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The European Accessibility Act and the shadow of the "social market economy"

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***E.L. Rev. 660 Abstract**

This article critically discusses the [Directive on the accessibility requirements for products and services](#), better known as "European Accessibility Act" (EAA), from an EU constitutional perspective. It locates this new legislative intervention within the scope of the "social market economy" ideal set out in [art.3\(3\) of the Treaty on the European Union \(TEU\)](#). In doing so, this contribution endeavours to revisit the scholarly interpretations of [art.3\(3\) TEU](#) itself and to provide novel insights on its practical implications. The analysis shows that the EAA presents a juxtaposition of market and social goals (broadly conceived). It argues that, while the EAA falls short of the wide-ranging obligations undertaken internationally by the EU under the UN Convention on the Rights of Persons with Disabilities, it does fulfil the constitutional ideal envisaged in [art.3\(3\) TEU](#). On the whole, this article contends that the EU has taken on the mandate of the social regulation of capitalism, and that the enactment of the EAA signals an attempt to re-orientation of positive integration in the pursuit of non-economic goals.

Introduction

After a long and somewhat difficult gestation, at the beginning of June 2019, the [Directive on the accessibility requirements for products and services](#), better known as "European Accessibility Act" (EAA or "the Directive"), was published in the Official Journal of the European Union (EU).¹ The EAA seeks to harmonise national provisions related to accessibility for people with disabilities of certain products and services, and is based upon [art.114 of the Treaty on the Functioning of the European Union \(TFEU\)](#). Its overarching purpose is to implement the wide-ranging accessibility obligations included in the UN Convention on the Rights of Persons with disabilities (CRPD, or "the Convention"), which was ratified by the EU in 2010.² In that vein, the EAA represents the latest development of a pan-European system of disability law and policy,³ prompted by the ratification of the CRPD and facilitated by the adoption of the **E.L. Rev. 661* "European Disability Strategy 2010–2020" (the "Strategy").⁴ The Strategy outlines a 10-year-long disability policy framework and identifies cross-cutting EU-level actions, signalling a strong pivot on accessibility, which is one of the eight interconnected areas for EU action—the others being: participation, equality, employment, education and training, social protection, health and external action.

The EAA has been welcomed by a range of stakeholders,⁵ and sparked the interest of scholars even prior to its adoption.⁶ After the publication of the legislative proposal by the Commission in December 2015,⁷ most of the attention has been devoted, on the one hand, towards analysing the compliance of the (then proposal for the) EAA with the CRPD, and understanding the extent to which the Act fulfils the wide-ranging obligations included in the Convention.⁸ On the other hand, legal scholarship has discussed how the EAA would interact with other areas of law and policies, such as standardisation rules,⁹ as well as with existing EU legislation.¹⁰ The final text of the Directive offers different avenues for research and could be examined from multiple perspectives, vis-à-vis the "human rights model of disability" propounded by the CRPD.¹¹ This article, however, moves away from those approaches and aims to discuss the EAA from an EU constitutional perspective, locating this new legislative intervention within the scope of the "social market economy" ideal purported by art.3(3) of the Treaty on the European Union (TEU).¹² In *E.L. Rev. 662* doing so, this contribution endeavours to revisit the scholarly interpretations of art.3(3) TEU, to provide novel insights on its practical implications and to contribute to the wider debate around a "Social Europe".¹³

Muir previously suggested that the EAA could be considered the latest example of the increased visibility of social objectives across various fields of EU intervention, beyond the Social Policy Title in the EU.¹⁴ She also argued that this Directive represents "an upgrade of social standards" in EU policy prompted by the Union's international obligations stemming from instruments such as the CRPD.¹⁵ This article contends that the EAA does not just show that social concerns have crept into the EU action, it epitomises the embodiment of the constitutional ideal of "social market economy". While fully cognisant of the ambiguity, criticisms and different interpretive nuances surrounding the concept of a "social market economy",¹⁶ and regardless of the absence (somewhat astonishingly) of any reference to it in the Directive itself, this contribution suggests that the EAA represents an interesting "case-study" in that it presents a seamless juxtaposition of market and social goals (broadly conceived).

Following on from these introductory remarks, the next section provides a succinct overview of the debate surrounding the concept of a "social market economy", mapping the diverse critical approaches to art.3(3) TEU. The third section, then, recounts the legislative process leading to the eventual adoption of the EAA, and critically discusses the interplay, within this process, between an intrinsic consideration of economic implications of accessibility within the internal market and the need to balance these with clear social objectives. This section also includes a brief examination of the core accessibility obligations included within the CRPD as a starting point for the elaboration of the EAA. However, it does not delve into the complexities and inner workings of the Convention, which remains, as such, outside the scope of this contribution. This is followed by a fourth section, which explores how the inherent tension between apparently contradictory interests—that of implementing the CRPD, versus that of streamlining the functioning of the internal market—has been resolved in a careful balance between market integration, economic freedoms of producers and service providers and social objectives. It ultimately argues that, while the EAA (almost inevitably) falls short of the wide-ranging obligations undertaken internationally by the EU under the CRPD, it does fulfil the constitutional ideal envisaged in art.3(3) TEU. The final section provides some concluding remarks on the long-term normative effects of a deeper interplay between "the social" and "the market" within EU law and policy, and how the EAA feeds into this process.

The EU social market economy—in search of a definition

Since 2009, and by virtue of art.3(3) TEU, the EU has constitutionally defined itself as a "highly competitive social market economy". This Union-level objective is textually linked to the aim of ensuring "full employment and social progress", and tallies with the goals of combating social exclusion and discrimination, and promoting social justice. Article 3(3) TEU operates in tandem with the cross-cutting social clause included in art.9 of the Treaty on the Functioning of the European Union (TFEU), by stating that, *E.L. Rev. 663*

"[i]n 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."

It is relatively uncontested that the Treaty borrows this term from the German scholarship,¹⁷ which originated after the Second World War.¹⁸ While various offshoots and divergences exist within the German theorisations of the same, Müller-Armack, the main proponent of the *soziale Marktwirtschaft*, postulated the existence of an efficient State (not influenced by private interests) that allows the market to work well and ensures a high level of provision of goods and services, in addition to actively protecting social rights.¹⁹ In Müller-Armack's economic theories, the "social market economy" includes "a wider complex of measures of

social policy and a narrower complex of measures of economic policy, delicately synchronized with each other".²⁰ Reflecting on these theories and their legacy, Šmejkal and Šaroch²¹ have identified the requirements of a "social market economy" in regulatory policies aimed at addressing market failures, and at limiting the inequalities that arise from a relatively free and unfettered market system itself. In a similar vein, Viehoff contends that a "social market economy" has three main aspects.²² First, it entails "a socio-economic order in which some domains of life are not subjected to the commodifying tendencies of the market", which therefore limits the commodification of important human needs.²³ Secondly, it corrects "the *outcomes* of markets via redistributive taxation to contain disparities of income and wealth".²⁴ Finally, a "social market economy" provides structure to social institutions and "regulate markets in such a way that the *process* by which markets create outcomes treats each citizen fairly".²⁵ In that connection, Syzdlo suggests that,

"the concept of social market economy mandates democratic governance in the field of economics that consists in the broad participation of self-interested undertakings and other representatives of *E.L. Rev. 664 society (such as trade unions and non-governmental organisations) in the determination of the legal rules that will bind all these stakeholders." ²⁶

In most recent elaborations, the "social market economy" is based on a separation between the market, where wealth creation takes place, and the State, which must redistribute this wealth *ex post*. It also necessitates corrective public policies capable of remedying market pitfalls *ex ante*, not only by limiting the economic operators' freedom through legal standards for health, social security and labour protection, but also by enhancing fair market access to people belonging to traditionally disadvantaged groups.

Yet, despite the origin and the epistemology of the term being evident, and notwithstanding a certain degree of convergence on what a "social market economy" should entail, a great deal of ambiguity on what form the "EU social market economy" should take remains. This ambiguity has its own roots in the debate, pre-dating the [Treaty of Lisbon](#),²⁷ over the far-reaching effects of fundamental freedoms on social rights, and on the autonomy of economic operators in the internal market.²⁸ It has been suggested that the indissoluble relationship between market goals, on the one hand, and social policy areas on the other,²⁹ put forward in [art.3\(3\) TEU](#), "solves the tensions between its constituent elements by obscuring them" but "hardly gives any guidance as to what the EU should do, or refrain from doing".³⁰ Semmelmann claims that introducing the concept of the "social market economy" within EU primary law was a mere "cosmetic and rhetorical step".³¹ Chirita acknowledges that [art.3 TEU](#) has "projected a much better social governance model that stands for solidarity, social justice, and equality" and that the "social market economy" imposes "economic limitations and restraints upon the desire for greater competitiveness".³² However, having regard to the labour market and taking into account a macroeconomic perspective, she notes that "many citizens have felt rather left behind by the negative effects inflicted through social dumping, camouflaged labour costs, and long-term austerity".³³ Ultimately, she claims that social goals remain subordinate to economic ones.³⁴ Civitarese Matteucci affirms that the notion of a Union-level "social market economy" is disengaged from the concept of social rights, as conceived in European constitutional traditions.³⁵ To some extent echoing Scharp's recounting,³⁶ he questions whether [art.3\(3\) TEU](#) gives rise to the imperative to rebalance the EU's trajectory in favour of a more "social Europe".³⁷ By the same token, Šmejkal and Šaroch argue that the "social market economy" objective "has not brought about any significant change *E.L. Rev. 665 of accents"³⁸ and "does not imply any push towards a 'social Union' in the sense of specific EU measures that would harmonise social rights and benefits across the EU".³⁹ Barnard and de Vries suggest that "there is a total absence of awareness of 'social market economy'".⁴⁰ Garben, in a more general fashion, contends that, with regard to EU economic governance, the balance between "the market" and "the social" has not been achieved, with such a lack of balance compromising the overall system of values in the EU polity.⁴¹

These critical statements usually build upon the observation that the constitutional innovation of injecting a new socially oriented language into the Treaties has not altered the very limited scope of the Union's social policy, and the—still constrained—Union competence in that domain.⁴² They are also premised on the dichotomy between economic and social (broadly considered) objectives. However, as Damjanovic argues, even though "the EU is restricted in developing its own redistributive welfare systems", this does not mean that "the EU cannot be based on a social market economy".⁴³ In that vein, this article embraces the idea that the EU social market ideal is not simply about the ability of the EU to deliver an internal market that does not undermine the capacity of the Member States to pursue redistributive policies. Moreover, it does not require internal market

policies to realise social rights in their entirety. Rather, it is submitted here that the social market economy requires that the social goals outlined in [art.3\(3\) TEU](#) (i.e. social inclusion, social progress, equality and social justice) are pursued alongside the elimination of trade barriers when building the internal market. This view is somewhat supported by the words of Advocate General (AG) Cruz Villalón in his Opinion on the case *Santos Palhota*, on the posting of workers.⁴⁴ He suggests that [art.9 TFEU](#) is directly connected to,

"the declaration in [art. 3\(3\) TEU](#) that the construction of the internal market is to be realised by means of policies based on 'a highly competitive social market economy, aiming at full employment and social progress'."⁴⁵

Albeit representing a sort of truism, this statement suggests that the social market economy "does not appear to strengthen the protection domestic nonmarket values as such; instead, it seems to give weight to European primary law provisions that incorporate social values."⁴⁶ The Court of Justice (CJEU), was more declarative in *AGET Iraklis*,⁴⁷ stating that the EU "has not only an economic but also a social purpose",⁴⁸ and, **E.L. Rev. 666*

"is not only to establish an internal market but is also to work for the sustainable development of Europe, which is based, in particular, on a highly competitive social market economy aiming at full employment and social progress, and it is to promote, *inter alia*, social protection."⁴⁹

While acknowledging the ambiguous and yet beguiling nature of the concept of social market economy, this contribution builds on the idea that [art.3\(3\) TEU](#) construes the role of the EU as driver of corrective market policies, which take place especially in the context of harmonisation within the internal market. Harmonisation, by its very nature, aims to create a level playing-field for market operators, but necessarily involves the consideration of certain social values.⁵⁰ The constitutional imperative included in [art.3\(3\) TEU](#) requires harmonising standards to be imposed on market operators, with a view to protecting health, social security and labour, but also in order to enhance market access in the EU. [Article 3\(3\) TEU](#) envisages the overlap (at least partial) of economic and social objectives. This understanding, somewhat endorsed in *AGET Iraklis*, does not solve the issue related to the erosion of national welfare states through EU market rules.⁵¹ However, it does provide a wider liminal space for the CJEU to balance market freedoms and social rights (or more broadly fundamental rights),⁵² as well as tracing a clearer path toward a more balanced form of European positive integration. With regard to the latter, the social market economy is hence a productive lens to investigate and shed light on the [EAA](#) as a positive integration socio-economic measure, in order to understand the extent to which internal market provisions may be used to achieve social goals. As will be discussed in the subsequent sections, in the [EAA](#), the pursuit of social standards (i.e. access to goods and services for people with disabilities) is a key element to enhance competitiveness and economic growth. In that regard, the [EAA](#) represents an interesting case study to discuss the balance between the "social" and the "market" and to contrast the view that social and economic rights are always mutually exclusive. It also allows us to reflect on the extent to which social goals are merely ancillary to economic objectives, or are entrenched to those, and to examine whether they are integral part of market processes.

The long road towards the European Accessibility Act—from the CRPD to the Internal Market

As mentioned in the Introduction, the [EAA](#) has always been intended as a means through which the EU could implement its international obligations under the CRPD. This section, therefore, first seeks to identify the core tenets of those CRPD obligations which can be considered the driving force behind the Directive. It then moves on to examine the main steps in the legislative process leading to the adoption of the [EAA](#) through the lens of the social market economy objective laid down in [art.3\(3\) TEU](#).

The starting point—the CRPD Obligations

It is widely acknowledged that the Convention is informed by a social-contextual understanding of disability (i.e. the view that disability stems from the interaction between an impairment and societal and **E.L. Rev. 667* environmental barriers).⁵³ Consistent with this understanding, the CRPD is built on the core concepts of dignity and autonomy, and it is underpinned by the principles of non-discrimination and equality, participation and accessibility. The latter, as stated by the UN Committee on the Rights of Persons with Disabilities (CRPD Committee), "is approached [in the CRPD] in all its complexity", and is a "precondition for persons with disabilities to live independently and participate fully and equally in society".⁵⁴ Accessibility obligations are firmly embedded within the text of the Convention, with [art.9 CRPD](#) being the core provision. It requires States Parties to,

"take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas." ⁵⁵

Article 9 CRPD does not specify any accessibility criterion to be implemented. Rather, it obliges States Parties to the Convention to develop and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public. In that vein, the Committee acknowledges that accessibility is a "dynamic concept" and "its application requires periodic regulatory and technical adjustments". ⁵⁶

The CRPD does not distinguish between the public or private ownership of buildings, transport means or technologies. Article 9(2)(b)(d) CRPD makes it clear that States Parties must ensure that private entities and market operators provide for accessible services and facilities. In *Nyusti and Takács v Hungary*, ⁵⁷ which concerned the accessibility of ATMs, the CRPD Committee confirmed that parties to the Convention must put in place a legislative framework "with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment" by private operators of certain services. ⁵⁸

The obligation to provide accessible goods and services envisaged in art.9 CRPD is an *ex ante* duty. This means that Parties to the Convention have the responsibility to ensure that accessibility is provided before an individual request to enter or use a place or service is made. ⁵⁹ The Committee contends that States Parties are under the obligation to ensure access to all newly created infrastructures, good and **E.L. Rev. 668* services and that existing barriers to access "shall be removed gradually in a systematic and, more importantly, continuously monitored manner, with the aim of achieving full accessibility." ⁶⁰ According to the CRPD Committee, the obligation to implement accessibility is unconditional, i.e. the entity obliged to provide accessibility may not attempt to circumvent this by referring to the burden of providing access for persons with disabilities. ⁶¹ The CRPD Committee does not offer definitive guidance regarding whether accessibility is a human right per se, as some scholars have contended ⁶² and as the European Economic and Social Committee (EESC) stated. ⁶³ Nor does the Committee say to what extent the lack of accessibility constitutes discrimination on the ground of disability. However, on the whole, it firmly anchors accessibility to the realisation of equality. The ambiguity surrounding the exact categorisation of accessibility seems to have given, de facto, some leeway to Parties in how to implement art.9 CRPD.

Moving away from the CRPD to build the Internal Market

Accessibility has emerged, since the ratification of the CRPD by the Union, as an area of EU shared competence, ⁶⁴ as it entails an intervention on the market and affects a range of areas, such as transport, already heavily regulated by the EU. ⁶⁵ As noted above, the EU has itself identified the implementation of the CRPD as a priority field of action within the European Disability Strategy 2010–2020. The Strategy envisages a portfolio of diverse instruments capable of improving access for people with disabilities to a wide range of goods and services, and complementing existing accessibility requirements included in a wide range of EU sectorial legislation, of which the *EAA* represents the "spearhead". ⁶⁶ In the Strategy, the Commission had explicitly committed itself to releasing the proposal for an *EAA* by 2012. The announcement of an initial roadmap, in June 2011 ⁶⁷ was followed by a public consultation, open from 12 December 2011 to 29 February 2012. In 2012, the results of the Flash Eurobarometer survey on accessibility revealed that, according to 93 per cent of the respondents ⁶⁸ to the survey "barriers to accessibility make it more difficult for people with a disability to attend schools, to have a job, to vote and/or to freely move around and go on holiday". ⁶⁹ This data confirms similar findings within scholarly research, which has consistently suggested that people with disabilities "are not free and independent agents when choosing **E.L. Rev. 669* their position in the market". ⁷⁰ The Flash Eurobarometer also revealed that 86 per cent of the survey participants agreed that having similar accessibility solutions across Europe would enable people with disabilities to travel, study and work in another EU country, supporting the case for an EU-wide legislation on the issue. ⁷¹ These initial actions were then followed by a long period of political stalemate. At the end of 2014, in its "2015 Work Programme", ⁷² the Commission reaffirmed its commitment to equality and accessibility for people with disabilities, but made no explicit reference to the *EAA*. Since the release of the initial roadmap, the European Parliament has been supportive of a new legislation capable of protecting the rights of people with disabilities at the EU level, and adopted a resolution on 20 May 2015 in which it called on the Commission "to present an ambitious proposal for the (repeatedly delayed) *EAA*". ⁷³ In October 2015, within the "2016 Work Programme", ⁷⁴ the Commission again indicated

its willingness to "improving access to selected goods and services for people with disabilities" and the EAA proposal was then released in December 2015.⁷⁵

In spite of the somewhat grandiose and atypical name, and the rhetoric surrounding the discussion and launch of the EAA proposal,⁷⁶ it was quite clear from the beginning that the Commission aimed to put forward a directive. The Commission was also adamant that art.114 TFEU would be the legal basis for such a directive,⁷⁷ drawing on Declaration No.22, regarding persons with a disability, annexed to the Treaty of Amsterdam, which stipulates that measures adopted within the scope of the internal market must take account of the needs of persons with disabilities. Moreover, art.114 TFEU had already been included as a legal basis of the decision on the conclusion of the CRPD (alongside art.19 TFEU),⁷⁸ signalling that this provision entails an appropriate legal basis for the CRPD implementation.⁷⁹

The Commission envisaged access to goods and services for persons with disabilities as a constituent part of the creation of a "deeper and fairer" internal market.⁸⁰ While the fulfilment of the CRPD obligations was the overarching purpose of the EAA proposal, it did not constitute a goal in itself. Rather, it was the expected effect of the elimination (and prevention) of barriers to trade of accessible goods and services. In fact, while the Commission inevitably referred to the Convention, the EAA was never characterised as an instrument primarily aimed at advancing human rights, although this can easily be attributed to the *E.L. Rev. 670 Union's lack of general human rights competence at present.⁸¹ To avoid any possible bias, the Commission also never categorized accessibility as a human right per se (contrary to what the EESC did in a *motu proprio* opinion).⁸² In a similar vein, the Commission never characterised the EAA as an instrument aimed at advancing equality.⁸³ It made the EAA travel on a "separate track" from EU non-discrimination law. There was virtually no discussion of a possible double legal basis, namely arts 19 and 114 TFEU. This choice seems linked to the fact that the EAA does not pursue multiple goals.⁸⁴ Rather, as it will be further discussed in the remainder of this piece, market and non-market objectives are deeply entrenched. In the proposal, what has been termed as the "economic rationale of harmonisation"⁸⁵ is combined with the explicit regulatory choice of the promotion of accessibility for persons with disabilities. Arguably, this was also a strategic choice. The Commission wanted to avoid the robust opposition that the accessibility provisions in the proposed multi-ground non-discrimination directive had encountered among the Member States.⁸⁶ More generally, the need to bypass the requirement of unanimity in the Council was an (unspoken) incentive in this respect.

In order to fulfil the well-established criteria that support the use of art.114 TFEU, the Commission always highlighted the "genuine link" between the EAA and the removal of existing and future obstacles in the internal market.⁸⁷ The EAA proposal, from its inception, did not entail a case of "indirect legislation"—that is, "the adoption of EU legislation in areas where the EU's direct legislative competence is limited" through the use of functional powers related to the internal market.⁸⁸ The Commission did not exploit the hazy boundaries of this functionally driven legal base⁸⁹; the EAA is a market regulatory instrument and, only to a limited extent, impacts on areas that are still in the hands of the Member States, considering that health care services, education, and housing remain outside of its purview.

The legislative process and the shadow of the "social market economy"

Accessibility had been portrayed by the Commission as a non-controversial issue that benefits citizens with disabilities, general consumers and businesses alike. However, the release of the proposal did not lead to an enthusiastic and swift enactment of the EAA. By contrast, a lengthy discussion took place in the Council and in the Parliament and focused on the politically sensitive issues that accessibility brings *E.L. Rev. 671 about in terms of obligations for market operators.⁹⁰ Several amendments were proposed. Some of them addressed issues related to the material scope of the act and other technical concerns related to definitions. Most of the amendments, though, centred on what constraints could best correct the market-generated inequalities that prevent people with disabilities from fully participating within the market (and within society), without those constraints undermining the ability of market players to operate. Consequently, while the CRPD remained in the background and arguably the need of implementing the Convention was a constant cause for concern, economic interests emerged prominently, especially (and contrary to the expectations of disabled people organisations) in the European Parliament (EP)'s debate. Some EP Committees demonstrated a greater sensitivity to the obligations contained within the CRPD, such as the Committee on Petitions (PETI)⁹¹; however, the final report of the Committee on the Internal Market and Consumer Protection highlighted that,⁹²

"[t]he Commission's proposal is a good working basis but needs several adjustments in order to ensure that the Act reaches its objectives: *striking the right balance* between the needs of people with disabilities, creating possibilities for innovating new products and services and at the same time reducing disproportionate costs for companies (emphasis added)." ⁹³

The need to balance social and market-based considerations culminated in a proposal to make several amendments to the Commission's text, in order to protect the interest of small market operators, such as the exemption from accessibility requirements for microenterprises (which has remained in the final text, as will be discussed in the fourth section):

"[m]icro-enterprises would not be able to cope with the obligations stemming from this Directive. Under the Commission proposal, a small independent retailer or a bookseller who would decide to create a website to sell his or her product would be required to make it fully accessible to people with disabilities. Your Rapporteur *does not believe that this is proportionate* (emphasis added). *E.L. Rev. 672 " ⁹⁴

Although it was not directly invoked, the "freedom to conduct a business", protected by art.16 of the Charter of Fundamental Rights of the EU ("the Charter"), seems to underpin the concerns expressed within the EP.

In line with the Commission's approach, the legislative process centred on keeping the EAA's character of "business friendly" legislation and finding a trade-off between economic objectives and non-market values. Throughout this process, art.3(3) TEU was never mentioned by the Commission, by the European Parliament or by the Council. It is unclear why this provision was on no occasion cited. It would appear that the German theorisations with which it is associated make the "social market economy" a tricky concept burdened by ideological connotations. However, contrary to what Šmejkal and Šaroch, as well as Semmelman, opined, the social market economy imperative embedded within the EU's constitutional identity *de iure* re-directs the reach of EU internal market legislation and re-defines the context in which it plays out. As already noted by the CJEU in *Portugal v Council*,⁹⁵ long before the entry into force of the Treaty of Lisbon, Treaty objectives "lay down a programme" and the implementation of that programme will then be a result of the "the policies and actions of the [EU]". In this respect, art.3(3) TEU created a fertile terrain (and an indispensable pre-condition) on which to found the EAA and to push for its final approval. Echoing Liebert's words, art.3(3) TEU has paved the way "for making economic and social rationalities mutually constitutive".⁹⁶

The EEA as "social market economy" legislation

The final text of the EEA in a nutshell

As already envisioned by the Commission, the final text of the EAA is explicitly premised on the idea that, since accessibility is an area of shared competence, the EU has the task to "facilitate the implementation in the Union of the [CRPD] by providing common Union rules" and to avoid a scattered implementation by Member States themselves which could endanger the construction of the internal market.⁹⁷ Unsurprisingly, the final text of the EAA does not include any reference to art.3(3) TEU, whereas the CRPD is alluded to on several occasions: the latter representing a feature of many of the new legislative acts that include accessibility provisions.⁹⁸ Those references embed a social-contextual understanding of disability⁹⁹ and the CRPD's wide concept of accessibility within the EAA. In that regard, the Preamble of the Directive refers to persons with disabilities in line with art.1(2) CRPD. Furthermore, it states that accessibility should be achieved by the removal of barriers, preferably through a universal design as defined by the CRPD.¹⁰⁰ Moreover, it claims that,

"[a]ccessibility and universal design should be interpreted in line with General Comment No 2(2014) — Article 9: Accessibility as written by the Committee on the Rights of Persons with Disabilities." ¹⁰¹

The Preamble also makes an explicit reference to the Charter. In particular, it states that that the EAA, *E.L. Rev. 673

"seeks to ensure full respect for the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community and to promote the application of Articles 21, 25 and 26 of the Charter." ¹⁰²

The material scope of the Directive covers a relatively wide range of consumer goods: computers and their operating systems, payment terminals, self-service terminals related to the services covered by the legislation, consumer terminal equipment used

for electronic communication services (such as smartphones), consumer terminal equipment used for accessing audiovisual media services, e-readers, electronic communication services, services providing access to audiovisual media services, certain elements of transport services (including: websites, mobile apps, electronic ticketing, real-time travel information, interactive self-services terminals except those installed as integrated parts of vehicles), consumer banking services, e-books, e-commerce and the European emergency number 112.

The scope *ratione personae* is intentionally extensive. Those who benefit from accessibility measures are people with disabilities, as broadly defined in art.1(2) CRPD,¹⁰³ and "persons with functional limitations", which includes "persons who have any physical, mental, intellectual or sensory impairments, age related impairments, or other human body performance related causes, permanent or temporary, which, in interaction with various barriers, result in their reduced access to products and services, leading to a situation that requires those products and services to be adapted to their particular needs". Obligations are placed on manufacturers, authorised representatives, importers, distributors and service providers,¹⁰⁴ and apply equally to economic operators from the public and private sectors.¹⁰⁵ However, microenterprises are exempt from complying with the accessibility requirements and any obligations relating to compliance with those requirements.¹⁰⁶ The Directive justifies this blanket exemption on the basis that microenterprises are,

"distinguished from all other undertakings by their limited human resources, annual turnover or annual balance sheet" and "the burden of complying with the accessibility requirements for microenterprises ... takes a greater share of their financial and human resources than for other undertakings and is more likely to represent a disproportionate share of the costs."¹⁰⁷

The Directive does, however, provide that microenterprises,

"should be encouraged to manufacture, import or distribute products and to provide services that comply with the accessibility requirements of this Directive, in order to increase their competitiveness as well as their growth potential in the internal market."¹⁰⁸

Additionally, Member States should provide guidelines and tools to microenterprises to facilitate the application of the national measures transposing this Directive.¹⁰⁹

The core obligations to make products and services accessible are spelled out in [art.7 onward of the EAA](#). Manufacturers, when placing their products on the market, must ensure that the products "have been designed and manufactured in accordance with the applicable accessibility requirements of this Directive", and must "ensure that procedures are in place for series production to remain in conformity *[E.L. Rev. 674](#) with this Directive".¹¹⁰ Importers must "place only compliant products on the market", and carry out a conformity assessment before placing a product on the market.¹¹¹ When it comes to distributors, the [EAA](#) adopts a more general language and obliges them to "act with due care in relation to the requirements of [the] Directive".¹¹² Moreover, distributors have to "ensure that, while a product is under their responsibility, storage or transport conditions do not jeopardise its compliance with the applicable accessibility requirements".¹¹³ Service providers must "ensure that they design and provide services in accordance with the accessibility requirements" of the [EAA](#).¹¹⁴ Alongside these core obligations to make products and services accessible, the [EAA](#) places several duties on economic operators to ensure compliance. For example, manufacturers who consider that a product which they have placed on the market is in breach of the Directive must adopt "the corrective measures necessary to bring that product into conformity, or, if appropriate, to withdraw it". All the economic operators must co-operate with national authorities in order to bringing the products into compliance with the relevant accessibility requirements.¹¹⁵ The Directive includes two major exceptions to the obligations provided for in it. Accessibility requirements do not apply where they would require a significant change in a product or service that results in the fundamental alteration of its basic nature; and where they would impose a disproportionate burden on the economic operators concerned.¹¹⁶ Economic operators are required to fully document the reasons for which they are not subject to accessibility duties, and, when they receive funding to ensure accessibility, they cannot rely on the disproportionate burden defence. The latter provision echoes what is provided for in the [Employment Equality Directive](#) with regard to reasonable accommodation duties imposed on employers,¹¹⁷ as well as in the [Web Accessibility Directive](#).¹¹⁸ The latter Directive provides that public sector bodies should apply accessibility requirements to the extent that those do not impose a disproportionate burden on them.¹¹⁹ The text of the [EAA](#) does not give a precise definition of what entails a disproportionate burden. It only stipulates in the (non-binding) preamble that such a disproportionate burden occurs when "an additional excessive organisational or financial burden on the

economic operator, while taking into account the likely resulting benefit for persons with disabilities".¹²⁰ However, while the [Employment Equality Directive](#) and the [Web Accessibility Directive](#) give a relatively loose guidance on how to determine whether the measures in question give rise to a disproportionate burden,¹²¹ the [EAA](#) is accompanied by an annex ([Annex VI](#)) *[E.L. Rev. 675](#) which lays down specific criteria to carry out the assessment. A first set of criteria concerns how to calculate the, "ratio of the net costs of compliance with accessibility requirements to the overall costs (operating and capital expenditures) of manufacturing, distributing or importing the product or providing the service for the economic operators." ¹²²

Those criteria include costs related to training or hiring new personnel, costs of developing new processes, costs related to the design and testing of accessibility features, but also legal and administrative costs. The Annex, in line with the wording of the preamble, also entails a balancing exercise and requires that "the estimated costs and benefits for the economic operators" are evaluated "in relation to the estimated benefit for persons with disabilities".¹²³ A final list of criteria concerns the ratio of the net costs of accessibility to the net turnover of the economic operator.¹²⁴

In order to ensure that the [EAA](#) does not remain a "paper tiger", Member States must put in place adequate and effective means to ensure compliance with accessibility requirements and introduce specific provisions allowing a consumer (but also public bodies or representative associations) to take legal action in cases of non-compliance.¹²⁵ It also requires Member States to lay down the rules on "effective, proportionate and dissuasive" penalties applicable to infringements of national provisions adopted pursuant to the [EAA](#).¹²⁶

The Directive is accompanied by a series of annexes, laying down accessibility requirements, and relevant information in relation to the procedures to assess compliance and to verify whether the exemption based on the disproportionate burden is met. Additionally, Commission's regulations, which will be adopted in the next five years,¹²⁷ will complement the [EAA](#)'s rules.

Falling short of the CRPD... but balancing "the social" and "the market"

Undoubtedly, the [EAA](#) does not just pay lip service to the CRPD. It constitutes a step forward in protecting and promoting the rights of persons with disabilities. Nevertheless, the [EAA](#) inevitably falls short of the obligations laid down in the CRPD, briefly highlighted above, in several respects. Bearing in mind that the [EAA](#) is not an isolated piece of legislation and must be located within the broader realm of accessibility measures sparse in EU hard law and read in conjunction with those,¹²⁸ the material scope of the [EAA](#) is too narrow to fulfil the intentions of art.9 CRPD. The scope *ratione personae* is in compliance with art.9(2)(b)(d) CRPD in that it ensures that both public and private entities provide for accessible goods and services. However, it is limited in terms of the market operators subject to accessibility obligations. In particular, the blanket exemption for microenterprises is likely to, be considered in breach of the CRPD by the CRPD Committee, which might recommend a revision of the Directive in this respect in its Concluding Observations on the next implementation report of the EU.¹²⁹ The Convention does not provide *[E.L. Rev. 676](#) for any exemption on accessibility obligations, which must be fulfilled (albeit in a progressive way). Another *punctum dolens*, from the point of view of the Convention, is limiting accessibility duties to situations in which these do not cause a disproportionate burden on the duty bearer. While the provision that exempts market players from compliance with accessibility requirements when those cause a fundamental alteration of the basic nature of the good/service in question might arguably stand the scrutiny of the CRPD Committee, the disproportionate burden limit will most certainly not. The CRPD considers the disproportionate burden defence only applicable to reasonable accommodation duties. As mentioned in subsection 3.1 of this contribution, the CRPD Committee has also clarified that the obligation to implement accessibility is unconditional, albeit one which might be progressively realised. With regard to the latter aspect, the Directive presents another key shortcoming. While Member States must implement the [EAA](#) by 2022, the applicability of implementing legislation is postponed until 2025. Even though the [EAA](#) obligations are beefed up at the national level, the extended time span for market operators to comply with accessibility obligations risks a serious dilution with regard to the implementation of the CRPD, which arguably does not fit within the idea of progressive realisation. The latter in fact requires that Parties to the Convention "move as expeditiously and effectively as possible towards the full realization of the rights in question".¹³⁰

While the [EAA](#) does not sit comfortably with art.9 CRPD, it is a perfect example of legislation which attempts to build the EU "social market economy". As noted by Nic Shuibhne, the reference to a "social market economy" in [art.3\(3\) TEU](#) "exemplifies an *integrated* conception of market and non-market goals for EU law and policy-making", which reflects and requires the

combination, rather than the contraposition, of market objectives and social objectives.¹³¹ As discussed above, the "social market economy" relates to how economic and social objectives, at least partially, overlap.

In fact, the [EAA](#) pursues the integrated character of market and non-market objectives. On the one hand, as noted in [Recital 1 of the Preamble](#), the Directive aims "to contribute to the proper functioning of the internal market ... by, in particular, eliminating and preventing barriers to the free movement of certain accessible products and services arising from divergent accessibility requirements in the Member States", and to "increase the availability of accessible products and services in the internal market". On the other hand, the Directive recognises that "[a]n environment where products and services are more accessible allows for a more inclusive society and facilitates independent living for persons with disabilities".¹³² The latter Recital shows that the [EAA](#) embodies a corrective public policy aimed at remedying market pitfalls by enhancing fair market access to people belonging to a traditionally disadvantaged group, which is the essence of a "social market economy".

While many internal market instruments remove market barriers and include some social slants,¹³³ the [EAA](#) does not include social goals but seamlessly propounds that, in reality, "social values are market *[E.L. Rev. 677](#) values too",¹³⁴ as required by a "social market economy". The multiple references to the CRPD and to the Charter, in the lengthy Preamble, do not overshadow the fact that market participation of consumers with disabilities is not only necessary to support their participation in society, but it is also necessary to develop the market itself. The elimination of barriers in the EU market for accessible goods and services favours economic operators, in particular small and medium-sized enterprises (SMEs),¹³⁵ in that balanced accessibility duties bring enhanced competition and stimulate technological developments.¹³⁶ In that vein, the [EAA](#) is meant "to help economic operators to concentrate resources on innovation instead of using those resources to cover expenses arising from fragmented legislation across the Union".¹³⁷ In the latter respect, the [EAA](#) does not just pursue a social market economy but a highly competitive one, and promotes (indirectly) technological advancement (another value inherent to [art.3\(3\) TEU](#)).

The [EAA](#) recognises the centrality of the social dimension of market integration and yet pursues a balance between accessibility duties of market operators and the right of people with disabilities to access products and services on an equal basis with others. It is noteworthy that the Preamble explicitly states that "[a]ccessibility requirements should be introduced in the manner that is *least burdensome for the economic operators and the Member States*" (emphasis added).¹³⁸ Moreover, as noted in the preceding section, accessibility requirements should only apply to the extent to which they do not impose a disproportionate burden on the economic operator concerned, and do not require a significant change in the products and services which would result in the fundamental alteration of that product or service.¹³⁹ As highlighted above, those provisions are quite divergent from the unconditional nature of the accessibility obligations as required by the CRPD. However, at the heart of those provisions lies the application of the proportionality principle, which finds a refined application in the disproportionate burden exception. The [EAA](#) is clear in stating that the organisational or financial burden on the economic operator must be evaluated against the likely resulting benefit for persons with disabilities, in line with the criteria set out in [Annex VI](#).¹⁴⁰ It is also prescribed that market surveillance authorities should operate in a proportionate manner in relation to the size of undertakings and to the small serial or non-serial nature of the production concerned, without creating unnecessary obstacles for SMEs and without compromising the protection of public interest.¹⁴¹ In that respect, the [EAA](#) builds upon the "Think Small First" communication,¹⁴² which is also cursorily evoked in the Preamble.¹⁴³ This balancing exercise tallies with the recognition of the "social value" that economic operators (in particular small and medium enterprises) may have. The [EAA](#) does not engage extensively on this aspect, but highlights that "most jobs in the Union are provided by SMEs and microenterprises", and that those enterprises "have a crucial importance for future growth".¹⁴⁴

The fact that the [EAA](#) acknowledges the range of actors involved (alongside people with disabilities) and the array of interests at stake should not be quickly dismissed as lack of compliance with the CRPD. While from a disability human rights perspective, the *scope ratione personae* of the Directive (with the exclusion of microenterprises from the range of market operators subject to accessibility obligations) is disappointing (to say the least), from a social market perspective, it shows that the balance between social *[E.L. Rev. 678](#) and market-based objectives is imperfect, context-dependent, and reliant on the specific subject matter at stake. It also mirrors the complexity of accessibility obligations and the need to take into account a conflicting set of rights, making the Court of Justice's future interpretation of the [EAA](#) essential to determine the exact balance between "the social" and "the market" in the Directive. In that regard, it would be interesting to see whether and to what extent arts 21 and 26 of the Charter, cited in the [Preamble of the Directive](#), will be used by the Court to interpret the [EAA](#), and whether they will play some role in the balancing exercise the Court will be arguably called to decide on.

The EAA does not engage with the concept of corporate social responsibility, or cite the Commission's relevant documents in this respect.¹⁴⁵ However, it places an emphasis on the social responsibility of market operators, which must comply with accessibility requirements and act sensibly and reliably in front of national authorities entrusted with assessing their compliance with accessibility requirements. Moreover, in exempting microenterprises but encouraging them to voluntarily comply with accessibility requirements, the EAA pays tribute to the need for economic activity to serve the common social good. This acts as another important signal of the EAA embracing (albeit implicitly) the social market economy ideal. In fact, the General Court, in *Corsica Ferries*,¹⁴⁶ identified as one of the pillars of the EU social market economy the social responsibility of, in that particular case, private investors (but this could, *mutatis mutandis*, be applied more generally to market operators):

"It should also be noted that, in a social market economy, a reasonable private investor would not disregard, first, its responsibility towards all the stakeholders in the company and, second, the development of the social, economic and environmental context in which it continues to develop [...]."¹⁴⁷

On the whole, the EAA is a somewhat bittersweet measure if analysed through the lens of the CRPD alone. However, despite its evident drawbacks, if considered through the lens of art.3(3) TEU, it signals an evolution of positive integration, in that the EAA posits a construction of the internal market which is, not only aligned to the achievement of social inclusion for people with disabilities, but the primary vehicle to achieve that goal.

Conclusion

The analysis conducted above has shown that the EAA represents a clear example of how market goals have become more and more intertwined with social objectives. It has also argued that the EAA reveals the increasing social dimension of the ongoing process of further market integration. The long-awaited EAA is the latest evidence that the liberal scenario evoked by AG Wahl in *AGET Iraklis*,¹⁴⁸ according to which the EU "is based on a free market economy, which implies that undertakings must have freedom to conduct their business as they see fit", is no longer a feasible constitutional option (and, in fact, was arguably dismissed by the Court in its judgment in that case too). Within the entire legislative process, the EAA was conceived of as a corrective public policy to remedy a well-defined market failure (i.e. a lack of accessible products) by setting defined legal standards aimed at enhancing fair market participation (which is one of the traits of a social market economy) to people with disabilities. The broadly "social" cipher of the EAA was hailed in the EU public debate surrounding the Directive, often in the context of deepening the social dimension of Europe.¹⁴⁹ It is noteworthy that, after 2017, the EAA was mentioned in **E.L. Rev. 679* connection with the European Pillar of Social Rights,¹⁵⁰ which also pursues the objectives of the Union's social market economy. It is also significant that, after its approval, the EAA was identified by the former Juncker Commission as one of the achieved social priorities and part of the "social *acquis*" of the EU,¹⁵¹ alongside, among others, the Directive on work-life balance for parents and carers.¹⁵²

From a constitutional perspective, the EAA shows that the "social market economy" objective set out in art.3(3) TEU is becoming a (silent but effective) driving force in the continuous construction of the internal market. It is undeniable that art.3(3) TEU has not played any visible role in the enactment of this Directive. However, this should not be taken as a confirmation of the shallowness of this provision. Nor should one consider it the latest evidence of it being a mere "cosmetic" innovation. Socially driven clauses are not an entire novelty for the EU.¹⁵³ The Treaty establishing the European Economic Community already mentioned social goals, such as: "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it", and "to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained". Both the *Treaty of Maastricht* and the *Treaty of Amsterdam* extended these social ideals, without enhancing the quite modest EU social policy. The failed draft Constitutional Treaty provided for the commitment to a "competitive social market economy", the recognition of "social rights" and new mechanisms for the co-ordination of social and labour market policies, which then were included in the *Treaty of Lisbon*.¹⁵⁴ In fact, the *Treaty of Lisbon*, building on the constitutional treaty, has gone further in making a social dimension part of the EU's economic policies. This is very visible in the EAA, despite the lack of reference to art.3(3) TEU. While the overt influence of the "social market economy clause" is undetectable, the legislative process surrounding the adoption of the EAA reveals that the search for rules which balance equal opportunities for consumers with disabilities with the right of market operators attempts to fulfil this constitutional ideal. It is argued here that this constitutional imperative acts as implicit normative resource to support "market correcting" measures.

From this standpoint, the heavy ideological matrix of the "social market economy" rooted in German ordoliberal scholarship, which was probably underestimated at the time of the drafting of the [Lisbon Treaty](#),¹⁵⁵ makes it uneasy for the EU political institutions to openly rely on it. The failure to refer to [art.3\(3\) TEU](#) in the [EAA](#) seems, hence, a confirmation that the irenic nature of the "social market economy" concept has acted as a stumbling block for the EU Institutions to engage with this provision more openly *[E.L. Rev. 680](#) in legislative processes. The limited engagement by the Court with the concept and its attempt, at least, to bring meaning to it have not (yet) solved the haziness of the "social market economy" that is inextricably linked to the contested nature of the EU integration, and to the "old controversy between 'free trade Europe' and 'social Europe'", which is "alive and kicking".¹⁵⁶ The somewhat ambivalent outcome of [Aget Iraklis](#), the absence of any further meaningful engagement with the concept by the CJEU, and some broad statements such as that of AG Kokott, in *Tesco v Nemzeti Adó*,¹⁵⁷ according to which [art.3\(3\) TEU](#) gives recognition to "the principle of the welfare state" (arguably in relation to the second alinea of that paragraph), have not facilitated full understanding of the EU "social market economy". Yet, the value of defining the EU as a "social market economy" sits in the practical realisation of the link between the legal structure of the internal market and a social orientation of the EU political economy, when enacting internal market legislation, as revealed by the [EAA](#).

The [EAA](#), however, also shows that the pursuit of the "social market economy" objective is relevant when the EU is implementing international obligations. The [EAA](#) falls short of the provisions laid down in the CRPD and is not a "human rights" legislation. Its material scope is too narrow to fulfil the wide-ranging obligations of [art.9 CRPD](#). The exceptions included in the [EAA](#) and the provision of a "disproportionate burden defence" fall short of the accessibility obligations put forward by the CRPD (which are unconditional, albeit to be implemented progressively), and will most likely not stand the scrutiny of the UN Committee. Those limits, from a social market perspective, show the attempt to search for an (uneasy) balance between social and market-based objectives, which might be given further substance by the CJEU. In that, the [EAA](#) shows that respect for international obligations, while being another important constitutional objective, occurs within the perimeter of the constitutional understanding of the EU as an autonomous legal order that pursues a social market economy (which raises further questions on the relationship between EU and international law that fall outside the scope of this article).

The critical analysis of the [EAA](#) does not allow us to draw any firm conclusion on the actual legal effects of [art.3\(3\) TEU](#). Any clarity in this respect mainly rests on a future political willingness to refer overtly to this provision and on the possible further engagement of the CJEU with the concept of "social market economy". However, the [EAA](#) seems to indicate that the EU has taken on the mandate of the social regulation of capitalism, to signal a re-orientation of positive integration in the pursuit of non-economic goals, and the attempt to move away from the "embedded liberal bargain".¹⁵⁸

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Footnotes

- 1 [Directive 2019/882 on the accessibility requirements for products and services \[2019\] OJ L151/70.](#)
- 2 [Council Decision 2010/48 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities \[2010\] OJ L23/35.](#) The procedure of conclusion was completed when the EU officially deposited the instrument of ratification on 23 December 2010 and the CRPD entered into force on 21 January 2011. On the negotiation process of the CRPD, see G. de Búrca, "The EU in the Negotiation of the UN Disability Convention" (2010) 35 E.L. Rev. 2.
- 3 The development of EU-wide comprehensive disability policies has been extensively analysed by political scientists and legal scholars. Among others see G. Quinn, "The Human Rights of People with Disabilities under EU Law" in P. Alston, M.R. Bustelo and J. Heenan (eds), *The EU and Human Rights* (Oxford/New York: Oxford University Press, 1999); M. Priestley, "In Search of European Disability Policy: Between National and Global" (2007) 1 ALTER — Revue Européenne de recherche sur l'handicap 61;

- L. Waddington, From Rome to Nice in a Wheelchair: The Development of a European Disability Policy (Groningen: Europa Law Publishing, 2006).*
- 4 Commission, "European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe" COM(2010) 636 final. On the Strategy see D. Hosking, "Staying the Course: The European Disability Strategy 2010–2020" (2013) 4 *European Yearbook of Disability Law* 73.
- 5 See, e.g., the statement of the European Disability Forum in March 2019 at <http://edf-feph.org/newsroom/news/european-accessibility-act-big-step-forward-long-journey> [Accessed 26 August 2020].
- 6 See *L. Waddington, "European Commission Proposes European Accessibility Act" (26 January 2016), <https://www.maastrichtuniversity.nl/blog/2016/01/european-commission-proposes-european-accessibility-act>* [Accessed 26 August 2020].
- 7 Commission, "Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services" COM(2015) 615 final.
- 8 *S. Charitakis, Access Denied: The Role of the European Union in Ensuring Accessibility under the United Nations Convention on the Rights of Persons with Disabilities (Antwerp: Intersentia, 2018).*
- 9 D. Hosking, "Promoting Accessibility for Disabled People Using EU Standardisation Policy" (2017) 42 *E.L. Rev.* 145.
- 10 D. Ferri and S. Favalli, "Web Accessibility for People with Disabilities in the European Union: Paving the Road to Social Inclusion" (2018) 8 *Societies* 40.
- 11 *UN Committee on the Rights of Persons with Disabilities, General Comment No. 6 on Equality and Non-Discrimination, UN Doc.CRPD/C/GC/6 (2018), para.11.*
- 12 This article refers to the "social market economy" rather than to the "European Social Model" (ESM). The latter term was used in the Commission's 1994 White Paper on social policy (Commission, "European Social Policy — A Way Forward for the Union" COM(94) 333), and by the scholarship. In the 1994 White Paper, the "European Social Model" was conceived of democracy and individual rights free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity. In a similar fashion to what is considered the main gist of the social market economy, the ESM is based on the premise that economic progress and social progress "must go hand in hand" (para.3 of the 1994 White Paper). The expression "ESM" is often used by EU law and policy scholars. However, "there is a lack of any comprehensive theoretical definition of the concept in the sense of identifying its defining points and locating empirical evidence of its existence as a distinctive model of development characteristic of Western Europe over the past 50 years" (see J. Bilbao-Ubillos, "Is There Still Such a Thing as the 'European Social Model'?" (2016) 25 *International Journal of Social Welfare* 110). The ESM is said to involve "a certain way of translating economic growth into development and social cohesion" (Bilbao-Ubillos, "Is There Still Such a Thing as the 'European Social Model'?" (2016) 25 *International Journal of Social Welfare* 110). This concept is inextricably linked to the concept of "welfare state" (F. Scharpf, "The European Social Model: Copying with the Challenge of Diversity" (2002) 40 *J.C.M.S.* 645). See also S. Corbett and A. Walker, "Between Neoliberalism and Nationalist Populism: What Role for the 'European Social Model' and Social Quality in Post-Brexit Europe?" (2018) 18 *Social Policy and Society* 93.
- 13 Among many others, see *F. Vandenbrouke, C. Barnard and G. de Baere, A European Social Union After the Crisis (Cambridge: Cambridge University Press, 2017); D. Schieck, U. Liebert and H. Schneider (eds), European Economic and Social Constitutionalism after the Treaty of Lisbon (Cambridge: Cambridge University Press, 2011); D. Schieck, The EU Economic and Social Model in the Global Crisis (Farnham: Ashgate, 2013); N. Brunn, K. Lorcher and I. Schomann (eds), The Lisbon Treaty and Social Europe (Oxford: Hart Publishing, 2012).*
- 14 E. Muir, "Drawing Positive Lessons from the Presence of 'The Social' Outside of EU Social Policy" (2018) 14 *European Constitutional Law Review* 75, 79.
- 15 Muir, "Drawing Positive Lessons from the Presence of 'The Social' Outside of EU Social Policy" (2018) 14 *European Constitutional Law Review* 75, 79.
- 16 See, generally, *D. Ferri and F. Cortese, The EU Social Market Economy and the Law (London: Routledge, 2018); R. Claassen et al., "Rethinking the European Social Market Economy: Introduction to the Special Issue" (2019) 57 J.C.M.S. 3, 4.*
- 17 *D. Ferri and F. Cortese, "Introduction" in D. Ferri and F. Cortese, The EU Social Market Economy and the Law (London: Routledge, 2018), p.1 at pp.5–6.*
- 18 N. Goldschmidt and M. Wohlgenuth, "Social Market Economy: Origins, Meanings and Interpretations" (2008) 19 *Constitutional Political Economy* 261. On the history of the concept, see

- Christian Joerges, "What is Left of the European Economic Constitution" (2004), EUI Working Paper at <http://cadmus.eui.eu/bitstream/handle/1814/2828/law04-13.pdf?sequence=1> [Accessed 26 August 2020]; A. Somma, "Economia sociale di mercato e scontro tra capitalismo" (2015), available at <http://www.dpceonline.it/index.php/dpceonline/article/view/47> [Accessed 27 August 2020]; A. Ebner, "The Intellectual Foundations of the Social Market Economy: Theory, Policy, and Implications for European Integration" (2006) 3 Journal of Economic Studies 206. For a recent reconstructive attempt see J. Mulder, "(Re) Conceptualising a Social Market Economy for the EU Internal Market" (2019) 15 Utrecht Law Review 16, available at <https://www.utrechtlawreview.org/articles/10.18352/ulr.510/#fn65> [Accessed 26 August 2020].
- 19 A. Müller-Armack, "The Social Market Economy as an Economic and Social Order" (1978) 36 Review of Social Economy 325. The term "social market economy" was also used in a different way by ordoliberal theorists. As noted by Hien and Jorges, "Müller-Armack's 'social irenics' did not meet with the approval of all representatives of ordoliberalism, but the term 'social market economy' became so popular that ordoliberal purists began to claim the concept for themselves, at the latest since Germany's economic miracle and Erhard's book Prosperity through Competition" (J. Hien and C. Joerges, "Dead man walking? Current European Interest in the Ordoliberal Tradition" (2018) 24 E.L.J. 142). For a critical view see also M. La Torre, "A Demented World: Politics without Politics, State without State" (2018) 24 E.L.J. 247.
- 20 Müller-Armack, "The Social Market Economy as an Economic and Social Order" (1978) 36 Review of Social Economy 325, 328.
- 21 V. Šmejkal and S. Šaroch, "EU as a Highly Competitive Social Market Economy—Goal, Options, and Reality" (2014) 14 Review of Economic Perspectives 393.
- 22 J. Viehoff, "Equality of Opportunity in a European Social Market Economy" (2019) 57 J.C.M.S. 28.
- 23 Viehoff, "Equality of Opportunity" (2019) 57 J.C.M.S. 28, 29.
- 24 Viehoff, "Equality of Opportunity" (2019) 57 J.C.M.S. 28, 30.
- 25 Viehoff, "Equality of Opportunity" (2019) 57 J.C.M.S. 28, 30.
- 26 M. Szydło, "Gender Equality on Boards of EU Companies" (2015) 21 E.L.J. 97.
- 27 See the wide discussion on the CJEU cases on *Viking* and *Laval*: among many others C. Joerges, and F. Rödl, "Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*" (2009) 15 E.L.J. 1.
- 28 H. Schepel, "Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law" (2012) 18 E.L.J. 177.
- 29 This close relationship was already evoked in the 1994 White Paper (Commission, "European Social Policy—A Way Forward for the Union" COM(94) 333 final, para.3).
- 30 R. Claassen et al., "Rethinking the European Social Market Economy: Introduction to the Special Issue" (2019) 57 J.C.M.S. 3, 4.
- 31 C. Semmelmann, "The European Union's Economic Constitution under the Lisbon Treaty: Soul-searching among Lawyers Shifts the Focus to Procedure" (2010) 35 E.L. Rev. 516.
- 32 A. Chirita "Competition Policy's Social Paradox: are We Losing Sight of the Wood for the Trees?" (2018) 14 European Competition Journal 367, 373.
- 33 Chirita, "Competition policy's social paradox" (2018) 14 European Competition Journal 367, 373.
- 34 Chirita, "Competition policy's social paradox" (2018) 14 European Competition Journal 367, 374.
- 35 S. Civitarese Matteucci, "Social rights, Social Market Economy, and the European Social Model: Tracing Conceptual Boundaries" in D. Ferri and F. Cortese, *The EU Social Market Economy and the Law* (London/New York: Routledge, 2018), p.51.
- 36 F. Scharpf, "The Asymmetry of European Integration, or Why the EU Cannot be a Social Market Economy" (2010) 8 Socio-Economic Review 211
- 37 Civitarese Matteucci, "Social rights, Social Market Economy, and the European Social Model" in *The EU Social Market Economy and the Law* (2018).
- 38 Šmejkal and Šaroch, "EU as a Highly Competitive Social Market Economy" (2014) 14 Review of Economic Perspectives 393.
- 39 Šmejkal and Šaroch, "EU as a Highly Competitive Social Market Economy" (2014) 14 Review of Economic Perspectives 393.
- 40 C. Barnard and S. de Vries, "'The 'Social Market Economy' in a (Heterogeneous) Social Europe: Does it Make a Difference?" (2019) 15 Utrecht Law Review 47, <https://www.utrechtlawreview.org/articles/10.18352/ulr.510/#fn65> [Accessed 26 August 2020].

- 41 S. Garben, "The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union" (2017) 13 *European Constitutional Law Review* 22.
- 42 M. Dawson and B. De Witte, "Welfare Policy and Social Inclusion" in A. Arnull and D. Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), p.964. See also G. Dale and N. El-Enany, "The Limits of Social Europe: EU Law and the Ordoliberal Agenda" (2013) 14 *German Law Journal* 613, 616.
- 43 D. Damjanovic, "The EU Market Rules as Social Market Rules: Why the EU can be a Social Market Economy" (2013) 50 *C.M.L. Rev.* 1685.
- 44 Opinion of AG Cruz Villalón in *Santos Palhota (C-515/08) EU:C:2010:245* at [51].
- 45 Opinion of AG Cruz Villalón in *Santos Palhota (C-515/08) EU:C:2010:245* at [51].
- 46 Francesco De Cecco, *State Aid and the European Economic Constitution* (Oxford: Hart Publishing, 2012), p.26.
- 47 *AGET Iraklis (C-201/15) EU:C:2016:972; [2017] 2 C.M.L.R. 32*. See K.A. Polomarkakis, "A Tale of Two Approaches to Social Europe: The CJEU and the Advocate General Drifting Apart in Case C-201/15 *AGET Iraklis*" (2017) 24 *Maastricht Journal of European and Comparative Law* 424.
- 48 *AGET Iraklis (C-201/15) EU:C:2016:972* at [77].
- 49 *AGET Iraklis (C-201/15) EU:C:2016:972* at [76].
- 50 Barnard and de Vries, "The 'Social Market Economy' in a (Heterogeneous) Social Europe" (2019) 15 *Utrecht Law Review* 47, <https://www.utrechtlawreview.org/articles/10.18352/ulr.510/#fn65> [Accessed 26 August 2020].
- 51 C. O'Sullivan, "The EU between Market State Ideals and Social Market Economy Objectives: Placing the Social Market Economy within the Union's Constitutional History" in D. Ferri and F. Cortese (eds), *The EU Social Market Economy and the Law* (London: Routledge, 2018), p.17.
- 52 On this aspect, inter alia, see V. Kosta, *Fundamental Rights in EU Internal Market Legislation* (Oxford: Hart Publishing, 2015).
- 53 The CRPD embraces the "social-contextual model" as opposed to the "medical model", which tends to view persons with disabilities as "objects" who are to be managed or cared for. The social-contextual model is considered a more refined elaboration of the social model, which attracted many criticisms on account of the fact that it focused on societal barriers (physical, attitudinal and legislative, among others) and neglected the role of impairment in disabling the individual concerned (A. Broderick and D. Ferri, *International and European Disability Law and Policy: Text, Cases and Materials* (Cambridge: Cambridge University Press, 2019)). Under the social-contextual model, disability is perceived as an interactive process between people with impairments and societal barriers. The term "social-contextual model" was coined by A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Antwerp: Intersentia, 2015), p.77.
- 54 UN Committee on the Rights of persons with Disabilities, *General Comment on Article 9 of the Convention, UN Doc. CRPD/C/GC/2 (2014), para.13*.
- 55 UN Committee on the Rights of persons with Disabilities, *General Comment on Article 9, para.33*.
- 56 UN Committee on the Rights of persons with Disabilities, *General Comment on Article 24 of the Convention, UN Doc. CRPD/C/GC/4 (2016), para.21*.
- 57 UN Committee on the Rights of Persons with Disabilities, *Nyusti and Takács v Hungary* — Communication No.1/2010, UN Doc. CRPD/C/9/D/1/2010. See also UN Committee on the Rights of Persons with Disabilities, *F v Austria* — Communication No.21/2014, UN Doc. CRPD/C/14/D/21/2014.
- 58 The UN Committee referred explicitly to banking services in that case, but the principle established in the decision can be extended to all private services and products. See A. Lawson, "Accessibility Obligations in the United Nations Convention on the Rights of Persons with Disabilities: Nyusti and Takács v Hungary" (2014) 30 *South African Journal on Human Rights* 380.
- 59 UN Committee on the Rights of persons with Disabilities, *General Comment on Article 9, para.25*.
- 60 UN Committee on the Rights of persons with Disabilities, *General Comment on Article 9, para.14*.
- 61 UN Committee on the Rights of persons with Disabilities, *General Comment on Article 9, para.25*. In that, accessibility obligations can be contrasted with the duty to provide reasonable accommodation which is provided in the CRPD. The latter is an *ex nunc* duty, enforceable only "from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context", and is subject to the limit of "undue"

- or "disproportionate" burden. See *Broderick and Ferri, International and European Disability Law and Policy: Text, Cases and Materials (2019), Ch.5.*
- 62 Most recently A. Broderick, "Of Rights and Obligations: The Birth of Accessibility" (2019) 24
International Journal of Human Rights 393.
- 63 European Economic and Social Committee, Opinion on Accessibility as a Human Right for Persons with
Disabilities [2014] OJ C177/15.
- 64 L. Waddington, "The European Union and the United Nations Convention on the Rights of Persons with
Disabilities: A Story of Exclusive and Shared Competences" (2011) 18 Maastricht Journal of European
and Comparative Law 431.
- 65 See the Declaration of competence annexed to the [Council Decision 2010/48](#).
- 66 Accessibility requirements are relatively widespread in the area of transport, including air, rail, road and
water transport and are established in relation to certain physical facilities, such as cableway installations
and lifts, or specific goods, such as medicinal products. See L. Waddington, "A Disabled Market: Free
Movement of Goods and Services in the EU and Disability Accessibility" (2009) 5 E.L.J. 575.
- 67 The road map is available at [http://ec.europa.eu/smart-regulation/impact/planned_ia/
docs/2012_just_025_european_accessibility_act_en.pdf](http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2012_just_025_european_accessibility_act_en.pdf) [Accessed 26 August 2020].
- 68 The respondents were EU citizens (aged 15 and older) living in the 27 Member States. The survey was
based on 25,516 interviews.
- 69 See https://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_345_en.pdf [Accessed 26 August 2020].
- 70 *I. Eskytė, Disability and Shopping: Customers, Markets and the State (New York: Routledge, 2019).*
- 71 See https://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_345_en.pdf [Accessed 26 August 2020].
- 72 Commission, Work Programme (2015), "A New Start" COM(2014) 910.
- 73 European Parliament Resolution on the List of Issues adopted by the United Nations Committee
on the Rights of Persons with Disabilities in relation to the initial report of the European Union
(2015/2684(RSP)). *A. Maniaki-Griva, and G. Caruso, Initial Appraisal of a European Commission Impact
Assessment, Accessibility requirements for products and services — The European Accessibility Act, EPRS,
European Parliament (April 2016).*
- 74 Commission, Work Programme (2016), "No time for business as usual" COM(2015) 610 final.
- 75 The UN Committee expressed serious concern on the delay in the release of the [EAA](#) and strongly
recommended that the adoption of a legislative measure "aligned to the Convention, as elaborated in the
Committee's General comment No. 2 ... on accessibility" (UN Committee on the Rights of Persons with
Disabilities, "Concluding observations on the EU initial report", 2 October 2015, para.29).
- 76 See the Commission's press release at http://europa.eu/rapid/press-release_IP-15-6147_en.htm [Accessed
26 August 2020].
- 77 *Deloitte, Study on the Socio-Economic Impact of New Measures to Improve Accessibility of
Goods and Services for People with Disabilities (2015).* [http://ec.europa.eu/social/main.jsp?
catId=1202&langId=en&moreDocuments=yes](http://ec.europa.eu/social/main.jsp?catId=1202&langId=en&moreDocuments=yes) [Accessed 26 August 2020]. The impact assessment
focused on the potential socio-economic impacts of possible new EU regulatory measures to improve
accessibility of goods and services for people with disabilities. The initial policy options on the table
included the possibility of keeping the status quo (not adopting any new measure), a soft law approach, or
a hard law approach, namely the approval of a Directive.
- 78 [Council Decision 2010/48](#).
- 79 *Commission v European Parliament and Council (C-178/03) EU:C:2006:4.*
- 80 See the Roadmap presented by the Juncker Commission in 2015. See the Press Release at [https://
ec.europa.eu/commission/presscorner/detail/en/IP_15_5909](https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5909) [Accessed 26 August 2020].
- 81 Some scholars argue, however, that the EU is moving towards such a general competence. See in this
respect, *R. White, "Reshaping the Human Rights Landscape of the European Union" in N. Nic Shuibhne
and L. Gormley, From Single Market to Economic Union: Essays in Memory of John A. Usher (Oxford:
Oxford University Press, 2011), p.341.*
- 82 European Economic and Social Committee, Opinion on Accessibility as a Human Right.
- 83 As mentioned above, accessibility is firmly anchored to the principle of equality, and as noted elsewhere
can be considered a "pragmatic translation of the principle of equality" (D. Ferri, "The Conclusion
of the UN Convention on the Rights of Persons with Disabilities by the EU/EC: A Constitutional
Perspective" (2010) European Yearbook of Disability Law 47).
- 84 From a legal perspective, the use of a double legal basis was arguably unnecessary, as, according to settled
case law, is allowed only when the act simultaneously pursues a number of objectives or has several

- components that are indissociably linked, without one being and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases. See, inter alia, *Spain v Council (C-36/98) EU:C:2001:64* at [59].
- 85 *S. Weatherill, "Chapter 5: The Competence to Harmonise and its Limits" in P. Koutrakos and J. Snell, Research Handbook on the Law of the EU's Internal Market (Cheltenham: Edward Elgar, 2017), p.84.*
- 86 Commission, "Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation" COM(2008) 426 final. See L. Waddington, "Future Prospects for EU Equality Law: Lessons to Be Learnt from the Proposed Equal Treatment Directive" (2011) 36 E.L. Rev. 163.
- 87 *Germany v Parliament and Council (Tobacco Advertising) (C-376/98) EU:C:2000:544; [2000] 3 C.M.L.R. 1175.*
- 88 S. Garben, "Competence Creep Revisited" (2019) 57 J.C.M.S. 205.
- 89 *Weatherill, "Chapter 5: The Competence to Harmonise and its Limits" in Koutrakos and Snell, Research Handbook on the Law of the EU's Internal Market (2017).*
- 90 *Council, Progress Report on a Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, 14463/16.* See also Council, "Proposal for a directive of the European Parliament and the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services — General approach, 7 December 2017". See also: *European Parliament, DGIP, The European Accessibility Act. In depth analysis for the PETI Committee (August 2016)*, and the Amendments adopted by the European Parliament on 14 September 2017 on the proposal for a directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services (COM(2015)0615 — C8-0387/2015 — 2015/0278(COD)) https://www.europarl.europa.eu/doceo/document/TA-8-2017-0347_EN.html?redirect [Accessed 26 August 2020].
- 91 Opinion of the Committee on Petitions for the Committee on the Internal Market and Consumer Protection on the proposal for a directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services (COM(2015)0615 — C8-0387/2015 — 2015/0278(COD)) at [https://www.europarl.europa.eu/RegData/commissions/peti/avis/2017/583968/PETI_AD\(2017\)583968_EN.pdf](https://www.europarl.europa.eu/RegData/commissions/peti/avis/2017/583968/PETI_AD(2017)583968_EN.pdf) [Accessed 26 August 2020].
- 92 Committee on the Internal Market and Consumer Protection, Report on the proposal for a directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services (COM(2015)0615 — C8-0387/2015 — 2015/0278(COD)) A8-0188/2017, [https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2017/0188/P8_A\(2017\)0188_EN.pdf](https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2017/0188/P8_A(2017)0188_EN.pdf) [Accessed 26 August 2020].
- 93 Committee on the Internal Market and Consumer Protection, Report on the proposal for a directive, p.112.
- 94 Committee on the Internal Market and Consumer Protection, Report on the proposal for a directive, p.113.
- 95 *Portugal v Council (C-149/96) EU:C:1999:574.*
- 96 *U. Liebert, "Reconciling Market with Social Europe" in D. Schiek, U. Liebert and H. Schneider (eds), European Economic and Social Constitutionalism after the Treaty of Lisbon (Cambridge: Cambridge University Press, 2011), p.48.*
- 97 *EAA, Preamble, paras 15–16.*
- 98 See, e.g., *Directive 2018/1972 establishing a European Electronic Communications Code (Recast) [2018] OJ L321/36, Preamble, para.296.*
- 99 See fn.48.
- 100 *EAA, Preamble, para.50.*
- 101 *EAA, Preamble, para.50.*
- 102 *EAA, Preamble, para.103.*
- 103 *EAA, Preamble, para.3 and art.2.*
- 104 *EAA arts 7–13.*
- 105 *EAA, Preamble, para.57.*
- 106 *EAA art.4(3).*
- 107 *EAA, Preamble, para.70.*

- 108 EAA, Preamble, para.72.
- 109 EAA art.4(5).
- 110 EAA art.7 of the EAA.
- 111 EAA art.9.
- 112 EAA art.10(1).
- 113 EAA art.10(4).
- 114 EAA art.13(1).
- 115 EAA arts 7(8), 8(2), 9(8)(9), 10(5)(6).
- 116 EAA art.14.
- 117 Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
- 118 Directive 2016/2102 on the accessibility of the websites and mobile applications of public sector bodies [2016] OJ L327/1.
- 119 Web Accessibility Directive art.5.
- 120 EAA, Preamble, para.66. The Preamble also states that "only legitimate reasons should be taken into account in any assessment of the extent to which the accessibility requirements cannot be met because they would impose a disproportionate burden".
- 121 Recital 21 of the Employment Equality Directive mentions some factors which should be taken into account such as "the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance". However, this list is not exhaustive. In a similar vein, but in the binding text, the Web Accessibility Directive provides that "[i]n order to assess the extent to which compliance with the accessibility requirements ... imposes a disproportionate burden, Member States shall ensure that the public sector body concerned takes account of relevant circumstances, including the following: (a) the size, resources and nature of the public sector body concerned; and (b) the estimated costs and benefits for the public sector body concerned in relation to the estimated benefits for persons with disabilities, taking into account the frequency and duration of use of the specific website or mobile application" (article 5(2) of the Web Accessibility Directive).
- 122 Annex VI of the EAA para.1.
- 123 Annex VI of the EAA para.2.
- 124 Annex VI of the EAA para.3.
- 125 EAA art.29.
- 126 EAA art.30.
- 127 EAA art.26.
- 128 See *Charitakis, Access denied (2018)*.
- 129 This contribution does not delve into the consequences of the lack of compliance of the EU with regard to the CRPD obligations on the international level. It is likely that the CRPD Committee will provide recommendation in its Concluding Observations on the next implementation report, which the EU is due to submit in January 2021. It is useful to recall that the EU has not ratified the Optional Protocol to the CRPD which empowers the CRPD Committee to examine individual communications on the violations of the CRPD. See in this respect *Broderick and Ferri, International and European Disability Law and Policy (2019)*, pp.80–81. The CJEU, while attempting to interpret EU secondary law in compliance with the CRPD, has ruled out the possibility to assess the validity of EU legislation vis-à-vis the CRPD because it is not sufficiently clear and unconditional. See to that effect *Z v A Government Department (C-363/12) EU:C:2014:159; [2014] 3 C.M.L.R. 20* at [74].
- 130 *T. Degener, Towards inclusive equality: 10 years Committee on the Rights of Persons with Disabilities (2018)*, p. 26 at https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/1_Global/INT_CRPD_INF_21_28325_E.pdf [Accessed 26 August 2020].
- 131 N. Nic Shuibhne, "The Social Market Economy and Restriction of Free Movement Rights: plus c'est la même chose?" (2019) 57 J.C.M.S. 111. In a similar vein, see *Ferri and Cortese, Introduction in The EU Social Market Economy and the Law (2018)*, p.1.
- 132 EAA, Preamble, para.2.
- 133 This is true for example for directives related to consumer rights (*V. Mak, "Social Considerations in EU Consumer Law: The Legislator, the Court, and a Rhapsody in Blue" in Ferri and Cortese, The EU Social Market Economy and the Law (2018)*, p.213).
- 134 Nic Shuibhne, "The Social Market Economy and Restriction of Free Movement Rights" (2019) 57 J.C.M.S. 111, 123.

- 135 EAA, Preamble, para.5.
- 136 See, e.g., EAA, Preamble, para.6.
- 137 EAA, Preamble, para.7
- 138 EAA, Preamble, para.21.
- 139 EAA art.4.
- 140 EAA, Preamble, para.66.
- 141 EAA, Preamble, para.65.
- 142 Commission, "'Think Small First'—A 'Small Business Act' for Europe" COM(2008) 0394 final.
- 143 EAA, Preamble, para.65.
- 144 EAA, Preamble, para.52.
- 145 Commission, "A renewed EU strategy 2011–14 for corporate social responsibility" COM (2011) 0681 final.
- 146 *Corsica Ferries France v Commission (T-565/08) EU:T:2012:415.*
- 147 *Corsica Ferries France v Commission (T-565/08) EU:T:2012:415* at [82].
- 148 Opinion of AG Wahl in *AGET Iraklis (C-201/15) EU:C:2016:429.*
- 149 F. Bonciu, "The European Pillar of Social Rights: Too Little, Too Late" (2018) 18 Romanian Journal of European Affairs 60, 64.
- 150 See https://europa.eu/rapid/press-release_STATEMENT-18-6390_en.htm [Accessed 26 August 2020]. The Pillar, after having received the support of the Parliament in January 2017, was solemnly proclaimed in November 2017. It revolves around three main themes: equal opportunities and access to the labour market; fair working conditions; adequate and sustainable social protection. On the Pillar, see, inter alia, F. Hendrickx, "The European Social Pillar: A First Evaluation" (2018) 9 European Labour Law Journal 3; S. Garben, "The European Pillar of Social Rights: Effectively Addressing Displacement?" (2018) 14 European Constitutional Law Review 210.
- 151 "Social Priorities Under the Juncker Commission #FutureofEurope" (14 August 2019), https://ec.europa.eu/commission/sites/beta-political/files/social_priorities_juncker_commission_en.pdf [Accessed 26 August 2020].
- 152 [Directive 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18 \[2018\] OJ L188/79.](#)
- 153 O'Sullivan, "*The EU Between Market State Ideals and Social Market Economy Objectives*" in *The EU Social Market Economy and the Law* (2018).
- 154 C. Joerges, and F. Rödl, "Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval" (2009) 15 E.L.J. 1.
- 155 As noted by Joerges and Rödl, "Joschka Fischer and Dominique de Villepin, to whom the assignment of constitutional significance to the concept of the 'social market economy' is owed ... were hardly aware of the interdependence between the economic and the social constitution as illustrated in the theory of the 'social market economy'". Joerges and Rödl, "Informal Politics, Formalised Law and the 'Social Deficit' of European Integration" (2009) 15 E.L.J. 1.
- 156 Claassen et al., "Rethinking the European Social Market Economy" (2019) 57 J.C.M.S. 3, 4.
- 157 Opinion of AG Kokott *Tesco-Global Áruházak Zrt (C-323/18) EU:C:2019:567* at [172]. See also Opinion of AG Kokott *Vodafone Magyarország Mobil Távközlési (C-75/18) EU:C:2019:492* at [187].
- 158 D. Ashiagbor, "Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration" (2013) 19 E.L.J. 303.