



Economic Constitution of the European Union, before and after Lisbon (between the principle of Competition and the “Social Market Economy”)

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ABSTRACT: This paper registers some notes and interrogations concerning the express legal enshrinement of the concept of Social Market Economy. It highlights the ordoliberal origin of this concept and questions its meaning – associated with a certain loss of intensity from the clear proclamation of the principle of Competition – in terms of the economic ordination of the Internal Market and European integration. However, the question to be asked brings us back to the effective and contextualised characterisation in the current moment of European integration – the economic Constitution of the EU. Will there be, then, a change of the ideological referential in the economic constitution of the EU and, consequently, in the paths that are intended to be trailed in the future? Or, instead, is the emergence of the express enshrinement in the Treaty of the “Social Market Economy” not indicative of a shift of perspective (sense of direction) of the economy in the Internal Market, but only an evolution in continuance?

KEYWORDS: Internal market – Social Market Economy – competition – economic constitution.

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1. The Founding Treaties, such as the Treaty of Rome of 1957 which created the European Economic Community (EEC), had a strong economic nature. The EEC Treaty pointed at the goal of “*principlology*” structuration of a determined economic organisation, namely the one it was intended to build under the European integration. This economic nature remains – although more diluted – in the current Treaty on the Functioning of the European Union (TFEU) which has reformed the precedent Treaties.

In fact, the “*establishment of a common market*” (later with the Maastricht Treaty, “*the establishment of a common market and economic and monetary union*”),¹ as well as the implementation of a “*system ensuring that Competition in the common market is not distorted*”² are genetic notes of the EEC Treaty. On the other hand, clearly after 1992 (with the Maastricht Treaty), the sense of the presupposed and intended economic organisation was highlighted by the European integration process since the beginning, as it was established that, in order to reach the goals (broad, political and intermediary) spelled in the original Article 2 EEC Treaty, “*the activities of the Member States and the Community*” implicated the “*adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the Internal Market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free Competition*”.³

Hence, such a principle⁴ was reaffirmed expressively, with the Maastricht Treaty as an institutional ordering framework of the action of the Member States (principle of loyalty) and the institutions. This was an ordering and modelling backdrop for the activities of the Member States and it highlighted the fact that the coordination of economic policies, the formulation of common objectives (of economic nature) and the concretization of the Internal Market must be conducted in accordance with the principle of free Competition.

Nevertheless, with the Treaty of Lisbon 2009, attitudes were diluted concerning the proclamation of the Competition nature of the economic ordination, presupposed for the European integration. At least, a downturn relating to the express, clear and assumed affirmation of that principle. Once the expression “*open market economy with free Competition*” is replaced in Article 3 of the Treaty of the European Union (TEU) by “*a highly competitive Social Market Economy, aiming at full employment and social progress (...)*”, indeed, the “*free Competition*” and, for instance, the “*not distorted market*” became expressions that, with Lisbon, were moved to a place of less immediate visibility, since without disappearing from the *acquis communautaire* – with consolidated foundations in Articles 101 and 102 TFEU – were remitted, in terms of listing attributions and objectives of the Union, from the aforementioned Article 3 TEU to, currently, the Protocol on Internal Market and Competition, appended to the Treaties.⁵

¹ Article 2, EEC Treaty, 1957.

² Article 3(f) – latter, with Maastricht, paragraph *g* – of the EEC Treaty, 1957.

³ Article 4(1), EC Treaty, version introduced by the Maastricht Treaty. However, the original version of the aforementioned Article 2, Treaty of Rome EEC, of 1957, read the following: “*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 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*”.

⁴ The aforementioned principle of “*an open market economy with free competition*” that is the principle of competition.

⁵ Protocol No. 27, on internal market and competition: “*Considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, have agreed that: to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under*

It must be clarified, then, that the formula of the TEU of the “*social economy market*” – mostly if such formula along with the moving of the express affirmation of the principle of competition to the Annex 27 – meant a change of sense of the economic (and political) organisation of the Union.⁶

Was the Lisbon Treaty intended to be a shift from the so-called “*economic constitution*” of the Union? How can one characterise now, as a consequence, this (post-Lisbon) “*economic constitution*” of the integration?

2. I believe that such dislocation of the narrative focus of the principle of competition⁷ from the primary law to a Protocol appended to the Treaties did not coincide with an ideological or political-constitutional change of European integration. I would say that despite the apparent devaluation of the principle of competition (which could suggest a discomfort relating to the clear affirmation of the principle) in the expositive method of the Treaties, the economic order of the integrated Europe has not substantially changed. The presupposition of the economic organisation (of the Internal Market), based on a Cosmvision and a “*Principiology*”, essentially a capitalist and competitive promoter of the economic freedom, seeing economy as the manifestation of the enterprises’ self-determination of entrepreneurs and consumers, was not affected at its core, namely, in terms of the *praxis* of the institutions (for example, the European Commission) and the case-law of the Court of Justice of the European Union (CJEU).

The placing of the principle of competition and the permanent construction of an open economy out of the main text of the Treaty was not directly related to eventual new imperatives of economic organisation of the integration itself, but instead, at least in a significant part, to the satisfaction of an internal political narrative in some Member States that, therefore, tried to justify some positions more protectionist and less integrative with which their respective public opinions began to confront.

Besides, the mismatch between the success of the economic integration and the pursuit of social policies that satisfy populations is evident to the generality of observers and citizens – and that balance is in disfavour of the action and the social policies of the Union. The rawness of the affirmation of the principle of competition may have intimidated some political decision-makers. For it the affirmation of a “*Social*

Article 352 of the Treaty on the Functioning of the European Union. This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union”.

⁶ It should be noted that the “*Social Market Economy*” was an expression already used in the draft Constitutional Treaty itself. In this respect, I find particularly valuable the comment of Vital Moreira, of 24th of November 2004, about the then project of Constitutional Treaty (not yet rejected in the French and Dutch referenda in 2005) and on some of the criticism that were addressed to that project: “*Em primeiro lugar, as políticas da UE devem ser agora prosseguidas à luz dos novos princípios fundamentais da nova Constituição europeia (se ela for para a frente), onde se contam expressamente os objetivos de justiça social, de progresso social, de pleno emprego, de desenvolvimento sustentável, de combate contra a exclusão social, entre outros (Article I-3^o). Não é por acaso que no novo texto o modelo económico da UE passa a ser designado por ‘economia social de mercado’, uma antiga expressão de origem alemã que pretende justamente marcar a diferença entre o chamado ‘capitalismo renano’, que incorpora o modelo social europeu, e o capitalismo liberal de matriz anglo-saxónica, especialmente o norte-americano. A não ser que se pretenda afastar a economia de mercado, em favor de qualquer economia ‘socialista’ planificada, a nova noção constitui um evidente progresso sob o ponto de vista da ‘Europa social’.* Vital Moreira, article *Constituição Europeia e Europa Social*, published and disseminated online, in *Aba da Causa*, 24th of November 2004, available on: <http://aba-da-causa.blogspot.pt/2004/11/constituio-europeia-e-europa-social.html> (accessed on 31st of January 2017).

⁷ Or returning to the expression, for instance, consolidated with Maastricht, of “*open market economy with free competition*”.

Market Economy” meant also a political message: The Union and the integration process are focused on overtaking social problems. They have an objective to satisfy the social cohesion, as the market and the market economy in Europe must also ensure the preservation of the Welfare State and the “*European Social Model*” (or at least should not be a risk factor to it).

The declarations of the former President of France, Nicolas Sarkozy, are well known. He was one of the main defenders of the removal of the expression “*free competition*” (principle of competition) of the text of the Treaty and claimed that:

“Sur le fond (...) nous avons obtenu une réorientation majeure des objectifs de l’Union. La concurrence n’est plus un objectif de l’Union ou une fin en soi, mais un moyen au service du marché intérieur. (...) Je crois à la concurrence comme un moyen et pas une fin en soi. Cela va peut-être aussi donner une jurisprudence différente à la Commission. Celle d’une concurrence qui est là pour favoriser l’émergence de champions européens, pour porter une véritable politique industrielle. (...) il ne s’agissait pas de faire un Traité d’économie ou le Traité du libéralisme. (...) Il s’agissait de tourner le dos à l’idéologie, au dogme et à la naïveté”.⁸

It is interesting to notice that, instead of what this declaration seems to mean, the competition policy under the European integration process and, consequently, the Union, has never seen the competition as an absolute goal. In fact, noticeably and markedly, at least until the entry into force of the Regulation 1/2003, the defence of competition was always subordinated to the major goal of the construction of the Internal Market.

One of the characteristic features of that European policy, compared with the American antitrust, lies precisely in this point: A policy and a law of competition has always been part of the Union, assuming that the competition itself is an instrument at the service of wider goals of economic policy and/or of goals of non-economic nature (such as the promotion and the defence of employment, technological development or protection of large interests of consumers). Frequently, it is pointed out that the position of the European policy and law of competition is reverent to a vision of “*competition-means*” and not of “*competition-condition*” (which marks the American perspective). Article 101(3) TFEU illustrates the fact the competition is not an absolute end under the European Law as it enshrines what the legal doctrine calls “*economic balance judgment*”, which justifies and not qualifies as illicit, certain behaviour that, *a priori*, could be subsumed into the category of infringing entente of competition [Article 101(1) and (2) TFEU]. On the other hand, in the statement by Sarkozy of 2007,⁹ there is still a sort of return to the past, namely to the first years of integration, as competition is associated to the emergence of an industrial policy of the Union that would favour the “*champions européens*” – that is the appearance of more European companies able to impose themselves competitively worldwide. In fact, this was also the defining configuration of the industrial policy prescribed by the EEC during the

⁸ See Nicolas Sarkozy, *Conférence de presse à l’issue du Conseil européen, 23 juin 2007*: <http://www.elysee.fr/president/les-actualites/conferences-de-presse/2007/conference-de-presse-a-l-issue-du-conseil.5856.html>.

⁹ See note 8.

first years of the integration.¹⁰

3. Returning to Article 3 TEU, as I have assigned, it has taken the stage, in the formulation of the Treaty with Lisbon, the express assertion of the objective of building “*a highly competitive Social Market Economy, aiming at full employment and social progress*”, relegating to the aforementioned Protocol No. 27 the “*undistorted competition*”.

The concept of “*Social Market Economy*” has its origins and its affirmation/diffusion in the German economic policies of the post-war under the influence of the ordoliberal thought.

Nowadays, the expression is largely used to appoint any kind of State intervention, in the economic domain, with the purpose of benefiting the most vulnerable. It has received, then, in standard terms, a relatively assisting meaning and of social-economic protection. Yet, the concept of “*Social Market Economy*” had originally an accurate theoretical meaning, referring to a determined model of socio-economic organisation and a political-ideological view that, to a large extent, influenced the European integration process. It is originally a formulation resulting from the German ordoliberalism and distinct also by the social Catholic thought. Irrespective of this, with the several visions and different ways of materialising the aspects of the so-called “*Social Market Economy*” as a model of social and economic organisation, it is possible to say that, in its grounds, there is a concern of reaching a high level of social cohesion. Deep down, organising the economic functioning according to the criteria and imperatives of a “*Social Market Economy*” was, in the ordoliberal perspective, the proper way (the best one) to ensure such cohesion.¹¹

The inclusion, within the Treaty of Lisbon, of the expression “*Social Market Economy*” in Article 3 TEU, notwithstanding the internal politics motivations that could justify the use of that expression (undervaluing co-respective and apparently the free Competition) took place in a context of reform of the Treaties, after the unsuccessful attempt of re-founding the process of integration with a “*Draft Constitutional Treaty (CT)*” and in the period of turbulence after the financial crisis of 2008 – turbulence and worry already felt during the process, leading to the adoption of the Treaty of Lisbon that would end up later, outbursting in the sovereign debt crisis of some Member States in the Euro zone (namely, Portugal). Hence, despite the unequivocal allusion to “*Social Market Economy*” in Article 3 TEU (after Lisbon), and in replacement of the “*free and undistorted competition*” formula, it was necessary to create a normative speech (rhetoric?) that could satisfy some circumstances of internal politics. It should be assessed now – a few years after the Treaty of Lisbon – if indeed there have been an approximation to the ordoliberal views in terms of practice and the path followed since then by integration – namely in response to the financial crisis after 2008. The leads to the answer to the question *supra* – how to characterise, now (post-Lisbon), the economic constitution of the integration? – might be collected and assessed in the light of this hypothesis: was or was not there an approximation (to some a return) to the original ordoliberal vision of the so-called “*economic constitution*” of the Union – namely in response to the

¹⁰ Such vision – privileging the growth and the increase of world competitiveness of the European industry ended up delaying in the context of the integration the regulation of economic concentration operations. Indeed, only in 1989 the first Regulation in that matter was created, Regulation (EEC) 4064/89 on the control of concentrations between undertakings.

¹¹ See for example, Christian Joerges and Florian Rodl, *Social Market Economy as Europe's Social Model*, EUJ, Working Paper Law, No. 2004/8, available on: <http://cadmus.eui.eu/bitstream/handle/1814/2823/?sequence=1> (accessed on 10 of January 2017).

political demands of priority attention to the social component (the defence and the strengthening of the so-called “*European Social Model*”)?

Indeed, one of the factors that is frequently seen as responsible, to a large extent, for some distancing of the populations from the Union and the process of integration is the aforementioned mismatch between the economic slope *lato sensu* (the economic integration itself and its progresses, here included the single monetary policy) and the social action/intervention of the Union. The problem of unemployment and the alleged scarce capacity of being developed, at the European level, policies of support and social intervention, comparatively with the intensity and the advancements of the economic integration and (mostly) monetary might be factors of distancing and disinterest of the European citizens concerning integration. In this context, the distancing would strengthen the feeling of exclusion even more, of non-participation in the functioning of the Union and, as a consequence, of lack of democracy (the alleged and often repeated “*democratic deficit*” of the Union). Well, irrespective the fairness and the prosperity of this criticism, it is interesting to frame whether the economic constitution of the Union has it or has not, it in consideration, been either a response to the criticism or, instead, part of the problem.

4. The concept of “*economic constitution*” that it is normally used, has its origins in the ordoliberal thought as well.

It is certain that, in a purely economic and descriptive sense, the economic constitution means “*economic order*”; it describes the type of economic relations that are established. It is equivalent (the economic constitution) to the real economic order.

Yet, the economic constitution also refers to a concept that surpasses the descriptive sense of real economic order (the description of the existing economic relations that characterise the functioning of an economy). There is a normative sense (traditional) that is reflected in a “*principiologic*” frame, written or not, which structures and fundamentals the economic orders of the states. It is the Fundamental Law that orders the economy. It is, at the bottom, an area of the Constitution, a set of existing norms in the Constitutions that implement the institutional frames which order the economic functioning.¹²

In that regard, the regular classifications and qualifications developed by the doctrine apply.

There is nonetheless a formal economic constitution (reporting to the set of normative principles inscribed in the written Fundamental Law) and a material economic constitution. In this last acceptance, the sense of economic constitution is close to what, some authors call, a mixed conception of (economic) constitution. Economic constitution in this mixed notion – that is, legal and economic – would integrate the set of principles and norms indispensable to the creation and guarantee of the functioning of an economic order (real economic functioning) considered

¹² “O conceito tradicional de constituição refere-se ao estatuto do Estado como pessoa coletiva, como corporação, e o seu objeto é a indicação dos órgãos dessa associação, a distribuição de competências entre eles, e as relações com os ‘súbditos’”. (...) “Com efeito, a partir do momento em que se possa afirmar que a economia e o estado não representam já dois planos autónomos, que se dissolvem a tradicional separação estado-sociedade, o conceito de constituição económica deixa de ser um elemento estranho no quadro tradicional da constituição do estado. Esta é necessariamente também constituição da economia” – Vital Moreira, *Economia e Constituição* in Boletim de Ciências Económicas. Suplemento ao Boletim da Faculdade de Direito da Universidade de Coimbra, Volume XIX (1976), 6 e 8. For the concept of economic constitution, *Capítulo V – Constituição Económica e Constituição Política*.

desirable and politically chosen by a certain community (state or politically organised community).¹³ It is a substantial meaning of economic constitution (it overtakes the formal constitution) and in it, the norms of the formal constitution relating to the ordering of the economy are incorporated. Not only those, but also other rules, such as the ones in ordinary or derivative legislation that, for its scope, contribute decisively for the design and the implementation of that intended economic order (at the bottom, for the construction of the model of economic functioning that was the object of the political-constitutional option of that organised community).

It is common in this approach (substantial, mixed) of the economic constitution to wonder which economic system is in place and/or is intended to order the functioning of the economy. The economic system is, in a certain way, the typical object of the economic constitutions. The economic system must be understood as, not only the rules and the institutions that provide guidance and sense to the legal ordering of the economy, but also the political and ideological option, the principles and values and even the sociological reality which (simultaneously) frames and determines socially that constitution. Therefore, the economic systems are at the same time, object and a determining factor of consolidation of a substantial economic constitution and derive from the “*socio-economic system*”. I shall not develop here the theory of economic systems (and, thus, of socio-economic systems) nor the meanings of their diverse categories. I will then accept the approach suggested by Sousa Franco and Oliveira Martins: the systems are “*typical and global forms of organisation and functioning of the economy, based on a number of fundamental principles that rule economies with distinct structures. They derive from the concept, broader, of social system (...). We may talk about abstract or concrete systems, according to a higher or lower degree of abstraction with which the respective principles are conceived, as informing and interpreting models of different social realities*”.¹⁴

5. It is relevant now, considering the issues raised previously,¹⁵ to provide the context of the ordoliberal thought and its influence in the European integration process.

Ordo-liberalism, associated with the denominated “*Freiburg school*”, begins to be known as of the 1930s, with authors as Walter Eucken, Franz Bohm and Alfred Muller-Armack (who would afterwards assume a political role in post-war Germany), among others. It is a school of liberal thought, even though it has come up as criticiser and attempter of excelling the imperfections of the classical liberal view. It has its climax, in terms of diffusion and adherence (even if mostly in the political, intellectual and ruling elites) in Germany after the war. Hence, it is not odd that it was profoundly marked by the German reality then and the respective concerns of reconstruction and normal insertion of Germany in the new international order. The ordoliberal thought at first was also significantly influenced by the social vision of the Catholic Church (social doctrine of the Church). This initial ordoliberal thought (part of the named

¹³ Josef Drexler, *La Constitution Economique Européenne – L’actualité du modèle ordolibéral*, in *Revue Internationale de Droit Economique*, 2011/4, tomo XXV, 419 a 454. Drexler, for example, follows Nipperdey to approach the mixed concept of economic constitution. Nipperdey H.C., *Die Grundprinzipien des Wirtschaftsverfassungsrechts, in Recht – Staat – Wirtschaft*, vol. III (1951) 223-225.

¹⁴ António L. Sousa Franco e Guilherme D’Oliveira Martins, *A Constituição Económica Portuguesa. Ensaio Interpretativo* (Coimbra: Almedina, 1993), 26 e 27.

¹⁵ That is, how to characterise nowadays and after the Treaty of Lisbon, the economic constitution of the EU; I investigate if the inclusion in the TEU, with Lisbon and quite emphatically, of the social market economy matched an intended shift of sense in the economic organisation of integration.

German liberalism) considered itself as a sort of third way between socialism and classic capitalism from the 18th century. Naturally, it is about a philosophical, legal and economic view deeply embedded in the German context of the post-war and all the traumas lived by the generation of its first cultivators and defenders.¹⁶

There are some driving forces that, in simple terms, can draft the ordoliberal's Cosmovision. I will list them synthetically.

6. Ordoliberals, more than trying to create an efficient economic functioning (in a strictly and reductively economic sense) were concerned, especially, with creating an economic order that could prevent the flaws of the market and ensure the necessary conditions for society in general, and the individuals in particular, to benefit from a life condition globally decent.

This economic order should be laid in principles of democracy and, at the bottom, it would be an ideal order, an *ethos*¹⁷ that would also be political and social.

In the end, it would be an integral, just and balanced order while being, naturally, democratic and also, able to be efficient from the exclusive economic point of view. The ordoliberal perspective does not segregate the question of the economic efficiency from justice and democracy. Furthermore, it would not be efficient an order that, from the economic point of view, were balanced (providing for institutionally the market's flaws) and did not guarantee the dignity of the individual.

To the ordoliberals, (and the authors I have mentioned and could be named first generation ordoliberals) the policy of monopolisation of the German economy promoted by the Nazi regime reflected the nature and the totalitarian principles that marked the economic order and planning of the national-socialism. Moreover, such policy was the economic mainstay of that totalitarianism which annulled the dignity of individuals. The monopolised economy was identified as the economic support of the Nazi regime.

Therefore, as protecting the dignity of the individuals, the political and democratic freedoms against totalitarian drifts of any kind or nature was a priority, it was fundamental to architect such an order based on a regime that would protect the economic freedoms and would disable, for its own setting, the monopolies or processes of economic concentration leading to the monopolisation of the economy. In this perspective, the individual's freedom and economic freedom were deemed essential imperatives for the construction of the ideal order; competition then became a necessary condition so that monopolist drifts and, consequently, totalitarian political drifts, could be prevented.

So it is understood the importance of the competition law (in its conception of a law of the defence of competition). This set of principles and rules assumed a decisive importance in all ordoliberal thought and had a quasi-constitutional status. At the core,

¹⁶ For a general description of the main features of the ordoliberal thought and the main problems and criticisms, see for example, Philippe Nemo and Jean Petitot, *Histoire du libéralisme en Europe (1ere edit.)* (Paris: PUF, 2006) 1002 – 1030. I cite the following extract: “La meilleure façon de décrire son héritage (de l’ordolibéralisme) serait peut-être de le qualifier de kantien (...) En ce qui concerne l’économie, il n’est guère possible de comprendre les travaux de Eucken et Bohm sans prendre en compte le clima intellectuel et politique de l’Allemagne. (...) Eucken s’est efforcé de trouver ses propres marques en surmontant la ‘grande antinomie’ entre l’approche historique et individuelle de l’école historique et l’approche ‘théorique et générale’ de l’école marginaliste. (...) Ils ont ressenti profondément la nécessité de reorganiser les institutions et de redéfinir les relations entre Etat et société – dont l’interpénétration avait été une cause récurrente des ‘routes de la servitude’ allemandes. Cette expérience pourrait expliquer le scepticisme qu’ils ont manifesté à l’égard de l’idée de Hayek d’une évolution spontanée des institutions?”.

¹⁷ Therefore, necessarily, it would also be a valuing and normative order.

the competition order was placed (using the orders terminology) in the same spot as the democratic order (or at least the former as *sine qua non* condition of the latter).

7. As is apparent from what I have written above on some of the features of the ordoliberal thought, the interdependence of the economic, legal and social orders (that is an integrated, unitary view of all those orders)¹⁸ was an essential mark, common to all authors who were part of that German school of liberal thought. Such interdependence, creator of an integral, balanced (fair) vision, became one of the fundamental theoretical concepts of ordo-liberalism (interdependence of orders). According to this concept, the economic order is integrated in a context that expresses the symbiosis of the social order, the political and constitutional order and the juridical order. In this perspective, the economic policy – any concrete economic policy – cannot be guided exclusively by the criterion of efficiency strictly economic. It must as well be a factor of transposition of constitutional values to the life of citizens.

One important aspect to highlight is this: law itself depends on the existing economic order, even though it also models and implements it. The juridical institutions or institutional frameworks designed by law have an impact and a social reach that depends on the configuration of that existing order (economic). It is the case of private property and the contractual freedom. Either in an order nourished and reflective of the pure “*laissez-faire, laissez-passer*” typical of the 18th century or in a competition economic order, in the meaning given by ordo-liberalism, those institutions are determining (both orders share those institutions or institutional framework). Yet, in the ordoliberal view, only in an order effectively competitive can the private property be acceptable generally for and by all citizens, even if many do not possess it.

The economic theory of modern industrial organisation upholds competition mostly on grounds of economic efficiency (the market is the main institution of efficiency) and through this, it protects consumer welfare. In other words, consumer welfare is considered, before all, a factor that favours functionally the competition and, as a consequence, is the promotor of a greater economic efficiency. Nonetheless, in the ordoliberal perspective, in an effective competition economic order, it should protect, first, the freedom of the consumer as a result of the individual freedom and against the totalitarian power of the monopolies, regardless of their role in the market. That being the case, consumer welfare is equally safeguarded, though having a different starting point and motivation when compared to the presuppositions of consumer welfare as defended functionally by the theory of modern industrial organisation.

To the initial ordo-liberalism, competition takes the nature of structuring the principles of the order, not only economic principles, but also political and social principles. It is certain still that the strict economic efficiency is not in foreground but the guarantee in favour of social cohesion, individual freedom and human life’s dignity, which motivate the importance of free competition. The competition principle is an almost absolute principle and, to a certain extent, universally unquestionable. The competition order is necessarily democratic and as long as it is an effectively competitive order, it prevents monopolies and totalitarianisms. In this formula, it makes sense of the concept of “*Social Market Economy*”.

8. To Alfred Muller-Armack, who was an official of the Ministry of Economy of the Federal Republic of Germany as of 1952 and Secretary of State in charge of

¹⁸ *Interdependenz der Ordnungen.*

the European Affaris, between 1958 and 1963, the “*Social Market Economy*” was that a concept following and modelled by the rules of the market in free competition, to which were added the social guarantees (reflecting, hence, that integral Cosmivision and/or interdependence of orders). It is important to note that Eucken was the first person to disseminate such a model of economy as the one to be adopted by the economic policy of Germany in the post-war period.

Three principles must be highlighted for a global understanding of what the ordoliberalists intended with the concept of “*Social Market Economy*” (and, if you please, for the understanding of the Muller-Armack formula of market economy with social guarantees). These three principles emanate from the concept of interdependence and the integral global Cosmivision, typical of this school of thought.

Therefore, in order to understand the reach of the concept of “*Social Market Economy*” it is relevant to consider the following;

Firstly, the market, the Social Market Economy and the social guarantees (if we like out of simplification we could say “*European Social Model*”) are connected, being the two sides of the same coin. Social guarantees are one condition of good functioning of the market and this is a necessary condition that needs to be present so that it is possible to talk about social security. Social order and market economy are simultaneously part of the ideal economic order; none precedes the other, none is more important than the other. Only the market economy for being indeed the most efficient has the conditions to assure the rights and social protection. Only the market and the market economy, despite the unbalances they create, may generate more wealth and, for this, produce conditions to facilitate a better and more vast redistribution of that generated wealth.

Secondly, the interconnection and complementarity among market economy, the market itself and a system of social guarantees explain the application of the principle of subsidiarity, which defines the social measures considered necessary at each time. In other words, the definition and the application of a social policy must follow logic of subsidiarity regarding the market: only concrete actions of social nature that adhere to the functioning of the market economy should be adopted. Still, the social policy should only interfere with the functioning of the free market if the actions equivalent to those whose adoption is intended cannot be generated by the functioning of the market.

In this perspective, competition law is the Fundamental Law of Social Market Economy: this law, insofar as it grants and protects the competition order and prevents monopolist processes and hinders the positions of market dominance, contributes to a fairer and more equal distribution of wealth. It prevents that the market is captured by abusive and harmful economic powers towards the interests of the citizens/consumers, namely the poorer. Thus, the competition order and the respective law that upholds it are the fundamental elements of the ordoliberal Cosmivision and the Social Market Economy.

Thirdly, the indispensability of competition law to establish itself and develop a Social Market Economy does not dismiss a social policy (e.g. State Intervention) with proper actions to the assurance of a satisfactory level of life and socio-economic well-being of the citizens.¹⁹

¹⁹ Synthetically: “*L’économie de marché moderne n’est pas l’économie de marché libre des flibustiers libéraux: d’une époque révolue [...] mais une économie de marché à engagement social qui permet à l’individu de s’épanouir, qui accorde la priorité à la valeur de la personnalité et qui récompense la performance avec un rendement mérité*”. Ludwig Erhard, *Congres du CDU*, Recklinghausen, 28th August 1948, in *Economie Sociale de Marché. Qu’est-ce*

9. Returning to the concept of mixed economic constitution (economic and normative, reflecting a material or substantial view), it is now relevant to underline a conclusion that comes with a relative ease: the understanding of the mixed economic constitution matches the initial ordoliberal vision.

The logic of socio-economic integrity, of interdependence of orders, the fact that this legal framework of the economy ordering (real economic order) point at a balance and a guarantee of social protection – considering the defence of competition and competition law as cornerstone (almost as Fundamental Law, as I stated) of the whole of the socio-economic and political system – are emanations and results of ordoliberal thought and Cosmivision. In that regard, the very notion of economic constitution has its origins in this (neo)liberal German thought.

The virtuosity of this understanding of economic constitution lies precisely in its interdependence nature, in its integral approach of reality as its object. A normative analysis and vision which methodologically has as its starting point, the sociologic reality, the concerns and concrete interests of the populations, of groups of interest, conflicts (antagonisms) and consensuses that create political moves and disputes, I would say that a normative approach – realistic – will always provide more efficient and more effective legal-social responses. To a certain extent, I recall on this matter the posthumous work of Max Weber, *Economy and Society*, in which a sociological approach is developed (sociology of law) that is proposed as one of the fundamental basis of the enhancement of juridical analysis and action.

On the other hand, such approach of ordoliberal basis of the economic constitution presents another supplementary advantage, or at least a compromise that might be an advantage – especially in terms of the European integration. Transposing that approach to the dimension of the EU constitution, that integrated (interdependent) constitutional understanding prevents us from falling into an excessively mechanical and technical approach.

The EU constitution (or even better the constitution of the European integration) may not be restricted to a set of rules that define a law and an order of integration only in technical-legal sense. There is, sometimes, the tendency to circumscribe that constitution to fundamental rules and principles of the Treaties and of the case-law that ensure the dialogue between the orders of European source and national source. This constitution is often limited to the so-called principles of “*Juridical Federalism*” (primacy, direct effect, direct applicability) or of principles that are shown without a sense and a social, political and ideological option, such as loyalty, subsidiarity, equivalence, interpretation in conformity, effective judicial protection and liability for the breach of EU law. Other principles of substantial nature are added to those and originate and frame some common policies as the ones of economic freedoms in the Internal Market (freedom of movement) and the rules of defence of the competition, always stressing the technical aspect, distant from the social and political model that should support the European construction.

It is clear that the protection of fundamental rights and the affirmation of the Union as a Union based on the rule of law²⁰ as well as, especially due to case-law boost,

que cela signifie concrètement, ed. Siegfried F. Franke e David Gregosz, Konrad Adenauer Stiftung, (2013) (available on: <http://www.kas.de/wf/doc/11312-1442-3-30.pdf> accessed on 13th January 2017).

²⁰ On the principles of the integration law and the principle of the Union based on the rule of law, see Alessandra Silveira, *Princípios de Direito da União Europeia. Doutrina e Jurisprudência*, 2nd ed. (Lisboa: Quid Juris, 2011).

the densification of European citizenship as a citizenship of rights, counterbalance that (eventual) risk of slippage to a constitution vision of the integration that is excessively neutral, apparently technical and out of touch with the political reality and the concrete sociological basis that gives life and materiality to the Union and the European construction. Yet, by definition, the ordoliberal economic constitution grounded in the interdependence of the orders and realities incorporates the social component in the balance of efficiency of law and the constitution of economy (real economic order or competition order) and always impose on us a vision and an embodiment of the idea of the economic constitution making a commitment with the social slope and, to a certain extent, connected with the expectations and aspirations of the citizens.²¹

10. The Treaty of Rome of 1957 (and, to a certain extent, its predecessor Treaty of Paris of 1951) and the project of European integration launched by it, had many affinities with the ordoliberal thought. The ordoliberal standpoint, particularly in the post-war German perspective, seemed especially suitable to the political legitimisation of the same project.

The freedoms of movement instituted and assured by the Treaty (the economic freedoms of the Internal Market, then common market), the principle of non-discrimination on grounds of nationality, the introduction of a competition order – from the normative and principiologic point – supported by rules that substantiated a law of the defence of Competition, all of that could be understood as structural pillars of an ordoliberal economic constitution, associated by the German decision-making elites with an dissuasive obstacle against totalitarianisms. The openness of the economy (of the economies of the Member States) fitted the German concerns of rebuilding and normalising its relations with the international community. Such ordoliberal affinity – which meant a comfortable political architecture of the integration to the German political decision-makers of then – was not disturbed by other rules and policies of notorious anti-competition nature and contrary to the ordoliberal vision, as it was the case, for instance, of the Common Agricultural Policy. Those disadvantages were largely compensated by the competition slant and the tune of economic freedom of the Treaty. From the point of view of democratic political legitimacy, the fact that the main instrument adopted for the European construction is of economic nature (that is, the construction of a Common Market), led to the edification of a competition order, which would later prove to be a decisive remark.²²

Europe, therefore, committed with the construction of a market that overlapped significantly with the Nation States. That market and the rules that enforced it pointed at an order that ensured free competition, managed by supranational organs (institutions) – organs whose political legitimacy would be from the beginning justified by the basis

²¹ A different problem and that may lead to other discussions is the concrete identification of which desires and aspirations are those; which priorities of life and real interests groups (and what groups?) of citizens have. Here, the risks are always those of excess of proselytism in favour of certain position or vision strictly subjective of the interpreter. The risk in fact of turning an alleged normative vision into a propaganda speech – this also out of reality and away from the generality of citizens. Yet, this difficult interpretation and discussion is not even on the table if we explore concepts as economic constitution (and constitution of the EU) with a reducing technical and specialized logic.

²² Going back to what I have state: the principle of competition is an almost absolute principle and, to a certain extent, universally unquestionable. The competition order is necessarily democratic and a long as it is an effectively competitive order it prevents monopolies and totalitarianisms.

and the technical-economic objective they pursued: the establishment of the Common Market of competition nature and founded in the economic freedoms.

In other words, that objective of the institutions and the very European construction was also the instrument to achieve the competition order that supported and dissuaded eventual pressures and totalitarian and anti-democratic dangers. We had the construction of a supranational competition order that conceptually and, from the values perspective, was justified. A competitive order and a market that overlapped the states and the question of national democratic legitimacy. In a certain sense, the universal character (and in the ordoliberal perspective) was naturally insuperable of the competition order, exempted the European project (economic, competition and supranational) of the burden of national democratic political legitimacy.

It was foreseen that a path with the first Treaties would be aimed at the states being under the surveillance of a supranational competition market and not of a market controlled by states. In that regard, the affinities amongst the European project, ordoliberalism and the German post-war view were evident.

This idea is also highlighted by Christian Joerges and Florian Rodl, to whom the fact of Europe began its integration process with an objective and a track, apparent and solely, economic progressively gave plausibility to the ordoliberal statements.

The former Communities were underpinned in terms of legitimisation in the construction and solidification of an order that strived and developed the economic freedom and the guarantee of free competition, independent of the legitimacy of the institutions of the democratic National States and that, despite the integration being, as a concept, antagonist to the ordoliberal ideas. Indeed, at first look, the idea of building an order merely economic, disconnected from its socio-political surroundings as well as the lack of acquisition ways of democratic legitimacy to this order, integration would have not been considered proper by ordoliberals. However, the perspective was progressively adjusted to the imperative of building a path that aimed at the competition order. In fact, “[t]his legitimacy was independent of the state’s democratic constitutional institutions. By the same token it imposed limits upon the Community, discretionary economic policies seemed illegitimated and unlawful”²³

11. Those integrating aspects of the ray of influences determinants of the idea and the implementation of European integration allow us to verify and understand the weight and importance of some policies – such as the policy (and the law) of competition – which have always had an impact on the effectiveness of the integration itself and the Union law. They also allow us to justify the construction of a (legal) economic order which has always rejected competition (entire of itself) as an absolute principle. Rather than the American tradition and jus-competition Cosmvision, in the European space and in the scope of the European economic integration, it has never been adopted as a model of policy and normative system that would enshrine the so-called theory of competition-condition. The European sensitiveness and tradition have always pursued a relativization of strictly economic principles (deriving or leading to a more productive efficiency), considering them, above all, as instrumental in relation to broader objectives, political and social included. Article 101(3), TFEU and the long decisional and case-law practice of European Commission and the CJEU in the application of this normative (economic balance judgment) illustrate just that. There is a Cosmvision that is relatively reformist and integral (pointing, in a way, to

²³ Christian Joerges and Florian Rodl, *Social Market Economy as Europe’s Social Model?...*, 5-6.

the interpenetration of orders) that marks the action of the institutions. Economic freedom and the institutional frameworks of capitalism have always been mitigated with concerns that go beyond the (strict) economic efficiency, in the definition and pursuit of common policies.

In that regard, the exceptions (and its causes) admitted to the economic freedoms are understood: for instance, in the context of the free movement of goods, Article 36 TFEU; the public policy/order, the public security and the public health in the context of the free movement of workers [Article 45(3) TFEU] and the right of establishment [Article 52(1) TFEU].

Therefore, the introduction and the prominence attributed to the Social Market Economy with the Lisbon Treaty might, in a way, mean a rekindling (a firmer and clearer assumption) of this original ordoliberal influence or legacy. The social dimension (social cohesion), for example, in this ordoliberal Cosmivision has never been diminished and, instead of a perspective (ideology?) is more anchored in the productive efficiency (strictly economic) and in a capitalist model, closer to the classic thought from the 18th century, its preservation. This (the preservation of such social cohesion) is an imperative of the competitive/economic order that is intended to be reached in this ordoliberal vision.

The Social Market Economy – and its prominence in terms of normative enunciation signalled and acquired with the Lisbon Treaty – rather than indicate a shift in the sense of the economic constitution of the EU, it might just refer to a return to some of the origins of the integration process (origins – *rectius*, original influences – always implied in this process).

This idea of a return to the ordoliberal origins/influences will be specially interesting and relevant if we give it the context now in a post-Brexit phase and when we move forward with an institutional debate started by the Commission on the future of Europe.²⁴

²⁴ European Commission – White Paper on the Future of Europe. Reflections and Scenarios for the EU27 in 2025, COM(2017)2025 of 1st of March 2017, available on: <https://ec.europa.eu/commission/white-paper-future-europe-reflections-and-scenarios-eu27>, accessed on 3rd April 2017.