MARIA MANUEL LEITÃO MARQUES

THE EUROPEAN COMMUNITY ECONOMIC LAW AND THE PORTUGUESE CONSTITUTION

Maio de 1996
Oficina nº 74

MARIA MANUEL LEITÃO MARQUES

THE EUROPEAN COMMUNITY ECONOMIC LAW AND THE PORTUGUESE ECONOMIC CONSTITUTION

nº 74
Maio 1996

Oficina do CES
Centro de Estudos Sociais
Coimbra

OFICINA DO CES

Publicação seriada do

Centro de Estudos Sociais

Praça de D. Dinis

Colégio de S. Jerónimo, Coimbra

Correspondência:

Apartado 3087, 3000 Coimbra

THE EUROPEAN COMMUNITY ECONOMIC LAW

AND THE PORTUGUESE ECONOMIC CONSTITUTION

Budapest. 12 th October, 1995.

Chamber of Commerce

Maria Manuel de Lemos Leitão Marques
Associate Professor.University of Coimbra. Portugal

AP 3087
3000 COIMBRA (PORTUGAL)
FAX: 351 39 29076
TEL: 351 39 26459
E Mail: MManuel@gemini.ci.uc.pt

THE EUROPEAN COMMUNITY ECONOMIC LAW

AND THE PORTUGUESE ECONOMIC CONSTITUTION

SUMMARY

The Problem 1

THE PORTUGUESE ECONOMIC CONSTITUTION

BASIC FEATURES 3

The economic constitution on the Portuguese Constitution's text 3

The Underlying Economic Model 4

ARTICULATION BETWEEN THE "EC ECONOMIC CONSTITUTION" AND THE PORTUGUESE ECONOMIC CONSTITUTION 4

Global Compatibility 4

Controversial Points 5

The Principle of An Open Market Economy and The Social Rights 7

Neutrality on Matters of Ownership Regime and the Public Sector (Art. 222 TR) 9

Freedom of Establishment, Ownership and Private Entreprise Rights 12

Comparison with the Portuguese Constitution 12

Freedom of Competition 14

Anti-monopolistic Principle in the Portuguese Constitution/ Reinterpretation 15

CONCLUSION 16

THE PROBLEM

The constitutions of most of the EC member-States include a number of rules about the economic system. Those dispositions may have a programmatic purpose establishing goals for public economic policies. Or they may have a direct normative meaning, establishing the basic features of the economic system and, consequently, the limits of the activity of economic agents. LEWIS and HARDEN (1983) stated that "a constitution is above all a definition of the public sphere. It therefore marks and polices the boundaries of public and private (...)" Therefore, the States, according to their constitutional order and particularly to their own economic constitution, are free to regulate their economy, promulgating and applying their own legal framework, with respect, of course, to thecompromises expected from the EC .

In fact, the basic economic organisation rules of the EC are binding on the Community's institutions and its member-States, and constitute the Community's economic legal order. Some authors, like CONSTANTINESCO (1977), by analogy with the economic constitutions of the member-States, talk about the "Community's economic constitution", explaining that its *core* (its goals, values and fundamental principles) lies in the first chapter of the Treaty of Rome named "Principles". According to this author, almost all of the original version of the Treaty of Rome is nothing but "the detailed explanation of the fundamental elements of the EEC's economic constitution presented in the first articles".

The EEC was then essentially a regional international organisation of economic integration; though, goals of political integration were not excluded. As yet this situation has not changed considerably, but the modifications introduced by the Treaty of Maastricht do imply a clear deepening of the political integration process. The European Union may in the medium-long term become a decisive tool of political integration, revealing a federation model which is yet to be defined. This model may evolve as a result of the specific characteristics of the EU, which is based on the Economic and Monetary Union and the Union's citizenship, on common security and foreign policies, and on co-operation concerning justice and internal matters.

To date, it is precisely in the field of economic legal order that the integration of the community space raises more, and larger limits, to the freedom of national States. With regard to this situation we can question today if the sources of the general

economic law of each country should be searched for first in each country's own constitution. Or if the national constitution could be compared with the Treaty of Rome, assuming that the two texts carry the same importance as sources of economic law. A third possibility is if the public economic regulation is based only in the Treaty, therefore relegating the national constitutional economic order to a secondary level. I will show you that it is very difficult to get a clearcut answer to this question. From the point of view of our Constitution, the correct answer would be the first, but the reality of the coexistence of both texts suggests the second answer or even the third. This means that most of the economic law is, directly or indirectly, EC law. Also, that the difference between member States is less and less determined at a national level, in their own constitutions, and more and more at the EC level, in the power game played in its decisional organs (where the European Court is included) or around them. This difference, in economic order among the member States, has been progressively reduced by positive and negative integration methods.

This compression of the national economic constitutions that are discordant with the community's orientations, becomes especially relevant to a Constitution like the Portuguese one. Established after the Revolution of April 1974, the Portuguese Constitution was first characterised by a model of mixed economy, with socialism as one of its fundamental goals, along with the guarantee of private property rights and private enterprise. Revisions in 83, 89 and 93 were progressively more liberalising and amongst other things, withdrew the references to socialism. In spite of these changes the Portuguese Economic Constitution retains the characteristics of a market economy, but one that is publicly regulated and socially concerned.

Bearing in mind the original EC law, I will now make a short description of the Portuguese economic Constitution, discussing afterwards the problem of its compatibility with the EC economic legal order on some specific matters . When it comes to the Community, a remark should be made: it's not enough to read and interpret the Treaty of Rome by itself. It is often important to consider the way it has been applied, particularly by the European Court, almost always in the sense of widening the Community's powers.

THE PORTUGUESE ECONOMIC CONSTITUTION: BASIC FEATURES

The economic constitution on the Portuguese Constitution

I will start by locating the economic constitution in the text of the Portuguese Constitution . Besides the preamble and the fundamental principles, the Constitution is divided in four parts: the basic rights, the economic organisation, the organisation of the political power, and the guarantees and revision of the Constitution.

The main location of the economic Constitution is of course Part II, dedicated to the economic organisation But there are a few more articles that are relevant to the economic Constitution that are spread through the different parts of the constitutional text. Following the structure of Portuguese Constitution, those articles are:

— some of the fundamental principles - such as Art. 2, which states that economic democracy is a goal of the Portuguese Republic;

— among the basic rights we find the "Workers' Rights, Freedoms and Guarantees" and the "economic rights and duties";

— and, also, in the Third Part, related to the organisation of political power, the articles that show the distribution of competences for the definition of the economic policy by the Parliament and Government - namely those that give exclusive legislative powers on economic matters to the Assembly of the Republic (t.i., our Parliament);

From the articles mentioned, the most important ones are of course the rights and freedoms and the rules related to the economic organisation. The first ones define the sphere of freedom and the protection that the agents of the economic process have, i.e., their rights and respective limits (property rights and private enterprise and the restrictions they have, the right to go on strike and its conditions). The economic organisation rules give us the basic legal framework of the economic process in its various stages: the primary duties of the State; ownership of the means of production - public, private, co-operative and social; foreign investment; State aid; privatisations; agricultural, commercial and industrial policies; the financial and fiscal monetary system. These are the core of the economic constitution.

The Underlying Economic Model

If we consider the whole of the economic constitution, it's clear that it outlines the basic principles of a market economy, imposing public regulation of some aspects of economic activity and safeguarding the workers' and consumers' own rights.

This balance between a market economy and public and social interests is shown in various rules of the Constitution. Let me give you some examples.

To guarantee the "social and economic democracy" - which is one of the characteristics of a Democratic State (Art. 2) - the Constitution bases social and economic organisation on the "subordination of the economic power to the political power", on the plurality of sectors of ownership of the means of production and of forms of entrepreneurship (private, public or co-operative), on the collective appropriation of those means of production, including land and natural resources, according to public interest, on the democratic planification of the economy and on the workers' participation (Art. 80).

Other articles of the Constitution support this balance. Private ownership is protected, freedom of entrepreneurship is established, competition is favoured, a central role is given to the private sector in the economic process, privatisations are allowed. At the same time, the State is given authority for orientation and control of economic activity and on matters of income distribution, job stability; the right to go on strike is stipulated; the consumers' right to be informed is granted and misleading advertising is prohibited; the environment is protected. As a result, we are in the presence of an explicit economic constitution concerned with definition of the objective limits in a free market activity.

ARTICULATION BETWEEN THE "EC ECONOMIC CONSTITUTION" AND THE PORTUGUESE ECONOMIC CONSTITUTION

Global Compatibility

After having mentioned the basic characteristics of the Portuguese system, I would like to consider its articulation and compatibility with the Community's legal order.

We can approach this issue, first, from the point of view of underlying social and economic models. We have already analysed the Portuguese case. Let's now take a look at the Community's case.

The nature of the EC "economic constitution" can be defined through a negative approach rather than through a positive one. On one hand, it is obviously opposed to a system of an authoritarian or planification economy, which is centered on the public ownership of the means of production, as it was the case of the East European

collectivist systems. On the other hand, it also seems to differ from a pure or classic liberal system. Even after Maastricht, this is evident in several aspects of the Treaty. In fact, nothing in it (TR) prevents the existence of forms of indicative and democratic planning or of economic programming. The Treaty remains neutral in relation to the ownership regime. Finally, even the competition policy should find, according to MOUSSIS, "the right balance between an anacronic *laissez-faire* and a stifling directionism"[1].

It is usually said that European economic integration is inspired by a liberal philosophy, but this statement is only partially correct. It's not really a question of adopting the classic assumptions of liberalism, but of, pragmatically, through compromising formulas, creating a regulated single market.

The idea of market expansion, removing tariff and non-tariff barriers, fighting forms of commercial discrimination, and the idea of free circulation of goods, services, capital and enterprises are inherent in the classic liberal approach theory . Going against this approach is the appeal to the achievement of common policies, the institution of supra-state authorities, the adoption of protectionist mechanisms (e.g., agricultural policy), the harmonisation of legislation and the consideration of socio-political factors in the economic decision making process (such as economic and social cohesion, environmental issues, etc.). In practice, EC adopts a conception of economic integration organised by social and political powers (lobbies included) and which is not left to the free market powers game.

Controversial Points

Therefore, the possibility of fundamental incompatibilities or contradictions between the Portuguese Economic Constitution and EC underlying models is substantially reduced. This doesn't mean that there aren't any conflicts or that all important questions are automatically answered. Some examples of existing or potentially conflicting situations can be given.

The first example is related to the *precedence of the Community law.* This question is not specifically related to the economic constitution, but, obviously, it also affects it.

---

[1] See Cannizzaro "Principi Fondamentali della Costituzione e Unione Europea", 1994: 1171.

There are no rules in the treaties that specifically state this precedence. However, the Court of Justice of the EC, in successive judgements, has argued that national judges cannot refuse to apply a Community rule, even of secondary law, that has a self executing effect, that is regulations and, for the Court, also directives. For the European Court the national judges cannot base their decision on the idea that the Community rule violates an internal rule or even the constitution. "The conflicts between the community's rules and the national rules" states the Court "should be solved by applying the principle of the precedence of the community law". The Court has also argued the autonomy of its conceptual sources, creating its own concepts such as the concept of *public service* for the application of exceptions to the freedom of movement for workers, which is naturally more restrictive than the one adopted by most of the Union's member-states.

So a supra-national value is given to primary and secondary Community law, and this is hardly compatible with the Constitutions of some Member States

Nevertheless, this is a theoretically controversial issue in the Portuguese constitutional doctrine. A significant part of the doctrine contests this interpretation and argues the superiority of our own Constitution. This claim is based on the way the Portuguese Constitution deals with problem of the international law incorporation. The Constitution states that international conventions that have been duly ratified and approved shall apply in national law, following their official publication, as long as they remain internationally binding with respect to the Portuguese State. However, it's also stated, in the n. 3, that "the rules made by competent organs of international organisations to which Portugal belongs apply directly in the national law to the extent that the constitutive treaty provides" (Art. 8). This means the recognition of the automatic incorporation rule. This disposition was especially created to receive the community secondary law. According to what is established in the TR, the community's regulations are applied in the national law once they're rightly approved by the competent organ.

This system rises delicate problems of articulation with internal legislative power, mainly if the community rules deal with matters for which, according to the Constitution, parliament has exclusive legislative powers. In this case, they not only substitute the Assembly of Republic's laws, but they also preclude their intervention from then on, due to the primacy of the community's law. And this situation occurs without the Parliament being asked to confirm the community law (as happens with the international conventions that legislate on matters of its exclusive legislative powers) or to delegate those powers (as happens with the decrees of the government in matters

where the parliament may do so). Also, it's the government, through its competent ministers, that participates in the EC Council. Thus, the executive sees its powers reinforced on mattersin which, according to the Portuguese Constitution, it cannot interfere at the internal level without parliamentary delegation. We must not forget that among the Parliament exclusive legislative powers we find several aspects of the economic order, e.g., the creation of taxes and the fiscal system, the definition of the ownership sectors, the public corporations' general statute, the monetary system, the agricultural policy basis, etc.

No matter which way we look at it, if we admit it's not acceptable that community law can prevail over the Constitution, the unconstitutional regulations or directives cannot be applied by the courts and may be submitted to our Constitutional Court. The court's decision cannot affect the "rule itself", but it can affect its implementation in the domestic order. However, this question remains a theoretical question in Portugal, since no case has reached the Court so far.

A Portuguese lawyer (J. MIRANDA, 1992) states *de jure condendo* that the constitutionality problem of the community's rules should only be considered with regard to matters of fundamental rights . Nevertheless his position, adopted by the Italian and the German constitutional courts, has no support in Portuguese constitutional text . (A different opinion is supported, for instance, by J. CANOTILHO and V. MOREIRA, 1991 and 1992)

The Principle of An Open Market Economy and The Social Rights

This leads us to another rule in the Community's economic constitution which could potentially cause difficulties in the future. We are talking about the rule of the freedom of competition and the open market economy. It is found in a large degree in the European Union's Treaty but it has no equivalent in any of the Member States' constitutions. We need to discuss the problem of the compatibility of that rule with what could be called the *social commitment* of the Portuguese Constitution (as well as of the Italian one[2]).

It's true that the Treaty explicitly refers to social goals, but it also states that in pursuit of these the necessity of "maintaining the competitiveness of the community's economy" should also be taken into account. This can either mean that those goals should be pursued according to the economic possibilities of the Member States , or it

---

[2] See Luciani, 1992: 663 ss.

could mean the subordination of social demands to the demands of economic system , which seems to be in conflict with the Portuguese Constitution .

In fact, our Constitution gives great importance to the rights of the workers, both as rights, freedoms and guarantees, and as social and economic rights. Among the former ones , there is the right to security of employment and the prohibition of dismissals without a just cause or dismissal for political or ideological reasons (Art. 53).

Among the rights, freedoms and guarantees, we also find the rights given to the workers' representative organisations: trade union freedoms (Art. 55), the right to strike and the lock-out prohibition (Art. 57), support for workers' committees, or the right to conclude collective agreements. Among the economic rights and duties, there's the right to work (Art. 58). The right to work should be understood as a positive contribution from the State involving the implementation of policies that assure the maximum possible employment and vocational training for workers as well as the equality of opportunity in the choice of occupation. So, it does not mean a right for workers to a specific job. The Constitution also guarantees a number of workers' rights related to payment and working conditions, as well as to the social welfare for unemployed people. Finally, the Constitution obliges the State to establish of a minimum wage (Art. 59).

It's true, however, that nothing is said in the Treaty that prevents the establishment of social rights or obliges to an underlevelling of their legal protection in the Member States constitutions or legislation. In the preamble of the European CommunityTreaty this was already stated as an essential purpose for Member States, "the improvement of the standard of living and working of their people" and the same idea is found in a Declaration of the Fundamental Rights dated April, the 5th, 1977, ratified by the Presidents of the Council, the Commission and the European Parliament. Today, this goal is reinforced by the European Union's Treaty in the Art. F, no. 2, which states that the Union will respect the fundamental rights such as they are established in that Convention and in the common constitutional traditions of the Member States, as general rules of Community law. The problem is that some of the workers' rights recognised in the Portuguese Constitution are not part of the common constitutional traditions of the Member States. For instance, the aforementioned case of the security of employment. This is an issue where our Constitution remains faithful to the original wording of 1976 and the Portuguese Constitutional Court has been very strict in its protection.

Therefore, the bigger or smaller compatibility between the "Community economic constitution" and the Portuguese one, as well as other European Constitutions will depend on the way the Court of Justice interpret this open market economy rule and on the articulation it makes with the social purposes.

Neutrality on Matters of Ownership Regime and the Public Sector (Art. 222 TR)

Another aspect that may cause problems of articulation between the Community law and the Portuguese Constitution is related to the existence and dimension of the public sector in general and with public monopolies in particular.

It's true that the Treaty of Rome includes a neutrality principle in relation to the Member States ownership regimes (Art. 222), accepting the existence of public enterprises, though subjecting them to the same duties as the private ones. In principle, a result of this disposition is that only the States will be able to decide the dimension of their own public sectors and on the nacionalisation of private property for public purposes (e.g., France made a lot of nationalisations in 1981).

This does not prevent, in the name of the "community's loyalty" principle (Art. 5 TR), the States from having to respect some rules of Community law when nationalising, such as the rule of non-discrimination on grounds of nationality, the freedom of establishment and of freedom of movement for capital.

On the contrary, the European Court has considered the discrimination of nationals as an internal issue (like what happened in the Portuguese nationalisations in 1975, where foreign capital was preserved).

This was a peaceful situation until the end of the 80's. The Court never accepted, for example Art. 222 as a standstill clause, defended by a minority of the doctrine, according to which the States were free to regulate the exercise of the ownership right, but not of suppressing it by nationalising. Nevertheless, the most recent decisions of the European Court consider the existence of public monopolies exceptional. They are only justified in the cases when it is necessary to deliver an public utility service at same price and quality for everybody (telephone, etc) (Dec. Courbeau)[3]. The Court has avoided this neutrality of art, 222, by appealing to the respect of other freedoms or rules included in the Treaty, such as free movement of goods and services as well as free competition. This interpretation seeks a bigger opening of the national markets, namely

[3] See Wachsmann and Berrod,1994: 39ss.

in sectors that were, for many years, considered as natural public monopolies. Associated with this were not only technological reasons that prevented, or made competition difficult (now, however, partially overcome), but also the association of the idea of public utility to some activities. Now the European Court has adopted a more liberalising interpretation as an attempt to make Community economic integration easier. The purpose seems to facilitate the merger of some companies in strategic sectors like telecommunications, energy, air transportation, etc., making the European companies more competitive at a world level.

There is another aspect which concerns the acquisition of public participations in companies already created, which, in spite of being considered legitimate by the Art. 222, may constitute a disguised way of state aid and as such prohibited by the Art. 92 TR.

Therefore, in reality, the European Court is placing more and more restrictions on the right to define ownership regimes favourable to the public ownership even if in very limited areas. Naturally, this interpretation collides with the national interest in maintaining public monopolies.

It follows that the Portuguese Constitution gives special importance to the public sector. It is true that it recognises the right to private property, but not as an absolute right. It can be limited or restricted due to reasons of general interest or to the necessity of enforcing other constitutional rules. The accepted constitutional restrictions are, for instance, a result of the existence of a public domain (including, territorial waters, railways, mineral water sources and so on) and of the possibility of compulsory acquisition of property for public purposes.

The Constitution also recognizes the collective ownership of the means of production, where required in the public interest and the co-existence of diffrent forms of ownership, as fundamental principles of economic organisation

The guarantee of the existence of three sectors of economic activity - public, private and co-operative and social - has been a constant feature in the constitutional text, with variations of weight and importance. The importance of public sector has changed a lot since the first version of the Constitution (1976). This change is justified by legal, economic and political factors specific to the Portuguese society and also reflects the evolution of global conceptions about the role of the public sector.

Until 1988, the public sector had an important economic role. In 1975 and 1976 almost all of the enterprises from a vast range of economic areas were nationalised

(banking, insurance, petrochemicals, paper pulp, cement, air transportation, shipbuilding, etc.).

Until 1988 the importance of the productive public sector was clearly marked by two constitutional rules.

The first one, stated the irreversibility of the nationalisations. This was overturned by the 1989 constitutional revision, after which the privatisation process started.

The second constitutional rule stated that the law should determine the basic sectors in which activity by private businesses is forbidden (Art. 87, no. 3). Until 1983, The law barred a lot of activities from private initiative - oil refining (but not its distribution), basic petrochemicals, airlines, railroads, banking, insurance, electric power, weapons, cements, etc. After 1983 the number of sectors barred was progressively reduced. Nowadays, in spite of Constitution still upholding this rule, the sectors which are forbidden are confined only to some traditional public utilities (like postal communications) and the armament. Besides, the management of some services by private entities became possible , with only the property being retained by the State.

As a result of this process, not only was the public sector reduced — some areas, like the breweries, were totally transferred to the private sector —, but also private corporations started, in most cases, to compete with public ones. At present this has reduced, but not completely removed the potential conflicts with Community rules.

Moreover, limits to the public sector do not only occur at the moment of its creation, but also during its activity. In this case, it's not the ownership, but the freedom of public enterprise that is controlled by the EC.

On the one hand, in force of Art. 90, public enterprises are submitted to the same competition rules as the private ones (with the exception of public utility enterprises or the ones that have special or exclusive rights). And on the other hand, the State is not free to financially support its own corporations, granting them, directly or indirectly, subventions, according to Art. 92 TR, which limits State Aid. Anyway, the financial relations between the State and its corporations are subjected to the Transparency rule, in the Directive 80/723/CEE dated the 25th June, 1980, since the European Court did not accept the argument that this directive violated Art. 222.

Freedom of Establishment, Ownership and Private Enterprise Rights

Another relevant aspect in the comparison with the national Constitution on matters of ownership and private enterprise rights is the freedom of establishment

which was included on the original TR. This right refers to the access, by the Member States' citizens in another State, to independent activities (independent workers, liberal professions, craft workers, etc.) or contractual activities characterised by management autonomy of a risk economy (stock companies' managers, etc.). It also refers to the creation and management of firms and companies (freedom of enterprise) under the same conditions established by country legislation for its nationals (Arts. 52 and 58 of the European Community's Treaty and the Convention of the 29th of February, 1968). This freedom is also based on the demand for equal treatment - which is, in the end, a consequence of the general principle of prohibition of discrimination based on an individual's nationality (Art. 7 and 52, no. 1).

Comparison with the Portuguese Constitution

At first sight it seems that there's no constitutional obstacle to the safeguard of this freedom of enterprise. As I have said, the Portuguese Constituion establishes the right to private enterprise. It is considered as a "fundamental right" of individual and firms and not only as a mere principle of economic organisation.

This right gives the possibility of having a private economic activity, through the freedom of creating and managing enterprises. Its components include the freedom of investment or access, which means the freedom of choice of the economic activity to be implemented; the freedom of organisation, i.e., the freedom of defining the way the activity is going to be developed (including quality and price); and the freedom of negotiating, which is the freedom of choice as to the rules which are to govern the contract.

However, the Constitution does not recognise the freedom of private enterprise without conditions, considering it to be dependent on the fulfilment of socio-economic demands.

As a result, restrictions and confinements can be found in both the Constitution and in legislation, affecting the right itself or any of its specific components. As a general doctrine, the Constitutional Court has stated that the restrictions to the private entreprise should only be the ones necessary and apropriate to the protection of other constitutional values (general interest, the public and the members of groups with a specific relationship to the enterprise's activity, such as the workers, the creditors. etc.), in respect to the proportionality rule. These restrictions should be general and abstract.

They cannot be retroactive and should respect the essential contents of the Constitutional rule that establishes that right.

Constitutional restrictions may result from the existence of public monopolies (Art. 87, no. 3), which affect especially the freedom of investment or access. They can also result from the possibility of discrimination, based on nationality, with regard to the right to invest. In force of Art. 88, Law should regulate foreign investment, in order to adjust it to the country's development and defend national independence and workers' interests. This legal possibility has to be articulated at Community level with the freedom of establishment and capital's movement. In 1986, this situation implied a complete reformulation of the Portuguese Foreign Investment Code. Before 1986, a system of previous authorisation was in force dependant on the national economic interest of the investment. This system was then basically replaced by a system of freedom of the establishment with the obligation of a mere declaration for foreign investors.

In spite of everything, the tension between the two principles *is* still visible now. A case which arose in 1990 is the legislation on privatisation. According to Portuguese law, privatisation of property or management is effected preferentially through public bidding (e.g., competitive bidding), stock exchange offer (that is public offering) or public subscription (Law 11/90, April the 5th). In exceptional cases, limited bidding, private sale or direct agreement are permitted.

The choice of the method or methods of alienation of stock depends largely on the degree of influence that the State intends to preserve on the enterprise. For instance, the state could use private sale or direct agreement to assure national control of the corporation, even selling it at a lower price (which could be considered by the EC Commission as State Aid).

In fact, in political terms, an additional risk of public bidding is the foreign control of national enterprises, especially in strategic areas. In order to avoid or lower this risk, according to Portuguese law (as well as it happens with French, German and English ones) there is the possibility of establishing a double limit: first, in relation to the amount of shares to be acquired by foreign entities in total, or whose capital is held mostly by foreign entities; second, a limit to the maximum proportion of their respective participation in equity capital. However, these are not compulsory restrictions for all privatisations. Their application and exact terms depend on a series of factors related to the strategic interest of the enterprise, and to expectations in relation to national demand, to the expected revenues, etc. Nevertheless, this rule has been challenged by some foreign enterprises on the grounds that it contradicts EC law, namely the freedom of

establishement and freedom of capital movements. The Portuguese Government based on its position due to the transition clauses prescribed in the Treaty between Portugal and the EC. But this is essentially a political decision and lacks juridical substance.

The safeguarding of public interest may still lead to the introduction of exceptions to common rules applicable to the management of the privatised enterprise. On one hand, the fact that the law allows the privatisation of enterprises that perform public utilities justifies the admissibility of the right of State intervention in the management of those private enterprises; on the other hand, being a regulatory measure, this may seem inconsistent with the deregulation philosophy underlying the privatisation of public management and property.

Thus, the law allows privatisation without boundaries — except for those referred to above regarding the areas forbidden to private business —, reserving for the state, however, exceptional rights in what regards the management of the enterprises, since these rights are no longer based upon equity ownership. The law states that deliberations concerning certain issues may be submitted to confirmation by a special representative appointed by the state, regardless of whether the State maintains an interest in the capital or not. This clause, however, is phrased in very restricting terms: it will only be applied in exceptional cases, and when it is required by reasons of national interest.

The law also admits, in exceptional cases, the possibility of "golden shares" intended to remain property of the state and which will grant the right to veto changes in the constitution of the company and other important decisions[4].

Freedom of Competition

Another limit to the private entrepreneurship right is a result of the necessity to protect competition. The Community itself, in the name of free competition, establishes various limits to free public entreprise. We also know that the EC Treaty demands the establishment of a "regime that guarantees that competition is not distorted" (Art. 3, al. f).

It has been said by GAVALDA and PARLÉANI, that "the free competition principle participates then, in an essential way, in the establishment of a true common market. The freedom of competition is therefore part of the EC economic public order".

---

[4] On Portuguese law of privatisations see Marques, 1993 e Santos, Gonçalves and Marques, 1995.

I.E., besides being a principle that permeates the whole EC Treaty, it is also a Community policy which explains its inclusion in the TR structure (Art. 85 and ss.).

Anti-monopolistic Principle in the Portuguese Constitution. A reinterpretation.

In both the present and the original version of the Portuguese Constitution an anti-monopolistic conception is visible. However, originally the principles or rules that showed that conception were not exclusively or even extensively based on the idea of protecting a competitive market. They were also based on the idea that the creation of a socialist society - one of the programmatic dispositions of the Constitution's original text - did not adjust very well, if at all, to the existence of economic groups and big private enterprises, which had been, therefore, nationalised in the most important sectors. On matters of private enterprises, the Constitution was mainly favourable to small and medium-sized enterprises.

The change in the Constitution ideology in both constitutional ammendments (1982 qnd 1986) affects the interpretation given to its anti-monopolistic rules. Nevertheless, the principle that establishes the subordination of the economic power to the political power still remains, which obviously justifies the opposition or at least the existence of a special control on private monopolies, but, on the other hand, this can conflict with the principle, already mentioned, of "an open market and free competition economy". In spite of everything, there's no longer any particular opposition to the creation of private economic groups, which seems to indicate the adoption of a practicable competition. As a result, the constitutional anti-monopolistic rules, are still being *interpreted* as a protection instrument for small and medium enterprises - which in itself is not incompatible with the Community law. This interpretation signifies now one of the ways to protect competition.

Moreover, the Constitution imposes in some sectors some special duties, as in the case of the media. To assure the freedom of press and of the media, it's considered necessary to prevent the concentration, "namely through multiple or crossed participations", of enterprises in this sector (Art. 38, no. 4). It's not only the plurality of economic agents that is supposed to be protected, but also the effective competition between them.

The rule that refers to the existence of very large estates according to the agrarian Constitution (Art. 97) has a totally different meaning. This specialisation of the anti-

monopolistic principle is included on a plan to re-dimension agricultural property and determines also the re-dimension of the very small farms (Art. 98).

There's another issue concerning this matter. This is the opening to competition of certain sectors, which had been under a legally protected or constitutional public monopoly regime. The first case was Telecommunications,the second, Television.

An interesting problem here is the one of knowing how to assure competition in sectors that, by their nature, have to be explored under a monopoly, and that, recently, have been opened to private entrepreneurship, even if on a concession regime. In fact, the Community has been concerned mainly with the lack of competition where there are public monopolies, but not with the restrictions that will occur as a result of their replacement by private monopolies. Due to this situation, some states have created public control agencies with the characteristics of independant administrative authorities. It means that privatisations and the opening of the public sector to competition has compressed public ownership, but not necessarily public regulation, which has been expanded, even though by different ways.

Of course this expansion does not affect all the aspects of public regulation. We can mention three components: the traditional State-police or State-regulator itself, the State as financial supporter of private activities and the State as buyer. When we refer to the reinforcement of the public regulation, we're only thinking of the first component. In fact, the State aid has been progressively reduced due to Community rules. Not only is the aid controlled by the Treaty, but also the after-Maastricht convergence policies restrict the national public policies for social and economic promotion.

The Portuguese Constitution gives the State various duties on this matter. However, its fulfilment becomes very limited due to obligations towards the Community, though one must not forget all the benefits and financial aid that have been received from there.

CONCLUSION

In short, the problem of the compatibility of national constitutions and particularly the Portuguese one is, nowadays, largely dependant on the interpretation made of the European Union's Treaty. A hyper-liberalising interpretation of the open market economy and free competition principle can reveal conflicts with some constitutional rules on matters of the coexistence of ownership sectors and the protection of social rights. Of course, the hypothesis of a constitutional revision in order to adjust it to the

sense of the new Community law is not excluded; however, this ammendment would be a voluntary act of the national authorities. This is what happened after Maastricht. For instance, in the Portuguese economic constitution, the article that established the "Bank of Portugal" as the only institution allowed to issue money was changed. Certainly, the almost simultaneous revision of different European constitutions, before the ratification of the European Union's Treaty, ended up determining, to a certain extent, a kind of a constitutional harmonisation process, but it didn't change the voluntary aspect of the action and therefore of including some exceptions.

Finally, though the conflictuality between the Treaty and the national constitutions should continue to be analysed and solved, from the texts and in its interpretation by competent courts and authorities, I believe that a political negotiation process will become more and more important as well as economic integration mechanisms. These mechanisms push the decision-making process towards the economic agents themselves (self-regulation). Maybe in the near future an important part of the economic regulation will be found in the contracts of big corporations and in private conduct codes.

BIBLIOGRAPHY

Cannizzaro, E. "Principi Fondamentali della Costituzione e Unione Europea", *Rivista Italiana di Diritto Pubblico Comunitario*, 1994, p.1171 ss

Canotilho, J. J. Gomes and Vital Moreira (1991), *Fundamentos da Constituição*, Coimbra, Coimbra Editora.

Canotilho, J. J. Gomes and Vital Moreira (1993), *Constituição da República Portuguesa Anotada*, 3ª Ed., Coimbra, Coimbra Editora.

Constantinesco, L. S., (1977) "La Constitution Economique de la CEE", *Revue Trimestrielle de Droit Europeen*, p.252 ss.

Miranda , Jorge, "La Constitution Portugaise et le Traité de Maastricht", *Revue Française de Droit Constitutionnel*, 12 1992 p.679

Lewis,N. and I Harden (1983) "Privatisation, de-regulation and constitutionality: some anglo-american comparisons", *Northern Ireland Legal Quarterly*, Vol 34, nº3.

Luciani, Massimo (1992), "La Constitution italienne et les obstacles à l'integration européenne", *Revue Française de Droit Constitutionnel*, 12, p.663 ss.

Marques, Maria Manuel Leitão (1993) «The Law on privatization in Portugal», in A. Kanndorp e J. Klich Ed., *Privatization and Restructurisation in East Central Europe,* Cracóvia.

Miranda, Jorge "La Constitution portugaise après Maastricht", *Revue Française de Droit Constitutionnel*, 12, p.663 ss.

Moussis, N. (1985) *As Políticas da Comunidade Europeia*, Coimbra, Almedina.

Santos, A. Carlos, M. Eduarda Gonçalves and Maria Manuel L. Marques (1995) *Direito Económico*, Coimbra, Almedina, 2ª Edição..

Wachsmann, Anne e F. Berrod, "Les critéres de justification des monopoles. un premier bilan après l'affaire Corbeau", *Revue Trimestrielle de Droit Européen*, 30 , 1994, p.39ss.