

Pl. ÚS 37/16 dated 26 February 2019

Opening Hours in Retail and Wholesale on Public Holidays

**Czech Republic
JUDGMENT
Of the Constitutional Court
In the Name of the Republic**

The Constitutional Court held, in the plenum consisting of the President of the Court Pavel Rychetský and Judges Ludvík David, Jaroslav Fenyk, Josef Fiala, Jan Filip, Jaromír Jirsa, Tomáš Lichovník, Vladimír Sládeček, Radovan Suchánek, Kateřina Šimáčková, Vojtěch Šimíček, David Uhlíř (Judge Rapporteur), and Jiří Zemánek, on the petition filed by a group of senators of the Senate of the Parliament of the Czech Republic, legally represented by Mgr. Pavel Pravda, attorney-at-law, with the registered office at Prague 1, Na Příkopě 859/22, seeking the annulment of Act No. 223/2016 Coll., on Opening Hours in Retail and Wholesale, with the participation of the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic as parties to the proceedings, as follows:

The Petition shall be dismissed.

Reasoning:

I.

Subject Matter of the Proceedings

1. By means of the petition filed under Section 64 (1) (b) of Act No. 182/1993 Coll., on the Constitutional Court, as amended (hereinafter only the “Constitutional Court Act”), served onto the Constitutional Court on 23 December 2016, a group of 18 senators (hereinafter only the “Petitioners”) sought the annulment of Act No. 223/2016 Coll., on Opening Hours for Retail and Wholesale, as amended by Act No. 183/2017 Coll. (hereinafter only as the “Act”) in the proceedings under Art. 87 (1) (b) of the Constitution of the Czech Republic (hereinafter only the “Constitution”) due to its inconsistency with the constitutional order, as specified in more detail in Art. III of this Judgment. The petitioning group of senators did not select one person to act on their behalf; they jointly granted the power of attorney to Mgr. Pavel Pravda, attorney-at-law, to represent them before the Constitutional Court.

II.

The Wording of the Contested Act

2. The wording of the contested Act reads as follows:

Section 1

Opening hours for retail and wholesale

(1) Sales in the retail and wholesale sectors shall be prohibited on the following public holidays and other bank holidays:

- a) 1 January – Restoration Day of the Independent Czech State and New Year;
- b) Easter Monday;
- c) 8 May – Liberation Day;
- d) 28 September – Czech Statehood Day;
- e) 28 October – Foundation of the Independent Czechoslovak State;
- f) 25 December – Christmas Day; and
- g) 26 December – St. Stephen’s Day.

(2) Sales in the retail and wholesale sectors shall be prohibited on 24 December (Christmas Eve) from 12.00 pm to 0.00 am.

(3) The restriction of the opening hours specified in paragraphs 1 and 2 shall not apply to operating:

- a) Outlets the sales area of which shall not exceed 200 m²;
- b) Service stations with fuels and lubricants;
- c) Pharmacies;
- d) Outlets at places with elevated concentrations of passengers at airports, railway stations and bus stations;
- e) Outlets in medical facilities;
- f) Retail and wholesale at the time of declaring a state of danger, an emergency, a threat to the state or war.

Section 2

The restrictions set out in Section 1 (1) and (2) shall apply *mutatis mutandis* to the opening and repurchasing hours of pawnshops, establishments intended for the trading of second-hand goods and equipment intended for the collection and purchase of waste, regardless of the size of the sales or repurchasing area.

Section 3

Infractions

(1) A legal entity or a natural person engaged in enterprise shall commit an infraction by operating sales in the retail or wholesale sectors or selling or repurchasing in the establishment specified in Section 2 at the time when their operation is prohibited under Sections 1 and 2.

(2) A penalty of up to CZK 1,000,000 may be imposed for an infraction under paragraph 1. A penalty of up to CZK 5,000,000 may be imposed if the legal entity or a natural person engaged in enterprise commits the infraction specified in paragraph 1 repeatedly.

(3) The Czech Trade Inspection shall perform a supervision of the compliance with the obligations set out in this Act.

Section § 4

Effect

This Act shall enter into effect on the first day of the third month following the date of its promulgation.

III.

The Petitioners' Arguments

3. In the petition, the Petitioners argue that the Act is contrary to the constitutional order of the Czech Republic; specifically, directly contrary to four constitutionally guaranteed rights, two of which are fundamental rights and two economic and social rights:

- The equality of all people in their rights guaranteed in Art. 1 of the Charter of Fundamental Rights and Freedoms (hereinafter only as the "Charter");
- The right to privacy and the principle of the autonomy of will guaranteed by Art. 4 and Art. 7 (probably having in mind only Art. 7 (1)) of the Charter;
- The right to engage in enterprise guaranteed in Art. 26 (1) of the Charter; and
- The right to acquire the means for one's livelihood by work guaranteed in Art. 26 (3) of the Charter.

4. As for the allegation that the Act is contrary to the principle of equality of people in their rights, the Petitioners refer to the Judgment of the Constitutional Court dated 28 May 2002, file reference Pl. ÚS 15/02, which implies that the right is violated in the case of concurrence of multiple circumstances. Different entities in the same or comparable situation are treated differently without any reasonable and objective reasons for such a different approach. In addition, there must be a proportionality relationship between the objective consisting in favouring access and the means to achieve it. The Petitioners argue that the Act prohibits the sale on certain public and other bank holidays in retail and wholesale the sales area of which exceeds 200 m². In view of the above conclusions and the wording of Art. 1 of the Charter, it is impossible to enact a law which unjustifiably limits a certain group of entrepreneurs to a randomly selected group of entrepreneurs and favours the rights of another equally randomly selected group. In this context, the Petitioners refer to the statement of reasons concerning the Act stating that:

- Higher revenues in the field of tourism and leisure activities may be expected;
- The impact on economic entities, the entrepreneurs concerned, will on the one hand consist in the reduction of sales revenue on public holidays, but on the other hand in the saving of labour costs and part of the overhead

costs, which will, however, apply only to large entrepreneurs; the impact on small and medium-sized enterprises will be positive, as the Act will indirectly limit competition from large entrepreneurs;

- There will be favourable social impacts, as people will have more spare time to devote to their family and hobbies, on which the European Union places more emphasis; working life should not negatively interfere with family and personal life.

5. The Petitioners allege that the Act applies only to retailers and wholesalers, yet not, for example, to service providers. Thus, a selected number of entrepreneurs are restricted in their right to engage in enterprise without its selection being justified in further detail. If the legislature argues with the protection of employees, it remains ambiguous why only a group of employees working in retail and wholesale and not other employees should be protected. According to the Petitioners, this approach is discriminatory and creates inequality. The Petitioners also perceive as discriminatory the purpose of supporting one group of entrepreneurs at the expense of the other. According to the Petitioners, the Act and the statement of reasons do not at all indicate the criteria on which the threshold area of 200 m² has been set, whereas it has not been stated what it is intended to support or how many entrepreneurs will be affected. Furthermore, the legal regulation does not reflect the possibility that a large entrepreneur would formally and effectively possess several autonomous outlets with a smaller sales area, which would not be subject to the opening hours restrictions. From the logic of the case, the Petitioners conclude that entrepreneurs with stores larger than 200 m² will establish additional smaller stores to at least partially cover losses and therefore there will be no impact of the Act. Also, according to the Petitioners, the legislature failed to address the issue of whether the Act would also apply to other forms of sale, typically e-shops. As for the last paragraph of the statement of reasons cited above, the Petitioners claim that it remains unclear why working life should not adversely affect the family and personal life of the employees of the businesses concerned, although it may interfere with the family and personal life of other employees.

6. As for the objection that the Act is contrary to the right to privacy and the principle of the autonomy of will, the Petitioners refer to the Judgment of the Constitutional Court dated 6 March 2012, file reference I. ÚS 1586/09, which implies that the right to respect for private life includes a guarantee of self-determination in the sense of fundamental decision-making on the self, including deciding on the organisation of one's life, which may be described as an active self-realisation component of personal self-determination. According to the Petitioners, the restrictions imposed on the right to self-determination must always be duly justified and may only be imposed in the interest of other fundamental rights. However, the statement of reasons does not justify the interference with this fundamental right at all. According to the Petitioners, by stating that people will have more spare time to spend with their families and pursue their hobbies, the legislature interferes impermissibly with the private sphere of employees in a manner limiting the content of their spare time. The Petitioners emphasise that this objective may also be achieved through labour law instruments, typically by amending employment contracts or changing employment. According to the statement of reasons, the primary objective of the Act is to regulate the opening hours so as to provide for a general ban on the opening hours on the specified back holidays and to restrict the opening hours on Christmas Eve. For this reason, in the Petitioners' view, the objective does not consist in the protection of employees' rights but rather the prohibition of certain activities.

7. In the objection that the Act is contrary to the right to engage in enterprise, the Petitioners claim that the purpose of this right is to enable the entrepreneur to decide on the organisation, activity and pursuit of their business plans. In the statement of reasons, its limitations are justified, inter alia, by giving priority to the employees' right to family life. The Petitioners believe that even if there is a conflict of several constitutionally guaranteed rights, it does not need to be addressed systematically by a statutory regulation, since private law institutes and the employer – employee relationship regulated by the labour law are fully sufficient. In the instant case, it is also impossible to assess whether the statutory regulation pursues a legitimate objective, as in the Petitioners' view, the argumentation of the employees' protection against work on public holidays and the possible affirmative action aimed at small and medium-sized enterprises by restricting competition from large entrepreneurs is insufficient. In addition, the reference to historical legal regulations is not appropriate, as in the past, public holidays had a significantly different meaning, being a product of their time. Furthermore, the Petitioners are convinced that the Act interferes with competition by limiting competition from large entrepreneurs. Pursuant to the conclusions formulated in the Constitutional Court's judgment dated 8 October 2009, file reference IV. ÚS 27/09, according to them, it amounts to a violation of the rules of fairness and good morals of competition.

8. Another part of the Petitioners' arguments focuses on the violation of the right to acquire the means for one's livelihood by work. They disagree with the claim on the protection of employees, since many employees, on the contrary, appreciate that they have the opportunity to earn more money by working on public holidays. Furthermore, after reiterating the discriminatory nature of the Act, they add that the statement of reasons does

not indicate any findings on the issues of the previous legally untreated practice and the lack of protection provided by the Labour Code.

9. The Petitioners finally focus on the objection that the Act is contrary to the principle of minimising interference with fundamental rights. Already the Judgment dated 12 October 1994, file reference Pl. ÚS 4/94, implies that in the event of a conflict of fundamental rights or freedoms, it is necessary to establish the terms and conditions under which the fulfilment of one right or freedom takes precedence over another. In this context, according to the Petitioners, the legislature has conducted an inadmissible, unfounded and arbitrary assessment of the interference with family and private life. Without any justification, it allegedly puts some spheres of human life above others without, for example, conducting a rationality test. Especially in the case of individuals who, for whatever reason cannot exercise the right to family life, there is an unjustified restriction on their fundamental rights.

10. In the conclusion of their petition seeking the annulment of the Act, the Petitioners request that the rationality test be conducted, and following the reference to the arguments concerning the violation of the above fundamental rights, they focus on the last criterion, i.e. considering the question of whether a statutory means used to achieve a legitimate aim is reasonable. The Petitioners conclude with a negative answer, when they particularly disagree with the opinion that restricting work for a total period of eight days in a year will result in family life and spare-time activities being supported.

IV. Statements of the Parties to the Proceedings

11. Upon the invitation of the Constitutional Court, the Chamber of Deputies of the Parliament of the Czech Republic briefly stated that both chambers of the Parliament expressed their consent with the bill in the constitutionally prescribed manner, the Act was signed by the relevant constitutional officials and duly promulgated.

12. In its statement, the Senate of the Parliament of the Czech Republic maintained that the contested Act was the result of its efforts to restrict the opening hours during selected public holidays. In this context, it described the earlier legislative process, which was supposed to lead to adoption of the legal regulation. In particular, it includes references to the arguments of some senators, while the Senate in the end leaves it up to the Constitutional Court to assess whether the Act will be annulled or not.

13. By means of the notification of the Prime Minister of the Government of the Czech Republic dated on 15 February 2017, the Constitutional Court was notified that the Government of the Czech Republic would not exercise its right to intervene in the proceedings.

V. Statement of the Public Defender of Rights

14. Upon the invitation of the Constitutional Court under Section 69 (3) of the Constitutional Court Act to intervene in the proceedings as the secondary party, the Public Defender of Rights notified the Court, in the submission dated 16 January 2017, of the decision not to exercise the Defender's procedural right under Section 69 (3) of the Constitutional Court Act and not to intervene in the proceedings.

VI. Dispensing with an Oral Hearing

15. The Constitutional Court concluded that no further clarification of the matter might be expected from the oral hearing and, as it did not take evidence, it did not list an oral hearing in accordance with Section 44 of the Constitutional Court Act.

VII. Terms and Conditions of Assessing the Merits of the Petition

16. The Constitutional Court has jurisdiction to hear the petition seeking the annulment of Act No. 223/2016 Coll., on Opening Hours for Retail and Wholesale; the petition filed by the group of 18 senators complies with all the statutory formal requirements and was filed by duly authorised persons [Section 64 (2) (b) of the Constitutional Court Act]. At the same time, the Court did not find any grounds for the inadmissibility of the

petition or discontinuing the proceedings. Thus, the terms and conditions for assessing the merits of the petition have been complied with.

VIII.

Standing to Sue and Statutory Terms and Conditions for Adopting the Contested Provisions

17. Within the proceedings on the reviews of statutes under Art. 87 (1) (a) of the Constitution, the Constitutional Court examines, pursuant to the provisions of Section 68 (2) of the Constitutional Court Act, whether the legal enactment was adopted and promulgated within the confines of the powers set down in the Constitution and in the constitutionally prescribed manner.

18. The Petitioners are a group of 18 senators, represented by the attorney-at-law indicated in the heading. The petition seeking the annulment of Act No. 223/2016 Coll. has been filed in accordance with Section 64 (2) (b) of the Constitutional Court Act. The petition is enclosed with a signature instrument in which the senators have certified that they are joining the petition. The Petitioners therefore have the standing to file the petition under review.

19. The bill No. 223/2016 Coll., on Opening Hours in Retail and Wholesale was debated in the Chamber of Deputies as Document No. 275 in the first reading on 9 December 2014 and on 20 October 2015, it was ordered to be debated in the Committee on Economic Affairs and the Committee on Social Policy. The Committee on Economic Affairs debated the bill on 13 November 2015 and the Committee on Social Policy on 4 December 12. 2015. The second reading of the bill took place on 2 March 2016 and the amendments were drafted as Document No. 275/4. The third reading of the bill took place on 15 April 2016, when it was adopted by the Chamber of Deputies. After debating the bill, the Senate referred it back to the Chamber of Deputies with amendments (Document No. 275/6). The Chamber of Deputies voted on the bill on 28 June 2016, and the bill was adopted in the wording passed by the Senate. Act No. 223/2016 Coll., on Opening Hours in Retail and Wholesale was promulgated in the Collection of Laws on 20 July 2017, taking effect on 1 October 2016.

20. With respect to the above, the Constitutional Court states that Act No. 223/2016 Coll., on Opening Hours in Retail and Wholesale was adopted and promulgated within the confines of the powers set down in the Constitution and in the constitutionally prescribed manner. This fact was not contested by the Petitioners either.

IX.

Own Review of the Constitutional Court

21. The Petitioners seek the annulment of a part of the contested provisions due to their contradiction with the constitutional order, specifically alleging the violation of equality of rights guaranteed in Art. 1 of the Charter, the right to privacy and the principle of autonomy of will guaranteed in Art. 4 and 7 of the Charter, the right to engage in enterprise guaranteed in Art. 26 (1) of the Charter, and the right to acquire the means for one's livelihood by work guaranteed in Art. 26 (3) of the Charter.

22. The Constitutional Court assessed the arguments raised in the petition, concluding that the petition is unfounded.

23. In paragraph 33 of the petition, with reference to Art. 41 (1) of the Charter, the Petitioners invite the Constitutional Court to subject the contested Act to the rationality test, yet their arguments contained in Art. II to VI of the petition also relate to fundamental human rights and freedoms, which may be claimed even beyond the limits of the implementing statutes, unlike economic and social rights.

24. The Constitutional Court therefore firstly had to decide whether in this case, the contested Act would be subject to the stricter proportionality test or a more moderate rationality (reasonableness) test. Laws affecting the economic, social and cultural rights listed in Art. 41 (1) of the Charter are measured by a more moderate rationality test when examining any contradiction with the Constitution. As a result, this was supposed to be the case of the contested Act. However, in some cases, it is necessary to examine the statute providing for the limits of economic rights using the stricter proportionality test.

25. The rationality test and the formulation of its individual steps have been repeatedly expressed by the Constitutional Court in a slightly different manner, taking into account the perspectives applied [see for instance the Judgment file reference Pl. ÚS 16/14 dated 27 January 2015 (N 15/76 SbNU 197; 99/2015 Coll.), paragraph 85; or the Judgment file reference Pl. ÚS 54/10 dated 24 April 2012 (N 84/65 SbNU 121; 186/2012 Coll.),

paragraph 48], yet their essence remains identical. The reasonableness (rationality) test comprises the following four steps:

- 1) Defining the essential content of the economic, social or cultural right, or its core;
- 2) Assessing whether the claim concerns the core of this right (its essential content);
- 3) Assessing whether the interests which are against the claim are legitimate (acceptable from the constitutional law perspective);
- 4) Considering whether the legal regulation concerning the claim is reasonable (rational), although not necessarily the best, most appropriate, most effective or wisest, with respect to the conflicting legitimate interests.

26. The Constitutional Court therefore had to consider whether it was sufficient to conduct the rationality test or whether the contested Act had to be subject to a proportionality test. In answering this question, the Constitutional Court proceeded from the fact that, if the legal regulation negates the core of the constitutionally guaranteed economic right, and denies its very existence, substance and meaning, then the statutes establishing the limits of economic rights must be evaluated using a proportionality test. It is necessary to offer a similar answer if the interference with an economic right also entails an interference with a fundamental human right which is logically and functionally associated with it or if the legal regulation serves to hide an interference with a fundamental human right otherwise obviously unrelated to the economic right concerned. The essence of the invoked rights to engage in enterprise and work consists in the capacity to freely enter into certain legal or social relationships, exchange with others the results of their mental and physical endeavours in return for money or other values, and earn revenue from one's assets. The objective of enterprise is to make profits; the goal of work is to earn a regular income. Thus, the core of these rights consists in a sufficient degree of decision-making on one's own property and time so that the individual can both satisfy their entrepreneurial and work ambitions and achieve the income needed to satisfy their economic needs.

27. The Act prohibits sales for a period of seven and half days in a calendar year, with the exception of stores with a sales area not exceeding 200 m² and with the exception of four other specific types of establishments. It may therefore be stated that the Act applies to a small portion of the possible opening hours of the stores concerned, while not imposing any opening hours limit on operators for the remaining 357 and half days in a year. Therefore, it may be concluded that the right to engage in enterprise is only marginally limited and this limitation does not affect its core.

28. As for the alleged interference with the right to work, i.e. the right to acquire the means for one's livelihood by work within the meaning of Art. 26 (3) of the Charter, the Constitutional Court has not concluded that the Act would substantially restrict it, as it limits the working hours to a small extent only. However, it is impossible to overlook a certain paradox since while a number of employees in commerce are not permitted to work on the specified days by the Act, a certain number of employees of the Czech Trade Inspection Authority are faced with the duty to work and supervise compliance with the obligations stipulated by this Act.

29. On the basis of the above, the Constitutional Court states that the legal regulation does not deny the core of the constitutionally guaranteed economic rights, or that it would at the same time amount to an interference with any fundamental human right or freedom with which they would be logically and functionally associated.

30. Furthermore, the Constitutional Court had to consider whether the legal regulation did not serve to hide an interference with a fundamental human right which at first sight is unrelated to the economic right in question. This would be the case, for instance, if the seemingly neutral regulation of the economic right resulted in discrimination violating the provisions of Art. 3 (1) of the Charter or interference with the right to freely manifest their religion as guaranteed by Art. 16 (1) of the Charter.

31. Above all, the Petitioners argue that the Act is contrary to the principle of equality rights, since it applies only to a certain range of enterprise, namely commerce, rather than to other groups, as well as due to the fact that it arbitrarily determines the sales area 200 m² as a threshold for dividing the "large" outlets concerned and other outlets not affected by the restriction. Restricting only a certain type of economic activity and leaving another type unrestricted has been historically common in the Czech Republic; regulating sales or certain production on public holidays has been a tradition for more than a century. For instance, the Constitutional Court refers to the Regulation of the Government of the Czechoslovak Republic No. 150/1919 Coll., on the Restoration of Sunday and Festive Rest, or the Regulation of the President of the Land Political Administration in Prague No. 180/1921 Coll., on the Regulation of Sunday Rest within the Butcher's Trade in the next Great Prague. Similar restrictions are also common in other countries. At the same time, in Europe, individual countries approach the regulation of

the opening hours very individually, on the basis of legislative discretion. While some countries, such as Finland, Portugal or Sweden, do not restrict the opening hours at all, there is a rather rigid regulation in others such as Austria or the Benelux countries. In the Federal Republic of Germany, the regulation of the opening hours is left to the discretion of the individual German states; in some other countries (France, Spain, or Romania), a certain degree of regulation or exemption from national regulation is left to the local government level.

32. As for the assessment of the question of the criterion pertaining to the distinction of the large stores concerned and of other stores not affected by the limit of 200 m² sale area, it is necessary to determine whether it has been selected arbitrarily and whether the area follows a reasonable justification. Obviously, instead of the size of the sales area criterion, the legislature could use different criteria, such as the number of employees or annual turnover (as is the case in Denmark), but the currently selected criterion is easier to verify and is fixed, unlike others. According to general experience, the area of 200 m² may correspond to the difference between a large store with an external workforce and a store run by a small entrepreneur, e.g. with the help of their family. They still have the option to decide whether to give preference to work or family on a certain day; unlike employees, they benefit from the autonomy of will, being able to freely decide how to spend the public holiday. The Constitutional Court also addressed the criterion of the size of the sales area in its Judgment dated 18 December 2018, file reference Pl. ÚS 27/16, in which it dismissed the petitioner's objection to a violation of the equality of food establishment operators, pointing out the distinguishing criterion in the form of an area of 400 m². Even in relation to the Act under review, it may be stated that the criterion of the sales area is entirely legitimate and not exceeding the constitutional limits due to the effectiveness of the measure and its easy verifiability, while taking into account the existence of analogy in foreign regulations.

33. The arguments of the inequality contained in the petition also apply to the different status of the employee and the employer, yet the Constitutional Court does not consider this appropriate. Their position is different. While it is not crucial for entrepreneurs on which day or time they sell their goods, what is essential for the employee is that they may fully engaged in some activities only on a certain day or a certain part of the day (typically Christmas Eve dinner). As for the argument of violation of human equality, in contrast to the alleged, it needs to be said that if people are equal in dignity and rights, they are also equal, for example, in the right to spend several days with their family dedicated to celebrating religious or public holidays. The institute of public holidays, which are equally set for everyone, serves to enable people to spend their spare time together in the family circle or with friends, engage in common activities, and strengthen and develop family and social ties.

34. The petition further implies the Petitioners' objection to the conflict of the Act with the right to privacy and the principle of autonomy of will. According to the Petitioners, the purpose of the Act does not consist in protecting any human right, but the mere arbitrary prohibition of a particular activity. The Constitutional Court states that, according to the statement of reasons, the purpose of the Act is to provide work and family life balance, an objective which undoubtedly aims at fulfilling the protection of the family within the meaning of Art. 32 (1) and (4) of the Charter. However, according to the Petitioners, the Act violates the employee's right to make decisions about themselves, especially if there is a possibility to go to work or not on a public holiday. Nevertheless, the Petitioners' arguments are not appropriate, as the employee does not decide on the work attendance on a public holiday. The working hours are scheduled by the employer in accordance with the provisions of Section 81 (1) of Act No. 262/2006 Coll., the Labour Code, as amended. In other words, before the Act under review was effective, the employer was entitled to order their employee to work on a public holiday, both in accordance with the statute and taking into account their economic strength. The Petitioners' idea that an ordinary employee may effectively discuss with their employer the need or necessity to come to work on a public holiday does not correspond to social reality.

35. Another part of the petition seeking the annulment of the Act relates to the alleged inconsistency with the right to engage in enterprise and the right to acquire the means for one's livelihood by work guaranteed by Art. 26 of the Charter. Due to the fact that it does not amount to a violation of fundamental human rights and freedoms, the argument on the use of the proportionality test is inappropriate and the Act will therefore be assessed using the rationality test. If the Petitioners rely on the sharp inconsistency of the Act with the principle of minimising interference with fundamental rights, the Constitutional Court will address this objection within the third step of the rationality test, i.e. when assessing whether the legal regulation pursues a legitimate aim and whether it is an arbitrary interference with fundamental rights. Thus, the rationality test is a sufficient and appropriate means to assess the constitutionality of the Act in the instant case.

36. The Constitutional Court defined the essential content of the core of the economic right in paragraphs 26 and 27 above. The question of whether the Act denies this core has already been addressed by the Constitutional Court in paragraphs 27 and 28 above when considering whether to conduct a proportionality test or whether a

rationality test is an appropriate measure. In this case, the Constitutional Court concluded that a rationality test was sufficient and, in association with this, states that the Act will stand in the first two steps of the rationality test.

37. When assessing the legitimacy of the objective of the legal regulation, this objective may be inferred not only from the statement of reasons, but also from well-known facts. According to the statement of reasons, the objective of the Act is to regulate the opening hours in retail and wholesale so as to provide for a general prohibition of the opening hours on the specified public holidays and for a restriction on the opening hours on Christmas Eve. According to the statement of reasons, the Act is also intended to supplement the legal regulation contained in Act No. 245/2000 Coll., on National Holidays, other Holidays, Significant Dates and Days of Rest, as amended, following the spirit of previous legal regulations concerning holiday law, regulating public holidays. The social implications of the Act, as set out in the statement of reasons, are to be favourable, as people will have more spare time to spend with their family and engage in their hobbies, which is also emphasised by the European Union, as working life should not interfere with family and personal life. The purpose of the statutory restriction of opening hours also consists in protecting the fundamental right of employees to satisfactory working conditions guaranteed by Art. 28 of the Charter and the right to protection of family life guaranteed by Art. 32 (1) of the Charter.

38. In the instant case, the fact that the constitutional order is the backbone of organised society cannot be overlooked. The Constitution's preamble implies that our society is faithful to all good traditions of long-existing statehood, is conscious of its responsibility towards the community, and is resolved to guard and develop together the natural and cultural, material and spiritual wealth handed down to us. The public holidays specified in Section 1 of the contested Act have been celebrated in the Czech Republic for a long time, some of them even for several centuries. Many of them have also been excluded from the official calendar for a long time, and thus it is important to commemorate these public holidays all the more intensely. In general, it may be stated that the list of public holidays (not only contained in the contested Act) is part of Czech cultural and spiritual tradition. It is therefore a legitimate aim of the Act to allow employees in employment to commemorate and celebrate these public holidays in peace and quiet. Likewise, it is legitimate to remind everyone that it is advisable to avoid the shopping bustle on some days and engage in other activities with a more spiritual focus, whether in the family circle or in the community of those who share the same values. It was Montesquieu who stated that "the merchant spirit unites nations, yet does not unite individuals in the same manner" (Charles-Louis de Montesquieu, *The Spirit of the Laws*). Nor can it be overlooked that the entrepreneur (employer) has so far been entirely free to decide to spend the public holidays with their family while their employee was significantly limited in this respect by the wishes and needs of the entrepreneur. Therefore, the contested Act also supports the idea of equality and belonging to the community.

39. The Petitioners argue that some employees appreciate working on public holidays, as they have the opportunity to earn a higher income for the same work due to statutory extra pay. In addition, there is also the alleged discrimination against employees working in large stores compared to employees who are not affected by any such restrictions. The Constitutional Court states that the restriction of opening hours on seven and a half days per year actually prevents employees from working on these days. However, their constitutional right to acquire the means for their livelihood by work is not substantially limited; it must be taken into account that, even for the remaining 357 and a half days, they cannot work with the same employer at their discretion, as in addition to physical capacities, they are also limited by their working hours and the work offered by their employer.

40. On the contrary, the Constitutional Court does not consider it a legitimate objective in the form of a positive impact on small and medium-sized enterprises by restricting the indirect competition of large entrepreneurs. Restricting competition and favouring some entrepreneurs at the expense of others amounts indeed to a violation of the principle enshrined in Art. 4 (4) of the Charter. However, in the instant case, the declared objective only causes insignificant restrictions on competition and the principle of equality, and it may thus be accepted.

41. The Constitutional Court therefore states that the fundamental objective of the contested Act, i.e. strengthening social and family cohesion by establishing at least a certain dimension of the fixed spare time which people can spend together, is legitimate, even if it cannot apply to all employees owing to natural societal needs.

42. Furthermore, the Constitutional Court dealt with the suitability of the act to achieve the intended effect. For millennia, our civilisation has followed the principle that it is necessary that people be not required to work without rest every day, and for this reason at least one day per week has been reserved as a day of rest even in

the form of various religious orders. Generations of those working for wages have fought for the privilege of statutory working hours and the possibility of regular rest. In a democratic society, one may observe a lasting rivalry between a legislature wishing to regulate a citizen's right to fixed days of rest, and a businessperson or consumer wishing to do business and enjoy material benefits even on holiday. It is probably a Sisyphean effort of the state to regulate, at least in a certain form, enterprise on days of rest, which amounted to grotesque forms in the past. For example, one may recall the bill of Deputies Tučný, Hrizbyl and comrades from 1920 on Sunday and public holiday rest in barbers', wig-makers' and, hairdressers' trades in the Czechoslovak Republic. In recent decades, however, a regular rotation of working and holiday days in the week has been loosened, both to the detriment of family life and to the detriment of personal satisfaction. The introduction of certain days of the year which will generally be perceived as non-working days represents a reduction in such harm. In this respect, the act is appropriate for the objective pursued.

43. The last step of the rationality test consists in answering the question whether the legal means to achieve the goal is reasonable, though not necessarily the best, most appropriate, most effective or wisest. Unless the rationality test is to be completely emptied, the Constitutional Court is required to measure the rationality of the legal regulation under review with the rationality of a possible better legal regulation. Therefore, there must be an obstacle which the irrational legal regulation will not pass compared to another, rational legislation. At the same time, it must be admitted that in the absence of a system that would accurately verify and ex-post evaluate the economic and social effectiveness of adopted legal regulations in the Czech Republic, decision-making of the judges of the Constitutional Court may in some respects be guided by internal conviction.

44. The Constitutional Court states that there are even better, more appropriate and more effective means to achieve the objective. The overall structure of the legal regulation, which until the adoption of the Act under review, provided employees with the right to rest, contained in the Labour Code, and the legal regulation in Act No. 245/2000 Coll., on National Holidays, other Holidays, Significant Dates and Days of Rest, leading to loyalty and respect for the good traditions of Czech statehood, is more comprehensive and more effective and reaches a significantly wider range of persons, while it also allows those who are able and willing to work on certain days of the year unlike others to work and be financially rewarded. If the legislature had wished to achieve the intended effect, it could have done so by parametric changes in the labour-law regulations, for example by increasing the remuneration for work on public holidays, rather than by adopting a special regulation. Nevertheless, it cannot be stated that the legal regulation under review was exceptionally irrational, and therefore the Constitutional Court concluded that the contested act would stand the rationality test. It is a matter of legislative discretion to decide which public holidays and bank holidays and the number of these days need to be supported by prohibiting certain occupational activities. If the regulation of the opening hours is not contrary to the values of the constitutional order and does not deviate from the national and state traditions, it is not appropriate for the Constitutional Court to intervene in any such decision of the legislature in accordance with Art. 87 (1) (a) of the Constitution.

X. Conclusion

45. The Petitioners' arguments lacked the capacity to infer the alleged inconsistency with the constitutional order. Due to this fact, in accordance with Section 70 (2) of the Constitutional Court Act, the Constitutional Court dismissed the petition seeking the annulment of Act No. 223/2016 Coll., on Opening Hours in Retail and Wholesale, in its entirety.

Instruction: Judgments of the Constitutional Court cannot be appealed.

In Brno, on 26 February 2019

Pavel Rychetský
President of the Constitutional Court