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**Eva Hartmann**  
**The Competitive Solidarity  
of European Integration**



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Eva Hartmann  
**The Competitive Solidarity of  
European Integration<sup>1</sup>**

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**Abstract:** The paper outlines the insights we gain by drawing on Michel Foucault's study of governmentality in the light of the importance of Ordoliberalism as a structuring principle of European integration. It further develops this perspective by interrelating it to a critical state theoretical perspective and sociology of competition with a view to contributing to a better understanding of the role of competition in establishing social bonds. A key concept the paper develops is competitive solidarity.

The second part of the paper provides a more empirical analysis of an emerging competitive solidarity at European level, highlighting the interaction between solidarity and competition in the sphere of European social policy. The analysis of this *sui generis* social policy provides interesting insights into the complexity of the attempt to establish European social bonds, paving the way for a European society.

**Key words:** European social policy, solidarity, Durkheim, Marx, Pashukanis

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# Introduction

The European Union (EU) is in deep crisis. In many European states right-wing parties have gained votes with their anti-European and chauvinistic slogans. British Euro-sceptics have even called upon their government to withdraw from the European Union. The imposition of far-reaching austerity measures on some EU Member States has further strengthened critical accounts of the integration project of the EU.<sup>2</sup> The right-wing movements in particular pose a major challenge to critical EU studies. How can one be critical of the integration process without joining these chauvinistic forces? A critique of the EU can only be European, if not global in its orientation. One way of doing this is to examine carefully the integration process, in order to disclose the power relations in operation and also to point out emerging European social bonds and solidarity structures we should build on, even if they have been established under conditions we strongly criticise.

In a first step, the contribution aims to identify some of the main principles which inform European integration policy. Along the lines of a Gramscian account of the ideational dimension of power, we can consider these principles as being part of an endeavour to establish a European hegemony. Several studies have been published in recent years arguing that the EU architecture has been heavily influenced by ordoliberal ideas, better known in the English-speaking world as the Freiburg School. At the centre of these studies is the vital role of the EU in establishing competition at the European level. Some of them, in the vein of Michel Foucault's studies of governmentality, focus on the individual and the state promoted by this sub-current of liberalism.<sup>3</sup> Other scholars put more emphasis on the dimension of the political economy of Ordoliberalism, using Nicos Poulantzas' state theory as a way of analysing the role of the EU in ensuring the reproduction of capitalism.<sup>4</sup> However, as I will show, both of these accounts tend to overlook how the Europeanisation of competition helps to establish –directly and indirectly – new, European social bonds. Drawing on Emile Durkheim, I suggest understanding these social ties as a form of solidarity. Along these lines and drawing on economic sociology, I will develop the notion of competitive solidarity with a view to identifying the specificity of the emerging European ties. The resulting insights will be integrated into Poulantzas' study of hegemony in capitalist societies. I will argue that competition rules and the underlying principle of non-discrimination are

2 I refer here in particular to the Stability and Growth Pact, the creation of a new Macroeconomic Imbalances Procedure (6-pack and 2-pack), and the Treaty on Stability, Coordination and Governance (TSCG).

3 Cf. Mitchell Dean: Free Economy, Strong State, in: Damien Cahill/Lindy Edwards/Frank Stilwell (eds.): *Neoliberalism. Beyond the Free Market*. Cheltenham 2012, 69-89; Werner Bonefeld: Freedom and the Strong State. On German Ordoliberalism, in: *New Political Economy* 17 (2012), 633-656; Thomas Lemke: 'The Birth of Bio-Politics'. Michel Foucault's Lecture at the Collège de France on Neo-Liberal Governmentality, in: *Economy and Society* 30 (2001), 190-207.

4 Ian Bruff: The Rise of Authoritarian Neoliberalism, in: *Rethinking Marxism* 26 (2014), 113-129.

vital for establishing European hegemony and the social formation that goes with it. I will also examine in more detail the role of competition and non-discrimination in establishing European social policy, which is usually considered to be vital for reinforcing the social bond in a society. The analysis provides insights into the extent to which competitive solidarity underpins the establishment of a European hegemony, but also highlights the limits of such an endeavour notably.

## The New Constitutionalism of the EU

Pointing out the vital role of supranational competition rules for the new constitutionalism at the European level, several scholars have argued that this political project is more ordoliberal than liberal in orientation.<sup>5</sup> These scholars offer a reading of EU competition law that is broadly shared by the mainstream community of experts on EU competition law and policy.<sup>6</sup> However, the critical scholars treat Ordoliberalism not merely as a form of economic policy but rather as a normative account of society. Using a Gramscian analysis of the relation between the economy, power and the state we can consider Ordoliberalism as being part of the ethico-political framework of European hegemony. Ordoliberalism and classical liberalism share the emphasis on the role of the market and private property in ensuring the freedom of the individual. In contrast to the liberal *laissez-faire* orientation, Ordoliberalism does not consider competition to be the consequence of any natural law.<sup>7</sup> In the light of market failure, notably the tendency towards oligopolies and monopolies, this sub-current of liberalism emphasises the need for a strong state imposing competition and antitrust law to ensure the smooth functioning of the market.<sup>8</sup>

5 Werner Bonefeld: Human Economy and Social Policy. On Ordoliberalism and Political Authority, in: *History of the Human Sciences* 26 (2013), 106-125; Antoine Vauchez: Ce Qu'ambitionne En Vérité L'Allemagne, in: *La Libération* (2011), URL: [http://www.liberation.fr/politiques/2011/12/06/ce-qu-ambitionne-en-verite-l-allemande\\_779740](http://www.liberation.fr/politiques/2011/12/06/ce-qu-ambitionne-en-verite-l-allemande_779740) (25 June 2015); Gareth Dale/Nadine El-Enany: The Limits of Social Europe. EU Law and the Ordoliberal Agenda, in: *German Law Journal* 14 (2013), 613-649. For a critical view Hubert Buch-Hansen/Angela Wigger: Revisiting 50 Years of Market-Making: The Neoliberal Transformation of European Competition Policy, in: *Review of International Political Economy* 17 (2010), 20-44.

6 Giuliano Marengo: The Birth of Modern Competition Law in Europe, in: A. Bogdandy/P.C. Mavroidis/Y. Méndy (eds.): *European Integration and International Co-Ordination. Studies in Honour of Claus-Dieter Ehlermann*. The Hague 2002, 303; David J. Gerber: *Law and Competition in Twentieth Century Europe. Protecting Prometheus*. Oxford 1998, 264; Richard Whish: *Competition Law*, 6th Edition. Oxford 2008; Giorgio Monti: *EC Competition Law*. Cambridge 2007. For a critical view Pinar Akman/Hussein Kasim: Myths and Myth-Making in the European Union. The Institutionalization and Interpretation of EU Competition Policy, in: *Journal of Common Market Studies* 48 (2010), 111-132.

7 Some consider parts of F.A. Hayek's work to be in line with ordoliberal ideas (cf. Stefan Kolev: *F.A. Hayek as an ordoliberal*, HWWI Research Paper 5-11, Hamburg Institute of International Economics. Hamburg 2010).

8 Alfred Müller-Armack: The Social Market Economy as an Economic and Social Order, in: *Review of Social Economy* 36 (1978), 325-333, here 327; Michel Foucault: *The Birth of Biopolitics, Lectures at the Collège de France 1978-79*. Houndsmill 2008, 120.

Michel Foucault's studies of governmentality analyse the "state project" underlying this school of thinking.<sup>9</sup> Along these lines we can further develop the term "new constitutionalism",<sup>10</sup> which was coined by Stephen Gill in order to examine the supranationalisation of enforcement mechanisms aiming to reconstitute capital on a European and global scale. Strengthened monitoring and enforcement mechanisms help to intensify competitiveness and increase the accountability of the state to the needs of capital, and seek to facilitate the further commodification of social relations. However, competition is more than that. It is an ideational framework, a principle of formalisation, a mode of abstraction which provides legitimacy to the new constitutionalism.<sup>11</sup> Only a state which ensures the freedom of its citizens, realised through the market, gains legitimacy according to the ordoliberal credo. In this regard Ordoliberalism promotes an anti-state state project essentially realised through competition. Such an account of Ordoliberalism goes far beyond the mainstream literature on EU competition law and policy. It outlines how competition plays the role of a guiding principle informing both economic policy and other policy fields of the new constitutionalism, thereby paving the way for a new societal constitution.

A case in point is social policy. Ordo-liberals consider this policy field to be vital to turn workers into entrepreneurs, even though they do not own the means of production.<sup>12</sup> It helps to restore "small property ownership"<sup>13</sup> without challenging the overall ownership order. A minimum of state support is considered to be crucial, so that a person in need can quickly get on her feet again and re-join the play of differentiation and competition, strengthening a society where "inequality is the same for all".<sup>14</sup> Social policy is closely related to economic growth and is part of the social market economy, a term coined by the ordoliberal scholar Alfred Müller-Armack.<sup>15</sup> The fact that this notion has become a key point of orientation for the EU confirms the influence of ordoliberal ideas on the European architecture. Since the Lisbon revision, the establishment of "a highly

9 Foucault: *Birth of Biopolitics* (2008), 77. See also Dean: *Free Economy, Strong State* (2012); Bonefeld: *Freedom and the Strong State* (2012); Lemke: *'Birth of Bio-Politics'* (2001).

10 Stephen Gill: Market Civilization, New Constitutionalism and World Order, in: Stephen Gill/A. Claire Cutler (eds.): *New Constitutionalism and World Order*. Cambridge 2014, 29-44, here 34.

11 Müller-Armack: *Social Market Economy* (1978).

12 Bonefeld: *Human Economy and Social Policy*. (2013), 106.

13 William Campbell: Introduction to the Transaction Edition, in: Wilhelm Röpke (ed.): *In the Social Crisis of Our Time*, New Brunswick, NJ 2009, xiii–xxiv, here xvi.

14 Foucault: *Birth of Biopolitics* (2008), 143.

15 Müller-Armack: *Social Market Economy* (1978). See also Alexander Ebner: The Intellectual Foundations of the Social Market Economy. Theory, Policy and Implications for European Integration, in: *Journal of Economic Studies* 33 (2006), 206-223; Christian Joerges/Florian Rödl: *'Social Market Economy' as Europe's Social Model?* EUI Working Paper Law No. 2004/8. Florence 2004; Ralf Ptak: Neoliberalism in Germany. Revisiting the Ordoliberal Foundations of the Social Market Economy, in: Philip Mirowski/Dieter Plehwe (eds.): *The Road from Mont Pèlerin. The Making of the Neoliberal Thought Collective*. Cambridge, MA. 2009, 98-138.

competitive social market economy”<sup>16</sup> has become one of the Union’s major goals in the broader framework of setting up an internal market.

Critical scholars, outlining the ordoliberal orientation of the EU, have paid little attention so far to the reason why this line of thinking may have become so influential at EU level. Foucault provides some interesting general insights in this respect, which can be extrapolated to the European level. He relates the rise of this school of thought to the particular situation post-war Germany was confronted with. An ordoliberal notion of the state provided a solution to the problem of how to reconstruct a state which had lost legitimacy after the defeat of the Nazi regime. The emphasis on the state’s vital role as a guarantor of competition, and hence individual freedom, made the establishment of a strong state more acceptable.<sup>17</sup> The EU is confronted with a similar “state-phobia”,<sup>18</sup> though for different reasons.<sup>19</sup> Transferring Foucault’s insights to the EU, we can relate the major influence of Ordoliberalism to the legitimacy it provides to supranational institution building. The term “output legitimacy”, coined by Fritz Scharpf, describes the situation very well.<sup>20</sup> This form of legitimacy is not based on democratic procedures but rather on the positive influence attributed to EU policy on economic growth. The prevalence of this sub-type of liberalism in the ideational framework providing legitimacy to the European integration process reflects the complex mediation between economy, power and hegemony Gramsci had already identified.<sup>21</sup> It cannot simply be reduced to the dominant economic and political role of Germany in the EU. However, we do not yet know much about the reasons for EU-phobia or the social ties established through competition.

## Towards an Authoritarian EU

Poulantzas’ concept of authoritarian statism provides an interesting explanation which helps us to better understand the reasons for the difficulties the EU encounters in finding broad acceptance.

<sup>16</sup> Art. 3 of the Treaty of the European Union, TEU.

<sup>17</sup> Foucault: *Birth of Biopolitics* (2008), 83. It is controversial among scholars whether the rise of Ordoliberalism in Germany should be seen in continuity with Carl Schmitt’s notion of the *Ausnahmezustand*, indirectly justifying the abolition of parliament and the reinforcement of the bureaucracy in Nazi Germany, or rather as an alternative to the Nazi regime (see Ralf Ptak: *Vom Ordoliberalismus zur sozialen Marktwirtschaft. Stationen des Neoliberalismus in Deutschland*. Opladen 2005). There is also major disagreement about the influence of Ordoliberalism on the actual shape of the post-war German welfare state.

<sup>18</sup> Foucault: *Birth of Biopolitics* (2008), 77.

<sup>19</sup> The defeat of the project to establish a constitution for Europe caused by French and Dutch voters in the 2005 referendum illustrates this “state-phobia”.

<sup>20</sup> Fritz Scharpf: *Governing in Europe: Effective and Democratic?* Oxford 1999.

<sup>21</sup> Antonio Gramsci: *Selections from Political Writings (1921-1926)*. London 1978, 144.



Poulantzas developed this notion in his theory of the capitalist state, in order to explain the transformation of European states in response to the economic crisis of the 1970s.<sup>22</sup> Part of this transformation was the declining influence of parliaments while the executive power was becoming dominant.<sup>23</sup> Today, a clear parallel can be drawn with the EU.<sup>24</sup> The European Council, consisting of the Heads of State or Government of the EU Member States, and the President of the European Commission – hence the executive power – have *de facto* legislative power, defining the general political direction and priorities of the EU. The strengthening of co-decision procedures and thus of the European Parliament over the last two decades has hardly compensated so far for the decline of the parliaments' influence at national level.<sup>25</sup>

The barely disguised influence of economically strong countries, as well as of powerful lobby groups of multinational companies in Brussels, further strengthens the public view that Brussels essentially defends its own interests as a bureaucracy and those of powerful governments and economic actors.<sup>26</sup> A recent case in point is Philip Morris International, the cigarette manufacturer, which employed 161 people who to meet 31 per cent of the members of the European Parliament as part of its efforts to combat a proposed EU tobacco products directive.<sup>27</sup> Given the visibility of this unequal influence on the EU policy-making process, the EU has major difficulties in appealing to the ideological safety-screen of its “role as neutral arbiter”<sup>28</sup> and hence its relative autonomy, which Poulantzas describes as vital for hegemony. In other words, the strong influence of some powerful groups and the strengthening of the executive power weaken the state's capacity to organise hegemony, which is characterised by a dual movement Poulantzas argues. On the one hand, the very function of the state is to split the social body into isolated atoms, reinforcing the fragmentation established through the capitalist division of labour. At the same time, however, the capitalist state derives its legitimacy from the fact that it presents itself as the unity of the people-nation.<sup>29</sup> In this sense, “individualization and privatization of the social body

22 For a summary which also includes Stuart Hall's analysis of this transformation see Bruff: *Authoritarian Neoliberalism* (2014), 118-120.

23 Nicos Poulantzas: *State, Power, Socialism*. London 2000 [1978], 213.

24 Bruff: *Authoritarian Neoliberalism* (2014); Lukas Oberndorfer: *Crisis of Hegemony. Heading Towards Authoritarian Competitive Statism?* (forthcoming); Forschungsgruppe “Staatsprojekt Europa”: *Die EU in der Krise. Zwischen autoritärem Etatismus und europäischem Frühling*. Münster 2012.

25 The co-decision procedure, notably in the case of disagreement between the European Parliament and the Council, indicates the continuing strong position of the executive power at the European level (European Parliament (2012): *Codecision and Conciliation. A Guide to How the Parliament Co-Legislates under the Treaty of Lisbon*, Dv\898248en, 10-24).

26 Heiko Kretschmer/Hans-Jörg Schmedes: *Enhancing Transparency in EU Lobbying? How the European Commission's Lack of Courage and Determination Impedes Substantial Progress*, in: *Internationale Politik und Gesellschaft* 1 (2010), 112-122.

27 The Guardian (7 September 2013): *Tobacco Giant Philip Morris 'Spent Millions in Bid to Delay EU Legislation'*.

28 Poulantzas: *State, Power, Socialism* (2000 [1978]), 244.

29 Loc. cit., 70.

are grounded on practices and techniques of power employed by a State which, in one and the same movement totalizes the divided monads and incorporates their unity into its institutional structure”.<sup>30</sup>

Law is considered to be of particular relevance in this context. It fragments the social body into individual legal subjects, ensuring private property while simultaneously imposing a framework of cohesion on social agents and representing their unity by writing them into the social imagination of the community to which the legal system belongs.<sup>31</sup> The dual movement risks being undermined in the moment of economic crisis, in which economic forces try to capture the state with a view to increasing their profit. Furthermore, the decline of democracy and the strengthening of the executive power as part of authoritarian statism placed the burden of legitimising the state on the state administration bureaucracy, which at the same time has fewer and fewer means available to organise the unifying process of hegemony. As a result, the economic crisis is transformed not only into a political crisis but also into a crisis of the state. Klaus Offe speaks of the “crisis of crisis management”.<sup>32</sup> Accordingly, the strengthening of the executive power in the context of authoritarian statism goes, paradoxically, hand in hand with the weakening of the state.

In his studies of the 1970s, Poulantzas relates the spread of popular anti-state struggles to this weakening of the state. Transposing this analysis to the EU level, we can understand the current popular struggles emerging in several EU Member States as a reaction to the current European crisis not only as an economic and political crisis but also as a profound crisis of the European architecture.<sup>33</sup> One can identify different strategies being employed by the EU in attempts to establish hegemony. A detailed study of one of the strategies will provide interesting insights into the role of the market in establishing hegemony, which the critical studies of new constitutionalism have ignored so far.

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<sup>30</sup> Loc. cit., 72.

<sup>31</sup> Sonja Buckel: *Subjektivierung und Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts*. Göttingen 2007.

<sup>32</sup> Claus Offe: Crisis of the Crisis Management. Element of a Political Crisis Theory, in: *International Journal of Politics* 6 (1976), 29-67.

<sup>33</sup> See, for instance, Eurobarometer 16 – Trust in European institutions – The European Parliament, the European Commission, the European Court of Justice, in: *Eurobarometer Interactive Research System*, URL: [http://ec.europa.eu/public\\_opinion/](http://ec.europa.eu/public_opinion/) (25 March 2014).

# The *sui generis* Nature of European Social Policy

The strengthening of the European Parliament is a vital endeavour in this respect. A milestone in this process was the establishment of a European citizenship complementing national citizenship in 1992, which entails direct representation in the European Parliament.<sup>34</sup> The Maastricht Treaty has also introduced a new, more distribution-oriented notion of solidarity.<sup>35</sup> It is part of the overall goal to strengthen “economic, social and territorial cohesion, and solidarity among Member States”. The way the EU hopes to strengthen cohesion must be seen in the light of EU-phobia, and is consequently heavily informed by Ordoliberalism. Scholars who advocate paying more attention to the *sui generis* nature of European social policy have so far overlooked this dimension.<sup>36</sup> Taking this broader context into account also makes it possible to point out the role of competition in establishing social bonds even in this policy field, which is traditionally considered to stand in contrast to competition.

Different studies reconstructing the early stages of European social policy have highlighted how the establishment of this policy field was, from the very beginning, related to a major dispute over the more general EU architecture. Falkner identifies two major fractions in this dispute, the socio-interventionists and the neoliberal school.<sup>37</sup> She outlines how the German government in particular was strongly opposed to any socio-political intervention at the Community level. An ordoliberal account of competition makes it possible to understand the dissent less as an argument about whether intervention should be possible and rather as a disagreement about what form it should take. The proponents of a more comprehensive social policy gained the upper hand in the framework of the Council of Europe, which, as an intergovernmental organisation, lacks the enforcement mechanism of the (largely) supranational EU.<sup>38</sup> In contrast, the ordoliberal line took the lead in the context of the European Community. This difference in the range of social policy indicates the decisive role of EU-phobia in shaping EU social policy.

The beginning of European social policy was closely related to the single market project. The social policy aimed to harmonise the labour conditions while “the improvement is being main-

34 Now Art. 10(2) TEU post-Lisbon.

35 Malcolm Ross: Solidarity – a New Constitutional Paradigm for the EU?, in: Malcolm Ross/Yuri Bergmann-Prebil (eds.): *Promoting Solidarity in the European Union*. Oxford 2010, 23-45, here 44.

36 Cf. Mary Daly: EU Social Policy after Lisbon, in: *Journal of Common Market Studies* 44 (2006), 461-481, here 463; Gerda Falkner: *European Integration and the Welfare State(s) in Europe*, Wp. 03/2009. Vienna 2009.

37 Gerda Falkner: *Kontinuität und/oder Wandel? Zahlen und Fakten zur EU-Sozialpolitik* (= Reihe Politikwissenschaft, 100). Wien 2004, 4.

38 As long ago as 1950 the Council of Europe drafted the Convention for the Protection of Human Rights and Fundamental Freedoms, which provided the legal basis for the European Court of Human Rights. Other conventions followed in the 1960s in the areas of higher education and social security schemes. The European Social Charter, adopted in 1961, covers a broad range of fundamental rights (Ana Heredero Gómez: *Social Security. Protection at the International Level and Developments in Europe*. Strasbourg 2009). In contrast, the EU Charter for Fundamental Rights of the European Union only entered into force in 2009. I will come back to the Charter later on.

tained”, as Art. 117 of the EEC Treaty stated. Along these lines, the Treaty of Rome identified workers as the primary target group of the European Social Fund.<sup>39</sup> Its objective is not only to raise workers’ living standards but also to improve their employment opportunities with a view to enhancing competition, much along the lines of Ordoliberalism. A key element of competition is the free movement of workers which is one of the four core freedoms promoted by the European Economic Community and later the European Union.<sup>40</sup> At the core is the idea that nothing should prevent or restrict the free movement, so that competition is fully guaranteed.<sup>41</sup> The prohibition of discrimination is supposed to ensure that “dissimilar conditions [are not applied] to equivalent transactions with other trading parties”.<sup>42</sup> Hence, what is considered to be equal should not be treated differently.

However, the free movement of persons was confronted with a problem Adam Smith had already identified when he stated that “it appears evidently from experience that a man is of all sorts of luggage the most difficult to be transported”.<sup>43</sup> The non-discrimination provisions for workers putting them on an equal footing aim to overcome this problem of immobility.

The Treaty of Rome had already established the non-discrimination provisions at two different levels of generality in 1957. One level is specific and work-related, and the second one is more universal in its orientation, essentially covering all areas. The work-related provision states that the Member States’ obligations in this respect “shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment”.<sup>44</sup> This work-related non-discrimination has since been further specified, notably through regulation 1612/68 on freedom of movement for workers within the Community (now replaced by Regulation 492/2011). A crucial element is Article 7(2), according to which a migrant worker of another member state shall enjoy the same social and tax advantages as national workers. By contrast, the more generic provision states that “any discrimination on grounds of nationality shall be prohibited” within the scope of EEC/EU law.<sup>45</sup> These two equalisation provisions have set the stage for developing European social policy. However, since the single market project prevailed from the very beginning, the work-related

39 Art. 123 of the EEC Treaty, today Art. 162 TFEU.

40 The four freedoms include the free movement of goods, workers, services and capital.

41 See EEC Treaty, Part II, Titles I & III and post-Lisbon TFEU Part III, Titles II & IV.

42 Art. 85(1)(d) of the EEC Treaty, today Art. 101(1)(d) TFEU.

43 Adam Smith: *The Wealth of Nations*. New York 2007 [1901], para 31.

44 Art. 48 EEC Treaty. Interestingly enough, an additional anti-discrimination provision was introduced prohibiting unequal payment between men and women (Art. 119 of the EEC Treaty, now Art. 157 TFEU). See Gerda Falkner: *EU Social Policy in the 1990s. Towards a Corporatist Policy Community*. London 1998, 61.

45 Art. 7 EEC Treaty, TFEU Art. 18.

equalisation provision has become far more important than the generic one, as I will show in the next sections.

The Treaty establishing the European Coal and Steel Community already expressed a clear concern that arrangements necessary for social security measures could hamper the free movement of labour.<sup>46</sup> This concern was included in the supranational framework of the Treaty of Rome, which authorised the Council to “adopt such measures in the field of social security as are necessary to provide freedom of movement for workers”.<sup>47</sup> The *sui generis* character of European social policy thus stands in sharp contrast to a notion of social policy understood as de-commodification, on which for instance Gøsta Esping-Andersen’s typology of welfare states draws.<sup>48</sup> Before I outline in further detail the role of competition in establishing European social policy, I will elaborate in theoretical terms the type of social relationship competition establishes. This should help us to better understand why and how competition and its underlying non-discrimination provisions have become a vital element of the dual movement by which the EU aims to establish hegemony, also in the sphere of social policy.

## Competitive Solidarity – an Irreconcilable Opposition?

What social bonds are established through competition? Foucault tells us little about it. An interesting proposal has been made by Wolfgang Streeck in his development of the notion of competitive solidarity.<sup>49</sup> His understanding of social ties essentially draws on Emile Durkheim’s distinction between mechanical and organic solidarity. Each type of solidarity stands for a different type of social bonds which tie individuals together. Durkheim outlines how modern societies are predominately characterised by organic solidarity.<sup>50</sup> As a result of an increased division of labour and functional specification, modern societies are confronted with strong centripetal forces; this in turn requires an adjustment of the centrifugal forces.<sup>51</sup> The new relation between homogenisation and individualisation makes it possible to loosen the social bonds, allowing for more movement of the individual parts and thus increased diversity. Streeck relates this idea to insights from the Varieties of Capitalism approach, which examines how countries can increase

46 Art. 69(4) of the ESCS Treaty, 1957.

47 Art. 51 of the EEC Treaty.

48 Gøsta Esping-Andersen: *The Three Worlds of Welfare Capitalism*. Cambridge 1990.

49 Wolfgang Streeck: International Competition, Supranational Integration, National Solidarity. The Emerging Constitution of “Social Europe”, in: Martin Kohli/Mojca Novak (eds.): *Will Europe Work? Integration, Employment and the Social Order*. London/New York 2001, 21-34.

50 Emile Durkheim: *The Division of Labor in Society*. Glencoe, IL 1997 [1893].

51 Loc. cit., 182.

their comparative advantage in global competition.<sup>52</sup> Along these lines, he describes how intensified global competition forces small states and sub-national regions to further specialise in order to increase “their internal homogeneity while externalizing heterogeneity to the outside world, basing their internal cohesion on a variant of mechanical solidarity while entrusting their external relations to organic solidarity among traders with complementary capacities”.<sup>53</sup> Linking mechanical solidarity to the domestic level and organic solidarity to global trade, as Streeck does, is not unproblematic since it clearly underestimates the diversity within countries that exists alongside a strong collective consciousness of the nation as an “imagined community”.<sup>54</sup> It might be more appropriate to distinguish two types of organic solidarity, each characterised by a different mix of centripetal and centrifugal forces with social ties of different degrees of looseness. How can we then understand the social ties of this second mode of solidarity, solidarity among traders, as Streeck puts it, where competition prevails? This question is at the core of economic sociology to which I turn in the next section.

## The Social Relations of Depersonalisation

In recent years a new interest has emerged within sociology, focusing on competition as the sociology of the early 20th century did.<sup>55</sup> The different sociological accounts of competition all agree in their basic assumption that competition is a mode of social interaction. The accounts differ profoundly, however, as regards the social role they assign to competition. Some underline the centripetal quality of competition as something that strengthens individualisation and differentiation. As we have seen, Ordoliberalism welcomes this effect of competition which it sees as a process that promotes a society where inequality is the same for all. On a more critical note, Dietmar Wetzel considers competition and its underlying mode of comparison as the most prominent way of legitimising inequality and hierarchies.<sup>56</sup> The second account of competition emphasises its centrifugal effects. The scholars considering the market as a social relationship are particularly interesting in this context. Some of them draw on Max Weber's study of the

<sup>52</sup> Peter A. Hall/David Soskice: *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage*. Oxford 2001.

<sup>53</sup> Streeck: *International Competition* (2001), 33.

<sup>54</sup> Benedict Anderson: *Imagined Communities. Reflections on the Origin and Spread of Nationalism*. London/New York 1991.

<sup>55</sup> Dietmar J. Wetzel: *Soziologie des Wettbewerbs*. Wiesbaden 2013; Hartmut Rosa: Wettbewerb als Interaktionsmodus. Kulturelle und sozialstrukturelle Konsequenzen der Konkurrenzgesellschaft, in: *Leviathan* 34 (2006), 82-104; Theodor Geiger: *Konkurrenz. En Sociologisk Analyse*. Aarhus, Universitet, Acta Jutlandica, Aarsskrift Vol. 13, No. 2. Aarhus 1941.

<sup>56</sup> Wetzel: *Soziologie des Wettbewerbs* (2013).

economy and society where he develops an interesting notion of the quality of the social bond established through market exchange, hence the solidarity among traders, as Streeck calls it.<sup>57</sup>

Weber speaks of impersonality which characterises the social relationship established through market exchange.<sup>58</sup> Such an account of economic transactions does not exclude the possibility that other types of social relations may also be vital in certain market interactions.<sup>59</sup> However, they play a minor role as long as the market is predominately organised through competition. Weber’s study points out the ephemeral nature of interaction between traders where the consociation established in the moment of exchange ceases to exist with the act of exchanging goods.<sup>60</sup> This particular relationship goes beyond the immediate exchange partners. Market exchange is ...

“[...] always a social action [*Gemeinschaftshandeln*] insofar as the potential partners are guided in their offers by the potential action of an indeterminately large group of real or imaginary competitors rather than by their own actions alone. The more this is true, the more does the market constitute social action.”<sup>61</sup>

Accordingly, we can understand the relationship between traders establishing competitive solidarity as part of a social action underpinned by an imagined community of traders relating to each other in an impersonal way.

Following Weber, Richard Swedberg points out in his economic sociology of law the crucial role of law in enabling market exchange.<sup>62</sup> Law interrelates the two major types of rationalisation that Weber sees at work in modern market societies, i.e. the rationalisation of market exchange with its own mode of calculation, and the rationalisation of bureaucracy.<sup>63</sup>

However, this account of the social bonds established through market exchange fails to explain how power relations and exploitation act through this very process of impersonalisation and rationalisation, and mask what Derek Sayer calls the “violence of abstraction”.<sup>64</sup> In the next section,

57 Ritu Birla: Maine (and Weber) against the Grain. Towards a Postcolonial Genealogy of the Corporate Person, in: *Journal of Law and Society* 40 (2013), 92-114, here 65.

58 Max Weber: *Economy and Society*. Berkeley 1978, 85.

59 Cf. Viviana A. Zelizer: *The Purchase of Intimacy*. Princeton 2007.

60 Weber: *Economy and Society* (1978), 635.

61 Loc. cit., 636.

62 Richard Swedberg: The Case for an Economic Sociology of Law, in: *Theory and Society* 32 (2003), 1-37. See also Lauren B. Edelman/Robin Stryker: A Sociological Approach to Law and Economy, in: Neil J. Smelser/Richard Swedberg (eds.): *The Handbook of Economic Sociology*. Princeton 2005, 527-551; Diamond Ashiagbor/Prabha Kotiswaran/Amanda Perry-Kessaris: *Towards an Economic Sociology of Law*. Malden/Oxford 2013.

63 Weber: *Economy and Society* (1978).

64 Derek Sayer: *The Violence of Abstraction. The Analytic Foundations of Historical Materialism*. New York 1987.

I therefore turn to a historical materialist account of the social relations established through the economy and through law.

## The Market as a Mode of Abstraction

Karl Marx's study identifies a major transformation of the products of labour through market exchange, by which the product is turned into a commodity. This transformation, rendering one commodity exchangeable with any other commodity, is characterised by the simultaneity of difference and equality that builds the nexus between production and circulation. Products are turned into commodities when they are assigned an exchange value that abstracts from their concrete use value and the condition of their production.<sup>65</sup> Marx calls this transformation the "mystical character"<sup>66</sup>, or the "fetishism of commodities". The "fantastic form of a relation between things"<sup>67</sup> is not a simple fiction but a social process of dissociation that makes it possible to displace something from its original context into another setting. It abstracts from the commodities' use value, their individual conditions of production, and the individual labour expended in them.<sup>68</sup> In relation to the exchange value, all these privately produced products become something they are not, i.e. equal and thus exchangeable. Isaac Balbus speaks of "a mode of substitution"<sup>69</sup> where everything becomes replaceable in principle. This account provides a very different understanding of the impersonal relationship between two traders which Streeck and Weber refer to. At its core is an abstraction and equalisation process which detaches the goods and services from the context in which they originated and renders the differences between them, also in terms of exploitation, invisible. Marx argues that after dissociation the commodities appear to be independent. But in fact they remain interconnected through the social conditions under which they have been produced. These conditions, and therefore the social character of commodities, determine their value.

"[T]he value of one commodity is to the value of another commodity as the quantity of labour fixed in the one is to the quantity of labour fixed in the other."<sup>70</sup>

65 Karl Marx: *Value, Price and Profit*. New York 2008 [1935], 44.

66 Karl Marx: *Capital, Vol. I, Part II: The Transformation of Money into Capital. Chapter Four: The General Formula for Capital*. New York 2007 [1867], 46.

67 Loc. cit., 47.

68 Karl Marx: *Capital. A Critique of Political Economy, Vol. I, Part I: The Process of Capitalist Production*. Moscow 1971 [1867], 85.

69 Isaac D. Balbus: Commodity Form and Legal Form. An Essay on the "Relative Autonomy" of the Law, in: *Law and Society Review* 11 (1977), 571-588, here 577.

70 Marx: *Value, Price and Profit* (2008 [1935]), 31.



Value is thus operationalised in quantitative terms, as the amount of time required for the production of a commodity in comparison to the amount of time fixed in another one. This quantity is not the one required to produce a specific product; it is rather the crystallisation of social labour as the quantity of labour necessary for the production of a commodity in a “given state of society, under certain social average conditions of production, with a given social average intensity, and average skill of the labour employed”.<sup>71</sup> However, this social context, the given state of society, is rendered invisible through the commodification process. Money, with all its different expressions (gold, paper, virtual etc.), takes on the role of a generalised equivalent in which all commodities can represent their (exchange) value and thus relate to each other.

Law works as another generic equivalent putting people on an equal footing. In his general theory of law, Evgeny Pashukanis outlines how the transactors recognise one another reciprocally as proprietors under the abstraction of the real relation of hierarchies and exploitation.<sup>72</sup> Through the employment contract, the owner of living labour is put on an equal footing with the capitalist, masking the major inequalities between them – notably in relation to the ownership of the means of production. Thus, law abstracts from the existing ties of mutual dependence and exploitation like exchange value abstracts from the plurality of use values and the condition of production. Money and law establish chains of equivalence.<sup>73</sup> This dissociation renders the social conditions of production, and hence exploitation, invisible and makes the market appear as if it were exclusively regulated by supply and demand.<sup>74</sup>

This analytical framework provides a far more critical account of the interaction of the enterprise society and a judicial society than Foucault's study of Ordoliberalism. It points out how this process is characterised by the simultaneity of equalisation and differentiation. Market exchange and its underlying contractual relationship build on the atomisation of the entities while unifying them in the very moment of exchange. Hence, they are part of the dual movement which Poulantzas considers vital for organising hegemony. In other words, the dissociation-unifying process of hegemony is not restricted to the extra-economic sphere. It also takes place through countless economic exchanges. The process challenges the existing state of society and transforms it into a new state, establishing another social average intensity of production and average skill of the labour employed. It is the result of the incessant search of capital for profit, its “endless and limitless drive to go

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<sup>71</sup> Loc. cit., 33.

<sup>72</sup> Evgeny B. Pashukanis: *General Theory of Law and Marxism*. 2nd edition. New Brunswick/New Jersey 2007 [1929].

<sup>73</sup> Loc. cit., 119.

<sup>74</sup> Loc. cit., 176.

beyond its limiting barrier. Every boundary [*Grenze*] is and has to be a barrier [*Schranke*] for it.”<sup>75</sup>

However, the extension of the scope and thus the shifting of existing boundaries requires a complex social process characterised by interactions organised through market exchanges and outside of them as I hope to show in this paper. A structuralist account of Marxism tends to underestimate the extra-economic requirements of such a shift. Conversely, state-theoretical approaches risk overlooking the role of the economy. What we need to do is take account of the dialectic between the economic and the extra-economic. Poulantzas’ state theory provides a good point of departure when it highlights the economy-building effects of the state. “The position of the State vis-à-vis the economy is never anything but the modality of the State’s presence in the constitution and reproduction of the relations of production.”<sup>76</sup> Further developing this idea, we also need to point out the state-building effects of economic interactions, and therefore the market’s presence in the constitution of the state. This perspective does not reduce the state to an appendix of the economy, as a number of structuralist accounts tend to do. It rather takes the economy seriously as a particular mode of organising social interactions, very much along the lines of economic sociology. It requires us to pay more attention to how the simultaneity of equalisation and differentiation organised through market exchange is in fact part of the dual movement of hegemony Poulantzas refers to.

Against this theoretical backdrop we can better grasp the state-effect of Ordoliberalism than Foucault’s study. The market plays a particularly important role for the EU in organising the dual movement. European integration goes hand in hand with a new division of labour and hence a new fragmentation of European social bodies. Simultaneously, it facilitates the unification process through economic exchange characterised by the simultaneity of difference and equality that builds the nexus between production and circulation. At the core is the dissociation and equalisation that puts very different products, services and people on an equal footing by abstracting from their origin. This fetishisation is required to comply with the Treaty’s prohibition of applying “dissimilar conditions to equivalent transactions with other trading parties”.<sup>77</sup> With Balbus we can call the underlying equalisation “a mode of substitution”<sup>78</sup> by which everything becomes replaceable in principle, as long as it is European. It is through this dual movement that competition and its legal regulation contribute to the creation of a new, European state of society.

<sup>75</sup> Karl Marx: *The Grundrisse*. New York 1973 [1857], 334. See also Michael A. Lebowitz: *Beyond Capital. Marx’s Political Economy of the Working Class*. 2nd Edition. Basingstoke/New York 2003.

<sup>76</sup> Poulantzas: *State, Power, Socialism* (2000 [1978]), 17.

<sup>77</sup> Art. 85(1)(d) of the EEC Treaty, today Art. 101(1)(d) TFEU.

<sup>78</sup> Balbus: *Commodity Form and Legal Form* (1977), 577.

In the remaining part, I will outline how competition rules and their underlying non-discrimination provisions set up such a dual movement in the field of social policy. This means that I do not consider social policy as being in contrast to competition, as most of the EU literature does. The close linkage between competition and social rights is particularly characteristic of the first and second generation of social rights, as the following historical reconstruction will outline. The study thus seeks to illustrate the heuristic value of the analytical framework and how the establishment of a new, European state of society is not only the result of a top-down change established by EU primary law. It is also the result of countless acts of equalisation, partly organised by economic exchanges and legal disputes, which give this state its own social materiality.

## The First Generation of European Social Policy

As already outlined, the EU provides for more generic as well as more work-related non-discrimination rules. The first generation of social rights merely drew on the latter type of non-discrimination. Given the worry that the lack of transferability of social security would impede the mobility of labour, the European Commission came up with a first proposal as long ago as April 1958, just a few months after it took up its duties, and prepared the adoption of Regulation 3 and 4 on social security for migrant workers. This entered into force on 1 January 1959.<sup>79</sup> The safeguard provisions the European Economic Community (EEC) included in its early social provisions were also restricted to work-related issues. They aimed to prevent occupational accidents and diseases. The Treaty of Rome authorised the European Commission to promote close cooperation, though only through opinions and consultations.<sup>80</sup> In the 1970s the Community started to strengthen its efforts towards European integration in this area, for example by setting up the Advisory Committee on Safety, Hygiene and Health Protection at Work.<sup>81</sup> The Treaty of Rome (1957) had also included vocational training in the social policy title, in contrast to general education (Art. 128).<sup>82</sup> Again the reason was that vocational training was considered to be vital for the

79 Rob Cornelissen: 50 Years of European Social Security Coordination, in: *European Journal of Social Security* 11 (2009), 9-45, here 12; Regulation (EEC) No. 3 of 25 September 1958 concerning social security for migrant workers, O.J. No. 30 of 16 December 1958.

80 Art. 118 of the EEC Treaty.

81 of the Decision directivesocial policy became characterised by a stronger harmonisation only from the 1970s onwards where a n Alan C. Neal/Frank Beverley Wright: *European Communities' Health and Safety Legislation*. London 1992, 1-14. See the Council Decision of 27 June 1974 on the setting up of an Advisory Committee on Safety, Hygiene and Health Protection at Work (74/325/EEC) and the Framework Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work of 12 June 1989. The Advisory Committee was merged into the tripartite Advisory Committee on safety and health at work (ACSH) in 2003 by a Council Decision (2003/C 218/01) and supported by the European Agency for Safety and Health at Work (EU-OSHA) set up in 1996.

82 The 1992 Maastricht revision established an extra title for general and vocational training (Art. 127 TEU).

market and therefore needed in order to establish a single market and European competitiveness. The Council started to undertake activities in this policy field in the 1970s after establishing some first common principles in 1963.<sup>83</sup> At the core of the activities were, however, the regulations in the sphere of social security aiming at enhancing competition by putting migrant workers from all other EU countries on an equal footing with domestic workers in the host country. The provisions on the coordination of social security have been modified on a regular basis. Regulation 3 was changed 14 times and its successor, Regulation 1408/71, 39 times, before it was replaced by Regulation 883/2004.<sup>84</sup> These modifications essentially codified ECJ rulings and illustrate well the vital role of the Court in advancing the integration process that several scholars point out.<sup>85</sup> However, we should not underestimate the role of the market, and the actual labour migration, in enabling the equalisation through the dissociation-unification process.

With each modification the categories of beneficiaries of non-discriminatory provisions have been extended. Regulation 3 was restricted to “wage earners or assimilated workers” (Art. 4) who were nationals of another member state. The ECJ gradually extended the notion of workers, subsequently codified by EU law to include frontier workers,<sup>86</sup> seasonal workers<sup>87</sup> and seafarers.<sup>88</sup> This extension established a broader sense of “employed person” as introduced by the successor legislation Regulation 1408/71. This more general sense provided the ECJ with even more leeway to further extend the scope.<sup>89</sup> In 1981, the scope of Regulation 1408/71 was further modified with a view to including self-employed persons, so that today the notion of workers includes essentially everyone providing a service in exchange for remuneration. This first generation of European social rights only included the workers’ families and their survivors as non-economically active potential beneficiaries.

83 63/266/EEC. See also Falkner: *EU Social Policy in the 1990s* (1998), 70-73.

84 Amended by Regulation (EC) No 988/2009, Commission Regulation (EU) No 1244/2010, Regulation (EU) No 465/2012 and Commission Regulation (EU) No 1224/2012. See Cornelissen: *European Social Security Coordination* (2009), 11.

85 Bruno De Witte/Elise Muir/Mark Dawson: *Judicial Activism at the European Court of Justice*. Cheltenham 2013; Walter Mattli/Anne-Marie Slaughter: Revisiting the European Court of Justice, in: *International Organization* 52 (1998), 177-209; Stephan Leibfried: Social Policy. Left to Courts and Markets?, in: Helen Wallace/William Wallace/Mark A. Pollack (eds.): *Policy-Making in the European Union*. Oxford 2005, 243-278; Alec Stone Sweet: The European Court of Justice and the Judicialization of EU Governance, in: *Living Reviews in European Governance* 5 (2010) 2, URL: <http://www.livingreviews.org/lreg-2010-2> (26 June 2015).

86 Regulation 36/63/EEC of 2 April 1963 concerning the social security of frontier workers, O.J. of 20 April 1963.

87 Regulation 73/63/EEC of 11 July 1963 concerning the social security of seasonal workers, O.J. of 24 July 1963.

88 Regulation 47/67/EEC of 7 March 1967, O.J. of 10 March 1967.

89 See, for instance, the Opinion of Mr Advocate General Mayras in Case 17/76 Brack [1976] ECR, p. 1454-1468, in particular pp. 1457, 1463.

## The Second Generation

The second-generation of European social rights was established through a gradual extension of the group of not economically active EU migrants entitled to non-contributory social benefits. In this sense they are more redistributive in nature. However, a closer study of the extension shows how closely the justification framework for the extension continues to be related to the free movement for workers.

The extension started with the families of migrant workers. The Freedom of movement for workers Regulation 1612/68 (Art. 12) provided for non-discrimination against children of migrant workers regarding access to education though merely with a view to strengthening workers' mobility. The Casagrande case essentially draws on these provisions (Case 9/74, ECR 773).<sup>90</sup> At the same time it was a seminal ruling of the ECR, since it extended the non-discrimination provisions for children of migrants to access to non-contributory benefits such as grants for maintenance and training. This ruling thus applied the work-related non-discrimination provisions for the first time to not economically active persons *and* non-contributory social benefits. However, the justification of the extension essentially remained in line with the previous regulations aiming to strengthen workers' mobility.

Access to non-contributory benefits was further improved by another seminal case, the Gravier case, in 1983 (Case 293/83).<sup>91</sup> This case no longer derived the social right from economic activities or family ties to an economic agent, as in the case of Casagrande. Gravier, a French national, was charged a fee to enrol on a four-year course of higher art education in Belgium where such fees did not exist for Belgian nationals. The ECJ ruled that this higher education study programme could be considered as vocational training so that it fell within the scope of the Treaty. Once the programme had been defined as vocational training, the Court reformulated the problem as an access problem covered by the general guidelines on vocational training established in 1963. The unequal imposition of fees established unequal barriers in access to higher education. What turned this case into a landmark ruling was the fact that the Court no longer argued in terms of non-discrimination between workers and their families but rather drew on the second, more generic non-discrimination principle.<sup>92</sup> However, it remains closely related to the single market project and its focus on the qualification of labour, and is hence ordoliberal in orientation.

<sup>90</sup> ECJ (1974): Casagrande V Landeshauptstadt München Case 9/74, Ecr 773.

<sup>91</sup> ECJ (1985): Gravier V City of Liège Case 293/83 [1985], Ecr 606. European Community.

<sup>92</sup> Now Art. 18 TFEU.

## The Third Generation

The Grzelczyk case stands for the development of the third generation of social rights which significantly expands access to non-contributory benefits (C-184/99).<sup>93</sup> This case involved a student of French nationality studying in Belgium. After having earned his living in his first years of study through several part-time jobs, he stopped working in the final year to focus on his studies. To cover his living expenses, he applied for the minimum subsistence allowance, which every Belgium student would be entitled to in a similar situation. But in his case the national authorities rejected the application. The Court ruled that this discrimination over access to non-contributory social benefits on the basis of nationality infringed the non-discrimination principle (C-184/99: No. 29).<sup>94</sup>

What distinguishes this case from the preceding rulings is its reasoning in relation to non-discrimination. It was no longer based on the principle of free movement of workers and economic activity, and hence regulation 1612/68, but rather on the generic non-discrimination provisions which have become strengthened through the introduction of European citizenship in the 1992 Maastricht revision.<sup>95</sup> The Grzelczyk ruling essentially challenged the provision of the Directive 93/96 on the right of residence for students, according to which EU students can only reside in another EU country if they have sufficient resources to avoid becoming a burden on the social assistance system of the host member state (Art.1). The Court found that a claim to social benefits could not lead automatically to a withdrawal of the residence permit once it had been granted, even though the application indicates that the applicant no longer meets the conditions of the right to reside (C-184/99: 42, 43).<sup>96</sup> Stefano Giubboni is right when he argues that accepting the entitlement to social benefits of economically active persons is one thing, and it is “quite another matter to open up national welfare systems to all European citizens as such, regardless of whether or not they participate in the economic process”.<sup>97</sup> We could say that the third generation comes closest to de-commodification, which Esping-Anderson considers to be at the core of social rights. It is closely related to European citizenship and is thus part of the social struggles

93 ECJ (2001): Rudy Grzelczyk V Centre Public D’aide Sociale D’ottignies-Louvain-La-Neuve (C-184/99), Ecr I-06193.

94 See also Anne Pieter van der Mei: *Free Movement of Persons within the European Community. Cross-Border Access to Public Benefits*. Oxford 2003, 149; Alexander Somek: *Solidarity Decomposed. Being and Time in European Citizenship*. Edited by U Iowa Legal Studies Research Paper No. 07-13 (2007), 7.

95 Now Art. 9 TFEU. See also Maurizio Ferrera: Towards an ‘Open’ Social Citizenship? The New Boundaries of Welfare in the European Union, in: Gráinne de Búrca (ed.): *EU Law and the Welfare State. In Search of Solidarity*. Oxford 2005.

96 In this respect, the ECJ further developed the line of reasoning of the seminal Martinez Sala vs Freistaat Bayern case where it explored the extent to which a not economically active person can claim equal treatment regarding access to non-contributory benefits (C-85/96).

97 Stefano Giubboni: Free Movement of Persons and European Solidarity, in: *European Law Journal* 13 (2007), 360-379, here 362.

that seek to give meaning and thus life to this conception of citizenship.<sup>98</sup> In the centre is the modification of the normative framework to legitimise the entitlement of EU migrants to social benefits in their host countries. The new framework keeps free movement as the major objective of the EU but no longer restricts it to (potentially) economically active persons and their families. It aims to strengthen the freedom of movement of all EU citizens and the right to residence in another EU country independently of their relationship to the labour market. In this regard, it is an attempt to go beyond competitive solidarity or the social bonds between traders, as Streeck puts it.

In the *Grzelczyk* case, the Court ruled that the refusal to provide non-contributory benefits could only be justified in case of an “unreasonable’ burden on the public finances of the host Member State” (C-184/99, 44). The Court also reminded the Member States that they had agreed, by way of several directives, to a certain level of financial solidarity between nationals of a host country and nationals of another member state, notably in the case where the need of the beneficiary is of a temporary nature.

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States further clarifies the social rights of EU migrants in host countries. To a certain extent this directive reinforces the Court’s line of reasoning, but it also imposes restrictions underpinning the superiority of the first and second generation of social rights. On the one hand, the directive underlines the principle of equal treatment of all EU citizens regardless of their place of (legal) residence, notably in relation to social security (Art. 24).<sup>99</sup> At the same time, it states that the host country is not obliged to confer the entitlement of social assistance during the first three months of residence. It also underlines the requirement of permanent residence, usually considered to have been met after five years, as the basis of entitlement to access to aid for studies, student grants and loans (Art. 24(2)). In most countries the requirement has been reduced to three years regarding the entitlement to student grants and loans to EU students from other Member States.

However, the superiority of social rights related to workers, their families and labour market-related qualification, meaning that the first and second generation of social rights, did not go unchallenged. In the joined cases C-523/11 *Prinz* and 585/11 *Seeberger*, as well as C-11/06 *Morgan*

<sup>98</sup> The recent “citizenship is not for sale” campaign of the European Parliament in reaction to the practices of several EU Member States to grant passports to wealthy foreign investors illustrates the strong de-commodification notion underpinning European citizenship in more general terms; see European Parliament (2014): *EU Citizenship Should Not Be for Sale at Any Price, Says European Parliament*; Press Release, Justice and Home Affairs. 16-01-201.

<sup>99</sup> However, the distinction between social security and social assistance has become an issue and focus of several ECJ cases (see for instance ECJ (2013c): *Peter Brey V Pensionsversicherungsanstalt* [Case C140/12]).

and C-12/06 *Bucher* the Court challenged the relation between the duration of the stay and the entitlement to social benefits as it was reinforced by the Directive on the right of citizens of the Union. The Court took the view that the minimum duration of the stay required for student grants was in contradiction to the principle of freedom of movement for citizens. It could dissuade students from studying in another EU country and hence hamper the free movement of persons.<sup>100</sup>

Two major strategies of the advocates of the third generation of social rights can be identified. First, a specification of the meaning of an unreasonable burden on public finances is designed to ensure sure that Member States cannot use it arbitrarily or excessively to refuse access. Advocate General Sharpston, for instance, has called for a robust assessment of this financial risk for the host country with a view to finding out whether the three-year rule is more restrictive than necessary.<sup>101</sup> Second, the advocates of the third generation are pushing for the individualisation of the assessment of whether an EU migrant is entitled to social rights in the host country. Sharpston calls for more attention to be paid to the level of social integration in the host country in order to determine whether an EU migrant is entitled to social benefits.<sup>102</sup> Along these lines, a recent guide to the applicable legislation published by the European Commission emphasises the need to determine the centre of interest of a person, as outlined in Article 11 of Regulation (EC) No 987/2009. The assessment should not only take account of the duration and presence of the migrant concerned in the host country, but also the geographical scope of her or his family ties and the housing situation.<sup>103</sup> In several rulings, notably in the *Brey* case, the Court has followed this line of reasoning and emphasised the need to carry out an assessment of the specific burden that a benefit would place on the social assistance system (*Brey* C-140/12: 65-72).<sup>104</sup> Furthermore, the Court has called for an assessment of the specific circumstance of the applicants, such as the length of stay, the temporary nature of the difficulty, and the relevant personal circumstances. In other words, the third generation of social benefits pushes for an individualisation of the assessment of whether an not economically EU migrant is entitled to non-contributory social benefits. This flexibilisation broadens the scope of the social ties to take into account in order to determine whether someone is already so well integrated in the host country that she or he should be

100 C-523/11 + 585/11: para 32; C-11/06 + C-12/06: para 28. ECJ (2007): *Joined Cases C-11/06 and C-12/06, Rhiannon Morgan V Bezirksregierung Köln, and Iris Bucher (C-12/06) V Landrat des Kreises Düren*, Ecr I – 9195; ECJ (2011): *Joined Cases C523/11 and C585/11, Laurence Prinz V Region Hannover and Philipp Seeberger V Studentenwerk Heidelberg*.

101 ECJ (2013a): *Opinion of Advocate General Sharpston*, 21 February 2013 on the *Joined Cases C-523/11 and C-585/11*: paras 64, 93.

102 *Loc. cit.*, para 108.

103 European Commission (2013): *Practical Guide on the Applicable Legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*. European Union, 43.

104 ECJ (2013b): *Pensionsversicherungsanstalt V Peter Brey*, [C140/12], 19 September 2013.



entitled to become part of its broader system of solidarity. The main reference is no longer the integration through the labour market and hence competitive solidarity.

However, the third generation of social rights has not yet gained the same acceptance as the first and second generation did. Case N (C-46/12) illustrates well the hierarchy between the different types of social rights. The complainant N., a European Union citizen had applied for a study programme at the Copenhagen Business School (CBS) and moved to Denmark before he was informed whether he had been admitted. Once in the country, he gained full time employment at an international wholesale company which he quit less than three months later upon being admitted to CBS. He continued working part time after starting his studies, as many Danish students do, and also applied for maintenance aid for student assistance, which is granted to Danish students under the same conditions. In his case, however, the Danish authority rejected his application for education. At the core of this case is a disagreement between the Danish authorities and the European Court about whether N. qualifies as a worker or as a student. The Danish authorities treated N. as a student and consequently denied his claim for non-contributory benefits since he did not yet meet the five-year residency requirement. By contrast, the Court ruled that the full time employment had qualified N. as a worker, even though the reason for his move to Denmark was study related. Accordingly, the denial of his claim was considered to be an unlawful discrimination prohibited by Article 7(2) of Regulation 1612/68 (para 52). This example illustrates well the continuing legal hierarchy between the difference in status and thus the generations of social rights. In other word, N. would not have obtained these non-contributory social benefits had he not been qualified as worker.

But the third generation also suffers from a lack of broader acceptance. Right-wing parties, in particular, are mobilising against it and warning that it may cause a major influx. Such “benefit tourism” would put considerable strain on schools, healthcare and the welfare state, they argue.<sup>105</sup> The stark difference between the acceptance of work-related access to social benefits and work-unrelated access is remarkable. Drawing on our theoretical framework, we can understand this difference in terms of the underlying mechanism of abstraction. The first and second generations of social rights essentially build on the (labour) market and its mediation of the simultaneity of difference and equality. The third generation lacks such a strong equalisation mechanism. In the light of the continuity of EU-phobia, European citizenship and its underlying non-market based non-discrimination principle reinforced by the Charter of Fundamental Rights is still a long way from providing a widely accepted mode of establishing European bonds by way of dissociating-unifying.

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<sup>105</sup> EurActiv. Published 17 October 2013, updated 04 November 2013, 2013 “Benefits Tourism” in the EU Is a Myth, Report Says.

# Conclusion

This contribution has sought to provide insights into the European “state”-building process studied by some scholars along the lines of Poulantzas’ state theory.

In the vein of Poulantzas, I have suggested that we need to understand the organisation of hegemony as a dual movement. The state fragments the social body and in one and the same movement totalises the divided nomads and incorporates their unity into an institutional structure. Extra-economic processes organised through parliament and political processes as well as through law and legal disputes play a crucial role in the equalisation. However, if we place too much emphasis on the extra-economic dimension we run the risk of underestimating the role of the market and market exchange in organising this dual movement. As a consequence, the state-building effects of the economy are overlooked.

I have related this idea of the role of the market in establishing hegemony to Foucault’s analysis of ordoliberalism. This analysis also sheds light on the role of the market in providing legitimacy to a state in a situation which is characterised by state-phobia. However, Foucault’s study tells us little about the type of relationship established through the market. Drawing on accounts from economic sociology and further developing them along the lines of Marx’s labour theory of value and Pashukanis’ general theory of law, I have outlined some major characteristics of the relationship. At the core is the role of competition and the underlying non-discrimination principle as a particular mode of dissociation which puts very different goods, services and labour on an equal footing so that they become exchangeable. Marx also speaks of fetishisation, which makes it possible to displace something from its original context into another setting. It abstracts from the commodities’ use value, their individual conditions of production, and the individual labour expended in them.<sup>106</sup> In this sense, we can understand competition as a mode of organising society beyond the market. It is a major guiding principle for society, an *eidōs*.

These ideas have been applied to the EU with a view to shedding light on the state- and society-building effects of its single market project and the dissociation unifying mechanisms it has introduced. To increase the mobility of labour and thus the dissociation from its origins, a European social policy had to be established. I suggest that we should understand this process in terms of competitive solidarity, hence as a particular mode of establishing European social ties. The first generation of European social policy aimed at enhancing EU workers’ mobility was developed with the clear objective of enhancing competition. The category of workers has become gradually extended, increasingly including not economically active citizens of the EU. The first extension took place along the lines of workers’ family ties. The second generation has strength-

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<sup>106</sup> Marx: *Capital* (1971 [1867]), 85.

ened an equalisation by way of dissociating-unifying which is no longer directly related to the status of workers but still closely tied to the labour market. This second generation thus includes not economically active persons as distinct from workers, but it still relates to the labour market in its attempt to establish social bonds based on competition. The fact that the broadening of the scope of beneficiaries took place only very gradually indicates the complexity of shifting boundaries with a view to establishing a new “state of society”<sup>107</sup> which is about to become a European society.

Due to EU-phobia, this extension is particularly precarious once it no longer draws on the equalisation processes organised through the (labour) market. This is visible in the context of the third generation of rights with its orientation towards de-commodification. The ECJ rulings have been vital in advancing this new mode of equalisation. However, the more the categories of beneficiaries include not economically active EU citizens, the more the EU requires alternative modes of (real) abstraction unifying the citizens of the EU Member States. I have argued that the weakness of the third generation can be related to the difficulty of establishing such an alternative mode as a social practice underpinning European citizenship and the Charter of Fundamental Rights.

In the absence of an alternative equalisation mechanism, not economically active EU migrants risk being seen predominantly as citizens of the sending country and not as a member of the emerging European society where all citizens are on an equal footing independent of their origin. In the worst case they are dubbed “benefit tourists”, allegedly trying to profit from social benefits provided by the host country. This difference between work-related citizens and non-work-related citizens points out how competitive solidarity remains the core social bond underpinning EU hegemony. Accordingly, the empirical study identifies another dimension of the weakness of authoritarian statism. Poulantzas argues that this weakness is the consequence of the strategy of placing the burden of legitimising the state on the state administration-bureaucracy, which at the same time has fewer and fewer ways of organising the unifying process of hegemony. Our case study illustrates how the burdening of the economic exchange with the organisation of the dual movement meets similar limits. This could be an important point of departure for a critical appraisal of the EU which remains European in its orientation. However, the EU-critical movement should not only aim to strengthen the third generation of European social rights. It also needs to acknowledge the first two generations, even though they have been established under conditions it heavily criticises.

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<sup>107</sup> Marx: *Value, Price and Profit* (2008 [1935]), 33.

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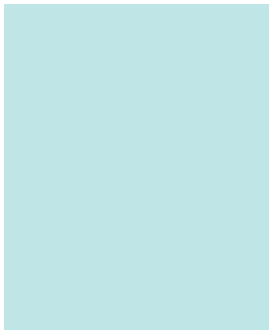
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