1 Introduction

In this book we are concerned with one particular aspect of European economic law: the ways in which the European courts define and delineate the spheres of the 'market' and the 'State' in their various guises, and how they elaborate the relationship between these two categories. Hence, we deal with questions like the place of 'the State' in economic life, with the role of private actors and 'the market' in the provision of collective goods and, ultimately, with the relationship between economic freedoms and political rights. A large part of our enquiry will, inevitably, involve the question of whether (and if so, to what extent) EU internal market law reflects or propounds particular models of capitalism, such as neoliberalism or the 'European social model'.

The constitutional question at issue is not limited to the specific balance between the forces of the free market and public intervention at this one (or any other) time in the history of European integration: the fundamental question is not so much where European law sets these boundaries, but how they are set. At the extremes, two contrasting answers to this question are possible. The first answer recognises that the extent to which political decision-making can assert itself over the market is itself properly a political decision. In the other model, the legitimate sphere of government intervention is defined by market failure and hence limited to those activities or services that cannot be provided by the market mechanism.

Neither of these clearcut answers, of course, provides a viable course for European law. The first would render the very idea of the internal market nugatory; the second would turn the 'democratic deficit' of the Union into a constitutional value in and of itself. One would therefore expect to find less absolute, more pragmatic and infinitely more complex principles and mechanisms in the case law of the European courts. And so it transpires.

In this book we provide an analysis of the case law of the European courts concerning free movement and competition. This involves, on the one hand, those provisions that are formally addressed exclusively to either the Member States in their regulatory capacity or to private undertakings in their economic capacity. It also involves those provisions that explicitly recognise State intervention in the market and deal with public undertakings, monopolies, special and exclusive rights, and State aid. The focus is almost exclusively on primary Community law, although we have included discussion not only of especially significant secondary law, such as public procurement legislation, but also of some less significant secondary law, such as the VAT Directive, where we find the case law interesting for our purposes. The focus throughout is on instances of conflict between competing claims of market logic and discipline and the claims of primacy of political decision-making over the provision of collective goods. These are to be found in many and sometimes unexpected variations, but largely fall into two categories: interpretations of the scope of particular Treaty provisions on the one hand and substantive balancing of different values on the other.

In the remainder of this introductory chapter, we will both try to provide some context to our topic and set out the focus of our research. We will, first, discuss the rise and decline of European economic constitutionalism in the wider context of the process of European legal integration. Next, we will discuss the concept of the 'European economic constitution' itself in the light of two key approaches of particular relevance to our research: German *Ordo*liberalism and the French legal and political tradition associated with the notion of *service public*. These two diametrically opposed political and legal frameworks for European economic law and their ideological underpinnings will serve as ideal types for constructing our discussion. The subsequent section will discuss the reconfiguration of the public and private spheres following in particular the 1993 'November revolution' and outline the problems faced by the Court of Justice when dealing with these sensitive issues. Finally, we will identify the key variables of the substantive discussion in the subsequent chapters and formulate the research questions that we will address there.

1.1. The economy in European constitutionalism

The original EEC Treaty can be described as a system of 'embedded liberalism', a combination of external trade liberalisation and domestic

interventionism.[1] EC law, after all, still explicitly acknowledges Member States' freedom to operate mixed economies in what is now Article 295 EC, according to which the Treaty 'shall in no way prejudice the rules in Member States governing the system of property ownership'. The absence of any provisions on social policy in the Rome Treaty, in this light, was not an unfortunate oversight and much less a policy choice in favour of economic liberalism, but could be construed as a fundamental decision in favour of domestic welfare states under direct democratic control.[2]

The process of constitutionalisation of the Treaty embarked upon by the Court of Justice kept this compromise largely intact. Thus, the canonical judgment in *Costa* v. *ENEL* found nothing in EC law to prevent Italy from nationalising its electricity industry, even while affirming the supremacy of EC law.[3] Even *Handelsgesellschaft* could be read in this way, protecting a decidedly illiberal Community regime of export controls against allegations of violating constitutionally protected 'economic liberty', even while affirming that respect for fundamental rights 'forms an integral part of the general principles of law' underpinning the Community legal order.[4] The Court's emphasis in its case law on free movement and competition law was squarely on market integration. The reference in the original Article 3(f) EEC to 'the institution of a system ensuring that competition in the common market is not distorted' was read in the key of terms of trade and not as an autonomous value.

Hence, in *Consten and Grundig*,[4a] the judgment that would define the objectives of EC competition law for decades, the Court made clear that even the anti-cartel provision Article 81 EC was concerned not so much with policing competitive markets, but with preventing fragmented markets. In disregard of the actual effects of the exclusive distribution agreement at stake, the Court noted:

> What is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of

[1] Applied to the Bretton Woods institutions, the term has been rendered famous by Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order', (1982) 36 *International Organization* 379.
[2] For an elaborate reconstruction of the early years of European integration in this key, see S. Giubboni, *Social Rights and Market Freedom in the European Constitution – A Labour Law Perspective* (Cambridge University Press, 2006).
[3] Case 6/64 *Costa* v. *ENEL* [1964] ECR 585.
[4] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1133.
[4a] Joined Cases 56 and 58/64 *Consten and Grundig* v. *Commission* [1966] ECR 299.

trade between Member States in a manner which might harm the attainment of the objectives of a single market between States.[5]

This concern was later to be imported into the regime on the free movement of goods, finding its way into the famous *Dassonville* definition of measures having equivalent effect to quantitative restrictions in the free movement of goods.[6] It was here, of course, that the art of separation found its limits. One could argue that *Dassonville* and *Cassis de Dijon*[7] could still be fitted into the logic of free trade orthodoxy by representing an altogether classical shift from a concern with tariff barriers to non-tariff barriers. However, the sheer scope of free movement under Article 28 EC made it all but impossible to maintain a meaningful distinction between market integration and market regulation. That dilemma was to become all the more clear after the launching of the Single Market programme in the mid 1980s. In his history of European integration, John Gillingham claims:

> The adoption of the Single European Act was a choice for the market, a judgment on the part of the Member States to shift decision-making authority away from national political institutions as well as government-regulated economies and toward that abstraction, buyers and sellers. It represented an acknowledgement that the model of the national mixed-economy had had its day.[8]

On the basis of the actual text of the Act, of course, it was no such thing.[9] Economic context, political Zeitgeist and the focusing of energies on market integration have given the Single Act its status as a charter of the politics of deregulation and privatisation. To be sure, the Court and Commission responded in kind by making the most of the existing framework. The Court flanked its unfaltering vigilance under

[5] Article 81 EC prohibits anti-competitive agreements 'which may affect trade between Member States'. The Court reads this as a jurisdictional clause. On the contested objectives of EC competition law, see generally R. Wesseling, *The Modernisation of EC Antitrust Law* (Oxford: Hart, 2000), pp. 77 ff.

[6] Case 8/74 *Dassonville* [1974] ECR 837.

[7] Case 45/75 *Rewe ('Cassis de Dijon')* [1976] ECR 196.

[8] J. Gillingham, *European Integration 1950–2003 – Superstate or New Market Economy?* (Cambridge University Press, 2003), p. 294. There are useful antidotes to this 'From-Hayek-to-Thatcher' history of Europe. See B. Eichengreen, *The European Economy Since 1945 – Coordinated Capitalism and Beyond* (Princeton University Press, 2007); and, more generally, T. Judt, *Postwar – A History of Europe Since 1945* (London: Penguin, 2005).

[9] See e.g. the careful analysis in Craig, 'The Evolution of the Single Market' in C. Barnard and J. Scott (eds.), *The Law of the Single Market – Unpacking the Premises* (Oxford: Hart, 2002), pp. 1, 11 ff.

Article 28 EC with a 'public turn' in competition law, and the Commission started to make extensive use of its powers under the regime on State aid and Article 86 EC.[10] It was on this basis that Claus-Dieter Ehlermann (then director general of the European Commission responsible for competition policy) could famously proclaim the EC Treaty 'the most strongly free market oriented constitution in the world'.[11] Almost immediately afterwards, however, the balance swung back in the opposite direction with the 1993 'November revolution' set off by the *Keck*[11a] case. Before dealing with this reversal of the case law, we will briefly discuss the demise of embedded liberalism.

Embedded liberalism is, of course, in many ways a contradiction in terms and a compromise that is bound to fall victim to its own success to the extent that an international market is replaced by a internal market.[12] Two structural processes have been at work in the thirty-five years that separate the Rome (1957) and Maastricht (1992) Treaties. Jointly they explain the demise of embedded liberalism.

The first is simply the consequence of the fact that, ultimately, the separation of 'the market' from social and political life is artificial. As economic integration progresses, the processes of market building and political interventions in market processes will need to be coordinated somehow if they are to be effective. It is for this reason that the Single Market programme turned out to be as much an exercise in re-regulation as it was in deregulation: in highly complex societies, functioning markets require a regulatory framework.[13]

[10] See Gerber, 'The Transformation of European Community Competition Law?', (1994) 35 *Harvard International Law Journal* 25, and D. J. Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus* (Oxford: Clarendon, 1998), pp. 382 ff.

[11] Ehlermann, 'The Contribution of EC Competition Policy to the Single Market', (1992) 29 CMLR 257, at p. 273. Emphasis in original.

[11a] Joined cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.

[12] The institutional turn in political economy now associated with 'varieties of capitalism' would even seem to suggest that the separation of the production regime and the welfare-protection regime is dysfunctional in the light of the need for institutional complementarity. See e.g. J. R. Hollingsworth and R. Boyer (eds.), *Contemporary Capitalism: The Embeddedness of Institutions* (Cambridge University Press 1999); P. A. Hall and D. Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001); and Rhodes, '"Varieties of Capitalism" and the Political Economy of European Welfare States', (2005) 10 *New Political Economy* 363.

[13] See e.g. Joerges, 'Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik' in R. Wildenmann (ed.), *Staatswerdung Europas? Optionen für eine Europäische Union* (Baden-Baden: Nomos, 1991), p. 225; and S. Weatherill, *Law and Integration* (Oxford: Clarendon, 1995).

Second is the process that emerged to remedy what Fritz Scharpf called the 'constitutional asymmetry' following from the combination of embedded liberalism (the 'political decoupling of economic integration and social-protection issues') and the constitutionalisation process:

> At the national level, economic policy and social-protection policy had and still have the same constitutional status – with the consequence that any conflict between these two types of interests could only be resolved politically, by majority vote or by compromise. However, once the ECJ had established the doctrines of 'direct effect' and 'supremacy', any rules of primary and secondary European law, as interpreted by the Commission and the Court, would take precedence over all rules and practices based on national law, whether earlier or later, statutory or constitutional. When that was ensured, all employment and welfare-state policies at the national level had to be designed in the shadow of 'constitutionalised' European law.[14]

The Member States eventually woke up to the unintended realities of integration by European law as constitutionalised by the Court. In many ways, the Maastricht Treaty could be seen as an attempt to remedy this state of affairs. In the context of Economic and Monetary Union, Articles 2 and 3 of the EC Treaty became cluttered with a long list of objectives and activities that were in obvious need of political reconciliation and coordination – including social policy, environmental and consumer protection, 'economic and social cohesion' and industrial policy – while at the same time committing Member States to coordinate their economic policies 'in accordance with the principle of an open market economy with free competition' in Articles 4 and 98 EC.

The Community's economic framework had now arguably evolved into a system of contestable policy objectives. However, even as politics appeared on the European agenda, the Economic Community itself was shielded, notably by the Bundesverfassungsgericht (BVerfG). On the one hand, its Maastricht decision sparked off serious constitutional debate about political union and the feasibility of constitutionality and supranational democracy,[15] but on the other it protected the internal market and economic union from any such worries. As long as the

[14] Scharpf, 'The European Social Model', (2002) 40 *Journal of Common Market Studies* 645, pp. 646–7. Cf. F. W. Scharpf, *Governing in Europe – Effective and Democratic?* (Oxford University Press, 1999), pp. 43 ff.

[15] Suffice it to refer to the authoritative debate in Weiler, 'Does Europe need a Constitution? Demos, Telos, and the German Maastricht Decision', (1995) 1 ELJ 218; and Grimm, 'Does Europe need a Constitution?', (1995) 1 ELJ 282.

powers and competencies of the Community 'remain essentially the activities of an economic union', the BVerfG held that the Member States could continue to rely on their quality of sovereign power and their status of 'Masters of the Treaties'.[16] A new form of separation between the economic and the political spheres was thereby established. To paraphrase Christian Joerges, Europe could remain a 'market without a State' as long as its component members were content to be 'States without markets'.[17]

It was in the immediate aftermath of both the Maastricht Treaty and the BVerfG judgment that the European Court of Justice embarked on what Norbert Reich has called the 'November revolution', rejecting decisively the idea that the Treaty forms a neoliberal charter of economic freedom.[18] First, the Court's ruling in *Keck* did away with the assumption that the market freedoms serve the liberal pursuit of commercial freedom within individual Member States rather than merely regulating trade between Member States.[19] Next, the *Reiff/OHRA/Meng* trilogy definitively closed the door on the theory that the EC competition rules provide the exclusive yardstick by which Member States' social and economic policies are to be measured.[20]

The 'November revolution' was clearly a concerted effort by the Court to draw clear lines around the internal market, but the rationale behind it is all but self-evident. Several complementary interpretations can be, and have been, put forward, all in one way or another a response to the political signals sent out by the Maastricht Treaty:

[16] Bundesverfassungsgericht, *Brunner* v. *European Union Treaty*, 1 (1994), CMLR 57, paras. 54 and 55.

[17] Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy', (2005) 30 ELR 461, p. 475.

[18] Reich, 'The November Revolution of the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited', (1994) 31 CMLR 459.

[19] Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097. This is how Tesauro, 'The Community's Internal Market in the Light of the Recent Case-law of the Court of Justice', (1995) 15 YEL 1, at p. 5; and Möschel, 'Kehrtwende in der Rechtsprechung in der EuGH zur Warenverkehrsfreiheit', (1994) 47 NJW 429 both read the ruling, even if Möschel is decidedly less happy about the outcome than then Advocate General Tesauro.

[20] Case C-185/91 *Reiff* [1993] ECR I-4769; Case C-2/91 *Wolf W. Meng* [1993] ECR I-5751; and Case C-245/91 *OHRA Schadeverzekeringen NV (OHRA)* [1993] ECR I-5851. Again not amused, Möschel, 'Wird die Effet Utile Rechtssprechung des EuGH Inutile?', (1994) 47 NJW 1709, 1710 (to paraphrase, 'the economic constitution is about measuring politics to law. Is that what this was supposed to be about?'). For similarly grim case notes, see Bach, (1994) 31 CMLR 1357; and Van der Esch, 'Loyauté Fédérale et Subsidiarité', CDE 30 (1994), 523.

- *Subsidiarity:* First, it has been called 'subsidiarity' case law to highlight its implications for the vertical balance of powers: that between the Community and the Member States. In this reading, the Court 'returns' to the Member States the power to decide on redistributive economic policies as long as these do not directly interfere with the internal market.[21]
- *Judicial formalism:* Second, the November revolution has been interpreted as the starting point of a retreat from judicial activism to formalism, with the Court insisting that the task of elaborating the principles of the economic constitution rests with the legislative institutions of the Community.
- *Loss of primacy of integration perspective:* Finally, the case law of the Court has been held against the light of the dynamics of market-building: now that the heroic days of establishing the internal market were drawing to a close, the purpose and scope of European economic law needed to be reconsidered. In this light, the brief flourishing of what has been called a neoliberal economic constitution (or *Wirtschaftsverfassung*) between the Single Act and the Maastricht Treaty was but a passing phase of forcing market integration by law.

There is a consistent body of case law from subsequent years that confirms this line of line of thought – indeed, if the 'November revolution' was considered bad, much worse was yet to come. In the electricity monopoly cases of 1997, the Court held that discriminatory practices prohibited by Article 31 EC itself could be covered by the Article 86(2) EC exemption for services of general economic interest – a concept largely defined at national level.[22] In *Altmark*, it held that the Article 86(2) EC exception could save subsidies from the intrusions of the State aid regime.[23] In the collective bargaining cases of 1999, it settled the competing objectives of undistorted competition and social policy in favour of the latter, inventing an exemption from the competition rules for anti-competitive measures resulting from collective

[21] Cf. Jickeli, 'Der Binnenmarkt im Schatten des Subsidiaritätsprinzips', (1995) 50 *Juristen Zeitung* 57; Rohe, 'Binnenmarkt oder Interessenverband? Zum Verhältnis von Binnenmarktziel und Subsidiaritätsprinzip nach dem Maastricht-vertrag', (1997) 61 *Rabels Zeitschrift* 1; and Winter, 'Subsidiarität und Deregulierung im Gemeinschaftsrecht', (1997) 31 EuR 247.

[22] Case C-157/94 *Commission* v. *Netherlands (Dutch Electricity Monopoly)* [1997] ECR I-5699; Case C-158/94 *Commission* v. *Italy (Italian Electricity Monopoly)* [1997] ECR I-5789; Case C-159/94 *Commission* v. *France (French Electricity and Gas Monopoly)* [1997] ECR I-5815; and Case C-160/94 *Commission* v. *Spain (Spanish Electricity Monopoly)* [1997] ECR I-5851.

[23] Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

bargaining agreements.[24] In *Wouters* first and *Medina* later, the Court reversed decades of persistent case law by allowing corporatist arrangements to be justified under Article 81 (1) EC in a full-blown rule-of-reason test.[25]

On the other hand, there seem to be important contradictions as well, especially in the fields of free movement of services and capital. In a string of cases brought by the Commission against Member States retaining a measure of control over recently privatised or strategic industrial conglomerates, the Court has struck down the practice of 'golden shares'.[26] Starting with the 1998 cases of *Kohll* and *Decker*, the Court has subjected national social security systems to the discipline of the free movement regime, another nail in the coffin of embedded liberalism.[27] Furthermore, in December 2007, finally, it held collective action by trade unions against social dumping to be illegal under the provisions concerning the freedom of establishment and free movement of services.[28]

The ambiguity of these cases reveals the difficulties European economic law faces with the internalisation of competing objectives.[29] In that light, they clearly reflect the Maastricht Treaty with its plethora of goals. Recent amendments and Treaty revisions show that these problems have not yet been resolved. Thus, the ill-fated Constitutional

[24] Case C-67/96 *Albany International* [1999] ECR I-5751; Joined Cases C-115/97, 116/97, 117/97 and 119/97 *Brentjens Handelsonderneming* [1999] ECR I-6025; and Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121.

[25] Case C-309/99 *Wouters* v. *Nederlandse Orde van Advocaten* [2002] ECR I-1577; and Case C-519/04 P *David Meca-Medina* v. *Commission* [2006] ECR I-6991.

[26] Case C-367/98 *Commission* v. *Portugal* [2002] ECR I-4731; Case C-483/99 *Commission* v. *France* [2002] ECR I-4781; Case C-503/99 *Commission* v. *Belgium* [2002] ECR I-4809; Case C-463/00 *Commission* v. *Spain* [2003] ECR I-4581; Case C-98/01 *Commission* v. *UK* [2003] ECR I-4641; Case C-174/04 *Commission* v. *Italy* [2005] ECR I-4933; Joined Cases C-282 and 283/04 *Commission* v. *Netherlands* [2006] ECR I-9141; and Case C-112/05 *Commission* v. *Germany* [2007] ECR I-8995.

[27] Case C-120/95 *Decker* [1998] ECR I-1831; and Case C-158/96 *Kohll* [1998] ECR I-1931. See e.g. P. Mavridis, *La Sécurité Sociale à l'Épreuve de l'Intégration Européenne* (Brussels: Bruylant, 2003); M. Dougan and E. Spaventa (eds.), *Social Welfare and EU Law* (Oxford: Hart, 2005); and G. de Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity*, (Oxford University Press, 2005). Cf. M. Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (Oxford University Press, 2005).

[28] Case C-438/05 *ITF* v. *Viking* [2007] ECR I-10779; and Case C-314/05 *Laval* [2007] ECR I-11767.

[29] Cf. Everson, 'Adjudicating the Market', (2002) 8 ELJ 152, especially at pp. 158 ff. Jürgen Schwarze has done the unthinkable in pulling together a systematic account of European economic law in his new tome: J. Schwarze, *Europäisches Wirtschaftsrecht. Grundlagen, Gestaltungsformen, Grenzen* (Baden-Baden: Nomos, 2007).

Treaty declared the Union's objectives to be 'to offer its citizens an internal market where competition is free and undistorted', while working for 'a highly competitive social market economy, aiming at full employment and social progress'.[30] The Lisbon Treaty retains the highly competitive social market economy, but has banished the system of undistorted competition that powers this economy to the legislative equivalent of a broom closet, a Protocol.[31] This new socio-economic settlement plays out in the shadow of political constitutionalism, complete with enhanced majoritarian politics, a Charter of fundamental rights, and notions of citizenship.[32]

Yet at the same time it evolves amidst the institutional and legal fragmentation launched by the 'new governance' of social Europe. This governance started gaining shape in the Treaty of Amsterdam, which inserted into Article 3 EC a reference to a 'coordinated strategy for employment' and was taken further by the Lisbon strategy. The result is the 'open method of coordination' (OMC), a contentious form of soft law outside the Treaty framework, far from the centralising tendencies of 'Brussels' and stretching out beyond employment strategies to the fields of education, health, pensions and social inclusion.[33] The re-coupling of economic integration and social welfare is thus accompanied by an exercise in decentralisation and dejuridification. That, in

[30] Article I-3(2) and (3). The Commission attributed the 'no' vote in France to 'the impression that the Constitution leant too much towards the liberal and not enough towards the social' in its Communication, *The Period of Reflection and Plan D*, COM (2006) 212, 1.

[31] Article 3, Treaty on European Union, as to be amended. In the Protocol on the Internal Market and Competition, the Contracting Parties 'consider' that the concept of the internal market includes a system of undistorted competition for purposes of competence under what is now Article 308 EC, to be renumbered as Article 352 TFEU.

[32] Cf. J. Schwarze (ed.), *Der Verfassungsentwurf des Europäischen Konvents-Verfassungsrechtliche Grundstrukturen und wirtschaftsverfassungsrechtliches Konzept* (Baden-Baden: Nomos, 2004).

[33] The literature is extensive. See e.g. Scott and Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', (2002) 8 ELJ 1; De Búrca, 'The Constitutional Challenge of New Governance in the European Union', (2003) 28 ELR 814; Trubek and Mosher, 'New Governance, Employment Policy and the European Social Model' in J. Zeitlin and D. M. Trubek (eds.), *Governing Work and Welfare in a New Economy – European and American Experiments* (Oxford University Press, 2003), p. 33; R. Dehousse (ed.), *L'Europe sans Bruxelles? Une Analyse de la Méthode Ouverte de Coordination* (Paris: L'Harmattan, 2004); O. De Schutter and S. Deakin (eds.), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Brussels: Bruylant, 2005); Trubek and Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination', (2005) 11 ELJ 343; and D. Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford University Press, 2006).