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# CONSTITUTIONAL ASPECTS OF ECONOMIC COMPETITION

*"Competition is the most promising means to achieve and to secure prosperity."*

*Ludwig Erhard*

## ABSTRACT

Article 6 (2) of the Constitution of Georgia recognises free competition as the basis of the economic order in the country. Defining the content of the constitutional clauses regarding economic competition and determining positive and negative obligations of the state deriving from the constitution usually give rise to significant practical and theoretical challenges.

Preceding paper aims to establish proper theoretical grounds to overcome abovementioned legal obstacles. Based on the best western experience and scientific approaches, it defines the scope of the state's positive and negative obligations concerning free competition and competitive equality of undertakings. The paper also examines the teleological grounds of the constitutional provisions regarding free competition and its role in the process of assessment of the constitutionality of a legislative act related to economic competition. Moreover, the study discusses the functions of free competition with respect to freedom of enterprise and consumers' rights, and it identifies the relevant legal values as well.

## INTRODUCTION

Competition generally means aspiration of two or more individuals towards a specific goal, where the success of one of them may proportionally reduce the chances of the competitor's success. This process takes place in almost all aspects of social life, for instance, sports, culture, education, science, etc. Economic competition is one of the essential expressions of competition.

The Constitution of Georgia upholds free competition as a basis of the economic order in the country and, under article 6 (2), it creates primary legal grounds for its protection and development. Article 6 of the constitution states that "the State shall take care of developing a free and open economy, free enterprise and competition". Following this provision, the state's economic policy should guarantee healthy competition within the whole country.

Regarding the issues related to economic competition, the case-law of the Constitutional Court of Georgia already encompasses several vital decisions and interpretations.[1] However, the need for further development and analysis of constitutional aspects of competition remains yet. Sound research of the issues related to the competition is of crucial importance primarily because, alongside the autonomy of will and private property, the free competition constitutes the basis for every efficient free market and public order.[2]

This paper aims to establish additional scholarly grounds to define the scope of the positive and negative obligations of the state concerning the development of competition and competitive equality of undertakings. It focuses on the relationship between constitutional provisions on the development of competition and the protection of the consumers' rights. Furthermore, the paper discusses teleological aspects of constitutional provisions regarding free competition and their importance for the assessment of conformity of the law to the constitution. Also, it tries to identify the functions and objectives of free competition and to specify protected legal values. The research is primarily based on the case-law of the Court of Justice of the European Union, as well as that of the EU member states and relevant juridical doctrines adopted in developed Western countries.

## 1. ESSENCE OF COMPETITION

Taking into consideration the title of the paper one may expect that it would determine the term of competition right away. However, the complexity of the concept in question makes it impossible to provide an ideal definition.[3] Therefore, legal literature and practice mostly prefer to focus not on the definition of competition, but its essential elements and functions. This approach makes the essence and the role of competition in the modern market economy clearer.

For the existence of competition following elements must be at hand: 1) relevant market; 2) at least two undertaking operating on the same market; 3) Antagonistic relationship of these undertakings and their aspiration towards strengthening their market position at each other's expense.[4] Determination of the concept of the undertaking and relevant market exceeds the scope of the preceding paper. Instead, its primary objective is the analysis of the third element regarding the confrontation of undertakings and their antagonistic relationship. It is precisely the rivalry,[5] and the process of gaining an advantage,[6] the very words that can be

[1] Judgment of the Constitutional Court of Georgia N1/2/411 dated 19 December 2008 in the case of "'Russenergoservice', LTD 'Patara Kakhi', JSC 'Gorgota', Givi Abalaki's Individual Company 'Farmer' and LTD 'Energia' v. the Parliament of Georgia and the Ministry of Energy of Georgia"; Judgment of the Constitutional Court of Georgia N2/11/74 dated 14 December 2018 in the case of "Ltd 'Giganti Security' and Ltd 'Security Company Tigonis' v. the Parliament of Georgia and the Minister of Internal Affairs of Georgia"; Judgment of the Constitutional Court of Georgia №1/1/655 dated 18 April 2019 in the case of "Ltd. SKS v. the Parliament of Georgia".

[2] *Emmerich Volker,* Kartellrecht, 13. Auflage. Rn. 11.

[3] *ibid*, Rn. 1.

[4] *Kling Michael, Thomas Stefan,* Kartellrecht, § 2. Rn. 6.

[5] *Clark J.M.* Toward a Concept of Workable Competition, see The American Economic Review, 1940, Vol. XXX, N2. 243.

used as one of the synonyms of competition, which is protected under article 6 of the Constitution of Georgia.

The Law of Georgia on Competition shares the same approach and defines the competition as a "rivalry between actual or potential undertakings on the relevant market to gain an advantage on the market." In contrast to the Georgian legislation, western states are practically reluctant to provide with any legal definition of the competition. An argument for the absence of the notion of competition in German legislation is that the legal definition based on the market structure, types of market actions and results, will limit the open and multifarious character of the concept of competition.[7]

Within the course of discussions regarding competition, the issue of potential competition is also of great significance. In particular, according to the definition of competition provided by Georgian legislation, competition might exist not only between undertakings operating on the same relevant market but also between undertakings that are already operating on the market and undertakings which have an intention to enter the market (potential competitor).

Scholarly works define competition the same way as "spontaneous order"[8] or the process of "search and discovery".[9] These definitions point to important and indispensable characteristics of the process of competition. Recognizing competition as a spontaneous order amounts to recognition of natural origins of the process of competition. This implies that competition is formed, developed and exists without any artificial intervention and it performs specific functions *ipso facto*, by virtue of its very nature. As for representing competition in form of the process of search and discovery – this underlines its dynamic character and the impossibility to predict results deriving from it.

In the light of the foregoing, it can be stated that the provision of article 6 implies the rivalry between undertakings, which are aiming to gain advantage on the market. This process is in constant development and improvement, and its dynamic nature is its primary characteristic. Under article 6, the state's obligation to take care of free competition implies promoting and ensuring the natural and dynamic process of rivalry among undertakings in relevant markets.

## 2. FUNCTIONS OF COMPETITION

As noted by Adam Smith, - also known as the founder of capitalism, - individuals become more productive and efficient when they act in accordance with their own interests and aspire toward their wellbeing.[10] During this time, the main objective of an individual does not concern increasing public good. However, the latter represents a side-effect of any action performed by the former. In other words, individual goals and ambitions of the market op-

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[6] *Whish/Bailey,* Competition Law, 7-th edition, 2011, p. 3.
[7] *Dreher Meinrad, Kulka Michael, Rittner Fritz,* Wettbewerbs- und Kartellrecht, 8. Auflage, Rn. 5.
[8] *Emmerich, supra* note 2, Rn. 29.
[9] *Kling/Thomas, supra* note 4, Rn. 6.
[10] *Smith Adam,* An inquiry into the nature and Causes of the Wealth of Nations. Edited by S. M. Soares. Metalibri Digital Library, 29-th May 2007, 349-350.

erator do, at the same time, serve the goal of increasing the public good. In addition, from the point of view of increasing public good, an undertaking in the relevant market is more efficient when the main purpose behind his/her actions is his/her own material gain. It is from this reasoning that we should draw the conclusion on the necessity to ensure healthy competition.

According to the concept developed by the government of Great Britain with respect to competition policy, dynamic and aggressive competition among undertakings represents the principal precondition for the formation of strong and efficient markets.[11] This results in increasing innovations and productivity and helps consumers receive high-quality goods and services at the most favourable terms.[12]

According to the reasoning of the European Commission's Directorate-General for Competition, competition is a main mechanism for market economy, which encourages companies to offer consumers goods and services at the most favourable terms.[13] It is precisely competition that encourages market efficiency and innovation and reduces prices.[14] It is a process of economic cohabitation, which is free from any artificial intervention and which naturally creates the optimal synthesis of goals stemming from the principles of freedom, equality and common good.[15]

Given the market competition, every undertaking has a constant expectation that it will lose its customers for the benefit of its competitors in case it does not offer a favourable price for the same or higher quality goods and services. The pressure generated as a result of such a competitive process ensures that a given undertaking will be oriented toward reducing the price, increasing the quality and developing its products. This, obviously, has a positive impact on the material wellbeing of customers, given that they can receive products of the highest quality for the lowest price, while having more options.

Formation of competitive markets also facilitates the process of increasing domestic undertakings' international competitiveness. This is because the pressure of competition stimulates undertakings and gives them an impulse for creating innovations, technological developments and implementation of new products. All of this increase competitiveness of undertakings and that of the products created in their country at the international level.

Based on the general discussion provided above, the following functions of the competition can be distinguished:

- *Governance function* – free competition should be considered a process independent from state interference and naturally ensuring a reasonable balance between demand and supply, thereby performing the function of governing the market;[16]

[11] A World Class Competition Regime Department of Trade and Industry, 30.07.2002. 13.
[12] *ibid.*
[13] Available here: https://ec.europa.eu/competition/antitrust/overview_en.html (as of 25.03.2020).
[14] *ibid.*
[15] *Emmerich, supra* note 2, Rn. 12.
[16] *Welfens Paul,* Grundlagen der Wirtschaftspolitik, 2. Auflage. 545.

- *Allocation function* – competition ensures optimal allocation of limited economic resources among participants of the market;[17]
- *Innovations/progress function* – the pressure of competition represents an important stimulant for undertakings to constantly care for improving goods and services and offer consumers new, innovative products;[18]
- *Limiting (neutralizing) market power* – competition neutralises market powers containing high risks and prevents concentration of such a scale of power in the hands of one operator or a group of operators, that threatens competitive environment or freedom of enterprise of other market operators;[19]
- *Social function* – competition ensures provision of goods and services to consumers at the most affordable price. Besides, competition creates important stimuli in terms of technological progress for reduction of expenditures related to production, which consequently results in reducing the prices.[20]

These functions are among those that should be performed by free competition, which is envisaged under article 6 (2) of the Constitution of Georgia and which forms a cornerstone of the country's economic order. By imposing a positive obligation for the state to take care of free competition, the Constitution is intending to protect the process of competition in itself, which forms an integral part of market stability. However, alongside ensuring the process of free competition, the said constitutional provision also ensures protection of interests of every participant of the market, consumers, and public and state interests while achieving the reasonable balance between these interests by exercising the aforesaid functions.

## 3. THE SCOPE OF A STATE OBLIGATION TO SUPPORT THE DEVELOPMENT OF ECONOMIC COMPETITION

### *3.1. GENERAL OVERVIEW*

While considering the aforesaid functions as well as the values related to competition, article 6 of the Constitution of Georgia recognises free competition as the foundation of the economic order in the country. It prescribes the constitutional principle of free and open economy, free enterprise and the development of competition.[21] These principles imply the state obligation to promote the development of competition. Accordingly, the state is under obligation to ensure favourable conditions for the development of the dynamic process of rivalry among undertakings. However, the Constitution does not specify the degree or the scale of competition which is to be achieved in relevant markets of the country. Accordingly, it is difficult to determine the optimal degree of rivalry among undertakings, the existence of which can point to the fact that a state is duly performing its obligation to support to devel-

[17] *Emmerich*, *supra* note 2, Rn. 7.
[18] *Welfens*, *supra* note 16, p. 545.
[19] *Emmerich*, *supra* note 2, Rn. 9.
[20] Judgment of the Constitutional Court of Georgia №1/1/655 dated 18 April 2019 in the case of "Ltd. SKS v. the Parliament of Georgia", para. 3.
[21] *ibid*.

oping competition. Hence, in order to identify the optimal degree and scale of competition envisaged by the Constitution, it might be useful to analyse the history of competition law as well as theories and approaches of developed Western countries in this regard. In addition, for the purposes of determining the optimal degree of competition, it is also important to take into account the functions discussed above, given that within the scope of the obligation prescribed under article 6 of the Constitution, the competitive environment established in the country should ensure performance of these functions.

### *3.2. PERFECT COMPETITION*

Economic theory distinguishes different types of market structure.[22] The beginning of the 20th century marks the formation of the theory of perfect competition ("Theorie des vollständigen Wettbewerbs"), which has been considered one of the leading theories in economic sciences.[23]

In the economic model of perfect competition, its positive effects are maximised from the point of view of benefits related to competition as well as social benefits.[24] The said model of competition is characterised by similar prices, homogeneity of goods and services and full transparency of the market.[25] Under these circumstances, undertakings offer consumers identical goods and services.[26] Buyers do not demand and suppliers do not provide any deviation from the existing standard quality of goods and services.[27] Besides, undertakings act as recipients towards the existing market price and the market share does not give them the possibility to influence the price of goods and services.[28] Furthermore, in perfect competition, the market is distinguished by maximal transparency and undertakings possess an exhaustive information with respect to market-related processes.[29] There are no practical barriers and neither entry nor exit from the market are associated with any costs.[30]

These elements which are characteristic to perfect competition ensure the existence of a large number of undertakings on the market, which deprives participants of the possibility to conduct economic policy based on the economy of scale.[31] Besides, the market provides homogeneous goods and services, which reduces the stimulus and motivation for the undertakings to be constantly oriented toward innovations and development. Under these circumstances, undertakings are deprived of the possibility to gain a large amount of profit, which consequently discourages them from engaging in research and technological development. Aspiration towards innovations and technological development is also reduced due

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[22] *Slot PJ, Johnston AC*, an introduction to EC Competition Law, 1-st ed. 4.
[23] *Kling/Thomas, supra* note 4, Rn. 7.
[24] *Whish/Bailey, supra* note 6 *p.* 4; *Lorenz Moris*, an introduction to EU Competition Law, 5.
[25] *Kling/Thomas, supra* note 4, Rn. 7.
[26] *Lorenz Moris*, an introduction to EU Competition Law, p. 5.
[27] *Slot, supra* note 22, p. 4.
[28] *Slot, supra* note 22, p. 4.
[29] *Japaridze Liana,* See Japaridze/Zukakishvili/Zhvania/Koadze/Gvelesiani/Akolashvili/Sergia/Momtsemlidze, Georgian Copetition Law, 2019, p. 29. quoting Whish, Richard and Bailey, David, Competition Law, 9th ed. Oxford University Press, 2018, p. 23.
[30] *Slot, supra* note 22, p. 4.
[31] *Kling/Thomas, supra* note 4, Rn. 7.

to having complete information about the market. These conditions reduce the level of rivalry among undertakings and they cohabitate "peacefully" with their competitors. In German literature, such a structure is known as "Schlafmützenkonkurrenz", which can be translated as a "dormant competition".

As noted above, competition is the process of "search and discovery" and its main characteristic is the dynamism of occurrences and actions. Accordingly, the static condition of the market in perfect competition contradicts the very essence of the competition. It is precisely because of the necessity to preserve the static condition and an unchanged position that the theory of perfect competition was not supported in practice.[32] On one hand, the perfect competition creates a market which is oriented on social wellbeing of consumers, but it factually implies the absence of elements and conditions necessary for the existence of competition. Based, among others, on this conclusion, achievement of the perfect competition can never be the objective of a rational competition policy.[33] Accordingly, the obligation to take care of the development of the competition as prescribed under article 6 of the Constitution should not be understood as the requirement to achieve the perfect competition in relevant markets.[34]

### *3.3. Effective Competition*

Given that the creation of perfect competition cannot be justified under article 6 of the Constitution, it is necessary to determine an alternative model, which can be utilised when interpreting this constitutional provision. In this regard, it is also important to define rational maximisation, given that under jurisprudence of the Constitutional Court, in relation to certain norms, it is also possible to examine constitutionality of the disputed provision with respect to the constitutional principle of the development of competition.[35]

Due to flaws of the perfect competition model, it was necessary to create an alternative approach in the doctrine, which was further adopted in the legislation and jurisprudence of Western countries. In this regard, *"Toward a Concept of Workable Competition"* by the American economist John Maurice Clark is of significance. In this work, Clark was the first one[36] to criticise the model of perfect competition; he pointed out that the perfect competition has never existed and will never exist due to irreversibility of agreements distorting competition or other actions having the analogous effect.[37] The perfect competition is an unrealistic, ideal standard; it only bears the function of the initial point, with respect to which a practically existing competitive environment is assessed in a given case.[38] Based, among others, on these grounds, Clark rejects the theory of perfect competition and elaborates on a new concept of workable competition ("Konzept des funktionsfähigen Wettbewerbs"). With-

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[32] *Kling/Thomas, supra* note 4, Rn. 7; *Slot, supra* note 22, p. 4.
[33] *Emmerich, supra* note 2, Rn. 17.
[34] *Cf.* OECD Glossary of Industrial Organisation Economics and Competition Law, 03.01.2002. p. 66.
[35] *supra* note 21, para 4.
[36] OECD Glossary of Industrial Organisation Economics and Competition Law, 03.01.2002. p. 84; *Whish/Bailey, supra* note 6, 16.
[37] *Clark J.M. supra* note 5 p. 241.
[38] *ibid.*

ing the scope of this concept, he stresses that the full transparency required by the perfect competition and possession of exhaustive information on market processes by undertakings is harmful for the workable competition (stating that "effective competition requires some uncertainty").[39] Today, the uncertainty surrounding market processes is deemed to be one of the cornerstones on the dynamic competition theory.[40]

After two decades, Clark produced a more comprehensive work entitled *"Competition as a Dynamic Process"*,[41] where he specifies the term of workable competition and introduces a new term of "effective competition". At the same time, he develops his new theory with respect to the optimal degree of competition, which was further recognised in the scholarly work as well as legislation and jurisprudence of many countries. In this work, Clark elaborates not on static but dynamic nature of competition, and notes that the dynamic process of competition is everlasting.[42] The dynamic nature of the process of competition has been attributed a great significance in the further development of competition law, especially given the fact that the competition law attained the function of not only protecting the factually existing process of competition, but also potential competition.[43]

The dynamic nature of the process of competition has also been attributed a great importance in one of the decisions of the Competition Agency of Georgia, which underlined that competition, as a dynamic process, can only be beneficial for consumers if it is in the process of constant improvement, development and growth.[44] Based on the case-law of the ECJ, the Agency also noted that the restriction of free competition is also at hand, when a certain action is capable on influencing the market structure, and is aiming to obstruct preservation of the existing degree of competition or prevent its growth and development.[45] The Agency also shared the view of the ECJ and opined that preservation of the market in static condition results in problems related to the reduction of innovative products, limitation of choice of consumers as well as the price of products.[46]

Competition law of the EU is also based on the concept of effective competition.[47] This is demonstrated, for example, by the EC Regulation on the control of concentrations between undertakings, which prohibits such a concentration and this is incompatible with effective competition.[48] Furthermore, the concept of effective competition is also shared in the juris-

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[39] *Supra* note 37, p. 249.
[40] *Kling/Thomas, supra* note 4, Rn. 14.
[41] *Clark J.M.* Competition as a Dynamic Process, 1961.
[42] *Emmerich, supra* note 2, Rn. 18.
[43] *Kling/Thomas, supra* note 4, Rn. 14.
[44] Order N04/44 of the Chairman of the Competition Agency of Georgia in *„The case concerning Geverse Development, Ltd.".*
[45] *ibid*, cited ECLI:EU:C:1979:36, Case 85/76, "*Hoffmann-La Roche*," §§ 91; ECLI:EU:T:2003:250, Case T-203/01 *"Michelin II"* §§ 238-239.
[46] *ibid*, cited ECLI:EU:C:2010:603, C-280/08 P, "*Deutsche Telekom AG"*, § 182, ECLI:EU:C:2009:214 Case C-202/07 P, *"France Télécom"*, § 112.
[47] *Lorenz, supra* note 26, p. 22.
[48] See Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation, ELI: http://data.europa.eu/eli/reg/2004/139/oj (Accessed 28 March 2020).

prudence of the ECJ.[49] Nevertheless, there is no universal definition as to what should be regarded as effective competition.[50] Accordingly, the optimal degree of competition and, subsequently, effectiveness of competition, is to be defined for a given market in accordance with characteristics and parameters of this market in particular. Among such characteristics there can be the number of undertakings, accessibility of information, diversity of products etc.[51]

It is noteworthy that Georgian legislation regarding competition is also based on the theory of effective competition. This is demonstrated by several provisions in the Law "On Competition", as well as subordinate normative acts adopted based on this law.

Provisions of the Law of Georgia "On Competition" that relate to concentrations do prohibit such a concentration between undertakings, which distorts effective competition. Methodological Guidelines for Market Analysis adopted by virtue of Order N30/09-3 of the Chairman of the Competition Agency are fully based on the principle of effective competition. Moreover, Methodological Guidelines for Market Analysis contain the provision defining effective competition, according to which effective competition implies such an optimal combination of the market structure and market behaviour of undertakings, when the market productivity reaches the highest possible indicator. This provision creates solid grounds for discussing additional aspects of the effective competition. One of the most important aspects stemming from this definition is that effective competition cannot be regarded as a unified "formula" for all respective markets. Rather, effective competition means that the market should reach the highest possible indicator of productivity. This indicator, obviously, will vary in different markets, which hints on the relative nature of efficiency of the competition. Accordingly, efficiency of the competition shall be assessed differently with respect to each market. Competition of a specific degree might not be sufficient for achieving similar competition in a different market. Efficiency of competition shall be evaluated based on market conditions, market structure and its other characteristics. Thus, the existence of effective competition is to be examined on a case-by-case basis and independently, while considering parameters of a specific market.

Given the foregoing, it is clear that the concept of effective competition is more realistic; based on the Western practice and scientific achievements, it can be argued that article 6 (2) of the Constitution of Georgia implies the obligation to take care of developing effective competition.

### *3.4. INTERIM CONCLUSION*

As demonstrated in the discussion provided above, the constitutional provision regarding the development of free competition does not intend to achieve the perfect competition in markets within the country. In this regard, state obligations are limited by creating favourable conditions for the formation of effective competition. Under article 6 of the Constitution, one

[49] ECLI:EU:C:1977:167, Case 26-76, *"Metro SB-Großmärkte"* § 21-22.
[50] *Lorenz*, *supra* note 26, p. 22.
[51] *ibid.*

of the constitutional aims of the country with respect to economic order is to achieve effective competition in the markets. This serves the goal of preserving the dynamic process of competition and is considerate of the market conditions, characteristics and other parameters thereof, while implementing the competition policy in a given market.

## 4. PROHIBITION OF MONOPOLISTIC ACTIVITIES

As mentioned above, article 6 of the Constitution denotes free competition as the basis of economic stability, however it does not represent the sole constitutional provision in relation to the economic competition. According to article 26 (4) the main constitutional aspect of economic competition should be the prohibition of monopolistic activities.

Considering the prohibition of monopolistic activities at the constitutional level already indicates the extent of potential damage that such practices may cause to the processes of establishing and developing free competition in the markets. The Constitution recognises monopolistic activity and free competition to be fundamentally incompatible, given that the existence of monopolistic practices renders it impossible to establish effective competition in relevant markets within the country. A constitutional provision of similar content indicates that, based on Article 6, in order to develop free competition, a country should pursue policies, which, through various mechanisms, prevent monopolies from occurring in the markets. The prohibition of monopolistic activity represents one of the specific instructions on the types of measures to be taken by the state in order to fulfil the obligation of developing free competition, as imposed by article 6. However, other than the prohibition of monopolistic activity, the Constitution does not specify the content of the said provision, which poses significant complications in practical interpretations of the norm. When interpreting article 26 (4) of the Constitution, it is of foremost importance to distinguish between the concepts of monopoly and monopolistic activity. The term "monopoly" describes a market in which only a single undertaking operates.[52] In such case, the only body/entity operating in the market is the exclusive supplier of specific goods or services.[53] "Monopolistic activity" refers to a specific action, or sets of actions, taken by undertakings. According to the verbatim interpretation of the norm, the prohibition only applies to the monopolistic activity, not to the monopoly itself. However, in order to determine the full content of the constitutional provision in question, it is imperative to analyse its teleological basis to establish the extent to which it applies to the monopoly itself.

Similar to the Georgian Constitution, primary treaties of the EU also establish the principles of open market economy ("offene Marktwirtschaft") and free competition ("freier Wettbewerb"). Specifically, paragraph 1 of article 199 of the TFEU obliges the Member States to adopt economic policies in accordance with the principle of an open market economy with free competition. The provision in the TFEU bears resemblance to the obligation to promote the development of free competition imposed on the country by the Article 6 of the Georgian

[52] *Shenefield John, Stelzer Irwin,* The Antitrust Laws, 4-th ed. p. 36.
[53] *Lorenz, supra* note 26, p. 10.

Constitution. Furthermore, unlike the Georgian Constitution, the TFEU establishes no guidelines in regard to the prohibition of monopoly or monopolistic activity. However, according to article 102 of TFEU, abuse by undertakings of a dominant position is prohibited. As defined by the ECJ, a dominant position refers to a state which would allow an undertaking to act independently from its competitors, clients and consumers, and limit free competition in the relevant market.[54] This definition makes it clear that the dominant position of an undertaking and a monopoly do not represent identical concepts, seeing as the existence of an undertaking with a dominant position, unlike a monopoly, does not preclude the existence of other undertaking in the relevant market. Nevertheless, it should be noted that according to the CJEU, article 102 does not prohibit the possession of a dominant position itself, rather - only its abuse.

A similar stance can be observed in the Law of Georgia "On Competition", which also prohibits not the possession of a dominant position, but the abuse of such a position. According to the law, an undertaking can be a dominant entity when it owns more than 40 percent of the market share. Furthermore, a monopolistic undertaking always owns more than 40 percent of the share in the market, and therefore automatically represents an entity with a dominant position. Thus, a dominant position is a broader concept than a monopolistic concept – a dominant entity is not always a monopolist; however, a monopolist is always a dominant entity. Accordingly, a dominant position and a monopolistic position do not represent identical concepts, and the notion expressed in scholarly works that "monopolistic position" and "dominant position" are synonymous, should be rejected.[55] Furthermore, it is clear that permitting a dominant position (which is a broader concept including a monopolistic position) implies the permissibility of a monopolistic position in itself.

As previously stated, similar to EU competition law, the Georgian legislation on competition also prohibits not the possession of a dominant position, but its abuse. An analogous notion can be found in the decision of the Competition Agency of Georgia, which stated that it is unlawful to abuse market power by limiting a free market though the "refusal to supply", not owning 100% of the market share (monopolistic position) itself.[56]

European and Georgian competition law approach is conditioned upon the concept of competition and its specific characteristics. Free competition makes it possible for an undertaking to gain significant advantage on a market, and as a result of the healthy competition remain as a sole active entity in the market. According to the dominant approach in the sciences of competition law, "competition exists for it to be won"[57] and the law "does not punish an honest winner".[58] Therefore, strengthening market position and increase in market share by a specific undertaking should be considered a concurrent event of a healthy compe-

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[54] ECLI:EU:C:1983:313, Case 322/81, *"Michelin"*, § 30; ECLI:EU:C:1979:36, Case 85/76, *"Hoffmann-La Roche,"* § 38; ECLI:EU:C:1978:22, Case 27/76, *"United Brands"*, § 65.
[55] Group of Authors, *Turava Paata*, ed, *Commentary to the Constitution of Georgia*, Chapter 2, Tbilisi, 2013. p. 374.
[56] *supra* note 44.
[57] *Japaridze*, *supra* note 29, p. 29. Quoting Whish, Richard and Bailey, David, Competition Law, 9 th ed. Oxford University Press, 2018, p. 9.
[58] *ibid.*

tition. Such a drive for "victory" from undertakings represents one of the determining factors for the growth of the quality of competition. Accordingly, monopoly itself cannot be prohibited, considering that such prevention will partially or fully eliminate the incentive for rivalry and subsequently inhibit the processes of establishing and developing healthy competition. For this exact reason, article 26 (4) of the Constitution does not instruct the prevention of a monopoly and the country's fundamental law does not prohibit the possibility of a monopoly in the relevant market *per se*.

Permitting a monopoly does not indicate that it represents a desirable condition for developing free competition and an open economy. As mentioned above, article 6 of the Constitution obliges the county to ensure the establishment of effective competition in the relevant markets. However, the existence of a monopolistic position in the market precludes the development of an effective competition, since a monopoly represents a complete theoretical opposite of perfect competition.[59] When only a single entity operates on the market, the undertaking is not subject to the competitive pressure from other undertakings, and market conditions are established not through the natural processes of competition, but by the undertaking in a monopolistic position. A monopolistic position grants an undertaking the power to independently determine the volume, quantity and scale of goods and services supplied to the market. In addition, the said undertaking sets prices that are self-tailored and not dictated by the market. Usually, in the absence of competition, an undertaking also neglects technological development and production of innovative goods. As a result, in contrast to the effective competition, a monopolistic market, as a rule, has detrimental effects on consumers' interest, establishment of a free and open market, and the common good of the society. Furthermore, one of the foremost negative effects of a monopoly is the prevention of participation in production and commercial relations by other entities.[60] Therefore, despite the status of legality with which a monopoly was established in the market, it is still considered to be an "economic evil" and is associated with artificially inflated prices, limited production and decreased innovation.[61]

Following this, despite the monopoly not being prohibited by the Constitution, given the nonexistence of competition in a monopolistic market, the responsibility to ensure free competition, as imposed by the article 6 of the Constitution, obliges the country - without a disproportionate and unjustified interference in natural processes of competition - to create an environment predisposed to prevent a specific undertaking from gaining a monopolistic position.[62] It can be said, that a monopolistic position is tolerated, but undesired.[63]

In contrast to a monopoly, article 26 (4) of the Constitution directly prohibits monopolistic activity, which is a more multifaceted and complex category. As mentioned before, prohibition of monopolistic activity is the constitutional aspect of an economic competition.

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[59] *Lorenz, supra* note 26, p. 9; p. 29. Quoting Whish, Richard and Bailey, David, Competition Law, 9 th ed. Oxford University Press, 2018, p. 22.
[60] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1.
[61] *Shenefield, supra* note *52*, p. 37.
[62] Such a mechanism is *e.g.* control of concentrations. See *infra* Chapter 5.2.
[63] *Shenefield, supra* note 52, p. 40.

Accordingly, the said term must be defined in conjunction with article 6 of the Constitution, which envisages the principles of an open economy and free competition. The prohibition of monopolistic activity stems from the constitutional purpose of ensuring free competition.

In a broad sense, it can be said that an activity/set of activities categorised as monopolistic activity is restrictive for competition in nature. This is evidenced by the Law of Georgia "On Monopolistic Activities and Competition" (declared void since 2005), which, unlike the current Law of Georgia "On Competition" contains a legislative definition of a monopolistic activity. According to the mentioned law, monopolistic activity refers to the activity by an undertaking which has an influence on the price of goods and limits competition. Although this definition may not be comprehensive and fall short on painting a full picture of a monopolistic activity, the important part is that, according to this definition, the essential aspect of monopolistic activity is the limitation of competition. It is also important to note, that article 1 of the Law of Georgia "On Monopolistic Activities and Competition" prohibits monopolistic activities by an undertaking. According to this provision, a subject engaging in a monopolistic activity can be any undertaking, regardless of its power in the market. Therefore, the subject of monopolistic activity may not even be an undertaking in a monopolistic position.

Determining what constitutes a monopolistic activity regarding article 16 of the Constitution is incredibly complex. This complexity is, in part, caused by the fact that the concept of monopolistic activity is not recognised by modern Georgian competition law. The concept of monopolistic activity is also foreign to sources of EU legislation as well as that of its Member States.

With respect to the monopolistic activity, it is noteworthy that the notion promoted by scholarly works stating that "monopolistic activities are undertaken based on the position of monopoly"[64] is not to be shared. This approach significantly limits the scope to which article 26 (4) of the Constitution can be applied and lets various actions distorting competition remain permitted. Interpreting the norm in such a way and thereby limiting its scope comes in direct contradiction to article 6 (2) of the Constitution, which reinforces the principles of free competition. The mentioned norm should not be interpreted to be assuming that a monopolistic activity is predetermined by a monopolistic position. In this case, the norm will not apply to the actions by undertakings in dominant positions who do not represent monopolistic entities.

In conjunction with article 6 (2) of the Constitution and the interpretation of article 26 (4) (in the context of prohibition of monopolistic activities) of the Constitution in accordance with the discussion presented above as well as the views shared in the doctrine a monopolistic activity should be defined as a an action/actions by an undertaking (not necessarily a monopolist), which are prohibited by classical internationally recognised mechanisms of competition law and are predisposed toward monopolising a market. These mechanisms are similar in content across almost all developed Western nations and incorporate prohibitive norms for the actions by undertakings that are aimed at or result in, through the abuse of

[64] Group of Authors, *supra* note 55, p. 374.

power in the market, profit maximisation, limitation of production or technology, imposition of unfair prices, and so on. Prohibition of such actions represents one of the essential broad principles of an open economy and free competition.[65]

Furthermore, the Constitution also incorporates a provision according to which, monopolistic activity is permitted only in cases determined by the law. Although, this provision should not be interpreted as an implication, that the legislator has full discretion in determining the permissibility of a monopolistic activity. Allowing an activity that limits competition is permitted to a legislator only when it serves a legitimate public purpose and adheres to the principle of proportionality.[66] This might happen when free competition and natural processes in the market based on free competition are not as successful in achieving a healthy competitive environment and its derivative positive effects, as, in specific cases, would be possible by limiting competition; or when the competition is limited in an insignificant way, without harming effective competition in the relevant market.

## 5. CONSTITUTIONAL OBLIGATIONS OF THE STATE WITH RESPECT TO COMPETITION

### *5.1. GENERAL OVERVIEW*

As stated before, article 6 of the Constitution of Georgia defines the main directions of the economic order in the country and recognises free competition as the fundamental institute for market economy, while ensuring its protection. At the same time, given its abstract nature, article 6 does not provide the possibility to see an all-encompassing picture of state obligations with respect to competition.

However, it has been pointed out in the previous Chapter, that prohibition of monopolistic activities is one specific direction among the types and forms of actions that are to be undertaken within the scope of the state obligation of developing free competition. Accordingly, positive and negative obligations regarding promotion of free competition can also be defined while considering the prohibition of monopolistic activities, as prescribed under article 26 of the Constitution.

### *5.2. POSITIVE OBLIGATIONS OF THE STATE*

It is reasonable to begin the analysis of the state's positive obligations by discussing a specific judgment of the Constitutional Court, where it provided an overview of state obligations with respect to ensuring freedom of enterprise. In particular, the Court noted that the freedom of enterprise obliges the state to "create such a normative environment, which encoura-

[65] See the subsequent chapters for the discussion on specific ways of distorting competition.
[66] *Cf.* Judgment of the Constitutional Court of Georgia N2/11/747 dated 14 December 2018 in the case of "Ltd 'Giganti Security' and Ltd 'Security Company Tigonis' v. the Parliament of Georgia and the Minister of Internal Affairs of Georgia".

ges viable subjects and does not result in their expulsion from the market".[67] Similar to freedom of enterprise, the constitutional provision regarding free competition obliges the state to create such a legislative order, which ensures the formation of free competition, its development and the protection of the natural process of competition.[68] The legal order should create a reasonable balance between the interests of entrepreneurs, consumers, state and the public, and, based on this balance, it should ensure effective performance of functions listed in Chapter 2 of this article.

In addition, taking care of free competition implies protection of a healthy and natural process of competition from various restrictions. Within the scope of positive obligations under article 6 of the Constitution, the normative environment created by the state should prevent artificial obstacles to free competition and should ensure the constant development of the dynamic process of competition.

Restrictions of the natural process of competition can occur as a result of actions of the state as well as those of market operators. Accordingly, within the scope of its constitutional obligations, the state shall provide legislative mechanisms, protecting the process of competition both from state bodies and undertakings. Under the said constitutional provision, the state must create a normative environment ensuring competition free from interference from individuals and state bodies, and the restrictions deriving from them.[69]

In accordance with the elements of competition described in Chapter 1, the state is under the obligation to promote the formation of markets for goods and services, ensure the undertakings' free access to this market and achieve a high degree of competition, - i.e. antagonistic relationship between undertakings operating therein. Existence of the said elements of competition is impossible without the freedom of enterprise, which is guaranteed under articles 6 and 26 of the constitution. Under the definition provided by the Constitutional Court, freedom of enterprise ensures that an entrepreneurial subject freely selects a specific entrepreneurial activity and engages in it unobstructed.[70] To put it in other words, it is precisely the freedom of enterprise that provides the possibility of creating new undertakings, which select a specific area of activities independently and, subsequently, become participants of the relevant market. Their entry into market automatically guarantees that the said subjects will become participants of the market and, accordingly, of the competitive process existing within the market. These undertakings begin advancing their own position in the market at the expense of other market operators either for the purposes of achieving their own material wellbeing or maximising the profit gained from their activities. Thus, antagonistic relationship between these subjects creates a competition among them.

In this regard, one of the most essential factors is the autonomy of will of the undertakings, as well as is capacity to determine its own economic policy independently, which is guaran-

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[67] *supra* note 21, para. 5.
[68] Judgment of the Constitutional Court of Georgia N2/11/74 dated 14 December 2018 in the case of "Ltd 'Giganti Security' and Ltd 'Security Company Tigonis' v. the Parliament of Georgia and the Minister of Internal Affairs of Georgia", para. 2.
[69] *Opperman Thomas, Clasen Claus Dieter, Nettesheim Martin,* Europarecht, 6. Auflage, § 20, Rn. 3
[70] *supra* note 21, para. 2.

teed by the constitutional recognition of the freedom of enterprise. This is demonstrated by one of the decisions of the Constitutional Court, where it noted that the formation of free competition in the market is indispensably linked to the freedom of enterprise.[71] Only in the context of freedom of enterprise it becomes possible to create new markets and enable undertakings to operate freely on these markets. Without the freedom of enterprise, it is impossible to create competition, given that it forms the precondition for the creation of new markets as well as providing free market entry to undertakings. This is the reason why article 6 (2) of the Constitution refers both to freedom of enterprise and free competition, as two inseparable categories, which together create the legal grounds for the formation of open economy in the country.

The process of competition is being formed and developed when undertakings are fully exercising their constitutional freedom of enterprise.[72] However, unlimited exercise of freedom of enterprise would have created a threat of such rights being used by undertakings for the purposes of distorting free competition, which, of course, would have threatened the process of creation of free and competitive markets. In particular, competitive pressures of various scales might incite undertakings to avoid the process of healthy competition and think of artificial mechanisms for reducing or eliminating such a pressure.

According to the position widely accepted in German scholarly literature, the existence of competition is impossible without economic freedom. However, unlimited freedom of enterprise in itself contains high risks for entrepreneurial freedom.[73] The process of healthy competition naturally creates reasonable and proportionate frames for freedom of entrepreneurship, within which it is possible to exercise the said freedom in a form and to an extent which does not threaten the stability of market structure.[74] Precisely for this reason, the ECJ noted that defining market policy within the scope of freedom of enterprise is not only the right of undertakings, but also – their obligation. In particular, the Court observed that an economic policy to be implemented or which is being implemented by an undertaking should be defined solely by this undertaking,[75] *i.e.* without making prior agreements with other market participants. According to the Court, the grounds for norms protecting competition are stemming from the opinion suggesting that every participant of the market defines their economic policy independently.[76]

Making an agreement regarding undertaking's economic policy with other undertakings while intending to reduce the competitive pressure and thereby protect one's own material or other types of interests contains serious threats to a healthy competitive environment and a natural process of competition. In this case, the pressure of competition within the market is reduced and undertakings become in charge of governing market processes, contrary to the natural process of competition. This contradicts the principle of free competition, under

[71] *supra* note 21, para 5.
[72] *Kling/Thomas, supra* note 4, Rn. 2.
[73] *Füller*, in Kölner Kommentar zum Kartelrecht, Bd. 3. § 101. Rn. 4.
[74] *ibid.*
[75] ECLI:EU:C:2009:343, *"T-Mobile Netherlands BV"* Case C-8/08 § 32.
[76] ECLI:EU:C:2006:734, *"Asnef-Equifax"*, Case C-238/05 § 52.

which the market should be governed by competition rather than a specific subject or a group of subjects. Anticompetitive Agreements are not only in breach of the principle of free competition, but they are also against the interests of entrepreneurial subjects and consumers.[77] Accordingly, the normative environment created by the state within the scope of its positive obligation to take care of competition should ensure prevention of actions aiming to restrict competition among undertakings, as well as imposing sanctions on undertakings in case of engaging in such actions.

It should also be noted that anticompetitive agreements represent one manner of limiting the realisation of autonomy of will of undertakings, which is protected under the freedom of enterprise. However, according to the definition of the Constitutional Court, "the interference within the formation of this will should not be excluded, when there is a real risk that a subject will abuse the entrusted entitlements and will act in contradiction to the traditions established in civil turnover. It is inadmissible the free will should become the ground for the formation of non-equivalent, disproportionate and unfair relations which would cause the distancing of the participants from the traditions of turnover and would at the same time come in conflict with the acknowledged moral imperatives".[78] Given that anticompetitive agreements represent an action against common good and interests, which threatens a healthy competitive environment and the country's economic order, it can be said that prohibiting actions distorting competition with the determination to take care of competition constitutes a justified restriction of the undertaking's freedom of enterprise.

Freedom of enterprise is the principal foundation of the competition, however, protection of competition borders with freedom of enterprise insofar that it is unacceptable for the freedom of enterprise of one or several undertakings to limit this right for other undertakings or inflict disproportionate and unjustified harm to the wellbeing of consumers. Under article 6 (2) of the Constitution, guaranteeing the freedom of enterprise is not a value higher than the development of competition, formation of the competitive market or free and open economy. This provision of the Constitution points to the obligation of undertakings not to use their constitutionally guaranteed freedom of enterprise for the purposes of distorting competition and, in this way, obstruct the process of formation or development of the free and open economy.

Actions such as abuse of dominant position, unfair competition and such concentrations of undertakings that are threatening the competition can be regarded as the exercise of the freedom of enterprise. However, alongside the anticompetitive agreements, all the aforesaid actions are prohibited by the Georgian legislation, as well as that of leading Western countries. In Georgian reality, this prohibition stems directly from the obligation to take care of competition under article 6 (2) of the Constitution.

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[77] See *infra* Chapter 6.

[78] Judgment of the Constitutional Court of Georgia №1/2/411 dated 19 December 2008 in the case of "LTD 'Russenergoservice', LTD 'Patara Kakhi', JSC 'Gorgota', Givi Abalaki's Individual Company 'Farmer' and LTD 'Energia' v. the Parliament of Georgia and the Ministry of Energy of Georgia".

The prohibition of abuse of dominant position protects the market from such actions of subjects having market power, which are harmful for a healthy competitive environment. Subjects having such a market position might use their power to obstruct activities of competitor undertakings, foreclose them from the market, create market barriers for potential competitors, set unfair prices for consumers, etc. This is the reason why a state should, within the scope of its obligation to care about competition, create such a normative environment, which can prevent the occurrences of the abuse of dominant position by subjects having significant market power and protect undertakings, consumers and the process of healthy competition as such.

In addition, as noted above, the obligation under article 6 (2) to take care of free competition prescribes that a state must create such an environment, without disproportionate and unjust interferences within the natural process of competition, that will be aiming to prevent specific undertakings from gaining monopoly over the market. Taking this into account, Georgian and European competition law, as well as that of different Western states envisage the possibility to control concentrations which are harmful for competition. Concentration is at hand when undertakings are linked/united by merger or other means.[79] Accordingly, concentrations result in combining the market power of undertakings operating in the market, which, obviously, decreases the degree of competition. Hence, in order to preserve free and healthy competition, it is important for the state to adopt special norms regulating such transactions, which will be aiming to prevent concentrations harmful for the process of competition.

For the purposes of protecting interests of consumers and entrepreneurs, the process of competition should follow fair rules of the game and there should be no place for undertakings' actions against good faith, which are contrary to work ethics and harms interests of competitors. Thus, it is necessary for one of the main directions of taking care of free competition under article 6 to be the prohibition of bad faith actions, which are harmful for the competition.

Accordingly, it can be stated that prohibitions regarding anticompetitive agreements, abuse of dominant position, unfair competition and concentrations that are incompatible with healthy competitive environment represent the principal mechanism for preventing threats stemming from undertakings, within the scope of the state obligation to take care of competition. However, as noted above, a healthy competitive environment can be threatened not only by private individuals, but particularly by executive bodies of the government as well. Thus, under the positive state obligation stemming from article 6 of the Constitution, the legislature shall provide such a legislative order, which will be able to prevent distortion of competition by various administrative bodies.

Distortion of competition by administrative bodies might be at hand when a preferential treatment is guaranteed for a specific undertaking, or, on the contrary, - when obstacles are created for an undertaking, thereby obstructing the natural competitive equilibrium within the market. Providing advantages to specific undertaking or a group of undertakings at the

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[79] *Zukakishvili Keti*, See Japaride/Zukakishvili/Zhvania/Kobadze/Gvelesiani/Akolashvili/Sergia/Momtsemlidze, Constitutional Law of Georgia, p. 496.

expense of government resources distorts the natural state of the market and provides artificial benefits to one part of undertakings, the achievement of which would have been impossible for this undertaking within the course of natural development. Such an approach is known in competition law as state aid, which implies "giving selective economic advantage by a state to a specific undertaking to a specific kind of activity".[80] The normative environment created by the state within the scope of its positive obligations under article 6 (2) should ensure reasonable regulations regarding provision of state aid and the existence of respective procedural norms.

Besides, a threat posed by administrative bodies can also be created when undertakings are granted certain rights exclusively with respect to public procurement, in breach of competition, equality, etc. For this reason, the Georgian Law on Competition prescribes certain norms which impose limitation on different government agencies. In this regard, it important to take a look at the definition provided by the Competition Agency: article 10 of the Law "On Competition" intends to perform such constitutional obligations, by barring the government as well as the bodies of autonomous republics and local self-government from carrying out activities which obstruct the development of free entrepreneurship and competition.[81]

Another important direction for ensuring competitive environment in the country is the area of public procurement, which, as stated by the Supreme Court of Georgia, "represents one of the most important functions related to public governance, and its legal consequences have an impact on creating a healthy competitive environment for entrepreneurial subjects, development of market economy, and ensuring lawful and fair civil circulation".[82] Precisely for this reason, article 6 of the Constitution also requires ensuring the principle of free competition in the context of public procurement.

In the light of the foregoing, it can be stated that the normative environment created by the state within the scope of its positive obligations regarding free competition should, on one hand, ensure the compatibility of executive bodies' actions with the free market order and, on the other hand, should eliminate different actions aiming to distort competition undertaken particularly by undertakings with the intent to distort competition. Accordingly, special legislation created with the intention to protect free competition shall not serve the purpose of state or undertakings' hegemony, but rather that of the pressure stemming from the natural process of competition. A normative environment created by the state within the scope of its positive constitutional obligations with respect to free competition should ensure that, on the hand, undertakings possess different scales of market power and; on the other hand, administrative/financial resources concentrated in hands of state organs shall be balanced in such a way that would prevent the hegemony of a state or undertaking(s) over the market, and that

[80] *Adamia Givi*, "Qualifying State Action as a State Aid according to the Georgian and European Competition Law" See "Georgian-German Journal of Comparative Law", 4/2019, p. 47.
[81] Order N04/216 of the Chairman of the Competition Agency of Georgia dated 17 August 2018 in "The case N3 regarding advance guarantees, p. 28.
[82] Judgment of the Supreme Council of Georgia, 21/07/2014, BS-667-642(k-13).

would ensure that the market is entirely governed by a healthy and natural process of competition.

Considering these elements of the positive state obligation to take care of free competition, creating a relevant normative environment is possible through enacting special legislation on competition. Competition laws create the principal grounds for the formation and development of market economy. They should ensure free competition and should limit already existing market powers in cases where the latter obstruct or might possibly obstruct the process of healthy competition and inflict harm upon efficiency of the market related to this process. This is the reason why Georgian legislation has adopted the Law "On Competition", which is aiming to prevent threats stemming, on one hand, from the government and bodies of local self-governments or autonomous republics, and, on the other hand, - from undertakings. It prescribes the norms prohibiting agreements distorting competition, abuse of the dominant position, unfair competition and concentrations that are incompatible with the healthy competitive environment. Provisions barring bodies of government, local self-government and autonomous republics from engaging into activities distorting competition take care of the prevention of obstructing competition by government bodies. In addition, the positive obligation to take care of competition also implies the necessity of a specialised administrative body, equipped with effective mechanisms in order to execute the said norms. It is also noteworthy that creating a normative environment within the scope of the positive state obligation to take care of free competition might not be limited only to the existence of competition legislation, and additional legal acts might be adopted in order to stimulate and encourage the development of healthy competition in the country.

### *5.3. NEGATIVE OBLIGATIONS OF THE STATE*

Negative obligations stemming from the constitutional guarantee for the protection of free competition imply abstaining from legislative actions or measures, which would amount to artificial interference within the natural process of competition and would obstruct the process of its natural development. Such an interference can have different forms and nature, the effects of which are to be determined on a case-by-case basis as a result of analysing circumstances of a given case. This paper will touch upon two of the most important violations of the state's negative obligations – the breach of competitive equality and imposing barriers for entering the market.

One of the most important aspects of taking care of competition is the protection of competitive equality. Under the case-law of the Supreme Court of Georgia, ensuring equality among undertakings is regarded as the measure for the promotion of free entrepreneurial activities and the guarantee of the constitutional provision regarding free competition.[83] The Constitutional Court noted that the *"state is obliged to abstain from creating unequal conditions for undertakings"*.[84] However, competitive equality is characterised by certain specificities. In particular, it implies equal treatment of not only undertakings operating on the market, but

[83] Judgment of the Supreme Council of Georgia 21/07/2014, BS-667-642(k-13).
[84] *supra* note 68, para. 3.

potential undertakings as well. To put it otherwise, for the purposes of ensuring effective competition on the market, it is essential that undertakings be considered as equal; while performing its negative obligations under article 6 of the Constitution, the state should not create a legislative basis that can breach competitive equality of similar subjects.

Violation of competitive equality might occur when the state gives a certain advantage to one undertaking, thereby creating such favourable market conditions that the latter would not have been able to achieve within the course of natural development of the market. Such an example is one of the cases of the Constitutional Court, where the state created legislation equipping the State Security Service with administrative resources, which resulted in competitive advantages as compared to its competitor undertakings.[85]

State interference might be at hand not only in cases where undertakings are given an advantage, but also where market position of a given undertaking is worsened. State actions might disproportionately limit rights of an undertaking operating within the relevant market, or they might obstruct its entrepreneurial activities, which subsequently results in worsening the market position of a particular undertaking, thereby giving other undertakings a competitive advantage.

Accordingly, the breach of competitive equality might occur in two cases: 1) when a state gives an undertaking or a group of undertakings certain advantages, thereby creating more favourable conditions for them as compared to their competitors;[86] 2) when a state creates disadvantageous conditions for one undertaking or a group of undertakings as compared to their competitors.

When examining state actions with respect to competitive equality, it is important to identify undertakings that are substantially equal. These would be subjects operating within the same market as well as potential subjects (subjects that have a reasoned intention to enter the relevant market). Afterwards, it should be examined whether a given legislative regulation provides a selective advantage to one of them, or whether it limits market positions of these undertakings. In both cases, state interference within the natural market process will be at hand, which is in breach of competitive equality of undertakings and harms the healthy competitive environment by destroying the equilibrium.

Accordingly, for the purposes of performing negative obligations with respect to the development of competition, it is also important to abstain from creating barriers for market entry. According to the Constitutional Court of Georgia, free competition ensures the protection against unjustified obstacles.[87] In this regard, scholarly works distinguish two types of barriers – financial/technical and institutional.[88]

In the context of negative state obligations related to competition, setting forth the requirement to have a certain amount of capital for market entry or specific technical preconditions

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[85] *supra* note 68.
[86] *supra* note 68, para. 4.
[87] *supra* note 68, para 6.
[88] Akolashvili/Sergia, See Japaride/Zukakishvili/Zhvania/Kobadze/Gvelesiani/Akolashvili/Sergia/Momtsemlidze, Constitutional Law of Georgia, p. 410.

might be regarded as technical/financial obstacles. As for institutional obstacles, - they might be at hand where some difficulties arise with respect to registration of an undertaking, or where permission or license is required for carrying out certain activities, etc.

With regards to the negative obligation of the State derived from the constitutional guarantee of safeguarding free competition, it is essential to point out a judgment of the Constitutional Court of Georgia, which dealt with the provision in the Law "On State Procurement" stating, that the State Procurement legislation was not applicable to the public procurement by a contracting authority of postal and courier services of the LLC Georgian Post (Law of Georgia "On State Procurements", article 3, paragraph "r").[89] With this Judgment the Constitutional Court of Georgia correctly declared the existing provision unconstitutional and invalidated it. However, the argumentation and the grounds which the Constitutional Court used to reach the conclusion are problematic. The Court points out the state aid multiple times and elaborates on the elements, characteristics and other aspects thereof. It is primarily noteworthy, that State Aid / Staatliche Beihilfe is a legal institute within the competition law, and it is not constitutional-law category. Therefore, assessing the constitutionality of legal provisions based on state aid cannot be appropriate. As mentioned above, constitutional obligation of the State with regards to the state aid is bound by proportional regulation of issuing state aid, which is positive obligation of the State to create relevant normative environment.

The instance discussed by the mentioned case is classic example of violating state negative duty. The State, on the one hand, infringes the competitive equality of the existing and potential undertakings on the market by granting unjustified and indirect privileges to the Ltd Georgian Post, which was expressed in the ability of providing postal services without tender procedures to contracting authorities. This provision also imposed barriers to postal service-providers from entering relevant market and excluded from such market the competitors and potential competing undertakings of the Ltd Georgian Post. Therefore, the State violated its negative constitutional obligation and did not abstain on a legislative level from the act or event, which would manifest into artificial interference and hindrance or encroachment of the natural development of this process.

As stated before, the principal characteristic of the competition process is its dynamic nature. Accordingly, in order to ensure constant development of this process and to preserve its dynamic nature, it is important for undertakings to have the ability to freely enter and operate in the relevant market within the country. This ability might be restricted by any obstacle set forth by the state, which results in difficulty or impossibility for new undertakings to enter the relevant market.

[89] *supra* note 21.

## 6. GROUNDS FOR EXAMINING CONSTITUTIONALITY OF NORMS WITH RESPECT TO FREE COMPETITION

Breach of the aforesaid positive and negative obligations undoubtedly creates the necessity to examine constitutionality of a specific action. Accordingly, it is important to identify constitutional provisions, with respect to which it will be possible to examine constitutionality of a specific norm in cases where there is an alleged breach of obligations related to free competition.

Based on one of the most important definitions provided by the Constitutional Court, assessing the constitutionality of the norm with respect to the constitutional principle of free competition is admissible.[90] In this definition, the Constitutional Court rightly pointed out that assessing constitutionality of the norm only with respect to article 6 of the constitution was impossible. As mentioned, in this case, free competition is one of the foundations of the economic order in the country as well as the general constitutional principle. Accordingly, examining constitutionality of the norm in the context of competition requires linking it with other constitutional provisions.

The said link should be established while considering those functions that are performed by free competition within the scope of the country's economic life. Functions of competition have already been discussed in Chapter 2 of this paper and, as a result of the analysis of these functions, it is evident that positive effects stemming from free competition are benefiting not only entrepreneurs, but also consumers. Constitutional provisions regarding the protection of freedom of entrepreneurship and consumers' rights are enshrined in article 26 (4) of the Constitution.

The said connection from the point of view of the context points to the fact that certain aspects of spheres protected under freedom of substantially equal and consumers rights shall be defined in accordance with functions of competition, that is the foundation of the country's economic order.

One of the aspects of freedom of enterprise is the possibility to engage into entrepreneurial activities in a healthy competitive environment. This freedom, in conjunction with article 6 of the Constitution, gives every entrepreneur the right to carry out its activities in a healthy competitive environment. This is also demonstrated by the definition provided by the Constitutional Court. Namely, the Court noted that the rights protected under article 26 (4) also implies the state obligation to abstain from distorting competition.[91] In this regard, consumer's rights consist of the possibility of receiving products of high quality for the minimal price set as a result of effective competition, as well as their ability to benefit from other goods produced as a result of free competition.

Accordingly, in the context of competition, constitutionality of a given norm can also be assessed with respect to freedom of entrepreneurship as well as provisions ensuring the protection of the consumers' rights. Article 6 of the Constitution encompasses part of the

[90] *supra* note 21, para 4.
[91] *supra* note 21, para. 19.

freedom of enterprise and consumers' rights guaranteed under article 26 of the Constitution. This means that the freedom of enterprise and consumers' rights imply carrying out entrepreneurial activities in a healthy competitive environment as well as providing customers with benefits stemming from effective competition (low price, high quality, more choice, etc.). Thus, depending on factual circumstances of specific cases, free competition can also fall within the scope of constitutional provisions ensuring the protection freedom of enterprise or consumers' rights. Hence, the breach of negative and positive state obligations with respect to free competition should also be deemed as an interference within the sphere protected under article 26 (4). In addition, legislation regarding economic governance alters competitive conditions of the market,[92] and, in this regard, it can also be deemed as an interference within the rights protected under article 26 (4) of the Constitution.

Besides, in accordance with exceptions from article 26 (4), enabling monopolistic activities at the legislative level also constitutes interference within the rights protected under this article (freedom of enterprise, consumers' rights). Hence, monopolistic activities shall also undergo the same test as other types of interference within free competition.

In addition, not every change in competition and interference within article 26 (4) point to its unconstitutionality.[93] Carrying out entrepreneurial activities in a healthy competitive environment and the possibility for the consumers to enjoy benefits stemming from effective competition are not absolute rights, and they can be subjected to proportionate limitations aiming to achieve a legitimate aim.[94] In such cases, legitimate aims might vary, and their analysis is a topic for another research, exceeding the scope of the present paper. However, it can be pointed out that one of the legitimate aims for limiting free competition might be the achievement of the functions, enumerated in Chapter 2 of the paper. In other words, restriction of free competition might be justified in cases where a special norm or a unity of norms integrate the aforesaid functions of the competition and ensure their more effective performance, as compared to how they would have been performed in the context of free competition independent from state interference.

## CONCLUSION

Based on the discussion presented in this article, it is possible to conclude that article 6 of the current edition of the Constitution of Georgia recognises free competition as the foundation of the economic order in the country. One of the main directions created based on this constitutional provision, as well as the economic policy of the country stemming from it, is ensuring healthy competitive environment in relevant markets. At the same time, this principle is of particular significance for the purposes of interpretation of article 26 (4) of the Constitution, as well as for defining the scale and types of specific obligations of the state.

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[92] BVerfGE 4, 7 – "*Investitionshilfe"* § 57.
[93] BVerfGE 4, 7 – "*Investitionshilfe"* § 57.
[94] *Cf. supra* note 68, para. 47.

This paper defined main elements and main characteristics of competition as prescribed under article 6 of the Constitution. In addition, the second part of the paper was dedicated to the analysis regarding principal functions of competition, which are highly valuable for the purposes of interpretation of specific provisions of the Constitution and Georgian legislation.

After elaborating on functions of competition, the paper also defined the scope and scale of the state obligation to take care of competition under article 6 of the Constitution. Based on leading scholarly work and practice of Western developed countries, it has been pointed out that the state obligation under this norm does not imply the achievement of perfect competition, but rather, - the effective competition.

Further, due regard has been paid to the constitutional provision in article 26 (4) of the Constitution regarding the prohibition of monopolistic activities. With respect to this provision, it has been noted that the Constitution does not prohibit monopoly as such, but rather – it prohibits monopolistic activities, which might not necessarily be carried out by a subject holding monopoly.

In addition, this paper defined the scope of positive and negative obligations of the state in the context of taking care of the development of competition; interrelation between constitutional provisions regarding the development of competition, freedom of entrepreneurship and protection of the consumers' rights has been analysed as well.

This paper also discussed the importance of the constitutional provision in the context of assessing constitutionality of the norm as well as its teleological grounds. As a result, it has been noted that free competition falls within the scope of article 26 (4) of the Constitution, which concerns the freedom of enterprise and the rights of consumers. Accordingly, examining constitutionality of the norm can also be possible with respect to article 6, in conjunction with article 26 (4) of the Constitution.