



# ECONOMIC ORDER OF THE EUROPEAN UNION AND ITS MEMBER STATES – LEGAL ASPECTS

# Economic Order

- Economic order/Economic Constitution
- Inclusive decision by a society about how its economic life is to be ordered (Vanberg, 1998)
- All economic activities take place within, and can be understood in the context of, that order (Eucken, 1992)
- Form of social contract relating to the market



# European Union

- ❑ Economics perspective: regional economic integration / trade block (customs union, monetary union, partially fiscal union)
- ❑ Legal perspective: *sui generis* legal order / *sui generis* new legal order of International Law (direct effect, supremacy)



# Treaty of Lisbon

TEU:

## Article 3

(ex Article 2 TEU)

(.....)

3. 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....



# Treaty of Nice

TEC:

## Article 4

*1..... the activities of the Member States and the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein, the adoption of an economic policy which is based on the close coordination of Member States economic policies, on the internal market and on the definition of common objectives, and **conducted in accordance with the principle of an open market economy with free competition...***



Treaty of Nice → Treaty of Lisbon

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Open market economy → Social market economy



December 1st 2009

# Social market economy

- Concept of German origin = *Soziale Marktwirtschaft*
- Alfred Müller-Armack, coined the term in a paper published in 1947
- Accredited for West German postwar recovery (*Wirtschaftswunder*)
- Evolved from ordoliberalism



# What is ordoliberalism?

- ❑ Ordoliberalism has its roots in Freiburg school of economic thought founded in 1930's, it was developed by German economists and legal scholars like Walter Eucken, Franz Böhm and Hans Grossmann-Doerth
- ❑ Ordoliberal theory holds that the state must create neutral legal environment for the economy and maintain a high level of competition (*ordnungspolitik*), thus strong emphasize on competition rules
- ❑ Ordoliberalas shared opposition to corporatist and oligopolistic economic policy of Nazi Germany which made them subject to moderate prosecution





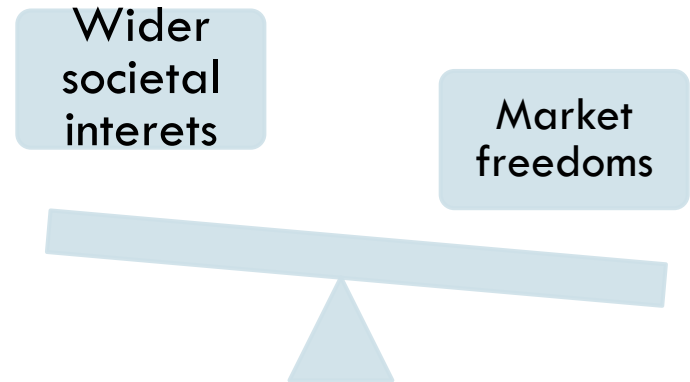
# What is the difference between ordoliberalism and neoliberalism?

- Share common roots – definition of liberalism on Walter Lippman Colloquium 1938 in Paris
- Unlike neoliberals ordoliberals are not opposed *a priori* to the strong role of the State (or public authority)
- For them market principles are the source of legitimacy for regulatory intervention in the market → Competition Law



# What is the difference between ordoliberalism and social market economy?

- ❑ Social market economy also interprets market freedoms as fundamental rights but allows for more balancing with wider societal interests.
- ❑ Balancing between market and wider societal interests in social market economy should be exercised by **neutral public authority** in **non-discriminatory and proportional manner**.
- ❑ Wider societal interests are never *a priori* above market interests *et vice versa*



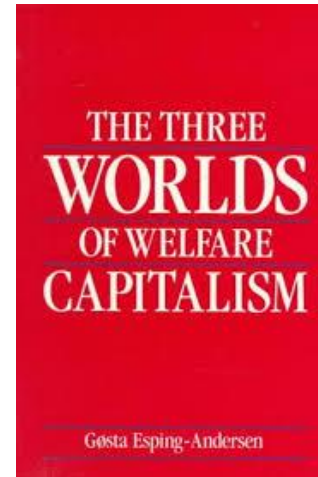
# Member States

- ▣ Gøsta Esping Andersen in his book *The Three Worlds of Welfare Capitalism* gives following classification:

Liberal model: ? (≠UK)

Christian-Democratic: Germany, France, Spain, Italy, Belgium, Austria

Social Democratic: Sweden, Netherlands, Denmark, Finland



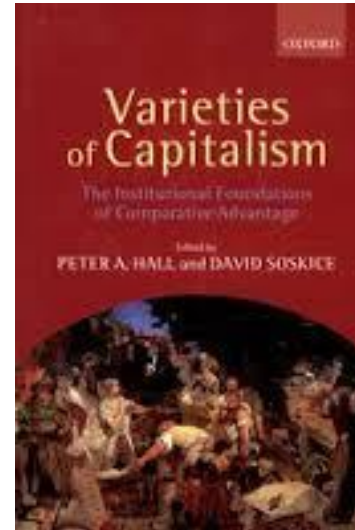
# Member Sates

Book *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, edited by political economists Peter A. Hall and David Soskice, provides two models:

Liberal market economies (LME): UK, Ireland

Coordinated market economies (CME):  
Germany, Austria, Sweden

Allowing for hybridity



# LME and CME - Varieties of Capitalism

## *Liberal market economies*

	Growth rate of GDP			GDP per capita		Unemployment rate		
	61-73	74-84	85-98	74-84	85-97	60-73	74-84	85-98
Australia	5.2	2.8	3.3	7932	16701	1.9	6.2	8.5
Canada	5.3	3.0	2.3	9160	18835	5.1	8.4	9.5
Ireland	4.4	3.9	6.5	4751	12830	5.0	9.1	14.1
New Zealand	4.0	1.8	1.7	7378	14172	0.2	2.2	6.9
UK	3.1	1.3	2.4	7359	15942	2.0	6.7	8.7
United States	4.0	2.2	2.9	11055	22862	4.9	7.5	6.0
LME average	4.3	2.5	3.2	7939	16890	3.2	6.7	8.9

## *Coordinated market economies*

	Growth rate of GDP			GDP per capita		Unemployment rate		
	61-73	74-84	85-98	74-84	85-97	60-73	74-84	85-98
Austria <sup>a</sup>	4.9	2.3	2.5	7852	17414	1.6	2.2	5.3
Belgium	4.9	2.0	2.2	8007	17576	2.2	8.2	11.3
Denmark	4.4	1.8	2.2	8354	18618	1.4	7.1	9.3
Finland	5.0	2.7	2.2	7219	15619	2.0	4.8	9.4
Iceland	5.7	4.1	2.7	8319	18285	0.6	0.6	2.5
Germany	4.3	1.8	2.2	7542	16933	0.8	4.6	8.5
Japan	9.7	3.3	2.6	7437	18475	1.3	2.1	2.8
Netherlands <sup>b</sup>	4.9	1.9	2.8	7872	16579	1.5	5.6	6.8
Norway	4.3	4.0	2.9	8181	19325	1.6	2.1	4.3
Sweden	4.2	1.8	1.5	8450	16710	1.9	2.3	4.8
Switzerland	4.4	.58	1.3	10680	21398	.01	0.4	2.5
CME average	5.1	2.4	2.3	8174	17902	1.3	3.6	6.1

Peter A. Hall, David Soskice  
(Eds), *Varieties of Capitalism:  
The Institutional Foundations of  
Comparative Advantage*, p 20

# Nordic model - *Folkhemmet*

- Little product market regulation
- Highest tax burdens
- Wide welfare policies, rule of law





## What about new Member Countries? Confused?

Don't be. Let us see how Economic Constitution works in practice.

# Example: *Viking* judgment of the Court of Justice of EU (C-348/05)

Viking Line, a Finnish shipping company, is the owner of the Rosella, a ferry flying the Finnish flag and plying the route between Tallinn and Helsinki.

Decision to reflag the Rosella by registering it in Estonia and entering into a collective agreement with an Estonian workers union (for lower wages) was stopped by union circular requesting its members to abstain from negotiations





# Example: *Viking* judgment of the Court of Justice of EU (C-348/05)

Viking broad and action before national court, claiming infringement of a freedom of business establishment as one fundamental market freedoms of EU Law.

Case was referred via preliminary ruling procedure to ECJ. The Court of Justice acknowledged that the right to take collective action, including the right to strike, constitutes a fundamental right which forms an integral part of the general principles of EU law.



Court added that that right must, however, be reconciled with the fundamental freedoms within the internal market, such that exercise of that right may be subject to certain restrictions, in accordance with the principle of proportionality.

# Example: *Viking* judgment of the Court of Justice of EU (C-348/05)

Court found that union actions have the effect of making less attractive, or even pointless, Viking's exercise of its right to freedom of establishment, such that they constitute restrictions on that freedom.

Next, it set out the criteria on the basis of which the referring court must examine whether or not justifications exist.

## Proportionality



# Proportionality test



- 1) Is there a legitimate aim for the measure?
- 2) Is the measure suitable to achieve a legitimate aim?
- 3) Is the measure necessary to achieve that aim or are less restrictive means available?
- 4) Does the measure have an excessive effect on the applicant's interests?

# Example 2: *Laval* judgment

## (C-341/05)

Latvian company, *Laval Un Partneri Ltd* won a contract from the Swedish government to renovate schools. Laval Ltd posted Latvian workers to Sweden to work on site. These workers earned much less than Swedish workers.

The Swedish Building Workers' Union requested Laval to sign its collective agreement. Laval refused to sign collective agreement. In response trade unions initiated a strike and a blockade of Laval buildingsites (collective action).



Laval brought action in front of the Swedish court regarding the legality of the collective action taken by trade unions and compensation for the loss.

# Example 2: *Laval* judgment

## (C-341/05)

Sweden does not have a system for declaring collective agreements universally applicable. Sweden also does not have a system of minimum pay.

Laval claimed *inter alia* that the blockade infringed free movement of services (now Article 56 TFEU) and prohibition of discrimination on grounds of nationality. The Swedish court referred the matter to the ECJ in the preliminary ruling procedure.



Posted Workers Directive (96/71/EC) requires of Member States to apply national minimum pay requirements to posted workers (thus, limiting social dumping).

# Example 2: *Laval* judgment

## (C-341/05)

Trade unions evoked right to strike (collective action in general) as fundamental right guaranteed by EU Law (and Swedish national law)

The Court of Justice concluded that a Member State in which the minimum rates of pay are not determined (in accordance with Posted Workers Directive) can not impose minimum pay to posted workers from other Member States.



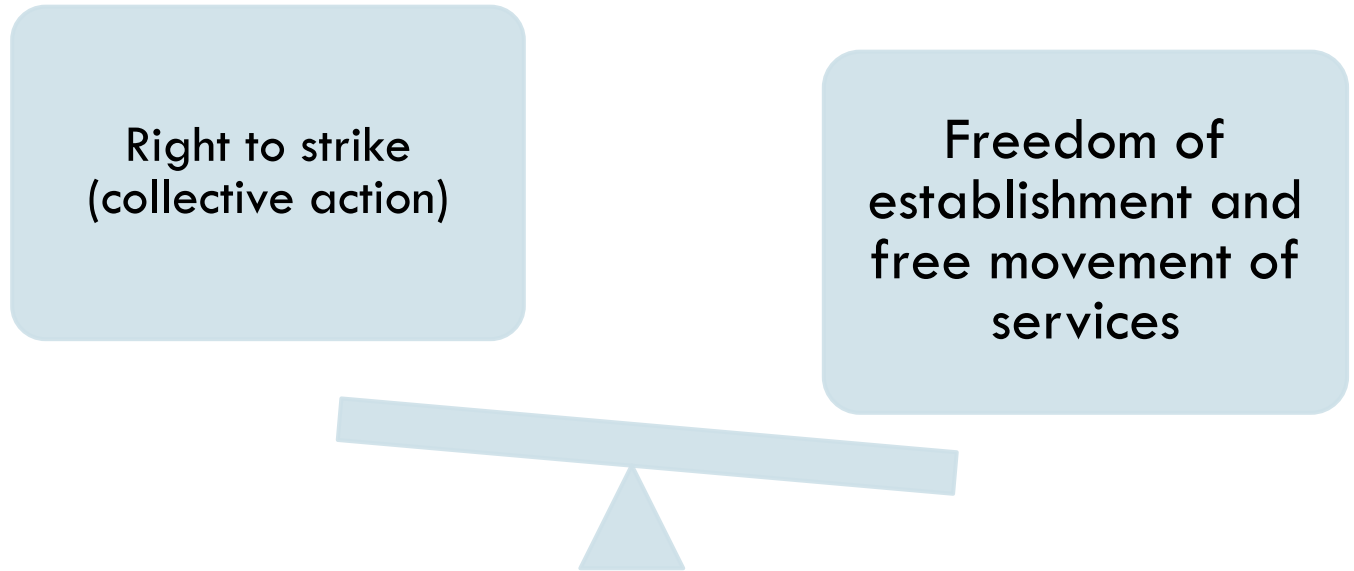
## Example 2: *Laval* judgment (C-341/05)

The Court went on to point out, as it had in the judgment in *Viking*, **that the right to take collective action constitutes a fundamental right, but that that right must nevertheless be reconciled with the fundamental freedoms guaranteed by the Treaty.**

ECJ concluded that trade union's blockade of Laval constituted discrimination on grounds of nationality and impediment to free movement of services that can not be justified by the reasons of public policy, public security or public health.



# *Viking* and *Laval* – balancing between wider societal interest and market freedoms





# Opinion of Advocate General Maduro in *Viking* case- ordoliberal interpretation?

*The rules on freedom of movement and the rules on competition achieve this purpose principally by granting rights to market participants. Essentially, they protect market participants by empowering them to challenge certain impediments to the opportunity to compete on equal terms in the common market. The existence of that opportunity is the crucial element in the pursuit of allocative efficiency in the Community as a whole. Without the rules on freedom of movement and competition, it would be impossible to achieve the Community's fundamental aim of having a functioning common market.*

(para 33 of the Opinion)



# Example 3: Mars judgment

## (C-470/93)

Consumer protection association from Koeln initiated proceedings against Mars GmbH company for misleading marketing practice violating German Law on Unfair Competition (UWG) - selling ice cream bars presented in wrappers marked "+10%"; despite the fact that "10%" part occupied more than 10% of wrapping and that price actually increased.

Mars GmbH imported ice cream bars from France. German court, Landgericht Koeln, referred the matter to the ECJ in preliminary ruling procedure.



# Example 3: Mars judgment

## (C-470/93)

German standard is uninformed consumer, most EU member countries has adopted in their national regulation stricter standard of reasonable informed consumer.

Prohibition of marketing for product in question constitute obstacle to trade among Member States. However is this obstacle proportional for the achievement of legitimate objective - consumer protection (recognized by earlier case-law)?



The Court of Justice concluded that such prohibition would be contrary to the Treaty provisions on free movement of goods.

# Example 4: Case A.G.M.-COS.MET (C-470/03)

AGM is a Italian company that manufactures and sells vehicle lifts. The Finnish authorities issued a report that found certain deficiencies in these lifts, but, in the absence of sufficient evidence, their use was not restricted or prohibited.

In a television news interview, Mr. Tarmo Lehtinen, an official of the Finnish administration, stated that the lifts could be dangerous.



# Example 4: Case A.G.M.-COS.MET (C-470/03)

AGM applied to the Finnish Court, seeking compensation from the Finnish State and Mr. Lehtinen for the damage caused to its business.

Case was referred in preliminary ruling procedure to the Court of Justice on interpretation of the rules on the free movement of goods and on the conditions of liability for infringement of EU law.



Can a public statement by a civil servant constitute an obstacle to the free movement of goods?

# Example 4: Case A.G.M.-COS.MET (C-470/03)

The Court of Justice concluded **that even a public statements of civil servants**, assuming that they are attributable to Member State, **can constitute an obstacle to the free movement of goods.**

ECJ did not apply directly Treaty provisions on free movement of goods to the case. Instead provisions of Directive 98/37/EC on machinery (containing exhaustive harmonization on free movement of machinery in EU) served as directly applicable basis for ruling in this case.



# Extensive interpretation of free movement rules – judicial activism in free movement of goods

## Article 34 TFEU

**Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.**



*Dassonville* formula (case 8-74):

**All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions**

(para 5)

# Competition Law – Abuse of dominance

## Article 102 TFEU

(ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) **directly or indirectly imposing unfair purchase or selling prices** or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.



# Abuse of dominance - excessive prices

## EU ≠ USA



ECJ: price is excessive when it has *no reasonable relation to the economic value of the product supplied* (case [27/76 United Brands](#) , para 248-249)

unfair prices (Art 102 TFEU)

Supreme Court of the United States:

*The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system*

(case *Verizon Communications, Inc v Law Offices of Curtis V Trinko, LLP* 157 L Ed 2d 823, 836).

# Can the EU be Social market economy?

According to Theory of double asymmetry in European integration, developed by Fritz W. Scharpf, emeritus director of the Max Planck Institute for the Study of Societies, in 2012 it can't.

Scharpf accepted models from Hall/Soskice *Varieties of Capitalism*:

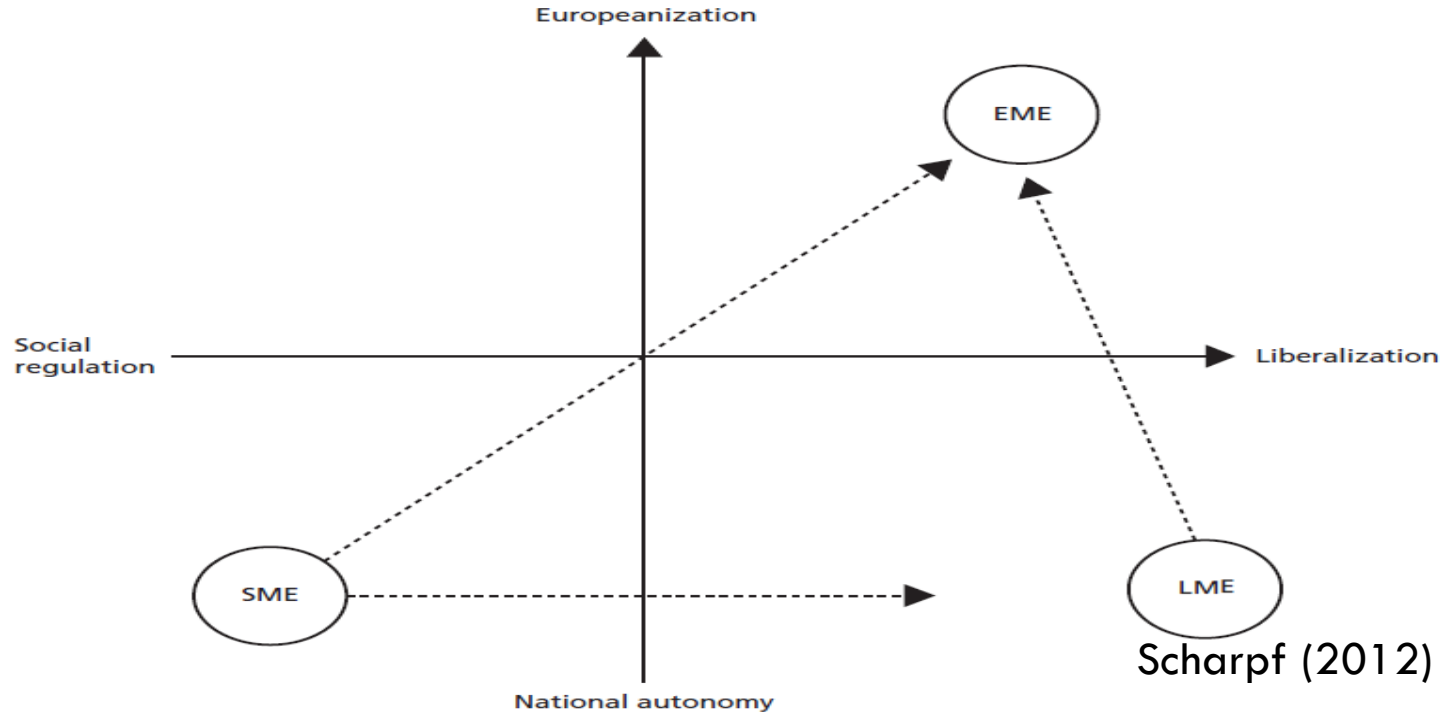
Liberal Market Economies - LME

Social Market Economies - SME (Hall/Soskice CME)



Since 1973 enlargement intrinsic tension exists in the process of European integration between SME and LME – result will be dominance of LME

# Can the EU be Social market economy?



# Can the EU be Social market economy?

## Counterarguments:

Normative: Article 3 TFEU requires design of EU internal Market as social market economy

### Article 4 TFEU

*The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives* → principle of sincere cooperation

German Federal Constitutional Court judgment on the Treaty of Lisbon (BVerfG, 2BvE, 2/08) gives room to conclusion that formation of economic order is left to the EU supranational institutions permanently

# Can the EU be Social market economy?

## Counterarguments:

Substantive: Strongest and most successful EU economy is Germany- a birthplace of social market economy was triumphant in the global recession

SME  $\neq$  Nordic model

Conclusion: Yes it can



# Questions and discussion



Thank you!

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