

THE EU SOCIAL INTEGRATION CLAUSE IN A LEGAL PERSPECTIVE

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Abstract

This contribution aims at analyzing how the “EU social integration clause”, encapsulated in Article 9 TFEU, works in infusing social values into other policies. Even at first reading, it is apparent that it is not a new competence but rather an attempt at regrouping and coordinating the exercise of a number of other autonomous policies, which therefore maintain their own nature and scope. The fact remains that, while the EU must take into account social objectives in the conduct of the other policies, it is more doubtful that it could adopt normative acts inspired by purely social aims, not adequately supported by the specific aims assigned by the ad hoc legal basis. In particular, this paper intends to assess the interaction between economic objectives and social aims enshrined in the pertinent normative acts. This purpose is fulfilled by using twofold criteria: first of all, the test balance used by the EU legislator; second, the one used by the ECJ. The outcome of this dual examination should permit to better define the nature and the scope of the social clause.

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1. Introduction

As a significant step forward regarding the organization of interests in previous versions of the Treaties, the Lisbon Treaty provides a fresh new emphasis on social needs. The most significant changes though lie not so much in the sphere of the EU's regulatory powers which, as will be seen below, remain almost unchanged¹ within the social sector more generally as in the different approach in which social values are recognized and expressed in the broader context of the objectives and priorities that shape the EU².

A glance at the opening provisions of the Treaty on European Union (TEU) shows that the values and goals that traditionally belong to the EU, and which lie at the heart of the integration process, are pervaded by an unprecedented social dimension, which was largely absent from the previous text of the Treaty of European Community (TEC). The increasing weight given to social values and objectives becomes readily apparent when the pre-existing version is compared with the current Arts 2 and 3 of the TEU, and is even more marked in comparison with the corresponding provisions relating to the sphere of market integration and to what could be called the hard core of the European economic constitution³.

Art 2 introduces a strong social connotation into the fabric of EU values where it states that it is based – first and foremost – on the values of respect for human dignity, freedom, democracy, equality and protection of human rights, and where it also acknowledges the inclusion of pluralism, non-discrimination, tolerance, justice, solidarity and gender equality that are common

¹ See the last paragraph of the present contribution.

² M. Dawson & B. de Witte, *Welfare policy and social inclusion*, in A. Arnulf & D. Chalmers (eds.), *The Oxford Handbook of European Union law*, 964-990 (2015); B. Cantillon, H. Verschuere & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012); M. Daly & P. Copeland, *Poverty and Social Policy in Europe 2020: Ungovernable and Ungoverned*, 42.3 Policy and Politics 351 (2014); E. Guild, S. Carrera & K. Eisele (eds.), *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU* (2013); U. Neergaard, R. Nielsen & L. Roseberry (eds.), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (2009); F. Pennings, *European Social Security Law* (5th edn, 2010); D. Schiek, U. Liebert & H. Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (2011).

³ A. Williams, *The Ethos of Europe. Values, Law and Justice in the EU*, 283 (2010).

to all Member States. Art 3, para 3, advances the EU's objectives with the formula – much debated for its ordoliberal origin⁴, but clear in its principled political inspiration⁵ – of 'a highly competitive social market economy, aiming at full employment and social progress', and that 'shall combat social exclusion and discrimination, and shall promote social justice and protection.'

At the same time, in the opening provisions of the new TEU, the reference to the 'open market economy with free competition', which strongly characterised the principles of the European economic constitution⁶ and was found in the text of the earlier treaty, has been suppressed and symbolically relegated to Protocol 27 annexed to the Treaties. The idea – formally expunged from the heart of the values, objectives and general principles of the EU – survives in Art 119 of the TFEU, which opens Title VIII on economic and monetary policy. This would also seem to confirm the weakening and downgrading of the idea of an 'open market economy with free competition' from a general principle to a more narrow principle related to a specific sector, that is, the sphere of legislative competence and action to which it specifically refers. However important this sphere might be, it could no longer claim to be central or even dominant in the interpretation of the European (economic) constitution.

This overall constitutional rebalancing stems from, and indeed is specifically reinforced by, the definitive acquisition of the Charter of Nice – and, in particular, of the rich catalogue of fundamental social rights and principles enshrined therein – along with the European Union's primary law. The moment when fundamental social rights were constitutionalised in the EU signalled the most substantial revision of the overall supranational legal order, which would finally allow a certain balance to be made, no longer systematically favourable to the free market. It is

⁴ Cf. Ch. Joerges & F. Rödl, "Social Market Economy" as Europe's Social Model?, in L. Magnusson & B. Stråth (eds.), *A European Social Citizenship? Preconditions for Future Policies from Historical Perspectives*, 125 (2004).

⁵ Which tends to rebalance "the internal asymmetries between market integration at supranational level and social protection at national level". See M. Monti, *A New Strategy for the Single Market at the Service of Europe's Economy and Society. Report to the President of the European Commission*, 71 (2010).

⁶ Cf. e.g., J. Baquero Cruz, *Between Competition and Free Movement. The Economic Constitutional Law of the European Communities* (2002).

not unreasonable to suppose then how the general provisions of the new treaties might open up a strong potential to reverse the relationship between social Europe and economic Europe. The interpreter, and more specifically the EU Court of Justice (ECJ) in the first place, stands before a framework of values, objectives and principles which have been significantly modified by the Treaties, extending beyond the functional and economic dimension of European integration, and recognising a co-essential social *finalité* of the EU. In this new axiological platform shaped by the opening provisions of the Treaties, the market ceases to act as supreme within the EU and competition shifts from being a protected value to a tool of the 'social market economy'⁷.

In this shortly defined context, particular relevance is given to the clause contained within Art 9 of the Treaty on the Functioning of the EU (TFEU), which states that '[i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'⁸. This is the so-called *Horizontal Social Clause* which, inserted in Title II of the TFEU among the provisions of general application, requires that the objectives of social policy be considered within the framework of other EU policies and actions. The clause thus tends to settle the tension between liberalism and solidarism that has been at the centre of the debate on the nature of European integration since its origins. The liberalist philosophy tends to see market integration as the predominant if not the only factor of integration, and has the obvious effect of isolating free-competition from the influence of EU social policy. The solidarist philosophy tends rather to suggest that social policy is not only a distinct policy of the EU, but also constitutes an imperative that should permeate the aims of any other policy.

⁷ D. Damjanovic, *The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy*, 50 *Comm. Mkt. L. Rev.* 1685 (2013).

⁸ The importance of the *Horizontal Social Clause* and its strict relationship with the objective of the "social market economy" is highlighted in the communication of the European Commission, *Towards a Single Market Act. For a highly competitive social market economy*, COM (2010) 608 final, 27 October 2010.

In line with the changes introduced by the Lisbon Treaty (see above), the clause thus presents a clear, strong political significance when it introduces the need to balance economic and market goals with social objectives⁹. In this sense, the clause reflects the need to repair the breach – also reflected in a series of ECJ rulings¹⁰ – between market interests and social protection¹¹.

Not so simple, however, is its significance in a strictly legal perspective since the clause raises many issues. First, it is unclear whether the institutions and actors called upon to implement EU policies and actions have a ‘legal duty’ (to take account of social objectives) which may be disputed judicially or what kind of control EU judges may exercise (para II). Secondly, assuming that Art 9 TFEU does not constitute an *ad hoc* legal basis for the realization of its objectives, it is not clear whether the clause, in indicating the need to integrate social objectives within other EU policies, determines an extension of purpose congruent with each material legal basis, or whether it is intended to disregard the principle of conferral (para III). There is also the matter of examining how EU legislature actually integrates social needs with other competences (para IV) and how the ECJ has reconciled social objectives with economic integration and what kind of

⁹ P. Vielle, *How the Horizontal Social Clause Can Be Made to Work: The Lessons of Gender Mainstreaming*, in N. Bruun, K. Lorcher & I. Schornann (eds.), *The Lisbon Treaty and Social Europe*, 105 (2012).

¹⁰ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line APB* [2007] ECR I-10779. See D. Leczykiewicz, *Conceptualising Conflict between the Economic and the Social in EU Law after Viking and Laval*, in M. Freedland & J. Prassl (eds.), *Viking, Laval and Beyond*, 307-322 (2014); S. Giubboni, *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective*, 7-40 (2006); C. Barnard, *EU Social Policy: From Employment Law to Labour Market Reform*, in P. Craig & G. de Búrca (eds.), *The Evolution of EU Law*, 641 (2nd edn, 2011).

¹¹ See European Commission, *A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020, 3 March 2010, which, as is well known, contains the future strategy to transform the EU into a smart, sustainable and inclusive economy characterized by high levels of employment, productivity and social cohesion. See M. Ferrera, *Mapping the Components of the Current Institutional Patchwork*, in E. Marlier & D. Natali (eds.), *Europe 2020. Towards a More Social EU?*, 45 (2010). See, also, European Economic and Social Committee, *Strengthening EU cohesion and EU social policy coordination through the new horizontal social clause in Article 9 TFEU*, (Opinion) (2012/C 24/06), 26 October 2011.

status has been given to the purposes indicated by Art 9 (paras V and VI). This analysis will therefore concentrate on the clause from a strictly legal perspective by examining the key issues that it raises. In the light of our findings, an attempt will be made to provide a brief reflection on the function that Art 9 carries out in relation to the context of the competences outlined by the Treaties (para. VII).

2. Constraints falling upon EU institutions and Member States

In defining and implementing its policies and activities, the EU 'shall take into account' the social needs set out in the clause. As mentioned, however, the rule does not clarify the extent of 'commitment' required¹². In its recent *Pillbox* judgment¹³ the ECJ, in stating that Art 9 'require[s] it to ensure' the objectives set down¹⁴, appears to suggest that the EU is subject to an 'obligation' and that this amounts to an 'obligation of result'. It is thus reasonable to conclude that the expression used by the ECJ is not limited to guiding the conduct of the EU, but has the added function of binding it to the achievement of social objectives¹⁵. From this perspective, the scope of integrating the needs of Art 9 into the context of other policies translates into a general obligation to evaluate the possible negative impact that such a measure can produce as compared to the achievement of standards of social rights protection.

This constraint should lead, in turn, to a duty on the part of the institutions to balance the need for protection of social values with competing interests, both in policy-making and policy

¹² The position of the *Horizontal Social Clause* in provisions of general application seems to argue for its strictly legal and not simply political nature. See, on this point, J.C. Piris, *The Lisbon Treaty: a legal and political analysis*, 310 (2010), who stresses the binding nature of HSC also for the European Union Court of Justice. About the binding nature of HSC see also F. Lecomte, *Embedding employment rights in Europe*, 11 Colum. J. Eur. L. 20 (2011).

¹³ See *infra*, Case C-477/14 *Pillbox v Secretary of State for Health* ECLI:EU:C:2016:324.

¹⁴ *ibid* para 116. Specifically, it should guarantee "a high level of protection of human health in the definition and implementation of all Union policies and activities".

¹⁵ See European Parliament Resolution (2012/C 380 E/08), 8 June 2011.

implementation¹⁶. As for the definition phase, the ruling should imply a substantial *ex ante* examination involving a systematic assessment of the impact of the measures to be taken on the achievement of social goals. The outcome of such an examination would likely occur, within the reasoned grounds of the decision, in the exposition of how social considerations have been integrated and balanced with interests of a different nature¹⁷. Similar conclusions should be drawn at the time of preparation of the implementing measures of the EU's policies.

Even more problematic might be the subsequent monitoring of compliance with the obligation laid down by Art 9. The main difficulty lies not so much at policy level or with an impact assessment of the Commission's proposals¹⁸, but rather the

¹⁶ See European Parliament Resolutions (2012/C 188 e/09), 17 February 2011; (2012/C 70 E/04), 20 October 2012.

¹⁷ The characteristic horizontal, or better cross, effect of this clause derives from the concept of mainstreaming as it has been developed by the EU Commission with regard to the principle of equality between men and women and the fight against discrimination. As is well known, 'to mainstream' means to integrate something or someone in a context which is considered the general and dominant paradigm. In the EU documents mainstreaming means to act in order that the principle of non-discrimination and the promotion of equal opportunities become a general and paradigmatic way in the process of policy-making. Similarly, the social mainstreaming clause under Art 9 TFEU has a cross nature because through an integrated approach it aims to make the protection of social objectives a general paradigm in the public action, ensuring that these goals are guaranteed not only through specific measures, but also through their systematic incorporation in all public policies.

¹⁸ See European Parliament Resolutions (2012/C 188 e/09), 17 February 2011, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=/EP/TEXT+TA+P7-TA-2011-0068+0+DOC+XML+V0/IT>. See, also, European Economic and Social Committee, *Strengthening EU cohesion and EU social policy coordination through the new horizontal social clause in Article 9 TFEU*, cit. at 11, 29; European Economic and Social Committee, *The open method of coordination and the social clause in the context of Europe 2020*, (Opinion) (2011/C 44/04) of 15 July 2010. The Belgian Presidency of the European Union in 2010 underlined the importance of this clause as a tool for increasing the focus on the European social dimension through a structured dialogue on the social impact of policies and actions within and outside the EU, identifying the Impact Assessment as a valid tool for implementing the HSC (Belgian Presidency of the European Union, *The horizontal social clause and social mainstreaming in the EU. The Horizontal Social Clause as a call for intensified cooperation and exchange of knowledge through the Commission's Impact Assessment*, (26-27 October 2010, Background Paper) www.socialsecurity.fgov.be/eu/docs/agenda/26-27_10_10_sia_en.pdf).

possibility to seek judicial review concerning an act that might fail to take due account of, or even undermine the interests of Art 9¹⁹. In this case, the ECJ would be called upon to assess the adequacy, in terms of social protection, of measures which, requiring 'political, economic and social choices' and towards which the legislator is called upon to undertake 'complex assessments', would leave room for 'broad discretion'²⁰. It is reasonable to wonder, then, just what kind of test the ECJ might adopt when the legislator, in view of the wide discretion available, has to balance social needs with other interests²¹.

Since Art 9 imposes an obligation to integrate social objectives in the EU as a whole, a significant role should also be assigned to Member States when implementing existing EU measures²². In this case, failure to abide by the obligation arising from Art 9 should, in principle, justify any claim against infringement. Again, however, such an action could prove problematic. The biggest challenge could lie in the difficulty of reviewing a failure, in breach of the obligation in Art 9, to integrate and reconcile the social objectives identified at EU level²³.

3. Legal basis

Article 9 is difficult to place within a theoretical framework also as regards its legal scope. In establishing a series of social objectives, which should guide the EU's activities and policies as a whole, it is open to diametrically opposed interpretations.

One line of argument is that since '[i]n defining and implementing its policies and activities, the Union shall take into

¹⁹ M.D. Ferrara, *Social Justice Through Social and Economic Mainstreaming: the Role of the Horizontal Social Clause of TFEU*, Social Justice Conference: the institutions that make social justice, London School of Economics, 1-2 August 2014.

²⁰ Case C-157/14 *Société Neptune Distribution v Ministre de l'Économie et des Finances* ECLI:EU:C:2015:823 para 76.

²¹ On this profile see, *infra*, para V.

²² See P. Vielle, *How the Horizontal Social Clause Can Be Made to Work: The Lessons of Gender Mainstreaming*, *cit.* at 9. The interpretation that extends the binding scope of Art 9 TFEU and its objectives also towards the Member States is founded on the principle of sincere cooperation.

²³ This would mean upholding the failed or correct transposition of a directive that already addressed the balancing of interests.

account' the various objectives set down in Art 9, it might be reasonable to suppose that one of the functions of Art 9 TFEU is to assign different objectives to each policy and activity, which go beyond those specifically established by each legal basis. From this perspective, in extending the range of objectives pursued by each policy beyond what is indicated by the specific legal basis, Art 9 would have the effect of eliminating or at least mitigating the functional link which, by virtue of the principle of conferral, exists between powers and purposes. In this light, the generally univocal correspondence that each legal basis establishes between powers of action and objectives, either explicitly or implicitly, would give way to an overall conception of the various competences conferred so as to 'rebuild the Union as an entity of general competence ... in the context of spheres of competences conferred'²⁴. From this perspective, the actual competence of the Union in the context of various concrete policies would have to be derived from a joint reading of the objectives of Article 9 (and other general clauses) and the powers assigned by each specific legal basis considered overall and balanced one against the other. The limitations of such an approach are obvious: an integrated approach to the system of the Union's objectives – assuming that they are not clearly assigned to each competence, but rather help to determine the overall picture of the objectives that the Union must pursue through all of its competences taken together – would make it extremely difficult, if not impossible, to identify the relevant legal basis for each individual measure taken, and would inevitably run counter to the principle of conferral, which continues to be a key feature of the legal system of the EU.

A second line of argument suggests a more cautious approach. Rather than widening the scope of other policies, the function of Art 9 TFEU is to suggest a series of objectives to guide the overall action of the Union, merely providing a framework in which individual policies should be conducted. From this point of view, Art 9 would then be a non-competence-specific and non-power-conferring statement; rather it would be an attempt to substantially increase overall policy coherence of the Union. On

²⁴ This very effective expression can be attributed to E. Cannizzaro, *Gerarchia e competenza nel sistema delle fonti dell'Unione europea*, 8 *Il Diritto dell'Unione europea* 651 (2005).

this basis, since Art 9 does not confer competence, it would not be a suitable means to broaden the objectives pursued by each material policy beyond what is indicated by the specific legal basis. It follows that the social policy objectives would have the limited function of guiding the development and implementation of policies of a material nature, but could not be considered an integral part of them.

This reading does seem to be in line with Art 7 TFEU, which opens Title II on provisions of general application. In establishing that '[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers', the rule would appear to indicate that the integration of social objectives within the exercise of other policies is simply to make the various policies consistent, without entailing any change in the scope of each material competence²⁵.

4. Legislative practice

Even a cursory examination of regulatory practice shows that EU legislature, after the introduction of Art 9 into the Treaties, has used the *Horizontal Social Clause* cautiously. Up until now, four acts alone have made explicit reference to the clause²⁶. In these cases, the intention of the EU legislator to include and integrate social considerations in the exercise of the powers it enjoys becomes apparent. The omitted mention of the clause should however not imply, in principle, the legislator's intention to exclude social considerations through a mutual balance from the purposes pursued by the measure. In this case, however, it is not always clear whether the inclusion of social values in the context of the act derives from Art 9 or from other sources.

²⁵ For the approach adopted by the Court of Justice see *infra* paras V and VII.

²⁶ The references to HSC were more frequent when the introduction of this clause was only in gestation. For example, see Commission, *Reforming Europe for the 21st century*, (Communication) COM (2007) 412 final, and *Opportunities, Access and Solidarity: towards a new social vision for 21st century Europe*, (Communication) COM (2007) 726 final. Surprisingly, the Commission does not mention the HSC in the recent Communication, *Strengthening the social dimension of the Economic and Monetary Union*, COM (2013) 690 final.

This difficulty emerges, for example, with regard to Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products²⁷. The Directive, based on Arts 53, para 1, 62 and 114 TFEU concerning, respectively, the right of establishment and approximation of laws, significantly modifies regulations on the manufacture, presentation and sale of tobacco and related products within the European market. The legislation is designed to ensure that such products are placed on the market under uniform conditions, ensuring, at the same time a high level of health protection. Nor is it clear whether this additional concern for health protection²⁸, which must be duly taken into account and reconciled with the needs of the market²⁹, derives from the *Horizontal Social Clause* or from Art 114 TFEU. The latter provision – to which the Directive expressly refers – requires a high level of

²⁷ 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 [2014] OJ L127/1 (Tobacco Directive). In the same vein see, e.g., the acts on the approximation of laws on regulations regarding food products (infra n No 48).

²⁸ See Art 1 of the directive which points out that the objective is “to approximate the laws, regulations and administrative provisions of the Member States ... in order to facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health”.

²⁹ See also further references to the interest of “health” in the directive. Recital 13 refers to the “obligation placed on the Union to ensure a high level of protection for human health”; recital 36, with reference to tobacco products states that “A high level of public health protection should be taken into account when regulating these products”; recital 43 states that “it is necessary to approximate the national provisions on advertising and sponsorship of those products having cross-border effects, taking as a base a high level of protection of human health”.

Similar considerations count, e.g., for Regulation (EU) 2016/589 of the European Parliament and of the Council of 13 April 2016 on a European network of employment services (EURES), workers’ access to mobility services and the further integration of labour markets, and amending Regulations (EU) No 492/2011 and (EU) No 1296/2013 [2016] OJ L107/1. Based on Art 46 TFEU (freedom of movement for workers), the regulation establishes a framework for cooperation in order to ease the freedom of movement of workers within the Union also aimed at “achieving a high level of quality employment” (Art 1, letter c).

protection such that the harmonisation measure affects 'health, safety, environmental and consumer protection'³⁰.

The Art 9 clause, however, is currently cited in very few legal acts. Among these is Regulation (EU) No. 1304/2013 of the European Parliament and the Council of 17 December 2013 on the European Social Fund³¹, which, in defining the tasks of the European Social Fund (ESF), the scope of its support as well as the specific provisions and types of eligible expenditure, must take into account '[i]n accordance with Art 9 TFEU, ... requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'³². The reference to Art 9 does not, however, appear to be particularly significant. The various interests that the regulation aims to promote, and which partly coincide with those mentioned in the clause, do not actually derive from the obligation arising from this clause³³, but from the legal basis employed which 'shall aim to render the employment of workers easier within the Union'³⁴. Significant in this regard is the recital 2 of the regulation, which, in indicating that the ESF 'should improve employment opportunities, strengthen social inclusion, fight poverty, promote education, skills and life-long learning and develop active, comprehensive and sustainable inclusion policies', clearly indicates that these are objectives that correspond to 'the tasks

³⁰ Art 114, para 3, TFEU.

³¹ Regulation (EU) 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006 [2013] OJ L347/20 (European Social Fund Directive).

³² *ibid* Recital no 2.

³³ Based on Art 164 TFEU, the regulation "shall promote high levels of employment and job quality, improve access to the labour market, support the geographical and occupational mobility of workers and facilitate their adaptation to industrial change and to changes in production systems needed for sustainable developments, encourage a high level of education and training for all and support the transition between education and employment for young people, combat poverty, enhance social inclusion, and promote gender equality, non-discrimination and equal opportunities, thereby contributing to the priorities of the Union as regards strengthening economic, social and territorial cohesion" (Art 2).

³⁴ Art 162 TFEU.

entrusted to the ESF by Article 162 of the Treaty on the Functioning of the European Union’.

Another act that invokes the clause is the Council Decision (EU) 2015/1848 of 5 October 2015 on guidelines for the employment policies of the Member States for 2015³⁵. Based on Article 148 TFEU, the decision lays down guidelines which should be taken into account by Member States in their policies on employment on the understanding that it is national policies on employment that help to define the policy of the Union on the area in question through mutual cooperation. As is clear from Decision 2015/1848, these guidelines not only regard ‘[b]oosting demand for labour’, ‘[e]nhancing labour supply, skills and competences’, and ‘[e]nhancing the functioning of labour markets’³⁶, but should also accord with the ‘requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education and training’³⁷ aimed at ‘[f]ostering social inclusion, combatting poverty and promoting equal opportunities’³⁸. Unlike the previous case, here the reference to the clause appears to take on more significance: the objective of promoting employment must be achieved not only through market and economic means, but also through instruments of social protection, on the basis therefore, of an approach that integrates and reconciles different needs. In other words, the guidelines clearly indicate, consistent with Article 9, that the promotion of employment is a goal whose achievement requires the reconciliation of both economic demands and social needs.

Even more significant for our purposes, are Regulations 472 and 473 of 2013³⁹ which, along with other measures, in order to

³⁵ [2015] OJ L268/28.

³⁶ *ibid* Guidelines Nos 5, 6, 7.

³⁷ *ibid* Recital No 2.

³⁸ *ibid* Guideline No 8.

³⁹ Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1 (Economic and Budgetary Surveillance Regulation); Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction

reassure the markets, curb speculation and restore stability to the Euro, combined to redefine the governance of the EMU in the aftermath of the 2008 economic crisis⁴⁰. Founded on Articles 136 and 121, para 6 TFEU, the two regulations (so-called Two Pack) are intended, respectively, to step up economic and budgetary surveillance of Member States within the Eurozone facing difficulties and risks to their stability or requesting or receiving financial assistance, and to establish common provisions between Member States of the Eurozone for the monitoring and assessment of draft budgets and for the correction of excessive deficits. Both regulations expressly refer to Art 9 TFEU⁴¹.

As for Regulation 472/2013, among other provisions, this establishes that any State intending to access financial assistance measures from Member States or third-party States or on the basis of other financial instruments should draw up 'in agreement with the Commission, acting in liaison with the ECB and, where appropriate, with the IMF, a draft macroeconomic adjustment program'⁴². This draft - aimed 'at rapidly re-establishing a sound and sustainable economic and financial situation and restoring the Member State's capacity to finance itself fully on the financial markets' - not only relies on a constantly reviewed assessment of the sustainability of the government debt⁴³, but also takes into account 'the practices and institutions for wage formation and the national reform programme of the Member State concerned in the context of the Union's strategy for growth and jobs'⁴⁴.

of excessive deficit of the Member States in the euro area, [2013] OJ L140/11 (Draft Budgetary Plans Regulation).

⁴⁰ See Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Preemption of Democracy*, 11 MPIfG Discussion Papers (2011).

⁴¹ See Recitals Nos 2 and 8.

⁴² Art 7 para 1 of the Regulation.

⁴³ Art 7 para 1 states: "The draft macroeconomic adjustment programme shall be based on the assessment of the sustainability of the government debt referred to in Article 6, which shall be updated to incorporate the impact of the draft corrective measures negotiated with the Member State concerned, and shall take due account of any recommendation addressed to that Member State under Articles 121, 126, 136 or 148 TFEU and of its actions to comply with any such recommendation, while aiming at broadening, strengthening and deepening the required policy measures".

⁴⁴ Art 7 para 1.

And this is not all: in preparing its drafts concerning the macro-economic adjustment program, the 'Member State shall seek the views of social partners as well as relevant civil society organisations ..., with a view to contributing to building consensus over its content'⁴⁵. Given these overall directions, it is reasonable to suppose that the Article 9 clause comes into play precisely wherever it requires the Member State (and the Commission) to found the draft program based on an extensive evaluation that takes into account and balances the various interests at stake: sustainability of the government debt, on the one hand; preserving national systems of collective bargaining, on the other⁴⁶.

Regulation 473/2013, for its part, establishes a framework to strengthen the monitoring of budgetary policies in the Eurozone and to ensure the consistency of national budgets with economic policy guidelines⁴⁷. The actions taken on the basis of the regulation, however, have some limitations: in accordance with Article 152 TFEU, they must recognize and promote the role of the social partners, respect current national systems and practices in the determination of wages and avoid undermining the right to negotiate, conclude or enforce collective agreements or take collective action in accordance with law and national practices⁴⁸. Again, it seems reasonable to suppose that the enhancement of the need to ensure respect for social values derives from Art 9. This Article, also in the context of Regulation 473/2013, strengthens social rights vis-à-vis conflicting budgetary interests with a view to protecting national social policies.

5. ECJ case law: the clause and objectives of general interest

As with regulatory acts, references to Article 9 TFEU in European case law are few and far between. The ECJ has invoked

⁴⁵ Art 8.

⁴⁶ See D. Chalmers, G. Davies & G. Monti, *European Union Law*, 745 (3rd edn, 2014): "The guarantees provided in EU law are greater than under the ESM. The programme must respect national system of collective bargaining. The Member State must also seek the views of social partner as well as civil society organisations in drafting this programme".

⁴⁷ See Art 1 para 1.

⁴⁸ See Art 1 para 2.

and 'employed' the *Horizontal Social Clause* in only four judgments in order to balance the goal of 'a high level of protection of human health' with other interests at stake. Although references in case law are limited, they do offer significant clues as to the legal scope of the clause. It is thus worth referring to these four cases, albeit briefly, retracing the ECJ's arguments.

In all four preliminary rulings the ECJ had to determine whether approximation norms regarding nutrition and health claims made on foods, in particular concerning the use and marketing of natural mineral waters, on the one hand⁴⁹, and the manufacture, presentation and sale of tobacco and related products, on the other⁵⁰, violated certain provisions of the Charter of Fundamental Rights. It should be noted that none of the acts subject to review makes any reference to Article 9.

In particular, in the first judgment (*Deutsches Weintor*)⁵¹, the Court was asked to verify the validity of Art 4, para 3, first clause of Regulation (EC) No. 1924/2006⁵² - which prohibits, without exception, the producer or distributor of alcoholic beverages from making 'health claims'⁵³ - in the light of Art 15, para 1 and Art 16 of the Charter. Such provisions ensures that everyone has the right to work and to pursue a profession, and to conduct business. The Court was therefore called upon to ascertain whether such individual rights and freedoms had been unlawfully restricted by the legislation concerned.

With concise and linear argument, the Court first stated that 'the compatibility of the prohibition ... must be assessed in the light not only of the freedom to choose an occupation and the freedom to conduct a business, but also of the protection of

⁴⁹ Regulation (EC) 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods [2006] OJ L404/9 (Nutrition and Health Claims Regulation); Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters [2009] OJ L164/45 (Natural Mineral Waters Directive).

⁵⁰ Tobacco Directive.

⁵¹ Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* ECLI:EU:C:2012:526.

⁵² Nutrition and Health Claims Directive.

⁵³ 'Beverages containing more than 1,2% by volume of alcohol shall not bear health claims'. In this case what was controversial was the wording 'easily digestible'.

health'⁵⁴. Consequently, such an assessment must be carried out 'in accordance with the need to reconcile the requirements of the protection of those various fundamental rights protected by the Union legal order, and striking a fair balance between them'⁵⁵.

On the one hand, freedom to pursue a profession or conduct a business are not absolute rights but must be considered in relation to their 'social function'. They can therefore be restricted 'provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights'⁵⁶. On the other, the protection of human health 'constitutes, as follows also from Article 9 TFEU, an objective of general interest justifying, where appropriate, a restriction of a fundamental freedom'⁵⁷.

Thus, in describing the protection of health – and with it the other interests protected by Article 9 – as 'objectives of general interest', the Court resorted to a conceptual method commonly used in its case-law whenever it might be necessary to reconcile conflicting interests. Traditionally, the objectives of general interest are those values/parameters that measure the degree of protection of fundamental rights. Although it would be wrong to speak of an elaboration of an independent notion of general interest of the Union⁵⁸, with this statement the Court referred to those interests that are inherently ingrained within the nature and functions of the Union and that, as such, are capable of justifying the restriction of individual fundamental rights and freedoms⁵⁹.

One issue that traditionally lies behind this method concerns the discretion enjoyed by the legislator when, in adopting a certain discipline, he is called upon to balance fundamental rights with the objectives of general interest. Clearly,

⁵⁴ Para 46.

⁵⁵ Para 47.

⁵⁶ Para 54.

⁵⁷ Para 49.

⁵⁸ On this topic, see C. Boutayeb, *Une recherche sur la place et les fonctions de l'intérêt général en droit communautaire*, 39.4 RTDE 587 (2003).

⁵⁹ Case 44/79 *Hauer* [1979] ECR 3727; Case 5/88 *Wachauf* [1989] ECR 2609; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR I-415; Case C-44/89 *von Deetzen* [1991] ECR I-5119.

the greater or lesser extent of the discretion conferred on the legislator will consequently determine the scope of judicial review reserved to the ECJ. In its *Deutsches Weintor* ruling the Court confined itself to stating that the contested legislation ‘must be regarded as complying with the requirement that is intended to reconcile the various fundamental rights in this instance and to strike a fair balance between them’⁶⁰. Indeed, ‘[f]ar from prohibiting the production and marketing of alcoholic beverages, the legislation at issue merely controls, in a very clearly defined area, the associated labelling and advertising’⁶¹.

Some more detail on this point is provided by the subsequent judgment in the *Société Neptune Distribution* case⁶². Here, too, the Court was called upon to establish the compliance of certain provisions of Directive 2009/54 and Regulation No. 1924/2006⁶³ with the freedom of expression and information (Article 11 of the Charter) and the freedom to conduct business (Article 16 of the Charter), in particular those which prohibit certain claims on packaging, labelling and advertising of natural mineral waters⁶⁴.

After pointing out that fundamental rights can be restricted when they are incompatible with objectives of general interest, the Court reaffirmed that ‘[i]n those circumstances, the determination of the validity of the contested provisions must be carried out in accordance with the need to reconcile’ the protection of individual liberties invoked with a high level of health protection⁶⁵. The Court, however, added that ‘[w]ith regard to judicial review of the conditions of the implementation of the principle of proportionality, the EU legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments’⁶⁶.

⁶⁰ Para 59.

⁶¹ Para 57.

⁶² Case C-157/14 *Société Neptune Distribution v Ministre de l'Économie et des Finances* ECLI:EU:C:2015:823.

⁶³ Natural Mineral Waters Directive and Nutrition and Health Claims Regulation.

⁶⁴ See Art 9 paras 1 and 2 of Natural Mineral Waters Directive, in addition to annex III and annex to Nutrition and Health Claims Regulation.

⁶⁵ Para 75.

⁶⁶ Para 76.

This premise sufficed for the Court to conclude that ‘the actual content of the freedom of expression and information of the person carrying on the business is not affected by those provisions’⁶⁷, and that ‘far from prohibiting the production and marketing of natural mineral waters, the legislation at issue in the main proceedings merely controls, in a very clearly defined area, the associated labelling and advertising. Thus, it does not affect in any way the actual content of the freedom to conduct a business’⁶⁸.

The Court, therefore, not only confirmed that where human health is at stake the protection of individual rights must be weighed against this and if necessary yield, but also provided a further indication. It recognised that where the assessments to be made are complex, such broad discretion has the effect of producing little control over the necessity and appropriateness of the measure adopted as it relates to the objective of general interest pursued. In concluding that the essential content of the freedoms in question is not affected, the ECJ clearly showed that it was unwilling to demonstrate the effective need that binds the measures taken to the fulfilment of the general interest or the impossibility of replacing such measures with alternative but equally effective instruments that might be less detrimental to fundamental rights.

In the subsequent *Pillbox* and *Philip Morris* cases⁶⁹, the Court was asked to rule on the alleged conflict of certain provisions of Directive 2014/40/EU with the EU Charter of Fundamental Rights and the principle of proportionality⁷⁰. Again, the directive, adopted to completely redefine the rules of harmonisation on tobacco products, overcame hindrances to its validity posed by the two cases. The dispute concerned the ban on certain labels on tobacco products; the ban on placing tobacco products with certain flavourings on the market; the requirements for warnings concerning health hazards to appear on packaging; the ban on promoting electronic cigarettes. The arguments relating to these

⁶⁷ Para 70.

⁶⁸ Para 71.

⁶⁹ Case C-477/14 *Pillbox* 38 ECLI:EU:C:2016:324; Case-547/14 *Philip Morris* ECLI:EU:C:2016:325.

⁷⁰ Tobacco Directive. On the content of the Directive and incidents accompanying legislative process see T.K. Hervey & J.V. Hale, *European Union Health Law*, 393 (2015).

regulations concerned the violation of the principle of proportionality; incompatibility with the freedom of expression and information (Article 11 of the Charter)⁷¹, the freedom to conduct a business (Article 16 of the Charter) and the right to property (Article 17 of the Charter)⁷².

According to the Court, restrictions on fundamental rights and freedoms that the directive actually causes appeared appropriate and necessary in relation to the legitimate objectives pursued. Some of the arguments put forward to reach these conclusions were unprecedented. After pointing out that the protection of public health, in accordance with Article 9, is a general interest objective recognized by the EU⁷³, the Court did not limit itself to reiterating that the legislature's task is to strike a 'fair balance'⁷⁴ between the different needs at stake, despite the likely negative impact on the profits of tobacco companies. It turned to a fresh argument, reasoning that in determining this balance, the discretionary power available to the legislature 'varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question'⁷⁵. Thereby, the Court introduced a new criterion: the evaluation of the discretionary margin reserved to the legislature. This criterion, in turn, is based on two parameters: the scope of the general interest objective; the nature of the activity affecting the individual right or freedom. In this case the first parameter concerned the interest of 'health protection in an area characterised by the proven harmfulness of tobacco consumption'⁷⁶. The second related to the exercise of individual freedoms 'to spread information in the pursuit of commercial interests ...'⁷⁷.

Once the Court identified the scope and nature of the competing interests in this manner, it concluded that the protection of human health 'outweighs the interests put forward by the claimants in the main proceedings'⁷⁸. Indeed, as is clear

⁷¹ *Philip Morris* para 146.

⁷² *Pillbox 38* para 152.

⁷³ *Philip Morris* para 152; *Pillbox 38* para 116.

⁷⁴ *Philip Morris* para 154.

⁷⁵ *ibid* para 155.

⁷⁶ *ibid* para 156.

⁷⁷ *ibid* para 155.

⁷⁸ *ibid* para 156.

from certain articles, and in particular Article 9 TFEU, 'a high level of human health protection must be ensured in the definition and implementation of all the European Union's policies and activities'⁷⁹.

Through the dual parameter deriving from the objective of general interest and the nature of the activity affecting individual rights, the ECJ accepted the balance operated by the legislature. It basically means that individual freedoms may yield, and in doing so are subject to a restriction, as a result of the higher importance, in accordance with Article 9, of the protection of health compared with the exercise of freedom to pursue commercial interests⁸⁰. The impression, difficult to dispel, is that setting health protection above other interests may further reduce judicial control, already ineffective as it is, over the necessity and appropriateness of the restrictive measure adopted in relation to the general interest objective being pursued⁸¹.

6. ... and what about overriding reasons?

The rulings that have been examined summarily attribute to the interest relating to health protection (and indirectly to all other interests identified in Article 9) the status of 'general interest objectives', that is, interests liable to restrict the enjoyment of fundamental individual rights and freedoms with which they come into conflict. The rulings also recognize a particular relevance to such interests where the individual rights at stake have a purely economic nature⁸².

⁷⁹ *ibid* para 157.

⁸⁰ *ibid* para 190, where the Court states that the legislature "weighed up, on the one hand, the economic consequences of that prohibition and, on the other, the requirement to ensure, in accordance with the second sentence of Article 35 of the Charter and Arts 9 TFEU, 114(3) TFEU and 168(1) TFEU, a high level of human health protection with regard to a product which is characterised by properties that are carcinogenic, mutagenic and toxic to reproduction". See also Case C-358/14 *Polland v European Parliament and Council* ECLI:EU:C:2016:323, para 102, and the Opinion of AG Kokott delivered on 23 December 2015 (ECLI:EU:C:2015:848) on the same case, para 130.

⁸¹ In similar terms, see P. Koutrakos, *Reviewing Harmonization: the Tobacco Products Directive Judgments*, 3 *Eur. L. Rev.* 305 (2016).

⁸² It is worth asking oneself whether the conclusion to consider the interest of health of 'greater importance' would be applied if the other interests referred to

That said, defining social objectives as ‘public interest objectives’ is justified in relation to the individual nature of the rights with which these objectives may enter into conflict within a certain discipline. If so, it is reasonable to suppose that the various social objectives may become ‘overriding reasons’ where they come up against so-called fundamental freedoms. An overriding reason applies when a national measure, though detrimental to the freedom guaranteed by the Treaty, is justified as it pursues a general interest according to that nation’s legal system.

In this view, *objectives of general interest* and *overriding reasons* are frequently two sides of the same coin: both tend to limit individual rights or the four fundamental freedoms in order to protect an interest worthy of protection according to the EU, in the first case, or national law, in the second. Consequently, when such an interest is recognized and protected in both legal systems it may represent either an ‘objective of general interest’ or an ‘overriding reason’, depending on the function it performs.

Based on this premise, the social objectives of the clause, which apply to Member States in the application of EU law, may be configured as ‘overriding reasons’ where they justify government measures restricting fundamental freedoms. Although the Court did not, at the time, refer to the objectives of the clause as ‘overriding reasons’, this line of argument was held by Advocate General Villalón in his opinion regarding the *Santos Palhota* case⁸³.

In this case, doubts were raised by the national court as to the compatibility of national legislation to monitor the intra-Community movement of workers with Treaty rules on the free movement of services⁸⁴. It is well known that case-law, on the one hand, has accepted a broad notion of ‘restriction’ to the freedom to

in Art 9 were at stake. A definite solution is not easy. The Court would appear to derive this ‘greater importance’ not only from the fact that it is recognised by primary law, but also by the required standard that must be high. If so, only the objectives related to employment, education and training could gain greater importance, once established that they require a high degree of protection.

⁸³ Case C-515/08 *Santos Palhota and Others* ECLI:EU:C:2010:245, Opinion of AG Cruz Villalón.

⁸⁴ Basically, doubts were raised as regards the legitimacy of the employer’s obligation to present the Belgian authorities with a prior declaration of posting, or to keep available copies of documents such as an individual account or payslip.

provide services – ranging from the actual prohibition of an activity to the mere loss of advantage to the latter⁸⁵ – while on the other it has provided a restrictive interpretation of the conditions justifying the use of national restrictive measures, based on overriding reasons of general interest⁸⁶.

According to the Advocate General, the restrictive approach of the Court regarding the interpretation of the conditions that justify the invocation of ‘overriding reasons’ should be softened because of the clause. The ‘overriding reasons’ based on the need to protect the interests identified in Art 9 – like, for example, the social protection of workers – appear, according to the Advocate General, to outweigh other ‘overriding reasons’. In the words of the Advocate General, the existence of the clause means that:

“when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law’s regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions

⁸⁵ This fundamental freedom requires not only the elimination of all discrimination on grounds of nationality against providers of cross-border services, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State, where he lawfully provides similar services (see, e.g., Case C-76/90 *Säger* [1991] ECR I-4221, para 12; Case C-398/95 *SETTG* [1997] ECR I-3091, para 16; Case C-244/04 *Commission v Germany* [2006] ECR I-885, para 30; and Case C-219/08 *Commission v Belgium* [2009] ECR I-0000, para 13).

⁸⁶ See, e.g., Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality”⁸⁷.

The social objectives of the clause thus confer a special significance not only to the *objectives of general interest*, as expressly recognized by the ECJ in the *Philip Morris* case⁸⁸, but also to the *mandatory requirements* that States are entitled to rely on in order to restrict freedom of movement that may infringe a substantial State interest. Indeed, from this perspective, where requirements regarding the protection of social values are in opposition to the interests of the market, the clause should be appreciated to the full, in accordance with the spirit that inspired its inclusion in the Treaties.

7. Concluding remarks

At this point it is not easy to draw definitive conclusions on the legal scope of the clause, hampered by poor legislation and equally limited case law. Indeed, current EU acts referring explicitly to the clause or implicitly to the social interests that it protects are few and far between. Case law too has shown a preference for moderate ‘use’, for the moment, focused mainly on the interest of health protection. This interest, in the absence of the clause, in all probability would be enhanced through alternative routes in case law, provided that different provisions of the Treaties, whether of general⁸⁹ or specific scope⁹⁰, recognize its importance.

⁸⁷ Case C-515/08 *Santos Palhota and Others*, cit. at 83, para 53.

⁸⁸ Case-547/14 *Philip Morris*, cit. at 69.

⁸⁹ See Art 36 TFEU where, among the exceptions that Member States may invoke to maintain or introduce measures restricting free movement of goods, is one that refers to ‘protection of health’; see, also, *supra*, Art. 114 TFEU.

⁹⁰ See Art 168 TFEU which, as regards public health, establishes in para 1, that a ‘high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities’; Art 169, para 1, which states that ‘[i]n order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health ... of consumers’; Art 191, para 1, TFEU, regarding the environment establishes that ‘Union policy on the environment shall contribute to pursuit of the following objectives: ... protecting human health.’

The fact remains that the indications that may be generally drawn do contribute significantly – if not to clarify the overall legal dimension of the clause – at least to reveal its most relevant aspects. Two aspects in particular are worth focusing on.

First, since the clause was invoked when acts concerning different sectors were adopted, the question arises as to whether the function⁹¹ that it has to play is the same in all cases, or may vary depending on the regulatory context at work. A cursory analysis of the acts analysed shows that while its policy function is undisputed, its legal effects may be cause for concern. This is clear in relation to Regulation (EU) No. 1304/2013 regarding the European Social Fund, where the clause appears to carry out a merely *promotional* function⁹². As noted earlier, the social objectives that the regulation aims to promote, and which are partly overlapping with those of Art 9, correspond to ‘the tasks entrusted to the ESF by Article 162 of the Treaty on the Functioning of the European Union’⁹³. A similar conclusion may be drawn in relation to Council Decision (EU) 2015/1848 on guidelines for Member States’ employment policies for 2015⁹⁴. Among the approved guidelines to guide the choices of Member States in matters of employment, is one related to ‘[f]ostering social inclusion, combating poverty and promoting equal opportunities’ in accordance with Art 9⁹⁵. However, as the objectives translate into a mere guideline, the clause seems to play a merely *guiding* role in the act in question.

Instead, an autonomous function going beyond pure policy is carried out by the clause where, as in regulations 472 and 473 of 2011⁹⁶, it provides for a greater emphasis to be placed on the need to ensure respect for social values within the framework of an overall balance of conflicting interests. In these cases, and far from producing effects at policy level only, the clause seems to fulfil a

⁹¹ Hereinafter the term *function* will be used in an atechical and generic manner in order to indicate the role played by the clause in the various contexts in which it is used.

⁹² European Social Fund Directive.

⁹³ *ibid* recital 2.

⁹⁴ n 35.

⁹⁵ *ibid* guideline 8.

⁹⁶ *Economic and Budgetary Surveillance Regulation and Draft Budgetary Plans Regulation*, cit. at 39.

prescriptive function. Similarly, a function of this kind is carried out by the clause even when it limits the enjoyment of positions related to economic interests or implies restrictions on the fundamental freedoms of the market. Its *regulatory* function is evident in relation, for example, to the acts of harmonisation in which EU legislature, in restricting the promotion or marketing of certain products for reasons of health, attempts to reconcile the two opposing economic and social dimensions. In this respect, the first significant signs of openness are visible on the part of the ECJ's case law opting for a more balanced assessment of the contentious matters while also taking into account the regulatory value of the clause. Thus, while in most cases the value of the clause lies at a policy level, in other cases it plays a merely regulatory/prescriptive function. What cannot be overlooked within this perspective is the strong potential that social values may fulfil in regulating the market in the future.

Another issue that deserves clarification concerns the possible effects that the clause produces or may produce on the distribution of competences between the Union and Member States. Protection interests under Art 9 are inherent in the fields of competence defined as *supporting* or *complementary* competences, which leave the regulatory powers of the Member States virtually untouched, reserving a mere coordination function for the Union⁹⁷. Based on this premise, it is reasonable to suppose that the obligation for EU legislature to graft social values identified in the clause onto the fabric of other policies may, in some cases, amount

⁹⁷ It regards those competences which, variously named, still retain a markedly national character. The actions taken by the Union are simply of a coordinating nature, complementing and reinforcing those of the Member States, though this does not mean that the acts adopted by the institutions lead to harmonisation of national laws or regulations, or that the competence of the Union replaces the competences of the Member States in the relevant sectors. Employment policies and a part of social policies fall within those policies for which the EU has a coordinating role (see, in particular, Art 5, paras 2-3 TFEU, Arts 145-150 TFEU included in Title IX concerning 'Employment', Arts 151-161 TFEU regarding 'Social Policy'). Education/training and the protection and improvement of human health fall within the so-called support competences in which the EU restricts itself 'to carry[ing] out actions to support, coordinate or supplement the actions of the Member States' (see Art 6, letters a), e) TFEU; see, also, Arts 165-166 TFEU included in Title XII concerning 'Education, Vocational Training, Youth and sport' and Art 168 TFEU regarding 'Public Health').

to a genuine exercise of competence, determining the corresponding expropriation of the regulatory powers of the Member States.

This hypothesis seems to hold true, for example, where the EU's measures entail harmonisation of national regulations governing the marketing of products that may have a negative impact on health, as in the context of Directive 2014/40 regarding harmonisation rules on tobacco products⁹⁸. The problem that arises relates to the fact that Art 168, para 5, TFEU (regarding 'public health') states specifically 'excluding any harmonisation' in the specific matter of the 'protection of public health regarding tobacco'. The regulation allows for incentive measures only on the part of the EU, in compliance with what is expected for the exercise of supporting, coordinating or complementary competences (Art 2, para 5, TFEU), which leads back to health policy and, in general, the protection of human health (Art 6 TFEU).

The making of an act for the approximation of legislations in this field thus poses the problem of coordination between the general rules on harmonisation (first and foremost, Art 114 TFEU)⁹⁹ and the aforementioned Art 168, para 5 TFEU. The contradiction could be resolved by giving preference to the latter provision in view of its speciality (*ratione materiae*), thus excluding the eligibility of acts of harmonisation. The opposite is the case in the solution that has emerged in EU case law, also reiterated in the judgments given in the *Philip Morris* and *Pillbox* cases¹⁰⁰. The Court recognized the legitimacy of the acts approximating the laws also in the specific matter of tobacco products.

The basis for the position taken by the ECJ lies in the affirmation that it is legitimate to adopt an act of regulatory harmonisation where the conditions for recourse to Art 114 TFEU

⁹⁸ See, for example, the Court's points in the judgment of 5 October 2000 Case C-376/98 *Germany v European Parliament and Council* ECLI:EU:C:2000:544 para 76 concerning legislative harmonisation of Member States in relation to advertising of tobacco products: '[t]he national measures affected are to a large extent inspired by public health policy objectives'.

⁹⁹ This issue could also arise with the other general provisions on harmonisation in Arts 51, para 3, and 62 TFEU, cited as a legal basis along with Art 114 TFEU in Tobacco Directive.

¹⁰⁰ n 69.

are met (i.e. when the act contributes to the objective of eliminating the existing or potential obstacles to the functioning of the internal market), despite the presence of health objectives. Thus, an act such as Directive 2014/40, which simultaneously pursues 'two objectives in that it seeks to facilitate the smooth functioning of the internal market for tobacco and related products, while ensuring a high level of protection of human health', may be based on Art 114 TFEU¹⁰¹.

Far from being neutral, this conclusion determines some very significant consequences. First, if the function of health protection is not simply to outline the framework underlying the regulation of tobacco products, but, like the smooth functioning of the internal market, is an equally predominant goal of the Directive, the clause would appear to extend the scope of other substantive policies, as well as those outlined in the Treaty. Seen from this perspective, Art 9 would be a clause conferring powers, contrary to earlier readings¹⁰².

Second, the expansion of the sphere of application of other substantive policies would, in turn, have the effect of determining, as mentioned, a creeping erosion of the competence which the Member States retain in matters of health protection. Holding that the adoption of an act of harmonisation is justified by the mere occurrence of a need for legislative approximation, irrespective of the fact that 'public health protection is a decisive factor in the choices to be made' means¹⁰³ in some way allowing the circumvention of the prohibition laid down by Art 168, para 5, TFEU.

To wind up, it is not unreasonable to suppose that besides disclosing a strong potential to reverse the relationship between economic Europe and social Europe through, in particular, its political but also regulatory dimension, the clause has the effect, at least in certain cases, of an expropriation of the competences that Member States continue to maintain in the social sector more generally. The need to extend the Union's action beyond the purely functional or economic aspects would therefore appear to assign the clause a limiting role as well: that of justifying

¹⁰¹ *Philip Morris* para 220.

¹⁰² *V.*, *supra*, para III.

¹⁰³ *Philip Morris* para 60.

intervention that is poorly compliant with the principle of conferred powers. And it is in this direction that the Court seems to be cautiously heading, giving 'greater importance' to social rather than economic objectives.