

# DIRITTI COMPARATI

Comparare i diritti fondamentali in Europa

## **CHALLENGING ASSUMPTIONS OF THE EU'S ECONOMIC CONSTITUTION: A REVIEW OF DELIA FERRI AND FULVIO CORTESE (EDS), THE EU SOCIAL MARKET ECONOMY AND THE LAW: THEORETICAL PERSPECTIVES AND PRACTICAL CHALLENGES FOR THE EU (ROUTLEDGE, 2019)**

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The European Union is perhaps above all a constitutionalised, transnational market. But what form of market does it represent and is this form hardwired into its constitutional DNA? These are old questions of European law and integration but ones which get a novel and nuanced treatment in this edited collection from Delia Ferri and Fulvio Cortese. Through a constitutionally framed yet detailed analysis of a broad range of EU policy sectors, this collection investigates the extent to which the concept of the 'highly competitive social market economy' can play a role in the legal construction of the internal market.

This edited collection is thoughtfully organised into an introduction, conclusion and two separate parts. Part I considers the broader historical and constitutional context of the concept of a 'social market economy', its origins in German mid-century *ordo-liberal* thinking and the role it has played in the history of European integration. Pieces by O'Sullivan, Dani, Civitarese Matteucci and Delledonne consider the constitutional history of

the Union, the social state within the EU context, the concept of social rights in EU law and the question of the social dimension of Union citizenship respectively. This part offers a range of views - on balance somewhat pessimistic - about the role and impact of the EU on social issues, but with some space for optimism. Part II of the book provides a series of detailed but accessible accounts of the role the concept of the social market economy - or the 'social' more generally - plays in the elaboration and application of EU law across a number of sectors, such as state aid, public procurement, health care, competition law, services of general economic interest, intellectual property, labour law, investment law and the common commercial policy. The selection is wide-ranging and all the authors appear to have adhered to a common brief; introduce the topic, identify the economic and social tensions at play and draw some general conclusions for the broader theme of the book. The result is a collection that is remarkably coherent across the different topics and accessible to the non-specialist.

As noted in the opening to this review, the book can be seen as entering into an old debate in EU law but it does so in a novel way. This originality is evident in at least two ways. Firstly, it does so through the use of the concept of the 'social market economy'. Secondly, it provides a detailed treatment of how this concept may or may not operate in a number of discrete sectors of EU law.

The collection is centred on the concept of the 'social market economy'. As is stressed by the authors, the concept of the 'social market economy', now found in Article 3 TEU, is a constitutional term that allows us to reconsider the balance between the market and the social within the broader constitution of the Union. It therefore opens up an alternative understanding of what a transnational constitutionalised market might look like and provides an alternative paradigm to the familiar positive-negative dichotomy as a means of analysing the balance between the market and the social. It also helps us move beyond an oppositional conception of the relationship between the social and the market towards a more integrated understanding. This collection is not a consideration of the social *and* the market within EU law but rather the concept of a 'social

market economy' as such. This integrated approach does not mask what the editors acknowledge are the tensions at play in the concept, but it does offer an alternative, more holistic and perhaps more fruitful way of addressing them. While the concept of the 'social market economy' is not uncontested – and indeed this is one of the findings of the book – it does appear to this reviewer that there is a sufficient core to the concept, rooted in history and a certain practice, for it to provide principles for the development of Union law and policy.

Indeed, this points to a further strength of the text; the detailed treatment of a broad range of discreet areas in order to reveal the extent to which the social does play a role in the construction of the market. The answer, as acknowledged by the editors in the conclusion, is nuanced. On the one hand, across a number of areas, considerations of market liberalisation dominate. To take one example, Sganga's chapter on copyright demonstrates well how concerns regarding developing the market and economic growth is at the heart of EU copyright law. Even if more recent developments introduce additional considerations, copyright law is largely developed in such a way as to maximise market freedoms. On the other hand, non-economic considerations do seem to play an increasingly important role in some areas. Busatta and Hervey's chapter on cross-border healthcare and the Patients' Rights Directive is a prime example of the extent to which the impact on social systems of liberalising moves on the part of the Court of Justice were exaggerated and how subsequent legislative action operates to protect rather than undermine national systems of solidarity. The extent to which such moves towards a greater consideration of the social in EU law are explicitly attributed to Article 3(3) TEU is limited; mention of the provision is extremely rare by either the legislature or by the Court of Justice. And yet it is evident from these chapters that in its actual, day-to-day operation, EU law is not the neo-liberal caricature it is sometimes made out to be. More importantly, these elements of the social within the construction of the market show that different political choices are possible within the current constitutional framework, as Clemens Kaupa (*The Pluralist Character of the European Economic Constitution*, Hart, 2016) has argued.

To return to the opening remark of this review; the Union is a constitutionalised, transnational market. However, within that basic framework there is space for political choice regarding the precise form of that market. A 'social market economy' is the choice that is indicated in Article 3(3) TEU. While it is difficult to say that currently the EU represents such a social market economy, this collection demonstrates that it is one possibility and provides some thoughts as to how this might be achieved.