The legal framework of the Single Market Acts I and II: The Market Levers for the Internal Market as a tool for economic growth

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Dissertation zur Erlangung des Grads eines Doktors der Rechtswissenschaft (Dr. iur.) der Universität Erfurt, Staatswissenschaftliche Fakultät

2022

Gutachter:

Gutachter: Prof. Dr. Stefan Korte, Dipl.-Kfm.

URN: urn.nbn:de:gbv:547-202200157

Datum der Disputation: 30.08.2019

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Chapter 1: Introduction

A. Background

In a spirit of the liberal market philosophy the European single market has opened the doors of new economic growth dimensions in the year 1992. The terms "single market", "internal market" and "common market" are often mentioned in one breath by the literature and appear to be interchangeable. However, it is more ordinary not to speak of the "common market" since the Single European Act (SEA) in 1986 but instead to use the term "internal market". Hereby, it is important to stress that the meaning of all three terms is usually identical. The meaning not only refers to the abolition of border controls between the member states but to the European area where the four market freedoms are guaranteed. Such an interpretation is also confirmed by Article 26 (2) of the Treaty on the Functioning of the EU (TFEU):

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

The so called "1992 programme" is often viewed as a milestone in the European economic process. Yet, the liberal market philosophy has caused many dilemmas about the correct degree of governmental regulation and also the risks of social division. Twenty years later one must admit that single market frontiers still exit in Europe until today. In times of the European crisis there has been an increased focus on the single market due to its potential to function as the key element for growth and development throughout Europe.

Indeed, the global crisis hitting the world in 2008 challenged the financial system worldwide and put the European economy under a further endurance test, after the dot-com bubble had burst in the year 2000. Both

occurrences made investor confidence decrease almost to a zero-point. In an increasingly inter-connected economic environment, the effects of the crisis have been enormously strong for almost everyone in Europe and beyond. These cascade effects are partly still felt today. It must be borne in mind that the Euro zone unemployment has even several years after the crises achieved staggering new records, especially in the southern EU member states.

Particularly, the imbalance of the banking sector challenged the role of new funding sources for start-up companies. More than 20 Million SMEs exist in Europe and the access to finance for these SMEs, notably the so-called start-ups, can be considered as a base for the overall economic stability. At this point also the significance of the service sector in general has to be stressed as there is the highest potential of economic growth. This sector where notably many micro-enterprises and small businesses are active is responsible not only for two-thirds of Europe´s GDP but also two-thirds of all jobs.[1]

Therefore, the question arises which measures can help SMEs to function more efficiently and create more economic growth. Yet, the even more decisive issue deals with intended overall economic strategy in Europe in order to be competitive in the increasingly inter-connected environment worldwide.

Only a united European force can be an appropriate reaction to the increasing economic challenges of attracting investors and of regaining the lost believe. Such a reaction must focus on creating an intact internal European market without shortcomings. Most of the current problems have become more and more global and complex and therefore cannot be solved through unilateral national action.[2]

As a first aid measure to respond to the European crisis, in April 2011 the European Commission adopted the Single Market Act I[3] which

[1] Baumann / Schäffer, in: Weidenfeld/Wessels (2012), p. 165
[2] See Schmitz (2001), p. 50.
[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Single

consists of several provisions within twelve market levers for the improvement of the internal European market with intended benefits for consumers and SMEs. In the preparation phase the Commission worked together with national governments, the European Parliament and civil society actors.

Finally, the Single Market Act II[4] was introduced by the European Commission in October 2012 in order to fill-out the deficits of the Single Market Act I. The Single Market Act II can be attributed to four motors and also to twelve market levers. The market levers become subject-matter regarding the economic growth in this paper. The date of the introduction of the Single Market Act II is indeed very historical. It is the twentieth centenary of the 1992 programme for the internal market.

Notably, the Single Market Acts I and II can only be understood in the context of the Europe 2020 Strategy. This 10-year strategy aims at sustainable economic growth and a better coordination between the national and European policy. At this point it becomes visible that it is justified to analyse the measure also from the perspective of sustainability.

The Single Market Acts I and II can be seen as a tool of the Europe 2020 Strategy. Hereby, the question arises if it is realistic that the intended constant economic growth reveals a reliable long-term future perspective. Besides, it must be expounded whether and to what degree one can expect that the target of economic growth within the Europe 2020 Strategy will really be reached, particularly through the market levers of the Single Market Acts I and II. At this point it becomes decisive to outline the recent legal harmonisation process of the Single Market Acts I and II as a vehicle to realise the growth intention within each market lever.

Market Act - Twelve levers to boost growth and strengthen confidence "Working together to create new growth", COM (2011) 206 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0206:DE:NOT> accessed 3 January 2014.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Single Market Act II –
Together for new growth, COM (2012) 573 final, <http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf> accessed 3 January 2014.

Economic, legal, political and social aspects must be outlined to reveal deficits and dangers of the intended economic growth measures. This is why a variety of issues such as notably a possible “race to the bottom”, the tax policy, the democratic deficit, the role of national parliaments, social spending and social justice, the competition policy of the EU and also the economic policy measures of the member states must at least be circumscribed for the understanding of the overall context. In doing so, it is supposed to become visible within each of the sections, aside from law limits, whether a minimum harmonisation is sufficient or a full harmonisation is essential. Possible de facto transfers and breaches of competence areas will critically be observed from the point of the member states. The role of national parliaments must also be sceptically reflected.

A report from May 2010, compiled by Mario Monti, reveals the dangers of economic nationalism and points out the significance of the internal market as a cornerstone of the European integration process. This underlines the general relevance of the key levers of the Single Market Acts I and II within the internal market and the associated wide-ranging consequences.

Free trade agreements such as the “Transatlantic Trade and Investment Partnership” (TTIP) and “The Comprehensive Economic and Trade Agreement“ (CETA) have raised public awareness and controversial debates about possible advantages and drawbacks. This indicates the tendency towards more global markets with new challenges in the light of the increasing globalisation. It justifies comparisons with the US market within the analysis of the market levers, particularly in the field of the data protection law next to the venture capital market and the digital sector.

During the free trade negotiations often the economic benefits for both sides based on an economic analysis are stressed while political and social discrepancies strongly remain in the background. Such trade agreements are a challenge for essential parts of the democracy because the decision-making process must be seen critically in the light of the high influence of huge international companies with the power to influence political decisions.

This makes it necessary to shed light and call into question the degree to which governmental decisions are in general based on economic factors. Possible social deficits shall not be left unmentioned, in particular by analysing the relation between the internal market and common good interests. That is why the concrete function of Article 114 TFEU in the overall context must be questioned.

The democratic deficit of the European Union has to be analysed to clarify to which degree national parliaments on the one hand and also citizens in general on the other hand play an active role in decision-making processes. The principle of subsidiarity as a restriction of the Union´s competence has also to be discussed in this context.

Although, it cannot be expected that the mentioned free trade agreements of the EU will annul the realisation of the market levers of the Single Market Acts I and II, the fear of a lower consumer protection in Europe caused through the discussions in the context of these agreements makes it necessary to have a closer look on those market levers of the Single Market Acts I and II which influence the protection of consumers in order then to outline possible risks of circumventions.

Finally, the analyses of the digitalisation of the internal market deserves particular attention in order to evaluate legal structures and competences in the light of current digital changes.

Apart from economic interests, a critical view on the legal aspects of all market levers is unavoidable to outline the law-making process in the European Union. In doing this, a sceptical analysis of the excessive application of Article 114 TFEU must be coped with in order to determine the borders of legal harmonisation.

B. Concept of investigation

The research goal is to provide comprehensible notes of the Single Market Acts I and II from a legal, economic and social perspective without leaving alone political aspects in order to anticipate the involving economic

effects of the legal measures with the support of normative and empirical analysis. The research problem is worthwhile studying due to the current ambiguity in respect to the efficiency of the planned European legislative action to boost the European internal market and the general high impact of the internal market to the overall economy.

At the same time, it must be admitted that the intended research concept can be regarded as challenging due to the fact that the single European market is a dynamic range with the ongoing need to be up-to-date with the legislative modifications. A completely harmonised single market is the final aim of all the analysed measures, but such an approach can be considered as risky because national hurdles due to the individual interests of the member states must be expected.

One goal of this paper is to reveal with the help of survey research the overall European single market's fragility in certain economic sectors with relevance to SMEs. The danger of the north-south differences should be depicted and again at a later time also be discussed from a social and political point of view. The economic difficulties in countries such as Spain and in particular Greece have to be focused on in order to analyse how a more united, social equitable and more sustainable framework with economic benefits for all member states could be reached.

Dealing with the single market analysis the question arises whether the governmental interference on the EU level is appropriate, notably in relation to hurdles of bureaucracy and issues concerning the implementation. Irrespective from the correct governmental tool it is alleged that governmental interventions can only be of limited use in developing the European industry. Yet, my hypothesis is that the governmental interference is of utmost significance for the European economic evolution. This will be observed through historical occurrences and then also be discussed within the described debate of the democratic deficit in the EU.

A retrospective policy-based analysis of the single market shall critically observe the European market policy and bring to light whether and how regulation and national protectionism can be harmful for the integration

process. Afterwards, evidence shall be found what kind of crucial and adjuvant features are reflected by the Single Market Acts I and II. At the same time, it shall be revealed what shortcomings and dangers are involved. A critical evaluation of possible social deficits of the Union is also provided at several sections of the paper.

The chronology of the research approach will be as follows: after an introduction, the paper commences with a preface of the single market's historical development and the key characteristics (chapter 2). In doing so, the retrospective analysis is based on the single market policy and empirical statements. Survey research is also accounted. The historical framework also contains the evolution of the venture capital industry in Europe. This shall help to understand single market distortions in a specific sector (access to finance) as a prime example to all general shortcomings in the European market. The economic growth in Europe in the past decades is also analysed to find out the relation between the increasingly intensive integration process of the internal market and more economic growth.

Chapter 3 contains several juridical estimations regarding the overall internal market context of Article 114 TFEU. The legal relation of Article 114 TFEU to the specific legal provisions is explored. Also the ratio between Article 114 TFEU and the flanking policies of the Union Treaties is reflected.

A further focus is put on the principle of subsidiary as an intended restriction of the Union´s competence. The goal is also to find out if this principle can really reduce the democratic deficit of the European Union. This democratic deficit is analysed to understand essential decision-making processes in the light of aspects regarding the legitimation. The role of national parliaments and the role of citizens regarding decision-making process must be critically observed in this section as well. The approximation of laws is a main pillar on the way to create a real single market. That is why the relevant market levers are lighted up from the perspective of the approximation of laws. The common good interests in the internal market are then analysed in order to disclose possible social inadequacies. This approach serves to provide a critical examination in

which degree the interplay between economic, ecological and social aspects shapes the internal market.

Once the reader has a grasp of the basic structure of the single market, the Single Market Acts I and II are presented after the Europe 2020 Strategy has been explained including the attached initiatives (beginning of chapter 4). The fourth chapter is the cornerstone of this paper. Initially, attendance has also to be paid to the "Innovation Union" as one of the seven flagships within the Europe 2020 Strategy with the goal of improving the area of research and innovation. Such approach serves as a bridge to understand the overall significance of the market levers in highly competitive global markets and it makes clear that Europe has to catch up with countries like the US and Japan, in particular concerning innovation.

The main part of chapter 4 is devoted to the legal and economic evaluation of the market levers of the Single Market Acts I and II by disclosing and analysing the comprised deficits in order to find out whether the provisions of the levers can be seen as an appropriate base for economic growth. For a better overview all levers will be divided in the categories of directives and regulations. Legal assignments to regulations and directives are provided with a sceptical view to the frequent use of Article 114 TFEU due to the attached possible danger of misusing Article 114 TFEU as a vacuum cleaner and universal remedy for all areas of policy. That is why it is justified to analyse certain fields of competences of the EU to discover possible threats to the national sovereignty of the member states.

Moreover, chapter 4 reflects the classification of the most important economically relevant European case law of the last decades into the market freedoms to outline the characteristics of each market freedom and to understand the concrete historic evolution. This classification widens the comprehension of the relations of the market freedoms among each other and serves as a bridge to further respectively categorise the 24 market levers in accordance with the most likely related market freedoms. Finally, the economic evaluation is divided into the so called 4 motors of growth which are analysed on the basis of GDP growth potential and sustainability.

Beyond this allocation, in chapter 5 the impact of the levers on the distribution of competences in the policy areas of the EU is to be pointed out with a highlighting analysis of the consumer protection. The government social spending in selected EU countries is also outlined to analyse the danger of a "race to the bottom" for the benefit of companies with possible threats to social rights. Further light is shed on the evaluation of the competences and the legal structures in the context of the levers 1 and 7. In this respect, also the impact of the digitalisation on the internal market is explored.

In addition, in chapter 6 a résumé of the prior analysis is provided and also the economic policy with competitive assessments at the EU and the member states levels is highlighted. However, a detailed comparative law approach with a view to all member states would exceed the scope of this research project. Instead, this approach only plays a subordinate role (e.g. revealing typical trends and also outstanding legislative situations in some member states within the harmonisation process). Moreover, the limitations of the legal harmonisation in the field of the single market are revealed.

Furthermore, forecasts of the single market development are outlined and proposals for an improvement are introduced to counter the shortcomings (chapter 7). Finally, the conclusions provide an overview of the paper by summarising the perceptions and wrapping up the results.

Chapter 2: The single market's historical development and key characteristics

A. Historical development

I. The four phases in the history of the single market

Resource input and efficiency, as the basis of economic growth, are influenced by the spontaneous action of private forces in the economy and by government policy.[5] In this section the government policy within the European integration process is going to be revealed as an attempt to stress out the high relevance of governmental actions.

The single market of today is the result of various levels of integration.[6] "We can distinguish four main phases in the history of the single European market: the first from 1957 to 1969, second from 1970 to 1985, third from 1985 to 1992, and fourth from 1993 to the present date."[7] Meanwhile, it can be considered to be appropriate to add a closing date to the fourth phase. The provisions of the Single Market Act are recent new milestones in the creation process of the internal market and mark the beginning of a new phase. Before analysing this new stage, the prior four phases are focused on in this chapter.

When one approaches a retrospective analysis of the single market it becomes difficult to measure the economic benefits of the internal market integration. While it is not possible to prove that a particular proportion of investment has been directly caused by the measures taken to create a common market, some economic studies provide quite strong evidence of a

[5] See Maddison (1995), p. 7.
[6] See Zschiederich (1993), p. 55.
[7] Grin (2003), p. 346. For a similar estimation see Schmitt von Sydow, in: Bieber / Dehoursse / Pinder / Weiler (1988), p. 80. Accordingly, it can only be distinguished between three significant periods in the history of the internal market. However, the book was published in 1998 and did not take into account the year 1992.

significant effect.[8] Yet, the more recent empirical studies do not report impressive gains, and besides, lawyers might be surprised that aggregate studies on internal market effects are few due to the involved complexity.[9] To begin with, a rough outline of the historical events in the creation process of the single market serves as a foundation to determine the economic effects.

The ideas of an internal European market date back to the 1950s. The first significant event in European post-war economic integration occurred in 1951 when six European countries brought into existence the European Coal and Steel Community.[10] This Community revealed the close "linkage between economics and politics"[11]. Hence, economic partnership can result in political stability. The Treaty of Paris which was signed in 1951 is considered to be the actual foundation act of the Community.[12]

Nonetheless, usually the Treaty of Paris is not accounted as the beginning phase of the single market evolution. The origin of the European single market concept can be referred to the Messina Conference. In the Italian city of Messina the decision was made to agree to concrete plans for the realisation of the European single market.

"As an outcome of World War II and the Cold War"[13], aside from pure commercial motives, the Treaty of Rome, officially named Treaty establishing the European Economic Community (TEEC), was then signed in 1957 and "was based on what is technically called a common market".[14]

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[8] Pinder, in: Bieber / Dehousse / Pinder / Weiler (1988), p. 42. Hereby, it is referred to research in the UK in the 70s.

[9] See Pelkmans, in: Pelkmans / Hanf / Chang (2008), p. 71.

[10] See Swann (1992), p. 6.

[11] Weatherill (1995), p. 8.

[12] Cockfield, in: Crouch / Marquand (1990), p. 1. Accordingly, it is argued that the Community was not, as commonly supposed, founded by the Treaty of Rome but by the Treaty of Paris. The author stresses that the Coal and Steel Community foreshadowed the creation of an Economic Community.

[13] Curzon Price (1988), p. 9. See also Cockfield, in: Crouch / Marquand (1990), p. 1. Hereby, it is referred to the objective of preserving peace in Europe with the result of being entirely successful.

[14] Swann (1992), p. 6. The ambition of a common market was described in Article 2 of the Treaty of Rome. "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a

The Treaty of Rome marked the beginning of the first phase in the history of the single market. The economic policy of the treaty "can be interpreted as a decision to establish an economic constitution that is based on ordoliberal ideas on the general conditions of a free market economy"[15].

Indeed, the completion of the single market among advanced industrial economies is not an exercise of laissez-faire but of "Ordnungspolitik"; and "Ordnungspolitik" has become immensely more complicated since the idea of the social market economy was developed in the 50s.[16] The term "Ordnungspolitik" refers to state measures as a framework to govern economic life. The "Ordoliberalismus" as a form of a neoliberal model has affected the development of the internal market in the very beginning.

However, it was not a typical neoliberal model due to its commitment to the social market economy. The term "social" is assumed to refer to the wide social safety net meant to balance out the ill effects of a free market economy.[17] Neoliberalism has finally received a positive label coined by the German Freiburg School, founded by Walter Eucken, to denote a moderate renovation of classical liberalism.[18]

According to the ordoliberal economic policy, the main task of the state is to set a framework of the economic order but not to interfere in economic processes. The policy contained the principle of open borders which was adopted on the European level. The opening of national economies by means of the free market and the principle of non-discrimination as well as the increase in competition within a more open

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continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it."

[15] Blanke, in: Blanke / Mangiameli (2012), p. 371.

[16] Bieber / Dehousse / Pinder / Weiler, in: Bieber / Dehousse / Pinder / Weiler (1988), p. 13 (Introduction).

[17] See Van Kook (2004), p. 291. For a more detailed description of the social market economy see Seibert (2005), p. 28.

[18] Taylor / Gans-Morse (2009): Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan, in: Studies in Comparative International Development (SCID), Volume 44, Number 2, pp. 139-161.

market can be interpreted as a decision to establish an economic constitution based on ordoliberal ideas.[19]

The ordoliberal approach turned out to be very successful, especially in Germany, as a main contributor to the German economic post-war development which has become known as "Wirtschaftswunder".

On the contrary, in East Germany the socialist economy model was adopted and turned out to be a disaster from an economic point of view. This contradictory development in Germany teaches us two lessons: firstly, it underlines that an appropriate governmental interference is of utmost significance for the economic evolution and secondly, the realisation of the ordoliberal ideas can be regarded as the correct lever for growth and prosperity. These two lessons are also confirmed by prior economic developments in Europe.

England became the first beneficiary of the fruits of the industrial revolution by adopting to a great degree the classical model of the free market economy advocated by economists such as Adam Smith.[20] Adam Smith has "started the first revolution in growth theory"[21]. He attributed economic growth to an increase in the quantity and quality of the three main factors of production (labour, capital and land) and this classification usually serves for growth accounting until today.[22]

Adam Smith´s approach of the famous invisible hand can be viewed very critically from a social and economic-ethical perspective. However, it proved to be very successful in England. Besides, the ordoliberal market system optimised this approach by taking the social deficits into account and creating a balance between pure economic growth intention and the need of social stability.

From a normative perspective, the reason why so many experts became proponents of the free trade policy was the firm believe that

[19] Blanke, in Blanke / Mangiameli (2012), p. 371.
[20] See OECD (1991), Competition and Economic Development, p. 71.
[21] Gylfason (1999), p. 19. However, modern growth theory can only be dated back to 1939 with investigations of Harrod. See Bradley / Whelan / Wright (1993), p. 113.
[22] Gylfason (1999), p. 21.

competition would create the best incentives for efficiency and welfare.[23] In the late 60s much progress was able to be achieved through the abolition of the customs duties between the member states. This progress almost came to a stop a decade later in the second phase of the single market (1970 to 1985), although the UK, Denmark and the Republic of Ireland joined the European Community. In the late 70s very little progress in respect to the Europeanisation was realised what is often termed "Eurosclerosis"[24]. Factors such as the acceleration of inflation and the oil shocks have contributed to this negative trend.[25]

However, this sceptical attitude changed 1985 when the White Paper[26] of the Commission "marked the turnaround"[27] and came into the focus of a summit of the twelve member states with the aim to reactivate the common market and finally to complete the single market. That is how the third phase of the single market history began. Hereby, the question arises how such a turnaround was able to be reached. The famous European Court case[28] involving the liqueur Crème de Cassis can be seen as the main reason for the turnaround.[29] The German retailer REWE wanted to import Cassis de Dijon and sell it as liqueur.

However, German authorities claimed that the alcohol content was too low for the desired classification as liqueur. In the year 1979 the European Court of Justice ruled against the German authorities and set a signal for free trade and against protectionism. Since this ruling the prospect

[23] See Grin (2003), p. 340.
[24] Swann (1992), p. 13.
The author refers to the oil crisis and the overall recession. See also Cockfield, in: Crouch / Marquand (1990), p. 2. Accordingly, the progress virtually came to a halt.
The enlargement of the Community and the recession are considered to be the decisive reasons.
[25] See Maddison (1995), p. 36.
[26] White Paper from the Commission to the European Council: Completing the Internal Market, COM (85) 310 final.
[27] Curzon Price (1988), p. 12. Regarding a critical view with arguments that the White Paper would lead to problems of unbalanced development see Bieber / Dehousse / Pinder / Weiler (1988), p. 17.
[28] Case 120/78 Rewe v Bundesmonopolverwaltung für Branntwein - Cassis de Dijon (ECJ 20 February 1978).
[29] See Colchester / Buchan (1990), p. 79. Accordingly, the judgement changed the whole perspective of the common market.

arose that all technical barriers are changeable.[30] The Cassis decision set the principle of mutual recognition.

According to this principle, a product which is launched legally in one member state can also be introduced and sold in all other member states. Yet, this very wide and market-friendly approach finds its limits in cases of Article 36 TFEU and also when the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions or the defence of the consumer is affected. In these cases trade restrictions are allowed.

The White Paper on the Internal Market of 1985 finally set the goal to remove physical, technical and fiscal barriers. It was drafted by the President of the Commission Delors and also the Commissioner Lord Cockfield. Amazingly, it consisted of about 300 proposals for harmonisation measures. These measures have been considered to be "one of the best expositions of Community policy, Community philosophy and Community aspirations"[31].

The harmonisation measures finally resulted in the Single European Act of 1986 which came into force in 1987 and received a famous status of deregulation through the "economic context, political Zeitgeist and the focus on the energies of market integration"[32]. The goal was a completion of the internal market until December 1992. The Act defined the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

More precisely, regarding the structure of the Single European Act it must be noted that it consists of a preamble which states the fundamental goals of the treaty and expresses the member states' determination to transform their relations as a whole with a view to create a European Union and the preamble also establishes the unique character of the act which brings together the common provisions as regards cooperation in the field of

[30] See Colchester / Buchan (1990), p. 81. Accordingly, the judgement changed the whole perspective of the common market.
[31] Cockfield, in: Crouch / Marquand (1990), p. 4. This estimation can be linked to the new hope and new prospective of the 1992 programme.
[32] Sauter / Schepel (2009), p. 4.

foreign policy and the European Communities.[33] Finally, the Single European Act particularly focuses on the improvement of the economic and social situation by extending common policies and pursuing new objectives and also on ensuring a smoother functioning of the European Communities.[34]

Of course there was no "big bang"[35] in the year 1992. Nonetheless, the completion of the internal market can be considered to be the most important plan since the foundation of the Community thirty years before.[36] It is an astonishing development that 90% of all White Paper projects have been realised until the end of 1993.[37] The internal market after 1992 marked a further "new history phase". The internal market was since then approached by different ideas.

Firstly, there was a stronger emphasis on monitoring and evaluation; secondly, the internal market was rather seen as a dynamic project than a definable end; thirdly there was a reconceptualisation of the internal market which was then viewed in the light of a diverse number of broadly related agendas; and fourthly the number of policy instruments was increased.[38]

The Treaty on the European Union (Maastricht Treaty) from 1992 mainly dealt with the transformation from the European Community into the European Union and was a further base for a real single European market. It is also said that the results of the Maastricht Treaty can be considered as the first steps to realise a social union.[39]

The next noteworthy step was the Amsterdam Treaty in 1997 which was a cornerstone in the process of blowing off frontiers by creating the Schengen Area. Finally, the Treaty of Nice in the year 2001 marked a

[33] Summaries of EU legislation: The Single European Act, <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_singleact_en.htm> accessed 15 October 2014.
[34] Summaries of EU legislation: The Single European Act, <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_singleact_en.htm> accessed 15 October 2014.
[35] Wägenbauer, Rolf (1997): Ein Aktionsplan für den Binnenmarkt, in: Europäische Zeitschrift für Wirtschaftsrecht (European Journal of Business Law), p. 386.
[36] Brealey / Quigley (1989), Introduction (VIII).
[37] See Strese (2005), p. 42.
[38] See Cremona (2007), p. 78.
[39] See Hummer (2003), p. 79.

further step. All the three mentioned treaties contained additional reforms in respect to the functioning of European institutions, whereupon the legislative work on the single market has been less important after 1992.[40] This estimation is based on the fact that the mentioned treaties more likely contain social and political issues instead of setting completely new principles for competition.

Nonetheless, during the last twenty years the geographical, political and conceptual map of Europe has significantly changed due to the fact that several processes dealing with transformation and accession, deepening and widening, occurred simultaneously.[41] This change primary refers to the EU enlargement in 2004 as a realisation of the Nice European Council in 2000 and the new dimension of challenges to create a well- functioning single market. The challenges are reflected by factors that reveal the diversity of the member states such as the understanding of the state and the constitution, the historical experience, policy traditions, geographic characteristics, public attitudes and identity and also religious beliefs.[42]

It became clear that each member state´s political culture could be brought to a common nominator through a more intensive economic relationship. Indeed, there is a huge potential of the single market strategy to increase innovation and competitiveness in Europe and this can lead to less political instability.[43] To give an example, the Eastern European countries have been able to achieve a very positive development in the integration process and the standard of living has been improved for many citizens.

Yet, the huge economic potential and the political stability are threatened due to increasing national approaches in the times of the crisis. The Single Market Act I marks the beginning of the fifth phase in the history on the single market and tries to find answers to the European crisis.

[40] See Grin (2003), p. 16.
[41] See Lenka, in: Brincker / Jopp / Lenka (2011), p. 16.
[42] See ibid., p. 36.
[43] See Marchetti / Clouet (2011), pp. 181 et seq.

II. The evolution of the VC industry in Europe

In the introduction it was stressed that the first lever (access to finance) of the Single Market Act deserves a main focus. This lever deals with the role of the VC industry (venture capital) to support start-up companies. Consequently, the historical outline of the VC industry in Europe shall help to confirm the significance of the governmental interference. Besides, it is aimed to demonstrate the harmfulness of national approaches in Europe in the past and to reveal single market distortions.

The composer of the term "venture capital" is unknown and no standard definition does exist.[44] However, the meaning is generally agreed upon. The term "venture capital" denotes resources that accredited investors provide to start-ups in order to help them commercialise their high-technology ideas.[45] There are many examples which highlight the realisation of these ideas.

The bagless vacuum cleaner and the wind-up radio or flashlight, which need no batteries, are now common household items but nearly failed to see the light of day because their inventors were not able to find financial support to transform their ideas into production.[46]

In comparison to the US legislation, the question arises why Europe has not been able to establish a similar strong environment for the venture capital industry. First of all, one has to distinguish between the development in the UK and Continental Europe. What both regions have in common is that there is more likely a focus on funds from governmental agencies unlike the situation in the United States with a striking strong private sector.

Factors in the UK which can be regarded as responsible for the slow VC development during the last decades are "a resistance to change, a lack of emphasis in exploiting technology, a shortage of executives prepared to

[44] See Bartlett (1999), p. 3.
[45] See Black / Gilson (1998): Venture Capital and the structure of capital markets: banks versus stock markets. In: Journal of Financial Economics, 47 (3), p. 245.
[46] See OECD (2006): Policy Brief: Financing SMEs and Entrepreneurs, p. 2, <http://www.oecd.org/dataoecd/53/27/37704120.pdf> accessed 31 January 2014.

have a go in new companies, high tax rates and less experience of large capital gains."[47] This estimation reflects national numbness.

Notably, there are five particular problems that are caused by the limitation and harmfulness of national approaches: "(1) national law cannot catch all the conduct that harms a nation's citizens; (2) national law with a generous reach may regulate other nations' people and transactions and as a result intrude on other nations' prerogatives and order, (3) national systems of law and regulation tend to clash; (4) nations often lack vision when problems are larger than their boundaries- we need a broader view from the top; (5) nations are increasingly inadequate representatives of people and firms that reside outside the borders are increasingly regulated without a voice."[48]

These five problems indicate the harmful effects which are attached to national protectionism. Consequently, these problems can only be solved from an international perspective instead from a national one and therefore the national numbness can be seen as a reason for the slow VC development in the UK during the last decades.

Yet, the UK has implemented several important direct policy measures like the Competitiveness White Paper to support VC investments in the last decade.[49] The measures resulted in the fact that the UK was considered to be the most attractive country for the VC industry in Europe in 2010.[50] While it took over 50 years of experimentation in the United

[47] Thompson (2008), p. 7.
[48] Fox, Eleanor M. (2001): "Global Markets, National Law, and the Regulation of Business: A View from the Top", St John's Law Review, p. 384, <http://www.heinonline.org/HOL/Page?handle=hein.journals/stjohn75&id=393&collection=journals&index=> accessed 31 January 2014.
[49] See Munari, Federico; Toschi, Laura (2010): Assessing the Impact of Public Venture Capital Programs in the United Kingdom: Do Regional Characteristics Matter?, p. 3, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539384&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539384> accessed 31 January 2014.
For the White Paper see:
<http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/comp/> accessed 31 January 2014.
[50] For a detailed graph see Groh, Alexander Peter / von Liechtenstein, Heinrich / Lieser, Karsten (2010): The European Venture Capital and Private Equity country attractiveness indices, Journal of corporate finance vol. 16 nr. 2, pp. 205-224, <http://www.sciencedirect.com/science/article/pii/S0929119909000595> accessed 31 January 2014.

States to produce the system in operation today, the speed at which the UK system is learning from policy experiments and improving can be considered as remarkable.[51] Consequently, the UK's development can be seen as a further proof that an appropriate governmental interference is of outmost importance when creating an investor favoured environment.

Compared to the UK, the anti-risk behaviour was at the outset even stronger in Continental Europe due to "a more regulated society, onerous employment laws and a dominance of banks in the provision of capital."[52] The significant role of banks and corporations as investors can be examined as traditional European cradles.[53] The clinical study[54] of the first German VC fund can be considered as representing the difficulties that have existed in Continental Europe to create a venture capital market.

Notably, the advent of modern venture capital firms is a phenomenon in Germany of the 1960s when the first "Kapitalbeteiligungsgesellschaften" (KBGs - equity stock companies), which can loosely be regarded as the German counterpart to the U.S.' SBICs, emerged.[55] The above cited clinical study refers to the "Deutsche Wagnisfinanzierungsgesellschaft" (WFG) which was the first German VC fund. This fund was founded in the year 1975 by several public and private financial institutions.

Aside from achieved valuable VC experiences, the fund turned out to be an economic disaster. The authors in respect to the above cited study, Becker and Hellmann, point out the lack of governance structures for the

[51] See Cowling, Marc / Baden-Fuller, Charles / Mason, Colin M. (2009): From Funding Gaps to Thin Markets: UK Government Support for Early-Stage Venture Capital, p. 6, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478902&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478902&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478902> accessed 31 January 2014.

[52] Thompson (2008), p. 7. See also Bartle (2005), p. 181. Accordingly, the reluctance to liberalise was very strong in Germany and France.

[53] See Bottazzi, Laura / Da Rin, Marco / Hellmann, Thomas (2004): The changing face of the European venture capital industry: Facts and analysis, The Journal of Private Equity vol. 7 nr. 2, p. 26.

[54] Becker, Ralf M. / Hellmann, Thomas F. (2003): The Genesis of Venture Capital – Lessons from the German Experience, CESIFO Working Paper No. 883, p. 3, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=386763> accessed September 31 2012.

[55] Plagge (2006), p. 37.

protection of investment returns next to the problematic issue of an active stock market. Beyond, the clinical study reveals the handicaps in respect to the institutional structure. The authors Becker and Hellmann also indicate the conflict of interests between the government and the banks. Specifically, the banks were concerned about their reputation rather than seeking success of new ventures and also deficits of high-quality entrepreneurs have contributed to the financial disaster.[56]

However, the internationalisation has caused Europe to adapt to the VC development. The European venture capital industry is still a young industry and has just experienced its first boom in the late 1990s.[57] Yet, the faith in further growth was seriously sobered through the dot-com bubble burst in the year 2000 and as a consequence a decent recovery took place only very slowly bit by bit.

Meanwhile, private equity funds invested mainly in large enterprises by buy-outs more than tripled in 2006 compared to the previous year; VC&PE investments to the Central and Eastern European Region even achieved the 1.7 billion Euro record level.[58] This marks a significant boost being also caused through a dynamic private equity development in countries like Poland and the Czech Republic.

The strong private equity development among the new member states demonstrates the success of open borders, the relevance of cross border activities for the European economy and the effects of governmental legislative frameworks. The form of public intervention has evolved from a supply-side approach with tax incentives targeted at high net worth individuals, through an intermediation approach with the goal to improve information availability, through capacity raising and, most recently of all,

[56] See Becker, Ralf M. / Hellmann, Thomas F. (2003): The Genesis of Venture Capital – Lessons from the German Experience, CESIFO Working Paper No. 883, p. 37, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=386763> accessed 31 January 2014.

[57] See Bottazzi, Laura / Da Rin, Marco / Hellmann, Thomas (2004): The changing face of the European venture capital industry: Facts and analysis, The Journal of Private Equity vol. 7 nr. 2, p. 28.

[58] Karsai, Judit (2009): "The End of the Golden Age": The Developments of the Venture Capital and Private Equity Industry in Central and Eastern Europe, p. 15, <http://econ.core.hu/file/download/mtdp/MTDP0901.pdf>accessed 31 January 2014.

back to a supply-side approach based on using public money to leverage private investment.[59]

Yet, the financial crises in the year 2008 put a shadow on that development. Private equity fundraising only slightly revived in 2010 and 2011, following the dramatic slump record in 2009, while VC fundraising even continued its downward trend in 2011, decreasing to EUR 1.7 billion in the first three quarters.[60]

Today, Europe is the dominant private equity market, not to mention the US. Nonetheless, the VC industry has to cope with many shortcomings in Europe until today. This is supposed to become visible at the analysis of the first lever of the Single Market Act I in the next chapter.

III. European economic growth in the past decades

Economic growth is not an independent national issue in Europe. Instead, there is a "magical triangle of price, economic growth and full employment"[61] with regard to Art. 3 (3) TFEU. Hence, economic growth is a European matter with far-reaching consequences.

Aside from factors such as economies of scale, structural change and the abundance of natural resources, over the long run there have been four main causal influences on economic growth performances: a) technological progress, b) accumulation of physical capital, c) improvement in human skills, education, organising ability; and d) closer integration of individual national economies through trade in goods and services, investment, intellectual and entrepreneurial interaction.[62] Despite of the interactive character of these influences the last mentioned aspect deserves a closer observation to define the effects of the economic integration in Europe.

[59] Mason, M. Colin (2009): Public Policy Support for the Informal Venture Capital Market in Europe: A Critical Review, International Small Business Journal vol. 27 nr. 5, p. 550.
[60] See Kraemer-Eis, Helmut / Lang, Frank (2011): European Small Business Finance Outlook 2/2011, p. 4, <http://www.eif.org/news_centre/publications/eif_wp_2011_12.pdf> accessed 31 January 2014.
[61] Blanke, Hermann-Josef (2011): The European Economic and Monetary Union – between vulnerability and reform, Int. J. Public Law and Policy.
[62] See Maddison (1995), p. 33.

Richard Edward Baldwin has earned a reputation as an important economist. In the book "Towards an integrated Europe" he stresses that there is a broad consensus among policy makers and economists that economic integration is an engine of growth.[63] Furthermore, he points out that trade affects growth mainly via its effect on investment in human capital, physical capital or knowledge capital.[64] Baldwin mentions Spain as an example and considers it as a side-effect of the efficiency gain that more investments occur.[65]

The astonishing development of Spain can best be explained in comparison with other European countries through the table below. While in 1973 the exports of Spain were only 5 per cent of the domestic product, the number more than doubled by 1992. This development also confirms that the fear that economically weak member states might become weaker due to the integration process is not justified.

The world economy has changed dramatically in the last decades. Open borders cause wider markets, more competition and increasing export rates. International trade enables countries to specialise in products at which they are most efficient and it eliminates the handicap of countries with limited natural resources[66].

[63] See Baldwin (1994), p. 50. Baldwin refers to the logic of growth to describe the link between integration and growth, whereupon growth in per capita output requires the accumulation of some factor of production (including knowledge capital). For a similar estimation in respect to the broad consensus see Cremona (2007), p. 15.
[64] See Baldwin (1994), p. 50.
[65] See ibid.
[66] Maddison (1995), p. 37.

World Trade Statistical Review 2019

Table A.4

World merchandise exports by region and selected economy, 1948, 1953, 1963, 1973, 1983, 1993, 2003 and 2018

(Billion dollars and percentage)

	1948	1953	1963	1973	1983	1993	2003	2018
	Value							
World	**59**	**84**	**157**	**579**	**1838**	**3688**	**7377**	**18919**
	Share							
World	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
North America	**28.1**	**24.8**	**19.9**	**17.3**	**16.8**	**17.9**	**15.8**	**13.6**
United States of America	21.6	14.6	14.3	12.2	11.2	12.6	9.8	8.8
Mexico	0.9	0.7	0.6	0.4	1.4	1.4	2.2	2.4
Canada	5.5	5.2	4.3	4.6	4.2	3.9	3.7	2.4
South and Central America and the Caribbean	**11.3**	**9.7**	**6.4**	**4.3**	**4.5**	**3.0**	**3.1**	**3.4**
Brazil	2.0	1.8	0.9	1.1	1.2	1.0	1.0	1.3
Chile	0.6	0.5	0.3	0.2	0.2	0.2	0.3	0.4
Europe	**35.1**	**39.4**	**47.8**	**50.9**	**43.5**	**45.3**	**45.9**	**37.6**
Germany (1)	1.4	5.3	9.3	11.7	9.2	10.3	10.2	8.2
Netherlands	2.0	3.0	3.6	4.7	3.5	3.8	4.0	3.8
France	3.4	4.8	5.2	6.3	5.2	6.0	5.3	3.1
United Kingdom	11.3	9.0	7.8	5.1	5.0	4.9	4.1	2.6
Commonwealth of Independent States (CIS), including associate and former member States (2)	.	.	.	.	.	**1.7**	**2.6**	**3.4**
Africa	**7.3**	**6.5**	**5.7**	**4.8**	**4.5**	**2.5**	**2.4**	**2.5**
South Africa (3)	2.0	1.6	1.5	1.0	1.0	0.7	0.5	0.5
Middle East	**2.0**	**2.7**	**3.2**	**4.1**	**6.7**	**3.5**	**4.1**	**6.0**
Asia	**14.0**	**13.4**	**12.5**	**14.9**	**19.1**	**26.0**	**26.2**	**33.6**
China	0.9	1.2	1.3	1.0	1.2	2.5	5.9	13.1
Japan	0.4	1.5	3.5	6.4	8.0	9.8	6.4	3.9
India	2.2	1.3	1.0	0.5	0.5	0.6	0.8	1.7
Australia and New Zealand	3.7	3.2	2.4	2.1	1.4	1.4	1.2	1.6
Six East Asian traders	3.4	3.0	2.5	3.6	5.8	9.6	9.6	9.9
Memorandum item:								
EU (4)	.	.	24.5	37.0	31.3	37.3	42.8	34.2
USSR, Former	2.2	3.5	4.6	3.7	5.0	.	.	.
GATT/WTO Members (5)	63.4	69.6	75.0	84.1	77.0	89.0	98.3	97.9

Note: Between 1973 and 1983 and between 1993 and 2003 export shares were significantly influenced by oil price developments.

(1) Figures refer to the Fed. Rep. of Germany from 1948 through 1983.

(2) Figures are significantly affected by including the mutual trade flows of the Baltic States and the CIS between 1993 and 2003.

(3) Beginning with 1998, figures refer to South Africa only and no longer to the Southern African Customs Union.

(4) Figures refer to the EEC(6) in 1963, EC(9) in 1973, EC(10) in 1983, EU(12) in 1993, EU(25) in 2003, and EU(28) in 2018.

(5) Membership as of the year stated.

Source: WTO[67].

[67] World Trade Organization: World Trade Statistical Review 2019, p.98, <https://www.wto.org/english/res_e/statis_e/wts2019_e/wts2019_e.pdf> last accessed 22 February 2022.

Also at this point the governmental role and the power to set the tax rates appeared to be decisive. Many economists and politicians blame the lack of progress in the 70s on government involvement in the maintenance of the welfare state which created a burden for business and resulted in marker rigidities, particularly the labour market.[68] The above numbers in the table reveal the negative effects of the European crisis in the 70s.

Export shares were also influenced by oil price developments. Finally, the European countries were able to significantly increase the export rates as the result of the amazing European integration process in the late 80s. As a matter of fact, the period of 1984 to 1990 constituted a period of considerable growth with an average real growth of about 3% among the fifteen member states due to the "more market and less state" ideologies throughout Europe.[69]

The issue of economic growth in the framework of the mentioned ideology turnaround can best be estimated from the perspective of the White Paper from 1985. In respect to the White Paper it is noteworthy that the European Commission launched a huge research project which was called "The Cost of non- Europe". The results of this undertaking were set down in more than twenty consultants´ reports: notably a report "The economics of 1992" (Emerson Report) and a report for the general public with the title "High Stakes for Europe" (Cecchini Report).[70]

A short investigation of the reports' content is essential to analyse the real growth potential of the single European market. According to the Emerson Report, the European Community could expect an additional real GNP growth of about 4.5% aside from an immense decrease of the unemployment rate. Cecchini stressed that with no need for the transport of goods to stop at the borders the costs for customs officers and also for the transport of goods could be saved.

[68] See Somers (1998), p. 315.
[69] See Ibid., p. 320.
[70] The term Emerson refers to the project leader and the term Cecchini is due to the name of the chairman of the project's steering committee. See also Siebert (1990), p. 24.

The "Cecchini Report" has attracted considerable criticism. This was not only based on the fact that possible hazards and risks were practically entirely blanked out by the "Cecchini Report". Instead, it was criticised that the report reveals a neoclassical theory and that the methodological bases are inappropriate.[71] In a research project Thomas Bley developed a growth model with the focus on physical and human capital which is based on the growth model of Romer.[72] Aside from physical and human capital, Romer also takes labour into account. Thomas Bley justifies his procedure by referring to the difficulty of distinguishing between labour and human capital. His research deals with the growth effects of the elimination of trade barriers. He stresses that despite of the elimination of trade barriers the economic incentive situation for the human capital almost remains unchanged, aside from an increase of the level of wages.[73] Accordingly, the abolition of trade barriers does not change the growth rate. A further survey[74] concludes that the implications of the 1992 programme are likely to be small for developing countries: a mixture of pluses and minuses.

Yet, such negative estimations can be played down by the assessments of other experts. Richard Baldwin and Elena Seghezza produced a noteworthy empirical study to explore the relevant growth effects in the year 1996. Four arguments were exposed which underline the existence of growth effects. Firstly, capital formation was boosted in countries like Portugal and Spain; secondly, the total factor productivity growth for European countries was higher than for a sample including non-European countries in the 70s and 80s; thirdly it was found that, as a general rule, the earlier a country has become a member of the Community, the better its productivity growth was; fourthly, being a member of the European Free Trade Association (EFTA) resulted in a worse productivity growth than being a member of the Community.[75]

In another empirical study from 1996 it was also brought to light that the European integration would generate accumulation effects and that

[71] Heine, in: Heine / Kisker / Schikora (1991), p. 33.
[72] For more details see Bley (1995), p. 119.
[73] See Ibid., p. 146.
[74] See Siebert (1990), p. 20.
[75] See Grin (2003), p. 330.

growth rates of around one percentage point were able to be reached.[76] This assessment was confirmed by a progress report from the European Commission. It underlines the following major positive results of the single market programme: a) the output of the EU was increased by more than 1 percent; b) the level of employment was raised by between 300000 and 900000 more jobs; c) the inflation rates were 1.0 to 1.5 per cent lower; d) the investment in the EU was stimulated by an additional 2.7%; e) extra foreign direct investment to the European Union was attracted; f) poorer EU states were able to grow faster than the rich ones; g) the intra-EU trade was significantly intensified; g) the share of public sector purchases from other member states was almost doubled from 6-10%; h) more than Ecus 5bn a year were knocked off in respect to the costs of Europe's traders and road hauliers; i) the price reductions in telecommunications equipment were accelerated by 7 per cent and finally (j) transport traffic was kept 20% higher than it would have been without the single market programme.[77]

Aside from these positive results, the report also sheds light on disappointments of the single market programme. Accordingly, the report reveals implementation deficits and demonstrates that that the desired effects in relation to the competitiveness for European businesses have not been reached.[78] Besides, it was admitted that the needs of SMEs were not sufficiently taken into account. Hence, they were not able to exploit new markets. Mainly only larger firms were able to benefit from new markets. This estimation serves as a further justification to set a core focus on the first lever of the Single Market within this paper. The question has to be answered if the needs of SMEs have finally been sufficiently accounted by the Single Market Act.

Ten years after the single market programme the European Commission launched a further report to draw a conclusion concerning the economic benefits of the internal market, not to mention the consumer benefits. Accordingly, 2.5 million jobs have been created due to the single

[76] See Ibid., p. 331. The mentioned study from Henrekson, J. Torstensson and R. Torstensson considers the years 1976-1985.
[77] Buchan (1996), p. 2.
[78] Ibid., p. 3.

market and EU GDP in 2002 was 1.8 percentage points higher; the competitiveness of EU firms was strengthened with the result that EU exports to third countries have increased from 6.9% of the EU GDP in 1992 to 11.2% in 2001.[79] This outcome can be seen as a confirmation of a prior report from Mario Monti, based on a series of 38 in-depth studies in relation to trade, investment and competition patterns, which reveals the positive effect on competition and the efficiency gains for consumers.[80] Accordingly, it is argued that, if a company's power to dictate prices to the marketplace is weakened, than it has to absorb costs increases itself and also its price-cost margin dips.

IV. Preliminary conclusions

To sum it up, no precise answer can be given regarding the concrete growth rate caused through the integration process of the internal market. One main reason is that we do not know how the trade policy of the EU would have developed in the absence of the internal market programme but with other things being the same.[81] Another reason is based on the fact that European governments used the luxury of the incipient pro-growth effects to install anti-growth social programmes and that is why it is so difficult to isolate the effects of the completion of the single market from national policies.[82]

Even the Commission has to admit in a report[83] from Mario Monti that it is barely possible to winnow out factors such as the globalisation in the world economy, technology shifts, German's reunification in 1990 and the 1992-93 disruptions among European currencies. According to the

[79] See European Commission: The Internal Market – Ten Years without Frontiers, SEC (2002) 1417.
Accordingly, the above estimates were produced using the so-called Commission's QUEST II model. The quantitative data used in the model was taken from empirical studies of the impact of the Internal Market on productivity growth and mark ups.

[80] Buchan (1996), p. 97.

[81] Holmes, in: Pelkmans / Hanf / Chang (2008), p. 197. Accordingly, the exact consequences of alternative policies cannot be measured and hence one can also not rely on growth models.

[82] See Grin (2003), p. 330.

[83] Buchan (1996), p. 2. Accordingly, the background research contained 38 independent studies of various sections of the economy, areas of legislation or economic variables, aside from a large scale survey of EU businesses.

European Commission, these factors, especially the rapid and accelerating globalisation and the rise of new technologies such as the internet also significantly contributed to efficiency and competitiveness of European companies, aside from the internal market factors.[84] Nonetheless, there shall be no doubt that the above mentioned positive numbers in relation to the economic growth in Europe were mainly caused through the integration process of the European internal market.

B. Key characteristics of the single market

To understand the key characteristics of the single market it is appropriate to focus on the Lisbon Strategy from the year 2000 which set the goal for the EU to become "the most dynamic and competitive knowledge-based economy in the world, capable of economic growth with more and better jobs and greater cohesion". This agenda was based on the concept of a socio-economic policy triangle, with equal weight for more and better jobs and greater cohesion alongside economic growth and competitiveness as EU objectives.[85] Social and employment policy were moved up by the European social model of the Lisbon Strategy and this demonstrated a higher commitment to a "Social EU".[86]

This orientation towards social issues makes clear that the European integration process does not reveal an uninhibited competitive system. Instead, the EU organises its economic constitution under the Leitmotif of the "constant improvements of the living and working conditions of their peoples" (recital 3 of the preamble of the TFEU), particularly by establishing an internal market and a "system ensuring that competition in the internal market is not distorted" (former Art. 3.1 EC) and the commitment to "the principle of an open market economy with free

[84] See European Commission: The Internal Market – Ten Years without Frontiers, SEC (2002) 1417.
[85] See Natali, in: Marlier / Natali (2008), p. 93.
[86] See Ibid., p. 95.

competition" (Art. 119.1 and 2, 120, 127.1 TFEU) or respectively to a "system of open and competitive markets" (Art. 173.1 (2) TFEU).[87]

From a historical point of view the duty of solidarity between the member states is not much pronounced due to the main focus on a purely economic integration.[88] Under the primacy of the individual self-help stands the help through the community in the spirit of solidarity.[89] However, due to factors caused by the financial and banking crisis there is a new pattern of a practised politically solidarity.[90]

It is noteworthy that the single market's mode of functioning to achieve wealth effects is based on cost benefits, economies of scale and an increasing competition. Notably, the aspect of competition plays a key role within the organisation of the EU. This is already demonstrated by numerous references of the term in the European contracts and particularly by the wording in Articles 101 and 102 TFEU which makes clear that undue distortions of competition are prohibited.[91]

This focus already became clear in "Consten and Grundig"[92]. This judgement defined the objectives of EC Competition law for decades and the court hereby stressed that even the anti-parcel provision Article 81 EC was concerned not so much with policing competitive markets but with preventing fragmented markets.[93] The court decision became a milestone in the creation process of real European single market.

Indeed, the appropriate competition policy is essential in a market system to function efficiently. Notably, competition reduces transaction costs and increases innovation with attached benefits for the productivity. Since the debate launched by the European Commission about the "more economic approach" freedom and efficiency are above all perceived as

[87] See Blanke, in: Blanke / Mangiameli (2012), p. 374.
[88] See Blanke / Pilz (2014), p. 261.
[89] See Ibid., p. 273.
[90] See Ibid.
[91] Blanke / Böttner, in: Niedobitek (2020), p. 927. Prior version: Blanke / Böttner, in: Niedobitek (2014), p. 143.
[92] Cases 56 and 58/64 Consten and Grundig v. Commission [1966] ECR 299. Here the problems of parallel imports came into the focus of the court.
[93] Sauter / Schepel (2009), p. 3.

opposites.[94] The dispute actually concerns the rule of law and the methods of application of the law.[95] In particular, it is argued that EU primary law would need modifications to allow a widespread introduction of economic models which is unlikely due to the different competition law philosophies of the member states.[96]

In the last decade despite of the criticism the so-called "more economic approach" became the key pillar of the analysis of competition law. This approach can be understood as placing "more economics" in the competition policy.[97] Firstly, this demonstrates that law and economics are interlinked. Secondly, the focus on economic issues helps to gain market efficiency and can be regarded as an answer to the globalisation and the strengthening of the transatlantic relationship between the EU and the US.

One of the most astonishing characteristics of the internal market is the fact that it in the meantime covers about 500 Million people and that makes it the biggest marketplace in the world. "It is the field of the internal market that the Union has the most extensive powers to delimit national competences, be it by means of prohibitions or by setting its own rules."[98] Beyond, the internal market also has the function of allocating powers to the Community.[99] This is what has made the single market a tool for legal harmonisation as an important element in the integration process. This also underlines the potential of the single market to function as the key element for growth and development throughout Europe.

The European single market consists of many different branches. The four interrelated market freedoms, general rules and the relevant components of several policies can be assigned to the single market.[100]

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[94] See Magen, in: Kirchhof / Korte / Magen (2014), p. 26 (§ 2, Rn.3).
[95] See ibid.
[96] For a critical estimation of the „more economic approach" see Thiele, in: Kirchhof / Korte / Magen (2014), p. 131 (§ 5, Rn. 26).
[97] See Schmidt / Wohlgemuth, in: Blanke / Scherzberg / Wegner (2010), p. 52. This source deals with a critical investigation of the competition concept of the EU from the economic perspective. Hereby, it is argued that the so-called economic approach does not deserve its name and tends to cause legal unclearness (p. 75).
[98] Hanf, in: Pelkmans / Hanf / Chang (2008), p. 83.
[99] Ibid.
[100] See Grin (2003), p. 7. Actually, the author refers to Prof. Mattera and argues that six instead of four market freedoms exist. Accordingly, the free movement of goods and of

Hereby, the "market freedoms" refer to the free movement of goods, capital, services and people. These market freedoms have the following double character: the prohibition to avoid undue distortion of competition which is addressed to all member states and also an individual right to all market participants to claim an infringement regarding the prohibition in front of national courts and public authorities.[101]

The term "general rules" is related to economic agents (taxation, rules on competition, company law, intellectual and industrial property) and to public authorities (public procurement and state aids).[102] The third item covers policies such as "the social policy, environmental policy, trans-European networks, energy policy, public health policy, consumer policy and market reform"[103].

It is noteworthy that the public authority sector plays a key role for the single market. There is an ambivalence of the European politics between strict state aid controls on the one hand and the exceptional provisions/ state aid provisions on the other hand which causes pressure situations and it also reveals the significance of the European state aid policy in the area of the international competitiveness.[104]

It is argued that two factors have dominated the evolution of EU law on the free movement of persons and services over the last decade.[105] These two factors refer to the EU citizenship and the secondary legislation governing the free movement of persons and services. EU citizenship has been far-reaching changed in its interpretation over the years and has

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capital are the same in two typologies and the free movement of services and the right of establishment in the typology of the six freedoms correspond to the free movement of services in the shorter typology. Nonetheless, this paper follows the more common approach of four freedoms.

[101] Von Steophasius, in: Furtak / Groß (2012), p. 205.

[102] See Grin (2003), p. 7.

[103] Ibid.

[104] Weck, Thomas / Reinhold, Phillip (2015): Europäische Beihilfenpolitik und völkerrechtliche Verträge, in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW), pp. 376-381.

[105] Craig / De Burca (2011), p. 544.

become a central vehicle for the judicial updating of the European integration.[106]

This entire process has been characterised by a conflict between integration and the protection of the national sovereignty and has therefore been a difficult balance act.[107] The citizenship of the Union represents an identity that is additional to the national identities of the member states which adds a further political dimension to personal and social aspects in the framework of the global society of network intercommunication and offers new possibilities for overcoming earlier physical limitations.[108] The identity of the Union, therefore, does not subsume or replace national identities.[109]

Yet, this estimation regarding the significance of the EU citizenship cannot reduce the meaning of any of the four interrelated market freedoms which are "originally and at the core anti-discrimination clauses"[110] for the EU integration. The promise of prosperity which is linked to the internal market and the principle of competition is only considered to be kept when the market citizens are able to exercise the fundamental freedoms without restrictions.[111]

The free movement of goods is already taken for granted but it took a long breath to remove the customs barriers between the member states. This was finally realised through the Single European Act.

Aside from this essential freedom, companies can only be encouraged to make investments among the member states as long as the free movement of capital is ensured. Consequently, it is essential that transfers of money among the member states have to be treated as domestic ones to ensure a real single European market. Also the free movement of

[106] Hilpold, in: Niedobitek (2020), p. 835. For the prior version see Hilpold, in: Niedobitek (2014), p. 94.
[107] See Ibid., p. 96.
[108] Lopez Castillo, in: Blanke / Mangiameli (2006), p. 147.
[109] Blanke, Hermann-Josef / Mangiameli, Stelio (eds.), (2013): The Treaty on European Union (TEU): A commentary, p. 202.
[110] Roth, in: Roth / Hilpold (2008), p. 607.
[111] See Blanke / Böttner, in: Niedobitek (2020), p. 924. See also the prior version Blanke / Böttner, in: Niedobitek (2014), p. 139.

services (Art. 56 TFEU) shall not be neglected. This gives self-employed persons the chance to provide their services in all member states.

Besides, the free movement of people refers to all EU citizens and allows them to move freely among the member states. This does not only involve living and studying but also working. This freedom helps companies to benefit from a high number of potential workers with the result of being more competitive. In addition, this freedom demonstrates that the internal market can improve the living circumstances of EU citizens and not only of EU companies. Notably, EU citizens are protected concerning the discrimination on the basis of nationality according to Art. 45 TFEU.

To achieve the unification of the economic rules within the internal market a legislative harmonisation is indispensable. Key elements and cornerstones are fiscal regulations in order to avoid quasi-tariff barriers.[112] Generally speaking, directives appear to be the popular tools to achieve more harmonisation within the internal market. "At the end of 2000, there were 881 basic single market instruments, of which directives constituted an overwhelming majority of 85%."[113] Hence, the use of directives can be seen as a further key characteristic of the internal market.[114]

The internal market can be divided into several submarkets such as the agricultural market, the transport services market, the market for service offers, the capital market, the energy market, the public procurement market and the telecommunication market.[115]

Furthermore, "four functional elements"[116] can be assigned to the internal market. These elements refer to the ownership and the legal capacity of the market players, entrepreneurial freedom like contractual freedom and freedom of prices and also the freedom of market access (the fundamental freedoms and protection against any distortions of competition). In relation to the economic constitution and competition

[112] See Zschiederich (1993), p. 61.
[113] Grin (2003), p. 11.
[114] A more precise and critical view concerning the use of directives will be offered in the following chapters.
[115] See Zschiederich (1993), p. 61.
[116] Strese (2005), p. 46.

within the Union it is also argued that a "triad of fundamental rights"[117] exists containing the freedom to choose an occupation (Art. 15 EUCFR), the freedom to conduct a business (Art. 16 EUCFR) and the right to property (Art. 17 EUCFR).

These rights are essential for the European internal market and provide legal certainty. "Many studies have concluded that there are three crucial aspects of a successful investment: the human resources, the market and the competitive product."[118] The mentioned fundamental rights serve as basis for all three interrelated aspects to ensure cross-border investments which result in economic growth throughout Europe.

Chapter 3: The process of approximation of laws in consideration of the relation between Article 114 TFEU and the specific single market provisions as well as the flanking policies of the Union Treaties and the common good interests

A. The process of approximation of laws

I. The scope of Article 114 TFEU as the legal tool for the harmonisation process

The terms harmonisation respectively approximation can be found in several places within primary Union law: Article 113 TFEU, Article 2 (5), Article 165 (4), Article 116 (4), Article 114, Article 115 and also Article 53 (1) TFEU while in practice a distinction between the terms harmonisation, approximation and coordination within the mentioned regulations is not

[117] See Blanke, in Blanke / Mangiameli (2012), p. 389.
[118] Li (2005), p. 53.

made.[119] The respective goal is not the unification of the law but a legislative approximation whereby the transitions are fluid.[120]

The fundamental freedoms, the instrument of approximation of laws and the competition law all have despite of different approaches a common objective, namely the creation of a European internal market, in which economic transport is largely free from public and private impairment.[121] Consequently, the approximation of laws plays a significant role within the creation process of the internal market with the goal to abolish unnecessary private and public impairment and to realise a uniform legal framework. The Single Market Acts I and II reflect the significance of the approximation of laws. This becomes particularly obvious with regard to the framework for the intellectual property rights (lever 3) and the e-invoicing in public procurement (lever 22).

The danger of damaging competitive distortion can not only be caused by private or governmental behaviour alone but in particular by different legal frameworks regarding the economic development and that is why the internal market objective does not only include the concept of market freedom but it also needs measures to ensure an equal market with homogenous conditions of market access and competition as a mobility prerequisite in the internal market.[122] The tool of legal harmonisation is of outmost importance when it comes to the aim to ensure an equal market environment with fair conditions for all market players. As a measure of positive integration the tool of legal harmonisation has a regulating and a creative function for the realisation of the internal market.[123]

The harmonisation of EU law can be seen as the process of creating common standards across the internal market with an "integrative effect"[124]. Articles 114-118 TFEU are the legal foundation for the harmonisation of the single market. The overall goal is the creation of a high level of consistency

[119] See Obwexer, in: König / Uwer (2015), p. 56.
[120] See ibid.
[121] Blanke / Böttner, in: Niedobitek (2020), p. 892.
[122] Kröger (2015), p. 50.
[123] Ibid., p. 51.
[124] See also Bock (2005).

of laws. It shall allow businesses to become active in cross-border relations without facing other rules than in domestic businesses.

In particular, Article 114 (1) TFEU (ex Article 95 TEC) is the key harmonisation tool regarding the creation of a real European single market through positive integration. The only requirement for the use of the provision is the functional criteria to be necessary for the establishment and operation of the internal market and therefore the legislative bodies of the EU have a cross-sectional competence to the detriment of the member states' competences.[125]

In this regard, it must be distinguished between positive and negative harmonisation. Positive harmonisation refers to the introduction of certain standards believed to be reasonable across the Community while negative harmonisation is the process of removing certain discriminatory behaviour and other restrictive practices committed by member states. The European approach combines both forms of harmonisation. The fundamental European economic free movement rights function as tools to reach a negative market integration and make a positive integration less relevant.

However, in the following areas a harmonisation is explicitly excluded: 165 (4), 166 (4), 167 (5), 168 (5) TFEU.[126] Besides, it has only a subordinated character to the specific competence provisions such as the freedom to provide services according to Articles 52, 62 TFEU. In addition, the subordinated character is revealed in the following areas: the freedom of movement for workers (Article 46 TFEU), the freedom of establishment (Articles 50, 52, 53 TFEU) and the free movement of capital (Article 64 TFEU).[127] To give an example, the mobility of citizens according to the lever 2 and lever 7 of the Single Market Act I falls into this category. The subordinated role can be deduced from the wording of Article 114 (1) which states "save where otherwise provided in the Treaties, the following

[125] Blanke / Böttner, in: Niedobitek (2020), p. 949. Prior version: Blanke / Böttner, in: Niedobitek (2014), p. 65.
[126] See also Korte, in: Calliess / Ruffert (2016): Art. 114 AEUV, Rn. 138.
[127] In the interest of completeness all the following norms have a special character towards Art. 114 TFEU: Art. 46, 48, 50, 52 (2), 52 (2), 59, 64 (2), 74, 77, 78, 79, 81, 82, 83, 87, 91, 113, 153 (2) (3), 157, 168 (IV), 169 (2) b (3), 172, 192, 194 (2) (1) a, 207 (1) see Korte, in: Calliess / Ruffert (2016): EUV / AEUV, Art. 114 AEUV, Rn. 13-18.

provisions shall apply for the achievement of the objectives set out in Article 26."

Often conflicts have occurred regarding questions of the legal differentiation to find the appropriate legal base. If several objectives are pursued simultaneously, classic delimitation criteria of the principles of speciality and subsidiarity fail. It is not easy to determine the correct legal competence base because the policy areas flanking the internal market such as the environmental policy (Article 11 TFEU), the consumer policy (Article 12 TFEU), the health policy (Article 168 (1) TFEU) or the employment policy (Article 147 (2) TFEU) make up a cross-sectional task and therefore must be considered at all measures of the EU in other areas, also within the framework of the legal harmonisation according to Article 114 (1) TFEU.

A focus needs to be determined based on objective factors – decisive connecting factors are the regulatory content respectively the factual proximity and the recognisable goal of the legal act – for a delimitation approach.[128] Accordingly, a legal act whose subject matter consists of specific respectively primarily measures in a policy field and only has parenthetical respectively indirect effects on other policy areas of the EU has the competence base within the policy-specific area and not within Article 114 TFEU.[129]

To understand the problem of the legal differentiation it is necessary to outline the most important cases regarding the question of competences within a historical background. From a historical point of view the introduction of Article 114 TEFU is originally mainly based on considerations which were made within the Commission´s White Paper[130] from 1985 in consideration of the principle of mutual recognition based on

[128] See Calliess, in: König / Uwer (2015), p. 22.
[129] Ibid.
[130] White Paper from the Commission to the Council: Completing the internal market, COM (85) 310, <http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf> accessed 11 July 2015.

the famous European Court case[131] involving the liqueur Crème de Cassis. The introduction of Article 114 TFEU is a means of achieving the realisation of the single market and has therefore an instrumental importance.[132] The reference to Article 26 within the wording of Article 114 underlines the goal of the functionality of the single market.

Whenever a provision mainly impairs the realisation of the single market and the Union action subjectively and objectively tries to eliminate this impairment, Art. 114 TFEU is applicable. Hereby, the Union is at its own discretion free to use any tools which are listed in Article 288 TFEU such as regulations, directives, decisions, recommendations and opinions. The decision to choose the appropriate legislative instrument depends on the intended intensity of harmonisation.[133]

If the Union legislator chooses a harmonisation method which allows the member states scope regarding the implementation, then the directive is used as an instrument.[134] By choosing one of these tools, the Union has to obey the principle of proportionality. This principle is subject to Article 5 (4) TFEU. The measures shall not go further than necessary.

Acts of harmonisation shall not go beyond what is required in consideration of the single market functionality according to Article 26 TFEU and they have to be suitable, necessary and proportionate, both formal and of content.[135] To give an example, a directive shall be used instead of a regulation when one can expect that a directive can already reach the intended harmonisation. This allows the member states individual spaces and reflects the principle of proportionality.[136] In this way local diverse characteristics can sufficiently be taken into account. The European Court of Justice allows the European Union legislature a broad discretionary power so that political, economic and social aspects can be sufficiently

[131] Case 120/78 Rewe v Bundesmonopolverwaltung für Branntwein - Cassis de Dijon (ECJ 20 February 1978).
[132] Khan, in: Geiger / Khan / Kotzur (2017), Art. 114 AEUV, Rn. 1.
[133] Blanke / Böttner, in Niedobitek (2020), p. 963. Prior version: Blanke / Böttner, in: Niedobitek (2014), p. 189.
[134] Ibid., p. 190.
[135] See Schröder, in: Streinz (2018), Art. 114 AEUV, Rn. 63.
[136] Only in exceptional cases directives can have a direct effect; for the concrete case law see Magiera, in: Niedobitek (2020), p. 568. For the prior version see Magiera, in: Niedobitek (2014), p. 620.

taken into account.[137] To a certain degree, the Single Market Acts I and II break from the above-mentioned principle to allow member states considerable individual spaces through the primary use of directives because the market levers are barely filled by directives but rather regulations.

It is often difficult to bring all these aspects in the interest of all member states together. The measures that seem to be the most proportionate can also cause conflicts. To give an example, the use of a directive instead of a regulation can result in the problem of a divergent interpretation and implementation by the member states. Consequently, the efficiency of a directive depends on a clear structure and a precise diction.[138] The time pressure and multilingualism make the European legislation process result in qualitative deficits regarding the final legislative measures.[139] That is why a critical evaluation of the legal structures of the market levers, in particular of levers 1 and 7, is also provided in the course of this paper to analyse these qualitative deficits.

There are also limits regarding the use of Article 114 (1) TFEU and here the question arises to what degree a harmonisation of the internal market is most appropriate for the involved parties on the one hand and legally possible on the other hand. Exception provisions according to Article 114 (2) TFEU cover the areas of taxation, the free movement of persons and the employee rights. This can be considered as problematic because tax incentives are an important tool to support specific industries. To give an example, direct tax incentives for the venture capital industry on the EU level could be effective to realise the goals of lever 1 of the Single Market I but in this area the member states have the say.

These exception provisions are the expression of the fear of the member states to be outvoted in these areas which are considered as very sensitive.[140] However, a restrictive interpretation in most cases and further competence provisions limit the significance of Article 114 (2) TFEU. It is noteworthy that the area of taxation must be separately considered. The

[137] Schröder, in: Streinz (2018), Art. 114 AEUV, Rn. 66.
[138] See Schwarze (1993), p. 68.
[139] Ibid.
[140] Schröder, in: Streinz (2018), Art. 114 AEUV, Rn. 11.

introduction of direct taxes to realise a harmonisation is governed by Article 115 TFEU.

In addition, in the case of indirect taxes for the harmonisation of the single market Article 113 TFEU is applicable. The term "taxes" is interpreted widely while the interpretation of the rights and interests of employees is particularly contentious.[141] Nevertheless the significance of Article 114 (1) TFEU particularly in the field of the free movement of goods is, in essence, hardly affected by Article 114 (2) TFEU.

Besides, the application of Article 114 (1) TFEU is further limited as Article 114 (3) TFEU states that it must be ensured that a high level of protection in the field of health, safety, environmental protection and consumer protection remains.

Full harmonisation and partial harmonisation are two different methods to realise a legal harmonisation. Article 114 TFEU itself does not expressly suggest a predilection for a partial or total harmonisation.[142] From 1962 to 1985 the approach of a full harmonisation was followed and turned out to be not efficient because the regulations had deficits regarding the standard of protection and also because the member states were often able to enforce particular variations.[143] Since 1985 the principle of mutual recognition and the minimum harmonisation made up the strategy of the Commission.[144]

In practice current harmonisation trends move with an increasing emphasis back in the direction of a total harmonisation as the selected method for the completion of the internal market.[145] In case of total harmonisation the EU member states have no deviation span unless they initiate the sharply delineated procedures mentioned in Article 114 (4-6) TFEU which allows them to reach changes and complementary measures.

[141] See Korte, in: Calliess / Ruffert (2016), Art. 114 AEUV, Rn. 14.
[142] Maletic (2013), p. 63.
[143] See Obwexer, in: König / Uwer (2015), p. 61.
[144] Ibid.
[145] Maletic (2013), p. 176. For a similar evaluation see also Obwexer, in: König / Uwer (2015), p. 61.

Yet, the notification procedure under Article 114 TFEU has a suspensive effect. The Commission has the central role in the administration of Article 114 TFEU and that is why a member state may not apply notified national provisions until it has been authorised by the Commission to do so.[146] This narrow restriction in the interpretation of Article 114 TFEU in the field of exceptions is needed in order not to undermine the primacy of EU law. The relatively small scope of the member states in the framework of Art. 114 (5) TFEU became visible within the judgment "Land Oberösterreich and Republic of Austria v Commission of the European Communities"[147] in the year 2007. In March 2003 the Republic of Austria had notified the Commission of a draft law of the Land Oberösterreich banning genetic engineering (Oberösterreichische Gentechnik-Verbotsgesetz).

That draft law intended to prohibit the cultivation of seed and planting material composed of or containing GMOs and the breeding and release, for the purposes of hunting and fishing, of transgenic animals. According to the decision of the Commission, Austria failed to provide new scientific evidence or demonstrate that a specific problem has been caused following the adoption of Directive 2001/18 which made it necessary to introduce the notified measure. Finally, the Commission rejected the Republic of Austria´s request for derogation which was confirmed by the court.

Also another important case[148] of a member state´s action within Article 114 (5) TFEU is worth mentioning. The Kingdom of the Netherlands notified the Commission by letter in the year 2005 of its intention to adopt a decree subjecting, from January 2007 and by derogation from the provisions of Directive 98/69, new diesel-powered vehicles in certain categories to a limit on emissions of particulate matter of 5 mg/km.

[146] Maletic (2013), p. 149.

[147] See joined cases C-439/05 P and C-454/05 P, Land Oberösterreich and Republic of Austria v Commission of the European Communities, 13 September 2007, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62005CJ0439&from=EN> accessed 28 July 2015.

[148] Case C‑405/07 P, Kingdom of the Netherlands v Commission of the European Communities, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=67885&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=632030> accessed 28 July 2015.

In support of its request for derogation, the Kingdom of the Netherlands stated that the limits on concentrations were exceeded in several areas of its territory and that it did not consider itself in a position to comply with its obligations under the concerned directive.

Furthermore, the Kingdom of Netherlands emphasised its high demographic density and greater concentration of infrastructure than in other member states which gives rise to a higher rate of emissions of particulate matter per square kilometre. It then pointed out that a large proportion of the pollution is caused by neighbouring member states so that only 15% of the national average of concentrations of particulate matter can be affected by national standards of environmental protection. Also in this case the Commission followed a strict approach and rejected the draft decree notified with the argument that the Kingdom of the Netherlands failed to prove the existence of a specific problem with regard to Directive 98/69 and that the notified measure was not proportionate to the objectives pursued.

Aside from the mentioned cases, it shall not be left unmentioned that the member states have the possibility to make use of simplified infringement proceedings. 114 (9) TFEU states that the Commission and any member state may bring the matter directly before the Court of Justice of the European Union if it considers that another member state is making improper use of the powers provided for in this article.

Notably, the partial harmonisation can be subdivided further into a minimum harmonisation, an optional and a facultative harmonisation. A facultative harmonisation means that producers and traders have the free choice to follow the national or the European rulings. In case of an optional harmonisation the member states are generally not allowed to introduce stricter rules than determined unless only national products are concerned.

The minimum harmonisation is characterised by the set-up of minimum standards while the member states are free to imply stricter standards. The concept of the minimum harmonisation reduces the negative consequences of the competitive pressure among the EU member states as in this way the so called “race to the bottom” reaches a necessary limitation

and this can prevent significant destructive competition. The use of the minimum harmonisation is not a tool of the lowest common denominator but it should establish the creation of an indispensable high basic protection according to Article 114 (3) TFEU.[149]

However, where minimum harmonisation is applied to matters related to tradable goods or services it raises several legal questions, for example concerning the application of higher national standards to imports and the influence on the free movement with the final danger that the minimum level in practice becomes the actual level prevailing in the marketplace.[150] In the case "Gallaher"[151] it became clear that minimum harmonisation under certain circumstances can lead to the distortion of competition.

In the "Gallaher" case the court ruled that regulations and administrative provisions of the member states concerning the labelling of tobacco products are to be interpreted as allowing the member states to require, so far as domestic production is concerned, that the indications of tar and nicotine yields and the general and specific warnings be printed on cigarette packets so as to cover at least 6% of each of the relevant surface areas. This distinction between domestic and non-domestic products has to be seen critically as it leads to the distortion of competition.

Finally, the question arises if single market related special competences make the general competence according to Art. 114 (1) TFEU superfluous. Such an estimation is given by the author Calliess. He argues that the legal harmonisation would still go on and the legal determinability could be improved if all preconditions for action are linked to the special competences and gaps within the special competences could be closed by Art. 352 TFEU.[152] Such assessment leaves out that a unanimous consent which is needed according to Art. 352 TFEU is a further barrier for an ideal

[149] See Schröder, in: Streinz (2018), Art. 114 AEUV, Rn. 73.
[150] See Chalmers / Davies / Monti (2010), p. 701.
[151] See Case C-11/92 R v Secretary of State for Health, ex parte Gallaher Limited, Imperial Tobacco Limited and Rothmans International Tobacco (UK) Limited, 22 June 1993, <http://eur-lex.europa.eu/resource.html?uri=cellar:16da7d2e-5186-40f4-977d-3c41bb97199a.0002.03/DOC_1&format=PDF> accessed 21 July 2015.
[152] See Calliess, in: König / Uwer (2015), p. 102.

harmonisation. Besides, such assessment has no sufficient regard to the ongoing high frequency of the application of Art. 114 TFEU.

Hereby is must be stressed that the analysis of the Single Market Acts I and II revealed that more than half of all the 24 key actions are based on Article 114 (1) TFEU. This shows that Article 114 (1) TFEU is a significant legal base within the legal harmonisation of the single market. Finally, the high degree of harmonisation which is needed could not be reached by the special competences alone. Any downplaying of the role of Art. 114 (1) TFEU is therefore not justified.

In this context another further important question arises. It must be clarified if the single market needs a full harmonisation going along with the analysed key levers. A general assessment without a differentiation is not appropriate at this point. If an act of the Union has the goal of a full harmonisation it must be examined on a case-by-case basis with the reference to the wording, the objective and the regulatory context.[153] In contrast to the partial harmonisation, a full harmonisation does not allow the possibility of a deviation.

To give an example, lever 3 can be seen more likely as a kind of partial harmonisation because the unitary patent package primarily consists of a regulation[154] creating an EU patent. This EU patent is introduced as a third option, along with the national and the European patent. The introduction of a further option is not measure of a full harmonisation but rather a tool of a partial harmonisation. National patents issued by national patent offices are still supposed to exist. In this area a full harmonisation is not needed. It remains the free choice of the patent holder to receive a legal protection only by a national patent and not by a European patent or an EU patent.

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[153] See Obwexer, in: König / Uwer (2015), p. 57.

[154] Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:361:0001:0008:EN:PDF> accessed 31 January 2014.

Also lever 19 levers which refers to a new regulation[155] about insolvency proceedings depicts a partial harmonisation. The new regulation only refers to cross-border business insolvencies. National insolvencies with no cross-border element will be still handled under the applicable national law of the member state involved. The principle of subsidiarity does not allow to treat all insolvencies according to EU law only and to abolish national insolvency rules. There is no need to totally harmonise all insolvency regulations.

To find out if there is a necessity for a full harmonisation it is decisive from which perspective someone evaluates this question. From a market integration perspective, minimum harmonisation, as opposed to full harmonisation, is an imperfect tool, as it will still not phase out divergences in national legislation and companies that wish to engage in cross-border trade have to abide by different rules while from the point of view of consumer policy, the concept of minimum harmonisation leads to a win-win situation: on the one hand, consumer protection is boosted in those member states where it traditionally lags behind, and on the other hand, those member states that champion consumer protection can keep their stronger levels of protection.[156]

The recent EU trends, however, show a move towards a more systematic application of the principle of full harmonisation in consumer law and it is stated very clearly that this is not an adequate and fine-tuned consumer policy tool but rather a disguised instrument to promote trade interests.[157] Such an estimation is to a certain degree confirmed by the key levers of the Single Market Acts I and II. Economic growth is the overall goal and when it comes to consumer rights trade interests and trade effects are always taken into account very intensively.

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[155] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=DE> accessed 10 July 2015.

[156] Goyens, Monique (2011): Will the European Single Market Finally Become a Reality for EU Consumers? - Lessons to be Learnt from Two Decades of Hesitations, Volume 46, March/April, Number 2, pp. 64-81, <http://www.intereconomics.eu/archive/year/2011/2/the-european-single-market-how-far-from-completion/> accessed 18 December 2015.

[157] Ibid.

The trend towards full harmonisation is also reflected by lever 5 of the Single market Act I which deals with standardisation. The EU standard-setting system has grown in prominence since the mid-80s after the realisation that full harmonisation on every possible technical detail through the powerful instruments of regulations would be undesirable.[158] Such assessment is confirmed by a new regulation[159] as the key action of lever 5. At this point it appears to be appropriate to underline the overall importance of the instruments of regulations which can be seen as the main tools to receive a full harmonisation.

In essential legal areas full harmonisation is desirable and this is also in the most cases taken into account by the European legislator. When it comes to the new regulation[160] concerning data protection which was analysed within the digital single market (lever 7) it is a welcoming sign that a full harmonisation is supposed to be reached. This significant area with a high potential of misuse should not be subject matter of any compromises.

According to the wording of the data protection regulation it must be underlined that member states alone cannot reduce the problems in the current situation and this is particularly the case for those problems that arise from the fragmentation in national legislations implementing the EU data protection regulatory framework and that is why there is a strong rationale for a legal framework for data protection at EU level with a need to establish a harmonised and coherent framework allowing for a smooth

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[158] See Delimatsis, Panagiotis: Standard-Setting in Services – New Frontiers in Rule-Making and the Role of the EU (June 2015). TILEC Discussion Paper No. 2015-013, 8, <http://ssrn.com/abstract=2616618 or http://dx.doi.org/10.2139/ssrn.2616618> accessed 18 December 2015.

[159] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:316:0012:0033:EN:PDF> accessed 31 January 2014.

[160] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM (2012) 11 final, <http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf> accessed 31 January 2014.

transfer of personal data across borders within the EU while ensuring effective protection to all individuals across the EU.

The analysis of the key levers shed to light that there is a trend towards full harmonisation and that there is also a need for a full harmonisation – at least in some essential areas. However, full harmonisation is not an all-purpose weapon because it is also afflicted with compromises and it does not automatically offer the highest level of protection.[161]

It is noteworthy that regulations and directives are both primary tools of the Single Market Acts I and II and form the most important legislative form of action of the EU. Practically all 24 key actions can be referred to one of these tools while about double as many regulations as directives are used. This approach with the focus on using regulations serves as a base to realise an ideal harmonisation on the EU level without any shortcomings because regulations are usually binding and do not allow member states to imply dissenting provisions.

Whenever the aim exists to harmonise an entire specific legal field, then regulations have been proven themselves effective.[162] Instead, when the goal is to achieve a gradual harmonisation a legal fragmentation can be caused.[163] Hence, the decision of using a regulation or a directive is not always easy and has far-reaching consequences.

Furthermore, it is noticeable that particularly the key levers of the Single Market Acts I and II which contain very essential topics for the harmonisation process are more likely filled out by regulations while less important key levers are filled by directives. To give an example, access to finance for SMEs was given priority by the Commission and was then realised by two regulations[164]. In a partly less significant areas such the

[161] See Obwexer, in: König / Uwer (2015), p. 76.
[162] See Schwarze (1993), p. 68.
[163] Ibid.
[164] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0001:0017:DE:PDF> accessed 31 January 2014. See also: Proposal for a regulation of the European Parliament and of the Council on European Long-term Investment Funds, lever 18 final, <http://eur-

posting of workers[165] and payment services[166] in the internal market there is a tendency to use more likely directives rather than regulations.

The assumption that regulations are used in important areas with a huge potential of economic growth is also confirmed by lever 6. The set-up of fully integrated networks according to lever 6 within the Single Market Act I finally resulted in a regulation[167] establishing the Connecting Europe Facility in December 2013. According to the wording of the regulation, the regulation establishes the Connecting Europe Facility ("CEF"), which determines the conditions, methods and procedures for providing Union financial assistance to trans- European networks in order to support projects of common interest in the sectors of transport, telecommunications and energy infrastructures and to exploit potential synergies between those sectors. In such an important field with huge financial interests for the member states and a significant economic growth dimension it is an appropriate tool to use a regulation in order to set clear and transparent guidelines for all involved participants.

The advantage of the use of regulations is also based on the fact that directives are based on a two-stage procedure. The necessary national implementing measures after the European legislative act can in some cases result in delays. Special legal problems can also arise, particularly in cases

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lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0462:FIN:EN:PDF> accessed 31 January 2014. It is noteworthy that the Council agreed with the position taken by the proposal on 25 June 2014, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/143368.pdf> accessed 17 September 2014.

[165] Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, 2012/0061 (COD), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0131:FIN:EN:PDF> accessed 31 January 2014.

[166] European Commission: Proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC, COM (2013) 547 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0547:FIN:EN:PDF> accessed 31 January 2014.

[167] Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:348:0129:0171:EN:PDF> accessed 31 January 2014.

of minimum harmonisation, when member states go further with the transposition than the directives intend.[168]

This phenomenon is called "gold-plating". With reference to a study[169] from 2014 requested by the European Parliament's Committee on Budgetary Control it is admitted that gold-plating is still a huge problem in many areas but it is also pointed out that that gold-plating (as well as related errors) can be addressed by capacity building, coordination and cooperation between all actors involved.

Yet, the above mentioned estimations regarding the distinction between a full harmonisation and a partial harmonisation on the one hand and the use of regulations and directives on the other hand only have the task to reveal some exemplary trends in the context of the Single Market Acts I and II. Simplified perceptions fail to give a precise reflection of the complex legal classifications. To give an example, prima facie the first market lever of the Single Market Act I can be allocated to a binding regulation and reveals a full harmonisation measure. A closer look at the content of the regulation discloses that where managers of collective investment undertakings do not wish to use the designation 'EuVECA', the regulation is not applicable. According to the wording of the regulation, in these cases, existing national rules and general Union rules should continue to apply. Consequently, the regulation is only binding to a limited degree and does not reveal a typical full harmonisation measure. It can be concluded that the precise content of each measure is decisive. Some regulations do not go content-related further than directives and regulations cannot automatically be allocated to a full harmonisation.

To sum it up, the harmonisation process on the EU level is realised by a mix of a total and partial harmonisation in the field of the single market. A minority of the measures of the Single Market Acts I and II refers to a partial harmonisation which is characterised by the set-up of minimum standards while the member states also have the freedom to imply stricter

[168] See Ohler, in: Hummer (2010), p. 156.

[169] European Parliament: 'Gold-plating' in the EAFRD: To what extent do national rules unnecessarily add to complexity and, as a result, increase the risk of errors?, study of 2014, <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/490684/IPOL-JOIN_ET(2014)490684_EN.pdf> accessed 24 July 2015.

standards. In the most areas regulations are used to realise an ideal harmonisation. A full harmonisation going along with the key levers in all areas is not aimed at. The dangers of the mentioned phenomena "gold plating" do not justify seeing the necessity for a full harmonisation in all areas which are covered by the key levers. The Union must give to the member states legal scope to act in some areas to allow them to follow individual needs and to take into account the country's typical features within economic, social and cultural aspects.

It is criticised that that the EU makes use of an ever larger number of regulatory concepts, whose implication often remains ambiguous.[170] To give an example, it is often referred to the "Service Directive"[171], where country of origin principle, mutual recognition, full and minimum harmonisation have all been brought into play and it is argued that these factors cause a lack of clarity.[172] One must admit that a clear differentiation is not always possible between a full and minimum harmonisation. However, a large number of regulatory concepts is needed to meet the needs of all participants and finally all measures go hand in hand and complement each other.

It is also noteworthy that alternative policy instruments have gained significance. The Single Market Act legislation demonstrated that the dialogue with civil society reveals the social component of the legislation and is needed to bring the Union closer to its citizens. The so called European social dialogue as a non-legislative action hereby plays a key role. The Social Dialogue Committee was already introduced in the year 1992 and finally the Lisbon Treaty[173] underlined the dimension of the European Social dialogue.

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[170] Klamert: Altes und Neues zur Harmonisierung im Binnenmarkt, in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW), pp. 265-268.

[171] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0123&from=DE>, accessed 10 July 2015.

[172] Klamert: Altes und Neues zur Harmonisierung im Binnenmarkt, in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW), pp. 265-268.

[173] See Article 11 (1) and (2) of The Treaty on European Union (TEU): "The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action"; and "The

It organises meetings with employee representatives (ETUC[174], Eurocadres[175] and the European Federation of Executives and Managerial Staff[176]) and employer bodies (BUSINESSEUROPE[177], UEAPME[178] and CEEP[179]) to discuss employment-related issues. Based on the meetings the social players can then make intersectoral agreements which often finally result in directives.

It is argued that "four factors account for the successful implementation of autonomous agreements at national level: 1) the interaction between European and national social partners; 2) existing industrial relations and regulatory practices at national level and their compatibility with European social dialogue; 3) interest in subject matter and its priority on the national bargaining agenda; 4) the added value of the European agreement with regard to existing national regulation."[180] Social dialogue meetings take place regularly.

The problem is that the representatives of national partner organisation often do not attend the offered meetings. There is a certain degree of correlation between participation in European social dialogue and national implementation.[181] The lack of interest of national member states in

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institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society".
See also Article 152 of The Treaty on the Functioning of the European Union (TFEU):
"The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy. The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue."

[174] ETUC stands for „The European Trade Union Confederation" which is a trade union organisation. It represents workers and their national affiliates.

[175] The Council of European Professional and Managerial Staff (EUROCADRES) is a cross-industry social partner in the European Social Dialogue. It represents the Professional and Managerial Staff.

[176] The European Confederation of Executives and Managerial Staff (CEC) is a further cross-industry confederation which represents employees by taking part in the European social dialogue.

[177] BUSINESSEUROPE defines itself as the leading advocate for growth and competitiveness at European level, standing up for companies across the continent and campaigning on the issues that most influence their performance.

[178] UEAPME is the employers' organisation which represents the interests of European crafts, trades and SMEs.

[179] CEEP stands for Central Europe Energy Partners. It is an International non-profit association with the goal of supporting the Central Europe energy sector integration.

[180] Kaeding (2013), p. 91.

[181] Ibid., p. 93.

the Europeanisation process can be seen a serious threat for the creation of a real single market without shortcomings.

Besides, recommendations are a further soft law tool. Some recommendations refer to the transposition of EU law into national law to help the member states within the implantation process. To give a further example, the above-mentioned country-specific recommendations (CSRs) which are based on the Commission's Annual Growth Survey and the medium-term budgetary plans and economic reform programmes can also be considered as a policy instrument in order to motivate and support the member states by defining realistic targets for each member state. The social dialogue and the CSRs have in common that individual needs of the member states can be taken into account. The definition of the individual needs and targets can then be taken as an effective base to coordinate the economic policy.

Furthermore, the so-called open method of coordination (OMC) which was formalised at the Lisbon European Council in 2004 is a significant intergovernmental policy instrument based on voluntary cooperation of the member states in fields where only member states have the competence. The OMC can be seen as a key tool to achieve the goals of the Europe 2020 Strategy. In areas such as social and employment policies (Art. 5 TFEU), protection and improvement of human health, industry, culture, tourism, education, youth, social protection and administrative cooperation (Art. 6 TFEU) the alternative policy instrument can forestall races to the bottom and defend social advances.[182]

Aside from this effect, there are more advantages. The OMC and the other alternative policy instruments can be adopted in a quicker, cheaper and more flexible way than a classical policy instrument such as a regulation. However, due to the characteristic of being not binding one of the disadvantages of the OMC is that there is a risk that the targets will finally not be reached. This problematic issue of non-binding rules becomes also part of the future prospects in the next chapter. Irrespective of the question if soft law without sanctions can be enough to reach certain targets,

[182] Ibid., p. 141.

it must be emphasised that the Commission focuses on many binding instruments. The OMC can be seen as a complementary measure to set-up individual goals for the member states in areas where there is no consent for binding instruments throughout all member states.

Finally, it can be summarised that in an overall assessment the approach of the Commission to use a mix of non-binding and binding instruments with the focus on the latter is appropriate to set a governmental framework where the individual needs of all market players are taken into account sufficiently and where an adequate and harmonised platform for economic growth is offered.

Despite of the more frequent use of alternative policy instruments one of the main problems of the harmonisation process is still the slow process of implementation. While in the year 2011 the number of member states which were able to reach the 1%-threshold regarding the transposition deficit was 20, in the year 2012 only 11 member states reached this goal.[183] This issue remains problematic despite of some improvements. To give a concrete example, more than two years after the deadline regarding the third energy package which aims to complete an internal gas and electricity market there are still delays in its transposition, enforcement and effective application on the ground, especially there were still twelve cases pending for non-transposition of the directives of which nine pursued by the Commission before the Court of Justice of the EU and three at the stage of reasoned opinion against seven different member states in October 2013.[184]

The high number of existing directives must be seen critically. The single market has still more than 1000 directives.[185] At least a significant reduction has been able to be reached in the automobile sector where 130

[183] Baumann / Schäffer, in: Weidenfeld/Wessels (2012), p. 164. The authors mainly refer to the Governance Test 2011 of the European Commission.
[184] See also Report from the Commission to the European Parliament, the Council, The European Central Bank, the European Economic and Social Committee, the Committee of Regions and the European Investment Bank: A single Market for growth and jobs: An analysis of progress made and remaining obstacles in the member states, Contribution to the Annual Growth Survey 2014, 12, COM (2013) 785 final, <http://ec.europa.eu/europe2020/pdf/2014/smr2014_en.pdf> accessed 31 May 2014.
[185] Baumann / Schäffer, in: Weidenfeld/Wessels (2016), p. 225.

directives have been cancelled.[186] Also the number of infringement proceedings regarding the single market has been improved.[187]

The delayed implementation is also a real threat in the creation process of a real single market in Europe. Also the long transposition deadlines are harmful for the single market.[188] The more frequent use of alternative policy instruments could reinforce the implementation process. These instruments are effective in the sense that they resolve the problem they were introduced to address and they can be considered as efficient in the sense that they minimise the direct compliance costs borne by those who are subject to the regulation and the costs which may be imposed to the public.[189]

Finally, the success of the harmonisation process of EU law depends on the willingness of the national member states to enable rapid implementation and to follow the country-specific proposals from the Commission. The efforts of the Commission will not be able to bear fruits in cases of unexpected uncoordinated national initiatives without consultations on the EU level to the enforcement of national interests.

II. The principle of subsidiarity as a restriction of the Union´s competence

The principle of subsidiarity does not have a notable value within the legal wording of the levers of the Single Market Acts but it has to be taken into consideration during the implementation processes of the measures to ensure a sufficient influence of the member states.

The principle of subsidiarity was enshrined by the Treaty of Maastricht and further substantiated by the Treaty of Amsterdam to limit the Union`s exercise of competence.[190] It is based on the concept of a constitution – namely the Basic Law – according to which the State is not an

[186] Ibid.
[187] Ibid. The authors stress that the number was 826 in November 2014 and finally only 749 in May 2015.
[188] Baumann / Schäffer, in: Weidenfeld/Wessels (2012), p. 164.
[189] Kaeding (2013), p. 18.
[190] Härtel, in: Niedobitek (2020), pp. 456-457. Prior version: Härtel, in: Niedobitek (2014), p. 514.

end in itself but exists for the sake of the people.[191] The intention of the principle is to bring the EU closer to the citizens.

With the Maastricht Treaty, entering into force in 1993, the subsidiarity review received a prominent role because rules where established in the introductory articles of the Treaty and according to these rules the Union can act when it has a legal right (principle of legality) and when it can be done more effectively at the Union level than at national level (principle of subsidiarity).[192] Finally, the principle of subsidiarity has gained importance through the Lisbon Treaty and allows the member states in the area of shared competence a defence right against objectively unjustified interventions of the Union.[193]

Art. 5 (3) TEU points out:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

This principle serves as a vehicle "to ensure appropriate vertical division of power and thus safeguard personal and social freedom."[194] This reflected Union character of diversity and unity becomes visible by many

[191] Blanke / Mangiameli (eds., 2013): The Treaty on European Union (TEU): A commentary, p. 76.
[192] Palsson (2013): The EU´s principle of subsidiarity - An empty promise, p. 18, <http://www.eudemocrats.org/eud/uploads/AMP_Subsidiarity_an_empty_promise_2013.pdf> accessed 11 June 2016.
[193] See Kröger (2015), p. 379.
[194] Blanke / Mangiameli (eds., 2013): The Treaty on European Union (TEU): A commentary, p. 76.

provisions of primary law.[195] The qualified instruments are finally assigned to the national Parliaments to verify that the proposed draft legislative acts of the Commission comply with the principle of subsidiary by taking into account the conformity of those acts to the regional and local dimension of the action envisaged.[196]

Regarding the scope of principle of proportionality Art. 5 (4) TEU clarifies:

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

This principle is a restriction of the instrumental and content-related intensity of a Community regulation.[197] The principle of proportionality as a barrier of the Union´s competence protects the member states and also ties in with the basic idea of subsidiarity.[198] Consequently, Article 5 TEU can on the whole be considered as the central focal point in cases of conflicts of competences between the member states and the EU.[199]

With the principle of conferral of powers (second paragraph of Article 5 TEU), the principle of subsidiarity in the proper sense (third paragraph of Article 5 TEU) and the principle of proportionality (fourth paragraph of Article 5 TEU) Article 5 TEU contains a triad of barriers according to community law for every EU exercise of competence.[200] Contrary to a federal state with a competence-competence the principle of conferral of powers becomes clearly visible through the explicit competence presumption for the benefit of the member states according to Article 4 (1)

[195] Härtel, in Niedobitek (2020), p. 456. Prior version: Härtel, in: Niedobitek (2014), p. 513. The author hereby refers to Article 22 in the Charter of Fundamental Rights of the EU and also to Article 3 (3) TEU, Articles 167 (1), 174 (1) TFEU where the character of diversity and unity is reflected.
[196] Blanke / Mangiameli (eds., 2013): The Treaty on European Union (TEU): A commentary, p. 430.
[197] See Kröger (2015), p. 382.
[198] Härtel, in: Niedobitek (2020), pp. 504-505. Prior version: Härtel, in: Niedobitek (2014), p. 570.
[199] See Calliess, in: König / Uwer (2015), p. 15.
[200] Regarding the explanation of the so called Schrankentrias see also ibid., p. 16.

TFEU and Article 5 (2) TEU and also through the obligation to state reasons for the EU legislator in cases of recommendations.[201]

Through the reformulation of the principle of conferral of powers and the multiple emphasis on this principle within the Treaty of Lisbon it is pointed out that the Union only has those competences which were transferred to the Union by the member states within the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU).[202] If two goals are followed by one legal act or the legal act has two components it must be distinguished where the main focus of the legal act is and then the legal act can be referred to just the one legal base which is essentially concerned.[203]

In the EU there has been a display-related problem regarding the question of competence because barely someone, in particular citizens, have been able to understand who is responsible for what in the area of legislation.[204] To give an example, it has long been the subject of heated debate if Article 114 TFEU constitutes an exclusive Union competence.[205] The regulations of responsibilities according to the TFEU and the TEU are useful but only to a limited degree because the lists of areas of responsibility are no legal basis which empower to act by themselves; only in the field of exclusive competence the Union can claim an overall competence zone.[206] The fact that a field of a non-exclusive competence of the Union is affected does not tell us to which degree the member states' margin for manoeuvre is restricted.[207] Also under the aspect of transparency a more precise definition of the individual responsibilities would be desirable.[208]

When it comes to the question of the competence it must be outlined where the limits of competences are set and to which degree a competence transfer in policy areas of the EU is realised through the market levers. It is

[201] See ibid.
[202] See ibid., p. 33.
[203] See Schröder, in: Streinz (2018), Art. 114 AEUV, Rn. 123.
[204] Eilmansberger, in: Hummer / Obwexer (2009), p. 206.
[205] See Calliess, in: König / Uwer (2015), p. 16.
[206] Eilmansberger, in: Hummer / Obwexer (2009), p. 206. For a similar opinion see also Calliess, in: König / Uwer (2015), p. 16.
[207] Ibid., 206.
[208] Ibid.

important to separate Art. 114 TFEU as a legal competence from other competence bases because Art. 114 TFEU allows the member states the possibility of deviating according to Art. 114 (4-6) TFEU while other competence provisions only allow a minimum harmonisation or even completely exclude the possibility of a harmonisation.[209]

The wording of Article 26 (3) TFEU states the following: *"The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned."* Due to the possible wide interpretation of the term "internal market" is it is no coincidence that the limits of competence are stressed repeatedly within Article 26 TFEU because prior to the entry into force of the Treaty of Lisbon it was a matter of dispute whether the task of the realisation of the internal market falls within the exclusive competence of the Union.[210]

In the meantime, most of the competence scopes are clearly set and clarified by the TFEU as follows: the exclusive competence of the Union only refers to the elements mentioned in Article 3 (1) TFEU such as the Customs Union and rules on competition.[211] Furthermore, areas such as the monetary policy for the member states, the conversations of maritime under the common fisheries policy and also the common commercial policy are enclosed by Article 3 (1) TFEU.

Article 4 TFEU clarifies that apart from the mentioned exclusive competence areas shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safe

[209] See Schröder, in: Streinz (2018), Art. 114 AEUV, Rn. 128.
[210] See Schröder, in: Streinz (2018), Art. 26 AEUV, Rn. 10.
[211] Ibid.

ty concerns in public health matters, for the aspects defined in this Treaty.

Besides, coordinating competences are set by Article 5 TFEU in the fields of economic policy guidelines, guidelines for employment policies and also social policies.

Finally, the Union has complementary competences according to Article 6 TFEU to carry out actions to support, coordinate or supplement the actions of the member states in the following areas: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.

Measures of legal harmonisation are realised in the tension field between European integration and the preservation of the member states' interests in national sovereignty. The dissolution of this tension field occurs through the principle of subsidiarity and the principle of proportionality and these two principles have a guiding effect on the legal harmonisation of the internal market.[212]

However, the mentioned restrictions of the power of the Union are more likely a theoretical approach. It must be noted that so far the competence power of the Union has not been restricted by tools such as the principle of subsidiarity. The increase of the EU competences at the expense of the member states has been caused through factors such as the limitations of parliamentarianism, the wide reach of EU competences, the extensive target directory and the precedence of the interpretation of the Commission.[213]

In particular, the undefined term “cannot be sufficiently” within Article 5 (3) TEU results in considerable problems in legal practise.[214] The principle of subsidiarity serves as early warning system which is oriented

[212] See Kröger (2015), p. 378.
[213] Palsson (2013): The EU´s principle of subsidiarity - An empty promise, p. 18, <http://www.eudemocrats.org/eud/uploads/AMP_Subsidiarity_an_empty_promise_2013.pdf> accessed 11 June 2016.
[214] Härtel, in: Niedobitek (2020), p. 501. Prior version: Härtel, in: Niedobitek (2014), p. 565.

toward the reduction of the democratic deficit of the Union but which is conditioned by many political factors.[215] In particular, the European Court of Justice has the final control when it comes to the unclear outcomes with the need for an interpretation of the competences.

Many decisions of the ECJ have underlined the strong competence of the Union even in areas which appeared clearly to be in the scope outside the Union´s competence. Such estimation primarily refers to the cases where the ECJ had to deal with health issues in the context of tobacco products.

The ECJ made clear in the decision called "Tobacco Advertising I"[216] about the ban of tobacco advertisement in the year 2010 that Art. 114 TFEU is not a general competence to govern the internal market. The disputed directive[217] had the purpose of a high level of the protection of health and this area the EU has only a complementary competence role.

The ECJ deviated the consideration that Art. 114 TFEU cannot be interpreted as an all-purpose competence through the second decision regarding the tobacco advertisement.[218] This decision is known as "Tobacco Advertising II"[219]. The disputed directive[220] dealt with the total ban of tobacco advertisement in print and broadcasting media. It created a greater degree of uniformity than the previous directive in the areas that mattered

[215] Blanke / Mangiameli (eds., 2013): The Treaty on European Union (TEU): A commentary, p. 431.
[216] Case C-376 Germany v Parliament and Council (Tobacco Advertising I), 2000, ACR I-8419, <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130d53b765e81a8ad49229a4ecb1eb36f0e36.e34KaxiLc3eQc40LaxqMbN4ObN8Ke0?text=&docid=45715&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=329222> accessed 11 July 2015.
[217] Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998L0043&from=EN> accessed 11 July 2015.
[218] Blanke / Böttner, in: Niedobitek (2020), p. 950; Blanke, in: Niedobitek (2014), p. 167.
[219] Case C-380/03 Germany y Parliament and Council (Tobacco Advertising II), judgment of 12.12.2006, ECR I-11573, <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130de3b79842afed74d0d86f0bb9df0486c25.e34KaxiLc3eQc40LaxqMbN4ObN0Se0?text=&docid=66366&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=444801> accessed 11 July 2015.
[220] Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0033&from=DE> accessed 11 July 2015.

while leaving other matters alone such as local sports tournaments with no international aspect at all and also the ashtrays and parasols for which apparently no market exists.[221] Within the judgment the same principles were applied as within the previous one but this time the court considered the directive to be valid.[222]

The ECJ pointed out that fulfilling the "functional element" of the single market is sufficient for the application of Art. 114 TFEU and that touching the scope of the provision for the protection of health according to Article 168 TFEU is not a competence barrier. The judgment finally clarified that it is enough whenever a directive pursues either the removal of obstacles to movement or undistorted competition and it is possible to harmonise public health matters under Article 114 provided this is part of a genuine internal market regulation.[223] Consequently, the application area of Article 114 is enormously far and unpredictable for the member states.

The tobacco directive is seen as an illustration of how the Commission overrides the Treaty provisions as it is argued that it interprets the principle of subsidiarity to the own advantage.[224] Although within the EU "snus" (a moist powder tobacco manufactured and consumed primarily in Sweden and Norway) is only allowed to be sold in Sweden and the tobacco directive also contained the prohibition of certain condiments in snus, the Commission only referred to the internal market when it justified the measures.[225] To formulate it in slightly exaggerated terms it can be concluded, that the European Court of Justice has given to the Commission a "free ticket" to practically decide all concerned matters. Finally, it is not a surprise that also the new tobacco directive (2014/40/EU) was considered to be valid by the European Court of Justice in May 2016.

[221] See Chalmers / Davies / Monti (2010), p. 691.
[222] See ibid.
[223] See ibid.
[224] Palsson (2013): The EU´s principle of subsidiarity - An empty promise, p. 26, <http://www.eudemocrats.org/eud/uploads/AMP_Subsidiarity_an_empty_promise_2013.pdf> accessed 11 June 2016.
[225] Ibid., p. 18.

The European Court of Justice continues the established "pro Union" case-law without any significant changes.[226] This recently became very well visible in May 2016 when the ECJ announced that the new EU directive[227] concerning the manufacture, presentation and sale of tobacco and related products is valid. The directive in particular deals with the prohibition of the placing on the market of tobacco products with characterising flavours and the standardisation of the labelling and packaging of tobacco products. In addition, the directive also introduces special rules for electronic cigarettes.

Poland, supported by Romania, challenged before the Court of Justice the prohibition of menthol cigarettes (Case C-358/14) and in two other cases (C-477/14 and C-547/14), the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) asked the Court of Justice whether a number of provisions of the directive on tobacco products are valid.[228]

In the context of the principle of subsidiarity the court stated:

"*In addition, the Court holds that it was lawful for the EU legislature, in the exercise of its broad discretion, to impose such a prohibition, since the less restrictive measures advocated by Poland do not appear to be equally suitable for achieving the objective pursued. The Court considers that neither raising the age limit solely from which the consumption of tobacco products with a characterising flavour is permitted, nor prohibiting the cross-border sale of tobacco products, nor, lastly, including a health warning on the labelling stating that tobacco products with a characterising flavour are as harmful to health as other tobacco products, is likely to reduce the attractiveness of those products and thus prevent persons above that age from starting smoking. Finally, the Court*

[226] With a reference to the Judgment of the Court (Grand Chamber) of 22 January 2014 (Case C-270/12 UK v Parliament and Council) see Obwexer, in: König / Uwer (2015), p. 76.
[227] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0040&from=EN> accessed 11 June 2016.
[228] Press release No 48/16 of the Court of Justice of the European Union, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-05/cp160048en.pdf> accessed 11 June 2016.

holds that such a prohibition does not infringe the principle of subsidiarity."

In addition, it was outlined by the court that in providing that each unit packet and the outside packaging must carry health warnings taking the form of a message and a colour photograph, which cover 65% of the external front and back surface of each unit packet, the EU legislature did not go beyond the limits of what is appropriate and necessary.[229]

Finally, it becomes clear that the ECJ decisions demonstrate the tendency to declare that the principle of subsidiarity and the principle of proportionality are usually not infringed without going into detailed explanations.

To give one further example for this estimation, in the Case C-270/12 (UK v Parliament and Council) the Court decided that the fear of the United Kingdom in relation to the powers of the European Securities and Market Authority ('ESMA') to intervene in the financial assets and securities markets were unfounded. So far the principle of the subsidiary has only been apostrophised by the European Court of Justice without any determination of a violation.[230] The influencing factor of the Union´s competence therefore remains very far-reaching and is finally decided by the European Court of Justice with a tendency towards an anti-national solution.

To sum it up, the principle of subsidiarity is not an effective tool to limit the Union`s competence. The possibility of the member states to be involved in the decision-making processes through the principle of subsidiary is more likely symbolic and does not reduce the democratic deficit of the EU noticeably.

[229] Ibid.

[230] Blanke / Böttner, in: Niedobitek (2020), p. 1008. Prior version: Blanke / Böttner, in: Niedobitek (2014), p. 245. The authors hereby refer to the following cases of the ECJ: Biopatent (C-377/98), British American Tobacco (C-491/01) and Vodafone (C-58/08).

III. The democratic deficit in the European Union

As it was resumed that the principle of subsidiarity is not an effective tool to reduce the democratic deficit noticeably it is needed to outline the characteristics of the democratic deficit in the EU for a better understanding of essential democratic structures and to consider efficient measures as tools for balancing these democratic deficits.

Before the introduction of the Single Market Acts I and II there have been many open discussion forums to analyse the problems of the internal market in public in order to improve the situation by a collective effort. All this is not, however, enough to reach the majority of the European citizens. The average citizens usually do not participate in the decision-making structures and cannot identify themselves with the European institutions. Only very few levers of the Single Market Acts have a direct impact on them such as the "mobility of citizens levers" according to lever 2 and lever 7.

There have been several debates regarding the issue if and to which degree the EU suffers from a democratic deficit. It has been even argued that such deficit does not exist. However, one must admit that not only a significant distrust of the EU citizens towards the EU politics does exist but also the way essential powers have been shifted from national Parliaments to the EU level must be seen critically.

The authors[231] Blanke and Böttner point out that it was only with the Treaty of Lisbon that the democratic principles of the Union (Art.10-12 TEU) have been incorporated into primary law based on Union Citizenship according to Art. 9 TEU.[232] Besides, the authors mainly refer to the doubtful democratic level of legitimation in the Union and also to the weak role of the European Parliament. According to Blanke and Böttner, the lack of participation comprises the role of national Parliaments. Here it becomes visible that questions of legitimation also touch the problematic borderline

[231] Hereby it is referred to the book of the footnote below. The relevant section of the book has the title: "The Democratic Deficit in the (Economic) Governance of the European Union"; see pp. 243.
[232] Blanke / Böttner, in: Blanke / Cruz Villalon / Klein / Ziller (2015), p.244.

between the national and the European identity. “In view of the obvious and manifest deficiency of the sense of a common European identity, the role of national Parliaments cannot be neglected.”[233]

A reform of the Union is then suggested by Blanke and Böttner which “needs to tackle the substantive distribution of competences between the Union and the Member States, including the stronger involvement of parliamentary bodies in the legislative procedure.”[234] The authors hereby follow a two-tiered approach: “the introduction of new elements at European level by strengthening the national Parliaments in their current position and a Treaty reform that leads to enhanced economic coordination with the right of the European Parliament to be heard in the economic policies of the Member States.”[235] At a later point Blanke and Böttner underline the need for direct democratic legitimation due to the dynamic interpretation of the Treaties in the light of effet utile.[236] They also refer to the linguistic component which also becomes subject matter of this paper in another section.

There is no doubt that all these mentioned aspects such as the role of the European Parliament and the national Parliaments, the aspect of legitimation, the question of identity and also the role of “effet utile” next to the linguistic component have a significant impact on the democratic development and the current deficits. At least the role of the European Commission has been strengthened by the elections 2014.[237] This must be evaluated as a positive signal.

However, the debate regarding the democratic deficit in the European Union has mainly always been a political one. Initiatives for European-wide referendums often have the interest to strengthen national approaches which are needed but which also comprise the risk that the EU would then not be able to speak with one strong voice anymore. As long as these deficits are only “on a paper” and not felt by citizens directly in

[233] Ibid., p. 245.
[234] Ibid.
[235] Ibid., p. 246.
[236] Ibid., p.250.
[237] Weidenfeld, in: Weidenfeld / Wessels (2016), p. 17.

everyday life, there is not a direct high danger for democracy. Democracy is finally seriously threatened at the point when citizens have the strong feeling that their voices are not heart anymore.

At this point it must also be stressed that the EU law is too complex and too hard to be understood by citizens without having studied law. Law-making processes and the also legal rules themselves have to become as simple as possible to be understood by as many people as possible. Firm legal rules everyone can trust in and rely on are a fundamental basis in times of crisis. Political processes might sometimes work slowly but as long as the citizens can believe in firm legal rules everyday life keeps on functioning well. Finally, the European Parliament must intensify a positive public image to be perceived by the average citizen.[238]

Social cohesion and the "team spirit of the Union" are threatened when a huge majority of the citizens feel a heavy helplessness towards "the elites of the EU". This has become very clear during the strong protest movement against "TTIP". One could have gained the impression during the secret "TTIP meetings" that huge international companies can form the law according to their will without the participation of the citizens. The high number of big demonstrations against "TTIP" made clear that the EU has to follow a new democratic approach with a stronger involvement of national Parliaments and also with a much more intense public participation in decision-making processes in order not to lose further authenticity.

B. Relation to the specific single market provisions

Before the precise evaluation of the Single Market Acts I and II an explanation about the concrete legal environment of Article 114 TFEU is given within this chapter to understand the overall legal context. The relation to the specific single market provisions is outlined to understand the meaning of Article 114 TFEU in the light of other important legal provisions.

[238] See ibid., p. 18.

The target of an internal market is primarily conceptually carried by the fundamental freedoms according to Article 26 (2) TFEU.[239] Through the development of the market freedoms from the prohibition of discrimination into the prohibition on restrictions the Union legislator has been successful to reduce the level of intervention to a minimum.[240] However, the market freedoms can only have a selective effect and for the realisation of the internal market the Union is beyond that reliant on measures of the positive integration such as the legal harmonisation according to Article 114 TFEU.[241]

Article 114 (1) TFEU is a general competence for the legislative approximation and in the case of an overlap the more specific provisions are applicable. However, it is a prerequisite that also these more specific provisions refer to the achievement of the objectives set out in Article 26 TFEU.[242] For instance, Article 46 and Article 48 for the freedom of movement of workers and Articles 50, 52 (2), 53 TFEU in the sector of the freedom of establishment and free movement of services belong to the more specific provisions.[243] The idea of the internal market to a certain agree superimposes the specific provisions.

In many cases it is difficult to draw a clear line regarding the applicable provisions because several provisions must be considered at the same time. To give an example, the key action of the tenth lever of the Single Market I deals with measures to improve the "Posting of Workers Directive"[244]. Within the Single Market I the following legal context is stressed by the Commission:

"The legislation on the single market must take due account of Articles 8 and 9 of the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union, which now

[239] See Terhechte, in: Grabitz / Hilf / Nettesheim (2020), Art 3. EUV, Rn. 40.
[240] See ibid.
[241] See ibid.
[242] See Korte, in: Calliess / Ruffert (2016), Art. 114 AUEV, Rn. 11.
[243] See ibid., Rn. 12.
[244] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').

has the same legal value as the Treaty. Accordingly, the Commission will propose legislation applicable to all sectors which will clarify the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights, including the right to take collective action, in accordance with national law and practices and in compliance with EU law."

Consequently, many different provisions regarding the social and territorial cohesion are also important and must be considered within the decision-making processes of the internal market.

There are many special competence rules which refer to the internal market. Some of them will be more closely analysed within the next subchapter "flanking policies". The special competence rules also include 43 TFEU (agriculture), Article 91 TFEU (transport), Article 134 TFEU (indirect taxation), Article 172 (network interoperability), Article 192 read in conjunction with Article 193 (environmental protection) and Article 207 TFEU (external trade policy).[245]

The market levers 6 and 10 are illustrative for the recent development in the area of the subject-specific harmonisation of national norms.[246] While for the implementation of the sixth market lever (European networks) the regulation 347/2013 about guidelines of the trans-European infrastructure was enacted based on Article 172 TFEU, the European Parliament and the Council adopted for the implementation of the tenth market lever (social cohesion) a directive for the enforcement of regulation 96/71 on the posting of workers in the framework of the right to provide services on the bases of Art. 51 (I) and 62 TFEU. [247] In this context also the regulation 1316/2013 establishing the Connecting Europe Facility has to be considered. Particularly in the internal market of European networks, the Union has the aim to establish a wide common legal base for the entire

[245] See Khan / Eisenhut, in: Geiger / Khan / Kotzur (2015), Art. 114, Rn. 5.
[246] See Blanke / Böttner, in: Niedobitek (2020), p. 961.
[247] Blanke / Böttner, in: Niedobitek (2020), p. 961. It is hereby referred to the Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009.

Union with uniform rules for all member states "in order to achieve smart, sustainable and inclusive growth and to stimulate job creation with the objectives of the Europe 2020 Strategy"[248].

The success of the internal market is to high degree also reliant on the national tax regulations of the member states.[249] In Article 114 (2) TFEU which is considered to be in the scope of a "political sensibility"[250] it is clarified that Article 114 (1) TFEU shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons. Due to the principle of unanimity which is applicable in the subject-matter of Article 114 (2) TFEU it is very difficult to reach a consensus of all member states.[251] Thus, any modifications in the area of Article 114 (2) TFEU are not foreseeable in the near future. Indirect tax provisions for the harmonisation can be adopted according to Article 113 TFEU. This harmonisation tool was considered within the tax lever (lever 9) and filled out by a proposal[252] concerning the revision of the energy taxation rules. In an indirect way the environmental policy is also shaped by lever 9 because tax incentives for a climate-friendly behaviour are provided.

The concrete distinction between several possible legal foundations is often difficult. "The variety of concurring EU legal bases to harmonise or respectively approximate legal provisions causes significant difficulties in practice when choosing the applicable legal basis."[253]

To give an example, the directives implementing the principle of equal pay between men and women which are important for the free movement of persons are all exclusively based on Article 115 TFEU or Article 352 TFEU rather 157 TFEU.[254] Unless Article 153 is not applicable,

[248] Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, p. 1.
[249] Blanke / Böttner, in: Niedobitek (2020), p. 983.
[250] See Tietje, in: Grabitz / Hilf / Nettesheim (2020), Art. 114 AEUV, Rn. 88.
[251] See ibid.
[252] Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, COM (2011) 260 final.
[253] Khan / Eisenhut, in: Geiger / Khan / Kotzur (2015), Art. 114, Rn. 5.
[254] See Kreuschitz, in: von der Groeben / Schwarze / Hatja (2015), Art. 46, Rn. 28.

it can be assumed that labour law and labour conditions are harmonised in the framework of Article 115 TFEU.[255] The legal boundary to Article 46 TFEU is not very sharp and a wide margin of discretion is granted to the legislator.[256] The criteria for the choice of the legal base must be whether the protection of the free movement is in the foreground or whether more likely a general labour or social measure is given which affects all domestic employees in the same way.[257]

The Single Market Acts I and II have blanked out the aspect of equal pay and missed the chance to strengthen the social character of the market levers by modernising the old regulations. Since the enforcement of the Directive 2006/54/EC[258] it took more than a decade to achieve a noteworthy next step through the launch of a new evaluation[259]. At the same time, however, one must admit that the question about the appropriate legal base is often more likely a theoretical one. In a new proposal[260], legally based on Article 157 (3) TFEU, with the goal to strengthen the principle of equal pay within the explanatory memorandum the real practical problems are described as follows: *"The Covid-19 pandemic and its economic and social consequences makes it even more pressing to tackle this issue, given that the crisis has hit female workers especially hard."* Due to the increased number of home-office employees and the difficult childcare infrastructure the principle of equal pay has gained a new significance. The new proposal is based on the concept of minimal harmonisation and allows the member states to set higher standards.

From a legal-dogmatic point of view, the classification of the competence areas is not very convincing. The wording of provisions and the

[255] See ibid., Rn. 29.
[256] See ibid.
[257] See ibid.
[258] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
[259] Commission staff working document evaluation on the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on equal pay for equal work or work of equal value; SWD (2020) 50 final.
[260] Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms; COM (2021) 93 final.

statutory system are often unclear. The scope of application of Article 50 TFEU may in particular overlap with the coordination competence of Article 53 (1) alt. 2 TFEU but also with the legal harmonisation base of Article 114 TFEU.[261] As in both cases a shared Union competence for the realisation of the internal market according to Article 4 (2) lit. a) TFEU is given and secondary EU legislation based on Article 53 TFEU or rather on Article 114 TFEU are adopted by the ordinary legislative procedure, it is assumed that a distinction of the areas of application in the relation to the competence of Article 50 TFEU is irrelevant respectively impossible.[262] The Union legislator also makes insofar no difference, but often uses these jurisdictional provisions side by side.[263] There is a risk of circumvention due to the lack of a clear differentiation. In particular, the self-contained duties mentioned in Article 50 (2) TFEU could lose every practical effect.[264]

One of the important specific provisions is also Article 53 TFEU. The provision outlines that the mutual recognition of diplomas, certificates and other evidence of formal qualifications is desired to make it easier for persons to take up and pursue activities as self-employed persons. This norm is very important in the context of lever 2 of the Single Market Act I. It is hereby referred to Directive 2013/55/EU[265] which is legally based on Articles 46, 53 (1) and 62 TFEU. According to Article 4a of the mentioned directive member states shall issue holders of a professional qualification with a European Professional Card upon their request. Together with the new development of the EURES portal which is subject of lever 17[266] these reforms together depict a significant improvement for the free movement of persons.

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[261] See Korte, in: Calliess / Ruffert (2016), Art. 50, Rn. 4.
[262] See ibid.
[263] See ibid.
[264] The author Korte therefore suggests bringing together the competence bases of Article 50 (1) TFEU and Article 53 TFEU from a legal policy point of view. See Korte, in: Calliess / Ruffert (2016), Art. 50, Rn 27.
[265] Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').
[266] See Commission implementing decision of 26 November 2021 implementing Regulation (EU) No 492/2011 of the European Parliament and of the Council as regards the clearance of vacancies and applications for employment and the re-establishment of EURES; 2012/733/EU).

A strict distinction between Article 53 (1) TFEU and other competences is necessary due to the bans of harmonisation such as in the field of culture according to Article 167 (5) TFEU and Article 165 (4) TFEU in the field of education.[267] Article 53 (1) only deals with a qualification once gained and not with purchases of proven skills.[268] The relation between Article 114 TFEU and Article 53 TFEU is not problematic due to the clearly specific character of Article 53 TFEU. "Without this legal basis, the free movement of persons within the internal market would be deficient."[269] However, the existing regulatory gaps in private and company pensions and problems in the field of health insurance matters remain.[270] These are practical barriers which need to be clarified through new legislative actions.

The scope of application of the fundamental freedoms is far-reaching with a major impact on the competition law. Real exceptional spheres which a priori exclude a control of national measures based on the fundamental freedoms are only Articles 45 (4), 51 (1) and 62 TFEU for workers in the public administration respectively for certain activities connected with the exercise of official authority.[271] The ascertainment of the scope of the exceptional spheres is the task of the Union and therefore under the control of the European Court of Justice to ensure the effectiveness of cross-border businesses.[272]

The free movement of persons is confronted with new practical barriers concerning the introduction of border controls and border closings in the year 2020 as a result of the global pandemic. The very important issue of mobility of citizens has suffered from major setbacks. The proportionality of some national laws must be open to questions because the mobility of citizens is one of the key elements of the internal market and cannot be bypassed so easily. The fundamental freedoms of the Union must be

[267] See Korte, in: Calliess / Ruffert (2016), Art. 53, Rn. 20.
[268] See ibid.
[269] Kotzur, in Geiger / Khan / Kotzur (2015), Art. 53, Rn. 1.
[270] See Krebber, in: Hatje / Müller-Graff (2021), p. 170 (Rn. 83).
[271] See Leible, in: Heermann / Schlingloff (2020), Grundlagen: Rn. 72.
[272] See ibid., Rn. 73.

defended more vehemently by all involved actors, particularly in times of a global pandemic.

However, the access to the markets is no absolute value and must be set in relation to competing legal interests.[273] Article 36 TFEU must be taken into account in particular. In Article 36 TFEU it is pointed out that prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property shall not be precluded. Moreover, Article 65 (1) TFEU clarifies that the provisions of Article 63 shall be without prejudice to the right of the member states to apply the relevant provisions of their tax law.

There is no uniform examination structure for the fundamental freedoms in the European jurisdiction.[274] An examination scheme based on the aspects scope of protection, impairment and justification which is often used in German literature is the attempt to contribute to more transparency and to ensure arguments according to constitutional principles.[275]

It is questionable whether the possible reasons of grounds of justifications such as Article 52 (1) TFEU can constitute an appropriate corrective factor for the expansion of the fundamental freedoms to prohibitions on restrictions. It would have been more appropriate to subsume legitimate objectives such as the environmental protection and also the consumer protection under the ground of justification of the public order.[276]

It is not very convincing and clear in the method that the consumer protection is not taken into consideration by Article 36 TFEU.[277] The member states are usually not successful when they appeal to the consumer protection as a justification due to the contradictory proportionality

[273] See ibid., Rn. 95.
[274] See Kingreen, in: Calliess / Ruffert (2016), Art. 36, Rn 28.
[275] See ibid.
[276] See Leible, in: Heermann / Schlingloff (2020), Grundlagen, Rn 97.
[277] For a similar estimation see also Müller-Graff, in: Groeben / Schwarze / Hatje (2015), Art. 36, Rn. 28.

examination of the European Court of Justice.[278] The court leaves it open which mandatory requirements respectively general interests constitute a primary character in the relation with the fundamental freedoms in order to be able to continue to react in a flexible way in accordance with the needs of the member states in every individual case.[279] In cases within the scope of application of Article 36 TFEU also the second sentence of this provision has to considered to avoid arbitrary and disproportionate measures of the member states.

This unclear European approach regarding the consumer protection in Article 36 TFEU must be seen critically. "On the paper" the consumer protection has a great significance. This becomes clear in Article 38 of the Charta of Fundamental Rights of the EU, in the cross-sectional clause in Article 12 TFEU and also in Article 169 TFEU. In practice, the consumer protection has partly been weakened in some member states in the last years. To give an example, the fully harmonised Consumer Credit Directive (2008/48/EC) has put the consumer at a significant disadvantage in countries such as England, Germany and Finland.[280] Also the Consumer Rights Directive 2011 has not strengthened the consumer protection because the minimum standard of the prior directives has become the maximum standard and already existing higher standards were eliminated.[281]

These examples demonstrate the problematic development of the consumer protection. There is legal debate regarding the question if the overall positive result to be achieved in a wide context for the consumers in Europe can justify the weakened position of the consumers in few member states in some cases.[282] This debate discloses that the exact meaning of Article 169 TFEU is not sufficiently clear and precise. It also reveals that the relation between Article 114 TFEU and Article 169 TFEU offers a wide space for irritations and different interpretations. The relation between

[278] Leible, T. / Streinz, in: Grabitz / Hilf / Nettesheim (2020), Art 34. EUV, Rn.13.
[279] See Leible, in: Heermann / Schlingloff (2020), Grundlagen, Rn. 100.
[280] See Knops, in: von der Groeben/Schwarze/Hatje (2015), Art. 38 GRC, Rn. 24.
[281] See ibid. The author hereby refers to Directive 2011/83/EU.
[282] See ibid. The authors hereby criticises the approach of Krebber, in: Calliess/Ruffert, EUV/AEUV, Art. 169 AEUV Rn. 14.

several legal provisions in the context of the TFEU is very complex and often has to be evaluated separately in each individual case.

The mentioned problems are only partly solved by the Single Market Acts I and II. The key action of lever 4 of the Single Market Act I, legally based on Article 114 TFEU, refers to Directive 2013/11/EU[283] and focuses on the legislation on alternative dispute resolution. The issues of collective redress, product safety, market surveillance and the ecological footprint of products, passenger rights and retail financial services are further aspects but only remain side stages.

A proposal[284] for a regulation on consumer product safety and a proposal[285] for a regulation on market surveillance of products form the two initial key actions of lever 23 (at the same time lever 11 of the Single Market Act II). Article 114 TFEU is the key legal base for both proposals. The adoption of both proposals turned out to take much longer than expected. Finally, both proposals failed and have not been adopted in the foreseeable form due to various national interests. Consequently, Directive 2001/95/EC is still applicable. This demonstrates how difficult a harmonisation of the consumer law turned out to be in the last years. At least the adoption of a further regulation[286] regarding the market surveillance and compliance of products based on Article 114 TFEU was achieved.

To sum it up, the role of the consumers was only partly strengthened but the different estimations of the member states have become very clear.

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[283] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

[284] Proposal for a regulation of the European Parliament and of the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC, COM (2013) 78 final.

[285] Proposal for a regulation of the European Parliament and of the Council on market surveillance of products and amending Council Directives 89/686/EEC and 93/15/EEC, and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 1999/5/EC,2000/9/EC, 2000/14/EC, 2001/95/EC, 2004/108/EC, 2006/42/EC, 2006/95/EC, 2007/23/EC, 2008/57/EC, 2009/48/EC, 2009/105/EC, 2009/142/EC, 2011/65/EU, Regulation (EU) No 305/2011, Regulation (EC) No 764/2008 and Regulation (EC) No 765/2008 of the European Parliament and of the Council; COM (2013) 75 final.

[286] Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011.

The consumers can only to a certain degree expect lower prices, more clarity and more safety. However, a lot of deficits remain and that is the Union has launched a new approach to achieve a stronger degree of harmonisation. In this context consumer law has to be considered together with the development the sales law and the company law.

The efforts of the Union to regulate the area of sales law and of company law meanwhile indicate that the Union, regardless of the missing exclusive competence of the consumer protection policy, does not want to remain in the present stage of integration, but will insert the legal harmonisation (Article 169 II lit a in conjunction with 114 TFEU) in the sign of the internal market as a tool for the purpose of the development of a European Private Law.[287] The Commission moves away from the principle of minimum harmonisation and towards the concept of total harmonisation to reduce the legal diversity in the area of consumer protection.[288]

Despite of these achievements the normative deficits regarding a clear differentiation between Article 114 and Article 169 TFEU remain. This has become clear in the "New Deal for Consumers"[289] initiative with the goal to strengthen the enforcement of EU consumer law in the light of a growing risk of EU-wide infringements and modernising EU consumer protection rules in view of market developments. Within both proposals of the mentioned initiative it is referred to Article 114 TFEU, whereas Article 169 TFEU has no practical relevance.

[287] Blanke / Böttner, in: Niedobitek (2020), p. 986.
[288] Ibid.
[289] The initiative refers to the following two proposals and a communication: a) COM(2018) 183: Communication on the New Deal for Consumers, b) COM(2018) 184: A Proposal on representative actions for the protection of the collective interests of consumers and repealing the Injunctions Directive 2009/22/EC (Representative Actions Proposal"), c) COM(2018) 185: A proposal to amend Directive 93/13/EEC on unfair terms in consumer contracts, Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers; Directive 2005/29/EC concerning unfair business-to-consumer commercial practices and Directive 2011/83/EU on consumer rights ("Proposal on better enforcement and modernization").

C. Relation to the flanking policies of the Union Treaties

It is important to outline the relation between Article 114 TFEU and the flanking policies of the Union Treaties to understand the overall context of decision-making processes. Article 114 TFEU is together with Article 115 TFEU a general clause and has a diametrically opposed position to the selective authorisation rules ordered by the policy areas.[290] The only requirement for the use of Article 114 is the functional criteria that the measure must refer to the establishment and the functioning of the internal market.[291] This serves as a wide "cross-sectional competence"[292] for the legislative bodies of the Union. However, the use of the legal harmonisation is tied to the goals of the union treaty.[293]

Within the legal text of the Single Market Act I the following is clarified by the Commission:

"The success of the single market and of European businesses in international competition depend on the European Union´s ability to ensure that its internal and external policies are consistent and complementary."

Consequently, a positive development of the internal market must go hand in hand with the appropriate policies. The following flanking policy areas are mainly impaired by the Single Market Acts I and II: consumer protection (levers 4 and 23), transport (lever 13, 14 and 15), trans-European networks (levers 6 and 16). Policy areas such as the environment, research and technological development more likely only have an accompanying function within the levers.

The energy policy refers to lever 16. Elements of social policy are partly considered within the levers 8 and 24. The employment policy is subject to lever 17 and lever 10. Partly aspects of taxation relating to the Energy Tax Directive are also taken into consideration (lever 9), whereas policy areas such as agriculture, fisheries, the promotion of equality between men and women and the external trade policy do not play a

[290] Ibid, p. 949.
[291] Ibid.
[292] Ibid.
[293] See ibid.

noteworthy role. Most of the market levers deal with different kind of policy areas at the same time and that is why a strict separation into specific categories is barely justified.

Policy areas such as culture, education, health, employment, taxes, parts of the social policy, criminal law, criminal justice, the internal and external security, national procedural law and substantive administrative law have been central substance matters of the member states.[294] These issues are only marginally or indirectly affected by the market levers. Besides, many policy areas interact with each other. To give an example, health matters and consumer protection must often be considered as a whole. Article 2 of lever 4 (the consumer protection lever[295] which is based on Article 114 TFEU) defines the scope of application and explicitly also contains health services provided by health professionals. This demonstrates the risk that a strong use of Article 114 TFEU can undermine existing control mechanisms of the member states.[296]

Article 207 (3) TFEU which refers to Article 218 TFEU deals with the negotiation of agreements with one or more third countries or international organisations. However, the Single Market Acts I and II do not appreciably refer to the existing worldwide trade dimensions. To give an example, the seventh lever of the Single Market Act II deals with the business environment. One goal within this lever is also to support the digital economy across Europe but no concrete global reference is made. This is a shortcoming because third countries outside the EU have a dominant position in the digital sector. The Union first has to sufficiently clarify this relationship and then on this basis a harmonisation of the European market is practically possible.

It appears justified that policy areas such as agriculture and fisheries have not been taken into account by the Single Market Acts I and II. A priority has more likely been given to the levers regarding the digitalisation, but one has to admit that the traditional agriculture and fisheries sectors also

[294] See Ludwigs (2004), p. 208.
[295] Directive 2013/11/EU.
[296] See Ludwigs (2004), p. 208.

have a high impact on millions of jobs in the EU, health issues and the environment.

In the realisation of the Union policies the European Commission has a wide margin of discretion.[297] The activities of the Commission have a "functional character"[298] with the role to promote the general interests of the Union. During the policy-making processes and during the establishment of the internal market various matters have to be brought under one roof according to Article 175(1) TFEU which clarifies the following:

„The formulation and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement."

It is hereby referred to the promotion of an overall harmonious development with the goal that the Union´s actions should lead to economic, social and territorial cohesion. The importance of this overall aspect is partly demonstrated by lever 10 ("the social cohesion lever").

Disparities between the levels of development of the various regions also should be reduced according to the above commitment. The addressee of this cross-sectional task is not explicitly mentioned and that is why the Union and also the member states are all together the obligated parties.[299] Due to the lack of a delegation barrier regarding the legislative tool the correct degree of institutional boundaries and the limits of competences become more and more blurred.[300] The Single Market Acts I and II do not consider specific regional necessities explicitly but more likely focus on the internal market as a whole. Hence, the member states have a major responsibility to reduce regional imbalances.

The internal market does only require open markets but also flanking legislation, particularly in the field of social and environmental policy because the EU has to comply with the provisions of the cross-sectional

[297] Kugelmann, in: Streinz (2018), Art. 17 EUV, Rn. 12.
[298] Ibid., Rn. 13.
[299] See Magiera, in: Streinz (2018), Art. 175 AEUV, Rn. 3.
[300] See Klement: Netzneutralität: der Europäische Verwaltungsverbund als Legislative, EuR 2017, 555 (561).

clauses on social protection (Article 9 TFEU), environmental protection (Article 11 TFEU), consumer protection (Article 12 TFEU), health policy (Article 168 (1) TFEU), employment policy (Article 147 (2) TFEU) or also cultural policy (167 (4) TFEU).[301] In the area of social policy the market levers reveal a lot of deficits. The levers 8,10 and 24 refer to social cohesion and social entrepreneurship but de facto do not directly refer to the social policy. More likely the levers focus on the improvement of the freedom to provide services as a market freedom, while social aspects are only apostrophised.

The Union only partly makes use of the various possibilities which are given. There are several legal bases for the EU to shape the flanking policies. As a tool for the flanking policies, the legal harmonisation of the Union related to the internal market is made possible by numerous legal bases next to Art. 114 such as Articles 18 (2); 21 (2); 33; 43 (2); 50 (2) lit. g); 52 (2); 53 (2); 64 (2); 70; 81 (2); 82; 91 (1); 113; 153 (1); 157 (3); 168 (4); 169 (2) lit. b) in conjunction with (3); 172; 192; 194 TFEU.[302] The used terms harmonisation and coordination can be interpreted in the same way. The inconsistent terminology within these provisions has no legal relevance.[303] Most of the mentioned paragraphs are not used by the Union and only have a theoretical meaning.

The competence of the Union has grown in many policy areas despite of the normative deficits. However, the parliaments of the member states still play a significant role. They can be regarded as "the guardians of the principle of subsidiarity"[304]. At the same time, the degree of practical involvement is not so well-developed. It is problematic that the parameters for the examination of the criteria of the principle of subsidiarity are not defined and therefore the organs of the Union have a significant margin of judgement.[305] Furthermore, the case-law of the ECJ has so far not determined any breach of the principle of subsidiarity.[306] Despite of the

[301] See Blanke/Böttner, in: Niedobitek (2020), p. 916.
[302] See Tietje, in: Grabitz / Hilf / Nettesheim (2020), Art 114. EUV, Rn. 2.
[303] See ibid.
[304] Calliess, in: Calliess / Ruffert, Art. 12 EUV (Rn. 68).
[305] See ibid.
[306] See Blanke/Böttner, in: Niedobitek (2020), p. 1008.

general justiciability of this principle, it essentially only has a significance as a procedural guideline for the Union organs.[307]

The content of the proposals of the market levers reveals that the reference to the legal bases and the subsidiarity principle is only made in very general set phrases without any specific and substantive examination. This puts in questions the general approach regarding the choice of legal basis for community acts. According to consistent case-law of the ECJ, the choice of legal base may not only depend on the conviction of the acting bodies but must be based on objective judicially verifiable facts regarding the goal and the content.[308] Hence, this demonstrates the need for a new requirement that in the future all Union proposals must be better explained and fully justified regarding the legal ground and the subsidiarity principle on a case-by-case basis.

There is also a need for national parliaments to "europeanise themselves in their practical work"[309] as a compensation of the deficits of the legal choice and of the principle of subsidiarity. Many national parliaments do not keep up with the legal developments in Europe sufficiently.

Calliess hereby refers to the transformation from the point of view of constitutional policy which can be sceptically considered under the motto "Take back control"[310] and also be euphorically considered as "Dare more democracy"[311]. Finally, it also depends on the political point of view, how one perceives constitutional aspects or how one believes things are to be.

The fact remains that new perspectives and tasks have been created for constitutional law in the context of the globalisation and Europeanisation.[312] A new division of responsibilities has developed and raised new legal questions about the correct degree of policymaking competences. The cards are constantly re-shuffled regarding the division of

[307] See Ludwigs (2004), p.132 (regarding the justiciability) and p. 133 (regarding the significance as a guideline).
[308] Bock (2005), p. 228.
[309] Calliess (NVwZ 2019, 692).
[310] Ibid.
[311] Ibid.
[312] Ibid.

responsibilities. There are non-linear, interacting components which shape the flanking policies of the Union.

Not only an effective cooperation between the European Parliament and the national Parliaments is needed but also the cooperation between the parliaments of the member states among each other has to be strengthened to realise a cohesive approach to major issues.[313]

The flanking policies of the internal market such as the environmental policy, the consumer protection policy, the health policy and also the employment policy according to Article 147 (2) constitute a cross-cutting task and must also be taken into account within all measures of the EU in other areas.[314] These policies often constitute a complex and comprehensive task because they also must be taken into account within measures of the framework of Article 114 TFEU.[315]

However, a positive teamwork does not only depend on the national parliaments. The national courts, in particular the Federal Constitutional Court in Germany, and the European Court of Justice should after a failed dialogue more likely focus on a cooperation according to Article 4 (3) TEU and a mutual consideration according to Article 4 (2) TEU instead of an avoidable confrontation.[316] There is certainty more "optimisation potential"[317]. The Federal Court of Justice in Germany and the ECJ must find a common constructive way to define the new role of the European Central Bank in order to guarantee a price stability for all European citizens. The principle of democracy and the independence of the European Central Bank must be brought in line with each other to avoid new political conflicts.

Often it is not immediately clear where the concrete legal base of a measure is. In accordance with objective criteria the policy specific focal point of a measure has to be determined - the significant connecting factors

[313] Calliess, in: Calliess / Ruffert, Art. 12 EUV (Rn. 73).
[314] See Calliess, in: König / Uwer (2015), p. 41.
[315] See Blanke / Böttner, in: Niedobitek (2020), p. 916.
[316] See Calliess: Konfrontation statt Kooperation zwischen BVerfG und EuGH, NVwZ 2020, 904.
[317] Kahl: Optimierungspotential „im Kooperationsverhältnis" zwischen EuGH und BVerfG, NVwZ 2020, 824 (828).

are the substantive content or rather the proximity to the subject-matter and the recognisable target setting – to make a distinction.[318]

The more specific provisions also include the common agricultural policy according to Article 43 TFEU, already determined by Article 38 (2) TFEU, next to the Union competence according to Article 103 TFEU.[319] In the areas of agriculture and fisheries there is a shared competence between the Union and the member states according to Article 4 para. 2 lit. d) TFEU.

It is not relevant that the measures according to Article 43 TFEU also contain aspects of the health protection sector because health is also a goal of the common agricultural policy.[320] It is only decisive that one of the goals mentioned in Article 39 TFEU is the foreground.[321] It this case Article 114 TFEU is not applicable. In the context of Article 43 TFEU also Article 352 has to be considered but both norms together barely have a practical relevance. "One of the very rare examples of using Articles 43 and 352 TFEU combined as the legal basis for a regulation was Regulation 3106/92 concerning food aid to Albania for humanitarian reasons."[322]

In the field of judicial cooperation in civil matters Article 81 TFEU is considered to be "lex specialis" in relation to Article 114 TFEU because according to Article 81 (2) TFEU already an indirect promoting effect on the internal market is sufficient.[323]

A differentiated view needs to be taken in the context of a common commercial policy "due to a lack of a harmonisation ban as in Article 192 TFEU"[324]. If the relevant measure is primary related to trade flows and does not solely has an effect within the Union, then Article 207 TFEU instead of Article 114 TFEU is applicable.[325]

Regarding the health protection Article 168 (5) TFEU has to be considered especially. According to this paragraph "the European

[318] See ibid., p. 42.
[319] See Korte, in: Calliess / Ruffert (2016), Art. 114 AUEV, Rn. 12.
[320] See Schröder, in: Streinz (2018), Art. 114 TFEU, Rn. 132.
[321] See ibid.
[322] Geiger, in: Geiger / Khan / Kotzur (2015), Art. 114, Rn. 9.
[323] See ibid., Rn. 133
[324] Korte, in: Calliess / Ruffert (2016), Art. 114 TFEU, Rn. 146.
[325] See Schröder, in: Streinz (2018), Art. 114 TFEU, Rn. 134.

Parliament and the Council may adopt incentive measures designed to improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States."

It can be concluded that the member states and the Union have parallel competences in the field of health protection. However, as long as the condition set out in Article 114 TFEU are fulfilled, the Union legislator can refer to Article 114 TFEU as the legal base despite of a relevant impact on health issues.[326] In defining and implementing the Union policies, a high level of human health protection is ensured according to Article 168 (1) TFEU and also by Article 114 (3) TFEU in the field of harmonisation measures in the single market.[327]

As long as the shared competence according to Article 168 (4) is applicable, there is no prohibition of harmonisation.[328] The further decision-taking practice of the European Court of Justice remains to be seen to allow a very clear division of the applicable legal base.

It is a serious shortcoming that the Single Market Acts I and II practically do not deal directly with the topic of health protection. Since the COVID-19 pandemic health protection according to Art. 168 TFEU must be evaluated in a new light. The pandemic does not reveal the weakness of the EU but the insufficient competence equipment of the EU in the fields of health protection and civil protection policy.[329] This estimation is also made by the author Calliess who supports a modification of Article 168 IV TFEU with a new competence for the Union to tackle the pandemic.[330] The national governments primarily have the competence and responsibility and

[326] See ibid., Rn. 135.
[327] See ibid.
[328] Korte, in: Calliess / Ruffert (2016), Art. 114 TFEU, Rn. 149.
[329] See Blanke/Pilz: Europa 2019 bis 2024 – Wohin trägt uns der Stier? – Sieben Thesen zu den Herausforderungen der Europäischen Union, EuR 2020, 273-301.
[330] Calliess, Christian: Braucht die Europäische Union eine Kompetenz zur (Corona-) Pandemiebekämpfung?, in NVwZ, 2021, 505-511.

that is why there is a need for a debate about the strengthening of the EU competences in the field of Article 168 TFEU and in the field of civil protection according to Article 196 TFEU.[331] Particularly during the early stages of the pandemic many member states were overstrained and did not know how to react to the health risks of the virus efficiently. Valuable time was lost and the pandemic was able to spread very quickly.

The COVID-19 pandemic has confronted us with "unprecedented challenges in public health"[332]. It became also clear that the World Health Organisation (WHO) alone is not able to protect the health of the citizens in Europe. Here too, it becomes clear how important more expenses for research and development are in order to be better prepared for future challenges. Also the financial resources for the humanitarian aid in favour of third countries according to Article 214 TFEU must be increased.[333]

In the area of consumer protection Article 169 TFEU clarifies that the Union has a contributing role. It can introduce measures which support, supplement and monitor the policy pursued by the member states. The consumer protection is primarily ensured by measures which are introduced in the framework of the realisation of the internal market according to Article 114 TFEU.[334] Only in cases of no concrete internal market relevance health protection measures are legally based on Article 169 TFEU instead of Article 114 TFEU.[335]

However, the exact relation between Article 169 TFEU and Article 114 TFEU is not sufficiently clear. On the one hand Article 169 (2) lit. a) can be understood as a declaratory function with no competence beyond Article 114 TFEU while another view considers Article 169 as an indirect competence norm.[336] Within a similar problematic issue the European Court

[331] See ibid.
[332] Seitz: Schutz vor Epidemien und Pandemien in der Europäische Union: Das Coronavirus CoV-19 als Testfall für den Gesundheitsschutz?, EuZW 2020, 449.
[333] See Blanke/Pilz: Europa 2019 bis 2024 – Wohin trägt uns der Stier? – Sieben Thesen zu den Herausforderungen der Europäischen Union, EuR 2020, 273-301.
[334] See Schröder, in: Streinz (2018), Art. 114 TFEU, Rn. 136.
[335] See ibid.
[336] See Pfeifer, in: Grabitz / Hilf / Nettesheim (2020), Art. 169 TFEU, Rn. 33.

of Justice rejected an enhanced competency in the context of health protection and the ban on tobacco advertising.[337]

Unlike in Article 169 (2) lit. a) the relation between the health protection and the other policies of the Union is explicitly regulated by law and that is why the tobacco case is not transferable but has together with Articles 1, 12 and 114 (3) TFEU an indicative effect for the denial for a competence of Article 169 (2) lit. a) beyond Article 114 TFEU.[338] Due to the still remaining lack of a concrete competence evaluation of the European Court of Justice it is still disputed strongly to what extent the legal harmonisation in the field of the consumer protection has the actual necessary internal market reference.[339]

At least the interpretation of Art. 169 (2) lit. b) is clearer and can therefore be considered as an independent legal competence base of the Union.[340] Article 169 (2) lit. b) also allows the Union to adopt legally binding rules with a direct effect on the action of the member states.[341] To sum it up, the uncertainty regarding the correct competence base, in particular within Article 169 (2) lit. a), has not a high practical importance because it is not expected that the European Court of Justice will declare current practice as invalid, but an unpleasant flavour remains in the light of legal certainty and legal precision.

The COVID-19 pandemic has demonstrated that many consumer rights of the European citizens have been ignored by many companies without serious consequences. The consumers who paid for services to be provided at a later date, in particular for flights, have struggled to obtain refunds from the service providers.[342] Many of them only offered vouchers instead in an attempt to preserve some of their cash reserves, thereby turning consumers into unsecured lenders to business.[343] The faith in contract law

[337] See ibid.
[338] See ibid.
[339] See ibid., Rn. 34.
[340] See ibid., Rn. 35. See also Micklitz / Rott, in: Dauses / Ludwigs (2020), Art. 169 TFEU, Rn. 26.
[341] See Pfeifer, in: Grabitz / Hilf / Nettesheim (2020), Art. 169 TFEU, Rn. 36.
[342] See Twigg-Flesner: The Covid-19 Pandemic – a Stress Test for Contract Law?, EuCML 2020, 89-92.
[343] See ibid.

has become an experience in patience and the following constellations show the wide legal effects of the COVID-19 pandemic.

"The reason why a contract can no longer be performed as expected could be due to a variety of reasons: (i) performance might become temporarily illegal under the lockdown conditions by a government; (ii) performance would still be possible, but one of the parties can no longer afford to proceed; (iii) a supplier might not be able to obtain sufficient goods to fulfil all contracts, or might only be able to do so at a later point in time; (iv) performance would no longer be of any use to one of the parties; and (v) elements of a long-term or subscription-style contract cannot be performed (service facilities closed; debtor unable to regular loan repayments to creditor etc.), to name the most common reasons."[344]

The European Union only partly has an adequate response for the above scenarios. The legal national rules also strongly differ from each other. This legal and political hotchpotch causes a low confidence in cross-border transactions and can have serious negative effects on the development of the internal market. It is a failure of the Single Market Act I and II that the need for a harmonisation of general contract law has been blanked out. Many selective approaches in the past such as the initiative of the "Common European Sales Law"[345] have failed due to various reasons. There have often been to many different positions of the member states. The subsidiarity principle was also a substantial reason for the failure of the Common European Sales Law.[346]

Finally, the facultative approach to create a new legal framework with the new rules next to national rules turned out be incompatible with Article 114 TFEU. Legislative measures to raise the claim to scale uniform rules for the entire Union and at the same time only apply next to national rules and therefore at most overlap national rules cannot be legally based on

[344] Twigg-Flesner: The Covid-19 Pandemic – a Stress Test for Contract Law?, EuCML 2020, 90-92.
[345] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Common European Sales Law to facilitate cross-border transactions in the Single Market (COM/2011/0636 final).
[346] See Blanke / Böttner, in: Niedobitek (2020), p. 1008.

Article 114 TFEU.[347] It can be concluded that the optional and facultative harmonisation (the terms are usually used interchangeably[348]) has proved to be not viable and not effective for the internal market.

In this context, it is important to mention that a noteworthy harmonisation was finally realised by the EU Directive 2019/771[349] and EU Directive 2019/770[350]. Within section 6 of the mentioned EU Directive 2019/771 the major deficits are explained:

"Union rules applicable to the sales of goods are still fragmented, although rules on delivery conditions and, as regards distance or off-premises contracts, pre-contractual information requirements and the right of withdrawal have already been fully harmonised by Directive 2011/83/EU of the European Parliament and of the Council. Other key contractual elements, such as the conformity criteria, the remedies for a lack of conformity with the contract and the main modalities for their exercise, are currently subject to minimum harmonisation under Directive 1999/44/EC of the European Parliament and of the Council. Member States have been allowed to go beyond the Union standards and introduce or maintain rules that ensure that an even higher level of consumer protection is achieved. In doing so, they have acted on different elements and to different extents. Thus, national provisions transposing Directive 1999/44/EC significantly diverge today on essential elements, such as the absence or existence of a hierarchy of remedies."

In the main, Directive 2019/771 contains an update and specification of the old Directive 1999/44/EC and therefore it is justified to discuss whether the new two directives can be considered as a "revolution"[351]. Article 11 of the Directive 2019/771 marks the following significant improvement of the consumer rights:

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[347] Blanke / Böttner, in: Niedobitek (2020), p. 956.
[348] See Ludwigs (2004), p. 111.
[349] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.
[350] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.
[351] Lommatzsch, Jutta / Albrecht, Rolf / Prüfer, Patrick: Zwei neue EU-Richtlinien zum Vertragsrecht – „Revolution" im Verbraucherrecht?, GWR 2020, 331-339.

"Any lack of conformity which becomes apparent within one year of the time when the goods were delivered shall be presumed to have existed at the time when the goods were delivered, unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. This paragraph shall also apply to goods with digital elements."

Consequently, in general the consumers do not have to accept it anymore that products often do not function after six months from the date of purchase. The consumers can rely on a certain quality of the products. Despite of the improvement of the contract law harmonisation it must be criticised that the two mentioned directives come into effect in the year 2022, more than two decades after the last significant changes in the framework Directive 1999/44/EC. The harmonisation reveals a significant positive step but at the same time demonstrates the slowness of the procedures.

Both new directives are legally based on Article 114 TFEU. This demonstrates once more that Article 114 TFEU plays a much stronger role compared to Article 169 TFEU. This current development confirms the approach of the Singe Market Acts I and II. The levers 4 and 23 deal with consumer protection and are also both legally based on Article 114 TFEU.

It is argued that for the European Commission there is a clear reason why regulation on the basis of Article 114 TFEU is preferred over regulation on the basis of Article 169 TFEU in so far as the European Commission wishes to legislate on the basis of full harmonisation, it needs to base its legislative proposal on the need to remove substantial barriers to trade for businesses and/or to improve the possibility for consumers to contract cross border, as only Article 114 TFEU provides for the possibility of full harmonisation.[352]

[352] See Loos, Marco: Full Harmonisation as a Regulatory Concept and its Consequences for the National Legal Orders: The Example of the Consumer Rights Directive (July 13, 2010). Centre for the Study of European Contract Law Working Paper Series No. 2010/03, p. 4, <http://ssrn.com/abstract=1639436 or http://dx.doi.org/10.2139/ssrn.1639436> accessed 20 December 2015.

According to this estimation, this explains why so far hardly any use has been made of Article 169 TFEU as a legal basis next to or instead of Article 114 TFEU with the consequence that the internal market dimension is always (over-) emphasised in the proposals of the European Commission which creates the risk that certain consumer protection aspects are simply overlooked or overpowered by the political or legislative need to promote the further development of the internal market.[353]

On a somewhat more critical note, it could be concluded that Art. 114 TFEU is misused to ensure a full harmonisation with positive trade effects at the expense of consumers. This assessment is at its core correct. Even within a press release of the European Parliament it is admitted that a full harmonisation would in practice lead to an unacceptable levelling down of certain consumer rights.

To sum it up, there is a tendency to leave out the use of Article 169 TFEU but instead to only to make use of Article 114 TFEU in order to ensure a full harmonisation while not taken sufficiently into account consumer rights. In entirely practical terms, similar critical estimations have not received a high relevance because a competence evaluation by the European Court of Justice has so far not taken place.[354] Finally, the internal market does not only need a full harmonisation going along with the market levers because a full harmonisation can have negative effects. This becomes very well visible in the field of the consumer policy because in case of a full harmonisation particular consumer protection provisions must in some cases be sacrificed due to standardisation.

Despite of the shortcomings, the European Court of Justice considers consumer protection as important. This has become clear in the judgement "Wind and Vodafone"[355]. The Court made clear that the sale of sim-cards on which services that can incur fees have been pre-loaded and pre-activated constitutes an aggressive unfair commercial practice when the consumers

[353] Ibid.
[354] See Pfeiffer, in: Grabitz / Hilf / Nettesheim (2020), Art. 169 AEUV, Rn. 34.
[355] Court of Justice of the European Union, press release No 130/18, 13 September 2018, Judgement in Joined Cases C-54/17 Autorita Garante della Concorrenza a del Mercato ("AGCM") v Wind Tre SpA and C-55/17, AGCM v Vodafone Italia Spa.

are not informed of that fact in advance. At the same time, reform bottlenecks in the field of consumer law have become visible in the recent ECJ case-law[356] while in the context of the interpretation of the old Directive 2005/29/EC legal uncertainties became apparent.

One further recent ECJ decision[357] reveals that many consumer law regulations do not consider new technical developments sufficiently. It had to be clarified by the ECJ whether, in the case where a contactless low-value payment is made using an NFC-enabled card, the payment instrument is used anonymously for the purposes of the derogation provided for in Article 63(1)(b) of Directive 2015/2366.

To give a further example, it is technically possible and legally appropriate that the compensation as a so-called smart contract is made available for the consumers automatically after an automatised testing of the legal requirements.[358] In practice often legal difficulties arise. There is a need to optimise the current legal framework of the EU regulation on air passenger rights to make it easier for passengers to receive a compensation in cases of flight cancellations immediately.

Trans-European networks constitute a further important policy area. According to Article 170 (1) TFEU the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures. Article 170 (2) TFEU clarifies that within the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks.

These objectives should be realised by the establishment of a series of guidelines, in particular in the field of technical standardisation according to Article 171 (2) TFEU. If the primary objective of the measure is to ensure the interoperability of national networks through operational measures of

[356] See Case C-109/17 (Bankia SA v Merino). In particular, the interpretation of Article 11 of Directive 2005/29 has caused a lot of confusions.
[357] See C-287/19 (Denizbank). It is hereby referred to judgement of the court (Frist Chamber) of 11 November 2020.
[358] Tavakoli: Automatische Fluggast-Entschädigung durch smart contracts, ZRP 2020, 49.

technical nature, then in general 172 TFEU is applicable.[359] For this purpose of the harmonisation of technical norms Article 171 (2) is applicable and "lex specialis" to Article 114 TFEU so that no restriction through Article 114 TFEU is allowed.[360]

In the area of the transportation policy Article 91 (1) TFEU states that the European Parliament and Council shall lay down the following for the purpose of implementing Article 90: (a) common rules applicable to international transport to or from the territory of a member state or passing across the territory of one or more member states, (b) the conditions under which non-resident carriers may operate transport services within a member state, (c) measures to improve transport safety and (d) any other appropriate provisions. However, not only the "traditional transport sector" but also the sea and transport sector according to Article 100 (2) TFEU are included.

For the distinction of the competence base according to Article 114 TFEU the decisive factor should be whether a measure more likely refers to the free transportation sector such as technical vehicle registration regulations or whether rather political aims, for example regarding the safety, are followed.[361] The distinction between Articles 114 and 91, 100 TFEU is in each case difficult and must be considered individually.[362] "The adoption of levers referred to Article 91 para. 1 may lead to conflicts arising between the principles of freedom and transport services (open market, free competition) on the one hand and the economic wellbeing of the population (standard of living, level of employment) as well as the proper operation of transport facilities in the affected regions on the other hand."[363] Due to the wide margin of discretion which is given to the Union in this area there is only little concern for serious practical conflicts between the above-mentioned conflicts.

The division of competences within environmental policy matters is also complicated. Since the beginning of the 1990s there has been a conflict about the choice of the correct competence base for a Union´s act, first of all

[359] See Schröder, in: Streinz (2018), Art. 114 TFEU, Rn. 137.
[360] See ibid.
[361] See ibid., Rn. 138.
[362] See ibid.
[363] Khan / Henrich, in: Geiger / Khan / Kotzur (2015), Art. 91, Rn. 4.

in the area of the environmental law policy.[364] While some authors in literature consider Article 114 TFEU as "lex specialis", other authors in literature classify Article 192 as the primary provision.[365] According to the prevailing view Article 114 and Article 192 TFEU stand equally side by side.[366]

If the focus of a regulation refers to the internal market and to the environment equally, the measure can be legally based on Article 114 together with Article 192 TFEU.[367] Due to the more generous protection clause according to Article 192 (1) TFEU the judicature of the Union considers this clause prior to Article 114 TFEU while Article 114 (1) must be considered before Article 192 (2) TFEU due to the more integration-friendly and democracy-friendly voting procedures.[368]

The internal energy market depicts a further policy area. The legal base of the internal energy market is Article 194 TFEU. Despite of the formulation in Article 194 (2) TFEU "without prejudice to the application of other provisions of the Treaties" Article 192 is not subordinated to Article 114.[369] The norm only clarifies that there is no restrictive effect on other regulations of the Treaties.[370]

The analysis of the special competence rules and the flanking policies revealed some structural deficits. "The original strategy to pursue an extensive harmonisation (complete harmonisation) had reached factual limits."[371] "More recently this strategy has therefore been complemented, or – especially in areas beyond mere technical standardisation – replaced by the setting of European minimum standards as well as the obligation of mutual recognition of normative or administrative national standards (new strategy)."[372]

[364] See Calliess, in: König / Uwer (2015), p. 42.
[365] Korte, in: Calliess / Ruffert (2016), Art. 114 TFEU, Rn. 145.
[366] See Schröder, in: Streinz (2018), Art. 114 TFEU, Rn. 140.
[367] See Korte, in: Calliess / Ruffert (2016), Art. 114 TFEU, Rn. 144.
[368] See ibid., Rn. 145.
[369] See Schröder, in: Streinz (2018), Art. 114 TFEU, Rn. 141.
[370] See ibid.
[371] Khan / Eisenhut, in: Geiger / Khan / Kotzur (2015), Art. 114, Rn. 9.
[372] Ibid.

This demonstrates the increased need for reforms arising from the new challenges of the European integration process. The need for a reform becomes also visible within the "high level of protection" according to Article 114 para. 3 TFEU which is not clearly defined. Harmonisation does not have to be based on the highest level and the institutions exercise a wide margin of discretion when executing this obligation.[373]

The question arises what measures can be introduced to achieve more precise provisions respectively definitions. Doe to the unanimity requirement and the different views of the member states it is almost impossible to change the legal content of Article 114 TFEU respectively add new provisions. It is assumed that abstract safeguard mechanisms are necessary to avoid extreme case-by-case decisions at the expense of member states.[374] Aside from clearer definitions regarding the competences, the creation of a new court which is only responsible for the sharing out of powers between the Union and the member states is discussed but all the mentioned ideas turned out to be not very convincing respectively practicable.[375]

The suggested introduction of new standards of review such as a "strict scrutiny test", a "rational basis test" or a " sliding scale approach" in the sense of the US-Supreme Courts could be one possible method to achieve a greater predictability and more certainty regarding the decisions of the European Court of Justice in context of the examination of the fundamental freedoms.[376] This will have to be discussed in the future. In doing so, it has to be considered that the European Court of Justice should not completely lose the needed flexibility to continuously shape the integration process.

[373] See Khan / Eisenhut, in: Geiger / Khan / Kotzur (2015), Art. 114, Rn. 21.
[374] See Kirschner (2014), p. 332.
[375] See ibid.
[376] See ibid., p. 333-334.

D. Common good interests and the solidarity principle in the internal market

The Single Market Act I and II do not explicitly focus on common good interests and the solidarity principle. This does not mean that these aspects do have to be taken into consideration within the internal market but there has been not put a noteworthy focus on them. Social aspects are overshadowed by the goal of economic growth.

At least few social approaches are visible in lever 8 which is filled by a regulation[377] on European social entrepreneurship funds. A key characteristic of a social business is that the primary objective is to reach a social impact rather than generating profits. However, investments are usually made on the bases of economic and not of social issues. Consequently, lever 8 has barely a practical relevance. There are only very few European social entrepreneurship funds. Also levers 10 and 24 only apostrophise social aspects.

Profit-oriented companies and consumers are usually the relevant players who participate in decision-making processes. A distinction between the total welfare standard and the consumer welfare standard can be drawn in the area of the economic efficiency as a goal of competition policy.[378] The predominantly preferred concept is constituted by the total welfare standard.[379] This usually does not involve a noteworthy consideration of social businesses.

Due to the fact that de facto economic efficiency has become so important many other values are often levered out. It is assumed that the consumption-production-investment-maximisation of profits scheme as an internally re-enforcing system fails to integrate a significant part of the society: the weak, the excluded, the unemployed, the poor and all those who are not able to respond to global challenges as global players.[380] It is

[377] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds.
[378] See Ludwigs (2013), p. 498.
[379] See ibid., p. 501.
[380] See Tsironis, in: Nebel / Collaud (2018), p. 151.

assumed that freedom of competition does not only promise freedom to the competition protagonists but also welfare to the society in the greatest amount.[381]

For a closer analysis it is indispensable to describe the relevant terms in this context. From a more general perspective, the terms "common weal", "common interests", "public interests" and "public welfare" are often used in one breath by the literature. A further differentiation can be dispensed because all the terms the concern the interest of society and are usually interchangeable. This wide interpretation is subject to risks due to the lack of clear criteria.

It is not appropriate to make a definitive and final assessment regarding the common good interests in Europe, but instead an "everlasting search process for the European common good"[382] exists. This search process persists as long as the principle of democracy "as a new driver of constitutional law integration"[383] is at the development stage in Europe. That is why it is necessary to evaluate the earlier stages of the public good in Europe to understand the overall development.

Common good interests are related to values. Values often in turn come along with traditions. That is why a short historical view is shortly provided at the beginning of this section. There are "three sources"[384] which form the European values. The Greek philosophy and the Roman heritage had a decisive influence, but Europe finally received "his soul" by the Christian view of humankind.[385] A human being as a "imago dei"[386] has the right to liberty and a responsibility at the same time.

The Christian view of humankind also contains the social dimension because human beings are sisters and brothers of the one Father and every person has a demand to belong to a community in a life shaped of permanent cooperations.[387] Hence, it is not sufficient only to refer to the

[381] See Klement (2015), p. 229.
[382] Calliess, NVwZ 2019, 692.
[383] Calliess, NVwZ 2019, 687.
[384] Rauscher, in: Blumenwitz / Gorning / Murswiek (2005), p. 20.
[385] Ibid., p. 22.
[386] Ibid., p. 23.
[387] See ibid., p. 24.

automatic indirect competition effects on the common weal.[388] Instead, common good interests must receive a stronger value in the legal framework of competition law and beyond.

A closer look on the wording of the Single Market Act I[389] and the Single Market Act II[390] reveals that "competition" is the key word which pervades a high number of the market levers while the word "solidarity" is only apostrophised. Therefore, it can be concluded that an optimised competition law is used as one of the vehicles to strengthen the social market economy of the internal market while only few social guidelines are installed. This also confirms the impression that "Community competition law is not a specified fundamental rights protection and conversely, is not guided by fundamental rights."[391] The focus of the market levers on the improvement of cross-border competition harbours the risk of the negligence of the solidarity.

Despite of the historical foundation and despite of the social components of the European Charter of Fundamental Rights of the European Union the considerable global location competition in Europe has decreased the scope for the member states to formulate social policy.[392] The Compendium of the Social Doctrine of the Catholic Church (2004) emphasises the dynamic nature of the pursuit of the common good and stresses the process of permanent development as follows[393]:

„The common good therefore involves all members of society, no one is exempt from cooperating, according to each one's possibilities, in attaining it and developing it. The common good must be served in its fullness, not according to reductionist visions that are subordinated by certain people to their advantages; rather it is to be based on a logic that leads to the assumption of greater responsibility. The common good corresponds to the highest of human instincts, but it is a good that is very difficult to attain

[388] See Klement (2015), p. 229. The author hereby refers to Hayeck and Hoppmann. Accordingly, competition is not a policy instrument.
[389] See COM (2011) 206 final.
[390] See COM (2012) 573 final.
[391] Klement (2015), p. 301.
[392] Von Komorowski, in: Blumenwitz / Gorning / Murswiek (2005), p. 103.
[393] See Dembinski, in: Nebel / Collaud (2018), pp. 68-69. The author hereby quotes § 167 of the Compendium of the Social Doctrine of the Catholic Church (2004).

because it requires the constant ability and effort to seek the good of others as though it were one's own good.“

It is argued that “the necessary social protection cannot be guaranteed any longer solely by individual states and as a community of values the European states should therefore strive to overcome the diversity of their respective social welfare systems and to enact further agreements promoting the implementation of social legal principles.”[394] The difficulty is that the pursuit of integration, the deepening of a nexus of the European common good, entails transferring sovereignty to the European Commission and the European Parliament and that is why it is the very nation states involved in integration which brake and reject it.[395] This behaviour is also based on cultural aspects.

“It can be expected that disturbances of the internal market and thus delays in the further economic and political integration must be accepted in the longer term due to the linguistic plurality.”[396] This correct estimation refers to the general cultural dimension of the languages. It demonstrates that social aspects and cultural aspects are often interlinked with effects on economic and political aspects. It becomes once more clear that the linguistic plurality is not only a brake for further economic growth dimensions in the internal market but also an overall barrier in the entire harmonisation cycle of the Union.

Due to the fact that national rules are not replaced by new European rules the negative integration is partly considered as a “cultural-politically restriction of the scope of action of the member states”[397]. In fact, social and cultural aspects of the member states are often moved to the background as a result of the negative integration process.

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[394] Ibid., p. 156.
[395] See Nebel, in: in Nebel / Collaud (2018), p. 147.
[396] Bock (2005), p. 217. The author hereby mainly refers to the relation between the protection of general interests and the labelling of products in different languages (EUGH, RS. C-51/93). However, this concrete case serves as a good example to underline the overall difficulties of the language plurality.
[397] Ress / Ukrow, in: Grabitz / Hilf / Nettesheim (2020), Art. 167, Rn. 154. For a more critical note see the older version Ress / Ukrow, in: Grabitz / Hilf (2009), Art. 151, Rn. 23. There the author speaks out the problem more clearly by calling it „cultural-politically blind“.

A legal definition of the term "culture" is not provided by the Union Treaties. A similar problem exits in the field of social law. The goals of the Union´s social policy according to Article 3 (3) TEU are outlined in an ambitious way but at the same time only defined in an abstract manner.[398] There is definitely a need for clearer guidelines as it is difficult to define social law.

For instance, many member states do not have a distinction between labour law and social law such as Germany.[399] Social policy according to Article 151 TFEU only deals with relevant issues of the traditional labour law.[400] That is why, for instance, health policy belongs to medical law and not to social law in the sense of Article 151 TFEU.[401] It is the will of the member states to decide for themselves about the essentials of social policy (see Article 21 para. 3 TFEU, Article 48 TFEU, Art. 153 para. 2 (lit a), Article 4 TFEU).[402] Only a supporting and a complementary function remains for the Union in the field of social policy.[403]

The diversity of the member states has also become very clear during the European migration crises. The approach of Christian humankind and the social dimension in the context of the migration crisis are very varied in each member state in practice. The member states interpret the appropriate steps which need to be taken to deal with the refugee crisis in a different way. While some member states more likely see the need to protect the own culture and the national territorial sovereignty, other member states more likely focus on the protection and human dignity of the migrants.

So far a needed comprehensive European solution has not been able to be achieved due to the political discrepancy and different approaches of the member states. Also within each member state there is a great disagreement about the appropriate way in which the migration crisis should be tackled. That is why there is a danger of an increasing division of society throughout the EU. Due to the blockade mentality of some member states it

[398] See Eichenhofer, in Streinz (2018), Art. 151, Rn. 5.
[399] See Heinig, in: Terhechte (2011), § 32 (Rn. 5).
[400] See ibid.
[401] See ibid.
[402] See Heinig, in: Terhechte (2011), § 32 (Rn. 18).
[403] See ibid. (Rn. 20).

is very difficult to find a compromise and that is why the member states need to decide for themselves what measures are legally and morally appropriate to deal with the migration crises. The tension between a European solution and national approaches of the member states in the migration crises also reveals the enormous difference of the practical implementation of social and cultural values throughout Europe.

The Union´s Charter of Fundamental Rights, in particular Articles 27-36, demonstrate that human rights comprise essential social rights.[404] There is a strong correlation between economic progress und social progress as a direct result of the internal market and of a policy which contributes to the European economic and social cohesion.[405]

The values are further described in Article 2 TEU as follows: „The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Here the question arises how far the social dimension goes. It has to be clarified, if Article 2 TEU contains social minimum standards. That is not the case because social minimum standards do not belong to the hard core of human rights and they are ensured by the various legal traditions of each member state to varying degrees.[406]

Due to the fact that Article 2 TEU does not reveal more than a minimum standard, it opens up a broad field of cross-national competition processes for the member states with the possibility to launch attractive location policy.[407] These possible competitive interactions can have negative effects at the expense of uncompetitive member states and this leads to the

[404] See Eichenhofer, in Streinz (2018), Art. 151, Rn. 4.
[405] See ibid.
[406] See Korte (2016), pp. 176-177.
[407] See ibid.

question of how EU primary law can prevent a strong selfishness of the member states with a duty of solidarity.[408]

There are good reasons to assume that there is a binding solidarity principle which derives from the Treaty system.[409] Thus, the member states have duties in relation to each other relating protectiveness and heedfulness.

Despite the fact that the solidarity principle is not a concrete subject matter of the Single Market Acts I and II the measures have to be understood in the light of solidarity. However, there is a lack of a specification of the solidarity principle and that is why it is difficult to concretise any duties for the member states, especially relating the question of appropriate aid measures for Greece.

The solidarity principle can generally be understood in different ways. The concrete content is still largely unsettled.[410] In a wide context it can be assumed that there are five levels of solidarity which can contribute to the common good.[411] The first level of solidarity and inclusion is within the family and community; the second level is the labour market and business; the third level is institutional redistribution; the fourth level is that of gift and philanthropy and the fifth level is the debt relationship.[412]

This wide range of the levels does not constitute the overall task of the Union but it demonstrates that is also barely possible to define the solidarity principle within the Treaties in a very concrete way. The solidarity principle is more likely related to integration-policy issues. The solidarity principle is enforceable not because of an effective remedy but because of its importance for integration policy.[413]

In the last years it became apparent that the market freedoms with the focus on the internal market can come into conflict with the autonomously formulated demands of the member states in the field of

[408] See Korte (2016), p. 179.
[409] There are only few unconvincing reasons to reject a binding principle. For a closer evaluation see Korte (2016), pp. 180-181.
[410] See Ludwigs (2004), p. 155.
[411] See Dembinski, in: Nebel / Collaud (2018), p. 70.
[412] See ibid., pp. 70-71.
[413] See Korte (2016), p. 212.

shaping the social sector.[414] It will also in the future be important to interpret the fundamental freedoms in the light of the general legal goals of Article 3 TEU und their social contents.[415]

All measures within the internal market cannot leave out the responsibility for the common good. The individual segments of public competition law are shaped by the idea of the realisation of the common good with the help of provisions which allow the public authorities to influence the competition.[416] This specific reference unifies different regulatory instruments and has insofar a cross-cutting effect.[417] The classification of the concrete legal field is not the deciding factor because public interests play a general and wide role.

In this context of the internal market the author Stefan Korte offers an analysis of the common good interests and first of all hereby refers to Articles 168 (1) subpara. 1, 191 (1) TFEU respectively Article 8 et seq. TFEU.[418] The protection of the health according to Article 168 TFEU and of the protection of the environment according to Article 191 TFEU are important aspects which have to be generally obeyed within new single market initiatives. This is clarified in Art. 8 et seq. TFEU. Moreover, Korte points out the level of protection according to Article 114 (3) TFEU and the aims mentioned in Article 3 TEU which are also considered not to be a sufficient common interest base to function within cross-national competition processes because the member states are not bound within the complete implementation process.[419]

Only to a very limited degree the fundamental freedoms reflect common good interests. The legislative alignment and the judicial use of the market freedoms constitute two different ways to remove obstacles in the internal market.[420] The first method of integration refers to an active policy of harmonisation and coordination (positive integration) while the second

[414] See Terhechte, in: Grabitz / Hilf / Nettesheim (2020), Art. 3 EUV, Rn. 40.
[415] See ibid.
[416] See Korte, in: Kirchhof / Korte / Magen (2014), p. 64 (§ 3, Rn.3).
[417] See ibid.
[418] Korte (2016), p. 162.
[419] See Korte (2016), p. 162.
[420] See Kingreen, in: Calliess / Ruffert (2016), Art. 36 AEUV, Rn. 2.

method of integration is characterised by the removal of national trade obstacles through the activation of the market freedoms.[421] The market freedoms are "transnational norms of integration"[422].

The scope of the internal market competence base according to Article 114 TFEU is significantly influenced by criteria which is inspired by the dogmatism of the market freedoms.[423] The burdensome procedures due to the unanimity requirement were the reasons for the weak functioning of the positive integration and allowed the development of the negative integration which functions independent of the division of competences and the difficulty of political consensus finding.[424]

Many voices in literature point out that the common weal responsibility sustained a splitting up due to an asymmetry of the weakly developed positive integration and the progressive negative integration.[425] The relation between these two forms of integration is quite complex. To some extent the mechanisms of the negative and positive integration interact and to some extent they also communicate with each other.[426]

The union lacks the competence for positive legislation while the member states increasingly lose the ability to react to social and ecological undesired side-effects of cross-border transactions.[427] The judicial criteria of assessment adjust the degree of the negative integration and thereby tare the horizonal and vertical balance of powers within the network of the European Constitution.[428]

For example, it is assumed that the member states have lost control over the access to social welfare because they cannot restrict the benefits only to national citizens and that is why there is a long-term danger to the

[421] See ibid. See also Korte, in: Calliess / Ruffert (2016), Art. 26 AEUV, Rn. 31.
[422] Stober / Korte (2019), p. 126.
[423] See Kingreen, in: Calliess / Ruffert (2016), Art. 36 AUEV, Rn. 2.
[424] See ibid., Rn. 3.
[425] See ibid. The author hereby refers to: Böckenförde, Welchen Weg geht Europa?, S. 22 ff.
[426] See Stober / Korte (2019), p. 133. According to this estimation, this effect can be understood due to the so-called „New Approach" which the Commission follows since 1985.
[427] See Kingreen, in: Calliess / Ruffert (2016), Art. 36 AUEV, Rn. 2.
[428] See ibid., Rn. 4. It is hereby referred to Kingreen, in: v. Bogdandy / Bast (Hrsg.), EuVerfR, S. 705 (720 ff.).

existence of the national social protection systems in the current form.[429] The market freedoms have a strong effect on the national welfare states. At the same time no new regulations through positive integration are achieved. From the perspective of sustainability the further development of the national social protection system must be very critically observed to avoid that social solidarity is undermined. The mentioned asymmetry is solidified by the removal of market barriers to trade at national level and the market correction orientated integration on the EU level.[430]

To give a further concrete example, it can be referred to the health sector. Procedures regarding the drug approval are regulated at the EU level and reveal a positive integration while the recognition of professional qualifications in the field of medical profession is part of a negative integration.[431] These two examples of the recognition of professional qualifications and product safety standards reveal typical constellations of the internal market integration.[432] The fragmentation can cause different kind of problems in practice.

A German citizen with a German health insurance, as for example, can visit an Italian doctor during his holidays in Italy and can theoretically demand the same services. In practice many problems arise regarding the reimbursement of the costs. The problems of the refundability of medical treatments in another member states could be solved by the partial harmonisation of the national health systems, but the Union only has a limited competence in the policy of the health sector.[433]

Questions of medical treatment abroad deal with the freedom to provide services as a market freedom because foreign patients are treated for own account respectively must first pay the bill.[434] The European Court of Justice does not care about the national specifities of the national security

[429] See Höpner / Schäfer (2008), pp. 339-340.
[430] See Höpner / Schäfer (2010), p. 17.
[431] See Krajewski, (EuR 2010, 168).
[432] See ibid.
[433] See ibid. (EuR 2010, 169).
[434] See ibid. (EuR 2010, 169-170).

and does not consider the problem as a whole but only in the light of the market freedoms.[435]

The arising conflicts with the organisational principles of the health and welfare systems of the member states must be re-balanced at the justification level or must let the member states solve the problems.[436] In terms of health economics, medical treatments abroad are problematical because they impair the national hedging instruments of the national health systems and make forecasting and planning efforts for the member states difficult.[437]

This is a typical case of a negative integration because the European Court of Justice expects from the member to remove obstacles but does not introduce new regulations on a Union base.[438] The Directive 2011/24/EU[439] only allows a very limited solution of the mentioned problems. The directive contains very few elements of a positive integration and does not refer to the real problems caused by the negative integration.[440]

The advantages of the positive integration through secondary legislation are the democratic legitimation of the internal market measures and legal certainty.[441] Also conflicts can be more adequately compensated in this way rather than the practice of sentencing by the judiciary because it does not only make national law inapplicable but also creates protective secondary law mechanisms.[442]

Moreover, not only an asymmetry of the weakly developed positive integration and the progressive negative integration but also practical problems arise in the context of the common good. Related to welfare economic concepts there is no empirical evidence of the causal relations between the market structure, market conduct and the reached market

[435] See ibid. (EuR 2010, 170).
[436] See ibid.
[437] See ibid. (EUR 2010, 174).
[438] Ibid.
[439] Directive 2011/24/EU of the European Parliament and of the Council of 9 March on the application of patients' rights in cross-border health care.
[440] See Krajewski (EuR 2010, 187).
[441] See Korte, in: Calliess / Ruffert (2016), Art. 26, Rn 33.
[442] See Ibid.

results.[443] For example, a legislative measure which is mainly introduced in the interest of the public can some years later turn out to be counterproductive for society. Despite of the needed substantial administrative effort it must be considered to widen the duty to state reasons and to introduce ex post checks to control the efficiency benefits.[444] One must admit that it is unrealistic to introduce new more complex scopes for evaluations within already overloaded public authorities.

Yet, one must be aware that each common good prognosis must very critically be questioned and must be monitored over the long term. A more critical review on scientific literature to common good interests is necessary in the future to reveal if an introduced measure offers real added value for society.

Common good interests must at least be as critically observed as environmental and nature concerns which have achieved a new dimension in the awareness of the EU citizens. The internationally accepted idea of the sustainable development wants to connect economic, ecological and social goals.[445] That is why these issues have to be considered as the whole. In particular, the environmental protection must be regarded as "a cross sectional task"[446] with the role to integrate the interests of nature and landscape protection into other common policies. In times of a stronger awareness of the nature several companies try to receive a green image and start appropriate marketing campaigns without a considerable added value for nature in reality.

Such a critical benchmark is also needed in the context of social rights and public interests. The real social content of measures which "only on the paper" stress the social dimension must be crucially analysed. Moreover, one has to face up to and be prepared for the fact that too much emphasis on the climate change involves the risk of minimisation the risks of social deficits in the Union. This demonstrates that it will be a major

[443] See Thiele, in: Kirchhof / Korte / Magen (2014), p. 132 (§ 5, Rn. 28).
[444] See ibid.
[445] See Stober / Korte (2019), pp. 36-37.
[446] Kahl, in: Streinz, Art. 11 AEUV (Rn. 1).

challenge for the Union to strike the right balance between economic, ecological and social issues.

Concrete requirements regarding this balance also arise from the so called "magical octogon"[447] according to Article 3 (3) TEU. Within this section the following is clarified:

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

Consequently, Art. 3 (3) TEU makes clear that Europe is not only a business place and does not only consider economic interests but also increasingly takes social justice into account. There are controversial debates about the exact range of the social dimension. To a certain degree a change from an Economic Community to a Social Community with a "European Pillar of Social Rights"[448] as an "extended internal market concept"[449] is concluded from the recent developments. However, the implementation of the social rights mainly falls within the area of competence of the member states and that is why the dimension of social rights is more likely symbol policy.[450]

Prima facie, the content of the Single Market Acts I and II attaches an importance to the social character. Levers 8, 10 and 24 explicitly contain

[447] Blanke / Böttner, in: Niedobitek (2020), p. 898.
[448] The term was proclaimed at the Social Summit in Gothenburg in the year 2017. See ibid, p. 899.
[449] Ibid, p. 900.
[450] See ibid, p. 900.

the term "social" within the wording. The mentioned levers are all called "social cohesion" respectively "social entrepreneurship". These vague wide-ranging terms have to be examined critically.

One would have expected that the levers 8, 10 and 24 directly deal with the fight against poverty because the Union formulated the goal within a strategy for the year 2020 to fight against poverty and social exclusion (at least 20 million fewer people in or at risk of poverty and social exclusion).

Yet, all three levers rather deal with the freedom to provide cross-border services instead of poverty. It is a welcoming sign that the measures also have a connection to the posting of workers and to European social entrepreneurship funds. They are more likely formulated according to the specific needs of service providers and investors. It goes without saying that the measures can have positive economic effects and therefore can indirectly help to reduce poverty.

At the same time, one must admit that the levers 8, 10 and 24 are more likely economic measures instead of social measures. Also, the social imbalance between the northern and southern member states is not taken into account. It can be concluded that common good interests only play a very subordinate role within the Single Market Acts I and II.

These social deficits have become even more problematic due to the COVID-19 pandemic. The severe shortages of available food and the food price increases during the particularly concerned months of the pandemic have revealed a new form of social injustice. The social welfare courts decided that no additional social services are provided for the increased requirements due to the pandemic.[451] This decision must be evaluated very critically. Not only the food prices significantly increased but it became increasingly evident that there is also a need for people to buy masks, gloves and disinfectants for the health protection. Against this background, the amount of the welfare-related benefits has to be regarded as not appropriate

[451] See Keller: Keine zusätzlichen Leistungen für erhöhten Bedarf durch Corona-Pandemie, NJW 2020, 1389-1392. It is hereby referred to the following social court decision in April 2020: SG Konstanz – S 1 AS 560/20 ER.

anymore. This has to become subject of a further research in the future because the overall outcome of the pandemic is not yet sufficiently clear.

However, one has to admit that there have been several approaches on the Union base to reduce the negative social effects of the pandemic. In particular, in March 2020 the European Commission launched a "coordinated economic response to the Covid-19 Outbreak"[452]. This response also contains the aspect of "ensuring solidarity in the Single Market" with the focus to reduce the barriers in the areas of the supply of medical equipment, transport and tourism. It is also determined that the deployment of the European Social Fund will be facilitated. Finally, the recovery package called Next Generation EU (NGEU) fund which was agreed by EU leaders in July 2020 with a €750 billion plan can considered as a milestone for the revival of the internal market.

Chapter 4: The evaluation of the Single Market Acts I and II

A. The classification of the levers in the concept of the European Single Market

The wording of Article 3 (3) TEU states the following: *"The Union shall establish an internal market."*

Through this obligation in the primary law of the EU the principle of a liberal economic constitution is transferred on the European integration process and is concretised by the historical and legal development and the regulation according Article 26 TFEU.[453]

[452] Communication from the Commission: Coordinated economic response to the COVID-19 Outbreak, COM (2020) 112 final.
[453] Kröger (2015), p. 43.

This first Annual Growth Report[454] marks the start of a new cycle of economic governance in the EU. It demonstrates that economic factors more and more influence governmental decisions on the EU level. It is therefore justified not only to put a focus on a legal evaluation but also to deepen the view on an economic evaluation to measure the effects of legislative proposals.

The Single Market Acts I and II can be seen as a tool of the Europe 2020 Strategy aiming at sustainable economic growth and a better coordinative function between the national and the European policy. The Europe 2020 strategy is often seen as a door-opener for a European economic government.[455]

It contains the following seven flagship initiatives: "Innovation Union"[456], "Youth on the Move"[457], "A Digital Agenda for Europe"[458], "Resource efficient Europe"[459], "An industrial policy for the globalisation

[454] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Annual Growth Report: advancing the EU's comprehensive response to the crisis, COM (2011) 11 final, p. 1, <http://ec.europa.eu/europe2020/pdf/en_final.pdf> accessed 30 April 2014.

[455] EU Communication and European Council Conclusions: STRATEGY "EUROPE 2020", Status: 12 April 2010, p. 3, <http://www.cep.eu/fileadmin/user_upload/Kurzanalysen/Strategie_Europa_2020/PB_EU_Strategy_2020_EN.pdf > accessed 30 April 2014.

[456] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Europe 2020 Flagship Initiative Innovation Union, COM (2010) 546 final, <http://ec.europa.eu/research/innovation-union/pdf/innovation-union-communication_en.pdf> accessed 17 June 2014.

[457] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Youth on the Move, An initiative to unleash the potential of young people to achieve smart, sustainable and inclusive growth in the European Union, COM (2010) 477 final, <http://europa.eu/youthonthemove/docs/communication/youth-on-the-move_EN.pdf> accessed 17 June 2014.

[458] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe, COM (2010) 245 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF> accessed 17 June 2014.

[459] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A resource-efficient Europe – Flagship initiative under the Europe 2020 Strategy, COM (2011) 21, <http://ec.europa.eu/resource-efficient-europe/pdf/resource_efficient_europe_en.pdf> accessed 17 June 2014.

era“[460], “An agenda for new skills and jobs“[461] and “The European Platform against Poverty and Social Exclusion“[462]. These flagship initiatives define aims which shall be achieved by the year 2020. At a later stage of this paper a current update of the exact state of development regarding the five headline targets is provided.

[460] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An Integrated Industrial Policy for the Globalisation Era, Putting Competitiveness and Sustainability at Centre Stage, COM (2010) 614, <http://ec.europa.eu/enterprise/policies/industrial-competitiveness/industrial-policy/files/communication_on_industrial_policy_en.pdf> accessed 17 June 2014.

[461] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An Agenda for new skills and jobs: A European contribution towards full employment, COM (2010) 682 final, <http://eur-lex.europa.eu/resource.html?uri=cellar:776df18f-542f-48b8-9627-88aac6d3ede0.0003.03/DOC_1&format=PDF> accessed 17 June 2014.

[462] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Platform against Poverty and Social Exclusion: A European framework for social and territorial cohesion, COM (2010) 758 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0758&from=EN> accessed 17 June 2014.

The 5 headline targets for the EU in 2020

1. **Employment sector**:
    - 75% of the 20-64 year-olds to be employed
2. **R&D sector:**
    - 3% of the EU's GDP to be invested in R&D
3. **Environmental Sector:**
    - Climate change and energy sustainability greenhouse gas emissions 20% (or even 30%, if the conditions are right) lower than 1990
    - 20% of energy from renewables
    - 20% increase in energy efficiency
4. **Educational sector:**
    - Reducing the rates of early school leaving below 10%
    - at least 40% of 30-34–year-olds completing third level education
5. **Social sector**:
    - Fighting poverty and social exclusion at least 20 million fewer people in or at risk of poverty and social exclusion

Source: Own graph based on European Commission data, see also: <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_149> last accessed 22 February 2022.

The above graph demonstrates the most significant targets of the flagship initiatives. It is noteworthy that the aims fit to the needs and potentials of every state. To give an example, the aim that 75% of the 20-64 year-olds should be employed refers to the European average. This EU-level target is translated into national targets in each EU country in order to take into consideration different situations and circumstances. Accordingly, Romania is supposed to reach an employment rate of 70% while Denmark should reach 80% by 2020.[463]

The sustainable elements of the strategy become visible through the declared targets to reduce greenhouse gas emissions by 20 % compared to 1990, to increase the share of renewables in final energy consumption to 20 % and also to reach a 20 % increase in energy efficiency. The targets belong to the flagships "Resource efficient Europe" and "An industrial policy for the globalisation era".

At this point is justified to stress the significance on the Innovation Union which is an EU strategy to create an innovation-friendly environment to make it easier for new ideas to be turned into products and services with the intended goal of more economic growth and jobs. 3 % of GDP shall be invested in the research and development (R&D) sector.

As the "Innovation Union Competitiveness Report 2013"[464] reveals, more and more countries in the world are upgrading their knowledge economies and Europe faces competitive pressure from the growing Asian economies which more intensively concentrate on transformative technologies and new markets. That is why the European Commission has several times encouraged the member states to spend more money for research and development.[465]

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[463] European Commission: Europe 2020 targets, <http://ec.europa.eu/europe2020/pdf/targets_en.pdf> accessed 17 June 2014.

[464] European Commission: Innovation Union Competitiveness report 2013, p. 10, <http://ec.europa.eu/research/innovation-union/pdf/competitiveness_report_2013.pdf> accessed 17 June 2014.

[465] See European Commission: State of the Innovation Union 2011, <http://ec.europa.eu/research/innovation-union/pdf/state-of-the-union/2011/state_of_the_innovation_union_2011_brochure_en.pdf#view=fit&pagemode=none> accessed 17 June 2014.

The Commission stresses that an increase in public investment in research and innovation, even if due to difficult budgetary conditions, may also have a considerable impact on a country's long-term growth potential by reducing the capacity to absorb research and innovation performed elsewhere.[466]

It is must be stressed that the Single Market Acts I and II are essential keys for the realisation of the above-mentioned targets. The Single Market Act I[467] was adopted by the European Commission in April 2011. It consists of several measures within twelve market levers for the improvement of the internal European market with intended benefits for consumers and SMEs. All five headline targets of the Europe 2020 Strategy can be associated with the Single Market I. The reduction of the unemployment rate, the raise of R&D investments, the improvement of energy investments and also the reduction of school leavers and poverty shall be achieved.

According to the Commission[468], there are four conditions for the effective governance of the Single Market Act: a wide and improved dialogue with civil society, a well- connected partnership with all market participants, a basis of ideal information for citizens and enterprises and also accurate monitoring of the application in respect to the single-market legislation. The approximately 1000 responses[469] within the public consultation of the Single Market Act which the Commission received

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[466] See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Research and innovation as sources of renewed growth, COM (2014) 339 final, p. 3, <http://ec.europa.eu/research/innovation-union/pdf/state-of-the-union/2013/research-and-innovation-as-sources-of-renewed-growth-com-2014-339-final.pdf#view=fit&pagemode=none> accessed 17 June 2014.

[467] See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions (2011): Single Market Act - Twelve levers to boost growth and strengthen confidence "Working together to create new growth", 13 April 2011, COM (2011) 0206 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0206:EN:NOT> accessed 31 January 2014.

[468] Ibid.

[469] See European Commission (2011): Staff working paper: Overview of responses to the public consultation on the Communication 'Towards a Single Market Act', 13 April 2011, SEC 2011 467 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0467:FIN:EN:PDF> accessed 31 January 2014.

demonstrate the willingness of civil society to become an active part in shaping the Single Market Act.

Nonetheless, the Single Market Act I cannot be considered as a final breakthrough in the process of achieving a real single market. This became clear when the Single Market Act II[470] was introduced in October 2012 in order to fill-out the deficits of the Single Market Act I. The introduction of the Single Market Act II revealed that the Single Market Act I was only a fast legislative response to the European crisis in order to serve as a first-aid utility for a revival of the economic growth.

Yet, some months later it became already visible that the crisis in Europe was ongoing and further actions were needed. Consequently, a second set of twelve priority actions were added within the Single Market Act II. The European Commission does not use the term "24 market levers" because it views the Single Market Acts I and II separately. Yet, many market levers overlap with each other and the Single Market Act II can be seen as a further development of the Single Market Act I. That is why a combined legal and economic evaluation within this paper appears appropriate.

The Commission classifies the measures of the Single Market Act II as four main drivers for growth, employment and confidence: (a) integrated networks, (b) cross border mobility of citizens and businesses, (c) the digital economy and (d) social entrepreneurship, cohesion and consumer confidence. The Commission also makes clear that the major profiteers of all actions are SMEs and consumers.

Hence, the following legal evaluation of all 24 market levers sets a focus on the promotion of SMEs and the consumer protection. Several classifications for the legal and economic analysis of the levers are made to separate regulations and directives on the one hand and also to allow categories according to the legal base of each legislative action on the other

[470] Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Single Market Act II, Together for new growth, COM (2012) 573 final, p. 7, <http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf> accessed 31 January 2014.

hand. This procedure should help to allow a better overview of all measures and serves for a better understanding of the current harmonisation trends.

I. Measures according to Art. 114 (1) TFEU

1. Regulations

a. Access to finance (lever 1)

The first lever of the Single Market Act I was realised through the regulation[471] of 17 April 2013 on European venture capital funds.

The regulation is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU). According to the considerations of the regulation it is necessary to lay down a common framework of rules regarding the use of the designation 'EuVECA' for qualifying venture capital funds, in particular the composition of the portfolio of funds that operate under that designation, their eligible investment targets, the investment tools they may employ and the categories of investors that are eligible to invest in them by uniform rules in the Union.

The European Venture Capital Funds label acts as a passport, allowing venture capitalists to market their funds across the EU and grow, while using a single set of rules.[472] A fund using the label `EuVECA´ has to prove that 70% of the capital received from investors are spent in supporting young and innovative companies.

Finally, the aim is to stimulate cross-border fundraising activity of VC funds throughout Europe. Aside from the intended strengthening of the movement of investments, SMEs shall be the profiteers of the key action. The overall goal is the financial fostering of SMEs.

[471] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0001:0017:DE:PDF> accessed 31 January 2014.

[472] See <http://europa.eu/rapid/press-release_MEMO-11-880_en.htm?locale=en> accessed 31 January 2014.

The complementary actions of this market lever are also worth mentioning as they refer to the deficits of the regulation of the financial markets which were also responsible for the economic crash in the year 2008. As a rule, it can be stated that democracy does not function without transparency and this refers to general non-transparent decision-making processes.[473] Transparency allows control of action and is therefore an expression of the democratic principle.[474]

The complementary actions involve "The Transparency Directive"[475], "The Regulation implementing the Prospectus Directive"[476], "Market Abuse Directive"[477] and also the "Markets in Financial Instruments Directive"[478] (MiFID II). The new Transparency Directive is based on

[473] Riemann (2004), p. 97.

[474] Blanke / Mangiameli (eds., 2013): The Treaty on European Union (TEU): A commentary, p. 71.

[475] Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0013:0027:EN:PDF>, accessed 31 May 2014.

[476] Commission delegated REGULATION (EU) No 486/2012 of 30 March 2012 amending Regulation (EC) No 809/2004 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements,
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0486&from=EN> accessed 31 May 2014.
See also: Commission staff working document: Impact assessment Accompanying the document
COMMISSION DELEGATED REGULATION amending Regulation (EC) No 809/2004 as regards the format and the content of the prospectus and base prospectus, of the summary and of the final terms and the disclosure requirements, SWD (2012) 77 final,
<http://ec.europa.eu/internal_market/securities/docs/prospectus/impact_assessment_en.pdf> accessed 31 May 2014.

[477] Proposal for a regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM (2011) 651 final,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0651:FIN:en:PDF> accessed 31 May 2014.

[478]Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=DE> accessed 30 June 2014.
The directive renews the so called MiFID I from 2004: Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive

Articles 50 and 114 TFEU. Within the directive it is stressed that the goal is to facilitate cross-border investment. Accordingly, investors should be able to easily access regulated information for all listed companies. In addition, the abolition of the requirement to publish quarterly financial information shall reduce the administrative burden and encouraging long term investment.

A Commission staff working document[479] concerning the Prospectus Directive reveals the goal of a proportionate disclosure regime which should have a positive impact for the SMEs with the willingness to finance their business in the securities markets; the cost of producing a prospectus would then also be reduced for these SMEs. The Market Abuse Directive can be seen as a tool to strengthen investor confidence and market integrity in general by prohibiting those who possess inside information from trading in related financial instruments.

The Markets in Financial Instruments Directive (MiFID II) is based on Art. 114 TFEU and was finally adopted by the European Parliament in April 2014. It focuses on establishing a more transparent and responsible financial system and also a more integrated and competitive EU financial market. This shall be achieved through equity market transparency, more supervision, effective sanctions and a stronger investor protection.

2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004L0039-20110104&from=DE> accessed 30 June 2014.
The new directive is part of the MiFID reform which also covers the following regulation: Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014
on markets in financial instruments and amending Regulation (EU) No 648/2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=DE> accessed 30 June 2014.

[479] Commission staff working document: Impact assessment Accompanying the document COMMISSION DELEGATED REGULATION amending Regulation (EC) No 809/2004 as regards the format and the content of the prospectus and base prospectus, of the summary and of the final terms and the disclosure requirements, SWD (2012) 77 final, p. 5,
<http://ec.europa.eu/internal_market/securities/docs/prospectus/impact_assessment_en.pdf> accessed 31 May 2014.

All these new measures have the task to build a capital market union. In a green paper[480] from February 2015 it is stressed that stronger capital markets could complement banks as a source of financing and would unlock more investment for all companies, especially SMEs, and for infrastructure projects; attract more investment into the EU and make the financial system more stable by opening up a wider range of funding. The creation of a capital market union as a counterpart to the banking union will be a long and difficult but necessary process.[481] According to the green paper[482], actions need to be put in place by 2019. The exact consisting administrative and regulatory barriers remain unclear within the green paper and also the question regarding regulation and deregulation.[483] An innovative approach of the green paper is missing and it can indeed take a long time until a capital market union is finally established.

Aside from the new regulation[484] as the key action of this lever, there are no specific EU level rules that facilitate fund-raising by venture capital fund managers.[485] This lack of rules can be considered as the most relevant current deficit. Venture capital is much more developed in some countries than in others but only nine EU member states have put in place dedicated rules for venture capital and all the others EU member states apply general rules on company or corporate law to venture capital funds.[486]

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[480] European Commission: Green Paper - Building a Capital Markets Union, COM (2015) 63 final, p. 2, <http://ec.europa.eu/finance/consultations/2015/capital-markets-union/docs/green-paper_en.pdf> accessed 10 July 2015.

[481] Hopt (2015): Die Schaffung einer Kapitalmarktunion in Europa – langwierig und schwierig, aber notwendig, in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW), pp. 289-290.

[482] European Commission: Green Paper - Building a Capital Markets Union, COM (2015) 63 final, p. 27, <http://ec.europa.eu/finance/consultations/2015/capital-markets-union/docs/green-paper_en.pdf> accessed 10 July 2015.

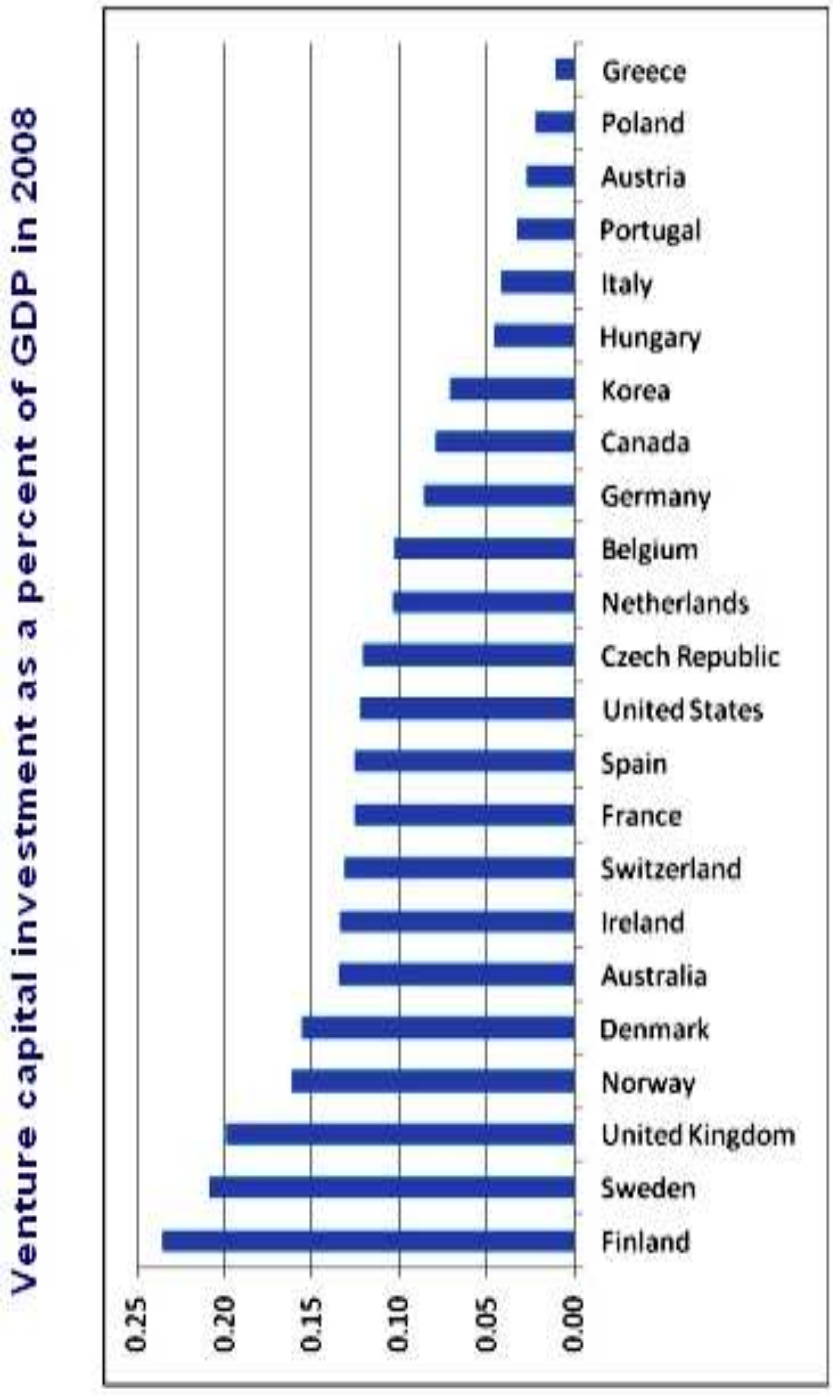
[483] Hopt (2015): Die Schaffung einer Kapitalmarktunion in Europa – langwierig und schwierig, aber notwendig, in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW), pp. 289-290.

[484] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0001:0017:DE:PDF> accessed 31 January 2014.

[485] See <http://europa.eu/rapid/press-release_MEMO-11-880_en.htm?locale=en> accessed 31 January 2014.

[486] See ibid.

As a result, there is limited cross-border fundraising activity of European venture capital funds. On average, the proportion of cross-border fundraising for all types of venture capital funds has for the last four years reached only 12% (2.5 billion euros).



Source: data from the OECD, <http://smallbiztrends.com/wp-content/uploads/2010/07/venture-capital-GDP.jpg> last accessed 22 February 2022.

In contrast to the United States, the European venture capital market appears to be rigid and unresponsive.[487] As demonstrated by the above OECD chart, in countries like Greece the VC industry had practically remained an unknown phenomenon with less 0.05 % of GDP in 2008. An OECD report[488] from 2013 reveals that these numbers have in general barely improved. Accordingly, only northern European countries record noteworthy VC investments. This is an indicator of a European single market disparity.

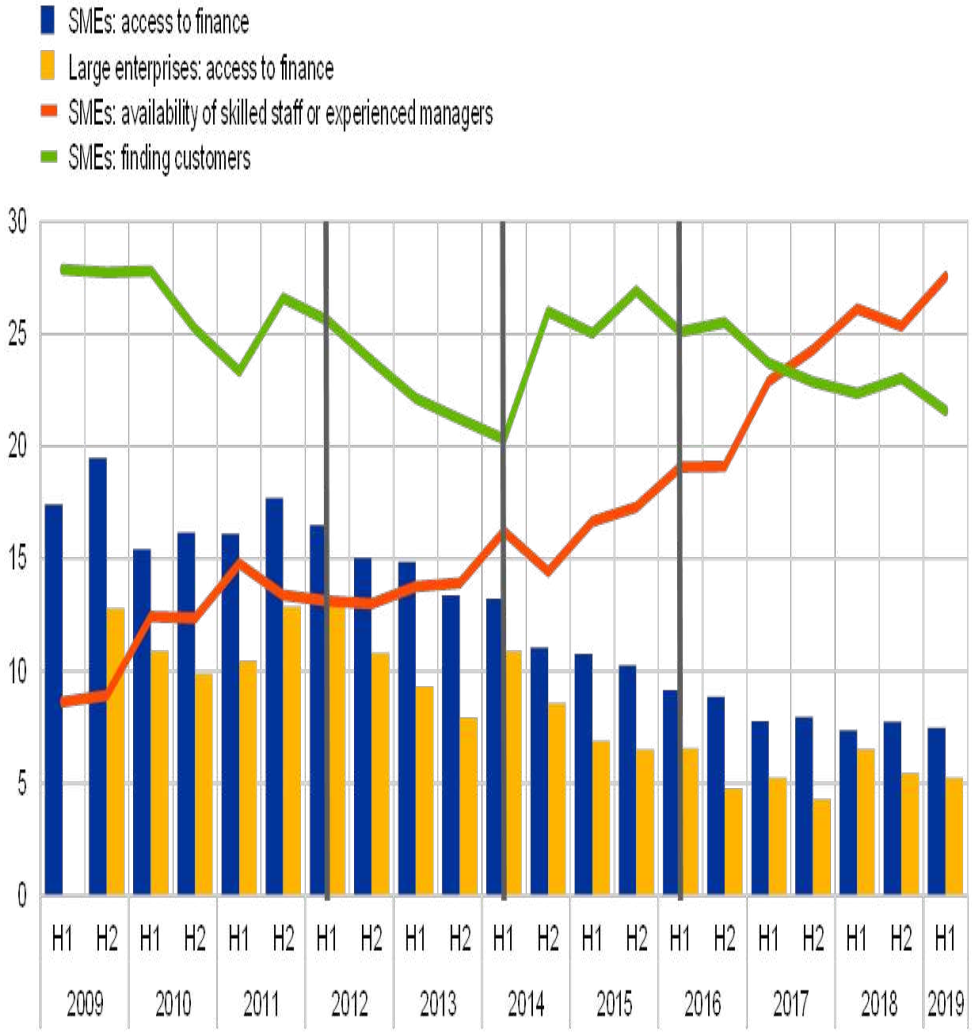
The general unfavourable economic environment in the southern EU member states implies a reserved attitude of the VC industry towards investments. An independent judiciary and a flexible, dynamic legal system are important contributors to a robust venture capital market and also it must be noted that venture capital markets tend to be larger in countries with better developed stock markets and in countries whose legal systems are effective in enforcing contracts.[489]

[487] See Vermeulen (2003), p. 53.
[488] See OECD (2013), Entrepreneurship at a Glance, OECD Publishing, p. 89, <http://dx.doi.org/10.1787/entrepreneur_aag-2013-en> accessed 30 April 2014.
[489] See Gregoriou / Kooli / Kraeussl (2007), p. 47.

Chart

Most significant problems faced by euro area firms

(weighted percentages of respondents)[490]



Source: ECB Economic Bulletin, Issue 4/2020, p. 106, <https://www.ecb.europa.eu/pub/pdf/ecbu/eb202004.en.pdf> last accessed 22 February 2022.

[490] Source: ECB and European Commission survey on the access to finance of enterprises (SAFE). Notes: The first vertical grey line denotes the announcement of the OMT; the second vertical grey line denotes the start of the TLTRO I and the negative rate policy; and the third vertical grey line denotes the start of the TLTRO II and the CSPP. The latest observation is for the period April-September 2019.

One of the core problems of this paper is reflected by the fact that many start-up companies face funding problems at the initial stage (as reflected by the graph). Aside from finding customers, access to finance remained the biggest challenge for SMEs for many years.

The first signs of a change in trend became visible in the year 2013. A European Central bank survey from 2013 outlined that SMEs were confronted with increased interest rates by the bank in the previous years.[491] The traditionally robust banking sector for funding was put in an unbalanced position through the global crisis in 2008 and reacted with escalating high interest rates to SMEs.

The banks were not willing to carry the high risks without reserve. The reasons for that reaction were based on the fact that innovative SMEs tend to be newcomers to the market and in many cases they try to achieve financing for a new type of product or service and usually have negative cash flows and untried business models and therefore they represent a higher risk to banks and cannot be assessed in the same manner as large firms.[492]

Another reason for this reaction concerns information asymmetries. Asymmetric information occurs when one party, for instance the borrower, has all the information concerning his or her credit worthiness, but the other party, typically the lender, does not have access to full information and this problem is a key feature of access to finance everywhere, but is of particular importance in emerging markets.[493] For banks to obtain information on the creditworthiness of potential SME clients is difficult or disproportionately costly.[494] This information asymmetry leads to mistrust towards SMEs and high numbers of rejected loan requests.

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[491] See European Central Bank (2013): SMEs' Access to Finance (survey 2013), <http://www.ecb.europa.eu/pub/pdf/other/accesstofinancesmallmediumsizedenterprises201311en.pdf?acff8de81a1d9e6fd0d9d3b38809a7a0> accessed 31 January 2014.

[492] See OECD (2006): Policy Brief: Financing SMEs and Entrepreneurs, p. 3, <http://www.oecd.org/dataoecd/53/27/37704120.pdf> accessed 31 January 2014.

[493] See OECD (2010): Business Climate Development Strategy, p. 18, <http://www.oecd.org/globalrelations/psd/47248312.pdf> accessed 31 May 2014.

[494] See Ganbold (2008): Improving Access to Finance for SME: International Good Experiences and Lessons from Mongolia, p. 16,

A report[495] conducted between the end of February and the end of March 2011 on behalf of the European Central Bank deals with the problematic aspect of financing for SMEs in the Euro Area. According to that report, several SMEs complained about an increase in price-related terms of bank loans while 7% of all SMEs did not even apply for a loan due to the fear of rejection. A further survey was requested by the European Commission and the European Central Bank which was conducted by Ipsos MORI between the end of August 2011 and the beginning of October 2011 regarding the access to finance of SMEs. It demonstrates that access to finance is the second most pressing problem facing EU SMEs (cited by 15% of business managers), after finding customers (cited by 24%).[496]

According to that survey, the SME respondents in Europe have experienced a decline of the conditions of bank financing during the last 6 months regarding the interest rate and other costs, collateral and required guarantees. Yet, bank loans belong to the most widely preferred external financing solution in order to realise firms' growth ambitions (63%).[497] Also a later survey from the European Central Bank, which was published in April 2012, states that "the importance of access to finance was broadly unchanged as a concern for euro area SMEs"[498] in comparison to the prior above explained survey of 2011. This demonstrates that the access of finance for SMEs is not a preliminary problem but a long-festering challenge that finally must be dealt with effectively. Indeed, the needed credence in the banking sectors has still not been achieved.

<http://www.ide.go.jp/English/Publish/Download/Vrf/pdf/438.pdf> accessed 31 January 2014.

[495] European Central Bank (2011), Survey on the Access to finance of SMEs in the Euro Area, p. 7, <http://www.ecb.europa.eu/pub/pdf/other/accesstofinancesmallmediumsizedenterprises201104en.pdf?b704f6b228e071bea9507d7569412805> accessed 31 January 2014.

[496] See European Commission (2011): SMEs' Access to Finance (survey 2011), p. 3, <http://ec.europa.eu/enterprise/policies/finance/files/2011_safe_summary_en.pdf> accessed 31 January 2014.

[497] See European Commission (2011): SMEs' Access to Finance (survey 2011), p. 1, <http://ec.europa.eu/enterprise/policies/finance/files/2011_safe_summary_en.pdf> accessed 31 January 2014.

[498] Notably, 1 % more of all SMEs compared to the prior survey in 2011demonstrated concerns of access to finance. See European Central Bank (2012): Survey on the Access to finance of SMEs in the Euro Area, p. 5, <http://www.ecb.int/pub/pdf/other/accesstofinancesmallmediumsizedenterprises201204en.pdf?e41269ca982eb16a689893e4074ede09> accessed 31 January 2014.

Regarding the complementary actions of this market lever, in particular the Markets in Financial Instruments Directive (MiFID II)[499], it must be stressed that the intended regulation of the financial markets became necessary due to deficits in the areas of clear rules for securities transactions and investment advisory services. Client meetings have often not been documented. This has resulted in problems in terms of evidence for the consumers who have not been able to proof that they have become victims of a false advice. Also the disclosure of fees and charges has often not been provided to the consumers. The crash of the New York investment bank Lehman Brothers in the year 2008 has demonstrated an information asymmetry which finally has made compensation claims against financial institutions and their brokers after a failed investment nearly impossible. This has caused a significant decrease of investor and consumer confidence with grave economic and financial repercussions in the European single market and worldwide.

Within the current so called MiFID I provisions the access for small and medium-sized enterprises ("SMEs") to financial markets is often difficult because SMEs face, for instance, greater difficulties and costs to raise capital from equity markets than larger issues due to the lack of visibility of SME markets, the lack of market liquidity for SME shares and the high costs of an initial public offering.[500]

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[499] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=DE> accessed 30 June 2014.
This directive is part of the MiFID reform which also covers the following regulation: Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=DE> accessed 30 June 2014.
See also Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0652&from=DE> accessed 30 June 2014.

[500] See Baker & McKenzie: Client Alert June 2012, MiFID II, p. 2, <http://www.bakermckenzie.com/files/Publication/1b598b9e-26b2-4b46-8733-f8260d6e0b13/Presentation/PublicationAttachment/7e405689-760b-42b8-89e6-a0ab50e3ae6f/al_global_mifidii_jun12.pdf> accessed 31 January 2014.

b. Intellectual property rights (lever 3)

The third lever of the Single Market Act I is realised through the so-called unitary patent package with the goal of an enhanced cooperation between the 25 participating member states. Spain and Italy rejected to become part of the patent package. Investors in these two countries will at least still have the chance to obtain protection through the classical European patent.

The unitary patent package consists of a regulation[501] creating a European patent with unitary effect, a regulation[502] establishing a language regime applicable to the unitary patent and an international agreement[503] among member states setting up a single and specialised patent jurisdiction (the Unified Patent Court).

The regulations are both based on Article 118 respectively 114 TFEU of the Treaty on the Functioning of the European Treaty (TFEU). The two new regulations already entered into force on 20 January 2013. The agreement on the Unified Patent Court was also already signed by 25 EU member states on 19 February 2013. The regulations will apply from the entry into force of the agreement after the ratification process.

The aim of creating an EU patent system is similar to the European patent system which is based on the European Patent Convention 1973. The classical European patent based on the European Patent Convention 1973 is a group of independent nationally enforceable patents and not a unitary right as it has to be validated in each state for which it has been granted. Instead,

[501] Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:361:0001:0008:EN:PDF> accessed 31 January 2014.

[502] Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements,
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1260&from=EN> accessed 31 January 2014.

[503] Council of the European Union: Agreement on a unified patent court, 11 January 2013, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016351%202012%20INIT> accessed 31 January 2014.

the new EU patent has a unitary effect. The unitary patent is a third option, aside from the national and the classical European patent and allows patent protection in all participating 25 EU member states under a modern European patent court system.

With the unitary patent protection scientific and technological advances are supposed to be fostered and the functioning of the internal market optimised by making access to the patent system become easier, less costly and legally secure.[504] An inventor can apply to the European Patent Organisation (EPO) for an EU unitary patent. This patent can be made available in English, French or German and is then valid in all EU member states.

Regarding the seat arrangements of the European Patent Court it was agreed that the seat of the Court of Appeal shall be in Luxembourg, the seat of the central division of the Court of First Instance shall be in Paris, the Training Centre for judges shall be located in Budapest and the Patent Arbitration and Mediation Centre shall be located in Lisbon and Ljubljana.

Four complementary actions of this lever are also worth mentioning. An important complementary action of this lever is made up by a directive[505] regarding digital music services. The goal is to make the access of new service providers easier to the entire European market.

A further complementary action was realised by a directive[506] on permitted uses of orphan works. Orphan works refer to books, newspaper

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[504] Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:361:0001:0008:EN:PDF> accessed 31 January 2014.

[505] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=DE> accessed 18 September 2014.

[506] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012
on certain permitted uses of orphan works,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:en:PDF> accessed 18 September 2014.

and magazine articles which are still protected by copyright but whose authors or other right-holders are not known or can not be located or contacted to obtain copyright permissions.[507] The goal of the directive is to make digitalisation and online displays of these works legally possible in the interest of the entire society. Also the role of "Observatory on Counterfeiting and Piracy" was enhanced to fight IPR infringements more effectively by introducing a new regulation[508]. Finally, a new regulation[509] was introduced to strengthen the competence of the customs authorities to fight against IPR infringements at the border.

Patent law on EU level can be considered as "a permanent construction site."[510] The current situation is characterised by a multiplication of patents and national patent litigation systems in Europe which is costly and inefficient and it generates legal insecurity.[511] IPR infringements can also not be fight against effectively and cause high damages to patent owners.

In the United States 224 000 patents were granted in the year 2011. In China the number reached 172 000 while in Europe the number of delivered European patents only reached 62000. Compared to US-American patents, proprietors of European patents can incur relatively high costs as national courts have been responsible in the case of a dispute and this has

[507] European Commission: Orphan works, <http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm> accessed 18 September 2014.
[508] Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0386&from=DE> accessed 18 September 2014.
[509] Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0608&from=EN> accessed 18 September 2014.
[510] Baumann / Schäffer, in: Weidenfeld / Wessels (2013), p. 158.
[511] Single Market Act: Twelve levers to boost growth and strengthen confidence ("Working together to create new growth"), p. 9, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF> accessed 31 January 2014.

frequently meant parallel court proceedings in several states, thus leading to high law enforcement costs.[512]

c. Services (lever 5)

The fifth lever of the Single Market Act I refers to services and was realised through a regulation[513] regarding European standardisation in October 2012 which came into force in January 2013. The regulation is based on Article 114 of the Treaty on the Functioning of the European Treaty (TFEU).

According to the European Commission, services standardisation must be developed at European level, taking full account of market needs in order to avoid the emergence of new barriers and to facilitate the cross-border provision of services, particularly business-to-business services, such as logistics or facility management services.[514]

The new regulation lays down the rules governing cooperation between national and European standardisation bodies and the European Commission in order to ensure a clear division of responsibilities and to avoid administrative snags and prevent the emergence of incompatible or contradictory standards.[515]

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[512] EU Regulation: EU PATENT, Status: 25 October 2010, p. 3, <http://www.cep.eu/fileadmin/user_upload/Kurzanalysen/EU-Patent/PB_EU_Patent.pdf > accessed 30 April 2014.

[513] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:316:0012:0033:EN:PDF> accessed 31 January 2014.

[514] Single Market Act: Twelve levers to boost growth and strengthen confidence (”Working together to create new growth"), p. 10, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF> accessed 31 January 2014.

[515] See Q&A on faster and more effective standardisation for economic growth, <http://www.europarl.europa.eu/news/de/news-room/content/20120621BKG47451/html/QA-on-faster-and-more-effective-standardisation-for-economic-growth> accessed 31 January 2014.

In Europe, standardisation is managed by independent organisations, primarily at national level, through national standardisation bodies issuing national standards.[516] The system is decentralised and the member states do not trust each other`s implementation.[517] The so called "New Approach directives" do not focus on setting out detailed technical requirements but only define some essential requirements in relation to issues such as health, safety and consumer protection.[518] Manufacturers are free to use different kind of technical solutions and this finally results in inconsistencies.

These mentioned aspects reveal the most serious current shortcomings. About 34% of all European standards are mandated by the European Commission while a large majority of them are initiated by industry and privately driven.[519] Hence, companies have to deal with more paperwork and this leads to higher production costs. Also the consumer protection is not homogenous.

d. Social entrepreneurship (lever 8)

Lever 8 is filled by a regulation[520] on European social entrepreneurship funds which is based on Article 114 TFEU. A key characteristic of a social business is that the primary objective is to reach a social impact rather than generating profits. According to Article 1 of the regulation, uniform requirements and conditions for managers of collective investment undertakings are laid down by the regulation that wish to use the

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[516] See ibid.

[517] See Chalmers / Davies / Monti (2010), p. 698.

[518] Commission staff working document: Accompanying document to the Proposal for a regulation of the European Parliament and of the Council setting out the requirements for accreditation and market surveillance relating to the marketing of products and a decision of the European Parliament and of the Council on a common framework for the marketing of products impact assessment, COM (2007) 37 final, <http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2007/sec_2007_0173_en.pdf> accessed 21 July 2015.

[519] See Q&A on faster and more effective standardisation for economic growth, <http://www.europarl.europa.eu/news/de/news-room/content/20120621BKG47451/html/QA-on-faster-and-more-effective-standardisation-for-economic-growth> accessed 31 January 2014.

[520] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0018:0038:en:PDF> accessed 31 January 2014.

designation 'EuSEF' in relation to the marketing of qualifying social entrepreneurship funds in the Union, thereby contributing to the smooth functioning of the internal market.

The regulation underlines that social investment funds provide funding to social undertakings that act as drivers of social change by offering innovative solutions to social problems. The regulation sets the aim to remove obstacles to cross-border fundraising by qualifying social entrepreneurship funds and to avoid distortions of competition between those funds.

Finally, the aim is to stimulate cross-border fundraising activity of social funds throughout Europe. Due to the fact that social economy entities are in the majority micro, small and medium sized enterprises (SMEs) it is appropriate to classify this lever in the category of the promotion of SMEs.

Without the intended common framework there has been a risk that member states take diverging measures at national level having a direct negative impact on, and creating obstacles to, the proper functioning of the internal market, since funds that wish to operate across the Union would be subject to different rules in different member states.[521] Moreover, diverging quality requirements on portfolio composition, investment targets and eligible investors lead to various levels of investor protection and generate confusion as to the investment proposition associated with qualifying social entrepreneurship funds.[522]

e. Digital single market (lever 7)

The digital single market lever refers to the proposal[523] for a regulation of the European Parliament and of the Council on electronic identification

[521] Ibid., p. 1.
[522] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, p. 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0018:0038:en:PDF> accessed 31 January 2014.
[523] Proposal for a regulation of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market, 4 June 2012, COM (2012) 238 final,

and trust services for electronic transactions in the internal market. The regulation[524] was finally adopted by the Council in July 2014.

The regulation is based on Article 114 TFEU. The intention of the regulation is to give legal effect and mutual recognition to trust services including enhancing current rules on e-signatures and providing a legal framework for electronic seals, time stamping, electronic document acceptability, electronic delivery and website authentication.[525] Ultimately, the consumers shall benefit from the regulatory environment as it allows them to enable secure and seamless electronic interactions between businesses and public authorities.

Current shortcomings in the following areas hinder the creation of a real digital single market: privacy & data protection, content & copyright, liability of online intermediaries, e-payments, electronic contracts, net neutrality, spam, cybercrime, dispute resolution and self-regulation.[526]

In particular, there is no comprehensive EU cross-border and cross-sector framework for secure, trustworthy and easy-to-use electronic transactions that encompasses electronic identification, authentication and signatures.[527] The currently existing differences in national legislation often lead to legal uncertainty and additional burden.[528]

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0238:FIN:EN:PDF> accessed 31 January 2014.

[524] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0910&from=EN> accessed 23 September 2014.

[525] See Dumortier / Vandezande (2013): Critical Observations on the Proposed Regulation for Electronic Identification and Trust Services for Electronic Transactions in the Internal Market, ICRI Working Paper (June), Interdisciplinary Centre for Law and ICT, K.U. Leuven, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152583> accessed 31 January 2014.

[526] EU study on the Legal analysis of a Single Market for the Information Society (2009): New rules for a new age?, <http://ec.europa.eu/information_society/newsroom/cf/newsletter-item-detail.cfm?item_id=7022> accessed 31 January 2014.

[527] Proposal for a regulation of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market, June 4th 2012, COM (2012) 238 final, p. 2, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0238:FIN:EN:PDF> accessed 31 January 2014.

[528] Ibid., p. 4.

One important issue is often left out during the discussions about a digital single market. The European industry greatly depends on US-American and Chinese components and that is why a stand-alone harmonised European single market is unthinkable.[529] Companies in many important sectors such as Microsoft, Google, Cisco and Huawei have a dominant position while the leading PC manufacturers such as APPLE, DELL and HP are also from the USA.[530] It is an illusion to believe that the EU can create effective rules regarding the digital single market without a stronger involvement of global actors in a global market.

The new regulation is a revision of the Directive 1999/93/EC[531] on a community framework for electronic signatures. The CROBIES[532] Study outlined the deficits of the Directive 1999/93/EC. Accordingly, deficits exist such as divergent national implementations, unclear supervision provisions and interoperability problems due to different technical solutions on national grounds and liability unclearness.

Finally, the question arises whether, aside from the mentioned concrete deficits, there is a general problem regarding data protection. The currently valid Data Protection Directive[533] dates back to 1995. Technical progress, technical changes and the increasing use of social services have taken place at a fast rate. In the year 2003 the European Commission admitted in a report on the implementation of the Data Protection Directive that "this data explosion inevitably raises the question whether legislation can fully cope with some of these challenges, especially traditional

[529] Bendiek, in: Weidenfeld / Wessels (2016), p. 230.
[530] Ibid.
[531] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:013:0012:0020:EN:PDF> accessed 31 January 2014.
[532] See study on cross-border interoperability of e-signatures <http://ec.europa.eu/digital-agenda/en/news/crobies-study-cross-border-interoperability-esignatures-2010> accessed 31 January 2014.
[533] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=DE> accessed 31 January 2014.

legislation which has a limited geographical field of application, with physical frontiers which the internet is rapidly rendering increasingly irrelevant."[534]

Until today no concrete action has been implemented to cope with these new challenges. This has to be considered as an apparent failure of the European legislator. At least there is hope that the increasing number of data scandals serves as a wake-up call to put a concrete focus on the data protection of consumers. The European Commission reacted much too late and finally launched a proposal for the "General Data Protection Regulation"[535] and a "Directive on the protection of individuals"[536] in January 2012. The legal base of each proposal is Article 16 TFEU. The European Convention on Human Rights (ECHR) in Article 8 points out the relevance of the right to protection of personal data.

However, this fundamental right currently almost runs empty. The data protection reform with severe penalties in case of infringements was already approved by the European Parliament in March 2014 but the adoption by the Council turned out to be also very time-consuming. It took until December 2015 until an agreement was found with the European Parliament and the Council after final negotiations regarding the data protection reform in the framework of the so-called 'trialogue' meetings. Finally, in April 2016 the Council adopted the new regulation[537] and the

[534] Report from the Commission: First report on the implementation of the Data Protection Directive (95/46/EC), COM (2003) 265 final, p. 4, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003DC0265&from=EN> accessed 31 January 2014.

[535] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM (2012) 11 final, <http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf> accessed 31 January 2014.

[536] Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM (2012) 10 final, <http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0010/COM_COM(2012)0010_EN.pdf> accessed 31 January 2014.

[537] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), <http://eur-lex.europa.eu/legal-

new directive[538] and also in April 2016 the adoption by the European Parliament took place. The new regulation and also the new directive entered into force in May 2016 and finally the EU Member States have to transpose the directive into their national law by May 2018.[539]

Such late implementation and the current huge deficit in the area of data protection constitute serious hazards for our democratic system. Data theft through hacker attacks has become a new everyday phenomenon and the loss of sensitive data can have devastating consequences for the parties concerned.[540]

It is also evident that the European Commission has to deal with a very strong lobby pressure in the area of data protection because the trade in data has become an extremely lucrative business for several companies. Also public authorities take advantage of this lucrative business by selling data of the register residents to companies and private persons. To give an example, the German registration offices were able to collect fees by selling data of the register residents in the range of approximate over 50 million Euro within one year.[541] The German Bundestag adopted a new law[542] in June 2012 to make personal data of citizens accessible to the advertising industry. The only chance for German citizens to palliate the risks of the transfer of personal data is to raise objection explicitly towards the registration offices.

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content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN> accessed 8 June 2016.

[538] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016L0680&from=EN> accessed 8 June 2016.

[539] European Commission: Reform of EU data protection rules, <http://ec.europa.eu/justice/data-protection/reform/index_en.htm> accessed 8 June 2016.

[540] Boie, Johannes: Wenn Opfer nicht wissen, dass sie Opfer sind (Süddeutsche Zeitung 22.07.2015), <http://www.sueddeutsche.de/digital/datenklau-das-hacker-und-igel-spiel-1.2577899> accessed 24 July2015.

[541] Lischka, Konrad: Melderegister - Städte machen Millionen mit Datenhandel (Spiegel Online 07.09.2012), <http://www.spiegel.de/netzwelt/netzpolitik/melderegister-staedte-verkaufen-adressdaten-und-verdienen-millionen-a-854146.html> accessed 24 July 2015.

[542] Gesetzes zur Fortentwicklung des Meldewesens (MeldFortG), <http://dipbt.bundestag.de/dip21/btp/17/17187.pdf#P.22470> accessed 24 July 2015.

This development shows that the lobby pressure is not only strong on a European but also on a national level. The fact that the law was adopted by the German Bundestag during the soccer Football European championship's semi-final Germany against Italy has a "bitter aftertaste". At least the impression was caused that the public was supposed to be bypassed during the adoption of the law. This afterwards caused a wave of indignation[543] which outlines how controversial the issue of data protection is discussed.

Also the European Commission has to admit that deficits in the area of data protection generate a domino effect. This becomes clear due to the following statements of the European Commission. "Data protection is closely linked to respect for private and family life protected by Article 7 of the Charter."[544] "This is reflected by Article 1(1) of Directive 95/46/EC which provides that member states shall protect fundamental rights and freedoms of natural persons and in particular their right to privacy with respect of the processing of personal data."[545]

"Other potentially affected fundamental rights enshrined in the Charter are the following: freedom of expression (Article 11 of the Charter); freedom to conduct a business (Article 16); the right to property and in particular the protection of intellectual property (Article 17(2)); the prohibition of any discrimination amongst others on grounds such as race, ethnic origin, genetic features, religion or belief, political opinion or any other opinion, disability or sexual orientation (Article 21); the rights of the child (Article 24); the right to a high level of human health care (Article 35); the right of access to documents (Article 42); the right to an effective remedy and a fair trial (Article 47)."[546]

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[543] Denkler, Thorsten: Übereilte Bundestagsabstimmung zum Melderecht - Unter dem Radar der Öffentlichkeit (Süddeutsche Zeitung 10.07.2012), <http://www.sueddeutsche.de/politik/uebereilte-bundestagsabstimmung-zum-melderecht-unter-dem-radar-der-oeffentlichkeit-1.1406738 > accessed 24 July 2015.

[544] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM (2012) 11 final, p. 7, <http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf> accessed 31 January 2014.

[545] Ibid.

[546] Ibid.

At least the Commission is aware of the far-reaching consequences of the data protection deficit. Yet, there is no doubt that the Commission has reacted far too late with appropriate proposals which consider the current needs of the consumers. The goal of the realisation of a digital single market without taking fundamental consumer rights into account must be seen as a failure from the present point of view. This appropriate criticism must not be simplified or trivialised based on the fact that in the US a comparable data protection does not exist.

Historical occurrences are the reason why Europeans are much more sensitive in the area of data protection than the US Americans. "Nine out of ten Europeans (92%) say they are concerned about mobile apps collecting their data without their consent and seven Europeans out of ten are concerned about the potential use that companies may make of the information disclosed."[547]

US Americans are not by far not so much concerned. Privacy is not considered as an explicit right with a top priority such as the freedom of speech and the freedom of religion which are covered by the First Amendment of the US Constitution. The First Amendment was adopted in the year in the year 1791 and constitutes with nine further Amendments the Bill of Rights. Privacy rights are not mentioned by the Bill of Rights at all.

Also the US approach of the free market economy allows IT companies an ideal environment to deal with data of consumers without strict restrictions. This point of view makes it more understandable that the US American IT companies which have subsidiaries in Europe are not highly interested in strict regulations to protect consumers because this would result in possible losses of profits. The skimming of sensitive consumer data and the trade in data is economically highly lucrative but it at the same it can result in an inappropriate intrusion into the privacy of every citizen.

[547] Special Eurobarometer 359: Attitudes on Data Protection and Electronic Identity in the European Union (REPORT), fieldwork: November – December 2010, publication: June 2011, <http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_en.pdf> accessed 23 September 2014.

Exactly this aspect can be expected to be the central issue for the question whether a final compromise will be found regarding negotiations such as "The Transatlantic Trade and Investment Partnership" (TTIP) and similar trade agreements. The so far unbridgeable ideological differences in this area reveal a dilemma which can be not easily resolved. It must be a warning for the governments to take the needs of the consumers seriously because it can be expected that the European consumers will carefully follow the negotiations of free trade agreements and less protection for consumers could finally lead to an alienation with respect to the European identity.

f. Access to finance (lever 18)

A proposal[548] for a regulation on European long-term investment funds based on Article 114 TFEU introduced the sixth lever of the Single Market Act II (so called lever 18). Finally, the Council adopted the regulation[549] in April 2015 with the aim to increase the pool of capital available for long-term investment in the EU economy by creating a new form of fund vehicle.

The European Long-Term Investment Fund, ELTIF, serves as a collective investment framework which allows investors to invest money in companies and projects with a need for long-term capital. Once the funds meet certain criteria (in particular at least 70% of the acquired capital must be invested in long-term eligible investment assets) they can invest money with a cross-border passport in all member states. The invested money shall serve as an access to finance tools.

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[548] Proposal for a regulation of the European Parliament and of the Council on European Long-term Investment Funds, lever 18 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0462:FIN:EN:PDF> accessed 31 January 2014. It is noteworthy that the Council agreed with the position taken by the proposal on 25 June 2014, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/143368.pdf> accessed 17 September 2014.

[549] EU Regulation 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term Investment funds, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0760&from=EN> accessed 29 July 2015.

Within the regulation the Commission points out that, aside of investments in infrastructure projects and real estate assets, the further growth of SMEs can be expected through more investments in unlisted companies.

The problem in the field of access to finance is based on the fact that insurance companies and pension funds with long term liabilities are investors which often look for a chance to invest in longer-term investment assets. Yet, so far there have been no corresponding rules on long-term orientated investment funds at European level and this circumstance prevents capital investment in long-term assets.[550] Existing funds can only raise money in one member state because they are not accepted across national borders and as a consequence the possible growth of funds is limited.[551]

g. Digital single market (lever 21)

A proposal[552] for a regulation on measures to reduce the cost of deploying high-speed electronic communications networks reveals the key action of this lever. The proposal is based on Art. 114 TFEU. According to the wording of the proposal, the objectives of the proposed regulation are to reduce the cost and enhance the efficiency of deploying high-speed electronic communications infrastructure by scaling up existing best practices across the EU. Finally, the proposal was realised by the launch of a directive[553] in May 2014.

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[550] EU Regulation: LONG-TERM INVESTMENT FUNDS (ELTIF), cepPolicy Brief No. 2013-51 of 09 December 2013, p. 1, <http://www.cep.eu/fileadmin/user_upload/CEP-Analysen/Langfristige_Investmentfonds/cepPolicyBrief_COM_2013__462_Long-term_Investment_Funds__ELTIF_.pdf> accessed 30 April 2014.

[551] European Commission: Press releases database: European Long-term Investment Funds - frequently asked questions, 26 June 2013, <http://europa.eu/rapid/press-release_MEMO-13-611_en.htm> accessed 31 January 2014.

[552] Proposal for a Regulation of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks, COM (2013) 147 final.

[553] Directive 2014/61/EU of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0061&from=EN> accessed 29 July 2015.

The freedom to provide electronic communications services and networks shall become better. Consumers can benefit the most from it as they are able to use electronic communication networks in a more time-efficient manner.

More and more new innovative services such as high definition television or videoconferencing are launched on the market and they need much faster internet access than generally available in Europe.[554] This lack is the reason for the deficit in the digital single market.

To catch up with world leaders such as South Korea and Japan regarding this new technology, Europe needs download rates of 30 Mbps for all of its citizens and at least 50% of European households subscribing to internet connections above 100 Mbps by 2020.[555]

In the context of the digital market and ongoing current political discussions it is also worth mentioning that the aspect of net neutrality came into focus of a new proposal for a regulation[556] with the goal to end discriminatory blocking and throttling and deliver effective net neutrality.

For legal practitioners the legal treatment of data in the internet has not been relevant.[557] However, in the last years the net neutrality, "a highly political topic"[558], has gained a new awareness.

To give an example, the so called geo-blocking is a discriminatory practice used for commercial reasons, when online sellers either deny consumers access to a website based on their location or re-route them to a local store with different prices and as a consequence such blocking means

[554] European Commission: A Digital Agenda for Europe, <http://ec.europa.eu/digital-agenda/en/our-goals/pillar-iv-fast-and-ultra-fast-internet-access> accessed 31 January 2014.
[555] Ibid.
[556] Proposal for a regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012, COM (2013) 0627 final, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52013PC0627> accessed 15 December 2015.
[557] Klement: Netzneutralität: der Europäische Verwaltungsverbund als Legislative, EuR 2017, 533- 561.
[558] Ibid., 532-561.

that, in particular, car rental customers in one member state may end up paying more for an identical car rental in the same destination.[559]

The measures within the proposal concerning an effective net neutrality are part of the so called "Connected Continent legislative package" which was adopted by the European Commission in September 2013. Finally, in October 2015 the European Parliament voted in favour for the first EU-wide net neutrality rules.[560] The rules go wider than the measures in the US and set out clear guidelines for traffic management which has to be non-discriminatory, proportionate and also transparent.

At just this point, Art. 23 (1) and (5) within the proposal, many political dilemmas were raised. Article 23 has the following headline: the freedom to provide and avail of open internet access, and reasonable traffic management. In the first paragraph it says according to the wording:

"End-users shall be free to access and distribute information and content, run applications and use services of their choice via their internet access service. End-users shall be free to enter into agreements on data volumes and speeds with providers of internet access services and, in accordance with any such agreements relative to data volumes, to avail of any offers by providers of internet content, applications and services."

In the fifth paragraph of Article 23 there is an exception rule which outlines when it is necessary to apply reasonable traffic management measures. According to the wording it is outlined: "Reasonable traffic management measures shall be transparent, non-discriminatory, proportionate and necessary to: a) implement a legislative provision or a court order, or prevent or impede serious crimes; b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminals; c) prevent the transmission of unsolicited communications to end-users who have given their prior consent to such restrictive measures; d) minimise the effects of temporary or exceptional network congestion

[559] See also European Commission (Press release): A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen, <http://europa.eu/rapid/press-release_IP-15-4919_en.htm> accessed 15 December 2015.

[560] European Commission (Press release): Bringing down barriers in the Digital Single Market: No roaming charges as of June 2017, <http://europa.eu/rapid/press-release_IP-15-5927_en.htm> accessed 15 December 2015.

provided that equivalent types of traffic are treated equally. Reasonable traffic management shall only entail processing of data that is necessary and proportionate to achieve the purposes set out in this paragraph."

Here the question arises what measures according to Article 23 (5) of the proposal can be seen as "reasonable". The terms of Article 23 (5) are too general and far-reaching. Art. 23 (5) is formulated in a too vague way. Consequently, the danger of misuse exists and an effective net neutrality cannot be guaranteed.

A short comparison to the recent development in the USA makes clear that net neutrality cannot be taken for granted. The U.S. Federal Communications Commission (FCC) suggested to revise the legal foundation for the agency`s Open Internet regulations ("Restoring Internet Freedom") and this order allows that certain data can be preferred, delayed or even blocked.[561] This can be considered as a "rollback of the net neutrality"[562] and must be understood as a warning for the Union which should not imitate the steps taken by the US American authorities.

h. Consumers (lever 23)

A proposal[563] for a regulation on consumer product safety and a proposal[564] for a regulation on market surveillance of products reveal the two initial key actions of the 11th lever of the Single Market Act II. The adoption of the proposals turned out to take much longer than expected and the exact outcome has been uncertain for long while. Finally (as already

[561] See Blanke / Perlingeiro, in Blanke / Perlingeiro (2018), p. 11.
[562] With a critical estimation: Blanke / Perlingeiro, in: Blanke / Perlingeiro (2018), p. 11.
[563] Proposal for a regulation of the European Parliament and of the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC, COM (2013) 78 final, <http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-act_en.pdf> accessed 31 January 2014.
[564] Proposal for a regulation of the European Parliament and of the Council on market surveillance of products and amending Council Directives 89/686/EEC and 93/15/EEC, and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 1999/5/EC,2000/9/EC, 2000/14/EC, 2001/95/EC, 2004/108/EC, 2006/42/EC, 2006/95/EC, 2007/23/EC, 2008/57/EC, 2009/48/EC, 2009/105/EC, 2009/142/EC, 2011/65/EU, Regulation (EU) No 305/2011, Regulation (EC) No 764/2008 and Regulation (EC) No 765/2008 of the European Parliament and of the Council, Com (2013) 75 final, <http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-surveillance_en.pdf> accessed 31 January 2014.

outlined above), both proposals failed and have not been adopted in the foreseeable form due to various national interests.

Both proposals are based on Article 114 TFEU whereby the latter is also based on Articles 33 and 207 TFEU. Businesses shall be confronted with less burden. At the same time, the rules shall ensure a better safety of consumer products across Europe and to strengthen the surveillance of non-food products.

Although new rules for harmonised products came into force in January 2010, there is still a clear need to streamline, simplify and improve market surveillance rules and procedures to make it easier for national authorities and economic operators to apply and follow these rules.[565] Notwithstanding legislation in place, unsafe and non-compliant products are still launched on the market.[566]

Products are usually only controlled by national authorities and the needed cooperation of the competent authorities among the member states is insufficient. Besides, rules on market surveillance and consumer product safety are fragmented and scattered over several different pieces of legislation, thus creating gaps and overlaps.[567]

It also appears to be difficult to detect and investigate certain discriminatory practices. In August 2014 the Commission pointed out in a press release practices of automatic rerouting following the identification of the consumer's IP address.[568] Accordingly, the IP address may also prevent the consumer from completing any booking online and alternatively, with no rerouting, the consumer may be given a different price after having

[565] Product safety and market surveillance package: Communication from the Commission to the European Parliament, the Council, the European and Social Committee: More Product Safety and better Market Surveillance in the Single Market for Products, COM (2013) 74 final, p. 3, <http://ec.europa.eu/consumers/archive/safety/psmsp/docs/psmsp-communication_en.pdf> accessed 31 January 2014.
[566] Ibid., p. 4.
[567] European Commission, press releases databases: Safer products and a level playing field in the internal market, 13 February 2013, <http://europa.eu/rapid/press-release_IP-13-111_en.htm> accessed 31 January 2014.
[568] European Commission, press releases databases: Commission presses car rental companies to stop discriminatory practices against consumers, 11 August 2014, <http://europa.eu/rapid/press-release_IP-14-917_en.htm> accessed 10 July 2015.

entered the country of residence on the website of the car rental company concerned.[569]

The Commission considered this as a violation of Art. 20 para. 2 of the Service Directive. Yet, an analysis[570] of the car rental cases sheds light on a lack of the Commission`s competence in this field and that is why only an informal letter has been sent to the car rental companies without any sanctions.

The significance of these breaches becomes visible when one takes into account the huge price differences. In a recent case, a consumer from Germany saw the announced price increase by 100% for renting a car in the United Kingdom after entering the country of residence.[571] This is a further reference for a lack of data protection and the discrimination of European citizens based on the place of residence. In most of the cases the consumer does not even notice that a discriminatory practice has occurred.

Also it is argued that in recent times, the optimistic vision of the empowered consumer has begun to face major criticism with the emergence of behavioural economics evidence indicating that consumers rarely act in their best interests, even if well informed, for numerous reasons linked to behavioural and cognitive biases while acknowledging these biases, and even supporting research in the area of behavioural economics, the European Commission still fails to apply the findings of these studies to the policies that it implements, overestimating the role of information in consumer empowerment.[572]

To a certain degree such an estimation has to be agreed to because the optimistic vision of the empowered consumer presumes that the consumer can find any needed information to make a choice in the best

[569] Ibid.

[570] See Hoffmann / Schneider: Preisdiskriminierung bei Dienstleistungsbuchungen im Internet, in: Europäische Zeitschrift für Wirtschaftsrecht, EuZW 2015, pp. 47- 52.

[571] European Commission, press releases databases: Commission presses car rental companies to stop discriminatory practices against consumers, 11 August 2014, <http://europa.eu/rapid/press-release_IP-14-917_en.htm> accessed 10 July 2015.

[572] Goyens, Monique (2011): Will the European Single Market Finally Become a Reality for EU Consumers? - Lessons to be Learnt from Two Decades of Hesitations, Volume 46, March/April, Number 2, pp. 64-81, <http://www.intereconomics.eu/archive/year/2011/2/the-european-single-market-how-far-from-completion/> accessed 18 December 2015.

interest. This vision leaves out that the consumer can no longer "see the wood for the trees" due to an information overload and the complexity of specific scenarios.

i. Maritime transport (lever 14)

A regulation[573] as part of the adoption of the Blue Belt Package[574] mainly constitutes the maritime transport lever. The aim of the measure is that EU goods which are transported between EU seaports shall not face the same strict administrative and customs formalities as goods which arrive from overseas ports. The regulation in particular refers to a prior regulation[575] from 1992 establishing the Community Customs Code. Article 100a (next to Articles 28 and 113) of the EEC Treaty was the legal base at this time. Art. 100a of the EEC Treaty complies to a great extent with the present Article 114 TFEU.[576]

Article 28 of TFEU allows the free movement of goods within the EU customs territory. In this way the ideas of the White Paper[577] for the future of transport shall be implemented.

Freight forwarders and exporters face the current difficulty that if they chose to send goods across Europe by short sea shipping, the heavy administrative burden at ports causes additional costs and significant

[573] Regulation (EU) No 1099/2013 of 5 November 2013 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (enhancement of regular shipping services), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0040:0041:EN:PDF> accessed 31 January 2014.

[574] Communication of the Commission: Blue Belt, a Single Transport Area for shipping, COM (2013) 510 final, <http://ec.europa.eu/transport/modes/maritime/news/doc/com(2013)510_en.pdf> accessed 31 January 2014.

[575] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1992:302:FULL&from=en> accessed 15 November 2015.

[576] See Calliess, in: König / Uwer (2015), p. 32.

[577] White Paper: Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM (2011) 144 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0144:FIN:EN:PDF> accessed 31 January 2014

delays.[578] To give an example, a ship moving between Antwerp and Rotterdam is still treated as it came from China.[579] This demonstrates that the EU is still far away from creating a single European market in the maritime transport sector.

2. Directives

a. Public procurement (lever 12)

As a realisation of the 12th lever of the Single Market Act I, the European Parliament adopted a package of new public procurement directives. In particular, the "Public Sector Directive"[580] and the "Utilities Directive"[581] are replaced by two new directives. The new EU procurement directives regarding the public sector[582] and regarding the utilities[583] came into force at EU level in April 2014. It took two more years since the enforcement until the member states implemented them in national legislation in the year 2016.

Besides, as a complementary measure a directive on concessions[584] was introduced. Every directive is based on Article 53, Article 62 and

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[578] European Commission press release: Blue Belt: Commission eases customs formalities for ships, 8 July 2013, <http://europa.eu/rapid/press-release_IP-13-652_en.htm> accessed 31 January 2014.

[579] European Commission press release: Blue Belt: Commission eases customs formalities for ships, 8 July 2013, <http://europa.eu/rapid/press-release_IP-13-652_en.htm> accessed 31 January 2014.

[580] Directive 2004/18/EC. See also the new proposal: Proposal for a directive of the European Parliament and of the Council on public procurement, COM (2011) 896 final, <http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/COM 2011_896_en.pdf> accessed 31 January 2014.

[581] Directive 2004/17/EC. For the new proposal see: Proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, COM 2011 (895), <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20110895.do> accessed 31 January 2014.

[582] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN> accessed 29 July 2015.

[583] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014
on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC,
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0025&from=EN> accessed 29 July 2015.

[584] Ibid.; see also the following proposal:

Article 114 TFEU. The directives have the aim to ensure a simpler and more flexible procurement procedure. This shall primary help SMEs to have a better access to the single market.

Many companies, in particular SMEs, complain that access to public contracts remains difficult in practice, because of high administrative burdens and disproportionate requirements set up by contracting authorities.[585] This is currently the biggest deficit in the area of public procurement.

In addition, the award of service concessions is not subject to any clear and unambiguous provisions, being guided only by the general principles of transparency and equal treatment of the Treaty on the Functioning of the EU which gives rise to potentially serious distortions of the internal market such as direct awards of contracts without any competition (with associated risks of national favouritism, fraud and corruption) and generates considerable inefficiencies.[586]

The worldwide phenomenon of corruption is a serious threat to the functioning of public procurement. To give an example, US authorities announced that Odebrecht S.A., a Brazilian petrochemical company, had pleaded guilty to having paid nearly 800 million dollars of bribes between 2001 and 2016 which flowed in ten Latin American and two African countries.[587] It is often assumed that corruption is an everyday item in certain regions such as Latin America and Africa only.

Yet, it is undeniable that also in Europe similar problems exist and political powerholders have tried to shape economic developments according to political interests, in particular in post-communist transition

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http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0897:FIN:EN:PDF> accessed 31 January 2014.

[585] European Commission Press Release: Proposal for a Directive of the European Parliament and of the Council on the award of Concession Contracts – Frequently Asked Questions, 20 December 2011, <http://europa.eu/rapid/press-release_MEMO-11-932_en.htm?locale=en> accessed 31 January 2014.

[586] European Commission Press Release: Proposal for a Directive of the European Parliament and of the Council on the award of Concession Contracts – Frequently Asked Questions, 20 December 2011, <http://europa.eu/rapid/press-release_MEMO-11-932_en.htm?locale=en> accessed 31 January 2014.

[587] In the context of the right of access to information in the societal and in the legal context see Blanke, in: Blanke / Perlingeiro (2018), p. 132.

economies.[588] The public procurement directives can only be successful, if the fight against corruption continues to be one of the priorities of the Union. Many issues are interlinked with the problem of corruption. Transparency and freedom of information play a major role to in the fight against corruption.[589]

b. E-invoicing in public procurement (lever 22)

A proposal[590] for a directive on electronic invoicing in public procurement depicts a further key action of the Single Market Act II. The content of this proposal contains the idea of a paperless public administration. More specifically, the entire procurement process shall take place electronically according to a binding European standard. The European Parliament and the Council reached an agreement on the "Directive on e-invoicing in public procurement"[591] in April 2014.

The directive is based on Art. 114 TFEU. The major profiteers of the legislation are expected to be SMEs for whom the proposal is tailored for.

Companies who are interested in cross-border operations have to deal with legal uncertainty. This reveals the most intense shortcoming when it comes to electronic invoicing in public procurement. In most of the member states public procurement is based on own national standards which are not interoperable. This leads to an increase in complexity and costs for firms wishing to participate in cross-border procurement and finally the overall result is that the adoption of e-invoicing in Europe is still very limited, accounting for 4 to 15% of all invoices exchanged.[592]

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[588] For a closer estimation see the following article: Wegner, G. J Evol Econ (2019) 29: 1507.

[589] See Blanke, in: Blanke / Perlingeiro (2018), p. 132. It is hereby referred to Article 10 of the UN Convention against corruption.

[590] Proposal for a Directive of the European Parliament and of the Council on electronic invoicing in public procurement, COM (2013) 449 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0449:FIN:EN:PDF> accessed 31 January 2014.

[591] Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0055&from=EN> accessed 29 July 2015.

[592] Proposal for a Directive of the European Parliament and of the Council on electronic invoicing in public procurement, COM (2013) 449 final, p. 2,

c. Social cohesion and social entrepreneurship (lever 24)

This lever is reflected by a proposal[593] for a directive on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features. The legal base of the proposal is Art. 114 TFEU. The goal of the proposal is to allow consumers to compare the fees charged for payment accounts more easily and consumers shall be able to switch from one bank account to another in a simple and quick procedure. As a special feature, European consumers shall have the right to open a basic bank account irrespective of their place of residence and of their financial situation. Finally, the directive[594] was adopted by the Council in July 2014.

Aside from problems with the comparability of payment account fees and the switching between payment accounts, the Commission stresses that more than 58 million EU citizens currently have no bank account and more than half of these people would like one but most of them have been refused an account because of their financial situation.[595] This reveals a very problematic area of social justice.

3. Mixed: Regulations and Directives

a. Consumer empowerment (lever 4)

The consumer protection is of outmost importance for the EU. This is revealed by Article 169 TFEU where the task of the EU is defined as a

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0449:FIN:EN:PDF> accessed 31 January 2014.

[593] Proposal for a directive of the European Parliament and of the Council on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, COM (2013) 266 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0266:FIN:EN:PDF> accessed 31 January 2014.

[594] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0092&from=EN> accessed 29 July 2015.

[595] European Commission, press releases database: Proposal for a Directive on Payment Accounts - Frequently Asked Questions, 8 May 2013, <http://europa.eu/rapid/press-release_MEMO-13-413_en.htm?locale=en> accessed 31 January 2014.

contributor to the protection of health, safety and economic interests of consumers, as well as a promoter of their right to information, education and to organise themselves in order to safeguard their interests. The "EU Consumer Policy Strategy 2007-2013"[596] underlined the significance of the consumer protection with the goal to empower consumers, enhance their welfare and to protect them effectively. Finally, the regulation on a multiannual consumer programme for the years 2014-2020[597] with a financial envelope of more than 180 million Euro sets a clear sign that the Commission really intends to ensure a very high level of consumer protection.

The fourth lever of the Single Market Act I includes a directive[598] from May 2013 on alternative dispute resolution for consumer disputes and a regulation on online dispute resolution for consumer disputes[599]. The two new sets of rules are based on Article 114 of the Treaty on the Functioning of the European Treaty and entered into force in June 2013. Article 169 TFEU as a legal base is not mentioned. This problematic issue becomes subject matter at a later point within the analysis regarding competences. The purpose of the new provisions is to establish simple, fast and affordable out-of-court settlement procedures for consumers and protect relations between businesses and their customers.

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[596] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: EU Consumer Policy strategy 2007-2013: Empowering consumers, enhancing their welfare, effectively protecting them, COM (2007) 99 final, <http://ec.europa.eu/consumers/overview/cons_policy/doc/EN_99.pdf > accessed 31 February 2014.

[597] Regulation (EU) No 254/2014 of the European Parliament and of the Council of 26 February 2014 on a multiannual consumer programme for the years 2014-20 and repealing Decision No 1926/2006/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0254&from=EN> accessed 31 February 2014.

[598] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF> accessed 31 January 2014.

[599] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF> accessed 31 January 2014.

A recommendation[600] dealing with collective redress makes up a complementary action of this lever. A further regulation[601] in the area of product safety and market surveillance constitutes a further complementary action.

The European Commission expressed the view that consumers still face many obstacles and a lack of confidence in their ability to pursue damage claims if problems arise.[602] This shows a huge current deficit in area of consumer empowerment. This is caused by the growth of the electronic marketplace and the related prevalence of disputes in B2C commercial relationships concerning the issue of quality or delivery disputes, excessive delivery costs, absence of information on costs, breach of privacy policy breach of security of confidential information etc.[603]

The disparities in "ADR"[604] coverage, quality and awareness in member states constitute a barrier to the internal market and are one of the reasons why consumers abstain from shopping across borders and why they lack confidence that potential disputes with traders can be resolved in an easy, fast and inexpensive way.[605]

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[600] Commission recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN> accessed 18 September 2014.

[601] Proposal for a regulation of the European Parliament and of the Council on market surveillance of products and amending Council Directives 89/686/EEC and 93/15/EEC, and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 1999/5/EC, 2000/9/EC, 2000/14/EC, 2001/95/EC, 2004/108/EC, 2006/42/EC, 2006/95/EC, 2007/23/EC, 2008/57/EC, 2009/48/EC, 2009/105/EC, 2009/142/EC, 2011/65/EU, Regulation (EU) No 305/2011, Regulation (EC) No 764/2008 and Regulation (EC) No 765/2008 of the European Parliament and of the Council, COM (2013) 75 final, <http://ec.europa.eu/consumers/archive/safety/psmsp/docs/psmsp-surveillance_en.pdf> accessed 18 September 2014.

[602] Single Market Act: Twelve levers to boost growth and strengthen confidence ("Working together to create new growth"), p. 9, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF> accessed 31 January 2014.

[603] Coteanu (2005), p. 87.

[604] See also Chuah (2001), p. 555. Accordingly, the term ADR refers to the various forms of ad hoc procedure which are consensual and not subject to any coercive powers of the court.

[605] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), p. 2,

b. Services (lever 20)

A proposal[606] for a directive on payment services in the internal market and a proposal[607] for a regulation on interchange fees for card-based payment transactions introduce the two key actions of this lever. Both measures are based on Article 114 TFEU. While the first proposal serves to replace the first payment service directive (2007/64/EC) the latter one sets statutory upper limits on fees for credit and debit card payments. This also includes the so-called interchange fees. The latter proposal was already realised by the launch of a regulation[608] in April 2015 while negotiations regarding the payment services turned out to take longer. The European Parliament finally adopted the revised Directive on Payment Services in October 2015.[609]

The goal of the modernisation is that cross-border payments shall become as easy and secure as payments within one member state. Aside from cost savings for the consumers, the proposals shall ensure a better market entry and business environment for payment service providers.

The Commission points out that a wide variety of interchange fees apply within national and international payment card schemes, gives rise to market fragmentation, prevents retailers and consumers from enjoying the benefits of an internal market for goods and services and finally interchange

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<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF> accessed 31 January 2014.

[606] European Commission: Proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC, COM (2013) 547 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0547:FIN:EN:PDF> accessed 31 January 2014.

[607] European Commission: Proposal for a regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions, COM (2013) 550 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0550:FIN:EN:PDF> accessed 31 January 2014.

[608] EU Regulation 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0751&from=EN> accessed 29 July 2015.

[609] European Commission - Press release: European Parliament adopts European Commission proposal to create safer and more innovative European payments, <http://europa.eu/rapid/press-release_IP-15-5792_en.htm?locale=en>, accessed 12 December 2015.

fees restrict market entry as their revenues for issuing payment service providers function as a minimum threshold to convince issuing payment service providers to issue payment cards or other payment instruments.[610] Consequently, several huge deficits still exist in the field of the service lever. The first Annual Growth Report[611] of the Commission demonstrates that cross-border services only represent 5% of GDP, less than a third of trade in goods.

II. Measures according to 46, 53(1) and 62 TFEU

1. Directives: Mobility of citizens (lever 2) and social cohesion (lever 10)

In October 2013 the European Parliament voted on the text of a legislative proposal amending Directive 2005/36/EC on recognition of professional qualifications. The Directive[612] of November 2013 is based on Articles 46, 53 (1) and 62 of the Treaty on the Functioning of the European Treaty. The European Professional Card ("EPC") is the key element of the revised Directive.[613] The EPC aims at simplifying the recognition of professional qualifications and increasing the efficiency of the procedure for professionals who intend taking up a regulated profession in another member state where the profession in question is regulated.[614]

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[610] European Commission: Proposal for a regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions, COM (2013) 550 final, p. 3, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0550:FIN:EN:PDF> accessed 31 January 2014.

[611] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Annual Growth Report: advancing the EU's comprehensive response to the crisis, COM (2011) 11 final, p. 7, <http://ec.europa.eu/europe2020/pdf/en_final.pdf> accessed 30 April 2014.

[612] Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:354:0132:0170:en:PDF> accessed 31 January 2014.

[613] See: Call for Expression of Interest in the Introduction of the European Professional Card (EPC), p. 1, <http://ec.europa.eu/internal_market/qualifications/docs/policy_developments/131018_call-for-interest_en.pdf> accessed 31 January 2014.

[614] Ibid.

According to Article 4 of the Directive the following conditions have to be fulfilled to be able to receive the EPC: (a) there is significant mobility or potential for significant mobility in the profession concerned; (b) there is sufficient interest expressed by the relevant stakeholders; (c) the profession or the education and training geared to the pursuit of the profession is regulated in a significant number of member states.

Consequently, this Directive shall strengthen the free movement of people as a fundamental EU right. This includes the right of EU citizens to work in another EU country. The recognition of professional qualifications of other member states is a precondition of the realisation of this fundamental right to work in another country.

Finally, the issuance of the EPC and the application of the alert mechanism were made possible by the adoption of Commission Implementing Regulation (EU) 2015/983 in June 2015.[615] However, it must be noted that not all professions are covered. Only nurses responsible for general care, pharmacists, physiotherapists, real estate agents and mountain guides can apply online for the recognition of their qualification in other EU countries through the Internal Market Information System.

As a complementary measure of this key lever the Commission published a white paper called "An Agenda for Adequate, Safe and Sustainable Pensions"[616] in order to stress the need for pension reforms. The Commission states that the success of the Europe 2020 Strategy, particularly raising the employment rate to 75% and reducing the number of people at risk of poverty by at least 20 million, could be threatened by the fact that pensions represent a very large and rising share of public expenditure: more than 10% of GDP on average today, possibly rising to 12.5 % in 2060 in the

[615] Commission implementing the EU regulation 2015/983 of 24 June 2015 on the procedure for issuance of the European Professional Card and the application of the alert mechanism pursuant to Directive 2005/36/EC of the European Parliament and of the Council, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0983&from=EN> accessed 13 July 2015.

[616] An Agenda for Adequate, Safe and Sustainable Pensions, COM(2012) 55 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0055:FIN:EN:PDF> accessed 31 January 2014.

EU as a whole.[617] Besides, the occupational pension provisions[618] were able to be modernised as a further complementary measure in order to improve the governance and transparency of these funds.

According to the OECD mobility is currently hindered by hurdles stemming from restrictive domestic labour market and pension policies, and by weak enforcement and implementation of legal rights under the Single Market.[619] Besides, annual cross-border mobility within the EU stands at an average annual rate of only 0.29% which is far below the internal mobility rates in Australia (1.5%) and the United States (2.4%).[620] This comparison shows that there is high potential of improving the mobility of workers in the EU.

An EU citizenship report[621] reveals that automatic recognition of qualifications applies only to seven out of more than 800 professions. Besides, citizens are not systematically offered the possibility to apply electronically for access to a regulated profession and have to wait several months for a decision on the application. Furthermore, the EU citizenship report outlines administrative practices, delays in recognition processes and resistance at national level. High costs are often involved and cause a difficulty of working abroad and increase barriers to entry into regulated professions.

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[617] An Agenda for Adequate, Safe and Sustainable Pensions, COM(2012) 55 final, p. 4, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0055:FIN:EN:PDF> accessed 31 January 2014.

[618] Commission implementing Regulation (EU) No 643/2014 of 16 June 2014 laying down implementing technical standards with regard to the reporting of national provisions of prudential nature relevant to the field of occupational pension schemes according to Directive 2003/41/EC of the European Parliament and of the Council, <http://eur-lex.europa.eu/legal-content/en/TXT/HTML/?uri=CELEX:32014R0643&qid=1407839843735&from=EN> accessed 18 September 2014.

[619] OECD Economic Surveys European Union (2012), March Overview, p. 1, <http://www.oecd.org/eco/49950244.pdf> accessed 31 January 2013.

[620] See EU Citizenship Report 2013, EU citizens: your rights, your future, p. 13<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0269:FIN:EN:PDF> accessed 31 January 2014.

[621] EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights, COM 2010 603 final, <http://ec.europa.eu/justice/citizen/files/com_2010_603_en.pdf> accessed 31 January 2014.

The key action of this lever is a proposal[622] of the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. The proposal is based on Articles 53 (1) and 62 TFEU. The aim is to reconcile the exercise of the freedom to provide cross-border services under Article 56 TFEU with appropriate protection of the rights of workers temporarily posted abroad for that purpose.[623] The proposal was realised by the launch of a directive[624] in May 2014.

In a report[625] the Commission evaluated the development of the Directive 96/71/EC. This report identified several deficiencies and problems of incorrect implementation and the application of the Directive 96/71/EC in some member States.[626] A lack of clarity of the existing legal framework on EU level is at the origin of the problems identified because member states have a wide margin with regard to implementation, application and enforcement in practice as well as previous attempts to address existing problems by the way of non-binding measures have not been sufficient to solve the identified problems.[627] Besides, the clash between the deregulation

[622] Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, 2012/0061 (COD), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0131:FIN:EN:PDF> accessed 31 January 2014.

[623] Ibid., p. 2.

[624] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0067&from=EN> accessed 29 July 2015.

[625] Report from the Commission services on the implementation of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, January 2014, <http://ec.europa.eu/social/main.jsp?catId=471> accessed 31 January 2014.

[626] Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, 2012/0061 (COD), p. 4, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0131:FIN:EN:PDF> accessed 31 January 2014.

[627] Commission staff working document: Executive summary of the impact assessment: Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Text with EEA relevance) and Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (Text with EEA relevance), SWD (2012) 64 final, p. 10,

of services on the one hand and national wage regulation and social policy-making on the other hand makes it difficult to achieve a European unity in the sector of services.[628]

2. Regulation: Mobility of citizens (lever 17)

The modernisation and improvement of the European job mobility network, EURES, marks the fifth lever of the Single Market Act II. The revised EURES network contains new members and is more flexible to bring jobseekers and employers together. The revised network is realised by a regulation[629] based on Article 46 TFEU and focuses on the free movement of people.

According to the initial statements of the regulation, the European Council decided on a "Compact for Growth and Jobs"[630] in June 2012 and on the basis of the Communication from the Commission entitled "Towards a job-rich recovery"[631] of 18 April 2012 that the EURES Portal should be developed into a true European placement and recruitment tool.

With only 25000 employers registered and some 150000 job placements/recruitments per year, the European Employment Services tool (EURES) has so far not made full use of its direct employment potential.[632] Besides, only about 2% of European citizens live and work in another member state than the country of origin. The more than 600 000 people who live in one EU country and work in another have to cope with different

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<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0064&from=EN> accessed 31 January 2014.

[628] Howarth / Sadeh (2012), p. 9.

[629] See Commission implementing decision of 26 November 2021 implementing Regulation (EU) No 492/2011 of the European Parliament and of the Council as regards the clearance of vacancies and applications for employment and the re-establishment of EURES; 2012/733/EU).

[630] Agreement of the European Council: Compact for Growth and Jobs, EUCO 76/12, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131388.pdf#page=8> accessed 30 April 2014.

[631] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a job-rich recovery, COM (2012) 173 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0173:FIN:EN:PDF > accessed 30 April 2014.

[632] Ibid., p. 17.

national practices and legal systems as they may come across administrative, legal or fiscal obstacles to mobility on a daily basis.[633]

III. Further measures

1. Regulations

a. Networks (lever 6) according to 172 TFEU

The key action of this lever was firstly presented by the European Commission[634] in October 2011 and finally resulted in a regulation[635] establishing the Connecting Europe Facility in December 2013. The regulation is based on Article 172 TFEU.

According to the wording of the regulation, the regulation establishes the Connecting Europe Facility ("CEF"), which determines the conditions, methods and procedures for providing financial assistance to trans- European networks in order to support projects of common interest in the sectors of transport, telecommunications and energy infrastructures and to exploit potential synergies between those sectors.

A report[636] from Mario Monti points out that planning, financing and management of infrastructure projects take place predominantly along national lines although production and distribution are becoming more integrated across national borders and as sectors such as energy and electronic communication call for new interconnections, the cross-border

[633] European Commission: EURES in cross-border regions, <https://ec.europa.eu/eures/main.jsp?acro=eures&lang=en&catId=56&parentCategory=56> accessed 30 April 2014.

[634] European Press Release: Connecting Europe Facility, Commission adopts plan for 50 billion Euro boost to European networks, 19 October 2011, <http://europa.eu/rapid/press-release_IP-11-1200_en.htm?locale=en> accessed 31 January 2014.

[635] Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:348:0129:0171:EN:PDF> accessed 31 January 2014.

[636] "A new Strategy for the Single Market at the service of Europe's economy and society", Report by Mario Monti to the President of the European Commission, 9 May 2010, p. 65, <http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf> accessed 31 January 2014.

infrastructure gap is becoming more acute in Europe. Furthermore, the report outlines that bottlenecks still exist within the single market.

b. Air transport (lever 15) according to 100 (2) TFEU

The air transport lever contains measures to realise the Single European Sky. The safety, capacity, efficiency and the environmental impact of aviation shall be improved through accelerating the implementation of the Single European Sky. The Commission outlines within the Single Market Act II that the acceleration of the implementation of the Single European Sky through a new package of actions, including legislative actions (such as on clarifying the institutional setup, reinforcing market principles for the provision of air navigation services, accelerating SESAR deployment, redefining the performance scheme and providing the Commission with clear enforcement tools, in particular with regard to functional airspace blocks), will address the persisting barriers and will result in large performance and efficiency gains.

A proposal for a regulation[637] in the field of aerodromes, air traffic management and air navigation services and also a proposal for a regulation[638] on the implementation of the Single European Sky shall help to realise these aims. Both proposals are based on Article 100 (2) TFEU. The latter proposal can be seen as a comprehensive revision combining the Framework Regulation (EC) No. 549/2004, the Air Navigation Services Regulation (EC) No. 550/2004, the Airspace Regulation (EC) No. 551/2004 and the Interoperability Regulation (EC) No. 552/2004. All provisions

[637] Proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 216/2008 in the field of aerodromes, air traffic management and air navigation services, COM (2013) 409 final, <http://ec.europa.eu/transport/modes/air/single_european_sky/doc/ses2plus/com(2013)409_en.pdf> accessed 31 January 2014. The proposal finally resulted in: Commission Regulation (EU) 2016/4 of 5 January 2016 amending Regulation (EC) No 216/2008 of the European Parliament and of the Council as regards essential requirements for environmental protection, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0004> accessed 29 July 2017.

[638] Proposal for a regulation of the European Parliament and of the Council on the implementation of the Single European Sky, COM (2013) 410 final, <http://ec.europa.eu/transport/modes/air/single_european_sky/doc/ses2plus/com(2013)410_en.pdf > accessed 30 April 2014. The adoption of this legislative act takes longer than expected due to the critical interference of the European Parliament.

primary focus on improving the freedom to provide air navigation services across the borders.

The air transport market is currently characterised by a "tradition of monopoly"[639]. Air traffic management in Europe is still based on national sovereign airspace which causes a fragmentation in Europe .The absence of a single integrated European airspace management has significant negative repercussions on airspace users as it results in aircraft flying unnecessary detours rather than direct routes and suffering from air traffic delays.[640] EU airspace is controlled by 38 air navigation service providers with varying air navigation systems. According to the European Commission, airspace management deficits finally lead to higher costs for airspace users.[641]

c. Business environment (lever 19) according to Art. 81 TFEU

A proposal[642] for a regulation on insolvency proceedings heralds the intended improvement of the business environment. A better efficiency of the EU framework for the handling of cross-border insolvency proceedings is the main aim of the proposal of the regulation and the corresponding legal basis is Article 81 of the Treaty on the Functioning of the European Union. The new culture of "rescue and recovering" shall prevent liquidations and support the restructuring of businesses. The regulation regulates cross-border insolvencies in the EU by means of rules on the conflict of laws. Integrated insolvency proceedings should lead to legal clarity.

Finally, the new regulation[643] was published in the official journal in June 2015. Based on the standardised submission of claims external

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[639] Goh (1997), p. 155.

[640] Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Single Market Act II, Together for new growth, COM (2012) 573 final, p. 8, <http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf> accessed 31 January 2014.

[641] Ibid., p. 7.

[642] Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM (2012) 744 final, <http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf> accessed 31 January 2014.

[643] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings,

creditors can expect reduced costs and the insolvency courts less administrative burden.[644]

The revision[645] of the VAT tax reform is a complementary action of the business environment lever and can be seen as the realisation of the VAT strategy[646] which was already part of the 9th lever of the Single Market Act I. In June 2014 the VAT Expert Group which assists the European Commission on VAT matters adopted an opinion[647] regarding the definitive VAT regime for the taxation of intra-EU B2B supplies of goods. Yet, the defined aims are still kept general within this opinion. The main aim was defined as working together towards a "simple, efficient, fair and robust definitive VAT system."[648] Concrete goals have not been achieved so far. The Commission already stressed at the end of 2011 that disagreements between the member states about the correct VAT regime make a noteworthy unity politically unachievable.[649]

In the proposal of the regulation the Commission states that between 2009 and 2011, an average of 200 000 firms went bankrupt in the EU each year while one-quarter of these bankruptcies have a cross-border element and a total of 1.7 million jobs are estimated to be lost due to insolvencies every year. This reveals the most serious current deficit in the field of business environment. For decades, efforts to harmonise insolvency rules in

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<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=DE> accessed 10 July 2015.

644 See Kindler, Peter / Sakka, Samy (2015): Die Neufassung der Europäischen Insolvenzordnung, in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW), pp. 460- 466.

645 Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards a standard VAT return, COM (2013) 721 final, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/legislation_proposed/com(2013)721_en.pdf> accessed 30 April 2014.

646 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the future of VAT: Towards a simpler, more robust and efficient VAT system tailored to the single market, COM (2011) 851 final, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/communications/com_2011_851_en.pdf> accessed 30 April 2014.

647 Opinion of the VAT Expert Group on the definitive VAT Regime, 12 June 2014, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/expert_group/opinion_vat_2014.pdf> accessed 17 June 2014.

648 Ibid., 2.

649 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the future of VAT: Towards a simpler, more robust and efficient VAT system tailored to the single market, COM (2011) 851 final, p. 5, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/communications/com_2011_851_en.pdf> accessed 30 April 2014.

Europe have failed and this reveals the big challenge finally to realise a harmonisation in this area.[650]

The Commission stresses that there is currently no mandatory publication or registration of the decisions in the member states where a proceeding is opened. A necessary European insolvency register also does not exist which would permit searches in several national registers. In a complex insolvency case the involvement of multiple proceedings, subsidiaries, affiliated entities, assets, operations and creditors in several nations is needed.[651]

2. Directives

a. Taxation (lever 9) according to Art. 113 TFEU

The European Commission's tax policy strategy was already outlined in a communication[652] on tax policy in the European Union in the year 2001. Within the communication the commission stresses that there is no need for an across-the-board harmonisation of member states' tax systems as the member states are free to choose the appropriate tax system.

Besides, the Commission states that due to the widely differing characteristics of member states' tax systems and different national preferences a harmonisation on an EU level is not desirable. In the year 2006 this assessment was underlined by the Commission´s communication[653] on coordinating member states' direct tax systems in the internal market. Accordingly, only a better coordination would be needed to solve existing tax problems on the EU level.

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[650] See Westphal / Goetker / Wilkens (2008), p. 3.
[651] See also Ho (2006), p. 11.
[652] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: Tax policy in the European Union: priorities for the years ahead, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0260&from=EN> accessed 17 June 2014. See also Terra / Wattel (2001), p. 127.
[653] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: Co-ordinating Member States' direct tax systems in the Internal Market, COM (2006) 823 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0823&from=EN> accessed 17 June 2014.

Consequently, due to the Commission´s ongoing national approach regarding taxation it cannot be expected that huge steps can be made in the field of tax harmonisation. However, the Commission has noted that more legal steps must be undertaken in the field of taxation to tackle the shortcomings. That is why the tax lever (lever 9) became part of the Single Market Act I.

The tax lever (lever 9) is filled out by a proposal[654] concerning the revision of the energy taxation rules. The proposal falls under Article 113 TFEU. It aims at splitting the minimum tax rate into two parts: a) based on CO2 emissions of the energy product and b) based on the energy content. This approach shall create a more resource-efficient, greener and more competitive European economy. Aside from this key action of the 9th lever of the Single Market Act I, the complementary measures of this lever are also worth mentioning: the introduction of a common consolidated corporate tax base[655], the determination of the new VAT strategy[656] and the adoption of a communication[657] on removing cross-border fiscal obstacles.

The VAT system is a consumption tax which is charged for goods and services traded for use or consumption in the EU. A minimum standard VAT rate of 15% exists in the EU. The goals of the VAT strategy are to make the VAT system simpler and more efficient.

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[654] Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, COM (2011) 260 final, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/com_2011_169_en.pdf> accessed 31 January 2014.

[655] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0121&from=EN> accessed 30 April 2014.

[656] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the future of VAT: Towards a simpler, more robust and efficient VAT system tailored to the single market, COM (2011) 851 final, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/communications/com_2011_851_en.pdf> accessed 30 April 2014.

[657] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Removing cross-border tax obstacles for EU citizens, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/tax_policy/com(2010)769_en.pdf> accessed 30 April 2014.

The concept of a common consolidated corporate tax base (CCCTB) which has its legal base at Article 115 TFEU contains the development of a set of common rules in order to determine the tax base of companies with operations in several member states. However, it must be stressed that the harmonisation of tax rates is not intended. The aim of the CCCTB is that SMEs operating across borders and opting into the system will only be required to calculate their corporate tax base based on one single set of tax rules.[658] In this case only one tax administration (so called one-stop-shop) will apply.

Besides, the Commission introduced a recommendation[659] regarding the relief for double taxation of inheritances. This recommendation includes suggestions for member states concerning modifications of their existing national rules for relieving double inheritance taxation. Moreover, the Commission adopted a communication[660] on ways to address double taxation.

The present problem in the field of taxation is based on the fact that the member states have a very wide scope to determine individual national rules. The many existing different tax systems weaken the realisation of a true single market. The Commission states that in the absence of common corporate tax rules, the interaction of national tax systems often leads to over-taxation and double taxation and that is why companies have to deal with heavy administrative burdens and high tax compliance costs.[661]

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[658] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121/4, p. 6, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/com_2011_121_en.pdf> accessed 31 January 2014.

[659] Commission Recommendation of 15 December 2011 regarding relief for double taxation of inheritances, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/personal_tax/inheritance/c_2011_8819_en.pdf> accessed 31 January 2014.

[660] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Double taxation in the Single Market, COM (2011) 712 final, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/personal_tax/inheritance/c_2011_8819_en.pdf> accessed 31 January 2014.

[661] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121/4, p. 4, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/com_2011_121_en.pdf> accessed 31 January 2014.

The Commission raised the question how much is lost every year through fraud. While the considered VAT gap covers more than just fraud (also legal avoidance and insolvencies), a study set the gap at 106.7 billion Euro in 2006 which represents an average of 12% of the net theoretical liability.[662] In 2009, total VAT receipts in the EU were around EUR 783 billion and the contribution to the EU from member states was based on a rate of 0.3% of the national harmonised VAT base which is considered as too low by the Commission. The idea of a Commission's proposal is to apply a single EU rate of 1 percentage point on all the goods and services currently subject to the standard rate in all EU Member States.

Tax liability is determined on the basis of a variety of relevant factors (i.e. the residence, domicile or nationality of the deceased and/or of the beneficiary; and/or the location of property) which differ in each member state and this can cause double or even multiple taxation of the same inheritance in different member states.[663]

One significant further problem which has not become subject of legal levers and also deals with questions of competition law is the treatment with tax havens and the caused huge financial losses for some member states. In August 2016 announced that Apple has to pay an additional amount of 13 billion Euros to the fiscal authorities of Ireland. The European Commission has a priori supported the so-called BEPS Initiative (base erosion and profit shifting) which has a high impact as some of the most important tax havens worldwide are within the European Union such as Ireland, Luxemburg and the Netherlands. [664]

This lever regarding the CCCTB has finally to be considered as a failure because of several disagreements. In October 2016 a new proposal[665] had to be introduced with a more manageable easier process.

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[662] European Commission: Press release, 6 December 2011, <http://europa.eu/rapid/press-release_MEMO-11-874_de.htm?locale=en> accessed 31 January 2014.

[663] European Commission: Paying inheritance tax twice? , <http://ec.europa.eu/taxation_customs/taxation/personal_tax/inheritance/index_en.htm > accessed 31 January 2014.

[664] Klodt, Weidenfeld / Wessels (2016), p. 316.

[665] Proposal for a Council Directive on a Common Corporate Tax Base, COM 2016 (685) final,

b. Business environment (lever 11) according to Art. 50 (1) TFEU

The realisation of the business environment lever occurred through a directive[666] on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings. The directive is based on Article 50 (I) TFEU. The main aim of the proposed directive on accounting rules is to reduce the administrative burden stemming from accounting requirements on micro- and small public limited companies and limited liability companies.[667]

It can be seen as the result of the Commission Communication entitled "Smart Regulation in the European Union"[668]. There the Commission stressed that the policy had to be changed. Accordingly, stakeholder consultations and impact assessments have become essential parts of the policy making process with the goal to create more transparency and accountability and less administrative burdens. This approach can also be seen as an evidence-based policy where the evaluation process plays a key role.

In order to stress the current burdens for SMEs it can be referred to a report[669] from an expert group. As an empirical result this report stresses that on average a business with fewer than ten employees has to face a

<https://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_685_en.pdf> accessed 28 July 2017.

[666] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF> accessed 31 January 2014.

[667] Single Market Act: Twelve levers to boost growth and strengthen confidence ("Working together to create new growth"), p. 18,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF> accessed 31 January 2014.

[668] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Smart Regulation in the European Union, COM (2010) 543 final, <http://aei.pitt.edu/43035/1/com2010_0543.pdf> accessed 31 January 2014.

[669] Report of the expert group: Models to reduce the disproportionate regulatory burden on SMEs, May 2007,
<http://ec.europa.eu/enterprise/policies/sme/files/support_measures/regmod/regmod_en.pdf> accessed 31 January 2014.

regulatory burden (measured per employee) that is roughly twice as high as the burden of a business with more than ten but less than twenty employees and about three times as high as the burden of businesses with more than twenty but less than fifty employees.[670]

3. Mixed: Regulations and Directives

a. Rail transport (lever 13) according to Art. 91 TFEU

The fourth railway package[671] marks the first lever of the Single Market Act II. The ideas of this package were already outlined in a White Paper[672] in the year 2011. In line with the flagship initiative "Resource efficient Europe" set up in the Europe 2020 Strategy the main goal of the European transport policy is to help establish a system that underpins European economic progress, enhances competitiveness and offers high quality mobility services while using resources more efficiently.[673]

This new railway package consists of a communication, six legislative acts[674] to amend existing directives and regulations, and three reports on

[670] Ibid., p. 16.

[671] Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions on "The fourth railway package – completing the single European railway area to foster European competitiveness and growth, COM (2013) 25 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0025:FIN:EN:PDF> accessed 31 January 2014.

[672] European Commission: White Paper: Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM (2011) 144 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0025:FIN:EN:PDF> accessed 31 January 2014.

[673] Ibid.

[674] a) Proposal for a Regulation of the European Parliament and of the Council repealing Regulation (EEC) No 1192/69 of the Council on common rules for the normalisation of the accounts of railway undertakings, COM (2013) 26 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0026:FIN:EN:PDF> accessed 30 April 2014. The proposal finally resulted in: Regulation (EU) 2016/2337 of the European Parliament and of the Council of December 2016 repealing Regulation (EEC) No 1192/69 of the Council on common rules for the normalisation of the accounts of railway undertakings, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2337&from=EN> accessed 28 July 2017.
b) Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, COM (2013) 27 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0027:FIN:EN:PDF> accessed 30 April 2014. This proposal finally resulted in: Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency

technical, legal and policy aspects. EU wide vehicle authorisations, safety certificates for rail operators, infrastructure governance, opening of domestic passenger markets and social protection for workers in the railway sector are the sections which are covered by the new railway package. Two[675] of the mentioned six proposals are in particular interesting from the economic point of view as they contain the opening of the domestic passenger transport services. All six proposals are based on Art. 91 TFEU.

Low competition, remaining market distortions and suboptimal structures are responsible for the insufficient quality of railway services

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for Railways and repealing Regulation (EC) No 881/2004, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0796&from=EN> accessed 28 July 2017.
c) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail, COM (2013) 28 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0028:FIN:EN:PDF> accessed 30 April 2014. For the final version see also Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2338&from=en> accessed 28 July 2017.
d) Proposal for a directive of the European Parliament and of the Council amending Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure, COM (2013) 29 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0029:FIN:EN:PDF> accessed 30 April 2014. For the final version see also Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L2370&from=EN> accessed 28 July 2017.
e) Proposal for a directive of the European Parliament and of the Council on the interoperability of the rail system within the European Union (Recast), COM (2013) 30 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0030:FIN:EN:PDF> accessed 30 April 2014. In May 2016 the Directive was signed by the Council and the European Parliament: Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0797&qid=1501338748852&from=EN> accessed 28 July 2017.
f) Proposal for a directive of the European Parliament and of the Council on railway safety (Recast), COM (2013) 31 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0031:FIN:EN:PDF> accessed 30 April 2014. The proposal resulted in: Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (recast), < http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0798&from=EN > accessed 28 July 2017.
[675] COM (2013) 28 final and COM (2013) 29 final.

until today.[676] Besides, long and costly procedures, access barriers for new entrants and different market access rules in the member states depict current deficits.[677]

b. Energy (lever 16) according to Art. 194 TFEU

The introduction of Article 194 TFEU reveals the importance of the internal energy market since the Treaty of Lisbon. The wording of Article 194 (1)TFEU states: "In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks."

A better application and enforcement of the "Third Energy Package"[678] is in the center of the energy lever as the European Commission outlined in a communication "on making the internal energy market work"[679] and finally in a further updated communication[680] from 2014. The "Third Energy Package" refers to regulations and directives. That is why it is justified to classify lever 16 within this category (mixed: regulations and directives).

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[676] Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions on "The fourth railway package – completing the single European railway area to foster European competitiveness and growth, COM (2013) 25 final, p. 10, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0025:FIN:EN:PDF> accessed 31 January 2014.

[677] Ibid., p. 10.

[678] The „Third Energy Package" is a legislative package for an internal gas and electricity market in the EU which mainly refers to Directives 2009/72/EC and 2009/73/EC, Regulations (EC) No 713/2009, 714/2009 and 715/2009.

[679] Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Making the internal energy market work, COM (2012) 663 final, <http://ec.europa.eu/energy/gas_electricity/doc/20121115_iem_0663_en.pdf> accessed 31 January 2014.

[680] Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Progress towards completing the Internal Energy Market, COM (2014) 634 final, <http://ec.europa.eu/energy/sites/ener/files/documents/2014_iem_communication.pdf> accessed 12 November 2015.

Infringement procedures against the member states which have not transposed the third energy package directives yet or have not done it correctly are supposed to lead the member states back on the track of the "Energy Roadmap 2050"[681]. An important goal is that companies can make cross-border investments in the energy market.

The internal energy market serves as a tool to realise a target triangle of competition, supply guarantee and environmental compatibility.[682] A new directive[683] on energy efficiency, legally based on Art. 194 TFEU, is in the heart of this lever to realise the mentioned target triangle. The reference to environmental matters demonstrates the sustainable element of the target and takes into consideration Article 11 TFEU which states: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development." One the one hand the goal is an opening of the national energy markets and the strengthening of the market freedoms; a regulatory intervention is made when it comes the introduction and the promotion of renewable energies on the other hand.[684]

The Commission emphasises that despite the adoption of the third energy package, no fully integrated European internal energy market has yet been achieved to the detriment of all energy users including private households.[685] National monopolies have long been the norm in the energy sector and the harmful market effects caused by monopolies are still felt

[681] Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy Roadmap 2050, COM (2011) 885 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0885:FIN:en:PDF> accessed 31 January 2014.

[682] Kröger (2015), p. 52.

[683] Directive 2012/27/EU of the European Parliament and of the Council 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0027&from=DE> accessed 31 July 2015.

[684] See also Kröger (2015), p. 84.

[685] Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Single Market Act II, Together for new growth, COM (2012) 573 final, p. 8, <http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf> accessed 31 January 2014.

today.[686] Particularly, very long-term contracts with a length of 10-15 years are common between the suppliers and consumers.[687] The Commission states that the internal energy market is still fragmented and has not achieved its potential for transparency, accessibility and choice because the development of companies beyond national borders is still hampered by a host of different national rules and practices.[688]

B. The allocation of the levers to the internal market freedoms

The three components consisting of the market freedoms, the approximation of laws and the competition law are designed to create an internal market where the economic trade can evolve without any public and private adverse effects.[689] This is why all these aspects are subject of this paper.

According to the definition of Article 26 (2) TFEU the "internal market" has the goal to strengthen the market freedom and to overcome internal borders regarding the free movement of goods, persons, services and capital.[690] This reveals the conceptual connection of the internal market goal and the primary fundamental freedoms which should prevent every form of discrimination and restriction in the trade between the member states in order to allow each European market actor to compete freely on the markets of the member states.[691] Consequently, the market freedoms are the base of negative integration and have a deregulating and a market expanding effect.[692]

[686] Howarth / Sadeh (2012), p. 7.
[687] Ibid., 9.
[688] European Commission: Energy 2020 - A strategy for competitive, sustainable and secure energy, <http://ec.europa.eu/energy/publications/doc/2011_energy2020_en.pdf> accessed 31 January 2014.
[689] Blanke / Böttner, in: Blanke / Cruz Villalon / Klein / Ziller (2015), p. 253.
[690] Kröger (2015), p. 50.
[691] Ibid.
[692] Ibid., 43-50.

According to a basic scheme, the internal market freedoms can be evaluated on the basis of the following criteria: scope of protection, intervention and justification. Yet, the European Court of Justice does not use a uniform structure to evaluate the internal market freedoms. That is why the mentioned scheme is not subject-matter of this evaluation.

The provided allocation to the internal market freedoms in this chapter shall instead primarily help to understand that the levers of the Single Market Act I and II rather reveal a negative integration approach than a positive integration approach. Yet, the differentiation is quite complex. The intended measures of the Single Market Acts I and II should help to overcome national barriers. This reveals a negative integration approach. To a certain extent a legislative framework with new provisions is also provided by the market levers which is typical for a positive integration approach. Besides, many measures are legally based on Article 114 and in general this norm rather constitutes a tool to realise a positive integration approach. Yet, many of the new provisions only have an optional character respectively a supplementary role instead of setting an entire new legal framework. Due to the strong reference to the market freedoms a strong emphasis lays on a negative integration process.

I. Freedom to provide services

1. Case law development

The freedom to provide services has originally to be considered as a residual clause in comparison to the other market freedoms but it has gained a much higher significance through the growth of the service sector in the last years.[693] The freedom to provide services is very closely related to the freedom of establishment but the latter one relates to a permanent integration of a service provider within the economic life of another member state.[694] Also connecting factors to the free movement of goods exist due to the product-related aspects of the freedom to provide service.[695]

[693] Schütz / Bruha / König (2004), p. 715.
[694] Ibid., p. 716. Hereby it is also referred to Case 55/94 - „Gebhard".
[695] Pache, in: Ehlers (2014), p. 419, Rn. 3.

These complex relations between the market freedoms demonstrate that the market freedoms are closely interconnected and cannot always be efficiently separated from each other. To give an example, the famous case of the soccer player "Bosman" can be referred to the free movement of workers but also contains aspects regarding the freedom to provide services. All in all, the case "Bosman" more likely refers to the free movement of workers because the decision clarified that a soccer player falls under the concept of a worker. Consequently, aspects related to the person were in foreground.

However, it makes sense to classify the most important relevant European case law of the last decades into the market freedoms to outline the characteristics of each market freedom and to understand the concrete historic evolution. This classification serves as bridge to further categorise the 24 market levers in accordance with the most likely related market freedom. There are many different aspects which can be considered to distinguish between the market freedoms. To give an example, compared to the free movement of good the provision of a service is characterised by the fact that a service is not tradable, transportable or storable.[696] Besides, services are more likely bound to a certain person and are more strongly based on intellectual capital and the qualifications of the staff concerned.[697]

Article 56 TFEU states that restrictions on the freedom to provide services within the Union are prohibited in respect of nationals of member states who are established in a state other than that of the person for whom the services are intended. It means that any form of discrimination concerning the provision of services on the basis of nationality is directly forbidden by Article 56 TFEU. Furthermore, Article 57 TFEU outlines that services shall be considered as such where they are normally provided against payment, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

The term service has to be interpreted widely due to the initial catch-all function of the freedom to provide services and the innovative character

[696] Blanke / Böttner, in: Niedobitek (2020), p. 1090. Prior version: Blanke / Böttner, in: Niedobitek (2014), p. 351.
[697] Ibid.

of the service market with new products.[698] One can distinguish between the active free rendering of a service (the supply of a service), the passive free rendering of a service (acceptance of a service) and in the third scenario only the service itself has a cross-border element while the relevant persons remain within the same location.[699] Also a fourth version is imaginable when the supplier and recipient meet each other in a third country as long as the Union relevance is still given.[700]

The principle of non-discrimination and the principle of proportionality are the "meta rules of the Union"[701]. The European Court of Justice has developed the market freedom from the principle of non-discrimination towards a general ban on restrictions.[702] The question arises to which degree possible restrictions have to be taken into account despite of the tendency towards a total ban. Due to the fact that Article 62 refers to Article 52 the purpose of maintaining public order and security as a possible justification and also overriding reasons relating to the public interest have to be noted.[703] The requirements of a service provision are reflected by the "services directive"[704].

This directive serves as a secondary law base with the task to shape the primary law according to Articles 56-62 TFEU.[705] The provisions of the directive are a part of the strategy with the goals to improve the functioning of the single market and to ensure that service provider can in other member states operate as easily as in the own member state.[706] At the same time a simplification of the administration and a closer cooperation should help to stimulate the internal market for services.[707]

Of course, certain decisions of the European Court of Justice before the coming into force of the mentioned directive are worth mentioning. It

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[698] Asemissen (2014), p. 155.
[699] Doerfert (2012), p. 123.
[700] Blanke / Böttner, in: Niedobitek (2020), p. 1091. Blanke / Böttner, in: Niedobitek (2014), p. 353.
[701] Blanke, in: Blanke / Scherzberg / Wegner (2010), p. 361.
[702] Asemissen (2014), p. 157. The Author hereby mainly refers to Case 33/74-van Binsbergen.
[703] Ibid., 159.
[704] Directive 2006/123.
[705] Blanke, in: Blanke / Scherzberg / Wegner (2010), p. 352.
[706] Ibid.
[707] Blanke / Böttner, in: Niedobitek (2020), p. 925. Prior version: Blanke / Böttner, in: Niedobitek (2014), p. 140.

was shown in "Luisi and Carbone" and "SPUC v. Grogan" that EU nationals could in principle travel to another member state to receive medical treatment because medical services constitute "services" within the meaning of the market freedom.[708] Gambling as a source of private profit became the subject matter of the "Schindler Case"[709]. It became clear that the public order and the consumer protection deserve a high protection. The Court held in this context:

"Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory".

However, all these possible justifications which limit the freedom to provide services are subject of a proportionality control which is determined by the ban of a double check.[710] The aim is that service providers should not be confronted with the burden of repeated controls.

In several cases the Court accepted several public interest groups. In the "Kohll Case"[711] it was recognized that such an interest is also reflected by preserving the financial balance of a social security scheme.

The importance of the principle of proportionality became also visible in a further case concerning the deportation of a person due to the infringement of UK immigration laws. In the "Carpenter Case" the Court concluded that a decision to deport Mrs. Carpenter (the wife of a service providing business person) did not strike a fair balance between the competing interests of the right of Mr. Carpenter to respect for his family

[708] Barnard (2004), p. 363. The author refers to the joined cases 286/82 and 26/83.
[709] Case C-275/92.
[710] Blanke, in: Blanke / Scherzberg / Wegner (2010), p. 354. The author hereby underlines Case 384/93 (Alpine Investments). For further reading see also Barnard (2004), p. 242.
[711] Case C-158/96.

life on the one hand and the maintenance of public order and public safety, on the other hand.[712] This decision outlined the significance of fundamental human rights within the market freedoms.

Besides, also the health care sector was influenced by the freedom market. The requirement of prior authorisation for a treatment abroad outside a hospital was considered not to be applicable with the freedom to provide services.[713]

The significance of the freedom to provide services was further underlined in "Fidium Finance Case"[714]. In this case it became visible again how different the distinction respectively the weighting factor between the market freedoms can be. In the above mentioned case the Swiss undertaking "Fidium Finance" was able to win against BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht) because the freedom to provide service was given a higher value compared to the freedom of movement of capital.

The freedom to provide service was again strengthened by the "Laval Case".[715] The striking right of a trade union was superseded by the market freedom.

The described cases demonstrate the astonishing rise from a catch-all provision to a fundamental market freedom with enormous effects on several areas of life of the EU citizens. The significance of the freedom to provide services has been growing in a fast manner during the last decades.

2. Reference to the levers

The first lever of the Single Market Act I which was realised through the regulation[716] of 17 April 2013 on European venture capital funds can be linked to the free movement of capital and the free movement of services. The intended aim to stimulate cross-border fundraising activity of VC funds throughout Europe can be seen as a measure to strengthen the free

[712] Barnard (2004), p. 245.
[713] Case C-355/99 (Müller-Faure).
[714] Case C-452/04.
[715] Case C-342/05.
[716] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0001:0017:DE:PDF> accessed 31 January 2014.

movement of capital. However, SMEs shall be the profiteers of the key action to be able to provide services in an ideal market environment and that is why the free movement of services as a fundamental EU freedom is most of all involved.

The fourth lever of the Single Market Act I is marked by a directive[717] from May 2013 on alternative dispute resolution for consumer disputes and a regulation on online dispute resolution for consumer disputes[718]. The goal is to establish simple, fast and affordable out-of-court settlement procedures for consumers and also to protect the relations between businesses and their customers. The European Commission stresses that these measures are realised in order to strengthen the rights of consumers. However, in the end effect the measures are made to improve the business environment and can best be classified by the freedom to provide services.

The fifth lever of the Single Market Act I refers to a regulation[719] regarding European standardisation. According to the wording of the regulation "European standardisation also helps to boost the competitiveness of enterprises by facilitating in particular the free movement of goods and services". This demonstrates that the freedom to provide services and the free movement of goods are concerned. However,

[717] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF> accessed 31 January 2014.

[718] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF> accessed 31 January 2014.

[719] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:316:0012:0033:EN:PDF> accessed 31 January 2014.

there is a focus on the freedom to provide services. This estimation is strengthened by the following wording of regulation:

In practice, it is not always possible to clearly distinguish standards for products from standards for services. Many standards for products have a service component while standards for services often also partly relate to products. Thus, it is necessary to adapt the current legal framework to these new circumstances by extending its scope to standards for services.

Also the European Commission stresses that services standardisation must be developed at European level, taking full account of market needs in order to avoid the emergence of new barriers and to facilitate the cross-border provision of services, particularly business-to-business services, such as logistics or facility management services.[720] This makes clear that primarily the freedom to provide service as a fundamental EU freedom shall be optimised through the regulation.

Lever 7 is marked by the regulation[721] which refers to electronic identification and trust services for electronic transactions in the internal market. It follows the aim is to give legal effect and mutual recognition to trust services and to provide a suitable legal framework. Consequently, the freedom to provide service as a fundamental EU freedom shall be optimised through the proposal.

The realisation of the business environment lever (lever 11) occurred through a directive[722] on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.

[720] Single Market Act: Twelve levers to boost growth and strengthen confidence (”Working together to create new growth"), p. 10, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF> accessed 31 January 2014.

[721] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0910&from=EN> accessed 23 September 2014.

[722] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF> accessed 31 January 2014.

Within the wording of the directive it is stressed: This Directive is based on the "think small first" principle. It is also mentioned that the central role played by small and medium-sized enterprises (SMEs) in the Union economy is recognized with the aim to improve the overall approach to entrepreneurship and to anchor the "think small first" principle in policymaking from regulation to public service. Consequently, the service aspect is in the center of attention of this directive and can best be classified by the freedom to provide services.

The European Parliament adopted a package of new public procurement directives to realise lever 12 of the Single Market Act I. The goal is to ensure a simpler and more flexible procurement procedure which shall primary help SMEs to have a better access to the single market. In this way the freedom to provide services as a fundamental EU freedom can be ensured, particularly in the SME sector.

Lever 13 marks the fourth railway package[723] and is the first lever of the Single Market Act II. More precisely, the new railway package initially consists of a communication, six legislative acts[724] to amend existing

[723] Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions on "The fourth railway package – completing the single European railway area to foster European competitiveness and growth, COM (2013) 25 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0025:FIN:EN:PDF> accessed 31 January 2014.

[724] The proposals which meanwhile all have been adopted are as follows:

a) Proposal for a Regulation of the European Parliament and of the Council repealing Regulation (EEC) No 1192/69 of the Council on common rules for the normalisation of the accounts of railway undertakings, COM (2013) 26 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0026:FIN:EN:PDF> accessed 30 April 2014.

b) Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, COM (2013) 27 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0027:FIN:EN:PDF> accessed 30 April 2014.

c) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail, COM (2013) 28 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0028:FIN:EN:PDF> accessed 30 April 2104.

d) Proposal for a directive of the European Parliament and of the Council amending Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure, COM (2013) 29 final,

directives and regulations, and three reports on technical, legal and policy aspects. The improvement of the domestic passenger transport services is in the focus of the railway package and that is why lever 13 mostly refers to the freedom to provide services.

Lever 15 refers to the field of aerodromes. The initial measures of this lever are a proposal for a regulation[725] in the field of aerodromes, air traffic management and air navigation services and also a proposal for a regulation[726] on the implementation of the Single European Sky. All provisions primary focus on air navigation services and that is why the freedom to provide services across the borders is mostly concerned.

Finally, the energy lever (lever 16) deals with a better application and enforcement of the "Third Energy Package"[727]. More precisely, the measures of lever 16 are revealed by a communication "on making the internal energy market work"[728] and finally in a further updated

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<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0029:FIN:EN:PDF> accessed 30 April 2014.

e) Proposal for a directive of the European Parliament and of the Council on the interoperability of the rail system within the European Union (Recast), COM (2013) 30 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0030:FIN:EN:PDF> accessed 30 April 2014.

f) Proposal for a directive of the European Parliament and of the Council on railway safety (Recast), COM (2013) 31 final,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0031:FIN:EN:PDF> accessed 30 April 2014.

[725] Proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 216/2008 in the field of aerodromes, air traffic management and air navigation services, COM (2013) 409 final,
<http://ec.europa.eu/transport/modes/air/single_european_sky/doc/ses2plus/com(2013)409_en.pdf> accessed 31 January 2014.

[726] Proposal for a regulation of the European Parliament and of the Council on the implementation of the Single European Sky, COM (2013) 410 final, <http://ec.europa.eu/transport/modes/air/single_european_sky/doc/ses2plus/com(2013)410_en.pdf > accessed 30 April 2014.

[727] The „Third Energy Package" is a legislative package for an internal gas and electricity market in the EU which mainly refers to Directives 2009/72/EC and 2009/73/EC, Regulations (EC) No 713/2009, 714/2009 and 715/2009.

[728] Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Making the internal energy market work, COM (2012) 663 final,
<http://ec.europa.eu/energy/gas_electricity/doc/20121115_iem_0663_en.pdf> accessed 31 January 2014.

communication[729] from 2014. The latter one stresses that the goal is to create a competitive market for innovative energy services. Hence, lever 16 can also be classified as the freedom to provide services.

A proposal[730] for a directive on payment services in the internal market and a proposal[731] for a regulation on interchange fees for card-based payment transactions introduce the two key actions of lever 20. The latter proposal was already realised by the launch of a regulation[732] in April 2015 while negotiations regarding the payment services turned out to take longer. The European Parliament finally adopted the revised Directive on Payment Services in October 2015.[733] The aim is that cross-border payments shall become as easy and secure as payments within one member state. In particular, the proposals shall ensure a better market entry and business environment for payment service providers. That is why the proposals can be linked to the freedom to provide services as a fundamental EU freedom.

The "Directive on e-invoicing in public procurement" [734] (lever 22) with the aim of eliminating market access barriers in e-invoicing in public procurement can be referred to the freedom to provide services. The major profiteers of the legislation are expected to be the SMEs for whom the

[729] Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Progress towards completing the Internal Energy Market, COM(2014) 634 final, <http://ec.europa.eu/energy/sites/ener/files/documents/2014_iem_communication.pdf> , accessed 12 November 2015.

[730] European Commission: Proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC, COM (2013) 547 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0547:FIN:EN:PDF> accessed 31 January 2014.

[731] European Commission: Proposal for a regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions, COM (2013) 550 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0550:FIN:EN:PDF> accessed 31 January 2014.

[732] EU Regulation 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0751&from=EN> accessed 29 July 2015.

[733] European Commission - Press release: European Parliament adopts European Commission proposal to create safer and more innovative European payments, <http://europa.eu/rapid/press-release_IP-15-5792_en.htm?locale=en>, accessed 12 December 2015.

[734] Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0055&from=EN> accessed 29 July 2015.

proposal is tailored for. The elimination of the market access barriers creates an ideal surrounding for companies to provide services in the entire EU.

Finally, lever 19 refers to the business environment and was realised by a new regulation[735] referring to insolvency proceedings. The goal is to make insolvency proceedings clear and transparent throughout the EU. This does not only help the creditors but it also causes a more trustful business environment when it comes to cross-border-transactions. In the end effect the freedom to provide services shall primarily be strengthened by this lever.

A new directive[736] from May 2014 belongs to lever 21 and refers to the digital single market. The directive intends to improve the circumstances to provide electronic communication and also the networks shall become better concerning this matter. Hence, the freedom to provide services as an EU freedom is primary affected.

Finally, lever 24 is revealed by a directive[737] which was adopted by the European Council in July 2014 and refers to payment services.

According to the wording of the directive it is stressed: "Union action with respect to the internal market in the retail financial services sector has already substantially contributed to developing cross-border activity of payment service providers, improving consumer choice and increasing the quality and transparency of the offers." The service element has the main priority within the directive and that is why lever 24 can be best classed in the freedom to provide services.

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[735] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=DE> accessed 10 July 2015.

[736] Directive 2014/61/EU of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0061&from=EN> accessed 29 July 2015.

[737] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0092&from=EN> accessed 29 July 2015.

II. Free movement of goods

1. Case law development

The creation of a customs union is the basement of the free movement of goods within the EU through the elimination of customs duties.[738] As a product liberty the Union law focuses on products and not on their owners and occupiers and that is why the personal scope of this market freedom covers all persons who trade goods with Union products across frontiers.[739] In the last decades the European Court of Justice has defined the legal borders of the free movement of goods in several cases and has made clear that the free movement of goods as a fundamental right has a very high value.

The first noteworthy case in the framework of the free movement of goods is Case 7/68[740] (Commission of the EC v. Italian Republic). The Commission considered that articles of artistic, historic, archaeological or ethnographic nature, which are subject of Italian Law, fall under the provisions relating to the customs union. The defendant was not successful with his argumentation who stated that the articles in question cannot be assimilated to consumer goods or articles of general use and are therefore not subject to the provisions. This case demonstrates that consumer goods have to be interpreted widely to allow a complete realisation of the free movement of goods. However, narcotic drugs which are not used for a medical or scientific reason are not covered by the free movement of goods.[741]

The Dassonville Case[742] marked a further significant decision with the reference to quantitative restrictions between member states and measures having equivalent effect. To understand this case, the most important facts of this case have to be outlined. In the year 1970 Gustave Dassonville and

[738] Folsom (2011), p. 112.
[739] Blanke / Böttner, in: Niedobitek (2020), p. 1054. Prior version: Blanke / Böttner, in: Niedobitek (2014), p. 302.
[740] Judgement of 10 December 1968.
[741] Doerfert (2012), p. 98. The author makes reference to Case C-137/09. The sale of Cannabis in Dutch coffee shops was restricted in this case.
[742] Procureur du Roi v. Dassonville - Case 8/74. Preliminary ruling of 11 July 1974.

his son imported whisky into Belgium, which Gustave Dassonville had bought from French importers before. Although the goods were imported on the basis of the French documents required, the Belgian authorities stated that the documents did not satisfy the Belgian Law as it is prohibited to import spirits bearing a designation of origin adopted by the Belgian Government when such spirits are not accompanied by official documents certifying their right to such a designation. The Dassonvilles claimed this provision is incompatible with the prohibition on quantitative restrictions and measures having equivalent effect.

Consequently, the Court held that the requirement by a member state of a certificate of authencity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another member state than by importers of the same product coming directly of the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

The famous European Court case[743] involving the liqueur Crème de Cassis can be seen as a confirmation of the Dassonville case. The German retailer REWE wanted to import Cassis de Dijon and sell it as liqueur. However, German authorities claimed that the alcohol content was too low for the desired classification as liqueur. Finally, the European Court of Justice ruled against the German authorities and set a signal for free trade and against protectionism. The Cassis decision set the principle of mutual recognition. According to this principle, a product which is launched legally in one member state can also be introduced and sold in all other member states. Yet, this very wide and market-friendly approach finds its limits in cases of Article 36 TFEU and also when the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions or the defence of the consumer is affected. In these cases trade restrictions are allowed.

[743] Case 120/78 Rewe v Bundesmonopolverwaltung für Branntwein - Cassis de Dijon (ECJ 20 February 1978).

In the Buy Irish Case[744] a national program with several measures for the promotion of the sale of Irish products was in the center of a debate between the Irish Government and the Commission. To give an example, a "Guaranteed Irish" symbol and the possibility for the consumer to refer any complaints with this symbol to the Irish Goods Council was introduced. The court held that even measures adopted by the government of a member state with no binding effect can be capable of influencing the conduct of traders and consumers. Consequently, the potential effects of such measures regarding the establishment of a national practice are comparable to government measures of a binding nature.

The broad scope of the so called Dassonville formula was finally limited by the Keck formula. The distinction between product requirements and selling arrangements is the outcome of the cases C-267/91 and C-268/91, Keck and Mithourd (1993). This means that aspects regarding the characteristics of a product on the one hand and regarding circumstances in which goods may be sold on the other hand have to be considered separately. In "Keck and Mithourd" the resale of products in an unaltered state at lower prices than the actual purchase price was forbidden according to French law. Two supermarket owners, Bernard Keck and Daniel Mithourd, stated that the rule was not compatible with Article 34 TFEU. The Court changed the approach compared to the previous case law and decided that rules on the sale of products, as long as they have an effect on all foreign and domestic traders and goods in the same legal and factual manner do not fall under Article 34 TFEU because they do not prevent market access for non-domestic goods more than for domestic products. The French law turned out to be in harmony with Article 34 TFEU.

A further decision dealing with the scope of Article 34 is the "Beer Case"[745]. Hereby, the following question appeared: Does the purity law according to German law (Reinheitsgebot) which limits the use of the beer designation to beverages produced according to the national manufacturing standard breach Article 34 TFEU? The Court concluded that the German

[744] Commission v. Ireland; Case 249/81; Judgement of 24 November 1982.
[745] Commission v. Germany – Beer Case (1987); Case 178/84.

law provisions were too restrictive and such provisions reveal an unjustified hurdle to importation.

A further German law was considered to be a breach of Article 34 in the "Mars Case"[746]. The ice cream was presented in wrappers with the mark "+10%" on a band. The problematic issue was that this mark covered more than 10 percent of the wrapping front paper. Under the strict German law with the goal to protect the consumer ideally such advertisement was forbidden because of the danger of misleading consumers. The "Mars Case" is an example of a product requirement because the German law in this case regulates the product packaging. The Court saw no need to protect the consumers and stated that the measure violates Article 34 TFEU.

The next noteworthy case deals with an Italian producer of magazines called De Agostini.[747] He sold magazines in Sweden with the name "Everything about Dinosaurs" and realised commercials on Swedish TV to attract the attention to his magazines. The Swedish authorities stated that the TV commercials are designed to attract the attention of children less than twelve years old and were therefore considered to be against Swedish law. The Court decided that the Swedish law does not conflict Article 34 TFEU as the Swedish provisions do not per se reflect a disadvantage to importers.

The behaviour of French farmers was put into the focus in a further case[748] dealing with Article 34 TFEU. The farmers sabotaged foreign products such as Spanish strawberries and Belgian tomatoes. The French authorities did not become active against the farmers and did interfere with appropriate measures. The Court held that Article 34 was infringed. This was a little bit surprising as it became clear through this decision that Article 34 TFEU can be violated not only by action but also by inaction.

A further protest group came into the focus in the "Schmidberger Case"[749]. Schmidberger, the owner of a trucking company, claimed damages for losses caused by a protest group. This group prevented Schmidberger taking goods to Austria by lorry. A demonstration was organised to block

[746] Case C-470/93.
[747] Joined Cases C-34/95, C-35/95 and C-36/95.
[748] Commission v. France – Spanish Strawberries, Case C-265/95.
[749] Case C-112/00.

the motorway between Northern Europe and Italy for 30 hours to show environmental and health concerns. The Court held that Austria's failure to ban the demonstration infringed Article 34 and 35 TFEU but it was considered to be justified by the right of demonstrators to freedom of expression.

Besides, Article 34 had also relevance in the "Deutscher Apothekerverband Case"[750]. In this case DocMorris, a pharmacy in the Netherlands, sold medical products via the internet. According to German law products could be sold only in pharmacy shops. The German pharmacy association (Deutscher Apothekenverband) took legal steps against Doc Morris to stop the online sales. However, the actions taken were only partly successful. The Court held that the measure was within Article 34 regarding prescription medicine. For Non-prescription medicine a justification was rejected. This decision can be considered as a good balance between medical concerns and national traditions one the one hand and free market interests on the other hand.

Despite of the high value of the market freedoms the national sovereignty in tax matters is not levered out. This became clear in the "De Dankse Bilimporterer Case"[751]. In this case a Danish association of car importers took legal steps against the high registration duty in Denmark. The Court found that the official figures concerning the number of new vehicles registered in Denmark and thus imported into that member state, do not in any way show that the free movement of that type of goods between Denmark and the other member states is impeded by the high level of the duty. The decision of the court is not surprising because in Denmark there is no domestic car production and that is why a discriminatory effect could not be considered.

2. Reference to the levers

The third lever of the Single Market Act I which is realised through the so-called unitary patent package follows the goal of an enhanced cooperation between the 25 participating member states. The unitary patent

[750] Case C-322/01.
[751] Case C-383-01.

package consists of a regulation[752] creating a European patent with unitary effect, a regulation[753] establishing a language regime applicable to the unitary patent and an international agreement[754] among member states setting up a single and specialised patent jurisdiction (the Unified Patent Court). Within the wording of the first mentioned regulation the following goal is stressed: "The creation of the legal conditions enabling undertakings to adapt their activities in manufacturing and distributing products across national borders and providing them with greater choice. This makes clear that this lever can best be classified as the free movement of goods.

The tax lever (lever 9) deals with the proposal[755] concerning the revision of the energy taxation rules. The goal is to split the minimum tax rate into two parts: a) based on CO2 emissions of the energy product and b) based on the energy content. At this point it becomes clear that the focus is put on products and also their effects on the nature. That is why lever 9 belongs to the category of the free movement of goods.

A regulation[756] as part of the adoption of the Blue Belt Package[757] constitutes the maritime transport lever (lever 14). With the goal to reduce

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[752] Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:361:0001:0008:EN:PDF> accessed 31 January 2014.

[753] Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements,
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1260&from=EN> accessed 31 January 2014.

[754] Council of the European Union: Agreement on a unified patent court, 11 January 2013, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016351%202012%20INIT> accessed 31 January 2014.

[755] Proposal for a council directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity,
COM (2001) 260 final,
<http://ec.europa.eu/taxation_customs/resources/documents/taxation/com_2011_169_en.pdf> accessed 31 January 2014.

[756] Regulation (EU) No 1099/2013 of 5 November 2013 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (enhancement of regular shipping services),
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0040:0041:EN:PDF> accessed 31 January 2014.

the administrative burdens and customs formalities for transported EU goods between the EU seaports it is clearly outlined that the free movement of goods as a fundamental EU freedom is in the center of this initiative.

A proposal[758] for a regulation on consumer product safety and a proposal[759] for a regulation on market surveillance of products make up the two initial key actions of the 11th lever of the Single Market Act II (lever 23). The fragmentation regarding the rules on market surveillance and consumer product safety shall not be diminished. Good and safe products are in the focus of the measures and that is why lever 23 can clearly be classified as the free movement of goods.

III. Free movement of persons

1. Case law development

The Union has increasingly focused the attention on the creation on what is called a "People's Europe".[760] In Article 45 TFEU the right of workers to move to another member state in order to find a job is provided. The rights of workers have mainly been defined in secondary law, most importantly in Regulation 492/2011 (ex-Regulation 1612/68) and the Citizenship Directive, as well as the case law of the Court.[761]

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[757] Communication of the Commission: Blue Belt, a Single Transport Area for shipping, COM (2013) 510 final, <http://ec.europa.eu/transport/modes/maritime/news/doc/com(2013)510_en.pdf> accessed 31 January 2014.

[758] Proposal for a regulation of the European Parliament and of the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC, COM (2013) 78 final, <http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-act_en.pdf> accessed 31 January 2014.

[759] Proposal for a regulation of the European Parliament and of the Council on market surveillance of products and amending Council Directives 89/686/EEC and 93/15/EEC, and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 1999/5/EC,2000/9/EC, 2000/14/EC, 2001/95/EC, 2004/108/EC, 2006/42/EC, 2006/95/EC, 2007/23/EC, 2008/57/EC, 2009/48/EC, 2009/105/EC, 2009/142/EC, 2011/65/EU, Regulation (EU) No 305/2011, Regulation (EC) No 764/2008 and Regulation (EC) No 765/2008 of the European Parliament and of the Council, Com (2013) 75 final, <http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-surveillance_en.pdf> accessed 31 January 2014.

[760] Folsom (2011), p. 110. At this point the author makes a reference to a multidimensional focus because the rights of traditional workers, the self-employed and their families and the rights of professionals and others operating in the services sector are all considered.

[761] Weiss / Kaupa (2014), p. 147.

When a worker moves to another state to work there, he has to be protected against discrimination. Article 45(4) TFEU only allows differential treatment in restricted area concerning the access to employment. This became clear in the "Sotgiu Case"[762]. Accordingly, once a worker has been employed in the public service, no discrimination can be justified by Article 45(4) TFEU anymore.

The Court had also to decide in a further case[763] how the term "worker" has to be defined to clarify the right to residence. In this conflict between a British citizen and Dutch authorities it was argued by the "Staatssecretaris" that an occupation is not covered by Article 45 TFEU because only a wage which is lower than the national minimum required for subsistence is paid. The Court stated that is not justified to determine the concept of "worker" unilaterally by one member state. All jobs are covered by Article 45 TFEU – as long as it is effective and not purely marginal.

The Court has routinely held limitations on the market freedoms have to be interpreted strictly.[764] The "Lawrie-Blum Case"[765] can serve as a further example. In this case a British citizen wanted to work as a trainee teacher in Baden Württemberg/Germany. Despite of her studies in Germany she was not admitted to the training course (the so called Vorbereitungsdienst) because of her nationality. The Court stated that a work of a trainee teacher does not fall under Article 45(4) TFEU.

In *Raccanelli* (Case 94/07), the Court rules that a doctoral student who works on his thesis based on a grant contract with the German research institute "Max-Planck-Gesellschaft" is only a worker when he works under the direction and subordinate to the institute an receives remuneration for this.[766]

The Belgian football player Bosman was in the sport light in a very important decision[767] in the 1995 with significant practical effects for all soccer players of the EU in transfer matters. A French soccer club asked

[762] Case 152/73.
[763] Case 53/81, Levin v. Staatssecretaris van Justitie.
[764] Weiss / Kaupa (2014), p. 165.
[765] Case 66/85.
[766] Weiss / Kaupa (2014), p. 152.
[767] Case 415/93.

Bosman for a high compensation fee according to UEFA rules. Finally, the decision of the Court prohibited restrictions on foreign EU players within national soccer leagues. It made it possible for players in the EU to move to another soccer club at the end of a contract without any transfer fees applicable. The wording of the legally most significant part of the decision is as follows:

"It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players access to the employment market in other Member states and are thus capable of impeding freedom of movement for workers."

In *Angonese*[768]an Italian citizen applied for a job in a bank without a needed certificate of Italian and German bilingualism and was therefore rejected. His bilingual skills were very good but the needed certificate reflected a high burden – also due to the fact that this certificate could only be acquired in Bolzano and that other similar certificates were not accepted. The Court considered this to be an indirect discrimination and made clear that the scope of Article 45 also covers contracts between individuals.

In a further recent case[769] a request was made in proceedings between Mr N. and the Danish Agency for Higher Education and Educational Support concerning the refusal to grant him education assistance. The Court (Third Chamber)[770] ruled regarding the definition:

"Articles 7(1)(c) and 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be

[768] Case 281/98.
[769] Case 46/12 (L.N. v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtte).
[770] Judgment of the Court (Third Chamber) of 21 February 2013; Case 46/12.

interpreted as meaning that a European Union citizen who pursues a course of studies in a host Member State whilst at the same time pursuing effective and genuine employment activities such as to confer on him the status of 'worker' within the meaning of Article 45 TFEU may not be refused maintenance aid for studies which is granted to the nationals of that Member State. It is for the national court to make the necessary findings of fact in order to ascertain whether the employment activities of the applicant in the main proceedings are sufficient to confer that status on him. The fact that the person entered the territory of the host Member State with the principal intention of pursuing a course of study is not relevant for determining whether he is a 'worker' within the meaning of Article 45 TFEU and, accordingly, whether he is entitled to that aid under the same terms as a national of the host Member State under Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community".

This decision made clearer that the specific nationality does not matter and that there is no room for discrimination. The term worker must be interpreted in wide sense. The made decision has a high practical relevance for many students in the EU. They only have to demonstrate the pursuit of effective and genuine employment activities as one of many objectives. Then a working student can satisfy the requirements to be treated as a worker according to Article 45 TFEU. Finally, it is the Union citizenship which can be seen as a free ticket and as a motivation to study and work across the EU.

2. Reference to the levers

Lever 2 is filled by the Directive[771] of November 2013 and deals with the recognition of professional qualifications. The EPC aims at simplifying the recognition of professional qualifications and increasing the

[771] Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:354:0132:0170:en:PDF> accessed 31 January 2014.

efficiency of the procedure for professionals who intend taking up a regulated profession in another member state where the profession in question is regulated.[772] This estimation clearly shows that the free movement of persons is concerned.

Lever 10 concerns the posting of workers in the framework of the provision of services. It was realised by the launch of a directive[773] in May 2014. Within the directive it is stressed that the protection of the workers is in the focus of the initiative. That is why the service component only has a subordinate role and lever 10 can best be classified as the free movement of persons.

A regulation[774] makes up lever 17 and deals with the improvement of employment. According to the initial statements of the regulation, the European Council decided on a "Compact for Growth and Jobs"[775] in June 2012 and on the basis of the Communication from the Commission entitled "Towards a job-rich recovery"[776] that the EURES Portal should be developed into a true European placement and recruitment tool. This reveals that lever 17 belongs to the category of the free movement of persons.

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[772] See: Call for Expression of Interest in the Introduction of the European Professional Card (EPC), p. 1, <http://ec.europa.eu/internal_market/qualifications/docs/policy_developments/131018_call-for-interest_en.pdf> accessed 31 January 2014.

[773] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0067&from=EN> accessed 29 July 2015.

[774] Commission implementing decision of 26 November 2021 implementing Regulation (EU) No 492/2011 of the European Parliament and of the Council as regards the clearance of vacancies and applications for employment and the re-establishment of EURES; 2012/733/EU).

[775] Agreement of the European Council: Compact for Growth and Jobs, EUCO 76/12, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131388.pdf#page=8> accessed 30 April 2014.

[776] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a job-rich recovery, COM (2012) 173 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0173:FIN:EN:PDF > accessed 30 April 2014.

IV. Free movement of capital

1. Case law development

Article 63 TFEU includes the prohibition of restrictions on the movement of capital and of payments. This market freedom is on an equal level compared to the other classical market freedoms and that is justified as it complements the other market freedoms, for example by ensuring that wages of workers can pass the borders easily.[777] The unhindered cross-border flow of capital should be guaranteed to allow the realisation of investments where they have the highest possible (economic) benefit.[778]

A primary law definition of the scope of application is also missing regarding the free movement of capital and that is why the terms capital and financial assets are to be understood in a wide sense.[779] Restrictions are constituted by Articles 65 and 66 TFEU. Aspects such as taxes and the prevention of money laundering are taken into account. At the same time all measures are subject to the general public interest and the principle of proportionality.

In a judgement[780] by the Court in 1995 the free movement of capital was strengthened and it was clarified that national authorities cannot lever out this market freedom as they wish. The Court ruled in particular:

"*Although Article 4 applies not only to measures to prevent infringements in the field of taxation and for the prudential supervision of financial institutions, but also to those designed to prevent illegal activities of comparable seriousness, such as money laundering, drug trafficking or terrorism, the requirement of authorization cannot be regarded as a requisite measure within the meaning of that provision, because it would cause the exercise of the free movement of capital to be subject to the*

[777] Doerfert (2012), p. 128.
[778] Blanke / Böttner, in: Niedobitek (2020), p. 1102. Prior version: Blanke / Böttner, in: Niedobitek (2014), p. 367.
[779] Ibid.
[780] Judgment of the Court of 23 February 1995 - Criminal proceedings against Aldo Bordessa and Vicente Marí Mellado and Concepción Barbero Maestre - References for a preliminary ruling: Audiencia Nacional - Spain. - Directive 88/361/EEC - Authorization for the transfer of money in the form of banknotes. - Joined cases C-358/93 and C-416/93.

discretion of the administrative authorities and thus be such as to render that freedom illusory. A prior declaration, on the other hand, may constitute a requisite measure within that meaning since, unlike prior authorization, it does not entail suspension of the transaction in question but does still allow the national authorities to exercise effective supervision in order to prevent infringements of their laws and regulations."

Shortly after the provision was introduced in its current form by the Treaty of Maastricht, the Court held for the first time that Article 63 TFEU lays down a clear and unconditional prohibition for which no implementing measure is needed (Sanz de Lera, 1995).[781] According to the decision of the Court, the provision confers "rights on individuals which they may rely on before the courts and which the national courts must uphold."[782]

The Verkooijen case can be seen as the beginning of the recent flood of cases on direct taxation and FMC, as it was the first direct tax ruling specifically and solely on this freedom, rather than as an alternative or secondary ground to services, workers or, most commonly, establishment.[783]

At this point it appears justified to demonstrate a famous procedure against Germany concerning the "Volkswagen Law" as an example for the restriction borders which limit the market freedom. The case summary[784] is as follows:

"Internal market and freedom of movement – Volkswagen Law – special powers for public shareholders The Court of Justice examined the law concerning Volkswagen, and in particular certain rules on the governance of the company and the special powers held by the public shareholders (the Land of Lower Saxony and the Federal State), and concluded that there was an obstacle to the free movement of capital for which it could find no justification. The Commission brought proceedings against the German law on Volkswagen (VW Law) for infringing the rules on the free movement of capital. This law had been adopted in 1960 to put

[781] Weiss / Kaupa (2014), p. 292. It is hereby referred to case 163/94.
[782] Ibid.
[783] Ibid. For more details see also Von Wilmowsky, in: Ehlers (2014), pp. 480-485.
[784] Case summary of the European Commission, <http://ec.europa.eu/dgs/legal_service/arrets/05c112_en.pdf> accessed 24 November 2016.

an end to the disputes between various groups of persons who had laid claim to private rights over the limited liability undertaking, Volkswagenwerk. The Commission asserted that certain rules in the VW Law derogated from general German company law and were liable to deter direct investment and for that reason constituted restrictions on the free movement of capital within the meaning of Article 56 EC. After having recalled its case-law on the concept of "movements of capital", and having observed that the VW Law was indeed a national law, the Court examined the limitation of the voting rights of every shareholder to 20% of the share capital, and the fixing of the blocking minority at 20% for the most important decisions of the general meeting. It pointed out that these limitations were indeed derogations from German general law on limited liability companies, imposed by way of specific legislation, affording any shareholder holding 20% of the share capital a blocking minority. Thus the fact that the Land of Lower Saxony still had a share of approximately 20% meant that this public actor had procured for itself a blocking minority allowing it to oppose important resolutions, on the basis of a lower level of investment than would be required under general company law. The Court concluded that this situation was liable to dissuade direct investors from other Member States and thus constituted a restriction on the movement of capital within the meaning of Article 56 EC. With regard to the third question, concerning the possibility for the Federal State and the Land of Lower Saxony each to appoint two representatives to the supervisory board of Volkswagen, on condition that they were shareholders in the company, irrespective of the extent of their holding, the Court stated that this gave two public actors the possibility of exercising influence which exceeded their levels of investment, which also constituted a restriction on the movement of capital. The Court then looked at the justifications put forward by Germany, which concerned the protection of the interests of workers and minority shareholders and the fact that a company as big as VW could affect the general interest, but it concluded that none of these arguments could justify conferring on public actors a strengthened and irremovable position in the capital, which in itself was a restriction that infringed Article 56 EC."

The Commission and then also the European Court of Justice demonstrated an investor-friendly attitude and underlined the significance of the market freedoms. Finally, as a result of the "Volkswagen Case" the "Volkswagen Law" was changed in the year 2008.

In a further similar case[785] the Commission challenged the special rights which the Portuguese State holds in Portugal Telecom in connection with its golden shares and the Court of Justice declared that, by maintaining in Portugal Telecom special rights, allocated in connection with golden shares, Portugal has failed to fulfil its obligations pursuant to the free movement of capital.[786]

2. Reference to the levers

Lever 8 which is filled by a regulation[787] on European social entrepreneurship funds sets the aim to remove obstacles to cross-border fundraising by qualifying social entrepreneurship funds and to avoid distortions of competition between those funds. With the goal to stimulate cross-border fundraising activity of social funds throughout Europe primarily the free movement of capital as a fundamental EU freedom shall be ensured.

The key action of lever 6 is a regulation[788] establishing the Connecting Europe Facility. According to the wording of the regulation, the regulation establishes the Connecting Europe Facility ("CEF"), which determines the conditions, methods and procedures for providing financial assistance to trans-European networks in order to support projects of

[785] Case C-171/08 (Commission/Portugal).
[786] For a detailed view see the Press Release No 74/10 of the European Court of Justice, 8 July 2010.
[787] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0018:0038:en:PDF> accessed 31 January 2014.
[788] Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:348:0129:0171:EN:PDF> accessed 31 January 2014.

common interest in the sectors of transport, telecommunications and energy infrastructures and to exploit potential synergies between those sectors.

Within the regulation it is clarified that the aim is to improve the free movement of persons, goods, capital and services. This regulation can best be attributed to the freedom of capital because the tools of financial assistance are described in detail within the regulation and without the mentioned financial tools the Connecting Europe Facility ("CEF") cannot be established.

As the realisation of lever 18 the Council adopted a regulation[789] in April 2015 for a regulation on European long-term investment funds. It intends to increase the pool of capital available for long-term-investment in the EU economy. In particular, the further growth of SMEs can be expected through more investments in unlisted companies with various effects on the market freedoms. Primarily, the regulation shall help to stimulate the free movement of capital as a fundamental EU market freedom.

C. The economic evaluation of the 4 motors of growth on the basis of GDP growth and sustainability

I. Integrated networks

1. Networks (lever 6)

As an introductory remark of the economic evaluation it is noteworthy that economic growth is usually measured by Gross Domestic Product (GDP) to determine macro-economic activity. GDP refers to the total value of all income created within the borders of a country, regardless of whether the ultimate recipient of that income resides within or outside the country.[790]

[789] Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term Investment funds, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0760&from=EN> accessed 29 July 2015.

[790] See Cypher / Dietz (2004), p. 31. See also the critique in Restuccia, Diego (2011): Federal Reserve Bank of Richmond: Economic Quarterly, Volume 97 nr. 3, 330-353.

Yet, the shadow side of GDP becomes visible at the longer term economic and social progress because GDP does not measure environmental sustainability or social inclusion and these limitations need to be taken into account when using it in policy analysis and debates.[791] The European Commission is aware of the problem and is willing to take into consideration the deficits of GDP.

Hence, in the year 2009 it already proposed to implement the following five actions: a) complementing GDP with environmental and social indicators, b) near real-time information for decision-making c) more accurate reporting on distribution and inequalities, d) developing a European Sustainable Development Scoreboard and e) extending national accounts to environmental and social issues.[792]

The monitoring report of the EU sustainable development strategy from 2013 demonstrates that the Commission already more and more often measures sustainable growth with the help not only of GDP but also based on the "EU Sustainable Development Strategy" and the "Resource Productivity".[793] "Resource Productivity" refers to GDP divided by "Domestic Material Consumption" (DMC) while the latter measures the total amount of materials directly used by an economy. The reflection paper of the European Commission "Towards a sustainable Europe by 2030"[794] underlines the increasing importance of sustainability. "Sustainable development — the development that meets the needs of present

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Accordingly, GDP per capita is a limited measure of welfare in an economy as cross-country differences in life expectancy, education, work hours, and inequality, among others, are also relevant measures in country's welfare.

[791] Communication from the Commission to the Council and the European Parliament: GDP and beyond: Measuring progress in a changing world, COM (2009) 433 final, p. 2, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0433:FIN:EN:PDF> accessed 30 April 2014.

[792] Ibid., p. 4.

[793] European Commission (Eurostat): Sustainable Development in the European Union: 2013 monitoring report of the EU sustainable development strategy, <http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-02-13-237/EN/KS-02-13-237-EN.PDF> accessed 30 April 2014.

[794] COM(2019)22 of 30 January 2019, <https://ec.europa.eu/commission/sites/beta-political/files/rp_sustainable_europe_30-01_en_web.pdf> accessed 30 November 2019.

generations without compromising the ability of future generations to meet their needs — is deeply rooted in the European project."[795]

Hence, it becomes clear that the goal of sustainable growth within the Europe 2020 Strategy is taken seriously. However, it is still more common to use GDP to determine economic prosperity and that is why it is appropriate to use GDP within this economic evaluation.

The European Commission expected due to the realisation of the investments in the transmission infrastructure, as determined in the regulation[796] establishing the "Connecting Europe Facility", the creation of 410000 new jobs and a GDP increase in the EU by 0.42 percentage points during 2011 and 2020.[797] This estimation is based on the European Commission´s proposal. Accordingly, 50 billion euros in total were supposed to be invested (9.1 billion in the energy infrastructure, 9.2 billion in the broadband infrastructure and 31.7 billion for the transport infrastructure). Yet, in February 2013 the European Council reduced the number of 9.2 billion for the broadband infrastructure to 1 billion.[798]

Finally, in December 2013 the Council adopted the regulation with the following budget: the overall CEF budget for 2014-2020 is 33.242.259.000 instead of 50 billion (about 26 million for the transport sector, about 5.8 billion for the energy sector and about 1.1 billion for the telecommunication sector). Hence, the real expected growth rate can in the ideal be only about 60% to 70% of the number presented by the European Commission.

[795] Ibid., 6.

[796] Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:348:0129:0171:EN:PDF> accessed 31 January 2014.

[797] European Commission: Connecting Europe, The energy infrastructure for tomorrow, <http://ec.europa.eu/energy/mff/facility/doc/2012/connecting-europe.pdf> accessed 31 January 2014.

[798] See <http://ec.europa.eu/digital-agenda/en/connecting-europe-facility> accessed 31 January 2014.

2. Rail transport (lever 13)

Lower prices and higher quality for passenger transport services by rail, as expected from opening up the market, tend to have a positive effect on growth and employment.[799] The transport industry represents an important part in the EU economy as it directly employs around ten million people and accounts for about 5% of GDP.[800] The European Commission expects that improved services which are foreseen in the fourth railway package[801] would bring clear benefits to passengers and savings of 30-40bn Euro to taxpayers.[802] Besides, the Commission wants to achieve a 20% reduction in the time to market for new RUs and a 20% reduction in the cost and time taken to authorise rolling stock which should lead to 500 Euro million savings over five years.[803]

3. Maritime transport (lever 14)

The European Commission underlines that approximately 40% of single market goods are transported via short sea shipping between EU ports.[804] This indicates the economic potential of the regulation[805] as part of

[799] EU-Amending Directive (4th Railway Package: Part 1): SINGLE EUROPEAN RAILWAY AREA, cepPolicy Brief No. 2013-13 of 2 April 2013, p. 4, <http://www.cep.eu/fileadmin/user_upload/CEP-Analysen/4._Eisenbahnpaket__Eisenbahnbinnenmarkt/cepPolicyBrief_COM_2013-29_4th_Railway_Package.pdf> accessed 30 April 2014.

[800] European Commission: White Paper: Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM (2011) 144 final, p. 5, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0025:FIN:EN:PDF> accessed 31 January 2014.

[801] Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions on "The fourth railway package – completing the single European railway area to foster European competitiveness and growth, COM (2013) 25 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0025:FIN:EN:PDF> accessed 31 January 2014.

[802] Ibid, p. 7.

[803] Ibid., p. 9.

[804] Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Single Market Act II, Together for new growth, COM (2012) 573 final, p. 7, <http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf> accessed 31 January 2014.

[805] Regulation (EU) No 1099/2013 of 5 November 2013 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (enhancement of regular shipping services), <http://eur-

the adoption of the Blue Belt Package[806]. According to the "European Shipowners Association" (ECSA) on the basis of information received by their members (shipping companies), savings of 25 Euro per container are possible due to simplifying administrative procedures.[807] Apart from saving money, saving time is even more important. Today, a lot of customers (e.g. exporters) choose road transport over maritime transport because of the time constraints. Hence, less administrative burden can cause a positive economic stimulation for the EU ports and the companies using them.

4. Air transport (lever 15)

A proposal for a regulation[808] in the field of aerodromes, air traffic management and air navigation services and also a proposal for a regulation[809] on the implementation of the "Single European Sky" allow high expectations from the economic point of view.

The creation of a "Single European Sky", particularly by organising European airspace to ensure optimum flow of traffic, reduces the costs for airlines and the prices for air traffic services and therefore the suppliers and consumers of air traffic services will both profit from this because shorter itineraries can then be flown.[810] A united European airspace can, according

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lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0040:0041:EN:PDF > accessed 31 January 2014.

[806] Communication of the Commission: Blue Belt, a Single Transport Area for shipping, COM (2013) 510 final, <http://ec.europa.eu/transport/modes/maritime/news/doc/com(2013)510_en.pdf> accessed 31 January 2014.

[807] European Commission press release: Blue Belt: Commission eases customs formalities for ships, 8 July 2013, <http://europa.eu/rapid/press-release_IP-13-652_en.htm> accessed 31 January 2014.

[808] Proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 216/2008 in the field of aerodromes, air traffic management and air navigation services, COM (2013) 409 final, <http://ec.europa.eu/transport/modes/air/single_european_sky/doc/ses2plus/com(2013)409_en.pdf> accessed 31 January 2014.

[809] Proposal for a regulation of the European Parliament and of the Council on the implementation of the Single European Sky, COM (2013) 410 final, <http://ec.europa.eu/transport/modes/air/single_european_sky/doc/ses2plus/com(2013)410_en.pdf > accessed 30 April 2014.

[810] EU Regulation: SINGLE EUROPEAN SKY (SES II+), cepPolicyBrief No. 2013-48 of 18 November 2013, p. 3, <http://www.cep.eu/fileadmin/user_upload/CEP-Analysen/Einheitlicher_Europ._Luftraum/cepPolicyBrief_COM_2013__410_Single_European_Sky__SES_II__.pdf> accessed 30 April 2014.

to the European Commission, decrease additional costs to airlines which are estimated at around 5 billion euros a year.[811]

5. Energy (lever 16)

Here the question arises what growth can especially be expected by the implementation of the so called third energy package[812]. On-going work on the cost of the absence of an integrated European energy market for gas suggests that the benefits of the full implementation of the third energy package in 2015 compared to 2012 (base case) could reach EUR 8 billion per year and these benefits could reach EUR 30 billion per year if Europe had a fully integrated market while in the electricity sector, the benefit of integration would be annual cost savings of up to EUR 35 billion.[813]

Based on a study[814] on the functioning of the retail electricity markets for consumers in the EU it is argued that consumers throughout the EU could save up to 13 billion Euro per year if they all switched to the cheapest electricity tariff available. However, such high savings costs are not realistic.

Consumers do not only focus on the cheapest tariff when they look for an appropriate company. The reputation and the offered services plays also an important role. Consumers also fear a possible bankruptcy in the rapidly changing energy sector and therefore do not accept prepayments which some companies in the electricity market prefer. This causes the consumers to choose a trustworthy company they can rely on – even if the prices might be a little bit higher. Hence, the possible saving costs which the Commission announced are of rather theoretical nature.

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[811] Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Single Market Act II, Together for new growth, COM (2012) 573 final, p. 8, <http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf> accessed 31 January 2014.

[812] Directives 2009/72/EC and 2009/73/EC, Regulations (EC) No 713/2009, 714/2009 and 715/2009.

[813] European Commission: The Compact for Growth and Jobs: one year on Report to the European Council, 27-28 June 2013, p. 3, <http://ec.europa.eu/europe2020/pdf/compact_en.pdf> accessed 30 April 2014.

[814] The functioning of the retail electricity markets for consumers in the European Union, final report prepared by ECME Consortium, <http://ec.europa.eu/consumers/consumer_research/market_studies/docs/retail_electricity_full_study_en.pdf> accessed 31 January 2014.

II. Citizen and business mobility

1. Access to finance (lever 1)

Facing the first lever of the Single Market Act I, it must be noted that entrepreneurship represents a notable determinant of economic prosperity.[815] The more troubles the banking sector faces, the more important the funding role of VC becomes for innovative SMEs. Ideal economic prosperity can only be reached through VC funding. It is noteworthy that an increase in VC investments of only 0.1 % of GDP is statistically associated with an increase in real GDP growth of 0.3 pp while early- stage investments have an even bigger impact of 0.96 pp what underlines Venture Capital's injection of economic dynamism on the whole.[816] Indeed, between 60-70% of net job creation in OECD countries is based on SMEs which are a decisive economic vehicle.[817]

Hence, funding problems of start-up companies can impair the overall economic situation tremendously. The over 23 million existing SMEs in the European Union can only function as real job creators as long as funding is ensured. Otherwise, the entire EU- wide private sector will be fractured with sizeable negative consequences for the entire economy. In order to circumvent funding problems and to cultivate the VC industry general conditions have to be devised by the EU.

The question arises whether the regulation[818] of April 2013 on European venture capital funds can cause economic benefits. The wording of the regulation states that it reduces regulatory complexity and the managers' costs of compliance with often divergent national rules governing venture capital funds, especially for those managers that want to raise

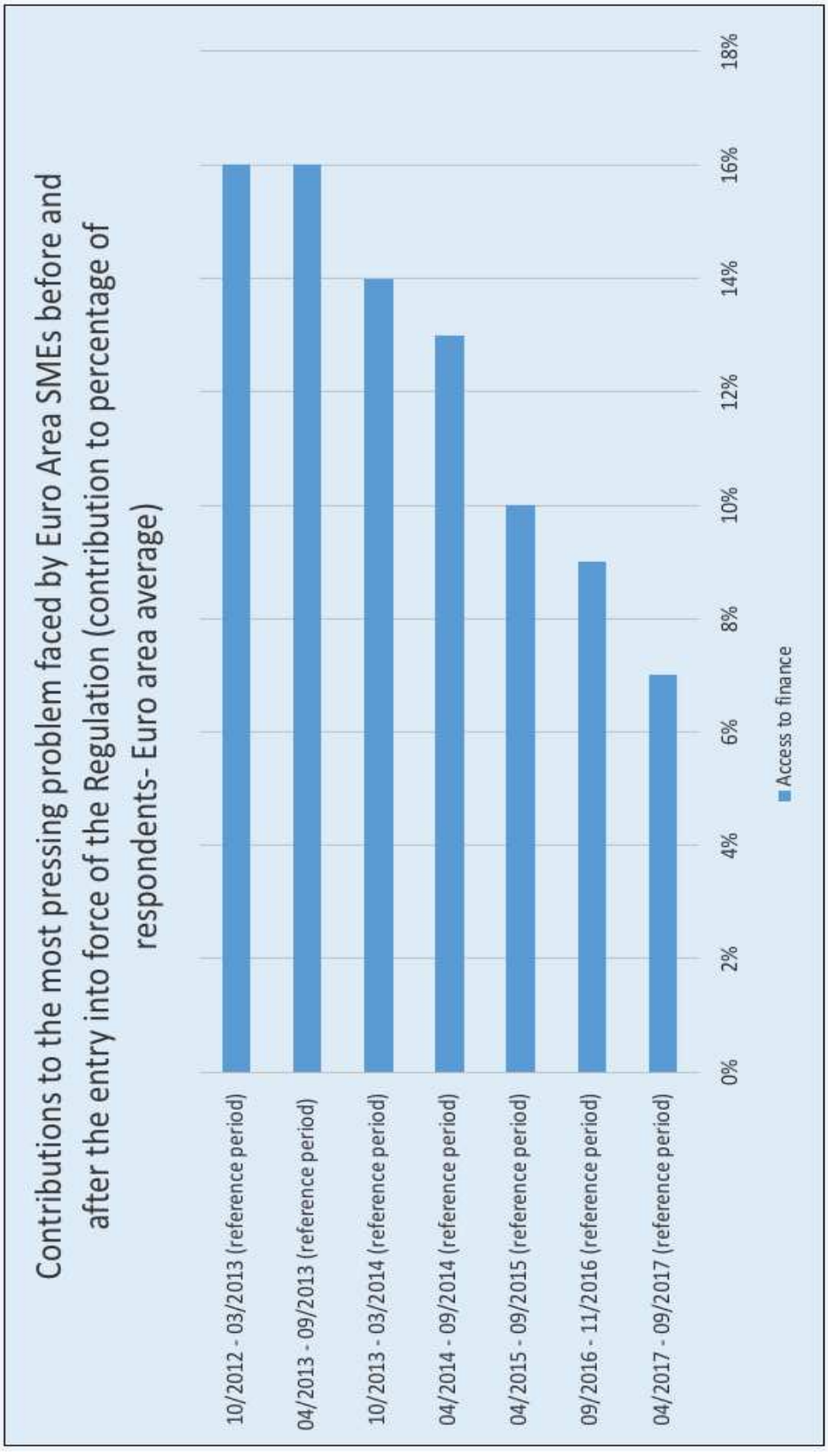
[815] See Eckermann (2006), p. 2.
[816] See Meyer (2010): Venture Capital adds economic spice, Deutsche Bank Research, p. 1, <http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD0000000000262487.PDF> accessed 31 January 2014.
[817] See OECD (2006): Policy Brief: Financing SMEs and Entrepreneurs, p. 5, <http://www.oecd.org/dataoecd/53/27/37704120.pdf> accessed 31 January 2014.
[818] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0001:0017:DE:PDF> accessed 31 January 2014.

capital on a cross-border basis. It also contributes to eliminating competitive distortions.

In order to find out if effects regarding economic growth can be already clarified or at least be expected in the future, it is necessary to take the latest available surveys on the access to finance of SMEs in the Euro area into account. The first survey[819] after the entering into force of the new regulation was conducted by the European Commission between August and October 2013 in the euro area countries.

The reference period was from April to September 2013. In July 2013 the regulation on European venture capital funds from April 2013 entered into force. Consequently, one could expect the first possible notable effects on a better access to finance for SMEs and the overall economy. However, possible improvements caused by the regulation on VC funds from a very short-term perspective cannot be determined.

[819] See European Central Bank (2013): SMEs' Access to Finance (survey April 2013), <http://www.ecb.europa.eu/pub/pdf/other/accesstofinancesmallmediumsizedenterprises201311en.pdf?acff8de81a1d9e6fd0d9d3b38809a7a0 > accessed 31 January 2014.



Source: Own graph with selected reference periods from 2012 to 2017 based on numbers of the European Central Bank.

As demonstrated at the first and the second bar of the above graph, compared with the first displayed survey[820] from April 2013 (reference period October 2012 to March 2013), the average rate of 16% first remained the same despite of the entrance into force of the VC regulation.

Yet, a survey[821] from April 2014 (as seen at the third bar of the graph) shows that only 14% instead of 16% of the SMEs in the Euro area consider access to finance as the most pressing problem. This small improvement can be considered as a first positive signal with the expectation that the access to finance will further improve.

Finally, a success can be considered in the years 2015 and 2016. Access to finance in general does not count to the main challenges for enterprises anymore. In 2016 access to finance was only a problem for 9% and in 2017 only for 7%, compared to 16% in 2009 and 10% in 2015.[822] This recent development reveals a positive contributing role of the regulation[823] of April 2013 on European venture capital funds. The general recovery of the banking sector also made the welcoming development possible. However, this overall estimation does not refer to all member states. To give an example, in Greece 24% of the SMEs still report major problems with financing in the year 2016.[824]

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[820] See European Central Bank (2013): SME´s Access to Finance (survey November 2013), <http://www.ecb.europa.eu/pub/pdf/other/accesstofinancesmallmediumsizedenterprises201304en.pdf?09f1a0a814d38c97cfcfe215cb4c50fd> accessed 31 January 2014.

[821] European Central Bank (2014): SME´s Access to Finance (survey April 2014) <https://www.ecb.europa.eu/pub/pdf/other/accesstofinancesmallmediumsizedenterprises201404en.pdf??da920468528300ff549d8cc95522eb81> accessed 30 April 2014.

[822] The newsroom of the European Commission: The „Survey on the access to finance of enterprises" (SAFE) was published today (30 November 2011), <http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=9006 > accessed 30 July 2017. For the year 2017 see also <http://ec.europa.eu/growth/access-to-finance/data-surveys> accessed 28 January 2018.

[823] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0001:0017:DE:PDF> accessed 31 January 2014.

[824] The newsroom of the European Commission: The „Survey on the access to finance of enterprises" (SAFE) was published today (30 November 2011), <http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=9006> accessed 30 July 2017.

It must be also emphasised that many member states have showed efforts to improve the access to finance for SMEs. They have introduced policies in order to improve access to finance, for instance to create or expand loan guarantee schemes or to foster alternative financing mechanisms, for instance through the development of corporate bond markets (Denmark, Estonia, Italy and Portugal) or venture capital markets (the Czech Republic, Germany, Spain, Estonia, the Netherlands, and Portugal) and also public resources have been mobilised to sustain investment in innovation, in particular by SMEs.[825]

At this point the Commission stresses that "such reforms naturally take time to have an impact on the ground"[826]. Consequently, the awareness of the importance of a better access for SMEs does exist and it can be expected that the efforts will become even more visible within the next years. The press releases from the European Commission demonstrate that within the European venture capital market still significant deficits exists and several more measures will be needed to reach noteworthy improvements.

From September 2015 until January 2016 the European Commission launched a consultation on the review of the European Venture Capital Funds (EuVECA) regulation (No 345/2013) with the possibility of an involvement of all concerned market players.[827] This event took place as a part of a new Action Plan package.[828]

The Commission admits that that it is necessary to facilitate a greater flow of capital from willing investors into the real economy and it points out

[825] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: 2014 European Semester: Country-specific recommendations, Building Growth, COM (2014) 400 final, p. 11, <http://ec.europa.eu/europe2020/pdf/csr2014/eccom2014_en.pdf> accessed 31 May 2014.

[826] Ibid.

[827] Press release of the European Commission – Fact Sheet: Questions and Answers on the Action Plan on building a Capital Markets Union, Brussels 30 September 2016, <http://europa.eu/rapid/press-release_IP-15-5731_en.htm?locale=en> accessed 3 June 2016.

[828] The so-called Action Plan package refers to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan on Building a Capital Markets Union, COM/2015/0468 final.

that the special venture capital investment funds have been available since 2013 but only a small number of funds set up as EuVECA has so far been launched.[829]

The consultation documents reveal that the problematic issue is demonstrated by the fact that the EuVECA passports are currently available only to smaller fund operators managing asset portfolios below EUR 500 million and that is why one must allow larger fund managers to establish and market EuVECA funds by reducing the investment threshold in order to attract more investors and expediting cross-border marketing and investment.[830]

The consultation documents also state that since the entry into force of the EuVECA Regulation in April 2013 national authorities have registered only 34 EuVECA funds which follow the aim to raise approximately €1.3 billion in capital.[831] Furthermore, the Commission stresses within the consultation documents that the Commission's Impact Assessment estimates that, over time, roughly €4 billion in additional venture capital funding could result from EuVECA and this means for the Commission that take-up of the opportunities presented by EuVECA is satisfactory but could still be improved further.[832] The Commission´s view appears to be appropriate with a look on the upper estimation regarding the economic effects in the access to finance area. Small economic improvements are visible in the European venture capital market but many further steps are needed to establish a real single venture capital market in Europe.

[829] European Commission: Public consultation on the review of the European Venture Capital Funds (EuVECA) and European Social Entrepreneurship Funds (EuSEF) regulations – 30.09.2015, <http://ec.europa.eu/finance/investment/venture_capital/index_en.htm#maincontentSec3> accessed 3 June 2016.

[830] See consultation documents of the European Commission: Public consultation on the review of the European Venture Capital Funds (EuVECA) and European Social Entrepreneurship Funds (EuSEF) regulations – 30.09.2015, <http://ec.europa.eu/finance/investment/venture_capital/index_en.htm#maincontentSec3> accessed 3 June 2016.

[831] Ibid.

[832] Ibid.

The most recent development concerning access to finance in general can be estimated as a final major turnaround. The statistics published in the years 2018[833] and 2019[834] from the European Central Bank reveal that access to finance has become the least important obstacle for euro area SMEs. This can be seen as a very positive development because access to finance was the biggest problem for these companies after the crisis. Regarding the access to finance, the crisis was overcome. Yet, two restrictions have to be made. The positive development is not mainly the result of the venture capital sector but rather the availability of bank loans has improved, as the above-mentioned statistics of the European Central Bank demonstrate. It must also be admitted that for SMEs in Greece, unlike in the euro area and other individual countries, access to finance is still the most important problem.

At this point also one of the complementary actions of this market lever, the "Markets in Financial Instruments Directive (MiFID II)"[835], shall be stressed. This tool for the regulation of the financial markets has a huge economic potential. It strengthens investor confidence and puts trading back from an underground economy on regulated platforms. The Commission does not provide concrete numbers regarding the expected economic growth but it stresses that the benefits of increased market transparency and finally more financial stability of EU financial markets are real benefits, "on which it is almost impossible to place a number"[836].

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[833] See 19th round of the Survey on the Access to Finance of Enterprises (SAFE) which was conducted between September and October 2018, <https://www.ecb.europa.eu/stats/ecb_surveys/safe/html/ecb.safe201811.en.html#toc1 > accessed 30 November 2019.

[834] See 21th round of the Survey on the Access to Finance of Enterprises (SAFE) which was conducted between September and October 2019, <https://www.ecb.europa.eu/stats/ecb_surveys/safe/html/ecb.safe201911~57720ae65f.en.html#toc1> accessed 30 November 2019.

[835] Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0652&from=DE> accessed 31 May 2014.

[836] European Commission: Press release database: More transparent and safer financial markets: European Commission welcomes European Parliament vote on updated rules for Markets in Financial Instruments (MiFID II), Brussels 15 April 2014, <http://europa.eu/rapid/press-release_MEMO-14-305_de.htm> accessed 31 June 2014.

However, the MiFID II cannot be seen as a complete tool to tackle all short comings. There are four areas in which shortcomings can be found: a) Structured deposits will fall within the scope of MiFID II while insurance (structured) products are still not covered, b) MiFID II still lacks appropriate rules with regard to the level and content of information, as well as remuneration rules, c) MiFID II does not address the need of protection for the younger and less educated consumers and d) MiFID II does not particularly focus on the importance of compliance and of complaints handling procedures and that is why problems regarding the enforcement are expected.[837]

To sum it up, the MiFID II as a significant complementary action can together with "The Transparency Directive"[838], "The Regulation implementing the Prospectus Directive"[839] and "Market Abuse Directive"[840] be seen as an effective measure to create a fair competitive environment and more transparency. The regained faith can contribute to the willingness of

[837] See Baker & McKenzie: Client Alert June 2012, MiFID II, p. 7, <http://www.bakermckenzie.com/files/Publication/1b598b9e-26b2-4b46-8733-f8260d6e0b13/Presentation/PublicationAttachment/7e405689-760b-42b8-89e6-a0ab50e3ae6f/al_global_mifidii_jun12.pdf> accessed 31 January 2014.

[838] Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0013:0027:EN:PDF>, accessed 31 May 2014.

[839] Commission delegated REGULATION (EU) No 486/2012 of 30 March 2012 amending Regulation (EC) No 809/2004 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0486&from=EN> accessed 31 May 2014.
See also: Commission staff working document: Impact assessment Accompanying the document
COMMISSION DELEGATED REGULATION amending Regulation (EC) No 809/2004 as regards the format and the content of the prospectus and base prospectus, of the summary and of the final terms and the disclosure requirements, SWD (2012) 77 final, <http://ec.europa.eu/internal_market/securities/docs/prospectus/impact_assessment_en.pdf> accessed 31 May 2014.

[840] Proposal for a regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM (2011) 651 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0651:FIN:en:PDF> accessed 31 May 2014.

more investors to play an active role in the financial markets with benefits for the overall economy. The revealed shortcomings of MiFID II will have to be tackled within further new regulative measures to ensure that loopholes in key areas which are undermining consumer trust can completely be closed.

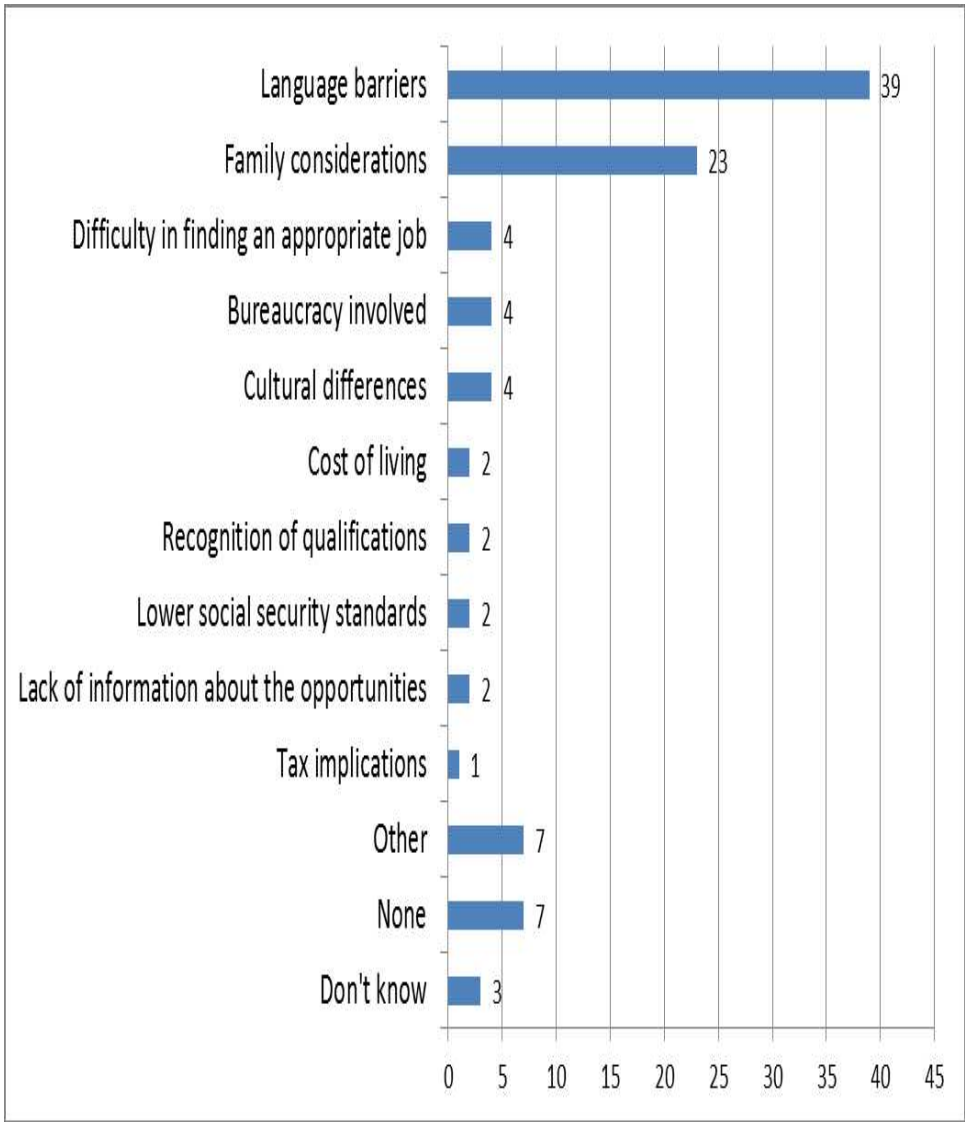
2. Mobility of citizens (lever 2)

An inefficient allocation of labour resources negatively effects the longer-term level and growth rate of potential output and, in the short run, limits the pace at which an economy can grow.[841] According to the EU Citizenship Report[842] from 2013 only 3% of all EU citizens work and live in another EU country and that shows that the mobility of workers is still low in the EU.

20-30% of all European citizenships envisage working abroad at some time in the future.[843] Yet, the recognition of the qualification is one of the smallest hurdles for EU citizens when they face the idea of working in another EU member state. The European Commission regularly[844] publishes a Special Eurobarometer to analyse the internal market and become aware of the citizen's concerns ongoing shortcomings in the internal market.

[841] European Central Bank: Cross border labour mobility within an enlarged EU, p. 7, <http://www.ecb.europa.eu/pub/pdf/scpops/ecbocp52.pdf> accessed 31 January 2014.
[842] See EU Citizenship Report 2013, EU citizens: your rights, your future, p. 13, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0269:FIN:EN:PDF> accessed 31 January 2014.
[843] See Eurobarometer: Geographical and labour market mobility, Report from June 2010, 11, <http://ec.europa.eu/public_opinion/archives/ebs/ebs_337_en.pdf> accessed 31 January 2014; Special Eurobarometer 363: Internal Market: Awareness, Perceptions and Impacts, 39, Report from September 2011 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_363_en.pdf > accessed 31 January 2014.
[844] See also Special Eurobarometer 398: Internal Market Report, <http://ec.europa.eu/public_opinion/archives/ebs/ebs_398_en.pdf> accessed 31 January 2014.

Most important practical difficulty
for working in another EU Member State
(Eurobarometer)



Source: Special Eurobarometer 363: Internal Market: Awareness, Perceptions and Impacts, 39, Report from September 2011 <https://data.europa.eu/euodp/en/data/dataset/S986_75_1_EBS363> last accessed 22 February 2022.

Taking into account the above-mentioned graph, it becomes clear that no significant economic growth effects can be expected from the new Directive[845]. The graph makes clear that the language barrier depicts the highest barrier that the Commission must handle in the future.

In an article[846] the author Lohmann describes a new variable, the Language Barrier Index (LBI)[847], quantifying international language barriers by measuring the dissimilarity between the main languages of trading partners. Lohmann points out that, aside from cost considerations, language is an important source of identity because people may naturally prefer to trade with others who speak similar languages since they often have other things in common, such as cultural or historical ties.[848] As an example he refers to the trading relation between Portugal and Brazil. Finally, the author concludes that a 10% increase in the Language Barrier Index can cause a 7% to 10% decrease in trade flows between two countries.[849]

Most studies have concluded that there are three main aspects of a successful investment: the human resources, the market and the competitive product.[850] To meet all the criteria a common language of all market players is the linguistic foundation of outmost importance. As already indicated above, the language barrier is the practical difficulty of most concern to EU citizens when it comes to the possibility of working in another EU country. Therefore, the industry cannot benefit from the human resources within European Union optimally. The human resources, the market and the competitive product have to be viewed as a chain. One single fragile column

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[845] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:354:0132:0170:en:PDF> accessed 31 January 2014.

[846] Lohmann (2011), 159.

[847] According to Lohmann "The Language Barrier Index" is a measure of the language barrier between two given countries, where the most widely spoken official language of each country is used to construct the index. Based on the similarity of the two languages, the Language Barrier Index assumes a value between 0 and 1, where 0 signifies no language barrier, as is the case when the two languages are the same, and 1 signifies the greatest language barrier, which is the case for two languages that have nothing in common.

[848] Lohmann (2011), p. 159.

[849] Ibid., p. 162.

[850] Li (2005), p. 53.

can cause a domino effect. The human resources deficits directly affect the market and the competitive product.

To sum it up, no significant economic growth can be expected based on the directive on recognition of professional qualifications. The OECD[851] suggests reforms at national level to pension systems and housing policies, which would be beneficial in their own right, as an opportunity to tackle disincentives to worker mobility.

3. Intellectual property rights (lever 3)

The European Commission points out that the introduction of the EU patent package on intellectual property rights causes an EU patent to cost only 4,725 Euro compared to an average of 36,000 Euro needed before.[852] It can be expected that this cost reduction will encourage companies to invest in innovations. The companies can than gain a wide protection of their patents in all member states taking part.

However, it must be stressed that the above numbers from the EU Commission have to be corrected. In practice, patent applications are not made in all member states. This is only the case in one percent of all applications.[853] Instead, in average an EU patent application is only validated in six EU member states.[854] When one takes into consideration the average patent application, one can assume that the costs for one average EU patent will only drop from 12,200 to 8,300 Euro.[855]

Aside from these cost savings for an EU patent, the importance of the intellectual property rights intensive industries for the overall economy

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[851] OECD Economic Surveys European Union (2012), March Overview, p. 1, <http://www.oecd.org/eco/49950244.pdf> accessed 31 January 2013.
[852] Press release, 11 December 11 2012: Parliament approves EU unitary patent rules, <http://www.europarl.europa.eu/news/en/news-room/content/20121210IPR04506/html/Parliament-approves-EU-unitary-patent-rules> accessed 31 January 2014.
[853] Thomas Rox (2013): EU-Patent – Kostenreduzierungen deutlich übertrieben, June, in: Platow Online, <http://www.platow.de/eu-patent--kostenreduzierungen-deutlich-uebertrieben/4444686.html> accessed 31 January 2014.
[854] Ibid.
[855] Ibid.

in Europe must be underlined. These industries are relevant to achieve the goal of an Innovation Union as part of the Europe 2020 Strategy.

In September 2013 the Commission announced the launch of an extensive study[856] on intellectual property rights which was carried out jointly by the European Patent Office (EPO) and the Office for Harmonization in the Internal Market (OHIM) with the goal to measure the importance of IP rights in the EU economy. The study reveals the overall contribution made by IPR‑intensive industries to the EU economy regarding output, employment, wages and trade in the context of patents, trademarks, designs, copyrights and geographical indications.

Key findings of the study refer to the circumstance that about 39% of total economic activity in the EU (worth some 4.7 trillion euros annually) is generated by IPR-intensive industries and approximately 26% of all employment in the EU (56 million jobs) is provided directly by these industries.[857]

In comparison to the US, the study stresses that that the EU and US economy have a similar structure but in terms of the contribution of IPR-intensive industries, the shares in employment and GDP are even higher in the EU than in the US: 26% vs. 19% for employment and 39% vs. 35% for GDP.[858]

To sum it up, the Commission´s high spending in the field of research and development projects of the EU has borne fruits and it can be expected that the unitary patent package will further strengthen the IPR-intensive industries and the overall economy.

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[856] Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union: Industry-Level Analysis Report September 2013, a joint project between the European Patent Office and the Office for Harmonization in the Internal Market, <http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf> accessed 31 January 2014.

[857] Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union: Industry-Level Analysis Report September 2013, a joint project between the European Patent Office and the Office for Harmonization in the Internal Market, p. 9, <http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf> accessed 31 January 2014.

[858] Ibid.

4. Services (lever 5)

Also the regulation[859] on European standardisation can cause growth effects. The first worth mentioning study on the impact of standards on economic growth started with the study of the German Institute for Standardization (DIN) on the Economic Benefits of Standardization.[860]

Jungmittag, Blind and Grupp (1999) estimated a production function based on macroeconomic data for Germany ranging from 1960 to 1996 within the pioneering DIN 2000 study and in the year 2011 an update of this study basically confirmed the results of the original study.[861] The following graph is the result of the recent study[862]:

[859] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:316:0012:0033:EN:PDF> accessed 31 January 2014.

[860] See World Standards Cooperation Newsletter: The Benefits of Standards for National Economies, October 2011,
<http://www.worldstandardscooperation.org/newsletters/003/newsletter03.html> accessed 15 February 2014.

[861] See World Standards Cooperation Newsletter: The Benefits of Standards for National Economies, October 2011,
<http://www.worldstandardscooperation.org/newsletters/003/newsletter03.html> accessed 31 January 2014.

[862] Blind, K., Jungmittag, A., Mangelsdorf, A. (2011): "The Economic Benefits of Standardisation – an update of the study carried out by DIN in 2000."
DIN German Institute for Standardisation,
<http://www.din.de/sixcms_upload/media/2896/DIN_GNN_2011_engl_akt_neu.pdf> accessed 31 January 2014.

National studies of the effects of standards on economic growth

Country	Publisher	Time frame	Growth rate of GDP	Contribution of standards
Germany	DIN (2000)	1960–1996	3.3%	0.9%
France	AFNOR (2009)	1950–2007	3.4%	0.8%
United Kingdom	DTI (2005)	1948–2002	2.5%	0.3%
Canada	Standards Council of Canada (2007)	1981–2004	2.7%	0.2%
Australia	Standards Australia (2006)	1962–2003	3.6%	0.8%

Source: The Economic Benefits of Standardization, An update of the study carried out by DIN in 2000, p. 6 (slightly modified), <https://www.din.de/blob/89552/68849fab0eeeaafb56c5a3ffee9959c5/economic-benefits-of-standardization-en-data.pdf > last accessed 22 February 2022.

The main result of the German study was the significant contribution of standards to German growth; it became evident that standards were at least as important for technical innovation as patents.[863] This makes it clear that innovation potential is not the only deciding factor in economic development but that it must also be broadly disseminated by means of standards and technical rules.[864] It was found that existing standards create a growth rate of about 1% of German GDP per year and in France the growth is estimated at 0.8% of GDP a year, and slightly less for the UK.[865] While no joint figures exist for all EU member states, the estimated impact of standards on the EU's annual growth could range from 0.3 to 1% of GDP, i.e. between 35 Euro and 120 billion a year.[866]

The European Commission announced an invitation to discuss the proposed Joint Initiative on Standardisation, part of the Single Market Strategy, with the European Commission and the European standardisation community regarding a closing Plenary of the Joint Initiative on Standardisation which took take place on 29 April 2016 in Brussels, in the context of a collaborative approach to unite market and policy needs.[867] This plenary followed the first plenary in November 2015 and the 9 consecutive meetings of the Editorial Committee of the Joint Initiative on Standardisation.[868] The high number of meetings and the ongoing discussions make clear that it will still take a long time until the expected economic benefits of European standardisation will finally be reached.

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[863] See The economic benefits of standardization, An update of the study carried out by DIN in 2000, p. 6, <https://www.din.de/blob/89552/68849fab0eeeaafb56c5a3ffee9959c5/economic-benefits-of-standardization-en-data.pdf> accessed 20 February 2020.

[864] Ibid.

[865] See Q&A on faster and more effective standardisation for economic growth, <http://www.europarl.europa.eu/news/de/news-room/content/20120621BKG47451/html/QA-on-faster-and-more-effective-standardisation-for-economic-growth> accessed 31 January 2014.

[866] Ibid.

[867] European Commission: Closing plenary of the Joint Initiative on Standardisation, published on 22 April 2016, <http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8790> accessed 3 June 2016.

[868] Ibid.

5. Taxation (lever 9)

The proposal[869] concerning the revision of the energy taxation rules can itself not result in a noteworthy direct growth. The main goal is to make the economy more resource-efficient and green. Yet, the revision of the energy taxation will have an incentive effect for new innovative companies to invest in new green energy projects.

Also the introduction of a Common Consolidated Corporate Tax Base (CCCTB)[870] can generate new growth rates. Calculations on a sample of EU multinationals, as mentioned in the first Annual Growth Report[871], shows that on average approximately 50% of non-financial and 17% of financial multinational groups could benefit from immediate cross-border loss compensation.

According to the Commission, survey evidence points to a reduction of compliance costs for recurring tax related tasks in the range of 7% under CCCTB.[872] Opening a new subsidiary in a new member state would than on average cost 62% less for a large enterprise and on average it would cost 67% less for SMEs.[873] The Commission expects that each year the CCCTB will enable EU businesses to save EUR 700 million in compliance costs and EUR 1.3 billion as a result of consolidation and companies wishing to

[869] Proposal for a council directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/com_2011_169_en.pdf> accessed 31 January 2014.

[870] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0121&from=EN> accessed 30 April 2014.

[871] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Annual Growth Report: advancing the EU's comprehensive response to the crisis, COM (2011) 11 final, p. 5, <http://ec.europa.eu/europe2020/pdf/en_final.pdf> accessed 30 April 2014.

[872] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121/4, p. 5, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/com_2011_121_en.pdf> accessed 31 January 2014.

[873] Ibid.

expand beyond national borders will be able to save approximately EUR 1 billion.[874]

Hence, it can be expected that these saving perspectives will encourage companies to invest more beyond national borders. However, the system is only optional. It can therefore not be exactly predicted how many companies will make use of it. Also the Commission has to admit that for member states the introduction of an optional system will of course mean that tax administrations will have to manage two distinct tax schemes (CCCTB and their national corporate income tax) which might cause higher costs due to higher administrative burdens.[875]

Within the new VAT strategy the Communication points out that broadening the tax base, restricting the use of reduced rates and reducing the scope for fraud could indeed increase revenues for the member states and also increase the EU budget.[876] The implementation of the VAT strategy is part of lever 19 where the economic growth potential is analysed.

The introduction of a Common Consolidated Corporate Tax Base (CCCTB) has a potential to achieve economic growth rates but it turned out to be a failure because of several political disagreements. In October 2016 a new proposal[877] was introduced and that is why further conflicts are possible in this area and no growth effects can be expected in the near future.

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[874] See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions (2011): Single Market Act - Twelve levers to boost growth and strengthen confidence "Working together to create new growth", 13 April 2011 (COM/2011/0206 final), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0206:EN:NOT> accessed 31 January 2014.

[875] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121/4, p. 6, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/com_2011_121_en.pdf> accessed 31 January 2014.

[876] European Commission: Press release, 6 December 2011, <http://europa.eu/rapid/press-release_MEMO-11-874_de.htm?locale=en> accessed 31 January 2014.

[877] Proposal for a Council Directive on a Common Corporate Tax Base, COM 2016 (685) final, <https://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_685_en.pdf> accessed 28 July 2017.

6. Mobility of citizens (lever 17)

The new regulation[878] stresses that the aim is that EURES supports the objectives of the Europe 2020 strategy, in particular to raise the employment rate to 75 % by 2020. It is noteworthy that Article 10 of the regulation focuses on the development of innovative transnational and cross- border cooperation between employment services such as common placement agencies, with a view to the improvement of the functioning of the labour markets, their integration and improved mobility. The strengthening of the cross-border cooperation is important to achieve a real single European market. In that way more people can be encouraged to work abroad and the companies will be able to deal better with the shortage of skilled workers.

There are meanwhile over 20 EURES cross-border partnerships, spread geographically throughout Europe and involving more than 13 countries, with the aim to meet the need for information and coordination connected with labour mobility in the border regions, these partnerships bring together public employment and vocational training services, employers and trades union organisations, local authorities and other institutions dealing with employment and vocational training.[879] EURES cross-border partnerships serve as valuable points of contacts among employment administrations, both regional and national, and the social partners and they are also an important means of monitoring these cross-border employment areas, which are a key element in the development of a genuine European labour market.[880]

However, as already analysed within lever 2, family considerations and the language barrier remain the most mentioned reasons by EU citizens why they do not consider working in another member state. Consequently,

[878] Regulation (EU) No 492/2011 of the European Parliament and of the Council as regards the clearance of vacancies and applications for employment and the re-establishment of EURES, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:328:0021:0026:EN:PDF> accessed 31 January 2014.
[879] European Commission: EURES in cross-border regions, <https://ec.europa.eu/eures/main.jsp?acro=eures&lang=en&catId=56&parentCategory=56> accessed 30 April 2014.
[880] Ibid.

the EURES modernisation will only be able to reach a limited number of people. At least to a certain degree the problem of the shortage of skilled workers can expected to be solved and stimulate economic growth.

The mentioned deficits regarding the mobility of citizens has considerable worsened in the last years. The following graph[881] which was published in November 2021 by the European Central Bank discloses that the availability of skilled staff or experienced managers has become the dominant concern for SMEs as well as large firms.

This quite negative development turned out to be a little bit surprising because after the crisis 2008 other problems such as the access to finance came into the focus of the Union legislator while in the field of the mobility of citizens rather only flanking measures have been introduced. This following graph demonstrates how important a better mobility of citizens is. Due to the direct effects on SMEs and large firms considerable economic losses are caused by the deficits. New incentives are needed to make it more attractive for citizens to work in another member state. The recognition of the qualifications has to be further improved. The need for action can be described as large and urgent. Otherwise the further economic development will be seriously threatened.

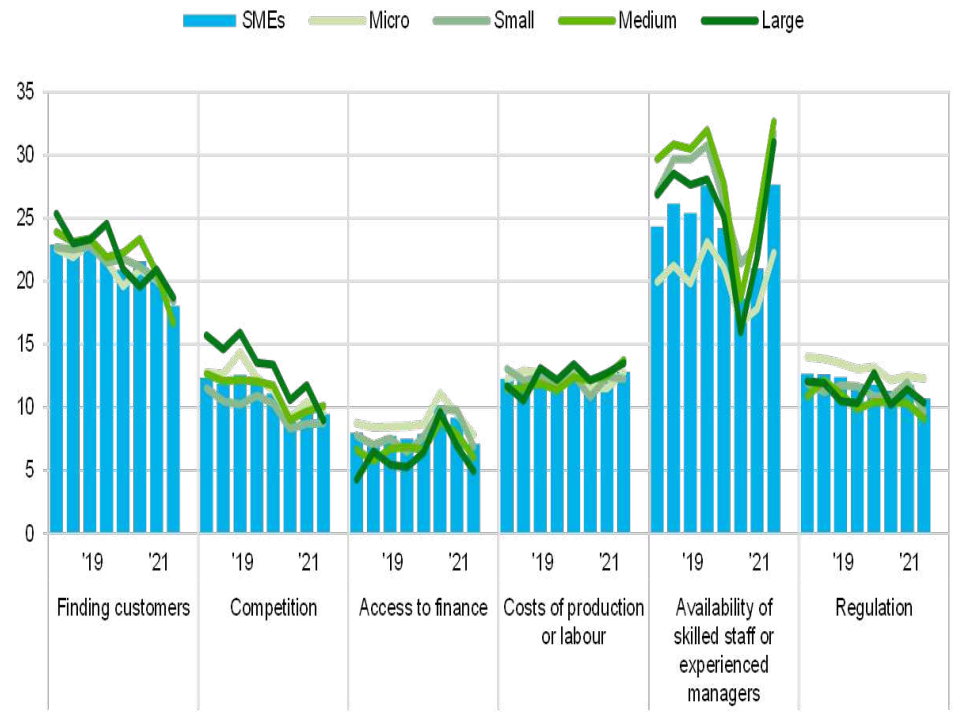
On the whole, it is positive to note that the first signs of a fast recovery of the crisis of the year 2020 can be measured by the following diagram. The high risks of an uncontrolled huge wave of unemployment were able to be absorbed.

[881] See European Central Bank: Survey on the Access to Finance of Enterprises in the euro area – April to September 2021, <https://www.ecb.europa.eu/stats/accesstofinancesofenterprises/pdf/ecb.safe202111~0380b0c0a2.en.pdf> accessed 20 February 2022.

Chart

The most important problems faced by euro area enterprises

(percentages of respondents[882])



Source: European Central Bank: Survey on the Access to Finance of Enterprises in the euro area – April to September 2021, <https://www.ecb.europa.eu/stats/accesstofinancesofenterprises/pdf/ecb.safe202111~0380b0c0a2.en.pdf> last accessed 22 February 2022.

[882] Base: All enterprises. The figures refer to rounds 18-25 of the survey (October 2017-March 2018 to April 2021-September 2021).
Notes: The formulation of the question has changed over the survey rounds. Initially, respondents were asked to select one of the categories as the most pressing problem. From round 8, all respondents were asked to indicate how pressing a specific problem was on a scale of 1 (not pressing) to 10 (extremely pressing). In round 7, the question used the initial phrasing for one half of the sample and the new phrasing for the other half. In addition, if two or more items had the highest score in Question 0B on how pressing the problems were, a follow-up question (Question 0C) was asked in order to resolve this, i.e. to determine which of the problems was more pressing, even if only by a small margin. This follow-up question was removed from the questionnaire in round 11. The past results from round 7 onwards were also recalculated, disregarding the replies to Question 0C. In round 12, the word "pressing" was replaced by the word "important". The data included in the chart refer to Question 0b of the survey.

7. Public procurement (lever 12)

The Commission expects that the new directives[883] in the public procurement sector will have positive effects on the overall economy.

In the year 2009 contracts governed by EU public procurement rules accounted for 3.6% of EU GDP.[884] The Commission points out that the potential benefits to the EU economy are significant: if the cost of public procurement contracts subject to EU directives could be reduced by 5% by 2020, EU GDP and employment could increase by 0.1% - 0.2%.[885]

Indeed, a well-functioning procurement market in the EU can provide huge business opportunities for European companies and stimulate competition.[886] The SMEs are the real profiteers of new directives on public procurement because contracts of a volume of more than EUR 500,000 (construction contracts of more than EUR 5 million) have to be split into partial contracts. That means that SMEs will become more active players

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[883] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014
on public procurement and repealing Directive 2004/18/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN> accessed 29 July 2015;
Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC,
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0025&from=EN> accessed 29 July 2015;
Directive 2014/25/EU directive of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0025&from=EN> accessed 29 July 2015; see also for the proposal <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0897:FIN:EN:PDF> access 31 January 2014.

[884] European Parliament: New EU-rules on public procurement - ensuring better value for money, 14 January 2014,
<http://www.europarl.europa.eu/news/en/news-room/content/20140110BKG32432/html/New-EU-rules-on-public-procurement-ensuring-better-value-for-money> accessed 31 January 2014.

[885] European Commission: The Compact for Growth and Jobs: one year on Report to the European Council, 27-28 June 2013, p. 2,
<http://ec.europa.eu/europe2020/pdf/compact_en.pdf> accessed 30 April 2014.

[886] European Parliament: New EU-rules on public procurement - ensuring better value for money, 14 January 2014,
<http://www.europarl.europa.eu/news/en/news-room/content/20140110BKG32432/html/New-EU-rules-on-public-procurement-ensuring-better-value-for-money> accessed 31 January 2014.

when it comes to public procurement procedures with contracts of high amounts.

According to a report from the European Commission in May 2016 there are significant delays regarding the enforcement of the public procurement directives. The Commission usually sends letters of formal notice to those member states which have failed to comply with their obligation to transpose EU directives into their national legal order in a timely manner.[887]

Consequently, in May 2016 the European Commission has requested 21 member states to transpose in full one or more of the three directives on public procurement and concessions (Directives 2014/23/EC, 2014/24/EC, 2014/25/EC) into national law because all member states were obliged to notify the transposition of the new public procurement rules by April 2016.[888] The Commission's request has been sent to Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Cyprus, Estonia, Ireland, Greece, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Finland, Spain and Sweden.[889]

To sum it up, it must be seen very critical that so many member states have not transposed the directives into national law on time. This reveals the overall enforcement problem of the EU and the huge responsibility of the member states. The economic success of the procurement rules is seriously threatened by the delays of the member states.

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[887] See newsroom of the European Commission - Public procurement: Commission requests 21 Member States to transpose new EU rules on public procurement and concessions, published on 26 May 2016, <http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8826&lang=en&title=Public%2Dprocurement%3A%2DCommission%2Drequests%2D21%2DMember%2DStates%2Dto%2Dtranspose%2Dnew%2DEU%2Drules%2Don%2Dpublic%2Dprocurement%2Dand%2Dconcessions> accessed 3 June 2016.

[888] Ibid.

[889] Ibid.

8. Business environment (lever 11)

The Commission estimates that the potential savings generated by the directive[890] on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings amount to EUR 1.5 billion per year for 1.1 million small companies and EUR 5.2 billion per year for 5.9 million micro-enterprises.[891] These savings would be achieved due to easier financial reporting requirements on these micro- and small enterprises.[892] In fact, many SMEs face hurdles of excessive bureaucracy. The new provisions have the potential to realise the above-mentioned saving amounts and will allow companies to spend more money for innovation and investment.

9. Access to finance (lever 18)

Insurance companies, pension and mutual funds are the biggest institutional investors in Europe as they together hold an estimated total of 13.8 trillion Euro of assets, equating to more than 100% of the region's GDP.[893] It can be expected that the realisation of the new proposal[894] will be an effective ground for more investments. As banks are less able to meet the long-term funding needs of borrowers, this creates an opportunity for insurers and pension funds since they tend to have long-dated liabilities which match the part of the lending market from which banks are

[890] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF> accessed 31 January 2014.

[891] Single Market Act: Twelve levers to boost growth and strengthen confidence (”Working together to create new growth"), p. 18, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF> accessed 31 January 2014.

[892] Ibid.

[893] Commission staff working document: Long-Term Financing of the European Economy Accompanying the document Green Paper Long Term financing of the European economy, SWD (2013) 76 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0076:FIN:EN:PDF> accessed 31 January 2014.

[894] Proposal for a regulation of the European Parliament and of the Council on European Long-term Investment Funds, COM (2013) 462 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0462:FIN:EN:PDF> accessed 31 January 2014.

retreating.[895] EU-wide legislation on funds which are permitted to be sold as ELTIFs reduces information deficits for investors and thus increases investor confidence.[896]

10. Business environment (lever 19)

The proposal[897] for a regulation on insolvency proceedings, realised by the regulation 2015/848[898], can have positive effects on the overall economic situation.

The Commission outlines that evidence suggests that failed entrepreneurs learn from their mistakes and are generally more successful the second time around.[899] To give an example, about 18% of all entrepreneurs who go on to be successful have failed in their first venture.[900] This demonstrates that the intended rescue plans indeed can prevent unnecessary liquidations. Also, the fear of failure as a major obstacle for starting a business shows some correlation with the time and costs of bankruptcy procedures as high costs and lengthy procedures are associated with large shares of people who see the possibility of failure as the major risk.[901] Consequently, the new regulation can minimise the entry barriers to business and open new growth perspectives by reducing the fear of failure.

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[895] Commission staff working document: Long-Term Financing of the European Economy Accompanying the document Green Paper Long Term financing of the European economy, SWD (2013) 76 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0076:FIN:EN:PDF> accessed 31 January 2014.

[896] EU Regulation: LONG-TERM INVESTMENT FUNDS (ELTIF), cepPolicy Brief No. 2013-51 of 09 December 2013, p. 1, <http://www.cep.eu/fileadmin/user_upload/CEP-Analysen/Langfristige_Investmentfonds/cepPolicyBrief_COM_2013__462_Long-term_Investment_Funds__ELTIF_.pdf> accessed 30 April 2014.

[897] Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM (2012) 744 final, <http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf> accessed 31 January 2014.

[898] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=DE> accessed 10 July 2015.

[899] European Commission: Press releases database, Insolvency: European Parliament backs Commission proposal to give viable businesses a 'second chance', <http://europa.eu/rapid/press-release_MEMO-14-88_en.htm> accessed 31 January 2014.

[900] Ibid.

[901] OECD (2013), Entrepreneurship at a Glance, OECD Publishing, p. 86,

An EU-wide electronic insolvency register significantly reduces the search and information costs for courts, creditors and potential creditors and allows all parties to make more efficient decisions.[902] Also it must be pointed out that SMEs are the profiteers of the new regulation because the provided standard forms allow particularly smaller companies to lodge their claims at lower cost.[903]

The revision[904] of the VAT tax reform, a complementary action of lever 19, can definitely result in cost savings for companies. Small and medium-sized businesses, in particular, hesitate to sell goods to consumers in other member states because – over certain thresholds – they have to submit a foreign VAT return and that is why businesses are reluctant to set up branches in other member states.[905] An EU-wide standard form and the harmonisation of the tax periods, deadlines for submission of VAT returns and deadlines for payment of tax, decrease the administrative hurdles for businesses and this encourages them to submit foreign VAT returns.[906]

More cross-border activities can therefore be expected. The Commission expects savings for the companies of up to 15 billion euros.[907] This estimation must be considered as too optimistic when one takes into

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<http://dx.doi.org/10.1787/entrepreneur_aag-2013-en> accessed 30 April 2014.

[902] EU Amending Regulation: CROSS-BORDER INSOLVENCIES: cepPolicyBrief No. 2013-38 of 16 September 2013, p. 4, <http://www.cep.eu/fileadmin/user_upload/CEP-Analysen/Grenzueberschreitende_Insolvenzen/cepPolicyBrief_COM_2012__744_Cross-Border_Insolvencies.pdf > accessed 30 April 2014.

[903] Ibid.

[904] Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards a standard VAT return, COM (2013) 721 final, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/legislation_proposed/com(2013)721_en.pdf> accessed 30 April 2014.

[905] EU Directive: STANDARD VAT RETURN FOR BUSINESSES, cepPolicyBrief No. 2014-07, <http://www.cep.eu/fileadmin/user_upload/CEP-Analysen/MwSt-Erklaerung/cepPolicyBrief_COM_2013__721_Standard_VAT_Return.pdf> accessed 30 April 2014.

[906] EU Directive: STANDARD VAT RETURN FOR BUSINESSES, cepPolicyBrief No. 2014-07, <http://www.cep.eu/fileadmin/user_upload/CEP-Analysen/MwSt-Erklaerung/cepPolicyBrief_COM_2013__721_Standard_VAT_Return.pdf> accessed 30 April 2014.

[907] Commission Staff Working Document: Impact Assessment: Accompanying the document Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards a standard VAT return, SWD (2013) 427 final, p. 37, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/legislation_proposed/swd(2013)427_en.pdf> accessed 30 April 2014.

account the concerns of the member states.[908] Accordingly, the number of possible profiteers of the VAT tax reform is only limited and does not justify the higher administrative burden which the member states have to suffer from. In addition, the EU-wide standard form which restricts the amount and content of information, can limit the information which is available to every member state to uncover tax fraud.

III. The digital economy

1. Digital single market (lever 7)

The strict liability rules according to the new regulation[909] on electronic identification and trust services ensure a better safety for consumers. Yet, service providers will have to make substantial investments in order to comply with the liability requirements and as a result a barrier to enter this market segment is caused.[910] Also the execution of the provision in practice remains unclear.[911] According to a Commission staff working paper[912] the digital economy is a major source of growth and innovation. The analysis of the GDP impact of these scenarios shows that the digital economy can contribute with up to a 12 percent increase in EU27 GDP

[908] In particular, the Federal Ministry of Economics and Technology reveals a sceptical view: Stellungnahme Deutschlands zu der Mitteilung der Europäischen Kommission vom 3. Oktober 2012 „Binnenmarktakte II - Gemeinsam für neues Wachstum“, p. 4, <https://www.bmwi.de/BMWi/Redaktion/PDF/S-T/stellungnahme-deutschlands-zu-der-mitteilung-der-europaeischen-kommission,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf> accessed 30 April 2014.

[909] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0910&from=EN> accessed 23 September 2014.

[910] See Dumortier / Vandezande: Critical Observations on the Proposed Regulation for Electronic Identification and Trust Services for Electronic Transactions in the Internal Market, ICRI Working Paper 06/2013, Interdisciplinary Centre for Law and ICT, K.U. Leuven, p. 7, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152583> accessed 31 January 2014.

[911] Ibid.

[912] Commission staff working paper: impact assessment: Accompanying the proposal for a regulation of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market, SWD (2012) 238 final, 77, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2012:0135:FIN:EN:PDF> accessed 31 January 2014.

between 2010 and 2020 (corresponding to an increase in the annual growth rate of +1.09 percent).[913]

Besides this so called "Best case", in the "Base case" (if the speed of adoption of online services continues at the speed during the period 2004-2006) scenario the current trend will add 8 percent to EU27 GDP over a ten year period.[914] Despite the fact that some deficits of the Directive 1999/93/EC were corrected by the proposal, the main problem remains: the lack of trust and confidence in electronic systems. Hence, it cannot be expected that a huge economic growth is caused directly through the proposal. In the ideal case the adoption of online services continues at the speed during the period 2004-2006 and that is why only an annual growth rate of +0.8 percent can be expected.

2. Services (lever 20)

The proposal[915] for a directive on payment services in the internal market and a proposal[916] for a regulation on interchange fees for card-based payment transactions reflect the new era of e-commerce. Finally, in the year 2015 the directive[917] and the regulation[918] were adopted.

[913] Ibid.
[914] Ibid.
[915] European Commission: Proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC, COM (2013) 547 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0547:FIN:EN:PDF> accessed 31 January 2014.
[916] European Commission: Proposal for a regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions, COM (2013) 550 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0550:FIN:EN:PDF> accessed 31 January 2014.
[917] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015
on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2366&from=EN> accessed 30 July 2017.
[918] Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0751&from=en> accessed 30 July 2017.

In a green paper[919] the Commission stresses that e-commerce currently represents only 3.4% of all European retail trade and there still is considerable untapped growth potential. According to the green paper, research reveals the expectation that annual growth rates of 10% in the e-commerce market are realistic.

Besides, the Commission states that the implementation of the services directive has already boosted EU GDP by 0.8% and the Commission analysis shows that if member states were to abolish the remaining restrictions, the potential economic gain is three times bigger – about 2.6% of EU GDP.[920]

Indeed, the growing number of credit and debit card payments, the development of e-commerce and the comprehensive use of smart phones underline the importance of a modernisation of e-payments with an attached economic growth potential.

The set goal that cross-border European payment services will be safer, as clarified in the new payment service directive, facilitates cross-border trade.[921] However, one can have doubts that the proposal for a regulation on interchange fees for card-based payment transactions will have a strong positive effect. Statutory upper limits on fees for credit constitute major interference with pricing and could also obstruct market entry to new card schemes as new market players might be able to offer the banks more attractive conditions.[922] The freedom to conduct a business could be restricted in a substantial way.

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[919] European Commission: Green Paper - Towards an integrated European market for card, internet and mobile payments, COM (941) final, p. 5, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0941:FIN:EN:PDF> accessed 31 January 2014.

[920] European Commission: The Compact for Growth and Jobs: one year on Report to the European Council, 27-28 June 2013, p. 2, <http://ec.europa.eu/europe2020/pdf/compact_en.pdf> accessed 30 April 2014.

[921] See also EU Directive: PAYMENT SERVICES: PSD II cepPolicyBrief No. 2014-11, p. 4, <http://www.cep.eu/fileadmin/user_upload/CEP-Analysen/ZDR_MIF/cepPolicyBrief_COM_2013__547_PSD_II.pdf> accessed 30 April 2014.

[922] EU Regulation: REGULATING THE CARD-BASED TRANSACTION MARKET: cepPolicyBrief No. 2014-13, p. 4, <http://www.cep.eu/fileadmin/user_upload/CEP-Analysen/ZDR_MIF/cepPolicyBrief_COM_2013_550_Card-Based_Transaction_Market.pdf> accessed 30 April 2014.

To sum it up, economic growth can be expected by the implantation of the new directives. Yet, the growth numbers of the Commission must be viewed sceptically as the Commission does not take into consideration data protection and data security sufficiently.

Also it must be criticised that an integrated parcel delivery market has not been put on the top agenda of the single market levers. Delivery failure, damaged or lost items and high delivery costs are among the top concerns of consumers, contributing to low consumer confidence in cross-border e-commerce.[923]

It is doubtful that it took until the middle of the year 2015 for the European Commission to finally launch an online public consultation[924] on parcel delivery. Consequently, it will still take a long valuable time to finally realise the important aims regarding parcel delivery set by the European Commission within a communication[925] in the year 2013. Nearly 40% of consumers indicate that problems with delivery prevent them from shopping online.[926] This high number of cautious customers indicates that a high growth potential of the e-commerce sector can only be reached when an integrated parcel delivery market will finally be established.

3. Digital single market (lever 21)

The proposal[927] for a regulation on measures to reduce the cost of deploying high-speed electronic communications networks, realised by the

[923] European Commission: Green Paper - An integrated parcel delivery market for the growth of e-commerce in the EU, COM 2012 (698) final, p. 3, <http://ec.europa.eu/internal_market/consultations/docs/2012/parcel-delivery/121129_green-paper-parcel-delivery_en.pdf> accessed 13 July 2015.

[924] European Commission: Consultation on cross-border parcel delivery, <http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8169>, accessed 13 July 2015.

[925] Communication from the Commission: A roadmap for completing the single market for parcel delivery Build trust in delivery services and encourage online sales, COM 2013 (886) final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0886&from=EN> accessed 13 July 2015.

[926] Ibid.

[927] Proposal for a Regulation of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks, COM 2013 (147) final.

launch of a directive[928] in May 2014, can stimulate economic growth according to some studies.

A study from 2010 which was published by the European Policy Centre makes clear Europe could gain 4 percent GDP by stimulating fast development of DSM by 2020.[929] In a further study it was found that a 10 percentage point increase in broadband penetration raised annual per capita growth by 0.9–1.5 percentage points.[930] As mentioned in the area of lever 7, it cannot be expected that such an ideal growth can really be achieved. Instead, the behaviour of European consumers can barely be predicted. Data losses and cyber-attacks can put the faith in the digital single market to almost a zero-point anytime.

4. E-invoicing in public procurement (lever 22)

The Commission has published different numbers regarding the expected savings caused by the directive on electronic invoicing in public procurement. Estimations of the European Commission state that the wide use of e-invoicing in public tenders in all member states will generate savings of funds allocated for public procurement of up to 2.3 billion euros a year.[931] The Commission recently announced that it expects that the mandatory use of means of electronic communication in public procurement will increase accessibility to procurement thereby allowing EU companies to exploit the full benefits of the digital single market and will bring

[928] Directive 2014/61/EU of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0061&from=EN> accessed 29 July 2015.

[929] European Policy Centre: The economic impact of a European Digital Single Market, final report, March 2010, p. 4, <http://www.epc.eu/dsm/2/Study_by_Copenhagen.pdf> accessed 31 January 2014.

[930] Czernich / Falck / Kretschmer / Woessman (2011): Broadband infrastructure and economic growth, in: The Economic Journal, 505, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0297.2011.02420.x/pdf> accessed 31 January 2014.

[931] European Commission: Press releases databases: E-invoicing in public procurement: another step towards end-to-end e-procurement and e-government in Europe – frequently asked questions, 26 June 2013, <http://europa.eu/rapid/press-release_MEMO-13-614_de.htm> accessed 31 January 2014.

efficiency gains (estimated savings: 100 billion Euro annually on total EU public procurement).[932]

The high amounts of savings can be explained by the fact that European standards for end-to-end e-procurement software make it easier for suppliers from other EU countries to take part in the public procurement process in every member state and that is why public contracts can be advertised more effectively EU-wide with the help of the common standards and the different internet sites or procurement platforms, which advertise the contracts, can exchange information more easily.[933] This allows a ground for more active suppliers and leads to more cost-effective offers for purchasers.[934]

Aside from the savings potential of the new proposal[935] in the field of public procurement, also risks can be associated with it. As regards the conversion to end-to-end e-procurement, there is a risk that, in individual member states, software will be introduced which is not compatible with the software of other member states and as a consequence this may put foreign suppliers at a disadvantage because it is generally more difficult for them to find out about public contracts and because they have higher costs when applying for or implementing the contract.[936] Technical software problems and manipulations caused by hacker attacks can seriously threaten the practical realisation of electronic e-invoicing in public procurement. Indeed, the question of data protection is barely outlined in the proposal. This

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[932] Revision of the Public procurement Directives, European Commission Memo/14/20, 15 January 15 2014, <http://europa.eu/rapid/press-release_MEMO-14-20_de.htm?locale=en> accessed 31 January 2014.

[933] EU Directive and EU Communication: E-INVOICING AND END-TO-END E-PROCUREMENT IN THE PUBLIC SECTOR, cepPolicyBrief No. 2014-02, p. 4, <http://www.cep.eu/fileadmin/user_upload/CEP-Analysen/e-Rechnung_e-Vergabe_oeffentlicher_Auftraege/cepPolicyBrief_COM_2013__449_E-invoicing_and_e-procurement.pdf> accessed 31 January 2014.

[934] Ibid.

[935] Proposal for a Directive of the European Parliament and of the Council on electronic invoicing in public procurement, (COM 2013), 449 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0449:FIN:EN:PDF> accessed 31 January 2014.

[936] EU Directive and EU Communication: E-INVOICING AND END-TO-END E-PROCUREMENT IN THE PUBLIC SECTOR, cepPolicyBrief No. 2014-02, p. 3, <http://www.cep.eu/fileadmin/user_upload/CEP-Analysen/e-Rechnung_e-Vergabe_oeffentlicher_Auftraege/cepPolicyBrief_COM_2013__449_E-invoicing_and_e-procurement.pdf> accessed 31 January 2014.

uncertainty will threaten the implementation and finally barely result in the high saving amounts which the Commission hopes to achieve.

IV. Social entrepreneurship, cohesion and consumer confidence

1. Consumer empowerment (lever 4)

The directive[937] from May 2013 on alternative dispute resolution for consumer disputes and the regulation on online dispute resolution for consumer disputes[938] can at least be viewed as symbolic measures to increase faith in electronic commerce.

According to the European Commission, increased consumer confidence in cross-border electronic commerce would generate additional economic benefits, estimated at approximately 0.02% of the European Union's GDP (i.e. EUR 2.5 billion).[939] However, a special Eurobarometer[940] on consumer empowerment reveals that such a positive estimation is doubtful. The Eurobarometer reveals that 50% of all asked citizens do not order any goods or services over the internet because they prefer to see things personally in the shops. 20% avoid shopping over the internet due to payment security concerns. Only 15% say that the reason for avoiding using the internet were trust concerns about receiving or returning goods and complaints.

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[937] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF> accessed 31 January 2014.

[938] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF> accessed 31 January 2014.

[939] Single Market Act: Twelve levers to boost growth and strengthen confidence (”Working together to create new growth"), p. 9, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF> accessed 31 January 2014.

[940] Special Eurobarometer 342: Consumer empowerment, April 2011, <http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf> accessed 31 January 2014.

2. Social entrepreneurship (lever 8)

The new regulation[941] in the social entrepreneurship area is part of the realisation of the Social Business Initiative[942] established by the Commission in 2011. The initiative makes clear how important the social economy in Europe is which achieves 10% of the European Economy (GDP) and provides work for 11 million people in Europe. Social entrepreneurship is a key of the Innovation Union, a programme under the 2020 Strategy.

While empirical evidence shows that social entrepreneurship is growing in many countries, measuring it is difficult.[943] The reason for this is the variety of the entities belonging to the field, but also to the fact that these entities vary according to the geographical context and that countries recognise social entrepreneurship differently.[944] These circumstances make it nearly impossible to determine the correct degree of economic growth that can be associated with the regulation. Despite of that uncertainty, one can at least expect that the new regulation will give a positive impulse to the social investment market, in particular in the cross-border fundraising segment.

The European Commission has a very similar view regarding the deficits if the EuVECA passports for the improvement of the venture capital market compared to the EuSEF passports to optimise ssocial entrepreneurship. The consultation documents of the Commission reveal that it is satisfactory that both passports are currently available only to smaller fund operators managing asset portfolios below EUR 500 million.[945]

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[941] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0018:0038:en:PDF> accessed 31 January 2014.

[942] The Social Business Initiative of the European Commission, <http://ec.europa.eu/internal_market/publications/docs/sbi-brochure/sbi-brochure-web_en.pdf > accessed 31 January 2014.

[943] OECD (2010): SMEs, Entrepreneurship and Innovation, p. 187, <http://ec.europa.eu/internal_market/social_business/docs/conference/oecd_en.pdf> accessed 31 January 2014.

[944] Ibid.

[945] See consultation documents of the European Commission: Public consultation on the review of the European Venture Capital Funds (EuVECA) and European Social Entrepreneurship Funds (EuSEF) regulations – 30 September 2015,

The Commission states that since the entry into force of the regulation on European social entrepreneurship national authorities have registered only 6 EuSEF funds with a capital target of €6 million.[946] The Commission concludes that the take-up for EuSEF funds is clearly unsatisfactory.[947]

To sum it up, this lever has to be seen as a failure. Only a very small positive impulse to the social investment market has been realised. This estimation underlines that social issues have been put too much into the background by the Commission.

3. Social cohesion (lever 10)

The Commission expects that by facilitating the cross-border provision of services and improving the climate of fair competition, the proposal[948] will allow the potential for growth offered by the posting of workers and jobs for posted workers to be tapped as a key element in the provision of services in the internal market.[949] However, the Commission also admits that posting of workers is a "small phenomenon"[950] in the EU labour market. Hence, a significant growth rate based on the concrete measures cannot be expected for the EU zone.

4. Consumers (lever 23)

According to the Commission, consumer confidence in cross-border electronic commerce can generate additional economic benefits, estimated at approximately 0.02% of the European Union's GDP (i.e. EUR 2.5

<http://ec.europa.eu/finance/investment/venture_capital/index_en.htm#maincontentSec3> accessed 3 June 2016.

[946] Ibid.

[947] Ibid.

[948] Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, 2012/0061 (COD), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0131:FIN:EN:PDF> accessed 31 January 2014.

[949] Ibid.

[950] Ibid., p. 5.

billion).[951] Besides, the rules will also allow businesses more clarity and therefore can reduce compliance costs for them. Yet, it must be expected that the proposal[952] for a regulation on consumer product safety and the proposal[953] on market surveillance of products will barely cause economic growth effects. Moreover, product safety and market surveillance of products are not worth mentioning concerns of European consumers.

5. Social cohesion and social entrepreneurship (lever 24)

The proposal[954] for a directive on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, realised by a directive[955] in 2014, will barely generate economic growth and enhance business opportunities for providers of financial services. On the one hand, one must admit that the reduction of obstacles to switching accounts and obtaining information on charges strengthens competition.[956]

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[951] Single Market Act: Twelve levers to boost growth and strengthen confidence (”Working together to create new growth"), p. 10, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF> accessed 31 January 2014.

[952] Proposal for a regulation of the European Parliament and of the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC, COM (2013) 78 final, <http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-act_en.pdf> accessed 31 January 2014.

[953] Proposal for a regulation of the European Parliament and of the Council on market surveillance of products and amending Council Directives 89/686/EEC and 93/15/EEC, and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 1999/5/EC,2000/9/EC, 2000/14/EC, 2001/95/EC, 2004/108/EC, 2006/42/EC, 2006/95/EC, 2007/23/EC, 2008/57/EC, 2009/48/EC, 2009/105/EC, 2009/142/EC, 2011/65/EU, Regulation (EU) No 305/2011, Regulation (EC) No 764/2008 and Regulation (EC) No 765/2008 of the European Parliament and of the Council, Com (2013) 75 final, <http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-surveillance_en.pdf> accessed 31 January 2014.

[954] Proposal for a directive of the European Parliament and of the Council on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, COM (2013) 266 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0266:FIN:EN:PDF> accessed 31 January 2014.

[955] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0092&from=EN> accessed 29 July 2015.

[956] EU Directive: RIGHT TO A BASIC ACCOUNT, ACCOUNT SWITCHING AND ACCOUNT CHARGES: cep Policy Brief No. 2013-39 of 23 October 2013, p. 4, <http://www.cep.eu/fileadmin/user_upload/CEP-

On the other hand, consumers with a low financial budget are in the focus of the proposal and that is why a noteworthy economic growth cannot be expected by these consumers due to the lack of money they possess. Instead, higher costs for banks will be involved as banks will be faced with a higher number of unprofitable operations. The measures more likely have a symbolic character to underline the social dimension of the Single Market Acts I and II.

Chapter 5: The impact of the levers on the division of competences in the policy areas of the EU and the evaluation of the competences and the legal structures with a focus on levers 1 and 7 in the light of digital changes

A. Division of competences in the policy areas

I. Division of competences in the consumer policy

The analysis of the policies and special competences within chapter 3 brought to light the problematic division of competences in the area of the consumer policy. In contrast to competition law, the consumer protection only serves the interests of a specific group of market participants.[957] A free and informed commercial decision of the consumer is pursued.[958] These facts already demonstrate the limited scope of the consumer protection.

The Single Market Acts I and II have not changed the division of competences in the consumer policy. Lever 4 and lever 23 concern the

Analysen/Basiskonten/cepPolicyBrief_COM_2013__266_Basic_account.pdf> accessed 30 April 2014.

[957] Ofner/Nitsch, in: Hatje / Müller-Graff (2021), p. 897 (Rn. 2).

[958] Ibid., p. 899 (Rn. 11).

consumer policy. The fourth lever refers to a directive[959] from May 2013 on alternative dispute resolution for consumer disputes and a regulation on online dispute resolution for consumer disputes[960]. The two new sets of rules are based on Article 114 TFEU. Within the new legislation it is stressed that "consumers are key players in the internal market and should therefore be at its heart"[961]. An improvement for the consumers was reached only to a certain degree who can solve disputes arising from cross-border online transactions more easily. However, an electronic complaint form must be filled in by the complainant. Finally, the legislation does not really improve the legal position of the consumers at the date of conclusion of the contract but is more likely an ex-post correction tool.

Besides, lever 23 is realised by a proposal[962] for a regulation on consumer product safety and a proposal[963] for a regulation on market surveillance of products while both proposals are also based on Article 114 TFEU. As already outlined above, both proposals failed and were not adopted. Finally, the market levers have not shifted the division of competences in the consumer policy.

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[959] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF> accessed 31 January 2014.

[960] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF> accessed 31 January 2014.

[961] Regulation 524/2013, (6).

[962] Proposal for a regulation of the European Parliament and of the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC, COM (2013) 78 final, <http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-act_en.pdf> accessed 31 January 2014.

[963] Proposal for a regulation of the European Parliament and of the Council on market surveillance of products and amending Council Directives 89/686/EEC and 93/15/EEC, and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 1999/5/EC,2000/9/EC, 2000/14/EC, 2001/95/EC, 2004/108/EC, 2006/42/EC, 2006/95/EC, 2007/23/EC, 2008/57/EC, 2009/48/EC, 2009/105/EC, 2009/142/EC, 2011/65/EU, Regulation (EU) No 305/2011, Regulation (EC) No 764/2008 and Regulation (EC) No 765/2008 of the European Parliament and of the Council, Com (2013) 75 final, <http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-surveillance_en.pdf> accessed 31 January 2014.

It also became clear that Art. 114 TFEU is the fundamental legal base to realise the consumer protection in the EU. Only in cases with the primary objective to improve the consumer protection and where there is no concrete relevance to the single market, only then Art. 169 TFEU alone is applicable. Such cases make up a rarity because almost all measures, in particular all the ones within the key levers 4 and 23, have a reference to the internal market and therefore Art. 114 TFEU is always applicable. This underlines the already above-mentioned estimation that within decision-making processes trade effects gain importance while the consumer protection depicts an unspectacular secondary stage.

II. Division of competences in the field of trans- European networks

The key action of lever 6 resulted in a regulation[964] establishing the Connecting Europe Facility. The legal base of the regulation is Article 172 TFEU.

If the main purpose of the measures focuses to ensure the interoperability of national networks through operational measures of technical kind in principle Art. 172 TFEU depicts the legal base and in this case Art. 114 TFEU has no importance as Articles 171, 172 TFEU displace Art. 114 TFEU via "lex specialis".[965]Articles 170-172 TFEU serve as the realisation of the internal market according to Article 26 TFEU and the strengthening by the regional policy by improving cross-border infrastructure.[966]

Due to practical needs, the policy area in the field of trans-European networks falls within the shared competences of the Union and the member states.[967] The contribution of the Union to the networks has to consider the

[964] Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:348:0129:0171:EN:PDF> accessed 31 January 2014.
[965] See Schröder, in: Streinz (2018), Art. 114 AEUV, Rn. 137.
[966] Kotzur: in Geiger / Khan / Kotzur (2015), p. 685.
[967] Ibid.

principle of subsidiary and also the needs of the private investors sufficiently need to be taken into account.[968]

The regulation[969] in the framework of lever 6 determines the conditions, methods and procedures for providing financial assistance to trans- European networks in order to support projects of common interest in the sectors of transport, telecommunications and energy infrastructures and to exploit potential synergies between those sectors.

Regarding the financial assistance the wording of the regulation is as follows:

In order to ensure sectoral diversification of beneficiaries of financial instruments as well as to encourage gradual geographical diversification across the Member States, and with particular regard to those Member States which are eligible for support from the Cohesion Fund, the Commission in partnership with the European Investment Bank, through joint initiatives such as the European PPP Expertise Centre (EPEC) and the Joint Assistance to Support Projects in European Regions (Jaspers), should provide support to the Member States in developing an appropriate pipeline of projects that could be considered for project financing.

Such measures are covered by Articles 170-172 TFEU. Article 171 TFEU clearly states that the Union can decide to establish a series of guidelines, to ensure measures for the interoperability of the networks and/or financially support projects of common interests. The Union is free to make use of any of these tools. The existence of a guideline is not even a precondition for the validity of the measures and also the interoperability can be reached not only by ensuring the compatibility of the national networks but also by harmonisation or measures of standardisation.[970]

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[968] Ibid.

[969] Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:348:0129:0171:EN:PDF> accessed 31 January 2014.

[970] Kotzur: in Geiger / Khan / Kotzur (2015), p. 687.

Finally, it can be concluded that the division of competences in the field of trans- European networks is at least partly shifted form the member states to the Union.

III. Division of competences in the social policy

There is an interrelation between the economic and the social integration in the Union. The separate accounts of economic and social integration have been partly based on an artificial perspective because in the practice social policy and economic integration have never been fully separated.[971] This is only to a certain degree consistent with the normative approach of the Union. Article 151 TFEU marks the social policy in the TFEU and states:

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy. They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

The wording of Article 151 regarding "the need to maintain the competitiveness of the Union economy" and "the functioning of the internal market" make clear that economic considerations play a high role when it

[971] For a closer analysis see Schiek (2012), pp. 49-50.

comes to the social policy. Hence, the levers of the Single Market I and II with an emphasis on economic growth are in conformity with the competences in the area of social policy.

Social policy only has developed within the EU in a "timid fashion"[972]. Only very few initial steps towards global social policy have so far been attempted.[973] The above reference to "take account of the diverse forms of national practices" at the same time also reveals the limited competence of the Union. The objectives of social policy as laid down by Article 151 TFEU do not constitute any competence as such.[974] The competence in respect of social policy remained with the member states even after Amsterdam.[975]

Lever 10 of the Single Market Act I concerns the social cohesion. It was realised by a directive[976] in May 2014 concerning the posting of workers in the framework of the provision of services with aim is to reconcile the exercise of the freedom to provide cross-border services with an appropriate protection of the rights of workers temporarily posted abroad for that purpose.[977]

At this point the problematic division of competences in the field of social policy becomes visible. There is a clash between the deregulation of services on the one hand and national wage regulation and social policy-making on the other hand which makes it difficult to achieve a European unity in the sector of services.[978] Consequently, as long as the national wage is regulated by the national authorities the EU has barely a chance to

[972] Schiek (2012), p.48.
[973] See ibid., p. 37.
[974] Kotzur: in Geiger / Khan / Kotzur (2015), p. 638.
[975] Ibid.
[976] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0067&from=EN> accessed 29 July 2015.
[977] See Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, 2012/0061 (COD), p. 2, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0131:FIN:EN:PDF> accessed 31 January 2014.
[978] Howarth / Sadeh (2012), p. 9.

improve the situation of the workers significantly. "As a normative notion, social integration beyond the nation state requires new approaches to social policy."[979] The Union has an overall responsibility which cannot just be palmed off on to the member states. A new division of competences has to be considered.

However, the Union still has the competences to coordinate and to act as a catalyst and it has a complementary function in the field of social policy in relation to the member states as it interacts in a supporting, complementing and ideally optimising way.[980] The Union should use the possibility of coordination intensively until a new legislative framework regarding the division of competences might be achieved in the future but one must admit that this very uncertain. EU´s Eastern Enlargement from 2014 onwards has reduced the chances for social integration within the EU due to the increasing divergence between the member states.[981]

Despite of the difficulties there is a need for a social reform to stress that the Union also has social responsibility. "Engaging positively with EU social integration, the EU could regain credibility and identification of the citizenry and become an example of how to achieve social justice through other models than closure within national boundaries."[982] The literature has to further discuss new legal structures for an appropriate equilibrium between economic and social factors.

It is often criticised that the model of negative harmonisation could cause an unbalance between social protection and a deregulated free market economy because standards in the areas of consumer and health protection could be undermined by the increasing use of negative integration.[983] The considered threat of a deregulated free market is not only seen regarding the consumer and health protection but also in field of social policy. There is

[979] Schiek (2012), p. 48.
[980] Kotzur / Lichtblau, in: Geiger / Khan / Kotzur (2015), p. 638.
[981] See Schiek (2012), p. 47.
[982] This estimation refers to the need for a better-balanced interaction between the economic and social dimensions: Schiek (2012), p. 51.
[983] See Maletic (2013), p. 9.

also a fear that environmental standards and the provision of infrastructure are influenced negatively trough the reduction of quality requirements.[984]

This discussion is also related to the problematic issue of the race to the bottom due to the competition among systems. Such a threat should not be exaggerated. It is not empirically proven.[985] The Single Market Act legislation puts a focus on the introduction of binding technical and partly also social standards in order to realise an improvement in these areas. However, one must admit that a strong focus on a deregulated free market economy has caused a neglect of social components. At the same time, it must be acknowledged that the spending of the member states in the field of social public services have barely be reduced.

[984] See Korte (2016), p. 40.
[985] For a closer empirical estimation see Korte (2016), p. 40.

2.26. Change in general government expenditures by function as a percentage of GDP, 2007 to 2019

	General public services	Defence	Public order and safety	Economic affairs	Environmental protection	Housing and community amenities	Health	Recreation, culture and religion	Education	Social protection
Australia	0.3	0.5	0.2	0.2	0.2	-0.1	0.9	0.0	0.5	0.2
Austria	-1.9	-0.2	0.0	-0.1	-0.1	-0.1	0.9	-0.3	0.1	0.7
Belgium	-1.8	-0.2	0.0	1.1	0.5	-0.1	0.8	0.0	0.6	2.6
Czech Republic	-0.2	-0.2	0.0	-0.3	-0.1	-0.3	0.9	0.0	0.6	0.5
Denmark	-0.7	-0.3	0.0	0.1	-0.1	-0.1	0.6	-0.1	0.3	0.0
Estonia	0.2	0.8	-0.3	-0.4	-0.2	-0.2	1.0	-0.1	0.3	4.1
Finland	1.3	-0.2	0.0	-0.2	-0.1	0.0	0.7	0.4	-0.1	5.0
France	-1.6	0.0	0.2	1.7	0.1	-0.1	0.6	0.0	0.0	2.2
Germany	-0.5	0.2	0.1	0.0	0.1	-0.4	1.0	0.0	0.4	0.8
Greece	-3.7	-0.8	0.6	-0.2	0.6	0.0	-0.7	0.2	0.4	4.1
Hungary	-1.4	-0.2	0.2	1.5	-0.1	-0.2	-0.4	1.5	-0.8	-4.5
Iceland	-2.8	0.0	0.1	-0.7	0.0	0.2	0.3	-0.2	-0.8	2.8
Ireland	-0.7	-0.1	-0.6	-1.3	-0.6	-1.0	-1.5	-0.1	-1.2	-4.2
Israel	-3.4	-1.7	0.1	0.4	0.0	-0.2	0.6	0.2	0.6	0.7
Italy	-1.7	0.1	0.0	0.0	0.1	-0.2	0.1	0.1	-0.5	3.7
Japan	-0.6	0.1	0.0	0.2	0.0	-0.1	1.5	0.1	-0.1	2.7
Korea	-0.4	0.2	0.1	-1.1	-0.1	-0.2	1.6	0.2	0.5	2.2
Latvia	-0.2	0.5	-0.2	-0.2	-0.3	-0.2	0.2	-0.2	0.2	4.2
Lithuania	-0.9	-0.1	-0.3	-1.3	-0.5	0.2	1.0	0.1	-0.4	1.5
Luxembourg	0.2	0.2	0.3	0.0	0.2	0.0	0.3	0.0	0.3	2.8
Netherlands	-1.4	0.0	0.0	-0.5	-0.1	-0.1	1.0	-0.1	-0.1	1.0
Norway	-1.1	0.3	0.4	2.2	0.4	0.3	1.8	0.5	0.7	4.2
Poland	-1.2	-0.3	-0.2	-0.1	-0.1	-0.2	0.4	0.2	-0.7	1.1
Portugal	-0.4	-0.4	-0.1	-0.5	0.0	-0.2	-0.6	-0.2	-1.5	2.0
Slovak Republic	1.3	0.3	0.1	0.9	0.1	-0.1	1.5	0.4	0.6	1.4
Slovenia	-0.3	-0.4	-0.1	0.4	-0.2	-0.2	0.7	0.1	-0.4	0.2
Spain	0.5	-0.2	0.0	-1.4	-0.1	-0.5	0.4	-0.4	0.0	4.5
Sweden	-0.8	-0.3	0.0	0.5	0.0	0.2	0.6	0.1	0.7	-1.0
Switzerland	0.0	0.0	0.2	0.3	-0.1	0.1	0.5	0.0	0.6	1.0
United Kingdom	0.1	-0.2	-0.5	0.7	-0.3	-0.3	1.2	-0.3	-0.8	0.5
United States	-0.2	-0.6	-0.2	-0.3	0.0	-0.1	1.6	0.0	-0.4	0.9
OECD	-0.5	-0.2	-0.1	0.0	0.0	-0.2	1.1	0.0	-0.1	1.4
OECD-EU	-1.0	0.0	0.1	0.1	0.0	-0.2	0.5	0.0	0.0	1.8
Romania	-0.2	-0.1	-0.2	-3.7	0.3	-0.4	1.4	0.0	-0.2	1.8

Source: OECD National Accounts Statistics (database); Eurostat Government Finance Statistics (database).

Source: Government at a Glance 2021 (OECD), p. 87, <https://www.oecd-ilibrary.org/docserver/1c258f55-en.pdf?expires=1645375779&id=id&accname=guest&checksum=75FF89E01131A8CFB42A8ADE38A2D15E> last accessed 22 February 2022.

The above graph shows that the expenditures for social protection has remained on the same level or has been constantly growing in almost all EU member states during the last years. Comparing the above numbers of the member states to the ones of other countries such as the United States, it becomes clear that the level of social protection in the EU member states can still be considered as relatively high from a global point of view. The threat of a race to the bottom can therefore not be underlined and it does not appear appropriate that an intervention is needed on the EU level to harmonise tax rates, particularly the total public social expenditure as a percentage of GDP.

At the same time, one must admit that the graph does not reveal possible modifications of statistical methods and a possible actual increased number of social benefit recipients. Indeed, in countries such as Greece deep social spending cuts have been realised so that the money every recipient of social welfare benefits receives has decreased compared to the years before the crisis. However, the social problems in certain countries such as Greece do not allow the conclusion that it has been caused by the race to the bottom.

Instead, the Greek government allowed the citizens to live beyond their means many years long, without taking steps to increase the own competitiveness. Also effective measures against corruption have not been introduced. One shall also not leave out the fact that Greece was accepted in the Euro currency based on wrong financial statistics. Consequently, the relevant problems are for the most part homemade.

Social disparities have been strong in many member states with the tendency to become stronger, regardless of the government social spending. To give an example, in the United Kingdom 20% of the rich possessed 42% of available resources in the year 2000.[986] At the same time, one must admit that the gap between rich and poor is not only a European problem but a global one. The above numbers regarding the unfair distribution of wealth in the UK were even higher in the non-EU member state Turkey, for

[986] See Pozzolo, in: Ferrer Beltran / Pozollo (2007), p. 10.

instance.[987] Consequently, the European harmonisation process itself cannot be held accountable for national social gaps within the member states.

Instead, every single country has an own historically developed single social responsibility.[988] The member state based individual social order in its core persists until today. The founding fathers of the European Union never foresaw that the common policies would include social policy.[989] Hence, taken historical aspects into account, the EU harmonisation process cannot be held responsible for undesirable national developments in the field of social policy. At the same time, one must admit that a better solidarity between the EU member states is indispensable as the EU citizens themselves cannot be blamed for governmental failures.

IV. Division of competences in the energy policy

The internal energy market is treated within a special regime since the Treaty of Lisbon and does not fall into the competence of Article 114 TFEU anymore.[990] Here the question arises which exact relation between Article 114 and Article 194 TFEU exists and what kind of horizontal conflict of jurisdiction can occur. It is argued that Article 194 (TFEU) more likely only has a declaratory value and does not reveal an expansion of competence.[991]

In line with the view taken in the legal literature the competence according to Article 194 TFEU is "lex specialis" towards the general internal market competence of Article 114 TFEU because of the wording and the regulatory purpose of Article 194 TFEU: according to Article 194 (1) TFEU the European Energy Policy deals "in the context of the establishment and functioning of the internal market" with the aim "to ensure the functioning of the energy market".[992]

From the substantive point of view and also in the light of legal competence Article 194 TFEU reveals a legal independence of the internal market

[987] Ibid.
[988] See also Schwarze / Lehnart (1990).
[989] Cantaro, in: Blanke / Mangiameli (2006), p. 194.
[990] See Schröder, in: Streinz (2018), Art. 114 AEUV, Rn. 141.
[991] See Kröger (2015), p. 82.
[992] Ibid., p. 364.

regulation and this is just what has been historically intended when carrying out the bundling of energy policy competences within Article 194 TFEU.[993] Consequently, in the sector of the energy internal market Article 194 TFEU supersedes the scope of the general internal market competence and enjoys the primacy of application which also includes the possibility of preventive approximation of laws in the internal energy market.[994]

Reaching far beyond the sovereignty over resources, the provision of Article 194 (2) subpara. 2 TFEU is an expression for sovereign rights reserved by the member states in the energy sector and codifies the right of the member states to determine independently the conditions for the use of energy resources and the general structure of energy supply.[995] As the environmental energy law belongs to the shared competences according to Article 4 TFEU the principle of subsidiary and and the principle of proportionality have to be obeyed. However, the national approach of the aid policy to strengthen renewable energies stands in conflict with the principle of free movement according to Article 34 TFEU and also the EU state aid rules which are based on the freedom of competition.[996]

Hence, it appears to be appropriate to introduce state aid rules on European level rather on a national level. This approach is compatible with the principle of subsidiarity. The question arises also if the harmonisation of national state aid rules is necessary for an integration of renewable energies within the European internal electricity market to discover a possible violation of the principle of proportionality. It appears to be appropriate to introduce European-wide measures in a phased manner for the sake of the member states in consideration of the existing national state aid rules.

The member states keep the national sovereignty reserve according to Article 194 (2) TFEU. According to the wording, such measures shall not affect a member state's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192 (2)

[993] Ibid.
[994] Ibid.
[995] Kotzur / Lichtblau, in: Geiger / Khan / Kotzur (2015), p. 732.
[996] Kröger (2015), p. 380.

(c). The energy lever (16) does not impair this national sovereignty reserve but it more likely tries to build a legal framework for a competitive business environment and a better protection of the nature. Within a communication[997] the European Commission stresses that the goal is to provide guidance to member states to ensure that their interventions are necessary and proportionate pointing at their pivotal role in making the internal market a success.

It stresses also that cooperation between the Commission, the governments of the member states, the regulators and the transmission system operators will continue to be important on this complex matter particularly in assessing how the gains from an integrated approach can be best achieved. At this point it becomes clear that the aims of the energy policy within Art. 194 TFEU are limited to goals with a reference to the functioning of the internal market.[998]

Finally, the question arises in what relation Article 194 TFEU stands to Article 192 TFEU. These two norms do not stand in a relation of specialty but are applicable next to each other.[999] Consequently, regarding the harmonisation of national state aid rules Article 194 TFEU and also Article 192 TFEU are potential competence bases.[1000]

B. In the light of recent digital developments: Evaluation of the competences and the legal structures in the context of levers 1 and 7

The internet has become an essential part for the realisation of the internal market.[1001] It constitutes "a decisive foundation for the European

[997] Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Progress towards completing the Internal Energy Market, COM (2014) 634 final, <http://ec.europa.eu/energy/sites/ener/files/documents/2014_iem_communication.pdf> accessed 12 November 2015.
[998] See Bings, in: Streinz (2018), Art. 194 AEUV, Rn. 33.
[999] Kröger (2015), p. 368.
[1000] Ibid, p. 380.
[1001] Osing (2017), p. 22.

single market"[1002] and that is why it is justified to evaluate the market levers of the Single Market Acts I and II, in particular levers 1 and 7, from the perspective of the current digital development.

The year 2020 is a historical turning point with a comprehensive new order of the society and the economy. The beginning of a new decade also marks the beginning of a new digital era which comprises all areas of life. The internal European market stands in front of completely new challenges because the national approaches of many member states have gained a new dynamic while digital global interconnections mark a new dimension.

The transition processes from analogue to digital have reached a new form of speed. The question arises if the digital levers of the Single Market Act I and II can function as a sufficient driving force and powerful motivator to use the new crisis as a chance to newly structure the internal market. Many important new questions of a scientific, a technical and a legal nature are raised. Data processing and data privacy must also be evaluated from a new perspective.

For a long time, large parts of the legal professions have not sufficiently been taken the digitalisation of legal consulting into account.[1003] Now also this sector is undergoing a state of upheaval with effects on the whole judicial system. To give an example, the confidentiality of new forms of communications between lawyers and clients is a new challenge for many law offices because new encryption technology is needed to protect the data of the clients.[1004] If sensitive data of clients is changed or lost by successful hacking attempts, this can have severe effects on the results of legal proceedings and lead to a company`s economic ruin.

In the case of the increasingly indispensable use of new communication platforms, new instant messenger services and new file-sharing services the confidentiality and the data protection must always have priority over the user-friendliness.[1005] This reveals the high importance

[1002] Osing (2017), p. 108.
[1003] See Hellwig / Ewer: Keine Angst vor Legal Tech, NJW 2020, 1784-1785.
[1004] See Gasteyer / Säljemar: Vertraulichkeit im Wandel digitaler Kommunikationswege, NJW 2020, 1768-1771.
[1005] See ibid.

of lever 7 which can be seen as the commencing establishment of a European Digital Identity. At the same time, the question arises in what circumstances governmental authorities should have special technical access possibilities to decrypt the encryption of confidential communication. The possible introduction of electronic courts records must also be critically debated.

The Single Market Act levers only consider the mentioned issues marginally. Lever 2 of the Single Market Act I is filled up with a directive[1006] of the recognition of professional qualifications. However, certain groups such as lawyers are excluded from this directive and the digital changes of the professional environment are also barely considered.

Due to the digital changes, it is necessary that also lawyers are motivated to help clients and provide legal advice beyond the home member state. The legal market in Europe has a demand for new guidelines to motivate law offices to provide legal advice throughout the member states. In this area the relevant competences must be moved to the EU level to reach a higher degree of harmonisation.

This recent development justifies that a closer evaluation of the levers 1 and 7 of the Single Market Act I is conducted in this chapter to analyse the changing effects on competences and legal structures. The long-term development of the economic situation in Europe will depend to a considerable degree on the situation of the SMEs, and in particular on an appropriate handling of the digitalisation.

A regulation on European venture capital funds[1007] constitutes the first lever of the Single Market Act I. As outlined above within the economic growth analysis, the first lever of the Single Market Act I has a key function as a notable determinant of economic prosperity. The analysed surveys brought to light that access to finance for SMEs has been significantly improved in the last decade. The importance of the venture

[1006] Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').
[1007] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds.

capital industry has even increased in the times of the new crisis in the year 2020. Due to the lack of a more specific provision the legal base of the regulation lever 1 is Article 114 TFEU and therefore the Union has the competence and responsibility to regulate European venture capital funds. However, practically it only has a limited competence because registered venture capital fund managers become subject to authorisation with the competent authorities of their member state.

Consequently, the member states can influence essential supervision and registration procedures. The regulation of lever 1 makes clear that supervisory information should be exchanged between the competent authorities in the home and host member states and ESMA. In practice, it remains unclear to what extend supervisory information must be exchanged. Also is not precisely determined which information platform should be used. This marks a huge deficit because in times of an increased digitalisation the determination of the information platform is of vital importance. Besides, the lack of exchange of supervisory information between the member states causes an information asymmetry. Hence, the imprecise wording of the regulation and missing provisions have caused legal uncertainty.

The target group respectively beneficiary of the regulation are SMEs which have a strong potential for growth and expansion. In this context also the levers 11 and 19 as the so-called business environment levers have to be taken into consideration. All these levers have the goal to reduce the administrative burden for companies and to make cross-border procedures easier. However, the Union legislator only provides a framework. The conditions in each individual case are usually determined by the member states.

Venture capital can be seen as a main driver for the internal market, in particular in times of the stricken banking sector which had to deal with new challenges in the year 2020 which can partly be compared to the situation in the year 2008. The question arises whether the venture capital sector is able to balance out a repetition of the banking crises in the year 2008. The possibility of access to finance is crucial for companies to

undertake investments and that is why they depend on different financial sources.

Hence, venture capital is generally suitable to function as an alternative financial source. At present the potential is not being fully exploited. The European Commission admits within a Green Paper[1008] that despite the progress capital markets are still fragmented and are typically organised on national lines. In addition, the Commission points out that the degree of financial market integration across the EU has declined since the crisis, with banks and investors retreating to home markets.[1009] This demonstrates that in case of a further banking crisis such as in the year 2008 it cannot be expected that venture capital will serve as a considerable cross-border gap filler. The VC sector can only to a certain degree compensate the banking sector. In times of an economic crisis SMEs can barely be able to make use of new cross-border venture capital. Most of the market players more likely act locally with the focus on home markets to avoid further possible risks.

The Single Market Act I prioritised the venture capital sector but was only the beginning of a large number of further initiatives. The debates about the correct degree to strengthen the venture capital sector has just begun. The purpose of the Green Paper[1010] is to begin the debate at EU and national levels, involving the co-legislators, other EU institutions, national Parliaments and all those interested, on the possible short and longer-term measures to achieve the objectives. As one of the problems the fact that in Europe around 25% of all companies and around 75% of owner-managed companies do not have a credit score was identified.[1011]

The venture capital development in Europe is still in early stage. The economic potential of this industry is huge and that is why there is a need for further initiatives which make it attractive for the VC industry to invest

[1008] See Green Paper: Building a Capital Markets Union, COM (2015) 63 final, p. 4.
[1009] See ibid.
[1010] See Ibid.
[1011] See ibid., p. 10.

in cross-border transaction. In a newsletter[1012] in the year 2017 of the European Commission the problems are defined as follows:

„Up until now, research into what works best in terms of tax incentives for venture capital and business angels has been fairly limited. With this in mind, the European Commission published a study on 8 June to evaluate existing tax incentives schemes, analyse and assess possible designs for potential new schemes, and put forward policy recommendations for the future.“

The mentioned study only intends to support member states implementing tax incentives. This constitutes a very limited step forward in integrating the venture capital market in Europe. As long as the relevant competences remain at the level of the member states cross-border venture capital transactions will not significantly be strengthened.

At the time of the introduction of the Single Market Act I there have been not enough research and not enough practical experiences with the venture capital market in Europe. That is why it is important to analyse the deficits of the Single Market Acts in this sector in order to learn from the made mistakes. According to the relevant regulation within lever 1, venture capitals can provide SMEs with valuable expertise and knowledge, business contracts, brands equity and strategic advice. Beyond these objectives a regulation does not contain further reference to common good interests. It can be concluded that the Union legislator continuously stresses the economic growth potential and indirectly assumes that this in everyone`s interest.

The Union legislator has the task to stress the overall benefits of venture capital more actively in order to gain a better acceptance of venture capital funds within all population groups. Some people consider that the venture capital industry is similar to the hedge fund industry with a purely economic approach. Often it is forgotten that many SMEs would not able to survive without the support of venture capital.

[1012] European Commission: Banking and finance newsletter on 28 June 2017: Venture capital tax incentives.

The regulation reflects the attempt to lay down a common framework of rules regarding the use of the designation "EuVECA" for qualifying venture capital funds, in particular the composition of the portfolio of funds that operate under that designation, the eligible investment targets, the investment tools they may employ and the categories of investors of that are eligible to invest in them by uniform rules in the Union.[1013]

It is in general appropriate to regulate the venture capital market within a regulation with a binding effect for the member states to achieve a real harmonisation. However, the content of the regulation exposes deficits. Only a limited scope is legally covered. The regulation covers only managers of those collective investment undertakings with assets undermanagement which in total do not exceed the threshold referred to in point (b) of Article 3 (2) of Directive 2011/61/EU.[1014]

Despite of the possibility to continue to use the designation "EuVECA" in case of exceeding the threshold it must be considered that there is a voluntary participation. Where the managers of collective investment undertakings do not wish to use the designation "EuVECA", this regulation does not apply and these cases, existing national rules and general Union rules continue to apply.[1015] Hence, a legal fragmentation of the venture capital market will remain. The Union legislator should have focused on an efficient harmonisation with binding provisions for all relevant actors rather than only giving a possibility to use the designation "EuVECA" voluntarily. This facultative harmonisation approach is not convincing and causes further fragmentation.

In case of using the designation "EuVECA" the companies are not provided with enough benefits so that the needed incentive effects are missing. In addition, some managers might also fear an overregulation. According to Article 17 of the regulation, the European Securities and Markets Authority (ESMA) shall maintain a central database which is publicly accessible on the internet with a list of all managers of qualifying

[1013] See ibid., p. 1.
[1014] See ibid.
[1015] See ibid.

venture capital funds registered in accordance with Article 14 and the qualifying venture capital funds which they market and also the countries in which those funds are marked.

The registration process is also quite complex. The wording within the regulation[1016] contains several uncertainties and it also does not express any special urgency of registration process. Article 14 (2) of the regulation states the following:

The competent authority of the home Member State shall only register the manager of a qualifying venture capital fund if the following conditions are met:

(a) the persons who effectively conduct the business of managing qualifying venture capital funds are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the manager of a qualifying venture capital fund;

(b) the information required under paragraph 1 is complete;

(c) the arrangements notified according to point (c) of paragraph 1 are suitable for complying with the requirements of Chapter II;

(d) the list notified under point (e) of paragraph 1 of this Article reveals that all of the qualifying venture capital funds are established in accordance with point (b)(iii) of Article 3.

The venture capital market is a fast market with many changes within a short time. Consequently, the venture capital funds depend on a fast registration process. However, the venture capital funds are confronted with serious practical bureaucratic barriers regarding the registration process with very long processing cycles of at least half a year and that is why Art. 14 of the regulation turned out to be a far too extensive notification procedure.[1017] This is absolutely unacceptable and marks a significant administrative burden.

[1016] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds.
[1017] See Siering / Izzo-Wagner: Die EuVECA-VO – eine Sackgasse der Verwaltungspraxis? - Die aktuelle Aufsichtspraxis als großes Problem für die Venture Capital Branche, BKR 2015, 101-104.

The registration authorities do not have the competence to delay the registration process indefinitely. The European legislator should have decided in a legally binding way that the registration authorities are legally forced to decide about the registration within few weeks after all relevant information has been made available. This could help to speed up the process and it could help venture capital funds to confront registration authorities with claims for compensation in cases of significant delays.

The European Securities and Markets Authority (ESMA), a European Union financial regulatory agency and European Supervisory Authority, evaluated the registration process as follows[1018]:

"EuSEF and EuVECA managers have to register with the competent authority of the home Member State twice, once in accordance with the EuSEF and EuVECA Regulations. However, taking into account the purpose of the EuSEF and EuVECA regulations is to create a light regime that facilitates the cross-border activity of these mangers, the double registration could take place simultaneously. National competent authorities are invited to simplify this process in order to avoid unnecessary repetition in the registration process."

In the ideal case the registration process should not last longer than two weeks instead of more six months.[1019] Also an electronic application form is often not provided.[1020] The search for the appropriate forms and the need to fill them out in a paper-based way already represents the first huge obstacle. The long registration waiting period is the next hurdle. These barriers demonstrate that a real simplification has not been achieved.

Few years after the introduction of the first lever of the Single Market Act I also the Union legislator noticed that so far lever 1 has not functioned as a driving force and that the low degree of harmonisation in the venture capital sector remained. The demand for further appropriate legal

[1018] See ibid, 102-104. The author hereby cites a statement of ESMA in March 2014 (ESMA/2014/311).
[1019] See Weitnauer: Die Verordnung über Europäische Risikokapitalfonds („EuVECA-VO"), GWR 2014, 143-144.
[1020] See ibid.

incentives was identified. A new regulation[1021] on European long-term investment funds which marks the sixth lever of the Single Market Act II (so called lever 18) was then adopted in April 2015 with the aim to increase the pool of capital available for long-term investment in the EU economy by creating a new form of fund vehicle.

Within the regulation[1022] it is stressed that the measures can help minimise the lack of financing for projects such as transport infrastructure, sustainable energy generation or distribution, social infrastructure (housing or hospitals), the roll-out of new technologies and systems that reduce use of resources and energy, or the further growth of SMEs. Consequently, the regulation puts an appropriate focus on public welfare concerns. The registration process was also improved. Article 3 of the regulation states that the competent authorities of the ELTIFs shall, on a quarterly basis, inform ESMA of authorisations granted or withdrawn. The time specification is important to make clear that the competent authorities must keep the ESMA in the loop regularly.

Finally, also revised provisions on venture capital investment and social entrepreneurship funds entered into application in March 2018 in order to make it easier for managers of all sizes to run these funds and in order to allow a wider range of companies to benefit from their investments. The modernised regulation[1023] refers to the communication of the Commission of 30 September 2015 on an Action Plan on Building a Capital Markets Union where the need for a modernisation of the provision was clarified.

It does not appear convincing that regulation 2017/1991 refers to venture capital investment and social entrepreneurship funds at the same time together. Within the Single Market Act these issues have been handled separately. While the first lever only refers to venture capital lever 8 deals with the European social entrepreneurship. "EuVECA" and "EuSEF" also

[1021] EU Regulation 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term Investment funds.
[1022] Ibid.
[1023] Regulation (EU) 2017/1991 of the European Parliament and of the Council of 25 October 2017 amending Regulation (EU) No 345/2013 on European venture capital funds and Regulation (EU) No 346/2013 on European social entrepreneurship funds.

have to be considered separately within the practical application. Venture capital has a much higher economic potential while at the same time social entrepreneurship funds so far have not reached any significance in Europe. They are also very important but more likely so far only have a symbolic value. Consequently, the Union legislator should have treated the reforms of EuVECA and EuSEF not together within one regulation.

Finally, the modernised regulation clarifies that the ESMA should to develop draft regulatory technical standards, for submission to the Commission. This is an important issue to allow the simplification and standardisation of all processes. The new provisions can be seen as the attempt to motivate the ESMA to work together with national authorities more efficiently. The ESMA can develop draft implementing technical standards on standard forms, templates and procedures. This will to improve the functioning of the European financial markets and strengthen the investor protection.

The new inserted Article 14 (1) states that "power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards". It can be concluded that this delegation increases the competence of the Commission which will play a more active role in the registration processes.

The new Article 16 states the following:

For the purposes of the first subparagraph, the competent authority of a qualifying venture capital fund that has been registered in accordance with Article 14a shall immediately notify the competent authority of the home Member State, the competent authorities of the host Member States, and ESMA, of any addition to or any removal from the register of a qualifying venture capital fund or of any addition to or removal from the list of Member States in which the manager of that qualifying venture capital fund intends to market that fund.

The fast notification process is fundamental for the venture capital funds. The above-mentioned term "shall immediately notify" makes clear that the competent authorities must inform each other about relevant

procedures very quickly. This also demonstrates that the symmetry of the access to relevant information for all parties needed an improvement. The ESMA needs all relevant information to be able to coordinate the development of the venture capital industry in each member state.

The new Article 17 states the following:

1. ESMA shall maintain a central database that is publicly accessible on the internet and that lists all managers of qualifying venture capital funds that use the designation "EuVECA" and the qualifying venture capital funds for which they use that designation, as well as the countries in which those funds are marketed.

2. On its website, ESMA shall provide weblinks to the relevant information regarding third countries that fulfil the applicable requirement under point (d)(iv) of the first paragraph of Article 3.'.

The mentioned provisions are of major importance because they lead to a new form of transparency and clarity. Every citizen and every SME can have access to the central database on the internet in order to be well informed about the activities of all managers of qualifying venture capital funds. This is an appropriate tool to decrease the above mentioned information asymmetry.

The new responsibility of the ESMA is further outlined in the following new addition of Article 20:

'ESMA shall organise and conduct peer reviews in accordance with Article 30 of Regulation (EU) No 1095/2010 in order to strengthen the consistency of the processes in relation to supervisory and investigatory powers carried out by competent authorities pursuant to this Regulation.'.

The competence of supervision and investigation has thereby been moved from the national level to the European level. The ESMA has received new tools in order accelerate proceedings within the member states. Quality peer reviews and consultations can lead to significant improvements because it increases the pressure on the competent authorities of the member states to work efficiently. This will help to reduce administrative delays and creates a new spirit of confidence in the activities

of the venture capital funds and will open new transparent doors for further investments.

While some procedures have become less bureaucratic the economic crisis in the year 2020 has created new cumbersome hurdles. Investors are suddenly very reluctant to invest in several member states at the same time because each member state has tried to fight against the pandemic with very different and constantly changing restrictions. An unpredictable und unmanageable environment for investors has been created. Many SMEs do not have a claim for compensation.[1024] That is why the introduction of government-backed aid programmes became essential to minimise the risks of insolvency.

In May 2020 the Commission published a new proposal[1025] for a regulation establishing a Recovery and Resilience Facility. According to this proposal, SMEs will receive liquidity and solvency support. It is hereby referred to Article 175 (third paragraph) as a legal basis. The Commission stresses "that the funding of the proposed activities through the envisaged regulation respects the principles of European added value and subsidiarity. Funding from the Union budget concentrates on activities whose objectives cannot be sufficiently achieved by the Member States alone ("necessity text"), and where the Union can bring additional value compared to action of Member States alone."[1026]

On the one hand, the offered funding possibilities are very important and a positive signal to tackle the current funding problems.

On the other hand, it must be evaluated critically that the Commission points out that the support is provided on a voluntary basis. This argument is used by the Commission to justify the initiative and is used as the main reason why the action is in accordance with the subsidiarity principle and the proportionality principle. However, this argumentation blanks out that the member states and the SMEs strongly depend on the

[1024] See Kment: Düstere Aussichten: Keine Entschädigung für die wirtschaftlichen Folgen der Corona-Krise, NVwZ 2020, 687-688.
[1025] Proposal for regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility; COM (2020) 408 final.
[1026] Ibid, (second section: legal basis, subsidiarity and proportionality).

funding and that is why there is no real voluntary basis. The member states are de facto forced to request that essential support. It must be also admitted that providing fresh money for the economic cycle in forms of new loans can lead to increasing inflation rates and further future risks for SMEs.

Unfortunately, only the European Investment Bank and the European Central Bank are explicitly considered within the mentioned proposal, whereas the venture capital sector has not been regarded in this context. However, this sector has become more and more important for SMEs in the last years. The total fundraising reached of European venture capital funds reached a ten-year peak of €11.4 billion in 2018.[1027] By the year 2022, the Commission is due to have allocated more than €3.3 billion to venture capital funds since the year 2014.[1028] The Commission has developed the 2014-2020 Multinational Financial Framework to widen the access possibilities of SMEs to venture capital. This included programs such as "The Single EU Equity Financial Instrument", "The European Fund for Strategic Investment", "VentureEU" and the "European Scale-up Action for Risk capital". Together with the "COSME programme for the competitiveness of SMEs" and the "Loan Guarantee Facility" in can expected that an appropriate access to finance for SMEs will be ensured in the next years through the support of the banking and of the venture capital sector.

The crisis of the year 2020 did not only have negative effects on the SMEs but is also a new challenge for the digitalisation of the internal market. This makes it necessary to focus on the market levers of the Single Market Acts I and II which primarily handle the digitalisation. The lever 7 of the Single Market Act I which was realised by a regulation[1029] deals with the digital single market. Lever 21 constitutes a further digital single market lever and refers to the Directive 2014/61/EU of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed

[1027] Special Report 2019 (European Court of Auditors): Centrally managed EU interventions for venture capital: in need of more direction, p. 10.
[1028] Ibid.
[1029] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

electronic communications networks. The contents of these two levers primarily deal with the electronic identification and the speed of communication networks.

This already demonstrates that many problems of the digitalisation have not been considered by these two digital single market levers. The other levers also partly deal with the digital development such as e-invoicing in public procurement according to lever 22. The relevant Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement is also an important step to realise the digitalisation. However, many important issues of the digitalisation and many current legal problems which will be presented in this paper below within this section have not become subject to the Single Market Act I and II.

Lever 7 deals with the electronic identification and trust services. However, it only defined the problems of digitalisation but has not been able to solve it so far entirely. Accordingly, a lack of trust respectively of legal certainty makes consumers, businesses and public authorities hesitate to carry out transactions electronically and to adopt new services. The removal of the mentioned lack of trust is the adjusting screw for new economic growth dimensions. This became clear in the above economic analysis of lever 7.

In general, a legal framework for the electronic identification and trust services is an appropriate tool to tackle the shortcomings and motivate the EU citizens to use the internet in a more unconcerned and legally secure way. This approach can help to minimise the deficits. The fragmentation of the digital market, the lack of interoperability and the rise in cybercrime were identified as major obstacles to the virtuous cycle of the digital economy.[1030]

It can be regarded as an effective tool that lever 7 provides for "the liability of the notifying member state, the party issuing the electronic

[1030] See paragraph 4 of the Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

identification means and the party operating the authentication procedure for failure to comply with the relevant obligation under this regulation."[1031] Strict liability rules have a deterring effect on potential infringers. However, this positive effect is very limited because the Commission states that the regulation is applied according to national rules on liability. "Therefore, it does not affect those national rules on, for example, definition of damages or relevant applicable procedural rules, including the burden of proof."[1032] The establishment of such a limited liability regime causes many legal uncertainties and legal risks.

The measures of lever 7 are legally based on Article 114 TFEU. This norm is the appropriate legal base due to the direct internal market relevance and the lack of a more specific provision. The other digital single market lever (lever 21) is also based on Article 114 TFEU. Consequently, Article 114 TFEU is the key provision to regulate the digital market in Europe.

The problematic issue is not the used legal tool but the used legal wording. A regulation is usually a better way to regulate the mentioned fragmentation compared to a directive due to the binding effect for the member states and therefore the correct tool but a closer look on the unprecise wording of the regulation in the context of lever 7 reveals that the Union did not really make use of this potential advantage. The degree of harmonisation which is used by the Union can be considered as very low due the used form of mutual recognition. Member states remain "free, in accordance with Union law, to recognise electronic identification means having lower identity assurance levels."[1033]

In addition, the Union legislator could have also embedded the content of the regulation in modern binding data protection provisions. Instead, within the regulation of lever 7 (paragraph 11) it is only pointed out that it should be applied in full compliance with the principles relating to the protection of personal data provided for in Directive 95/46/EC. This directive can be classified as antiquated and out-of-date. The possibility of secure electronic identification and authentication could have been clarified

[1031] Regulation (EU) No 910/2014, (18). Also see Article 11 of this regulation.
[1032] Ibid.
[1033] Regulation (EU) No 910/2014, (15). Also see Article 8 of this regulation.

within a reform of Directive 95/46/EC. The content of lever 7 with the reference to Directive 95/46/EC contributes to a legal fragmentation in the field of data protection and therefore a legal fragmentation of a secure electronic identification is a compelling consequence.

Besides, the fact that lever 7 refers to a directive which allows the member states scope for an individual legal structure instead of a binding regulation provides a further lack of legal certainty and does not lead to a needed unification.

The Union legislator leaves too much scope for the member states. This is clarified in the regulation of lever 7 which points out that the member states should remain free to use or to introduce means for the purposes of electronic identification for accessing online services and they should also be able to decide whether the private sector in the provision of those means is involved. Without any incentives the involvement of the private sector on a completely voluntary bases cannot be expected.

Furthermore, paragraph 13 of the regulation expresses that the member states should not be obliged to notify their electronic identification schemes to the Commission and also the choice to notify the Commission of all, some or none of the electronic identification schemes used at national level to access at least public online services or specific services should be up to the member states. This formulation makes clear again that the Union legislator refers to the principle of mutual recognition. This approach can be classified as not effective to solve the fragmentation of the digital market. Instead, a further fragmentation is caused.

Nevertheless, the regulation also contains very good legal approaches. To give one example, predominantly clear and objective criteria are determined in Article 8 regarding the specification of low, substantial and high assurance levels of electronic identification schemes. At the same time, however, technical details of the referred standards are still not clarified.

Within paragraph 19 of the regulation of lever 7 one of the possibly arising problems is identified. Accordingly, it could happen that electronic

identification schemes require specific hardware or software to be used by the relevant parties at national level; in this case cross-border interoperability calls for those member states not to impose such requirements and related costs on relying parties established outside of their territory. Unfortunately, the regulation does not provide a concrete solution in this case. Within the regulation it is only suggested that "in that case appropriate solutions should be discussed and developed within the scope of the interoperability framework."[1034]

This opens the door for new conflicts between the member states and demonstrates the legal ineffectiveness of diverse electronic identification schemes. The aspect of electronic identification and trust services and electronic transactions depicts an important driving force of the internal market because in has a strong effect on the faith in the use of electronic services throughout the member states and therefore must be unified with no scope left for the member states. A full harmonisation is needed in this legal field to stop the fragmentation of the digital market.

Finally, the Union legislators have realised some of the mentioned shortcomings of lever 7[1035]. In June 2021 a new proposal[1036] for regulation was launched amending the "old regulation of lever 7". Within the explanatory memorandum of the new proposal the European Commission admits that lever 7 has not been able to address the new market demands. The inherent limitations to the public sector, the limited possibilities and the complexity for online private providers to connect to the system were identified as the shortcomings. The mentioned memorandum brought also to light the insufficient availability of notified eID solutions in all member states and its lack of flexibility to support a variety of use cases. One very important further point is that the lack of scope of application. "Identity solutions falling outside the scope of eIDAS, such as those offered by social

[1034] Paragraph 19 of the Regulation (EU) No 910/2014.
[1035] Regulation 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS).
[1036] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity; COM (2021) 281 final.

media providers and financial institutions, raise privacy and data protection concerns."[1037]

The new mentioned proposal is a completely modernised version and considers most of the mentioned deficits. It does not refer to Directive 95/46/EC anymore but to the current General Data Protection Regulation[1038]. The possible cases of security breaches have finally been considered appropriately within Article 10a and it can be expected that very soon all member states will have functioning homogenous eID schemes. "Since the entering into force of the eID part of the regulation in September 2018, only 14 member states have notified at least one eID scheme and as a result, only 59% of EU residents have access to trusted and secure eID schemes across borders."[1039]

The new proposal is also legally based on Article 114 TFEU. The explanations within the new proposal regarding the legal basis and the subsidiarity are not entirely convincing. The risk of an increased fragmentation and the estimation that national interventions would not be equally efficient and effective are used as the main arguments within the proposal to justify the use of Article 114 as a legal base and to assume the compatibility with the principle of subsidiarity. This is only partly convincing because the main problem for the member states is only apostrophised within the explanation of the proportionality. "The proposed Regulation will give rise to financial and administrative costs, which are to be borne by Member States as issuers of the European Digital Identity wallets, by trust services and online providers."[1040] A concrete assessment respectively comprehensive evaluation of both concrete costs and concrete

[1037] Ibid (explanatory memorandum, p. 1).
[1038] Regulation (EU) No 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/47/EC-
[1039] Description of the "context of the proposal" within the "explanatory memorandum" of the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity; COM (2021) 281 final.
[1040] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity; COM (2021) 281 final, p.5.

benefits should have been ideally provided within the proportionately explanations.

However, despite of this lack, many different opinions have been regarded before the proposal was finalised. To give an example, an open public consultation was launched on 24 July 2020, the Commission received 318 contributions and a survey of Member States representatives of the eIDAS Cooperation Network in July-August 2020 next to various dedicated workshops haven been considered.[1041] Finally, the new proposal can be regarded as a significant further development of lever 7.

It is difficult only to refer the digital market to the Single Market Acts I and II because the succession plans of the Unions are still ongoing. There are several new legal measures which complement or amend the market levers. However, most of the market levers such as lever 7 are still applicable because the new proposals are still in the transformation phase. To give an example, the author Kainer refers explicitly to the requirements of lever 7 in the context of the introduction of the Company Law package.[1042] This package contains two new proposals[1043] to modernise the use of digital tools and encourage cross-border-transactions and refers to a lever which is very soon not up to date anymore.

This deficit is described as "legislative differences as a result of the harmonisation intensity"[1044] by the author Bock. Often the community legislator only harmonises a scope of themes step by step and that is why barriers for the market freedoms remain because not all disturbing legal provisions are not harmonised at once.[1045] Finally, because of this fact the internal market is still far away from completion.

[1041] See ibid., p. 6.
[1042] Kainer, in: Hatje / Müller-Graff (2021), p. 296 (Rn. 114).
[1043] It is hereby referred to: a) Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1133 as regards the use of digital tools and processes in company law; COM (2018) 239 final.
b) Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions; COM (2018) 241 final.
[1044] Bock (2005), p. 217.
[1045] See ibid.

Notwithstanding, the possibility to establish and register a company online without any personal presence in the new framework of the Company Law Package demonstrates a strong commitment to digital tools which will help to encourage companies to increase the number of cross-border transactions. At the moment there is the possibility of cross-border transformations guaranteed by European Law due to case-law in the cases Cartesio, Vale und Polbud.[1046] In the new directive this case-law is codified. [1047] The ECJ stated in the Polbud case that member states may not impose mandatory liquidation on companies that wish to transfer their registered office to another member state and this transfer, when there is no change in the location of its real head office, falls within the scope of the freedom of establishment protected by EU law.[1048] As in the other areas of the internal market, the liberalisation process largely weighs on the shoulders of the European Court of Justice, whereas other institutions have barely fulfilled their regulatory tasks.[1049] There is increased doubt as to whether essential questions of the digital development can be answered by the ECJ alone in an efficient way and as to whether this form of negative integration is appropriate.

The new proposal for a directive[1050] in the year 2016 which addresses regulatory issues arising from the special characteristics of the electronic communications sector can be seen in the light of the "Digital Single Market strategy for Europe"[1051] and is a further tool to tackle the fast electronic development. The dynamics of the digital sector make it almost impossible for the Union to keep the legislative framework up to date. All these new legislative measures as an attempt to respond to the speed of the

[1046] Kainer, in: Hatje / Müller-Graff (2021), p. 297 (Rn. 118).
[1047] Ibid. It is hereby referred to Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions; COM (2018) 241 final.
[1048] Court of Justice of the European Union, Press release No 112/17, 25 October 2017 (Judgement in Case C-106/16 Polbud – Wykonawstwo sp. Z o.o.).
[1049] Kainer, in: Hatje / Müller-Graff (2021), p. 301 (Rn. 125).
[1050] Proposal for a Directive of the European Parliament and the Council establishing the European Electronic Communications Code (Recast), COM (2016) 590 final.
[1051] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, COM (2015) 192.

digitalisation partly overlap with each other and that is why the very large number of new regulations can be seen critically.

The author Wolfgang Kerber points out that "it is very difficult to develop legal rules and regulatory solutions for the protection of privacy in these highly innovative digital markets without overly impeding further innovation and endangering the many (so fat still unknown) future opportunities of the digital economy.[1052] "It can therefore be expected that numerous regulatory errors will also be made, both in regard to under- und overregulation."[1053]

In order to ensure that all contracts with digital elements are legally covered and to strike the right balance achieving a high level of consumer protection and promoting the competitiveness of enterprises the "EU Directive 2019/770"[1054] was introduced. Within the directive it is admitted that consumers are not always confident when buying cross border, in particular online, due to the uncertainty about their key contractual rights and the lack of a clear contractual framework for digital content and digital services.[1055] The Single Market Act I and II have so far not been able to provide the needed clarification about the precise definitions.

This lack is compensated by EU Directive 2019/770 which clearly outlines that "computer programmes, applications, video files, audio files, music files, digital games, e-books or other e-publications, and also digital services which allow the creation of, processing of, accessing or storage of data in digital form, including software-as-a-service, such as video and audio sharing and other file hosting. Word processing or games offered in the cloud computing environment and social media should be covered."[1056] "As there are numerous ways for digital content or digital services to be supplied, such as transmission on a tangible medium, downloading by consumers on their devices, web-streaming, allow access to storage

[1052] Kerber: Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection (GRUR Int. 2016, 639-646).
[1053] Ibid.
[1054] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.
[1055] See paragraph 5 of the Directive (EU) 2019/770.
[1056] Paragraph 19 of the Directive (EU) 2019/770.

capabilities of digital content or access of the use of social media, this Directive shall apply independently of the medium used for the transmission of, or for giving access to, the digital content or digital service.[1057]

The precise definition is of crucial importance. This became clear in the year 2019 in the deficient telecommunication legislation. The question arose whether "Gmail" must be classified as a traditional communication service as assumed by the BNetzA or as a service "Over-the-top".[1058] The BNetzA (Bundesnetzagentur) estimated that, to be a telecommunications service the service provided must, from the point of view of its technical functionality, have as its primary purpose the conveyance of signals.[1059]

Accordingly, Gmail fulfils that condition since the transmission of email between sender and recipient is possibly only by means of the conveyance of signals and the service provider does not have to convey the signals itself or at least exercise control over their conveyance by a third party and therefore it is decisive only that signals should actually be conveyed as a technical component of the service. The judicial estimate of the BNetzA turned out to be wrong.

In June 2019 the assessment[1060] of the European Court of Justice was that Article 2 (c) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as mentioned by Directive 2009/140/EC, must be interpreted as meaning that a web-based service which does not itself provide internet access, such as the Gmail service provided by Google LLC, does not consist wholly or mainly in the conveyance of signals on electronic communications networks and therefore does not constitute an electronic communications service within the meaning of this provision.

[1057] Ibid.

[1058] See Wilmes / Ceglecki: Google Gmail ist kein meldepflichtiger Kommunikationsdienst i. S. v. § 6 TKG (IR 2019, 235).

[1059] See also the following case descritption: Gerichtshof der Europäischen Union: Ein internatbasierter E-Mail-Dienst stellt keinen elektronischen Kommunikationsdienst dar-Google (GRUR Int. 2019, 940-941).

[1060] Case C-193/18 (Google LLC v Bundesrepublik Deutschland): Judgement of the Court (Fourth Chamber) of 13 June 2019.

This decision must expose the Union legislator to considerable criticism.[1061] The decision does not take into account the perspective of the consumers and does not account common good interests. For the consumers the type of signal transmission is not a decisive criterion. In practice, Google LLC de facto constitutes an electronic communication. The Union legislator gives rise to new unbalanced market powers, creates legal vacuums and strengthens "quasi-monopolistic"[1062] structures within the European internal market. The digital economy must be confronted with a stronger regulation.[1063] Data which is of interest to the competition must become a more relevant criterion.[1064]

Despite of all justified criticism of this decision a differentiated view is necessary to evaluate the "Google phenomenon". There is a controversial debate in literature how to evaluate the impact of the access to big data to competition law concerns.[1065]

The above-mentioned case serves as an appropriate example regarding the question how to deal with companies such as Google which constitute welfare benefits and risks at the same time. Google`s general search engine significantly enhances welfare and helps consumers to secure lower prices but at the same time it earns enormous sums from paid ads and refuses to deal by lowering the so-called rank of organic results.[1066]

The search engine of Google also qualifies as indispensable for many companies which do not lead markets because they cannot compete effectively when Google does not rank organic results according to the relevance.[1067] Through the mentioned ruling of the European Court of Justice Google has reached even more power and more influence. It appears

[1061] For another legal estimation without a critical note see: Wilmes / Ceglecki: Google Gmail ist kein meldepflichtiger Kommunikationsdienst i. S. v. § 6 TKG (IR 2019, 235).
[1062] For a detailed analysis of the extremely wide range of acitivities of Google see: Reinnarth, in: Reinnarth / Schuster / Möllendorf / Lutz (2018), p. 9.
[1063] See Bosch: Die Entwicklung des deutschen und europäischen Kartellrechts, NJW 2020, 1714 (1720).
[1064] See ibid.
[1065] For a detailed evaluation see Fast / Schnurr / Wohlfarth, in: Specht-Riemenschneider / Werry / Werry (2020), p. 763.
[1066] See Strader: Google, Monopolization, Refusing to Deal and the Duty to Promote Economic Activity (IIC 2019, 519-594).
[1067] See ibid.

to be that the Union is barely able to handle the constantly increasing high influence of the "data octopus".

The decision discloses that it is possible to circumvent fundamental legal regulations of the EU. The way of interpretation of the wording "electronic communications service" by of the European Court of Justice is not convincing. The European Court of Justice totally blanks out the perspective of the consumer. For the consumer it is not relevant at all in which technical way the conveyance of signals occurs. Moreover, the intention and purpose of the telecommunication services provisions is not taken sufficiently into account. Besides, for several competitors who are active in the area of electronic communication this decision results in questionable developments in the framework of competition law.[1068]

The classification of not being a telecom service under EU law means that certain surveillance obligations must not be fulfilled. The law enforcement agencies will not enjoy the needed support anymore. Moreover, the data of the consumers can more freely be used for commercial purposes. This reveals that the decision of the European Court of Justice has direct and indirect effects on consumer law, competition law and criminal law. This demonstrates that unprecise legal definitions within EU law can have far-reaching consequences.

Yet, these consequences are limited in time until the implementation of the follow-up provisions[1069] with a deadline for transposition through the member states in December 2020. Accordingly, the convergence of the telecommunications, media and information technology sectors means that all electronic communications networks and services should be covered to the extent possible by a single European electronic communications code established by means of a single directive.[1070] The Union legislator has seen

[1068] For a closer analysis of the relation between big data and competetion law see: Weck / Fetzar: Big Data und Wettbewerbsrecht – ein Konferenzbericht (NzKart 2019, 588-593).
[1069] Directive (EU) 2018/1972 of the European Parliament and oft he Council of 11 December 2018 establishing the European Electric Communications Code (Recast).
[1070] See paragraph 7 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electric Communications Code (Recast).

the need that the current legal split-up due to the five directives[1071] as the existing regulatory framework for electronic communications networks and services must be overcome.

The European Commission launched three strategic connectivity objectives for the year 2025.[1072] It is hereby referred to the need of a better internet connectivity for all citizens and businesses. Of course massive investments are needed to provide all urban areas as well as major roads and railways with uninterrupted 5G coverage. Yet, one must critically examine the lengthy period of time. The Commission indirectly admits that it would need nine years to ensure an ideal internet connectivity for all citizens and businesses. The question arises here why this aspect has not been considered already by the Single Market Acts I and II.

Besides, it must be questioned whether the period of nine years must be considered as unreasonably long having regard to the fast technical development in the digital sector. It is at least theoretically possible that 5G will be an outdated technique in the year 2025 already.[1073] Europe is still a long way from having completed the digital reform process.

It can be concluded that the Union legislator is not always fast enough but at least willing to realise harmonised and precise legal provisions to keep pace with the digital development.

The high importance of the digitalisation shows that modifications are needed in the future to avoid a further case such as the above-mentioned legal uncertainty regarding an "electronic communications service". New directives and regulations should allow no misinterpretation of legal provisions in the future anymore. The citizens and consumers of the Union should explicitly be at the centre of every new legislative initiative in the field of digitalisation. In case of any legal doubts, provisions should always

[1071] It is hereby referred to Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC and Directive 2002/58/EC.
[1072] See press release of the European Commission (14 September 2016): State of the Union 2016: Commission paves the way for more and better internet connectivity for all citizens and businesses.
[1073] For a more optimistic estimation with reference to „ambitious" goals see Scherer / Heinickel: Ein Kodex für den digitalen Binnenmarkt (Vorschlag der EU-Kommission für eine Reform des Rechts der elektronischen Kommunikation), MMR 2017, 71-77.

be interpreted for the benefit of the citizens and consumers of the Union rather than accept any form of paternalism caused by large companies from third countries.

The digitalisation offers many chances, but also noteworthy risks[1074] are involved. The ever-faster technical progress makes it necessary for the European legislator too react on time. Companies with the focus on the development of biometric systems such as facial recognition hope to sell their products to as many public authorities as possible. The member states are highly interested in these new products.

On the one hand, this can have positive effects on the security in sensitive public areas such as airports and railway stations. On the other hand, it is a threat to civil rights because an expansion of the use within all public areas is probable and this opens the doors to a total surveillance. Several member states currently have plans to introduce these new forms of monitoring mechanisms.

The European Commission must clarify the use explicitly beforehand and make it clear to the member states that certain monitoring methods go too far. It is a welcoming sign that a general ban of facial recognition was indicated by the European Commission recently. There is now demand for the introduction of binding standards through the Union to regulate the use of monitoring methods such as facial recognition. The current legal framework for the use of facial recognition is very confusing and that is why the legislator must become active.[1075]

Otherwise, the digitalisation can result in a danger to democracy. This danger has already been demonstrated by different forms of the misuse of micro-targeting methods before elections with a strong influence on voting behaviour[1076]. The dubious digital methods of targeting voters have to be warning for Europe to avoid such unfair practices with significant

[1074] For a closer analysis of the risks see: Heldt, Gesichtserkennung: Schlüssel oder Spitzel? Einsatz intelligenter Gesichtserfassungssysteme im öffentlichen Raum, MMR 2019, 285-289.
[1075] See Mysegades: Keine staatliche Gesichtserkennung ohne Spezial-Rechtsgrundlage, NVwZ, 852-856.
[1076] For a closer evaluation of this data scandal see Haberl / Volbers, in: Specht-Riemenschneider / Werry / Werry (2020), p. 827.

possible effects on the outcome of elections and the European democracy as a whole because "the election of political leaders is the key feature of democracy"[1077]. Due to the high relevance of the digital sector on common good interests and the mentioned economic weight the goal of a full harmonisation in the digital sector is of great importance.

The digital single market has received a new significance due the recent crisis in the year 2020. The digital single market levers are extremely incomplete and do not address important legal aspects of the current digital development, particularly in the health sector and in the area of fundamental rights of citizens. This is a shortcoming because the digitalisation in the health sector has experienced a boom since about ten years and the legislator has so far not been able to provide adequate reactions trough new suitable legal frameworks.[1078]

Data is the "key of new knowledge"[1079] and therefore it is needed that the legal framework constantly adapts to the technical progress. In this context also algorithm systems have to be evaluated critically. Algorithm systems are unable to take into consideration human qualities such as openness, empathy, feelings, warmth and compassion.[1080] Consequently, they cannot replace human communications and the personal exchange of information.

At this point also the question arises if there is an appropriate focus on the common good. „Working for the common good means constantly seeking, despite the deficient nature of its determination, despite the obstacles and the conflicts, this conjunction between the good of individuals and that of their community.[1081] „It means believing in the future value of the goods that make a political community into a human one."[1082]

[1077] Flessner, in: Ludwigs / Remien (2018), p. 56.
[1078] Blaeser / dos Santos Firnhaber: Tracking & Tracing: Fluch oder Segen der Digitalisierung des Gesundheitsmanagements? RDG 2020, 182-190.
[1079] Raue / von Ungern-Sternberg: Ethische und rechtliche Grundsätze der Datenverwendung, ZRP 2020, 49-52.
[1080] See ibid., 52.
[1081] Nebel, in: Nebel / Collaud (2018), p. 148.
[1082] Ibid.

If relevant data of today is based on data from the past, the continuation of prejudices and stereotypes can have a discriminative effect. To give an example, in some cases citizens have no chance on the job market because of the negative results within algorithm systems.[1083] For certain forms of algorithm systems a governmental certification procedure is needed due to the damage potential.[1084] This measure can be seen as a "sharp sword of an economic regulation"[1085] but in some cases it can be appropriate to protect essential constitutional values and human rights.

One must admit that the Union legislator has already reacted to some of the mentioned imbalances and new digital developments recently. One of the key questions in this context is how far we can allow artificial intelligence (AI) to improve the internal market and at the same time ensure ethical standards and fair rules. A legal framework on AI has so far not existed, although it already has a high impact on everyday life for many citizens. In April 2021 the Commission launched a very important proposal[1086] for a regulation laying down harmonised rules on artificial intelligence as core part of the EU digital single market strategy. The proposal follows a risk-based approach, differentiating between uses of artificial intelligence that create (i) an unacceptable risk, (ii) a high risk such as the real-time remote of biometric identification and (iii) a low or minimal risk.[1087] The proposal sets clear principles and demonstrates that some possible new digital methods such as the introduction of social scoring systems by governments is unacceptable and must be banned. The digitalisation is not unavoidable natural phenomenon, but a partly beneficial and partly very threatening technical progress which is accessible to human composition.[1088] That is why we actively need to regulate AI as fast as possible instead of remaining passive and be regulated by AI.

[1083] See Raue/von Ungern-Sternberg: Ethische und rechtliche Grundsätze der Datenverwendung, ZRP 2020, 51-52.
[1084] See ibid.
[1085] See ibid., 51.
[1086] Proposal for a regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts, COM (2021) 206 final.
[1087] See ibid, 5.2.2. (prohibited artificial intelligence practices).
[1088] Schliesky: Digitale Ethik und Recht, NJW 2019, 3696-3697.

Another important aspect of the digitalisation refers to the question if legal-tech-providers should be empowered to make available legal services. The current legal framework only allows legal-tech an unsystematic and incomprehensible field of activity. On the one hand, this modern form of legal services can result in a threat to the established professional advocacy.

On the other hand, legal-tech can allow a "democratisation of law"[1089] because it can offer a fast legal service for all citizens in an uncomplicated and cost saving way. The market for legal services needs a new legal framework to allow legal certainty for all parties involved. So far legal-tech is in principle considered to be permissible but the legal borders of legal-tech-activities still must be evaluated in the light of the circumstances of each individual case.[1090]

It can be expected that many lawyers will not be able to work efficiently without legal-tech-software in the near future.[1091] The practical barriers for the lawyers are not high because they only need a software license agreement in order to use the software which is already on the market.[1092] The significance of legal-tech has experienced a boost due to the crisis in the year 2020 and the already gained experiences in the area of digital processes and digital consulting has turned out to be a real competitive advantage compared to traditional law offices.

One further aspect of the digitalisation refers to the borders of the freedom of expression. The jurisdiction stands in front of the setting of a new agenda with an impact on the shape of the digital democracy in the next decades with the following relevant question: What freedoms do social networks have in the decision process of considering user contents as acceptable?[1093] In practice, the decision to delete an online contribution is very difficult because the range between a still legitimate opinion and a possible violation of personal rights can be very narrow. It is often a case-by-case decision with the need to consider all circumstances in each individual case.

[1089] Kilian: Von Airlines und Rechtsdienstleistern, ZRP 2020, 59.
[1090] Hellwig / Ewer: Keine Angst vor Legal Tech, NJW 2020, 1783.
[1091] See ibid.
[1092] See ibid., 1784.
[1093] Friehe: Löschen und Sperren in sozialen Netzwerken, NJW 2020, 1667-1702.

Violations of the right of personality in the internet have become the media`s focus more than ever before.[1094] Also here fundamental rights are concerned and it is the task of the legislator to clearly define the borders of the anonymity of the internet. It is not appropriate only to introduce new criminal law and governmental supervision measures while leaving out the need for a practicable civil law right to information in combating hatred in all online media.[1095]

The European Union has partly avoided responsibility on the many key issues of the digitalisation. This also becomes clear in the area of net neutrality. The hazardous situation lies in the fact that network service providers and network access providers are equally capable of exercising influence on the stream of internet data.[1096] In doing so, they are able to impede or prevent the accessibility of certain offers by the downshift or blockage of the data stream, and thereby, reduce their attractivity.[1097] The current net neutrality regulation in Europe is incomplete and in legal and technical terms incorrect.[1098] The European Union has delegated its rule-making authority to member state authorities without any substantial justification.[1099] This development poses a huge difficulty for the harmonisation of the internal market. Essential issues of the digitalisation must in the future be conclusively clarified on a Union level because net neutrality does only refer to a market perspective but also to the "factor of democratic participation"[1100].

To sum it up, the digitalisation involves almost all branches of law and it must be concluded that it is partly a failure of the Single Market Acts I and II that only to a very low extent the relevant questions of the current digitalisation have been considered. The used degree of harmonisation is too low in important areas and that is why the digital levers have so far not been functioning as noteworthy driving forces.

[1094] Bohlen: Der zivilrechtliche Auskunftsanspruch bei der Bekämpfung von Hass im Internet, NJW 2020, 1999-2004.
[1095] See ibid.
[1096] Korte, in: Leupold/Wiebe/Glossner (2021), Teil 8.4 Netzneutralität, Rn. 2.
[1097] Ibid.
[1098] Klement: Netzneutralität: der Europäische Verwaltungsverbund als Legislative, EuR 2017, 560- 561.
[1099] See ibid.
[1100] Osing (2017), 177.

However, one must admit that some current developments, in particular the speed of the digitalisation and the public health risks, have in this form not been predictable. Many effective immediate measures[1101] have also been introduced as fast as possible to handle the current challenges on a European level. The demand for more joint research was already identified and will lead to new forms of innovations.

On the whole this is not sufficient. The Union legislator has the task to rearrange and strategically realign the core of the structure of the European internal market by introducing new provisions which sufficiently take into account the mentioned deficits. The situation of the SMEs has to be further improved. The described structures of some quasi-monopolies must be restricted because it hampers the development of a fully functioning market economy. Furthermore, it must be ensured that a higher degree of harmonisation and a stronger focus on common good interests are realised within the internal market.

C. New demarcation problems and legal uncertainty as a result of the measures against the COVID-19 pandemic

As a result of the measures against the pandemic many competences and legal structures are shifted. Areas of law such as the infection protection law have suddenly gained a growing importance and allow governmental authorities to initiate significant interventions.[1102] The infection protection

[1101] See Decision (EU) 2020/547 of the European Parliament and of the Council of 17 April 2020 on the mobilisation of the Contingency Margin in 2020 to provide emergency assistance to Member States and further reinforce the Union Civil Protection Mechanism/rescEU in response to the COVID-19 outbreak; See also Regulation (EU) 2020/1043 of the European Parliament and of the Council of 15 July 2020 on the conduct of clinical trials with and supply of medicinal products for human use containing or consisting of genetically modified organisms intended to treat or prevent coronavirus disease (COVID-19).

[1102] See Mayen: Der verordnete Ausnahmezustand: Zur Verfassungsmäßigkeit der Befugnisse des Bundesministeriums für Gesundheit nach § 5 IfSG, NVwZ 2020, 828-834. For a critical evaluation of the encroachment on fundamental rights see Schmitz / Neubert: Praktische Konkordanz in der Covid-Krise: Vorübergehende Zulässigkeit schwerster Grundrechtseingriffe zum Schutz kollidierenden Verfassungsrechts am Beispiel von Covid-19-Schutzmaßnahmen, NVwZ 2020, 666-671.

law has put the entire administrative law in the state of crisis.[1103] It has also a high impact on municipal law, public construction law and procurement law.[1104] While data protection concerns, the awareness of the sensitivity of personal data and the meaning of fundamental rights of the citizens are put in the background, the obsessive collection of "health data" and information gains a new dimension.

The focus on regional so-called high-risk areas conveys the impression that the problems must be solved on a national or regional level only. In times of increasing international data and increasing European and international research collaborations it is not appropriate only to concentrate on regional risk areas. The pandemic is not a problem of few regions but the entire EU and practically all third countries are concerned.

In many areas of everyday life online registrations have become partly mandatory for citizens to be able to participate in some social life activities. Here new legal complexities become visible and new legal questions arise. Can the EU citizens be practically forced to install and use certain apps to be able to use products and services of everyday life despite of known considerable current security loopholes of several app providers?

This mentioned example demonstrates to some extent a partly alarming development and the need to legally regulate these cases in consideration of civil liberties. However, not only the personal life of citizens is confronted with new challenges. The financial and economic equilibrium is also shifted with large-scale displacements. On the one hand, the big internet pioneers such as Amazon have been able to earn high profits and reached a new market power as an effect of the pandemic. On the other hand, many SMEs struggle with negative economic consequences. This is very problematic because at the same time the banking sector has become less stable.

The introduction of corona-warning-apps based on the Pan-European Privacy-Preserving Proximity Tracing (PEPP-PT) has put data protectionists

[1103] See Siegel: Verwaltungsrecht im Krisenmodus, NVwZ 2020, 577.
[1104] See ibid.

on alert.[1105] In a substantial way the fundamental rights of the citizens have already been restricted by governmental measures in order to minimise the negative results of the COVID-19 pandemic.[1106] As a consequence, many citizens fear a systematic governmental Big-data-profiling.[1107]

This fear has to be taken seriously because due to all the mentioned corona-restrictions and the surveillance laws in the last decades we have already achieved a certain critical point with the tendency to a new dimension of possible encroachments of a totalitarian state into personal life and the loss of the most important freedoms of the European citizens. To give an example, the debate[1108] about the use of drones for the purpose of monitoring contact bans marks a new dimension of governmental control mechanisms.

So far no clear legal basis for the use of the corona-warning-app exists and is doubtful that many governmental bodies do not even see the need to be active by creating concrete legal provisions. If the governmental bodies created a specific legal bases for the introduction of the corona-warning-app, the acceptance of the service and the faith in the correctness of the process would increase across the population groups.[1109] More users of the app would probably also result in a better health protection.

In this context also problems in terms of employment rights arise. It is barely possible to draw the exact line between the private interests and the professional interests of the employees. Of course, the employers cannot directly instruct the employees to install the corona-warning-app on the private smartphone and cannot expect the constant use.[1110] However, it is realistic that some employers will try to make available company

[1105] See ibid., 183-190. With the reference to the so far voluntary nature it is predominantly argued the current practices are compliant with the data protection provisions: See Kühling / Schildbach: Corona-Apps – Daten- und Grundrechtsschutz in Krisenzeiten, NJW 2020, 1545-1550.
[1106] See Schaefer: Pandemieschutz im Luftverkehr: Von der Kreissäge zum Skalpell, NVwZ 834-339.
[1107] Blaeser / dos Santos Firnhaber: Tracking & Tracing: Fluch oder Segen der Digitalisierung des Gesundheitsmanagements? RDG 2020, 184-190.
[1108] See Knell: Der Einsatz von Drohnen zur Überwachung des Kontaktverbots in Zeiten der Corona-Pandemie, NVwZ, 688-689.
[1109] See Köllmann: Die Corona-Warn-App, Schnittstellen zwischen Datenschutz- und Arbeitsrecht, NZA 2020, 833-836.
[1110] See ibid., 835-836.

smartphones for employees where certain apps are already installed and then argue that the employees have given a consent by using them. Here many constellations are possible where the legal framework is not clear.

The General Data Protection Regulation protects the personal data of data subjects and can be regarded as "one of the great achievements of European legislation"[1111]. However, is partly only worded in quite general terms and also allows exceptions for certain circumstances which are legally not always precise enough. It can, for example, allow the use of the collected data for research purposes based on the voluntary principle.[1112] Art. 9 para. 2 lat. A GDPR permits data processing on the basis of the consent of the data subject and it must be considered that – in contrast to Art. 6 para. 1 sentence 1 lit. a GDPR – an implied consent is not sufficient.[1113] In practice, the providers of apps and gadgets often do not make a contribution to transparency, clear information and openness.

Also the market for tracking and tracing applications with so called gadgets and wearables has experienced a boom since the year 2014 with small chips and computers directly on the body, in particular smart watches and smart glasses, or integrated into clothing.[1114]

On the one hand, new forms of pulse rate measurements can save lives and improve the health situation of the users. On the other hand, the medical digitalisation can also have a critical influence on labour law and social law issues because the daily work of employees is increasingly confronted with the introduction of workplace health promotions by employers. It is often forgotten that the risks of liability claims in the event of data errors can be severe in the healthcare sector.[1115]

[1111] Raue/von Ungern-Sternberg: Ethische und rechtliche Grundsätze der Datenverwendung, ZRP 2020, 50-52.
[1112] Blaeser / dos Santos Firnhaber: Tracking & Tracing: Fluch oder Segen der Digitalisierung des Gesundheitsmanagements? (RDG 2020, 185-190).
[1113] Lachenmann / Berthold: Data Protection vs. Corona Virus – Legal Bases and Permissible measures, ZD-Aktuell 2020, 07053.
[1114] See Blaeser / dos Santos Firnhaber: Tracking & Tracing: Fluch oder Segen der Digitalisierung des Gesundheitsmanagements? (RDG 2020, 186-190).
[1115] For a closer evaluation see Eimer, in: Specht-Riemenschneider / Werry / Werry (2020), p. 846.

Not only the privacy of private users and consumers are concerned but also the one of employees which are engaged in "an intensive search for work-life-balances" due to many rapid changes of everyday life[1116]. Private life and professional life are increasingly mixed up as a result of the digitalisation and the increased number of home office employees.

Here the question arises if the GDPR alone can regulate all matters. The current General Data Protection Regulation (GDPR) allows employers and public authorities a wide scope of measures. Recital 46 states that the processing of data may be lawful if it serves humanitarian purposes, including for monitoring of epidemics and their spread or in situations of humanitarian emergencies and therefore the GDPR provides the legal grounds to enable the employers and the competent public health authorities to process personal data in the context of epidemics, without the need to obtain the consent of the data subject.[1117]

The GDPR provides legal principles, but the processing always requires national law to allow such measures and therefore it is possible that, despite the General Data Protection Regulation, the processing is handled differently in the EU countries.[1118] This demonstrates that the GDPR is not suitable to regulate details about corona-app-functions in every member state and that is why a concrete new legal provisions have to be established to regulate the corona-warning-apps and the new digital tools in a comprehensive way.

[1116] Reinnarth, in: Reinnarth / Schuster / Möllendorf / Lutz (2018), p. 33.
[1117] See Lachenmann / Berthold: Data Protection vs. Corona Virus – Legal Bases and Permissible measures, ZD-Aktuell 2020, 07053.
[1118] See ibid.

Chapter 6: Synopsis and level of development

A. Summary of the analysis of the 24 market levers

After the analysis the question arises if the Single Market I and II can be seen as successful reforms as a whole. At this point it must be stressed that it became visible that the measures are part of the 2020 Strategy with the focus on sustainable growth without being "a flash in the pan". It remains to be seen how the economy in Europe will further develop after the COVID-19 pandemic. The final repercussions of the pandemic cannot yet be predicted and must be subject matter of future research.

That is why it is justified to evaluate, in summary, the market levers until the starting-date of the pandemic predominantly. At least first indicators can be found that the economic crisis in the Euro area is preliminary over at the beginning of the year 2020 and the Single Market Acts I and II considerably contributed to this positive trend.

An OECD survey from April 2014 stresses that "the euro area economies, including those most heavily hit by the crisis, appear to be turning the corner after many years of low and uneven growth; confidence has improved and progress been made in reducing fiscal and current account imbalances and improving competitiveness in many vulnerable countries."[1119]

The legal and economic evaluation of the market levers confirm the positive assessment of the OECD. The evaluation reveals that most of the levers lead to economic growth in the EU. Some already implemented measures of the Single Market Act I have without a doubt already resulted in economic growth in the area of the European internal market while others such as the realisation of the set-up of fully integrated networks within the Single Market Act II will need to be analysed after the implementation. Also

[1119] OECD, Economic Surveys (2014): Euro area, April, p. 2, <http://www.oecd.org/eco/surveys/Euro-Overview-2014.pdf> accessed 31 May 2014.

at this point a clear distinction is needed. The degree of economic efficiency and effectiveness differs from lever to lever.

The promotion of SMEs can only be partially viewed as a successful undertaking. The measures for a better access to finance for SMEs as a main objective of the Single Market Acts I and II has borne fruits with a positive development since the year 2015. In this area the analysis was able to shed light on the fragility of the European venture capital market. Here the discrepancy between the innovative northern and the economically weakened southern EU member states came to light. Although the EU Commission stresses a positive economic trend for Greece[1120] and Spain[1121] since 2014 there is a danger that the economic discrepancy between these states and the northern EU states will further extend. Particular measures addressing the specific needs of the southern member states regrettably did not become part of the 24 market levers.

At least one must admit that many cross-border barriers were tackled by the new provisions and the expectation is given that the access to finance for SMEs will significantly improve in all EU member states when one looks at it from a long-term perspective. As a further aspect, a better business environment for the SMEs was able to be determined. This does not only concern rules referring to the annual financial statements with a lower level of bureaucracy for SMEs. Especially, it can be expected that the changes of the procurement rules and the new "MiFID II"[1122] provisions which are tailored for SMEs will open new markets for SMEs and offer them new areas to flourish.

The analysis of the levers which deal with consumer protection are only to a limited degree welcoming signs to encourage the consumers to take part in cross-border e-commerce transactions. Stricter liability rules and

[1120] See European Commission: Greece - Recovery signs strengthening, <http://ec.europa.eu/economy_finance/eu/countries/greece_en.htm> accessed 17 June 2014.

[1121] See European Commission: Spain - Job creation returns as the recovery firms, <http://ec.europa.eu/economy_finance/eu/forecasts/2014_spring/es_en.pdf > accessed 17 June 2014.

[1122] European Commission: Press release database: More transparent and safer financial markets: European Commission welcomes European Parliament vote on updated rules for Markets in Financial Instruments (MiFID II), Brussels 15 April 2014, <http://europa.eu/rapid/press-release_MEMO-14-305_de.htm> accessed 31 June 2014.

better dispute resolutions strengthen the rights of consumers and surely allow consumers to have a more positive view about e-commerce to a certain degree.

Yet, the main concerns of the consumers were mostly ignored by the reforms. On the one hand, many consumers want to see things personally in the shop before they buy them and therefore avoid buying things via the internet. On the other hand, the legal analysis of the digital single market levers brought to light that many European consumers are very concerned about data protection.

Regrettably, data protection was practically blanked out by the key levers of the Single Market Acts I and II. It is therefore doubtful that the announced economic growth can be reached by the consumer protection levers as the increasing number of data scandals has caused a reluctance to online purchasing. Instead of putting the needs of the consumers on the very top, the key levers more likely serve as foundations for a fair competitive environment for the service providers. At least one must admit that it is a welcoming signal that the Directive on security of network and information systems (the NIS Directive[1123])" as the first piece of EU-wide legislation on cybersecurity"[1124] was adopted by the European Parliament in July 2016.

However, the member states will have 21 months to transpose the NIS Directive into national laws and six months more to identify operators of essential services.[1125] Due to the long implementation process cybersecurity remains one of the biggest challenges in the process of creating a safe and reliable digital single market.

[1123] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1148&from=EN> accessed 30 July 2017.

[1124] See also the statements of the European Commission: <https://ec.europa.eu/digital-single-market/en/network-and-information-security-nis-directive> accessed 30 July 2017.

[1125] Ibid.

To give an example, the proposal[1126] for a directive on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features appears to have more likely a symbolic effect to underline the social aspect of the reforms. It could lead to more costs for companies which have to fulfil all the requirements without benefitting from any noteworthy economic growth potential.

The analysis on the consumer protection lever also brought the significance of data protection into the focus. Particularly, in the comparative examination of the data protection standard between the US American approach and European approach a huge gap was determined. It was possible to outline that this gap can primary attributed to historical events. In this area of law the fundamental differences between the US American free market approach and the European social market economy level became visible. Despite of a modernised European consumer model based on an empowered and educated consumer, the European "more economic approach" and the smaller gap towards the US American free market approach there is still a significant discrepancy.

The examination of the set-up of fully integrated networks turned out to be of a very high importance to realise the four market freedoms. The legal analysis shed light on the huge deficits in the European rail, maritime, air transport and energy sector. Finally, the economic analysis revealed that hundreds of thousands new jobs and also savings for companies and consumers in the area can be caused by the set-up of fully integrated networks. This estimation is confirmed by one of the last reports of the Commission which points out that networks are one of the key areas where the growth potential is the biggest.[1127]

[1126] Proposal for a directive of the European Parliament and of the Council on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, COM (2013) 266 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0266:FIN:EN:PDF> accessed 31 January 2014.

[1127] See also Report from the Commission to the European Parliament, the Council, The European Central Bank, the European Economic and Social Committee, the Committee of Regions and the European Investment Bank: A single Market for growth and jobs: An analysis of progress made and remaining obstacles in the member states, Contribution to

The free movement of services as a further area of the examination demonstrated that the economic growth numbers of the EU often turn out to be too optimistic. This became clear within the economic analysis of the regulation[1128] on intellectual property rights where the Commission took into consideration an unrealistic assessment base in regard to the possible cost savings for companies applying for patents.

Nonetheless, the EU unitary patent rules and also the standardisation rules will help to create common rules. This leads to savings for the companies and finally more legal certainty and new cross-border investments. Within the taxation lever it was shown that the introduction of a Common Consolidated Corporate Tax Base (CCCTB)[1129] can generate significant growth rates.

Finally, it was found that the free movement of people will barely be improved through the market levers. It turned out that most of the EU citizens are just not willing to live and work in another country. New agency rules will primary only help those to find a job who are already willing to live and work abroad. Yet, the Commission is not able to tackle hurdles such as family considerations and the language barrier.

To sum it up, the overall analysis has shown that positive effects clearly outweigh the risks and deficits. Regrettably, the defined targets of the 24 market levers often remain vague and predominantly focus on the year 2020. Regarding the success of the Single Market Acts I and II the Commission recently drew an overall positive balance in a report called "Five years of laying the foundations of new growth in Europe"[1130].

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the Annual Growth Survey 2014, 2, COM (2013) 785 final, <http://ec.europa.eu/europe2020/pdf/2014/smr2014_en.pdf> accessed 31 May 2014.

[1128] Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:361:0001:0008:EN:PDF> accessed 31 January 2014.

[1129] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0121&from=EN> accessed 30 April 2014.

[1130] European Commission: Internal Market and Financial Services - Five years of laying the foundations of new growth in Europe, 2010 – 2014,

Accordingly, the report mentions general achievements but does not reveal any concrete numbers, not to mention any reference to GDP. It more likely appears to be a summary of the key levers of the Single Market Acts I and II. Self-criticism is only mentioned peripherally.

In the preface of this report the European Commissioner responsible for internal market and services Michel Barnier had to admit that "successive crises have left their mark: 26 million Europeans are unemployed, including 50 % of young people in many countries and many SMEs still struggle to get the financing they need in order to grow and create jobs."[1131]

This assessment confirms the results of the economic analysis of the 24 key levers but it leaves out the success in the field of access to finance for SMEs since the year 2015. The efforts of the Commission to fight against poverty have not been paying off yet. Regrettably, the above report does not mention the data protection deficit which is also a serious concern of European citizens. Hence, the most significant failures of the Single Market Acts I and II can according to the legal and economic analysis be considered in the areas of social welfare and consumer protection.

At the same time, one must admit that this paper can only offer an evaluation of the 24 market levers to a limited degree based on the present stage and can therefore only reveal short-term and medium-term effects. It is therefore particularly important to outline a tendency on the future prospects which becomes subject to the next chapter of this paper.

B. The economic policy at EU and member states levels

The competition policy of the European Union has a little bit been outlooked in the public awareness and also in the political practice in the last years.[1132] The recent special treatment of certain aids with a high growth

<http://ec.europa.eu/internal_market/publications/docs/legacy/legacy_en.pdf> accessed 18 September 2014.

[1131] Ibid, p. 7.

[1132] Klodt, in: Weidenfeld / Wessels (2016), p. 313.

potential without the usual control proceedings has to be seen critically as it does correspond to the legal framework.[1133]

Article 101 et seq. and Article 107 et seq. are the central provisions of primary legislation in the framework of the European competition policy but due to interstate clauses and cases without a cross-border element the national competition authorities often play an important role.[1134] However, there are different European approaches beyond primary law to influence the economic policy of each member state and to realise an innovative competition-based European wide strategy.

The most problematic recent problems regarding the competition policy refer to the digital sector. In April 2016 the Commission announced that the abuse of a dominant position has to be considered due to the special contracts with companies in the context of the operating system Android which is installed on 80% of all mobile phones worldwide.[1135] In June 2016 the Commission initiated legal proceedings against Amazon due to a possible abuse of a dominant position by using restrictive contract clauses in the e-book sector.[1136] These cases demonstrate the technical leadership of the USA and also the fact that a harmonised digital single market in the EU can only be reached with more global agreements in a global and not only European market.

The Europe 2020 strategy is sometimes considered as the "beginning of European economic governance with sharp interventionist traits in terms of industrial policy interests".[1137] It is argued that areas such employment policy, R&D, educational policy and the poverty policy shall be solved on national level rather than on European level. Yet, it must be stressed that the national sovereignty is not threatened and Article 121 TFEU allows the EU to coordinate economic policies. It is important to set a framework in these areas for the realisation of an effective harmonisation of the single market

[1133] Ibid, p. 314.
[1134] Doerfert (2012), p. 145.
[1135] Klodt, in: Weidenfeld / Wessels (2016), p. 315.
[1136] Ibid.
[1137] Center for European Policy (CEP): Strategy 2020, <http://www.cep.eu/en/analyses-of-eu-policy/further-subjects/the-european-distrategy-europe-2020/> accessed 15 June 2014.

by creating a monitoring progress for the self-reflection of the member states. The European Commission stresses that the political nature of the targets of the Europe 2020 Strategy reflects the primary role that national governments are expected to play in the strategy, in line with the principle of subsidiarity.[1138]

The above analysis of the Single Market Acts I and II must be seen in the light of the efforts and the reforms by the member states. The willingness of the member states to enforce a growth-enhancing economic policy and to work together with the European Commission can contribute to the success of the 24 analysed levers. A better economic and budgetary coordination between the EU and its member states is a key for a successful economic governance. Hereby the European Semester plays a significant role because it prepares the so-called National Semester where the policies are finally implemented.

The main steps of the European Semester can be described as follows: a cycle is launched every year by the Commission's Annual Growth Survey, which sets out the priorities for the EU; this leads to discussions of the member states in the run-up to the Spring European Council and into the preparation of their national reform programmes and stability or convergence programmes.[1139]

The Commission then undertakes non-binding approaches such as recommendations instead of legislative proposals in order to offer the member states guidelines for the national policy. On the one hand, that becomes visible in the field of taxation. The Commission regularly publishes[1140] a statistical and an economic analysis of the tax systems of the member states to discover taxation trends in recent years.

[1138] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth, COM (2014) 130 final, p. 15, <http://ec.europa.eu/europe2020/pdf/europe2020stocktaking_en.pdf> accessed 15 July 2014.

[1139] Ibid., 18.

[1140] See Taxation trends in the European Union: Data for the EU Member States, Iceland and Norway, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2014/report.pdf> accessed 17 June 2014.

On the other hand, the recommendations also refer to the growth policy. As every year, in June 2014 the European Commission published the so-called country-specific recommendations (CSRs).[1141] The prior Commission's Annual Growth Survey[1142] and the medium-term budgetary plans and economic reform programmes are the bases for the country-specific-recommendations. This kind of economic governance serves as a tool to ensure transparency and to deepen the partnership between the European Commission and member states.

The recommendations are tailored proposals for member states for more economic growth and more jobs. The recommendations reveal what achievements can be expected in the next 12 to 18 months to realise ideal economic growth rates. Such outlook should help to observe current deficits and finally to achieve the goals of the Europe 2020 Strategy.

The Commission admits that "the crisis has left Europe divided from an economic and social point of view."[1143] The unemployment rate in countries like Germany and Austria on the one hand and in Spain and Greece on the other hand underline this division. Also the number of people facing severe material deprivation rose significantly (by around 7 million).[1144] To sum it up, in general the country-specific-recommendations reveal that not enough is being done by the most member states to reduce the high tax wedge on labour and according to most recommendations limited progress has been made in reforming product market and services

[1141] For the recommendations see: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: 2014 European Semester: Country-specific recommendations, Building Growth, Com (2014) 400 final, <http://ec.europa.eu/europe2020/pdf/csr2014/eccom2014_en.pdf> accessed 31 May 2014.

[1142] See also Report from the Commission to the European Parliament, the Council, The European Central Bank, the European Economic and Social Committee, the Committee of Regions and the European Investment Bank: A single Market for growth and jobs: An analysis of progress made and remaining obstacles in the member states, Contribution to the Annual Growth Survey 2014, COM (2013) 785 final, <http://ec.europa.eu/europe2020/pdf/2014/smr2014_en.pdf> accessed 31 May 2014.

[1143] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: 2014 European Semester: Country-specific recommendations, Building Growth, Com (2014) 400 final, p. 3, <http://ec.europa.eu/europe2020/pdf/csr2014/eccom2014_en.pdf> accessed 31 May 2014.

[1144] Ibid., p. 4.

market as well as on measures to improve the business environment and the framework conditions for R&D and innovation.[1145]

Besides, the recommendations underline that more also needs to be done to improve the competition framework and the functioning of network industries, including through further upgrading of infrastructure and opening and integration of markets and there is still much scope to improve the coverage and performance of education and welfare systems, as well as to improve the functioning of public administration, which would free budgetary space for growth-enhancing expenditure.[1146]

In November 2013 the Alert Mechanism Report 2014[1147] was launched. It has the task to identify hurdles that hinder the smooth functioning of the EU economies. Also there the social situation in the EU is seen critically. It is stressed that Germany is the only EU member state where the unemployment rate was lower in 2012 than in 2008. Besides, the household saving rate in Germany is among the highest in the euro area.[1148] Also Germany has the second-lowest share of private sector (firms and households) debt in GDP in the euro area and favourable interest rate conditions.[1149]

In contrast to the positive development in Germany, the Commission reveals the crisis in Spain and stresses that despite the on-going rebalancing efforts in the Spanish economy, the magnitude of the necessary adjustment and additional vulnerabilities related to soaring unemployment and growing general government sector debt represent a substantial challenge going ahead, requiring continued policy action.[1150]

Notably, despite of the negative assessment the Commission honours the Spanish efforts as Spain has adopted reforms on pensions, healthcare, independent fiscal institution, public administration, financial sector, non-

[1145] Ibid., p. 7.
[1146] Ibid.
[1147] Report from the Commission to the European Parliament, the Council, the European Central Bank and the European Economic and Social Committee: Alert Mechanism Report 2014, COM (2013) 790 final, <http://ec.europa.eu/europe2020/pdf/2014/amr2014_en.pdf> accessed 31 May 2014.
[1148] Ibid., 14.
[1149] Ibid.
[1150] Ibid., 15.

bank financial intermediation, labour market, corporate insolvency, internal market, liberalisation of the housing rental market, and to tackle the electricity tariff deficit.[1151] At the same time, the Commission asks for further actions. The country-specific recommendations from the Commission to Spain reveal the following fields: public finances, financial sector, labour market, education and training, social inclusion, product and services markets, network industries and the efficiency of the public administration.

Yet, certain national reforms can not only achieve a progress but even become a risk in countries with a recovered economy such as Germany. The recent pension reform which is aimed at improving pensions and early retirement conditions for long-term insured people who can retire early at the age of 63, puts an additional strain on the sustainability of the pension system and results in increased pension contributions and thus potentially to a higher tax wedge for the active labour force, including low-wage earners.[1152]

The recent German pension reform represents the counterpart to the white paper called "An Agenda for Adequate, Safe and Sustainable Pensions"[1153] which is a complementary action of the second key lever of the Single Market Act I. Such development demonstrates a national solo run ignoring the efforts of the European Commission. At this point the Commission should increase the political pressure and clearly outline the risks of early retirement for the functioning of the overall pension system.

[1151] Commission staff working document: Assessment of the 2014 national reform programme and stability programme for Spain, accompanying the document Recommendation for a Council Recommendation on Spain's 2014 national reform programme and delivering a Council opinion on Spain's 2014 stability programme, SWD (2014) 410 final, p. 39, <http://ec.europa.eu/europe2020/pdf/csr2014/swd2014_spain_en.pdf> accessed 31 May 214.

[1152] Commission staff working document: Assessment of the 2014 national reform programme and stability programme for Germany, accompanying the document Recommendation for a Council Recommendation on Germany's 2014 national reform programme and delivering a Council opinion on Germany's 2014 stability programme, SWD (2014) 406 final, p. 3, <http://ec.europa.eu/europe2020/pdf/csr2014/swd2014_germany_en.pdf> accessed 31 May 2014.

[1153] An Agenda for Adequate, Safe and Sustainable Pensions, COM (2012) 55 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0055:FIN:EN:PDF> accessed 31 January 2014.

Also the Commission criticised that no progress in improving the efficiency of the tax system has been made in Germany.[1154] The country-specific recommendations 2014 from the Commission to Germany in order to help it improve its economic performance contain the following areas: public finances, labour market, energy and the competition in the services sector.

Compared to Spain this indicates that public finances and the labour market are key areas where the Commission expects more reform efforts from almost all member states. The country-specific recommendations of the Commission are appropriate as a means of exerting political pressure on the national member states.

It is necessary that the Commission keeps on monitoring the national reforms in every member state in order to outline ongoing discrepancies and to ensure that an ideal economic growth can be realised in every EU member state.

Chapter 7: Outlook and thesis results

A. Current trends, future prospects and recommendations

According to an announcement of the OECD[1155] in May 2014 it had been predicted that the euro area could expect a return of positive growth after three years of contraction: 1.2% in 2014 and 1.7% in 2015. This outlook turned out to be a slightly too optimistic for 2014. However, at least

[1154] Commission staff working document: Assessment of the 2014 national reform programme and stability programme for Germany, accompanying the document Recommendation for a Council Recommendation on Germany's 2014 national reform programme and delivering a Council opinion on Germany's 2014 stability programme, SWD (2014) 406 final, p. 3, <http://ec.europa.eu/europe2020/pdf/csr2014/swd2014_germany_en.pdf> accessed 31 May 2014.

[1155] OECD Newsroom: Global economy strengthening but significant risks remain, says OECD in latest Economic Outlook, 6 May 2014, <http://www.oecd.org/newsroom/global-economy-strengthening-but-significant-risks-remain.htm> accessed 31 May 2014.

a positive growth rate of 0.9% was reached in the Euro area in 2014.[1156] This trend of a moderate growth then went on. In the middle of year 2016 the OECD[1157] announced that the Euro area can expect growth of 1.6 percent for 2016 and 1.7 percent by 2017.

In the year 2016 the economic growth rates were indeed very positive for Ireland and Spain as these two countries more and more recover from the deep recession while Greece still faces declining economic developments with an unemployment rate of more than 24% in March 2016.[1158] In the European Union the unemployment rate was decreased by one percentage point compared to the previous-year period and stood with a rate of 8.6% in May 2016.[1159] In the year 2017 the positive trend continued.

To a certain degree this development might refer to the fruits of the Single Market Acts I and II. Yet, a view on the worldwide economic development indicates that the positive numbers in the Euro area are also caused through the overall positive outlook in other relevant regions such as the United States.

The OECD[1160] had also assumed that among the major advanced economies, recovery would be best established in the United States, which had been projected to grow by 2.6% in 2014 and 3.5% in 2015 while in Japan, growth would be dented by the launch of much-needed fiscal consolidation measures and would be expected to however at 1.2% in 2014 and 2015.

Finally, the United States reached a growth rate of 2.4% in 2014 while Japan had to deal with an economic contradiction of 0.1% in the year

[1156] OECD Newsroom: General assessment of the macroeconomic situation, VOLUME 2015/1, <http://www.oecd.org/eco/outlook/Economic-Outlook-97-General-assessment.pdf> accessed 28 July 2015.
[1157] OECD Report from June 2016: <http://www.oecd.org/eco/outlook/OECD-Economic-Outlook-June-2016-general-assessment-of-the-macroeconomic-situation.pdf> accessed 11 June 2016.
[1158] Döhrn / Kösters, in: Weidenfeld/Wessels (2016), p. 317.
[1159] Ibid.
[1160] OECD Newsroom: Global economy strengthening but significant risks remain, says OECD in latest Economic Outlook, 6 May 2014, <http://www.oecd.org/newsroom/global-economy-strengthening-but-significant-risks-remain.htm> accessed 31 May 2014.

2014.[1161] This discrepancy makes clear that precise predictions cannot always be made regarding the growth rate and despite of the positive trends one should be aware of certain risks that could prevent a realisation of the mentioned economic growth numbers.

An OECD report[1162] from April 2014 revealed that the uncertain political situation, social tensions and still challenging public finances in many member states present risks which mean that financial market turbulence could flare up again. Social division within the single market is a hazard which should be taken seriously. The Commission makes clear that cross-country differences are expected to remain large in the future.[1163]

According to the OECD report[1164] from the year 2015 the extraordinary risks include geopolitical upheavals and severe financial instability brought about by a disorderly exit from the zero interest rate policy in the United States, failure to reach a satisfactory agreement between Greece and its creditors, and the uncertain situation in China so that mutually reinforcing monetary, fiscal and structural policies are required.

Many more factors have an influence on the current economic growth with consequences which can barely be evaluated separately as political decisions can suddenly change the economic situation. The so-called "Brexit" is not the only occurrence with a high impact on the European integration process but also the migration, security issues and the increasing national movements in many member states such as the critical developments in Poland, Hungary and Turkey have to be considered as huge challenges.[1165]

[1161] OECD Newsroom: General assessment of the macroeconomic situation, VOLUME 2015/1, <http://www.oecd.org/eco/outlook/Economic-Outlook-97-General-assessment.pdf> accessed 28 July 2015.

[1162] OECD, Economic Surveys: Euro area, April 2014, p. 10, <http://www.oecd.org/eco/surveys/Euro-Overview-2014.pdf> accessed 31 May 2014.

[1163] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: 2014 European Semester: Country-specific recommendations, Building Growth, COM (2014) 400 final, p. 4, <http://ec.europa.eu/europe2020/pdf/csr2014/eccom2014_en.pdf> accessed 31 May 2014.

[1164] OECD Newsroom: General assessment of the macroeconomic situation, VOLUME 2015/1, <http://www.oecd.org/eco/outlook/Economic-Outlook-97-General-assessment.pdf> accessed 28 July 2015.

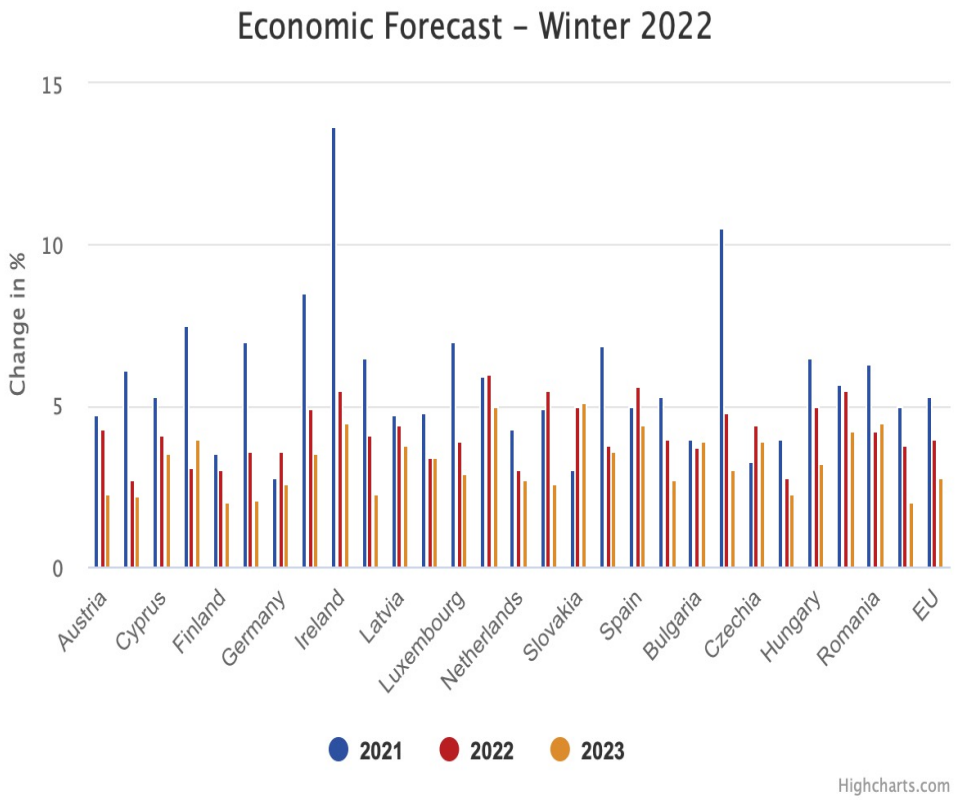
[1165] Weidenfeld, in: Weidenfeld / Wessels (2016), p. 15.

The introduction of border controls due to the increasing number of refugees does not impair the single market in a formal way but de facto the consequences of these control borders for the single market become more than apparent.[1166] Delays at borders are really harmful regarding the transportation of goods from one member state to another. A loss of up to 15 billion Euros is estimated due to the temporary border controls.[1167]

The OECD reports from the recent years show that the main challenges can turn out to be significantly different within one year and less. This demonstrates the dynamism in the field of economic growth based on the relevance of political decisions, on the one hand. On the other hand, it shows regarding to Greece that decisions of one member state can have unprecedented domino effects with possible huge economic damages for all market players in Europe and beyond.

The economic development of the European single market can be seen optimistically in general. Finally, according to the "Spring 2017 Economic Forecast" European economy has entered its fifth year of recovery with improved numbers in all EU member states.[1168] Finally, the crisis 2020 had a strong negative impact on the European economy. However, the speed of recovery in the year 2021 is remarkable. The following graph from the European Commission was published in February 2022 and demonstrates that the positive economic trend will continue in almost all European countries but with a substantially weakened speed.

[1166] Baumann / Schäffer, in: Weidenfeld / Wessels (2016), p. 226.
[1167] Ibid.
[1168] European Commission: Spring 2017 Economic Forecast, <https://ec.europa.eu/info/business-economy-euro/economic-performance-and-forecasts/economic-forecasts/spring-2017-economic-forecast_en> accessed 30 July 2017.



Source: Winter 2022 Economic Forecast, <https://ec.europa.eu/info/business-economy-euro/economic-performance-and-forecasts/economic-forecasts/winter-2022-economic-forecast-growth-expected-regain-traction-after-winter-slowdown_en> last accessed 22 February 2022.

The strategy to tackle the pandemic and also the outcome of international trade disputes and conflicts will ultimately determine the exact degree of economic growth in the next years. According to the OECD, a better coordination for trade and global taxation and also clearer policy directions for the energy transition are needed to reduce the risks of long-term stagnation. Yet, the above-mentioned figures give also rise to optimism. The economic climate is stable and quite positive on a global scale and this will help the export-oriented companies to use the overall tailwind.

However, despite of this positive growth dimension the soul of Europe needs to be rediscovered and new goals, perspectives and

orientations are needed.[1169] The capital of Belgium needs to be aware of the role model function because the city is also the "capital of Europe". A new pioneering role of Brussels is needed. The transportation concept and the environmental idea must be revised with the help of local players. Brussels has to react faster than the other cities to new occurrences such as the "diesel scandal" through a new transportation concept with fewer emissions. If the EU expects other member states to take actions without putting the own house in order it creates an unreliable image.

Brussels must become one of the most innovative cities in the European Union to provide incentives for the member states to imitate innovative ideas. The representative impact of this city for the overall public awareness should not be undervalued.

The Single Market Acts I and II are at least some further important steps in the harmonisation process of creating a real single market. Yet, it remains an ongoing process. No official plans about the introduction of a so-called Single Market Act III exist. Yet, first voices[1170] already encouraged the Commission to take into consideration a Single Market Act III several years ago. It is clear that the Single Market Acts I and II will have to be further developed. The Commission already announced in the year 2014 that new proposals for the pursuit of the Europe 2020 strategy are needed.[1171]

Finally, the European Commission presented a new "Single Market Strategy" to deliver a deeper and fairer Single Market in October 2015.[1172] The measures have to be classified as "not surprising"[1173]. This strategy is divided into four topics: consumers, SMEs and start-ups, innovative services and professionals. The following measures are supposed to be taken: a)

[1169] See Weidenfeld, in: Weidenfeld / Wessels (2016), p. 21.
[1170] Euractiv: Spelman (2012): Commission should be thinking about Single Market Act III, <http://www.euractiv.com/innovation-enterprise/spelman-commission-thinking-sing-interview-515538> accessed 15 July 2014.
[1171] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth, COM (2014) 130 final, p. 12, <http://ec.europa.eu/europe2020/pdf/europe2020stocktaking_en.pdf> accessed 15 July 2014.
[1172] European Commission - Press release: A deeper and fairer Single Market: Commission boosts opportunities for citizens and business, 28 October 2015, <http://europa.eu/rapid/press-release_IP-15-5909_en.htm> accessed 19 December 2015.
[1173] Baumann / Schäffer, in: Weidenfeld / Wessels (2016), p. 228.

modernise the standards system, b) strengthen the single market for goods, c) reduce barriers in key sectors such as business services, construction and retail, d) prevent discrimination against consumers based on nationality or place of residence, e) strengthen preventive enforcement by reforming the notification procedure, f) enable the balanced development of the collaborative economy.[1174]

The measures of the new legislative proposals within the "Single Market Strategy" are rather a modernised version of the measures which already have been introduced. Some delays due to a series of revisions must be expected. That is why further legislative steps cannot become subject matter of this paper. The mentioned measures are also not really innovative but more likely only "updated strategy documents"[1175]. However, it can be already concluded that the Single Market Acts I and II have not been able to reach a completion of the single market. The mentioned plans within the new "Single Market Strategy" concern almost all thematic areas of the Single Market Acts I and II.

Consequently, shortcomings still exist in all thematic areas of the internal market and therefore the internal market is far away from a completion. In particular, the digital single market is very "incomplete". In May 2015 the European Commission announced "A Digital Single Market Strategy for Europe"[1176]. The Commission announced that it will launch new measures. The new strategy is based on three pillars: a) better access for consumers and businesses to online goods and services across Europe, b) create the right conditions for digital networks and services to flourish with high-speed, secure and trustworthy infrastructures and content services, supported by the right regulatory conditions for innovation, investment, fair competition and a level playing field, c) maximise the growth potential of

[1174] European Commission - Fact Sheet: A deeper and fairer Single Market, 28 October 2015, <http://europa.eu/rapid/press-release_IP-15-5909_en.htm> accessed 19 December 2015.

[1175] Baumann / Schäffer, in: Weidenfeld / Wessels (2016), p. 228. The authors stress that regularly updated strategies documents cannot really be seen as productive and results-oriented.

[1176] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: A Digital Single Market Strategy for Europe, COM (2015) 192 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0192> accessed 20 December 2015.

our European Digital Economy with investments in ICT infrastructures and technologies such as Cloud computing and Big Data, and research and innovation to boost industrial competitiveness as well as better public services, inclusiveness and skills.[1177]

The new measures within the "Digital Single Market Strategy" focus on the deficits in the area of data protection. This refers to the adoption of Regulation (EU) 2016/679, the General Data Protection Regulation ("GDPR") and the review of Directive 2002/58/EC ("ePrivacy Directive") in order to provide a high level of privacy protection for users of electronic communications services and a level playing field for all market players.[1178] A new proposal[1179] as "lex specialis to GDPR" was launched in the beginning of 2017 to review the "ePrivacy Directive".

This example demonstrates that all measures which became part of the Single Market Acts I and II regarding the digital single market completely have to be further developed. The launch of many new single market strategies can be seen as a tacit admission that the single market is far away from completion, in particular regarding the digital single market.

In any case, the fact remains that further legislative actions are essential to minimise the still existing shortcomings of the European single market. Otherwise there is a danger that the targets of the Europe 2020 Strategy will not even nearly be reached. From the current perspective, in some sectors the Commissions lags far behind the goals of the 2020 Strategy.

To give an example, in March 2014 the Commission admitted within a communication[1180] that with a level of 2.06% of GDP in the R&D sector

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[1177] Ibid.

[1178] See the explanatory memorandum of the new proposal according to the next footnote, COM (2017) 10.

[1179] Proposal for a regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM (2017) 10,
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017PC0010&from=EN> accessed 30 July 2017.

[1180] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth, COM (2014) 130 final, p. 12,

in 2012, and limited progress over time, the 3% target for 2020 is unlikely to be met because investment in R&D is forecast to increase only to 2.2% by 2020.

The Commission further points out that only if member states meet their national targets, this share could amount to 2.6%.[1181] Consequently, with a forecast of 2.2% to 2.6% it must already be admitted that the target to increase combined public and private investment in R&D to 3% of GDP will barely be reached. However, a significant part of the final improvements in the R&D sector will be decided by the member states themselves who have to be more ambitious to meet the national targets, particularly in the R&D sector.

Taking into account the "Eurostat"[1182] data from October 2019, it must be acknowledged that no improvement in the R&D sector is determinable. The R&D intensity of the EU has stagnated around 2% of GDP since the year 2012 and has been far below the 3 % target for 2020.[1183] The general development of R&D is not satisfactory while some regions made significant progress. The German Braunschweig region spent over 10% of its GDP on R&D in the year 2015.[1184]

In addition, deficits became clear regarding the goal to increase the employment rate of the population aged 20-64 to at least 75%. The EU employment rate stood at 68.4% in 2012, compared to 68.5% in 2010 and based on trends, it was expected to increase to around 72% in 2020.[1185] Yet, the more recent statistics turned out to be surprisingly positive. The EU employment rate has shown an upward trend in recent years and reached a

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<http://ec.europa.eu/europe2020/pdf/europe2020stocktaking_en.pdf> accessed 15 July 2014.

[1181] Ibid.

[1182] Smarter, greener, more inclusive? Indicators to support the Europe 2020 Strategy, <https://ec.europa.eu/eurostat/documents/3217494/10155585/KS-04-19-559-EN-N.pdf/b8528d01-4f4f-9c1e-4cd4-86c2328559de> accessed 30 November 2019.

[1183] See Ibid., 10.

[1184] See ibid., 39. Here the economic importance of the automobile industry becomes visible.

[1185] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth, COM (2014) 130 final, p. 12, <http://ec.europa.eu/europe2020/pdf/europe2020stocktaking_en.pdf> accessed 15 July 2014.

high of 73.2 % in the year 2018.[1186] In the light of the economic forecasts there are good chances to reach the employment target of 75% in almost all member states.

At least it can be expected that the target to reduce greenhouse gas emissions by at least 20% compared to 1990 levels, increase the share of renewable energy in final energy consumption to 20% and moving towards a 20% increase in energy efficiency will probably be reached. At this point the Commission stresses that further progress can be expected by 2020 and could bring the reduction of greenhouse gas emissions to 24% compared to 1990, thus over-achieving the EU target while in 13 member states the existing policies would not be sufficient to meet national targets by 2020 according to national projections.[1187] From 7.5% in 2000, the share of renewables already reached 14.4% in 2012 and that is why the target of a 20% share by 2020 can according to recent trends even be exceeded (around 21%).[1188] The overall view allows a positive trend in the areas of climate and energy. The "Eurostat"[1189] data from October 2019 confirms that despite of some differences between the member states the EU, from a general point of view, is on track to achieving its climate targets.

However, during the last years the controversial discussions about the expansion of the capacity at the Baltic Sea pipeline Nord Stream demonstrated the problems in the energy sector.[1190] The future of the energy sector also highly depends on political outcomes. The importance of the crisis in the Ukraine and the relevance of this country as a transit state demonstrate the "international dimension of the Energy Union"[1191].

Also the educational sector allows a positive assessment. The share of early leavers from education and training has fallen steadily since 2003, reaching 12.8 % in 2012 and according to recent trends the target to reduce

[1186] Smarter, greener, more inclusive? Indicators to support the Europe 2020 Strategy, 23, <https://ec.europa.eu/eurostat/documents/3217494/10155585/KS-04-19-559-EN-N.pdf/b8528d01-4f4f-9c1e-4cd4-86c2328559de> accessed 30 November 2019.
[1187] Ibid., p. 13.
[1188] Ibid.
[1189] Smarter, greener, more inclusive? Indicators to support the Europe 2020 Strategy, 44-54, <https://ec.europa.eu/eurostat/documents/3217494/10155585/KS-04-19-559-EN-N.pdf/b8528d01-4f4f-9c1e-4cd4-86c2328559de> accessed 30 November 2019.
[1190] Fischer, in: Weidenfeld / Wessels, p. 244.
[1191] Ibid., p. 245.

early school leaving rates to less than 10 % is reachable.[1192] The number has fallen to 10.6% in 2018 and despite of the stagnation in the last years improvements have been made in almost all member states.[1193]

Besides, the share of the population aged 30 to 34 with tertiary educational attainment has been continuously increasing since 2000 and the trend suggested that the Europe 2020 target of increasing this share to at least 40 % by 2020 will be reached.[1194] In this sector the development in the last years was more positive than expected. The reached share of 40.7% in the year 2018 means that the Europe 2020 target has been already reached two years before.[1195] That is also a welcoming sign from an economic point of view as human resources are an important pillar in the economic process.

The social component of "Europe 2020" must be seen as problematic. The new social movements are the response of the political failure. These movements have learnt to act efficiently because they are transnational and seek to create negative effects for companies in terms of their markets.[1196] The aim of "Europe 2020" to lift at least 20 million people out of the risk of poverty and social exclusion can be considered as a failure. The number of people at risk of poverty and social exclusion in the EU (comprising people at risk of financial poverty, experiencing material deprivation or living in jobless households) increased from 114 million in 2009 to 124 million in the year 2012.[1197]

[1192] European Commission (Eurostat): Sustainable Development in the European Union: 2013 monitoring report of the EU sustainable development strategy, p. 12, < http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-02-13-237/EN/KS-02-13-237-EN.PDF> accessed 30 April 2014.

[1193] See Smarter, greener, more inclusive? Indicators to support the Europe 2020 Strategy, 59-60, <https://ec.europa.eu/eurostat/documents/3217494/10155585/KS-04-19-559-EN-N.pdf/b8528d01-4f4f-9c1e-4cd4-86c2328559de> accessed 30 November 2019.

[1194] European Commission (Eurostat): Sustainable Development in the European Union: 2013 monitoring report of the EU sustainable development strategy, p. 12, < http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-02-13-237/EN/KS-02-13-237-EN.PDF> accessed 30 April 2014.

[1195] See Smarter, greener, more inclusive? Indicators to support the Europe 2020 Strategy, 62, <https://ec.europa.eu/eurostat/documents/3217494/10155585/KS-04-19-559-EN-N.pdf/b8528d01-4f4f-9c1e-4cd4-86c2328559de> accessed 30 November 2019.

[1196] See Moreau, in: De Burca / De Witte: Social Rights in Europe, p. 381.

[1197] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth, COM (2014) 130 final, p. 14,

In 2017, 113 million people were still at risk of poverty or social exclusion and that is why the target of 96 million people remains at a far distance and will very probably not be reached.[1198] In many member states the situation regarding people at risk of poverty had deteriorated. The share has risen in 10 member states since 2008 and this outcome is considered as a legacy of the economic and financial crisis[1199]. This demonstrates that a significant social deficit exists in the EU policy and the negative effects of the crisis still have not been overcome in the social sector. The social issue became barely part of the 2020 Strategy as economic growth was put in the focus.

This finally leads to the question which recommendations can be taken into account in order to counter the shortcomings. The analysis of the Single Market Acts I and II brought to light that the language barrier is a serious hurdle in the harmonisation process of the single market. However, the European Commission still stresses that the harmonious co-existence of many languages in Europe is a powerful symbol of the European Union's aspiration to be united in diversity, one of the cornerstones of the European project.[1200]

At least the Commission admits that multilingualism can prevent EU citizens and companies from fully exploiting the opportunities offered by the single market and possibly blunt their competitive edge abroad; it can also be an obstacle to effective cross-border administrative cooperation between member states in the EU and the efficient working of local services such as hospitals, courts and job centres.[1201]

<http://ec.europa.eu/europe2020/pdf/europe2020stocktaking_en.pdf> accessed 15 July 2014.

[1198] See Smarter, greener, more inclusive? Indicators to support the Europe 2020 Strategy, 68, <https://ec.europa.eu/eurostat/documents/3217494/10155585/KS-04-19-559-EN-N.pdf/b8528d01-4f4f-9c1e-4cd4-86c2328559de> accessed 30 November 2019.

[1199] See ibid., 69.

[1200] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: Multilingualism: an asset for Europe and a shared commitment, COM (2008) 566 final, p. 3, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0566&from=EN> accessed 15 July 2014.

[1201] Ibid., p. 5.

Regrettably, the language aspect has not become part of the Single Market Acts I and II. Also the approach of the Commission is questionable as only the teaching of more languages is supported without setting a focus on the English language. However, it must be stressed that English is the global language of business and it would be much easier for the SMEs to administrate cross-border activities.

Hence, the first recommendation is that the English language finally throughout all member states shall become the recognised lingua franca as an essential foundation for an intact single market. Furthermore, it is recommendable to foster the introduction of English as the court language in all member states for certain cross-border disputes related to commercial matters. Such an initiative can be attributed to the dilution of details caused by translations and also the attached immense costs that could be saved because the place of jurisdiction would not have to be transferred to English speaking courts in the UK or the US and to arbitration tribunals.

It is a welcoming sign that the German "Bundesrat" recently approved a draught legislation regarding the introduction of chambers for commercial matters.[1202] This is already the second draught legislation in this area. Regrettably, the first attempt to realise such draught legislation had failed four years before. However, at this time, the political indicators are positive and it can be expected that the introduction of chambers for commercial matters will soon be realised despite of current ongoing concerns and delays.

The European Commission should become active to encourage all member states to introduce English as the court language for certain cross-border disputes and also to contribute that the English language will finally become the recognised lingua franca throughout Europe. Otherwise the creation process of the single market might turn out to be "The Tower of Babel".

[1202] Gesetzentwurf des Bundesrates: Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG), <http://dip21.bundestag.de/dip21/btd/18/012/1801287.pdf> accessed 3 September 2014.

The second recommendation refers to the social deficit. The analysis of the Single Market I and II demonstrated that the social component more likely only has a symbolic value and the increased risk for the European citizens to live in poverty seriously threatened the success of the Europe 2020 Strategy. In July 2014 the European Commission proposed to mobilise the European Globalisation Adjustment Fund (EGF) to help 280 workers made redundant in the food and beverage service sector in Spain to find new jobs.[1203] Such initiatives are more likely only a flash in the pan.

The extremely rigorous budgetary policy in countries like Spain has come to a dangerous point as the risk of deflation increases. It must be stressed that the social deficit which Europe faces primarily refers to the southern states. This view is confirmed by the results of a new index comparing the justice of all 28 EU states, which was published in September 2014 by the German foundation Bertelsmann Stiftung. Within this published paper the following estimation is made: "Should the social imbalance last for long or increase even more, the future of the European integration project will be threatened."[1204]

The index report[1205] of the Bertelsmann Stiftung considers six analysed dimensions of social justice which are poverty prevention, access to education, access to the labour market, social cohesion, non-discrimination, health and intergenerational equity. The report reveals that regarding the aspect of social justice only Luxembourg, Germany and Poland improved significantly compared to the 2008 Social Justice Index.

The northern EU member states such as Sweden, Finland and Denmark, as well as the Netherlands are the leaders in this comparative

[1203] European Commission News: Commission proposes 960,000 Euro from Globalisation Fund to help redundant bar and restaurant workers in Spain, <http://ec.europa.eu/social/main.jsp?langId=eb&catId=86&newsId=2093&furtherNews=yes> accessed 15 July 2014.

[1204] Bertelsmann Stiftung: Press release (15 September 2014): Social imbalance in Europe is increasing, <http://www.bertelsmann-stiftung.de/cps/rde/xchg/SID-42F27810-838A1844/bst_engl/hs.xsl/nachrichten_122135.htm> accessed 16 September 2014.

[1205] Schraad- Tischler, Daniel / Kroll, Christian: Social Justice in the EU – A Cross-national Comparison Social Inclusion Monitor Europe (SIM) – Index Report, <http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-42F27810-838A1844/bst/xcms_bst_dms_40361_40362_2.PDF> accessed 16 September 2014.

assessment while social injustice has again significantly increased in the crisis-battered countries of Greece, Spain and Italy.[1206] The index report concludes that there is a correlation between the economic strength and the social justice. In general it can be stated that the higher the economic strength in an EU member state is, the higher the level of social justice becomes.

However, in countries such as the Czech Republic, Slovenia and Estonia a comparatively high degree of social justice exists despite of a merely middling economic performance.[1207] This demonstrates that social justice also depends on the national social policy of the member states themselves. This also becomes clear through the fact that the competence of the EU in this area is very limited.

At the same time, the European Commission cannot leave this important issue to the member states themselves but has to take the social deficit more seriously. This can be realised by putting more political pressure on countries with high social deficits.

The report of the Bertelsmann Stiftung criticises that "despite of the formulation of specific social policy objectives at the EU level – for example, the socio-political goals of the Europe 2020 strategy and the accompanying European Platform Against Poverty and Social Exclusion – there is as yet no integrated EU strategy which consistently and comprehensively combines the two key objectives: growth and social justice."[1208]

One must admit that the main objective during the last years was to put Europe out of the crisis through the focus on economic growth. At the same time social aspects were neglected. The European platform against poverty and social exclusion has therefore to be put on the top agenda of all flagships of the 2020 Strategy.

It is necessary to implement long-term investment projects for the revival of the economy in the southern European member states in order to

[1206] Ibid, p. 84.
[1207] Ibid.
[1208] Ibid. P. 86.

decrease the widening gap between the economically stable northern and the weakened southern EU member states. It is a welcoming sign that Jean-Claude Juncker in July 2014 called for a 300-billion-euro investment plan for Europe to boost public and private investments as he laid out his vision for the future with a more socially-oriented approach.[1209]

However, there is a reason to fear that the citizens of the southern member states will not really be the profiteers of these investments but that rather investors themselves might take advantage of the investment plan. There is a need that the investment plan is implemented according to strict guidelines with the focus on the needs of the unemployed and poor citizens.

An effective Marshall Plan Initiative in form of a new solidarity fund is required, preferably mainly financed by the northern member states, to stop the widening gap between the southern and northern member states. As a matter of course, the conditions have to be set precisely to avoid any form of misuse. To promote an efficient allocation of resources, public authorities have the task to reduce market failure through appropriate measures.[1210] The widening gap between the southern and the northern member states from an economic view reflects a case of market imperfections which primary only on the EU level can be brought back into balance.

The need of the mentioned initiative shows that the social aspects should have been more reflected in the levers of the Single Market I and II. At the same time, it cannot be concluded, that the levers are not efficient regarding to economic growth in general. However, it shows that there is a tendency for a too neoliberal adjustment of the market levers and a need for a social balance due to the competitive advantage of the economically strong northern member states.

Otherwise, as already implied earlier, the northern member states could also become the victims of a widening gap. Once a southern member

[1209] European Parliament News: Juncker presents his programme, Press release 15 July 2014, <http://www.europarl.europa.eu/news/en/news-room/content/20140711IPR52247/html/Juncker-presents-his-programme> accessed 15 July 2014.
[1210] See Mühlenkamp, in: Hrbek / Nettesheim (2002), p. 65.

state collapses economically, the northern member states sit in the same boat and then also have to cope with possible dramatic repercussions.

To sum it up, only few of the goals of the Europe 2020 Strategy can still be achieved. In case of a positive development of the world economy and in case of a stronger focus on social issues and the needs of the consumers on EU and national level it can be expected that the Europe 2020 Strategy will become at least a partial success story.

Last but not least, despite of the ideological-political differences between Europe and other countries such as the USA, particularly in the consumer protection segment, it can be expected that an intensified trade will finally result in an economic success to the benefit to all actors. Also the recently reached compromises within the Comprehensive Economic and Trade Agreement (CETA) show the tendency to more global trade. However, the negotiations of CETA date back to the year 2009 and also demonstrate how difficult and long-lasting negotiations can be until the final approval and implementation.

The promises regarding the free trade agreements that no lowering of the European level of protection has to be feared, will be difficult to be kept because only the willingness to find compromises can result in a positive outcome of the trade agreements for Europe as investing together is a two-way street of giving and taking.

In July 2014 the President of the European Commission Jean-Claude Juncker made clear that he "will not sacrifice Europe's safety, health, social and data protection standards or our cultural diversity on the altar of free trade."[1211] "Notably, the safety of the food we eat and the protection of Europeans' personal data will be non-negotiable for me as Commission President."[1212] It can be expected that these are more than empty words and therefore it will be crucial to the reluctance of any EU partner to enter into commitments based on these fundamental European principles.

[1211] A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission:
Opening Statement in the European Parliament Plenary Session by Jean-Claude Juncker on 15 July 2014, <http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf> accessed 25 September 2014.
[1212] Ibid.

Nevertheless, one has to admit that the arguments which are adduced by the opponents of the trade agreements are basically the same ones which many years before had been already used by the opponents of the European single market.[1213] The opponents had feared that a powerful European Court of Justice would undermine the democratic structure of national courts such as the German Bundesverfassungsgericht but in reality finally the protection of basic rights became much further developed by the European Court of Justice compared to the Bundesverfassungsgericht.[1214]

It is stated that the resurgence of anti-American feelings in Europe neglects the fact that free trade agreements do not only involve risks but has to be seen as a chance for Europe in a global competitive environment.[1215] The USA is the most important sales market for European products and services and therefore further trade developments can be expected through the realisation of new free trade agreements.[1216]. However, the methods of the introduction, the agreement contents and the scope must be questioned.

The assessment within a guest commentary further states that it is justified that the free trade negotiations are kept secret because otherwise a compromise could not be achieved if too many groups are involved.[1217] One the one hand, this estimation is comprehensible taking into account the effectiveness of policy- making processes. On the other hand, one has to admit that is a failure that the EU was not able to convince the EU citizens regarding the possible advantages of new free trade agreements and that is why there is still a sceptical attitude among the population. That is why the concerns about the democratic deficits in the negotiation processes of free trade agreements are partly justified.

However, also one must admit that a possible success of the Trans-Pacific Partnership (TPP) between several Pacific countries and the failure

[1213] Geiger, Andreas: TTIP, TPP und die europäischen Kleingeister, in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2014, p. 681.
[1214] Ibid., p. 682.
[1215] Ibid.
[1216] Treier, Volker / Wernicke, Stephan (2015): Die Transatlantische Handels- und Investitions-partnerschaft (TTIP) – Trojanisches Pferd oder steiniger Weg zum Olymp?, in: Europäische Zeitschrift für Wirtschaftsrecht, p. 339.
[1217] Geiger, Andreas (2014): TTIP, TPP und die europäischen Kleingeister, in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW), p. 681.

of the EU´s free trade agreements at the same time could isolate the European market. The European economy heavily depends on global trade, particularly the transatlantic trade, and that is why Europe cannot afford to leave out any chance of an intensified partnership. Besides, the USA is also "the main global actor from the point of world security"[1218]. If one takes into consideration that the USA is obviously able to find comprises within the TPP with diverse countries such as Japan, Australia and China it should be easy to realise free trade agreements between only two main actors.[1219]

Yet, these evaluations meanwhile have to be considered from a new perspective. In January 2017 the USA withdrew from TPP. The political change of the American policy between 2016 and 2020 towards a national approach with a critical view of free trade agreements and the establishment of new customs conventions was a very difficult challenge for the European economic policy. As already indicated above, the final impact of the COVID-19 pandemic on the internal market is grave but cannot yet be predicted. Finally, the pandemic should be used as chance for the introduction of a new legal digital order for the European single market.

To sum it up, it must be stressed that due to certain political inconsistencies between the USA and Europe and also between Europe and Russia the relationships between these powerful operators on the world key market in some parts practically reached rock bottom periodically. At this point one has to remember that after the Second World War the experienced low point in the relationship between the European countries finally led to a new confidence and a greater social cohesion through new trade agreements and the idea of the European single market.

Hence, it can be expected that after the 2020 US elections a more intensive trade relationship between the mentioned actors can restore faith and confidence and that finally the political discrepancies will be resolved. Such positive outlook does not only refer to the transatlantic partnership between the EU and the US. It would be also a welcoming sign if trade relations between the EU and countries such as Russia and China will be

[1218] Laursen (2012), p. 19.
[1219] See also Geiger, Andreas: TTIP, TPP und die europäischen Kleingeister, in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2014, p. 681.

intensified through new trade agreements and the removal of walls-up policy approaches and blockade mentalities.

B. Overview of the thesis results

I. In English

1. Core statement

The aims of the Single Market Acts I and II predominantly classified as sustainable for the realisation of the "Europe 2020 strategy" with regard to more economic growth and employment can be in the essentials considered achieved because of the stable economic growth continuing during several years in the EU with noticeable short-term and medium-term growth impulses.

2. Legal aspects

a. Article 114 TFEU is the fundamental norm of the Union´s legal harmonisation and serves as the central juridical instrument of the Single Market Acts I and II. Article 114 TFEU is the legal base for 14 of the 24 analysed market levers. Consequently, Article 114 TFEU generates a considerable legislative power with a broad decision-making scope. A collision with the principle of conferral which protects the legislative power of the member states according to Article 5 (2) TEU is imminent.

b. The application of Article 114 TFEU as a legal basis is especially problematic in the case of regulations on the consumer protection in contrast to Article 169 TFEU. Article 169 (2) lit. a) TFEU makes clear that internal market policy is also consumer protection policy, so that a very high, but not the highest level of consumer protection is ensured. Also Article 114 (3) TFEU merely regulates the obligation to provide a high level of protection. The member states only have a narrow margin of manoeuvre for their own provisions within the limits of Article 114 (4) TFEU with the associated dependence on a decision to be approved by the Commission. Article 169 (4) TFEU, on the other hand, allows a mere notification to the Commission

to be sufficient in the case of derogation. Due to the continuing lack of harmonisation of general contract law and the law of obligations, effective EU-wide consumer protection is only guaranteed to a limited extent, also against the background of a not clearly defined European consumer model.

c. The legislative approximation according to Article 114 constitutes a complex procedure with the function to achieve a common weal based balance between the diverse wide-ranging interests, in particular from an economic and integrationist perspective. A precise new formulation of Article 114 TFEU is practically not enforceable, so that at least clearer demarcation criteria applied by the European Court of Justice are needed, with the result of a better legal certainty for the member states.

d. The dissolution of the tension fields, in particular regarding the consumer protection and social rights, should ultimately occur through the principle of subsidiarity and the principle of proportionality. The analysis of the market levers and the court decisions of the European Court of Justice concerning the tobacco directives (98/43/EC, 2003/33/EC and 2014/40/EU) brought to light aside of the low relevance of the principle of proportionality that the principle of subsidiarity neither constitutes an effective tool to limit the Union`s competences nor to reduce the democratic deficit of the EU.

e. Regulations and directives are both primary tools of the Single Market Acts I and II. Practically all 24 key actions can be referred to one of these tools while about double as many regulations as directives are used. Based on the analysis of the levers the current trend moves to a full harmonisation as the chosen approach for the completion of the single market. Even if a directive can have similar effects to that of a regulation, a regulation with its direct applicability tends to be preferred to a directive as a more suitable harmonisation instrument for the full harmonisation, due to its direct legal effect and the general prohibition of transposition.

f. The market levers intend the dismantling of barriers to trade and are due to the determined allocation to the market freedoms predominantly attributable to the negative integration. The EU approach to use a mix of non-binding and binding instruments with the focus on the latter is in general appropriate to set a governmental framework where the individual

needs of all market players are taken into account sufficiently and where an adequate and harmonised platform for economic growth is offered.

g. In the area of the consumer protection and the digitalisation the market levers remain particularly deficient. This is valid in particular concerning the delays with the enactment of comprehensive and precise data protection regulations and delays with the regulation enactment of artificial intelligence without which a successful "Digital Agenda" cannot be realised. The Transposition of the "General Data Protection Regulation" (2016/679/EU) and the "Data Protection Directive for Police and Criminal Justice Authorities" (2016/680/EU) by the member states took place until May 2018 but only has a limited scope of application. As long as well-known web services from third countries are still not considered as telecommunication services within the meaning of the European directive on telecommunications (judgement of 13 June 2019, Case C-193/18), the current provisions are to be considered as totally insufficient. Until the implementation of the relevant follow-up regulations in December 2020 the providers had sufficient time in order to collect personal data and create offers according to their own preferences. In particular within the scope of a historical consideration it became clear that data protection deficits cause a big concern for EU citizens, in contrast to US citizens.

3. Economic aspects

a. The investigation of the risk capital market with a comparison between Europe and the USA revealed on the one hand the strong fragility of the European risk capital market and on the other hand the increasingly significance of economic factors for governmental decisions and their immediate effects on the economic growth. The focus on consumer benefit and the impact approach as components of the "more economic approach" are generally suitable means of meeting the new challenges in an increasingly global competitive environment.

b. A main objective within the scope of the Single Market Acts I and II – the improvement of the access to finance for SMEs – can be considered as achieved. However, the opportunity for risk capital funds to apply for a

European passport offered within the scope of Regulation 345/2013/EU on European venture capital funds has only in a few cases been taken. There is still considerable development potential in improving risk capital financing as a key objective of the Capital Market Union, which, in addition to reducing information asymmetries between investors and SMEs, can only be exploited through new legislative initiatives with even greater incentives for venture capital funds.

c. The final aim of a completely accomplished uniform economic area by the implementation of the market levers of the Single Market Acts I and II is on account of the remaining weighty deficits still far away. Also several goals defined within the "Europe 2020 Strategy", in particular with regard to the reduction of the number of the poverty-threatened and from social exclusion threatened European, will not be reached according to current state in the intended extent. The failed compliance with the significant headline indicators for monitoring the progress of the strategy „Europe 2020" strengthens the impression of a missing sustainable social policy.

4. Socio-political aspects

a. The lack of a socio-political flanking for the internal market measures which are based on negative integration is increasingly leading to an asymmetry between the economic and social dimension of the European integration process. While fundamental freedoms as transnational integration norms drive the negative integration, there is a lack of accompanying social protection rules. This discrepancy is exacerbated by the fact that the Union's internal market levers are generally geared more to improving the internal market situation as a whole, but do not pay sufficient attention to the individual impact in each member state in terms of consumer protection and the risk of a "race to the bottom". The full harmonisation, which is predominantly provided for in the levers, does not allow the member states any significant autonomous powers of countermeasures in the areas covered, apart from some options and safeguard clauses. While a race to undercut social and environmental standards is not concretely discernible in this work, the race in international tax competition continues to pose a major threat that needs to be clarified at

international level, as national defensive measures by member states are practically impossible due to competitive pressure.

b. The division of competences turned out to be the most problematic in the area of the social policy because different national wage regulations make it impossible to achieve a real European unity and to strengthen the rights of the workers significantly. National self-interests are often placed before the European common good. Also within the Single Market Acts I and II only a weak catalyst respectively complementary function is given to the EU in the field of social policy which makes clear that the social component has not sufficiently been taken into account and an effective protection of workers on EU level is not ensured. However, an investigation of the social expenses of the member states during the last years contradicts the fear of a "race to the bottom" by the deregulation at the expenses of social rights.

c. The language barrier is one of the most concerns to EU citizens and results in adverse trade effects. It is recommendable to establish the English language finally throughout all member states as the recognised lingua franca to lay an essential foundation for an intact single market. This could contribute to the improvement of the determined huge deficits in the fields of the occupational mobility of citizens in Europe and of the availability of qualified workers for SMEs and big companies.

d. The determined increasing north- south disparity and the demonstrated democratic deficits threaten to lead to a social splitting of the EU. It requires an additional package of measures in the area of the internal market which on the one hand covers the specific needs of the southern member states and on the other hand corrects the indicated democratic and social deficits of the Union. Beside reinforced civil participation the establishment of a new solidarity fund is recommendable to stop the increasing slope between the southern and northern member states.

II. In German

1. Kernthese

Die überwiegend als nachhaltig einzustufenden Ziele der Binnenmarkten I und II zur Realisierung der Europa 2020 Strategie bzgl. mehr Wirtschaftswachstum und Beschäftigung können wegen des mehrere Jahre lang andauernden stabilen Wirtschaftswachstums in der EU mit feststellbaren kurz- und mittelfristigen Wachstumsimpulsen als im Wesentlichen erreicht angesehen werden.

2. Rechtliche Aspekte

a. Artikel 114 AEUV ist die fundamentale Norm der Rechtsangleichung der Union und dient als zentrales rechtliches Instrument der Binnenmarktakten I und II. Artikel 114 AEUV ist die Rechtsgrundlage für 14 der 24 untersuchten Markthebel. Folglich bildet Artikel 114 AEUV eine erhebliche legislative Gestaltungsmöglichkeit mit sehr weitem Anwendungsbereich. Es droht eine Kollision mit dem die mitgliedschaftliche Gesetzgebungskompetenz schützenden Prinzip der begrenzten Einzelermächtigung gemäß Artikel 5 Abs. 2 EUV.

b. Problematisch ist die Anwendung von Artikel 114 AEUV als Kompetenzgrundlage insbesondere bei Regelungen über den Verbraucherschutz in Abgrenzung zu Artikel 169 AEUV. Artikel 169 Abs. 2 Buchst. a) AEUV stellt zwar klar, dass Binnenmarktpolitik auch Verbraucherschutzpolitik darstellt, so dass zwar ein sehr hohes, jedoch nicht das höchste Verbraucherschutzniveau sichergestellt wird. Auch Artikel 114 Abs. 3 AEUV regelt lediglich die Pflicht eines hohen Schutzniveaus. Den Mitgliedstaaten bleibt für eigene Bestimmungen dabei an sich lediglich ein enger Spielraum in den Grenzen von Artikel 114 Abs. 4 AEUV mit der damit verbundenen Abhängigkeit eines zu billigenden Beschlusses durch die Kommission. Artikel 169 Abs. 4 AEUV lässt hingegen im Fall der Abweichung eine bloße Mitteilung an die Kommission genügen. Aufgrund der nach wie vor nicht erfolgten Harmonisierung des allgemeinen Vertrags- und Schuldrechts ist ein effektiver unionsweiter Verbraucherschutz auch vor

dem Hintergrund eines nicht klar definierten europäischen Verbraucherleitbilds nur bedingt gewährleistet.

c. Die Gestaltung der Rechtsangleichung gemäß Artikel 114 AEUV stellt ein komplexes Vorgehen mit der Funktion dar, einen gemeinwohlbasierten Ausgleich zwischen den diversen weitgefächerten Interessen, vor allem in wirtschaftlicher sowie in integrationspolitischer Hinsicht, zu erzielen. Eine präzise Neuformulierung des Artikel 114 AEUV ist praktisch nicht durchsetzbar, so dass zumindest eindeutigere Abgrenzungskriterien bei der Anwendung durch den Europäischen Gerichtshof notwendig sind mit dem Resultat einer besseren Rechtssicherheit für die Mitgliedstaaten.

d. Die Auflösung der Spannungsfelder, insbesondere im Bereich des Verbraucherschutzes und der sozialen Rechte, ist letztlich durch den Grundsatz der Subsidiarität und den Grundsatz der Proportionalität vorgesehen. Die Analyse der Markthebel und der Gerichtsentscheidungen des EuGH bzgl. der Tabakrichtlinien (98/43/EG, 2003/33/EG und 2014/40/EU) brachte neben der geringen Relevanz des Grundsatzes der Proportionalität ans Licht, dass der Grundsatz der Subsidiarität weder ein effektives Mittel zur Beschränkung der EU Kompetenzen noch zur Reduzierung des Demokratiedefizits der EU darstellt.

e. Rechtsverordnungen und Richtlinien sind das vorrangige legislative Rüstzeug der Binnenmarktakten I und II. Praktisch alle 24 Markthebel können diesen Handlungsformen zugeordnet werden, wobei Rechtsverordnungen in etwa doppelt so viel Anwendung finden wie Richtlinien. Gemessen an der Analyse der Markthebel bewegt sich der aktuelle Harmonisierungstrend in die Richtung der Vollharmonisierung als ausgewählte Vorgehensweise zur Vollendung des Binnenmarktes. Auch wenn eine Richtlinie ähnliche Wirkungen entfalten kann wie eine Verordnung, so ist eine Verordnung mit ihrer unmittelbaren Geltung aufgrund der Durchgriffswirkung und des grundsätzlichen Umsetzungsverbots als ein für die Vollharmonisierung geeigneteres Harmonierungsinstrument gegenüber einer Richtlinie tendenziell vorzuziehen.

f. Die Hebel dienen dem Abbau von Handelshemmnissen und sind wegen der festgestellten Zuordnung zu den Marktfreiheiten überwiegend der negativen Integration zuzuordnen. Der EU-Ansatz des Gebrauchs einer Mischung rechtlich nicht bindender sowie bindender Instrumente mit dem Fokus auf letzteren ist grundsätzlich angemessen, um eine staatliche Rahmengesetzgebung zu manifestieren, wo die individuellen Bedürfnisse von allen Marktteilnehmern hinreichend berücksichtigt werden und diesen eine angemessene und harmonisierte Plattform für Wirtschaftswachstum geboten wird.

g. Die Binnenmarkthebel sind besonders im Bereich der Digitalisierung und des Verbraucherschutzes defizitär. Dies gilt insbesondere in Bezug auf die Verzögerungen beim Erlass umfassender und präziser datenschutzrechtlicher Bestimmungen und die Verzögerungen beim Erlass von Regulierungen der künstlichen Intelligenz, ohne die eine erfolgreiche „Digitale Agenda“ nicht realisiert werden kann. Die Umsetzung der Datenschutz-Grundverordnung (2016/679/EU) und der Datenschutz-Richtlinie für Polizei und Strafjustiz (2016/680/EU) durch die Mitgliedsstaaten ist zwar bis Mai 2018 erfolgt, hat jedoch nur einen begrenzten Anwendungsbereich. Solange namenhafte Webdienste aus Drittstaaten vom EuGH nach wie vor nicht als Kommunikationsdienste im Sinne der europäischen Telekommunikationsrichtlinie angesehen werden (Urt. v. 13.06.2019, Az. C-193/18), sind die derzeitigen Regelungen als völlig unzureichend zu werten. Bis zur Umsetzung der einschlägigen Nachfolgereglungen im Dezember 2020 verblieb den Anbietern hinreichend Zeit, um nach ihren eigenen Vorstellungen persönliche Daten zu sammeln und ihre Angebote zu gestalten. Insbesondere im Rahmen einer historischen Betrachtung wurde deutlich, dass Defizite im Datenschutz bei EU-Bürgern, anders als bei US-Bürgern, eine große Besorgnis hervorrufen.

3. Wirtschaftliche Aspekte

a. Die Untersuchung des Risikokapitalmarktes mit einem Vergleich zwischen Europa und den USA offenbarte zum einen eine starke Fragilität des europäischen Risikokapitalmarktes und zum anderen die Signifikanz zunehmend ökonomisch geprägter Faktoren bei staatlichen

Entscheidungsprozessen und den unmittelbaren Auswirkungen auf das Wirtschaftswachstum. Der Fokus auf den Konsumentennutzen und der Auswirkungsansatz als Komponenten des „more economic approach“ sind grundsätzlich geeignete Mittel, um den neuen Herausforderungen im stets globaler werdenden Wettbewerb zu begegnen.

b. Ein wesentliches Ziel im Rahmen der Binnenmarktakten I und II – die Verbesserung des Zugangs zu Finanzmitteln für KMU – kann als erreicht eingestuft werden. Die im Rahmen der Verordnung über Europäische Risikokapitalfonds (345/2013/EU) eingeräumte Möglichkeit der Beantragung eines europäischen Passes wurde von Risikokapitalfonds jedoch bislang nur vereinzelt genutzt. Bei der Verbesserung der Risikokapitalfinanzierung als wesentliches Ziel der Kapitalmarktunion gibt es nach wie vor ein erhebliches Entwicklungspotential, das neben dem Abbau von Informationsasymmetrien zwischen Investoren und KMU nur durch neue Gesetzesinitiativen mit noch mehr Anreizen für Risikokapitalfonds ausgeschöpft werden kann.

c. Das endgültige Ziel eines komplett vollendeten einheitlichen Wirtschaftsraums durch die Umsetzung der Hebel der Binnenmarktakten I und II ist aufgrund der verbleibenden gewichtigen Defizite nach wie vor in weiter Ferne. Auch mehrere der im Rahmen der Strategie „Europa 2020“ definierten Ziele, insbesondere bzgl. der Reduzierung der Zahl der armutsgefährdeten und von sozialer Ausgrenzung bedrohten Europäer, werden nach jetzigem Stand nicht im vorgesehenen Umfang erreicht werden. Die nicht gelungene Einhaltung der erheblichen Leitindikatoren zur Überwachung der Fortschritte der Strategie „Europa 2020“ verstärkt den Eindruck von einer fehlenden nachhaltigen Sozialpolitik.

4. Sozialpolitische Aspekte

a. Die mangelnde sozialpolitische Flankierung der auf der Negativintegration basierten Binnenmarktmaßnahmen führt zunehmend zu einer Asymmetrie zwischen der ökonomischen und der sozialen Dimension des europäischen Integrationsprozesses. Während die Grundfreiheiten als transnationale Integrationsnormen die negative Integration antreiben, fehlt

es an flankierenden sozialrechtlichen Schutzregeln. Diese Diskrepanz wird dadurch verstärkt, dass die Union bei den Binnenmarkthebeln grundsätzlich eher auf die Verbesserung der Situation für den Binnenmarkt im Gesamtergebnis abstellt, jedoch die individuelle Auswirkung in jedem einzelnen Mitgliedstaat in puncto Verbraucherschutz und Gefahr eines „race to the bottom“ nicht hinreichend beachtet wird. Die in den Hebeln überwiegend vorgesehene Vollharmonisierung lässt für die Mitgliedstaaten in den erfassten Sachbereichen neben einigen Wahlmöglichkeiten und Schutzklauseln keine nennenswerten eigenständigen Kompetenzen für Gegenmaßnahmen zu. Während ein Unterbietungswettlauf bei Sozial- und Umweltstandards in dieser Arbeit konkret nicht feststellbar ist, stellt der Wettlauf im internationalen Steuerwettbewerb weiterhin eine große Gefahr dar, die auf internationaler Ebene geklärt werden muss, da nationale Abwehrmaßnahmen der Mitgliedstaaten aufgrund des Wettbewerbsdrucks praktisch unmöglich sind.

b. Die Kompetenzverteilung erwies sich besonders im Bereich der Sozialpolitik als problematisch. Verschiedene nationale Lohnregulierungen machen es unmöglich, eine europäische Einigung zu erreichen und die Rechte der Arbeiter signifikant zu stärken. Nationale Eigeninteressen werden häufig über das Wohl Europas gestellt. Auch innerhalb der Binnenmarktakten I und II kommt der EU nur eine schwache Katalysator- beziehungsweise Ergänzungsfunktion im Bereich der Sozialpolitik zu, wodurch deutlich wird, dass die soziale Komponente nicht hinreichend Beachtung gefunden hat. Eine Untersuchung der Sozialausgaben der Mitgliedstaaten in den letzten Jahren widerspricht jedoch der Befürchtung eines „race to the bottom“ durch die Deregulierung auf Kosten von Sozialrechten.

c. Die Sprachbarriere betrifft eine der größten Sorgen der EU-Bürger und führt zu nachteiligen Handelseffekten. Es ist zu empfehlen, dass zur Schaffung eines wesentlichen Fundaments für einen intakten Binnenmarkt die englische Sprache schließlich in allen Mitgliedstaaten als anerkannte „lingua franca“ etabliert wird. Dies könnte zur Verbesserung der festgestellten beträchtlichen Defizite in den Bereichen der beruflichen

Mobilität der Bürger in Europa sowie der Verfügbarkeit qualifizierter Arbeitskräfte für KMU und Großunternehmen beitragen.

d. Das festgestellte zunehmende Nord- Süd- Gefälle sowie die aufgezeigten Demokratiedefizite der Union drohen zu einer sozialen Spaltung der EU zu führen. Es bedarf eines zusätzlichen Maßnahmenpakets im Bereich des Binnenmarktes, das zum einen an den spezifischen Bedürfnissen der südlichen Mitgliedstaaten angepasst und zum anderen die aufgezeigten demokratischen und sozialen Defizite der Union behebt. Neben verstärkten Bürgerbeteiligungen ist die Errichtung eines neuen Solidaritätsfonds empfehlenswert, um das zunehmende Gefälle zwischen den südlichen und nördlichen Mitgliedstaaten zu stoppen.

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