FREEDOM OF COMPETITION IN THE HUNGARIAN CONSTITUTION: A MATTER OF INTERPRETATION

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Abstract

Freedom of competition was a product of German ordoliberalism that was influenced by American competition policy. After the political transition in 1989, Hungary codified this concept into its constitution, making it the basis of its market economy and competition law. Freedom of competition came up in a few cases of the Constitutional Court and it was used in connection with basic rights and the principle of market economy. For over two decades, however, the Court could not work out a sustainable definition and content, and, eventually, in 2012, freedom of competition lost its constitutional recognition. Despite this, in a recent decision, the Constitutional Court decided to include it in Article M of the new Fundamental Law.

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I. Evolvement of the concept of freedom of competition

Although the concept of „freedom of competition" originated in the United States[1], its significance in economic policy

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1 In American jurisprudence of the early XX century, "freedom of competition" was often used as a synonym of "free competition". Cf. W. H. Tuttle, *Legitimate Competition*, 43 Central Law Journal 15, 305 (1896); n.a., *The individualism of the Constitution*, 62 Central Law Journal 20, 379 (1906). Also with regard to the Sherman Act, "freedom of competition" meant to refer to free competition in terms of commerce without improper obstacles. See, in particular, concurring opinion of Judge Hook in the Standard Oil case (218. U.S. 681). See also G. W. Wickersham, *Recent Interpretation of the Sherman Act*, 10 Mich. L. Rev. 1. 1 (1911);

was first recognized in the Federal Republic of Germany. During the interwar period, theories of liberalism were reborn in the company of a few professors of Freiburg who also gave rise to an ideological foundation for a new economic policy.[2] This ideology focused on a competitive economic system that would serve as the main economic and political precondition for prosperity and freedom.[3] Unlike the followers of laissez- faire theories[4], the Freiburg School representatives proposed to enact the economic order into a solid public legal framework as they placed the significance of economic competition onto a broader social and political context.[5] This was partly based on the recognition of the strong relationship between economic freedom and political freedom. They held that uncontrolled economic freedom might undermine the democratic institutions of the state since economic conduct is selfish and amoral by its very nature.[6] Consequently, the balance of social order could only be maintained by protecting political power from economic power and the belief of omnipotence of economic markets. This viewpoint led to the attribute "social" to be associated with the theory of market

G. H. Montague, *The defects of the Sherman anti-trust law*, Yale L.J. 103 (1909).

2 For a detailed history of Freiburg School see T. Tóth, *The message from the past: The ordoliberal school of competition policy*, in E. Balogh, M. Homoki-Nagy (eds), *Emlékkönyv Dr. Ruszoly József egyetemi tanár 70. születésnapjára* (2010), 878-880, and L. A. Sullivan, W. Fikentscher, *On the Growth of the Antitrust Idea*, Berkeley Journal of International Law 211-217 (1998).

3 L. Lovdahl Gormsen, *Article 82 EC: Where are we coming from and where are we going to?*, Competition Law Review 9 (2006), and P. D. Schapiro, *The German law against competition – Comparative and international aspects*, Colum. L. Rev. 14 (1962). See also D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 25 The American Journal of Comparative Law 36-38 (1994).

4 P. D. Schapiro, *The German law against competition – Comparative and international aspects*, cit. at 3, V. J. Vanberg, *The Constitution of Markets. Essays in political economy*, Routledge 42-44 (2001).

5 W. Möschel, *The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy*, Journal of Institutional and Theoretical Economics 4 (2004).

6 W. Bonefeld, *Freedom, Crisis and the Strong State: On German Ordoliberalism*, 9 <http://bisa.ac.uk/index.php?option=com_bisa&task=download_paper&no_html=1&passed_paper_id=137> accessed 5 May 2015. See also L. A. Sullivan and W. Fikentscher, *On the Growth of the Antitrust Idea*, cit. at 2, 212; W. Röpke, *The Moral Foundations of Civil Society* (2002), 49; W. Röpke, *The Social Crisis of Our Time* (1991) 52, 181.

economy.[7] Another reason for connecting economic competition to social, political and legal order was the recognition of how, without sufficient state control over economy, excessive market power prevented the exercise of economic freedom since uncontrolled freedom was considered to have a tendency of misuse. In this view, freedom was effective only as an ordered freedom[8]; and whereas economy in itself cannot maintain this order, the state should work out and protect the freedom and operation of this economic order. Accordingly, the Freiburg School envisioned a strong state that would ensure that market actors kept to the rules and protect individual economic freedom.[9] Furthermore, individual economic freedom should be protected not only from excessive economic power, but also from unreasonable state interventions. The idealized strong state was, therefore, a self-controlled state.[10] Thus, from their point of view, the Freiburg School saw economic freedom and political freedom as interdependent because if the state was unable to protect economic freedom, then this would eventually also endanger the democracy.[11] Since these views obviously challenged those of the traditional liberal economy, the followers of the Freiburg School called themselves "ordoliberals" in order to emphasize the distinction. The phrase "ordoliberal" denoted by the Latin word "ordo" which means "to order" "symbolized the soul of their program".[12]

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7 L. Erhard, *Prosperity Through Competition* (Frederick A. Präger, 1958) 117; Cf. W. Bonefeld, *Freedom, Crisis and the Strong State: On German Ordoliberalism*, cit. at 6, 15.

8 Cf. W. Bonefeld, *Freedom, Crisis and the Strong State: On German Ordoliberalism*, cit. at 6, 5, D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, cit. at 3, 45.

9 Cf. W. Möschel, *The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy*, cit. at 5, 7, W. Bonefeld, *Freedom, Crisis and the Strong State: On German Ordoliberalism*, cit. at 6, 5-9, D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, cit. at 3, 49.

10 Cf. W. Bonefeld, *Freedom, Crisis and the Strong State: On German Ordoliberalism*, cit. at 6, 19, V. J. Vanberg, *The Constitution of Markets. Essays in political economy*, cit. at 4, 50-51.

11 L. Lovdahl Gormsen, 'The conflict between economic freedom and consumer freedom in the modernization of Article 82 EC' (2007) European Competition Journal 332.

12 Hero Moeller called first the economic policy of the Freiburg School

With economic freedom at the center of the Freiburg School's economic policy, it also affected its competition policy.[13] Competition, as individuals strived to achieve commercial advantage amongst sellers or buyers within the market[14] was considered to provide freedom of choice and increase efficiency.[15] Since competition was deemed to imply freedom, their theories for competition policy were also based on the idea of economic freedom[16] and competitive liberty. The objectives of competition policy were to protect individual economic freedom and economic competition itself.[17] Accordingly, individual economic freedom should be protected by freedom of contract and competition law should protect the competition. The objective of competition law was, therefore, not the protection of competitors, consumers or individual economic freedom, but the protection of competition itself as an institution and as an operation of the economy. Competition law then should, firstly, struggle against competition restraints and inhibit the development of excessive market power. Secondly, it should compel inevitable excessive market power (e.g. natural monopolies) to act as if there was competition and lastly, it should ensure undertakings' entry and participation in economic competition.[18] To consolidate all these objectives, Erich

ordoliberal. One of the components of this word combination came from the title of the scientific periodical of the Freiburg School, 'ORDO'. D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, cit. at 3, 58.

13 E. Hoppmann, *Das Konzept der optimalen Wettbewerbsintensität: Rivalität oder Freiheit des Wettbewerbs: Zum Problem eines wettbewerbspolitisch adäquaten Ansatzes der Wettbewerbstheorie*, 179 Jahrbücher für Nationalökonomie und Statistik 4, 124-125 (1966); L. Erhard, *Prosperity Through Competition*, cit. at 7, 117; M. Motta, *Competition Policy. Theory and Practice* (2004), 24.

14 L. A. Sullivan and W. Fikentscher, *On the Growth of the Antitrust Idea*, cit. at 2, 217.

15 E. Hoppmann, *Workable Competition. The Development of an Idea on the Norm for the Policy of Competition*, 13 Antitrust Bulletin 61-62 (1968).

16 The idea of economic freedom was part of private autonomy and included freedom of commerce.

17 E. Hoppmann, *Workable Competition. The Development of an Idea on the Norm for the Policy of Competition*, cit. at 15, 289; Wolfgang Kerber, *Should Competition Laws Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law* (FB Wirtschaftswiss, 2007) 13-14; I. Lianos, *Some Reflections on the Question of Goals of EU Competition Law*, 3 CLES Working Paper Series 24-25 (2013).

18 Cf. D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism,*

Hoppmann, in the 1960's, started using the term "freedom of competition"[19] (*Wettbewerbsfreiheit*) as the primary goal of competition policy.[20] All phenomena threatening these objectives, in particular excessive market power, were identified as dangerous to freedom of competition.

This formalist approach adumbrating aspects of efficiency,[21] and also establishing the concept of *per se* infringement of competition law in Europe, has been strongly criticized during the last decades of the XX century.[22] Although the ordoliberal competition policy placed less emphasis on economic aspects of antitrust law, its legal terminology was complex and coherent.[23] Ordoliberals recognized that the market in itself was not omnipotent, and they accepted necessary state intervention if it aimed at protecting the economic order based on competition.[24] Such intervention had to serve the preservation of competition and thereby (indirectly) the whole economic order, and also to comply with the economic constitution.[25] Since, in this respect, the legal framework protected the competition from unreasonable state intervention as it similarly protected the state from excessive market power,[26] the competition law became the protector of both economic development and political freedom.[27]

Competition Law and the "New" Europe, cit. at 3, 49-53.

19 A. D. Chirita, *The Analysis of Market Dominance and Restrictive Practices Under German antitrust Law in Light of EC Antitrust Law*, European Competition Journal 417-419 (2008).

20 E. Hoppmann, *Workable Competition. The Development of an Idea on the Norm for the Policy of Competition*, cit. at 15, 70.

21 Ioannis Lianos argues that ordoliberal competition policy did not ignore efficiency aspects, but implied them to the social and economic order that the state should protect through competition policy. I. Lianos, *Some Reflections on the Question of Goals of EU Competition Law*, cit. at 17, 26-27.

22 Cf. P. Akman, *Article 82 Reformed? The EC Discussion Paper on Exclusionary Abuses*, Journal of Business Law (2006).

23 R. J. Van Den Bergh and P. D. Camesasca, *European Competition Law and Economics – A Comparative Perspective* (2001), 40.

24 Cf. I. Lianos, *Some Reflections on the Question of Goals of EU Competition Law*, cit. at 17, 25-26; T. Tóth, *The message from the past: The ordoliberal school of competition policy*, cit. at 2, 881; T. Tóth, *Az Európai Unió versenyjoga* (2014), 34.

25 D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, cit. at 3, 46-48.

26 T. Tóth, *Gazdasági alkotmány - a piac és a verseny védendő értékei*, 32 Pázmány Working Papers 8 (2011).

27 Cf. L. Lovdahl Gormsen, *Article 82 EC: Where are we coming from and where are*

These ordoliberal views became the foundation of the Federal Republic of Germany's restoration after the World War II. Frameworks for a new economic policy were set up by the Potsdam Conference[28] and by the unratified Havana Charter of the United Nations, forming the basis of global decartelization[29], while its content was provided by the ordoliberal mutation of U.S. competition policy.[30] The central pillar of U.S. competition policy[31] was embodied by the Sherman Act that was regarded as a charter for the freedom of commerce[32] and as the Magna Charta of free enterprise.[33] In the U.S. controlled sector of the Federal Republic of Germany, the preparation for the legislation of the new era begun early, and a decree of the local self-government on antitrust rules was adopted in 1947.[34] It was followed by the abolishment of the price regime in 1948.[35] In that year, the US Supreme Court rendered its judgment in the U.S. v. Line Materials Co. case[36], and held that "*Despite possible advantages to a stable economy from efficient cartels with firm or fixed prices for products, it is crystal clear from the legislative history and accepted judicial interpretations of the Sherman Act that competition on prices is the rule of congressional purpose and that, where exceptions are made, Congress should make them. The monopoly granted by the patent laws is a statutory exception to this freedom for competition, and consistently has been construed as limited to the patent grant.*" By this judgment, the Supreme Court went

we going to?, Competition Law Review 10 (2006); P. D. Schapiro, *The German law against competition – Comparative and international aspects*, cit. at 3, 7.

28 Potsdam Agreement of 2 August 1945, art. 12.

29 L. A. Sullivan and W. Fikentscher, *On the Growth of the Antitrust Idea*, cit. at 2, 208-209.

30 P. D. Schapiro, *The German law against competition – Comparative and international aspects*, cit. at 3, 3-4. For a detailed analysis on the relationship between roots of German and US competition law, see D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, cit. at 3, 62-64.

31 For a detailed analysis on the history of US competition policy, see L. A. Sullivan and W. Fikentscher, *On the Growth of the Antitrust Idea*, cit. at 2, 199-208.

32 288. U.S. 344 (1933) Appalachian Coals Inc. v United States.

33 405. U.S. 596 (1972) United States v Topco Assocs. Inc.

34 J. Hoerner, *Competition Law in the European Union: A Dual Enforcement System*, <http://www.antitrust.de> accessed 5 May 2015.

35 OECD, *OECD reviews of regulatory reform – Regulatory reform in Germany: The role of competition policy in regulatory reform* (OECD, 2004) 9.

36 333. U.S. 287 (1948).

beyond its earlier decision in the Precision Instruments Mfg. Co. v. Auto Maintenance case[37] that declared "*the right to access to a free and open market*" three years before, and apparently identified economic competition as a freedom. Although that later judgment referring to the American legal history and the case law related to the Sherman Act did not define the content of the concept of freedom of competition, this development of the law in the United States provided complete legal terms for the legislation pursuing the ordoliberal competition policy in West Germany's U.S. controlled sector. American and West German competition policy were different,[38] but its ordoliberal approach was very much influenced by the jurisprudence of the U.S.; so much so its concept of freedom of competition was imported from the U.S.

The purpose of the Antitrust Act adopted in 1957[39] was to protect freedom of competition and prevent the evolution of excessive market power that would hinder the effective operation of the market.[40] The Freiburg School always propounded that the foundations of economic freedom should be protected at the highest level of the legal system and should be reflected by the constitution in order to oblige the government to protect the competition.[41] Although freedom of competition as such had not been incorporated in the constitution of West Germany, eventually it grew to be a quasi-constitutional principle as part of the "economic constitution."[42]

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37 324. U.S. 806 (1945).

38 L. Erhard, *Prosperity Through Competition*, cit. at 7, 120-121.

39 The first bill was submitted to the Bundestag in 1950, but it was adopted seven years later. The new Competition Act entered into force in 1 January 1958 and repealed former competition laws. P. D. Schapiro, *The German law against competition – Comparative and international aspects*, cit. at 3, 2; A. Weitbrecht, *From Freiburg to Chicago and Beyond – the First 50 Years of European Competition Law,* European Competition Law Review 82 (2008).

40 J. Hoerner, *Competition Law in the European Union: A Dual Enforcement System*, cit. at 34; P. D. Schapiro, *The German law against competition – Comparative and international aspects*, cit. at 3, 7; A. D. Chirita, *The Analysis of Market Dominance and Restrictive Practices Under German antitrust Law in Light of EC Antitrust Law*, cit. at 19, 415.

41 OECD, cit. at 35, 9; D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, cit. at 3, 44-46.

42 OECD, cit. at 35, 5. Although the Grundgesetz does not declare explicitly the concept of freedom of competition, jurisprudence implies it in Article 2 and Article 12. Cf. Peter-Michael Huber, *Konkurrenzschutz im Verwaltungsrecht* (J.C.B.

In the post war period, freedom of competition itself did not acquire constitutional recognition in other European countries, but West European constitutions contained a few articles on protecting competition. The declaration of the freedom of enterprise or the freedom of trade formed the highest level of the framework for competition policy.[43] Only Portugal[44] and Ireland's[45] constitutions contain specific provisions for protecting competition.

On the Eastern side of the iron curtain, within the paradigm of socialism, the economic competition could not be understood as an objective of economic policy. Since the dissolution of the Soviet Union and the termination of the Council for Mutual Economic Assistance, national constitutions of newly freed independent states have been protecting economic competition through specific rights in order to signify and to guarantee market economy. Even though the theories of the Freiburg School on competition policy had been outworn by that time, post-socialist constitutions still took concepts of ordoliberalism and built their economic constitution on such concepts as "social market economy"[46], "freedom of economic activity"[47], or "freedom of (fair) competition."[48]

In this context, it is quite understandable that the concept of freedom of competition was declared by the Hungarian Constitution at a time when the country's political system shifting from socialism to democratic, despite neither the West European

Mohr, 1991) 316-325.

43 See, in particular, article 38 of Spain's constitution, article 41 of Italy's constitution, article 74 of Denmark's constitution, or article 11 of Luxemburg's constitution. On a supranational level, also the European Court of Justice declared the principle of freedom of competition in the Grundig case. Joined Cases 56/64 and 58/64 *Consten/Grundig v Commission* (1966) ECR I-342.

44 See art 81 s F, art 86 para 3 and art 99 s A of the Constitution of the Portuguese Republic.

45 See art 45 paras 2-3 of the Constitution of Ireland.

46 See art 20 of the Constitution of the Republic of Poland and the preamble of the Constitution of the Republic of Hungary.

47 See art 20 of the Constitution of the Republic of Poland, art 46 of the Constitution of the Republic of Lithuania and art 11 s 1 of the Constitution of the Republic of Albania.

48 See art 46 of the Constitution of the Republic of Lithuania, art 9 para 2 of the Constitution of the Republic of Hungary and art 126 para 2 s B of the Constitution of the Republic of Moldova.

models making it necessary, or the competition culture in Hungary being sufficiently developed enough to require this constitutional provision.[49] These two reasons contributed to the fact that freedom of competition has not gained eminent significance in the case law of the Hungarian Constitutional Court.

II. Freedom of Competition as Interpreted by the Constitutional Court of Hungary

After the political transition in 1989 (15 years before Hungary's EU membership), Hungary formally switched over to the social market economy[50], and deployed basic individual rights in pursuing Western European economic systems. At this time basic economic rights were codified into the Hungarian Constitution[51] through a series of amendments to the 40 years old law.[52] According to article 9 of the Constitution amended by Act XXXI of 1989, "*The economy of Hungary is a market economy utilizing also the advantages of planning, in which public property and private property shall receive equal consideration and protection under the law. The Republic of Hungary, on the basis of competitive neutrality, recognizes and supports the right to enterprise and the freedom of competition in the economy that may be limited only by a fundamental act*." This article, however, was effective for only eight months because Act XL of 1990 amended the Constitution again. According to the new wording of article 9, which was in effect for more than two decades, „*The economy of Hungary is a market economy in which public property and private property shall receive equal consideration and protection under the law. The Republic of Hungary recognizes and supports the right to enterprise and the freedom*

49 Although there was a Competition Act in effect since 1984, it could not function perfectly due to the then existing planned economy scheme. As regards the history of Hungarian competition law see in particular Imre Vörös, 'A modern magyar versenyjog kezdetei (1984-1996)' in Pál Szilágyi and Tihamér Tóth (eds), *A magyar versenyjog múltja és jövője* (PPKE, 2011). See also Imre Vörös, *Javaslat a hazai versenyjogi szabályozás továbbfejlesztésére* (MIE, 1989) 11-12 and 19.

50 Substantial changes in commerce have already begun in the early 1980's, but formally, the political shift gave new framework to the economy.

51 Act XX of 1949 on the Constitution of the Republic of Hungary.

52 T. Drinóczi, *Gazdasági alkotmány és gazdasági alapjogok*, in T. Drinóczi (ed), *Gazdasági alapjogok és az új magyar alkotmány* (2007) 150.

of competition in the economy." In respect of this new article, the legislative preamble stated that „*despite the thoroughly considered interests of undertakings, it* [article 9] *does not emphasize the declaration of principle of competitive neutrality, unlike the former provisions*." Thus, for the following two decades, „freedom of competition" without any reference to the "competitive neutrality" was the central concept for the constitutional protection of economic competition in Hungary.

As for the constitutional nature of freedom of competition, according to an interpretation by the Constitutional Court, it was not a fundamental right[53] but a state goal[54] protected by the Constitution. At the beginning, however, the Court had defined it as a constitutional right. In its earlier decision, the Court declared that freedom of enterprise and freedom of competition as a constitutional right were to protect the freedom of contract.[55] In 1991 it laid down that the market economy was "*the economy, in which the structure of ownership is plurally separated, operating in accordance with the constitutionally recognized principle of equality of different forms of ownership and freedom of competition*."[56] One year later the Constitutional Court went further and declared the "*constitutional freedom of economic competition*."[57] The qualification changed again in 1993, when it was defined as a constitutional right, on one hand ("*constitutional right for the freedom of competition*") and, on the other hand, it was considered a constitutionally recognized and protected principle.[58] In a subsequent decision also in 1993, freedom of competition was unambiguously identified as a constitutional principle. In that decision the court set forth that freedom of competition was "*such a constitutional principle whose aim is, inter alia, to promote the colorful and efficient exercise of freedom of enterprise and freedom of profession*."[59] Its final definition as a state goal was outlined in 1994, when the Constitutional Court declared that it "*would assess*

53 Decision nr. 21/1994 (IV. 16.) of the Constitutional Court.
54 The concept of "state goal" as the legal nature of certain articles was introduced by the Constitutional Court in 1993.
55 Decision nr. 32/1991 (VI. 6.) of the Constitutional Court.
56 Decision nr. 59/1991 (XI. 19.) of the Constitutional Court.
57 Decision nr. 46/1992 (IX. 26.) of the Constitutional Court.
58 Decision nr. 33/1993 (V. 28.) of the Constitutional Court.
59 Decision nr. 1105/B/1993 of the Constitutional Court.

the unconstitutional infringement of market economy, freedom of competition and other similar state goals only in exceptional cases."[60] This conceptual change did not get into the spotlight of jurisprudence, even though there was an obvious movement from a "constitutional right" via "principle recognized by the constitution", "constitutional freedom" and "constitutional principle" towards a "state goal". All these were apparently the consequences of that the Constitutional Court having to define the legal nature of the concept in the early 1990's when it also had to distinguish each category of constitutional concepts,[61] whilst its doctrinal terminology was changing from time to time.[62] Although the concept of "state goal" did not originate from the Constitution itself, or any written law, since 1993 the Court defined the legal nature of certain articles of the Constitution (including freedom of competition) as state goals.[63] Nevertheless, the identification of freedom of competition as a constitutional right or a state goal is not only a question of terminology, but also a quality determining the extent of constitutional protection.[64] Protection of a constitutional right is undoubtedly more solid than that of a principle or even of a state goal. State goals, in that respect, were considered as special principled norms that conferred rights and duties on the legislation and the governmental bodies being responsible for the enforcement of the Constitution. Means of that enforcement, unlike constitutional rights, could be freely chosen by the state.[65] It is understandable, in this context, that the Constitutional Court, who admittedly did not want to limit the government's latitude in economic policy,[66] gradually softened the magnitude of freedom of competition, in order to avoid being obliged to base the reasoning of its decisions with economic effect "*on this swampy ground (in respect of its doctrinal terminology)*."[67] Nevertheless, the evolution of the interpretation of freedom of

60 Decision nr. 35/1994 (VI. 24.) of the Constitutional Court.
61 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon* (2001), 131.
62 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon,* cit. at 61, 627-628.
63 Decision nr. 33/1993 (V. 28.) of the Constitutional Court.
64 Decisions nr. 28/1994 (V. 20.) and 778/D/2010 of the Constitutional Court.
65 Report nr. OBH 1806/2003 of General Deputy of the Parliamentary Commissioner of Citizens' Rights.
66 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon,* cit. at 61, 150-151.
67 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon,* cit. at 61, 421.

competition suggests that the Constitutional Court would have been able to construe this concept as a constitutional right that would definitely have had a more concrete and solid content than an oblique state goal.

Yet, in 1991, the Constitutional Court explained the meaning of article 9, paragraph 2 as "*giving protection against also the restriction (through legislation) of economic competition and freedom for enterprise by the state provided that restriction is not complying with establishing market economy.*"[68] Three years later, however, it stated "*it would ascertain an infringement of freedom of competition and other similar state goals only in exceptional cases, when the state intervention is both conceptually and obviously contrary to the state goal*".[69] This decrease in significance was a consequence of the fact that the Constitution, according to the Constitutional Court, was neutral in matters of economic policy and it did not prescribe any particular model of market economy. All these were in relation to the constitutional nature of freedom of competition being softened in the early 1990's as it eventually became a state goal from being a constitutional right, and that the Constitutional Court asserted the infringement of freedom of competition only in few cases, of them being rendered between 1991 and 1997.[70]

Although according to previously settled case laws, freedom of competition was strongly connected to articles of the Constitution about market economy, freedom of enterprise and other basic economic rights, this relationship appeared in different forms in its decisions. In 1993, the Constitutional Court held that freedom of competition was "*a constitutional principle whose aim is, inter alia, to promote the colorful and efficient exercise of freedom of enterprise and freedom of profession.*"[71] In this context, the concept did not appear as an autonomous constitutional value, but only as a device ("*whose aim is, inter alia, to promote*") for enforcing basic economic rights. This materially compares to a decision rendered in the following year, whereby the Constitutional Court confirmed that "*recognition and support of freedom of competition by the state*

68 Decision nr. 19/1991 (IV. 23.) of the Constitutional Court.
69 Decision nr. 35/1994 (VI. 24.) of the Constitutional Court.
70 Decisions nr. 59/1991 (XI. 19.), 33/1993 (V. 28), 21/1994. (IV. 16.), 31/1994 (VI. 2.), 48/1994 (X. 26.), 58/1994 (XII. 14.), 16/1995 (III. 13.) and 5/1997 (II. 7.) of the Constitutional Court.
71 Decision nr. 1105/B/1993 of the Constitutional Court.

requires the set-up of objective institutional protection of fundamental rights concerning trading."[72] It was also declared that freedom of competition was a precondition of market economy that was materialized primarily through the enforcement and protection of basic economic rights. By this decision, the Constitutional Court eventually asserted equality between freedom of competition and enforcement of basic economic rights, since the goal of the former was the exercise of the latter, and as a consequence freedom of competition materialized. This decision had another important addition: it made a direct logical link between the concepts of freedom of competition and the market economy. Therefore, these two constitutional goals were not yet "connected organically"[73] but the performance of the earlier became the precondition of the latter. Due to the Court viewing the entire economic constitution as a protector of market economy, notably in the early 1990's, the only acceptable interpretations were those that complied with the settlement and consolidation of market economy.[74] This led to freedom of competition not becoming an autonomous entity in the practices of the Constitutional Court, but only a device for ensuring market economy through enforcing basic economic rights. In other words, it served to provide the aspects of market economy in the interpretation of basic economic rights.

The relationship between freedom of competition and market economy has never been clarified by the Constitutional Court. According to certain views, from the perspective of constitutional law, the term "market economy" implies freedom of competition and vice versa.[75] In my opinion, however, this relationship was not reciprocal because, although market economy certainly cannot exist without economic competition, competition in itself does not make market economy.[76] Neither the

72 Decisions nr. 21/1994 (IV. 16.) and 31/1994 (VI. 2.) of the Constitutional Court.

73 Decision nr. 1105/B/1993 of the Constitutional Court.

74 Decision nr. 19/1991 (IV. 23.) of the Constitutional Court.

75 According to these views, the only difference between freedom of competition and market economy is that while the former may be restricted for itself, the latter may be restricted to the outermost edge of its concept. T. Drinóczi, *Gazdasági alkotmány és gazdasági alapjogok*, cit. at 52, 155; T. Drinóczi, *A piacgazdaság és a versenyszabadság – alkotmányjogi értelemben*, Jogtudományi Közlöny 281 (2004).

76 Although economic competition is an essential component of market

decisions of the Constitutional court, nor general economic axioms assume that competition postulates market economy.[77] If freedom of competition, for the sake of argument, postulated market economy, then unconstitutional infringement of market economy would necessarily entail the infringement of freedom of competition. The invalidity of this conclusion is proven by the fact that the Constitutional Court has assessed unconstitutional infringement of market economy without mentioning a word about economic competition.[78] On the contrary, in 1991 it declared "*competition is an elemental form of market economy*",[79] meaning that if competition is harmed, the state goal of market economy too is necessarily harmed. Therefore, the relationship between market economy and economic competition is only one way. In this context, freedom of competition appears to be a reflection of market economy in constitutional law.

Although the Constitutional Court set up a conceptually sound and logical connection between freedom of competition, market economy and basic economic rights (regarded as being distinct from freedom of competition), it did not define, comprehensively the concept of freedom of competition. Its hermeneutical function, furthermore, did not involve any normative content since its role was simply to connect the state goal of market economy with basic economic rights. Due to the lack of normative content, the Court was rarely able to assert the charge of substantive infringement. Accordingly, the unconstitutional infringement of freedom of competition was usually assessed together with other articles of the Constitution.[80]

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economy, competition in itself is not sufficient to maintain market economy as it has more requirements. Cf. article 2 paragraph 7 of the Council Regulation 384/96/EC of 22 December 1995 on protection against dumped imports from countries not members of the European Community (1996) OJ L056/39.

77 Cf. L. Trócsányi, ed., *A mi alkotmányunk: Vélemények és elemzések Magyarország Alkotmányáról* (2006), 107.

78 Decision nr. 50/1995 (VII. 12.) of the Constitutional Court. It is worth noting here, that the Constitutional Court did not have to examine the conformity of a particular law to each article of the Constitution once its unconstitutional infringement is declared.

79 Decision nr. 19/1991 (IV. 23.) of the Constitutional Court.

80 This was a result of that freedom of competition was considered as a state goal which was not really enforceable before the Court due to the lack of its normative content.

In most cases, infringement was examined in the light of market economy, however, to establish any infringement of the Constitution, a breach of basic economic rights or the principle of anti-discrimination was required.[81] The decisions of the Constitutional Court relating to freedom of competition concerned four major types of market anomalies: monopolies, barriers to market entry, discriminative market conditions and anti-competitive state measures.

The question of monopolies typically emerged in relation to laws providing exclusive rights to certain undertakings that blocking economic competition within a certain market. Freedom of competition would have been construed, in this sense, as an instrument to cease monopolies and exclusive rights, but the Constitutional Court restricted its scope. According to the Court's interpretation, freedom of competition applied only to markets, but frameworks of markets were defined by the state. Article 10 paragraph 2 of the Constitution set out that "*Fields of ownership and economic activity deemed to be the sole domain of the State shall be defined by law.*"[82] Regarding this article together with article 9 paragraph 2, the Constitutional Court asserted that freedom of competition was not infringed when the state reserved exclusive rights concerning specific activities, because the scope of freedom of competition did not extend to that field.[83] Accordingly, the Court held that existence of monopolies in relation to exploitation of state-owned properties[84], strategic economic activities[85] or the

81 Once a legal provision was annulled on the grounds of certain article of the Constitution, the Constitutional Court did not continue to examine that provision at stake also in light of other articles. Thus, when unconstitutional infringement of a basic right was declared, there was no need for examining also the breach of freedom of competition.

82 Article 10 paragraph 2 of the Constitution was interpreted by the Constitutional Court several times. It was considered as a constitutionally legitimate device to keep certain goods in sole ownership of the state, out of scope of freedom of competition. Cf. decisions nr. 981/B/1991 and 71/2009 (VI. 30.) of the Constitutional Court.

83 Decision nr. 1814/B/1991 of the Constitutional Court.

84 In its decision nr. 46/1992 (IX. 26.) the Constitutional Court ruled that the law, having provided the state with exclusive right for exploitation of the right for hunting, was complying with the Constitution. It declared that the harm of competition did not exceed the extent that was necessary for the state to use its rights. In another decision, nr. 101/B/2008, the Court held that the law entitling local governments to prohibit mining in their respective territories was not

performance of statutory duties of local governments[86] was complying with the Constitution. However, when particular exclusive rights had not been reserved by the state on the basis of article 10 paragraph 2, monopolies granted to undertakings owned by the state[87] or by a local government[88] were deemed to be infringing freedom of competition. Thus, from this aspect, freedom of competition was to protect competition within the market, irrespective of competition for the market. In relation to monopolies not granted but awarded through public procurement or tender, the Constitutional Court held that such awarded monopolies were not contrary to freedom of competition since the public procurement[89] or the tender[90] enabled each undertaking to

contrary to freedom of competition since its aim was to harmonize mining activity based on the state monopoly with local governments' regulations.

85 In its decision nr. 981/B/1991 the Constitutional Court ruled that the law stipulating that only a state-owned undertaking was entitled to provide electricity supply to consumers was complying with the Constitution. It declared that the state had the right provided by article 10 paragraph 2 of the Constitution to determine such strategically significant activities that should be controlled directly through the ownership of the state.

86 In its decision nr. 39/1994 (VI. 30.) the Constitutional Court ruled that a decree of a local government that gave a certain undertaking an exclusive right for local refuse collection did not infringe freedom of competition because it aimed at performing a statutory duty of the local government. That decree was deemed to be infringing the laws on a different basis though.

87 In its decision nr. 16/1995 (III. 13.) the Constitutional Court ruled that the decree by which passenger insurance and baggage insurance for public transport companies might be provided only by the state-owned insurance company was unconstitutional. It declared that, although at the time of the adoption of that particular decree, there had been only one insurance company, but since then the insurance market had been liberalized and therefore such exclusive right became unconstitutional as it harmed freedom of competition without constitutionally justifiable reason.

88 In its decision nr. 58/1994 (XII. 14.) the Constitutional Court ruled that a decree entitling only the undertakings owned by local governments to engage in certain chimney sweep activities was unconstitutional. The Court pointed out that chimney sweeping was a purely economic activity not belonging to regulatory conducts and therefore it infringed freedom of competition.

89 In its decision nr. 42/B/2005 the Constitutional Court ruled that the law awarding the exclusive right of manufacturing cow earmark to an undertaking through public procurement was conforming with the Constitution. Although it established an exclusive right, each undertaking in the relevant market had had the right to make a bid, and therefore freedom of competition had been respected in that procurement.

bid for the respective exclusive right. From a broader perspective, it meant that the Court was satisfied with the competition for the market and did not require additionally the competition within the market. Thus, freedom of competition, with a few exceptions, was unable to facilitate dissolving monopolies and exclusive rights, because the Constitutional Court significantly constricted its scope in two ways. Firstly, this freedom applied only to markets defined by the state; secondly, the Court was satisfied with competition either for or on the market and did not require both.

Barriers of market entry were examined in those cases where the law created or upheld obstacles that precluded free market entry. In these markets, compared to monopolistic markets, there were two or more actors who were theoretically able to compete with each other, but a new undertaking could not contest the market. Freedom of competition could have reduced these barriers as the principle of equal opportunities was considered an essential part of it,[91] but the fact that the Constitutional Court applied a test it had worked out for assessing constitutional restriction of basic rights, its impact was restricted. Accordingly, entry barriers established for controlling the distribution of petroleum products[92] or the operation of liquidator

90 In its decision nr. 71/2009 (VI. 30.) the Constitutional Court ruled that the act on radio and television broadcasting was not contrary to freedom of competition despite it allowing the state authority to extend, without a tender, fixed term licences for the use of country wide analogous broadcasting radio frequencies. The Court pointed out that the range of radio frequencies was limited and frequencies were the sole domain of the state based on article 10 paragraph 2 of the Constitution, and therefore freedom of competition was constitutionally restricted. Although each undertaking had had equal opportunity to bid for a country-wide radio frequency, the Court nevertheless declared this an infringement based on the breach of freedom of enterprise and freedom of profession.

91 Decision nr. 31/1994 (VI. 2.) of the Constitutional Court.

92 In its decision nr. 1105/B/1993 the Constitutional Court ruled that the law was conforming to the Constitution despite it restricted entry to the market of distribution of petroleum products by requiring appropriate premises. The Court connected freedom of enterprise to freedom of competition, and declared that restriction of freedom of enterprise was neither arbitrary, nor disproportionate since the legislative intention of the law was to facilitate state control over distribution of products concerned and to restrain black market. Thus, neither freedom of competition, nor freedom of enterprise was

officers,[93] for ensuring comprehensive and profound medical examinations in relation to driving licences,[94] or for ensuring country wide and continuous animal health service[95] were not held to be unconstitutional since the restriction on competition was neither arbitrary, nor disproportionate. This test for proportionality and necessity was what the Court used for appraising restriction of basic rights. Thus, in some cases, the restriction of freedom of competition was treated as if it had been a basic right.

The Court went further and argued, in its decision

unconstitutionally restricted.

93 In its decision nr. 580/B/1997 the Constitutional Court held that the law having required defined form of corporation and other specific conditions from liquidator officers was not unconstitutional despite it restrained market entry. According to its reasoning, those strict regulations were reasonable, necessary and proportionate. Moreover, there was not real competition among liquidator officers since their course of action was different from those of free market actors due to strict regulations.

94 In its decision nr. 990/B/2009 the Constitutional Court ruled that the law precluding doctors within the occupational health service from carrying out medical examinations for civil driving license was not infringing the Constitution. According to the laws, general practitioners were allowed to carry out medical examinations for both the civil driving license and the professional one, but doctors of occupational health were allowed to carry out medical examination only for professional driving license. The Constitutional Court admitted that this regulation precluded a few doctors from entering the market of a specific medical examination, but considering that comprehensive and profound medical examinations for a civil driving licence required the awareness of case history known only by the general practitioners, is was reasonably justifiable, not arbitrary. Notwithstanding, it did not explain why medical examinations for professional driving licences did not require the knowledge of case history.

95 In its decision nr. 602/B/2006 the Constitutional Court ruled that act on the Hungarian Veterinary Chamber and the private veterinary praxis was conforming with the Constitution, despite it restricting freedom of competition to some extent. It declared the fact that although allowing private veterinarians to carry out their praxis in the territory of only one county, and territorial extension requiring the consent of the board of a competent organization was restricting freedom of competition, this restriction was constitutionally justifiable. This justification was based on countrywide public interest and the need for a continuous animal health service supporting food healthy and safety. Nonetheless, Judge Péter Paczolay set out in his concurring opinion that, although he agreed on the merit of the decision, it was not justified that such a restriction of freedom of competition and freedom of enterprise would enable the realization of defined food healthy and safety.

regarding the act on establishment and operation of pharmacies that consistency and security of the distribution of medicines were endangered by free competition. Therefore, setting up considerable barriers to market entry was constitutionally justifiable as it was a necessary and proportional restriction of competition.[96] On the other hand, in respect of the liberalization of the medicine distribution market a decade later, the Court declared that the consistency and security of medicine distribution could be ensured by regulated competition. Therefore, there was no need for high barriers to market entry.[97] Similar reasoning was used for the refusal of a constitutional complaint in relation to the act on organized gaming.[98] The complainant stated that the act allowing certain unauthorized undertakings to organize gift drawing in connection with providing goods or services infringed freedom of competition, because it opened the door to unfair commercial practices. The Court refused this complaint and declared that it was unnecessary to repress such potential infringements by constitutional instruments that could be fairly treated by means of competition law. In another case relating to

96 In its decision nr. 677/B/1995, the Constitutional Court ruled that the act on the establishment and operation of pharmacies was complying with the Constitution despite significant entry barriers being set up and the competition being restricted to a considerable extent. The Court declared that this restriction was necessary and proportional due to the need for the consistency and security of medicine distribution. Since it was deemed to be a constitutionally justifiable basis for the restriction, the Constitution was not infringed.

97 In its decision nr. 1094/B/2006 of the Constitutional Court ruled that liberalization of medicine distribution market was not contrary to the Constitution, because the consistency and security of distribution did not require significant barriers to entry. Since both the consistency and the security could be ensured by also a regulated competition, there was no need for allowing retail distribution only in pharmacies. Consequently, the fact that shops other than pharmacies were allowed to distribute some medicines not requiring prescription, this complied with the Constitution as well as with freedom of competition. With regard to those shops that allegedly gained more favorable market conditions than pharmacies, the Court pointed out that pharmacies and shops acted on different markets since pharmacies were allowed to distribute both prescribed and non-prescribed medicines, while shops were allowed to distribute only the latter. As a consequence, the liberalization of medicine distribution market was deemed to be conforming with the Constitution.

98 Decision nr. 1055/B/1998 of the Constitutional Court.

land survey,[99] the Constitutional Court pointed out that excluding potential market actors from a market of four competitors endangered (not infringed) freedom of competition, because the administrative order concerned favored a few undertakings to the detriment of all other market actors. So was the case with the law that allowed only artificial persons having legal personality to use typographical duplicator and industrial photocopier. According to the Court, this law was contrary to the Constitution since it precluded other undertakings from the market without any constitutionally justifiable reason.[100] Thus, in most cases relating to entry barriers, the Constitutional Court applied the same test it had established for restrictions of basic rights. Unconstitutional entry barriers were declared only in two cases, and none of them were assessed in light of the aforementioned test (necessity and proportionality). As a consequence, freedom of competition was unable to reduce barriers to market entry unless it was apparently arbitrary.

Most of the decisions taken by the Constitutional Court in relation to freedom of competition concerned discriminative market conditions set up by the laws. The conflict was based on the fact that if the state applied different rules to the market actors, then they would get different advantages or disadvantages that might significantly affect their market conditions. In these cases, neither the competition, nor entry into the market was precluded, but any of them had discriminative conditions. Freedom of competition, in this sense, could have been the guarantor for equal opportunity to conduct economic activity[101], but the fact that it was mainly construed together with the basic right of anti-discrimination, significantly lightened the relevance of competition at least in the reasoning. Depending on whether the state participated as a market actor or not, there were two types of decisions of this category.

In respect of discriminative market conditions enjoyed by a

99 In its decision nr. 48/1994 (X. 26.) the Constitutional Court held that an administrative order appointing four state-owned companies to carry out official land survey and related record keeping was endangering freedom of competition, because it favored specific undertakings, which was contrary to competitive neutrality implied in the concept of freedom of competition.
100 Decision nr. 19/1991 (IV. 23.) of the Constitutional Court.
101 Decision nr. 133/B/1996 of the Constitutional Court.

state-owned undertaking, the Constitutional Court laid down, as a principle, that the state acting as an owner of an undertaking was a market actor just like any other, and hence it was contrary to the Constitution when the state, by administrative means, created favorable market conditions for itself.[102] Unjustifiable favoritism for the state[103] or the state-owned undertaking[104] in corporate law was, therefore, considered to be infringing the basic right of anti-discrimination. Generally, the Constitutional Court applied the same approach as it applied to monopolistic markets, namely a discriminative regulation was ruled to be conforming to the Constitution only if the favored undertaking was deemed to be outside the market. Accordingly, an undertaking outside the market could not be regarded as a competitor of another undertaking operating in the market, even if they were engaged in economic activities of the same kind. This question emerged when the Constitutional Court had to judge the law defining different rules for concession licensees and state owned undertaking, despite both being gaming organizers.[105] Organized gaming was a state monopoly that was exercised partly by a state owned undertaking, partly by concession licensees. The Court held that since the state monopoly was outside the market, the concession licensee was not its competitor, and thus the different rules that applied to them did not infringe freedom of competition. This decision formed a transition from the concept of "outside the market" to the concept of "lack of competition" and then led to a

102 Decision nr. 469/B/1997 of the Constitutional Court.

103 In its decision nr. 59/1991 (XI. 19.) the Constitutional Court ruled that the law providing unjustifiable advantages to the state was contrary to the Constitution. According to the general rule of corporate laws, the share issuer had the right, in case of oversubscription, to refuse subscriptions. As per the challenged law, however, the subscription of budgetary organizations and banks could not be refused. The Constitutional Court held that this discrimination was unjustifiable. Although it also raised the question of infringement in freedom of competition, this question was left open.

104 In its decision nr. 33/1993 (V. 28.) the Constitutional Court held that the law repealing minority shareholders' right within the operation of the undertaking having managed state-owned assets was contrary to the Constitution. The Court declared that minority shareholders' rights were a manifestation of freedom of competition in the corporate law, and thus discriminative rules in favor of the state as the majority shareholder infringed the freedom of competition.

105 Decision nr. 1814/B/1991 of the Constitutional Court.

state owned monopoly that was regarded lawful due to lack of real competition, despite the fact that the economic activity in question was not within the sole domain of the state. Therefore, the law by which the undertaking managing the state-owned properties enjoyed immunity from corporate tax and excise duty was not held to be infringing freedom of competition since this undertaking was an atypical market actor, not having had real competitors, and thus there was not competition, in effect, that this discrimination would have distorted.[106] As it is evident in the decisions regarding favoritism of the state, the function of freedom of competition was simply to convey market economy aspects to the interpretation of anti-discrimination rules. In other words, it did not add anything to the known principle of anti-discrimination, but a bit restricted its scope by introducing new exculpations, such as the concept of "out of market" and "lack of competition".

In relation to laws establishing discriminatory market conditions without favoring the state-owned undertaking, the Constitutional Court has never assessed any unconstitutional infringement of freedom of competition.[107] Although it declared unconstitutional infringement of the basic right of anti-discrimination in some cases, a breach of freedom of competition was never established. Two local government decrees were ruled to be infringing the prohibition of discrimination due to unreasonable differentiation in charges for the commercial use of public areas, but the Court did not examine their conformity with freedom of competition.[108] The Court, in its decisions relating to

106 In its decision nr. 1339/B/1996 the Constitutional Court, referring to the article 10 paragraph 2 of the Constitution, pointed out that the state had the right to determine the extent of its exclusive rights within the framework of non-discrimination and freedom of competition. According to the Court, however, once the state occupies a particular exclusive activity, it would not be subject to freedom of competition any longer, since it does not apply to sole domains of the state.

107 Cf. T. Tóth, *Gazdasági alkotmány - a piac és a verseny védendő értékei*, cit. at 26, 6

108 In its decision nr. 49/2009 (IV. 24.) and nr. 50/2009 (IV. 24.) the Constitutional Court ruled that local government decrees stipulating differentiated charges for the commercial use of public areas were unconstitutional. The Court, referring to its earlier decision nr. 38/1998 (IX. 23.), pointed out that differentiation in itself would not have been infringing the basic right of anti-discrimination, provided that differentiation was based on

this sort of market anomalies, applied four types of arguments. The first type of argument applied to tax laws, was based on that freedom of competition did not preclude the state from imposing different tax rules on the market actors.[109] In accordance with this approach, the Constitutional Court declared that imposing different tax rules on legal entities did not infringe freedom of competition, provided that differentiation was based on "the logic of taxation system"[110], was within "the discretion of the government in economic policy"[111] was in favor of action protected by the tax policy[112] or did not apply to the relation of undertakings to each other.[113] Likewise, the Constitutional Court

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reasonable cause. Differentiation without reasonable cause, however, was deemed to be infringing the prohibition of discrimination.

109 In its decision nr. 59/1995 (X. 6.) the Constitutional Court ruled that the act on income tax was not infringing freedom of competition although it imposed different tax rules on market actors. The challenged law provided relief for interest on income tax from the sale of public shares but not of private shares. Although the Constitutional Court held that it was unconstitutional on the grounds of infringement of unjustifiable discrimination, it declared that neither competitive neutrality, nor freedom of competition precluded the state from imposing different tax rules on the legal entities.

110 In its decision nr. 133/B/1991 the Constitutional Court held that the provision of the act on value added tax that stipulated different rules on different types of purchase was conforming with the Constitution. It declared that the fact that the law excluded end-user consumption from VAT deduction was not infringing competitive neutrality as it was based on the logic of taxation system.

111 In its decision nr. 137/B/1991 the Constitutional Court held that the law provided different tax relieves to the undertakings owned by foreigners and those owned by domestic persons did not infringe freedom of competition because the determination of the extent of any tax relief was up to the discretion of the government.

112 In its decision nr. 558/B/1994 the Constitutional Court ruled that the provision of the act on corporate income tax was conforming with the Constitution despite some part of the interest of shareholders' loans being an addition to the value of corporate income tax. The Court declared that, although this rule was unfavorable to certain companies, it was not generally and definitely detrimental to market entry or to their chance to compete with competitors. Therefore, it did not create unequal market conditions and did not infringe freedom of competition since it was in favor of those companies who acted in the manner protected by the tax policy.

113 In its decision nr. 252/B/2008 the Constitutional Court held that the act on social security establishing a system of differentiated health care contribution was complying with the Constitution. It declared that the challenged act was not contrary to the freedom of enterprise since the health care contribution was

declared that, in relation to tax immunity[114] and different conditions of excise relief, differentiation between market actors or economic activities in accordance with economic policy priorities did not infringe freedom of competition, since "*fostering, incenting or restricting certain economic activities was not a question of constitutionalism.*"[115]

The second type of arguments in relation to discriminative market conditions was based on the principle that discriminative regulations could be unconstitutional only within a homogeneous group of entities. Therefore, the Constitutional Court did not ascertain unconstitutional infringement of anti-discrimination principles when differentiated regulations applied to advocates and other undertakings[116] or to NGO's and companies in public interest[117], second-hand buyers and other undertakings[118], or to

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differentiated but not discriminative. Neither was freedom of competition infringed, as per the Court, because that act in question did not concern the relationship of undertakings to each other.

114 In its decision nr. 8/2010 (I. 28.) the Constitutional Court ruled that the provision of a tax law allowing immunity to ecclesiastic and local government owned real properties from a specific tax was complying with freedom of competition since the Constitution, in itself, was neutral to economic policy, setting taxes and immunities therefore was within the scope of economic policy. Other provisions of this law were found to be infringing other articles of the Constitution though.

115 In its decisions nr. 1416/D/1996 and nr. 141/B/2003 the Constitutional Court ruled that different conditions of excise relief were not unconstitutional, since freedom of competition could not be infringed by distinctive conditions of excise relief.

116 In its decision nr. 374/B/1998 the Constitutional Court ruled that the law whereby advocates were entitled to have membership of only one territorial bar association and to have their office only within that territory was neither unconstitutionally discriminative, nor infringing the freedom of competition. It declared that the freedom of competition should be construed in relation to the comparison of the advocates, not the advocates and other professionals.

117 In its decision nr. 728/B/1998 the Constitutional Court held that the law allowing certain civil organizations to acquire the ownership of the real properties they had been using freely was conforming with the Constitution. It declared that freedom of competition was not infringed because the challenged law differentiated between companies in the public interest not belonging to the same group of entities.

118 In its decision nr. 887/B/1994 the Constitutional Court ruled that the tax law that imposed different rules on the deduction of input tax to the second-hand buyers and other undertakings was complying with the Constitution. The challenged provisions of the act allowed undertakings generally to deduct

certain types of cultural articles.[119] The Court pointed out, that the fact that certain professions, unlike others, required specific licences did not infringe freedom of competition, because this restriction applied to all of those professionals, and such profession was chosen with awareness of those requirements.[120] Similarly, it also stated that providing certain undertakings with a tax relief or state aid and excluding others from it was not infringing freedom of competition provided that the criteria for the relief or aid was general and equal[121], as well as all undertakings having the opportunity to meet all clearly defined criteria.[122]

The third type of argument was based on that differentiated rules were constitutional to some extent, and only excessive[123]

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input tax at the time of purchase, but second-hand buyers were allowed to do so only at the time of resale and only to the extent of value added tax incurred at the resale. The Constitutional Court declared that these differentiations were not contrary to freedom of competition since the same rules applied to all second-hand buyers within a homogeneous group.

119 In its decision nr. 571/B/1993 the Constitutional Court held that the law imposing cultural tax on the distribution of certain articles did not infringe freedom of competition because the law was equally applicable to all undertakings engaged in the same economic activity.

120 In its decision nr. 573/B/1993 the Constitutional Court ruled that the law setting up certain limitations in relation to carrying out armed professional services, was not infringing freedom of competition because those limitations were known and applied to all professionals concerned. It declared that the fact in itself that some professions require a license, unlike the others, does not constitute an infringement of freedom of competition or freedom enterprise.

121 In its decision nr. 691/B/2001 the Constitutional Court ruled that the act on the subvention for small and medium enterprises was conforming to the Constitution despite the exclusion of large enterprises. It declared that such a subvention scheme did not infringe freedom of competition provided that "*legislature, in establishing its conditions, stipulates achievable and possible requirements on the general level of norms. In the present case, the challenged act meets these criteria, if it stipulates equal and erga omnes conditions in defining the scope of subvented entities. So defined conditions are based on the discretion of legislature under political responsibility.*"

122 In its decision nr. 1005/B/1995 the Constitutional Court ruled that the law providing excise relief to undertakings engaged in the sale of motor vehicles did not, in principle, infringe the Constitution since all undertaking had the opportunity to operate in that specific manner. To the contrary, it was deemed to support freedom of enterprise, therefore freedom of competition was not infringed.

123 While the "proportionality" test was based on the relation between benefits

discrimination would infringe freedom of competition. In this sense, the Constitutional Court declared that freedom of competition did not mean that the state should treat all undertakings the same, provided that discrimination was not excessive. Therefore, differentiated regulations in corporate income tax rules[124], in tax relief rules[125], in natural gas procurement[126], or in corporate forms[127], were not considered to infringe freedom of competition, due to the fact that differentiation in applicable rules did not exceed a certain extent. Although the threshold of acceptable differentiation had not been detailed, in a case about state aid, the effect on competition was used as an argument. The Court declared that since the amount of the aid in question was relatively low, it was not so excessive intervention that it would be capable of having a considerable

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and detriments of restricting a certain right, the "excessive" test was meant to refer to an absolute measure of harm. Nevertheless, the exact meaning of excessive harm was never defined by the Constitutional Court.

124 In its decision nr. 54/1993 (X. 13.) the Constitutional Court ruled that the act on corporate income tax conformed to the Constitution despite it not applying to self-employed undertakings. The Court declared that freedom of competition did not mean that the state should treat all economic activities and all market actors the same. Only excessively discriminative tax rules would infringe freedom of competition, but the tax rules in question were not so differentiated.

125 In its decision nr. 566/H/1994 the Constitutional Court examined a local government decree that allowed the reduction of the debt of local business tax on equity basis only for self-employed undertakings, but not for corporations. It declared that the decree concerned was not infringing freedom of competition since it did not restrict disproportionately the freedom of enterprise.

126 In its decision nr. 358/B/2007 the Constitutional Court held that the act on security stockpiling of natural gas was complying with freedom of competition despite it stipulating different regulations on licensed procurers and non-licensed procurers. Licensed procurers, on the basis of statutory membership to the Hungarian Hydrocarbon Stockpiling Association, had to pay a contribution which increased their operational cost. Although it provided a competitive advantage in the market to the non-licensed procurers, the Court ruled that this differentiation was not so excessive that it would be regarded as contrary to the state goal and consequently the act was considered to be complying with the Constitution.

127 In its decision nr. 65/1997 (XII. 18.) the Constitutional Court ruled that the law allowing patent agents to operate in various corporate forms was not infringing the Constitution. It declared that freedom of competition did not mean that the state had to provide exactly the same corporate forms to all the undertakings engaged in the same economic activity. Freedom of competition might be infringed only in case of excessive discrimination.

effect on competition.[128] From this perspective, the Constitutional Court seemed to have considered differentiation as excessive and unconditional only if it had had considerable[129] effect on competition.

The fourth type of reasoning was based on that differentiated regulation aimed at equalizing different market conditions or was otherwise reasonable. According to the Constitutional Court, the concept of freedom of competition meant that the state should regulate situations that, due to unequal opportunities for market actors, would detrimentally affect the evolvement and the enforcement of economic competition. In other words, the state should equalize different market conditions in order to promote competition. Thus, the Court held that differentiated tax rules applied to school co-operatives and other co-operatives[130], or certain consumer products warehoused before and after tax increase[131], were

128 In its decision nr. 922/B/2000 the Constitutional Court ruled that laws providing state aid to certain actors in the agriculture sector to the exclusion of others was compatible with freedom of competition. It declared that the state had the right to subvent some producers and to exclude others as it was neither excessive intervention, nor capable of having a considerable effect on competition.

129 The meaning of "considerable effect" was never defined by the Constitutional Court.

130 In its decision nr. 19/B/1999 the Constitutional Court ruled that the act providing more favorable conditions in relation to social security tax to school co-operatives than to other undertakings was complying with the Constitution. It declared that since students employed by school co-operatives were not subject to social security tax, unlike those employed by other co-operatives or undertakings, the act equalized their different market conditions. Although the Court also pointed out that differentiation was applied to a heterogeneous group, it exculpated only the charge of discrimination. Thus, in this particular case, anti-discrimination and freedom of competition separated from each other.

131 In its decision nr. 44/B/1996 the Constitutional Court ruled that the act imposing different consumer tax on certain product warehoused before and after the tax increase was complying with the Constitution. It declared that the act aimed at equalizing the different positions of market actors stemming from the fact that some distributors were able to warehouse products before the tax increase, and some were not. Even though this regulation prevented some undertakings from gaining extra profit from the difference in tax, it was adopted within the competence of the government's tax policy and was not a question of constitutionalism.

complying with freedom of competition as the differentiation aimed at promoting competition through equalizing unequal opportunities. On the other hand, however, the Constitutional Court did not accept the argument of equalizing different market conditions when the differentiated rules were not considered to be appropriate instruments for equalization. In a case concerning compensation for the slaughter of livestock, the Court ruled that the system of differentiated compensation was neither an adequate, nor a capable means of equalizing different market conditions. Since there was no other constitutionally justifiable reason for the differentiation, that law infringed the basic right of anti-discrimination.[132]

Reasonability (as distinct from proportionality) was also used as a justification for differentiated regulations. According to the Constitutional Court, the fact that neuropathic doctors had higher entry barriers to the medical market than ordinary doctors had did not infringe freedom of competition, since this differentiation was reasonable.[133] Consumer protection was considered as a reasonable justification for differentiated regulations. The Constitutional Court declared that since economic competition had to also respect the interests of consumers, regulation of the market in terms of consumer protection was not contrary to the Constitution. Therefore, in industries where the interests of consumers were significantly

132 In its decision nr. 44/2007 (VI. 27.) the Constitutional Court ruled that the act providing differentiated compensation schemes to farmers was contrary to the Constitution. The challenged act provided higher compensation per unit for slaughter to farmers having smaller livestock than those having larger livestock. The legislative intention was to balance the inequality stemming from a differentiated buying-in price. According to the Court, the amount of compensation should have reflected the damage caused instead of the market conditions, and thus differentiated compensation was discriminative without any constitutionally justifiable reason. It also declared that since the unconstitutional infringement had already been assessed, there was no need to examine its effect on freedom of competition.

133 In its decision nr. 684/B/1997 the Constitutional Court ruled that laws setting up different entry barriers to the medical market for ordinary doctors and neuropathic doctors were reasonable, and therefore were conforming to the Constitution. This reasonableness stemmed from the fact that required the educational and scientific basis for non-conventional cure was lower than that of ordinary doctors, and therefore, higher requirements were established for doctors practicing neuropathic medicine.

exposed, the regulation allowing economic competition only within the framework of consumer protection was not unconstitutional.[134] Although, involving consumer protection within the scope of freedom of competition was definitely a progressive interpretation in 1992, this argument was invoked in only a few cases.

The fourth type of market anomalies the Court's decisions focused on was about anticompetitive state measures. In these cases, there was a competitive market without exclusive rights, unreasonably high entry barriers, and discriminative market conditions. However, the state or the local government restricted some elements of competition by legislative means. Some of these measures restricted the competition by setting up a price regime; some restricted other elements of competition, such as the number of market actors or business operation.

As for the price regime, the Constitutional Court declared infringement of the Constitution in only one case. In this decision, the Court declared that the law by which fuel clearing had to be based on nominal statutory prices was contrary to the Constitution.[135] It asserted that since fuel clearings had to be based on nominal statutory fuel prices instead of real market prices, laws were setting up a fictitious price regime that was infringing freedom of competition. Nonetheless, the Court did not explain how the general fixed prices in tax clearing might affect the competition on the fuel market; this decision seems to have considered an extremely broad scope of freedom of competition. Apart from this case, price regimes were not considered to be unconstitutional.[136] The Constitutional Court pointed out that, although prices should be, in principle, set by supply and demand on the market and a price regime was theoretically capable of infringing freedom of competition, intervention on prices was

134 In its decision nr. 254/B/1992 the Constitutional Court ruled that the regulation requiring special professional requirements and insurance from travel agencies did not infringe freedom of competition as these requirements ensured the protection of consumers.

135 Decision nr. 5/1997 (II. 7.) of the Constitutional Court

136 In its decision nr. 577/D/2001 the Constitutional Court declared that the law regulating the price of natural gas supply did not infringe the Constitution because there was no considerable constitutional relationship between the base fee fixed by the law and freedom of competition.

accepted in some specific circumstances.[137] According to the preamble of act LXXXVII of 1990 on regulatory price setting, direct state measures on prices were justifiable when the Competition act was unable to prevent the detrimental restriction of competition and the abuse of a dominant position. The Court derived from this principle that price setting would be necessary even in a market economy, if free competition led to conducts detrimental to public interest or if the exceptional state measure aimed at enforcing economic competition.[138] Both arguments were applied in case law, but competition and market economy were slightly confused in the Court's reasoning. Protection of public interest from detrimental competition was referenced in relation to house rental fees being capable of impairing vulnerable consumers. The Constitutional Court ruled that the act and decree maximizing the rental fee of certain real properties in private ownership did not restrict disproportionately the market economy and freedom of competition since it aimed at protecting vulnerable tenants.[139] A decade earlier in a very similar case however, the Court justified the maximization of rental fees by claiming it did not infringe disproportionately or unreasonably the market economy as it then stood.[140] Six years later the Constitutional Court examined a law allowing local governments to maximize taxi fares in their respective territories.[141] The majority of judges ruled that this law

137 See dissenting opinion of Judge László Trócsányi to the decision nr. 813/B/2009 of the Constitutional Court.

138 In its decision nr. 19/2004 (V. 26.) the Constitutional Court ruled that the price regime in medicinal retail distribution did not infringe freedom of competition since that intervention aimed at ensuring consumer protection and protection of the medicine market.

139 Decision nr. 795/B/2000 of the Constitutional Court.

140 Decision nr. 432/B/1992 of the Constitutional Court.

141 In its decision nr. 782/H/1998 the Constitutional Court ruled that the law allowing local governments to maximize taxi fares was conforming with the Constitution because that price regime would apply equally to all undertakings and would support consumer protection. According to the concurring opinion of Judge István Bagi and Judge István Kukorelli, price regime was capable of restricting freedom of competition and therefore primarily it would be justifiable only if competition was insufficient. They also pointed out that consumer protection and competition issues should have been treated by the respective authorities. Nevertheless, since the challenged act was not conceptually and apparently contrary to freedom of competition, it was not deemed to infringe the Constitution.

conformed with the Constitution on the basis that maximized fares would apply to all taxi providers in the territories concerned and would support consumer protection in the public interest. According to two judges, however, it was doubtful whether price maximization was necessary, but it was not conceptually and apparently contrary to freedom of competition, and therefore did not infringe the Constitution.

The enforcement of economic competition was also invoked in the reasoning of the Constitutional Court. It held that raising the contractual interests and installments of certain housing loan contracts complied with the Constitution since it aligned those contracts concluded during the socialism with the conditions of market economy.[142] The Court pointed out that, although shifting planned economy to market economy required the reduction of state interventions, this did not entail the total exclusion of measures. It went further in another case, and declared that the prohibition of pharmacies' competition in price was constitutionally justifiable because the act partially took the pharmaceutical market away from the competition.[143] Freedom of competition, thus, was unable to prevent price regimes, but the Constitutional Court recognized that state measures beyond a certain extent might restrict freedom of competition, and therefore were allowed only in exceptional cases and due to reasonable causes.[144]

There was an outstanding price regime case upheld by the Constitutional Court, but neither public interest, nor the enforcement of competition was invoked in the Court's reasoning. In this case, the Constitutional Court had to judge the law allowing wine villages to set up statutory protective prices for all producers.[145] According to the Court, the objective of that

142 Decision nr. 32/1991 (VI. 6.) of the Constitutional Court.

143 Decision nr. 677/B/1995 of the Constitutional Court.

144 Decision nr. 19/2004 (V. 26.) of the Constitutional Court.

145 Decision nr. 41/1995 (VI. 17.) of the Constitutional Court. The challenged law stipulated statutory membership of the wine village for all producers having significant turnover in their respective territory, and allowed the board of the wine village to set up a protective price for vitivinicultural products. According to this protective price system, had a member sold products below the protective price, he would have had to pay the difference to the wine village. The Court compared this protective price to the price fixing of associations of undertakings, and pointed out that the former, unlike the later,

protective price was to protect the goodwill of the products and applied equally to all producers. Although it admittedly restricted freedom of competition and freedom of enterprise, since this restriction was deemed to be neither unnecessary, nor disproportionate, the Court ruled that law concerned was conforming with the Constitution.

In relation to anti-competitive state measures of other kinds, the starting point of adjudication was the case in which the Constitutional Court examined the act entitling local governments to regulate the number of taxi providers within their respective territories.[146] According to the Court, although the Constitution declared market economy and freedom of competition,[147] it did not define the constitutional framework for intervention on the economy. In addition, neither the extent, nor the type of lawful state measure could be derived. Therefore, only those measures that exceeded a critical extent could be regarded as contrary to the Constitution and thus would "*conceptually and apparently exclude the existence of market economy*", such as general socialization or establishing strict planned economy. In this particular case, the Constitutional Court ruled that the act in question was unconstitutional because defining a closed number of taxi providers would significantly restrict freedom of enterprise that would not be regarded as justifiable. Consequently, the aforementioned conceptual and apparent exclusion of the existence of market economy was, in effect, construed as a significant restriction on a basic right. This interpretation was often used in later cases relating to anti-competitive state measures, such as when the Constitutional Court ruled that regulations imposing value added tax on certain types of money acceptance[148] or the establishing of statutory closing hours on

was not against some market actors and did not aim at direct economic benefits for the stakeholders. Consequently, the restriction of competition was considered to be constitutionally justifiable.

146 Decision nr. 21/1994 (IV. 16.) of the Constitutional Court.

147 According to article 9 of the Constitution, "*The economy of Hungary is a market economy in which public property and private property shall receive equal consideration and protection under the law. The Republic of Hungary recognizes and supports the right to enterprise and the freedom of competition in the economy*".

148 In its decision nr. 274/B/2005 the Constitutional Court ruled that the act on value added tax that considered acceptance of money on non-nominal value to be a supply of goods for tax purposes. It declared that since this did "*not make*

certain catering providers[149] were not contrary to freedom of competition since they did not conceptually and apparently restrict the market economy. In relation to a law entitling the government to freeze wholesale prices of medicines as agreed by suppliers and purchasers, the question of conformity with freedom of competition was surprisingly not raised. Instead of freedom of competition, the Constitutional Court examined that law in light of market economy and freedom of contract. The Court declared that medicine distribution was a regulated sector due to the high public interest in efficient medicine supply. Whereas this sector was regulated, the scope of market economy was necessarily limited, but that was not considered as a basic right and therefore its restriction was not limited. In addition, freedom of contract as a recognized basic economic right, was not infringed as per the Court, and therefore the challenged provision of that law was deemed to be conforming with the Constitution.[150]

As can be seen in the cited case law, freedom of competition was barely able to protect economic competition from the anti-competitive legal environment because it was not considered to imply any specific constitutional substance, serving only as a guideline for the interpretation of basic economic rights. The scope of freedom was very limited due to several reasons; at least three filters can be identified that constricted its influence. Firstly, it could only be invoked – with few exceptions – in relation to existing markets (but the borderline between markets and sole domains of the state was drawn by the state itself). This meant that the legislation had the right to simply take an economic

market economy apparently impossible and the measure was not deemed to be conceptually contrary to freedom of competition", the act complied with the Constitution.

149 In its decision nr. 1448/B/2007 the Constitutional Court ruled that the local government decree on statutory closing hours was not contrary to the Constitution. That decree obliged local catering providers, except restaurants and providers operating within a defined territory of town, to keep closed at night. The Constitutional Court declared that this measure of the local government was not considered as "*conceptually and apparently contrary to market economy and freedom of competition*" and therefore it was not infringing the Constitution.

150 Decision nr. 87/2008 (VI. 16.) of the Constitutional Court. However, other provisions of the challenged law were considered to be unconstitutional on other grounds.

activity away from the market where freedom of competition did not extend. The second filter stemmed from the difference between economic activities and non-economic activities, where the decisive factor was the liberty of undertakings to offer services or products on the market[151] to each other.[152] Consequently, official services[153], public services[154] and other services being provided on a mandatory legal basis[155] were not considered as economic activities. As a result, freedom of competition was not capable of protecting competition within certain markets of services in the public interest. The third filter was based on some sort of *de-minimis* considerations whereby a state measure not having a significant impact on competition, either by its very nature[156] or because of the lack of fierce competition[157], did not

151 According to decision nr. 684/B/1997 of the Constitutional Court, since only those doctors who have private praxis carry out economic activity on the market of ordinary healing – other types of medical services do not form part of the market – competition, in a broader sense, can exist only among these ordinary medical service providers or among non-conventional service providers.

152 In its decision nr. 252/B/2008 the Constitutional Court ruled that freedom of competition applied to the relationship of undertakings to each other, so differentiated health care contribution did not infringe that.

153 In its decision nr. 354/B/1995 the Constitutional Court ruled that laws ensuring exclusive rights for providing official translation services did not infringe freedom of competition since official translating, translation authenticating, or making certified copies thereof were not considered economic activities. It also pointed out that a striking distinction should be drawn between economic activities and official services.

154 According to a constitutional complaint, the company information service provided by the Ministry of Justice, on the basis of the law, was infringing freedom of competition. Information provided by the Ministry allegedly gained unfair competitive advantage by falsely appearing to be official because the official company register was kept by the courts. In its decision nr. 1130/B/1995 the Constitutional Court pointed out that the service of the Ministry of Justice was a legitimate public service that was provided to everyone and therefore could not, by its very nature, infringe freedom of competition.

155 The Constitutional Court pointed out in its decision nr. 784/B/1994 that freedom of competition primarily applies to the economic activities of undertakings. The activities of local governments however, being set out by law, do not constitute competition among local governments.

156 State aid to certain undertakings is not contrary to freedom of competition, provided that the amount of state aid is not capable of significantly affecting the competition. Decision nr. 922/B/2000 of the Constitutional Court.

157 Decision nr. 580/B/1997 of the Constitutional Court.

unconstitutionally breach freedom of competition.

The Constitutional Court declared in 1994 that there was no constitutional canon for freedom of competition.[158] Consequently, whereas it was not considered as a basic right, the limitation of restricting such rights set out in article 8, paragraph 2[159] did not apply to this provision.[160] Freedom of competition, nonetheless, had obvious constitutional limitations. In its decision of 1992, the Constitutional Court upheld that article 10, paragraph 2 of the Constitution formed a limitation to freedom of competition.[161] This provision expressed that "*Fields of ownership and economic activity deemed to be the sole domain of the State shall be defined by law.*" It had to be, therefore, interpreted together with article 9, paragraph 2. Partly on this basis, some authors state that freedom of competition should have been deemed to be the institutional protection of freedom of enterprise instead of a mere state goal.[162] In my opinion, however, this relationship should have been recognized in just the opposite direction, since freedom of enterprise was one of the *sine qua non* preconditions of economic competition.[163] As to the limitations, the Court declared that this

158 Decision nr. 21/1994 (IV. 16.) of the Constitutional Court.

159 "*In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law. However, such law may not restrict the elemental meaning and content of fundamental rights.*" Constitution, art 8 par 2.

160 Decisions nr. 782/B/1998 and 802/B/1999 of the Constitutional Court.

161 Decision nr. 46/1992 (IX. 26.) of the Constitutional Court.

162 G. Nagy, *A piacgazdaság és egyes ezzel összefüggő gazdasági alapjogok, alkotmányos alapelvek értelmezési, továbbfejlesztési lehetőségei az új Alkotmány kapcsán*, in T. Drinóczi, *Gazdasági alapjogok és az új magyar alkotmány* (2007), 101-102. According to decision nr. 54/1993 (X. 13.) of the Constitutional Court, although freedom of enterprise meant unconditionally that one should not be precluded from becoming an entrepreneur, it did not mean that one had the right to engage in whatever economic activity. In addition to constitutionally legitimate restrictions relative to certain businesses, this freedom did not extend to economic activities reserved solely to the state. Freedom of enterprise, in contrast to freedom of competition, was considered as a real fundamental right as per the decision nr. 21/1994 (IV. 16.) of the Constitutional Court.

163 Ensuring freedom of enterprise is a requirement of protecting freedom of competition since economic competition postulates undertakings competing with each other. Freedom of competition, however, is not necessarily required by freedom of enterprise as competition is impossible on certain markets (e.g. the market of a natural monopoly) where freedom of enterprise is respected. Therefore, freedom of enterprise only related to freedom of competition insofar as the entrepreneurship was utilized on a competitive market. In other words,

state goal did not apply to cases where the restriction of freedom of enterprise was imposed as a sanction of unlawful economic conduct.[164] Likewise, the Constitutional Court declared that consciously deceiving consumers through fraudulent actions was not within the scope of freedom of competition, and therefore sanctions of illegal actions were not infringing the Constitution.[165]

Additionally, a misconception arose regarding the limits of this state goal. In 1994, the Court declared that the state had the right to restrain economic competition, provided that that restraint was not discriminative and was adopted in the appropriate legislative form.[166] On this ground, some authors identify the means of competition law as a sort of constitutional restriction of freedom of competition.[167] In my opinion, however, competition law does not restrict the freedom of competition, but only those conducts that would threaten the goals of freedom of competition.[168] Attention must be drawn to the fact that this decision was about the restriction of competition in favor of freedom of competition, and not about the restriction of the constitutional state goal. Competition as such and freedom of competition should not be confused since competition law is just to forestall *laissez faire* competition in compliance with the Constitution. Should freedom of competition protect any sort of unlimited competition, it would be adverse to the paradigm of social market economy, which was also declared by the

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freedom of competition could not, by its very nature, be the institutional protection of freedom of competition, while the latter necessarily postulates the former since there cannot be competition without undertakings.

164 In its decision nr. 1133/B/1998 the Constitutional Court ruled that "*administrative sanctions being imposed upon illegal actions do not constitute infringement of freedom of competition or freedom of enterprise.*" Thus, the law that imposes the compulsory closure of business premises as a sanction to breaching the tax regulations on billing conformed to the Constitution.

165 Decision nr. 1133/B/1998 of the Constitutional Court.

166 Decision nr. 31/1994 (VI. 2.) of the Constitutional Court.

167 G. Nagy, *A piacgazdaság és egyes ezzel összefüggő gazdasági alapjogok, alkotmányos alapelvek értelmezési, továbbfejlesztési lehetőségei az új Alkotmány kapcsán*, cit. at 162, 102. See also G. Nagy, *A magyar gazdasági alkotmányosság alapjai – egyes alkotmányos alapértékek és alapvető jogok fényében*, Közjogi Szemle 43 (2009).

168 In its decision nr. 17/1998 (V. 13.) the Constitutional Court declared that restricting economic competition by laws did not constitute an infringement.

Constitution.[169]

The Constitution itself declared only the recognition and support of freedom of competition. The case law added that the state also had to ensure and protect it.[170] Recognition and support meant, on the one part, that national and local government authorities had to enforce and protect basic economic rights in favor of realizing the state goal.[171] On the other part, the state had to establish the institutional protection of basic economic rights required for the market economy or freedom of enterprise.[172] Hence, the Constitutional Court did not differentiate between support and recognition of freedom of competition; both were construed to serve basic rights.

Ensuring this freedom meant, according to the Constitutional Court, that the state had to secure that each market actor was able to sell its products or services within the market on the same conditions and none of them was able to gain an advantage via regulation.[173] Thus, anti-discrimination appeared to be at the center of ensuring this state goal. Worth of note, the Court emphasized, in relation to this duty, that the state had to stay neutral in relation to basic rights.[174] Although it was never defined how and to what extent the state had to stay neutral, this term presumably referred to the concept of competitive neutrality. Despite the fact that this concept had not been declared by the Constitution itself since its amendment in 1990 (as also the Constitutional Court rightly pointed out in 1994,[175]), competitive neutrality regularly came up as an implicit part of the content of freedom of competition in the reasoning of the Court's decisions

169 Like Lénárd Darázs rightly pointed out, competition law, by prohibiting certain acts on the market, restricts freedom of contract, not freedom of competition. L. Darázs, *A szerződési szabadság és a verseny alkotmányos védelme*, Acta Facultatis Politico-iuridicae Universitatis Budapestiensis XLIV 37-42 (2007).

170 Decision nr. 19/1991 (IV. 23.) and decision nr. 21/1994 (IV. 16.) of the Constitutional Court.

171 Decisions nr. 21/1994 (IV. 16.), 20/1998 (V. 22.) and 802/B/1999 of the Constitutional Court.

172 Decision nr. 21/1994 (IV. 16.) of the Constitutional Court.

173 Decision nr. 684/B/1997 of the Constitutional Court.

174 Decision nr. 31/1994 (VI. 2.) of the Constitutional Court.

175 Decision nr. 566/H/1994 of the Constitutional Court.

until 1996.[176] The duties of the state in respect of protecting freedom of competition were not clearly defined either, but the adoption of the Competition Act and establishment of the competition authority were identified as manifest in protecting the state goal.[177] This interpretation was basically reflected in both the Competition Act[178] and the strategic documents of the Hungarian Competition Authority.[179] As per the principles of its self-assessment, freedom of competition was meant to protect the competitive process from undue restraints such as abuses of dominant position, cartels, and harmful mergers. It also pointed out that freedom of competition did not mean protection of economic freedom or market entry of individual undertakings.[180] All these substantially coincided with the concurring opinion of Judge István Bagi and Judge István Kukorelli to a decision in 1998, in which they expressed that the state in a market economy should ensure the most efficient competition, and should prevent detrimental consequences of imperfect competition such as abuse of dominant position and monopolies.[181]

Although the Constitutional Court has never comprehensively described article 9 paragraph 2 of the Constitution, its outlines can be synthesized now from landmark decisions. It was construed as an obligation and a prohibition relative to the state. It obliged the state to set up institutions for

176 Decisions nr. 1/1991 (I. 29.), 133/B/1991, 353/B/1992, 20/B/1995, 752/B/1995 and 44/B/1996 of the Constitutional Court.

177 Decisions nr. 1211/B/1996 and 183/2010 (X. 28.) of the Constitutional Court.

178 According to the preamble of the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, "*The public interest in maintenance of competition on the market ensuring economic efficiency and social progress, the interests of undertakings complying with the requirements of business fairness and the interests of consumers require the state to protect by law fairness and freedom of economic competition.* (...)".

179 The previous set of strategic documents of the Hungarian Competition Authority were replaced by a single strategic document in 2015, which still emphasizes, as its mission, that fairness and freedom of competition shall be guarded for the increase of consumer welfare. Hungarian Competition Authority, *Középtávú Intézményi Stratégia 2015-2018*, 16 (2014).

180 Cf. Hungarian Competition Authority, *A verseny szabadságával kapcsolatos, a GVH által követett alapelvek* 19, 119-120 (2007).

181 See concurring opinion of Judge István Bagi and Judge István Kukorelli to the decision nr. 782/H/1998 of the Constitutional Court.

protecting competition from anti-competitive actions of market actors. It also prohibited the state from adopting a law that would significantly and unjustifiably hamper basic economic rights in relation to offering goods or services within the market. It did not mean, however, that the state was to establish a pro-competitive legal environment, liberalize any market, or ease market entry. Furthermore, it did not prevail over basic rights or other state goals.

III. Concluding remarks

It is visible in the foregoing cited cases that freedom of competition, as interpreted by the Constitutional Court, was to support basic economic rights and to protect competitive process on the market. From this perspective, it complied with the ordoliberal origins of the concept since it focused on protecting competition through competition law and ensuring economic freedom through basic economic rights. What it did not seem to achieve was the protection of competition from legislative interventions. In other words, it concerned competition within a particular actual legal framework, and barely dared to challenge the law establishing anti-competitive legal environment. As per the interpretation of the Constitutional Court, competition law had to protect the competitive process from the restrictive practices of undertakings, and freedom of competition was partly to ensure this protection existed, and partly to support basic economic rights. It focused on the competition process within the paradigms that had political power set up, but was at the same time vulnerable to the political power. It was the same dilemma the Freiburg School had had; to how to protect competition on the constitutional level.[182]

The relative weakness of freedom of competition within Hungarian constitutionalism stems basically from two factors: a historical and a political one. Firstly, the wording of article 9 paragraph 2 was unclear as it codified an unprecedented and immature principle that implied a variety of possible

182 V. J. Vanberg, *The Constitution of Markets. Essays in political economy*, cit. at 4, 50-51. See also V. J. Vanberg, *Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy*, 9 Walter Eucken Institut (2009).

interpretations on a constitutional level. If the Constitution had been about the recognition and support of the competition itself instead of its freedom, it would have fitted better the constitutional meaning of market economy and would have made it clearer what the state should do in respect of competition. Even though article 9 paragraph 2 was ahead of its time in the region, severe and inherent uncertainty was the price it paid.

The second reason is rather a theoretical one. The Constitutional Court tried not to deal directly with matters belonging to economic policy so as not to limit the government's latitude in forming economic policy.[183] Its legal justification was based on a decision in 1993 in which the Court ruled that beyond declaring market economy[184], the Constitution was neutral in respect of economic policy, and therefore several aspects of state intervention could not be subject to the supervision of the Court.[185] The practical basis of this approach was that the Court wanted to avoid being obliged to base reasoning of its decisions in matters of economic policy "*on this swampy ground (in respect of its doctrinal terminology)*" of the economic constitution.[186] This was what the first president of the Constitutional Court called the "*danger of unelaborated concepts*."[187] Nevertheless, declaring competition as an autonomous and protectable legal substance would have been safe in that regard, and at the same time, established a sound constitutional pillar for the market economy.[188] If competition itself had been a clear constitutional value, the state would still have had the power to adopt anti-competitive laws or interventions, but only upon a constitutional justification. In such a case, the question in a constitutional assessment of a law would not be what prohibits the anti-competitive measure, but what justifies it. Consequently, there have been opportunities for the state to strengthen the concept of

183 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon,* cit. at 61, 150-151.

184 The German Constitutional Court had a similar decision in 1959. See BVerfGE 50, 338.

185 Decision nr. 33/1993 (V. 28.) of the Constitutional Court.

186 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon,* cit. at 61, 421.

187 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon,* cit. at 61, 150-151.

188 Cf. T. Tóth, *Gazdasági alkotmány - a piac és a verseny védendő értékei*, cit. at 26, 2.

freedom of competition without interfering with legislation or the government.

After two decades of debate on the need for a new constitution, the Hungarian Parliament adopted the new Fundamental Law in 2011 to replace the old Constitution. This new ground law, with a new structure and new content, entered into force in 2012. Although the majority of the changes were driven by rather political and theoretical motivations than those of jurisprudence,[189] articles of the Fundamental Law formed the new basis for the whole legal system including competition law, and set up a new framework for economic policy. It did not take over the provision on competition in the old Constitution, but in some sense went beyond it. According to Article M paragraph 2, "*Hungary shall ensure the conditions of fair economic competition. Hungary shall act against any abuse of dominant position, and shall protect the right of consumers.*" By eliminating the word "freedom", the range of interpretation was tighter since it can hardly be understood as an article setting out a fundamental right. Rather, it appears to refer to some sort of obligation of the state, but the new reference to "conditions" undoubtedly constricts the extent of obligations implied therein.

The Constitutional Court has already interpreted article M of the Fundamental Law a few times. Firstly, it declared that article M paragraph 2 is an essential principle of market economy so, in that respect, the Court maintained the special relationship between market economy and the constitutional protection of competition.[190] Secondly, it pointed out that enforcement of "fair competition", as part of general public interest, extended to the prohibition of cartels, the regulation of criminal and private enforcement, and the protection of procedural rights of the

189 Cf. A. Arató, G. Halmai, J. Kis (eds.), *Vélemény Magyarország Alaptörvényéről,* 1 Fundamentum 61-62 (2011). See also Opinion no. 621/2011 (11) of the European Commission for Democracy Through Law (Venice Commission), B. Molnár, M. Németh and P. Tóth (eds), *Mérlegen az Alaptörvény. Interjúkötet hazánk új alkotmányáról* (2013), 19-20.

190 Decision nr. 30/2014 (IX. 30.) of the Constitutional Court. In this decision, the Constitutional Court refused a constitutional complaint submitted in relation to the judgement of the Curia of Hungary whereby the Curia had upheld the decision of the competition authority that had imposed cartel fines on the complainant.

competition authority.[191] Thirdly, the Court defined "fair competition" as competition in which market actors follow, besides the law, "*requirements of moral economy and fair business.*"[192] In addition to these definitions, the Court upheld that certain economic activities could be reserved for the State,[193] and also that article M on ensuring the conditions of fair economic competition did not form a basic right.[194]

The dilemma about freedom of competition seemingly ceased to exist in 2012 as the legal basis changed. However, the Constitutional Court in a decision of July 2012 interpreted article M paragraph 2 of the Fundamental Law as a protection for freedom of competition again and thereby brought back the basis for the problematic interpretation of the concept examined in this paper. In this recent decision the court declared that "*freedom of contract is protected by the Fundamental Law since it is a crucial condition of market economy and therefore of the operation of freedom of enterprise and of competition protected by Article M of the Fundamental Law.*"[195] Given the lack of detailed reasoning in this particular decision, the connection between freedom of competition and the new article is not really set out clearly. Since there have only been

191 Ibid. It was reconfirmed by the Constitutional Court in decision nr. 3100/2015 (V. 26.) whereby a constitutional complaint submitted in relation to the judgement of the Curia of Hungary and the Competition Act was refused. The Court pointed out in the reasoning that the competition authority had had the right to impose cartel fines on the complainant, and the Competition Act as the legal basis of the fines was conforming to the Fundamental Law.

192 Concurring opinion of Judge Barnabás Lenkovics to the decision nr. 8/2014 (III. 20.) of the Constitutional Court.

193 In its decision nr. 3194/2014 (VII. 15.), the Constitutional Court stated that the law reserving retail distribution of tobacco products for the state was conforming to the Fundamental Law because the state had the right, on the basis of article 38 of the Fundamental Law, to reserve certain economic activities for itself.

194 In its decision nr 3024/2015 (II. 9.), the Constitutional Court examined the law that restricted the publishing of school books. It declared that since article M paragraph 2 of the Fundamental Law did not constitute a basic right, constitutional complaints could not rely on it. Therefore, the Court could examine the challenged law in particular in the light of freedom of enterprise, and concluded that the challenged law was conforming to the Fundamental Law because freedom of enterprise was not infringed.

195 Decision nr. 3192/2012 (VII. 26.) of the Constitutional Court. This argument was upheld in concurring opinion of Judge Barnabás Lenkovics to the decision nr. 8/2014 (III. 20.).

a few Court decisions regarding article M so far, it cannot be confidently claimed that the new article really implies freedom of competition or not. The Constitutional Court, however, will undoubtedly have the opportunity to define the constitutional substance of the new article and its connection to the old concept. Otherwise, freedom of competition will only be part of the history of Hungary's constitutional law.