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Do common constitutional traditions matter in the field of regulated markets?

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1.- A new tension is spreading throughout Europe: the tension between Common Constitutional Traditions (CCTS) and Constitutional Identity (CI). Recent cases brought before the Court of Justice of the European Union (CJEU), which have gone to the core of European Integration, have revealed this tension. In particular, I mention the "Taricco saga" and the more recent cases concerning the independence of the judiciary in Poland.
The rulings concerning the first group of cases use the concept of CCTS in a quite conventional way, that is, with regard to fundamental rights. As Professor Sabino Cassese wrote concerning the CCTS clause:

"Its purpose in the TEU is very clear. It should be instrumental to the establishment of general principles for the protection of fundamentals rights".

But, immediately after, he added:

"In principle, common constitutional traditions can go beyond the protection of fundamental rights, and could be instrumental, for example, to new arrangements in other areas of European law, such as the separation of powers or judicial independence. However its scope is limited by the TEU"[1].

Indeed, in the second group of cases I mentioned, the CCTS are invoked in relation to a fundamental principle of constitutional organization, that of the independence of the Judiciary. The ruling of the Grand Chamber on the 27 February 2018, Associação Sindical dos Juízes Portugueses, recognized the role in primary EU law of the principle of independence of the judiciary, which has its roots in the right to effective judicial protection, qualified as a general principle of EU law which derives from the CCTS

* Articolo sottoposto a referaggio.
[1] S. CASSESE, *The «Constitutional Traditions Common to the Member States» of the European Union*, in *Rivista trimestrale di diritto pubblico*, 2017, n. 4, p. 939 ff., spec. p. 943.

of the Member State and which is guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by Art. 47 of the Charter of Fundamental Rights of the EU.

The subsequent Grand Chamber ruling of 25 July 2018, *LM*, strongly reaffirmed that the principle of the independence of Judges concerns the essential content of the fundamental right to a fair process and added that it plays a crucial role in guaranteeing the common values of the Member States recognized by Art. 2 of the TEU, including the rule of law.

In these rulings, the interaction between the CCTS and fundamental rights produces a general principle which goes beyond the sphere of fundamental rights, affects the constitutional organizations of the Member States and concerns the core values of the EU.

Immediately after the request for a preliminary ruling on the same issue by the Polish Supreme Court, the Attorney General/Minister of Justice of the Republic of Poland submitted a question before the National Constitutional Court (in October 2018) concerning the compatibility of Art. 267 TFEU with Poland's Constitution, in so far as it allows a preliminary ruling to be given on fundamental aspects of the Constitution.

The Polish Question expresses the tension which the relationship between the CCTS and CI (Constitutional Identity) can trigger and shows that if constitutional identity can be used to reaffirm a certain pluralism, referrals to the CCTS can go in the opposite direction, acting as a centripetal force[2]. In the end, this dialectical relationship seems, in part, to overlap with the relationship between European Integration and State Sovereignty[3]. As Joseph Weiler suggested some years ago, National Identity may be considered a disguised form of Sovereignty.

At this point in time, it is possible that the complex relationship between the CCTS and CI will affect other areas, such as the market regulation and public intervention in the economic sphere. This is an area in which the eurozone crisis, which peaked in 2011, has left many problems unresolved, as well as conflicting ideas on how to restore sustainable economic growth together with financial stability. A political context which fuels the dialectical relationship between European economic integration and economic sovereignty.

[2] M. GRAZIADEI, R. DE CARIA, *The «Constitutional Traditions Common to the Member States» in the Case-law of the European Court of Justice: Judicial Dialogue at its Finest*, in *Rivista trimestrale di diritto pubblico*, 2017, n. 4, p. 949 ff., spec. p. 969.

[3] M. E. COMBA, *Common Constitutional Traditions and National Identity*, in *Rivista trimestrale di diritto pubblico*, 2017, n. 4, p. 973 ff., spec. p. 974.

2.- The Court of Justice has used the CCTS in the field of fundamental rights. The wording of art. 6 of the TEU limits the use of CCTS with respect to fundamental rights. But the concept has the ability to expand its scope.

In the light of the recent developments mentioned above, I would like to address the following question: are CCTS relevant when dealing with markets and their relations with public authorities?

Generally speaking, the jurisprudence of the CJEU has not explicitly used this notion in the economic field. Nevertheless, Advocate General Cruz Villalòn in his Opinion delivered on 14 January 2015, in a very sensitive case concerning the role of the European Central Bank (ECB), applied the concept of the CCTS and focused on the interplay between the CCTS and Constitutional identity. So, the CCTS and CI were used – almost always in one case – to address a crucial aspect of the so-called Economic Constitution of the EU.

The Opinion, which prepared a landmark CJEU decision, was expressed in the well-known *Gauweiler* case. The Advocate General said:

"I think it useful to recall that the Court of Justice has long worked with the category of 'constitutional traditions common' to the Member States when seeking guidelines on which to construct the system of values on which the Union is based. Specifically, the Court of Justice has given preference to those constitutional traditions when establishing a particular culture of rights, namely that of the Union. The Union has thus acquired the character, not just of a community governed by the rule of law, but also of a 'community imbued with a constitutional culture'. That common constitutional culture can be seen as part of the common identity of the Union, with the important consequence, to my mind, that the constitutional identity of each member State, which of course is specific to the extent necessary, cannot be regarded, to state matters cautiously, as light years away from the common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States".

In my view, it is important to stress that the Advocate General's reflections were formulated with a particular aim in mind: to resolve the question of the "functional difficulty" of the request for a preliminary ruling, when placed in the context of the relevant case-law of the BVerfG (Bundesverfassungsgericht).

In fact, a section of the order for reference concerned the judgments of 12 October 1993 (Maastricht), 30 June 2009 (Lisbon) and 6 July 2010 (Honeywell) issued by the German Constitutional Court. The request for a preliminary ruling was placed in the context of national case-law in so far as the BVerfG attributed a special function to the preliminary ruling in the specific case: to prepare the ground for a

subsequent assessment by the Constitutional Court of the OMT program delivered by the ECB. The BVerfG, in essence, threatened to use its Constitutional "Identity checks" and "Ultra Vires check" in the event that the CJEU ruled in favour of the compatibility of the OMT program with the TFEU and with Protocol n. 4 on the Statute of the European System of Central Banks and of the European Central Bank. The two measures, which have been shaped by the jurisprudence of the Federal Constitutional Court (FCC), are closely linked. In principle, the ultra vires doctrine serves to protect the democratic principle guaranteed by the Basic Law. Indeed, according to the FCC, the democratic legitimacy of the EU secondary law applied in the German legal system is strengthened by the participation of the German Bundestag, which lays down its European integration agenda in its Act of Assent to a European Treaty. Consequently, the decision of the EU institutions that violate the competences transferred by the Bundestag are inapplicable in the German constitutional order. The case could end in a clash between the German Constitutional Identity and the EU Law.

3.- Until then, the interpretation of the provisions, introduced by the Maastricht Treaty, on the function of the ECB has been consistent with the role that German economic and legal culture has attributed to the Central Bank. A role which was deeply influenced by Ordoliberalism and the more recent monetarist theory and supply-side economy.

According to the "Brussels-Frankfurt consensus", the Eurozone states had to finance their budgets on the market, the states which required more financial resources than those obtained through taxation had to issue bonds and other financial instruments subject to the conditions set by the capital markets. The cost of financing should differ from State to State according to the different credit values decided, in a decentralized manner, by the financial market. The different interest rates, paid by the States, would have a disciplinary function: if a State had spent more than its economic fundamentals justified, the market would have demanded higher interest rates, prompting the State to adopt a more prudent budgetary policy. European institutions had nothing to do with the above mentioned functions: financing the States and regulating their finances.

In this perspective, the key provisions were those of Articles 123 and 125 of the TFEU. The first provision forbids the monetary financing of States by the European Institutions and the other States, while the second contains the so called "no bail-out clause".

Other essential features of the model concerned a prudent budgetary policy, which should avoid eccessive government deficits and public debt, and the role of the ECB. The central bank cannot do much to stabilize the economy. The danger is that its intervention could cause inflation. So the best thing a central

bank can do is to stabilize the premium level. This will have the added effect of producing the best possible outcome in terms of the stability of the economic cycle.
The model was based on the prevalence of rules over discretion. EMU (European Monetary Union) was governed by a predefinite set of substantive rules limiting the discretion of monetary and fiscal policy.
Was this model embedded in the Treaty or was it compatible with the Treaty but not legally binding?
The BVerfG's threat was that an interpretation which considered a different role for the ECB compatible with the Treaty and saved the MTO program would have hindered the German Constitutional Identity and given way to an "ultra vires" check conducted by the German Court.

4.- Returning to the Advocate General's conclusions in the case in question, he stressed the "functional difficulty" already mentioned in the reference for a preliminary ruling linked to a subsequent review, conducted by a Constitutional Tribunal, having, in substance, the same subject as the ruling requested from the CJEU. To simplify, the difficulty lay in the fact that the reference for a preliminary ruling is not a procedural mechanism designed to make it easier for national courts and tribunals to review the legality of EU acts, such as the review by the BVerfG, but rather to ensure that the review of validity is carried out before the court which has exclusive jurisdiction for that purpose, namely the Court of Justice. If a national constitutional court were to reserve the last word on the validity of an EU act, the preliminary ruling procedure would then be of a purely advisory nature, and its function would thus be severely undermined.
The solution provided by the Advocate General was based on the principles of "mutual loyalty" and a "cooperative relationship" between the CJEU and the National Constitutional Courts. Something more defined than the imprecise "dialogue" between the Courts.
The AG pointed out that:

"It is clear that the principle of sincere cooperation also applies to courts and tribunals, including the two courts concerned in these important proceedings. That mutual loyalty is all the more important in those cases in which the supreme court of a Member State raises… its concern about a given decision of an EU body".

This obligation implies that any review subsequent to a preliminary ruling and conducted on the basis of constitutional criteria would not reach conclusions that are in open contradiction with the ruling given by the Court of Justice. At the same time, the principle of loyal cooperation is applied to the Court of Justice and entails a two-fold obligation. In the words of the Advocate General:

"In the first place, substantively, that principle requires the Court of Justice to respond in the greatest spirit of cooperation possible to a request which has been referred to it in the same spirit: there cannot be the least doubt about it…. In the second place…the principle of sincere cooperation requires a particular effort on the part of the Court to provide an answer on the substance to the question referred…".

The premise of this reasoning was, as we have seen before, that there is a general convergence between the constitutional identity of the Union, built on the shoulders of the CCTS, and that of each member State.

5.- The *Gauweiler* case concerned relations between the financial market, the Member States and the ECB. At first there was a conflict between two ideas of the EMU and the role of the ECB, which seemed irreconcilable.

On the one hand, the dominant idea expressed by the FCC which gave a rigid and restrictive interpretation of the role of the ECB, strictly limited to assuring price stability, in line with the German tradition regarding the Central Bank. In this perspective, there was a sort of overlap between the European economic constitution and the German *Finanzverfassung*.

The central legal question posed by the FCC was whether art. 123 TFEU prohibits the purchase of bonds on the secondary market and whether the ECB, through its non-conventional operations on this market, pursues economic policy objectives, going beyond its mandate which focuses exclusively on price stability.

On the other hand, there was a competing idea, to weaken the early years of the EMU, but reinvigorated in the aftermath of the crisis and more consistent with the constitutional, political and economic traditions of other member States, such as France and Italy.

In short, according to this concurrent idea, a monetary union needs adequate tools to deal with asymmetric shocks. The focus is, therefore, on the European budget, which should act as a federal budget. The Budgetary Union should perform two functions, the so-called insurance function and the debt consolidation function. The role of the ECB should also be very different from that envisaged by the first model, and should be more similar to that of a "last resort lender" in the sovereign bond market.

A conflict between two strong ideas of the economic constitution underlined the case.

The end of the story is well known. The CJEU rejected the German interpretation and saved the MTO but, at the same time, the Court made the legitimacy of the MTO subject to strict conditions which recognized some of the concerns expressed by the Constitutional Court.

In this judgement, the Court delivers an interpretation of the TFEU which does not adopt any of the conflicting ideas on the economic constitution and the role of the ECB referred to above. The TFEU does not impose a very detailed model of the ECB, although some limitations have been set, and so Clemens Kaupa has support his thesis on the pluralistic nature of the European economic constitution[4].
The FCC showed deference to the CJEU ruling, but immediately afterwards issued a new reference order concerning the Public Sector Purchase Programme (PSPP) adopted by the ECB. This time it was not a question of the eligibility of non-conventional transactions and the purchase of government bonds on the secondary market, but of compliance with the conditions laid down by the Court in the *Gauweiler* ruling.
I have referred to the ECB's non-conventional programmes and related cases in a very concise way, because, of course, my aim is only to gather from them some elements which may be useful to address the subject of this presentation.

6.- There are several indications which can be drawn from the judicial narrative developed in the *Gauweiler* landmark case, which, in my opinion, touch on the topic of the CCTS and their interaction with CI.
The first point is that CCTS is a part of the mechanism, alongside European case law, which goes beyond the field of fundamental rights and can engage the European Economic Constitution and therefore also the relations between markets and public powers. This trend is still embryonic, but could have interesting and useful developments. This observation is very emphatic with the subsequent addition of Graziadei and De Caria, as far as the CCTS is concerned:

Their role is multifarious, ranging from being a tool to interpret existing EU law, to possibly a self standing ground of review[5].

The CCTS may be invoked not only to build a general principle that serves to shape a fundamental right, but, in a more ambitious way, "to build the system of values on which the Union is founded " and, in doing so, to forge that common constitutional culture which "can be seen as part of the common identity of the Union" (I again quote the words of Cruz Villalòn).
In this perspective, the way in which the contents of the CCTS are determined has important implications. The decisions of the Court and the opinions of the Advocates- Generals have never

[4] C. KAUPA, *The Pluralist Character of the European Economic Constitution*, Oxford, 2016.
[5] M. GRAZIADEI, R. DE CARIA, *The «Constitutional Traditions Common to the Member States» in the Case-law of the European Court of Justice: Judicial Dialogue at its Finest*, in *Rivista trimestrale di diritto pubblico*, 2017, n. 4, p. 949 ff., spec. p. 955.

attempted a comparative analysis of the text of the Constitutions of the Member States and have sometimes qualified as CCTS a principle which was present only in very few States.

The fact is that it is the Court that chooses which aspects of national constitutional culture matter. The Court can use material that is very rich in texts, customs, political ideas, socio-economic norms, constitutional theory, and, in doing so, the Court can reach two objectives. Firstly, to maintain the effectiveness of EU law and the legitimacy of the intervention of the EU institutions. In this respect, we should always bear in mind that the discovery of the CCTS was, at its origins, a response to the challenge raised by the German Federal Administrative Court in the *Internationale Handelgesellschaft* to question the legitimacy of the EU legal order on the basis of the German constitutional order.

Secondly, to weaken the conflict with the national constitutional order by building a bridge between the constitutional traditions belonging to different Member States, and between these and the constitutional identity of the EU.

From this perspective, we can say that – as it is evident in the Opinion of AG in the *Gauweiler* case - CCTS and CI can go hand in hand, in an institutional environment based on the principle of judicial cooperation. To achieve this goal, it is necessary to manage the intrinsic ambiguity of the notion of identity. Identities can be used as a basis for an exclusive membership, fueling an unresolved conflict with other identities, as can be seen in Carl Schmitt's well-known theorization of the *amicus-hostis opposition* as the essence of politics. But identities can be integration factors, if they are used to include different traditions and ideas, bridging the gap and smoothing differences, while mantaining a certain degree of pluralism.

To follow this path, the Court cannot totally embrace a constitutional model or a specific socio-economic theory. But the approach should be pragmatic, less intellectually coherent but more result-oriented. This constitutional pragmatism, for instance, is manifested in the case law on the role of the ECB and, as a result, gives the European economic constitution a pluralistic character.

This character could be very useful at a time when rapid political transformation and populism have called European integration into question. Recognizing the pluralistic nature of the economic Constitution leads to political conflict, limiting the risk of the EU's constitutional structure, identity and existence being called into question.

In this broader view, the CCTS has a role to play in all situations where there is a potential conflict between EU primary law and the CI of a Member State.

7.- Before going on, allow me to make a brief point. The ability of the CCTS to develop a dialogue between different constitutional and socio-economic ideas is underlined by the type of legal language

which is intrinsic to this concept: the language of principles. Art. 6 of TEU specifically links the CCTS and the general principles of law.

It should be noted that there is a basic distinction between rules and principles. They both have legal value, but while rules are applied in the form of "all or nothing", so that if the conditions laid down by the rule are met it is legally binding to apply all the consequences foreseen by the rule, the principle expresses a reason which must be taken into consideration when making the judicial decision. Principles can have different implementations and their typical way of working is to compare with other principles. Those who have the responsibility to decide should strike a balance between different principles and proportionality and is generally the criterion used to assess the proper way in which a principle has been implemented. In the end, principles have an inherent aptitude to engage constructive debate and to find a possible compromise between the different points of view.

The search for compromise is sought as far as it is possible. It is important to stress "as far as possible". Because, the effort to accommodate should not be ill-timed and there are exceptional situations where conflict cannot be avoided.

8.- If we move from the macroeconomic aspects of the European economic constitution to the microeconomic aspects, linked to the internal market and the safeguarding of competition, it is easy to establish that the CCTS and IC have not been used. Nevertheless, I think that the methodological approach which I have called "constitutional pragmatism" can also be found in these fields, which show other interesting features regarding the relationship between CCTS and IC.

The milestone in the jurisprudence concerning the common market is the Cassis de Dijon judgement. With this judgment the principle of mutual recognition emerged, when the CJEU interpreted the notion of Restrictions of equivalent effects to quantitative restrictions on imports and exports (articles 34 and 35 TFEU). According to it, goods are entitled to move freely within the European market once they comply with the law of their "home State" and the "host State" is principally no longer allowed to exercise its internal sovereignty over the "marketing" of imported goods. In this way – as Robert Schutze pointed out – the Court seemed to embrace a specific model of market integration: a federal market model[6]. To use the words of Schutze:

"A federal market is based on the principle that States that States not only lose a part of their 'external sovereignty'; they will also have to give up a part of their 'internal sovereignty' over their internal markets. This happened in the United States where the (dormant) Commerce clause expanded to cover intra-State

[6] R. SCHÜTZE, *From International to Federal Market. The Changing Structure of European Law*, Oxford, 2017.

commerce and, consequently, measures that – even if not distinctly applicable to imports – were nevertheless seen as excessively burdening interstate commerce. […]
Within art. 34 TFUE, the federal model of market integration is not concerned with the question whether or not the host State laws discriminate against imports. Rather, it examines whether the extension of host State laws to imports imposes a restriction or an obstacle to intra-Union trade"[7].
To quote again Robert Schutze:

"Through the federal prism, a restriction or obstacles is here seen to arise because a good is subject to two – or worse, twenty-eight – different national standards that simultaneously demand application in the common market"[8].

The Cassis judgment regarded a specific category of measures – technical barriers through product requirements -, but the Commission propagated a generalization of its ratio. In a communication concerning the consequences of Cassis, it thus argued:

"In its judgment of 20 February 1979 the Court indicates the scope of art. (34) as it applies to technical and commercial rules. Any product lawfully produced and marketed in one member States must, in principle, be admitted to the market by any other Member State".

This attempt to export the Cassis judgment and the principle of mutual recognition beyond technical rules influenced the jurisprudence of the CJEU. The "national market" model gained strenght in the second half of the 1980's, as showed by a series of rulings concerning the opening of shops on Sunday. In Torfaen (C-145/88), the Court stated that selling arrangements could be subject to an absolute trade-restrictiveness test. For it was not the intra-Union disparities between national opening times that created an obstacle to trade but the very existence of the national measure that restricted trade. In this perspective, free-movement provisions were no longer concerned with inter-State trade but with trade tout court. The provision on free movement of good could potentially become an "economic due process" clause that would allow individual traders to challenge all national laws regulating trade.
Advocate General Tesauro (in case C-292/92) warned against this development whose aim was – in his words – "to encourage the unhindered pursuit of commerce in individual Member States".
A problem was thus posed: how could this ultraliberal interpretation has cohabited with national constitutional traditions common to some Member States – like France or Italy – in which an economic

[7] R. SCHÜTZE, *From International to Federal Market. The Changing Structure of European Law*, Oxford, 2017, spec. p. 134.
[8] R. SCHÜTZE, *From International to Federal Market. The Changing Structure of European Law*, Oxford, 2017, spec. p. 134.

model based on government control was still embedded? This national model was at odds with free and competitive market economy which was at the core of the European Economic Constitution.
In this situation it is interesting to stress that the subsequent jurisprudential developments were bidirectional. On the one hand, the court restricted the scope of the provision on free movement of goods, taking seriously national concerns. On the other hand, a new interpretation of the national economic constitutions developed which fostered a progressive shift from the state-controlled model to a free and competitive marked economy.
The Court made admission that the liberal philosophy behind art. 34 had gone too faraway. In 1991 the Court stated:

"In view of the increasing tendency of traders to invoke art. (34) of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter".

The admission was made in the Keck case (joined cases C-267.8/91). In this judgment the Court abandoned the national market model with regard to measures which it described as "selling arrangements". This kind of measures, even when they prohibited certain distribution channels or certain marketing method, would not violate art 34 if two conditions were fulfilled. First, the national measures would need to apply to all traders within the national territory, that is they must be indistinctly applicable; and, secondly, the selling arrangements would have to affect in the same manner the marketing of domestic and imported goods.
With Keck judgement the Court admitted that different categories of national rules were subject to different tests. The introduction of a new test to assess the lawfulness of national measures was a pragmatic way to limit the scope of the provision on the free movement of goods. For a very long time it seemed that art. 34 could solely cover national rules that something interfered with the commercial chain beginning with the production of a good to its trading and subsequent selling. The status of national laws regulating the "consumer use" of a good therefore seemed safe. But in 2006 the Court starded a new approach (in the Case Commission v. Portugal, case C-265/06). The Court qualified national measures that reduce consumer demand as measures equivalent to quantitative restrictions. So a third test was introduced. According to the market access test any national measure that greatly restricts the use of goods is seen as "hindering the access to the domestic market in question for those goods" and thus constitutes a measure having equivalent effect to quantitative restrictions on imports. (case C-142-05, Mickelsson and Roos). This third line captures national measures that apply without distinction to

imported and domestic goods, and whose restrictive effect is not caused by a disparity of national legislation. The consequence is that the model of market integration is that one of a national market with a very strong limitation of economic sovereignty of each member State, that rehabilitated the ultra liberal philosophy of 1980's.

It is noteworthy to observe that the Court does not follow a unique test and a unique model of economic integration but has a casuistic flexibility, so that – to quote again Schutze – "economic interests must never become the Court's sole or dominant value in interpreting Article 34". The introduction of the market access test was introduced when the constitutional culture of the Member States had rejected the State controlled model and embraced the principles of a free and competitive marked economy. This development, for example, brought to what has been called the "Europeanization of the Italian Constitutional court's case law on competition and free trade (E.M. Lanza). The Court delivered an interpretation of art. 41 of the Italian Constitution – a provision extensively based on a vision of private economic choices guided by the pursuit of a "common good" to the effect that private economic initiative could be squeezed to the extent necessary – which was consistent with the fundamentals principles of the European economic Constitution. The change of perspective with regard to market economy became more and more evident in the 1990's.

9.- It was only in 1982, i.e. after 25 years of Italy's membership to the EEC, that the Italian Constitutional Court (ICC) considered competition as a useful instrument to achieve the "common good" (judgment n. 223/1982). The ICC stated that free competition has a double aim: on the one hand, it fulfills the freedom of economic initiative and, on the other hand, it is instrumental to the interests of the overall society, because the plurality of competing undertakings holds down the prices and improves the quality of products. For the first time, the ICC referred to the application of European competition law in the domestic legal order. Even if judgement number 223/1982 proved to be a one off case, as it not followed a series of judgments cutting off the heavy presence of the State in the economy, in the nineties the ICC opened the doors to competition. Judgment n. 241/1990 stressed that the absence of the domestic antitrust law was a serious lack in the Italian legal system and some months after the Italian Parliament adopted law no "87/1990, "Provisions to protect competition and the market"., while the 2001 Italian constitutional reform put in the text of the Constitution a reference to the "protection of competition". It was classified as a matter upon which the central State, as opposed to the Regions, retained exclusive legislative competence (art. 117, paragraph 2, letter e). The reference to the "protection of competition" promoted the perception of competition as a limit to the scope of public regulation, in many fields, from State aids to public tenders.