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15. The pluralist socio-economic character of the European Treaties

Clemens Kaupa

I. INTRODUCTION

Have neoliberalism and austerity been constitutionalized in the European Union, as the neo-Gramscian political scientist Stephen Gill has argued since the 1990s?¹ Is the Union a bureaucracy characterized by “entrenched corporatism and socialism,” as the Thatcherite historian John Gillingham suggested in 2003?² Does it fuel a “drift” toward massive economic concentration and thereby undermine the pursuit of a genuinely left political project, as Perry Anderson and Stuart Hall, leading voices of the British New Left, argued in the 1960s?³ Is it “ obligated to pursue regulatory policies along the lines of the ordoliberal school,” as Manfred Zuleeg, who later would become a judge at the CJEU, proclaimed in 1978?⁴ Or, is it destined to develop into a “centrally planned European economy,” undermine the liberal character of the global economic order, and “threaten” European economic integration, as Wilhelm Röpke, a leading ordoliberal scholar, warned in 1958?⁵ These assessments represent only a small fraction of the claims that have been made in relation to the Union’s socioeconomic orientation over the course of its existence. Even more numerous are instances where such assumptions enter, consciously or unconsciously, legal or political discourse in a less explicit or reflected form.

The discussion on the socioeconomic orientation of the Union has a distinct legal dimension: Assuming that the Union is in fact biased in favor of any specific socioeconomic paradigm, ideology, or worldview, does this also translate into a legal obligation, and if yes, in what form? Do the Treaty provisions unambiguously oblige the European institutions and the Member States to exercise their powers in accordance with a specific socioeconomic perspective? And if this is not the case, could the


⁵ Wilhelm Röpke, ‘Gemeinsamer Markt und Freihandelszone’ (1958) 10 Ordo 31, 32.
European legal system nonetheless effectuate or facilitate ideologically biased outcomes as a matter of, for example, institutional dynamics? The present text will argue that the European Treaties cannot be understood to conform to any specific socioeconomic paradigm or ideology in a way that would bind institutions or Member States to such a view. This assessment is based on a textual, historical, and functional interpretation of the Treaties. Regarding their substantive socioeconomic orientation, the Treaties are found to be ambiguous in central respects, and to grant broad discretion in their interpretation and application. Consequently, the Treaties will usually enable the pursuit of political projects informed by very different socioeconomic views. Precisely this quality of the Treaties also entails the possibility of biased policy outcomes. Given their ambiguity and the broad discretion they grant, the European Treaties may indeed be interpreted and applied along the lines of a specific worldview, either due to a conscious choice of the relevant institutions, or as an effect of hegemonic political, social, and economic assumptions that enter the interpretative process. Thus, while the Treaties are, in legal terms, un- or underdetermined in the light of competing socioeconomic paradigms, the current legal and political practice may yet be liable to effect ideologically biased outcomes. The present text suggests that the Treaties enable broad regulatory choices to shape the socioeconomic character of the European and the national polities. However, such potential may remain unrecognized if existing, historically contingent interpretations of the Treaties are mistaken for their only correct interpretation. In order to highlight the Treaties’ potential, the present text describes their negative quality—that is, that they do not unambiguously prescribe any specific worldview—as their pluralist socioeconomic character.

II. METHODOLOGICAL CONSIDERATIONS

The authors referenced at the beginning of the text all argue that the Union is shaped by a specific “logic,” which is assumed to structure and limit the available political choices in socioeconomic terms in some form. As their assessments come to conflicting conclusions, it might appear tempting to either dismiss their relevance from a legal perspective altogether or to assume that they all provide a valid yet incomplete view, with the truth lying somewhere in between. However, ignoring such assessments would be unsatisfactory because claims about the Union’s socioeconomic orientation clearly influence the legal and nonlegal discourses. For an example from nonlegal discourse see Jean-Paul Fitoussi and Francesco Saraceno, ‘European Economic Governance: The Berlin-Washington Consensus’ (2013) 37 Cambridge Journal of Economics 479; for examples from legal discourse, see Matjaz Nahtigal and Bojan Bugaric, ‘The EU Fiscal Compact: Constitutionalization of Austerity and Preemption of Democracy in Europe’ (2012), https://ssrn.com/abstract=2194475, 1–2.

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6 The present text is based on Clemens Kaupa, The Pluralist Character of the European Economic Constitution (Hart, 2016).

In the assessment of Anderson and Hall, the Treaty text appears relatively undetermined in ideological terms. In a section tellingly entitled “Treaty of Rome: letter vs. logic,” they argue: “[on] paper, the terms of the Treaty of Rome appear innocuous enough. Viewed, however, as part of an unfolding process, the story reads quite differently.”

This suggests that the “logic” restraining the political choices available to policymakers is not significantly dictated by the European constitutional text, and instead operates mainly in other ways. In Gill’s view, the role of law appears more prominent, but remains ambiguous: His concept of the “constitutionalization of neoliberalism” describes the process of entrenching structures and practices in the European polity which facilitate the implementation of neoliberal and austerity-oriented policies. This includes, but is not limited to, European constitutional law: the neoliberal “logic” unfolds also through other means, including institutional dynamics, political and economic power, and hegemonic political and economic discourses. While neoliberal thinking has come to shape the provisions of the European Treaties (Gill specifically highlights the provisions on monetary union), it does not exhaustively determine their meaning. Under different political and socioeconomic circumstances, Gill suggests, the Union’s constitutional framework could also support alternative socioeconomic projects.

By contrast, Zuleeg’s view—which employs the ordoliberal concept of the “economic constitution”—suggests that European constitutional law is completely congruent with the Union’s ordoliberal “logic.” According to him, the Treaty of Rome expressed a fundamental and comprehensive choice in favor of a socioeconomic order to the liking of ordoliberals, prohibiting the pursuit of socioeconomic projects that conflict with their worldview. This is claimed to be the case despite the fact that this choice did not find explicit expression in the Treaty text, and despite the fact that the Treaty provisions themselves would also allow for significantly different interpretations, as Röpke’s grave warnings cited at the beginning of the text had clearly illustrated. Thus, we can identify two distinct perspectives on the relationship between the identified ideological “logic” that shapes the European polity on the one hand, and the European constitutional framework on the other: the first—forwarded, for example, by Zuleeg—makes a very strong legal claim, namely that the European constitution prescribes a certain ideological perspective that must inform its interpretation, thereby limiting the available political choices. By contrast, the second perspective—forwarded, for example, by Gill—relies on a much weaker legal argument, merely suggesting that the European Treaties allow or possibly facilitate specific ideological outcomes, without necessarily prescribing them in an unambiguous form. The first perspective can be described as a positive legal claim, as it proposes that the Treaties prescribe a specific obligation, namely to interpret its provisions along the

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8 Anderson and Hall, 7.
9 Gill, 47–8.
10 Ibid.
12 Zuleeg, 90–2 and 97.
13 The highly problematic form of legal reasoning employed by Zuleeg has been criticized by, e.g., Detlev Rahmsdorf, ‘Eine zweite Ordo-Debatte?’ (1980) 4/80 Integration 156.
lines of a certain worldview. I suggest that such claim must be considered to be false if it can be shown the Treaties also allow for a plausible alternative interpretation. While this might appear to be a relatively low threshold of falsification, I believe that it is justified in the light of the specific nature of the claim, which interprets the Treaties in a way that is both highly partisan and highly restrictive in regard to the competences of the European institutions as well as the Member States. It is partisan because it imputes a specific ideological worldview to the Treaties that is, if anything, a minority view. It is restrictive because it proclaims far-reaching limitations on the discretion available to the institutions authorized by the Treaties to interpret and apply its provisions; this includes that of democratically legitimated institutions such as the European and national parliaments and the Council. I posit that such a partisan and restrictive interpretation of the Treaties can only be considered valid if it is, in hermeneutic terms, significantly more convincing than alternative Treaty interpretations that are not restrictive and partisan. In our subsequent Treaty analysis it will be shown that positive claims holding that the European Treaties establish a socioeconomic constitution restrained along the lines of any specific ideology clearly fail such standard, and must therefore be considered to be false. Thus, the Treaties’ socioeconomic orientation can, from a legal perspective, only be described in negative terms, namely by the absence of any specific prescription of an ideological view as an interpretative guideline. As such, the Treaties must be understood as pluralist in the light of competing socioeconomic paradigms or worldviews.

The second perspective—that is, that certain dynamics at work in the European Union effect ideologically biased outcomes—holds a much weaker legal claim, namely that the Treaties do not prevent such dynamics from unfolding. This can be described as a negative legal claim: It must be considered as valid if the Union’s constitutional framework is shown to be sufficiently ambiguous and open to different interpretations, thereby enabling (though not requiring) its interpretation and application in an ideologically biased form. These methodical considerations show that, from a legal perspective, the various claims that can be encountered in debates on the socioeconomic orientation of the Union do not stand on equal footing, as they imply qualitatively different legal claims. The present text aims to show that analyses suggesting that the European Treaties comprehensively and unambiguously enshrine a positive obligation to interpret and apply it along the lines of a specific ideology are incorrect, given the Treaties’ pluralist character. By contrast, analyses suggesting that the Union legal framework is liable to effect ideologically biased outcomes without arguing that the Treaties unambiguously prescribe them are valid as to the legal dimension of their claim.

III. A TEXTUAL INTERPRETATION OF THE EUROPEAN TREATIES

In order to determine whether the Treaties require interpretation of their provisions along the lines of a specific socioeconomic paradigm we first look at the Treaty text itself, as well as the doctrine developed by the European institutions on its basis. Due to space constraints, our analysis will be limited to three areas: the Treaty provisions on
internal market law, on competition law and on obligations relating to the Member States’ debts and deficits laid out in Article 126 TFEU. I have selected these provisions not only because they constitute central socioeconomic provisions of the Treaties, but also because they are commonly referenced in discussions on the socioeconomic orientation of the Union.

A. Internal Market Law

According to the CJEU’s current doctrinal approach, the internal market provisions are interpreted as individuals’ enforceable rights to act across borders unrestricted by regulatory obstacles. Such right is limited by national measures that are justified on grounds of the general welfare, insofar as they are found to be proportional. It may be argued that this doctrinal approach is ideologically tilted because it conforms to a liberal (rather than, for example, a communitarian) understanding of socioeconomic rights: public regulation is assumed to restrict individual freedoms, and can be upheld only if it passes a stringent proportionality test. As such, the Court’s doctrinal approach is reminiscent of the “substantive due process” adjudication of the Lochner-era US Supreme Court of the early twentieth century, which has come to be viewed as an unwarranted, ideologically biased usurpation of legislative powers by the Court. In the CJEU’s case law, a structural bias has been identified, for example, in decisions relating to labor law, corporate mobility, taxation, and corporate governance. It may also be argued that the Court’s internal market doctrine, while possibly neutral on its face, is nonetheless liable to effect ideologically biased outcomes through an interplay with other factors. These may include other Treaty provisions (for example competence limitations), institutional dynamics, or hegemonic socioeconomic and political discourses that inform the interpretative process. Because the proportionality analysis pits national regulatory choices against the interests of mobile individuals and businesses (which frequently tend to be equated with the regulatory objectives of the Union as such), it may be liable to one-sidedly enforce the particular concerns of a specific group at the expense of balancing the various affected interests through the democratic process; and as judicial deregulation on the national level

18 Ibid.
easier than Europe-wide re-regulation, especially in regulatory areas that have significant redistributive implications, an ideological bias may be the factual consequence.\textsuperscript{19} However, for the purposes of the present text, such observations about factual (for example, institutional) dynamics must be distinguished from the (narrow) legal question as to whether the Treaty provisions, and the doctrine developed on its basis, unambiguously prescribe that internal market law cases must be decided along the lines of any specific socioeconomic paradigm. To answer this question we will first discuss the Court’s doctrine in relation to the Treaty provisions, and subsequently look at the doctrine itself.

As anybody who has ever taught a class on internal market law has surely experienced, students tend to be puzzled by the fact that the Treaty provisions provide so little obvious textual support for the Court’s doctrinal framework. This difficulty of relating the doctrine to its textual basis already indicates that the former does not unambiguously follow from the latter, instead constituting a specific interpretation of the Treaty provisions. As such, it is characterized by at least three significant discretionary choices by the Court. First, as the CJEU conceded in \textit{Van Gend en Loos}, the internal market provisions do not explicitly grant enforceable, individual rights.\textsuperscript{20}

Of course, Articles 45, 49, and 56 TFEU are phrased in ways that lend some support to the view that the provisions are granting subjective rights to individuals, instead of merely defining obligations which bind the Member States. For example, Article 45 TFEU prescribes that the “[f]reedom of movement for workers shall be secured within the Union,” thereby explicitly referring to the individual and to her freedom. By contrast, Articles 30, 34, and 63 TFEU on the free movement of goods and capital do not mention the individuals behind such transactions. Without questioning the legitimacy or plausibility of the Court’s understanding of the Treaty provisions as enforceable individual rights, it can be stated that it is the result of a discretionary, interpretative choice by the CJEU that is enabled, but not required by the Treaty provisions.

The same holds true in regard to the second significant discretionary choice that the CJEU made in the development of its internal market doctrine, concerning the substantive scope of the Treaty freedoms. The scope has been defined by the Court in a broad form, namely as including all measures that make the exercise of the freedom “less attractive, or more difficult.”\textsuperscript{21} However, this view is not the only plausible interpretation of the Treaty freedoms, as the extensive discussion on the concept of “measures having equivalent effect” (MEEs) in the 1960s and 1970s indicates.\textsuperscript{22} For example, an early commentator proposed that MEEs should be understood as prohibiting only those measures that physically prevent goods from crossing the border, with all other national measures, including directly discriminatory ones, remaining outside


\textsuperscript{21} Case C-341/05, \textit{Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggetan and Svenska Elektrikerförbundet} (2007) ECLI:EU:C:2007:809, para 99.

\textsuperscript{22} For a detailed analysis of the discussion see Kaupa, 165–84.
its scope. Others proposed that the prohibition should cover directly discriminatory measures only, or, conversely, extend to indirectly discriminatory measures. Yet another author defined the prohibition of Article 34 TFEU as extending to indistinctly applicable measures, but only insofar as they restricted imports “directly.” None of the proposed solutions was found to be entirely satisfactory: whereas a broad, effects-based definition (for example, applying to all indistinctly applicable measures hindering trade) would cover all potentially problematic national measures, it failed in providing a sufficiently precise or predictable delineation between legal and illegal national regulation. By contrast, a narrow, formal definition (for example, covering only directly discriminatory measures) was assumed to be relatively precise, but could be circumvented relatively easily. This dilemma also characterized the Court’s own interpretative approach. In Dassonville, it held MEEs to include indistinctly applicable measures, but established two significant limits on such broad scope: The definition was limited to “all trading rules” (thereby presumably aiming to exclude certain national measures from its scope, such as tax measures), and also excluded measures that were “reasonable.” In the subsequent case law, the “trading rules” limitation was dropped, and the exclusion of “reasonable” measures was supplemented by a proportionality requirement. The resulting doctrinal approach ensured that all problematic measures were caught without inadvertently axing “reasonable” measures, but it obviously lacked any precise and predictable limits, and was eventually supplemented with more formal limitations in Keck. While the Court’s approach is certainly defensible, it clearly does not represent the only plausible interpretation of Article 34 TFEU; it is enabled but not required by the Treaties.

The third significant discretionary choice made by the Court in its development of its internal market doctrine stands in direct relationship with the second. Defining the scope of Article 34 TFEU broadly implied that all kinds of national regulation would fall under its prohibition, including useful or manifestly unproblematic measures. However, the exceptions listed in Article 36 TFEU did not cover all possible regulatory objectives that Member States pursued or might legitimately pursue. For this problem, again, various solutions were forwarded in the early debate: Some authors proposed interpreting the Treaty exceptions broadly, whereas others wanted to subject all restrictive measures to the same proportionality requirement, regardless of whether the underlying regulatory objectives were covered by explicit Treaty exemptions or not. The Court eventually adopted the latter approach, and subsequently extended it to the

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27 For a detailed discussion see Kaupa, 174–84.
29 For a detailed discussion see Kaupa, 177–81.
other Treaty freedoms as well. While such an approach finds at least partial textual support in Article 36 TFEU, this is not the case for the remaining Treaty freedoms. Where the chosen doctrinal approach is thus a possible interpretation, it manifestly does not follow from the Treaties in any unambiguous form. The fact that the Court’s doctrinal approach is significantly shaped by discretionary choices implies that, insofar as internal market adjudication is found to effect ideologically biased outcomes, this cannot plausibly be attributed to the Treaty, at least not in a narrow textual sense. Instead, the opposite conclusion is warranted: The Treaty provisions apparently grant broad discretion in their interpretation and application, which includes, but is not limited to the interpretation underlying the Court’s current doctrine. Consequently, the internal market provisions should be understood to be pluralist from an ideological perspective.

This finding also holds true in regard to the Court’s doctrine itself. As the scope of the Treaty provisions is defined in a virtually all-encompassing way, its function has essentially become that of a jurisdictional rule.30 Because no clear counterfactual comparator is defined (less attractive than in which alternative scenario?), virtually any national measure falls within the scope of the Treaty provisions. Consequently, the substantive evaluation of the national measure has essentially moved into the proportionality analysis. And the proportionality analysis is openedend, not predetermining the final outcome.31 Any regulatory objective may, in principle, justify indistinctly applicable national measures that have restrictive effects on crossborder mobility. Justifications accepted by the Court include numerous socioeconomic objectives, even though this fact is sometimes obscured by the Court’s formulaic style of reasoning.32 They include the protection of consumers and workers; the prevention of social dumping, unfair competition and abuse of the freedom to provide services; avoiding disturbances in the labor market; combating concealed employment; the cohesion of the tax system; the need to ensure the effective collection of income tax, and so on.33 Consequently, the basic structure of the proportionality analysis must be understood to be pluralist in the light of competing socioeconomic paradigms.

This also holds true in regard to the specific elements of the proportionality test. The suitability and necessity requirements evaluate the national measure on the terms defined by its own regulatory objective. This is obvious for the suitability requirement, which tests whether a fundamental mismatch between means and ends exists. Similarly, the necessity requirement requires the national legislator to choose a regulatory solution that is least restrictive to the beneficiaries of the Treaty freedoms, but only if the regulatory objective can still be attained. The third step requires an openended balancing of the competing regulatory interests and the effects of the measure. As such, it does not predetermine the outcome. Consequently, it can be stated that neither the

30 For a similar view see e.g. Peter Oliver, Free Movement of Goods in the EEC (European Law Centre, 1982) 87.
32 For a detailed discussion of the CJEU’s case law on ‘reasons of a purely economic nature’ see Kaupa, 204–16.
33 For a full list and references see Kaupa, 205–6.
Treaty provisions nor the doctrine developed on the Treaty’s basis prescribe any specific socioeconomic paradigm to guide their application, and they are therefore best described as pluralist. At the same time, the broad reading of the scope of the Treaty provisions allows the Court to scrutinize virtually any regulatory measure, and the ambiguous structure of the proportionality test provides a clear entry point for biased views (for example, in the form of hegemonic assumptions about socioeconomic issues), which may then effect ideologically biased judgments. But while such effect is certainly possible under the internal market provisions, it is by no means required.

B. Competition Law

The provisions on competition law have remained unaltered since the Treaty of Rome. Within this regulatory framework, the Commission has, over the past decades, come to pursue very different competition policies. These may be assumed to mirror shifting political influences and objectives, as well as changes in hegemonic socioeconomic thinking. In terms of antitrust theory the Union’s early decades were shaped, broadly speaking, by the so-called Harvard school, which understood competition law as pursuing multiple regulatory objectives and was, at least in theory, quite intervention-friendly in the light of certain anticompetitive market structures. By contrast, the past decades have seen an increasing influence of the Chicago- and Post-Chicago approaches, which advocate a singular focus of competition analysis on short-term price effects and are characterized by much greater confidence in market self-regulation. In practice, the Commission has always also pursued objectives related to European industrial policy through competition law. In the Union’s early years, this essentially implied open support for industrial concentration, to the distress of both left and ordoliberal commentators. Such concentration was held to be necessary in order to realize the potential economies of scale in the European common market and to outbalance the power of large US companies. In the 1970s, in response to the economic crisis of 1973–4, the Commission allowed large-scale restructuring measures, which included crisis cartels in various industries. In past decades the Commission has become stricter on cartels, but even more merger-friendly.

These significant shifts in competition policy, informed by very different socioeconomic paradigms and regulatory objectives, indicate that competition law is an ideologically ambivalent form of regulation, even though its inclusion in the Treaty of

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37 Buch-Hansen and Wigger, 28–32.
38 Ibid, 30–1; See also Anderson and Hall, 4–6; Ernst-Joachim Mestmäcker, Europäisches Wettbewerbsrecht (Beck’sche Verlagsbuchhandlung, 1974) 81–3.
39 Ibid, 30.
Rome can certainly be attributed to ordoliberal influences. The historical origins of antitrust regulation lie in the populist and progressive opposition to the increasing concentration of industries that characterized the late nineteenth century in the United States, which was perceived as a threat to consumers and smaller-scale businesses as well as to the democratic process. Ordoliberals themselves viewed the role of competition law in a similar form. At the same time, competition law was also mobilized, for example, to pursue neoliberal objectives such as the liberalization of the network industries in the EU. Thus, competition law may in principle serve very different socioeconomic objectives, ranging from keeping a check on corporate power to the pursuit of liberalization objectives. The ambiguity of competition law finds expression in the relevant Treaty provisions. Article 101(1) TFEU provides a demonstrative list of possibly anticompetitive agreements, but no general definition. The same is true for Article 102 TFEU, which prohibits the abuse of a dominant position without defining it. Consequently, the provisions provide a broad discretionary scope in their application. Such broad discretion also characterizes the justifications for competition violations. The Court and the Commission have developed a doctrinal approach that essentially balances pro- and anticompetitive effects, which finds partial textual support—at least in relation to anticompetitive agreements—in the Treaty provisions (Article 101(3) TFEU). Such form of balancing is openended and necessarily allows, as already discussed in relation to internal market law, for a broad spectrum of discretionary choice in its application. Depending on the underlying socioeconomic assumptions and the regulatory objectives pursued, the provisions allow for very different competition policies. The Commission’s and the Court’s current approach—euphemistically termed the “more economic approach,” but essentially drawing from mostly post-Chicagoan thinking—constitutes but one possible interpretation of the Treaty provisions, which are best understood as pluralist in the light of competing socioeconomic paradigms.

C. The Debt and Deficit Rules

Since the 1950s, the macroeconomic stability of the individual Member States was one of the Union’s core concerns, as macroeconomic imbalances of one country in the common market could have significant adverse effects on the others. This concern is illustrated, for example, by the inclusion in the Treaty of Rome of provisions on the coordination of the Member States’ conjunctural policies and on the balance of payments (Articles 103–109 EEC). This concern became even more central with the beginning of European monetary integration in the 1970s. The Treaty of Maastricht, creating the European monetary union (EMU), defined macroeconomic benchmarks

41 Buch-Hansen and Wigger, 28.
44 Buch-Hansen and Wigger, 35.
that the Member States adopting the common currency had to meet. Most notably, this included limits on public deficit and debt levels. These were later transformed into permanent obligations of the Member States, now codified in Article 126 TFEU and a Protocol to the Treaties, as well as in secondary law (the Stability and Growth Pact, or SGP).\(^45\) Still later these were supplemented by a balanced budget requirement in secondary law, which went on to be also included in the Fiscal Compact. In order to meet the Maastricht benchmarks, the prospective eurozone countries enacted far-reaching austerity measures and significantly restructured the public sector.\(^46\) Most notably, Member States privatized public companies and spun off public activities (together with parts of the public debt) into autonomous institutions and companies, thereby reducing their calculated debt level.\(^47\) Other measures enacted by the Treaty of Maastricht exacerbated this effect: The independence of the ECB, the definition of price stability as its primary objective, and the prohibition of central bank financing of public expenditure severely limited the Member States’ ability to alleviate the effects of the budget rules by means of monetary policy. The freedom of capital mobility, also implemented by the Treaty of Maastricht, facilitated capital flight and regulatory arbitrage. This exerted pressure on the Member States to reduce corporate and capital taxation, which in turn required the enactment of austerity measures. Monetary union and the SGP were enacted during a period characterized by the rising dominance of neoliberal thinking in Europe, and the effects just described certainly conform to key neoliberal policy objectives.\(^48\) This raises the question whether the SGP, independently or in conjunction with the other Treaty provisions, must be assumed to prescribe a neoliberal, austerity-oriented paradigm in the form of an unambiguous obligation, or whether alternative socioeconomic strategies remain legally possible.

While the original SGP prescribed, in principle, clear numerical (though arbitrarily chosen) debt and deficit limits, it also included significant exceptions; moreover, central regulatory concepts were ambiguous, and the European institutions were granted a high degree of discretion in interpreting and applying the provisions. The enforcement system subjected the excessive deficit procedure to the political supervision of the Council. All of this enabled the flexible application of the SGP, but also limited its coercive force. This was sometimes criticized as a significant shortcoming of the SGP.\(^49\) However, such a view presumes that strict enforcement of the Maastricht criteria regardless of prevailing political and socioeconomic circumstances would actually be


desirable from the perspective of the Union’s regulatory objectives. And this is a highly questionable assumption: The dominant view in macroeconomics since World War II is that the beneficial development of a market economy depends crucially on the ability of governments to counteract detrimental dynamics arising from the private sector by managing the business cycle and responding to economic crises. Because individual economic actors necessarily make their business decisions (for example, in relation to investment) on the basis of their best guess about future economic developments which they can neither predict nor influence, an economic downturn has a self-reinforcing dynamic: In the light of a looming economic downturn, businesses decide to cut inventories, capital investment, jobs, and wages. While this may be a rational choice from an individual perspective, it forces suppliers to do the same, thereby accelerating the downward spiral. This is further amplified by falling aggregate demand caused by wage cuts and job losses. While such downturn may eventually reach a floor, there is no guarantee of recovery: Given that business decisions rely on predictions about future developments, and given that such predictions usually extrapolate developments of the near past into the future, the economy may also stagnate in a low-investment, high-unemployment position for years. Traditional liberal economic thinking, which shaped economic policymaking until the 1930s, had assumed that markets would generally self-correct problematic dynamics. From this perspective, an economic downturn was viewed as a necessary aspect of the self-correction process. Government attempts to influence this macroeconomic process would be futile at best and counterproductive at worst: The only thing it could do was wait. However, since the Great Depression this view has become a minority position among macroeconomists (although it remains politically influential, most recently illustrated by the embrace of austerity policies in the EU). The dominant view—which is influenced by Keynesian thinking—believes that the government has to use the means at its disposal to limit the adverse effects of a downturn, to rekindle business activity, and—maybe most importantly—to reestablish business confidence, given that crisis dynamics have a strong psychological dimension. Among the most important tools at the disposal of modern states is their budget, which is to be employed in a countercyclical fashion to stimulate economic activity: Faltering private demand during the crisis is replaced by

54 Keynes, 161.
55 For a clear overview of the argument see Amartya Sen, ‘The Economic Consequences of Austerity’ *New Statesman*, 4 June 2015.
public spending, most notably through unemployment payments, tax cuts, and public investment. Once private business activities pick up again, tax revenues increase; in conjunction with spending cuts that mirror the increase in private sector activity, debt and deficit will drop, again in a countercyclical fashion. With the Treaty of Maastricht, the Union had taken up some of the functions that characterize a comprehensive macroeconomic policy, such as monetary policy. However, it had neither the budget nor the necessary institutional structure (for example, unemployment insurance) at its disposal to pursue an effective countercyclical fiscal policy. From this perspective, an SGP design that allows for a flexible application of its framework in the light of uncertainty about future economic developments does not necessarily qualify as a failure to effectively implement the Union’s regulatory objectives. As long as no adequate fiscal capacity existed at the Union level to engage in effective countercyclical fiscal policy, it would appear highly risky to bind national budgets comprehensively and for all time to untried budget restrictions based on arbitrarily chosen numbers. In the light of these considerations and the considerable flexibility its original design provided, the SGP cannot plausibly be understood as a comprehensive choice for an austerity-oriented paradigm. The SGP was partly sharpened in terms of its enforcement mechanism in the mid-2000s, and again in 2010. However, the 2008 crisis illustrated the need for flexibility in the enforcement of the Union’s debt and deficit rules, but also showed that such flexibility remained possible even within the reformed SGP, given the political will. The need arose because the Member States, supported by the Union, decided to socialize their banks’ debts as a measure to secure the continued functioning of the national and European banking systems. The costs of these measures increased the public debt significantly: for example, in Spain from 36 percent of GDP to 100 percent between 2007 and 2016; in Portugal from 70 percent to 130 percent; in Ireland from 24 percent to 75 percent (down from 120 percent in 2012). Unsurprisingly, a full 24 Member States were subject to ongoing excessive deficit procedures in 2011 (only a few remain open today). However, no fine has been issued to date. Consequently, it must be assumed that the SGP still provides a considerable degree of flexibility in its application. We will now take a closer look at Article 126 TFEU in order to identify the textual basis for such flexibility, and subsequently discuss the implications for the Union’s socioeconomic orientation.

According to Article 126(1) TFEU, “Member States shall avoid excessive government deficits.” The question whether a deficit is “excessive” must be established by the Council on the basis of an “overall assessment,” which in turn is based on a Commission report that provides a comprehensive evaluation of the Member State’s budgetary situation. This evaluation is triggered if the Member State misses the deficit or debt benchmark defined by Article 126(2) TFEU in conjunction with the Protocol.

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57 On the 2005 reform see Eichengreen.
that is, if its yearly deficit is above 3 percent or its total debt is above 60 percent. However, Article 126(2) defines two exceptions: the Member State also meets its objective if the deficit is higher than, but “comes close to,” 3 percent and “has declined substantially and continuously.” This is also the case if its debt is above 60 percent but is “sufficiently diminishing and approaching the reference value at a satisfactory pace.” In its report, the Commission has to consider not only whether a Member State has exceeded the benchmarks, but also the relation of the deficit to government investment expenditure, the balanced budget requirement, and “all other relevant factors.” This all shows that the conditions that determine whether a deficit is “excessive” are actually highly ambiguous. The fact that a Member State has exceeded the numerically defined thresholds is, as such, not decisive. The exceptions themselves are phrased ambiguously, and the final determination as to whether a Member State has breached its obligations implies broad discretion of the Commission and the Council. While the relevant secondary law partly clarifies the ambiguous concepts employed in Article 126 TFEU and regulates the exercise of the discretion granted to the institutions, this must be viewed as a possible interpretation of the provision and not its necessary application. The extent to which the application of Article 126 TFEU depends on discretionary choices is illustrated by a further source of ambiguity: The debt and deficit benchmarks are defined on the basis of macroeconomic indicators for which no uncontroversial definition exists. The accounting methodology is laid down in the ESA2010, which is an act of secondary law and can be altered via the ordinary legislative procedure. Changes made to the methodology have significant effects on the Member States’ deficit and debt levels as calculated for the purposes of the SGP, as indicated by the changes that occurred when ESA2010 replaced ESA95. Finally, the benchmarks themselves, which are laid down in the Protocol, can be altered without a formal Treaty change: Article 126(14) TFEU allows the Council, by unanimous decision, to alter the provisions of the Protocol. Consequently, Article 126 TFEU implies significant flexibility in regard to the precise obligations to which the Member States are subject. The European legislator can change the benchmarks and the underlying accounting methodology as well as the applicable procedure, and the Commission and the Council have broad discretion as to whether the budgetary situation of a Member State is considered “excessive” or not. Within this framework, very different systems of budgetary surveillance could be developed.

Even after the Council has established the existence of an “excessive deficit,” the European institutions retain broad discretion, providing the system with considerable flexibility. For example, the Commission may authorize deviations from the proposed annual improvement path in case of “special circumstances,” and a revision is possible in case of a “severe economic downturn.” Fines are prescribed “as a rule,” implying the possibility of exceptions. Of particular relevance is the fact that the SGP regime allows its suspension in case of major economic crises. This is particularly relevant

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62 Article 2(1) and Article 3(5) Reg 1467/97.
because the key difference between an austerity-oriented and a Keynesian approach to fiscal policy concerns precisely such crisis situations: As we saw, the latter view holds that public stimulus during a crisis is a decisive precondition for economic recovery. But the very fact that the SGP establishes an exception from the budgetary limits in case of a severe crisis implies the possibility to adopt a Keynesian approach to crisis management.

The decision whether the conditions triggering any of those exceptions are present lies with the Commission, thereby furnishing it with significant discretion. Effectively, the question whether the Member States can pursue a countercyclical fiscal policy is not conclusively regulated by the SGP, and instead depends on the way the Commission exercises its discretion. This, in turn, will depend to a significant extent on the socioeconomic assumptions that underlie the Commission’s analysis: Austerity-oriented or Keynesian assumptions will inform discretionary choices in line with that view. The decisive role of socioeconomic assumptions in the interpretation of the SGP is also illustrated by the balanced budget requirement, which forms part of the SGP, as well as the Fiscal Compact.63 A Member State is considered to be in breach of the requirement if it incurs a “structural deficit,” which is a counterfactual estimate of the deficit a state would have incurred in the absence of expenditure necessitated by an economic downturn in the business cycle. However, this estimate depends entirely on a prognosis of how a state’s economy would have developed in the absence of the downturn, which is obviously highly uncertain.64 Such prognosis necessarily depends largely on the socioeconomic assumptions that inform the Commission’s analysis.65 All these examples show, then, that the Treaty provisions do not unambiguously prescribe any specific ideological approach as to how to deal with public deficits and debts. Its key elements are ambiguous in that regard, and the provision grants broad discretion in its interpretation and application. The same is essentially the case with regard to the secondary law built upon Article 126 TFEU. It certainly does not prohibit the exercise of discretion in a way that effects ideologically biased outcomes, as the Union’s austerity-oriented approach of the past two decades, and particularly the past few years, illustrates; at the same time, however, such bias is not a necessary legal implication of the Treaty provisions, and instead must be understood as a political choice by the relevant European institutions.

D. Intermediary Findings

While these examples cover only parts of the Treaty provisions, they illustrate that in three main regulatory areas, the Treaty text does not unambiguously prescribe outcomes along the lines of any specific socioeconomic paradigm. This implies that applications of the Treaty provisions that are found to exhibit an ideological bias of

63 Article 3(1)(b) TSCG, Article 2a Reg 1466/97.
some sort may be based on a possible interpretation of the Treaty text (an assumption that must be confirmed in each individual case), but certainly not a necessary interpretation thereof. Consequently, the Treaties can provisionally be described as pluralist in the light of competing socioeconomic paradigms.

IV. THE OBJECTIVES OF THE TREATY OF ROME AND THE COMPETENCES IT ESTABLISHED: A HISTORICAL PERSPECTIVE

In this section we take a historical perspective, and ask whether the Treaty of Rome has been informed by any specific socioeconomic paradigm, ideology, or worldview that must be assumed to constrain the regulatory choices available to policymakers. It will be shown that this is not the case, and argued that the Treaty of Rome is best understood as pluralist in the light of competing socioeconomic paradigms. In the subsequent sections it will be asked whether this assessment also holds true in the light of subsequent Treaty reforms.

The Treaty of Rome was enacted in a phase of intensive trade liberalization on both the global and the European levels. By 1957, four (of a total of eight) trade rounds had already been concluded under the umbrella of the GATT, effecting steep cuts in tariffs. By the same time, the (noncommunist) European countries had rolled back quantitative restrictions under the auspices of the OEEC to a significant extent, and reestablished currency convertibility via the European Payments Union (EPU). Within this context, the Treaty of Rome was commonly understood not as a simple continuation or intensification of the ongoing liberalization process, but as a qualitatively very different instrument. This is illustrated by the fact that the OEEC countries remaining outside the EEC were highly concerned by its formation, and many international trade scholars shared this view. The proposed customs union was viewed as a discriminatory and protectionist instrument: discriminatory because the abolition of tariffs and quantitative restrictions between the EEC Member States were neither extended to the other OEEC partner countries nor to the rest of the world; and protectionist because the Community’s common external tariff, by way of the underlying calculation method, effectively increased many tariffs significantly. Thus, the Treaty of Rome was

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66 Kaupa, 22–6.
67 The EPU’s system aimed to discourage both balance-of-payments deficits and surpluses, which is interesting from a perspective of today’s discussion on the eurozone, in which the destabilizing effects of trade surpluses are not recognized to the same extent. On the EPU see Henry Schloss, ‘The European Payments Union’ (1951) 17 Southern Economic Journal 465.
68 On the reactions of the OEEC partner countries see Röpke, 58–60; For a discussion of the views of traditional trade scholars on European integration see Bela Balassa, The Theory of Economic Integration (George Allen & Unwin, 1961), 106.
commonly viewed as rupturing a traditional liberal conception of international economic relations rather than emboldening it.

That the Treaty of Rome aimed at something qualitatively quite different is also illustrated by the Commission’s activities in the early years. According to the Commission, the Treaty’s objective was to form an “economic union,” and its 1962 “Action Programme” laid out an ambitious, far-reaching plan to achieve it. In the economic literature of that time, “economic union” was conceptualized as the deepest form of economic integration between states, establishing full factor mobility within a framework of extensively harmonized socioeconomic regulation and coordinated macroeconomic policies. By contrast, a traditional liberal vision of international economic relations aimed at neither full factor mobility nor regulatory harmonization. The role model for such ‘economic union’ was the United States, the economically and socially most advanced nation in the world. Its success was owed, it was assumed, to the enormous size of its internal market. It allowed mass production at a much larger dimension than in the European countries, thereby reaping significant benefits from scale in terms of productivity, competition, and innovation. Whereas traditional liberal trade scholars had dismissed the significance of those scale, competition, and innovation effects, they became a key justification for economic integration on the part of the new generation of economists and policymakers whose central concern was economic growth. It was believed that a traditional liberal trade architecture was insufficient to achieve conditions that characterized the US internal market, and therefore also to realize the full potential of modern, large-scale production. In this context it is also important to note that the United States, under the New Deal, had established a significant administrative infrastructure that provided a far-reaching framework of socioeconomic regulation on the federal level. It had also spearheaded the modern form of active (essentially Keynesian) macroeconomic management of the economy, and had developed an extensive welfare system. The prospect that the European Communities would embark on a similar trajectory upset those who advocated a more traditional liberal economic order, such as the ordoliberal scholar Wilhelm Röpke, whose concerns were encountered earlier in this text. According to Röpke, the “logic of European economic integration” mapped out in the Treaty of Rome would ultimately lead to the establishment of a “veritable European central government.” Röpke feared the far-reaching harmonization of socioeconomic regulation across the Member States, as

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71 See generally Balassa; see also Robert Marjolin, ‘Prospects for the European Common Market’ (1957) 36 Foreign Affairs 131, 139.


74 For a detailed discussion and references see Kaupa, 36–45.

75 Röpke, 36.
well as the pursuit of expansionary monetary and welfare policies, socialization of productive means, and economic planning.  

And indeed, both the Treaty’s objectives and the competences it granted enabled the pursuit of an integration project that was significantly at odds with traditional liberal thinking about international economic relations. We will first discuss the Community’s regulatory objectives, and then turn to a discussion of its competences. Article 2 of the Treaty of Rome defined the objectives of the Community and the means to achieve them as follows:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, 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.

To rephrase, the Community was supposed to foster social peace, steady economic growth, socioeconomic stability, popular prosperity, and economic multilateralism. The specific historical meaning of these objectives becomes clearer when looked at in their historical context. Economic growth, a peripheral subject of economic research and policymaking before the 1930s, became the dominant political objective in the years after the war: Together with the employment rate, GDP had become the undisputed indicator of the socioeconomic success of a country, and by extension of the political success of its government. Economic growth was assumed to be the answer to many political concerns faced by the Member States: the Great Depression was commonly understood as a decisive factor in the rise of authoritarian regimes in Europe; consequently, addressing the “social question” by improving general living standards was assumed to be essential to protect the young democracies of the postwar period.

What equally had to be avoided at all costs were the class and regional divisions that had dominated the politics of the interwar years, which meant that all sectors of society, including workers and the large rural population still employed in agriculture, had to participate in the economic progress. Fear of Communism was another significant factor in this regard. These objectives also made it completely impossible to tolerate the violent boom–bust cycles that had characterized capitalist economies ever since the nineteenth century. Whereas the traditional liberal view had fatalistically suggested the inevitability of such economic volatility even in the aftermath of the Great Depression, the economic policies developed, inter alia, by the New Dealers in the United States suggested a different path: Since World War II, ensuring macroeconomic stability was a

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76 Ibid, 37.
77 Milward, 26.
79 Some liberal commentators mentioned the success of communism in Western countries such as France or Italy as a major reason to support a form of European integration that had relatively equitable distribution as its objective. See for example Michael Heilperin, ‘European Integration: Commercial and Financial Postulates’ in Grove Haines (ed), *European Integration* (Johns Hopkins Press, 1957), 129.
central concern of governments, to be achieved via the active macroeconomic management of the economy. Finally, economic recovery in Europe had been significantly hampered by the absence of a functioning multilateral trade system in the first years after the war.\textsuperscript{80} Their reestablishment required a new institutional structure: International economic relations were to be organized through multilateral trade agreements and the relatively flexible international monetary system of Bretton Woods and the EPU. This replaced the rigid gold standard, which had routinely forced governments experiencing balance of payment difficulties into painful, and politically dangerous, austerity measures before the war.\textsuperscript{81} The Treaty’s broadly defined objectives, set within their historical context, therefore point toward an integration project that deviates significantly from a traditional liberal understanding, and instead conforms more to a postwar Social or Christian Democratic understanding. With the US internal market serving as the main inspiration, an “economic union” was to be established: Full mobility of productive factors was to be realized within a framework of harmonized socioeconomic regulation and coordinated macroeconomic policies. This was supposed to create scale efficiencies, which in turn would lead to higher productivity and innovation and thereby to higher growth, which would support the general improvement of living standards.

In order to realize these objectives, the Treaty of Rome granted far-reaching competences to the European institutions. In general terms, Article 2 EEC defined two means to reach the Community’s objectives, namely the creation of the common market and the progressive harmonization of the Member States’ policies. Two observations can be made in this regard. First, the creation of a common market was not considered to be an end in itself; rather, it was conceptualized as a \textit{means} to achieve the Community’s objectives. Second, the Community’s objectives were to be pursued through \textit{both} market-making and regulatory harmonization, and the Treaty did not define a hierarchy between the two instruments. In contemporary debate, these two means were usually found to be deeply interconnected: Most notably, a well-functioning common market was assumed to depend on competition being \textit{undistorted}; to ensure this, the conditions of production had to be approximated, which was assumed to necessitate the harmonization of national regulation.\textsuperscript{82} The degree to which such harmonization was necessary was subject to intense discussions in the 1950s and the early 1960s: Whereas some (including the Commission) believed that undistorted competition would eventually necessitate extensive harmonization in areas such as social and tax legislation, others believed that such alignment would, to some extent, be effected by market integration itself. Regardless of these different views on the desirable level of harmonization, contemporary commentators tended to accept that, in

\begin{footnotesize}
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\textsuperscript{81} Keynes, 382–3.

\textsuperscript{82} European Commission, ‘Memorandum of the Commission on the action programme of the Community for the second stage’, 6.
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purely legal terms, the Treaty granted broad harmonization competences, including in fields such as economic, tax, labor, social, and macroeconomic policies. This was also the legal view held by the Commission, as the 1962 Action Programme illustrates. Moreover, it was equally recognized that the Treaty established few substantive limitations regarding the exercise of these broad competences. This is illustrated by the fact that the Treaty of Rome was frequently described as a “framework treaty,” granting far-reaching discretion to the European legislator to shape the European polity in socioeconomic terms. To substantiate this point, we will take a closer look at some of the Treaty’s central competence provisions. The most sweeping competences were certainly granted by Articles 100, 101, and 235 EEC. Article 100 EEC (today’s Article 115 TFEU) allowed for the approximation of national measures which “directly affect” the common market, and Article 101 EEC allowed for the harmonization of measures which were “distorting the conditions of competition.” Article 235 (today’s Article 352 TFEU) provided for the creation of additional powers whenever this was necessary for the attainment of the Community’s objectives. A review of contemporary literature shows that these provisions were held to enable the harmonization of essentially any area of socioeconomic relevance. In their 1973 textbook, Paul Kapteyn and Pieter verLoren van Themaat (who would later become judge and advocate general, respectively, at the CJEU) argued that Article 100 would allow, in principle, for harmonization in areas such as labor, social, and fiscal law, as well as parts of civil and commercial law. According to a 1960 German commentary edited by Wolfarth et al, which generally advanced a restrictive view of the Community competences, a distortion of competition within the meaning of Article 101 EEC was indicated whenever regulatory differences would lead to different production costs, which suggests a fundamentally broad scope of the provision. This reading is confirmed by the Spaak Report, which defined competitive distortions in a similarly broad manner.

Even broader was Article 235 EEC, which was, in substantive terms, only limited by the Treaty objectives itself. Whereas Articles 100 and 235 EEC required unanimity in the Council (and thereby established a certain procedural brake to harmonization), Article 101 required only a qualified majority after the first stage of the transitional period. Such a broad reading of the Treaty’s general harmonization competences is also confirmed by the broad scope of regulatory policies enacted by the Community, especially from the 1970s onwards: by 1974, the Community had adopted harmonization measures in fields such as social, consumer, environmental, industrial, and monetary policy. Equally broad harmonization competences existed within the

86 Kapteyn and verLoren van Themaat, 244; Wohlfarth et al, 608.
87 European Commission, ‘Programme of Action of the European Communities on the Environment’ [1973] OJ C112/1; European Commission, ‘The Community’s industrial policy. Commission Memorandum to the Council’ COM(70)100; Supplement to the Bulletin of the
framework of agricultural and transport policy as well as for the coal and steel sector under the ECSC. Numerous specific harmonization competences (for example, regarding direct taxes) complement the picture.

Of particular interest is the Community’s role in macroeconomic policy. As previously discussed, the emerging policy consensus in the postwar period assumed that active macroeconomic management was necessary to ensure a stable and beneficial development of the economy, which was termed “economic planning” in contemporary discourse. It essentially entailed the strategic use of the instruments available to the government to pursue macroeconomic objectives on the basis of prognoses about future economic developments, which had become possible through the development of modern macroeconomic tools. Understood in such a sense, it is unquestionable that all Western countries engaged in “planning.”88 This is also reflected in the Treaty of Rome, which established extensive rules on the balance of payments (Articles 104–109 EEC) and also provided for the coordination of conjunctural policies (Article 103 EEC). Commentators such as Ulrich Everling and Pieter verLoren van Themaat suggested that Article 103 EEC (alone or in conjunction with Article 235 EEC) authorized the creation of a far-reaching and binding European macroeconomic policy.89 A similar view was taken by the Commission in its 1962 Action Programme, which created significant unrest among German ordoliberals. While Germany itself undoubtedly engaged in the macroeconomic management of its economy as well (without, however, describing it as “planning” in the way that, for example, the Netherlands or France did90), ordoliberals took the opportunity to renounce such policies on the European level.91 A few years earlier, ordoliberals had put forward the claim that the German constitution should be understood as a comprehensive choice in favor of their own socioeconomic views, which they described as its “economic constitution.”92 This claim, however, was summarily rejected by the German constitutional court, which insisted on the constitution’s socioeconomic “neutrality.”93 On the occasion of the Commission’s Action Programme, the argument was recycled in relation to the Treaty of Rome. The latter was held to establish an “economic constitution” along ordoliberal lines, and thereby to summarily prohibit any form of “planning” on the European

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88 See Jelle Zijlstra, Economische politiek en concurrentieproblematiek in de EEG en de lid-staten (Staatsdrukkerij- en Uitgeversbedrijf, 1966).
90 See e.g. Jelle Zijlstra, Möglichkeiten und Grenzen der Konjunkturpolitik (Universität Kiel, 1962) 6.
91 For an extensive overview of the discussion and further references see Josef Scherer, Die Wirtschaftsverfassung der EWG (Nomos, 1970).
level.\textsuperscript{94} In the 1970s, ordoliberals eventually came around to concede the necessity of a macroeconomic management of the business cycle, and also recognized the legality thereof under the Treaty of Rome.\textsuperscript{95}

The preceding section showed that the Treaty of Rome was largely shaped by the postwar socioeconomic consensus. This consensus was influenced by the political economy of the US, which was characterized by a powerful administrative framework of socioeconomic regulation on the federal level, a strong welfare system, and the active macroeconomic management of its economy. The Treaty also provided far-reaching competences to pursue its objectives, which, however, were substantively undetermined to such an extent that it was sometimes described as a “framework treaty.” Thereby granting significant discretion to the Community lawmakers, the Treaty cannot be assumed to prescribe any specific socioeconomic paradigm or ideology, and certainly not an ordoliberal one. Instead, the Treaty of Rome is best understood as a pluralist instrument in the light of competing socioeconomic paradigms.

V. THE “1992” PROJECT: A HISTORICAL AND FUNCTIONAL INTERPRETATION

In this section we will discuss whether subsequent developments confirm our initial assessment as to the pluralist character of the Treaty of Rome, as well as whether the various Treaty reforms undertaken since the 1980s change that picture. Due to space constraints, we will focus on the Single European Act (SEA) and the Treaty of Maastricht, which formed part of the “1992 project” aimed at creating a European “union” by that year.

Progress on the Commission’s ambitious legislative agenda had stalled by the mid-1960s due to increased resistance from the Member States. This can be explained, to some extent, by the absence of a pressing need to do more. This point can be illustrated in regard to the issue of macroeconomic coordination. While the Treaty of Rome had, as we saw, provided extensive competences that would, in principle, have enabled the development of a common European macroeconomic policy, the Community had created only consultative and coordinative structures in its first decade. However, a relatively effective form of policy coordination existed in a different form: With the European currencies pegged to the dollar through the Bretton Woods system and thereby to each other, a common monetary system was already in place in the Community.\textsuperscript{96} The system forced Member States to pursue roughly similar macroeconomic policies, both in relation to the United States and to each other: The existence of dollar-denominated accounts in the Member States, together with limited capital

\textsuperscript{94} Scherer, 199.
\textsuperscript{95} Zuleeg, 95.
\textsuperscript{96} On the role of dollar-denominated accounts in Europe see e.g. Robert Mundell, ‘A Plan for a European Currency’ (paper prepared for discussion at the American Management Association Conference on Future of the International Monetary System, New York, 10–12 December 1969) 8.
restrictions in the 1960s, made it relatively difficult for individual governments to sustain, for example, significantly different interest or inflation rates. The Bretton Woods system disintegrated in the late 1960s, heralding a period of freely floating exchange rates and much greater macroeconomic volatility. This led the Community to reconsider the Commission’s earlier plans for integrating macroeconomic policies, leading to the Werner Plan for Monetary and Economic Union in 1970. While that project was not implemented fully, it did lead to a first system of European currency coordination, the “currency snake.” After the 1978/9 crisis it was further developed into the European Monetary System (EMS), which remained in place until it was replaced by the EMU. Partly triggered by the 1973 economic crisis, the Member States also increasingly sought cooperation in many other socioeconomic areas. This led, as mentioned, to the adoption of common policies in social, consumer, environmental, and industrial policy, which complemented the existing common policies in coal, steel, transport, and agriculture. These policies confirm, in a practical manner, the substantive openness of the Treaty of Rome, as well as the broad competences it had established.

In the light of this observation, the socioeconomic implications of the “1992” Treaty reforms are not straightforward. We will discuss the Treaty reforms along three lines: the internal market objective, the new competence chapters, and Council voting requirements. The SEA established a timeline for the completion of the “internal market” by the year 1992. How did this relate to the Member States’ obligation to establish a “common market” by the end of the transitional period in 1970? This question was addressed in an article by CJEU judge Pierre Pescatore, which surely ranks among the angriest texts ever written on the subject of European market regulation. By establishing a new transitional period, Pescatore foamed, the Member States were essentially attempting to neutralize their existing obligations stemming from the Treaty of Rome. Moreover, Pescatore found the “internal market” objective (defined as comprising “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”) highly deficient: “For the well-balanced and complex notion of a ‘Common Market’, the Single Act substitutes the one-sided notion of an ‘internal market’ based on an arbitrary selection of the Treaty objectives, ignoring essential features such as the rules on competition, freedom of current payments, economic policy, commercial policy, taxation, non-discrimination etc.” The awkward relation between the “internal market” objective and the existing

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101 Single European Act, Article 8a.
103 Ibid, 12.
104 Ibid, 11.
Treaty obligations and competences that Pescatore highlighted points to the fact that its significance lies less in its (questionable) legal relevance; instead, it may be best understood as a renewed political commitment of the Member States, as Claus-Dieter Ehlermann, director of the Commission’s legal service, suggested. 105

Similar anger was targeted at the SEA’s new competence chapters, which Pescatore believed to be superfluous. 106 The Treaty of Rome, Pescatore argued, had provided those competences all along. Today, it is commonly suggested that the competence chapters added by the SEA and the Treaty of Maastricht in various socioeconomic areas expanded the Community’s competences beyond its original scope, but this view is misleading. The Treaty of Rome had, as we have seen, established broad competences in the socioeconomic realm that were essentially undetermined in substantive terms. Thus, adding explicit competence chapters for consumer or environmental law, for example, did not actually expand the Community’s competences (with the partial exception of the EMU, which we discussed earlier). In fact the underlying motivation was the opposite, namely to establish a clearer delineation between European and national competences and to constrain the scope of the broad harmonization competences that the Treaty of Rome had created. Finally, Pescatore’s anger was also targeted at the changes in the Council voting requirements. The expansion of qualified majority voting in the SEA was argued to facilitate harmonization by eliminating the possibility for a single Member State to block legislation. However, Pescatore argued, the Treaty of Rome had not been the problem in that regard, but rather Member State practice. The Treaty of Rome had already prescribed qualified majority voting in various provisions (including the general harmonization provision of Article 101 EEC), but Member States had insisted on unanimity voting in the Council in practice. 107

Thus, the “1992” Treaty reforms do not shift the Treaty of Rome in any specific, identifiable ideological direction. The “internal market” objective essentially restated existing obligations and competences. While the SEA and the Maastricht Treaty created new competence chapters in various socioeconomic fields, this should not be viewed as simply expanding the Community’s competences. Instead, the Treaty reforms codified and thereby possibly legitimated existing competences, while at the same time also attempting to establish sharper limitations. The competence landscape therefore became much more complicated in the wake of these Treaty amendments: Instead of the relatively clear competence framework of the original Treaty, the new text was a patchwork of competence provisions, interacting awkwardly with the existing Treaty provisions, such as the general harmonization provisions of Article 114–115 and 352 TFEU. Of course, it is not impossible that such a complex and intransparent regulatory framework creates dynamics that may effect ideologically biased outcomes in practice.

However, this should not be mistaken for a conscious or implicit regulatory choice in favor of any specific socioeconomic paradigm or worldview. Rather, the Treaty text amended by the SEA and the Treaty of Maastricht was a compromise shaped by all kinds of regulatory as well as political objectives, and was certainly not determined by any specific ideological objective in a comprehensive way. On this basis it must be assumed that the “1992” reforms did not fundamentally alter the Treaties’ pluralist character.

VI. THE CURRENT TREATY OBJECTIVES: A FUNCTIONAL INTERPRETATION

We have already discussed the original regulatory objectives pursued by the Treaty of Rome, arguing that they conformed to the postwar socioeconomic consensus. It had, roughly speaking, a Social or Christian Democratic and Keynesian orientation, but—given the open nature of its objectives and the broad scope of the competences created—must essentially be viewed as pluralist in the light of competing socioeconomic paradigms. In the current Treaties, the Union’s objectives became, if anything, even more open and comprehensive. Article 3 TEU provides a virtually all-encompassing list of objectives that the Union aims to pursue. Its paragraph 3, which addresses socioeconomic objectives to be pursued within the internal market, holds:

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.

These objectives are manifestly highly diverse, and point toward very different ideological pedigrees. Whereas objectives such as a “highly competitive social market economy” and price stability may be assumed to conform to (ordo)liberal thinking, “sustainable development” and environmental protection appear to relate more to “green” ideas. The objectives of “aiming at full employment and social progress,” social justice, economic and social cohesion, and combating social exclusion express Social and Christian Democratic objectives. Neither Article 3 TEU nor the remainder of the Treaties define a hierarchy between these objectives; nor do they establish how a possible conflict between them should be resolved.\textsuperscript{108} Given this, ambiguously phrased

\textsuperscript{108} Miguel Poiares Maduro, We the Court. The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty (Hart, 1998), 151 and 153.
Treaty provisions—such as the internal market and competition law provisions, or Article 126 TFEU discussed earlier—will frequently allow for very different readings, depending on which regulatory objectives inform their functional interpretation. It is on the basis of such considerations that Miguel Poiares Maduro, almost 20 years ago, described the socioeconomic constitution of the EU as “open.”

However, there is an important additional reason why a functional reading of the Treaty provisions will routinely allow for very different interpretations: depending on the socioeconomic assumptions that underlie the analysis, different regulatory strategies will appear effective to achieve the various objectives. The central issue of conflict between the various competing socioeconomic views held today is usually not whether one or the other of the Union’s objectives should be pursued at all, but how they should be pursued. For example, few people will oppose the promotion of “scientific and technological advance” as such, whereas conflicting views exist as to how this should be done. We previously discussed the existence of conflicting socioeconomic views in relation to the SGP; similar disagreement can be identified, to different degrees, in relation to all of the Union’s socioeconomic objectives. This implies, however, that a functional interpretation of Treaty provisions will often lead to ambiguous results: for example, if it is asked how the internal market provisions should be interpreted in the light of, for example, “balanced economic growth,” completely different responses are possible depending on the underlying socioeconomic assumptions. This argument will now be illustrated by two regulatory objectives—economic growth and regional cohesion—discussed in the context of conflicting theories on trade.

A. Economic Growth

As already discussed, the issue of economic growth became perhaps the most important socioeconomic and political objective of governments in Europe after World War II. However, the question of how economic growth—understood as the increase of productivity per head—is achieved remains one of the most controversial issues in economics. In traditional liberal thinking, economic growth as just defined had not been a significant issue of analytical concern. Classical and neoclassical economics followed Ricardo’s view that economic analysis was to be concerned with the allocation of existing goods alone. Such a “static” perspective, in which all economic forces were conceptualized to be in a state of balance, supported the view that public policy had no significant role to play in the functioning of the economic system. As we saw, such a view was rejected in the wake of the Great Depression, and was largely replaced by the New Deal/Keynesian assumption that active public macroeconomic management of the economy was necessary. To this day, this remains the dominant view among macroeconomists. This view also informed the first formal growth model, that is, the first attempt to explain which factors influence the “dynamic” process of productivity growth. It showed that, given that private economic actors make

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109 Ibid, 159.
investment decisions individually and under conditions of uncertainty about future economic developments, it is unlikely that an optimal growth path (characterized by the full employment of a society’s productive means) could be achieved without public coordinative activity. In terms of policy, this implies that the economy will grow at a suboptimal level without conducive macroeconomic management. Macroeconomic coordination requires a sufficiently large public sector in order to effectively influence the economy in a countercyclical form. However, the traditional liberal “hands off” view did not disappear after World War II. Its static assumptions were translated into dynamic growth models, which were supposed to illustrate the futile or even counterproductive effect of government action on economic growth.\footnote{An example is the so-called ‘Real Business Cycle Theory’, put forward e.g. by Finn Kydland and Edward Prescott: ‘Time to Build and Aggregate Fluctuations’ (1982) 50 Econometrica 1345.} Such or similar views continue to shape policymaking, as evidenced by the pursuit of austerity policies in Europe during the economic downturn of the past years. Newer growth models tend to focus on innovation as a driver of economic growth.\footnote{See e.g. Paul Romer, ‘Increasing Returns and Long-Run Growth’ (1986) 94 Journal of Political Economy 1002; Gene Grossman and Elhanan Helpman, ‘Endogenous Product Cycles’ (1991) 101 Economic Journal 1214.} They commonly conceptualize innovation as being influenced by both the private and the public sector. Consequently, public policy has a potentially significant role to play in stimulating innovation, for example through the public educational system or the financing of public and private research.\footnote{Hein, 80.} We can thus observe that significantly different economic views exist as to which factors influence economic growth and, consequently, what the proper role of public policy is. This implies that if the Treaty provisions are read functionally in the light of the Union’s growth objective, their interpretation will differ significantly depending on the socioeconomic assumptions that inform the interpretative process. We previously discussed the SGP as one possible area of relevance: As Article 126 TFEU grants significant discretion, and as the Treaty, read from a historical and functional perspective, cannot be assumed to prescribe any specific socioeconomic approach to inform the exercise of that discretion, claims that the Union institutions would be obliged to enforce an austerity-oriented view must be viewed as incorrect. If anything, the fact that most macroeconomists support some version of a Keynesian countercyclical policy, a functional interpretation of Article 126 TFEU in the light of the Union’s growth objective, would suggest the opposite.

\section*{B. Benefits from Trade and Regional Cohesion}

Disagreement among economists can also be identified with regard to the issue of trade, which we will discuss in the context of the Union’s objectives to foster economic growth and regional cohesion. In classical trade theory, benefits from trade were conceptualized in terms of relative advantage: If every region specializes in the economic activity in which it is relatively most productive (that is, as compared to other economic activities it could pursue) and then trades, the overall product will be higher...
than in the absence of trade. In the neoclassical trade model, regions will specialize in
the production that draws from productive factors (land, labor, resources) that are
relatively most abundant, and then trade.\textsuperscript{115} On the basis of such trade models, any
measure that increases import costs could be understood to be a trade barrier. This is
obviously the case for tariffs, but may also extend to many other measures that
influence import costs in some form. Because there is no commonly agreed baseline
that allows for distinguishing between national measures that restrict trade and those
that do not, such an understanding of trade is liable to foster an antiregulatory bias.
However, the classical and neoclassical trade models find only partial empirical
support: most global trade takes place between developed countries, which do not differ
significantly in either productivity or factor endowment.\textsuperscript{116} Instead, trade between
developed countries can largely be explained by scale and network effects, as proposed
by New Trade Theory (NTT).\textsuperscript{117} Scale effects describe benefits from size, either of a
specific company or of an industry as a whole. We previously discussed how expected
scale effects were a major economic argument supporting a form of European
integration that significantly departed from a traditional liberal understanding. Network
effects describe benefits from proximity: For example, a high-tech company will be
more productive if it is located in a region where specialized service providers and a
specialized labor market exist. Such network and scale effects explain why certain
industries tend to cluster in certain regions, for example IT in Northern California or
the chemical industry in the Ruhrgebiet. This view implies that national measures
constitute trade barriers only if they prevent the realization of scale and network effects.
By contrast, measures that merely increase overall costs—the main target of traditional
trade theory—are irrelevant for the realization of beneficial trade effects as long as
those costs are outweighed by the gains from scale and network effects. Moreover, it
suggests that the antiregulatory assumptions that tend to be voiced in conjunction with
traditional trade theories in European legal discourse may be misguided. In fact, certain
industries may cluster in highly regulated countries not despite but because of this
regulatory environment: The institutional, political, social, and cultural structure of a
country may be assumed to have beneficial economic effects which outweigh their
costs.\textsuperscript{118}

The two perspectives on trade also suggest different effects of economic integration
on the participating regions. From a classical and neoclassical perspective, economic
integration is assumed to have a leveling effect: Lower labor costs in lower-developed
regions will draw investment, pushing up wages to eventually match those in the other

\textsuperscript{115} Paul Samuelson, ‘International Trade and the Equalisation of Factor Prices’ (1948) 58
Economic Journal 163, 165; Bertil Ohlin, Interregional and International Trade (Harvard

\textsuperscript{116} Elhanan Helpman, ‘Imperfect Competition and International Trade: Evidence from
Fourteen Industrial Countries’ (1987) 1 Journal of the Japanese and International Economies 62,
63.

\textsuperscript{117} Elhanan Helpman and Paul Krugman, Market Structure and Foreign Trade (Harvester
Wheatsheaf, 1985).

\textsuperscript{118} On the role of institutions in economic development see Dani Rodrik, Arvind Subraman-
inan and Francesco Trebbi, ‘Institutions Rule: The Primacy of Institutions over Geography and
regions. By contrast, scale and network effects can be assumed to produce the opposite dynamic: Higher-developed regions draw capital and a qualified labor force, thereby increasing their advantage from scale and network effects, which aggravate the difference between the regions. The deindustrialization of Southern Italy in the aftermath of Italian unification in the mid-nineteenth century is a historical illustration of this proposition. It became an influential example that was routinely cited in the political and economic discourse on European economic integration, and informed, for example, the creation of the European Investment Bank by the Treaty of Rome (an institution that Röpke explicitly targeted in his critique of the Treaty). Thus, a functional interpretation of European law in the light of Treaty objectives such as economic growth or regional cohesion may reach completely different results depending on which view on trade informs it. Consider internal market law as an example: Given that internal market doctrine is ambiguous in the light of competing socioeconomic paradigms, any evaluation of a national measure will crucially depend on the underlying socioeconomic assumptions, which includes views about the supposed beneficial effects of European economic integration. On the basis of a traditional trade view, such evaluation is liable to see national regulation as a trade obstacle, thereby fueling an antiregulatory bias. By contrast, an NTT-inspired perspective on trade would not support such a view: Depending on the circumstances, a national measure, even if it increases trading costs, may have either positive or negative effects on trade. In the absence of clear indications that the latter is the case, judicial intervention cannot be considered to be appropriate.

C. Intermediary Findings

The two examples just discussed illustrate our proposition that a functional reading of textually ambiguous Treaty provisions in the light of the Union’s regulatory objectives will often allow for different interpretations, depending on the socioeconomic assumptions that inform the interpretative process. Consequently, it can be argued that the Treaties must be considered pluralist in the light of competing socioeconomic paradigms also from the perspective of a functional interpretation of the Treaties in the light of their regulatory objectives.

VII. CONCLUSION: THE PLURALIST SOCIOECONOMIC CHARACTER OF THE TREATIES IN THE LIGHT OF THE ECONOMIC CRISIS

With the beginning of the most recent economic crisis in 2008, the European Union entered a state of extended turmoil in economic, political, and legal terms. Economically, the crisis brought massive unemployment, rising inequality, exploding public debt,
far-reaching austerity measures, and significantly aggravated differences between the Member States. Politically, many Member States experienced major shocks that ranged from the collapse of governing parties and the development of authoritarian government structures to the rise of rightwing extremist movements. Within the Union itself, authoritarian modes of governance were adopted, technocratic institutions such as the ECB or the Eurogroup accrued massive influence, and the power imbalance between the Member States increased significantly. Legally, the Member States and the Union enacted a plethora of measures in response to the crisis, including bank and industry rescues, the ESM Treaty and Fiscal Compact, financial assistance to prevent Member State insolvency and thereby save overexposed banks, the Troika regime, the Six Pack and Two Pack reforms, the ECB’s “nonconventional” policies, and the banking union. Many of these measures moved in unclear legal terrain, with no consensus as to whether they conformed with the European Treaties.

These economic, political, and legal developments also entered the discussion on the Union’s socioeconomic orientation. For our purposes, arguments relating to the crisis period can be distinguished and evaluated along the lines proposed earlier in the text. On the one hand, we can observe renewed claims suggesting a factual relationship between the Union’s “constitution”—defined in Gill’s sense as its entrenched institutions, structures and practices—and the socioeconomic developments characterizing the Union during the crisis. For example, it has been argued that the Union aggravated the adverse effects of the crisis through its austerity bias. Another argument identifies construction flaws in the Union’s monetary and fiscal architecture—most notably the creation of a monetary union without a fiscal union—which are held responsible for the credit crunch and subsequently soaring interest rates on government bonds in the peripheral European countries. The present text has confirmed that the Union’s constitutional framework, while ambiguous in the light of competing socioeconomic worldviews, may be interpreted in ways liable to effect ideologically biased outcomes.

On the other hand, we also encounter renewed attempts to constrain the political discretion available to national and European policymakers by imputing a specific socioeconomic worldview on the European Treaties. For example, it has been claimed that the European Treaties would prohibit the creation of a “transfer union.” Drawing from the neoclassical distinction between market allocation and political distribution, this concept projects an ideologically coded structure onto the Treaties that is liable to constrain the political choices available to the European and national policymakers. However, the claim is manifestly incorrect, given that already the Treaty of Rome created instruments like the common agricultural policy, the European Social Fund and the European Investment Bank, all of which have a significant redistributive dimension.

Another attempt at imputing an ideologically partisan view onto the Treaties concerns the interpretation of Article 125 TFEU, which is commonly referred to as the

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“no-bailout clause.” In Pringle, the plaintiff interpreted the provision as a comprehensive prohibition of any Union or national measure aimed at easing a Member State’s debt-related difficulties. Such interpretation is ideologically coded: the debt incurred by the peripheral states is viewed as their responsibility alone, even though the Eurozone architecture and the Union-supported bank rescues are at least partly responsible as well. The CJEU found such interpretation to conflict with the Treaties, only to forward its own, ideologically coded interpretation of Article 125 TFEU. The Court held:

It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy (see Draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, Bulletin of the European Communities, Supplement 2/91, pp. 24 and 54). The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline.125

Based on this, it defines the following limitation in regard to the operation of the ESM: “Given that that is the objective pursued by Article 125 TFEU, it must be held that that provision prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished.”126 To rephrase, the Member State receiving aid must pursue a “sound budgetary policy,” which is further defined as remaining “subject to the logic of the market when they enter into debt.” While the preparatory work cited by the Court indeed speaks of “sound budgetary policy,” it does not define the meaning of the term, and certainly does not mention a “logic of the market,” which also does not appear anywhere in the Treaties themselves. The term “logic of the market” also cannot be assumed to refer to an empirically observable phenomenon: This is because the financial assistance that the ESM is supposed to provide became necessary precisely because the “logic of the market” did not prevent the build-up of public debt that had become unsustainable in 2010. In fact, it had contributed to this build-up, namely by providing the demand for the governments’ supply of bonds. Thus, the Court’s claim that Article 125 TFEU must be understood in the context of some ideologically informed “logic of the market” is not supported by the Treaties, and must therefore be rejected.

These two examples illustrate that claims insinuating an obligation to interpret the provisions of primary law along the lines of a specific socio-economic worldview remain commonplace in current European legal discourse. The present text has shown that such claims will usually be incorrect in legal terms, given the Treaties’ pluralist socio-economic character.

125 Pringle, para 135.
126 Ibid, para 136.