

Conference
Legal reform and EU enlargement – Transfer of experiences
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Dominik Vuletić,
PhD Candidate,
Law Department, Faculty of Economics and Business,
University of Zagreb

***ECONOMIC ORDER OF THE EU IN THE CASE LAW OF
THE COURT OF JUSTICE: NEW INTERPRETATION AND
RECENT DEVELOPMENTS***

Structure of the presentation:

- A) PhD research: general outline of the research proposal
- B) Selected issues: direct horizontal effect of the free movement rules?

A) PhD research: general outline of the research proposal

1. Introduction and conceptualization
2. Aim of the research
3. Work plan and methodology
4. Expected contribution

1. Introduction and conceptualization

Substantive content of the economic system



question of fundamental importance for every organized polity

Answer: substantive basis (substantive source of law, *fontes iuris essendi*) followed by formal normative regulation of the economic system (formal source of law, *fontes iuris cognoscendi*).



meta-juridical basis

(pre-legal nature)

1. Introduction and conceptualization

- Thought the course of human history various economic systems have been proposed:

-anarchism

-barter economy

-binary economics

-communism

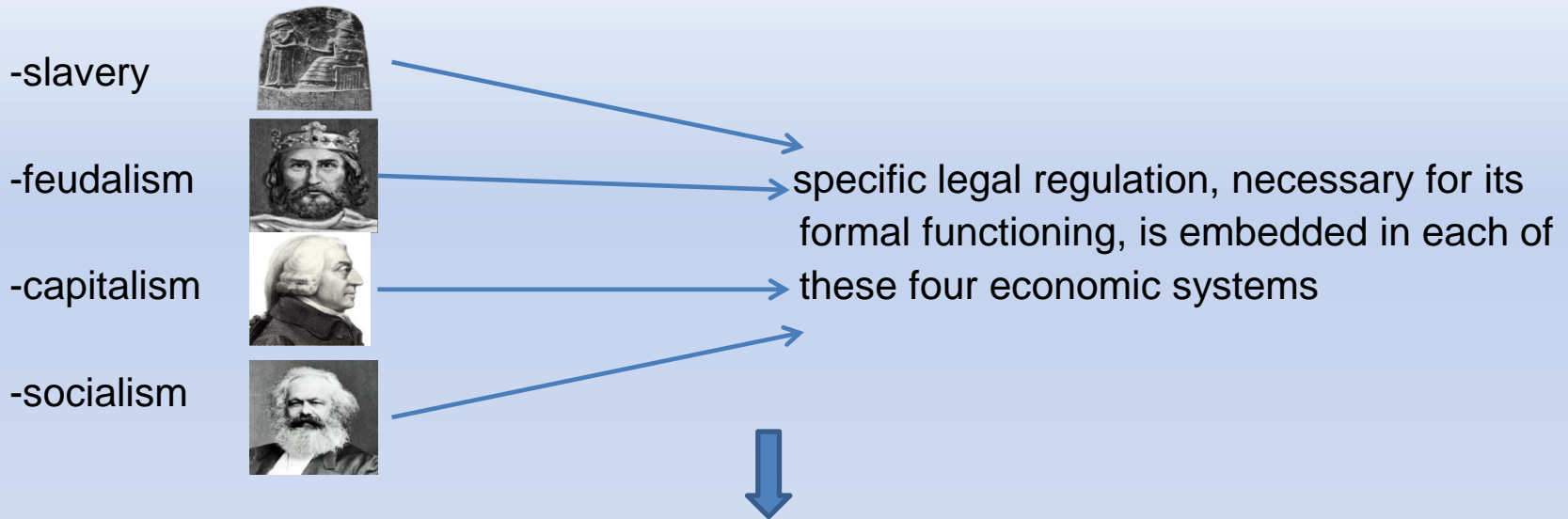
-progressive utilisation theory (PROUT)

-gift economy

(....)

1. Introduction and conceptualization

History has shown that only four economic systems have been achieved so far by a civilized society:



However, these four economic systems are not static constructs but rather open concepts with various levels of specialization in inter-human relations and, more importantly, with possibility of redefinition and change

1. Introduction and conceptualization

EUROPEAN UNION

Economic perspective: - capitalism
(free market economy, capitalist mode of production)

- regional economic integration

Legal perspective: -new legal order (*sui generis*) of international law

-international organization (legal person)

1. Introduction and conceptualization

Primary assumption: capitalistic nature of EU (?) → open to discussion

Economy aspect of the Copenhagen criteria:

-functioning market economy

(producers have the capability to cope with competitive pressure and market forces within the Union)

Continuation of the completion of Internal market

Existence of:

- private ownership (art. 17 CFREU, constitutional tradition common to member states...)
- competition rules in EU law

1. Introduction and conceptualization

- However, non-static(ever-changing) nature of economics systems in general leaves primary assumption of capitalistic nature open to redefinition

EU => service orientated economy (tertiary sector of the economy >71% GDP, > 69% workforce)

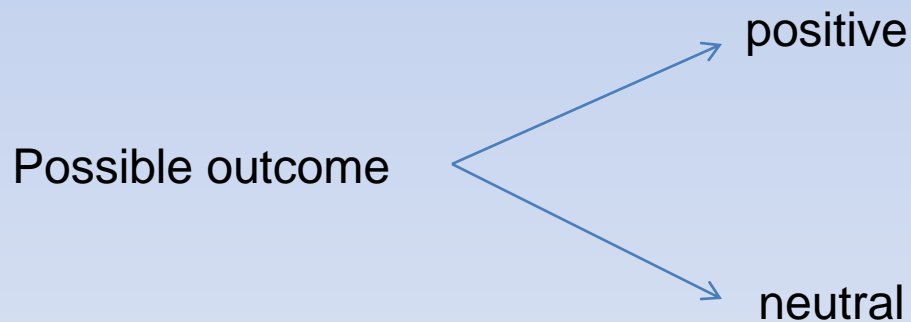
= post-industrial society in terminology of David Bell

General critique of the term:

“post” prefix – transitional form (capitalism is in that sense “post-feudal “ society) ?

2. AIM OF THE RESEARCH

AIM: to determine whether there is a specific economic order embedded in the legal norms of European law



2. AIM OF THE RESEARCH

In the case of positive outcome (specific economic order embedded in EU Law) research will try to answer following questions:

- When did specific economic order emerge in the EU law – at the beginning of the integration process or later?
 - ➔ influence of the Treaty of Lisbon entry into force?
- Who are its representatives in the institutional structure of the EU?
- What is the content of the economic order?


3. WORK PLAN AND METHODOLOGY

In order to answer research questions dissertation will analyze:

- case-law of the CJEU
- administrative practice of other institutions (Commission in particular)

In selected two areas:

-Internal market law  primary EU Law

-Competition law  abuse of dominant position of undertakings

3. WORK PLAN AND METHODOLOGY

Primary law focus – 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. It shall promote scientific and technological advance.*

3. WORK PLAN AND METHODOLOGY

TFEU:

Article 34

(ex Article 28 TEC)

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

3. WORK PLAN AND METHODOLOGY

TFEU:

Article 102

(ex Article 82 TEC)

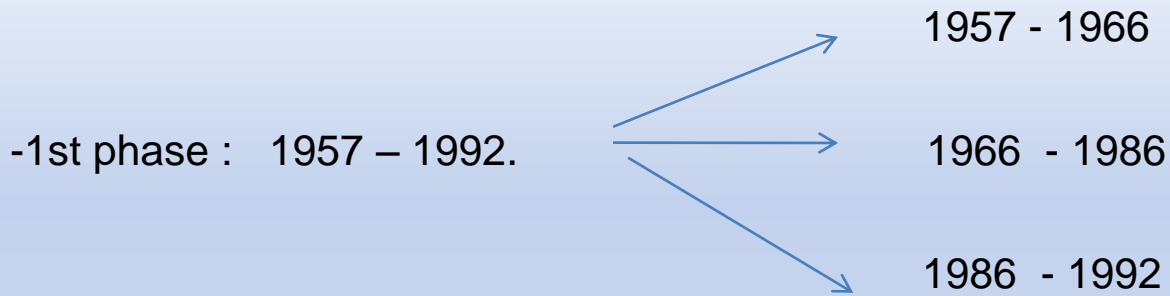
*Any **abuse by one or more undertakings of a dominant position** within the internal Market or in a substantial part of it **shall be prohibited** as incompatible with the internal market **in so far as it may affect trade between Member States.***

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.*

3. WORK PLAN AND METHODOLOGY

Research will divide integration process in to three phases:



-2nd phase: 1992 - 2009

-3d phase: > 2009



3. WORK PLAN AND METHODOLOGY

STRUCTURE

- dissertation will be structured in three chapters (not including introduction and conclusion) :

The first chapter will clarify the concepts of economic science that will be used in further analysis in the context of European integration, e.g. :

- efficiency,
- market failure,
- regulatory failure;

macro-economic concepts and theories will also be analysed in that particular context:

- Welfare state,
- Keynesian economics,
- Neoliberalism and ordoliberalism.

3. WORK PLAN AND METHODOLOGY

Chapter 1:

- Economic theory in the context in the European integration process



Research focus in the first chapter will be devoted to concept of **social market economy** as the EU aim established in primary law by legal force of the Lisbon Treaty (Article 3, paragraph 3 TEU).

3. WORK PLAN AND METHODOLOGY

Chapter 2: analysis of the internal market case-law of the CJEU

Three phases of the integration process (previously mentioned)



-in **historical context**

The jurisprudence analysis will specially focus on the **differences between previously established case-law** and the new developments.

Work of other EU institutions, primarily the European Commission, Council and the Parliament will also be discussed.

3. WORK PLAN AND METHODOLOGY

Chapter 3:

The third chapter will analyze the jurisprudence of the Court of the EU and the administrative practice of the European Commission in the area of abuse of a dominant position of undertakings in the Competition law.

The analysis will be carried out comparatively to the development in the United States to detect substantial differences between two regulatory models.

Degree of the intervention in the market.

3. WORK PLAN AND METHODOLOGY

Methodology :

-interdisciplinary and transdisciplinary method

-use of Law and Economics (Economic Analysis of Law)

-comparative legal method: comparison with the regulation in the U.S. in the field of dormant commerce clause and Institute of abuse of dominant position

-analysis of judicial and administrative case-law

-detecting future developments

3. WORK PLAN AND METHODOLOGY

Extensive use of existing literature on the subject, e.g: C. Joerges i F. Rödl *Social Market Economy as Europe's Social Model*, C.Joerges “*The Market without the State? The Economic Constitution of the European Community and the Rebirth of Regulatory Politics*” L.M.P.Maduro “*We the Court – The European Court of Justice and the European Economic Constitution*”.

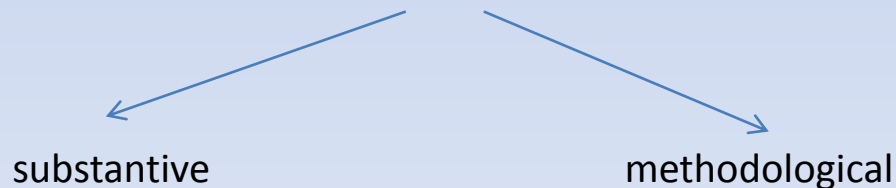
4. Expected contribution

question of the nature of the economic system and legal norms embedded in it:
fundamental importance for every *polity*.

-actual in the context of Global economic crisis
(general discussion on the regulation of economic order in the post-industrial society)

-introduction of the concept of the social market economy in the Lisbon Treaty is not sufficiently explored

Thus, contribution of the research should be twofold:



B) Selected issues: direct horizontal effect of the free movement rules?

A) Application of free movement rules to private parties

B) General importance

1. Application of free movement of goods rules to private parties

Direct effect of Art. 34 TFEU:

Very early

Famous 1963 *Van Gend en Loos* (Case 26-62) ruling:

direct effect of rules prohibiting new custom duties

Gingerbread case-*Commission v Luxembourg and Belgium* (Joined cases 2/62 and 3/62):

direct effect of prohibition of quantitative restrictions

1. Application of free movement of goods rules to private parties

However, Court has never recognized direct horizontal effect of this rules

SINCE ARTICLES 30 AND 34 OF THE TREATY CONCERN ONLY PUBLIC MEASURES AND NOT THE CONDUCT OF UNDERTAKINGS, IT IS ONLY THE COMPATIBILITY WITH THOSE ARTICLES OF NATIONAL PROVISIONS OF THE KIND AT ISSUE IN THE MAIN PROCEEDINGS THAT NEED BE EXAMINED

(Case C-311/85, paragraph 30)

-different in other market freedoms e.g. 1974 *Walrave and Koch* ruling in the freedom to provide services

1. Application of free movement of goods rules to private parties

Winds of change?

Dansk Supermarked (Case C-58/80, para.17) :

IT MUST FURTHERMORE BE REMARKED THAT IT IS IMPOSSIBLE IN ANY CIRCUMSTANCES FOR AGREEMENTS BETWEEN INDIVIDUALS TO DEROGATE FROM THE MANDATORY PROVISIONS OF THE TREATY ON THE FREE MOVEMENT OF GOODS

-IP legal context

Fra.bo (Case C-171/11, para. 32)

Article 28 EC [34. TFEU] must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body.

2. General importance

-recognizing direct horizontal effect would give impetus to the reading of Article 34. as economic due process clause, possibly even in the ordo-liberal context

-it would produce considerable case-law burden of the CJEU

Market building v. market maintenance



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THANK YOU FOR YOUR ATTENTION !