to Art. 3(3) TEU. Such potential is usually overlooked, as the possibility of socially embedding the market through internal market legislation is ruled out prematurely. Also, in practice, recent developments do not fit the narrative of an absent legislator that is unable to correct the social deficit. Recent accomplishments, such as new legislation for posting of workers and the introduction of the ELA provide proof for the possibility to embed social considerations in the internal market through internal market legislation. The legislative avenue, although less explored, is after all, especially in comparison to the Court's adjudication on Art. 3(3) TEU, the most promising option to put the social in the SME.

## IV. CONCLUSION

This part explored the opposition of the market and the social through analysing the actors available at the European actors for constructing the SME. The Court's case law shows little interest to make use of the SME, even though two cases directly reference the provision. It became clear that the Court's main objective is the effectivity of the internal market and that resting hopes on the Court to activate the SME are premature. The mere enforcement of social rights does not provide a promising avenue towards Art. 3(3) TEU. However, this does not rule the Court out as an actor in SME's architecture, but simply shows that in the opposition of the market and the social, the Court is eager to push for the former.

The legislative avenue is less explored regarding Art. 3(3) TEU, but provides the potential framework for embedding social considerations into the market. This only becomes visible if one refrains from the idea that the legislator remains in a deadlock as long as the social policy competences are not substantially enhanced. Ten years in, one can also see that legislative efforts reference Art. 3(3) TEU and take exactly this avenue: constructing the SME through internal market law.

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In relationship to the role of the Court, this principally creates the possibility for the legislator to push for social considerations against the background of the market-friendly approach of the Court. The opposition of the market and the social can therefore be conceptualized along the lines of the relationship of adjudication and legislation. As a result, first contours of a conceptualization of the SME become visible. Those will be investigated more deeply in the next part against the background of examples where the SME impacted areas of EU law.

# Part 3

## *Pursuing the SME as a cooperative effort*

This part will now test the findings of Part 2 and trace the action of both actors in a field in which the SME concept recently gained traction. The first section will lay out the theoretical framework before the second section tests this framework in the area of posting of workers and the broader context of labour mobility.

### I. THE FRAMEWORK

Mediating social interests in the internal market law is mainly analysed through the spectre of the CJEU's case law. The European legislator however, due to its alleged incapability to contribute to Art. 3(3) TEU, was so far prematurely left out of the discussion. Especially after having analysed the Courts' struggle to create capacity for social interests next to the economic rationale, the question remains if the court is the actor best suited for this task.

#### 1. Mediating transnational effects and the need for European solutions

##### *i) Mediating in coordination with the national level*

Investigating which actor is best suited to mediate the conflict between the social and the market has to unpack a twofold question. First, there are actors available on the European and the national level. Therefore, one might form the argument that this process of mediating should ultimately be achieved at national level, hence asking to refer conflicts between social interests

and the market back to the national state as a form of self-constraint.<sup>135</sup> Such a model is not shared here for two reasons. First, the original set up of embedded liberalism – which was based on such leeway for national social policies – does not exist anymore.<sup>136</sup> As seen in the light of the EU's social deficit, the capacity for the Member States to correct the EU's legal frameworks' economic imperative has been narrowed significantly. Secondly, a substantial self-constraint is not visible in the Court's case law. The Court, as *Viking* and *Laval* exemplify, chooses to solve the conflict between the social and the market on its own. Also, in *AGET Iraklis*, the court – even though the Greek provision ultimately fails the proportionality test only due to being too opaque – creates very little leeway for social rights that could protect national solutions. The potentially infringed social rights at stake are not even substantially evaluated.<sup>137</sup>

Next to these general doubts, the yardstick advocated here is not dependent on referring the conflict back to the national level. Investigating Art. 3(3) TEU through the lens of internal market legislation means applying a *European* toolset. The idea of involving the Member State must be seen in light of the argument that substantial competences for social policies still remain with the Member State and not with the EU.<sup>138</sup> Those who argue that the ability to perform a broad array of social policies as essential to Art. 3(3) TEU have to look at contributions from the Member States since the Lisbon Treaty did not enhance the social policy sector. The apparent lack of European policies this then compensated by creating leeway for national social policies on the EU level. However, nor is focussing social policy competences necessary to provide a sound starting point for Art. 3(3) TEU and neither is, consequently, falling back on national contributions. The search for the actor to mediate the conflict will have to look away from the national level and investigate who should act on the supranational level.

*ii) Justifying the European solution: transnational effects of the single market*

Embedding the mediation of the market and the social at the European level needs a justification as well. Such a justification can be provided by viewing the mediation on the European

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<sup>135</sup> Effectively, such an approach aims at reinstating the idea of embedded liberalism, see cf. J Mulder, *Responsive Adjudication and the Social Legitimacy of Internal Market Law*, *European Law Journal* 2016, 22(5), 597 – 620 at 603; L Niglia, *Eclipse of the Constitution {Europe Nouveau Siècle}*, *European Law Journal* 2016, 22(2), 132 – 156.

<sup>136</sup> See *infra* Part 2 III 1 and *supra* n. 106.

<sup>137</sup> *Infra* Part 2 II 2 ii).

<sup>138</sup> *Infra* Part 2 III 2 i).

level as a necessary compensation for the incapability of the national level to decide on issues with transnational implications and effects in a satisfactory fashion.<sup>139</sup> The core of this argument is – in the overall context of comitology – aptly described by Joerges and Neyer:

‘the legitimacy of governance within constitutional states is flawed in so far as it remains *inevitably one-sided and parochial or selfish*. The taming of the nation-state through democratic constitutions has its limits. If and because democracies presuppose and represent collective identities, they have very few mechanisms ensuring that ‘foreign’ identities and their interests be taken into account within their decision-making processes.’<sup>140</sup>

How does this translate into an argument for a mediation of the market and the social on the European level? Joerges and Neyer point to the limits of the legitimacy of national institutions as they are necessarily primarily concerned about the national interests, without taking foreign interests into account that might be affected by the decision on the national level. In other words, the national institutions of one Member State are not fit to decide (alone) on conflicts that have a transnational dimension, since one decision causes transnational effects for another Member State. Due to this chain reaction caused by one actor in a transnational setup, the national institution is unable to ensure that foreign interests are sufficiently considered in the national decision-making process. As Somek aptly holds, the economic freedoms of the internal market give rise to these transnational effects as they allow for cross-border transactions which then ‘serve as the means by which one democratic constituency is confronted with the choices made by others, for example, if as a result of a disparity of product regulations a commodity is barred from entering the market of another country.’<sup>141</sup> Mediating social interest in the internal market entails such a scenario since national decisions on social policies influence the conditions of the market as they are locational factors which create competition amongst the social systems.<sup>142</sup>

<sup>139</sup> J Mulder, *supra n. 135*, 597 – 620 at 600 – 605; J Mulder, *Social Legitimacy in the Internal Market: A Dialogue of Mutual Responsiveness* (Oxford Hart Publishing 2018), 9 – 10; C Joerges and F Rödl, *Das soziale Defizit des Europäischen Integrationsprojekts*, *Kritische Justiz* 2008, 149 – 165 at 155; A Somek, *The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement*, *European Law Journal* 2010, 16(3), 315 – 344.

<sup>140</sup> C Joerges and J Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, *European Law Journal* 1997, 3(3), 273 – 299 at 294 – emphasis added by the author.

<sup>141</sup> A Somek, *supra n. 139*, 315 – 344 at 321.

<sup>142</sup> One example is posting of workers (*on this infra Part 3 II 1*), another are non-standard work forms (*see infra Part 4 I 2 i*)).

This interdependency of decisions in the internal market asks for a mediator that will encompass not just national interests in his decision-making. This however, is only guaranteed on the European level, ideally through decision-making that includes every state affected. Consequently, talking internal market law means talking about European solutions while national solutions tend to fall short. The latter remain uninformed by the conditions of the market and try to counter-balance the markets' impact instead of aligning to its standards. The lacking capability to sufficiently address the transnational effects on the national level therefore triggers, as the other side of the same coin, the legitimacy of a European decision resulting from the ability to perform a compensatory function.<sup>143</sup>

The other side of embedding the mediation of the conflict on the European level is the overriding of national decision structures that are unable to respond problems that cause transnational effects. As Somek illustrates, as a consequence of this – using his terminology – ‘argument from transnational effects’, these national decision structures will be gradually removed, as they are not fit to accommodate to the transnational interests of the integrating market.<sup>144</sup> This poses the question, how one assures that the argument from transnational effects does not end up legitimizing the derogation of the social in favour of the rationale of the market. As Somek notes, the argument bears the inherent danger that it slips ‘into a freewheeling rampage of economic due process’.<sup>145</sup> It also needs to be added that this logic bears the danger of establishing a narrative where integration through the market becomes self-serving and subject to circular reasoning. After all, empowering the market causes more transnational effects which then again ask for supranational solutions which are heavily influenced by the rationale of the market. The mediation of transnational effects therefore has to involve creating a counterpart to this dynamic in light of the social to balance out this dynamic. This aspect will be of importance shortly, but for now we can record that transnational effects generally legitimise the mediation of conflicts between the market and the social on the *European* level. Before exploring potential ways of establishing this balance to constrain the argument from transnational effects, one needs to find an answer to the question which European actor should mediate the transnational effects.

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<sup>143</sup> C. Joerges and F. Rödl, *supra n. 139*, 149–165 at 155; C. Joerges, Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form in R. Nickel and A. Greppi (eds.), *The Changing Role of Law in the Age of Supra- and Transnational Governance* (Nomos) 2014, 127–179.

<sup>144</sup> A. Somek, *supra n. 139*, 315–344.

<sup>145</sup> A. Somek, *supra n. 139*, 315–344 at 332.

## 2. The case for the European legislator

### *i) Narrowing down the ‘argument from transnational effects’*

Generally, scholars recur on the argument from transnational effects to in principle justify the role of adjudication by the CJEU in internal market law. It serves as the starting point to investigate how the court *in concreto* proceeds to establish social legitimacy through its case law when it decides on the social in the market.<sup>146</sup>

However, this does not capture the whole problematic and neither does it exhaust the full potential of the argument from transnational effects as such. Taking a closer look at why transnational effects inform the choice of the actor supposed to solve internal market conflicts, it should be noted that the argument is not confined to the CJEU. It justifies a supranational solution but does not imply that only the Court can mitigate these transnational effects. Next to the CJEU, the European legislator is capable of mitigating transnational effects as well.<sup>147</sup> Hence, it becomes clear that the argument from transnational effects ultimately asks us – next to drawing a distinction along the lines of ‘supranational v national’ – to distinguish between adjudication and legislation. In other words, next to the question if transnational effects allow for a European mediation of the problem, one also needs to find an argument why this mediation should be achieved through adjudication and not through the legislator. Especially, if Art. 3(3) TEU is directed at the internal market, the European legislator has to be considered as a key actor for mediating this conflict. While the legislator may be constrained in the social policy sector due to lacking competences, this is not the case for the internal market.<sup>148</sup>

### *ii) Mediating transnational effects beyond the CJEU – what brings a focus on the legislator to the table?*

Both options, mediation through the CJEU’s case law or through legislative action, are not necessarily exclusive. Clearly, the legislator is unable to regulate every single conflict between the market and the social, as there are simply too many. Without a regulation in place, the

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<sup>146</sup> Most recently J Mulder, *supra n.139*; see also M Dani, *Rehabilitating Social Conflicts in European Public Law*, *European Law Journal* 2012, 18(5), 2012, 694 – 710.

<sup>147</sup> A Somek, *supra n. 139*, 315 – 344 at 332; M Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*, (Hart Publishing) 1998, 152.

<sup>148</sup> See above *infra Part 2 III*.



CJEU has to solve the conflict by default. Additionally, and beyond this clear-cut scenario, internal market legislation will often involve the CJEU by providing a legislative outline that includes guidelines that are up for interpretation by the Court. Often legislation also is a direct response to the Court's action. Hence, arguing for the legislator to mediate transnational effects should not be misunderstood as arguing against a role of the CJEU in this process. The version of the argument of transnational effects I am developing here is one that includes both actors and acknowledges that both have valid roles in the architecture of an internal market that is responsive to social issues to ultimately live up to the promise of Art. 3 (3) TEU. That being said, what is indeed claimed here is that the role of the European legislator – having in mind the strong emphasis new approaches to support social rights through the courts' spectre – is underappreciated in this scenario.<sup>149</sup> Especially, when it comes to providing a detailed framework for securing social considerations against the market integration friendly case law of the Court. This becomes clearer when one underpins the distinct advantages of the legislative process regarding transnational effects in contrast to the mediating process through a single court.

(1) *CJEU: Individual cases and the difficulties to create a coherent framework*

First, the CJEU is structurally limited by having to work with individual cases as the material for the Court's adjudication is dependent on preliminary references by the national courts (cf. Art. 267 TFEU). Unlike the legislator, who can go through various scenarios, weigh in on different – also hypothetical – circumstances to come up with a fitting outline of the legislative measure, the Court has to decide on the facts of the case and provide a solution that solves the question at hand. At the same time the legitimacy of judicial-making is dependent on providing a general framework that can be applied to future cases. Against the background of individual cases this results in establishing general criteria which however lack sensitivity towards specific problems that arise in future cases.<sup>150</sup> In their combination, developing a sound framework beyond the individual case becomes difficult.

These difficulties are on full display in *AGET Iraklis*. In case, the Greek provision is hardly a representative example of how national labour law systems cope with mass redundancies. The Greek provision, that basically referred the decision entirely to the minister, created a situation where the decision to opt for a mass redundancy and terminate a site was completely out of the

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<sup>149</sup> For the reasons see *infra Part 2 III 2*.

<sup>150</sup> See F Scharpf, *supra n. 11*, 211 – 250 at 240.

hands of the employer. However, neither does the directive demand such a drastic solution, nor is this representative for the other Member States. Still, the CJEU has to mediate the conflict, with an excessive provision as the starting point. This might explain why the rights of the employer are so prominently featured in the decision, but it also initiates a line of case law that affects future cases. If ‘hard cases make bad law’, and *AGET Iraklis* seems to confirm this saying, one should also note that such cases can be the start to a rough ride when adjusting this jurisprudence to the more average systems in place for mass dismissals becomes necessary in future cases. Developing comprehensive case law in these difficult questions is paramount for the legitimacy of the CJEU’s case law. Yet, with no influence on the selection of the cases, putting such a coherent framework together is a task in itself that might take years of jurisprudence.

(2) *Safeguards in the legislative process that mediate transnational effects*

On the flipside, the legislative process is suited to address not just individual cases but is interested in developing a general framework to mediate conflicts. Although adjudication through the Court is ideally also interested in solving lines of caselaw in a cohesive fashion, the legislative process provides tools that are better suited to create such a framework. A sound architecture of a SME is ultimately more than just the sum of individual case law. This is ensured by four attributes one can ascribe to the legislative process: it is participatory, inclusive, more contextual and provides more room for an in-depth analysis.

The legislative process is participatory in the sense that it involves multiple actors. As the result, the legitimacy of the regulation and the compromises that are made on the way is being increased. In comparison, the CJEU may have the opportunity to hear parties and acquire expertise from other sources, e.g. from the opinions of the Advocate General, but ultimately the Court makes the final decision – not being dependent on other actors. In legislative avenue many actors get the chance of giving statements and contributing in the process of drafting legislation. Art. 115 TFEU provides a striking example as the Council, the European Parliament, and the European Economic and Social Committee have to be included. Especially, the actor mentioned last is fit to provide information on specifics of the diverse social systems on Member State level as the European Economic and Social Committee proceeds his work in three groups, two of them explicitly representing the interests of the employers (‘Group I’) and

the employees respectively ('Group II').<sup>151</sup> This allows social interests to be addressed by multiple actors and the representation of a broader spectrum of political interests. With respect to reaching a legitimate result, the more actors one involves, the more input and dialogue one creates. That is why Garben is correct when she notices that the legislative process in the social policy sector is better suited to provide legitimacy since the social partners bring expertise in questions of labour and social law to the table.<sup>152</sup> This dialogue between actors is, which is not surprising and not even a specific shortcoming of the CJEU, far more developed in legislature than it is in adjudication of courts.

In addition, the legislative avenue is more inclusive towards the Member States. It actively involves the Member States and gives them the opportunity to voice the need specifics of their social systems. This is crucial as the legislative process ensures the dialogue between European and national interests that is lacking in the above analysed case law of the CJEU. The crucial difference lies in the fact, that the court may practice a form of self-restraint or discretion towards solutions of the Member States, whereas the legislative process actively involves the Member States through the Council in the *decision-making process* itself. Those affected by the transnational effects are not just passive recipients of the decision, but active participants of the process towards the decision. If one takes another look at Art. 115 TFEU one also has to note that the provision even asks for a unanimous decision by the Council to take legislative action. Admittedly, this also slows down the legislative process as Member States can block or hamper the process. Nonetheless, a scenario where every single Member State is guaranteed the possibility to take part in this mediating process is a strong safeguard for creating legitimacy. The necessity to come to a compromise assures that actors will concede a point to achieve the overall goal, hence giving other perspectives room as well. Including the Member States' interests in this fashion therefore also provides for a high level of transparency as one will be confronted with the whole spectrum of conflicting interests. Gathering this information through the involvement of the Council is key in understanding the transnational effects at stake as a whole, which ultimately will make for a sounder mediation of the conflict.

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<sup>151</sup> See <https://www.eesc.europa.eu/en/members-groups> (last accessed 30.9.2019).

<sup>152</sup> S Garben, *supra n. 97*, 23 – 61. Notably for the internal market such a body of expertise was missing so far. However, this gap can potentially be filled by the ELA's activity in questions of fair labour mobility, *infra Part 3 II 2 ii*).

Furthermore, the legislative process is more contextual in the sense that it can also tackle problems and follow-up questions that are linked to the overall picture of the pressing issue.<sup>153</sup> The Court can solve a certain conflict, but it cannot operate with multiple obiter dicta to acknowledge the overall picture and the overall impact a key decision might have. When the CJEU is asked to give its interpretation in a specific case, the palpable difficulty stems from the tendency to develop the solution against the background of this one specific scenario. In a legislative process however, the chances are, that – also through the more inclusive and participatory nature of the process – problems will be addressed in a holistic manner which results in a more sound solution.

This goes hand in hand with a more ‘in-depth’ analysis.<sup>154</sup> Having several actors with different interests involved in the process broadens by definition the exchange of arguments. This consequently raises the quality of how transnational effects are understood and addressed. Additionally, the legislative process allows to recur on a level of expertise that is realistically impossible to achieve by one court. Here, next to financial resources, the resource of time is of importance. The Court has to eventually decide cases without having the opportunity to engage in broad research on the topic like one would expect it to happen in a legislative process.<sup>155</sup> The legislator can obtain expertise from third parties, run ‘fitness tests’<sup>156</sup> to re-evaluate already existing internal market legislation, or engage in impact assessments.<sup>157</sup> Such impact assessments allow the

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<sup>153</sup> The style of reasoning practiced by the CJEU is also not helping in this respect because it is often apodictic and in general not discursive at all, see J H H Weiler, Epilogue: The Judicial Après Nice, in G de Búrca and J H H Weiler (eds.), *The European Court of Justice* (Oxford University Press), 2001, 215 – 227.

<sup>154</sup> One example is the very detailed regime laid out in the Public Procurement Directive that establish a tight framework for rules to follow for participants, see Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94/65 and *infra Part 4 II 2*.

<sup>155</sup> See e.g. the studies carried out in the process of revising the PWD, including studies on wage systems and minimum rates regarding the former directive 96/71/EC that cover several hundred pages, available at <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7980&furtherPubs=yes> (last accessed 30.9.2019).

<sup>156</sup> See for the area of consumer law Commission SWD(2017) 209 final and [https://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=59332](https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332) (last accessed 30.9.2019).

<sup>157</sup> Further information on impact assessments: [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments\\_en#subsidiarity-and-proportionality](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments_en#subsidiarity-and-proportionality) (last accessed 30.9.2019). In the light of Art. 3(3) TEU it is noteworthy that the ELA can carry out such impact assessments specifically regarding the effects that the economic freedoms have on social standards, see *infra Part 3 II 2 ii*).

Commission to gather evidence and information on the economical, legal and political implication of the possible legislative action. Those impact assessments also encompass the CFR, hence asking for legislature that takes social rights in account. The necessary components of such an impact assessment report include essential aspects (e.g. ‘the environmental, social and economic impacts, including impacts on small and medium enterprises and competitiveness’<sup>158</sup>) that allow for a deeper understanding on how conflicts in the internal market may be tackled. Drawing the contrast to the court, it is striking how much more background information finds its way into the legislative avenue. Of course, there are valid reasons for this discrepancy as lacking resources, lacking man-power and simply the aspect of an immense workload for the judges. However, this does not change how much better equipped the legislator is to carry out this task.

(3) *The more democratic way*

Additionally, constructing the SME with an emphasis on the European legislator equals with putting the social in the hands of the democratically designated actor to establish new policies.<sup>159</sup> Hence, making a case for the European legislator goes hand in hand with making a case for a more democratic structure of the internal market in the light of Art. 3 (3) TEU. Empowering the actor with the strongest democratic legitimisation is therefore another upside to this approach. This gain in democratic process is of significant importance to create a SME that stands on a solid foundation, also in terms of the legitimacy of the policy choices one has to make inside such a system. Narratives of ‘old’ and ‘new’ Member States and ‘winners’ and ‘losers’ in the internal market are much less corrosive when there is a more robust democratic decision behind it.

(4) *Putting political decisions where they belong: the difference between compensating and creating*

Lastly, we need to hark back to the conceptual premise of the argument: that the legitimacy for a European mediation of these effects results from its compensatory function. The question

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<sup>158</sup> See *supra* n. 157.

<sup>159</sup> C Kilpatrick, *supra* n. 97,3. Even if one views the EU’s institutional capacity to socially embed the market as limited and per se as undemocratic (cf. F de Witte, *supra* n. 11, 20) one has to concede that a stronger emphasis on legislative efforts puts this process in the hands those that are more fit to solve these political questions.

when this act of compensating of a national shortcoming evolves in creating an overriding European narrative that replaces the national level is the dividing point among the mentioned scholars. The way Joerges, Neyer and Rödl, argue, ‘compensating’ means filling out a blank space of the national legal order with supranational law.<sup>160</sup> Then however, mediating conflicts between the market and national social systems through adjudication becomes a delicate enterprise as economic freedoms, just like in *Viking* and *Laval*, collide with *existing* social systems. This is not the scenario in mind by these scholars as there is no failure on the national level in terms of democratic legitimacy, but rather a social system, embedded in the given constitution, with deep roots in the nation state. In other words: there is no compensation, but an act of replacement. Consequently, Joerges and Rödl ultimately advocate to totally refrain from weighing market access and national security systems against each other.<sup>161</sup> In opposition, Mulder and Somek explicitly promote an understanding of the ‘compensation’-argument that covers the replacement of national regulations by the CJEU. The role of the CJEU is here not restricted to filling out blank spaces, but the argument is used to justify the Courts’ legitimacy to replace national structures. While the former strand of argumentation leads to a very constrained role of the CJEU, the latter empowers the CJEU to reform the national level through the market as means of dialogue.

The dispute between these authors sheds light on the underlying motive that is working behind the argument of transnational effects: the political role of the Court. Joerges and Rödl make this explicit by voicing strong scepticism towards the Court deciding conflicts that are in nature political (hence: unauthorized creating and not legitimately compensating).<sup>162</sup> The political nature of these decisions is indeed striking, as national social systems – which necessarily rest on political decisions – are now subject to reconfiguration by the CJEU. The wider understanding of ‘compensation’ of Mulder and Somek implicitly puts the CJEU exactly in the position to solve these political questions. It is this position that creates not only a political burden, but even more so the difficulty for the court to transmit these political implications into a sound legal argumentation. Without addressing and living up to the political implications of these cases, creating

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<sup>160</sup> C.Joerges and J Neyer, *supra n. 140*, 273 – 299 at 294.

<sup>161</sup> C.Joerges and F Rödl, *supra n. 139*, 149 –165 at 164.

<sup>162</sup> C.Joerges and F Rödl, *supra n. 139*, 149 –165 at 164: ‘The CJEU is not a constitutional court with encompassing powers. *It does not have the legitimacy* to reorganize the interdependence of the European economic and social constitution, let alone to *replace* the diversity of European social models [...]’ – my own translation and emphasis.

legitimacy through adjudication is doomed to fail. It is exactly this struggle that is visible in the case law analysed above and it should be clear in the scope of the argument of transnational determines the political role of the court in the internal market. As seen in the light of the cases that concern Art. 3 (3) TEU, this is even more true for the SME.<sup>163</sup>

That being said, drawing attention to the fine line between compensation and creation sheds light on the final benefit of mediating transnational effects through legislative measures. One avoids this conflict and addresses the actor that is fit to solve political questions by design – the legislator. That conflicts of the market and the social address highly sensitive political questions is then not problematic since the legislative process is designed to solve them. The tools and safeguards mentioned above serve exactly this purpose. What might be uncertain or shaky territory for the court (‘the creating’) is the natural habitat of the legislator. Therefore, if the architecture of a SME encompasses solving conflicts that are at heart political, the case for the legislator to solve them is complete.

### 3. The necessity of cooperation with the Court

This emphasis on the legislator is one part of the picture. The legislative avenue might be more suited to create a sound and detailed framework for mainstreaming social considerations in the market but, after all, the legislator is dependent on the Court. The final say on the constitution of the internal market stays with the Court since legislative acts remain subject to review in light of the economic freedoms.<sup>164</sup> This creates the necessity for the legislator to cooperate with the Court and take its adjudication into account to develop sustainable legislative acts in the market.<sup>165</sup> Bearing in mind the Court’s case law, one might regard this as a burden for the SME. After all, the Court’s adjudication on the conflict of the market and the social is primarily concerned with providing an effective enforcement of the economic freedoms. However, this would be premature for two reasons.

First, also the Court possesses distinctive advantages for mediating transnational conflicts that complement the weaknesses of the legislative avenue. The Court’s adjudication is first of all not dependent on existing regulation on the specific topic. Since the Court can decide basic conflicts

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<sup>163</sup> G Dale and N El-Enany, *supra n. 57*, 613 – 649 at 645 even form the argument that law is generally not fit to serve as an agent towards social justice or the social market economy because of its depoliticizing effect.

<sup>164</sup> E.g. the review of legislative efforts regarding the posting of workers under Art. 56 TFEU, *infra Part 3 II 1 i) – iii).*

<sup>165</sup> C Kilpatrick, *supra n. 97*.

by invoking economic freedoms anytime, identifying a potential conflict of transnational effects and providing a first solution is a role suited for the Court. While the legislator may be absent in crucial questions, the Court must provide a decision. Such a decision does not have to mediate the transnational effect once and for all, but it can trigger a dialogue with other actors. Here the court acts as the ‘instigator’. While the Court lays out the rough edges, the fine-tuning of such a framework is subject to the following dialogue. Additionally, the Court has the advantage of providing new impulses without being caught up in the long legislative procedure where conflicting political interests hamper progress. Entrenched positions, contradictory political interests on a topic might hinder the adjustments in the legislative avenue, but the Court is not subject to these limitations. If the reality of the market changes, the Court can provide an immediate solution to the changing circumstances by reinterpreting the framework in place.<sup>166</sup> The economic freedoms provide this opportunity at any time. This can provoke a legislative reaction aiming for a constant adjustment to the realities of the internal market.<sup>167</sup> This flexibility for the internal market architecture is, after all, enabled through the Court’s adjudication.

<sup>168</sup>

Secondly, just as one might ask the Court to impose a self-restraint on its adjudication for the national level, such a self-restraint is achievable towards the European legislator. This would ask the Court to respect the legislative bargain and to refrain from striking it down through primary law.<sup>169</sup> At the same time, the Court’s adjudication would have to leave leeway for the legislator to fill up the rough framework provided by the Court. This would grant the legislator the opportunity to modify its legislative output with respect to the new interpretation of the Court.

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<sup>166</sup> This notably happened in the area of posting of workers after the enlargement of the EU in 2004, see *infra Part 3 II 1 ii*).

<sup>167</sup> For posting of workers, the result of this dynamic is the Amendment Directive, for the development see *infra Part 3 II 2 i (1) – (3)*.

<sup>168</sup> C Kilpatrick, *supra n. 97*, 19.

<sup>169</sup> Notably, such a role for the Court is advocated by the President of the Court himself: K Lenaerts, The Court’s Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice, in in M Adams, H de Waele, J Meeusen and G Straetmans (eds.), *Judging Europe’s Judges* (Hart Publishing, 2013, 13 – 60. As a matter of fact, this willingness on behalf of the Court is not just clearly visible in the area of posting (*infra Part 3 II 1 ii*) but also on a wider scale as the Court actively protects legislative bargains that provide social protection. A recent example is C-414/16, 17.4.2018, *Egenberger*, ECLI:EU:C:2018:257 where the Court in para 81 emphasizes to respect ‘the balance struck between those interests by the EU legislature in Directive 2000/78’.



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## 4. Conclusion

Both avenues, adjudication and legislation, have a theoretical and practical place in the mediation of transnational effects. For the SME, however, the role of the legislator is underappreciated, especially against the background of the Court's struggle in applying the provision. It is the legislative avenue that is best suited to create a coherent framework to implement social considerations into the internal market.

This leads to the necessity of a dialogue. Both actors need to be responsive to each other and send signals on how transnational effects have to be mediated. Two components enable this dialogue. The Court needs to exercise a self-constraint that prevents developing the economic freedoms in trump cards that suffocate legislative efforts. The legislator needs to be willing to react to the Court's case law accordingly and stay active by continuously exploring and fine-tuning the framework. If these components are practically visible will be investigated in the next section.

## II. EXEMPLIFYING THE FRAMEWORK – POSTING OF WORKERS AND FAIR LABOUR MOBILITY

If the mediation of transnational effects in the internal market is carried out best through a cooperative approach between legislation and adjudication one should find examples cooperation moves the EU towards Art. 3 (3) TEU. For the field of the internal market law the way of coming to the recently introduced Directive (EU) 2018/957 in the area of posting of workers (hereinafter: Amendment Directive)<sup>170</sup> serves as a stellar example for how the cooperation of legislation and adjudication can steer an area of the internal market towards what encapsulates the idea of a SME: a stronger responsiveness for social matters in the framework of the market.

The Amendment Directive is connected to a rich a history of case law by the Court and legislative reactions to it. Looking at this history through the spectre of Art. 3(3) TEU, two points become clear. First, even prior to the introduction of the SME, the framework for posting of

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<sup>170</sup> Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Text with EEA relevance), OJ L 173/16.

workers was the product of a cooperative approach between the Court and the legislator. Secondly, post-Lisbon, this cooperative approach then moved the freedom of services towards Art. 3(3) TEU. As a result, the demanded impact of the SME becomes visible. Additionally, the introduction of the ELA brings another significant step towards Art. 3(3) TEU: installing an agency that safeguards the process of implementing social considerations into the internal market.

## 1. Pre-Lisbon: the transnational effects of posting

### *i) The initial impulse and the legislative answer*

The main example for the cooperative approach in the field of posting pre-Lisbon can be found in the circumstances surrounding the adoption of the first legislative framework for posting of workers, the Directive 96/71/EC (hereinafter: PWD).<sup>171</sup> The PWD is a response to the Court's case law, especially regarding the judgement *Rush Portuguesa*.<sup>172</sup> In that judgement the Court decided on a Portuguese undertaking that temporally provided services in the construction business with its own workforce in France. The Court held, that the undertaking could not be subject to supplier restrictions regarding recruitment or the obtaining work permits as it was exercised by the French office national d'immigration.<sup>173</sup> For this, the Court referred to of the protection of the undertaking's activity through the freedom of services (then guaranteed under Art. 59 and 60 EEC Treaty). This principally allowed posting of workers as part of the freedom of services, also indicating limitations for restrictions of this freedom through labour law standards of the state where the work is carried out. However, in the same breath, the Court emphasized that Community law does not preclude Member States from extending their legislation, or collective labour agreements to any person who is employed within their territory, regardless the country in which the employer is established. The same applies to the enforcement of those rules by appropriate means.<sup>174</sup> Consequently, with *Rush Portuguesa*, the Court triggered a debate

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<sup>171</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18/1.

<sup>172</sup> C-113/89, 27.3.1990, *Rush Portuguesa v Office national d'immigration*, ECLI:EU:C:1990:142. See also S Feenstra, How Can the Viking/Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?, in F Vandenbroucke, C Barnard and G de Baere (eds.), *A European Social Union after the Crisis* (Cambridge University Press), 2017, 309 – 343 at 327.

<sup>173</sup> C-113/89, 27.3.1990, *Rush Portuguesa v Office national d'immigration*, ECLI:EU:C:1990:142, paras 3, 12 and 19.

<sup>174</sup> *Ibid.*, para 18.

about an appropriate framework for posting of workers under the service of freedoms and its limitations due to labour law standards of the host state. The judgement stipulates the general admissibility of posting but, at the same time, points to the possibility of the host states applying their labour law standards to the posted workers. This provides the rough edges of a framework, but it does not give instructions on when these measures are to be considered appropriate, nor which conditions can be applied to the posted workers *in concreto*. This lays out the problem, but also creates a lot of uncertainty regarding concrete solutions and contours of a potential framework. However, by explicitly emphasizing the possibility to impose their own labour law standards, Member States had to see *Rush Portuguesa* as an invitation to start negotiating a framework to concretize the judgement, since interests among them varies significantly. Being a host-state, the focus is on defending the own labour standards and as a state that sends workers, the focus is on protecting the competitive edge that results from applying lower working standards. In sum, with *Rush Portuguesa*, the Court set the scene for a follow up discussion about a framework that respects its general instructions, while the specific conditions for posting are left for that debate. This puts its role as the ‘instigator’ on full display.

This debate was picked up in a Commission proposal for a directive on posting that specifically addressed the problems left unclear by *Rush Portuguesa*.<sup>175</sup> First, the Commission summarized and clarified the effects of the judgement. It points out, that the situation where lower working standards (than those in force in the place where the work is temporarily carried out) apply to the posted workers, result in unfair competition between undertakings and impairs equality of treatment between national and foreign undertakings.<sup>176</sup> Secondly, as a solution to the consequences of *Rush Portuguesa*, Art. 3 of the proposal delivers a set of mandatory host-state rules that must be respected by the undertaking that posts workers.<sup>177</sup> As the result of balancing the protection of host-state’s labour standards while at the same time guaranteeing the tool of posting, such a set of mandatory rules for posted workers then made its way into Art. 3(1) PWD.<sup>178</sup> The result was as follows: Art. 3(1) PWD listed areas as minimum payment, working time or holidays for which host-states can establish rules in order to apply them for posted workers. This minimum rule-set of Art. 3(1) PWD was interpreted as non-exhaustive, since Art. 3(7) PWD stated

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<sup>175</sup> Commission Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, 1.8.1991, COM(1991)230 final.

<sup>176</sup> *Ibid.*, 8 where this is deemed as ‘completely unacceptable’ from a ‘social point of view’.

<sup>177</sup> *Ibid.*, 15, 22.

<sup>178</sup> See C Kilpatrick, *supra n. 97*, 4 – 5.

that the application of more favourable terms and conditions of employment remained possible. Additionally, Art. 3(10) PWD allowed the application of terms and conditions beyond Art. 3(1) PWD in certain areas as long as this was done with respect to the equality of treatment between foreign and national undertakings. To avoid protectionist application of Art. 3(1) PWD, especially with respect to establishing these rules through collective agreements, Art. 3(4) PWD and Art. 3(8) PWD imposed restrictions on this possibility.

The PWD, as the first legislative framework for posting of workers, therefore – at least in the majority reading – solves the conflict triggered by *Rush Portuguesa* by providing minimum working conditions for posted workers, while at the same time allowing host-states to apply more favourable working conditions. Consequently, the broad freedom for host-states to impose their labour standards granted in *Rush Portuguesa* is resembled in the design of the PWD. Already at this stage it becomes clear how strong the impact of the Court's ruling is on the following legislature procedure: *Rush Portuguesa* puts host-states in a comfortable situation in terms of negotiating the conditions of the framework. As the starting point of the discussion on mediating the transnational effects of posting, the judgement sets the tone for legislative action in response to the Court. However, even though the PWD seemingly allowed going beyond the minimum standard, those more favourable working conditions of the host-states still pose a conflict to the freedom of services. The PWD therefore provides a first detailed outline for mediating the transnational effects of posting. At the same time, it leaves another potential area of conflict open.

### *ii) Readjusting the PWD through Laval*

This conflict materialized in *Laval*. Here, the host-state, Sweden, provided more favourable working conditions for posted workers than the home state, Estonia. Hence, the question if more favourable working conditions could prevail had to come into the focus of the Court. This set the scene for the next stage of dialogue on transnational effects of posting of workers. The Court – in contradiction to the prior assumption that the PWD provides for a non-exhaustive floor of rights – drastically restricted the application of host-states working standards to posted workers.<sup>179</sup> According to *Laval*, Art. 3(1) PWD provides a core of working conditions in a 'limited

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<sup>179</sup> C-341/05, 18.12.2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet avdelning*, ECLI:EU:C:2007:809.

list'.<sup>180</sup> Beyond this, the labour law standard of the home state applies. Art. 3(1) PWD is therefore reinterpreted from a minimum of rights to a maximum of what host-states can impose on posted workers.<sup>181</sup> By doing so, the variables shift: *Laval* promotes labour mobility in the name of the freedom of services while the corridor for national labour standards is significantly narrowed.

For the purpose of the argument formed here, it is the starting point of the Courts argumentation that is particularly interesting, rather than this outcome. Even though *Laval* strengthens Art. 56 TFEU, the freedom of services is not used to strike down the PWD.<sup>182</sup> The Court rather chooses the avenue of reinterpreting Art. 3(7) PWD – the provision at heart of the former interpretation of Art. 3(1) PWD as minimum set of rights – from *within* the framework of the PWD.<sup>183</sup> According to the Court, Art. 3(7) PWD only permits more favourable working conditions of the home state but not of the host-state, effectively shutting down any labour standards of the host state that go beyond Art. 3(1) PWD.<sup>184</sup> Although this reading of Art. 3(7) PWD can clearly be contested, one also has to admit that the wording of the Art. 3(7) PWD does not exclude the interpretation of the Court for the simple fact that the provision itself does not explicitly refer to the working standards at stake. It is certainly possible to interpret the provision either way, in relation to the working standards of the host-state, as much as in relation to the home state.<sup>185</sup> *Laval* may contradict the popular interpretation of the provision, but the Court still chooses to operate within the framework of the PWD to argue for his new approach.<sup>186</sup>

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<sup>180</sup> Ibid., para 77.

<sup>181</sup> C Kilpatrick, *supra n. 97*, 12.

<sup>182</sup> This possibility was discussed before *Laval*, see P Davies, *The Posted Workers Directive and the EC Treaty*, *Industrial Law Journal* 2002, 31(3), 298 – 306 at 301 and 305.

<sup>183</sup> C Kilpatrick, *supra n. 97*, 12 and 18.

<sup>184</sup> Ibid., paras 77 – 79. Regarding the second provision that supported the former interpretation, Art. 3(10) PWD the Court followed up its restrictive interpretation in *Commission v Luxembourg*. There the Court restricted relying on the public policy option of Art. 3(10) PWD by interpreting this provision extremely narrow, asking for a genuine and sufficiently serious threat to a fundamental interest of society, see C-319/06, 19.7.2008, *Commission v Luxembourg*, ECLI:EU:C:2008:350 and C Barnard, *The UK and Posted Workers: The Effect of Commission v Luxembourg on the Territorial Application of British Labour Law*, *International Law Journal* 2009, 38(1), 122 – 132.

<sup>185</sup> C Kilpatrick, *supra n. 97*, 18.

<sup>186</sup> L Azoulai, *supra n. 42*, 1335 – 1356 at 1353; C Kilpatrick, *supra n. 97*, 18.

Regarding the mediation of transnational effects of posting through a dialogue between the legislator and the Court, one has to acknowledge that the Court effectively does respect the legislative bargain of the PWD. The necessary self-constraint is visible: instead of striking the legislative output down via Art. 56 TFEU, *Laval* signals the necessity of resuming the dialogue on how to update the framework for posting to the needs of the internal market.

### iii) *Preliminary conclusions*

So far, following the development of posting before Art. 3(3) TEU, it becomes clear that the development of the PWD and a framework for posting strongly depends on the input of adjudication and legislation and how both play off each other. Already at this point, each actors' distinct advantages mentioned above are visible. The role of the Court as 'instigator' of such the dialogue is on full display in *Rush Portuguesa*. The legislator then engaged in that dialogue and presented a first solution. The PWD mediated the conflict between competitive labour mobility and protecting national social standards through a floor of rights for posted workers. Notably, the design of the PWD is directly linked to *Rush Portuguesa*. The result is first framework to mediate transnational effects caused by posting of workers. This framework was then drastically reinterpreted in *Laval*, effectively minimizing the room for protecting host-state social standards. Next to the harsh criticism that the Court received for turning the floor of rights in Art. 3(1) PWD into a ceiling, the clear signal for further cooperation by the Court in *Laval* often gets overlooked: despite having the opportunity, the Court respects the legislative compromise and avoids striking down the PWD. Here, the necessary self-restraint by the Court towards legislative output becomes visible. However, post-*Laval*, it was also clear that the dialogue on the effects of posting in the internal market had to move on, since the original intention of the legislative actors behind the design of the PWD was inconsistent with the position of the Court.

## 2. Post-Lisbon: towards the SME through the legislative avenue

The Pre-Lisbon dialogue produced a first framework to mediate the transnational effects for national labour law standards through posting. However, shortly before the introduction of Art. 3(3) TEU, *Laval* restarted the dialogue. In the Post-Lisbon phase, it is now interesting to see how this dynamic continues, now against the background of the legally binding goal of Art. 3(3) TEU. Legislative answers to the Court now also have to respect Art. 9 TFEU. According to the proposal of this thesis, this should result in a development that is more responsive to national labour law standards, and social considerations in the area of posting overall.

### *i) Legislative responses*

The legislative avenue has created several responses to the Courts' case law post Lisbon.<sup>187</sup> Those responses picked up pace the moment the Commission gave up its initial reluctance to respond to the Court under the newly elected Barroso-Commission.<sup>188</sup> It is the following period in which the legislative avenue started relying on the SME. That aiming for Art. 3(3) TEU and reacting to the Court's case law potentially fall together was already visible in 2011, when the Commission delivered fifty proposals for moving towards a SME – one of them being a potential reconfiguration of the PWD.<sup>189</sup> The context of three legislative responses to the Court are of importance for this development.

#### *(1) The failure of Monti II*

The first attempt to correct the outcome of *Viking* and *Laval* was the proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, commonly known as Monti II.<sup>190</sup> Monti II aimed at clarifying the relationship of social rights and fundamental freedoms by introducing a proportionality test corrected the structural imbalance mentioned above. According to Monti II, social rights should be able to restrict fundamental freedoms under the same conditions that apply in case of restricting the use of social rights via the fundamental freedoms.<sup>191</sup> The proposal

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<sup>187</sup> According to Z Rasnača, *supra n. 92*, 114 – 119 the Treaty-makers remained unresponsive towards the case law of the Court, also with respect to Art. 3(3) TEU and Art. 9 TFEU. This is only accurate in the sense that those provision do not directly reverse the Court's case law. However, their implementation leads to responses to the Court.

<sup>188</sup> J M D Barroso, *Passion and responsibility: Strengthening Europe in a Time of Change*, available at [https://europa.eu/rapid/press-release\\_SPEECH-09-391\\_en.htm](https://europa.eu/rapid/press-release_SPEECH-09-391_en.htm) (last accessed 30.9.2019). For Barroso, committing to review the effects of the Court's case law, was crucial to gather a majority to be elected in the first place, see Z Rasnača, *supra n. 92*, 121.

<sup>189</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions, Towards a Single Market Act, For a highly competitive social market economy, 50 proposals for improving our work, business and exchanges with one another, 27.10.2010, COM(2010) 608 final, there proposal 30.

<sup>190</sup> Proposal for a COUNCIL REGULATION on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, 21.3.2012, COM(2012) 130 final.

<sup>191</sup> *Ibid.*, there Article 2. At the same time the proposal obscures this goal by claiming of not wanting to reverse the Court's case law after all, see under 3.1. 'Legal elements of the proposal'.

directly linked this plan to the necessity of living up to Art. 3(3) TEU.<sup>192</sup> Monti II therefore represents a first effort of adjusting the internal market post Lisbon to the SME.

This attempt however was unsuccessful. Monti II was revoked by the Commission due to the pressure of national parliaments, mainly with respect to the lack of EU competences the regulation.<sup>193</sup> Overall, Monti II sheds light on the difficulties that are attached to a legislative attempt of, at least slightly, reversing the Court's case law. Even though Monti II left room for speculation on how it would have affected the Court's case law, it, in any case, represents the least promising way of engaging in a dialogue with the Court. Depending on one's interpretation, Monti II either aimed at the modification of the basic approach of the Court to social rights and economic freedoms or at codifying the Court's case law. This either risks a direct confrontation with the Court or the end of the dialogue by creating law that repeats the Court. Harking back to the distinct advantages EU actors bring to the table as mediators, this is not surprising. The Court's basic outline for the relationship of both is not up for renegotiation. Rather, reconfigurations in favour of the social have a higher chance of succeeding if they operate in the framework of the Court. This is put on display by the other reactions to *Laval* that ended up in amending the PWD.

## (2) *Enforcement Directive*

Responses through the legislative avenue then switched to corrections on the PWD. With the need for developing a framework in line with the Court's new guidelines post-*Laval* visible, the Enforcement Directive was the first step, even though it only brings slight adjustments.<sup>194</sup> The explanation lies in the fact that it was a compromise from the outset that tried to cater to those who requested changes of *Laval* and to those that were in favour of the decision.<sup>195</sup> This compromise is also enshrined in the Enforcement Directive in Art. 1(2) that states that it 'aims to guarantee respect for an appropriate level of protection of the rights of posted workers for the cross-border provision of services [...] while facilitating the exercise of the freedom to provide

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<sup>192</sup> Ibid., there under 3.1. 'Legal elements of the proposal'.

<sup>193</sup> European Commission, Withdrawal of obsolete Commission proposals, 16.4.2013, OJ L C 109/7.

<sup>194</sup> Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159/11.

<sup>195</sup> See Z Rasnača, *supra* n. 92, 127.



services for service providers and promoting fair competition between service providers, and thus supporting the functioning of the internal market.’ While the Enforcement Directive addresses several issues raised by *Laval*, the main point of controversy – the reinterpretation from a floor of rights to a maximum measure – is left untouched.<sup>196</sup> Notably, regarding the drafting process and the Directive itself, there is no existing reference to Art. 3(3) TEU or Art. 9 TFEU.

### (3) *Amendment Directive*

This changed when the Commission proposed amendments to the PWD as part of the Labour Mobility Package.<sup>197</sup> The explanatory memorandum of this proposal, the first step on the way to the Amendment Directive, immediately refers to Art. 3(3) TEU next to highlighting the importance of posting in the internal market.<sup>198</sup> In terms of the relationship with the Enforcement Directive, the Commission’s proposal emphasizes that the amendments address issues left out by the Enforcement Directive. In order to put the Amendment Directive into the context of the architecture of a social market economy, two features are of importance with regard to the here proposed concept of Art. 3(3) TEU.

First, the process in the background of drafting the Amendment Directive shows why the mediation of transnational effects has to rely on the legislative avenue since it ensures a substantial involvement of the Member States. Especially, with the divide between host states trying to protect their working standards, and sending states that profit through posting by their lower working standards as a competitive edge, their involvement is crucial. In case of the Amendment Directive this divide was on full display even before the Commission issued its first proposal.<sup>199</sup> On the one hand, a group of host states, advocated for amending and widening the provisions to impose their working standards according to the principle of ‘equal pay for equal work’.<sup>200</sup>

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<sup>196</sup> See Z Rasnača, *supra n. 92*, 129.

<sup>197</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of the 16 December 1996 concerning the posting of workers in the framework of the provision of services, 8.3.2016, COM(2016) 128 final.

<sup>198</sup> *Ibid.*, 2.

<sup>199</sup> Z Rasnača, *Identifying the (dis)placement of ‘new’ Member State social interests in the posting of workers: the case of Latvia*, *European Constitutional Law Review* 2018, 14, 131 – 151.

<sup>200</sup> See *supra n. 197*, COM(2016) 128 final, 4. The letter was jointly submitted by Austria, Belgium, France, Germany, Luxembourg, Netherlands and Sweden.

On the other hand, a group of sending countries, argued against a review of the PWD, seemingly content with its interpretation of the Court.<sup>201</sup> Mediating this conflict of interests is challenging in the legislative avenue. But in opposition to the Court, it is possible in a satisfactory way through compromising.

Secondly, with the Amendment Directive the framework became more responsive to social considerations. Two improvements, that were already part of the Commission's proposal, exemplify this. First, the Amendment Directive widens the scope of Art. 3(8) PWD to all sectors of the labour market for universally applicable collective agreements, hence going beyond the restriction for the construction sector.<sup>202</sup> This restriction was once introduced to avoid protectionism of home states through collective agreements. Widening the scope here, equals broadening the possibility to impose higher working standards. This goes hand in hand with more sensitivity towards social systems of host states. Secondly, the replacement of 'minimum rates of pay' to 'remunerations' is worth noting.<sup>203</sup> By doing so, the proposal does not only consider the Court's case of *Sähköalojen ammattiliitto ry*,<sup>204</sup> but also, as *Rasnača* aptly points out, achieves that Member States without a statutory minimum wage are now in line with the requirements of the PWD.<sup>205</sup> This also exemplifies how the framework is becoming more sensitive towards social systems of the Member States.

Another example was introduced by the Amendment Directive itself. Article 3(1a) Amendment Directive introduces that if the effective duration of posting exceeds twelve months, the Member States have to ensure, that all applicable terms and conditions of employment of the host state have to be applied to the posted workers.<sup>206</sup> This effectively limits posting under the minimum conditions of Art. 3(1) Amendment Directive to twelve months and implements the idea of equal treatment beyond this time frame. While this restricts the instrument of posting in the context

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<sup>201</sup> Ibid., 5. The letter was jointly submitted by Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania. Unsurprisingly, those countries argued that the idea of 'equal pay for equal work' seems not comparable with the internal market and that posted workers should generally remain under the legislation of the sending Member State.

<sup>202</sup> Ibid., 7.

<sup>203</sup> Ibid., 7.

<sup>204</sup> C-393/16, 12.2.2015, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, ECLI:EU:C:2015:86.

<sup>205</sup> Z *Rasnača*, *supra n. 92*, 132.

<sup>206</sup> Next to excluding some matters from this rule, the possibility to modify these standards through collective agreement remains under the requirements of paragraph 8. Also, the new regulation grants the possibility to extend this period to 18 months.

of the freedom of services, it realizes a higher standard of protection of working conditions at the same time. If one compares this to the Pre-Lisbon and Post-*Laval* scenario the point becomes even clearer. While the Amendment Directive seems to keep the *Laval*-concept of a maximum set of rights for Art. 3(1) PWD, which structurally favours the freedom of services, there is more sensibility for the host state's working standards for long-term use of posted workers.

#### (4) Conclusion

In sum, the legislative responses post-Lisbon shed light on how the dialogue with the Court resulted in steps towards Art. 3(3) TEU. The proposal of Monti II referred to the provision and, if implemented, would have curbed the Court's approach to reconciling social rights and economic freedoms. The Enforcement Directive is the first sign of implementing the Court's case law which however lacks a substantial strengthening of social considerations. Here, one also finds no reference to Art. 3(3) TEU. This changed immediately with the efforts to amend the PWD as part of the Labour Mobility Package. Comparing the results of that dialogue pre- and post-Lisbon, one can see the effects of striving for the SME. The provision is recited by the legislator and contributed to creating a new framework for posting that is more responsive to social considerations for this area of the internal market.<sup>207</sup>

#### ii) The ELA

Another significant legislative step towards the SME, that is inherently connected to the area of posting, is the establishment of the ELA through the Regulation 2019/1149/EU of the European Parliament and the Council of 20 June 2019 (hereinafter: ELA-Regulation).<sup>208</sup> The ELA was first announced in September 2017 by then president of the Commission Jean-Claude Juncker in order to ensure 'fairness in our single market'.<sup>209</sup> It aims at securing the application and enforcement of existing rules on fair labour mobility in the market by concentrating tasks

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<sup>207</sup> In a nutshell this embodies practically what was before (*infra Part 2 III 2 iii*) detected as the added value of the SME.

<sup>208</sup> Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, OJ L 186/21.

<sup>209</sup> J-C Juncker, *State of the Union Address 2017*, available at [https://europa.eu/rapid/press-release\\_SPEECH-17-3165\\_en.htm](https://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm) (last accessed 30.9.2019).

in one agency. Overall, the ELA's focus is to increase the consistency of EU policy of cross-border mobility, which creates the already mentioned overlap to posting of workers.<sup>210</sup>

The ELA-Regulation is a stellar proof for the capability of the legislator to develop the SME by means of internal market legislation, since it is based upon an array of the EU's internal market competences. The Commission's proposal is based on the Art. 46, 48, 53(1), 62 and 91(1) TFEU, effectively addressing the free movement of workers, the coordination of social security systems and the freedom to provide services under one legislative framework. The ELA-Regulation itself highlights the freedom of movement for workers, the freedom of establishment and the freedom to provide services in its first recital.<sup>211</sup> Consequently, the ELA affects the internal market beyond one specific economic freedom, but it aims at securing fair labour mobility in the internal market *as a whole* (Art. 2 ELA-Regulation). Fair labour mobility here refers to creating the framework that allows for labour mobility in the EU while at the same time providing safeguards that demand transparent conditions and prevent the abuse of varying social standards among the Member States. Consequently, the scope of activities (Art. 1(4) ELA-Regulation) also includes safeguarding the effective application of the PWD and the recent amendments to this directive for the posting of workers (Art. 1(4)(a) ELA-Regulation). However, if safeguarding the implementation of social considerations into the internal market under the label of fair labour mobility is the ELA's purpose, it does not come by surprise that the second recital to the ELA-Regulation references Art. 3(3) TEU and Art. 9 TFEU. In sum, the legal basis, as well as the intention of the ELA, aligns seamlessly with the here developed concept of the SME.

Having these basic outlines of the role of the ELA in mind, it becomes clear that the ELA has the potential to contribute to the development of a SME in various ways. What is however definitely beyond the ELA's mandate is taking on the role of the legislator. The ELA-Regulation clearly states that it does not intend to affect rights or competences that can be found on EU or Member state level, but to assist in enforcing the existing framework. To achieve that, the tasks of the ELA are broadly defined and range from supporting Member States and mediating conflicts, to carrying out analyses and risk assessments (Art. 4 ELA-Regulation).

Of course, it remains to be seen how effective these tools work. Many tools, like the improvement of information on labour mobility (Art. 5 ELA-Regulation), remain abstract and just

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<sup>210</sup> European Commission, 13.3.2018, proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority, COM(2018) 131 final, 2.

<sup>211</sup> *Supra n. 208*, recital 1.

oblige the ELA to ‘support’ Member States. The same can be said for the coordination of EURES (Art. 6 ELA-Regulation) or the general provisions for the cooperation and exchange (Art. 7 and 8 ELA-Regulation). Already from the terminology in the ELA-Regulation the lack of tools to truly enforce the legal framework becomes visible. Most tools use soft terms as ‘support’, ‘encourage’, ‘facilitate cooperation’ or ‘promote’. To that end, the effectivity of the ELA’s work is also highly dependent on the will of Member States to engage with the ELA. An example is the possibility for the ELA to engage with Member States, but only upon their request (Art. 7 ELA-Regulation). Similarly, conditions and terms of an arrangement for concerted and joint inspections will depend on the Member States’ cooperation (Art. 9 ELA-Regulation). However, the ELA-Regulation also provides a tool that is highly promising for the SME architecture. Art. 10 ELA-Regulation grants the possibility to carry out labour mobility analyses and risk assessments. Here the ELA has the possibility to investigate specific problems of labour mobility and provide input for the Commission and the European Parliament (Art. 10(3) ELA-Regulation). This potentially also encompasses cooperation with the social partners.<sup>212</sup> Overall, this creates a gateway for the ELA to be part of mediating the transnational effects of labour mobility. Bringing further expertise to the legislative avenue can enliven dialogue on new legislative initiatives to create a more balanced internal market. Here, even though in an indirect way, the ELA finds itself a valuable tool to engage in the dialogue on the SME.

Lastly, the relationship to the Enforcement Directive is worth mentioning. While Art. 3 of the Enforcement Directive embedded supervision and enforcement on the national level, the ELA aims at coordinating these structures on the European level. Emblematic is the idea of the bundling the relevant information on the ELA’s website.<sup>213</sup> Since transnational effects are solved best on the European level, establishing European structures of coordination is another step towards the SME.

Concluding, the ELA is another, potentially profound, step towards Art. 3(3) TEU that fits in the here developed framework of a SME. At its best, the ELA shields the process of embedding social considerations into the market by an effective enforcement of the existing tools while (indirectly) cooperating with the European Parliament and the Council through expertise, analyses and risk assessments. That labour mobility causes transnational effects was clear since *Rush Portuguesa*. Under Art. 3(3) TEU the EU legislator did not only reform the PWD to create a

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<sup>212</sup> Ibid., recital 20.

<sup>213</sup> Ibid., recital 11.

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better balance against the background of the Court's (overall freedom of services-friendly) adjudication, but also established an authority that ensures the application of this framework. Putting both aspects together, one sees which powerful results Art. 3(3) TEU can produce in the legislative avenue.

## Part 4

### *Outlook and potential: The exception to the rule?*

If the area of posting of workers and freedom of services serve as an example of how the dialogue between the Court and the legislator can pave the road to Art. 3 (3) TEU, the question remains whether such a development is unique. What Part 3 proved is that constructing the SME is possible, but to what dimension is this process already taking place? Art. 3 (3) TEU addresses all areas of the internal market and Art. 9 TFEU asks for mainstreaming of social consideration in all areas of EU law. Hence, a realistic picture of movements towards Art. 3 (3) TEU can only be painted by adopting a holistic perspective that investigates the entire internal market legislation.<sup>214</sup> This is however outside of the scope of what this thesis can cover. To position the so far findings in this broader context, this part will therefore point to two ongoing developments that underpin the architecture of a SME. The first section looks at ongoing impulses of the legislator pursued in the light of the SME. The second section then looks at EU competition law to exemplify how severe the struggle for implementing social considerations into the market rationale can be. Regarding the overall goal of this Part, the first section strengthens my argument and the framework it stands on, while the second section points to potential limitations in other areas of internal market law. This puts the findings of Part 3 into perspective and creates a more realistic picture of where the SME currently stands.

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<sup>214</sup> Even though not through the conceptual framework adopted here, such an overview is given by D Ferri and F Cortese (eds.), *The EU Social Market Economy and the Law – Theoretical Perspectives and Practical Challenges for the EU* (Routledge), 2019.

## I. FURTHER LEGISLATIVE IMPULSES IN THE LIGHT OF ART.

### 3(3) TEU: THE EUROPEAN PILLAR OF SOCIAL RIGHTS

#### 1. Potential and link to the SME

The example provided in this section for the willingness of the legislator to take further steps towards the SME is centred around the European Pillar of Social Rights (hereinafter: EPSR).<sup>215</sup> In fact, already the EPSR itself fits in the framework of a cooperative approach towards the goal of Art. 3 (3) TEU, even though there are some noteworthy differences to the area of posting.

The EPSR is a non-legally binding declaration issued by the European Parliament, the Commission and the Council on the 17.11.2017. It encompasses twenty principles that are laid out in three chapters: the creation of equal opportunities and access to the labour market, securing fair working conditions and principles to boost social protection and inclusion. Notwithstanding the soft-law nature of the EPSR, it still provides stellar potential for substantial moves towards a stronger social acquis and a more socially responsive internal market. Those principles address topics that, in theory, would boost the social pedigree of EU law tremendously, such as the right to fair wages, a work-life balance or unemployment benefits.<sup>216</sup> They are, as stated by the EPSR itself, however not legally binding. Recital 12 refers to the declaration as a mere guide, which – according to recital 14 – only becomes legally enforceable when the principles and rights are adopted by measures or legislation at the appropriate level.<sup>217</sup> Also, recital 18 clarifies that the EPSR does not entail an extension of the competences of the EU, but that its implementation is dependent on the existing framework. Consequently, a potential mode of cooperation regarding the EPSR has to differ the area of labour mobility, as PWD and ELA are legally binding answers given through existing competences in the internal market. The EPSR on the other hand, as a soft-law instrument, is not directly subject to adjudication of the Court and potential legislative answers to these decisions. Rather, the EPSR formulates a general direction for a social agenda on the European level that asks for voluntary cooperation between the different

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<sup>215</sup> Available at [https://ec.europa.eu/commission/publications/european-pillar-social-rights-booklet\\_en](https://ec.europa.eu/commission/publications/european-pillar-social-rights-booklet_en) (last accessed 30.9.2019); see also K Lörcher, *Die Europäische Säule Sozialer Rechte – Rechtsfortschritt oder Alibi?*, *Arbeit und Recht* 2017, 10, 387 – 393.

<sup>216</sup> *Ibid.*, there principle 6, 9 and 13.

<sup>217</sup> *Ibid.*, 8.



actors. How deep this agenda will be pursued depends on the willingness of the actors to bring the principles to life.<sup>218</sup> As recital 17 states, ‘delivering on the European Pillar of Social Rights is a shared political commitment and responsibility’. However, this also creates the necessity to cooperate and the dependency of fleshing the EPSR out by legislative means. Consequently, if the EPSR will contribute to the SME, this will happen through the here preferred framework of Art. 3(3) TEU.

Additionally this structural resemblance is also anchored in the EPSR itself since the first recital in the preamble connects EPSR’s the purpose to Art. 3 TEU and references the SME.<sup>219</sup> Recital 2 refers to the mainstreaming clause of Art. 9 TFEU, essentially pointing to the tool of implementing social considerations into the internal market and the intention of the EPSR to strengthen this process.<sup>220</sup> Regarding the latter, the preamble states in recital 11 that the ‘European Pillar of Social Rights should be part of wider efforts to build a more inclusive and sustainable growth model by improving Europe’s competitiveness’.<sup>221</sup> More specifically, recital 7 directly describes the EPSR as an instrument to balance the integrity of the internal market with a sustainable growth and promotion of economic and social progress.<sup>222</sup> Consequently, the EPSR addresses the conflict that is of interest for this thesis: fostering convergence towards higher social standards while at the same time ensuring the competitiveness and well-functioning of the single market.<sup>223</sup>

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<sup>218</sup> For an outlook and potential conflicts along the way see P Vesan and F Corti, *New Tensions over Social Europe? The European Pillar of Social Rights and the Debate within the European Parliament*, *Journal of Common Market Studies* 2019, 57(5), 977 – 994. Scepticism derives mostly from the fact the EPSR is supervised by the European Semester under the paradigm of financial stability, see M Dawson, *New governance and the displacement of Social Europe: the case of the European Semester*, *European Constitutional Law Review* 2018, 14, 191 – 209. It remains to be seen if this hinders the development of the EPSR as there are signs for a ‘socialisation’ of the European Semester itself, see J Zeitlin and B Vanhercke, *Socializing the European Semester: EU Social and Economic Policy Co-ordination in Crisis and Beyond*, *Journal of European Public Policy*, 25(2), 149 – 174.

<sup>219</sup> *Supra n. 215*, see recital 1, 4.

<sup>220</sup> *Ibid.*, 4.

<sup>221</sup> *Ibid.*, 7.

<sup>222</sup> *Ibid.*, 6. Therefore not convincing S Garben, *The European Pillar of Social Rights: Effectively Addressing Displacement?*, *European Constitutional Law Review*, 2018, 14, 210 – 230 at 228 who holds that the ‘Pillar is not aimed at fixing any problems within the internal market’.

<sup>223</sup> Commission Staff Working Document, Report of the public consultation accompanying the document ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions’, 26.4.2017, SWD(2017) 206 final, 8.

As a preliminary conclusion one can hold that the EPSR brings theoretically a substantial strengthening of the social acquis as well as room for social considerations in the internal market as such. Also, the EPSR relies on other actors to bring this process to life and is hence depended on a cooperative approach and the willingness of the legislator to bring the principles to life. In combination with the reference to the SME and Art. 9 TFEU, the EPSR provides a promising starting point for further impulses for the architecture of the SME.

## 2. Impact: Impulse for the legislator and cooperation with the Court – the example of the TPWC

However, this potential has to be activated with the existing tools. How the EPSR can impact the legislative process can already be seen in the case of the recently adopted directive (EU) 2019/1152 on transparent and predictable working conditions (hereinafter: ‘TPWC’).<sup>224</sup> The TPWC replaces the Directive 91/533/EEC on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship (hereinafter: ‘Written Statement Directive’).<sup>225</sup>

### *i) The transnational effects of non-standard employment forms*

Before looking at how the EPSR connects the TPWC to the SME one apparent objection to this argument has to be addressed. Notably, the TPWC is based on Art. 153(1)(b) and TFEU Art. 153(2)(b) TFEU. It is rooted in the social policy sector and not a product of internal market legislation. Arguing for constructing the SME through internal market legislation above,<sup>226</sup> it seems contradictory to rely on the TPWC to exemplify the potential of such an approach. It is however not, since the argument made above does not negate the use of existing social policy competences for protecting social considerations against the dynamics of market integration.<sup>227</sup> Instead, I argued that the SME is not dependent on *new* social policy competences. That the TPWC does indeed react to the dynamics of the market becomes clear when one looks at why

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<sup>224</sup> Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 186/105. See also M Maul-Sartori, *EU-Arbeitsrecht weiter auf dem Vormarsch*, *Neue Zeitschrift für Arbeitsrecht* 2019, 1161 – 1168.

<sup>225</sup> Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288/32.

<sup>226</sup> *Infra Part 2 III 2 i).*

<sup>227</sup> See already *supra n. 112*.

the revision of the Written Statement Directive was initiated. The TPWC is a reaction to the growing flexibility of the labour market regarding the rise of ‘non-standard’ employment forms and the lack of predictability in working relationships that come with this development.<sup>228</sup> Also, the Commission’s proposal is issued in the light of ensuring dynamic labour markets and the EU’s competitiveness while at the same time offering basic protection to these workers.<sup>229</sup>

The trigger for an European regulation lies in the diversity of Member States’ regulations on these non-standard employment forms.<sup>230</sup> Those different standards get linked through the possibility of workers to move between these diverse regulatory systems under the protection of Art. 45 TFEU.<sup>231</sup> Making use of the freedom of movement therefore creates transnational effects. If one Member State regulates this issue, workers might move to another Member State where they find more favourable conditions.<sup>232</sup> And viewed from the opposite perspective, employers will look at those Member States, where non-standard work forms are regulated in a way that is most favourable for them. In the framework presented above, these are the scenarios that are addressed by the SME and it is this transnational effect that the TPWC addresses. Which kind of *existing* EU competence is used to mediate these effects is secondary for the SME conceptualized in this thesis. Relying on Art. 153 TFEU to do so is therefore not contradictory but complementary to the here developed approach.

ii) *Mediating these effects with the EPSR as a reference point*

The path from the revision of the Written Statement Directive towards the TPWC (‘procedure 2017/0355/COD’) was from the beginning carried out in the light of – and through the framework of – the EPSR. The explanatory memorandum of the proposal for the TPWC describes the Commission’s initiative as a key action to follow up on the EPSR, mainly in respect to

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<sup>228</sup> REFIT Evaluation of the ‘Written Statement Directive’ (Directive 91/553/EEC), 26.4.2017, SWD(2017) 205 final.

<sup>229</sup> Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, 21.12.2017, COM(2017) 797 final, 1.

<sup>230</sup> *Ibid.*, 1 – 2.

<sup>231</sup> That is also, why it is sound to address this problem through implementing the concept of worker that the Court developed under Art. 45 TFEU, see below.

<sup>232</sup> *Infra Part 3 I.*

Principle 5 on ‘Secure and adaptable employment’ and Principle 7 on ‘Information about Employment conditions and protection in case of dismissals’.<sup>233</sup> Characterizing the EPSR as ‘a compass for the renewed upwards convergence of social standards’ is therefore not an understatement.<sup>234</sup>

For the TPWC this was visible from the very beginning when the European Parliament – in its resolution on a European Social Pillar of Rights – called on the Commission to revisit the Written Statement.<sup>235</sup> This then was followed up by the European Parliament’s resolution of 4 July 2017 on working conditions and precarious employment that directly calls for legislative action on part of the Commission to adjust the Written Statement Directive to the new challenges of labour markets.<sup>236</sup> Subsequently, the Commission initiated two phases of consultation of the European social partners on 26 April 2017 and 21 September 2017 respectively under Art. 154 TFEU.<sup>237</sup> Even though the social partners did not take the procedure to the stage of Art. 155 TFEU, both phases of consultation show no indication of refraining from the general idea of modernizing the given legal framework in the light of new challenges in labour markets.<sup>238</sup> The efforts of the Commission were then explicitly supported by the European Economic and Social Committee,<sup>239</sup> as well as by the European Committee of the Regions.<sup>240</sup> The latter refers to the

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<sup>233</sup> *Supra n. 229*, 2.

<sup>234</sup> *Ibid.*, 2.

<sup>235</sup> Proposal by the European Parliament resolution of 19 January 2017 on a European Social Pillar of Rights (2016/2095(INI)), P8\_TA(2017)0010 as part of ‘updating existing labour and social standards’.

<sup>236</sup> European Parliament resolution of 4 July 2017 on working conditions and precarious employment (2016/2221(INI)), P8\_TA(2017)0290.

<sup>237</sup> First phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive (Directive 91/553/EEC) in the framework of the European Pillar of Social Rights, Consultation Document of 26.4.2017, C(2017) 2611 final {SWD(2017) 205}; Second phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive (Directive 91/553/EEC) in the framework of the European Pillar of Social Rights, Consultation Document of 21.9.2017, C(2017) 6121 final {SWD(2017) 301 final}.

<sup>238</sup> *Supra n. 229*, COM(2017) 797 final, 8.

<sup>239</sup> See already before the involvement of the social partners: Opinion SOC/542 of the European Economic and Social Committee of 25 January 2017 on [COM(2016) 127 final] as well as later the conclusion 1.1. of the Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, 10.8.2018, (COM(2017) 797 final – 2017/0355 (COD)) (2018/C 283/06).

<sup>240</sup> Opinion of the European Committee of the Regions – Transparent and predictable working conditions in the European Union, 25.10.2018, (2018/ C 387/53).

Directive as a step to implement important principles of the EPSR through European employment legislation in order to adjust the legal framework to EU labour markets of the 21<sup>st</sup> century.<sup>241</sup> Notably, the foreword to the opinion by the European Economic and Social Committee directly links the EPSR to Art. 3 (3) TEU.<sup>242</sup>

This liaison of using the EPSR to update the framework of the Written Statement Directive is not just reflected in the context of the proposal and the procedure 2017/0355/COD, but also in the final result of the TPWC. From the beginning the Commission generally aimed for a replacement of the Written Statement Directive that introduced a new instrument for ensuring transparency of working conditions for all workers by defining rights and hence improving predictability and security of working conditions.<sup>243</sup> Those instruments linked to the principles of the EPSR. The new information requirements implement Principle 1 on Education, training and lifelong learning while, having in mind that mostly female workers enter non-standard employment relationships, a stronger emphasis on participation in the labour market strengthens Principle 2 on gender equality.<sup>244</sup> The most significant overlap can be found with Principle 5 and Principle 7. Regarding the first, the TPWC – by refraining from leaving the notion of employee and employment relationship to be defined by the Member States – implements the idea of providing equal and fair working conditions, training and access to social protection by not allowing any differentiation in terms of ‘the type and duration of the employment relationship’. With Art. 2 TPWC the directive relies on the concept of worker once developed by the Court under Art. 45 TFEU, which also does not allow for any differentiation for determining who is to be considered a worker.<sup>245</sup> Principle 7 asks for the right of workers to be informed in writing at the start of the employment about their rights and obligations. Under the TPWC this is achieved by extending and updating the scope of minimum information that has to be provided by the first day of the employment relationship. Again, one can clearly see how the TPWC is designed to implement the EPSR. Consequently, the TPWC provides an example where virtually every actor involved in the legislative process of drafting a directive under Art. 153(2)(b)

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<sup>241</sup> Conclusion 21 of the Opinion of the European Committee of the Regions – Transparent and predictable working conditions in the European Union, 25.10.2018, (2018/ C 387/67).

<sup>242</sup> Opinion SOC/542 of the European Economic and Social Committee of 25 January 2017 on [COM(2016) 127 final], 3.

<sup>243</sup> *Supra n. 229*, COM(2017) 797 final, 3.

<sup>244</sup> *Ibid.*, 5.

<sup>245</sup> Especially C-66/85, 3.7.1986, *Deborah Lawrie-Blum v Land Baden-Württemberg*, ECLI:EU:C:1986:284.

TFEU and Art. 153(1)(b) TFEU cooperates in order to implement impulses given by the EPSR. This cooperation also includes the Court. The key notion of the TPWC that non-standard forms of work create the danger of falling outside of the scope of employment law is also recognized by the Court in its jurisprudence on the concept of worker which is now implemented into the TPWC through its Art. 2. From the starting point, the vocal point of the Court was the effective application of the standards of social protection through a uniform and autonomous concept that is not depended on the type of employment relationship or on the categorizations used in the national labour law systems.<sup>246</sup> This led to the Court consistently pushing for a broad definition that included many constellations that were deemed to fall outside of the scope of the Member States' labour law systems.<sup>247</sup> The TPWC combines this jurisprudence of the Court now being to Principle 5 of the EPSR since the Court's concept of worker provides just that: a personal scope that is immune to the exclusion of non-standard work forms because of their specific type of working. By doing so, the TPWC therefore is not just a product of cooperation among the legislative actors, but it also has to be seen as an active engagement with the Court's effort to address the same problem that provided the context for the procedure 2017/0355/COD in the first place.

Overall, the TPWC illuminates how a cooperative approach throughout the process of legislation, which is aware of the Court's case law, can create a sound framework that mediates transnational effects in a way that makes EU legislation more robust against market dynamics.<sup>248</sup> It also needs to be noted that the TPWC is just one of several efforts that are launched as part of the implementation of the EPSR. This includes a proposal on work-life balance of parents and careers,<sup>249</sup> a social partners' consultation on access to social protection for workers and the self-

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<sup>246</sup> Again C-66/85, 3.7.1986, *Deborah Lawrie-Blum v Land Baden-Württemberg*, ECLI:EU:C:1986:284.

<sup>247</sup> E.g. C-215/16, 17.11.2016, *Betriebsrat der RuhrlandKlinik gGmbH v RuhrlandKlinik gGmbH*, ECLI:C:2016:883.

<sup>248</sup> With a similar assessment to the EPSR's impact, although more focussed on the EMU than on the internal market, S Deakin, What Follows Austerity?, in F Vandenbroucke, C Barnard and G de Baere (eds.), *A European Social Union after the Crisis* (Cambridge University Press), 2017, 192 – 210. More critical S Garben, *supra n. 222*, 210 – 230 at 227.

<sup>249</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM(2017)253 final.

employed,<sup>250</sup> and an interpretative communication on working time.<sup>251</sup> The EPSR has overall stimulated the willingness of the legislative avenue to upgrade the protection of social considerations. This matches the here advocated idea of a SME.

## II. THE STRUGGLE FOR THE SOCIAL: THE CASE OF COMPETITION LAW

Next to new impulses for strengthening the social in the light of Art. 3(3) TEU, the SME remains absent in other areas of EU law. If the fields of posting of workers, labour mobility and the EPSR provide examples for steps towards the SME, EU competition law serves as a reminder for the difficulties that one faces on the way towards Art. 3(3) TEU.

### 1. EU competition law as a building block of the market and its current relationship to social considerations

Competition law was from the outset a central building block in constructing the European internal market.<sup>252</sup> The link between competition and the creation of a market could not be closer, as competition law is generally concerned with restricting market power.<sup>253</sup> Therefore, also the SME depends on a body of effective EU competition law. It is the tool to ensure a competitive market by restricting arrangements (e.g. cartels) that limit competitiveness through

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<sup>250</sup> First phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights, C(2017)2610 final and Second Phase Consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights, C(2017)7773 final.

<sup>251</sup> Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, C(2017)2601 final.

<sup>252</sup> D J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press Oxford), 1998 and the contributions to K K Patel and H Schweitzer (eds.), *The Historical Foundations of EU Competition Law* (Oxford University Press), 2013.

<sup>253</sup> D J Gerber, *supra n. 252*, 266.

creating powerful positions in the market. In the wording of Art. 3(3) TEU this correlation is made by depicting the SME as ‘highly competitive’.<sup>254</sup>

However, against the background of Art. 9 TFEU and Art. 3(3) TEU, EU competition law has to interact with social considerations in some way.<sup>255</sup> For a closer look at this interaction two aspects of EU competition law – both shedding light on why in sum social considerations have little impact in the current setup – have to be separated.

First, already on a fundamental level, the debate on the overarching goals of EU competition law heavily contributes to the lacking influence of social considerations.<sup>256</sup> The goal of competition law necessarily affects the interpretation of the provisions governing competition law cases. In that respect it has to be noted that targeting social considerations is no substantial part of any of the advocated approaches. When interpreting EU competition law as means to protect the freedom to compete,<sup>257</sup> social interests must not necessarily be considered. Viewing the welfare of citizens as the outcome of granting the possibility to compete advocates for a conception of competition law that is neutral towards social considerations.<sup>258</sup> For others, the goal of competition law lies in increasing consumer welfare through efficiency.<sup>259</sup> As this strand of argumentation – which is heavily influenced by the Chicago School<sup>260</sup> – does not allow other competing interest next to efficiency, social considerations fall short again.<sup>261</sup> Overall, this central block of

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<sup>254</sup> A Heinemann, Social consideration in EU competition law – The protection of competition as a cornerstone of the social market economy, in D Ferri and F Cortese (eds.), *The EU Social Market Economy and the Law – Theoretical Perspectives and Practical Challenges for the EU* (Routledge), 2019, 123 – 146 at 126.

<sup>255</sup> On the long last lasting debate regarding the overall goals of competition law, see R Zäch and A Künzler, Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law, in R Zäch, A Heinemann and A Kellerhals (eds.), *The Development of Competition Law: Global Perspectives*, 2010 (Edward Elgar), 61 – 87.

<sup>256</sup> See F Maier-Rigaud, On the Normative Foundations of Competition Law – Efficiency, Political Freedom and the Freedom to Compete, in D Zimmer (ed.), *The Goals of Competition Law* (Edward Elgar Publishing), 2012, 132 – 168.

<sup>257</sup> See F Maier-Rigaud, *supra n. 256*, 150 – 151.

<sup>258</sup> A Heinemann, *supra n. 254*, 123 – 146 at 127.

<sup>259</sup> This is the predominant strand of thought, see among many S Bishop and M Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell), 2010; R Whish and D Bailey, *Competition Law* (Oxford University Press), 2018.

<sup>260</sup> See G Monti, *EC Competition Law* (Cambridge University Press) 2007, 63 – 72.

<sup>261</sup> A Heinemann, *supra n.254*, 123 – 146 at 127.



the internal market is detached from any kind of reasoning that gives social considerations room. This is reinforced by the current approach to EU competition law. Starting from the 1990s, the idea of unhindered free markets and competition as means to economic welfare gained traction, especially with the Commission.<sup>262</sup> Through its function as a competition authority and its interpretative guidelines, it started remodelling competition law with a strong focus of implementing economical thinking into the interpretation of the existing provisions of EU law.<sup>263</sup> In this setup it is after all not surprising that EU competition law tends to turn a blind eye towards the implementation of social considerations.<sup>264</sup>

Secondly, one finds hardly any evidence for references to social considerations by the Court or the Commission.<sup>265</sup> This also holds true for the former, despite the fact that – on paper – its approach remains flexible to incorporate such considerations.<sup>266</sup> The Court acknowledges that European competition law can have several goals, which opens the possibility of enforcing the role of non-market and social considerations.<sup>267</sup> In that respect, Heinemann introduces the helpful distinction between the role of social considerations as an outer limitation to the general scope of EU competition law, and their influence within the application of EU competition law.<sup>268</sup> This sheds light on the fact that social considerations predominantly impact the first scenario and are virtually absent from the second. The case in point for the first scenario is the *Albany* case, which introduced an exemption for collective agreements from Art. 101(1)

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<sup>262</sup> M Monti, *European Competition for the 21<sup>st</sup> Century*, Fordham International Law Journal 2000, 24(5), 1602 – 1614.

<sup>263</sup> D Bartalevich, *The Influence of the Chicago School on the Commission's Guidelines, Notices and Block Exemption Regulations in EU Competition Policy*, Journal of Common Market Studies 2016, 54(2), 267 – 283; A C Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing), 2016.

<sup>264</sup> A Gerbrandy, *Rethinking Competition Law within the European Economic Constitution*, Journal of Common Market Studies 2019, 57(1), 127 – 142.

<sup>265</sup> A Heinemann, *supra n. 254*, 123 – 146 at 127.

<sup>266</sup> A Gerbrandy, *supra n. 264*, 127 – 142 at 137 and 138 who advocates for recalibrating the balancing approach to come closer to Art. 3(3) TEU; more optimistic V Šmejkal, *Competition law and the social market economy goal of the EU*, International Comparative Jurisprudence 2015, 1, 33 – 43; V Šmejkal, *Social or Highly Competitive Europe? EU Law Solution to Conflict of Social Security and Competition Law*, Prague Law Working Papers, 2015/II/2 who however only looks at the outer limitations of the scope of EU competition law due to social considerations and not at the application of the provisions themselves.

<sup>267</sup> See A Gerbrandy, *supra n. 264*, 127 – 142 at 137 with reference to C-8/08, 4.7.2009, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343.

<sup>268</sup> A Heinemann, *supra n. 254*, 123 – 146 at 129.

TFEU.<sup>269</sup> In its broader implications, *Albany* establishes that EU competition law self restricts its application to avoid undermining social policy objectives.<sup>270</sup> On the level of its general scope EU competition law is therefore responsive to social considerations. Notably, this approach of the Court, addressing social matters by limiting the scope of EU competition law, was carried over in the post-Lisbon era without referring once to Art. 3(3) TEU.<sup>271</sup>

Beyond this, when it comes to the application of EU competition law, social considerations gain little traction, even though there are many potential friction points which would invite a stronger emphasis on non-market interests.<sup>272</sup> This is identified by Heinemann for the prohibition of cartels under Art. 101(1) TFEU, for a possible exemption under Art. 101(3) TFEU and for Art. 102 TFEU.<sup>273</sup> The Guidelines for the interpretation for the latter provision by the Commission exemplify the struggle for social considerations. Although the clause is occasionally interpreted widely to include social progress in order to grant an exemption to Art. 101(1) TFEU, the Commission highlights that paragraph three must be interpreted in a way that that social considerations are only relevant when they have impact efficiency or the other conditions laid down in that provision. Social considerations are therefore of no independent relevance.

## 2. Explaining the struggle: little legislative input

As shown above, the social struggles significantly when it comes to the actual application of EU competition law. An explanation could be given by questioning what has been set out above:

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<sup>269</sup> C-67/96, 21.9.1999, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430, para 60. Another example is exempting social security systems from competition law when they do not perform an economic activity, see A Heinemann, *supra n. 254*, 123 – 146 at 130 with further references for the Court's case law.

<sup>270</sup> A Heinemann, *supra n. 254*, 123 – 146 at 312; also G Monti, *supra n. 260*, 63 – 72. This technique is also found in cases apart from collective agreements, see C-309/99, 19.2.2002, *J. C. J. Wouters, J. W. Savvelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98 and C-115/97, 21.9.1999, *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, ECLI:EU:C:1999:434.

<sup>271</sup> See C-437/09, 3.3.2011, *AG2R Prévoyance v Beaudout Père et Fils SARL*, ECLI:EU:C:2011:112. In C-413/13, 4.12.2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI:EU:C:2014:2411 the approach was confirmed for collective agreements for workers that are in essence not self-employed.

<sup>272</sup> A Gerbrandy, *supra n. 264*, 127 – 142 at 131. One of the many examples would be the conflict of environmental sustainability initiatives with competition law, see G Monti and J Mulder, *Escaping the clutches of EU competition law*, *European Law Review* 2017, 42(5), 635 – 656.

<sup>273</sup> A Heinemann, *supra n. 254*, 123 – 146 at 135, 136 and 138.

the general goals of competition law or the balancing approach of the Court.<sup>274</sup> However, just as in the case of the calls for a social turn post *Viking* and *Laval*,<sup>275</sup> one has to keep in mind that next to the legal possibility,<sup>276</sup> one is also dependent on the actors' political will. To be clear: adopting the 'more economic approach' on part of the Commission is not a legal requirement, but a political choice. The setup of the Treaties does not exclude a stronger emphasis of social considerations in competition law. Art. 3(3) TEU and Art. 9 TFEU are rather signals in the opposite direction.<sup>277</sup> After all, from several legally available approaches to EU competition law, the current actors favour one that shows little sensibility for social considerations. Just as in the case of social rights and *AGET Iraklis*, the will to bring these provisions to life is not visible when looking at the Court's and the Commission's track record. Waiting for the social turn in EU competition law by these actors seems just as unpromising as in the case of social rights and economic freedoms. Nonetheless, the perspective taken in this thesis informs two other aspects that are worth noting to align EU competition law in the overall context of Art. 3(3) TEU.

First, just as Shuibhne and Gerbrandy correctly point out, competition law might simply not be the 'best place' to establish the SME, as the market is dependent on competition.<sup>278</sup> This provides for a different starting point than areas, like labour mobility, that deal with questions easily linked to the social. Posting of workers is already thematically linked to working standards from the outset. Here, the impact of the market on the social is felt immediately. This typically triggers the debate, which then eventually takes the form of a dialogue towards Art. 3(3) TEU.<sup>279</sup> The market dynamics have stronger effects in different fields of the SME. Regarding competition law, this is also coherent with the here preferred understanding of the SME that remains focussed

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<sup>274</sup> A Gerbrandy, *Solving the Sustainability Deficit in European Competition Law*, *World Competition* 2017, 40(4), 539 – 562.

<sup>275</sup> *Infra Part 2 II 1 ii*).

<sup>276</sup> A Gerbrandy, *supra n. 264*, 127 – 142 at 136 advocates for taking such a 'constitutional possible' turn in balancing market and non-market interest.

<sup>277</sup> From a strictly normative standpoint Gerbrandy's case for rethinking EU competition law (A Gerbrandy, *supra n. 264*, 127 – 142 at 138) therefore provides a desirable, yet unrealistic, scenario. Forcing this process of rethinking through legislative input is the preferred option of this thesis that cannot be explored intensively due to time and space restrictions.

<sup>278</sup> A Gerbrandy, *supra n. 264*, 127 – 142 at 137. N Nic Shuibhne, *The Social Market Economy and Restriction of Free Movement Rights: plus c'est la même chose?*, *Journal of Common Market Studies* 2019, 57(1), 111 – 126.

<sup>279</sup> For posting of workers this was the case the moment *Rush Portuguesa* was handed down by the Court, see *infra Part 3 II 1 i*).

on the functioning of the market.<sup>280</sup> Less influence of social considerations in this area of the SME, than in a field like labour mobility, are therefore not surprising.

Secondly, it needs to be noted that – opposed to the other areas investigated so far – EU competition law is dominated by the Court and the Commission, while legislative input is scarce. If we go back to the framework for mediating transnational effects between the market and the social, it was already pointed out that this is effectively done through a dialogue of the EU actors.<sup>281</sup> In this setup, the legislator generally has the role of developing social content, mostly against the background of a more market integration friendly approach of the Court. What can be learned post-Lisbon from the area of posting of workers is that the legislative avenue can be the tool to embed social considerations into the fabric of an area of EU law. This holds true for balancing social rights with economic freedoms and it can also be applied to EU competition law. Coined to this area of the internal market, it appears that a more dominant role of the legislative avenue is desirable, as it is this avenue where doubts about the shortcoming of the social are typically voiced. This becomes even more crucial with two dominant actors keen on pushing market interests along the lines of economic reasoning that predominantly highlights effectivity as the goal of competition law.

In that respect looking at the only legislative pillar of EU competition law, the regulation on Merger control,<sup>282</sup> is of particular interest. It holds in recital 23 that ‚[...] the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.‘ If one translates this to the post-Lisbon setup, the necessity of aligning Merger control with Art. 3(3) TEU arises, as the SME is one of the fundamental objectives recital 23 would refer to today. Already this indicates that the framework for Merger

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<sup>280</sup> *Infra Part 2 III 2.* The reason is the influence of ordoliberalism in this area see D J Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New Europe”*, American Journal of Comparative Law 1994, 42(25), 25 – 84; C Talbot, *Ordoliberalism and Balancing Competition Goals in the Development of the European Union*, The Antitrust Bulletin 2016, 61(2), 264 – 289. Regarding the links to the *Soziale Marktwirtschaft* see R M Froufe, *Economic Constitution of the European Union, before and after Lisbon (between the principle of Competition and the “Social Market Economy”)*, UNIO-EU Law Journal 2017, 3(1), 109 – 122 at 118: ‘In this perspective, competition law is the Fundamental law of the Social Market Economy’.

<sup>281</sup> *Infra Part 3 I.*

<sup>282</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1.

control puts a stronger emphasis on social considerations than the rest of EU competition law.<sup>283</sup> For this, the *Vittel* case provides a hint, as, according to the Court, the ‘assessment of whether a concentration is compatible in the market’ also demands considering ‘the social effects of that operation’.<sup>284</sup> Of course this remains highly abstract, not fleshed out in further case law and without any reference to fundamental objectives of the EU. Being decided in 1995, the case also provides no direct connection to the SME. What is however evident is that the only legislative pillar of EU competition law is the only area explicitly addressing the need of respecting the social effects next to the economic and market driven parameters that can be found in the other areas.

A brief look towards existing work in other areas, such as EU public procurement law, supports suspicion that lacking legislative input equals struggle for the SME. In this area of the internal market legislative impulses and reactions to the Court’s jurisprudence were key in developing the architecture of this field of the internal market.<sup>285</sup> Even though neither the Court, nor the legislative acts concerning EU public procurement law reference Art. 3(3) TEU, the way of constructing this field of the internal market fits the framework for the SME. The new public procurement directive provides two hints in that respect.<sup>286</sup> First, in its recital 37, as well as in Art. 18(2), the directive emphasises the necessity of complying with social and labour law requirements as part of public procurement procedures. Secondly, the second recital emphasises the key role of public procurement in the Europe 2020 strategy as one of the market-based instruments to ensure a smart, sustainable and inclusive growth of the EU.<sup>287</sup> Those three priorities were also ‘at the heart’ of the Europe 2020 strategy. Notably, in pursuing these, according to the Europe 2020 strategy, ‘they offer a vision of Europe’s social market economy’. Accordingly, public procurement is marked strategic tool for achieving the SME and the new directive

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<sup>283</sup> A Heinemann, *supra n. 254*, 2019, 123 – 146 at 138.

<sup>284</sup> T-12/93, 27.4.1995, *CCE Vittel v Commission*, EU:T:1995:78, para 38.

<sup>285</sup> Especially to C-31/87, 20.9.21988, *Gebroeders Beentjes v State of Netherlands*, ECLI:EU:C:1988:422 and C-225/98, 26.9.2003, *Commission v French Republic*, ECLI:EU:CU:2003:494. See for an overall analysis C Kilpatrick, *supra n. 97*.

<sup>286</sup> *Supra n. 154*.

<sup>287</sup> Communication from the Commission, 3.3.2010, Europe 2020, A Strategy for a smart, sustainable and inclusive growth, COM(2010) 2020, available at <https://ec.europa.eu/eu2020/pdf/COMPLETE%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf> (last accessed 30.9.2019).

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is part of that strategy. Consequently, the new framework for EU public procurement law is actually linked to Art. 3(3) TEU.<sup>288</sup>

Consequently, the explanation for the lacking impact of Art. 3(3) TEU is twofold. Next to the current interpretation of competition law rules, the process of mediating the transnational effects of competition law is carried out by two actors with a similar emphasis on market interests, while no advocate for social considerations makes its voice heard. This gap is filled by the legislator in those areas of EU law where traces towards the SME are visible. It is not just the substance of EU competition law that is not fertile soil for Art. 3(3) TEU but also about how this substance is developed by only several actors.

### III. CONCLUSION

Part 4 has touched on two additional areas of EU law to contextualize the potential of the here adopted understanding of a SME architecture. It becomes visible that the social especially struggles in areas of EU law where the legislator is inactive. Without creating counterweights through this avenue, market interests will structurally trump social interests, especially if the active actors are concerned with enforcing the former. In such a scenario pursuing Art. 3(3) TEU becomes highly difficult.

EU competition law is emblematic for this, as legislative output is scarce while the actors involved in this area – the Commission and the Court – rely heavily on a market friendly rationale. Social considerations predominantly function as an outer limitation for the scope of EU competition law, but have little influence on the actual solving of competition law cases. Notably, the one pillar of EU competition law that is carried out by the legislator is more open to implementing social considerations. At the other end of the spectrum one can witness how the EPSR functions as a catalyst for new legislative output in the name of Art. 3(3) TEU. Put together, this allows for the conclusion that the development in the area of posting of workers under Art. 3(3) TEU is not unique but also not the standard for other fields. Every area has its own prerequisites

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<sup>288</sup> The same then applies for the area of EU state aid law with respect to the Commission's references to the Europe 2020 strategy even though here no direct references to Art. 3(3) TEU are detectable, see also D Ferri and J J Piernas López, State aid law in a social market economy, in D Ferri and F Cortese (eds.), *The EU Social Market Economy and the Law – Theoretical Perspectives and Practical Challenges for the EU* (Routledge), 2019, 147 – 160 at 160.

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that highly affect the construction of the SME. While they lead to a visible development under Art. 3(3) TEU regarding the freedom of services, they hinder a similar development in EU competition law.

In sum, already this first outline of other areas next to posting of workers allows for the conclusion that the SME is sectoral in the sense that its impact differs regarding in each sector of EU law. A complete picture of Art. 3(3) TEU demands a more holistic investigation of the provision which however could not be carried out in this thesis. What is however clearly visible is the importance of the legislative avenue for the architecture of Art. 3(3) TEU. Balancing social considerations with market interest takes place most effectively when actors advocate for them through the legislative avenue. What has been already argued in terms of the theoretical framework behind Art. 3(3) TEU,<sup>289</sup> is proven by the two examples of this Part. Other areas of interest for Art. 3(3) TEU, like public procurement, point in the same direction.

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<sup>289</sup> *Infra Part 3, I.*

# Part 5

## *Final Conclusions*

This thesis posed the question whether the goal of a SME is just an empty promise, mere social language that amounts in window-dressing, or if conceptualizing a legal dimension of the SME is possible. The here developed framework proves the latter to be accurate. To reach this conclusion, this thesis has relied on a SME architecture that relies on the activity of the EU legislator. Through this perspective the recent legislative development, as well as the Court's relevant case law, can be captured in one coherent framework. In that respect it has been shown that one can give teeth to the SME in the current setup of the Lisbon Treaty. Fulfilling the promise of the SME is not dependent on adding new European competences, but rather on the usage of the existing competences, especially those of the internal market in line with Art. 3(3) TEU and Art. 9 TFEU. In addition, the existing competences of the social policy sector allow for mediating conflicts to the market dynamics as well. In light of Art. 3(3) TEU and corresponding projects like the EPSR, reviving these competences contributes to the SME as well.

This SME might look disappointing to those that interpret Art. 3(3) TEU as the EU's promise to move closer to a social welfare state. However, such critique turns out to be premature for two reasons. First, neither is such an expectation coherent with the terminological roots of the SME, visible in the drafting process of the provision, or in any form indicated in the systematic of, and the changes to, the Treaties. Secondly, the actual application of the SME goal in recent legislative projects shows how impactful it can be, even when the SME is confined to regulating social hardships caused by market dynamics. The notion, that such a SME cannot include much social overall, is inaccurate: The Amendment Directive installs new safeguards for the area of posting, installing the ELA aims at providing fair labour mobility across the board and the EPSR allows for reacting to new realities for labour markets on a broad scale. Adding leeway for imposing higher working standards in posting, improving transparency of new working forms and installing supervision for these achievements are significant social upgrades to the market.



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What can factually be traced in these areas, was theoretically supported through a nuanced version of the argument of transnational effects. Adding the analysis on EU competition law and looking briefly at EU public procurement law points in the same direction: while the Court, as the driver of market integration, fails to be the main actor in constructing Art. 3(3) TEU, legislative responses to the Court's adjudication make for the vast majority of rules that embody the SME. It is through the legislative avenue that social considerations are embedded in the fabric of internal market law and the areas of EU law which are affected by the dynamics of market integration. However, this does not take the Court out of the occasion: it has a viable role in constructing Art. 3(3) TEU as the last word on any form of internal market architecture remains with the CJEU. What enables steps towards Art. 3(3) TEU is not the individual effort of the legislator, but the cooperative effort of adjudication and legislation. The moment both avenues work together, balancing the market and the social amounts to shaping the SME in its distinct European form.

At the same time, the visible achievements of the SME must not be misunderstood in the sense that every area of EU law is impacted in similar fashion by Art. 3(3) TEU. Each area, due to different preconditions, reacts differently to the necessity of incorporating social considerations. Comparing labour mobility and EU competition law provides a stellar example. While the SME impacts the structure of the first significantly, it has no direct impact in the latter and EU competition law – once it is applicable – provides little space for implementing social considerations after all. This does however not mean that a SME is not achievable, but simply that the overall picture is diverse. Although completing this picture by adding other areas of EU law was not possible in this thesis, it provides the necessary framework for such an undertaking.

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