Obligation of the legislator to ensure equality of rules governing market behaviour for all the participants of economic competition

L a p š a n s k ý, L.*

LAPŠANSKÝ, L.: Obligation of the legislator to ensure equality of rules governing market behaviour for all the participants of economic competition. Právny obzor, *100*, 2017, special issue, pp. 64-77.

Obligation of the legislator to ensure equality of rules governing market behaviour for all the participants of economic competition. Article 55 paragraph 2 of the Constitution of the Slovak Republic imposes on the state the obligation to ensure equality of rules governing market behaviour for all the participants of economic competition. The Constitutional Court of the Slovak Republic develops systematically interesting case-law on admissibility of criteria for distinguishing among participants of economic competition. Only cases where selection of criteria favouring a group of participants of economic competition went beyond the requirement of minimum coherence and legitimacy were subject to censorship.

Keywords: *protection of economic competition, Constitution, Constitutional Court*

Introduction

According to Article 55 of the Constitution of the Slovak Republic (hereinafter "Constitution"): *"(1) The economy of the Slovak Republic is based on the principles of a socially and environmentally oriented market economy. (2) The Slovak Republic shall protect and encourage economic competition. A law shall lay down the details."*

The quoted paragraph 1 of Article 55 of the Constitution confirmed also at the constitutional level that Slovakia had switched from a centrally managed economy to a market economy.

The quoted paragraph 2 of Article 55 of the Constitution confirms that basic mechanism of a market economy is economic competition. Economic competition is indispensable for a market economy[1].

Article 55 paragraph 2 is part of Title 3 Section 1 of the Constitution entitled "Economy of the Slovak Republic". The provision of Article 55 paragraph 1 of the Constitution defines principles, on which economy of the Slovak Republic is based, in particular the principle of socially and ecologically oriented market economy. To be compliant with Article 55 paragraph 1 of the Constitution, standard law must comply with all these principles. The Constitution in Article 55 paragraph 2 declares protection and encouragement of economic competition.[2] Article 55 of the Constitution formulates the **principles of economic policy of the Slovak Republic**. The principles of economic policy belong to the **basic constitutional principles**.[3]

* Mgr. Lukáš L a p š a n s k ý, PhD., Institute of State and Law of SAS. This paper is a result of the research projekt APVV-15-0456: "Long-term and Recent Tendencies of Development of Positive Law in Selected Fields of Legal Order".

[1] Ruling of the Constitutional Court of the Slovak Republic of 1 July 1998, file no. PL. ÚS 13/97.

[2] Ruling of the Constitutional Court of the Slovak Republic of 28 January 2009, file no. PL. ÚS 3/03.

[3] Quoted ruling of the Constitutional Court of the Slovak Republic, file no. PL. ÚS 13/97.

Unlike the right to conduct entrepreneurial and other gainful activity according to Article 35 paragraph 1 of the Constitution[4], which is a subjective right, Article 55 paragraph 2 of the Constitution does not regulate the subjective right of a physical or legal person. Article 55 paragraph 2 of the Constitution **guarantees neither the right to economic competition nor the right to take part in the competition**[5].

The basic constitutional principles in a legal state determine the activity of all state authorities and predetermine the process of creation of legal regulations as well as their content, because the norms set out in the Constitution have not only a political or declaratory importance. Article 55 paragraph 2 of the Constitution contains a legally binding provision that the Slovak Republic wishes to protect and encourage economic competition. As Article 55 paragraph 2 is a constitutional norm, in conjunction with Article 2 paragraph 2 and Article 152 paragraph 4 of the Constitution it imposes **on all state authorities of the Slovak Republic** the **obligation by their behaviour to protect and encourage economic competition** in relevant social relations.[6] Article 55 paragraph 2 of the Constitution grants the constitutional right to protection of competition as economic policy of the state; it belongs to the basic constitutional principles and envisages a **positive obligation of the state to protect economic competition**[7].

The Constitutional Court concluded that not every competitive behaviour is relevant in terms of economic competition, because there are competitive activities without economic substance, which are fully excluded from the scope of application of the rules of economic competition[8].

According to established case-law of the Constitutional Court, all entities performing an economic activity[9] do not compete with each other; the object of protection according to Article 55 paragraph 2 of the Constitution is not a single national market existing "since the foundation of the state until its end" for all non-fungible products, goods and services. The whole market economy is fragmented into a large number of relevant markets. The purpose of protection of economic competition is the protection of economically important activities on relevant markets, within a group of competitors, who actually compete with each other, because they perform similar and hence comparable activity, by which they strive to achieve maximum profit from legal entities which need the result of this activity.[10]

[4] In the proceedings before the Constitutional Court, where the applicants sought declaration of violation of Article 55 paragraph 2 of the Constitution, the applicants often sought also declaration of violation of Article 35 paragraph 1 of the Constitution.

[5] Quoted ruling of the Constitutional Court of the Slovak Republic, file no. PL. ÚS 13/97. On some theoretical aspects on the purpose and effect of economic competition see as well: KRÁLIČKOVÁ, B. Súkromnoprávne aspekty protimonopolného práva [Private Law Aspects of Competition Law], Bratislava : VEDA, 2012, p. 18 et seq.

[6] Quoted ruling of the Constitutional Court of the Slovak Republic, file no. PL. ÚS 13/97.

[7] Judgment of the Supreme Court of the Slovak Republic of 23 May 2013, file no. 8Sžhpu/1/2012.

[8] Quoted ruling of the Constitutional Court of the Slovak Republic, file no. PL. ÚS 14/2014, paragraphs 32 and 33.

[9] Quoted ruling of the Constitutional Court of the Slovak Republic, file no. PL. ÚS 13/97.

[10] Ruling of the Constitutional Court of the Slovak Republic of 14 November 2015, file no. PL. ÚS 14/2014, paragraphs 41 and 43.

In summary, the subject of protection according to Article 55 paragraph 2 of the Constitution is only **competitive activity with economic substance**, which is **performed on a specified relevant market**.

The obligation of the state authorities to protect and encourage economic competition applies to the phase of creation of law as well as to the phase of application of law. In the phase of creation of law the National Council of the Slovak Republic is obliged to ensure the protection and encouragement of economic competition[11].

In terms of the content, the principles of economic policy of the Slovak Republic include promotion and protection of a competitive economic environment and establishment of legal means and guarantees against restrictions on economic competition, which the law regards as unlawful. **Basic characteristics of economic competition are the freedom of market entry** and equality of rules governing market behaviour for all the participants of economic competition. The Slovak Republic through Article 55 paragraph 2 of the Constitution guarantees the establishment of basic rules of entry and participation in economic competition.[12]

From the aforesaid conclusions of the Constitutional Court it follows that the public authorities of the Slovak Republic ensuring protection according to Article 55 paragraph 2 of the Constitution are burdened by the obligation:

a) To ensure the freedom of market entry and equality of rules governing market behaviour for all participants of economic competition, i.e. the obligation to achieve certain quality of the legal environment, and
b) To define unlawful behaviour and to provide legal means and guarantees against unlawful behaviour, i.e. the obligation to use certain normative instruments.

In this contribution we will focus on the obligation of the legislator to ensure equality of rules governing market behaviour for all the participants of economic competition. We believe that the previous rulings of the Constitutional Court provide the basis for outlining of at least basic elements of this positive obligation of the legislator resulting from Article 55 paragraph 2 of the Constitution.

1. Instruments for fulfilment of the obligation of the legislator to ensure equality of rules governing market behaviour for all the participants of economic competition

The National Council of SR adopted **Act No. 136/2001 Coll. on protection of competition** (hereinafter "APC"). This Act represents a general legal regime of protection of competition. By adoption of APC the legislator fulfilled directly and explicitly the positive obligation of the state pursuant to Article 55 paragraph 2 of the Constitution to protect economic competition.

[11] Quoted ruling of the Constitutional Court of the Slovak Republic file no. PL. ÚS 14/2014, paragraph 40.
[12] Quoted ruling of the Constitutional Court of the Slovak Republic, file no. PL. ÚS 13/97.

Article 55 paragraph 2 does not provide that the Slovak Republic shall protect and encourage only such part or such form of economic competition that will be declared as economic competition by APC. Therefore protection and encouragement of economic competition according to the Constitution cannot be identified exclusively with protection of competition regulated by Article 1 of APC. The second sentence of Article 55 paragraph 2 of the Constitution has a legal importance not only for determination, which state authority is empowered to establish the right to protection and encouragement of economic competition. The formulation "the details shall be stipulated by the law" does not create only the constitutional basis for adoption of the Act on Protection of Competition. The National Council of the Slovak Republic may adopt **any number of laws and acts that will contain legal norms relating exclusively or partially to protection and encouragement of economic competition**.[13]

In accordance with the constitutional promise to protect and encourage economic competition the National Council of the Slovak Republic is entitled to adopt legal norms for protection and encouragement of economic competition, e.g.:

a) in laws on taxes and prices[14],
b) in the Act No. 308/2000 Coll. on transmission and retransmission, through protection of plurality of information by prohibition of certain potentially risky connections by property according to Articles 42 to 44 of this Act[15];
c) in the Act No. 276/2001 Coll. on regulation of network industries;
d) in the Act No. 231/1999 Coll. on state aid[16], but not only because of Article 2 paragraph 1, which provides: *"It is prohibited to provide a state aid, which violates or may violate economic competition by favouring a group of entrepreneurs or production of certain goods or provision of certain services, if provision of such state aid negatively influences the conditions of trade between the Slovak Republic and the European Communities..."*;
e) in the Act No. 92/1991 Coll. on conditions of the transfer of state property to other persons, where Article 10 paragraph 2 provides: "*The government shall always decide on the privatisation of an undertaking with character of natural monopoly, on determination of property participation of the state in business of such undertaking or company, and on privatisation of a joint-stock company with state participation, which has a character of natural monopoly, after a discussion of the privatisation plan and procedure in the National Council of the Slovak Republic... The National Council is obliged to submit comments to the proposal within 30 days of its submission. After expiration of this time-limit the proposal shall be regarded as discussed."*[17]

[13] Quoted ruling of the Constitutional Court of the Slovak Republic, file no. PL. ÚS 13/97.
[14] Quoted ruling of the Constitutional Court of the Slovak Republic file No. PL. ÚS 13/97.
[15] Quoted ruling of the Constitutional Court of the Slovak Republic file No. PL. ÚS 14/2014, paragraph 40.
[16] Now repealed and replaced by Act No. 358/2015 Coll. on regulation of certain relations in the area of state aid and minimum aid and on amendment of some other acts (Act on State Aid).
[17] Quoted ruling of the Constitutional Court of the Slovak Republic file No. PL. ÚS 14/2014, paragraph 30.

From the aforesaid exemplificative list of legal provisions through which the legislator fulfils the positive obligation of the state to protect and encourage economic competition, it follows that the legislator fulfils this obligation by adoption of legal provisions:

a) that directly regulate relations in economic competition, whether exclusively (APC) or partially (e.g. Act No. 308/2000 Coll. on transmission and retransmission), or
b) the application of which may influence the position of the participants in economic competition (e.g. laws on the taxes and prices).

The increased interest of the Slovak Republic in protection and encouragement of economic competition is guaranteed in accordance with Article 55 paragraph 2 of the Constitution by entrusting the legislator with regulation of the details of protection and encouragement of economic competition, without granting him the constitutional power to authorise the executive bodies for further restrictions of economic competition[18].

2. Content of the obligation of the legislator to ensure equality of rules governing market behaviour for all the participants of economic competition

The National Council of the Slovak Republic as a sole legislative body in the Slovak Republic (Article 72 of the Constitution) adopts a large number of laws. When adopting laws the National Council tries not only to fulfil the constitutional obligation to ensure equality of rules governing market behaviour for all the participants of economic competition resulting from Article 55 paragraph 2 of the Constitution, but also to project into legislation the protection of many other interests, which it regards as legitimate. The variety of interests, the protection of which is projected into legislation, and the large number of groups of entities, to which this legislative protection suits, cause that on many relevant markets operate entities, to which the perfectly equal rules of behaviour do not apply. In the decision-making practice of the Constitutional Court therefore a logic question arises, what distinguishing among entities operating on the same relevant market falls within legitimate discretion of the legislator and what distinguishing will be already sanctioned on the basis of Article 55 paragraph 2 of the Constitution.

The Constitutional Court answered the question what quality the situation of inequality of rules governing market behaviour for all participants of economic competition must have to fall within the scope of application of Article 55 paragraph 2 of the Constitution. But even more important, the Court provided its opinion to the criteria for distinguishing, the application of which puts the participants of economic competition on the same relevant market into unequal position.

2.1. Unequal position of participants of economic competition

In the proceedings **PL. ÚS 7/2013**[19] the Constitutional Court examined the provision of Article 6 paragraph 12 (j) of the Act No. 596/2003 Coll. on state administration in education and school self-government.

[18] Ruling of the Constitutional Court of the Slovak Republic of 27 February 1997, file No. PL. ÚS 7/96.
[19] Finding of the Constitutional Court of the Slovak Republic of 25 June 2014, file no. PL. ÚS 7/2013.

According to the provision under consideration, a municipality shall provide funds for a pupil, student or child to a:

a) church or private elementary school of art,
b) church or private language school,
c) church or private nursery school, and
d) church or private school establishment,

corresponding at least to 88% of the amount earmarked for wages and operation for a pupil, student or child of:

a) elementary school of art,
b) language school
c) nursery school and
d) school establishment

founded by the municipality. The municipality shall provide funds for a pupil, student or child in church or private establishments of school catering, corresponding at least to 88% of the amount earmarked for wages and operation for catering of a pupil/student of a school founded by the municipality.

The Constitutional Court deemed it necessary to note that for the purposes of financing of church and private school establishments the legal provision at issue envisages that the municipal self-government itself determines through a general binding regulation the details of their financing. The legal provision under consideration thus postulates only a general legal framework for financing of church and private school establishments in the form of a minimum requirement for the amount of subsidy in their favour as compared to the volume of financing of school establishments founded by municipalities. The Constitutional Court could only assess constitutional conformity of this general framework for financing of non-state school establishments. Nothing prevents a municipal self-government from providing to these church and private school establishments equal financing as compared to financing of school establishments founded by the municipality itself.

According to opinion of the Constitutional Court, for a final decision on conformity of a legal provision, which regulates the minimum requirements for financing of church and private schools and allows their different financing as compared to public school establishments, with Article 55 paragraph 2 of the Constitution it is not necessary to examine whether the public and other school establishments (or their founders) compete with each other. Behaviour that is admissible according to legal regulations relating to financing of school establishments cannot violate regulations for protection of economic competition.

From Article 55 paragraph 2 of the Constitution it follows that the state is obliged to establish a (subconstitutional) legal framework for protection of economic competition

as well as an effective mechanism for combating anticompetitive behaviour. According to Article 39 of APC state authorities in the exercise of state administration, municipalities in the exercise of self-governance and transferred state administration, and professional self-governance bodies in the exercise of transferred state administration must not provide evident support giving advantage to certain undertakings or otherwise restrict competition.

From the aforesaid it follows that potential violation of economic competition could occur (if any) only as a result of particular behaviour of a self-governing community, i.e. competition cannot be violated directly by a legal regulation stipulating the minimum requirements for financing of school establishments, and only under the conditions determined by the Act on Protection of Competition, by issuance of which the state fulfilled the requirement of Article 55 paragraph 2 of the Constitution. The Constitutional Court therefore did not accept as justified the complaint of the applicants that the legal provision at issue, regulating financing of church and private school establishments, was contrary to the provision of Article 55 paragraph 2 of the Constitution.

From the reproduced legal opinion of the Constitutional Court it can be concluded that **A**rticle 55 paragraph 2 of the Constitution is not applicable to a situation where the legislator orders to public authorities (in this case municipalities), which provide to a certain group of entities financing from public sources (in this case to school establishments founded by communities), to provide to other group of entities (in this case to church and private school establishments) financing from public sources at least corresponding to certain percentage of the amount of financing provided to the first group of entities (in this case at least 88% of financing of selected items of school establishments founded by municipalities). It is because t**he public authorities can always decide to provide to the second group of entities the same amount of financing as to the first group of entities**. Only the final amount of financing of the second group of entities as compared to financing of the first group of entities, which will result from a decision of the public authority, can be the subject for distinguishing among (potential) participants of economic competition relevant from the perspective of Article 55 paragraph 2 of the Constitution.

2.2. Criteria for distinguishing among participants of economic competition

2.2.1. Admissible criteria for distinguishing among participants of economic competition

In the quoted ruling **PL. ÚS 3/03** the Constitutional Court assessed certain provisions of Act No. 223/2001 Coll. on Waste[20].

This Act among others established the Recycling Fund as a non-state dedicated fund, in which were accumulated funds for support of collection, recycling and processing of

[20] Act No. 223/2001 Coll. on waste and on amendments and supplements to certain acts. As at 1 January 2016 this Act was replaced by Act No. 79/2015 Coll. on waste and on amendments and supplements to certain acts.

waste from specified groups of products. The Act regulated the bodies of the Recycling Fund as well as its activity and sources of income. Its sources of income were so-called "contributions of producers and importers to the Recycling Fund (hereinafter "contribution") and the Act generally determined groups of products that were subject to the obligation to pay contribution. Payment of this contribution was governed by the rule that it would be paid by a producer or importer of products, which were subject to the obligation to pay contribution. The contribution was calculated as the determined rate multiplied by the amount (weight) of products placed on the market in the Slovak Republic, less the amount of exported (or re-exported) products. The producer paid the contribution in the form of quarterly advance payments during the calendar year and in the following calendar year it paid supplementary contribution, if the advance payments had not covered the amount of contribution calculated from data for the preceding calendar year. Importer paid contribution for each import.

The supreme body of the Recycling Fund was the board of directors, which had 16 members. Ten members of the board of directors were appointed by the minister of economy at the proposal of the representative employers´ association in a manner ensuring representation of producers or importers from each sector of commodities being subject to the obligation to pay contribution; proposals of the representative employers´ association for appointment of a member were binding for the minister. Three members were appointed by the minister of environment at the proposal of professional associations of cities and communities, which was binding for the minister. One member was appointed without proposal by the minister of economy, minister of finance and minister of environment (each of the ministers appointed one member). The board of directors approved the budget of the Recycling Fund, decided on fundamental issues relating to the development of activity and policy of the Recycling Fund, was responsible for the effective use of sources from the Recycling Fund and decided on provision of sources from the Recycling Fund.

According to the applicants the legal state created by the Act No. 223/2001 Coll. on waste negatively affected competition in many ways, in particular because:

a) The collection of contributions to the Recycling Fund increased the costs of producers and importers and thus affected competition with products for which contribution for recycling had to be paid;
b) The importers had to spend money reserved for payment of contribution during the calendar year, in which they performed imports. On the other hand, the producers could use these funds for their economic activity until the rise of obligation to pay quarterly contributions and so-called supplementary contribution, by which they gained unjustified competitive advantage against the importers;
c) Imported final product was usually subject to a single payment of contribution, although a comparable domestic final product may actually be subject to multiple payments of contribution (if such product is the result of processing of a semi-finished product, for which contribution has already been paid as for a separate product).

According to the Constitutional Court, the applicants did not prove that application of the objected provisions of the Act on Waste led to unequal treatment of a group of entrepreneurs. The objected legal provisions **imposed equal rights and obligations in the framework of the same group of importers or exporters, or sellers and producers of commodities regulated by law.**

The Constitutional Court **did not establish** that the examined legal provisions had created **objectively unjustifiable differences in the legal position of the participants of economic competition**.

According to the applicants the constitutional principles for protection and encouragement of economic competition were violated also because the Act on Waste allowed the determination of particular rates of contribution by the executive regulation, albeit in the spirit of legal criteria, but these were not applicable).

When deciding on provision of sources from the Recycling Fund, the board of directors of the Recycling Fund should have taken into account: i) conformity of the proposed use of sources with the purpose of waste management, ii) conformity with approved budget of the Recycling Fund, iii) approved priorities of the environmental policy of the Slovak Republic and iv) approved programme of the Slovak Republic. The purpose of waste management was defined in Article 3 of the Act on Waste in general terms and the decision whether required conformity had or had not been achieved was left to discretion of the board of directors. Moreover, as regards the approved priorities of state environmental policy, which the board of directors should have taken into account, none of legal regulations mentioned the mechanism of approval of priorities of the state environmental policy.

The Recycling Fund therefore could create its own policy, which however was not a state or public policy – it was a policy of this Fund, which was dependent on a private association (representative employers' association that represented also producers or importers of commodities who were obliged to pay contributions). According to the applicants it means that the board of directors decides on allocation of sources from the Recycling Fund, for which no legal claim exists, on the basis of rather vague criteria; has enough space for discretion; determines alone the political objectives of such allocation mechanism; can freely decide whether it will provide funds to an applicant who fulfils differently its requirements and the requirements of the law; and in its decision-making is independent on the state and public institutions.

The Constitutional Court did not accept these arguments. According to its opinion the argument that the acts of the Recycling Fund (or its bodies) were not subject to state supervision, is not tenable. Individual control powers as well as the question of liability for violation of obligations of this Act are entrusted to the state authorities responsible for waste management. These authorities not only decide on administrative offences, but also receive records of volumes of production, import, export and re-export of individual commodities, that are submitted to them on a quarterly basis. Moreover, the state authorities responsible for waste management verify the correctness of calculation of contribution to the Recycling Fund.

Finally, the applicants pointed out that regardless of suitability or unsuitability of conservation of the Recycling Fund as an institution, the Recycling Fund by its work intervened into competitive relations and distorted economic competition by its contributory policy. This Fund actually served for the support of entrepreneurs who conduct business in this area with the aim to achieve profit; they could not see any reason for granting subsidies for activities of these entrepreneurs, in particular with the aim to motivate them to extend their waste collection and recycling activities. Moreover, this restriction of economic competition was not justified by a public interest, and therefore, it was contrary to Article 55 paragraph 2 of the Constitution.

The Constitutional Court pointed out that general objections of the applicants leading to allegation that management and activity of the Recycling Fund, as well as the method of payment of contributions and support of selected activities by the Fund, were contrary to Article 55 paragraph 2 of the Constitution, **cannot violate economic competition** (by creating objectively unjustifiable differences in the legal position of individual competitors) **in such extent that it might cause substantial restriction or elimination of economic competition.**

In the quoted proceedings **PL. ÚS 14/2014** the Constitutional Court assessed some provisions of the Act No. 463/2013 Coll., amending the Act No. 595/2003 Coll. on income tax and introducing the institute of tax licence for legal persons into the Act on Income Tax.

The tax licence is a minimum tax that the legal persons are obliged to pay, irrespective of potential lower tax liability calculated in the tax return or potential tax loss of the taxpayer. The purpose of introduction of the tax licence was to reduce tax evasion and the amounts involved.

The applicants objected violation of protection of economic competition by introduction of tax licences for the reason of **establishment of differences between entrepreneurs – legal persons,** on which was imposed the obligation to pay for tax licences, **and entrepreneurs – physical persons,** on which this obligation was not imposed.

The Constitutional Court said that economic competition does not take place on the relevant market, where legal persons would compete with physical persons. Competition may also take place between legal persons and physical persons, but not on the basis of division of business entities to the opposite groups of legal persons and physical persons. Legal persons can compete with physical persons on many relevant markets, but they can also compete on relevant markets, where physical persons do not operate at all. The applicants therefore had objected violation of Article 55 paragraph 2 of the Constitution **for a reason that could not endanger or restrict economic competition with constitutional intensity** (paragraph 44).

In its decision **PL. ÚS 14/2014** the Constitutional Court also expressed a legal opinion, according to which on relevant markets (without limitation to one or several markets) two groups of entrepreneurs operate – **entrepreneurs who declare the tax base in line with their actual results and pay the tax on it, and entrepreneurs who**

unlawfully, at the edge of the law, or even lawfully do not pay the tax. The Constitutional Court was aware of the complexity of the search for the border between so-called "tax optimization" (procedure still permitted by the law) and tax avoidance, tax evasion or unlawful conduct of the taxable party. This situation causes among others unequal access to the market and unequal market position due to division of entrepreneurs to those, who properly pay the taxes, and the others, who have advantage over the first group, because they do not pay the taxes and thus create for themselves an investment opportunity, which is not available to entrepreneurs who lost their sources due to payment of the taxes. Many unduly favoured entrepreneurs thus obtain a competitive advantage over entrepreneurs who conduct business in accordance with the Act (paragraph 47).

On the basis of aforesaid legal opinions of the Constitutional Court we can say that the public authorities may expose the participants of economic competition operating on one relevant market to different rules of behaviour without violating Article 55 paragraph 2 of the Constitution, if the **differences in the rules of behaviour of the participants of economic competition operating on one relevant market do not achieve constitutional intensity in the form of substantial endangering, substantial restriction or elimination of competition** on the relevant market. The criteria for distinguishing among participants of economic competition, which do not achieve the determined constitutional intensity, include:

a) position of a participant as a physical or legal person,
b) classification of a participant to certain group of importers, exporters, sellers or producers of commodities specified by the law;
c) non-payment of the tax by the participant (whether lawfully, at the edge of the law, or unlawfully) as compared to the participants who declare the tax base in line with their actual results and pay the tax, or
d) other circumstance that is objectively justifiable.

2.2.2. Inadmissible criteria for distinguishing among participants of economic competition

In the quoted proceedings **PL. ÚS 13/97** the Constitutional Court assessed selected provisions of the Act No. 92/1991 Coll. on conditions of the transfer of state property to other persons.

The Acts No. 190/1995 Coll. and No. 322/1996 Coll. amended the Act No. 92/1991 Coll. on conditions of the transfer of state property to other persons, whereby they favoured certain groups of legal persons in acquisition and use of bonds issued by the National Property Fund of the Slovak Republic (hereinafter "bonds of the Fund"). The National Property Fund of the Slovak Republic (hereinafter "Fund") was a legal person established directly by the law. Among other tasks, state property intended for privatisation was transferred to the Fund and the Fund was issuing decisions on privatisation of this property according to a procedure regulated by the Act No. 92/1991 Coll. on conditions of the transfer of state property to other persons. The nominal value of bonds of the Fund

was determined at SKK 10,000. The yield from these bonds was determined at the amount of the discount rate declared by the National Bank of Slovakia and valid in the end of current year. The maturity date of bonds of the Fund, including the yield from them, was determined at 31.12.2000 or 31.12.1997, if the owner of the bond achieved (as at 19.11.1996) the age of 70 years or higher. The Fund guaranteed repayment of bonds by its property. The right to acquire a bond of the Fund was granted to any citizen of the Slovak Republic; the right to acquire bonds of the Fund was thus reserved to physical persons. The favouring of selected groups of legal persons consisted in the fact that bonds of the Fund could be acquired before the maturity date (from physical persons, who acquired them as primary owners) by certain groups of legal persons, among which also:

a) legal persons or physical persons for repayment of their debts to the Fund, related to acquisition of privatised property,
b) legal persons, which provide supplementary old-age and health insurance services according to special regulation, and
c) banks intended for restructuring according to a special regulation.

The Act granted to these groups of entities not only the right to acquire bonds of the Fund before the maturity date, but also the right to use bonds of the Fund before the maturity date for repayment of their debts to the National Property Fund of the Slovak Republic or the Slovak Land Fund.

According to the Constitutional Court the provisions of the Act determined the convenient use of a bond of the Fund before the maturity date. The applicability of these provisions of the Act was limited by the maturity date of the bond of the Fund, because after the maturity date all owners of the bond achieved the same legal position for the purposes of its disposal. However, before the maturity date of bonds of the Fund certain groups of persons got into unequal position as compared to all other persons. Some of the persons, who were entitled to acquire a bond of the Fund before its maturity date, participated in competition. The Act grants to these participants of economic competition a right that is not available to the other participants of economic competition.

According to the Constitutional Court, the right itself to acquire bonds of the Fund before the maturity date, which was only granted to selected participants of economic competition, created unequal legal position of the entities taking part in competition.

The legislator did not specify the reasons, for which it was in the public interest to restrict economic competition and thus put the entities, which acquired property by privatisation, into more advantageous legal position against the other participants of economic competition on the relevant market.

By allowing the acquisition of bonds of the Fund before the maturity date by entities, which acquired property in privatisation, the legislator violated competition on all relevant markets, where operated participants, who had acquired property in privatisation, as well as participants who had acquired property for other legal reason. The legislator

thus created a legal state, which is contrary to the principle of protection and encouragement of economic competition, as guaranteed by Article 55 paragraph 2 of the Constitution.

The banks were in equal position to each other according to Article 1 paragraph 1 of the Act No. 21/1992 Coll. on banks. The assessed provisions of the Act No. 92/1991 Coll. on conditions of the transfer of state property to other persons violated this equal position of the banks by granting the right to acquire bonds of the Fund before the maturity date only to the banks intended for restructuring[21]. The acquisition of bonds of the Fund before the maturity date was neither a necessary condition for restructuring of the banks, nor a guarantee of achievement of the purpose of restructuring. The right granted to the banks intended for restructuring could not be recognised as a right granted in the public interest for the purpose of restructuring of the banks. Therefore the Constitutional Court decided that the provision of the Act No. 92/1991 Coll. on conditions of the transfer of state property to other persons, which granted the right to acquire bonds of the Fund before the maturity date to the banks intended for restructuring, was contrary to the principle of protection of economic competition, as guaranteed by Article 55 paragraph 2 of the Constitution.

On the basis of the aforesaid legal opinions of the Constitutional Court it can be stated that the **public authorities cannot expose the participants of economic competition operating on one relevant market to different rules of behaviour** without violating Article 55 paragraph 2 of the Constitution, **if the difference in the rules of behaviour is the result of application of criteria such as**:

a) acquisition of property of a participant in privatisation (against participants who acquired their property for other legal reason), or
b) bank being intended for restructuring (against banks that are not intended for restructuring).

It can be assumed that a general reason for the application of Article 55 paragraph 2 of the Constitution in these cases was the effort to prevent the legislator from selecting criteria favouring certain entities operating on the market fully arbitrarily, i.e. outside the requirement of at least minimum system coherence and legitimacy.

Conclusion

The Constitutional Court builds a constitutional regime of the obligation of the state to protect and encourage economic competition according to Article 55 paragraph 2 of

[21] The process of restructuring of the credit portfolio of the banks was regulated by Act No. 58/1996 Coll., amending the Act No. 21/1992 Coll. on banks. The process of restructuring with state participation should have been applied to credit portfolios of the banks, which provided credits or to which receivables from credits provided before 1 January 1990 were transferred, whereby these credits became classified due to the existence of the risk that receivables from them would not be repaid by the debtors properly and timely in their full nominal value (Article 44a of the Act No. 21/1992 Coll. on banks, as amended by the Act No. 58/1996 Coll.).

the Constitution, emphasising the independence of this constitutional regime on the general legal regime of protection of economic competition (APC)[22]. Although the Constitutional Court confirmed the independence of the constitutional regime of protection of economic competition, it did not prevent it from using the legal term "relevant market" for construing the subject of protection of Article 55 paragraph 2 of the Constitution and making it the basic framework, in which the constitutional regime of protection of economic competition will operate.

The case-law relating to admissibility of the criteria for distinguishing among of participants of economic competition in the process of verification of fulfilment of the obligation by the state to ensure equality of rules governing market behaviour for all the participants of economic competition is very interesting from the system aspect. The Constitutional Court seems to leave the legislator enough space for implementation of legislative interventions in case of enforcement of other requirements than merely protection and encouragement of economic competition. Although these legislative interventions often create a situation where the same rules of behaviour are not applied to participants of economic competition operating on the relevant market, the Constitutional Court finds violation of the obligation of the state to ensure equality of rules governing market behaviour for all the participants of economic competition only in exceptional circumstances. Censorship was only applied to cases, where selection of the criteria for distinguishing among (favouring of certain) participants of economic competition had gone beyond the requirement of minimum coherence and legitimacy.

In terms of classification of litigation concerning Article 55 paragraph 2 of the Constitution we observe the absence of cases where the Constitutional Court explicitly stated a conflict between the obligation of the state to ensure equality of rules governing market behaviour for all the participants of economic competition, on one hand, and other legitimate interest protected by the Constitution, justifying the violation of the principle of equality of rules governing market behaviour for all the participants of economic competition, on the other hand. In this case the Constitutional Court will apply its established case-law, according to which in case of a conflict of interests protected by the Constitution none of the interests will be provided such extensive protection that would cause absolute inapplicability of the rights serving for protection of the conflicting interest. For this reason **competition is protected by the state only when and insofar there is no reason to restrict or eliminate competition in public interest**. Therefore, even protection of economic competition may not be placed above any other public interest, or above the rights and freedoms granted to private persons.[23]

[22] For instance independence at the level of effects of the court´s finding of violation of Article 55 paragraph 2 of the Constitution and APC – see Ruling of the Constitutional Court of the Slovak Republic of 31 March 2005, file no. PL. ÚS 2/04: violations established by the Antimonopoly Office of the Slovak Republic do not mean automatically violation of the constitutional guarantees under Article 55 paragraph 1 of the Constitution. Also in other branches, such procedure in decision-making of the public authorities would be automatically associated with violation of the Constitution. Positive or negative decisions of the public authorities cannot cause this effect.

[23] Quoted rulings of the Constitutional Court of the Slovak Republic file no. PL. ÚS 7/96 and PL. ÚS 13/97.