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European Economic Law: a Missing Link in the Debate on Participatory Democracy in the EU

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Introduction

Participatory democracy has permeated the institutional and, eventually, the constitutional discourse of the EU. To such an extent that it has now been erected by Article 11 TEU, even if it does not say so explicitly, to the status of a democratic principle which should guide the European Union in its quest for legitimacy. This article presents a two-dimensional picture of participatory democracy. It is, on the one hand, concerned with the direct participation of *citizens* in the political life of the EU. It is, on the other hand, dealing with the participation of *organised civil society* in EU governance. Indeed, according to Article 11 TEU, the Commission shall consult widely with interested parties, including civil society organisations.¹ Moreover, institutions shall give representative associations the opportunity to make known and publicly exchange their views, but they will also maintain an open, transparent and regular dialogue with representative associations and civil society.²

How can this civil society-centric conception of participatory democracy be assessed in normative terms? This paper, relying on the theoretical framework elaborated by Cohen & Arato in their famous *Civil Society and Political Theory*,³ will put forward the view that civil society should be seen as a sphere of *participation* between *state* and *market* (Section 1). It will be argued that, in this respect, civil society's involvement in European governance might

¹ Art 11 (3) TEU.

² Art 11 (1) (2) TEU.

³ JL Cohen and A Arato, *Civil Society and Political Theory* (MIT Press, Cambridge 1992).

bring much needed relief to the crisis which afflicts *representative* politics in the EU. It will, however, be claimed that the EU, if it wants to take advantage of the democratic virtues usually associated with civil society, needs first to confront the paradoxes of its participatory discourse: this bottom-up participation for which civil society's involvement in European governance is praised depends on the autonomy civil society has gained from the administrative and economic spheres, autonomy which would necessarily be threatened by 1) the bureaucratic imperative of European governance and 2) the market imperative of European economic law. While the governance-participation paradox has received much attention, the market-participation paradox has been completely overlooked by existing literature, to such an extent that European economic law is still a missing link in the debate on participatory democracy in the EU. This oversight is a problem considering that European economic law could well threaten the autonomy of civil society if it does not limit the reach of its market imperative (Section 2). The empirical relevance of this concern becomes clear once we focus on social CSOs and the constraints that negative integration imposes on national social policies aiming at empowering civil society against the market (Section 3). In conclusion, the limits inherent to the legal approach adopted here are discussed within the wider context of a globalised economic order which increasingly restricts what national social policies can do.

Section 1: Civil Society as a Sphere of Participation between State and Market

According to *Cohen & Arato's* tripartite framework, civil society is 'a sphere of social interaction between economy and state, composed above all of the intimate sphere (especially the family), the sphere of associations (especially voluntary associations), social movements,

and forms of public communication'.⁴ This sphere is distinguished 'from both a political society of parties, political organizations, and political publics (in particular, parliaments) and an economic society composed of organizations of production and distribution'.⁵ 'Political and economic society generally arise from civil society'; they however do not belong in civil society, for they 'are directly involved with state power and economic production, which they seek to control and manage'.⁶

While agreeing with participatory theory that 'without public spaces for the active participation of the citizenry in ruling and being ruled (...) polities are democratic in name only',⁷ *Cohen & Arato* however rejects the institutional models proposed by participatory theorists,⁸ for they all threaten the foundations of our modern, differentiated societies.⁹ Instead, it chooses to 'locate the genesis of democratic legitimacy and the chances for direct participation not in some idealized, dedifferentiated polity but within a highly differentiated model of civil society itself'.¹⁰ The neo-Tocquevillian thesis that civic engagement in a plurality of local, and to some extent, overlapping voluntary associations, provides citizens with the habits of cooperation, solidarity, and public spiritedness which make democracy

⁴ *Cohen & Arato* (n 3) pref ix.

⁵ *Cohen & Arato* (n 3) pref ix.

⁶ *Cohen & Arato* (n 3) pref ix-x.

⁷ *Cohen & Arato* (n 3) 7.

⁸ See, ie, P Bachrach, *The Theory of Democratic Elitism* (Little, Brown and Company, Boston 1967); C Pateman, *Participation and Democratic Theory* (CUP, Cambridge 1970); CB Macpherson, *The Life and Times of Liberal Democracy* (OUP, Oxford 1977); B Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, London 1984); JD Wolfe, 'A Defense of Participatory Democracy' (1985) 47 *The Review of Politics* 370.

⁹ *Cohen & Arato* (n 3) 7.

¹⁰ *Cohen & Arato* (n 3) 19.

work,¹¹ is here restated in the perspective of a modern, differentiated civil society seen as ‘a seedbed for the cultivation of citizenship’.¹²

Cohen & Arato grounds democratic legitimacy in discourse ethics which holds that ‘just those norms deserve to be valid that could meet with the approval of those potentially affected, insofar as the latter participate in rational discourses’.¹³ Rational discussion presupposes that participants recognise each other as *equals*, that is, ‘as autonomous, rational subjects whose claims will be acknowledged if supported by valid arguments’.¹⁴ The dialogue between participants must, moreover, be *public*, that is, unconstrained by political and economic factors and open to the *participation* of all interested parties.¹⁵

In this respect, the discourse-ethical principle of democratic legitimacy demands the institutionalisation of a *plurality of democracies*.¹⁶ What matters, therefore, is that existing forms of democracy be democratised further according to the requirements of discourse ethics and be supplemented, completed, but never replaced, by other forms of democracy. Democratisation of the economic and political sphere according to this pluralist ideal is very much constrained by the coordinating mechanisms of money and power which prevail, and need to prevail if differentiation is to be maintained, in those spheres. It is then at the level of civil society that the plurality of democracies can hope to find its fullest expression, for civil society provides a fertile institutional terrain for the norms of *publicity*, *plurality* and

¹¹ RD Putnam, R Leonardi and R Nanetti, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, Princeton 1993) 89-90. See also A de Tocqueville and H Reeve (tr), *Democracy in America* (1899) Electronic Edition Deposited and Marked-Up by ASGRP, the American Studies Programs at the University of Virginia, 1 June 1997 <<http://xroads.virginia.edu/~HYPER/DETOC/>> accessed 16 April 2011.

¹² B Barber, 'Three Challenges to Reinventing Democracy' in PQ Hirst and S Khilnani (eds), *Reinventing democracy* (Blackwell, Oxford 1996) 151. See also *Cohen & Arato* (n 1) 19.

¹³ J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press, Cambridge 1996) 127. See also *Cohen & Arato* (n 3) 347-348.

¹⁴ *Cohen & Arato* (n 3) 348.

¹⁵ *Cohen & Arato* (n 3) 348.

¹⁶ *Cohen & Arato* (n 3) 410-420.

participation which underpin discourse ethics.¹⁷ Indeed, civil society refers to the institutional anchoring of a communicatively-coordinated *public* sphere into the lifeworld.¹⁸ Civil society is, moreover, often described as a *pluralist* sphere conducive to small-scale *participation* in a wide array of social institutions.¹⁹ The foundations are then already laid in civil society for a democratisation of society according to the norms of publicity, plurality and participation.²⁰

As will be shown in the next section, this political theory is fully in line with the democratic aspirations which have motivated the turn to civil society in the EU, for it locates ‘the normative necessity and empirical possibility of democratization in civil society’,²¹ seen a civic sphere in which citizens participate in addition to traditional representative channels. The relevance of *Cohen & Arato*’s tripartite framework for participatory democracy in the EU becomes even clearer when set in the context of the social theory which underpins it.

The tripartite model is grounded on the conceptual framework elaborated by Habermas in its ‘critique of functionalist reason’²² wherein the *economic* and *administrative* subsystems are distinguished from each other and from the *lifeworld*.²³ While the state and the economy are steered by the media of power and money respectively, the lifeworld reproduces itself through the forces of communication.²⁴ For *Cohen & Arato*, the lifeworld is a double-headed concept. On the one hand, it refers to ‘the linguistically structured stock of knowledge, the

¹⁷ *Cohen & Arato* (n 3) 419. See also *Habermas* (n 13) 368; Opinion of the Economic and Social Committee on ‘The Role and Contribution of Civil Society Organisations in the Building of Europe’ [1999] OJ C329/10, 32-33.

¹⁸ *Habermas* (n 13) 366-367.

¹⁹ See *de Tocqueville* (n 11); *Putnam* (n 11); *Barber* (1996) (n 12).

²⁰ *Cohen & Arato* (n 3) 417.

²¹ *Cohen & Arato* (n 3) 411.

²² *Cohen & Arato* (n 3) 426. See J Habermas, *The Theory of Communicative Action /Vol.2, Lifeworld and System: A Critique of Functionalist Reason* (Polity Press, Cambridge 1987).

²³ On the lifeworld/system distinction, see L Goode, *Jürgen Habermas : Democracy and the Public Sphere* (Pluto Press, London 2005) 62-71.

²⁴ *Cohen & Arato* (n 3) 426-427.

reservoir of unshaken convictions, and the forms of solidarity and competence' on which social actors rely without question.²⁵ On the other hand, it encompasses the institutions specialised in the reproduction of those very resources. It is on this last, institutional, level that *Cohen & Arato* locates civil society as a concept including 'all of the institutions and associational forms that require communicative interaction for their reproduction and that rely primarily on processes of social integration for coordinating action'.²⁶ Civil society is therefore pictured as a distinctly modern construct referring to all those social institutions which specialise in the reproduction of solidarity, this scarce and precarious resource which needs to be constantly renewed through the life of associations.²⁷ It is situated on the institutional level of a rationalised lifeworld based on the logic of communicative action where deference to traditions has been replaced by 'a new and reflexive relation, *a nontraditional relation to tradition*'.²⁸

This rationalisation of the lifeworld would not have been possible without the development of the economic and administrative subsystems because they have unburdened the lifeworld from strategic concerns related to money and power.²⁹ The paradox of modernity is however that 'the same processes that are among the constitutive conditions of a modern lifeworld also represent the greatest potential threats to that lifeworld'.³⁰ Indeed, the expansion of the economic and administrative subsystems which has relieved the lifeworld from the strategic concerns which stifled its communicative potential, now comes to threaten the lifeworld it has set free; to such an extent, says *Cohen & Arato*, that a primordial task is now to protect

²⁵ *Cohen & Arato* (n 3) 428.

²⁶ *Cohen & Arato* (n 3) 429.

²⁷ *Cohen & Arato* (n 3) 472.

²⁸ *Cohen & Arato* (n 3) 435-436.

²⁹ *Cohen & Arato* (n 3) 439.

³⁰ *Cohen & Arato* (n 3) 440.

the lifeworld against the dark side of modernity, that is, its *colonisation* by the media of power and money.³¹

This implies a two-pronged strategy: erecting *barriers* against colonisation and establishing *sensors of influence* over the administrative and economic subsystems.³² It is for fundamental rights, seen as ‘the *organizing principle* of a modern civil society’,³³ to stabilise social differentiation and strengthen the barriers defending the lifeworld against both media,³⁴ while a politics of influence aimed at the administrative and economic subsystems, to be successful, calls for the introduction of discursive structures within those subsystems with a view to make them receptive to the communicative influence of civil actors.

It will be argued in the next section that this social theory sheds light on the fundamental paradoxes which haunt the EU participatory discourse. Indeed, how can civil society be expected to contribute to participatory democracy in the EU if its autonomy is threatened by the bureaucratic imperative of European governance and the market imperative of European economic law?

Section 2: Civil Society, Participatory Democracy and the EU

The EU political system has been democratised according to a strategy which seems to perfectly fit the pluralist credo.³⁵ This strategy has involved, on the one hand, developing a political society at the EU level with, at its centre, a strong European parliament able to keep the European executive in check, and, on the other, reinforcing the grip of national political

³¹ Cohen & Arato (n 3) 448-449. On the concept of ‘colonisation’, see W Outhwaite W, *Habermas : A Critical Introduction* (2nd ed Polity, Cambridge 2009) 80-105.

³² Cohen & Arato (n 3) 489, 471.

³³ Cohen & Arato (n 3) 442.

³⁴ Cohen & Arato (n 3) 477-478.

³⁵ See, ie, D Beetham and C Lord, *Legitimacy and the EU* (Longman, London 1998).

societies over their own executive in the Council. Territorial representation has even been extended down to regional and local interests since the creation of the Committee of the Regions, while functional interests are channelled through the Economic and Social Committee.³⁶

The democratisation of the EU is, however, confronted by some important hurdles: while national parliaments' scrutiny of their executive in the Council is inevitably limited, the European political society has not yet fully taken off.³⁷ Both democratic deficits have contributed to the creation of a legitimacy gap between EU power-holders and their constituencies. Increasing abstention at Euro-elections as well as the repeated failure of EU-related referenda attests indeed to citizens' growing scepticism, disillusionment and lack of commitment to the European project. There is, moreover, mounting concern that this gap which seems to grow wider between the EU and its citizens is only the tip of the iceberg, the reflection of a wider crisis affecting the legitimacy of modern *representative* democracies more generally.³⁸

Aware of the need to bring the EU closer to its citizens, European institutions have come to develop the discourse that participatory democracy could be introduced so as to *complement* and *support* the already existing democratic channels of representation.³⁹ Beside timid inroads into direct, citizen-based democracy, participatory democracy is mainly understood by EU institutions from a civil-society-centric perspective as the participation of organised

³⁶ See, ie, S Smismans, *Law, Legitimacy, and European Governance: Functional Participation in Social Regulation* (OUP, Oxford 2004).

³⁷ See, ie, A Follesdal and S Hix, 'Why there is a Democratic Deficit in the EU : A Response to Majone and Moravcsik' (2006) 44(3) *JCMS* 533.

³⁸ See, ie, R Dehousse, 'European Governance in Search of Legitimacy: The Need for a Process-Based Approach' in O De Schutter, N Lebeisis and J Paterson (eds), *Governance in the European Union* (Office for Official Publications of the European Communities, Luxembourg 2001).

³⁹ See S Smismans, 'The Constitutional Labelling of 'the Democratic Life of the EU': Representative and Participatory Democracy' in L Dobson and A Follesdal (eds), *Political Theory and the European Constitution* (Routledge, New York 2004) 122.

civil society in European governance,⁴⁰ with the confidence that, because ‘belonging to an association is another way for citizens to participate actively, in addition to involvement in political parties or through elections’,⁴¹ the establishment of a more open, transparent and regular dialogue with civil society⁴² will represent ‘a chance to get citizens more actively involved in achieving the Union’s objectives’.⁴³

Participatory democracy so conceived suggests a departure from the elite politics which has characterised European integration so far, for the mere representation of citizens’ interests by professional, organised elites would make way for the direct involvement of a civil society of active citizens in European governance. Yet, merely eulogising the democratic virtues of civil society on paper will not do. In order to take advantage of them, the EU needs, first, to confront the paradoxes of its participatory discourse: this bottom-up participation for which it praises civil society’s involvement in European governance crucially hinges on the autonomy civil society has gained from both the administrative and economic subsystems, autonomy which is necessarily threatened by 1) the bureaucratic logic of European governance and 2) the market imperative of European economic law. Ignoring those paradoxes could come at great cost for civil society and would run counter to the democratic reasons for which the EU turned to civil society in the first place.

Taking its cue from *Cohen & Arato*’s assumption that civil society is a sphere of civic *participation*, this paper argues that civil society’s involvement in European governance *might* bring much needed relief to the crisis of *representation* which afflicts EU politics. It is

⁴⁰ See Intro.

⁴¹ Commission (EC), ‘Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission’ (Communication) COM (2002) 704 final, 11 December 2002, 5.

⁴² Art 11 (2) TEU.

⁴³ Commission (EC), ‘European Governance: A White Paper’ COM (2001) 428 final, 25 July 2001, 15.

however contended that, for civil society to maintain the autonomy without which it could not realise its participatory potential in the EU, and this is this thesis's answer to the governance-participation paradox, civil society's participation ought to take place within and through the framework of a European governance structure which has been democratised according to the requirements of discourse ethics.⁴⁴

Contrary to the governance-participation paradox which has already caught the attention of many scholars, the participation-market paradox has so far been absent from the theoretical debate on European civil society. This is curious, to say the least, for participatory theorists have made quite clear that participatory democracy prescribes a reform of the structures of corporate capitalism.⁴⁵ In other words, there cannot be *political* equality without a fair degree of *social* and *economic* equality.⁴⁶ Ideally, wealth should be distributed in such a way that 'no citizen shall ever be wealthy enough to buy another, and none poor enough to be forced to sell himself'.⁴⁷ 'A society of economic equality and economic independence',⁴⁸ that is, 'a one-class society of working proprietors',⁴⁹ is therefore advocated.

This concern has then been taken on board by the modern, pluralist, associative and deliberative, variants of participatory democracy. Habermas, on whom many deliberative theorists rely, has paid a great deal of attention to the need to protect the lifeworld against the

⁴⁴ For a similar view, see D Curtin, '*Civil Society' and the European Union: Opening Spaces for Deliberative Democracy?* (Collected courses of the Academy of European law, Florence 1996) 208.

⁴⁵ See P Bachrach, *The Theory of Democratic Elitism* (Little, Brown and Company, Boston 1967); C Pateman, *Participation and Democratic Theory* (CUP, Cambridge 1970); CB Macpherson, *The Life and Times of Liberal Democracy* (OUP, Oxford 1977); B Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, London 1984); JD Wolfe, 'A Defense of Participatory Democracy' (1985) 47 *The Review of Politics* 370.

⁴⁶ *Macpherson* (n 45) 100.

⁴⁷ GDH Cole (tr) and JJ Rousseau, 'The Social Contract Or Principles of Political Right' (1762) Liberty Library of Constitutional classics <<http://www.constitution.org/jjr/socon.htm>> accessed 23 February 2011, Book II, Chap 11.

⁴⁸ *Pateman* (n 45) 22.

⁴⁹ *Macpherson* (n 45) 16-17.

colonising tendencies of the economic subsystem,⁵⁰ while Hirst has put forth associative democracy as a means for citizens to reassert control over corporate capitalism, pleading for an extension of associationalist principles to the corporate sector.⁵¹ Finally, Dahl, an important proponent of pluralism, has pointed out that market capitalism, even though it is far more favourable to democratic institutions than any nonmarket economy, harms democracy in a number ways.⁵²

Once those theories have been uploaded to the European stage, the negative impact that the market can have on democracy and civil society has however been left unaddressed. This shortcoming is difficult to fathom since the EU has grown out of the initially purely economic project of building an internal market in which competition is free and undistorted. With this purpose in mind, the EEC treaty contained provisions aiming at the removal of barriers to the free movement of factors of production, as well as provisions prohibiting anti-competitive practices. Those provisions, reinforced by the subsequent case-law of the ECJ consecrating their primacy and direct applicability in the European legal order, have now been elevated to a constitutional status.⁵³

It is argued, and this is this thesis' answer to the participation-market paradox, that participatory democracy in the EU would not be achievable if European economic law was a *carte blanche* given to the functional need of expanding competitive markets, as this would lead to legally-backed colonisation of civil society by the market imperative. The normative requirement drawn from this section is therefore that *European economic law needs to be*

⁵⁰ J Habermas, *The Theory of Communicative Action /Vol.2, Lifeworld and System: A Critique of Functionalist Reason* (Polity Press, Cambridge 1987).

⁵¹ PQ Hirst, 'Can Associationalism Come Back?' in PQ Hirst PQ and V-M Bader (eds), *Associative Democracy : The Real Third Way* (Frank Cass, London 2001).

⁵² Dahl RA, *On Democracy* (Yale University Press, London 1998) 166-179.

⁵³ J Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Hart, Oxford 2002).

reflexive regarding its economic function so as to prevent the colonisation of civil society by the market imperative and confine its expansive tendencies to a well-circumscribed, self-limited market sphere.

The empirical relevance of this requirement becomes clear once we focus on social CSOs and the challenges they are facing in multilevel social Europe.

Section 3: Civil Society, Participatory Democracy and Social Europe

Social CSOs are two-dimensional organisations.⁵⁴ Social CSOs, indeed, provide social services, while, at the same time, advocating social change, although ‘the move to political advocacy work in almost all those organisations can historically be traced as a secondary move once it became clear that the political circumstances relating to their work needed to be changed’.⁵⁵ Taking into account this two-dimensionality, one quickly realises that social CSOs, if they want to maintain their autonomy against encroachments by the administrative and economic subsystems, face two important challenges in modern societies: while delivering social services, CSOs are threatened by *marketisation*, a process by which they see the social services they provide being taken over by for-profit, economic organisations and/or by which they give up on their organisational characteristics so as to mimic the behaviour of their economic, for-profit counterparts. While advocating social change, CSOs risk *bureaucratisation*, a process by which they become formal, leader-dominated organisations

⁵⁴ See A Evers, 'Part of the Welfare Mix: The Third Sector as an Intermediate Area' (1995) 6 *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 159, 171, 177-178. See also Commission (EC), 'Promoting the role of voluntary organisations and foundations in Europe' (Communication) COM (1997) 241 final, 6 June 1997, 2-3.

⁵⁵ N Beger, 'Participatory Democracy: Organised Civil Society and the 'New' Dialogue' (2004) Online Paper 09/04, the Federal Trust <<http://www.fedtrust.co.uk/default.asp?groupid=0&search=beger>> accessed 15 June 2011, 3. See also E Fazi and J Smith, 'Civil Dialogue: Making it Work Better' (2006) Study commissioned by the Civil Society Contact Group <<http://act4europe.horus.be/module/FileLib/Civil%20dialogue,%20making%20it%20work%20better.pdf>> accessed 15 June 2011, 17.

where representation has replaced participation, in no way different from the other interest groups which lobby the political system.

This two-dimensionality should not be overlooked when studying social CSOs in the multilevel context of the EU. European civil society is the result of a historical process by which social CSOs active at the local level have mobilised so as to advocate social reform at the national level first, and now increasingly direct their advocacy to Brussels in the hope of adducing a social dimension to the European economic project. In order to reinforce their advocacy effort, many of them have joined national and then European networks of social CSOs. Those European networks, however, allege that they still have strong roots to local activity, that they represent a civil society in which ‘advocacy and the provision of practical resources or services are two sides of the same coin’.⁵⁶ In this respect, they are just the tip of an Europeanising civil society at the bottom of which thrive local organisations for which service provision and advocacy are just two sides of the same struggle for social justice.⁵⁷

In this regard, it is claimed that the two-fold systemic challenge that social CSOs face in modern times has taken a specific form in the EU, largely determined by the context of its multilevel social policy regime: a) while *delivering social services* at the local level, CSOs risk *marketisation* through the process of negative, legal integration if this process does not learn to *limit* the reach of its market imperative; and b) while *advocating social Europe*, CSOs are threatened by *bureaucratisation* if they participate in European governance arrangements which have not been *democratised*. Considering the *two* sides of European civil society, both processes, bureaucratisation by European governance *and* marketisation by negative integration, may threaten the autonomy without which social CSOs cannot realise

⁵⁶ *Beger* (n 55) 3.

⁵⁷ Commission (EC), ‘Promoting the role of voluntary organisations and foundations in Europe’ (Communication) COM (1997) 241 final, 6 June 1997, 2-3.

their civic, participatory potential in the EU. Due to space constraints, only the second process will be analysed here.

Even the most liberal welfare state has taken care to develop a legal infrastructure supportive of CSOs by conferring them legal recognition through appropriate statutes, by funding, through tax-exemption and grants, their activities, by shielding their conduct from the rigour of competitive markets and by commissioning social services from them.⁵⁸ Those policies have become even more topical now that Member States, confronted with the limits of social democracy and the shortcomings of its neo-liberal antithesis, may be willing to experiment with third way arrangements similar to the ones envisaged by *Cohen & Arato* and the proponents of civil and associative democracy.⁵⁹

Underpinning these endeavours is the theoretical insight that it makes sense not only from an output but also from a *democratic* perspective to empower civil society as a third sector between the state and the market, for *only* civil society can regenerate the scarce resource of solidarity which arises out of the coming together of citizens committed to the public good.⁶⁰ Since solidarity is a *civil* resource which can neither be bureaucratically-engineered by the clientelism of the welfare state nor stimulated by the egotism of the private sector,⁶¹ it is for social policy to nurture a civic space different from both the market and the state and somewhat protected against them where citizenship can thrive. In this respect, the purpose of social policy is not only to guarantee social citizenship through redistributive policies but also

⁵⁸ See *Evers* (n 54) 178.

⁵⁹ See *Cohen & Arato* (n 3) 26; PQ Hirst PQ, 'Can Associationalism Come Back?' in PQ Hirst and V-M Bader (eds), *Associative Democracy : The Real Third Way* (Frank Cass, London 2001); VA Pestoff, *Beyond the Market and State: Social Enterprises and Civil Democracy in a Welfare Society* (Ashgate, Aldershot 1998).

⁶⁰ *Cohen & Arato* (n 3) 472-473.

⁶¹ W Outhwaite, 'Who Needs Solidarity?' in N Karagiannis (ed), *European solidarity* (Liverpool University Press, Liverpool 2007) 90-91. See also *Pestoff* (n 103) 25, 63.

to protect from colonisation the civil institutions through which citizens actually give shape to their civic commitments.⁶²

Is empowering civil society against the market still possible now that Member States' sovereignty is threatened by the legal force of *negative integration*,⁶³ this process by which the Commission and the European Court of Justice, with the complicity of market-minded claimants, impose on recalcitrant Member States the market compatibility requirements of European economic law?⁶⁴ Surely this legal-economic threat ought to be taken seriously. The case-law of the Court is indeed quite interventionist. However, the extent to which it erodes, under the combined forces of the four freedoms and European competition law, the sovereignty of Member States may at times be exaggerated.⁶⁵ The general impression one gets by reading the case-law is that the European Court of Justice quite hesitantly intervenes into welfare matters⁶⁶ and that, when it does, a *balanced*, rather than a strictly pro-market, stance is taken.⁶⁷

This general impression cannot, however, stand on firm grounds as long as a closer examination of the case-law with an eye on civil society empowerment is not conducted. In

⁶² See J Habermas, *The Postnational Constellation: Political Essays* (MIT Press, Cambridge 2001) 77.

⁶³ FW Scharpf, *Governing in Europe: Effective and Democratic?* (OUP, Oxford 1999) Chap 2.

⁶⁴ S Leibried, 'Social Policy: Left to the Judges and the Markets?' in H Wallace, W Wallace and MA Pollack (eds), *Policy-making in the European Union* (5th edn OUP, Oxford 2005).

⁶⁵ KA Armstrong, *Governing Social Inclusion: Europeanization through Policy Coordination* (OUP, Oxford 2010) Chap 6.

⁶⁶ See, ie, Case 263/86 *Belgian State v René Humbel and Marie-Thérèse Edel* [1988] ECR 5365; Joined cases C-159/91 and C-160/91 *Poucet v Assurances Générales De France and Caisse Mutuelle Régionale Du Languedoc-Roussillon* [1993] ECR I-637; Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-3395; Case T-319/99 *Federación Nacional De Empresas De Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission* [2003] ECR II-357.

⁶⁷ See, ie, the case-law on the right to receive healthcare abroad where the Court regularly balances the need for a European healthcare market with Member States' right to maintain a public health system accessible to all (see T Hervey, 'The Current Legal Framework on the Right to Seek Health Care Abroad in the European Union' (2007) 9 CYELS 261). See also the case-law regarding Art 106 TFEU, ie, Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089 and Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 (for more detail, see JL Buendia Sierra, *Exclusive Rights and State Monopolies Under EC Law: Article 86 (Formerly Article 90) of the EC Treaty* (OUP, New York 1999)).

this respect, while EU lawyers have already provided us with some very detailed appraisals of the impact of EU law on many facets of national social policies,⁶⁸ *the legal possibility that negative integration might hinder civil society empowerment* has been quite overlooked. The risk is however real, considering that the market requirements of negative integration come into play as soon as CSOs provide social services which are considered ‘economic’, a notion which has been interpreted extensively by the ECJ. It is with this concern in mind that I am currently researching the constraints European economic law imposes on civil society empowerment at the national level. In another contribution,⁶⁹ I have, for instance, explored the case of *Sodemare*,⁷⁰ where the ECJ dealt with a piece of legislation that made reimbursement for social services conditional upon the requirement for the providing institution to be non-profit making.⁷¹

Conclusion

I wish to conclude by highlighting the limits inherent to the legal stance which has been taken in this paper. Indeed, even if found to confirm the balanced approach which characterises the case-law of the ECJ regarding social policy more generally, the positive conclusions to which my research might lead ought to still be taken with cautious optimism, for, beside the *legal* constraints on the possibility for national social policy to protect civil society against economic colonisation, there are further indirect *de facto* pressures that the European process

⁶⁸ See, ie, J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart, Oxford 2000); E Spaventa and M Dougan (eds), *Social Welfare and EU Law* (Hart, Oxford 2005); G De Búrca (ed), *EU Law and the Welfare State : In Search of Solidarity* (OUP, Oxford 2005); U Neergaard, R Nielsen and L Roseberry (eds), *The Services Directive - Consequences for the Welfare State and the European Social Model* (DJOF Publishing, Copenhagen 2008); M Krajewski, U Neergaard and JW van de Gronden (eds), *The Changing Legal Framework for Services of General Interest in Europe: Between Competition and Solidarity* (T.M.C. Asser Press, The Hague 2009); U Neergaard, R Nielsen and L Roseberry (eds), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (DJOF Publishing, Copenhagen 2009).

⁶⁹ G Busschaert, ‘Revisiting the Fundamentals of Internal Market Law: Civil Society as a Third Sector between the State and the Market’ (2011) 6 EBLR, forthcoming.

⁷⁰ Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-3395.

⁷¹ Paras 3-10.

of economic integration imposes on Member States. An oft-cited example is provided by the move towards the Economic and Monetary Union and the cuts this has implied for the budget allocated to social policy.⁷² Those indirect limits only reflect the wider context of a globalised *economic* order in which welfare states are increasingly renouncing their social commitments in a quest for attracting mobile factors of production.⁷³

Does that mean the irreversible subordination of social policy to the imperative of economic globalisation?⁷⁴ Not necessarily so. It is claimed that positive, interventionist social policy can still ‘catch up’ with globalised markets provided that nation-states summon the necessary strength to impose redistributive duties on market participants at a higher, European, level.⁷⁵ Considering the many obstacles to single social Europe, even its most ardent proponent would, however, agree that ‘European social policy will for a long time, and for all practical purposes forever, be made simultaneously at two levels, a supranational and a national one’,⁷⁶ with European law being confined to the subsidiary role of supporting and complementing social policies essentially defined, funded and implemented at the national level.

The multilevel nature of the European social policy regime has found consecration with the official endorsement, by the Lisbon European Council in March 2000, of the Open Method of Coordination (OMC), a new and widely applicable tool of governance launched with a view to make the EU ‘the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social

⁷² See *Leibfried* (n 64) 269-272.

⁷³ *Habermas* (n 62) 68-80; *Scharpf* (n 63) 38-42.

⁷⁴ J Habermas, *Une Époque De Transition* (Fayard, Paris 2005) 137-140.

⁷⁵ *Habermas* (n 62) 84.

⁷⁶ W Streeck, ‘Neo-Voluntarism: A New European Social Policy Regime?’ in G Marks, FW Scharpf, PC Schmitter and W Streeck (eds), *Governance in the European Union* (Sage Publications, London 1996) 65. See also *Leibfried* (n 64) 274.

cohesion'.⁷⁷ Beyond the coordination of economic (Broad Economic Policy Guidelines, 1992) and employment (European Employment Strategy, 1997) policies, the OMC has become 'the central tool of EU social policy-making in the new millennium',⁷⁸ with the instauration of separate coordination processes for social inclusion, pensions, and healthcare and long-term care, followed by their merging into a single social OMC in 2005. A reform of the OMC is currently being implemented within the framework of the Europe 2020 strategy for smart, inclusive and sustainable growth, successor to the Lisbon agenda.⁷⁹

This enthusiastic embrace of the OMC attests to a progressive move away in national and EU debates from harmonisation in favour of coordination as the preferred tool for advancing social Europe.⁸⁰ Instead of striving for uniformity, the OMC takes the diversity of Europe as an opportunity to start a deliberative, learning process by which Member States can discover and experiment with new solutions to the intractable problems their welfare systems are collectively facing.⁸¹ It has, in this respect, been emulated as a third way for European social policy between harmonisation and regulatory competition, by which Member States can address common concerns in way that respects their diversity.⁸² But, will this third way be offensive enough to counter the deleterious effects of economic globalisation on national social policies? Considering the hard constraints imposed by the economic constitution of the EU, one could fear that this soft cooperation will not go beyond the minimal role of coordinating the downward adjustment of national welfare systems to the needs of globalised

⁷⁷ European Council (2000), Lisbon European Council, *Presidency Conclusions*, 23-24 March 2000.

⁷⁸ J Zeitlin, 'The Open Method of Co-Ordination in Question' in J Zeitlin, P Pochet and L Magnusson (eds), *The Open Method of Co-Ordination in Action : The European Employment and Social Inclusion Strategies* (P.I.E.-Peter Lang, Brussels 2005) 19.

⁷⁹ For more detail, see <http://ec.europa.eu/europe2020/index_en.htm>.

⁸⁰ J Zeitlin, 'Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?' in G De Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (Oxford University Press, Oxford 2005).

⁸¹ DM Trubek and LG Trubek, 'The Open Method of Co-Ordination and the Debate Over "Hard" and "Soft" Law' in J Zeitlin, P Pochet and L Magnusson (eds), *The Open Method of Co-Ordination in Action : The European Employment and Social Inclusion Strategies* (P.I.E.-Peter Lang, Brussels 2005) 87.

⁸² Zeitlin (n 78) 22.

markets.⁸³ The validity of this concern has already been confirmed by the failure of the Lisbon strategy to meet its objectives. Whether the Europe 2020 strategy has managed to meet those criticisms is still open to question.

⁸³ FW Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 *JCMS* 645, 658. See also C Offe, 'The European Model of "Social" Capitalism: Can it Survive European Integration?' (2003) 11 *The Journal of Political Philosophy* 437.