Pl. ÚS 44/13 of 13 May 2014
Cancellation of the Uniform Deposit for Fuel Distributors

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, consisting of the President of the Constitutional Court Pavel Rychetský and its judges Stanislav Balík (judge-rapporteur), Ludvík David, Jan Filip, Vlasta Formánková, Ivana Janů, Vladimír Kůrka, Jan Musil, Vladimír Sládečka, Radovan Suchánek, Kateřina Šimáčková, Milada Tomková, Jiří Zemánek, and Michaela Židlická, decided on the petition filed by a group of 18 senators of the Senate of the Parliament of the Czech Republic seeking the annulment of the provisions of Section 6i (1), Section 6i (2), and Section 6j of Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended by Act No. 234/2013 Coll., of 26 June 2013, amending Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended, and Act No. 455/1991 Coll., on trades (the Trades Act), as amended, 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 the parties to the proceedings, and the Government of the Czech Republic and the Public Defender of Rights, as the interveners, as follows:

I. Part the provisions of Section 6i (1) of Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended by Act No. 234/2013 Coll., amending Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended, and Act No. 455/1991 Coll., on trades (the Trades Act), as amended, which reads "... by means of (a) Depositing the amount of CZK 20,000,000 in a special account of the customs office, while the deposit of this amount must be in the account for the entire term of the registration of a fuel distributor; or (b) The bank guarantee accepted by the customs office to secure arrears in the total amount of CZK 20,000,000, as reported to the authorities of the Customs Administration of the Czech Republic or other tax authorities on the ninetieth day after the cancellation or termination of the registration of a fuel distributor" and Section 6i (2) of the act are annulled upon the end of 30 June 2015.

II. The remainder of the petition is rejected.

REASONING

I.
Recapitulation of the petition

1. The Constitutional Court received on 20 September 2013 the petition filed by a group of 18 senators of the Senate of the Parliament of the Czech Republic (hereinafter referred to as the "Petitioner") seeking the annulment of Section 6i (1) of Act No. 234/2013 Coll., amending Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended, and Act No. 455/1991 Coll., on trades (the Trades Act), as amended (hereinafter referred to as Act No. 234/2013 Coll.): Based on the petition, the Petitioner sought a judgment with the statement that reads as follows: "In Section 6i (1) (a) and (b) of Act No. 234/2013 Coll., the numeral 20,000,000 is deleted".

2. Through the submission dated 2 January 2013, received by the Constitutional Court on 6 January 2014, the Petitioner changed the prayer for relief, while continuing the seeking of the rendering of a

judgment with the statement that reads as follows: "Part the provisions of Section 6i (1) of Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended by Act No. 234/2013 Coll., amending Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended, and Act No. 455/1991 Coll., on trades (the Trades Act), as amended, which reads "... by means of (a) Depositing the amount of CZK 20,000,000 in a special account of the customs office, while the deposit of this amount must be in the account for the entire term of the registration of a fuel distributor; or (b) The bank guarantee accepted by the customs office to secure arrears in the total amount of CZK 20,000,000, as reported to the authorities of the Customs Administration of the Czech Republic or other tax authorities as of the ninetieth day after the cancellation or termination of the registration a fuel distributor" and Section 6 (2) (correctly: Section 6i (2)) of the act and Section 6j of the act are annulled."

3. In its extensive submission, the Petitioner primarily quoted from the preamble to Act No. 234/2013 Coll., the speeches of deputy Michal Babák when discussing the bill in the Chamber of Deputies of 7 May 2013 and of the Minister of Finance Miroslav Kalousek of 15 May 2013, the letter from the Vice-president of the Office for the Protection of Competition of 19 December 2012, ref. No. ÚOHS-586/2012/KD-23987/2012/850/MBu, of the correspondence between the Chairman of the Economic Committee and the Agricultural Committee of the Parliament of the Czech Republic, the chairmen of the parliamentary clubs of political parties, the First Deputy Minister of Finance and Deputy Minister of Industry and Trade, from which it has argued that "the commendable effort to minimise tax evasion in the area of the application of value added tax suffers from that the bill submitters and the whole legislative process including the discussion and approval of the draft amendment are not supported by the specific verifiable empirical data..." Further, the Petitioner pointed out primarily to the contradiction of the contested legal regulation with Article 26 (1) and (2) of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter"), stating inter alia that the "flat application of the deposit in the amount of CZK 20 million to fuel distributors even after the Chamber of Deputies approved the draft amendment was not and could not be perceived as an unambiguously positive act in respect of the business of fuel distributors". Finally, the Petitioner also argued that the contested legal regulation would not stand the test of proportionality and that the determination of the uniform deposit of CZK 20,000,000 was the manifestation of arbitrariness which might have a liquidation effect on the part of the entrepreneurs in the area of fuels and fuel filling stations (the so-called "choking effect").

II.
Course of the proceedings and recapitulation of statements of the parties to the proceedings

4. In accordance with Section 69 of Act No. 182/1993 Coll., on the Constitutional Court, as amended (hereinafter referred to as the "Act on the Constitutional Court"), the Constitutional Court called on the parties to the proceedings - the Chamber of Deputies of the Parliament of the Czech Republic (hereinafter referred to as the "Chamber of Deputies") and the Senate of the Parliament of the Czech Republic (hereinafter referred to as the "Senate"), as well as the interveners - the Government of the Czech Republic and the Public Defender of Rights to comment on the petition.

5. The Chamber of Deputies, through its President Jan Hamáček, described the legislative process which has resulted in the passing of Act No. 234/2013 Coll., saying that "the provision in question was adopted after the properly conducted legislative procedure and that the legislature acted being satisfied that this provision is in compliance with the Constitution and our legal order". It concluded that it is the role of the Constitutional Court to assess the constitutionality of the provision in question and issue the appropriate judgment.

6. The Senate, through its President Milan Štěch, described the course of discussing the bill in the Senate and said that within the debate the circumstances in favour of the bill had been discussed exhaustively, but the views criticising the amendment had been discussed as well. According to the stenographic record, he quoted in his comment the speeches of individual senators given during the

discussion. The Senate concluded that "it is entirely the role of the Constitutional Court to assess and finally decide whether the petition seeking the annulment of the respective provision of the act in the context of the constitutional order of the Czech Republic will stand".

7. The Government of the Czech Republic (hereinafter referred to as the "Government"), through its Prime Minister Jiří Rusnok, said that it had decided to enter the proceedings as an intervener. In its comment, the Government then stated that the institute of deposit is one of the measures through which the amendment to the Fuels Act should reduce the black market in fuels in the Czech Republic. The reason for the introduction of deposit was to allow the customs office and other tax authorities to pay, using a deposit, any penalties and other payments arrears, relating to the activities of fuel distributors. The effect of the amendment should be a significant reduction of tax evasion in the particular market segment. The Government also described "major criminal attacks" the fuel market had been exposed to since the nineties of the 20th century, as well as "non-standard events in the fuel market", allegedly taking place in the period between the date of force and the effective date of the amendment, i.e. from 2 August 2013 to 30 September 2013. The Government responded to the Petitioner's assertion that the data mentioned by the Ministry of Finance and the Ministry of Industry and Trade is vague, claiming that the data is only available to those ministries and, at the same time, pointing out that the petition does not contain any data that would demonstrate any choking effect. The Government pointed out to the incomprehensibility of the prayer for relief in the form before its amendment. The Government stated that the "application of a choking effect institute is conceptually excluded in terms of the existing case-law of the Constitutional Court". The Government submitted its opinion on the various steps of the proportionality test. According to the Government, those are objectives legitimate and necessary in a free democratic society. The amount of deposit is set out also with regard to the risk of business in the field of fuels; in addition, it is not possible to argue that the deposit has a discriminatory nature because small-sized distributors are unable to pay the deposit in the determined amount. It is a measure that is imposed upon all the respective entities without exception. When it comes to alternative ways of attaining the objective, the Government argued with the Petitioner about the possibility of the introduction of the reverse charge. The Government pointed out in particular to the negative opinion of the European Commission which did not comply in 2010 with the request of the Ministry of Finance for granting an individual exemption that would allow the application of the reverse charge. According to the Government, the European Commission stated that "the institute of deposit may be introduced if it is not discriminatory and is aimed at proper tax collection and the fight against tax fraud as an overriding public interest justifying restrictions on the free movement of goods and services". The Government stated that in the course of the legislative process there were also discussed possibilities for individual determining the deposit through a decision of the customs office; the legislature decided, however, to determine the deposit of the same amount for all, which "seems to be the only possible solution... while arguing against the discriminatory nature of the measure is not relevant". The Government disagreed with the Petitioner's claim that "the deposit has been determined in a speculative and inadequate manner in relation to the reality of the functioning of the fuel market", because as for the data provided by the General Financial Directorate the average amount of the realised tax evasion was taken into account in the determination of the deposit amount. According to the Government, the provisions governing the deposit, including the amount thereof, will stand the test of proportionality. The Government further stated that from the available data it could not be concluded that the introduction of the deposit had caused the liquidation of small and medium-sized enterprises. Accordingly, it is obvious that it is not true that the introduction of the deposit has *a priori* liquidation effects on small-sized distributors. Finally, the Government reiterated that "the current legal regulation, including the deposit, does not distort the fuel market but rather it corrects the market as it has excluded from the market especially those distributors who have committed tax fraud". In view of the above, the Government moved that the petition should be rejected or dismissed.

8. The Public Defender of Rights, Mr Pavel Varvařovský, notified that he entered the proceedings and in his statement, pointing out to the case-law of the Constitutional Court, noted in particular that the contested legal regulation could not stand the third step of the test of proportionality. He stressed that the adopted approach of the state did not comply with the requirement for the considerateness of

infringement upon fundamental rights. The Public Defender of Rights also considered the deposit as contrary to Article 11 of the Charter. In his view, "in the present case, it is not advisable to prefer the interest of the state to eliminate unwanted (and illegally operating) entities through the deposit, which may affect some entities very severely and disproportionately, to the protection of their fundamental rights set out in particular in Article 11 and 26 of the Charter". Finally, he moved that the Constitutional Court should decide that in Section 6i (1) (a) and (b) of Act No. 234/2013 Coll., the numeral 20,000,000 is deleted.

9. Without any request, the Constitutional Court received submissions irrelevant for the court from companies PENTACO, spol. s r.o., LA - TRANSGAS LNÁŘE, s.r.o., and ARTWELD, s.r.o., seeking the status of an intervener in the proceedings because of a legal interest in the outcome of the proceedings.

III.
Text of the contested statutory provisions

10. The contested provisions read as follows:

"Section 6i
Deposit

(1) Each fuel distributor is required to make a deposit by means of

(a) Depositing the amount of CZK 20,000,000 in a special account of the customs office, while the deposit of this amount must be in the account throughout the registration of the fuel distributor; or

(b) The bank guarantee accepted by the customs office to settle arrears in the total amount of CZK 20,000,000, as reported to the authorities of the Customs Administration of the Czech Republic or other tax authorities as of the ninetieth day after the cancellation or termination of the registration of a fuel distributor.

(2) The bank guarantee must be provided for a fixed period of time, of not less than 2 years.

Section 6j
Use of deposit

(1) Upon the final and effective cancellation or termination of the registration of a fuel distributor, the amount deposited becomes an overpayment made by the fuel distributor. If this overpayment is a refundable overpayment, the customs office shall refund it to the fuel distributor within 90 days of the date of final and effective cancellation or termination of the registration of that fuel distributor.

(2) The time limit referred to in paragraph 1 is suspended for the period for which the proceedings are conducted before the competent authority the Customs Administration of the Czech Republic or other tax authority,
(a) Which may result in a decision to determine taxes, fees or other similar monetary payments; and
(b) Which were instituted within 90 days of the date of final and effective cancellation or termination of the registration of the fuel distributor.

(3) In the event of cancellation or termination of the registration of a fuel distributor, the customs office shall call upon the issuer of the bank guarantee to pay the arrears as shown as of the ninetieth day after the cancellation or termination of the registration with

(a) The customs office; or

(b) Other tax authority that required the customs office to make such payment.

(4) The customs office shall call upon the issuer of the bank guarantee not sooner than after the first 90 days, but not later than 5 months from, the date of cancellation or termination of the registration of a fuel distributor.

(5) The issuer of the bank guarantee is obliged to pay the amount within 15 days of the date of receipt of that call."

IV.
Review of the procedure of passing of the contested statutory provisions

11. The Constitutional Court, as required under Section 68 (2) of the Act on the Constitutional Court, then examined whether the contested provisions had been adopted within the limits of the competence set by the Constitution of the Czech Republic and in a constitutionally prescribed manner; the examination was based on the stenographic records, as well as the mentioned comments by both chambers of the Parliament of the Czech Republic.

12. Bill No. 234/2013 Coll., amending Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended, and Act No. 455/1991 Coll., on trades (the Trades Act), as amended, was laid before the Chamber of Deputies by a group of deputies on 19 December 2012: The bill was circulated to deputies as Publication No. 883/0. The bill was sent to the Government for giving its opinion, with the opinion being sent on 17 January 2013. The opinion of the Government was sent to deputies on 18 January 2013 as Publication 883/1. The first reading took place on 8 February 2013. The bill was assigned to the Economic Committee that adopted proposed amendments to the bill, also concerning the contested provisions. In the detailed debate within the second reading, deputies David Kádner, Josef Nekl, and Michal Babák submitted their proposed amendments, concerning, *inter alia*, the contested provisions. Out of 159 deputies present, 126 senators voted in favour of and 3 against the passing of the bill.

13. The bill was referred to the Senate on 7 June 2013. The Organisation Committee of the Senate assigned it, as Senate Publication No. 120, to the Committee for Economy, Agriculture and Transport. The committee discussed the bill on 25 June 2013 and, through its adopted Resolution No. 117, recommended that the Senate plenum should pass the bill (Senate Publication No. 120/1). At its meeting held on 26 June 2013, the Senate passed the bill following the debate, when out of 61 senators present, 44 senators voted in favour of and 1 against the passing of the bill, with a quorum being 31 senators.

14. The President of the Czech Republic signed the Act on 18 July 2013. On 2 August 2013, the Act was promulgated in the Collection of Laws under No. 234/2013 Coll.

15. The Constitutional Court states that Act No. 234/2013 Coll., amending Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended, including the provisions currently contested, was passed and published within the constitutionally established powers and in a constitutionally prescribed manner.

V.
Review of the petition on the merits

16. The Constitutional Court considered the arguments of the Petitioner and concluded that the petition is partly justified.

17. The petition does not seek to cancel the institute of deposit but is opposed to the uniform deposit amount for all fuel distributors, on the grounds of its conflict with Article 26 of the Charter, as well as to the legal regulation of the use of deposit should the company of the fuel distributor be dissolved finally and effectively or should its registration cease to exist.

18. The Constitutional Court in its judgment of 12 March 2008, file No. Pl. ÚS 83/06 (N 55/48 SbNU 629, No. 116/2008 Coll.), stated that "one of the essential features of the democratic rule of law is the principle of adequacy, which implies in particular that the measures restricting fundamental rights or freedoms may not have negative consequences exceeding the positives represented by the public interest in such measures. The limitation of fundamental rights or freedoms may only rarely occur in the event of their collision with one of the public goods (public interest); however, in this context, the principle according to which the fundamental right or freedom may only be limited in the event of exceptionally strong and well-justified public interest, with a careful investigation of the nature and objective of the limited fundamental right, is essential."

19. In the present case, the Constitutional Court then proceeded with the test of proportionality assessing the constitutional conformity of the contested provisions. The Court repeatedly defined the test in its case-law as a test of three steps consisting in assessing the legitimacy and necessity of the objective to be attained within a democratic society, in assessing the rationality of the connection between the objective and the means chosen to ensure its implementation, and, finally, in assessing whether there are alternative ways to attain the objective, the utilisation of which would make the infringement upon the fundamental rights less intense, or eliminate it completely.

20. Firstly, the Constitutional Court concluded that the contested legal regulation could stand in the first test of proportionality. The contested provisions are based on the legitimate efforts by the legislature "to limit the formation and abuse of special-purpose companies that play a major role in all known offences in the fuel market" (see the explanatory memorandum to Publication of the Chamber of Deputies No. 883/0). Neither the Petitioner itself challenges the institute of deposit, which is also according to the Constitutional Court a rational means to implement the objective.

21. Regarding the rationality of the contested legal regulation, it would surely attain its objective in relation to those committing tax malpractices. On the other hand, it should be taken into account in particular the fact that in the fuel market there also active fair and honest fuel distributors whose rights could be infringed upon in an insensitive manner as a result of the contested legal regulation. In other words, as a Czech saying has it, it could happen that the "dirty water would be poured from the bath also with the baby".

22. In the case currently under consideration, as for the submissions of both the Petitioner and the parties to the proceedings and interveners, the *prima vista* key issue is the outcome of the third step of the test of rationality, i.e. whether there are alternative ways to attain the objective, the use of which would make the infringement upon the fundamental rights less intense, or eliminate it completely. The Constitutional Court concluded that the contested part of provisions of Section 6i (1) and (2) of Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended by Act No. 234/2013 Coll., of 26 June 2013 (hereinafter referred to as "Part of Section 6i of the Act"), would not stand in this step of the test of proportionality.

23. The Constitutional Court in its judgment of 13 August 2002, file No. Pl. ÚS 3/02 (N 105/27 SbNU 177, No. 405/2002 Coll.), stated that "in the case of fines charged to legal and natural persons running their business under special legislation it is necessary to assume that any such interference with the property, a result of which the property base for future business would be "destroyed", is excluded. In other words, fines having a liquidation effects are impermissible. It should be noted that a fine in a liquidation amount constitutes in principle the "most severe" case of interference with the financial situation, which, moreover, may also lead to a breach of Article 26 (1) of the Charter; while it is not impossible to relate the conclusion of the considerable intensity of the interference with the ownership right also to such cases in which the fine exceeds the possible revenues to such extent that the entrepreneurial activity becomes essentially "pointless" (i.e. undertaken solely in order to pay the fine imposed after a considerable period of time)." In the case currently under consideration, the Constitutional Court has come to the conclusion that by analogy to the case when the legislature determined unconstitutionally the minimum limit of fine it is possible to relate the expressed

conclusions to the cases where the amount of the deposit for fuel distributors is not determined individually.

24. Even at the time of adopting its decision, the Constitutional Court did not find the method of determining the uniform deposit under the contested legal regulation as the only possible, but especially in relation to all fuel distributors as the most considerate. In addition to this method, especially the option of the legal regulation of the conditions of the determination of the amount of deposit that would reasonably be graded by the legislature would otherwise come into consideration. The option that the deposit would only be determined for those distributors who enter the fuel market for a limited time of time is not excluded either. Also on the grounds that the contested legal regulation may have a choking effect on small-sized fuel distributors, consisting in the very difficulty to obtain the required amount of deposit, the Constitutional Court has found it, in addition to the mentioned options, as apparently the least considerate in relation to the right guaranteed under Article 26 of the Charter.

25. The Constitutional Court notes that the very fact that the contested Part of Section 6i of the Act did not pass the third step of the test of proportionality makes such part unconstitutional. Therefore, the Constitutional Court decided in accordance with Section 70 (1) of the Act on the Constitutional Court that the part of Section 6i (1) of Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended by Act No. 234/2013 Coll., amending Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended, and Act No. 455/1991 Coll., on trades (the Trades Act), as amended, which reads "... by means of (a) Depositing the amount of CZK 20 million in a special account of the customs office, while the deposit of this amount must be in the account for the entire term of the registration of a fuel distributor; or (b) The bank guarantee accepted by the customs office to secure arrears in the total amount of CZK 20,000,000, as reported to the authorities of the Customs Administration of the Czech Republic or other tax authorities on the ninetieth day after the cancellation or termination of the registration of a fuel distributor" and the provisions of Section 6i (2) of the act which are contrary to Article 26 of the Charter are annulled upon the end of 30 June 2015, which gives the legislature sufficient time to modify on an individual basis the amount of deposit or the conditions of its determination in a constitutionally conforming manner.

26. On the contrary, the Constitutional Court did not find Section 6j of Act No. 311/2006 Coll., on fuels and fuel filling stations and on amendments to some related acts (the Fuels Act), as amended by Act No. 234/2013 Coll., of 26 June 2013, to be unconstitutional. Neither has the Petitioner brought about in relation to this contested provision any constitutionally relevant arguments. Therefore, the Constitutional Court rejected this part of the petition as manifestly unfounded based on the analogous application of Section 43 (2) (a) and (b) of the Act on the Constitutional Court.

Appeal: No appeal is permissible against the judgment of the Constitutional Court (Section 54 (2) of the Act on the Constitutional Court).

In Brno on 13 May 2014

A dissenting opinion of judge Ivana Janů

I am adopting a dissenting opinion disagreeing with the statement and the reasoning of the judgment file No. Pl ÚS 44/13, pursuant to Section 14 of Act No. 182/1993 Coll., on the Constitutional Court, as amended.

I disagree with the decision for the following reasons:

The petition seeking the annulment of part of Section 6i (1) and Section 6i (2) of the Fuels Act is not insufficiently justified by arguments given the seriousness of the underlying legal issue not only in constitutional but also in general aspects. As opposed to the explanatory report which unambiguously defines clearly and comprehensibly the reasons for acceding to an amendment to the existing legal regulation (tax evasion amounting to hundreds of billions of dollars), as well as the manner in which the introduction of a deposit of CZK 20,000,000 prevent their further proliferation (the limitation in the establishment and abuse of special-purpose companies), the petition of senators is rather an additionally expressed disagreement with the legislative process in the Chamber of Deputies of the Parliament of the Czech Republic. Out of 159 deputies present, 126 senators voted in favour of and 3 against the passing of the bill. The bill was passed by the Senate smoothly as well, when out of 60 senators present, 44 senators voted in favour of and 1 against the passing of the bill.

The Constitutional Court as the body protecting the constitutionality acts within an abstract review of the constitutionality of laws as an instrument of a minority of deputies or senators who did not have the power to enforce their opinion in the legislative body against the majority. The petition in the present case has been filed by a group of 18 senators, without it being evident based on what the minority has been formed, because only 1 senator was against the bill, as mentioned above. The remaining 17 senators had to be either absent during the vote on that important amendment or vote for its passing or abstain from voting. However, it is clear that a group of senators voted in the most comfortable way, by submitting an amendment to the Constitutional Court for assessment, without bothering to submit their serious arguments in the Senate as a subject of the public debate and express their opinion on the unconstitutionality of the vote, as the one senator mentioned did.

It seems to me that the Constitutional Court did not deal in the Reasoning of its judgment with specific arguments as they were presented in the opinion of the Government, which is alarming under the situation when the Government notified in its submission of 20 November 2013 that it intervenes in the proceedings under Section 69 (2) of the Act on the Constitutional Court. Within the meaning of the cited provision, by doing so, the Government has the status of an intervener. Pursuant to Section 28 (2) of the Act on the Constitutional Court, interveners have the same rights and obligations as parties to the proceedings. It was therefore undoubtedly the duty of the Constitutional Court to confront a very qualified opinion of the Government with the petition filed by the group of senators that contained almost none of any constitutional arguments or material facts documenting the conclusions of the liquidation effect of the deposit in question. The Constitutional Court did not have such evidence on the basis of which it could have drawn a conclusion on the turnover of fuel distributors, their profits, financial demands for investment or the impact of the solution chosen by the legislature, in which a working committee was also involved with the participation of the Union of Small and Medium-sized Enterprises. Through its nullity judgment, the Constitutional Court affects, without any proper analysis of the relevant issues and comparative studies, the area of fiscal policy of the state and its activism in the division of power narrows the space for the legislative power, which, unlike the Constitutional Court, carries responsibility for the adopted and the necessary legislation.

In principle, I cannot also agree with the conclusion of the judgment of the Constitutional Court finding that the contested legal regulation is unconstitutional because it may have a choking effect on small-sized fuel distributors. The Constitutional Court justified this conclusion, in my opinion, inappropriately by referring to its judgment of 13 August 2002, file No. Pl. ÚS 3/02 (impermissibility of fines of liquidation nature), without distinguishing a different nature of the deposit which has not a punitive nature, contrary to the fine, and as a refundable overpayment does not interfere with the assets of the undertaking entity.

In this context, the Constitutional Court did not even deal with the arguments of the Government, which, in its statement, in my opinion, reliably refuted the argument claiming the existence of any choking effect, when pointing to the fact that the business activities in the area of fuels, even in a relatively smaller scale entails considerable input and operating investments (documented by the specific costs of the purchase of basic equipment in hundreds of millions of Czech crowns), compared

with which the deposit amount of CZK 20,000,000 is "at least bearable and, in many cases, negligible".

I also evaluate as convincing the method presented by the Government according to which the amount of the deposit in question was calculated (with respect to the average amount of the realised tax evasion). When it comes to the more considerate methods of determining the deposit (Item 24) as proposed by the judgment, they were in the opinion of the Government subject to the legislative process and were rejected by the legislature because of a high administrative burden, an increased risk of arbitrariness in the application of administrative discretion, and corruption risks. In its judgment, the Constitutional Court presented its opinion neither on those facts claimed by the Government.

The fact that the amount of the deposit in question is not generally liquidation for small-sized fuel distributors is also evidenced by the facts raised by the Government that dozens of distributors - small and medium-sized enterprises, as defined by Act No. 47/2002 Coll., on the support of small and medium-sized enterprises, have already paid the deposit and fulfilled additional conditions of registration according to the data from the register of fuels. I believe that it is reasonable to take into account the fact that the business in the fuel distribution is a specific and strategic line of business and must, therefore, be strictly regulated with regard to the increased possibility of tax evasion, and the amount of the uniform deposit contested by the Petitioner corresponds to the above-mentioned. A similar situation has already been addressed by the Constitutional Court in its judgment of 13 May 2012, file No. Pl. ÚS 17/11, in the case of photovoltaic power plants, stating that "in the abstract review of constitutionality, it is not able to prove objectively or simulate hypothetically every conceivable situation that the contested provisions in individual cases may cause". Also in the present case, possible liquidation effects borne by individual fuel distributors would be possible to be assessed through individual constitutional complaints.

Further, it is not possible to disregard the fact completely omitted in the judgment of the Constitutional Court and mentioned on page 12 of the opinion of the Government, that the European Commission does not consider the amount of deposit as inadequate. According to the European Commission, the amount of deposit may be determined based on the risk of the amount of tax evasion, not only on the basis of the size of the fuel distributor.

According to the settled case-law of the Constitutional Court (cf. the judgment of 23 October 2006, file No. Pl. ÚS 61/04, Item 41) as regards the fundamental rights provided for in Article 41 (1) of the Charter (economic, social, and cultural rights which include the right to conduct business under Article 26 (1) and (2)), "the test of constitutionality will be passed by such legal regulation as for which a legitimate objective can be ascertained and which does so in a way that can be thought of as a reasonable means to achieve the objective, although not necessarily the best, most appropriate, most efficient or wisest".

For the reasons referred to above, I conclude that the contested legal regulation does not show signs of unconstitutional nature because it pursues a legitimate objective and in terms of rationality it is an adequate means to remedy the current situation where the very extensive black market within the trade in fuels, which is generally linked to the legal market, threatens the fiscal interests of the state, the interests of consumers (leading to distorted competition), and constitutes also a security risk for the Czech Republic.

For all the reasons above, I believe that the petition filed by the senators should have been dismissed and the deposit of CZK 20,000,000 should not have been cancelled.

In Brno on 13 May 2014

A dissenting opinion of judges Radovan Suchánek and Jan Musil

on the judgment with file No. Pl. ÚS 44/13

Pursuant to Section 14 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, we are giving our dissenting opinion to the statement and the reasoning of the judgment with file No. Pl. ÚS 44/13.

1. The unconstitutionality of part of Section 6i (1) and Section 6i (2) of the Fuels Act annulled by the Constitutional Court has been found by a majority of the Plenum in a breach of the right to conduct business and carry out other economic activities as referred to in Article 26 (1) of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter") (see Items 24 and 25 of the Reasoning).

When assessing the compliance of the contested legal regulation with the right to conduct business, having the nature of economic right, the Constitutional Court has so far as standard proceeded similarly as in the case of social rights for the review of which the test of rationality has been designed and developed in the existing case-law [cf. the judgments, file No. Pl. ÚS 61/04 of 5 October 2006 (N 181/43 SbNU 57; 16/2007 Coll.), file No. Pl. ÚS 83/06 of 12 March 2008 (N 55/48 SbNU 629; 116/2008 Coll.), Item 185 or file No. Pl. ÚS 54/10 of 24 April 2012 (N 84/65 SbNU 121; 186/2012 Coll.), Item 48]. In the area of economic, social, and cultural rights, which may be claimed according to the provisions of Article 41 (1) of the Charter only within the limits of implementing legislation, this provision opens a wide space for the legislature in the selection of various solutions. With respect to Article 41 (1) of the Charter, the legal regulation need not be in the strict proportionality relation to the objective which is pursued by the regulation, i.e. it need not be a measure necessary in a democratic society, as in the case of those rights which may be claimed directly based on the Charter. The Constitutional Court therefore consistently held that the test of constitutionality in this sense would be passed by such legal regulation as for which pursuing any legitimate objective can be ascertained and which does so in a way that can be thought of as a reasonable means to attain the objective, though it need not be the best, most efficient or wisest [cf. also the judgment file No. Pl. ÚS 61/04 of 5 October 2006 (N 181/43 SbNU 57, 16/2007 Coll.)].

Only when the Constitutional Court concluded in the second step of the test of rationality that the contested legal regulation affected the very existence of this fundamental right or actual realisation of its essential content, it assessed the permissibility of the interference with this right within the test of proportionality. In the same manner, the Constitutional Court acted in the past also in cases where the reason for a breach of the fundamental right should consist simultaneously in a breach of the principle of equality [judgment file No. Pl. ÚS 19/13 of 22 October 2013 (No. 396/2013 Coll.), Items 50 and 51].

We cannot therefore agree with that the Plenum majority did not perform the test of rationality at all in the present case, by way of derogation from the aforementioned settled case-law of the Constitutional Court; and therefore it has not established whether the contested legal regulation concerns the very existence of the right to conduct business or the actual implementation of its material content, when under this inadequate state of knowledge of the impact of the contested legal regulation it proceeded directly with the test of proportionality [as to Item 19 of the Reasoning, it should be recalled that even this test consists as standard of four, and not three, steps, i.e. gradual examination of meeting the requirements of the constitutionally approved (legitimate) objective of reducing the basic right, appropriateness, necessity, and proportionality in the narrow sense - see, e.g. the cited judgment, file No. Pl. ÚS 19/13, Item 51].

2. The judgment then even "topped" this way of review of the compliance of the contested legal regulation with the right to conduct business by completely disregarding Article 26 (2) of the Charter, which in relation to Article 26 (1) of the Charter states that the law may prescribe the conditions of and restrictions on the exercise of certain professions or activities. The Constitutional Court has hitherto inferred as standard from the fact that Article 26 (2) of the Charter does not specify the purpose of such restrictions [judgment file No. Pl. ÚS 38/04 of 20 June 2006 (N 125/41 SbNU 551;

409/2006 Coll.), Item 29] that the legislature has a relatively broad power to define specifically the content and manner of implementation of Article 26 of the Charter (see also the judgment file No. Pl. ÚS 19/13, Item 49), limited especially by Article 4 (4) and Article 1 (3) (1) of the Charter. However, the judgment did not deal with the relevance of Article 26 (2) of the Charter at all.

3. We cannot therefore be satisfied with that how the Plenum majority has performed - euphemistically speaking - a "shortened" but in fact a shallow and, consequently, an unrestrained review of the legal regulation falling within the area of economic rights under Chapter Four or Article 41 (1) of the Charter.

4. According to the Plenum majority, the annulled legal regulation did not stand due to the requirement for necessity as the constitutionally legitimate objective can be in this case allegedly achieved by the methods which are more considerate in relation to the concerned fundamental right than the deposit in the uniform amount for each fuel distributor. These examples of the methods in two options are enumerated in Item 24 of the judgment, i.e. a graded amount of deposit, or a deposit only for the distributors newly entering the market.

As for this argument, first of all, we think that the judgment does not show any inconsiderateness of the annulled provisions in relation to the entrepreneurs distributing fuels, let alone the claim that "the contested legal regulation may have a choking effect on small-sized fuel distributors, consisting in the very difficulty to obtain the required amount of deposit" (Item 24). The hypothetical concern of the Plenum majority might have been allayed if the production of evidence is carried out within the proceedings, or if the comments by the concerned administrative authorities, particularly the Ministry of Industry and Trade, the Ministry of Finance, the General Financial Directorate, the General Customs Directorate, and the Office for the Protection of Competition are requested as for the petition seeking the annulment of the contested statutory provisions. However, this has not happened to the detriment of the cause.

5. On the other hand, the judgment in no way addresses the substantial arguments contained in the opinion of the Government which had a status of an intervener.

We regard as completely legitimate the efforts of the Government, or the legislature, to restrict the fuel black market which is according to the Government "in the long term extremely large and represents not only a threat to the fiscal interests of the state, but also a threat to the interests of consumers, and with regard to the organised nature of the criminal activity in this area also a risk for internal order and security of the Czech Republic". Legitimate parts of that efforts can be surely the effort "to allow customs offices and other tax authorities to pay, using a deposit, any penalties and other payments arrears, relating to the activities of fuel distributors", or the effort "to ensure a certain minimum economic standard of entities running their business in the fuel market" because the business in the area of the distribution of fuels is "with regard to the increased possibility of tax evasion ... very susceptible to the black market origination and breach of legal regulations" (page 2 of the Government's opinion).

The judgment also acknowledged as legitimate the efforts by the legislature "to limit the formation and abuse of special-purpose companies that play a major role in all known offences in the fuel market", thereupon finding the institute of deposit as a rational means to enforce the objective (Item 20). However, we do not agree with that the means used to attain that objective, i.e. the uniform amount of deposit of CZK 20 million for all fuel distributors, was inconsiderate to them while limiting their right to conduct business.

The Government, in its opinion, detailed the system of special-purpose companies and their retail chains, within which fuels are pre-sold by a number of distributors or the sale of fuels is mediated in order to evade their tax obligations: "The characteristic feature of the entity that within the given chain implements tax fraud is that it is a legal entity (usually a limited liability company). Such legal entity has no assets and history and most often its registered office is at some of the properties that are used

to provide space and business addresses to a large number of entities. The governing body is usually a "straw person", i.e. a person without knowledge and experience in the field of fuels. The control structures of the given company are untraceable for the tax authority, there is usually also a connection to the organised crime. The length of life of such companies is determined by the response capacity of the financial and customs administration, because immediately after the discovery of such company it is replaced by another company. With an increased activity of customs and financial administration, the life of such company is about 14 days." The data of the Financial Administration of the Czech Republic shows that even when the value added tax is evaded the tax evasion implemented on a single tank is CZK 190 thousand, while the daily amount of tax evasion of one entity can be up to CZK 38 million. The total amount of such VAT evasion is estimated by the General Financial Directorate at CZK 6 to 8 billion at least.

The proceedings concerning the petition seeking the annulment of the contested provisions did not challenge even the data of the Government that, among other things, said on this practice of tax fraud becoming widespread the following: "If tax fraudsters use on the entry to the Czech Republic only one "letterbox" company, such company is able earn its deposit by evading the value added tax as early as in two days. However, in one time period, 3 to 7 letterbox companies are usually used for that purpose. If 5 letterbox companies are used, each will earn its deposit as a result of saving on the value added tax in 7 days. Other costs are negligible (a commission to the beneficiary amounting to CZK 0.1 per litre, CZK 30,000 for the purchase of the prepared company CZK 5,000 to 10,000 for the director for registering the company in the name of the director). For these reasons, the amount of deposit of CZK 20 million has been found as the minimum one to be able to prevent tax fraud ...".

As for the usual costs in the mentioned business sector, the Government stated (page 8): "The purchase of fuels in the smallest acceptable transportable unit, i.e. one tank with a capacity of 32,000 litres, is for about CZK 850,000. As for the expensiveness of the actual business activities of a fuel distributor, a deposit of CZK 20,000,000 is at least bearable and in many cases negligible."

6. For comparison, it is perhaps not irrelevant to point out that in other similarly highly regulated and risk business areas, such as the financial sector, the legal requirements for the "creditworthiness" of the entities entering the market are much more demanding: a condition for granting the licence to operate a bank is the registered capital consisting of monetary contributions of at least CZK 500 million (Section 4 (1) of the Banking Act); a condition for filing an application for the incorporation and business of a cooperative savings company is the payment of an amount of at least CZK 35 million (Section 2 (3) of the Act on Savings and Loan Cooperatives and Certain Related Measures); a condition for filing an application for the permit to provide public health insurance is paying a deposit of CZK 100 million (Section 4 (1) of the Act on Departmental, Professional, Corporate and other Health Insurance Companies). In none of the cases referred to above, the minimum amount of monetary investment, or a deposit, is not differentiated according to whether the entity is "small" or "large" naturally.

In the present case, the Plenum majority has probably missed also the fact that the registration obligation, including the obligation to pay a deposit, does not apply to the persons who are only the operators of fuel filling stations selling fuels to consumers. The registration and deposit applies only to fuel distributors (Section 2 (d), (f), a (j) of the Fuels Act). In any case, the idea that the deposit could cause the end of business of "a small rural operator" of one fuel filling station is therefore not appropriate.

7. In accordance with the standpoint of the Government, we are of the opinion that the current system of registration for fuel distributors sets the same rules for all the entities concerned and eliminates the arbitrariness in the decision-making by the registering administrative authority (customs office), because the legal entitlement to registration arises upon the fulfilment of statutory requirements (Section 6k (1) of the Fuels Act).

8. We regard as inappropriate also the arguments in Item 23, referring to the judgment, file No. Pl. ÚS 3/02, of 13 August 2002 (N 105/27 SbNU; No. 405/2002 Coll.), which concern the impermissibility of the legal regulation allowing the imposition of fines in the amounts leading to liquidation. We find no analogy between such legal regulation of fines and the annulled legal regulation that set a deposit of CZK 20 million in the same amount for all distributors. It cannot be overlooked that the deposit - unlike the fine - is not a sanction, but it is a mere assurance that in the event of final and effective cancellation or termination of the distributor's registration to the extent that will not be used for the payment of taxes, fees or other similar monetary performance becomes a refundable overpayment (Section 6j of the Fuels Act which has not been found unconstitutional by the Plenum majority - Item 26).

9. In Item 7 of the Reasoning, the judgment cites from the Government's comment part of the EU Commission's opinion, however it is completely missing the Commission's statement that "the amount of the deposit is not inadequate as it may be determined based on the risk (amount of tax evasion), not only on the basis of the size of the fuel distributor (page 12)".

10. In this context, we therefore do not consider the regulation chosen by the legislature by means of a deposit of 20 million for all fuel distributors in relation to the essence of the right to conduct business as in any way inconsiderate for small-sized distributors, let alone "choking".

11. In our opinion, the Constitutional Court should assume in the matter of its competence to assess the impact of deposits on individual businesses entities a similar attitude as in the case of assessing the impact of legal regulation of transfer payments for the electricity from solar radiation [judgment file No. Pl. ÚS 17/11 of 15 May 2012 (N 102/65 SbNU 367, 220/2012 Coll.), Item 88], when pointing out that "in the abstract review of constitutionality, it is not able to prove objectively or simulate hypothetically every conceivable situations that the contested provisions in individual cases may cause. The subject of assessment therefore can now be neither specific cases of individual producers as for whom, while taking into account individual circumstances and taking into account the level of business and economic risks, the Constitutional Court may specify its assessment in the future [cf. e.g. the judgment with file No. Pl. ÚS 9/07, Item 54 (see above)]. The Constitutional Court takes for granted and relevant for seeking justice that it is always necessary to proceed from individual dimensions of each individual case, based on the factual circumstances established. Many cases and their specific circumstances can be very complicated and unusual; but it does not relieve ordinary courts of the obligation to do everything for a fair solution, although it may seem difficult." By analogy, within an abstract review of the constitutionality of the contested provisions the Fuels Act, it should not be relevant in any manner to evaluate the legal regulation through the prism of its specific impact on individual fuel distributors.

12. In the spirit of the above-mentioned, we also consider inappropriate that the Constitutional Court defines the options to be pursued by the legislature when drafting the future legal regulation of the deposit (Item 24). The solutions offered are highly problematic and, if chosen, the deposit could lose its purpose (which criteria can you imagine for a "reasonable grading" of the deposit?); further, their application would lead to impermissible discrimination, as it would be likely when distinguishing whether the distributor enters the market newly or has already been operating in the market.

Indeed, the Government has already commented on the recommendations to the legislature *de lege ferenda* in Item 24 of the judgment, stating among other things that: "Any change in the economic situation of the entity ... may occur in a matter of hours, that means without the customs office being practically able to respond to this change in time. Nothing would prevent thus a fuel distributor from increasing, irrespective of the amount of deposit, the volume of sold or imported fuels, which is particularly dangerous in the case of entities entering the market newly, as for which the amount of deposit cannot be more specifically estimated even according to the volume of previously sold or imported fuels". However, the Plenum majority apparently overlooked even this.

13. If the judgment did not annul the obligation of the distributor to provide a deposit (see the introductory sentence of Section 6i (1)), which is a condition of registration (Section 6g (1) (e), or if repeal statement I is basically based on the fact that the amount of deposit for distributors is not set individually (Item 23), then we doubt about the justification of the annulment of Section 6 (2) of the Fuels Act under which a bank guarantee (as a means of providing the deposit) must be provided for a definite period of time of not less than 2 years. Should the arguments justifying the unconstitutionality of the provision be absent from the Reasoning of the judgment, one can only speculate about in what the conflict of that provision with the constitutional order consists. It can hardly be presumed in connection with the institute of deposit (which itself was not annulled by the judgment) that the concerned regulation of the bank guarantee (as an alternative to a cash deposit in the amount of deposit to be paid to the account of the office) is contrary to the right to conduct business pursuant to Article 26 (1) of the Charter.

14. Of all the reasons stated, contrary to the opinion of the Plenum majority, we consider the annulled provisions of the Fuels Act to be a constitutionally approved restriction of the right to conduct business under Article 26 (2) and Article 41 (1) of the Charter. The petition of the group of senators seeking the annulment of the contested provisions of the Fuels Act governing the institute of deposit should, therefore, be dismissed.

15. Finally, we do not agree with statement II of the judgment, through which the petition was rejected "in the remaining parts" (i.e. the petition seeking the annulment of Section 6j of the Fuels Act) due to that it was apparently unjustified. If the Constitutional Court advanced to the stage of review of the content of the constitutionality of the contested provisions of the act on the merits and, in that review, did not found either of them "to be unconstitutional", it dealt with the justification of the petition. Pursuant to Section 70 (2) of the Act on the Constitutional Court, if the Court comes to the conclusion upon the proceedings carried out that there are no grounds for the annulment of any act or other legal regulations or individual provisions thereof, it shall dismiss the petition on the merits. Therefore, the petition of the group of Senators should also be dismissed and not rejected in the mentioned part.

In Brno on 13 May 2014