



Economic Freedom in the Perspective of Constitutional Jurisprudence

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Abstract

In the jurisprudence of the Constitutional Court, it is constantly underlined that the freedom of economic activity is a negative freedom as long as it is related to the will of the individual to choose the field of exercise of this activity by freely entering into economic relations with other subjects. But in addition to this, the freedom of economic activity has its positive aspect, which implies the obligation of the state to, through the legislator, intervene in the regulation of this freedom with the aim of guaranteeing, in addition to the freedom of economic activity, the principle of the social state and thanks for sharing. This obligation of the legislator is expressed through the issuance of concrete legal norms, which aim to discipline the exercise of free economic activity in certain sectors or fields. In this case, the state should play the role of catalyst for the effective realization of economic freedom on the one hand and the protection of this freedom on the other hand. Based on the active role of the state, the drafters of the Constitution have provided the criteria on the basis of which it can be intervened to regulate the exercise of this right. The peculiarity of this provision, according to the structure of the Constitution, is that it is not provided in the group of other rights and freedoms, but in the part where the basic principles are provided on which the organization and state functioning of the country is based. So, the drafter of the Constitution preferred to consider the freedom of economic activity first, as a basic principle of the economic system of the Republic of Albania and second, as part of the catalog of freedoms and rights of citizens. It is precisely this distinctive element of this freedom, i.e. being as one of the pillars of the democratic state that gives this freedom a special nature. Precisely these issues with all the problems that appear in practice and in constitutional jurisprudence will be the object of treatment in this statement. The methodology used will be analytical and comparative, identifying problems and ambiguities that are often evident during discussions, not only in doctrinal but also in practice. The paper will aim, albeit in a non-exhaustive way, to make a theoretical presentation of the principle of economic freedom, as well as an analysis of constitutional decisions.

Keywords: constitution, free initiative, economic freedom, decision, proportionality, public interest

1. Introduction

1.1 The meaning of free economic activity according to the Constitution

Economic rights and freedoms include those rights and freedoms that were first promoted in the century. XIX, with the first documents such as the Universal Declaration of Human Rights of 1948 and the International Covenant on Economic,

Social and Cultural Rights of 1966.

In its article 6, the International Covenant on Economic, Social and Cultural Rights declares that: "States party to this Covenant recognize the right to work, which includes the right of everyone to have the opportunity to secure a living by working". Legally, these important rights are guaranteed to all individuals, without any discrimination. The principle of reciprocity, understanding and equality are the main guides in their observance.

Meanwhile, in Article 17 of the Universal Declaration of Human Rights, it is stated that: "Everyone has the right to own property, both alone and in community with others." No one should be arbitrarily deprived of his property. Everyone, as a member of society, has the right to social security and necessary economic rights. Everyone has the right to work, to freely choose work, to have satisfactory and favorable working conditions and to be protected from unemployment. Everyone, without any discrimination, has the right to receive equal wages for equal work. Everyone who works has the right to a just and favorable remuneration, in order to provide him and his family with a life that corresponds to human dignity and, if necessary, will be supplemented by other means. of social protection".

But the above-mentioned freedoms and economic rights, provided for in these international documents, are also guaranteed at the national level. The Constitution of the Republic of Albania, approved in 1998, specifically in its article 11 states: "1. The economic system of the Republic of Albania is based on private and public property, as well as on the market economy and the freedom of economic activity. 2. Private and public property are equally protected by law. 3. Restrictions on the freedom of economic activity can be imposed only by law and only for important public reasons".

The Constitution of the Republic of Albania defines the importance and guarantees enjoyed by the freedom of economic activity and due to the importance that this right carries, it has placed it at the head of the basic principles. Based on this definition, all laws and legal acts are forced to have the same spirit and guarantee those rights provided by the country's constitution.

Freedom of economic activity is a very broad concept and contains in itself many rights and freedoms, such as: freedom of business or the ability to create and close a business, freedom of trade or the absence of barriers related to the import and export of goods and services, monetary freedom as a measure to guarantee price stability, fiscal freedom on income, whether individual or business in particular, property rights as the ability of individuals to accumulate, possess and dispose of things free from interference of the state, freedom of investment and free circulation of capital, especially loan capital, financial freedom and independence from state control, freedom of labor to interact restrictions from the state.¹

The sphere of the freedom to exercise economic activity can be understood in a more complete way by evaluating those other fundamental constitutional rights, closely related to free economic activity, which also make possible and guarantee the free exercise of this activity and which are identified with the guarantee of private property (Article 41 of the Constitution) and with the right to work (Article 49 of the Constitution). Without the existence of these constitutional guarantees, even economic freedoms would remain a mere utopia and unable to be effective.²

1.2 Evolution over time of constitutional economic freedoms

From the initial moment when it was expressed and predicted for the first time in international acts, the concept of free economic activity and up to our days there is an evolution which has expanded and enriched the meaning of this concept. Almost all constitutions, with the exception of the Constitution of the People's Socialist Republic of Albania of 1976, have directly or indirectly guaranteed free economic initiative as a right that regulates the market and protects the consumer. But, even though some of them have expressly guaranteed it, or have not prohibited it as it is clearly reflected in the 1976 Constitution, Albania has not had special legislation to guarantee the right of free economic initiative in general and the right of competition, in particular, which is organically linked to the activity of economic freedom.

The Organic Statute of Albania, approved in Vlora, on April 10, 1914, is recognized as the first source of law and it is precisely this Constitution that defined Albania as a constitutional, sovereign and inheritable principality under the guarantee of the six Great Powers. The sanctioning of the right to private property and to the development of free economic enterprise is dealt with extensively in this document.

Since the first chapter of the statute enshrines the right of natural or legal persons, local or foreign, to own private property and the inviolability of legally acquired assets, as well as deprivation of property only on the grounds of public benefit and in any case based on the legally defined forms and against a fair preliminary reward. More or less a definition

¹ See the decision of the Constitutional Court no. 10, dated 19.03.2008

² E. Katro, L. Pelinku, *Protection of the free market in the Albanian Constitution, published in the Journal of Legal Studies "The constitutional system and its challenges", Faculty of Law, UT, January 2011, p. 255*

like the current Constitution, but elaborated and moderated anyway.³

The statute also supported the free economic activity through the sanctioning of the right of private enterprises, alongside the government, to carry out works of public benefit with a concession and the guarantee of the free exercise of activity in the fields of trade, industry, and crafts under the condition of only by obtaining permission in advance from the competent authorities according to law.⁴

The Organic Statute of Albania was abolished with the adoption of the Statute of Lushnja (1920, which hamlets of the democratic state and was the precursor of the expanded Statute of Lushnja. The Extended Statute of Lushnja, originally called "Extension of the Statute of Lushnja", is another source of law, which, although it existed for a short period of about 3 years (1922-1925), had a wide content regarding the rights of citizens. In this statute, private property was guaranteed as an inviolable right, except when required by the interest of the state and in any case against a reasonable compensation.⁵

In total, this Statute had 129 points in the form of articles, but it did not contain any provisions to define free economic initiative and the ways of its regulation, but on the other hand, there were no provisions to limit or prohibit this right. In 1928, Albania adopted the Statute of the Albanian Kingdom and the form of government was announced: Democratic, parliamentary and hereditary Kingdom, with King Zogu I governing.⁶

This statute resembled the statute of 1922, but was even richer with new concepts in the sphere of economic freedom, such as: the right to form associations, and the right to establish commercial companies.⁷

On June 3, 1939, Albania adopted the founding Statute of the Kingdom of Albania, and based on it, the Albanian State was ruled by a Monarchic Government headed by Victor Emmanuel III, King of Italy and Albania. In this statute, there were no spaces dedicated to market freedom, entrepreneurship, economic initiatives, etc., but the de facto deployment of numerous Italian military and civilian contingents in Albania gave rise to the expansion of consumption in the country's market and, therefore, to the expansion of private enterprise. Some of the trading firms accumulated large capitals within a short time. During the Italian occupation there was an increase in production in those branches which were connected with the trade of war, while agricultural production generally declined.

In 1946, Albania adopted the Statute of the People's Republic of Albania and was declared a people's republic, according to the philosophy that all power originates from the people and belongs to the people. Based on it, the state directed life and economic development based on the general economic plan. Relying on the state economic sector and the cooperative sector, the state exercised overall control over the private sector of the economy.

The Statute of the People's Republic of Albania sanctioned for the first time, expressed directly, the guarantee of free initiative and the right of competition in Albania. In its article 9, it was foreseen the prohibition of monopolies, trusts, cartels, etc., created in order to dictate prices and monopolize markets to the detriment of the national economy.

In July 1950, the Constitution of the People's Republic of Albania was adopted, which had many of the characteristics of the 1946 constitution, including direction by the state based on the state economic plan of life and development of the country and general control over the private sector of the economy, through the cooperative sector.

Article 11 of this constitution, which sanctioned the guarantee of ownership and private initiative in the economy and prohibited any form of monopoly, was similar to Article 9 of the 1946 Constitution.

In the Constitution of the People's Socialist Republic of Albania (1976), social ownership of the means of production and the prohibition of private property were finally sanctioned. Also, private enterprise was prohibited, which was labeled as "exploitation of man by man". The only socialist property consisted of state property and cooperative property in agriculture. In the absence of private ownership, land was given for joint use to state enterprises and institutions, agricultural cooperatives and social organizations, as well as for personal use by citizens. The land was given for use and without compensation.

With the approval of the law on the main constitutional provisions, the 1976 Constitution of the SRSR was repealed and it was sanctioned that: "the state, natural and legal persons had the right to private property". This was the first comprehensive legal document, which made the big turn, from a centralized one-party system, to political pluralism; from a monopoly economy in the hands of the state, to a market economy and free economic initiative.

The most important provision of this Constitution that made a revolution in the country's economic relations was

³ See the *Organic Status of Albania* in its art. 33j

⁴ See the *Organic Statute of Albania* *ibid* in its art. 200

⁵ See the *extended Statute of Lushnja*, art. 115

⁶ See the *Basic Statute of the Kingdom of Albania*, art. 50 and 51

⁷ *Ibid*, art. 199; 200 See the *Basic Statute of the Kingdom of Albania*, art. 50 and 51

Article 10: "The economy of the country is based on the variety of properties, the free initiative of all economic subjects in the regulatory role of the state. The economic initiative of legal and natural persons cannot be developed contrary to the social interest and must not violate the security, freedom and dignity of man".⁸

This provision contains two basic indivisible rights, that of private property and free economic initiative, otherwise known as economic freedom. These rights cannot be understood without the existence of each other. We cannot have free economic activity if every asset and property is managed by the state. On the other hand, the right to competition cannot be guaranteed if the state has a monopoly on the main services for its citizens. It is precisely for this reason that when free economic initiative is analyzed, the economic and political regime of the country, the existence or not of private property is also studied. The law on the main constitutional provisions played an important role in the sanctioning of many rights and the regulation of various relationships, but it could not be a long-term constitution, as it contained only 46 articles, there was a lack of sanctioning of some rights and important institutions of the country. But this law was a precursor to the Constitution of the Republic of Albania, approved in 1998.

The Constitution of the Republic of Albania, 1998, provides that: "Citizens having complete freedom, without infringing the interests of the state, can be involved in various economic initiatives according to their interests. The state does not interfere with an individual's private choices about where to work or how much income they are able to earn. The state, on the contrary, as the main regulator, guarantees free competition and prohibits the creation of monopolies or oligopolies, for which they do not bring quality in the service, appropriate price and new initiatives in the market. The most important provision that guarantees this right is Article 11 of the Constitution: "The economic system of the Republic of Albania is based on private and public property, as well as on the market economy and on the freedom of economic activity. Restrictions on the freedom of economic activity can be established only by law and only for important public reasons". This provision guarantees free economic initiative and competition in the market. This article of the constitution offers a double guarantee, which, on the one hand, should be understood as a guarantee that all economic operators can enter and operate in the market under conditions of legal equality, and on the other hand, it is about the relationship between economic operators and the State, being identified with the fact that the freedom to exercise economic activity can be limited only in cases where the limitation is expressly provided for by law and only for reasons of public importance.⁹ Some of the economic, social and cultural freedoms and rights guaranteed by this Constitution in contrast to previous constitutions are: Everyone has the right to earn his livelihood through legal work, which he has chosen or accepted. He is free to choose his profession, workplace, as well as his professional qualification system.¹⁰ Employees have the right to freely join trade unions for the protection of their labor interests¹¹. The employee's right to strike, which is related to labor relations, is guaranteed.¹²

1.3 Interpretation of Article 11 of the Constitution

Article 11 of the Constitution of the Republic of Albania states that: The economic system of the Republic of Albania is based on private and public property, as well as on the market economy and the freedom of economic activity. Private and public property are equally protected by law. Economic freedom finds special protection in the Constitution of the Republic of Albania.

The Constitution has expressly sanctioned the principle of the market economy. Also, it has established the legal reserve as a guarantee for the protection of free economic initiative. Restrictions on the freedom of economic activity can be imposed only by law and only for important public reasons.¹³

This provision does not list the rights that form the chain of freedom of economic activity, such as The right to entrepreneurship, the right to competition, the right to work, free trade, etc., but it has been expressly stated that the economic system of RSH is based on the freedom of economic activity, and that this freedom is guaranteed by the Constitution of the country itself, even any restrictions that can be placed on this right, are made only by law and for important public reasons.

⁸ Text for higher schools, *Political Economy of Socialism*. State University of Tirana, 1972, p. 263, article 10

⁹ E. Katro, L. Pelinku, *Protection of the free market in the Albanian Constitution, published in the journal Studime Juridike "The constitutional system and its challenges"*, Faculty of Law, UT, January 2011, pg. 254

¹⁰ See the Constitution of RSH, article 49

¹¹ *Ibid.*, Article 50

¹² Art. 51 Constitution of RSH

¹³ See Art. 11, Constitution of RSH

But what are some of the rights that are classified as economic freedom?

This includes all rights related to the production, distribution or consumption of goods and services, rights supporting free economic initiative and the right to competition. The highest form of economic freedom means the right to property, the freedom of movement of labor, capital and goods without any restrictions. The individual has the right to work, produce, consume and invest in any way he likes and this freedom must be protected by the state.¹⁴

Freedom of economic activity contains in itself many rights and freedoms, such as: freedom of business or the ability to create and close a business, freedom of trade or the absence of barriers related to the import and export of goods and services, monetary freedom as a measure for guaranteed price stability, fiscal freedom on income, whether individual or business in particular, property rights as the ability of individuals to accumulate, possess and dispose of things freely from state intervention, freedom of investment and circulation free flow of capital, especially foreign capital, financial freedom and independence from state control, freedom of labor to interact without restrictions from the state.¹⁵ The sphere of the freedom to exercise economic activity can be understood in a more complete way by considering those other basic constitutional rights that make possible and guarantee the free exercise of economic activity of the individual in the market and that are identified with the guarantee of private property (Article 41 of the Constitution) and with the right to work (Article 49 of the Constitution).¹⁶

2. Jurisprudence of the Constitutional Court Regarding Economic Freedom

In order to complete the interpretation of the constitutional concept of freedom of economic activity in Albania, some important decisions of the Constitutional Court of Albania come to our aid, which have fully elaborated this concept and have already created a rich jurisprudence by also analyzing the way the intervention of the state in the exercise of free economic activity, as well as with the principle of proportionality and the public interest.¹⁷

In a matter subject to review by the Constitutional Court, an expanded interpretation of free economic activity was carried out, the position of which the court has remained consistent in other subsequent decisions related to this matter. The association of hydrocarbon companies with a request addressed to the Court requested, among other things, the repeal as incompatible with the Constitution of point 1 of Instruction no. 18, dated 18.06.2008 of the Minister of Finance, for some additions to Instruction no. 17, dated 13.05.2008 "On the tax on added value", claiming that they conflicted with Articles 11, 118, 116, 131 letter "a" of the Constitution of the Republic of Albania. According to the applicants, the instruction violates the principle of freedom of economic activity and the right to property and the free market economy, protected by Article 11 of the Constitution, as it provides that there is only an agency contract between fuel suppliers, leaving no opportunity for the subjects of freely choose the terms of their agreement. Thus, retailers cannot own the goods. It was also claimed that the directive restricts economic freedom and this restriction was made without law and without considering any significant public interest.¹⁸

On the other hand, the interested entities, the Council of Ministers and the Ministry of Finance, opposed these claims by presenting the arguments that the instruction does not violate Article 11 of the Constitution, as it was issued on the basis of the implementation of the VAT law. If there is a restriction of economic freedom, it was established by the 1995 law on VAT itself. According to the explanations of the interested parties, this legal restriction was dictated by public needs to avoid informality and fiscal evasion. These are important public reasons that justify the restriction of the freedom of economic activity.¹⁹ The high level of informality and fiscal evasion in the supply of special categories (also of fuel according to the statistics of the Ministry of Finance) compared to the restriction on the establishment of special schemes shows that the criterion of proportionality of the VAT law is met. According to them, instruction no. 18 does not violate Article 118 of the Constitution because it was issued within the framework of the absolute legal reserve. Regarding the claim that the Directive, object of the request, violates the constitutional principle of freedom of economic activity, the

¹⁴ J.Lamaj "The right to compete in the framework of constitutional economic freedom" Dissertation for the degree of Doctor, Tirana 2018, pg..76

¹⁵ See the decision of the Constitutional Court no. 10, dated 19.03.2008

¹⁶ E. Katro, L. Pelinku, Protection of the free market in the Albanian Constitution, published in the Journal of Legal Studies "The constitutional system and its challenges", Faculty of Law, UT, January 2011, p. 255

¹⁷ Decision No. 12 dated 28.04.2009 of the Constitutional Court

¹⁸ See the decision of the Constitutional Court no. 10, dated 19.03.2008

¹⁹ Ibid

Constitutional Court clarified that this freedom mainly means the right to conclude contracts, individually or collectively, freely and on the basis of personal will, the right to choose the activity that the individual wants to exercise, the right to choose a job according to preference, etc. This freedom includes all rights related to the production, distribution or consumption of goods and services. The highest form of economic freedom means the right to property, the freedom of movement of labor, capital and goods without any restrictions and that the individual has the right to work, produce, consume and invest in any way that likes and this freedom must be protected by the state. The freedom of economic activity contains in itself many rights and freedoms such as: freedom of business or the ability to create and close a business, freedom of trade or the absence of barriers related to the import and export of goods and services, monetary freedom as a measure to guaranteed price stability, fiscal freedom on income, whether individual or business in particular, property rights as the ability of individuals to accumulate, possess and have things free from state intervention, freedom of investment and free circulation of capital, especially foreign capital, financial freedom and independence from state control, freedom of labor to interact without restrictions from the state.

On the other hand, the Court has stated that the freedom of economic activity includes the obligation of the state to, through the legislator, intervene in the regulation of this freedom, in order to guarantee the principle of the social state and the common good in addition to the freedom of economic activity. This obligation of the legislator to regulate is expressed through the issuance of concrete legal norms, by means of which it is aimed to discipline the exercise of free economic activity in certain sectors or fields. Only the state can manage to create the true and optimal environment for the exercise of this personal freedom, therefore it should be seen as a regulator in order to protect the market from the deformations that the free development of economic activity can naturally bring with it. In its jurisprudence, the Court has further clarified the criteria on the basis of which the state can intervene to regulate the exercise of the freedom of economic activity according to this article of the Constitution. The Constitutional Court has evaluated the violation or not of economic freedom by referring to the content of Article 17/1 of the Constitution, which extends to all the rights and freedoms provided for in it, according to which, "limitations of rights and freedoms provided for in this Constitution can only be established by law, for a public interest or for the protection of the rights of others. The restriction must be proportionate to the situation that dictated it". This provision, in addition to the public reason, which we also find in Article 11/3, contains the obligation to respect other criteria, such as: the limitation for the protection of the rights of others and the existence of a fair relationship between the limitation and the condition that dictates it. The well-known principle of proportionality means that the intervention of the legislator to limit a certain right or freedom is done with appropriate means that respond to the goal that is intended to be achieved.²⁰

In the present case, based on the standards of interpretation expressed above, the Court first evaluated the existence or not of a limitation by the Instruction of the Minister of Finance. The assessment that the court made in this case included the analysis of whether the alleged restriction was made according to the criteria expressly defined in the Constitution, i.e. by law and for a public interest or for the protection of the rights of others and in proportion to the situation that dictated it that. The directive, object of constitutional review, in the evaluation of the Constitutional Court, is an instrument related to the implementation of the fiscal regime, specifically VAT, in the field of fuel supply. VAT is part of the financial system of the Republic of Albania. The obligation to pay taxes and duties, or other financial obligations, is an obligation stipulated by Article 155 of the Constitution, according to which, "Taxes, taxes and national financial obligations of local, the facilitation or exclusion from them of certain categories of payers as well as the method of their collection are determined by law. Yes, according to the Court, the purpose of the tax system is the general well-being, which means that of individuals and the community in general, as well as the fulfillment of the social objectives of the state. The provisions of articles 155 and 157 of the Constitution, which consolidate the budget system and determine the sources of revenue creation of the state budget, sanction the constitutional obligation to pay tax obligations. Taxes and taxes are not negotiable obligations and are collected by the tax authorities, in the ways defined by law.²¹ Tax relations are legal relations of obligation between the state and taxpayers and as such they can only be defined by law. For the specific case, the Court at the end of the analysis assessed that the Instruction no. 18, dated 18.06.2008 of the Minister of Finance, issued in implementation of the VAT Law, according to the specific provisions of articles 10/4 and 35 of the law, does not violate the freedom of economic activity provided for in Article 11/3 of the Constitution.

In another case addressed to the Constitutional Court, the Association of Hydrocarbon Companies has requested²² the repeal as incompatible with the Constitution and international agreements of the Decision of the Council of Ministers no. 52, dated 14.01.2009 "On the quality of gasoil (diesel) fuel" , produced from the refining of crude oil, extracted in the

²⁰ See decision no. 10, dated 19.03.2008 of the Constitutional Court

²¹ See Decision of the Constitutional Court no. 16, dated 25.07.2008

²² In Decision No. 24, dated 24.07.2009

territory of the Republic of Albania, and marketed for road vehicles and generators." because it imposes a restriction on economic freedom that can only be imposed by law. The petitioner claimed that the decision, object of this trial before the Constitutional Court, creates a discrimination in favor of the Diesel D1 product produced from sources within the territory of the Republic of Albania, against the one imported by the petitioner's members. Also, the petitioner claimed that this decision harms the economic interests of its members through the creation of a temporary monopoly by only allowing the trading of Diesel D2 fuel produced by the company ARMO Inc.. For these reasons, according to the association, decision no. 52, dated 14.01.2009 of the Council of Ministers violates the principle of freedom of economic activity, the right to property, the free market economy and the free circulation of goods, protected by Article 11 of the Constitution. The applicant also claimed that the decision subject to review violates this principle, as it creates a discrimination in favor of the local product produced by the ARMO Company in terms of the amount of sulfur allowed in the fuels that will be marketed in the territory of the Republic of Albania from 1 January 2009 to January 1, 2012. As we quoted above, the Court has broadly clarified the concept of freedom of economic activity, guaranteed by Article 11 of the Constitution, freedom that implies the right to contract, on the basis of personal will, the right to choose the activity that one wants to exercise the individual, the right to choose a job according to preference, etc. The court in the present case, after a detailed analysis of the meaning of free economic activity, the principle of public interest, proportionality in the interventions that the state makes to curtail this freedom, found that the disputed decision allowing the trading of the same product with quantities of various Sulphur, allowing the trading of a product by the ARMO company prohibited for other operators and, imposing on commercial entities that are members of the petitioner and that carry out the activity of wholesale trading of oil, gas and their by-products, near an operator alone, if they want to continue selling this product, it creates a monopoly in the market in favor of the company ARMO Inc.. and consequently violates the freedom to import and export goods and services, thus limiting their economic freedom. As has been consistently emphasized by the Constitutional Court²³, restrictions on economic freedom can only be imposed by law. The court has previously clarified the meaning of the expression "only by law" in its other decisions. So, according to the court, the decision under review imposed a restriction on economic freedom, a restriction which, based on the constitutional provisions, can only be imposed by law. In this case, the court ruled the repeal as incompatible with the Constitution of points 1, 2, 3, 4, 5, 6, 7, 8, 9 and 11 of the Decree No. 52, dated 14.01.2009 "On the quality of fuel gasoil (diesel), produced from the refining of crude oil, extracted in the territory of the Republic of Albania, and marketed for road vehicles and generators".²⁴ Taking into consideration that the public interest prevails against the private interest, reasonable restrictions on the freedom of activity are accepted which serve to regulate the market or the interests of a social state.

Restrictions that are undertaken for public interest can be of different natures, even of a monetary nature, such as imposition of taxes and duties, which is considered in itself as a kind of restriction.²⁵ On the part of the court in its reasoning, the guarantee of the possibility of the individual to freely choose the field of his activity (economic initiative) and to realize his ideas on the economic activity he has chosen is generally considered sufficient. What is important in this case is that the essence of this activity of the individual is not violated to the extent that it becomes impossible to exercise it.²⁶

Precisely this report can be understood by bringing to attention the case of the request that the Association "Connection of businessmen and electronic games" claimed that the amended law "On games of chance, casinos and hippodromes" ²⁷gives a new definition of electronic games with instant profit, defining as such only electronic slot machines, and therefore this law is unconstitutional and as such should be repealed. According to the petitioner, the change brought by the new law is a violation of the freedom of economic activity, sanctioned by Article 11 of the Constitution, as it prohibits the exercise of this activity for these types of machines in an unjustified manner. The new provision has led to the limitation of the right of property according to the applicant, since by excluding from the exercise of the activity the machines with more than one game position, he is obliged to put them out of use, which, according to him, brings significant costs for the subjects of this activity. Such an action, according to them, is equated with expropriation.

The well-known principle of proportionality means that the legislator's intervention to limit a certain right should be done with appropriate means, which respond to the goal that is intended to be achieved. For this reason, the Constitutional Court first expresses itself regarding the existence or not of a limitation in this case by the legislator, in

²³ See decision no. 12, dated 28.04.2009 of the Constitutional Court

²⁴ See decision no. 24, dated 24.07.2009 of the Constitutional Court

²⁵ See the decision of the European Court of Justice in Luxembourg of 21 September 1999, *Laara and others C-124/97, Rec.p.I-6067*

²⁶ See the decision of the Constitutional Court of the Federal Republic of Germany: *BVerfGE 29, 26*

²⁷ See the decision of the Constitutional Court of the Federal Republic of Germany: *BVerfGE 4, 7 (16); 8, 274*

order to reach the conclusion, whether or not this limitation has brought about an infringement of the freedom of economic activity, as claimed by the petitioner in this issue. By means of the provision under review, the definition of the term "electronic machine" has been changed, excluding as such machines with many game positions. Subjects who own these types of cars, according to the amended provision, should no longer use them, in case they do not meet the criteria defined for this purpose.

So, through this change, the legislator has provided additional criteria, in order to use a certain type of electronic machine by licensed subjects for the exercise of this activity. The addition of criteria by the legislator in order to exercise a certain activity is within his scope of action and evaluation. It is the right of the legislator to assess case by case the need for intervention by means of a new regulation. The task of the Constitutional Court, when exercising control over the legislator's interventions in regulations affecting fundamental rights and freedoms, is to assess whether this restriction is done according to the criteria expressly defined in the Constitution, i.e. by law, for a public or for the protection of the rights of others and in proportion to the situation that dictated it.

The constitutional concept of public interest, as it has already been treated in several cases by this Court, is quite broad and must be seen in the perspective of the concrete provision that is presented for review before it. It is difficult to list exhaustively the cases of public interest or public reason leading to the limitation of a fundamental right. They can only be ranked negatively, that is, in terms of concrete limitation. The Constitutional Court has appreciated that the public interest, which led the legislator to amend the law under consideration, was such that it justifies his intervention. Increasing the guarantee to participate in games of chance through increased control over entities that exercise this activity, strengthening of licensing rules and improving the geographic distribution of entities, increasing revenues in the state budget through increasing tax obligations, categorization and the separation of gambling, better protection of young people, etc., are considered by the Constitutional Court as important public reasons justifying the new regulation. The legislator has seen fit to guarantee all these interests by adding criteria for obtaining a license for this purpose.

The legislator has left the way open for each entity that fulfills the established criteria for exercising the activity even for machines with multiple gaming positions.²⁸

Based on this fact, the mere addition of criteria for the exercise of a certain activity, without being accompanied by exclusionary or discriminatory measures against other subjects, cannot be considered unconstitutional, as long as the activity is not violated in its essence or becomes impossible to exercise. All subjects who would like to obtain a license for the exercise of the activity, even for machines with multiple game positions, are free to do so once they have met the conditions for obtaining the license. Only the impossibility to meet the subjects' criteria cannot be considered a violation of economic activity. It is not the state's responsibility and obligation to make it possible from a financial point of view for subjects to exercise a certain activity.²⁹

The state's obligation is to design the necessary legal framework for this purpose, creating the opportunity for everyone to compete in a free market. It seems that the legislator has respected the principle of establishing a fair relationship between the public interest and guaranteeing the protection of individual freedom, by strengthening the licensing criteria in order to increase the guarantee and protection of consumers, vulnerable groups, as well as increasing revenues in the budget of the state³⁰. At the same time, the legislator has given commercial subjects the possibility of further exercising their activity if they meet the criteria. For the aforementioned reasons, the Constitutional Court of the Republic of Albania decided to dismiss this request.

The need to protect the public interest takes on a special importance, especially when it comes to public procurement or services with public funds in the interpretation of Articles 11 and 18 of the Constitution. The European Court of Justice (ECJ) in this regard has stated that if a measure taken by the state leads to unequal opportunities between economic operators and, therefore, distorts competition, then such a measure constitutes a violation of EU competition law³¹. Even when the subject of the review was public procurement, the CJEU concluded that according to the principle of equal treatment of economic operators, the purpose of which is to promote the development of a healthy and effective competition between operators participating in a public procurement procedure, the latter must be given equal opportunities in the formulation of their offers, which means that the operators must be subject to the same conditions. Furthermore, the principle of equal treatment means that tenderers must be on an equal footing, both during the preparation phase of their procurements and when the tenders are evaluated by the contracting authority.

In all the practice of the Constitutional Court, as it results from the analysis of some decisions, the concept of the

²⁸ See Law no. 9121, dated 28.7.2003 "On the protection of competition", article 2 point 3

²⁹ See the judgment of the European Court of Justice in Luxembourg of July 4, 2000, Haim case, C-424/97, Rec p.I-5123

³⁰ See decisions of the Constitutional Court of the Republic of Albania: V-16/2004; V-35/2007305

³¹ C462/99, *Connect Austria Gesellschaft für Telekommunikation GmbH vs Telekom-ControlKommission*, 22 May 2003, § 84

activity of economic freedom has been elaborated and in each case the test carried out regarding the existence of this freedom, its limitations and the principles that must be respected in each assessment of the specific case have enriched the doctrine and jurisprudence by offering a good opportunity for further analytical studies.

3. Conclusions

From the analysis of the object of this paper, of the concept of free economic activity, we come to the conclusion that free initiative does not enjoy unlimited protection from the constitutional point of view. It, like any other right, can be limited, if the public interest prevails over the private one, but in any case a limitation of this right is made only by law and not by other normative acts. The public interest and the principle of proportionality are accepted as reasonable restrictions on the freedom of economic activity, which serve to regulate the market or the interests of a social state. The well-known principle of proportionality means that the intervention of the legislator to limit a certain right is done with appropriate means, which respond to the goal that is intended to be achieved. The need for a peaceful coexistence between members of society as well as objectives of general interest does not mean that fundamental rights are guaranteed without any restrictions. It is the right and duty of the legislator to evaluate case by case the need for intervention by means of a new regulation. These measures of the legislator can be of different natures and even of a monetary character when this is necessary. What is important is that the essence of the individual's activity is not violated to such an extent that it becomes impossible to exercise it. It is generally considered sufficient to guarantee the possibility of the individual to freely choose the field of his activity (economic initiative) and to realize his ideas on the economic activity he has chosen.

In conclusion, we can say that the state should play the role of the regulator for the effective realization of economic freedom, on the one hand, but also the protection of this freedom, on the other hand. Only the state can manage to create the right environment for the exercise of this personal freedom, therefore it should be seen as a catalyst in order to protect the market from the deformations that the free development of economic activity can naturally bring with it.

As it resulted from the submission of this paper, Article 11 of the Constitution contains in itself a kind of constitutional favoring for a competitive market, since the option expressed in favor of the market economy, together with the recognition of the freedom to exercise economic activity, clearly confirms that the object of protection of this provision in reality is the market itself understood as a value that must be allowed to develop.

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