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*CORRESPONDENCE

Csaba Erdős
✉ erdos.csaba@ga.sze.hu

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The limits of restrictions on free competition in the state of emergency—the Hungarian fuel and food retail price maximisation in the light of the Hungarian constitutional court's, the Strasbourg court's and the Luxembourg court's jurisprudence

Csaba Erdős^{1*}, Viktória Verebélyi² and László Knapp³

¹Department of Constitutional Law and Political Sciences, Faculty of Law and Political Sciences, Széchenyi István University, Győr, Hungary, ²Doctoral School of Law and Political Sciences, Széchenyi István University, Győr, Hungary, ³Department of International and European Law, Faculty of Law and Political Sciences, Széchenyi István University, Győr, Hungary

Since March 2020, Hungary has almost continuously been under a type of special legal order, the state of emergency, which was first introduced to better protect against the COVID-19 epidemic and then in May 2022—following the amendment of the Fundamental Law—due to the Russian-Ukrainian war. Both the crises caused by the epidemic and the armed conflict in the neighbouring country were de facto limited not only to the health and migration-humanitarian fields, but the Government made use of the exceptional legislative powers of the special legal order in almost all areas of life. Economic regulation was no exception: in 2021, the Government capped the retail price of fuel, and from February 2022 onwards, the retail price of several basic foodstuffs (including flour, sugar, milk, chicken breast and other meats, and later eggs and potatoes). The aim of this paper is to show the limits of one of the most powerful state interventions in the economy: the price maximisation. This can basically be determined on the basis of the relevant case law of three fora of legal protection—the Hungarian Constitutional Court, the European Court of Human Rights in Strasbourg and the Court of Justice of the European Union. A comparison of the case law of the above-mentioned three courts also shows which legal protection mechanism is most effective against legislation restricting the free competition—at least in a period of special legal order.

KEYWORDS

state of emergency, Hungary, price maximisation, fundamental rights, SPAR-case

1 Introduction

The state of emergency as a type of special legal order¹ was declared in Hungary on the 11th March 2020² and has been in place almost continuously since then.³ It was first introduced to better protect against the crisis caused by the COVID-19 epidemic⁴ and then in May 2022—following the amendment of the Fundamental Law—due to the Russian-Ukrainian war. Both the epidemic and the armed conflict in the neighbouring country were *de facto* limited not only to the health and migration-humanitarian fields, but the Government made use of the exceptional legislative powers of the special legal order in almost all areas of life. Economic regulation was no exception: among the economic policy measures, public and professional interest mainly focused on the various types of price regulation by public authorities. One group of such measures was the introduction of retail price ceilings for some basic foodstuffs—including flour, sugar, milk, chicken breast and other meats, and later eggs and potatoes—(hereinafter referred to as food price caps). The other group of official price-fixing measures consisted of the retail price ceilings for certain types of fuel (hereinafter referred to as fuel price caps).

1 It should be stressed that the state of emergency is considered as a legal order, even if it is an exceptional state, and is treated as such by the Hungarian legal system. Contrary to the theory of Carl Schmitt, who interpreted the decision on the exceptional status as the supreme expression of the sovereign, it is not a matter of law but of politics. It reveals to whom that power is vested and who is the true sovereign in a given state. For more on the political-philosophical foundations of the state of emergency (see Schmitt, 1922).

2 Government Decree 40/2020 (III. 11) on the declaration of an emergency.

3 For the first time, the state of alert was “suspended” between 16 June 2020 and 4 November 2020—replaced by an epidemiological alert. See: Government Decree 282/2020 (17.VI.2020) on the lifting of the state of emergency declared on 11 March 2020, Government Decree 283/2020 (17.VI.2020) on the introduction of an epidemiological alert and Government Decree 478/2020 (3.XI.2020) on the declaration of a state of emergency. On 8 February 2021, the state of emergency declared on 3 November 2020 was lifted by Government Decree 26/2021 (I. 29.), but with the same effect, a new state of emergency was declared by Government Decree 27/2021 (I. 29). *De facto*, the Government has also maintained the state of emergency continuously. As of 1 June 2022, Government Decree 181/2022 (VII. 24) lifted the state of emergency of 2021. However, in view of the armed conflict and humanitarian disaster on the territory of Ukraine and in order to avert the consequences of these in Hungary, Government Decree 180/2022 (II. 24) on the declaration of a state of emergency and certain emergency rules reintroduced the “new” state of emergency. In the same way, *a de facto* state of emergency remained in place on 1 November 2022. Following the Ninth and Tenth Amendments to the Fundamental Law, it became necessary to lift the state of emergency declared on 1 June 2022, which was abolished by the Government Decree 423/2022 Decree 424/2022 (X. 28.) on the declaration of an emergency situation and certain emergency rules to avert and manage the consequences of armed conflict and humanitarian disasters in Ukraine and their consequences in Hungary, which is still in force.

4 For further details on the diversity and impact of different governments’ measures to reduce public health risks (see Abayomi, 2024; Capati et al., 2023; Andersson et al., 2022).

2 Materials and methods

The aim of this paper is to show the legal limits of one of the most powerful state interventions in the economy: the price control by its maximisation (price ceilings). This can basically be determined on the basis of the relevant case law of three fora of legal protection—the Hungarian Constitutional Court (hereinafter: HCC), the European Court of Human Rights in Strasbourg (hereinafter: ECtHR) and the Court of Justice of the European Union (hereinafter: CJEU). A comparison of the case law of the above-mentioned three courts also shows which legal protection mechanism is most effective against legislation aimed at protecting the economy—at least in a period of special legal order. This is also the main question of the research.

The research applies the classical jurisprudential methodology: the interpretation and critical analysis of norms and individual decisions. It will also use these to draw conclusions about the future, hypothetical decisions of the forums analysed. On the basis of the past practice and hypothetical decisions of the HCC, the ECtHR and the CJEU, it attempts to identify the most effective forum for price maximisation mechanisms. It also provides an answer to the question of which gives the national legislator the greatest freedom of discretion, i.e., policy-making leeway.

To this end, the paper outlines the legal basis for state intervention in the economy and then describes the institution of special legal order price regulation in Hungary. It will then analyse the legal protection provided by the HCC, then the ECtHR and finally the CJEU in order to establish the answer to the main research question.

The fact that both the HCC and the CJEU have taken substantive decisions only on the food price cap makes comparisons difficult. Nevertheless, we attempt to outline, based on the jurisprudence on the food price cap, what decisions these fora may take on fuel price maximisation. In the case of the ECtHR, where there is no explicit jurisprudence on price ceilings, we will build our conclusions on its decisions on the right to property.

3 General considerations on market economy and price regulation—from a legal perspective

One of the pillars of Western-style democracies is the market economy, which has its roots in Roman law. The ‘sanctity’ of property, the freedom of contract that ensures its dynamism—and the free determination of prices, which is one of its most important elements—were fundamental institutions of Roman law and remain so to this day.⁵

With the emergence of the charter constitutions, a new level of property protection emerged: that of fundamental rights. In addition, a number of constitutions, including the Hungarian Fundamental Law, enshrine the market economy and freedom of contract as

5 According to Peter Temin the early Roman Empire was primarily a market economy. Although the parts of this economy located far from each other, but they still functioned as part of a comprehensive Mediterranean market (Temin, 2001; Temin, 2006).

constitutional values. Accordingly, a complex system of constitutional property protection is also functioning at the national level, guarded by the constitutional adjudicating body, the HCC in Hungary.

Property protection at the national level has been complemented by supranational legal protection regimes. From the point of view of a state, which is a member both the Council of Europe and the EU, the two most important fora are the ECtHR in the field of international law and the CJEU in the field of *sui generis* EU law.

In spite of the historical developmental arc outlined above and the fact that the democratic rule of law is unthinkable without a market economy—and its safeguards like right to property, freedom of contract—price regulation is not unknown. In addition to the Roman legal roots of property, price regulation can also be found: Diocletian's edict of 301 regulated in detail the maximum price of goods. The reason for issuing the edict at the time was high inflation (Prantl, 2011). The fight against inflation has remained a legitimate purpose of intervention in the economy in modern times—often, but not exclusively, in wartime.⁶ One of the most famous of these regulations is the US General Ceiling Price Regulation (GCPR) of 1951, which introduced the “general freeze” after the Korean war broke out. This regulation “froze” prices at the highest prices charged by individual sellers during the period between December 19, 1950, and January 25, 1951 (Ginsburg, 1952; Durham, 1952).

The examples given show that price maximisation has its place, at least exceptionally, even in the most liberal market economy. Such strong state intervention can be justified primarily in times of financial-inflationary crises, which are often underpinned by other types of crises, such as war. Also in 2021, the runaway inflation and the resulting financial and economic crisis were the basis for the Hungarian government's decision to introduce a price cap on fuel from 2021 and on certain basic foodstuffs from 2022.⁷ As in the case of the Edict of Diocletian and the GCPR, there were also ‘underlying crises’ which, in the government's view, triggered inflation: the COVID-19 pandemic in 2020, and the Russian-Ukrainian conflict, which erupted in 2022 and escalated rapidly into a war.

6 For example, Cochoy and colleagues examine price ceilings in the inflationary environment of the postwar era (Cochoy et al., 2023).

7 Fuel price regulation in recent years has not been without precedent in the Central and Eastern European region. The Slovenian government decided to cap the retail price of certain fuels in response to the turmoil in the oil market and non-seasonal price fluctuations. In February 2022, the Croatian government justified the restriction of retail fuel prices by the sudden change in global oil prices and oil derivatives, and the imbalance between supply and demand. In addition to maximising fuel prices, the Croatian government decided to introduce a retail price cap. For Croatian legislation see: Decree NN 17/2022 (7 February 2022) on the determination of the maximum retail price of petroleum products; Decree NN 86/2022 (25 July 2022), amending the Decree fixing the maximum retail selling price of petroleum products; Decree NN 78/2024 (1 July 2024) on determining the highest retail prices of petroleum products; NN 107/2023 (September 15, 2023), Decision on direct price control measures for certain products in retail trade For further information on the petroleum product price structure in Slovenia, see: <https://www.gov.si/en/topics/petroleum-product-prices/>.

4 Overview on the relevant regulation

4.1 Regulation of fuel price maximisation

The price cap on certain fuels was in force in Hungary between 15 November 2021 and 31 December 2022. During its little more than 1 year of operation, the legislation was subject to a number of technical and substantive amendments. Below we review the most important changes to the regulation in this narrow area of law.

The Government imposed the fuel price cap by exercising its emergency legislative powers under Article 53(2) of the then-effective Fundamental Law, through the adoption of two emergency government decrees. Government Decree 624/2021 (XI. 11.) on the different application of Act LXXXVII of 1990 on the determination of prices during an emergency set the maximum retail gross price of 95 octane petrol and diesel at HUF 480 per litre.⁸ Government Decree 626/2021 (XI. 13.) on the detailed rules for the distribution of fuels at the official price entered into force at the same time as Government Decree 624/2021 (XI. 11.) and laid down a number of provisions to ensure effective distribution. For example, it stipulated that service stations may not operate shorter opening hours than normal and may only announce a closure of their service stations in the cases specified in the Regulation.⁹

The regulatory environment for fuel retailers improved from February 2022. Government Decree 57/2022 (II. 28.) on certain measures related to the official fuel price capped the wholesale price of fuel types with official retail price at HUF 480 and created a contractual obligation for wholesalers, and stated that no other costs or fees may be charged when selling to retailers. The regulation exempted fuels subject to price regulation from the member contribution to the Hungarian Hydrocarbon Stockpiling Association for the months of March, April, and May 2022 and granting a reduction in the excise duty on fuels.¹⁰ In March 2022, the Government launched a programme¹¹ to support small petrol stations,¹² under which small petrol stations could receive a pro-rata subsidy for the fuel they sell that is subject to a price freeze. The aid was paid by online application for a period of 7 months from March to September 2022.¹³

The group of consumers eligible to purchase fuel at capped prices was narrowed in two stages starting on March 10, 2022. The amended

8 The Price Regulations have been repealed by the legislator as of 1 January 2022, but the price freeze remains in place. The provisions of Act CXXX of 2021 on Certain Regulatory Issues Related to Emergency Situations, which entered into force on 1 January 2022, maintained the price cap for the two fuel types.

9 Section 3 of the Government Decree 626/2021 (XI. 13.) assigned the responsibility for overseeing the price cap to the National Tax and Customs Administration.

10 Government Decree 162/2022 (IV. 28.) amending certain government decrees on price regulation extended the period of the exemption from the membership contribution payable to the Hungarian Hydrocarbon Stockpiling Association until 30 April 2022.

11 Government Decision 1117/2022 (III. 5.) on the support of small petrol stations to guarantee security of supply in rural areas.

12 An undertaking operating up to 50 service stations with a turnover from fuel sales not exceeding HUF 50 billion in 2021.

13 See <https://kisbenzinkutak.mgfu.hu/>.

regulation initially excluded non-Hungarian-registered vehicles from eligibility for fuel purchases at capped prices.¹⁴ Subsequently, from July 30, 2022, the discount was no longer available for „company cars.”¹⁵ Government Decree 190/2022 (V. 26.) on the entry into force of certain government decrees issued during the emergency declared to avert the consequences of the coronavirus pandemic and on emergency measures reintroduced the rules on price maximisation on 1 June 2022. However, the Decree expired on 1 November 2022 due to the amendment of the special legal order chapter of the Fundamental Law. Despite this, the institution of the official fuel price cap continued to exist, as the Government issued Government Decree 425/2022 (X. 28.) on the entry into force of government decrees issued during an emergency and on emergency measures, which entered into force again on 1 November 2022.

The end of the fuel price freeze was marked by the adoption of Government Decree 494/2022 (XII. 6.) on certain provisions related to fuel prices. The Decree repealed the part of the regulation relating to the price freeze and the distribution obligation and their duration, consequently the fuel price freeze ended on 31 December 2022.

4.2 Regulation on food price maximisation

Below, we provide an outline of the regulatory concept, along with a presentation of the most significant substantive changes.

The Government also ordered the retail price cap using its emergency legislative power under Article 53(2) of the Fundamental Law in force at the time. In order to prevent the adverse effects of market disruptions related to the COVID-19 pandemic, the Hungarian government issued a Government Decree¹⁶ at the beginning of 2022 regulating the marketing of eight basic foodstuffs (certain types of sugar, wheat flour, sunflower oil, pigmeat, poultrymeat and milk).¹⁷ The Government Decree entered into force

on 1 February 2022 for an initial period of 3 months and due to successive extensions, it remained in force until 31 July 2023. The Government Decree obligated retailers, in regard to the aforementioned food products, to sell the items distributed on October 15, 2021, and to offer at least the average daily quantity sold on the corresponding day of the week in 2021. For these products, the gross retail selling price charged by traders of everyday consumer goods could not exceed the gross retail selling price applied on 15 October 2021. The Government Decree provided for sanctions in cases of non-compliance with the prescribed obligations.¹⁸ The legislation was subject to a number of technical and substantive amendments.

As a result of the war in Ukraine, the Hungarian Government amended the Government Decree¹⁹ such that with effect from 10 November 2022, the reference quantity to be considered was no longer the average daily quantity offered for sale in 2021, but rather the average daily quantity of stock available to the trader on the corresponding day of the week during that year. The amendment also entailed extending price regulation to two additional product categories, namely eggs and potatoes. In the case of these products, the Government Decree set the maximum price and the distribution obligation based on the reference date of September 30, 2022.

The end of food price maximisation was marked by the adoption of Government Decree 347/2023 (VII. 27.), which amended the Government Emergency Regulations. The Decree repealed the provisions related to price maximisation, the marketing obligation, and their duration, thereby ending the food price maximisation on 1 August 2023.²⁰

Although the study focuses on the limits of price maximisation, one of the most powerful forms of state intervention in the economy, the reference to the institution of compulsory action imposed on retailers should not be overlooked in the context of presenting the rules on price maximisation. In May 2023, the Hungarian Government, exercising its extraordinary legislative powers under Article 53(1) of the Basic Fundamental Law, issued Government Decree 162/2023 (V. 5.) on measures necessary to control wartime food price inflation, deciding to introduce mandatory promotions to replace the price maximisation rules. The regulation defined the categories of products subject to the promotions and obliged the covered trader to reduce the price of one free choice product from

14 Vehicles with non-Hungarian registration plates were excluded from eligibility to purchase fuel at capped prices by Government Decree 94/2022 (III. 10.) on the divergent application of Act CXXX of 2021 concerning certain regulatory issues related to extraordinary situations. This exclusion did not apply to vehicles registered in countries that provided fuel at capped prices for refuelling Hungarian vehicles.

15 Government Decree 278/2022 (XII. 30.), amending certain government decrees on the official fuel price, excluded motor vehicles operated by non-natural persons („company cars”) from the group entitled to purchase fuel at the capped price. This exclusion did not apply to vehicles providing a taxi service.

16 Government Decree 6/2022 (I. 14.) on the different application of Act LXXXVII of 1990 on the fixing of prices during an emergency.

17 The product categories of food items subject to price regulation are listed in the first annex of the decree. Between February 1, 2022, and May 1, 2022, the food items included in the scope of regulated prices were: granulated sugar (white sugar), wheat flour type BL 55, refined sunflower cooking oil, pork leg (including bone-in, skin-on, filleted, diced, sliced, or ground forms, whether pre-packaged or not, sold fresh, chilled, or frozen), chicken breast, chicken back—including back, tail, and wing tip (in whole or separate, in bone-in, skin-on, filleted, diced, sliced, or ground forms, whether pre-packaged or not, sold fresh, chilled, or frozen), and ultra-high-temperature (UHT) treated cow’s milk with 2.8% fat content.

18 According to Article 3 of the Government Decree, if the authority responsible for consumer protection identified a breach of the obligations specified in the Government Decree, it could impose fines ranging from HUF 50,000 to HUF 3,000,000. In the case of repeated violations, the authority could temporarily prohibit the trader from continuing their activities, with the duration of the prohibition ranging from a minimum of 1 day to a maximum of 6 months.

19 Government Decree 451/2022 (XI. 9.) amending Government Decree 6/2022 (I. 14.) on the different application of Act LXXXVII of 1990 on the fixing of prices during an emergency.

20 According to the currently applicable Section 7 of the Government Decree, however, the provisions that have been repealed shall still apply as substantive legal rules in proceedings initiated on the basis of previous breaches of obligations, in accordance with the legal framework in force at the time the breach occurred.

each of the designated product categories per promotion period.²¹ The mandatory promotion for certain food products was in force in Hungary from 1 June 2023 until 1 July 2024.²²

5 Retail price maximisation in the light of the fundamental law

5.1 Constitutional framework of market economy

This paper examines the institution of retail price maximisation from the perspective of the right to conduct a business, freedom of contract and the right to property. These are not only constitutional safeguards of the market economy and economic competition, but are also closely interrelated. As the HCC has pointed out since the beginning of its work, “[competition] is the basic *raison d'être* of the market economy. The vital value of a social and economic order based on a market economy is the development and protection of economic competition.”²³ The HCC has further stated that “[t]he freedom of contract is an indispensable condition for the operation of the market economy and thus for the freedom of enterprise and competition protected by Article M of the Fundamental Law, and as a consequence it also enjoys the protection of the Fundamental Law.”²⁴ “Economic autonomy, i.e., the autonomy of the decision to dispose of property, rights and claims, can be determined primarily from the right to property and, in a subsidiary way, from the right to enterprise.”²⁵—confirmed the previous practice of the HCC, based on the Constitution, after the entry into force of the Fundamental Law.

5.2 Freedom to conduct a business and fair economic competition

Fair economic competition as a constitutional value is declared in Article M(2) of the Fundamental Law, while freedom of enterprise is declared in Article M(1) of the Fundamental Law. Article XII(1) of the Fundamental Law also refers to freedom to conduct a business as a “genuine” fundamental right. According to this, “everyone has the right, guaranteed by the Fundamental Law, to engage in business, i.e.,

to carry on a business activity. However, the right of entrepreneurship means the right to be granted the opportunity to enter into a certain set of economic conditions created by the State for enterprises, or, in other words, the opportunity to become an entrepreneur, sometimes subject to conditions, sometimes limited, motivated by professional considerations.”²⁶ In the context of fuel price maximisation, it is important to note that the freedom to conduct a business also means protecting businesses that are already operating, i.e., it also protects the continuation of entrepreneurial activity: “The scope of protection of the right to conduct a business as a fundamental right thus extends both to entry into the market (the free “choice” of a given business activity, becoming an entrepreneur and starting an activity) and to the continuation of an activity that has already started, while stressing that the fundamental right in question does not guarantee the immutability of the legal environment. The difference between subjective and objective barriers, which are more stringent, but in both cases subject to the necessity/proportionality test,²⁷ is that subjective conditions can in principle be met by anyone, whereas objective barriers are understood to be requirements that are independent of the person wishing to set up a business.”²⁸

In the context of the retail price freeze, the HCC has dealt in detail with the test for a restriction on the freedom to conduct a business in a special legal order. The reason for this is that in a special legal order, the Fundamental Law provides for the application of less stringent rules for the restriction of fundamental rights than in the normal legal order and even allows for the complete suspension of fundamental rights, with some exceptions.²⁹ In this respect, the HCC has significantly modified the proportionality element of the fundamental rights test. Therefore, instead of comparing the advantages and disadvantages of a restriction of rights, the HCC examined whether the legislator periodically reviewed the maintenance of the restrictive measure (Erdős and Tanács-Mandák, 2023).

The determination of the applicable test was further complicated by the fact that the chapter of the Fundamental Law regulating the special legal order was completely restructured on 1 November 2022, following the Ninth and Tenth Amendments to the Fundamental Law. Under the current rules of the Fundamental Law, the restriction on the freedom to conduct a business was assessed ‘on the basis of a set of criteria developed in the light of Article I(3), Article 51(2) and Article 52(1) and (2) of the Fundamental Law:

- whether the fundamental right in question has been interfered with,
- whether the restriction of fundamental rights had a legitimate aim,
- whether the restriction is appropriate to achieve the legitimate aim,

21 The benchmark for the promotional price applied by the trader was the lowest gross retail price of the product in the 30 days preceding the price reduction, compared to which the trader was required to apply a gross retail price at least 10% lower.

22 During its little more than 1 year of operation, the legislation was subject to a number of technical and substantive amendments. Government Decree 279/2023 (VI. 29.) on the measures related to the introduction of the food price freeze changed the price reduction to 15% and included products with previously capped prices in the range of products subject to price reduction. The extension of the applicability of the compulsory action was provided for in Government Decree 440/2023 (IX. 25.) and Government Decree 516/2023 (XI. 22.).

23 Decision 19/1991 (IV. 23.) AB, cited in Decision 3192/2012 (VII. 26.) AB, Reasoning [20].

24 Decision 3192/2012 (26. VII.) AB, Reasoning [21].

25 Decision 20/2014 (VII. 3.) AB, Reasoning [291].

26 Decision 3/2020 (I. 3.) AB, Reasoning [35].

27 Article I (3) of the Fundamental Law: ‘(3) The rules on fundamental rights and obligations shall be laid down by law. A fundamental right may be restricted to the extent strictly necessary for the exercise of another fundamental right or for the protection of a constitutional value, in proportion to the aim pursued and with due regard for the essential content of the fundamental right.’

28 Decision 3/2020 (I. 3.) AB, Reasoning [36].

29 Decision 3128/2022 (IV. 1.) AB, Reasoning [163].

- whether the disadvantages caused by the restriction of a fundamental right outweigh the advantages of achieving a legitimate aim (proportionality).³⁰

In the case of the test, it is worth highlighting that the HCC has significantly tightened the test of limitation of fundamental rights, as amended in view of the special legal order, by reintroducing the traditional interpretation of proportionality. The other development is that, as a result of the tightening, the general test for the protection of fundamental rights applicable to the special legal order differs from that applicable in the normal legal order in only one element. It does not require necessity, i.e., that the legislator should choose the least intrusive measure that is likely to achieve a legitimate aim.

With regard to the constitutionality of the retail price cap, the HCC held that the introduction of the ceiling did not constitute an interference with the freedom of business, as it did not hinder market entry nor impose subjective conditions on the pursuit of economic activities. The HCC based its finding on the fact that the price regulation applied to only a narrow segment of retail activity, affecting just eight product groups out of the thousands typically found in stores.³¹

Applying the above test to fuel price maximisation, we can conclude the following.

The first element of the test is answered in the affirmative, and interference with the right to conduct a business is established. In its decisions on the retail price freeze, the HCC reached a different conclusion, but also pointed out that the price freeze applied to only eight product groups out of a typical range of several thousand products in shops. In contrast, the fuel price cap concerned the two most typical products of service stations, i.e., the core of their activity, since the other products and services offered by service stations (motor oil sales, shop, car wash, etc.) are typically complementary.

The legitimate aim of the restriction of fundamental rights is twofold. On the one hand, to ensure that the public has access to fuel at a realistic price and, on the other hand, to mitigate the effects of inflation. The latter is primarily a constitutional value, the former is also of fundamental rights relevance, as the HCC's case law interprets the freedom to travel by vehicle in the context of Article XXVII(1) of the Fundamental Law, which guarantees freedom of movement.³²

The third, 'aptitude' element of the test may cause some uncertainty in the assessment. It is not clear on which spectrum/in which sense the suitability is to be tested. If it is only focused on whether the fuel price maximisation ensures that the legitimate objective can be achieved, then suitability can be established beyond doubt. However, by broadening the concept, suitability may also be called into question. To this end, we refer to the supply difficulties that occurred under fuel price controls: stockpiling by the public caused an increase in demand, and the supply constraints were exacerbated by the refinery capacity constraints. Dealers have introduced volume restrictions (litres/day/vehicle/service station) partly to reduce supply constraints and partly to reduce their losses from fuel price maximisation. The availability of the types of fuel affected by fuel price maximisation has therefore not always changed

in a positive direction. The appropriateness of achieving a legitimate objective can only be established on the basis of a more thorough analysis, supported by economic analyses, which is a question of economic policy and expediency, on which the HCC usually refrains from ruling.

In the context of proportionality, it cannot be ignored that in February 2022 the scope of the regulation changed and capped the wholesale price of retail authority-priced fuel types at HUF 480. In March 2022, the Government launched a programme³³ to support small petrol stations.³⁴ The range of consumers eligible to buy fuel at the official price was narrowed. First vehicles with non-Hungarian registration plates, then "company cars," with the exception of taxis, were excluded from the eligible group.

The above legislative steps are in favour of proportionality. However, the fact that the period of price maximisation has been extended several times and has lasted for a longer period of time can be seen as a countervailing circumstance. On the whole, however, it is clear that after 4 months the burden on retailers of the fuel price cap has been significantly reduced, so that the time for meaningful intervention was limited. The differentiated regulation based on the size of the businesses concerned—and their resulting capacity to cope with the burden—and the entitlement to the 20 HUF per litre subsidy, shows the legislator's desire to spread the burden of fuel price maximisation in a proportionate way.

5.3 Right to property: article XIII of the fundamental law

The infringement of the right to property typically arises in three aspects in relation to the fuel price maximisation imposed in connection with the marketing obligation. The first is the loss of profit in the absence of free pricing, the second is the restriction of the right to dispose of the sale and price determination, which is part of the right to property, and the third is the restriction of the right of use, which is also part of the right to property, by the obligation to use the infrastructure used for sale. With regard to the loss of profit, the HCC has consistently held that: "The fundamental right to property protects property already acquired and, in exceptional cases, property expectations [...]. However, the HCC has consistently held that the mere hope of future profit from economic or regular income-generating activities, from entrepreneurial activity, cannot be regarded as a property expectation recognised and protected by the constitutional right to property, i.e., it is not protected by Article XIII of the Fundamental Law."³⁵ In the light of the practice of the HCC, such a petition would therefore most probably be inadmissible on the merits.

According to the practice of the HCC, partial rights to property are constitutionally protected: "[a] necessary restriction on property must, however, also be proportionate, which imposes on the legislator the obligation to ensure compensation proportionate to the restriction

30 Decision 3004/2024 (I. 12.) AB, Reasoning [57].

31 Decision 3323/2024 (VII. 29.) AB, Reasoning [144].

32 Decision 3215/2013 (XII. 2.) AB, Reasoning [35].

33 Government Decision 1117/2022 (III. 5.) on the support of small petrol stations to guarantee security of supply in rural areas.

34 An undertaking operating up to 50 service stations with a turnover from fuel sales not exceeding HUF 50 billion in 2021.

35 Most recently, see Decision 3192/2024 (V. 31.) AB, Reasoning [50].

in the case of expropriation and other restrictions similar in their actual effects to expropriation, in particular in the case of legal restrictions on certain partial rights to civil property (possession, use and enjoyment, disposal). In the case of expropriation or other cases involving substantial restrictions on the exercise of partial civil property rights, the guarantee of security of tenure is therefore replaced by a guarantee of value.³⁶ The HCC therefore applies the public interest test to assess the compatibility with the Fundamental Law of restrictions on the right of disposal and use.

From the above, it could follow that the obligation to sell a product at a maximum price also constitutes a violation of the right to dispose of property, which is part of the right to property. However, in the case of the exchange of foreign currency loans, and later also in relation to retail price caps, the HCC took a different position, and assessed this aspect in the context of freedom of contract: “Freedom of contract [...] is also closely linked to the right to property protected by the Fundamental Law. Article XIII(1) of the Fundamental Law also guarantees the freedom of property and the protection of the private autonomy of owners. One of the partial rights of property is the freedom of “disposal” of property, of which freedom of contract is a necessary substantive element.”³⁷

The approach has two consequences. On the one hand, it establishes conformity with the Fundamental Law on the basis of a different standard from the level of protection of the right to property, the public interest test. This standard is more lenient than the public interest test. It is noted that if the petitioner also invokes a violation of Article XII(1), which guarantees the freedom to conduct a business, the general fundamental rights test for the assessment of the restriction, or its version adapted to the specific legal order, is stricter than the public interest test. On the other hand, by interpreting the right to dispose in the context of freedom of contract, the HCC is making a *de facto* distinction in the level of constitutional protection based on the objects of property.

The function of the “general” category of property is to provide the material framework for individual self-fulfilment (e.g., a home, a car, consumer goods) or the functioning of a business (e.g., machinery, premises, etc.), while in the case of another special category, the acquisition of property is inherently for the purpose of resale (and the profit to be derived from it). While the public interest test applies to the restriction of ownership of objects in the first category, the reasonableness test for freedom of contract or the necessity-proportionality test for freedom to conduct a business applies to those in the second category.³⁸ While the distinction may be justified, it may

be difficult in practice to determine which group an object (or group of objects) falls into.

The third theoretical aspect of the restriction of the right to property that was raised was the use of traders’ licences and shop infrastructure for a specific purpose. In this context, however, the HCC pointed out that the infrastructure and the licences are used for profitable entrepreneurial activities, but that the expectation of profit is not protected as property.³⁹ Thus, the HCC did not deal with the restriction of the right of use as part of the right to property.

5.4 Freedom of contract as a constitutional value

As a consequence of the previous point, contractual freedom is of particular importance in relation to forms of retail price freeze, and it is therefore important to clarify the criteria to be applied to limit it. As with the freedom to conduct a business, a distinction must be drawn between the standards applicable to the normal and the special legal regime.

The HCC has consistently held that freedom of contract is protected under Article M of the Fundamental Law.⁴⁰ In this context, it has explained that “Article I(3) on the restriction of fundamental rights does not apply to it either, i.e., even the essential content of contractual freedom may be restricted” and that “the level of protection of contractual freedom as an independent constitutional right is different, [...] a restriction of contractual freedom may be unconstitutional if there is no justification for the restriction and the restriction is not unreasonable.”⁴¹ As stated in the previous point, freedom of contract is also closely linked to the freedom of disposal which is part of the right to property protected by the Fundamental Law. “To sum up: freedom of contract follows from Article M and Article XIII(1) of the Fundamental Law, and is therefore not a fundamental right, but it enjoys the protection of the Fundamental Law as an independent constitutional right and is a right guaranteed by the Fundamental Law, the violation of which is a ground for a constitutional complaint under the Abtv. However, the constitutionality of the restriction is not to be assessed on the basis of Article I(3) of the Fundamental Law, but—taking into account the public interest—by applying the test of reasonableness.”⁴²

The HCC laid down the specific legal standards for the restriction of freedom of contract in Decision 3004/2024 (I. 12.) AB. It was based on the premise that freedom of contract is not a fundamental right guaranteed by the Fundamental Law and that “it also follows that

36 Decision 23/2017 (X. 10.) AB, Reasoning [16]; similarly, Decision 25/2021 (VIII. 11.) AB, Reasoning [100].

37 Decision 3004/2024 (I. 12.) AB, Reasoning [35]; Decision 33/2015 (XII. 3.) AB, Reasoning [25].

38 In relation to the limits of the right to property of enterprises, a similar argument was formulated by Béla Pokol in paragraph [41] of his parallel reasoning to Decision 3194/2014 (VII.15.) AB: ‘In my opinion, the reasoning of the decision should have stated in principle that if the profit-oriented operation of property arises, then this can no longer be included in the framework of the protection of property under the Basic Law, but the right to enterprise and the constitutional value of the freedom of enterprise to strengthen this right are there. With this declaration of principle, we could avoid in the future that the complainants would also focus on and argue their grievance in the course of profit-oriented property operation as a grievance of property, whereas the

Fundamental Law has regulated this activity - with a content largely different from the previous Constitution - in a different context.” András Bragyova, also in a dissenting opinion on this decision, argues that the right to property in the context of the protection of the property of undertakings only extends to the name and *goodwill* of the business introduced as an asset, while other aspects are more appropriately assessed in the context of the freedom of enterprise (Decision 3194/2014 (VII.15.) AB, Reasoning [66]).

39 Decision 3323/2024 (VII.29.) AB, Reasoning [100].

40 Decision 22/2018 (XI. 20.) AB, Reasoning [34].

41 Decision 3298/2014 (XI. 11.) AB, Reasoning [29].

42 Decision 33/2015 (XII. 3.) AB, Reasoning [26] In the citation Abtv. refers to Act LX of 2011 on the Constitutional Court.

Article 52(2) of the Fundamental Law⁴³ [...] does not apply to freedom of contract. At the same time, the concept reflected in Article 52(2) of the Fundamental Law, according to which the legislative leeway of the Government is greater than in a normal legal order, for the reason that it can take the measures necessary to avert the danger threatening society and the state and to mitigate its consequences with the greatest possible effectiveness, cannot be ignored when determining the standards for the restrict ability of the freedom of contract as a right under the Fundamental Law. On the basis of the foregoing, the HCC, taking into account the so-called reasonableness test [...], has separated the following steps in its examination of the permissibility of the restriction of contractual freedom:

- whether there has been an interference with contractual freedom;
- whether the interference had a reasonable justification based on an objective assessment, in particular the public interest, or was arbitrary;
- whether the intervention was suitable to achieve the objective for which it was intended.⁴⁴

The HCC applied the above test to the rules on retail price maximisation in the following manner. According to the practice of the HCC, all forms of public pricing, including the relevant rules on retail pricing, constitute a restriction of contractual freedom, as they prevent traders from setting the retail price of the products they sell based on market conditions, such as prevailing supply and demand.⁴⁵ Turning to the second element of the applicable test, namely the justification for the interference, the HCC noted that the legislative objective of institutionalising the legislation was, in addition to preventing the harmful effects of market disturbances, to ensure public access to basic foodstuffs at affordable prices and in sufficient quantities. In doing so the legislator has promoted the right of access to healthy food, as guaranteed by Article XX(2) of the Fundamental Law, and through this the right to physical and mental health, as declared in Article XX(1) of the Fundamental Law, and the right to life, as guaranteed by Article II(1) of the Fundamental Law, as well as the right to the proper physical development of children, as guaranteed by Article XVI(1) of the Fundamental Law. Under the third element of the test, the HCC assessed that access to food cannot be understood without considering its quantitative and economic aspects. Therefore, the maximisation of retail prices, in conjunction with compulsory distribution and the quantitative requirement, is, in principle, suitable to ensure that the population has access to these foods at prices not subject to inflationary effects.⁴⁶ The HCC has held, with regard to retail price maximisation, that the fixing of prices for certain basic foodstuffs to ensure public access to essential goods at affordable prices and in sufficient quantities does not constitute an unconstitutional restriction of contractual freedom.

Applying the above test to the fuel price maximisation, we can conclude the following.

43 "with the exception of the fundamental rights laid down in Articles II and III and Article XXVIII(2) to (6), the exercise of fundamental rights may be suspended or restricted in a particular legal order beyond the limits provided for in Article I(3)."

44 Decision 3004/2024 (I. 12.) AB, Reasoning [39]–[40].

45 Decision 3004/2024. (I. 12.) AB, Reasoning [42]; Decision 3323/2024 (VII. 29.) AB, Reasoning [150].

46 Decision 3323/2024 (VII. 29.) AB, Reasoning [115]–[155].

The fact of interference with the freedom of contract is unquestionable, since the freedom to set prices and raise prices is removed by the interference.⁴⁷

As regards the public interest as a reasonable, objective justification to counterbalance the disadvantages of the interference and the suitability of achieving it, we are of the opinion that the conclusion drawn in the context of freedom to conduct a business may be the relevant one.

6 Assessing retail price maximisation in the light of ECtHR practice

6.1 The Strasbourg framework of market economy

While the constitutionality of retail price maximisation has been assessed in the context of the right to conduct a business, freedom of contract and the right to property, the following discussion will assess the regulation in the light of the right to property as enshrined in the First Additional Protocol to the European Convention on Human Rights (hereinafter: ECHR). The reason for this is that the scope of the declarations of the ECHR that can be examined is narrower than the scope of the relevant provisions of the Hungarian Fundamental Law. The ECHR does not provide for the right to conduct a business and freedom of contract. The ECtHR, applying the Convention, therefore interprets the questions relating to the right to conduct a business and freedom of contract in the context of the right to the peaceful enjoyment of goods, i.e., the right to property.

In its previous practice, the ECtHR has not examined the issue of retail price maximisation in substance, therefore the methodology of the examination is based on the general case law of the ECtHR on property rights. The application of the general case law of the ECtHR on property rights is also justified by the fact that Hungary has not notified any specific derogation.⁴⁸

6.2 Right to property and restrictions

The ECHR did not originally provide for the right to property, but the First Additional Protocol, annexed in 1952, declared: "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions."⁴⁹ According to Article 1 of the First Additional Protocol, property may be deprived in the public interest, under conditions laid down by law and in accordance with the general principles of

47 See with the same conclusion in relation to the retail price freeze: "All types of official pricing [...] constitute a restriction of freedom of contract. This is because the trader cannot exercise the possibility—which also derives from the right of disposal, which is considered an essential element of the right to property enshrined in Article XIII(1) of the Fundamental Law—to determine the retail price of the product(s) he sells in the light of market conditions, including the prevailing supply and demand situation. On that basis, the HCC held that the legislature had interfered with the freedom of contract by enacting the provisions of the LR at issue." Decision 3004/2024 (I. 12.) AB, Reasoning [42].

48 On specific issues of derogation (see in detail Higgins, 1978; Gross, 1998; Cowell, 2013).

49 For a detailed analysis of the development of human rights protection of property (see Ristik, 2015).

international law. The provision also allows the restriction of property in the public interest and for the payment of taxes, other public charges and fines.⁵⁰ The text does not provide for an obligation to compensate for the deprivation of property, which follows from the ECtHR's practice and law-enforcement work (*James and Others v. the United Kingdom*, 1986) (*Lithgow and Others v. the United Kingdom*, 1986).

As can be seen from the above, the text of the First Additional Protocol to the ECHR does not contain explicit provisions on price regulation or on the obligation to distribute and sell. It does, however, address aspects of restrictions on the right to property (Coban, 2004; Pejchal Grünwald, 2022). A restriction on property rights in accordance with the First Additional Protocol to the ECHR requires that the use of goods in the public interest be regulated by law by the states parties. Although the Additional Protocol does not mention it among the criteria of restriction, the ECtHR's practice (Vékony v. Hungary, 2015) (*Könyv-tár Kft. and others v. Hungary*, 2018) has highlighted the importance of proportionality of the interference, i.e., the balance between the public interest justifying the interference and the private interest affected by the interference. In conclusion, therefore, an interference with the right to property is compatible with Article 1 of the First Additional Protocol to the ECHR if it is (1) based on law, (2) in the public interest and (3) proportionate. In the following, the paper will examine how the institution of retail price regulation is compatible with the right to property enshrined in the ECHR's First Additional Protocol and the ECtHR's case law.

First and foremost, however, the question of whether the retail price maximisation imposed in conjunction with the marketing obligation constitutes an interference with the right to property under the First Additional Protocol to the ECHR must be addressed. The expected future profits from a business activity cannot be included in the concept of 'goods' within the meaning of Article 1 of the First Additional Protocol to the ECHR. The broad concept of "property" can be understood to include the prejudice to the customer base as understood in the context of corporate goodwill (*Könyv-tár Kft. and others v. Hungary*, 2018). In the case of the food price freeze, the harm to customers did not arise in the present case because the scope of the regulation extended to all traders. The same applies to fuel price regulation, too. The statutory restriction of contractual freedom is to be interpreted not only according to the HCC, but also according to the ECtHR's practice in the field of the right of disposal (*Mellacher and others v. Austria*, 1989). Contrary to the practice of the HCC as explained in section 3.3,⁵¹ interference with the right to dispose may constitute interference with the right to property under the ECtHR (*Marckx v. Belgium*, 1979).

6.2.1 Provided by law

According to Article 1 of the First Additional Protocol to the ECHR, property may be taken only under conditions laid down

by law. The expression "provided by law" requires, in the first case, that the contested measure must have a legal basis in national law. In the other case, it also refers to the quality of the right in question, which must be accessible to the person concerned and predictable in its effects (*VgT Verein gegen Tierfabriken v. Switzerland*, 2001) (*Rotaru v. Romania*, 2000) (*Maestri v. Italy*, 2004). According to the ECtHR's practice, the domestic legal provisions which provide for intervention must be sufficiently accessible, precise and predictable.

Compliance with this requirement is demonstrated in the cases of the retail price freeze regulations by the legislative form, the publication in the Hungarian Official Gazette, the time period between publication and entry into force. Another aspect to be assessed under this condition is that the legislations have been subject to a number of technical and substantive amendments. On several occasions, the legislator extended the period of application of the price freeze and—in the case of fuel prices—narrowed the eligibility criteria for consumers to purchase fuel at the official price. This is not, however, incompatible with the substantive requirement of a legal basis, as all amendments were made by legislation published in the Hungarian Gazette and the substantive amendments did not create a new, different and unknown obligation for the addressees.

6.2.2 Public interest

The next element of the test is that interference with property rights must be in the public interest. According to ECtHR practice, the concept of "public interest" is to be interpreted broadly. This is because the ECtHR respects the legislature's judgment as to what "serves the public interest"—unless it is manifestly unfounded (*James and Others v. The United Kingdom*, 1986). The legislative purpose of the introduction of the retail price freeze was twofold. On the one hand, to ensure that the public has access to food and fuel at a realistic price and, on the other hand, to mitigate the effects of inflation. These legislative objectives also undoubtedly justify the existence of a public interest justifying the intervention.

6.2.3 Proportionality

On the basis of the above, it can be concluded that the retail price freeze constitutes an interference with the right to property which meets the requirement of being defined by law and is in the public interest. The proportionality of the interference is therefore examined below.

When assessing the proportionality of an intervention, the ECtHR takes into account a number of criteria and gives States Parties a very wide margin of discretion/appreciation. It should be stressed that in the present cases, the legislator has limited the right to dispose of property, which is part of the right to property, and has not deprived the trader of his property. Therefore, the case law on compensation for deprivation of property is not directly relevant (*J.A. Pye (Oxford) Ltd. v. The United Kingdom*, 2005).

The ECtHR's rulings on freedom of contract and/or legislative price maximisation in breach of convention have been in cases where the whole of the activity in question was prevented by the State Party.⁵² Out

50 For more on the discretionary power granted to the state (see Schwelb, 1964).

51 The HCC also pointed out in Decision 3323/2024 (VII. 29.) AB that "freedom of contract [...] is also closely related to the right to property protected by the Fundamental Law. Article XIII(1) of the Fundamental Law also guarantees the freedom of property and the protection of the private autonomy of owners. One of the partial rights of property is the freedom of "disposal" of property, of which freedom of contract is a necessary substantive element."

52 For example, in the case of renting a flat (*Hutten-Czapska v. Poland*, 2006) or textbook distribution (*Könyv-tár Kft. and others v. Hungary*, 2018).

of the thousands of products on offer in shops, the food price cap only affected a few types of products, while the others were subject to free pricing. This included the possibility of offsetting losses on products with price caps against profits on other products. The fuel price maximisation concerned the two most typical products of service stations, the core part of the activity. Other products and services (motor oil sales, shop, car wash, etc.) sold at service stations are typically complementary.

However, the unfavourable proportionality of the subject matter of the legislation has been counterbalanced by a number of other measures. The temporary nature of the price ceiling can be interpreted in this way. The legislative context shows that the legislator has examined the need for price capping on several occasions and has subsequently decided to maintain it. The legal price capping of certain fuels was therefore part of the Hungarian legal system for a limited period of time: in the case of fuel between 15 November 2021 and 31 December 2022. It cannot be ignored that from February 2022 the regulatory environment concerning fuel changed in favour of retailers. The loss of retailers was reduced by the Government Decree 57/2022 (II. 28.) on certain measures related to the official fuel price by capping the wholesale price of fuel types with official retail price at HUF 480 and creating a contractual obligation for wholesalers. It also stipulated that no other costs or fees could be charged for sales to retailers. It also provided for an exemption from the membership contribution to the Hungarian Hydrocarbon Stockholders Association and a reduction in the excise duty on fuels. The narrowing of the range of consumers eligible to purchase fuel at the official price is also a measure that can be assessed in the context of proportionality for all retailers. In addition, from March 2023, small petrol retailers could also receive a subsidy of HUF 20 per litre for the distribution of fuels covered by the price freeze.

Overall, retail price maximisation has served the interests of consumers and has placed the burden on certain market players, initially only retailers. However, in the case of the food price cap, the fact that it applied to only a few products from the huge range of products available in shops could justify proportionality. In the case of the fuel price cap, the following arguments in favour of the proportionality of the intervention can be made out: the temporary nature of the price cap and the favourable development of the regulation for retailers (wholesale price cap, reduction in the number of eligible retailers, public compensation scheme for small retailers), it did not lead to the disappearance of these operators and their exclusion from the market.

Consequently, it can be concluded that, on the basis of the ECtHR's previous practice, it is likely that the retail price caps did not infringe the right to property guaranteed by Article 1 of the First Additional Protocol to the ECHR, given the uncertainty inherent in the proportionality test.

7 Price maximisation before the Luxembourg court

7.1 The EU legal framework concerning price regulation

Despite the fact that the EU's primary sources of law include the Charter of Fundamental Rights—including the freedom to conduct a business (Article 16) and the right to property (Article 17), the CJEU's

practice on price regulation is based on a more competence-based logic, and is founded on aim to ensure the functioning of the internal market.⁵³ The basis for this is the framework provided by the Treaty on the Functioning of the European Union (hereinafter: TFEU). These include Article 4 TFEU lists internal market as shared competences between EU and its Member States covering the free movement of goods as one the fundamental freedoms (in specific Articles 26 and 28–37 TFEU). The Common organisation of the markets (hereinafter: CMO) regulation,⁵⁴ which fleshes out Articles 38–44 TFEU on agricultural and agricultural policy, is particularly prominent in the case C-557/23 (hereinafter: SPAR-case).

7.2 The SPAR-case

In the SPAR-case CJEU has ruled on the compatibility of the food price ceiling with EU law in a preliminary ruling procedure. The member state court asked the CJEU for a ruling on how the food price ceiling could be applied in the light of CMO regulation 83(5) and 90a(3).

Although the CJEU concluded that the provisions of the CMO regulation relied on by the national court were not relevant, it dealt with the food price dispute in a broader context, including the CMO regulation as a whole and the principle of free movement of goods. To this end, it first of all stated that the Common Agricultural Policy and the CMO regulation fall within the shared competence between the EU and the Member States. In the exercise of this shared competence, Member States are obliged to refrain from any measure which would derogate from the CMO regulation or which would hinder its proper functioning. In the absence of a pricing mechanism, the free formation of selling prices on the basis of fair competition is a component of the CMO regulation and constitutes the expression of the principle of free movement of goods in conditions of effective competition. However, the establishment of a CMO does not prevent the Member States from applying national rules intended to attain an objective relating to the general interest other than those covered by that CMO, even if those rules are likely to have an effect on the functioning of the common market in the sector concerned, provided that those rules are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective. The CJEU therefore examined the following aspects:

- whether there was an interference with the freedom of competition
- whether the interference had a public interest objective
- whether the interference was suitable to achieve the public interest objective

⁵³ For further details on internal market aspects of price regulation (see [Lovas and Pelle, 2023](#)).

⁵⁴ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013L 347, p. 671, and corrigendum OJ 2016 L 130, p. 9), as amended by Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 (OJ 2021 L 435, p. 262).

- whether the interference was proportionate (does not go beyond what is necessary to achieve the objective).

The CJEU has assessed public pricing and the obligation to sell in sufficient quantities as interference with the freedom of competition. The Court accepted as a public interest objective of the interference the fight against inflation and the protection of disadvantaged consumers under Articles 219 and 221 of the CMO.⁵⁵ The CJEU did not take a definitive position on the question of suitability, but assumed that it existed. This was not justified because it failed the proportionality element of the test: “the undermining of free access by traders to the market in conditions of effective competition, free access ensured by the CMO Regulation, and, consequently, the disturbance of the entire supply chain caused by the regulated prices imposed on those traders and the obligation imposed on them to offer for sale the quantities required of the products concerned go beyond what is necessary to attain the objectives pursued by that decree.”⁵⁶

7.3 Fuel price maximisation in the light of EU law

Since the CJEU has not ruled on the fuel price cap, we can only draw conclusions from its similar practice as to how it would take a position on its compatibility with EU law. In this respect, we can rely on the SPAR case only to limited extent, as it is based primarily on the TFEU provisions on agricultural policy and the CMO regulation, also in this area. However, we can state that fuel is a commodity to which the rules of the internal market apply. It follows, on the one hand, that the test applied in the SPAR case may also similarly apply to fuel. Concerning the free movement of goods, EU law prohibits quantitative restrictions and measures having equivalent effects (Articles 34–35 TFEU), but allows Member States to rely on limitations based on Article 36 TFEU (public policy, public security, etc.). Besides, in case of non-discriminatory national restrictions, EU law recognises the so-called mandatory requirements as obstacles to movement resulting from disparities between the national laws in absence of common rules relating to the production and marketing, including those relating to, e.g., the fairness of commercial transactions and the defense of the consumer (Case C-120/78, paragraph 8.).⁵⁷ Since all service stations were subject to the fuel price cap, it cannot be considered as a discriminatory measure, therefore it might constitute such a mandatory requirement, but for this purpose, the relevant rules must meet a four-part test:

- must be applied in a nondiscriminatory manner;
- must be justified by imperative requirements in the general interest;
- must be suitable for securing the attainment of the objective which they pursue; and
- must not go beyond what is necessary in order to attain it (Case C-55/94, paragraph 37.).

55 See also the TFEU’s Article 39(1) (d) and (e) points.

56 Competition (law) aspects of price regulation are analysed by Dunne (2018).

57 On relevance of mandatory requirements in case of public pricing (see Nagy, 2014).

Based on the SPAR case, public pricing might be considered as a measure of consumer protection, so the fuel price cap can be justified by general interest. However, as in the mentioned case, even assuming suitability, necessity is questionable. One reason for this is that the fuel price cap applies to the dominant products of petrol stations, so the intervention in that market is much more significant than it is in the food market. Another indication of the absence of necessity is that not only those state rules are prohibited that hinder the fundamental freedom in question, but also those that “make it less attractive.” (Case C-55/94, paragraph 37.) Price-fixing makes not only the free movement of goods less attractive, but also to exercise other fundamental freedoms, since it may deter new potential actors from entering this market.

The part of the fuel price cap which, with few exceptions, granted access to fuel with a price cap only to vehicles with Hungarian registration plates, raises a breach of the prohibition of indirect discrimination on grounds of nationality laid down in Article 18 TFEU.

8 Conclusion

Above, we have reviewed the most important elements of retail price cap regulation and the relevant case law of the HCC, ECtHR and CJEU. The research question—which of the three fora provides the most effective legal protection and constrains government—can be answered in clear terms. As the ECtHR has no relevant case law, we could only conclude whether the retail cap would stand the test. The main uncertainty here is proportionality, so we cannot give a definitive answer. However, the HCC has judged the institution of a food price cap on its merits, stating that it does not generally violate the Fundamental Law, only the sanction of a temporary ban on trading was found to be unconstitutional. On the basis of this case law, although not decided on the merits, it is reasonable to conclude that the fuel price cap would also stand the test of the HCC. In the food price cap case, the CJEU held the core of the institution to be incompatible with EU law, and it is only with low uncertainty that we can conclude that the fuel price cap would not pass this test either.

Overall, it can be concluded that EU law imposes much stricter requirements on interference in the economy than the Hungarian Fundamental Law—at least in a special legal order.⁵⁸ It also follows, however, that the CJEU’s rather economic integration focused logic

58 In emergency situations, the political space and legislative power of the executive branch are expanded to respond to new and rapidly evolving challenges that cannot be addressed within the framework of existing laws. The Hungarian Fundamental Law provides greater leeway for the government to act in such situations. The government’s room for maneuver is constrained by the actions of the Constitutional Court, which is reflected in the special tests applied when assessing restrictions on fundamental rights during a state of emergency. Moreover, the proportionality element of the standard test can provide a framework for assessing the legitimacy of emergency measures. Some argue—see for example Csink (2017)—that specific tests are therefore unnecessary, because the framework of the general test can also take into account the actual elements of social reality (whether a viral situation, an economic crisis or a war).

provides a higher level of legal protection against economic interference by the state than the fundamental rights standards.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

Author contributions

CE: Conceptualization, Funding acquisition, Methodology, Supervision, Writing – original draft. VV: Funding acquisition, Writing – review & editing. LK: Writing – review & editing.

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