

## "Europe isn't working in Europe": reform and modernisation of the European welfare state in the wake of the economic crisis

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## ARTICLE

# “EUROPE ISN’T WORKING IN EUROPE”: REFORM AND MODERNISATION OF THE EUROPEAN WELFARE STATE IN THE WAKE OF THE ECONOMIC CRISIS

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### *INTRODUCTION*

The response to the economic recession in Europe has elicited different reactions from, and within, the Member States as well as the people affected by the economic downturn. As the election in February 2015 of the new government in Greece, campaigning on an anti-austerity election platform, has dramatically demonstrated, the response of the European Union (“EU” or the “Union”) to the economic crisis is by no means accepted as either a popular, or the “right,” response.<sup>1</sup>

This Essay uses as its starting point the electioneering position taken by right-wing political parties, exemplified in the statement from Mitt Romney. For him the economic crisis in the EU has been

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1. On January, 25 2015 the left-wing party, SYRIZA, won a legislative election in Greece but without an overall majority. It formed an “anti-austerity” coalition with the *Independent Greeks* party on the following day and subsequently has been re-negotiating the terms of the Troika (EU, European Central Bank and the International Monetary Fund) bail-out of its sovereign debt.

created by the continuing commitment to public intervention in markets and financing the national welfare state. Thus the responses by the EU are inadequate to address the necessary structural reforms to allow for economic growth: “Europe isn't working in Europe. It's not going to work here. I believe in America. I believe in the opportunity and the freedom that is American opportunity and freedom. I believe in free enterprise and capitalism.”<sup>2</sup>

The theme is echoed in the electioneering by the Conservative Party in the United Kingdom.<sup>3</sup> To rebut the allegation requires a qualitative analysis.<sup>4</sup> This can be demonstrated in the adaptation of the institutional and governance structures of the EU and the way the EU has reacted to the economic crisis through fiscal and economic reform measures,<sup>5</sup> the use of [temporary] state aid,<sup>6</sup> an attempt at revitalising the single market,<sup>7</sup> alongside the modernisation of

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2. Mitt Romney, Remarks at the Republican Presidential Debate, (Sept. 22, 2011), available at <http://www.telegraph.co.uk/news/worldnews/republicans/8783948/Mitt-Romney-European-socialist-policies-not-right-for-US.html>.

3. See Mark Briggs, ‘*Europe Isn't Working*’ Says Cameron, EURACTIV.COM, (Mar. 17, 2014, 3:38 PM), <http://www.euractiv.com/sections/uk-europe/europe-isnt-working-says-cameron-312965>.

4. A quantitative response can be seen in evaluating various economic indicators in the EU set out in Eurostat Reports. The Europe 2020 Strategy, adopted by the European Council in 2010, seeks to establish a smart, sustainable, and inclusive economy in Europe with high levels of employment, productivity, and social cohesion. National targets of Member States reflect the five ambitious objectives of the strategy which cover employment, research & development (“R&D”), climate change & energy, education and poverty reduction, reflecting their situation, to be reached by 2020. EUROSTAT, the statistical office of the EU, has provided a comprehensive overview with breakdowns by Member State of the progress the EU has made toward its 2020 targets in the publication *Smarter, Greener, More Inclusive? See EUROSTAT, Smarter, Greener, More Inclusive? Indicators to Support the Europe 2020 Strategy*, (2015) available at <http://ec.europa.eu/eurostat/documents/3217494/6655013/KS-EZ-14-001-EN-N.pdf/a5452f6e-8190-4f30-8996-41b1306f7367>.

5. See *infra* notes 37-75 and accompanying text.

6. See Christian Ahlborn & Daniel Piccinin, *The Great Recession and Other Mishaps: the Commission's Policy of Restructuring Aid in a Time of Crisis*, in RESEARCH HANDBOOK ON EUROPEAN STATE AID LAW, 124 (Erika Szyszczak ed., 2011); see also *State Aid Scoreboard 2014, Aid In the Context of the Financial and Economic Crisis*, EUROPEAN COMMISSION (Dec. 17, 2014), available at [http://ec.europa.eu/competition/state\\_aid/scoreboard/financial\\_economic\\_crisis\\_aid\\_en.html](http://ec.europa.eu/competition/state_aid/scoreboard/financial_economic_crisis_aid_en.html).

7. Initiated through the Monti Report and implemented through the Single Market Act I and II and the Europe 2020 Programme. See Mario Monti, *A New Strategy For The Single Market: At The Service of Europe's Economy and Society* (2010) [hereinafter The Monti Report], available at [http://ec.europa.eu/internal\\_market/strategy/docs/monti\\_report\\_final\\_10\\_05\\_2010\\_en.pdf](http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf); *Europe 2020*, EUROPEAN COMMISSION (2015), [http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/eu-tools-for-growth-and-jobs/index\\_en.htm](http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/eu-tools-for-growth-and-jobs/index_en.htm).

procurement,<sup>8</sup> as well as modernising aspects of other aspect of state intervention in markets, particularly public services (welfare and social services) termed "Services of General (Economic) Interest" in EU law and policy.<sup>9</sup>

The reaction to the economic crisis has adopted a distinctive EU approach, and, indeed, was part of a reform and modernisation process that started *before* the economic crisis was felt in Europe. The EU response has been implemented as a mixture of political and legislative change, the use of new governance processes and governance tools. Often such responses are derived from the catalyst of litigation at the national level, using the creative legal space of EU law to challenge the law and policies of the Member States. This, in turn, has allowed for a distinctive shift in political power in the EU: between the Member States *inter-se* and between the Member States and the Institutions of the EU. In tandem it has diminished the populist trust in the EU by reversing the attempts of recent years for greater accountability and democratic input in EU law and policy-making. One aspect of this movement embraced greater involvement of national and local government in policy-making through the use of subsidiarity. In turn this has allowed the EU to adopt a new hybrid form of governance, based upon hard law and new processes of soft governance leading to a plurality and diversity of instruments and techniques which, to date, have escaped an adequate typology. This evolution may be viewed as a permanent reform of the EU, emphasising the flexibility of the EU to adapt its governance modes as part of its own ecology, based upon political survival.<sup>10</sup>

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8. See The Monti Report, *supra* note 7, at 76; Council Directive 2014/24/EU of the European Parliament and of the Council on Public Procurement and Repealing Directive 2004/18/EC, 2014 O.J. L 94/65; Council Directive 2014/25/EU 2014 of the European Parliament and of the Council on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and Repealing Directive 2004/17/EC, O.J. L 94/253; see also Directive 2014/23/EU of the European Parliament and of the Council on the Award of Concession Contracts, 2014 O.J. L 94/1.

9. See generally FINANCING SERVICES OF GENERAL ECONOMIC INTEREST: REFORM AND MODERNISATION (Erika Szyszczak & Johan Willem van de Gronden eds., 2013). For a typology of Services of General Interest, see Ulla Neergaard, *Services of General Economic Interest: The Nature of the Beast*, in THE CHANGING LEGAL FRAMEWORK FOR SERVICES OF GENERAL INTEREST IN EUROPE (Markus Krajewski et al. eds., 2009).

10. Erika Szyszczak, *Social Policy: A Happy Ending or a Reworking of the Fairy Tale?*, in LEGAL ISSUES OF THE MAASTRICHT TREATY (David O'Keefe & Patrick Twomey eds., 1994).

One important issue that has generated academic and political discussion is whether the responses to the economic crisis have dismantled or re-invented the role of state intervention in the economy in Europe and the commitment to a welfare state. By taking two areas on EU policy, the reform of macro-policy budgetary surveillance and enforcement and the reform and modernisation of public services in the EU, the unfolding analysis will argue that the EU has not adhered to a strong commitment to maintaining a state interventionist approach to the market or a firm commitment to maintaining the *status quo* of a welfare state in Europe. But equally, the crisis has reinforced the need for the role of state intervention to be re-assessed and re-calibrated. There is a mixed and uneven commitment to the continued scope for national social and welfare systems to operate in an internal market. This has allowed for a new political and constitutional configuration in the EU where concepts of a national welfare state have been overtaken by fiscal and economic modernisation of economic governance structures and a process of modernisation. Thus, the position taken by Mitt Romney is challenged by a mixed academic discourse within Europe. On the one hand, there is a school of thought which suggests that rather than an adherence to a strong interventionist model of the state in Europe, there is a pervasive attachment to neo-liberalism.<sup>11</sup> On the other hand, a different school of thought argues that the recent responses to the economic recession have served to weaken democratic involvement in policy-making as well as the commitment towards developing socio-economic rights.<sup>12</sup> However, by analysing recent modernisation and reform developments in the EU a more nuanced approach emerges.

The structure of the Essay is as follows. The first section analyses the European commitment to a welfare state in the light of the creation of an Internal Market and the economic crisis. The second section addresses how the EU has set about the reform and modernisation of public finances in response to the economic crisis. The third part analyses how the EU is balancing a modernisation

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11. See, e.g., *RESILIENT LIBERALISM IN EUROPE'S POLITICAL ECONOMY* (Vivien A. Schmidt & Mark Thatcher eds., 2013).

12. See Paul O'Connell, *Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity*, in *HUMAN RIGHTS AND PUBLIC FINANCE*, (Nolan, O'Connell & Harvey eds., 2012), available at <http://ssrn.com/abstract=1915221>; Paul O'Connell, *The Death of Socio-Economic Rights*, 74 *MOD. L. REV.* 532 (2011) (the discussion by the same author of a tendency not to acknowledge judicial protection of socio-economic rights in the judicial fora by some national Supreme Courts).

agenda of reforming public services with a tougher agenda on reforming public finances. This section is followed by a specific case study of the modernisation of the procurement and financing of public services.

### I. THE WELFARE STATE IN THE INTERNAL MARKET

A particular argument that is put forward to argue that the *national* welfare state is still strong in the EU is that the EU lacks competence to create its own supra-national welfare state or redistributive policies.<sup>13</sup> This legal fact may act as a buffer towards too much political or judicial interaction with national welfare policies. Over time, opportunist litigation has used the forum of the European Courts<sup>14</sup> to challenge the legitimacy of national welfare rules, against the free movement and competition rules of the TFEU (the economic or market rules of the Treaty). But, if the European Courts prioritised the economic law of the EU over national welfare rules significant regulatory gaps would form where the EU cannot fulfill a re-regulatory role. This is because traditionally, the legislative, economic, and social spheres of the EU have been separated, with the Member States retaining significant legislative competence in the social and welfare sphere.<sup>15</sup> Article 151 TFEU<sup>16</sup>

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13. For several years, academic research used the typology of welfare states developed by Esping-Andersen in *GØSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM* (1990). This approach has been challenged from a theoretical perspective, alongside the challenges from the economic crisis and the recalibration of the welfare state in EU Member States. See Bernhard Ebbinghaus, *Comparing Welfare State Regimes: Are Typologies an Ideal or Realistic Strategy?* (Draft Paper presented at Eur. Soc. Pol'y Analysis Network Conf., Sept. 6-8, 2012), available at [http://www.cas.ed.ac.uk/\\_data/assets/pdf\\_file/0005/89033/Ebbinghaus\\_-\\_Stream\\_2.pdf](http://www.cas.ed.ac.uk/_data/assets/pdf_file/0005/89033/Ebbinghaus_-_Stream_2.pdf).

14. The General Court and the Court of Justice of the European Union ("CJEU").

15. See Erika Szyszczak, *Be Careful What You Wish For in FESTSKRIFT - LIBER AMICARUM ET AMICORUM IN HONOUR OF RUTH NIELSEN* (Jens Fejø, Ulla Neergaard, Christina Tvarnø & Grith Skovgaard Ølykke eds., 2013).

16. See Consolidated Version of the Treaty on the Functioning of the European Union art. 151, 2012 O.J. C 326/114 [hereinafter TFEU]. Article 151 of the TFEU states:

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

recognises a limited set of social objectives for the Union, but legislative competence and the political will is not always available to allow for Union social initiatives or interventions in areas governed by national welfare law.<sup>17</sup>

Historically, the CJEU has been accused of prioritising economic concerns of European integration over social values but, from an early stage, has also paid lip service to demands that the Union should not be a purely economic union but should recognise social values.<sup>18</sup> A general lack of legislative competence for the EU to intervene in social and welfare policies, alongside the principle of subsidiarity,<sup>19</sup> has allowed the Member States to develop their own culturally distinct social and welfare policies and to continue with redistributive policies in tune with national preferences and mediated through national democratic processes. This would be seen as preferable to a diluted Union-level legislative compromise.

However, the autonomy of the Member States to determine and mediate their welfare policies has been challenged in recent years

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To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

17. Two examples would be the tortuous legislative history of the Services Directive, Directive 2006/123/EC of the European Parliament and of the Council on Services in the Internal Market, 2006 O.J. L 376/36 (where numerous exclusions and safe harbours were created for social services), and the Patients' Rights Directive, Directive 2011/24/EU of the European Parliament and of the Council on the Application of Patients' Rights in Cross-Border Healthcare, 2011 O.J. L 88/46. *See also* Erika Szyszczak, *Soft Law and Safe Havens, in SOCIAL SERVICES OF GENERAL INTEREST IN THE EU* (Ulla Neergaard et al. eds., 2013).

18. *See* Defrenne v. Sabena, Case 43/75 [1976] E.C.R. 455; Laval un Partneri Ltd. v. Sweden, Case C-341/05 [2007] E.C.R. I-11767; International Transp. Workers' Fed'n & Finnish Seaman's Union v. Viking Line ABP, Case C-438/05 [2007] E.C.R. I-10799. *See also* Renaud Thillaye, *Gearing EU Governance Towards Future Growth: The Side-lining of Europe 2020 and its Worrying Consequences* (Pol'y Network Paper, 2013); Frank Vandenroucke, *Europe: The Social Challenge: Defining the Union's Social Objective is a Necessity Rather than a Luxury* (Observatoire Social Européen Opinion Paper No. 11, 2012).

19. *See* Consolidated Version of the Treaty on European Union art. 5(3), 2010 O.J. C 83/01 [hereinafter TEU Post-Lisbon]; *see also* TEU Post-Lisbon Protocol (No. 2) on the Application of the Principles of Subsidiary and Proportionality, 2007 O.J. C 83/206. The Union's social objectives include employment promotion, the development of human resources with a view to lasting high employment, improved living and working conditions, the dialogue between management and labour, proper social protection, combating poverty and social exclusion.

through a process of competence creep whereby opportunist litigation has used the forum of the European Courts to challenge national welfare rules, arguing for the prioritisation of economic law over national welfare law. If such prioritisation occurs a national welfare system can become destabilised. Litigation becomes contagious: litigation from one Member State may stimulate interest in litigation in other Member States, creating the potential for national welfare law to fall like a house of cards.<sup>20</sup> So far, this has not happened in Europe. The European Courts have been sensitive to national democratic preferences and have created principles to protect national welfare systems from the full force of EU economic law by deploying various techniques. For example European Courts have found that certain activities are not "economic" activities and therefore not caught by the Treaty rules;<sup>21</sup> or that a welfare system displays sufficient solidarity to either justify the non-application of the Treaty rules or to invoke a justification or exemption from the Treaty;<sup>22</sup> or by the use of

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20. Perhaps the most developed area of challenge to the organisation of national welfare schemes is seen in the litigation relating to patients' rights to move to receive health care in another Member State. By asking the home state to pay for health care received in another Member State could seriously upset the financial balance of a national care system, as well as impact upon the supply of medical care in the home—and the host—Member State. See HEALTH CARE AND EU LAW (Johan van de Gronden ed., 2011); see also Stephane De La Rosa, *The Directive on Cross-Border Healthcare or the Art of Codifying Complex Case Law*, 49 COMMON MKT. L. REV. 15 (2012).

21. Examples from the European Court's case law include the exercise of public authority involving strategic services. See, e.g., *Corinne Bodson v. SA Pompes funèbres des régions libérées*, Case 30/87, [1988] E.C.R. 2479 (mooring services in ports) *Corsica Ferries France v. Direction Général des Douanes*, Case C-49/89, [1989] E.C.R. 4441 (air traffic control) *SAT Fluggesellschaft mbH v. Eurocontrol*, Case C-364/92, [1994] E.C.R. I-43; *Selex Sistemi Integrati SpA. v Comm'n*, Case C-481/07P, [2009] E.C.R. I-2207 (anti-pollution surveillance); *Diego Cali & Figli Srl v. Servizi Ecologici Porto di Genova SpA (SEPG)*, 34 Case C-343/95, [1996] E.C.R. I-1547. See also Okeoghene Odudu, *Economic Activity as a Limit to Community Law*, in THE OUTER LIMITS OF EU LAW 225-43 (Catherine Barnard & Okeoghene Odudu eds., 2009).

22. See e.g., *Freskot AE v. Elliniko Dimosio*, Case C-355/00, [2003] E.C.R. I-5263; *Cisal di Battistello Venanzio & C. Sas v. Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)*, Case C-218/00, [2002] E.C.R. I-717; *Kattner Stahlbau GmbH v. Maschinenbau und Metall-Berufsgenossenschaft*, Case C-350/07, [2008] E.C.R. I-1513; *Freskot AE v. Elliniko Dimosio*, Case C-355/00, [2003] E.C.R. I-5263; *Sodemare SA & Others v. Regione Lombardia*, Case C-70/95, [1997] E.C.R. I-3395; *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, 1999 E.C.R. I-5751; Case C-155-157/97, *Brentjens Case C-67/96*, [1999] E.C.R. I-6025; *Maatschappij Drijvende Bokken BV v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, Case C-219/97, [1999] E.C.R. I-6121; *Firma Ambulanz Glöckner v. Landkreis Südwestpfalz*, Case C-475/99, [2001].C.R. I-8089; *Comm'n. v. Fed. Rep. of Ger.*, Case C-160/08, [2010] E.C.R. I-03713; *Diego Cali & Figli Srl v. Servizi Ecologici Porto di Genova SpA (SEPG)*, Case C-343/95, [1997] E.C.R. I-



the derogation in Article 106(2) TFEU that the application of the market rules of the Treaty would prevent a Service of General Economic Interest from fulfilling its obligations effectively;<sup>23</sup> or by allowing for Member States to justify national welfare policies through overriding reasons in the public interest.<sup>24</sup>

Alongside the European Courts' sensitivity to national welfare systems a door has been opened for the Commission to develop soft governance processes to "persuade" the Member States to modernise social welfare policies. This has been described as a process of Europeanisation as EU sites and *fora* emerge and processes stimulated to create a dialogue and a discourse at the EU level to persuade the Member States—and public opinion—to modernise and liberalise welfare and public services. This began with the evolution of open methods of co-ordination for social issues<sup>25</sup> and was reinforced by the Commission deploying soft law. Such processes involve different constellations of stakeholders to drive the agenda of modernisation of social and public services in Europe.<sup>26</sup>

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1547; AGR2 *Prévoyance v. Beaudout Père et Fils SARL*, Case C-437/09, [2011] ECR I-1003. See also Ulla Neergaard, *In Search of the Role of "Solidarity" in Primary Law and the Case Law of the ECJ*, in *THE ROLE OF COURTS IN DEVELOPING A EUROPEAN SOCIAL MODEL: THEORETICAL AND METHODOLOGICAL PERSPECTIVES* 97-138 (Ulla Neergaard & Ruth Nielsen eds., 2010); Malcolm Ross, *The Value of Solidarity in European Public Services Law*, in *THE CHANGING LEGAL FRAMEWORK FOR SERVICES OF GENERAL INTEREST* 81-99 (Markus Krajewski & Ulla Neergard, eds., 2009); Tamara Hervey, "Social Solidarity": *A Buttress Against Internal Market Law?*, in *SOCIAL LAW AND POLICY IN AN EVOLVING EU* 31-47 (Jo Shaw ed., 2000); Michael Dougan, *Expanding the Frontiers of EU Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?*, in *THE OUTER LIMITS OF EU LAW* 119, 199-265 (Catherine Barnard & Okeoghene Odude eds., 2009); Rob Houtepen & Ruud Ter Meulen, *New Types of Solidarity in the European Welfare State*, 8 *HEALTH CARE ANALYSIS* 329, 329-40 (2000); Jonathan White, *Rethinking Transnational Solidarity in the EU*, *PERSPECTIVES: CENTRAL EUR. REV. INTL. AFFS.* 40, 40-57 (2003); NATHALIE KARAGIANNIS, *EUROPEAN SOLIDARITY* (2007).

23. Case C-320/91, *Corbeau*, [1993] E.C.R. I-2563.

24. Seen especially in the free movement area and healthcare litigation. See Vassilis Hatzopoulos, *Financing National Health Care in a Transnational Environment: The Impact of the EC Internal Market*, 26 *WIS. INT'L L.J.* 761, 761-804 (2009); J.M.F. Martin & Síofra O'Leary, *Judicial Exceptions to the Free Provision of Services*, in *SERVICES AND FREE MOVEMENT IN EU LAW*, 163-95 (Mads Andenas & Wulf-Henning Roth eds., 2002).

25. See generally Peter Lelie & Bart Vanhercke, *Inside the Social OMC's Learning Tools: How "Benchmarking Social Europe" Really Worked* 19 (OSE Paper Series Research Paper No.10, 2013).

26. See Szyzszak, *Soft Law and Safe Havens*, *supra* note 17, at 317. For a new attempt at analysis of when and how soft law is used in the EU, see Fabien Terpan, *Soft Law in the European Union—The Changing Nature of EU Law*, 21 *EUR. L.J.* 68.

## II. THE MODERNISATION OF PUBLIC FINANCES IN THE EU

A significant incursion into national welfare policies has occurred as a result of the EU response to the sovereign debt crisis. The crisis turned attention to the weaknesses and instability of the economic and monetary constitutional structure of the Union, particularly the weaknesses in monitoring imbalances in public budgets. The explanations for these weaknesses are multiple and involve political and governance aspects of the EU integration model. Realising the euro became a political end in itself, with a blind eye turned to the creative accounting used by some Member States to meet the original convergence criteria targets. But another weakness is that the EU is not a complete economic and monetary union ("EMU"), with several Member States refusing to contemplate membership,<sup>27</sup> and several new Member States hastily adjusting their economic and fiscal policies to join the EMU as a badge of honour. As a consequence, Article 121 TFEU states that "Member States shall regard their economic policies as a matter of common concern." This exposed the choices made by the Member States in balancing their public finances to scrutiny and was implemented through the use of multilateral surveillance techniques with a weak form of peer review and weak sanctions in the form of Recommendations.<sup>28</sup> As a result, several Member States became exposed and vulnerable as the economic recession deepened and now have been subjected to macro-economic reform and modernisation programmes in order to receive bailouts from the EU. These programmes have impacted the financing and delivery of welfare services in the Member States as they have been asked to "effectively renegotiate their basic social contracts."<sup>29</sup>

The response of the EU to the existing inadequacy of macro-economic surveillance in the EMU was to introduce a new procedure of surveillance and enforcement called the "excessive imbalance procedure."<sup>30</sup> While these new procedures continued with the peer pressure approach of earlier techniques, a new remedy, or sanction, was introduced whereby a Member State belonging to the euro area

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27. For example, the United Kingdom and Denmark.

28. See generally Dariusz Adamski, *National Power Games and Structural Failures in the European Macroeconomic Governance*, 49 COMMON MKT. L. REV., 1319, 1319-64 (2013).

29. J-W. Müller, *Beyond Militant Democracy?*, 73 NEW LEFT REV. 44 (2012).

30. Council Regulation 1176/2011, art. 22, 2011 O.J. L 306/25; see also Council Regulation 1174/2011, 2011 O.J. L 306/8.

that does not follow a Council Recommendation is subject to a fine of 0.1% of its GDP. This is not an automatic process. The Commission must issue a Recommendation finding the Member State concerned is affected by excessive imbalances.<sup>31</sup> In practice, even this stage of the new processes is not automatic. Several Member States experiencing excessive budget imbalances and under macroeconomic reform programmes imposed as part of the conditions for obtaining financial assistance from the “Troika” (the IMF, the ECB, and the EU) as part of the financial rescue programme, notably, Greece, Ireland and Portugal, were not subject to further in-depth investigation by the Commission.<sup>32</sup>

Article 136(3) of the TFEU provides that the “granting of any required financial assistance . . . will be made subject to strict conditionality.” The depth of the economic recession and the exposure of a number of weak economies led to stricter emphasis upon the reform of welfare budgets alongside the need to modernise employment policies without overlooking the need for a social-economic balance in the prescriptions handed out.<sup>33</sup> The explanation for the imperative—and harshness—of the requirements to reform domestic economic policies is explained by Adamski as part of the solidarity of the EU: “This democratic dynamic explains why the more Germany and other creditor countries financially assist the euro area countries on the downside, the more they are susceptible to alleviate the harshness of the conditionality of assistance and the more ground the idea of a fiscal union gains.”<sup>34</sup>

Furthermore, as an explanation for the weaknesses, or lacunae, in the supra-national powers of the Union, Adamski notes, “[b]ut it also instantiates a fundamental paradox of the Union’s political constitution. Institutions of the Union do not have enough legitimacy

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31. See Council Regulation 1176/2011, *supra* note 30, art. 7(1).

32. An explanation for the reticence to fine a Member State may be that a Recommendation is a non-binding instrument in EU law. See Jonathon Zeitlin, *Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020*, (Watson Inst. Int’l Stud., Brown U. Working Paper No. 17, 2014). Observing that in a public lecture, Judge Koen Lenaerts raised doubts as to whether sanctions under the Excessive Imbalances procedure of the MIP were legal, but this point was not made in the written version of the lecture. See Judge Koen Lenaerts, *Address on Economic Integration, Solidarity and Legitimacy: The EU In Times of Crisis*, available at <https://www.kuleuven.be/euroforum/viewpic.php?LAN=E&TABLE=DOCS&ID=860>.

33. See S. Bekker et al., *EU Governance of Economic and Social Policies: Chances and Challenges for Social Europe*, 2 EUR. J. SOC. L. 103-20 (2013).

34. Adamski, *supra* note 28, at 60.

to pursue structural reforms at the national level, while only structurally reformed Member States would not be a burden to a fiscal federation."<sup>35</sup>

The Commission recognised the absurdity of fining a Member State with an economy already under financial stress. More surprising is the fact that the Commission also chose not to find that the Member States of Spain, Italy, Cyprus, Slovenia, and France, which were also experiencing excessive imbalances, were "only" "very serious" imbalances in the case of Spain and Cyprus and "serious" imbalances in the case of France, Italy, and Slovenia. However, the lack of sanctions for non-compliance, alongside the deepening of the sovereign debt crises in some Member States, forced the political hand of the EU to introduce a new political and constitutional approach to economic governance. On March 2, 2012 twenty-five Member States signed a new Treaty: The Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union (TSCG).<sup>36</sup> This Treaty created the Fiscal Compact which requires the signatory Member States to enact into national constitutions (or fundamental law) a commitment to converge progressively towards a structural deficit of 0.5% of GDP (0.1% for States with a debt ratio substantially below 60%), with compliance monitored by independent institutions. A different layer of enforcement is introduced in that a Member State may/should take legal action under Article 8(1) TSCG against a Member State not implementing a balanced budget. If the action is successful the CJEU should impose a fine, by way of a lump sum or penalty payment, that shall not exceed 0.1% of the GDP of the Member State in breach of the Treaty rules (Art. 8(2) TSCG).

The involvement of the CJEU in the enforcement of the solidarity pact of the Member States moves beyond a reinforcement of the rule of law as an integral part of the EU integration model. It also reinforces the moves away from participative democracy in the decision-making framework of the EU. A deeper and more profound impact of the new constitutional structure is also noted by Damien Chalmers in *The European Redistributive State and a European Law of Struggle*. He argues that the effect of the Court's new role has been to alter the constitutional balance in the EU to allow for the emergence of what he describes as a new form of redistributive

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35. *Id.*

36. The United Kingdom and the Czech Republic abstained from signing the new Treaty on Accession to the EU; in 2013 Croatia signed the new Treaty.

state.<sup>37</sup> This new polity is described as a regulatory state where fields of domestic economic and fiscal policy-making have been transferred to “new areas of political contestation” in which other Member States and the EU Institutions are more heavily involved in domestic policy-making. Chalmers perceives that this new form of polity lacks the conventional constraints associated with constitutional democracies and the rule of law, arguing that the traditional public law heritage of the Union, a system of accountability, democratic engagement, and constitutional checks and balances, has been lost to the emergence of a regulatory state.

The radical nature—and permanence—of the alterations to the institutional balance in the Union are also analysed by Mark Dawson and de Witte.<sup>38</sup> Their analysis is detailed in scope by arguing that the constitutional structure of the Union contains a ‘substantive’, ‘institutional’ and ‘spatial’ dimension that has been affected, or recalibrated, by the response to the economic and fiscal crisis in Europe.

According to their thesis the *substantive* balance of the Union is destabilised by the manner in which citizens of the Union have lost ownership and authorship over core values that have culturally and historically shaped national values towards a welfare state.

Both theses may be expanded by drawing upon the use of the economic, or market rules, of the Union being used by opportunist litigation to challenge core values of national law. The lack of Union legislative competence has not restrained the European Courts from acknowledging that social and welfare policies which are economic in nature may be mediated through EU law, primarily through the scope of justifications and derogations from the Treaty rules. This limits the autonomy of the Member States, particularly through the necessity to re-appraise national rules to comply with the principle of proportionality.

Dawson and de Witte argue that the *institutional balance* of the Union is altered by decreasing the voice of marginalised interests and representative institutions.<sup>39</sup> The loss of representative influence is

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37. See, e.g., DAMIAN CHALMERS, THE EUROPEAN REDISTRIBUTIVE STATE AND A EUROPEAN LAW OF STRUGGLE, 18 *EURO. L.J.* 667 (2012).

38. See generally Mark Dawson & Floris de Witte, *Constitutional Balance in the EU After the Eurocrisis*, 76 *MOD. L. REV.* 817 (2013).

39. See K. Lenaerts & A. Verhoeven, *Institutional Balance as a Guarantee for Democracy in EU Governance*, in *GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET*

seen in the development of new constellations of actors in policy-formation *fora*, chosen and orchestrated by the Commission through soft governance processes<sup>40</sup> and in the dominance of the executive, and now the CJEU, in the new fiscal surveillance and enforcement mechanisms of EMU. Thus the result is likely to be greater power for national executives, with responsibilities for the initiation of, and compliance with, policy proposals shifting during the economic crisis towards the European Council (that is, the executives of the Member States). This is a significant departure from the attempt towards encouraging a greater involvement in national parliaments in EU law-making scrutiny and the move towards local decision-making through the principle of subsidiarity.<sup>41</sup>

Finally, according to Dawson and de Witte, the marginalisation of certain interests is also seen in terms of the threat to the *spatial balance* of the Union, which protects the voice of smaller and poorer Member States and their citizens from majoritarian or even hegemonic tendencies. The increased influence of the bigger, more resourceful Member States, in combination with the changes to the Union's substantive and institutional structure, leads to the loss of political autonomy for smaller and poorer Member States.

The frustration of this denial of democratic participation in decisions affecting national interests has spilled out onto the streets of European cities from Lisbon to Dublin, and from Madrid to Athens.

### III. THE RECALIBRATION OF THE SOCIAL AND THE ECONOMIC

The Treaty of Lisbon 2007, negotiated before the economic crisis, is portrayed as a significant turning point in the constitutional structure of the Union, signaling a qualitative change to policy making: a recalibration or rebalancing of the economic priorities found in the earlier Treaties with a set of social aims and values set out in Articles 2 and 3 of the Treaty on European Union ("TEU").<sup>42</sup> In particular the use of the term "a highly competitive social market

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(C. Joerges and R. Dehousse eds., 2002); see also J. P. Jacque, *The Principle of Institutional Balance*, 41 COMMON MKT. L. REV. 387 (2002).

40. See Szyszczak, *supra* note 17.

41. See Adam Cygan, *Accountability, Parliamentarism and Transparency*, in THE EU: THE ROLE OF NATIONAL PARLIAMENTS (2013).

42. See Erika Szyszczak, *Building A Socioeconomic Constitution: A Fantastic Object?*, 35 FORDHAM INT'L L.J. 1364 (2012).

economy” in Article 3 TEU suggested the EU would intervene to create social policies alongside respecting the Member States’ commitments to social welfare policies. This would go some way to plugging the regulatory gaps when national law clashed with the fundamental economic law of the EU, as well as to ensure that a social dimension was part of the response to the economic crisis. But the ability of the EU to deliver on this promise has been questioned.<sup>43</sup> And, as this analysis reveals, the social dimension of European integration has been subsumed into the new macroeconomic surveillance mechanisms and economic imperatives of reform and modernisation. Zeitlin and Vanhercke describe the process as “socializing of the European Semester.”<sup>44</sup> By this they argue that social policies have been absorbed into the economic co-ordination framework, the European Semester, through the increased focus social objectives as targets in EU Recommendations to the Member States, an increased emphasis on social monitoring and multilateral surveillance and peer review of Country reporting, an enhanced role for social and employment actors, for example, the EU Employment and Social Protection Committee. At the same time the Commission refused to engage in the Social Open Method of Coordination, arguing that the policy processes should be coordinated within the Europe 2020 process and that social reporting should be channeled through the European Semester.<sup>45</sup> Zeitlin and Vanhercke argue that these developments are “a product of reflexive learning and creative adaptation by social and employment policy actors to the new

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43. Fritz W. Scharpf, *The Asymmetry of European Integration, or: Why the EU Cannot be a ‘Social Market Economy’*, 8 *SOCIOECONOMIC REV.* 211 (2009); see Dragana Damjanovic, *The EU Market Rules As Social Market Rules: Why the EU Can be a Social Market Economy*, 50 *COMMON MKT. L. REV.* 1685 (2013).

44. See Zeitlin, *supra* note 32. The European Semester begins in November when the Commission issues its Annual Growth Survey identifying key economic challenges faced by the EU and identifies priorities for action. The Survey reviews the Country Specific Recommendations from the previous year. Simultaneously the Commission issues an Alert Mechanism Report which identifies the Member States deemed necessary for In-Depth Reviews under the Macroeconomic Imbalances Procedure (which reports in March). Using the Annual Growth Survey the European Council in March endorses the EU and national priorities and provides reflections on the implementation of the previous cycle of reporting. In April the member States submit their Reform programmes which cover the Europe 2020 Guidelines and the Euro+Pact commitments, as well as the Macro Imbalances Procedure and their Stability or Convergence programmes. The Commission assesses these programmes in May, proposing Country-Specific Recommendations which are reviewed by the ECOFIN and EPSCO Committees and endorsed by the European Council in June/July.

45. See *id.* at 29.

institutional conditions of the European Semester: another form of 'socialization.'"<sup>46</sup>

For some commentators this is a missed opportunity to recalibrate and modernise the European welfare state.<sup>47</sup> However, there are some countervailing pulls towards balancing the economic and social values of the EU. For example, a reinforcement of the social dimension to EU political integration can be seen in the incorporation of the Charter of Fundamental Rights into EU basic law, alongside greater reference to the Charter in European Court judgments. Contained in Articles 34-36 of the Charter is a Chapter on "Solidarity", and recognising as part of the EU heritage are a set of welfare rights and principles common to the Member States: social security, social services, social housing, healthcare, and public services (services of general economic interest).<sup>48</sup>

Additionally, a constitutionally entrenched boundary between economic and non-economic activities was created in Article 14 TFEU where a distinction is made between public services, known as Services of General Economic Interest ("SGEI") and non-economic services of general interest ("NESGI"). This distinction is reinforced in Protocol No. 26 on Services of General Interest ("SGI"), setting a means of dividing competences between the EU and the Member States.

Thus the Treaty of Lisbon 2007 facilitated a bridge between national welfare state policies and the complementarity of a set of EU social welfare policies. The near absence of an EU social dimension in the earlier Treaties had allowed the Member States leeway in developing national policies on public services and protecting these policies from outside competition. But now, this notion of a "bounded space" for national welfare policies has been increasingly challenged by opportunist litigation testing the national welfare policies against EU market or economic law.<sup>49</sup>

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46. *Id.* at 4.

47. See ANTON HEMERIJCK, *CHANGING WELFARE STATES* (2013); see also Anton Hemerick, Lecture at the London School of Economics, *Fault Lines and Silver Linings in the European Social Models* (June 14, 2014) (transcript available at <http://www.lse.ac.uk/publicEvents/events/2014/06/20140611t1830vNT.aspx>).

48. For a detailed commentary on the meaning and scope of the Charter, see THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY (Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward eds., 2014).

49. The term is used in MAURIZIO FERRERA, *THE BOUNDARIES OF WELFARE* (2005).



At EU level, initially, the emphasis upon the social dimension to European integration was boosted in a way that would challenge the integrity and structure of national welfare policies, particularly in the financing and demographic planning of the delivery of such services. The CJEU provided intellectual leadership towards creating the idea of a single market in welfare services by allowing individuals to access public services in another Member State by utilising the concept of Citizenship of the Union,<sup>50</sup> replacing the traditional territorial boundaries with a new single market for public services.<sup>51</sup> However, there is a lack of symmetry in this process.<sup>52</sup> In shaping the *supply* side of public services it has proved not to be as easy for EU law to open up cross-border markets, outside of the liberalisation of the networked industries.<sup>53</sup> If we take one sector, healthcare services, the CJEU has shown that there can be incentives for competition to materialise in public social services, for example, by allowing patients seeking alternative health care in another Member State to utilise the free movement provisions of EU economic law.<sup>54</sup> Despite the push for patients' rights and free movement, health care *supply* side reform is largely underdeveloped at the EU level. The creation of markets in cross-border health care is the exception with the majority of social public services continuing to be provided within territorial boundaries. At first sight the Member States have been allowed to create a safe, protected laboratory to experiment with different forms of liberalisation, or marketisation, modernisation, and reform of such

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50. *But see* Elisabeta Dano and Florin Dano v. Jobcenter Leipzig, Case C-333/13, [2014] E.C.R. I \_\_\_\_ (delivered 2014). The CJEU placed limits on Citizenship where a migrant was unable to claim special non-contributory social security benefits when she was not legally resident in a Member State. *See* Jobcenter Berlin Neuköln v. Nazifa, Sonita, Valentina & Valentino Alimanovic, Case C-67/14, [2014] E.C.R. I \_\_\_\_ (delivered 2015).

51. Access to some public services has proved easier than others. *See, e.g.*, R v. London Borough of Ealing and Secretary of State for Education and Skills, *ex parte* Dany Bidar, Case C-209/03, [2005] E.C.R. I-2119 (discussing education). In contrast access to public social security benefits has been tightened. *Compare* Dano Case C-333/13, with Pensionsversicherungsanstalt v. Brey, Case C-140/12, [2013] E.C.R. I \_\_\_\_ (delivered Sept. 19, 2013); Gryzelczek, C-184/99, [2001] E.C.R. I-06193; Förster C-158/07 (delivered Nov. 18, 2008).

52. *See* Erika Szyszczak, *Legal Tools in the Liberalisation of Welfare Markets, in* INTEGRATING WELFARE FUNCTIONS INTO EU LAW—FROM ROME TO LISBON (Ruth Nielsen et al. eds., 2009).

53. *See* Sodemare SA & Others v. Regione Lombardia, Case C-70/95, [1997] E.C.R. I-3395.

54. *See generally* HEALTH CARE AND EU LAW, *supra* note 20; De La Rosa, *supra* note 20.

services within their own territorial and cultural space.<sup>55</sup> This has been achieved through the lack of litigation to challenge certain sectors as well as the use of exemptions and safe havens of certain sensitive social services such as social housing, hospital care, or education created in EU secondary law and European Commission soft law Communications.<sup>56</sup> However, the economic and fiscal crisis has created a countervailing pull to the evolution of a national-led social dimension to the EU by focusing the re-shaping and recalibration of public services as *economic* services, guided by considerations of competition and efficiency.

The drive for the marketisation of social services is taking place not only through demands made by the response to the fiscal and economic crisis but also the marketisation processes inevitably have led to the application of free movement and competition law to areas of state activity previously shielded from the economic law of the EU.

The need, on the one hand, to shield public services from competition, but, on the other hand, to ensure a level playing field where significant amounts of public expenditure, as well as access to ancillary markets is concerned, has blurred the boundaries of EU law. This is generating strong pressure on some of the solutions adopted by the CJEU when trying to protect the Member States freedom from the checks and balances derived from EU economic law.<sup>57</sup> To address this emerging problem the European Commission has created a new form of governance through soft law communications to retain a normative dimension to EU regulation of social and welfare services.<sup>58</sup>

The first attempts at modernisation of national social services and social security systems were initiated through soft forms of

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55. Albert Sanchez Graells & Erika Szyszczak, *Modernising Social Services in the Single Market: Putting the Market into the Social*, in FOSTERING GROWTH: REINFORCING THE INTERNAL MARKET CEU EDICIONES 61-88 (J. Maïllo & J. Beneyto eds., 2014), available at <http://ssrn.com/abstract=2326157>.

56. See Szyszczak, *Soft Law and Safe Havens*, *supra* note 17. But note, however, such sectors may not be totally immune from the fundamental Treaty rules on competition and free movement. See *Libert v. Gouvernement flamand*, Joined Cases 197/11 & 203/11, [2013] E.C.R. I \_\_\_ (delivered May 8, 2013). Here a Flemish law on social housing was tested against the free movement rules. See also *Diputación Foral de Bizkaia*, Case T-397/12, [2015] E.C.R. I \_\_\_ (delivered May 19, 2015).

57. See e.g., *Fenin v. Commission*, Case C-205/03 P, [2006] E.C.R. I-6295; *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK) v. Ichthyol-Gesellschaft Cordes*, Joined Cases C-264/01 & 306/01 & 354/01 & 355/01, [2003] E.C.R. I-2493.

58. Szyszczak, *Soft Law and Safe Havens*, *supra* note 17.

persuasion to the Member States, through the use of Recommendations and discussions termed “High Level” talks between civil servants of the Member States. Reform of public services was on the modernisation agenda of the EU before the sovereign debt crisis added to the economic and fiscal crisis in Europe. In 2008 a renewed Social Policy Agenda was adopted by the Commission.<sup>59</sup> This was intended to complete the limping Lisbon Process for the years 2008-2010 by linking employment and economic stability. Its aims were lost in the ensuing economic recession and a lack of analysis and understanding as to how social policy governance fitted with the new architecture for economic and fiscal coordination outlined in the earlier section of this Essay.

Instead, following on from The Monti Report, the “Europe 2020” programme was adopted by the European Council in June 2010. This resulted in the Single Market Acts I and II which provide a framework for modernisation of aspects of the Single Market. Of significance alongside the modernisation and reform of the Single Market is the integration of the social dimension of EU policy coordination into the European Semester. In a Communication of 2013 social indicators continue to be the predominant policy tool, alongside the coordination of national employment policy, in monitoring the Member States’ social policies.<sup>60</sup> Similarly social indicators continue to be used to guide a social “open method of coordination” to combat poverty, pensions and long-term care in the Member States. The Communication suggests that the new procedure, the “Macroeconomic Imbalance Procedure,” may create a surveillance mechanism to pick up imbalances that could threaten the EMU macroeconomic policy surveillance mechanisms. Another new mechanism termed the “Alert Mechanism Report” uses the indicators of social policy to create a Score Board to alert the Commission to conduct further in-depth investigations and to issue Recommendations accompanying the Country Specific Recommendations emerging from the European Semester reviews. This is a new dimension to the way in which social policies, that

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59. Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Renewed Social Agenda: Opportunities, Access and Solidarity in 21st Century Europe COM (2008) 412 Final (September 2008).

60. Communication on Strengthening the Social Dimension of the Economic and Monetary Union, COM (2013) 690 Final, 2014 O.J. C 67/24.

affect the operation of welfare states in Europe, are brought within macro-economic surveillance mechanisms. The subtle introduction of this new area of surveillance is necessary because the legal base for the six-pack and two-pack regulations is Article 121(6) TFEU that states that “[t]he European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4.”

Paragraphs Three and Four State:

3. In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment.

For the purpose of this multilateral surveillance, Member States shall forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary.

4. Where it is established, under the procedure referred to in paragraph 3, that the economic policies of a Member State are not consistent with the broad guidelines referred to in paragraph 2 or that they risk jeopardising the proper functioning of economic and monetary union, the Commission may address a warning to the Member State concerned. The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned. The Council may, on a proposal from the Commission, decide to make its recommendations public.

#### *IV. REFORM OF PUBLIC SERVICES IN THE EU*

The economic crisis created new challenges for the Member States to continue to supply and adapt public services under the traditional national material and financial structures. Member States are under significant pressure to find new ways of meeting their social duties with increased “efficiency,” or, in other terms, under pressure to achieve significant savings that allow them to remain in compliance (or to attain compliance) with financial stability

obligations without completely dismantling the welfare state. Although not all of the reforms are driven by efficiency arguments since there is evidence that quality and choice in public services has also been a driver.<sup>61</sup> Other evidence from Europe indicates that a central driver of reform of public services is the role of the middle class as a central and key constituency for welfare reform.<sup>62</sup>

Public sector reform initiatives, and specifically those concerned with public service provision, need to be compliant with an increasingly complicated web of EU economic or market rules and principles. Despite the increasing relevance of solidarity and the continued treatment of social services as a matter of exclusive legislative competence of the Member States, compliance with secondary EU legislation and with soft law instruments adopted by the European Commission (indirectly) bring social services within the sphere of EU economic law. Recent reforms in state aid and public procurement, emanating from the Monti Report, make it particularly challenging for Member States to ‘rethink and redesign’ the strategies for the provision and financing of public and social services.<sup>63</sup> The modernisation of the funding and operation of public services in the EU had started at the national level in response to national political preferences for the reduction of state provision and funding of such services in several Member States,<sup>64</sup> but most notably the United

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61. K. Dowding & P. John, *The Value of Choice in Public Policy*, 87 *PUB. ADMIN.* 219 (2009); JULIAN LE GRAND, *THE OTHER INVISIBLE HAND: DELIVERING PUBLIC SERVICES THROUGH CHOICE AND COMPETITION* (2007).

62. See Joan Costa-Font & Valentina Zigante, *The Choice Agenda, in European Health Systems: The Role of ‘Middle Class Demands’* (London Sch. Econ and Pol. Sci., Paper No.82, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2522841](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2522841).

63. In particular the Almunia Package up-dating the earlier European Commission Package on *Altmark* which regulates the financing and operation of SGEI. Commission Communication on the application of the European Union State Aid Rules to Compensation Granted for the Provision of Services of General Economic Interest, 2012 O.J. C 8/4; Commission Decision of December 20th on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State Aid in the Form of Public Service Compensation Granted to Certain Undertakings Entrusted with the Operation of Services of General Economic Interest, 2012 O.J. L 7/3; Commission Communication - European Union Framework for State Aid in the Form of Public Service Compensation, 2012 O.J. C 8/15; Commission Regulation on the Application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid Granted to Undertakings Providing Services of General Economic Interest, 2012 O.J., L 114/8; *Swap Rate Proxies*, EUROPEAN COMMISSION, [http://ec.europa.eu/competition/state\\_aid/legislation/swap\\_rates\\_en.html](http://ec.europa.eu/competition/state_aid/legislation/swap_rates_en.html). See generally REFORM AND MODERNISATION, *supra* note 9.

64. See, e.g., A. Anell, *Swedish Healthcare Under Pressure*, 14 *HEALTH ECON.* September 2005, at S237; Yvette Bartholm e & Hans Maarse, *Health Insurance Reform in the*

Kingdom.<sup>65</sup> But there is also some evidence that efficiency gains and demands of the European middle classes for greater choice in the provision of public services, particularly health care, are also significant drivers in the reform of public services.<sup>66</sup> Reform in some Member States may act as a form of institutional arbitrage creating incentives for other Member States to follow.<sup>67</sup> However, there is also an acknowledgement that while certain 'hard' public services can be put out to competitive tender and efficiency gains measured, for example the collection of waste, other 'social' services are regarded as 'softer' involving more complicated evaluations of quality.<sup>68</sup> Research from the United States shows that markets in social services are not competitive.<sup>69</sup> Indeed, the EU rules on procurement of such social services allow for a reduction in the competition for social services contracts.<sup>70</sup> Such an approach is controversial: a reduction of competitive pressure can lead to either a price premium or a drop in quality for the same price. Having fewer suppliers will also encourage collusion between them in smaller markets.

This process of opening up public contracts to competition was Europeanised through the CJEU ruling in *Altmark*,<sup>71</sup> which established a set of *ex ante* criteria for the legitimate funding of public services. This was an indication of a prescriptive approach for the Member States to adopt in the design and delivery of public services and was far-reaching given that the EU did not have competence to legislate in the area. Such services were brought within the remit of

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*Netherlands*, 12 EUROHEALTH 7, (2006); Laura Cabiedes & Ana Guillén, *Adopting and Adapting Managed Competition: Healthcare Reform in Southern Europe*, 52 SOC. SCI. MED. 12015 (2001).

65. Social (Welfare) Services are also subject to reform, resulting in less direct provision of public services by local government and increased 'marketisation' of such services. See, e.g., MUTUALS TASKFORCE, PUBLIC SERVICE MUTUALS: THE NEXT STEPS 6 (2012), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61776/Public-Service-Mutuals-next-steps.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61776/Public-Service-Mutuals-next-steps.pdf); HM GOVERNMENT, OPEN PUBLIC SERVICES 9 (2012), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/255288/OpenPublicServices-WhitePaper.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255288/OpenPublicServices-WhitePaper.pdf).

66. See Pierre Bourdieu, *The Forms of Capital*, in READINGS IN ECONOMIC SOCIOLOGY (Nicole Woosley Biggart ed., 2008).

67. See Cabiedes & Guillén, *supra* note 64.

68. See David M. Van Slyke, *The Mythology of Privatisation in Contracting for Social Services*, 63 PUB. ADMIN. REV. 296 (2003).

69. See Jonathan Levin & Steven Tadelis, *Contracting for Government Services: Theory and Evidence from U.S. Cities*, 58 J. INDUS. ECON. 507, 535 (2010).

70. See Council Directive 2014/24/EU, *supra* note 8, art. 74-77.

71. See LE GRAND, *supra* note 61.

the market rules by case law and taken up by the Commission in a quasi-legislative package to manage the administration of the effect of the market rules on public services. This prescription was further defined and refined by the Commission in a set of soft law documents: the Monti-Kroes package. Thus, *Altmark* can be situated within the line of case law that state monopolies are no longer privileged undertakings in the EU operating in a *sui generis* market.<sup>72</sup> Public services can be (and now often are) economic activities that are delivered in competitive markets and the EU economic (or market) rules of free movement and completion can be used to foster efficiency and consumer satisfaction.

A parallel aspect of *Altmark* was a response to a need to increase efficiency in the delivery of public services in Europe in response to increasing international competitiveness. Thus through judicial intervention efficiency and competitiveness were introduced as core values in the delivery of public services in the EU but fine-tuned in a distinctive European manner to also protect the interests and values underpinning the role of public services (SGEI) in the EU.

A review of the *Altmark* ruling was already on the agenda for 2009.<sup>73</sup> The Member States had hoped for greater recognition of the recalibration of the social and the economic balance values in EU law and policy from Treaty of Lisbon 2007, and, in particular a recognition that *social* services could be ring-fenced from interference from EU law by being provided at the local level or national level and not fully exposed to market principles. But the impetus from the Commission's review of the single market, recognising new ideas of citizenship and solidarity, and the Monti Report,<sup>74</sup> influenced the Commission to bring SGEI into the main frame of the new single market programme with tougher conditions on the entrustment of a public service and tighter fiscal controls to avoid over-compensation of SGEI. This has focused attention on economic efficiencies of public services rather than quality. In parallel the Commission has used soft law processes to indicate to the Member States how and

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72. The death knell of State monopolies sounded in the early 1990s, on the eve of the deadline set of the completion of the internal market. *See Höfner v. Macrotron*, Case C-41/90, [1991] E.C.R. I-2010, ¶ 43. Since that case very few cases have been taken using Article 106(1) TFEU as a legal base. But, recently the European Commission and the CJEU showed that the Article 106 TFEU is not redundant. *See Commission v. DEI*, Case C-533/12P, [2014] E.C.R. I \_\_\_ (delivered July 17, 2014).

73. *See* Commission Decision No. 2005/842/EC 2005 O.J. L 312/29.

74. *See id.*

when social services may continue to be outside the capture of EU law, and this in turn allows for a prescriptive agenda to emerge: the Member States are left in little doubt that if they resort to the marketisation of any public or social services they run the risk of the EU market rules applying.<sup>75</sup>

These interventions by the EU reflect the increased interest in the marketisation of public and social services in Europe, especially in the United Kingdom. The adoption of 'competition-based' solutions or 'market-oriented' formulae for the provision of social services implies the necessity to overcome a set of EU regulatory hurdles (or controls) at different stages of the process of turning public services into market-oriented services. Such controls make it difficult for Member States to seek efficiency gains without resorting to the (private) market and, consequently, limit their choices and strategies as soon as there is any type of private participation (generally, by means of financial transfers, acquisition of ownership or conclusion of contracts). Unless Member States rearrange their schemes for the provision of public services without any private participation whatsoever, EU economic law will apply, generating a complicated regulatory landscape that may impose significant restrictions on the Member States' competence to autonomously choose how to provide public services under the new market-based circumstances.

### CONCLUSION

The elements of solidarity seen in the acceptance of sovereign debt bailouts funded by the EU, (and the IMF and ECB), for Member States undergoing complex economic problems reveals the flexibility in the EU governance framework to adapt to times of crisis and goes some way to demonstrate that the "EU *is* working" in its response to the economic crisis. Austerity is rarely accepted as a popular solution and in some Member States has led to even greater social and economic problems. Hall has argued that the public objectives of the European austerity programmes are not clear:

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75. For a general discussion of the persuasive use of soft law, see generally Szyszczak, *Soft Law and Safe Havens*, *supra* note 17. For the most recent form of soft law in relation to SSGI, see European Commission, Guide to the application of the EU rules on state aid, public procurement and the internal market services, SWD (2013) 53 Final (Apr. 29, 2013) at 20 (2013).



It is not the reconstruction of productive capacity, full employment, or the development of the shared benefit of the welfare state, but rather the goal of sound fiscal soundness, formalised in targets for government debt and deficit, and the ability to borrow and repay, in international financial markets. . . . austerity is focussed primarily on public spending, rather than consumer spending (reinforced by the objective of focussing on the management of public rather than private, debt).<sup>76</sup>

This distinctive EU response has met with deeper and more complex criticism and opposition in the way that it has challenged the constitutional settlement of the Union and altered its values. The use of legal measures to create a tougher framework for macroeconomic surveillance of public finances in the EU has resulted in a new constitutional and institutional arrangement whereby the executive of the larger, and financially stronger, Member States wield a bigger voice and power over weaker and less financially secure States. Within this new framework democratic participation and consultation, alongside judicial review, transparency and accountability have been sacrificed, allowing the voice—and the values—of the stronger Member States to play a significant role in creating a new national policy framework for the economically, and weaker states.

While it is argued that these States have lost control over their social contract it is not necessarily the case that the social contract has been dismantled. However, the de-politicalisation of these processes and measures has masked the lack of a democratic involvement in the modernisation and reform of the welfare states of Europe. Inherent within that policy reform process is the inevitable reduction of publicly provided or publicly financed services. While this may eventually lead to the weakening of the traditional welfare state in some European states this Essay has shown, that this aspect of reform and modernisation of the role of State intervention in the market is not wholly generated by the responses to the economic crisis. Such policies have been on-going and are also generated by other processes that are also not inherently democratic. The most extreme aspect of the non-democratic recalibration of national public welfare services is the ability to litigate to challenge and test national public welfare services against the free market or economic rules of the EU. The

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76. David Hall, *Services of General Interest under Regimes of Fiscal Austerity*, in *SERVICES OF GENERAL INTEREST BEYOND THE SINGLE MARKET: EXTERNAL AND INTERNATIONAL LAW DIMENSIONS* (M. Krajewski ed., forthcoming 2015).

ensuing case law alters not only the constitutional balance between the EU-Member State legislative competence settlement but also accelerates the ensuing EU competence creep. Applying the EU economic rules to public services through soft law and soft governance processes alters the inter-institutional constitutional balance within the EU. To date this has not led to the breakup of the EU, or the dismantling of the welfare state in Europe, but a recalibration of the way in which the social contract in Europe is made.