

European Union as a Highly Competitive Social Market Economy

Legal and Economic Analysis

Václav Šmejkal
Stanislav Šaroch
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The authors consider creating highly competitive social market economy, as referred to in Article 3 Paragraph 3 of the Treaty on the European Union, a highly topical goal which should not become merely a dead provision of the Lisbon Treaty. They analyse its economic and legal aspects in view of the current course of the European integration.

They pose the following questions: How shall we understand this goal in today's world? What sense does it make in the conditions of the 21st century globalized economy? Do the EU bodies still define and exploit this goal? And, does the EU have enough powers to pursue it?

Despite their critical views of the way the EU bodies have approached this issue in the post-Lisbon era, the authors are seeking to show what internal changes in the EU could help remove the asymmetry and establish balance of the current European integration, in accordance with the basic concept of the social market economy, and make it more apt to mitigate the clashing economic pressures and social needs.

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2016

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Abbreviations

AET	Associated Employment Tresthold
AG	Advocate General
AGS	Annual Growth Survey
AMR	Alert Mechanism Report
CDU	Christlich Demokratische Union Deutschlands (Christian Democratic Party of Germany)
CEPR	Centre for Economic Policy Research
CFREU	Charter of Fundamental Rights of the EU
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the EU
CSR	Country Specific Recommendations
CSU	Christlich-Soziale Union in Bayern (Christian-Social Union in Bavaria)
CT	Constitutional Treaty (Treaty establishing a Constitution for Europe)
EC	European Community
ECB	European Central Bank
ECOSOC	Economic and Social Committee
EEC	European Economic Community
EMU	Economic and Monetary Union
EP	European Parliament
ESM	European Stability Mechanism
ETUC	European Trade Union Confederation
FRG	Federal Republic of Germany
GDR	German Democratic Republic
GC	General Court of the EU
GDP	Gross Domestic Product
HSC	Horizontal Social Clause (Art 9 TFEU)
ILO	International Labour Organization
IMF	International Monetary Fund
KAS	Konrad-Adenauer-Stiftung (Foundation)
MIP	Macroeconomic Imbalance Procedure
OCA	Optimum Currency Area
RQMV	Reverse Qualified Majority Voting
SME	Small and Middle-sized Enterprises
SPD	Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

VAT	Value Added Tax
WEF	World Economic Forum
WGSE	Working Group „Social Europe“

FOREWORD

ON THE PROSPECTS OF SOCIAL MARKET ECONOMY IN THE RESTLESS EU

If we inquire about the prospects of social market economy,¹ we must first remind ourselves of the main pillars of the content of this concept, which – owing to the division of powers between the EU and Member States – must be examined both at the level of the Member States (in this text, somewhat restricted to references to the Czech and EU reality) and at the level of the whole EU.

The social market economy concept is an economic one, connecting the ideas of economically free capitalism and social order. To some experts, it represents the “most brilliant invention in the history of economic policy” (Vogt 2011:1). Where this concept has taken Germany is self-evident.

Social market economy positions itself in the midstream between *laissez-faire* capitalism and mixed economy. Its breadth and flexibility, however, enable placing different accents within its framework, e.g. putting greater emphasis on the social aspect or, conversely, on individual responsibility, thus making it acceptable for a greater number of political subjects.

The prospects of this concept would be worse if, in terms of the economic programme, extreme subjects dominated the political spectrum, whether left-wing or right-wing. In the *realpolitik* of recent decades we have seen some closing of the gap between the left and right (see what nuances distinguish SPD and CDU in Germany); if we speak about extremism, it is rather in the nationalist than economic sense. Therefore, the space for the midstream concept of social market economy is available here, too.

Indeed, the mere look at the fundamental principles of social market economy evokes this breadth of political spectrum. This is because the basis of social market economy is the interconnection between individual freedom and social solidarity. The state does not take part in the immediate management of the economy, but using legal tools focuses on safeguarding free competition and social justice. The pillars of social market economy include state-protected competition, monetary stability and social security, e.g. pension insurance or insurance in unemployment. This economic model rejects blanket transfer of personal responsibility to the collective à-la socialism; instead, social certainty must primarily arise through an individual's effort, and the obligation of the state only arises where this is not possible. Nothing like “to each according to his needs”, therefore, as proclaimed by Communists during the times of non-freedom. I point this out because in 2017 we will commemorate a 100- year anniversary of the Bolshevik revolution in Russia, which had ushered in an entirely different concept than social market economy – the concept of the dictatorship of the proletariat, suppressing private ownership, and a centrally managed economy without economic competition, with results that require no commentary.

¹ The term social market economy was coined by the leading representative of the so-called Freiburg School, the neoliberal sociologist and CDU member Alfred Müller-Armack (1901-1978) in his book *Wirtschaftslenkung und Marktwirtschaft* (1947).

Without having to go too deep into the Czech situation, the finding that the social market economy model is claimed by both social democracy² and Christian democracy³ is itself sufficient. However, what of the word “restless” in the heading? The present times are restless indeed, to put it optimistically. Although we enjoy unprecedented living standards, live in a peaceful environment and benefit from political freedom, we feel threatened. It is not my aim to examine to what extent this feeling is based on reality or compounded by some political forces and “their” media thriving on the sense of fear. Equally, it would be a task for sociologists, psychologists and also theologians to demonstrate to what extent the restlessness of the present time is related to the feeling of non-fulfilment, lack of vision of the future and taking our living standard, peace and political freedom for granted – simply put, that we do not value the good life we have. Moreover, this restlessness is fuelled by the nagging feeling that we constantly need to be getting better off (“sustainable growth”); everything else – stagnation or slight decline – is presented as tragedy. This might bring me to the subject of true solidarity and the solution to the migration crisis, etc., yet this is not my intention here.

This restlessness undermines our trust in ourselves, in the world around us, in our own institutions. As mentioned on one occasion⁴ by Herman van Rompuy, fear does not allow us to see things in proportion; it exaggerates the negatives.

We do not keep the consequences of this restlessness to ourselves. In searching for the root causes of this often exaggerated fear, it seems ideal to have an outer enemy at hand, such as when Russia, for instance, uses the image of the decadent Western world to justify its own imperialism. For many people, such an outer enemy and a suitable whipping boy is the European Union, especially because they lack the required awareness of its functioning and the division of powers between it and the Member States.

Why is it necessary to deal with the European Union in the context of social market economy? Because the European Union explicitly embraces the social market economy concept; in other words, this concept has been embraced especially by the Member States. The Lisbon Treaty (2007) newly defined, among others, the goals of the European Union in Art 3 of the Treaty on the European Union (TEU) (Lenaerts and Van Nuffel 2011:108). For the first time, the numerous EU goals explicitly included social market economy, although it was a goal de facto followed from the onset of post-war integration owing to Germany’s influence.⁵

² For the Czech Social Democratic Party’s embrace of this model, see the statement of its Chairman B. Sobotka, available at: <https://www.cssd.cz/ke-stazeni/videogalerie/video-novinky/bohuslav-sobotka-nasi-zakladni-vizi-je-socialne-trzni-ekonomika/>

³ Namely Christian-Democratic Union-Czechoslovak People’s Party, cf. the Articles of Association § 2, point 5: available at: <http://www.kdu.cz/o-nas/dokumenty/stanovy>. By membership in the European People’s Party, the concept of social market economy was also embraced by the Czech right-wing party TOP09, but its programme documents, available online, contain no mention of this concept.

⁴ In particular, 3 December 2015 in the European Parliament at a conference on the launch of the book by Jos J. van Gennip: *Ethics and Religion*, published by Wilfried Martens Centre, Brussels 2015.

⁵ For the introduction of the concept of social market economy in primary EU law cf. the report of the working group of the XI Convention preparing the Treaty Establishing the Constitution for Europe Convent, CONV 516/1/13, p. 10. For the criticism of entering this goal into TEU see Joerges and Rödl 2004: 10-11.

However, social market economy is not referred to just by the Lisbon Treaty, but, above all, by top politicians, including President of the European Commission Jean-Claude Juncker⁶ and Commissioner for Employment, Social Affairs, Skills and Labour Mobility Marianne Thyssen⁷; in one instance even by the Court of Justice of the European Union.⁸

As mentioned above, social market economy is a relatively wide concept; therefore, it may be useful to see what accents are currently being assigned to the social market economy principle by the European Union. Let us repeat that the pillars of social market economy include state-protected competition, monetary stability and social security. As there have been no recent attacks on economic competition,⁹ it is monetary stability and social security that are placed at the centre of attention. Despite the two areas being closely related, in terms of powers transferred to the EU by the Member States they represent completely different situations: whereas monetary policy is within the exclusive competence of the EU for Eurozone members (Art 3 TFEU), social security is, on the other hand, an area where the EU can at most coordinate member states in exercising this competence that they have not transferred to the EU (Art 5 TFEU).

The stimuli for these accents can be traced in the aftermath of the financial crisis of 2008–2010, one cause of which is seen by President of the Commission Juncker in ignoring the principles of social market economy: “One of the factors which caused the crisis was that the persons primarily responsible breached the cardinal virtues of social market economy.”¹⁰ The other stimuli also include globalization, relatively high unemployment and the widening symbolic gap in private sector remuneration.

⁶ See Juncker 2016: “The financial crisis did some good in that we were able to do two things: one, to remember the values – you spoke of *Gaudium et Spes* – that are the truly fundamental values of the European social market economy. One of the factors that brought about the crisis was because those primarily responsible disregarded the cardinal virtues of the social market economy. We know that now.”

⁷ Cf. e.g. Thyssen 2014a: “My motivation will remain the same for the next five years: devoting myself to the welfare and well-being of all Europeans, and promoting the social market economy as envisaged by Article 3 of the Treaty ... The social market economy should also include an adequate safety net with a strong social protection for people who cannot work (anymore) due to illness, disability, age, temporary or permanent care responsibilities... In the meantime I also see that during the crisis the number of Europeans living in poverty has sharply increased and inequalities have been on the rise, calling into question the fairness and effectiveness of our social market economy.” Also Thyssen 2014b: “The President-elect Jean-Claude Juncker has asked me to ensure that the word “social” regains its full meaning and effectively completes our “market economy”. I gladly take on this challenge, as a convinced supporter of the social market economy, where freedom, responsibility and solidarity go hand in hand.”

⁸ Cf. judgment of the General Court T-565/08 *Corsica Ferries* EU:T:2012:415, para 82.

⁹ Let us recall that at the time of the financial crisis, the then President of France Nicolas Sarkozy nevertheless enforced in the Lisbon Treaty the removal of the explicit reference to economic competition from the EU’s goals and its move to Protocol No. 27 on the internal market and economic competition; this, however, only has symbolic, not legal, meaning, because (1) the protocols are simultaneously a binding part of the founding treaties of the EU and (2) protection of economic competition is a part of social market economy, which, on the contrary, was added as a goal by the Lisbon Treaty.

¹⁰ See Juncker 2016: “... Second, the crisis made us move forward with Economic and Monetary Union – something we had to do – so that today banks and the banking sector and the real economy are better prepared to withstand external shocks than they were in 2008, 2009 and 2010. Banking Union is making progress, though not as much as I would like. Banking supervision works. Everything we have achieved over the years is working well, although more must and will be done to complete Economic and Monetary Union.”

As far as monetary stability is concerned, the subject of discussion is both non-compliance with the so-called convergence criteria and the role of the ECB in dealing with the financial crisis of 2008–2010. Therefore, along with others, Juncker says that partial failures and limited legitimacy of the Eurozone’s governance should have the following consequences (i) it is not ECB’s task to govern the Eurozone; this should be the task of the Commission and the Eurogroup with a full-time President, (ii) structural reform programmes and stability support of the Eurozone should be measured not only by fiscal sustainability but also by social impacts. It is incompatible with social market economy, he argues, that ship-owners and speculators should see their wealth increase during a crisis while pensioners are unable to look after themselves; finally, (iii) to strengthen the outer dimension of the Eurozone by enshrining the common representation of Eurozone’s members in the IMF, as a result of which the Eurozone would become the IMF’s biggest shareholder (Juncker 2014).

Social security as another pillar of social market economy is, as already mentioned, fundamentally within the competence of the Member States, and the EU only performs certain coordination measures in this area. Nevertheless, social security constitutes a part of a wider social policy, some aspects of which fall within the competence shared by the EU and the Member States. In this broader area, today’s main accent at the Union level – moreover with overlap to EMU – is the European Commission’s proposal for the European Pillar of Social Rights of 8 March 2016.¹¹ It is an initiative aimed at deeper and faired EMU and the strengthening of its social dimension. This is also related to the consequences of the economic crisis, namely for the single-currency countries in particular, because the Commission maintains that the Eurozone’s future success depends to a great extent on the effectiveness of labour markets and social security systems, as well as on the economy’s ability to handle and respond to fluctuations.

The content of the document is divided into three chapters: (1) equal opportunities and access to the labour market including the development of skills and lifelong learning and active support of employment; (2) fair working conditions; (3) appropriate and sustainable social protection and access to quality basic services, including childcare, healthcare long-term care, with the aim to safeguard dignified life.

The European Pillar of Social Rights is primarily focused at Eurozone countries, with other EU Member States able to join if they express an interest in doing so. On a side note, it is around this pillar, i.e. around the Eurozone, that the boundary between the hard core of European integration and other Member States might arise.

From the viewpoint of the new Member States, the social sphere and its relation to the EU’s single market is related the issue of the so-called social dumping, which primarily involves criticism of unfair practices – misclassification of employees as independent contractors, etc.¹² Although such unfair practices deserve criticism, we

¹¹ Cf. Thyssen 2016b: “To address these changes in the world of work, the European Commission is proposing to bring forward a European Pillar of Social Rights. This will be a reference framework based on the values and principles that mark the essence of the 21st century social market economy.”

¹² Cf. European Parliament’s resolution of 14 September 2016 (2015/2255(INI)), item 1: the concept of social dumping “...covers a wide range of intentionally abusive practices and the circumvention of existing European and national legislation (including laws and universally applicable collective agreements), which enable the development of unfair competition by unlawfully minimising labour and operation costs and

cannot overlook the fact that the use of the word dumping is manipulative, as dumping requires two territories separated by a border, which does not apply for the borderless single market for goods and services. In this context, old Member States not only propose enforcing the minimum wage, but both Commission President Juncker and Commissioner Marianne Thyssen call for the principle of the same pay for the same job at the same place.¹³ In the case of workers posted under Directive 96/71 concerning the posting of workers in the framework of the provision of services, this results in eliminating the competitive advantage of companies posting their workers to provide services on the territories of other Member States. The practical effect of the social dumping concept in the EU is applying the minimum wage on the so-called posted workers – employees of undertakings who obtain their wages according to the country of their origin. In the framework of the internal EU market, undertakings from countries with a lower wage levels (i.e. more or less the Eastern EU Member States) will lose their competitive advantage over undertakings from the so-called old Member States, because their wages are lower.

The authors of this concept do not acknowledge that the freedoms of the internal market are one package. Free movement of goods, services and the capital has its counter-performance in the freedom of movement of workers. If business boundaries are removed, domestic production cannot be protected against the more competitive products from abroad, so domestic production can become limited or cease to exist. In return, workers who have lost their jobs at home due to this can go and work in a different country, and the undertakings can also move to do business in the same place. Now, however, the differences in wages, i.e. the main competitive advantage of such undertakings, are to be removed. These undertakings will certainly have thought: “we have opened the markets to your undertakings, but you are closing the door on us and our workers”. The new Member States could, therefore, start the debate on restricting other advantages to the undertakings of old Member States. The concept of social dumping in the EU is toxic for the functioning of EU’s single market.

Thus, I do not regard the concept of social dumping as a healthy foundation for the building of Europe, especially not from the representatives of old Member States, who have their mouths full of solidarity – but the concept of social dumping follows the path of disturbing the single market.

Thus, to conclude, if we ask about the prospects of the social market economy concept in Europe, they are certainly there. The promise thereof consists not only in

lead to violations of workers’ rights and exploitation of workers;... the use by certain economic actors of illegal practices such as undeclared work or of abusive practices such as bogus self-employment can lead to major market distortions which are detrimental to bona fide companies, in particular SMEs; ...”

¹³ Cf. Juncker 2015b: “En matière de droit du travail, il faudra en Europe que nous arrivions avec une dose de bon sens, sachant que le bon sens est distribué d’une façon très inégale en Europe, nous devons nous mettre d’accord sur un principe simple: un même salaire, pour un même travail, au même endroit...” or Juncker 2014a: “Fairness in this context means promoting and safeguarding the free movement of citizens as a fundamental right of our Union, while avoiding cases of abuses and risks of social dumping. Labour mobility is welcome and needed to make the euro area and the single market prosper. But labour mobility should be based on clear rules and principles. The key principle should be that we ensure the same pay for the same job at the same place.”

its enshrinement in legal texts but also in the political demand, often voiced both by national politicians and high-ranking EU officials. Moreover, these officials are aware that in recent past, some social market economy principles were sacrificed in crisis situations at the altar of the effort to achieve fast solutions, the results of which, however, did not confirm the correctness of such a deviation. Similarly unsuccessful will be the attempt to misuse the so-called social dumping in order to undermine the freedom of movement of services and workers unless the awareness of the four freedoms of the single market as a single package is drowned out by the interests of the old Member States.

However, due to the division of powers and the lack of consensus, the EU cannot enshrine social market economy as a Union-wide social economic model. Contrary to post-war Germany, where both Christians, Liberals and Socialists participated in one concept for a certain period of time, there is no consensus in the EU. Therefore, the Commission itself refers to social market economy in some documents in the plural, in the sense of various social market models of EU Member States, as allowed by the flexibility of this concept. This, however, does not rule out the EU supporting some social market economy elements centrally, such as some expenditure items of the EU's budget, e.g. funds preventing asymmetrical shocks in the social area or support for migrating job-seekers, etc. Similarly, the CJEU could adjust its proportionality tests applied in the event of conflict of social rights with the freedoms of the internal market and could make much greater use of the horizontal social clause (Art 9 TFEU),¹⁴ both in checking the compliance of secondary law with the Treaty and in the clash of EU-protected equivalent values, etc.

It is the announced European Pillar of Social Rights that is to be the current principal bearer of social market economy at the EU level. It will be compatible with social market economy in so far as the social accent and its consequences (taxation and business regulation) do not undermine initiative, which is in fact the key precondition for both market and social market economy.

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¹⁴ Article 9 TFEU: In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

1. INTRODUCTION: WHY STUDY AND PROJECT THE EU AS A SOCIAL MARKET ECONOMY?

A simple answer to the question posed above could be as follows: because the EU is committed to it by the target provision of Art 3(3) of the Treaty on European Union (hereinafter, TEU), which deals with its task to work for a highly competitive social market economy.¹⁵ However, the answer will be unsatisfactory for the mere reason that it is far from clear what the value of such a Treaty provision exactly is. It can be easily contested by asking whether we are dealing with a realistic provision or just another cry of mythological Europeanism, i.e. a mere part of “those illusory goals that characterize many declarations and programmes of the Union’s leaders” (Ricceri 2014: 84).

Although the analysis of the legal value of the goals set out in the programme provisions of the founding Treaties of European integration has its place in formulating the answer to the question posed, it is impossible to leave it at that and not attempt to answer the following questions: Why and how did the EU set such a goal? What content does it fill it with? How best should it fulfil this goal if genuinely wanting to accomplish it? These are in fact questions not only for legal but, equally, for political and especially economic analysis. Without searching for an answer in the present initiatives, legal decisions, as well as economic projects and results of the EU, it will be impossible to dispel the aforementioned scepticism regarding the fact that the social market economy goal might involve a mere glossy catch-all declaration of general interest without practical meaning ... not worth spending much time on.

Analytical works performed in the years 2014–2016, however, led the authors of this text to the belief that the goal of social market economy does deserve attention and could be – when handled correctly – a useful guideline for the present and future effort of the EU. The resulting book summarizing these results is, in its own way, another contribution to the Europe-wide debate on whether and how the EU should become more social at this very stage – which appears necessary amidst the present crisis in order to convince citizens that the EU is not a non-democratic machine to enforce the interests of investors and entrepreneurs in the liberal business environment, stable currency and a flexible labour market (Monti 2010:68; Contouris and Freedland 2013:493-494; Lehrndorff 2015:30). The calls for EU’s socialization, often discussed in the media, are no doubt legitimate as they contain the truth about the current perception of the EU by its citizens. But anger alone, as we know, does not by any means constitute a programme leading to a goal. Therefore, in addition to the analysis of the causes of disillusionment

¹⁵ The wording of Art 3(3) of TEU is in reality much more developed and also complicated as will further be explained. It says in full: “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.”

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