2012/11/27 - Pl. ÚS 1/12: Forced Service

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

The Plenum of the Constitutional Court, consisting of the Chairman and Judge Rapporteur Pavel Rychetský and Judges Stanislav Balík, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jan Musil, Jiří Nykodým, Miloslav Výborný and Michaela Židlická, ruled on a petition from a group of deputies of the Chamber of Deputies of the Parliament of the Czech Republic, represented by Deputy JUDr. Jeroným Tejc, seeking the annulment of Act no. 341/2011 Coll., on General Inspection of Security Forces and on the Amendment of Related Acts, of Act no. 364/2011 Coll., which Amends Certain Acts in Connection with Cost-saving Measures by the Ministry of Labour and Social Affairs, of Act no. 365/2011 Coll., which amends Act no. 262/2006 Coll., the Labour Code, as amended by later regulations, and other related Acts, of Act no. 366/2011 Coll., which amends Act no. 111/2006 Coll., on Assistance in Material Need, as amended by later regulations, Act no. 108/2006 Coll., on Social Services, as amended by later regulations, Act no. 117/1995 Coll., on State Social Support, as amended by later regulations, and other related Acts, of Act no. 367/2011 Coll., which amends Act no. 435/2004 Coll., on Employment, as amended by later regulations, and other related Acts, of Act no. 369/2011 Coll., which amends Act no. 48/1997 Coll., on Public Health Insurance and on the Amendment and Supplementing of Certain Related Acts, as amended by later regulations, and certain other Acts, of Act no. 370/2011 Coll., which amends Act no. 235/2004 Coll., on Value Added Tax, as amended by later regulations, and other related Acts, of Act no. 372/2011 Coll., on Health Care Services and Conditions for Providing Them (the Act on Health Care Services), of Act no. 373/2011 Coll., on Specific Health Care Services, of Act no. 374/2011 Coll., on the Medical Emergency Service, of Act no. 375/2011 Coll., which Amends Certain Acts in Connection with the Adoption of the Act on Health Care Services, the Act on Specific Health Care Services, and the Act on the Medical Emergency Service, of Act no. 426/2011 Coll., on Retirement Savings, of Act no. 427/2011 Coll., on Supplementary Pension Savings, and of Act no. 428/2011 Coll., which Amends Certain Acts in Connection with the Adoption of the Act on Retirement Savings and the Act on Supplementary Pension Savings, alternately, seeking the annulment of § 30 par. 2 let. d) of Act no. 435/2004 Coll., on Employment, as amended by Act no. 367/2011 Coll., in § 18a par. 1 of Act no. 111/2006 Coll., on Assistance in Material Need, as amended by Act no. 366/2011 Coll., the words “and persons listed in the register of job seekers54),” and § 121 par. 1 and 5 of Act no. 372/2011 Coll., on Health Care Services and Conditions for Providing Them (the Act on Health Care Services), alternately on the petition from the secondary party seeking the annulment of § 70 to 78, § 114 par. 1 let. g), § 117 par. 1 let. e), f), g), n) and r) and par. 3 let. d), e), f), g), h), i) and m) of Act no. 372/2011 Coll., on Health Care Services and Conditions for Providing Them (the Act on Health Care Services), alternately on the petition from the secondary party seeking the annulment of § 4 par. 5, §14, § 28 par. 2, § 35, § 36 par. 3, 5 and 6, § 45 to 47, § 48 par. 1 and 2, § 50, § 52 to 54 of Act no. 372/2011 Coll., on Health Care Services and Conditions for Providing Them (the Act on Health Care Services), with the participation of the Chamber of Deputies of the Czech Republic and the Senate of the Parliament of the Czech Republic as parties to the proceeding and a group of senators from the Senate of the Parliament of the Czech Republic, represented by JUDr. Jan Mach, attorney, with his registered office at Prague 1, Vodičkova 28, and a group of deputies from the Chamber of Deputies of the Parliament of the Czech Republic, represented by Deputy JUDr. Vojtěch Filip, as secondary parties to the proceeding, as follows:

I. The provisions of § 30 par. 2 let. d) of Act no. 435/2004 Coll., on Employment, as amended by Act no. 367/2011 Coll., are annulled as of the day this judgment is promulgated in the Collection of Laws.

II. In § 121 par. 1, the words “for a period of no more than 36 months from the day this Act goes into effect, unless stated otherwise,” including the preceding comma, in par. 4 first sentence the words “but no later than 36 months after the day when this Act goes into effect,” including the preceding comma, par. 4 second sentence, and par. 5 of Act no. 372/2011 Coll., on Health Care Services and Conditions for Providing them (the Health Care Services Act), are annulled as of the day this judgment is promulgated in the Collection of Laws.

III. The provisions of § 76 and 77 of Act no. 372/2011 Coll., on Health Care Services and Conditions for Providing them (the Health Care Services Act), are annulled as of the day this judgment is promulgated in the Collection of Laws.

IV. In § 36 par. 3 of Act no. 372/2011 Coll., on Health Care Services and Conditions for Providing them (the Health Care Services Act), the words “The validity of a previously expressed wish is 5 years.” are annulled as of the day this judgment is promulgated in the Collection of Laws.

V. The remainder of the petition is denied.

REASONING
(Edited and abridged)

I.-V.
Subject Matter of the Proceeding

1. The Constitutional Court ruled on a petition from two groups of deputies and one group of senators. The first group of deputies proposed the annulment of 14 Acts that had been re-approved by the Chamber of Deputies after being rejected by the Senate or returned with amending proposals. The petitioners believed that the process of adoption of these Acts was inconsistent with the Constitution. However, their petition was also directed against the new legislation on public service, which extends possible performance of it to persons listed in the register of job seekers. They, however, cannot refuse an offer to perform public service from a regional branch of the Labour Office without a serious reason, because they would be taken off the register for a period of at least six months. This group of deputies also sought annulment of the obligation of existing operators of health care facilities to apply for a new authorization to conduct their activity ("re-registration") if they wish to conduct it after 31 March 2015.
2. The petition from the group of senators was directed, in addition to the provisions concerning the cited "re-registration" obligation, against the new legal framework for the National Health Information System and the definition of the elements and amounts of penalties for certain administrative delicts under the Health Care Services Act.
3. Finally, the petition from the second group of deputies contained objections relating to the manner in which the Health Care Services Act was adopted, and relating to the content of the Act. On a general level, it disputed the introduction of the term "health care services" and the new definition of the standard of health care provided. However, it also contained a petition seeking the annulment of a number of component provisions regulating certain specific institutions of the Act, e.g. the time limitation applied to a previously expressed wish.

VI.
Review of the Competence and Constitutional Conformity of the Legislative Process

4. The Constitutional Court states that the petitions submitted by the petitioner and the secondary parties met the formal requirements set forth by the Act on the Constitutional Court, so nothing prevented substantive review of them.

5. Under § 68 par. 2 of the Act on the Constitutional Court review of the constitutionality [sic] of a law with the constitutional order, or another legal regulation, consists of three components. The following questions must be answered: whether the statute or other legal regulation was adopted and issued within the bounds of constitutionally provided competence, whether it was adopted in a constitutionally prescribed manner, and whether its content is consistent with constitutional laws or, in the case of another legal regulation, with statutes.

6. In the case of all the contested statutes, there is no doubt whatsoever that Parliament was competent to adopt them, under Art. 15 par. 1 of the Constitution, and the Constitutional Court also has no doubts that during their adoption the constitutionally prescribed manner of decision making was observed by the chambers of Parliament and by the President, and that they were always adopted by the prescribed majority of deputies or senators. Nor do the petitioners dispute these facts in any way. Therefore, the Constitutional Court turned to the individual objections that both groups of deputies raised in relation to the manner of adoption of the contested statutes.

7. The petitioners seek annulment of the contested statutes on the grounds that they, as representatives of the parliamentary opposition, were denied their constitutionally guaranteed rights during the legislative process. The Constitutional Court has recognized in the past that such interference is sufficient grounds for the annulment of a statute in a proceeding on review of norms; however, it required as a condition for granting such a petition that it be filed without undue delay after the adoption of the statute, or after its promulgation in the Collection of laws. As the contested statutes were promulgated in the Collection of Laws in December 2011 (or, in case, at the end of November 2011), the petition, which was delivered to the Constitutional Court on 6 January 2012, can be considered to have been filed immediately after their promulgation. Thus, the conditions were met for the Constitutional Court to review the constitutional conformity of the legislative process in terms of all the objections made by the petitioners.

8.First, the Constitutional Court considered the manner in which the bills denied or returned by the Senate were inserted into the agenda of the then ongoing 25th meeting of the Chamber of Deputies. Under § 97 par. 3 and 4 of the Rules of Procedure, the chairman of the Chamber of Deputies "shall submit" a denied or returned bill after at least ten days "at the next earliest meeting," so the Chamber of Deputies will vote on it again. It is evident that the cited provisions give the chairman an obligation to initiate discussion of these bills at the next earliest meeting, so that it will be possible to decide on them as soon as possible. The law does not provide the specific manner in which the chairman is to initiate this, but one can expect that the form will correspond to the methods provided by the Rules of Procedure for including a particular point on the meeting agenda. As a rule, this means a draft meeting agenda under § 54 par. 4 of the Rules of Procedure, or it may mean a proposed amendment to an approved meeting agenda under § 54 par. 6 of the Rules of Procedure; however, objections against it can be raised by two parliamentary groups or by 20 deputies. In contrast, supplementing a session agenda by decision of the Chairman of the Chamber of Deputies cannot be considered such a method, for the following reasons.

9.The overall concept of the Rules of Procedure indicates that approving a meeting agenda is in the competence of the Chamber of Deputies, and the law allows expanding it without the chamber's consent only exceptionally. Essentially, this means in extraordinary situations, which include, e.g. declaration of a state of war or a situation of endangerment of the state. In these cases the Rules of Procedure expressly state that if a meeting is held, the discussion of a particular point shall be included in the agenda (§ 100a par. 3, § 109m par. 2 of the Rules of Procedure). This text must be distinguished

from those provisions that merely order including a point in the agenda of the next meeting (e.g., § 82 par. 1, § 109 par. 6 of the Rules of Procedure), which is a formulation analogous to that in § 97 par. 3 and 4 of the Rules of Procedure. Their purpose is to ensure that the points in question will be discussed at the earliest opportunity. Nonetheless, these provisions permit points to be included in an approved agenda of an ongoing meeting in a manner other than that under § 54 par. 6 of the Rules of Procedure. Supplementing a meeting agenda always carries the risk that the parliamentary majority, by the surprise inclusion of a particular point, will deny individual deputies the opportunity to prepare for discussion of it, or even take part in the discussion (cf. judgment file no. Pl. ÚS 53/10, point 126), which are also the reasons why a parliamentary minority can use an objection to block such a proposal. The foregoing would apply in the case of including a particular proposal for immediate discussion at a meeting where that was done by decision of the Chairman of the Chamber of Deputies based solely on his own discretion; this is why such an interpretation of his powers cannot be supported.

10. Despite these conclusions, the Constitutional Court did not find that there was an impermissible limitation of the rights of the parliamentary opposition in the contested actions by the Chairwoman of the Chamber of Deputies. The approved agenda allowed for consideration of bills denied or returned by the Senate. Although it did not directly specify these bills, the agenda was approved at time when the resolutions to deny or return the bills of the contested statutes had already been delivered to the Chamber of Deputies. Thus, one could assume that the supplement to the agenda would concern these in particular. Moreover, the date for discussion of them was set so as not to conflict with the ten day period under § 97 par. 3 and 4 of the Rules of Procedure, the purpose of which is to create sufficient time to familiarize oneself with the position on the bills taken by the Senate. Therefore, we can summarize that, even if the additional supplementing of the agenda for the 25th meeting of the Chamber of Deputies to include the bills returned or denied by the Senate required the process under § 54 par. 6 of the Rules of Procedure, the already approved agenda allowed for consideration of the contested statutes. Therefore, in this matter there was no room to apply the opposition deputies' objections against the supplementing of the agenda.

11. As regards the contested combining of debate and simultaneous limiting of the deputies' speaking time and the number of their opportunities to speak, the Constitutional Court emphasizes that in creating the structure of the legal order, in terms of its formal division into statutes, the legislature is bound by the attributes of a state based on the rule of law, which include the principles that the law should be foreseeable, understandable, and internally consistent. It is precisely from these principles that one can draw the requirement that a statute, in the formal sense, not simultaneously regulate multiple topics that are not mutually connected, in content and systematically. Justification for this requirement can also be found in relation to the manner in which bills are considered. If the legislative process is to permit open and critical evaluation of bills, it is desirable that its subject matter be defined precisely in view of the abovementioned connection in content, and that discussion thus take place in a clear and understandable manner. For these reasons, the Constitutional Court shares the petitioners' opinion that § 54 par. 8 of the Rules of Procedure must be interpreted to mean that combining discussion of one or more points on the agenda presupposes that they are mutually substantively connected. Combination of debate on several unrelated points would, in contrast, lead to the absurd result of an "all-inclusive" debate that would lack any reasonable purpose, precisely due to the scope of its subject matter.

12. This interpretation is also important for the potential application of § 59 par. 1 and 2 of the Rules of Procedure, under which the Chamber of Deputies may agree, "regarding a point under consideration" to limit the speaking period, which may not be shorter than ten minutes, and also that a deputy may speak no more than twice "regarding the same matter." The Constitutional Court does not find extreme the interpretation that these concepts could be applied to the subject of debate, which, in the case of combined debate, is all the points discussed as part of it. The reason for this is precisely the requirement of substantive connection, from which viewpoint it is only important that the subject of debate is a certain coherent topic, not whether it is formally divided into several bills, and thus forms several points on the agenda. A different interpretation would ultimately lead only to an artificial attempt to adopt particular material in a single statute, although for practical or other reasons it could be much more useful to leave it, formally, in a number of statutes.

13. The Constitutional Court is of course aware that the purpose of the cited methods, which can be applied by the parliamentary majority, is precisely to shorten the total period of debate, which always brings with it a limitation on the opportunity for (not only) opposition deputies to speak in the debate. However, this does not mean that these are automatically illegitimate methods or that they disproportionately affect the rights of the opposition. The Rules of Procedure may permit the parliamentary majority to adopt measures whose purpose is to address situations where the opposition attempts to postpone adoption of the decision under discussion through maximum use of all legal means. Limiting the speaking period or the number of times one person can speak under § 59 par. 1 and 2 of the Rules of Procedure does not remove the right of individual deputies to take part in debate, but only limits it in time. As indicated above, the point is to find a balance between the governing majority's interest in adopting a particular decision and the opposition's right to seek, through permissible means, to reach the opposite result.

14. Thus, for reviewing all these limitations in terms of the rights of the parliamentary opposition the key question is still whether the requirement of substantive connection was met, which would justify combining debate under § 54 par. 8 of the Rules of Procedure, and if that was not the case, whether the failure to meet this requirement is sufficient to establish grounds for derogation in relation to the contested statutes. We can summarize briefly that the debate in question concerned, substantively, statutes containing significant (or even fundamental) changes in the area of provision of health care, the pension system, the social system, and labour relations. The connection undoubtedly existed between some statutes, as is evident in the statutes in the areas of health care and retirement security. However, concluding that it exists in relation to all of them is possible only in a very abstract form, far removed from the content itself, which obviously does not correspond to the purpose of combining debate. Unlike with the Act on Stabilization of Public

Budgets, which was reviewed in the past (judgment file no. Pl. ÚS 24/07), in this case it is not even possible to identify a joint purpose for these statutes in an intelligible way. In the case of the Act on General Inspection of Security Forces there is even no substantive connection with any of the other contested statutes. Therefore, even with a restrained review, the Constitutional Court did not find that the statutory prerequisites for combining debate existed for the bills of the contested statutes. However, it concluded that in this case the error is not of an intensity that would, in view of the overall review of the manner of adoption of the contested statutes, establish that they were inconsistent with the constitutional order.

15. In this regard, the Constitutional Court emphasizes that the limitation in question occurred in the last phase of the legislative process, when the Chamber of Deputies had already had three readings of all these bills, in the usual time frame. They had also been duly considered in the Senate. Thus, the Chamber of Deputies only faced the decision whether it would insist the bills that had already been approved once, or whether it would deny them, or, in the case of the two returned bills, whether it would approve them in the version amended by the Senate. These facts are fundamentally reflected in the review of the legislative process as regards fulfillment of its legitimating function. The content of the limitations does not in any way cast doubt on the conclusion that the result of this process as a whole is statutes where all persons taking part in the process had an opportunity to familiarize themselves with their content, to take a position on them, and, in the course of debate, to state this position publicly in Parliament (and not only there), as well as to propose possible amendments. The statutes also cannot be criticized on the grounds of unforeseeability or surprise in relation to the parties they addressed, or in relation to the wider public.

16. Unlike the petitioners, the Constitutional Court does not believe that, in terms of observance of the fundamental constitutional principles regarding the legislative process, the manner in which the contested statutes were adopted can be compared to the manner of consideration and adoption of several statutes in shortened proceedings during a state or legislative emergency in November 2010, which were the subject of its review in judgments file no. Pl. ÚS 55/10 and file no. Pl. ÚS 53/10 (also in judgment file no. Pl. ÚS 17/11). While in that case the entire legislative process was shortened to only several days, without there being extraordinary and serious grounds for such serious interference in the process, against the will of the parliamentary opposition, here the contested statutes were, although with the exception of the contested combined debate, considered in the standard manner and in a framework that allowed sufficient time. Thus, this matter does not involve a situation where deputies had to take a final position on a government bill immediately after it was submitted. On the contrary, the Chamber of Deputies had already once expressed its position on the bills, and the purpose of repeated debate on them was to allow the deputies to respond, in connection with the legislative process up to that point, to the reasons that had sounded in the Senate, due to which the bills were denied, or returned with comments. It must be emphasized that the Chamber of Deputies held a second vote only after the ten day period under § 97 par. 3 and 4 of the Rules of Procedure, which allowed all deputies to familiarize themselves in advance with the Senate's position. At the same time, the parliamentary opposition as a whole had the opportunity to speak regarding the bills in debate, although we can recognize that for individual deputies the opportunity was significantly limited.

17. Nothing about this review is changed by the fact that in the case of most of the contested statutes there was a certain shortening of the deadlines for discussion of bills in committees under § 91 par. 1 and for starting the third reading under § 95 par. 1 of the Rules of Procedure, although one can have various opinions on the justification for these measures, in view of the subject matter being reviewed and its scope. However, the shortening was not such as could, in terms of the abovementioned positions, cast doubt in a constitutionally relevant manner on the legislative process that took place, even through its cumulative effect with the combining of debate in the last phase. The Constitutional Court considered the other objections raised in relation to the legislative process to be obviously unjustified.

18. For all these reasons the Constitutional Court concluded that the manner of adoption of the contested statutes was consistent with Art. 1 par. 1, Art. 5, 6 and 15 of the Constitution and Art. 4, Art. 21 par. 1 and 4 and Art. 22 of the Charter, or with certain other articles thereof, which were cited in this regard by the petitioners and the secondary parties. The contested statutes were adopted and issued within the bounds of constitutionally specified competence and in a constitutionally prescribed manner. Thus, the Constitutional Court could turn to a substantive review of the contested provisions of the statutes.

VII.
Review of the constitutional conformity of the law that specify refusal to perform public service as a reason for deletion from the register of job applicants

19. The first group of measures for which the petitioners seek substantive review supplement the legislative framework of the institution of public service contained in the Act on Assistance in Material Need. It is obvious from the contested § 30 par. 2 let. d) of the Act on Employment and § 18a par. 1 of the Act on Assistance in Material Need that, although they do not provide a direct obligation for the registered job seeker to accept an offer to perform public service, they do tie his decision to the consequence of whether he will continue to be listed in the relevant register and whether he will continue to have the opportunity to exercise rights arising from that status. This condition is key to constitutional law review of this matter.
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VII./c
Review of the consistency with the prohibition of forced labour

20. The Constitutional Court first reviewed whether public service, in the case of persons listed in the register of job seekers is work or service under the cited provisions, then whether it is performed willingly, or whether it is not performed as a result of duress of under threat of penalty, and finally, if these questions could be answered in the affirmative, whether it is not a case of forced labour or service subject to an exception under Art. 9 par. 2 Charter or Art. 4 par. 3 of the Convention, possibly also Art. 2 par. 2 of the Convention concerning Forced or Compulsory Labour or Art. 8 par. 3 let. b) and c) of the International Covenant on Civil and Political Rights, promulgated as no. 120/1976 Coll.

21. The first question must be answered in the affirmative. It was already stated that public service has the character of employment ["dependent work"] under § 2 of the Labour Code; therefore it can, with no doubt whatsoever, be included within the wider concept "work or services" under Art. 9 par. 1 of the Charter. Thus, the Constitutional Court could turn to the next question posed, whether the performance of public service takes places willingly or as a result of coercion. In this case however, the answer is not obvious prima facie, and requires more detailed definition of the criterion.

22. We must note, first of all, that an obligation that could be described as forced labour or services need not be imposed on an individually independently, but may be part of the rights and obligations that arise to him out of a legal relationship to which he is a party. Therefore, in order to evaluate whether he expressed consent with the creation of that obligation, it is essential to weigh whether he had an opportunity to influence the content of that legal relationship, what aim he was pursuing by entering into it, and whether the given obligation also serves to achieve that aim, whether it is related in content to the subject matter of the legal relationship, and whether it is not disproportionately burdensome in relation to it.

23. A job seeker's obligation to accept an offer to perform public services cannot be evaluated independently, but as a component of this legal relationship, corresponding to his status. Related to this, however, is a key question that must be answered in this matter, and that is whether public service can be considered forced labour in a situation where the job seeker was included in the relevant register at his own request, without being required to file the application, and could also request to be removed from the register at any time. In this regard, we must consider the aim of including a job seeker in the register, as well as the manner in which this aim can be achieved through an obligation to perform public service.

24. The legal framework for providing assistance finding employment under Chapter II of the second part of the Act on Employment, which is the legal basis for the register of job seekers, in the aggregate implements Art. 26 par. 3 of the Charter. This provision guarantees citizens who, through no fault of their own cannot exercise their right to obtain the means for their living needs through work (and are also not unfit for work under Art. 30 par. 1 of the Charter), that they will be provided material security in an appropriate scope by the state. The constitutional framers thereby bound the state to adopt a legislative framework that will at least partially mitigate the negative consequences that loss of income can have for an individual and his dependents, and will thus provide an opportunity for him to address this situation. What is meant by an appropriate scope is not clear from the text of the Charter alone. Definition of this term, as well as setting conditions for exercising the right in question, is up to the legislature, which must weigh all other circumstances, not excluding the possibility of public financing. However, the normative solution chosen by the legislature must respect the aim of the guarantee, and its content may not make achievement of that aim impossible.

25. These conclusions also connect to the previous case law concerning social rights, which the Constitutional Court developed in its judgment of 24 April 2012 file no. Pl. ÚS 54/10 by the construction of the reasonability test as an instrument to review the legislature's intervention in the area of constitutionally guaranteed social rights. This test, which will be applied below to the contested legislation, reflects both the need to respect the legislature's relatively wide discretion, and the need to rule out possible excesses on its part. It consists of the four following steps:
1) defining the purpose and essence of a social right, i.e., its essential content,
2) evaluation of whether a statute does not affect the very existence of a social right or the actual implementation of its essential content,
3) evaluation of whether the legislative framework pursues a legitimate aim, i.e., whether it is not an arbitrary lowering of the overall standard of fundamental rights,
4) evaluation of whether the statutory means used to achieve it is reasonable (rational), even if not necessarily the best, most suitable, most effective, or wisest (point 48 of this judgment).

26. The legislature is entitled to set the conditions and scope in which the right to appropriate material security in unemployment can be exercised under Art. 26 par. 3 of the Charter, including conditions for listing job seekers in the register and maintaining them in it, from which other rights, in addition to the right to support during unemployment, are derived, e.g., payment of health insurance by the state. Thus, it can undoubtedly require cooperation and fulfillment of other obligations for the purpose of ensuring that the assistance in question will be provided to persons who are interested in working but do not have an opportunity for employment. In its deliberations, however, it must keep in mind that the persons for whom the entitlement is intended, by being included in the register of job seekers, are exercising their statutorily provided rights in the confidence that their purpose is to mitigate the effects of loss of employment on their financial situation and assistance in seeking new employment. This confidence is strengthened not only by the constitutional guarantee of this right, but also by the fact that a condition for the creation of an entitlement for support in unemployment is a previous period of employment during which these persons were required to pay premiums for social security. Being listed in the register is also the only way in which they can seek any performance on the grounds that they became unemployed.

27. The Constitutional Court believes that public service is a public law relationship, the content of which is the performance of activity that meets the elements of employment under § 2 par. 1 of the Labour Code. What distinguishes

it from the basic labour law relationships (§ 3 second sentence of the Labour Code) is, first, the mutual positions of the parties. Whereas in concluding an employment agreement the employee and employer are formally on an equal level and the content of the agreement is the result of their identical expressions of intent, in the case of public service the relationship is between a job seeker and the regional branch of the labour office, which, however, acts in the relationship like a state body. This relationship also requires a contract, but the specific offer to conclude the agreement depends on the administrative discretion of the relevant body. The job seeker has no opportunity to influence the subject matter of the agreement or where and how long he will perform it. He can only refuse the offer in its entirety, the result of which, however, will be that he will be removed from the register of job seekers. The only exception is a case where the job applicant had serious reasons for refusal under § 5 let. c) of the Act on Employment; however, even the cited "reasons worthy of special consideration," which are the only open concept in the exhaustive list given in this provision, do not create an opportunity to simply express disagreement with the offer. These grounds are aimed at exceptional situations, when the requirement to mitigate possible disproportionate consequences of this obligation is appropriate. However, other differences between public service and basic labour law relationships can also be emphasized. As will be set forth below, in the case of public service, the person performing it does not have a right to compensation. These persons are not even reimbursed for expenses that they incurred in connection with the performance of public service, nor are they subject to a number of provisions that protect the employee's position in basic labour law relationships in various aspects (e.g., concerning vacation).

28. The foregoing is reflected in the constitutional law review of the contested provisions and in a way testifies to the contradictory nature of the present state of the law. If a person who lost employment decides to ask for assistance finding it, he must, after two months in the register, accept that in the case of an offer he will, for a period of up to one half of the specified weekly working hours (§ 79 par. 1 of the Labour Code) perform what is essentially employment for an entity designated by the state, without an entitlement to wages, and with a considerably lower level of protection than the Labour Code provides to employees. In other words, the state conditions the exercise of the person's rights, which it grants in the event of employment, on de facto ordering the person half-time employment. However, the job seeker remains formally unemployed, which means that he is denied rights that an employee normally has in a labour law relationship, and the state does not have to provide the counter-performance that the state itself otherwise requires from any other employer, under threat of penalty. Moreover, the job seeker still has a number of obligations connected with being listed in the register of job seekers (e.g., cooperation with the regional branch of the labour office), and he is forced to look for employment himself in his own interest.

29. The above-defined ambivalence in a job seeker's position strengthens the negative effects that the contested legislative framework causes in the sphere of his fundamental rights and freedoms. This means not only the freedom to decide whether to accept the public service or not. If the purpose of the state measures under the Act on Employment is to provide assistance finding employment, then it is understandable that the job seeker cannot without a reason refuse the offer of employment provided (cf., in this regard, the approach of the European Court of Human Rights, e.g., in the decision of 4 May 2010 in Schuitemaker v.The Netherlands, Application no. 15906/08). In such a case, the requirement that the job seeker cannot, through no fault of his own, obtain the means for his living needs through work would be significantly cast in doubt. However, the public service and the connected grounds for being removed from the register of job seekers under § 30 par. 2 let. d) of the Act on Employment does not lead to assistance finding employment. As indicated by the statement from the Minister of Labour and Social Affairs, its purpose must be seen in securing purposefulness of the cooperation on the part of the state, i.e. that it is aimed at persons who are socially needy and is not misused ("being unemployed should not pay"). It should also be a means for maintaining or reacquiring work habits and preventing the social exclusion of the unemployed. However, the contested provisions pursue these aims only seemingly, and the obligation they set of accepting an offer of public service after only two months of unemployment does not in any event represent an appropriate and commensurate means for achieving them.

30. Primarily, it is not at all clear for what reason the legislature presumes a loss of work habits after only two months of unemployment. In the case of persons who were employed for several years or even decades, such a general presumption has no justification. However, questions are also undoubtedly raised about whether such a manner of performing work can lead to maintaining or reacquiring work habits. The individual guarantees that the constitutional order defines through the prohibition of forced labour and the right to free choice of profession, but also the right to fair compensation and the right to appropriate material security during unemployment, in the aggregate formulate an imperative for the legislature that the legislative framework relating to the performance of work always reflect its importance for an individual's free and dignified life. Thus, the legislature cannot view the performance of work in isolation, only as an independent activity, without taking into account all the other related aspects. The condition contained in § 30 par. 2 let. d) of the Act on Employment puts the job seeker in a position where, if he wishes to continue to draw unemployment support, or other benefits, or if he is to continue to be provided assistance by the Labour Office, he must be available in order to work off this state assistance. According to the Minister of Labour and Social Affairs, these benefits are even supposed to represent the equivalent of work performed as part of public service, or "fair compensation," even though they take the form of "social benefits." As we can judge from his statement, the public service is intended for persons who are "able and willing to work," and the evidence of their "willingness," which is a necessary prerequisite for remaining on the register, is precisely performing the public service. Thus, the consequence is a completely opposite view of the essence of work than that which arises from the abovementioned constitutional norms. Work habits are to be preserved and continued through such performance of work in which, apart from the activity itself, all its other natural aspects, which give its performance purpose and provide motivation to the worker, are denied.

31. However, similar reasons can be used to cast doubt on the second purpose of public service, that of preventing social exclusion. The fact that the job seeker is performing public services changes nothing about the fact that he

continues to be unemployed, and in terms of income he receives the appropriate social support from the state. Therefore, it is difficult to find support for the conclusion that his social position is improved. On the contrary, the Constitutional Court believes that, in view of the particular features of public service, its effect is precisely the opposite. The state assigns the work of those performing public service a lower value than in other analogous cases, which is also in and of itself reflected in the manner in which the wider public sees the performance of public service. However, in this regard, we also cannot overlook the similarity between the performance of public service and serving a sentence of community work (§ 65 of the Criminal Code), as a result of which, in the eyes of the public the differences between the two institutions are blurred. This is evidenced in particular by the fact that the kind and scope of the work performed are similar, that as a rule even the "supervisors" of their proper performance are the same, and that in both cases the work is performed without an entitlement to compensation. This consequence is at present intensified by the visible identification of the workers involved by vests with the label "public service." Thus, in the aggregate, the state treats them in the same manner as persons sentenced for a crime, only for the reason that they became unemployed and are exercising their legal rights, without violating any legal obligation. Therefore, the obligation to accept an offer of public service does not serve to limit social exclusion, but to intensify it, and it can cause those performing it, whose work has the same elements externally (for other people) as serving a sentence, humiliation to their personal dignity.

32. The contested obligation also cannot be considered an appropriate means that prevents misuse of the relevant power by the state, which can also be achieved by a less intrusive method. An offer of public service can have (and in a number of cases undoubtedly has) this effect on those job seekers who took advantage of state support, although they could themselves obtain the means for their living needs through work. These job seekers have no reason to accept public service under the conditions required, because they will understandably consider it disproportionate in relation to the benefits provided by the state, or it will be a barrier to black market work for them. However, it cannot be presumed that all job seekers will misuse the assistance; with some groups of job seekers especially such a situation will definitely not be the rule. As an example that anyone can document by observing the people around himself we can certainly cite persons who lost their jobs a few years before reaching retirement age and despite their best efforts cannot find new employment. These people do not, as a rule, lose their work habits in two months, and yet they will be subject to this provision if they ask to be added to the register of job seekers. Although they have not in any way transgressed against the rules, they will be forced to accept and perform public service under the conditions stated above, often for a period of several months. Yet, the intended purpose could undoubtedly be achieve by more appropriate measures, which would affect only those job seekers who really did not observe the conditions for continued listing in the register, e.g., strengthening inspection mechanisms.

33. The cited shortcomings, which cast doubt on the ability of this institution to be a suitable or proportional means for achieving the aims pursued, cannot be removed even through the use of administrative discretion by the regional branches of the Labour Office when selecting job seekers. There is a fundamental problem in the fact that these branches do not have an obligation, but merely the possibility of offering the performance of public service, which is dependent on the number of places agreed with municipalities or other entities. Understandably, a substantial proportion of job seekers, or even a majority of them, will see public service of up to 20 hours a week, performance of which is motivated, instead of any sort of compensation, purely by the threatened penalty of being removed from the register of job seekers, not as an opportunity, but as a burden. Thus, a situation will arise, when it will depend on the number of agreed on places, whether a particular person will or will not perform public service, so it will not be exceptional to find a situation in which out of two job seekers who are in a comparable position in terms of the relevant criteria, only one will have to perform public service. As a result, a certain group of job seekers will have to in fact work for all the entitlements arising from their inclusion in the register of job seekers while another group will not, even though this inequality cannot be justified in any way except as a consequence of randomness. Moreover, this opens the door to possible misuse of discretion, because it will in fact be possible to exclude a particular person from this offer, without any kind of justification.

34. The text of § 18a of the Act on Material Need indicates that the Act does not contain criteria for selecting job seekers who are to be offered public service. Therefore, the selection of them depends on the practices of the individual regional branches of the Labour Office, which gives them extremely wide administrative discretion. One can imagine several alternatives for setting these criteria. They could take into account e.g., the length of time that a person is listed in the register of job seekers, as well as qualifications, economic and social status, family or health situation, age, etc. However, no key will be able to change the fact that an offer of public service and the related obligation for the job seeker to accept it will always affect only those job seekers who have been listed in the register for more than two months. This is not an inequality that could be approved merely by reference to its preventive function. If public service could be considered exclusively a measure against misuse of the position of a job seeker and the related benefits, then one could undoubtedly accept that it will be offered, according to a certain pre-defined key, only to certain job seekers, and the mere possibility of the offer will serve as a warning. The Constitutional Court confirmed this solution in the case of the conduct of random tax inspections [cf. judgment of 18 November 2008 file no. I. ÚS 1835/07 (N 196/51 SbNU 375), including the dissenting opinion of Judge Ivana Janů, and the opinion of the plenum of 8 November 2011 file no. Pl. ÚS-st. 33/11 (368/2011 Coll.), which reversed the legal opinion contained in that judgment]. However, the comparison with tax inspection ceases to be relevant, if other elements of public service are taken into account, that is the performance of work of up to 20 hours a week over a period of several months. This is an obligation that is sufficiently burdensome that, for the group of job seekers to whom public service was offered, it fundamentally changes the conditions for exercising their entitlements to material security in the event of unemployment.

35. Thus, in the aggregate, in view of § 30 par. 2 let. d) of the Act on Employment, two groups of job seekers are created, with fundamentally different conditions for being maintained in the relevant register, and the determination of which group a particular job seekers belongs in depends to a great degree on the wide discretion of the regional branch of the Labour

Office. In view of the limited number of places, the decision about who will be offered public service will always have a certain element of randomness. This inequality between the two groups of job seekers, which will basically arise each time, if public service is not always offered to all job seekers, who can, in consequence of not accepting it, be taken off the register, lacks constitutionally approved justification and is inconsistent with the prohibition of arbitrariness arising from the principle of a state governed by the rule of law under Art. 1 par. 1 of the Constitution.

36. The fact that job seekers can defend themselves in the administrative courts against a decision to remove them from the register does not in any way cast doubt on these conclusions. The appropriate complaint can be used to protest against a removal from the register for which legal reasons were not given, which, in the case of a reason under § 30 par. 2 let. d) of the Act on Employment, will also mean review of whether the job seeker had the right to refuse public service for a serious reason under § 5 let. c) of the Act on Employment, that is, e.g., for the reason that the kind of public service offered is obviously disproportionate to the job seekers existing expert qualifications. Nonetheless, such a review cannot remove the structural problems of the institution, which, apart from the cited inequality, include other shortcomings identified in this judgment. These are the consequence of the contested legislative framework, and can be removed only by action on the part of the legislature.

37. The Constitutional Court states that the aims of the legislative framework for assistance in finding employment under Chapter II of Part Two of the Act on Employment and public service diverge significantly. In view of the fact that public service offers the unemployed only the possibility of unpaid performance of the assigned work activity, the obligation on a job seeker to perform it for up to 20 hours a week, with all the cited limitations, can be considered a disproportionate burden for exercising individual statutorily defined rights that are accorded the job seeker for the purpose of material security during unemployment. This is an obligation imposed by law, which every person applying for assistance finding a job must bear during the time that he is listed in the register of job seekers. Otherwise, he would not be able to exercise any of these rights. All these facts make it impossible for a review of the contested obligation to perform the offered public service to begin with the assumption, that it involves the job seeker's consent to be listed in the relevant register. On the contrary, based on these facts one can reach the opposite conclusion, that § 30 par. 2 let. d) of the Act on Employment imposes on job seekers a disproportionate obligation to perform work, and penalizes refusal by removal from the register. Therefore, the Constitutional Court concluded that this obligation meets both elements of forced labour under Art. 9 of the Charter and Art. 4 of the Convention, or Art. 2 par. 1 of the Convention on forced or compulsory labour.

38. Thus, to conclude this part, the last of the posed questions remains to be answered, that being whether the contested obligation cannot be included under one of the exceptions to the prohibition of forced labour established by the Charter, the Convention, or another international treaty. In this regard the Constitutional Court emphasizes that the only exception to the prohibition that can come into consideration is the argument of extraordinary circumstances as a result of an economic crisis, formulated by the Minister of Labour and Social Affairs. In his opinion, this argument could be included under Art. 4 par. 3 let. c) of the Convention, under which forced or compulsory labour is not considered to include service required in a case of emergency or calamity that endangers life or the well-being of society, and under Art. 2 par. 2 let. d) of the Convention concerning Forced or Compulsory Labour, which establishes this exception for work required in cases of emergency that would endanger the existence or the well-being of the whole or part of the population. However, the Constitutional Court emphatically rejects such an assessment.

39. The reference to the ongoing economic crisis is, above all, very vague, and it does not in any way indicate in what way the obligation of job seekers to accept an offer of public service is supposed to contribute to overcoming it, or overcoming its consequences. The aim of the obligation, though one can have reservations regarding the ability of this obligation to achieve it, is primarily directed at the protection of individual job seekers from the consequences of (not only) long-term unemployment. This does not mean that the aim is not compatible with the public interest in reducing unemployment and that achieving it could not, in a wider context, contribute to economic development, but this connection is very abstract, and it could be justified by basically any sort of work obligation, so the Constitutional Court cannot consider it to be adequate. This exception could be accepted only if a certain obligation was imposed precisely for the purpose of preventing or removing a danger that would threaten lives and health or property values (well-being). By the nature of the matter these must be obligations of an extraordinary nature, which does not rule out imposing them for a longer period. However, the obligation of job seekers to perform public service is not a means for removing some extraordinary situation, but is conceived as a permanent measure within the active employment policy, intended to preserve job seekers' work habits and prevent them from being socially excluded. For these reasons it cannot be included in any of the abovementioned exceptions.

40. For all these reasons the Constitutional Court concluded that the obligation of job seekers to accept an offer to perform public service, which is a condition for their continued listing in the register of job seekers, is inconsistent with the prohibition of forced labour under Art. 9 par. 1 and Art. 26 par. 1 of the Charter, Art. 4 par. 2 of the Convention and Art. 8 par. 3 let. a) of the International Covenant on Civil and Political Rights, and also violates the prohibition of arbitrariness under Art. 1 par. 1 of the Constitution and the principle of equal dignity under Art. 1 of the Charter, or the right to preservation of human dignity under Art. 10 par. 1 of the Charter.

VII./d
Review of consistency with the right to appropriate material security during unemployment under Art. 26 par. 3 of the Charter

41. Setting a new reason for removing someone from the register of job seekers as a result of refusing an offer to perform public service also functions as a change to the conditions for the creation and continued existence of an entitlement to support during unemployment, because this entitlement can arise only for a listed job seeker (§ 39 of the Act on Employment). Thus, its primary consequence is a fundamental limitation of the entitlement, which, upon expiration of two months, becomes an entitlement that is conditioned on the acceptance of a possible offer. This is undoubtedly a very fundamental change, which, depending on the age of the job seeker who refuses an offer, can mean shortening the support period by 3, 6 or even 9 months, and can thus have a fundamental negative effect on his social situation. Therefore, simply for this reason doubt arises from the fact that the legislature did not in any way take into account the legitimate expectations of participants in this insurance in relation to the decisive period and did not provide appropriate transitional measures that would establish a longer time period for such changes. However, before the Constitutional Court could weigh the possible intensity of this action in terms of the principle of legal certainty or confidence in the law, it had to ask a more general question, whether this limitation can be accepted in view of the content of the obligation.

42. The Constitutional Court again emphasizes that public service is a public law relationship; those performing it, if they are job seekers, despite performing employment ["dependent work"] of up to 20 hours a week, remain formally unemployed, and they are denied rights that they would have as employees in basic employment law relationships. Thus, their obligation to accept an offer to perform public service in fact establish a new condition for them to receive support in unemployment, which consists in the performance of an activity that is de facto nothing other than employment, and the obligation thus changes the very meaning of the support, because, as the Minister of Labour and Social Affairs openly stated in his statement, it becomes compensation for public service. However, this completely denies the aim for which support in unemployment is meant to be provided, and especially, for which the relevant insurance premiums are paid. The job seekers must again work off the benefits to which they should already be entitled under the law as a result of the occurrence of the insured event. In no event is this only an obligation whose aim is to be inspection of whether the conditions for the entitlement actually exist, e.g., whether the job seeker really cannot perform employment through no fault of his own. Finally, we cannot leave unnoticed the unjustified inequality that arises among job seekers as a result of setting a new reason for removing someone from the register of job seekers under § 30 par. 2 let. d) of the Act on Employment.

43. The reasons thus summarized justify the conclusion that the contested legislative framework affects the material existence and actual implementation of the essential content of the constitutionally guaranteed social right to appropriate material security during unemployment under Art. 26 par. 3 of the Charter, because, after only two months, moreover in some cases without any objectively reviewable reasons, permits removing job seekers from the register of job seekers, with the described consequences of losing appropriate material security.

VII./e
Review of consistency with the right to fair compensation for work under Art. 28 of the Charter

44. To conclude this part of the judgment the Constitutional Court considered the question of whether the contested provisions are consistent with the right to fair compensation for work under Art. 28 of the Charter. Its essence is the principle that the performance of employment ["dependent work"] in any form of an employment law relationship entitles employees to compensation, and in this case too the legislature has wide discretion to determine how it will ensure that this is applied, including the ability to regulate the manner and level of compensation.

45. To evaluate the consistency of the contested provisions with this right it is sufficient to answer two questions, those being whether the principle contained in Art. 28 of the Charter also applies to the performance of public service, and if so, whether the benefits that the law accords to job seekers as material security during unemployment can be considered fair compensation. Regarding the first question, we must state that the institution of public service under § 18a of the Act on Assistance in Material Need does create a framework for performance of activity that may have the nature of dependent work [employment] without entitlement to compensation, but the Act does not attach any penalty to refusal of that activity. Nor can such a penalty be agreed to in a written contract of a public law nature, which represents the legal basis for performance of public service, because a regional branch of the Labour Office lacks the necessary statutory authorization to make such an agreement. However, these characteristics are applied only in the event that the public services is performed by persons in material need or persons listed in the register of job seekers for a period of not more than two months. In contrast, if they were listed as job seekers for a longer period, then they would be subject to the obligation to accept the offer of public service under § 30 par. 2 let. d) of the Act on Employment, and under Art. 28 of the Charter they would have to be considered to be employees, who must be entitled to compensation for performing employment ["dependent work"].

46. It is obvious that the lack of any compensation whatsoever in the case of the obligation of job seekers to perform public service would be impermissible interference in the very essence and significance of their right to fair compensation for work, because this right would be completely denied (the second step of the reasonability test). As already mentioned, in terms of the Charter the performance of employment ["dependent work"] must be viewed in all its aspects, not only as an independent activity. It is precisely the compensation for work that is the counter-performance that motivates an employee to perform the work and best illustrates the mutual positions of both parties in labour law relationships. At the same time, it permits employees to create conditions for a dignified life and the creation and maintenance of social relationships. Therefore, it is very difficult to understand how the performance of public service without an entitlement to a wage is supposed to lead to renewing and preserving work habits. In this regard the law actually creates worse conditions for those performing public service than for those serving a prison sentence, who, in

contrast, if they are assigned to perform work, are guaranteed an entitlement to compensation (§ 33 par. 1 of Act no. 169/1999 Coll., on Serving a Prison Sentence, and Amending Certain Related Acts). A different procedure with sentenced persons would cast doubt on the very re-socialization function that this assignment is meant to fulfill [cf. decision of the German Constitutional Court of 1 July 1998 file no. 2 BvR 441/90 (BVerfGE 98, 169)].

47. It remains to answer the second of the posed questions, or what can be considered fair compensation. However, it is sufficient here to refer to the abovementioned reasoning, that support during unemployment and other rights that form appropriate material security in that event, pursue different aims, and cannot be considered as compensation or counter-performance for the performance of public service. To illustrate the absence of any connection, we can point to the fact that the level of these benefits changes according to criteria that have no relationship to the work performed. A person performing public service who was given the offer after two months in the register of job seekers will for several months receive all the benefits, including support during unemployment. However, if, after the end of the support period he continues to perform the same work, then he will do so only through an "exchange" for other rights, in particular payment of health insurance. In fact, this will also be the case during the period when he does not receive unemployment benefits because of receiving severance pay (cf. § 44a of the Act on Employment). Therefore, the Constitutional Court states that § 30 par. 2 let. d) of the Act on Employment is not consistent with the right of employees to fair compensation for work under Art. 28 of the Charter, and also under Art. 7 let. a) of the International Covenant on Economic, Social and Cultural Rights.

48. This ground for derogation does not apply in relation to the possibility of job seekers to perform public service under § 18a of the Act on Assistance in Material Need, which the petitioners also seek to have annulled in a section of the petition. Thus, public service remains the legal form of performing activity for one of the purposes defined in this provision, the use of which by persons in material need or by job seekers depends fully on their consent. The question of what motivation these persons will have to perform it, which naturally arises in this regard, exceeds the scope of this constitutional law review.

VII./f
Summary

49. For all the stated reasons, the Constitutional Court concluded that § 30 par. 2 let. d) of the Act on Employment, as amended by Act no. 367/2011 Coll., is inconsistent with Art. 1 par. 1 of the Constitution, Art. 1, Art. 9 par. 1, Art. 10 par. 1, Art. 26 par. 1 and 3 and Art. 28 of the Charter, Art. 4 par. 2 of the Convention and Art. 8 par. 3 let. a) of the International Covenant on civil and Political rights and Art. 7 let. a) of the International Covenant on Economic, Social and Cultural Rights. The Court did not find justified the proposal to annul § 18a par. 1 of the Act on Assistance in Material Need, as amended by Act no. 366/2006 Coll., in the part expressed by the words "and persons listed in the register of job seekers54)," which, in view of the petitioners' arguments, was to be reviewed only as to its consistency with Art. 28 of the Charter.

VIII.
Review of constitutional conformity of the obligation of new registration of providers of health care services under § 121 par. 1 and 5 of the Act on Health Care Services

50. The petitioners and the group of senators, which has secondary party status in this proceeding, also see § 121 par. 1 and 5 of the Act on Health Care Services as inconsistent with the prohibition of retroactivity and the principle of legal certainty under Art. 1 par. 1 of the Constitution and with the right to conduct business under Art. 26 par. 1 of the Charter. They point to the fact that the operators of non-state health care facilities, who conduct their activity on the basis of a decision on registration under the Act on Medical Care in Non-State Medical Facilities, must re-apply for a permit to provide health care services. The application presumes re-submission of certain documents, which can result in a disproportionate burden on these subjects. However, the petitioners' objections are also directed against the fact that their existing authorization is to expire by law upon the expiration of 36 months from the day the Act on Health Care Services goes into effect, even though the affected operators of non-state health care facilities have not committed any sort of wrongdoing.

51. In this matter, the Constitutional Court had to consider the question of whether the change of legal status of the existing operators of non-state health care facilities implemented by the contested provisions justifies a conclusion that the interference in their legal certainty is of such intensity that it would justify concluding that the provisions are inconsistent with the principles of a state based on the rule of law under Art. 1 par. 1 of the Constitution. It reviewed this question together with the possible interference in the right to conduct business under Art. 26 par. 1 of the Charter, because, in view of the nature of the legal relationships affected by the contested provisions, one can assume that any interference of such intensity into legal certainty will also affect the other right.

52. The Act on Health Care Services sets conditions for obtaining authorization to provide health care services which do limit the possibility of conducting business in this field; however, the need for them is justified at a general level by the requirement of the appropriate level of expertise in providing health care, though the Constitutional Court does not at this point state a position on the particular legislative framework. In their petition, the petitioners do not in any way dispute the new framework. They see violation of Art. 26 par. 1 of the Charter only in the treatment of the issue of continued validity of the authorization of those health care services providers who, after the Act on Health Care Services goes into effect,

perform their activity on the basis of registration under the Act on Health Care in Non-State Health Care Facilities. Specifically, they argue against subjecting the provision of health care services to a requirement of obtaining a new authorization under the Act on Health Care Services. Their starting point is the assumption that it is only as a result of this consequence that existing operators of non-state health care facilities, in the case of individuals, or their professional representatives, in the case of individuals who do not have the required expert qualification or legal entities, will be required to prove their professional specialization under Act no. 95/2004 Coll., while otherwise it would be sufficient for them to have specialization under the regulations that preceded this Act. The Constitutional Court does not agree with this assessment.

53. In its transitional provisions, Act no. 95/2004 Coll. specified in detail in what manner, or also under what conditions, specializations obtained under existing legal regulations will be considered to be specializations under the new Act and its implementing regulations. This is legislation that went into effect several years before the Act on health Care Services went into effect, and was also relevant in relation to person through whom non-state health care facilities provided health care in accordance with existing legislation. Thus, even during the time when the Act on Health Care in Non-State Health Care Facilities was in effect, the loss of competence to conduct a health care profession under § 13 par. 1 let. a) of Act no. 95/2004 Coll. could lead to termination of registration, which, understandably, also applied to cases where requirements were not met for a specialization under previous legal regulations to be considered specialization under the latter Act. Thus, the contested provisions do not present any change from the existing legal situation as regards the requirement of specialization for physicians, dentists, and pharmacists.

54. The foregoing means that acquiring a new permit to provide health care services under § 121 par. 5 of the Act on Health Care services does not require existing operators of non-state health care facilities to have higher or different qualification of those employees who are physicians, dentists or pharmacists. Therefore, in the case of the contested provisions, if one can even consider whether a consequence of them is a further limitation of the right to do business under Art. 26 par. 1 of the Charter, it can only be on the grounds of a time limitation on the ability to provide health care services on the basis of existing registration and on the grounds of the new administrative burden that is unavoidably tied to the acquisition of a new permit. The first reason is also cited by the petitioners. Therefore, the Constitutional Court reviewed whether these provisions, which set new conditions for the ability to provide health care services, as interference in the right to practice a particular profession or conduct activity, will stand up to the proportionality test.

55. The provisions are mutually related in content, and they can be seen as a single whole, because both are components of the treatment of the intertemporal effects of the Act on Health Care Services on existing legal relationships. Nonetheless, a certain problem arises already in the first step of the proportionality test, i.e. identification of an aim that can justify the interference in a fundamental right. In the case of the contested provisions, it would be possible to formulate the aim of the time limitation on the existing authorization and the related requirement of a new authorization to provide health care services as an interest in having all providers of health care services, after the end of the transitional period, conduct their activity on the basis of authorization under the Act on Health Care Services. However, an aim formulated thus is not sufficient, for the reason that it itself includes the aim of limiting the right to conduct business under Art. 26 par. 1 of the Charter, which, however, cannot be a purpose in and of itself. In order to stand up to the test, its wording would have to provide an understandable answer to the question of why this limitation is to take place, that is, why are all providers of health care services supposed to have an authorization issued when this Act is in effect. However, such an answer cannot be derived from the contested provisions.

56. As indicated by their content, as of the day the Act on Health Care Services goes into effect, the same legislative framework applies to all providers of health care services, regardless of whether they conduct their activity on the basis of existing registration or a new authorization. The Act thus enabled existing operators of non-state health care facilities to function for a certain time under the regime of the new statute, without that change requiring these subjects to meet any special conditions. However the submission of an application under § 121 par. 5 of the Act on Health Care Services does not carry any obligation to prove new qualification or other prerequisites that would, as regards the requirements for obtaining an authorization to provide health care services, permit distinguishing in this regard between providers on the basis of registration under existing legislation, who need not meet these requirements for now, and providers with authorization under the new law, to which the new legislation applies in full. The application basically requires only presenting data that had to be contained in an application for registration under § 10 of the Act on Health Care in Non-State Health Care Facilities, and which the relevant administrative offices have at their disposal.

57. The purpose of the requirement for a new authorization was not formulated either by the Minister of Health in his statements nor by the professional associations approached by the Constitutional Court, which, in contrast, pointed out that this requirement is unnecessary. Even the background report to the government bill does not give an answer to the question of an aim, because its original version assumed that the existing operators of non-state health care facilities would be able to provide health care services on the basis of their registration without any time limitation. The change was not made until the amending proposal from the Health Care System Committee, which did not contain any reasons for it.

58. In the case of the contested provisions, the Constitutional Court was not able to identify any aim that could be furthered by subjecting the further provision of health care services to the requirement of a new authorization that is not tied to documentation of any new facts. The prohibition on arbitrariness that follows from the principle of a state governed by the rule of law under Art. 1 par. 1 of the Constitution does not permit the legislature to impose an obligation, or a limitation of a particular fundamental right, the fulfillment of which has no objectively perceptible aim that would constitutionally approve this interference. If the legislature also tied a certain penalty to the violation of this obligation, it

would be appropriate, depending on its content, to consider whether it is chicanery. In the case of the contested provisions, the Constitutional Court is aware that the requirement for a new authorization does not represent a significant or even intolerable burden. The legislature established simplified conditions for obtaining it and created an adequate time frame for applying. However, these facts are significant for evaluating the intensity of the interference in a fundamental right, which can be evaluated only in relation to the aim pursued. On the contrary, its absence justifies a conclusion that the obligation in question is of an arbitrary nature, because a limitation on the rights and freedoms of an individual that is an aim in and of itself is not acceptable in a state governed by the rule of law.

59. Therefore, the Constitutional Court concluded that the obligation of existing operators of non-state health care facilities to obtain a new authorization for the provision of health care services and the connected time limitation on providing them on the basis of registration under the Act on Health Care in Non-State Health Care Facilities is inconsistent with the principle of arbitrariness, which arises from the principles of a state governed by the rule of law contained in Art. 1 par. 1 of the Constitution, and is also a violation
of the right of these subjects to conduct business under Art. 26 par. 1 of the Charter. This reason for derogation affects part of the contested § 121 par. 1 of the Act on Health Care Services expressed by the words “for a period of no more than 36 months from the day this Act goes into effect, unless provided otherwise,” in par. 4 first sentence the words “but no later than 35 months after the day this Act goes into effect,” including the preceding comma, and par. 4 second sentence and § 121 par. 5 of the same Act; for that reason the Constitutional Court ruled to annul them.

IX.
Review of the constitutional conformity of collecting and publishing certain data on health care workers

60. The group of senators that is a secondary party in this proceeding in its petition seeks the annulment of § 70 to 78 of the Act on Health Care Services, which newly regulate the National Health Care Information System. The Constitutional Court states here that some of the objections raised do not qualify for a review on the merits. The secondary parties do state, on a general level, that the purpose of this system is defined very generally, but they do not further clarify whether their objection disputes the aim of all the component (and relatively independent) registers that it comprises, or only some of them. The Constitutional Court also considers indefinite the claim that, in contrast to the original legislative framework, there is no new provision of the manner in which the database is to be technically created and how the data in it are to be coded, and that the scope of data that are to be made anonymous is not provided. In this case as well the secondary parties do not specify what part of the National Health Care Information System their objections are directed against, and apart from the reference to certain provisions of the Charter and of the Convention on Human Rights and Biomedicine do not present any consideration that would indicate the reason why the stated facts are alleged to be inconsistent with the constitutional order.

61. The secondary parties met the burden of proof only in that part of their judgment [sic] that is directed against the legislative framework for the National Register of Health Care Workers. The secondary parties specifically object to the scope of data contained in it about health care workers, which, moreover, will be newly published on the relevant webpages. At the same time, they do not see any purpose for the duplicate collection of personal data about physicians, dentists, and pharmacists. As is evident from their petition, they believe that these facts make the contested legislative framework inconsistent with the right to protection from unauthorized collection, publication, or other misuse of personal data under Art. 10 par. 3 of the Charter and the right to protection from interference in private life under Art. 10 par. 2 of the Charter.

62. The provisions of § 70 and 73 of the Act on Health Care Services and the background report to it indicate that the purpose of processing personal data in the National Register of health care workers is to obtain information about the staffing for the provision of health care services for the management of the health care system and formation of health policy, as well as for scientific and statistical purposes. The last purpose which is, though implicitly, expressed in the abovementioned contested provisions, is to ensure public access to these collected data about health care workers. Thus, the Constitutional Court could turn to evaluation of the legislative framework of the register from that viewpoint, whether its purposes can be considered sufficient to justify interference in the fundamental right for informational self-determination under Art. 10 par. 3 of the Charter, and if so, whether the obligation imposed in order to achieve them, to disclose personal data, or to tolerate the processing and publication of the data, will stand up in terms of proportionality.

63. The first cited purpose, obtaining data on staffing for the provision of health care for managing the health care system and the creation of health policy, undoubtedly can be described as constitutionally approved. Creating a register containing data on health care workers, specifically their identification and contact data [§ 76 par. 1 let. a), b) and d) of the Act on Health Care Services], basic data on their structure [§ 76 par. 1 let. c), e), in essence also let. j) of the Act on Health Care Services], on their qualifications [§ 76 par. 1 let. g), h) and k) of the Act on Health Care Services] and data related to the performance of the health care profession [§ 76 par. 1 let. i), j), l), m) and n) of the Act on Health Care Services], is also a means that is capable of achieving the declared aim. These date permit the relevant state bodies to evaluate to what extent the provision of health care (or health care services) is ensured at the statewide and regional level in terms of the number and qualifications of health care workers, to record and assess relevant changes, including various aspects of the migration of health care workers, and to adopt necessary measures which they consider useful in order for a possible shortage not to endanger citizens’ access to health care in the short or long term. In a wider context they thus contribute to the protection of the constitutional values of life, health and human dignity.

64. In the next step of the proportionality test the Constitutional Court reviewed whether the contested framework will stand up in terms of the requirement of necessity. A substantial part of the data in the register is already recorded in connection with the creation and existence of health care workers' authorization to conduct the activity in question, as in the case of physicians, dentists and pharmacists these data are maintained by the relevant professional associations, who keep them as part of their member lists. However, this duplication is not decisive for evaluating necessity. The new register is intended to serve for evaluating the staffing for the provision of health care services for purposes of managing the health care system, i.e. undoubtedly a different purpose from that which justifies maintaining the lists in individual associations. It is also processed by a different subject, and, as a whole, includes a much wider scope of data about a greater number of subjects. Therefore, the mere establishment of it cannot be considered unreasonable or even arbitrary, and the requirement of necessity in this case must be evaluated in terms of the data processed and the manner in which they are handled, in connection with its purpose.

65. Above we outlined the connection of individual data to the pursued aims, which is also the starting point for evaluating the necessity for the extent of data processed. The Constitutional Court is of the opinion that in the case of identification data of health care workers, data about their structure (sex, age, citizenship), and qualifications (education, specialization) and practice of a health care profession (place of work, date of beginning, interruption and ending of work) the aim for which these particular data are required is obvious. All these areas basically involve basic data without which it would not be possible to obtain the information that is the aim of the data processing. preserving identification data during the period that one practices the profession allows inspection of the processed data, if they are provided by several subjects, as well as tracking changes, including the time aspect.

66. The remaining data are related to the practice of a health care profession. Whereas the abovementioned assessment applies without anything further to data about whether the person is a visitor or permanent staff member, about the health care provider where the health care worker is employed, and about the region, in the case of data concerning loss of authorization to practice a health care profession, on the loss of health qualification, loss of a clean record and the length of the period for which the conduct of activity is prohibited, it is desirable to state more detailed reasons. All the terms set forth in § 76 par. 1 let. n) of the Act on Health Care Services must be interpreted from the standpoint of whether they are relevant in relation to the existence of the authorization to perform a health care profession or not. A health care worker's loss of health qualification or a clean record under § 3 of Act no. 95/2004 Coll. or § 3 of the Act on Non-Physician Medical Professions automatically means that a person may not continue to practice his profession, and the loss of authorization to conduct a health care profession (e.g., expulsion from a professional association) or imposition of a prohibition on activity have the same consequence. However, the register does not serve for the collection of particular data on the health status of health care workers, or about what particular conduct that met the elements of a crime or disciplinary violation they committed. These data are not necessary for obtaining information about whether a health care worker is practicing his profession. Therefore, for purposes of this register it is sufficient information that such a situation arose, and its legal classification. For that reason, the scope of data maintained under § 76 par. 1 let. n) of the Act on Health Care Services must be interpreted restrictive, in the abovementioned sense.

67. As regards access to the processed data, a fundamentally important provision is § 76 par. 2 let. a) of the Act on Health Care Services, under which data processed under paragraph 1 and contained in the relevant register shall be publicly accessible on the webpage of the Ministry of Health. The only exceptions are data about national identification number and residence. Thus, the first question that arises in this regard is directed toward the purpose of this publication and whether it can justify such intensive interference in the right to informational self-determination.

68. The contested legislative framework undoubtedly pursues the aim of permitting public access to data about health care workers, but the publication of personal data without the consent of the subject cannot be a purpose in and of itself, but merely a means to achieving a different aim, which either must be expressly defined in the law, or must be possible to derive unambiguously. In this case the legislative framework does not expressly define a particular aim. Nonetheless, a legitimate reason for publication can be seen in relation to the data concerning the actual performance of a profession, similarly as in the case of the lists kept by professional associations. Mandatory publication of data about the fact that a certain person is practicing (and thereby also meets the requirements for) a health care profession, what qualifications he has for that performance, what his specialization is and where he practices permits everyone to verify whether he is being provided services by a person who meets all the requirements imposed by legal regulations. Persons performing these professions must be aware that, although the conduct of their activity serves to protect the life and health of patients, it also carries significant risks (typical incorrect performance of a particular procedure), and therefore the ability to verify their qualifications must be seen as a legitimate means for protection of patients (or a guarantee that they will be provided health care at the requisite level of expertise) and as a limitation related to the practice of a profession under Art. 26 par. 2 of the Charter.

69. The cited conclusions undoubtedly justify publication of a significant part of data under § 76 par. 1 of the Act on Health Care Services, but they cannot apply to all the data. Date and place of birth, or citizenship, like the unpublished national identification number or place of usual residence, are personal data where no reason can be found why they should be publicly available for all the cited workers. This also applies to the register of data concerning loss of authorization to perform a health care profession, on loss of health qualification, loss of a clean record and the length of time for which performance of the profession is prohibited. If the purpose of publication is to be the ability to verify whether a health care worker really meets all the legal requirements to practice his profession, then the fact that he is listed in the register is sufficient evidence. However, if he ceased to meet them, or stopped practicing his profession, then there is no reason to make his data available. It is sufficient to state these facts without further details, that is, without any data relating to the loss of a clean record or health qualification. Therefore, public access to data on health care workers

under § 76 par. 2 let. a) of the Act on Health Care Services, if it concerns data under paragraph 1 let. b), e) and n) of the Act on Health Care Services, will not stand up in the second step of the proportionality test.

70. The Constitutional Court does not rule out the possibility that public access to the data in question may also have another legitimate aim that could justify the greater part of these data, or even all of them; however, the law does not define it and it cannot be unambiguously concluded, even implicitly. In the end this also applies to the period during which data are to be published and which is not defined definitely enough. Although the arguments above indicate that public access to data under § 76 par. 1 let. n) of the Act on Health Care Services will not stand in the second step of the proportionality test, we cannot overlook the fact that the legislature expected this. The legislature specified that data on the loss of authorization to practice a health care profession or on a prohibition of activity, or also on termination of performance of a health care profession [§ 76 par. 1 let. i) of the Act on Health Care Services] would also be publicly available, from which it is evident that the legislature intended this to be so even after a worker ceased to practice his profession. The question is, however, how long this access is to continue, or what is the criteria by which one can evaluate whether it is appropriate for the information on a particular person's health care profession to be publicly available, even after the passage of a longer period of time, without the consent of the subjects or even against their will. If the aim, as was implicitly concluded, is only to enable the public to verify the qualifications and authorization of a health care worker who is currently practicing his profession, then there is no reason for subsequent (long-term) publication of these data. In this regard as well, a different aim, one that would justify a longer period of publication, would have to be provided by law. It remains to be added that, for these same reasons, one can have doubts as to the period for which data are supposed to be maintained in the register in a non-anonymous form. The legislative framework gives no answer to the question of whether and when they are to be deleted or made anonymous, and in view of the inadequate definition of the aim no answer is given by § 20 par. 1 of the Act on Personal Data Protection either.

71. The fact that the scope of publicly available data will not stand in the second step of the proportionality test is also significant for the constitutional law evaluation of the access of other subjects. Of course, there is no problem with § 76 par. 2 let. b) in connection with § 73 par. 2 let. c) of the Act on Health Care Services, which guarantees health care workers access to the register in the scope of data that they submitted about themselves. However, in the case of other authorized subjects under § 76 par. 2, in particular in connection with § 77 par. 1 of the Act on Health Care Services, the question, for what purpose and in what scope these subjects are to have access to personal data processed in the register, is not sufficiently addressed. This shortcoming is partly a consequence of the fact that the legislative framework fundamentally expected public access to the register in question. However, even in that case, there would not be a clear reason why, for example, an educational facility or health care services providers should have access to the national identification numbers or addresses of the usual residences of all health care workers. Whether they will have it depends on a decision by the Ministry of health, which, under § 73 par. 3 of the Act on Health Care Services ensures individual workers of an authorized subject access to the register and determines its scope and purpose; however, in the absence of a statutorily defined aim for this access, any decision it makes will be unreviewable, and will be interference in the right to informational self-determination. Because the condition of a statutorily defined aim has not been in the case of the majority of authorized subjects under § 76 par. 2 let. c) in connection with § 77 par. 1 of the Act on Health Care Services, in this case too we can conclude that the contested framework has not met the requirement of necessity.

72. For all these reasons, the Constitutional Court concluded that the contested legislative framework for the National Register of Health Care Workers sets public access to processed personal data in a scope and for a period that cannot be justified by any constitutionally approved aim; likewise such a purpose cannot be deduced in relation to the authorization of certain subjects for the achievement of which the Ministry of Health is to define the scope of access rights for their workers. These conclusions affect the evaluation of whether the contested legislative framework will stand as a limitation of their fundamental right to informational self-determination under Art. 10 par. 3 of the Charter in the proportionality test, and they justify a conclusion that in that test, in terms of necessity, § 76 par. 2 let. a) and c) of the Act on Health Care Services clearly will not stand. At the same time, it must be emphasized that annulment of these provisions would have a fundamental effect on the legislative framework of the register as a whole, because the ability to use it would be considerably limited, but it would not be possible to evaluate precisely whether it continues to serve the aim for which it was created. This fact, together with uncertainty as regards the period of keeping the processed data, justifies the conclusion that the legislative framework in§ 76 and 77 of the Act on Health Care Services will not stand in the second step of the proportionality test as a whole, and is therefore inconsistent with Art. 10 par. 3 of the Charter.

73. To conclude this part, the Constitutional Court points out that in this proceeding it did not review the constitutionality of the legislative framework for the national Health Care Information System as a whole, but only considered certain aspects of those provisions that apply to the National Register of Health Care Workers. Therefore, this judgment does not, beyond the scope of that review, establish the obstacle of res judicata as regards § 70 to 78 of the Act on Health Care Services, so nothing prevents the secondary parties (or any other authorized petitioner) from submitting a new petition against those provisions, in which they specify the grounds why they seek annulment of them. The Constitutional Court is aware that the collection and processing of personal data on the state of health of patients without their consent is very intensive interference in their fundamental rights and in this regard it is necessary to impose especially strict requirements on the legislative framework, in particular as regards setting the aims for which these data are to be collected and processed, the scope of the data, the circle of persons who are to have access to the data, the purpose of that access, the period for which they are to be processed, and safeguards to ensure that they will not be accessed without authorization or misused, including measures for subsequent inspection of the use of the data. In this regard, such a framework must stand in relation to all personal data that are processed. Therefore, it is desirable for the legislature, when adopting new legislation for the National Register of Health Care Workers, carefully weigh, to what extent the other registers in the National Health Care Information System will stand from these viewpoints, and by timely

action remove any shortcomings in them that could lead to violation of the right of patients, health care workers, or other persons to informational self-determination.

X.
Review of the constitutional conformity of the definition of elements of certain misdemeanors or other administrative delicts in the Act on Health Care Services and the level of penalties for them

74. The petition from the group of senators was also directed against § 114 par. 1 let. g) and § 117 par. 1 let. e), f), g), n) and r) and par. 3 let. d), e), f), g), h), i) and m) of the Act on Health Care Services, which define the elements of certain misdemeanors or other administrative delicts in the provision of health care services. The secondary parties believe that the upper limit of fines that this Act sets for committing the cited delicts are, in view of their gravity, set at a disproportionate level, and thus will not stand in terms of Art. 4 par. 1 and 4 of the Charter. In the case of some of these delicts, the disproportion is also caused by ambiguity, vagueness, or even inconsistency of their elements, which does not allow health care workers to clearly evaluate whether their actions are or are not consistent with the law.

75. Under the Constitutional Court's settled case law, a monetary penalty that has the character of a public law obligation for monetary payment to the state is interference in the property substratum, and thus also the property rights of the obligated subject, but it does not in and of itself mean violation of that constitutionally guaranteed right (judgment file no. Pl. ÚS 7/03). Evaluation of whether the penalty will stand as permissible interference generally depends on meeting certain conditions. First of all, the penalty, including in the case of an administrative delict, must be provided by statute, which has been met in this matter (cf. judgment file no. Pl. ÚS 14/09, point 29). However, the legislation must also stand up to the test of ruling out extreme disproportionality, that is, whether the interference in constitutionally guaranteed property rights, connect with the penalty, does not lead to such a fundamental change in the affected subject's property rights that it would mean "ruining the very basis of property", i.e. "destruction of the property base" (judgment file no. Pl. ÚS 3/02), or whether it is not a case where the "limit of public law mandatory monetary performance by the individual vis-à-vis the state reached a choking (suffocating) effect" (judgment file no. Pl. ÚS 7/03). However, the legislation can also be reviewed in terms of observance of the constitutional principle of equality, both accessory equality under Art. 3 par. 1 of the Charter, which prohibits discriminating against persons in the exercise of their fundamental rights, as well as non-accessory equality, enshrined in Art. 1 of the Charter and consisting of ruling out arbitrariness by the legislature when differentiating the rights of certain groups of subjects [cf. judgment file no. Pl. ÚS 36/01, judgment file no. Pl. ÚS 7/03, judgment of 21 April 2009 file no. Pl. ÚS 29/08 (N 89/53 SbNU 125; 181/2009 Coll.), point 56]. If the considerations thus defined are preserved, the final word regarding the purposefulness of a monetary penalty at a certain level is reserved for the legislature.

76. The starting points summarized above are significant for evaluating the arguments of the secondary parties, which consist of the objection that the upper limit of the penalties is disproportionate in view of the gravity of the violations, as well as the uncertainty of their definition. As regards the first viewpoint, it is obvious that the objection is primarily an expression of disagreement with how the legislature used its authority when setting the possible levels of penalties in the Act on Health Care Services. The secondary parties are actually seeking reevaluation of them, because they do not consider the individual administrative delicts to be sufficiently serious to justify setting penalties at the stated level. However, the Constitutional Court is not authorized to conduct such a review. Within the framework of an abstract review it can review the proportionality of contested monetary penalties, in the meaning of the objection, only in terms of their possible liquidatory or "suffocating" effect, and even in that case it cannot limit itself only to consideration of whether the upper limit is proportional or not. Even if setting a fine at that level, which, in the case of the contested penalties is CZK 100,000 to CZK 1,000,000, had that character in relation to a particular group of responsible subjects, the relevant administrative body has the ability, in each individual case, when deciding on the level of penalty, to take into account not only the gravity of the violation and the circumstances under which it was committed, but also the property situation of the responsible subject.

77. The obligation to review the effects on the property of the responsible subject arises directly from the constitutional order, because any imposition of a monetary penalty is always interference in property rights under Art. 11 of the Charter, and therefore must stand, in every individual case, in terms of all the abovementioned constitutional criteria for review of the level of penalties. If such a penalty is imposed on a health care services provider for violation of an obligation relating to the conduct of that business activity, it must be taken into account whether imposition of the fine does not de fact make it impossible for the provider to continue his activities. In other words, it must be reviewed whether the fine does not interfere in the very essence and significance of the right to conduct business under Art. 26 par. 1 of the Charter, or whether, in relation to that right, it does not have a liquidatory effect that is not the aim of the penalty. For these reasons, the fact that § 118 par. 2 of the Act on Health Care Services does not mention the possible effects of a penalty on the property of the responsible subject cannot be interpreted to mean that an administrative bode need not, or even must not, take them into account. Nothing about this conclusion is changed by comparison with § 12 of Act no. 200/1990 Coll., on Misdemeanors , as amended by later regulations, which is applied in the case of a misdemeanor under § 114 par. 1 let. g) of the Act on Health Care Services, or with other provisions of special statutes that define the limits of administrative discretion for imposing fines on individuals or legal entities and, on the contrary, expressly set forth the obligation to take into account the property situation of the responsible subject. The absence of this viewpoint in certain legislative frameworks, which is primarily a negative consequence of the continuing fragmentation and lack of conceptual unity of the legislation governing administrative punishment, does not justify a conclusion that the legislature intended to rule out the obligation of administrative bodies to heed the constitutionally guaranteed rights of responsible subjects when exercising administrative discretion. Such an interpretation could not even be considered constitutional,

and in a situation where one can derive the obligation to take the responsible subject's property situation into account directly from the cited articles of the Charter, a different interpretation must take priority.

78. Thus, annulling the legislation in question would be appropriate only if the cited viewpoint were ruled out when imposing penalties, which could typically be the consequence of setting its lower limit at a level that could have a liquidatory or „suffocating" effect on at least part of the responsible subjects [cf. judgment file no. Pl. ÚS 3/02, judgment of 10 March 2004 file no. Pl. ÚS 12/03 (N 37/32 SbNU 367; 300/2004 Coll.), judgment file no. Pl. ÚS 14/09]. In this case, however, this is a hypothetical consideration, as the Act on Health Care Services does not set any lower limit for penalties for the contested administrative delicts. The possible unconstitutionality of the provision setting the upper level of penalties, resulting from the ability to set a fine at such an extremely high level that imposing a penalty at that level would be impermissible under all circumstances, is clearly ruled out in this case.

79. Therefore, for all these reasons, the Constitutional Court cannot but state that the reviewed provisions of the Act on Health Care Services setting penalties for certain administrative delicts are not inconsistent with Art. 11 par. 1 in connection with s Art. 4 par. 1 and 4 of the Charter. The possibility of reviewing specific application of these provisions from the abovementioned constitutional law viewpoints in proceedings on constitutional complaints remains unaffected.

80. To conclude this section, the Constitutional Court had to address the related arguments concerning the uncertainty, vagueness, or inconsistency, but it did not find this objection to be justified. The contested provisions are not a case where the wording of a legal regulation makes it impossible to determine its normative content even through the use of usual methods of interpretation.

XI.
Further objections against the Act on Health Care Services or individual provisions thereof

81. The Constitutional Court turned to review of the last submitted petition, the petition from a group of deputies, which is a secondary party in this proceeding, seeking annulment of the Act on Health Care Services as a whole, or annulment of some of its provisions.

XI./a
The term "health care services"

82. In relation to the Act on Health Care Services, the secondary parties object that instead of the term "health care," used by the Charter and the Constitution, it uses a new term, "health care services," whereby it, as a whole, comes into conflict with the constitutional order. However, the Constitutional Court does not agree with this assessment.

83. First of all, it must be emphasized that the significance of introducing the term "healthcare services" as the central term of the new legislative framework is undoubtedly more than a mere change of terminology, and it can also be seen as an element of a certain cultural or value shift in the manner in which the society views questions of the doctor-patient relationship, an individuals' responsibility for his health, and the role of the state in ensuring the availability of health care. The consequence will be that it will gradually penetrate and establish itself in people's thinking, and in time also in the related wider social discussion on these questions, which can have an effect, among other things, on the content of a number of existing legal concepts or institutions. Nonetheless, it is not up to the Constitutional Court to criticize this change in terms of purposefulness or correctness. It is only authorized to evaluate its consistency with the constitutionally guaranteed right to protection of health and provision of health care under Art. 31 of the Charter; in this sense one can question the basic starting point of the secondary parties' arguments, because health care does not cease to be a legal term (cf. § 2 par. 4 and § 5 of the Act on Health Care Services). It is not replaced, but merely subordinated under the wider term "health care services." Thus, it maintains its autonomous content, arising from Art. 31 of the Charter. Moreover, introduction of the new term cannot be interpreted in a manner that would limit the content of the term "health care," and thus the relevant constitutional right also remains preserved. For these reasons the Constitutional Court considers this objection to be unjustified.

XI./b
New definition of the standard of health care guaranteed by law

84. As regards objections relating to individual provisions, the secondary parties are arguing first of all against § 4 par. 5 and § 28 par. 2 of the Act on Health Care Services. Unlike the existing § 11 par. 1 of the Act on Care for the Health of the People, under which health care facilities provided health care "in accordance with the currently available medical knowledge" the new legislative framework provides patients the right to provision of health care services only at the "requisite level of expertise," which it defines „in view of the specific conditions and objective possibilities."

85. The Constitutional Court emphasizes that the statutory obligation that health care, or health care services, be provided "in accordance with the currently available medical knowledge" (§ 11 par. 1 of the Act on Care for the Health of the People) or "under the rules of science and recognized medical procedures" (the contested provisions), is defined only in general and its content is made specific by the aggregate of available knowledge in medical science in a particular period accepted by professionals in the field and verified by practice. However, that does not mean that it is defined

vaguely or indefinitely for its addressees. The ability to answer the question of whether a particular procedure meets it or not must be viewed in the context of the qualification requirements for the practice of individual health care professions. This obligation is also defined in a similar manner in Art. 4 of the Convention on Human Rights and Biomedicine, under which any procedure in the field of health care, including scientific research, must be conducted in accordance with the appropriate professional obligations and standards.

86. There is no fundamental difference between the requirements arising from the existing and new legislative framework as regards the cited part; nor do the other elements contained in the definition of "requisite expert care" under § 4 par. 5 of the Act on Health Care Services support a different conclusion. The requirement to respect a patient's individuality arises from the fact that the effect or suitability of a particular type of treatment or procedure can vary depending on the patient, and his mental and physical condition. However, taking account of "specific conditions and objective possibilities," which undoubtedly means both the specific circumstances in which health care services were provided and the current possibilities of individual health care facilities to conduct the provision of these services in a particular manner, also cannot be considered a novelty.

87. It is precisely this element of the definition of requisite expert care that the secondary parties object when they claim that as a result of it, the Act on Health Care Services (compared to the previous legislative framework) no longer insists on the best possible treatment of the patient, i.e. – in other words – that the patient be treated according to the highest degree of scientific knowledge. However, the Constitutional Court is of the opinion that this requirement cannot be derived from the constitutional order. It must be stated, above all, that defining the conditions under which an individual can exercise the right to health care belongs to the legislature, under Art. 31 in connection with Art. 41 par. 1 of the Charter. Its discretion is limited, on the one hand by the general principles related to the principle of a state governed by the rule of law, primarily the principle of equality and the prohibition of arbitrariness, and on the other hand by the requirement of respecting the essence and significance of a constitutionally guaranteed right (Art. 4 par. 4 of the Charter), which, in the case of social rights, generally has the character of a guarantee of a particular performance or service that pursues some constitutionally approved aim. Therefore, it is up to the legislature to define such conditions for the exercise of rights under Art. 31 of the Charter as will give individual insured persons access to health care that will meet all the abovementioned requirements for quality. However, any recognized claims are tied to the framework of health insurance and the related limiting factor, which is the limited funds available to pay for health care [cf. judgment of 10 July 1996 file no. Pl. ÚS 35/95 (N 64/5 SbNU 487; 206/1996 Coll.), also the reference to "available resources" under Art. 3 of the Convention on Human Rights and Biomedicine]. Therefore, the statutory requirement of a guarantee for provision of health care at the best level from a worldwide viewpoint, instead of raising the standard, would most likely lead to that level becoming unattainable in the great majority of cases, and in view of the costs, would in fact limit an individual's access to health care. Even § 11 par. 1 of the Act on Care for the Health of the People, which the secondary parties consider to be constitutional, did not recognize a different interpretation. In its case it was also not possible to overlook the de facto limits (in finance, knowledge and personnel) that were and are determinative for the extent and form of health care provided in the Czech Republic. Therefore, the answer to the question of whether a specific type of treatment will always be the best possible, or whether another (less expensive) alternative will be given priority always depends on the legislature's discretion, or on how it sets the rules that will be determinative in this question. This legislative framework of course cannot step outside the limits that the constitutional order provides for defining the content of a right under Art. 31 of the Charter. For these reasons, the Constitutional Court concluded that the contested provisions are clearly not inconsistent with Art. 31 of the Charter, or with Art. 4 of the Convention on Human Rights and Biomedicine, with the content of which they agree.

XI./c
Overlooking the patient's actual competence to decide on his rights

88. The Convention on Human Rights and Biomedicine states in Art. 6 par. 2 that "Where, according to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorization of his or her representative or an authority or a person or body provided for by law. The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity." The secondary parties believe that § 35 of the Act on Health Care Services is inconsistent with this provision, because it overlooks the actual competence of minors to give consent to health care. Instead of that, it merely sets forth an obligation to record in the health care documentation the opinion of the minor, or also of a patient who has been stripped of competence to perform legal acts.

89. The contested provision is based on Art. 6 of the Convention on Human Rights and Biomedicine, the text of which it basically takes over in paragraph 1 and further develops in later paragraphs. While this article assumes that even if a procedure can be performed on a minor only with the consent of his legal representatives, the minor's opinion will be taken into account as a factor whose binding nature grows proportionately to age and degree of maturity, § 35 of the Act on Health Care Services only sets forth an obligation to record in the health care documentation the opinion of the minor patient or patient who has been stripped of competence to perform legal acts. However, this fact does not prevent making a constitutionally conforming interpretation of the provision, which would accord it wider significance, in that the opinion will be taken into account. Moreover, the Act itself assumes the provision is relevant, as it addresses a situation where the opinion of a minor patient or a patient who has been stripped of competence to perform legal acts differs from the opinion of their legal representative. Therefore, the Constitutional Court states that it does not see inconsistency with the constitutional order in the question of insufficient account being taken of the will of these persons.

XI./d
Limiting the application of a previously expressed wish

90. Further objections are directed against limiting the validity of a previously expressed wish under § 36 par. 3 of the Act on Health Care Services to 5 years. The secondary parties do not directly identify the constitutional norm with which the contested provision is said to be in conflict, but it is obvious from their arguments that it is Art. 9 of the Convention on Human Rights and Biomedicine, under which a patient's previously expressed wish regarding a medical procedure is to be taken account if, at the time of the procedure, the patient is not in a condition where he can express his wishes.

91. The institution of a previously expressed wish permits a patient to express consent or lack of consent with the provision of a particular health care service or the manner in which it is provided in the event that he is in a condition in which he cannot express his wishes. The seriousness of the consequences of this expression of intent requires that there not be any doubts as to whether the patient in question made it. Lack of consent to a particular procedure can lead to worsening a patient's state of health or even to his death. Therefore, the Constitutional Court does not consider limitation of this right to be impermissible, if the law conditions its application on certain formal requirements that prevent possible misuse of this institution, and permits the actual content of the patient's intent to be unambiguously understandable.

92. The purpose of limiting the validity of a previously expressed wish to a period of 6 years is to protect the patient in view of the assumed developments in medicine. New medical procedures, which may not have been known to the patient at the time the wish was expressed, could be a relevant reason for changing his decision, if he knew about them and his state of health permitted him to make a decision about the provision of a particular health care service. Thus, the Act assumes that if a patient wishes to maintain his previously expressed wish, he must express the wish (and confirm it), repeatedly, after a certain interval of time.

93. In this regard, the Constitutional Court posed the question of whether this framework conflicts with Art. 9 of the Convention on Human Rights and Biomedicine, which establishes an obligation to take the patient's wish into account, without the validity of that wish being in any way limited by the passage of time. It considers it essential to distinguish situations where it is possible for a patient to express the wish again without great difficulties and where, in contrast – in view of his state of health – it is not possible. It is precisely in these cases that the contested time limitation comes into conflict with the purpose of the institution of a previously expressed wish. The patient expressed the wish precisely for the eventuality that he would not be able to make his own decisions about himself, but the law conditions the validity of the wish, in the event that such a situation arises, on a new expression of will, which, however, the patient cannot make. The consequences of this shortcoming in the legislative framework can be demonstrated on the example of a patient with Alzheimer's disease who, before his state of health no longer permits him to express consent or lack of consent with the provision of health care service, expresses in the prescribed manner his wish that he not be resuscitated in the event of a heart attack. This wish can be valid for several months or years after the point when he will no longer be able to give consent, but the day after the five year period expires it will no longer be possible to take the wish into account, although, with the exception of the expiration of that time, nothing has taken place that would cast doubt on the wish continuing, and the patient himself cannot express his original wish again. The reasons for the original wish may be an expression of the patient's long-term value beliefs, and any general considerations about the expression of will not being current as a result of the passage of time may not have any substantive justification.

94. The Constitutional Court is of the opinion that it is not compatible with the rights of the patient under Art. 9 of the Convention on Human Rights and Biomedicine, for his previously expressed wish not to be taken into account only as a result of the passage of a statutorily provided period of validity, if the patient does not have a real opportunity to renew the wish through an expression of intent. In view of the fact that the contested provisions allows that possibility, it must be seen as a limitation of the right in question that lacks any constitutionally approved reason (cf. Art. 26 and 27 of the Convention), as a result of which it is inconsistent with Art. 9 of the Convention. Of course, this inconsistency applies only to the last sentence of § 36 par. 3 of the Act on Health Care Services, under which the validity of a previously expressed with is 5 years.

XI./e
Refusal to accept a patient or ending care for a patient

95. The secondary parties point out the serious effect of § 48 par. 1 and 2 of the Act on Health Care Services, which govern the reasons for ending care for a patient on the patient's fundamental rights. However, the Constitutional Court does not find the reason for ending health care under § 48 par. 2 let. c) of the Act on Health Care Services to be vague or uncertain. Under § 28 par. 1 of that Act, and in accordance with Art. 5 of the Convention on Human Rights and Biomedicine, provision of health care is tied to the free and informed consent of the patient, and ending care for a patient is a logical result of a situation where a patient does not consent to the provision of any health care services.

96. Apart from the stated reason, the secondary parties criticize the lack of an opportunity to defend against incorrect evaluation of the existence of reasons for ending care on the part of the health care facility provider, but this objection is also not appropriate. Refusing to accept a patient, or ending care for a patient, without the legal conditions having been met, could have consequences at the level of civil law relationships, primarily in case of a question of compensation of

damages. Thus, in that sense the affected patient is guaranteed judicial protection of his right in accordance with Art. 36 par. 1 of the Charter. We can added that this protection is also supplemented in the form of administrative inspection in the field of provision of health care services, because a health care services provider's actions that are inconsistent with § 48 of the Act on Health Care Services constitute an administrative delict under § 117 par. 3 let. a) and b) of that Act. The secondary parties' arguments are not justified in relation to the contested provisions.

XI./f
Non-provision of health care services

97. The Act on Health Care Services permits health care workers to not provide health care services in cases whether their lives are directly endangered or their health is serious endangered or if it conflicts with their conscience or religion. The secondary parties believe that the contested § 50 of the Act on Health Care Services exposes patients to a risk of endangering their health, or even encourages the commission of a crime. They criticize the fact that health care workers will not have to provide assistance without regard to their own risk, although they have that obligation under the Hippocratic oath and a number of professional codices.

98. The right to protection of health gives rise to the general obligation of the state to ensure the provision of health care to citizens, which, however, does not mean that every health care worker must, regardless of his conscience or religion, or values that he holds, must always provide any sort of health care. In terms of this right, it is not important which health care worker provides the service, but that it be provided. Insofar as § 50 par. 2 fifth sentence of the Act on Health Care Services also ensures that the refusal will not happen in a case where the refusal will endanger the life of the patient or seriously endanger his health, and the provider is not able to ensure the provision of health care services by another health care worker, it is quite obvious that this regulation does not affect the essence of the right under Art. 31 of the Charter.

99. The situation is different with the non-provision of health care services under § 50 par. 1 let. b) of the Act on Health Care Services, i.e., in the event that provision of them would directly endanger the life of the health care worker or serious endanger his health. This exception applies regardless of whether the patient is exposed to risk of injury to health or even death, and in specific cases will actually approve the consequence that a particular person will not be provided health care services at all. In this sense the contested provision affects the very essence of the right to protection of health and to health care; therefore, we must review whether interference in this right for the purpose of protection the right of the health care worker to health and protection of his health will stand up in the proportionality test. In other words, it is necessary to evaluate whether the right to not provide health care in view of the risks involved, which is definitely a suitable (competent) measure for protection the life and health of the health care worker outweighs the right of the person to protection of his health, or to the provision of health care.

100. In an abstract review of constitutionality, the scope for answering this question is limited to general weighing of the conflicting values. The Constitutional Court believes that the life and health of a health care worker are values that, in the practice of this profession, are also entitled to protection, and which justify the existence of limits in the degree of risk that can be unconditionally required of a health care worker. However, what can be considered direct endangerment of life or serious endangerment of health depends on evaluating specific circumstances. In terms of this review it is important that the non-provision of health care services must be a necessary measure, and thus cannot be accepted in a case where the risks tied to provision of health care could be effectively eliminated in view of these circumstances. However, it is also true that determining the degree of risk is not an exact science, and the possibility of objective evaluation must always be affected by the amount of information that the health care worker had at his disposal at the relevant moment. If these conditions are met, we can state that the contested provision permits limiting the right to health care under Art. 31 of the Charter in a manner that is consistent with Art. 4 par. 4 of the Charter. Any closer evaluation of proportionality will be possible only in particular cases where the contested provision is applied.

XI./g
Processing a patient's personal data and maintaining health care documentation

101. The objection directed against the legislative framework for the processing of a patient's personal data, and specifically the handling of his national identification number under § 52 of the Act on Health Care Services consists only of a claim that it is inconsistent with a number of provisions, primarily of the Charter and of the Convention, but the secondary parties have not in any way indicated what specifically this inconsistency is supposed to consist of. Therefore, the Constitutional Court did not review it, and did likewise with the secondary parties' objection to § 53 and 54 of the Act on Health Care Services, which govern the manner of maintaining health care documentation.

XI./h
Defining the position of an expert representative

102. The secondary parties' last objection was directed against § 14 of the Act on Health Care Services, which provides conditions for appointing a certain person as the expert representative of a health care services provider. Their criticism of the contested provision is that it uncertainly defines what an expert representative is responsible for and that it allows one person to function as the responsible representative for up to two health care facilities. They see inconsistency with

the right to payment-free health care under Art. 31 of the Charter in insufficient guarantees that this care will be provided at an adequate level of quality.

103. The Constitutional Court is of the opinion that allowing the possibility that one person will be the expert representative of up to two providers does, in a wider sense, affect the quality of the provision of health care services, but its content does not in any way cast doubt on the existence of effective guarantees. The limitation, under the condition that the person must conduct his function in a scope necessary for the proper expert management of the health care services provided, is directed toward the aim that the function not be performed for several providers, merely formally. However, it is not up to the Constitutional Court to evaluate whether this provision is suitable and correct, that is, whether it is sufficient to limit it to two health care facilities. The Court's review can only concern the already cited question of ruling out arbitrariness, which the contested provision will undoubtedly meet, as it is capable of achieving its aim and it cannot in any case be described as unreasonable. Therefore, the secondary parties' petition is not justified in relation to this provision.

104. The secondary parties did not raise any objections to the other provisions of the Act on Health Care Services, so the Constitutional Court did not review their consistency with the constitutional order.

XII.
Formulation of derogatory verdicts and their legal consequences

105. For all the cited reasons the Constitutional Court ruled that § 30 par. 2 let. d) of the Act on Employment, as amended by Act no. 367/2011 Coll., in § 36 par. 3 the words "The validity of a previously expressed wish is 5 years," § 76 and 77, in § 121 par. 1 the words "for a period of no more than 36 months after this Act goes into effect, unless provided otherwise," including the preceding comma, in par. 4 first sentence the words "but no later than 36 months after the day this Act goes into effect," including the preceding comma, par. 4 second sentence and par. 5 of the Act on Health Care Services are inconsistent with the constitutional order; therefore, it annulled them under § 70 par. 1 of the Act on the Constitutional Court.

106. The Constitutional Court did not find the remainder of the petition to be justified, and denied it under § 70 par. 2 of the Act on the Constitutional Court.

Instruction: Decisions of the Constitutional Court cannot be appealed.

Brno, 27 November 2012

Pavel Rychetský
Chairman of the Constitutional Court