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Competition law and the social market economy goal of the EU[☆]



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ABSTRACT

The present study asks whether the enforcement of competition protection, according to Art. 101, 102 and 106 TFEU, causes conflict with measures belonging to the EU's social market economy model. Integration of the social market economy objective into the EU's goals was newly stated in Article 3 (3) TFEU and it is therefore of interest to find whether it has had so far any impact on the traditional EU's competition law approach towards clashes between social protection measures and free competition imperatives. The study reviews first the new wording of social provisions of the EU Treaties, then it analyses the relationship between the social market economy model and the market competition in general. A more detailed attention is then dedicated to the pre-Lisbon approach of the EU Court of Justice towards agreements between social partners and to the privileged rights of organisations providing social security services. In its final part, the study examines whether this earlier established approach corresponds to the current post-Lisbon case law of the Court. The conclusion is that even though the goal of a social market economy has been so far never mentioned by the Court and its pre-Lisbon case law precedents have not been overruled, the current standard of application of EU competition rules is largely responsive towards social schemes established at the national level.

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1. Introduction

Since the approval of the EU Lisbon Treaty, which took place simultaneously with the outbreak of the financial and economic crisis, the issue of social rights and protection measures has been back in the spotlight at national and EU levels. In terms of EU law this reinforced accent on the social aspects has been directly required by numerous new provisions of the EU Treaties, in particular by the formulation of Article 3(3) TFEU which stipulates that the EU should follow the path leading towards a highly competitive social market economy with full employment etc. At first glance, we are witnessing a turnover from the neoliberal emphasis on deregulation, liberalisation and free competition, so popular at the turn of the century, to the values of social peace, socially and ecologically sustainable development etc. The question naturally arises whether the complex and sophisticated EU competition law, which in the late 1990s became an important tool for promoting an economic model based just on liberalisation and undistorted competition, does not stand in direct opposition to such a reversal.

Our analysis addresses these concerns on two levels. First, from the perspective of the theory it looks at the place of free competition in the concept of social market economy, as developed in the economic theory and practice of the post-war West Germany. On this theoretical level, it is especially necessary to separate the social market economy concept from the

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welfare state model as these two models add different value to the free play of market forces and do not accept the same scope of their correction by State measures. The social market economy model however, by admitting the introduction of market forces into formerly State-controlled sectors, expands the scope of potential conflicts between the free market competition and the emphasis on the protection of those social rights, which cannot be sacrificed to economic efficiency.

Hence, secondly, the need for a more detailed review of the case law of the EU Court of Justice (CJ), which is the final authority for dealing with situations in which the values protected by various provisions of EU law interfere. The goal is to ascertain whether the objective of the social market economy and other socially oriented provisions of the Lisbon Treaty have created new sources of conflict with the EU policy against cartels and abuses of dominance and to find out the way in which these conflict have been solved by CJ.¹ In order to compare the pre-Lisbon and the post-Lisbon solutions an outline of the traditional (pre-Lisbon) jurisprudence of CJ in the given area needs to be drafted first. It will be shown that the CJ's solutions were neither simple nor uniform as they were built on more than one type of justification that allowed the fulfillment of social goals. From this base it will be then researched if there has been, during the 2009–2015 period, any shift in the EU's standard of application of Articles 101 (prohibition of Cartels), 102 (prohibition of abuse of the dominant features of position), and also 106 (services of general economic interest) TFEU that would preclude the maintenance and development of social protection measures, of social dialogue outcomes, or of other aspects associated with the model of social market economy.

The following paragraphs, therefore, look at whether and how the EU law has succeeded so far in balancing the liberal and social values and has managed to open the way to an order of social market economy that would be both socially just and highly competitive.

2. The EU's social market economy goal as a specific problem

Although the Lisbon Treaty has already been in force for more than five years, some debates about the issues it has raised have still not faded away. One of them concerns the new EU target, set by Article 3(3) of the Treaty on European Union (TEU), that of *a highly competitive social market economy aiming at full employment and social progress...* This has been supplemented by the Treaty on the Functioning of the EU (TFEU) by a number of other provisions testifying to the Union's increased interest in social rights and their protection. These are, in particular, the "social" horizontal clause of Article 9 TFEU exhorting the EU to promote a high level of employment in all its policies, the guarantee of adequate social protection, and the fight against social exclusion... as well as the similarly worded rights mainly contained in Chapter IV of the Charter of Fundamental Rights of the EU, entitled "Solidarity". In a similar vein, another provision of general application should also be mentioned, that of 14 TFEU, stressing the importance of services of general economic interest "in the shared values of the Union", together with the related Protocol No. 26 *On services of general interest* and the fundamental right of access to them referred to in Article 36 of the Charter of Fundamental Rights. All these provisions of EU primary law reflect important principles for the future operation and direction of the Union, but they do not establish any directly enforceable social rights of individuals or any binding commitment among the Member States to build a harmonised European social model.²

Title X of the TFEU, entitled "Social Policy" (Articles 153 and 156 TFEU, in particular) that could have contained such a specific mandate and set of directly claimable rights, was not changed by the Lisbon Treaty, and thus does not allow the EU to do more than "support and complement" the activities of the Member States in the fields of labour and social security law. In all key issues (social security and the social protection of workers, the collective defence of the interests of workers, etc.), the Member States have retained the right of veto in the Council. The principles of social security systems (the degree of solidarity and redistribution, the involvement of social partners, etc.), and matters regarding remuneration, the right of association, and the right to strike or the right to impose lock-outs, are not even subject to EU harmonisation powers.³ The

¹ State aid control is not included in the study, partly due to the fact that the European Commission recently clarified the question in its Commission Staff Working Document - Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest (European Commission, 2013).

² The adjective "social", whether in regard to policy or model, does not have a precisely defined content. In a broad sense, which is often used by the EU, it includes "all areas of social policy" (see Article 156 TFEU). It includes the coordination of employment measures, as well as labour rights and working conditions, training and further education, social security, protection against occupational accidents and diseases, health and safety at work, the right to associate in professional organisations and the right to collective bargaining between employers and employees. It is therefore about individual and collective entitlements, ranging from labour law through the regulation of the labour market and job training, to social protection or security, i.e. to the systematic hedging against risks in professional and everyday life (sickness and maternity benefits, invalidity benefits, including those intended for the maintenance or improvement of earning capacity, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, and family benefits) – as they were originally defined in Art 4 (1) of EEC Regulation 1408/71 as referred to constantly by the CJ in its rulings, for instance, in C-78/91 para 15, (*Rose Hughes v Chief Adjudication Officer*, 1992).

³ The EU has been granted its own initiative in the field of social security by Article 48 TFEU, albeit limited to social security for migrant workers. For them, the EU aims to "create a system" that, however, does not consist in the payment of "European benefits from the European budget," but instead, in the coordination between national social security systems, so that migrant workers do not lose their entitlements acquired in different Member States and their respective benefits are paid to them in the country where they are resident. Historically, this is a result of the founding compromise under which the EU (then the EEC) was granted powers to regulate and deregulate the market (including the free movement of workers), while social security remained in the hands of the Member States, in the hope that "economic growth would strengthen market integration and solve social issues. For more details, see Grass (2013), p. 83, 83–87).

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