

# 2008/09/23 - PL. ÚS 1/08: STABILIZATION OF PUBLIC BUDGET - HEALTH CARE FEES

## HEADNOTES

In deciding, the Constitutional Court could not overlook the fact that the part of the contested Act that is adjudicated in this proceeding is an integral content component of the stabilization of public budgets. In this regard it focused its attention on the principle of restraint and minimizing interference and on the question of the Constitutional Court's authority to make a cassation decision. Similarly as in judgments file no. Pl. ÚS 24/07 and file no. Pl. ÚS 2/08 (promulgated as no. 166/2008 Coll.), the Court believes that, even if it finds sufficient grounds to deny the petition after merely finding the answers to this circle of questions, it is appropriate not to decide, citing grounds of procedural economy, without performing a rationality test, i.e., considering - even if in terms of the optical viewpoint and the structure of the judgment's reasoning - the seemingly closing, but from a juristic viewpoint undoubtedly primary substantive question - whether the contested legal framework violates any provision of the Constitution or of the Charter, or whether it interfered in any right protected by the Charter. Thus, this means restraint and minimization of interference, the rationality test, or the consistency of the contested legal regulation with the provisions of the Constitution or of the Charter.

The Constitutional Court of course also took into consideration that reform of the health care system in this phase has not yet been finished, and that Minister of Health Tomáš Julínek, as a witness, testified that other related bills will be prepared in the near future. The Constitutional Court now adds that if it acted in too activist a manner in relation to any reform, including reform of health care, it would certainly create case law that would a priori close the door on any reform attempts. The Constitutional Court also takes into account the fact that the effects of reform cannot be evaluated until after the mechanisms created can begin to function, and adds that, in terms of evaluating the constitutionality of the contested provisions, it has authority only to decide on the fundamental principles, not on a particular factual situation.

It will be the obligation of the legislature, after analyzing the effect of regulatory fees, to evaluate for every individual fee whether it does not affect the existence or exercise of a right arising from Art. 31 of the Charter, whether it pursues a legitimate aim, and whether a particular fee is a reasonable means to achieving that aim, also together with evaluating the effects on the ability [to pay] of various groups of payers of regulatory fees in connection with rights to financial or other material profits established by statutes from other areas of law than statutes implementing Art. 31 of the Charter. The legislature must then make decisions based on this evaluation, including possibly derogatory (or amending) ones. However, the existing review of a statutory regulation permits the Court to base its reasoning only on abstract constitutional law arguments, not on the actual effects of a statute, which it is not possible to determine individually in proceedings before the Constitutional Court. If the petitioners, as representatives of the legislative branch, believe that the

legal regulation they contest is inappropriate or has negative consequences, they can seek change within political competition, not within judicial review of constitutionality, which, by definition, must be limited only to questions of a constitutional law nature. If the Constitutional Court were to grant the petition and decide itself, instead of the legislature, it would violate not only the cited provisions of the Constitution of the CR, but it would make the competition of political parties unnecessary (see Judgment Pl. ÚS 2/08).

Realizing that “in contrast to legal science ... or practical dogmatics, other fields that concern themselves with law, without considering practical aims, such as legal history, comparative law, and legal philosophy, are of a supporting nature” (cf. L. Heyrovský, *Dějiny a systém soukromého práva římského* [History and System of Private Roman Law], VI. edition, Bratislava 1927, pp. 9-10), the Constitutional Court, first looked from the perspective of these disciplines at the circumstances in which the right to protection of health and provision of health care were formulated, under which it is, was, or was not introduced in the constitutional order in the developed European States, and finally how it was in reality applied in the practice of the Czech lands, and how the organization of health care developed. These are substantial grounds which give rise to what the unique features of social rights will be, as summarized in the judgment.

Before proceeding to the reasonableness test, the Constitutional Court considered the nature of social rights and their different nature, given by Article 41 par. 1 of the Charter. Analogously as in judgment file no. Pl. ÚS 2/08, it states that these rights “are not unconditional in nature, and they can be claimed only within the confines of the laws (Art. 41 par. 1 of the Charter) .... Within these bounds the legislature has a relatively wide ability to regulate the implementation of individual social rights, including the possibility to amend them.”

For the foregoing reason, the Constitutional Court concluded that the reasonableness test in the case of social law is methodically different from a test that evaluates proportionality with fundamental rights, “because social-economic aspects play a much greater role here.” The rationality test, especially in a situation where the Constitutional Court concluded that a judgment [sic - petition?] could be denied for reasons of maintaining restraint, has a more orientational and supportive role here.

In combination with the requirements arising from Art. 4 par. 4 of the Charter we can describe 4 steps leading to a conclusion that a statute implementing constitutionally guaranteed social rights is or is not constitutional:

- 1) defining the significance and essence of the social right, that is a certain essential content. In the presently adjudicated matter, this core of a social right arises from Art. 31 of the Charter in the context of Art. 4 par. 4 of the Charter.
- 2) evaluating whether the statute does not affect the very existence of the social right or its actual implementation (essential content). If it does not affect the essential content of the social right, then
- 3) evaluating whether the statutory framework pursues a legitimate aim; i.e. whether it does not arbitrarily fundamentally lower the overall standard of

fundamental rights, and, finally

4) weighing the question of whether the statutory means used to achieve it is reasonable (rational), even if not necessarily the best, most suitable, most effective, or wisest.

Only if it is determined in step 2) that the content of the statute interferes in the essential content of a fundamental right should the proportionality test be applied; it would evaluate whether the interference in the essential content of the right is based on the absolutely exceptional current situation, which would justify such interference .

Thus, it follows from the nature of social rights that the legislature cannot deny their existence and implementation, although it otherwise has wide scope for discretion.

The essential content (core) of Art. 31, second sentence of the Charter is the constitutional establishment of an obligatory system of public health insurance, which collects and cumulates funds from individual subjects (payers) in order to reallocate them based on the solidarity principle and permit them to be drawn by the needy, the ill, and the chronically ill. The constitutional guarantee based on which payment-free health care is provided applies solely to the sum of thus collected funds.

The Constitutional Court considers it determined that the purpose of the legislature's original intentions concerning regulation was an emphasis on such organization of the health care system as would ensure higher quality actual implementation of Art. 31, first sentence of the Charter, that is, the provision of health care at an adequate place and time and of better quality.

As indicated by the evidence presented, the fees introduced by the Act regulate access to health care that is paid from public insurance, whereby they limit excessive use of it; the consequence is to increase the probability that health care will reach those who are really ill. Thus, through the fees, the legitimate aim of the legislature is met, without the means used appearing unreasonable.

Abstract review of a statute cannot theoretically review and reliably rule out all its imaginable effects in the personal sphere of the addressees of norms. However, such possible individual interference can, of course, still be corrected using standard procedures, including a constitutional complaint.

According to the contested Act, a "regulatory fee" is the income of a health care facility. However, this provision cannot be interpreted out of the context formed by the synallagmatically connected system of rights and obligations of the three participating subjects, i.e. the patient, the health care facility, and the health insurance company. Hypothetically we can certainly imagine the alternative that the "regulatory fee" in the same amount would be conceived as part of the insurance premium for health insurance, and the place of payment would be the health insurance company, which would subsequently, contractually or by law, increase the payment to the relevant health care facility by the amount of this insurance premium, which, incidentally, would not even have to be collected as a collection debt. This model, which would not

conflict with linguistic interpretation of Art. 31 of the Charter, would, however, have the same consequences for the patient as the existing model, which is based on the principle that the payment is made directly to the final recipient.

The Constitutional Court did not find that regulatory fees have a generally “strangling effect” and realistically make health care or health care aids inaccessible for anybody. In concrete individual cases one can proceed under § 16a par. 2 let. d) of the Act on Public Health Insurance, under which the regulatory fee is not paid by an insured person who presents a decision, notice, or confirmation, no more than 30 days old, issued by a body providing assistance in material need, about the benefit payment that is provided to him under a special regulation. We also cannot overlook the limit of CZK 5,000 specified by § 16a par. 1 of the Act on Public Health Insurance. In the context of relationships based on internal solidarity, we cannot neglect to mention the institutions of the mutual support obligation between parents and children, the support obligation between other relatives, the support obligation between spouses, alimony for a divorced spouse, a contribution for the support and payment of certain expenses for an unmarried mother under Part Three of Act no. 94/1963 Coll., on the Family, as amended (the “Act on the Family”). Nor can we overlook the provision of the Act on the Family on parental responsibility, or, e.g., the obligations of a child living in a common household with its parents under § 31 par. 3 and 4 of the Act on the Family.

The Constitutional Court is aware of the multi-functionality of a regulatory fee, because, in addition to the regulatory element, there is a utilitarian viewpoint, consisting of the fact that regulatory fees help a health care facility, in addition to providing payment-free health care, to function better, provide related services, or improve personnel aspects and the level of the environment in which health care is provided, and so on.

As part of the reasonableness test, the Constitutional Court weighted whether the principle expressed in Art. 4 of the Declaration of the Rights of Man and of the Citizen in 1789, that “liberty consists in the power to do anything that does not injure others,” applies to the area of social rights, and concluded that formalistic insistence on payment-free medicine for individuals using an expansive concept could actually lead to lowering the level of payment-free medical care paid out of public insurance, in the real sense of the word, for all members of society.

A health care facility does not have a right under Art. 31 of the Charter, that is held by the citizen, or the patient. A health care facility is a health care provider, and a subject in the health care system, which also fulfills organizational, economic, financial, employer, scientific-research, educational, etc. functions. The fact that a health care facility does not collect regulatory fees is a transgression, the object of [making it one] is the interest in the functioning and protection of the health care system. A certain analogy can be found, e.g. in the penalties imposed for violating the rules of economic competition or in the regulation of consumer protection. In these areas as well, a public law penalty is imposed for violation of obligations that consist of unfair distortion of a private law relationship. The consequences of not fulfilling the

obligation to collect regulatory fees can appear, e.g., in distortion of access to health care facilities or a reduction in quality where a health care facility that does not collect fees exceeds its patient capacity. The Constitutional Court adds that it is up to the legislature, to choose which subject it will give the power to impose a public law penalty, if the penalty is imposed as the result of a proper administrative proceeding and the imposition of a penalty is subject to judicial review, which the contested legal regulation meets.

If the Ministry of Health acted thus *ultra vires* and issued an individualized decree that was not a generally binding legal regulation, but a hidden individual administrative act, it would certainly be appropriate to object to such a decree; however, the Constitutional Court did not find the statutory authorization to be unconstitutional.

Of course, in order to deny the petition it would have been independently sufficient for the Constitutional Court to conclude either that, for reasons of restraint and minimizing interference, there is no room for a derogatory judgment, or that the contested legal regulation is not unconstitutional, because in its opinion the contested legal regulation was adopted within the framework set forth by Art. 4 par. 4 of the Charter and it met the rationality test. Thus, theoretically the Constitutional Court basically had to choose whether to choose for the reasoning of its decision only one of the groups of reasons, or all of them. After deciding, in the specific matter, which concerns the very serious issues of life and health, for a more comprehensive approach, and thus weighing reasons from all spheres, it adds that, among them, it gives hierarchical priority, including within the intent of the judgment in the matter file no. Pl. ÚS 24/07 and file no. Pl. ÚS 2/08 - having in mind the interconnected content and unifying context of the Act on Stabilization of Public Budgets and noting that the decision to separate this matter and the matter conducted under file no. Pl. ÚS 2/08 was of a purely procedural nature - grounds that led it to restraint and minimization of interference. The fact that the contested legal regulation was not found to be unconstitutional and that it met the reasonableness test leads to the conclusion that interference by the Constitutional Court in analogous matters could come into consideration only in case of flagrant caprice, arbitrariness and unreasonableness by the legislature, which - as was repeatedly said and indicated - was not found in this matter.

**CZECH REPUBLIC  
CONSTITUTIONAL COURT  
JUDGMENT**

**IN THE NAME OF THE CZECH REPUBLIC**

The Constitutional Court, consisting of Stanislav Balík (judge rapporteur), František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, ruled on 20 May 2008 on a petition from 1) a group of 67 deputies of the Parliament of the Czech Republic, represented by Deputy Mgr. Michal Hašek, and from 2) a group of 43 deputies of the Parliament of the Czech Republic, represented by Deputy JUDr. Vojtěch Filip, and from 3) a group of 19 senators of the Parliament of the Czech Republic, represented by JUDr. Kateřina Šimáčková, attorney, with her registered address at Mojžíšova 17, 612 00 Brno, seeking the annulment of:

- points 3 and 4 in Article XVII in Part Ten (amending the Act on Administrative Fees), Part Forty (amending the Act on Public Health Insurance), Part Forty One (amending the Act on Premiums for General Health Insurance), Part Forty Two (amending the Act on the General Health Insurance Company of the Czech Republic), Part Forty Three (amending the Act on Ministry, Department, Company, and Other Health Insurance Companies), Part Forty Eight (amending the Act on Jurisdiction of Bodies of the Czech Republic in the Area of Prices) and Party Forty Nine (amending the Act on Prices) of Act no. 261/2007 Coll., or individual provisions of the cited parts of Act no. 261/2007 Coll., on Stabilization of Public Budgets,

- § 11 par. 1 let. g) to i), § 12 let. m), § 16a, § 16b, § 17 par. 5, in § 43 par. 2 in the first sentence, the words “and paid regulatory fees under § 16a and supplemental payments for partially reimbursed medical preparations and foods for special medical purposes, which are included in the limit under § 16b par. 1,” and in the second sentence, the words “including paid regulatory fees under § 16a and supplemental payments for partially reimbursed medical preparations and foods for special medical purposes during that time,” § 53 par. 1 second sentence and at the end of the text of the third sentence, the words “with the exception of deciding on a refund of overpayment of insurance premiums, reducing deposits for premiums, and reimbursing amounts under § 16b” of Act no. 48/1997 Coll., on Public Health Insurance, as amended by Act no. 261/2007 Coll.,

- § 5 let. f), in § 7 par. 1 let. a), the words “and for payment of amounts exceeding the limit for regulatory fees and supplemental payments for medical preparations and foods for special medical purposes, partly reimbursed by public health insurance, or for payment of a portion of those amounts in the event the insured party changes health insurance companies, under conditions provided by a special regulation 1b)” of Act no. 551/1991 Coll., on the General Health Insurance Company of the Czech Republic, as amended by of Act no. 261/2007 Coll.,

- § 13 let. f) and in § 17 par. 1 in the first sentence the words “and for payment of amounts exceeding the limit for regulatory fees and supplemental payments for medical preparations and foods for special medical purposes, partly reimbursed by public health insurance, or for payment of portions of those amounts in the event the insured party changes health insurance companies, under conditions provided by a special regulation 1b)” of Czech National Council Act no. 280/1992 Coll., on

Ministry, Department, Company, and Other Health Insurance Companies, as amended by of Act no. 261/2007 Coll., with the participation of A) the Chamber of Deputies of the Parliament of the Czech Republic and B) the Senate of the Parliament of the Czech Republic, as parties to the proceeding, and C) the group of 43 deputies of the Parliament of the Czech Republic, represented by Deputy JUDr. Vojtěch Filip and D) the group of 19 senators of the Parliament of the Czech Republic, represented by JUDr. Kateřina Šimáčková, attorney, with her registered address at Mojžíšova 17, 612 00 Brno, as secondary parties to the proceeding, as follows:

**The petition is denied.**

## REASONING

### I.

#### Subject Matter of This Proceeding

1. The group of 67 deputies of the Chamber of Deputies of the Parliament of the Czech Republic, represented by Deputy Mgr. Michal Hašek, in its petition, submitted to the Constitutional Court on 22 October 2007, under Art. 87 par. 1 let. a) of the Constitution of the Czech Republic (the “Constitution”), and under § 64 par. 1 let. b) of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, seeks the annulment of the entire Act no. 261/2007 Coll., on Stabilization of Public Budgets, or of individual provisions specified in the petition.
2. In addition, the group of 67 deputies, in the same petition, sought the annulment of certain provisions of these statutes, specified in the petition, amended by Act no. 261/2007 Coll.:
  - of Act no. 48/1997 Coll., on Public Health Insurance, as amended by later regulations,
  - of Act no. 551/1991 Coll., on the General Health Insurance Company of the Czech Republic, as amended by later regulations,
  - Czech National Council Act no. 280/1992 Coll., on Ministry, Department, Company, and Other Health Insurance Companies, as amended by later regulations,
  - of Act no. 586/1992 Coll., on Income Taxes, as amended by later regulations.
3. The matter was initially conducted under file no. Pl. ÚS 24/07.
4. The resolution of the plenum of the Constitutional Court of 8 January 2008 ref. no. Pl. ÚS 24/07-147 separated out for independent proceedings the petitions for annulling those parts of Act no. 261/2007 Coll. and possible related petitions that concern the independent issues of financing health care from public health insurance and petitions for annulling those parts of Act no. 261/2007 Coll., that concern the independent issue of social security. Separate proceedings are being conducted on these parts of the petitions under file nos. Pl. ÚS 1/08 and Pl. ÚS 2/08.
5. Thus an independent proceeding is being conducted under file no Pl. ÚS 1/08 on one of the separate sections, namely the petition to annul:

- points 3 and 4 in Article XVII in Part Ten (amending the Act on Administrative Fees), Part Forty (amending the ACT on Public Health Insurance), Part Forty One (amending the Act on Insurance Premiums for General Health Insurance), Part Forty Two (amending the Act on the General Health Insurance Company of the Czech Republic), Part Forty Three (amending the Act on Ministry, Department, Company, and Other Health Insurance Companies), Party Forty Eight (amending the Act on Jurisdiction of Bodies of the Czech Republic in the Area of Prices) and Party Forty Nine (amending the Act on Prices) of Act no. 261/2007 Coll., or individual provisions of the cited parts of Act no. 261/2007 Coll., on Stabilization of Public Budgets,

- § 11 par. 1 let. g) to i), § 12 let. m), § 16a, § 16b, § 17 par. 5, in § 43 par. 2 in the first sentence, the words “and paid regulatory fees under § 16a and supplemental payments for partially reimbursed medical preparations and foods for special medical purposes that are included in the limit under § 16b par. 1” and in the second sentence the words “including paid regulatory fees under § 16a and supplemental payments for partially reimbursed medical preparations and foods for special medical purposes for that period,” § 53 par. 1 second sentence and at the end of the text of the third sentence the words “with the exception of deciding on refunding an overpayment of insurance premiums, reducing deposits for insurance premiums, and paying amounts under § 16b” of Act no. 48/1997 Coll., on Public Health Insurance, as amended by of Act no. 261/2007 Coll., - § 5 let. f), in § 7 par. 1 let. a) the words “and for payment of amounts exceeding the limit for regulatory fees and supplemental payments for medical preparations and foods for special medical purposes, partly reimbursed by public health insurance, or for payment of a portion of those amounts in the event the insured party changes health insurance companies, under conditions provided by a special regulation 1b)” of Act no. 551/1991 Coll., on the General Health Insurance Company of the Czech Republic, as amended by of Act no. 261/2007 Coll., - § 13 let. f) and in § 17 par. 1 in the first sentence the words “and for payment of amounts exceeding the limit for regulatory fees and supplemental payments for medical preparations and foods for special medical purposes, partly reimbursed by public health insurance, or for payment of portions of those amounts in the event the insured party changes health insurance companies, under conditions provided by a special regulation 1b)” of Czech National Council Act no. 280/1992 Coll., on Ministry, Department, Company, and Other Health Insurance Companies, as amended by of Act no. 261/2007 Coll.

## II.

### Party and Secondary Party Status

6. The party to this proceeding - the petitioner - is a group of 67 deputies of the Chamber of Deputies of the Parliament of the Czech Republic, represented by Deputy Mgr. Michal Hašek. The Constitutional Court found that the petition meets all statutory procedural requirements and prerequisites, and thus nothing prevents reviewing and ruling on the merits of the matter. Under § 69 par. 1 of the Act on the Constitutional Court, 1) the Chamber of Deputies and 2) the Senate of the Parliament of the Czech Republic are also parties to the proceeding.



7. In the petition delivered to the Constitutional Court on 19 November 2007, a group of 43 deputies, represented by Deputy JUDr. Vojtěch Filip, also sought annulment of Act no. 261/2007 Coll., or individual provisions in it, specified in the petition. By its resolution of 23 November 2007, file no. Pl. ÚS 28/07, the Constitutional Court denied that petition under § 43 par. 2 let. b) in connection with § 43 par. 1 let. e) of the Act on the Constitutional Court, on the grounds of the obstacle of lis pendens. The Constitutional Court, under § 35 par. 2 of the Act on the Constitutional Court, added this group of deputies as a secondary party of the present, earlier proceeding on the petition from the group of 67 deputies. The secondary party has the same rights and obligations in the proceedings as the parties (§ 28 par. 2 of the Act on the Constitutional Court).

8. In a petition delivered to the Constitutional Court on 7 December 2007, a group of 19 Senators of the Parliament of the Czech Republic, represented by attorney JUDr. Kateřina Šimáčková, also sought annulment of parts of Act no. 261/2007 Coll., specified in the petition. By its resolution of 12 December 2007, file no. Pl. ÚS 29/07, the Constitutional Court denied this petition under § 43 par. 2 let. b), in connection with § 43 par. 1 let. e) of the Act on the Constitutional Court on the grounds of the obstacle of lis pendens. The Constitutional Court, under § 35 par. 2 of the Act on the Constitutional Court, added this group of 19 Senators as a secondary party to the present, earlier proceeding on the petition from the group of 67 deputies. The secondary party has the same rights and obligations in the proceedings as the parties (§ 28 par. 2 of the Act on the Constitutional Court).

9. In a filing of 21 November 2007, titled “Announcement of the Municipal Court in Brno of Entry into an Already Opened Proceeding as a Secondary Party,” the Municipal Court in Brno sought to be treated as a secondary party under § 35 par. 2 of the Act on the Constitutional Court, because its previous petition, of 12 November 2007, had been denied by Constitutional Court resolution file no. Pl. ÚS 27/07, of 21 November 2007, on the grounds of the obstacle of lis pendens.

10. In its judgment file no. Pl. ÚS 24/07 of 31 January 2008 (promulgated as no. 88/2008 Coll.), the Constitutional Court explained the reasons why, after the plenum of the Constitutional Court issued its resolution of 8 January 2008, ref. no. Pl. ÚS 24/07-147, the Municipal Court in Brno could not be treated as a secondary party in the proceeding now conducted under file no. Pl. ÚS 24/07. In the proceedings under file no. Pl. ÚS 1/08, in addition to the grounds stated in the petition of 31 January 2008, file no. Pl. ÚS 24/07, there was the fact that the petition from the Municipal Court in Brno concerns provisions of Art. XLVIII, Party Thirty of Act no. 261/2007 Coll., which are not part of the subject matter of this proceeding.

### III.

Arguments of the Petitioners and Secondary Parties Disputing Whether Act no. 261/2007 Coll. Was Passed and Issued in a Constitutionally Prescribed Manner

#### III/a

Arguments of the Group of 67 Deputies of the Parliament of the Czech Republic Disputing Whether Act no. 261/2007 Coll. Was Passed and Issued in a

## Constitutionally Prescribed Manner

11. The group of 67 deputies of the Parliament of the Czech Republic, represented by Deputy Mgr. Michal Hašek, seeks the annulment of the entire Act no. 261/2007 Coll., on Stabilization of Public Budgets (“Act no. 261/2007 Coll.”). The petitioners claim that the contested Act no. 261/2007 Coll. was passed in an unconstitutional manner and was thus inconsistent with the constitutional order. They consider the grounds for unconstitutionality to be violation of the principle of harmonious, understandable and foreseeable law, violation of the principle of separation of powers, and violation of the principle of democracy, principles which are the attributes of a democratic, law-based state under Art. 1 par. 1 of the Constitution. They point to the case law of the Constitutional Court, which has already considered the constitutional requirements on the legislative process in a number of its decisions, in particular in judgments file no. Pl. ÚS 21/01 (promulgated as no. 95/2002 Coll.), Pl. ÚS 5/02 (promulgated as no. 476/2002 Coll.) and Pl. ÚS 77/06 (promulgated as no. 37/2007 Coll.), and they emphasize that these requirements were violated when Act no. 261/2007 Coll. was passed.

12. The petitioners’ specific criticisms, asserting that the constitutional rules of the legislative process have been violated (setting aside for now the arguments aimed against the conflict in content between specific provisions of the Act with the constitutional order), can briefly be summarized in the following claims:

- 1) The fundamental flaw in the Act is the fact that one amending statute connected many amendments to various law that are not directly related to each other, which violates the principles of creating harmonious, foreseeable, and understandable law, principles that are to be used to measure not only amending proposals, but also draft statutes.
- 2) The link between the set of norms - stabilization of public budgets - is too uncertain, comparable to, e.g. an “Act on Changes in the Legal Order.”
- 3) The regulations contained in many of the statutes in question do not concern the stabilization of public budgets at all - e.g. establishing the bodies of the General Health Insurance Company or a network of contractual health care facilities. Therefore, for several reasons, on the formal side the petitioners would accept only Parts One, Two, Three, Four, Five, Six, Eight, partially Ten, Eleven, Thirteen, Fourteen, Twenty Three, and Twenty Four of the contested Act.
- 4) The Act, in addition to amendments of existing statutes, also contains three new statutes on ecological taxes, which, among other things, violates the Legislative Rules of the Government.
- 5) Through amending proposals, the so-called “add-ons” became part of the Act, but they will not withstand evaluation of the content and purpose of the original bill and the amending proposals: a new system of prices for regulation of medications, an Act on Accounting, and an Act on Prices. The amending proposals can be criticized for allowing too little time for the deputies to study them and for the public to be informed. This also limited parliamentary discussion as a form of transparent government, kept in check by the opposition and the public. The following are also expressly considered “add-ons”: 1. in Part Four (Amendment of the Act on Value Added Tax) in Art. VIII - points 1, 3, 4, 5, and 15 to 21; 2. in Part Ten (Amendment of the Act on Administrative Fees) in Art. XVII - points 3 and 4; 3. in Part Twenty Two (Amendment of the Act on Organization and Administration of Social Security) in Art. XXXV - points 1, 2, and 12; 4. in Part Twenty Four

(Amendment of the Act on Pension Insurance) in Art. XXXVIII - points 1, 2, 3, and 5; 5. in Part Forty (Amendment of the Act on Public Health Insurance) in Art. LXIV - points 1 to 9, 14 to 17, 24 to 26, 29, 30 and Art. LXV (Transitional Provisions); 6. in Part Forty Eight (Amendment of the Jurisdiction of Bodies of the Czech Republic in the Area of Prices) - Art. LXXV and LXXVI; 7. in Party Forty Nine (Amendment of the Act on Prices) - Art. LXXVII; 8. in Part Fifty (Amendment of the Act on Accounting) - Art. LXXVIII. The petitioners point, in particular, to the requirement stated by the Constitutional Court "... in order for an amending proposal to really only amend the legal regulation being presented, i.e., in accordance with the requirements of the rule of a close relationship, according to which an amending proposal must concern the same subject matter as the bill going through the legislative process, a given amending proposal should not deviate from the limited space reserved to amending proposals in the form of extensively exceeding the subject matter of the bill being discussed." The petitioners point to the Constitutional Court's opinion that failure to meet this requirement leads "... to violation of the separation of powers, with consequences for the principles of creating harmonious, understandable and foreseeable law, which the Constitutional Court already connected to the attributes of a democratic, law-based state; it also leads to circumventing the institution of a legislative initiative under Art. 41 of the Constitution of the CR and violation of the government's right to express its opinion on a bill under Art. 44 of the Constitution." (Judgment of the Constitutional Court, file no. Pl. ÚS 77/06, promulgated as no. 37/2007 Coll., point 73).

6) The amending proposals were not discussed in committees of the Chamber of Deputies, and they have no justification. The Prime Minister, Mirek Topolánek, submitted them, as a Deputy, based on coalition discussions, which, however, cannot replace a decision by the government, as the bill's sponsor.

7) In the Senate, when a resolution was passed that expressed the will not to discuss the bill, the opposition was silenced.

8) The legislative process failed to meet not only the requirements for creating harmonious, foreseeable, and understandable law, but also the requirement of being democratic. Art. 6 of the Constitution indicates that the will of the majority should be behind every fundamental political decision. As the Act in question is a collection of numerous decisions, but intended for one final vote, the existence of a majority could not be tested in a relevant manner.

9) The legislative power, as the power to set forth the content of a statute, which belongs to Parliament under Art. 15 of the Constitution, could not manifest itself, and shifted to the government, or the prime minister. However, the government could be strengthened legitimately only by a decision of framers of the constitution, which did not take place.

10) The Act became valid on the day it was promulgated; some provisions also went into effect at that time. In view of the manner in which parts of the Collection of Laws are distributed, persons affected by the statute were thus meant to act in the newly-specified manner, but for at least two days had no opportunity to familiarize themselves with it. This raises the problem of actual retroactivity of the statute.

11) On the technical side, this created gaps in the legal order, because if several points set forth a regulation, with various dates when they go into effect, the last point applies, under the principle *lex posterior derogat legi priori*. However, that cancelled the rates of income tax for the period beginning 1 January 2008.

12) The aim of the government was to put Parliament under pressure, and in addition there is a short period between the time between the new Act becoming

valid and going into effect.

13. The petitioners describe in detail the legislative procedure followed in passing the contested Act, and criticize many errors. They allege that, as early as the preparation stage of the Act - at the latest at the point when the bill was approved by the government - the bill was inconsistent in content, so even for the legislators themselves, the bill was unforeseeable, surprising, inaccessible, incomprehensible, and difficult to orient oneself in. The time devoted to preparing such a complicated and extensive norm was too short, and did not allow sufficient room for familiarizing oneself with its content, thinking through all the connections, or for democratic discussion.

14. Allegedly, many unrelated amending proposals were raised in the legislative process, some of them not until the closing phases of discussion in the Chamber of Deputies, without proper justification. All that is claimed to have had a negative effect on the opportunity for and quality of parliamentary debate, and thus also on the opportunity for, and quality of public discussion, the right of interest groups to have their opinion heard, and ultimately also on keeping the public informed about on-going political decisions.

15. According to the petitioners, the violation of the principles of separation of powers and democracy was reinforced by the fact that the unrelated amending proposals came from government circles. The prime minister (in the role of a deputy) substantially changed the government bill several days before the final vote, without giving the deputies the reasons for the new legal regulation, or time to study and discuss it, let alone a realistic opportunity to submit further amending proposals. The prime minister, or the government, with its extensive bureaucratic apparatus, thus absolutely dominated the legislative assembly, which does not even have sufficient expert resources to be able to present effective counter-arguments to the surprising government proposal, under the time pressure that was created. Thus, the influence of members of the legislative assembly (both opposition and majority) on the exact form of the Act was effectively minimized.

16. The Senate of the Parliament of the Czech Republic, which is controlled by the same political majority as the Chamber of Deputies, by expressing its intent not to discuss the bill (Art. 48 of the Constitution), made impossible debate in a plenary session of the Senate; opposing views could then not be effectively heard either in the Chamber of Deputies or in the Senate.

17. The petitioners summarize that the proposing and passing of a de facto governmental (more precisely, "prim ministerial") amending proposal that was not related in content to the proposed bill is inconsistent with Art. 1 par. 1, Art. 2 par. 1, Art. 6 and Art. 15 par. 1 of the Constitution, circumvents the institution of a legislative initiative under Art. 41 of the Constitution, and also conflicts with Art. 44 par. 1 and Art. 76 of the Constitution. The fact that the Parliament did not take into account the existing case law of the Constitutional Court, which, moreover, was decided not long before the passage of Act no. 261/2007 Coll., also violated Art. 89 par. 2 of the Constitution.

18. The petitioner states the opinion that the procedure chosen by the government when discussing the contested Act, if it were accepted, could lead to absurd consequences: “in the extreme case, the government could, once a year, collect all legislative aims into a draft Act ‘on Amending Legal Relationships in the Czech Republic,’ or even an Act ‘on Improving the Fate of the Citizens of the Czech Republic,’ and use political pressure to force the governing majority to approve a bill in that form. This would completely marginalize any actual influence the deputies might have on the content of laws, and Parliament would become virtually useless. The government would basically need Parliament only to formally confirm the blanket statement of its will, and could make any public parliamentary discussion impossible by having the majority in the Chamber of Deputies refuse to allow other points on the agenda. A parliament like that would be merely a façade, completely rejecting the principles of democracy and the separation of powers.”

19. Thus, the petitioners conclude that submitting and passing a government bill that is extensive, inconsistent in content, and poorly organized unclear is inconsistent with the preamble of the Constitution (which expresses the intent of the citizens to be guided by all the time-tested principles of a law-based state), as well as with Art. 1 par. 1, Art. 2 par. 1, Art. 6 and Art. 15 par. 1 of the Constitution.

20. For these reasons, the proposed judgment in the petition from the group of 67 deputies asks, first of all, that the Constitutional Court annul Act no. 261/2007 Coll. in its entirety.

21. If the Constitutional Court does not annul Act no. 261/2007 Coll. in its entirety, then the group of 67 deputies proposes in its alternative proposed judgment under point E) to annul those parts of this Act that are not related to its basic subject matter, or to its purpose. In the present proceeding, conducted under file no. Pl. ÚS 1/08, the following parts of Act no. 261/2007 Coll. are proposed to be annulled:

- points 3 and 4 in Article XVIII in Part Ten (amending the Act on Administrative Fees),
- Part Forty (amending the Act on Public Health Insurance) - Articles LXIV and LXV,
- Part Forty One (amending the Act on Insurance for General Health Insurance),
- Part Forty Two (amending the Act on the General Health Insurance Company of the Czech Republic) - Article LXVIII,
- Part Forty Three (amending the Act on Ministry, Department, Company, and Other Health Insurance Companies) - Article LXIX
- Part Forty Eight (amending the Act on Jurisdiction of Bodies of the Czech Republic in the Area of Prices) - Articles LXXV and LXXVI, and
- Party Forty nine (amending the Act on Prices) - Article LXXVII

22. The petitioner allege that all these parts of the Act are not related to the subject matter and purpose of the Act, and passing them would require the form of a special statute. The current legislative solution is unclear and legislatively defective.

23. If the Constitutional Court does not annul Act no. 261/2007 Coll. in its entirety, or those parts of it that are proposed to be annulled in the alternative proposed judgment under point E), then the group of 67 deputies proposes in an alternative

proposed judgment, under point F), to annul those parts of this Act that were introduced into it through amending proposals and are in the nature of so-called “add-ons,” i.e. they do not meet the criterion of a close relationship to the subject matter of the statute, but are de facto an entirely different statute, not related to the legislative proposal. In the present proceeding, conducted under file no. Pl. ÚS 1/08, the following parts of Act no. 261/2007 Coll. are proposed to be annulled:

- in Part Ten (amending the Act on Administrative Fees), in Article XVII points 3 and 4
- in Part Forty (amending the Act on Public Health Insurance) in Article LXIV points 1 to 9, 14 to 17, 24 to 26, 29, 30 a and Article LXV (Transitional Provisions)
- Part Forty Nine (amending the Act on Prices) - Article LXXVII.

### III/b

Arguments of the Group of 43 Deputies of the Parliament of the Czech Republic Disputing Whether Act no. 261/2007 Coll. was Passed and Issued in a Constitutionally Prescribed Manner

24. One of the alternatives in the proposed judgment in the petition from the group of 43 deputies also contains (like the petition from the group of 69 deputies) a request to annul the entire Act no. 261/2007 Coll. due to constitutional law defects in the legislative process. The arguments of the group of 43 deputies, in the part of the petition that alleges that Act no. 261/2007 Coll. was passed and issued in an unconstitutional manner, is in large part the same as the arguments in the petition from the group of 67 deputies.

25. The petitioners criticize the passed Act for serious legislative errors. They emphasize that the Act is not a standard amendment or legal norm, but a collection of partial regulations that are, on the one hand, amendments to dozens of statutes, and, on the other, regulations that could be independent statutes. They are, for example, changes in the area of tax regulation, including introduction of “ecological” taxes, the legal framework for virtually all the social systems, especially the system of state social support, minimum living and subsistence standards, the health insurance system, the framework of the pay structure for setting the salaries of constitutional officials and state representatives, employment, and the legal framework of public health insurance, premiums for that insurance, changes in the jurisdiction of ministries, etc.

26. According to the petitioners, the Act is unclear because, e.g., so many provisions of the amending statute were annulled without any prior connection to the Act being amended; for example, there was an amendment to Act no. 218/2007 Coll. (amending the Act on Injury Insurance and amending other Acts) despite the fact that Act no. 218/2007 Coll. had not yet gone into effect at the time that Act no. 261/2007 Coll. was being discussed.

27. According to the petitioners, discussion of the Act in the Chamber of Deputies was affected by time pressure, and the deputies did not have enough time to study such an extensive bill, which amended 46 legal norms. Moreover, discussion was complicated by the many amending proposals, especially that of Prime Minister Topolánek, which concerned eighteen existing sections of the government bill and, in addition, expanded the government bill by changes to another three statutes. The repeated proposals from several opposition deputies to extend the deadline for discussing the Act or returning it for further work were always denied. The Senate, despite objections from the opposition, did not discuss the bill.

28. The petitioners objected that the legislative process when passing this Act was

inconsistent with the Legislative Rules of the Government (e.g., with Art. 2 par. 2, which requires taking care that a legal regulation is in accordance with legal regulations of a higher legal force and with judgments of the Constitutional Court, and becomes an organic component of the entire legal order, and that it be conceived in a well-organized manner and formulated unambiguously, understandably and linguistically and stylistically correctly).

29. In this case, the legislative process did not respect Constitutional Court judgment file no. Pl. ÚS 77/06. The petitioners consider the provisions on the management of the General Health Insurance Company, supplementing regulation to the system of setting compensation and the prices of medical preparations and foods for special medical purposes, on regulation of medicine prices, introduction of so-called “ecological” taxes, as well as the change of the legal regulation of virtually all social systems, etc., to be “add-ons.”

30. The petitioner concludes that the manner in which the Act was passed and promulgated was unconstitutional, based on violation of the prohibition on arbitrariness in the legislative process arising from Art. 1 par. 1 and from Art. 2 par. 3 of the Constitution. It also alleges violation of Art. 23 par. 3 of the Constitution, on a deputy’s oath, and Art. 44 of the Constitution, on the powers of the government in the discussion of bills.

### III/c

Arguments of the Group of 19 Senators of the Parliament of the Czech Republic,  
Disputing Whether Certain Parts of Act no. 261/2007 Coll. Were Passed and Issued  
in a Constitutionally Prescribed Manner

31. The petitioners emphasize that their petition does not question whether the content of the contested Act is consistent with the constitutional order, but only the manner in which it was passed, which they consider to be unconstitutional.

32. The part of the petition which is concerned in this proceeding, conducted under file no. Pl. ÚS 1/08, seeks the annulment of points 1 to 9, points 14 to 17, and points 24 to 30 of Article LXIV, and the entire Article LXV of Party Forty (amending the Act on Public Health Insurance) of Act no. 261/2007 Coll. and Party Forty Eight of Act no. 261/2007 Coll. (amending the Act on Jurisdiction of Bodies of the Czech Republic in the Area of Prices), consisting of Art. LXXV and LXXVI, and Party Forty Nine of Act no. 261/2007 Coll. (amending the Act on Prices), consisting of Art. LXXVII.

33. The objections are aimed, first of all, against the Senate’s decision not to discuss the bill. In the petitioners’ opinion, this decision is inconsistent with the Senate’s constitutional role and with § 63, § 101 and § 102 of the Act on the Rules of Procedure of the Senate. It is also inconsistent with the current parliamentary practice and with the purpose of that institution.

34. The arguments of this group of 19 senators matches the arguments of the group of 67 senators and of the group of 43 senators in those parts of the petition where the legislative process is criticized for defects consisting of “add-ons” contained in

the supplemental proposals from deputy Mirek Topolánek.

35. Those parts of the Act that the group of senators proposes to be annulled were, in the petitioners' opinion, passed inconsistently with the Constitution and with the statutorily prescribed legislative procedure. Specific criticisms are violation of the principle of understandability, good organization, and clarity of the legal order, and the principle of respecting democratic principles in the legislative process, violation of the prohibition of arbitrariness in the legislative process, and violation of the principle of protecting political minorities - i.e., violation of Art. 1, Art. 2 par. 3, Art. 6, Art. 37 par. 2, Art. 41 and 44 of the Constitution, and Art. 2 par. 2 of the Charter of Fundamental Rights and Freedoms (the "Charter"). Allegedly the institution of a legislative initiative under Art. 41 of the Constitution was also circumvented, and the rights of senators under Art. 46 and 48 of the Constitution were violated. Further, it is claimed that several provisions of the Act on the Rules of Procedure of the Chamber of Deputies and the Act on the Rules of Procedure of the Senate were violated.

36. The petitioners refer to several judgments of the Constitutional Court that emphasize the importance of observing the constitutionally prescribed manner of passing statutes, e.g., judgments file no. Pl. ÚS 33/97, Pl. ÚS 5/02, Pl. ÚS 21/01, and especially judgment Pl. ÚS 77/06. The principles expressed in these judgments of the Constitutional Court were allegedly not observed during the enacting of Act no. 261/2007 Coll. In the petitioners' opinion, the last cited judgment of the Constitutional Court also opened important questions before the Senate, which is supposed to function, among other things, to insure constitutionality and the quality of legislative activity.

37. In the petitioners' opinion, the process of enacting Act no. 261/2007 Coll. against accentuates the need to observe the principle "that the parliamentary majority cannot do everything that the rules of procedure do not expressly prohibit." The petitioners express their hope that the Constitutional Court's decision will help cultivate the parliamentary legislative process, and will set the limits of what is merely a violation of the legal culture, and where violation of the rules of the legislative process takes a form that is subject to constitutional sanctions.

#### IV.

Arguments of the Petitioners Disputing whether the Content of the Act is Consistent with Constitutional Acts (as regards the Subject Matter of the Proceeding in file no. Pl. ÚS 1/08)

#### IV./a

Arguments of the Group of 67 Deputies of the Parliament of the Czech Republic against the Content of the Act

38. One of the alternative proposed judgments of the group of 67 senators seeks, on the grounds of constitutional defects in content, the annulment of: - § 11 par. 1 let. g) to i), § 12 let. m), § 16a, § 16b, § 17 par. 5, in § 43 par. 2 in the



first sentence, the words “and paid regulatory fees under § 16a and supplemental payments for partially reimbursed medical preparations and foods for special medical purposes, which are included in the limit under § 16b par. 1,” and in the second sentence, the words “including paid regulatory fees under § 16a and supplemental payments for partially reimbursed medical preparations and foods for special medical purposes for that period,” § 53 par. 1 second sentence and at the end of the text of the third sentence, the words “with the exception of deciding on a refund of overpayment of insurance premiums, reducing deposits for premiums, and reimbursing amounts under § 16b” of Act no. 48/1997 Coll., on Public Health Insurance, as amended by Act no. 261/2007 Coll.,

- § 5 let. f), in § 7 par. 1 let. a) the words “and for payment of amounts exceeding the limit for regulatory fees and supplemental payments for medical preparations and foods for special medical purposes, partly reimbursed by public health insurance, or for payment of a portion of those amounts in the event the insured party changes health insurance companies, under conditions provided by a special regulation 1b)” of Act no. 551/1991 Coll., on the General Health Insurance Company of the Czech Republic, as amended by of Act no. 261/2007 Coll., - § 13 let. f) and in § 17 par. 1 in the first sentence the words “and for payment of amounts exceeding the limit for regulatory fees and supplemental payments for medical preparations and foods for special medical purposes, partly reimbursed by public health insurance, or for payment of portions of those amounts in the event the insured party changes health insurance companies, under conditions provided by a special regulation 1b)” of Czech National Council Act no. 280/1992 Coll., on Ministry, Department, Company, and Other Health Insurance Companies, as amended by of Act no. 261/2007 Coll.,

39. The petitioners analyze the unconstitutionality of the contested provisions of the Act in detail in part IV. of the petition (Proposals for the Annulment of Individual Provisions of the Act Due to Inconsistency with Constitutionally Guaranteed Rights and Freedoms.)

40. As regards regulatory fees in connection with the provision of health care, the petitioners point primarily to Art. 31 of the Charter, Art. 12 of the International Covenant on Economic, Social and Cultural Rights (no. 120/1976 Coll.) and Art. 11 of the European Social Charter (no. 14/2000) Coll.). They also point to the International Labour Organisation Convention concerning Minimum Standards of Social Security (no. 461/1991 Coll.).

41. The petitioners emphasize that the contested provisions are sharply inconsistent with Art. 31, second sentence of the Charter, because they are based on the principle that all, even the most basic care, including emergency care, should be paid directly by the citizen (insured party); in contrast, the Charter assumes that payment-free health care paid through public insurance must be insured for all citizens of the Czech Republic (Art. 42 par. 1).

42. The right to protection of health and the right to payment-free health care under Art. 31 of the Charter, which are affected by the contested provisions, are among the social rights that, according to the petitioners, are binding on the legislature, although in a special manner. The petitioners point out that social rights are enshrined in a number of constitutions of European states in various

extents, and that they are also recognized by the German Federal Constitutional Court, although they are not expressly enshrined in the Basic Law of Germany. They point to the opinions of the constitutional scholar Robert Alexi, particularly the argument concerning competencies, according to which the parliament, which is the institution with primary democratic authority, should decide on political matters with a massive impact on the state budget. The petitioners conclude that the Charter guarantees a minimum standard of social rights, and, pointing to Constitutional Court judgment file no. Pl. ÚS 35/93 (no. 49/1994 Coll.), they analogously state the belief that the core of the citizens' right to payment-free health care and to medical aids on the basis of public insurance under Art. 31, second sentence, of the Charter is part of the untouchable minimum standard of social rights which the legislature may not reduce or violate.

43. The petitioners express the opinion that the level of statutory fulfillment of social rights above that minimal standard depends on the specific context in time and place in which they are guaranteed. In their opinion, the legislature is required to pursue a trend to fulfillment of these rights in an ever greater degree, and regression is justified only in the event of a credible and substantiated worsening of these conditions. The petitioners conclude that, although, at least in the last 10 years, the Czech Republic has demonstrated a consistently increasing growth of well-being, this increasing wealth of the society as a whole is allegedly accompanied by a retreat from the principles of solidarity, between generations and between people. Thus, the petitioners are not surprised that some citizens glorify the totalitarian regime as a better guarantor of their social rights than the present democratic, law-based state.

44. In terms of linguistic analysis, the petitioners point to the meaning of the terms “payment-free” “without payment,” “without paying” “unpaid,” “to pay” and “to cover,” and emphasize that a systematic interpretative method plays an important role in analyzing Art. 31, second sentence, of the Charter. The petitioners emphatically claim that, if basic health care is allowed to be burdened by fees, the constitutional imperative for payment-free health care on the basis of public insurance would become completely meaningless. Although Art. 31 of the Charter contains the phrase “under conditions provided for by law” and the petitioners concede that this fact could, for example, exclude above-standard health care from the payment-free regime (e.g., on the line between medical and cosmetic treatment) or “hotel services” in a hospital stay, or, e.g., tie payment-free care to proper payment of health insurance by the citizen, etc., health care that is basically payment-free must be preserved. Certainly the phrase does not permit setting up the health care system so that citizens who duly participate in public insurance cannot receive even basic health care without having to pay additional fees. The petitioners reject a conception under which the Charter prevents imposing fees on health care *stricto sensu*, i.e. only for health-restoring services and medical aids.

45. Finally, the petitioners conclude that the amounts of the regulatory fees introduced are intended to deter one from access to health care, and point to Constitutional Court judgment file no. Pl. ÚS 35/95 (promulgated as no. 206/1996 Coll.).

46. The petitioners find the contested provisions unconstitutional because of the evident lack of clarity in regulatory fees, i.e. the question of whether this is an institution of public or private law. They claim that § 16a par. 6 of Act 48/1997 Coll., as amended by of Act no. 261/2007 Coll., is inconsistent Art. 26 par. 1 of the Charter. According to the petitioners, imposing penalties consisting of a fine of up to CZK 50,000 means that performance under private law receives a public law penalty.

47. The petitioners point to the conflict of the contested provisions with medical ethics and the Hippocratic oath, and conclude that the charitable activities of people such as Albert Schweitzer, or the organization Doctors Without Borders [Médecins sans frontières] would not be possible in the Czech Republic without the risk of financial sanctions. With reference to the principle *ultra esse nemo tenetur*, the petitioners question the possibility of applying § 207 par. 2 of the Criminal Code. The petitioners also point to conflict with Art. 3 par. 1 of the Charter, in connection with Art. 31 of the Charter, in the property context.

48. Finally, the petitioners address the justification of a judgment of the Constitutional Court of the Slovak Republic, file no. Pl. ÚS 38/03, of 17 May 2004, no. 396/2004 Coll., and point out that the Czech Constitutional Court is not bound by this judgment.

49. The petitioners then, expressly conceding that imposing fees on “hotel services,” that is setting fees for accommodation and food in a hospital, need not exceed the bounds of constitutionality, seek annulment of the entire system of regulatory fees that the Act introduces.

50. In part IV. 2. of the petition the petitioners protest against the manner of payment for health care through a list of services assigned point values, pointing to the fact that, as of 1 January 2008, negotiation proceedings have been removed. They object to the fact that the legal regulation mixes the forms of an individual and normative legal act will decide and issue a decree). With reference to Constitutional Court judgment file no. Pl. ÚS 36/05 (promulgated as no. 57/2007 Coll.) the petitioners conclude that the factual situation is analogous.

#### IV./b

Arguments of the Group of 43 Deputies of the Parliament of the Czech Republic and the Group of 19 Senators of the Parliament of the Czech Republic against the Content of the Act

51. The group of 43 deputies of the Parliament of the Czech Republic, basically in agreement with the petitioner, in the position of a secondary party, does not raise significantly different arguments. This group stresses that “these asocial proposals are raising the twelve percent patient co-participation, which is already intolerably high for many people, points to the UN Covenant on Economic, Social and Cultural Rights of 1966, in force in the Czech Republic since 1976, and presumes an increased administrative burden and the fact that, because of it, doctors will have less time for their patients. The deputies in this group also state that part of the population will experience a marked decrease in living standards and health, that

there will be deep differentiation based on property, and increased poverty.

52. The group of 19 senators of the Parliament of the Czech Republic has no content-based objections to the Act.

#### V.

##### Briefs from the Parties to the Proceeding

53. The Constitutional Court, pursuant to § 42 par. 4 and § 69 of the Act on the Constitutional Court, sent the petition seeking annulment of the contested provisions to the Chamber of Deputies and the Senate of the Parliament of the Czech Republic.

#### V./a

##### Brief of the Chamber of Deputies of the Parliament of the Czech Republic

54. In its brief of 30 November 2007, signed by Chairman Miloslav Vlček, the Chamber of Deputies of the Parliament of the Czech Republic recapitulates the petitioners' objections and disagrees with them.

55. The petitioners allegedly incorrectly argue on the basis of Constitutional Court judgment file no. Pl. ÚS 77/06 (concerning so-called "add-ons"), chose an incorrect interpretation that expands it, and applied the legal conclusions expressed by the Constitutional Court, not only to the manner of submitting and adopting amending proposals in Parliament, but also to the manner of drafting the bill itself. The petitioners allegedly took advantage of the fact that the reasoning of the cited Constitutional Court judgment "is so rich in arguments that it offers fundamentally different interpretations of what the Constitutional Court wanted to express." The brief is of the opinion that the cited Constitutional Court judgment must be interpreted narrowly in the sense that it concerns "primarily the issue of amending a submitted bill during the course of the legislative process, i.e. in the chambers of Parliament."

56. The brief also disputes some other conclusions stated in Constitutional Court judgment file no. Pl. ÚS 77/06 concerning the requirement that law must be foreseeable, harmonious, and understandable, to which the petitioners refer. Allegedly, if the Constitutional Court consistently applied the opinions stated by it, "... then it would have to annul statutes until the legal order of the Czech Republic became accessible even without the help of the legal information system, which, in the current legislative situation, would not only be unrealistic, but would seriously exceed the competence of the Constitutional Court. ... If the unforeseeability, internal conflict, and lack of clarity in a statute, broadly understood, were to be grounds for the Constitutional Court to annul it (as the violation of an imaginary, abstract "right to good laws"), this would mean that we would conclude that the Constitutional Court was competent to annul any law, without having to limit itself to the text of specific provisions of the Constitution when seeking grounds for the annulment. The Constitutional Court would thus at the same time formulate the legislative policy of the state. However, setting policy is a matter for a

representative body elected by the people in democratic elections, and answerable to the people for its activities.” The Constitutional Court allegedly cannot be a “guarantor of the quality of legal regulations” evaluated according to the criteria of foreseeability, harmony and clear organization because that allegedly “... conflicts with the constitutional definition of the court’s position.”

57. The brief expresses disagreement with the petitioners’ claim that the government bill and the Act itself are inconsistent in content. The subject of the bill was determined “... by the government’s unifying aim which, according to the explanatory report, was to optimize income for the state budget which, at the same time, was supposed to support economic growth and protection of the environment.” Allegedly, even the amending proposals adopted in the third reading did not deviate from the framework defined by the subject matter of the bill.

58. The brief’s position also disagrees with the petition to annul individual provisions of the contested Act or the amended Acts due to their inconsistency with constitutional regulations. The subject matter of this proceeding is touched on in the disagreement with the objections about regulatory fees and setting coverage for health care through a List of Services with Point Values. According to the brief, as regards regulatory fees, “it is clear from the name of these fees that they are not fees for health care, but ‘regulatory’ fees, the purpose of which is to regulate and limit the misuse and purposeless consumption of medical care. The aim is to improve this care as a result. Thus, medical care remains payment-free under conditions provided by a special statute.” The new legal regulation for the manner of setting health care fees through the List of Services with Point Values, in accordance with European Union law, assumes that payment for medical preparations will come under the regime of individual decision through an administrative proceeding. According to the brief, “the Act now logically also expects that decision making will be analogously individualized in the area of price regulation when deciding on the maximum prices for medical preparations that are regulated by setting maximum prices. Thus, the decision of an administrative body will be fully reviewable. The regime of setting maximum prices is based on foreseeable and verifiable criteria set forth in the Act.”

59. In conclusion, the brief sets forth the summary position that the Chamber of Deputies acted in the belief that the Act is consistent with the Constitution, the constitutional order, and the legal order.

V./b

Brief from the Senate of the Parliament of the Czech Republic

60. The Senate of the Parliament of the Czech Republic, represented by its chairman, Přemysl Sobotka, in its brief of 28 November 2007, described the process in which the Senate evaluated Act no. 261/2007 Coll.

61. It stated that the bill approved by the Chamber of Deputies, after being passed to the Senate was assigned to three committees for discussion - the Committee for the Economy, Agriculture, and Transportation (which acted as the guarantee committee), the Committee for Local Development, Public Administration, and the

Environment, and the Committee for Health Care and Social Policy. All three committees recommended approving the bill in the version passed on by the Chamber of Deputies. The Senate discussed the bill at its 8th session on 19 September 2007. The brief states that the plenum of the Senate did not conduct “classic” debate according to the Rules of Procedure of the Senate. However, before a vote was held on a proposal that the Senate not discuss the bill, several officials of the Senate and chairmen of the party clubs exercised their right to priority in taking the floor (§ 69 of the Act on the Rules of Procedure of the Senate).

62. In the brief, the Chairman of the Senate states that at the Senate session, just as before, in the Senate committees, there were opinions that the bill represents and extensive, poorly organized legal norm that is unique in our legal order. There was criticism of the procedure whereby certain new parts were introduced into the bill during discussion in the Chamber of Deputies; other objections were also raised.

63. When, by resolution no. 192 of 19 September 2007, a majority of the Senate approved a motion expressing the intent not to discuss the bill, the Senate allegedly acted in the belief that this norm is consistent with the Constitution and with the Charter. Although the Act allegedly “at first glance may seem like a set of unrelated, independent partial amendments collected into one comprehensive statute,” nevertheless “it contains the essential unifying idea ... of stabilization of the public budgets.” Such a procedure is allegedly not new in the Czech legislative process; the same was done e.g., when establishing the regions (Act no. 132/2000 Coll.) or when terminating the activities of district offices (Act no. 320/2002 Coll.). Through the prism of the bill’s unifying idea the Senate also adopted a set of amending proposals (from deputies Topolánek, Tluchoř and Rován) adopted by the Chamber of Deputies.

64. In relation to the amendment of the Act on Public Health Insurance and the new legal framework regulating the prices and reimbursement of medical preparations and foods for special medical purposes, the brief stresses the interest in quickly establishing the new legal regulation, also in view of the fact that the existing regulation was annulled by Constitutional Court judgment Pl. ÚS 36/05, effective as of 31 December 2007. In the matter of regulatory fees “the majority of the Senate stressed the idea that regulatory fees “are not of a public law character” and the importance of their expected regulatory and financial effect on stabilizing the health care sector.”

65. The Senate leaves it to the Constitutional Court to evaluate the constitutionality of the adopted Act and make a decision.

V./c

Brief from the Ministry of Health, including Supplement

66. On 27 December 2007 the Constitutional Court received (without having requested it) a brief from the Ministry of Health of 19 December 2007, signed by the Minister of Health, Tomáš Julínek. In it the Ministry of Health states that, as

the central state administrative body for health care, required to respect the public interest, it is presenting an *amicus curiae* brief concerning the petition from the group of deputies and senators.

67. In its brief, the Ministry of Health expresses the opinion that the legislative process of adopting Act no. 261/2007 Coll. was in accordance with constitutional regulations. The Ministry describes as off-base the petitioners objections to Part Forty of Act no. 261/2007 Coll. (amending the Act on Public Health Insurance), which consist of the fact that the content of the new regulation contained in Part Forty are not related to the basic topic, or the purpose of the Act, which is supposed to be “stabilization of the public budgets.” On the contrary, the Ministry claims that the new regulation for setting reimbursements and prices of medical preparations has the same subject matter as the entire Act, which supposedly has a clear “unifying idea,” i.e. “optimization of the income to the state budget.” The Ministry of Health also claims that objects raised to the procedure of submitting and adopting the amending proposals of deputy Tluchoř (concerning the setting of reimbursements and prices of medical preparations) also will not stand, because these amending proposals were also related to the subject matter of the entire Act.

68. The brief from the Ministry of Health sharply disagrees with the submitted petition. The Ministry is of the opinion that the petitioners are trying to use their petition to implement their own political program, which did not find sufficient support in Parliament. As regards the part of the petition that proposes annulling regulatory fees for health care provided, the Ministry of Health takes as its starting point the opinion that modern legal science no longer sees the public law and private law spheres as strictly and clearly separate; a number of legal relationships combine private law and public law elements. In the system of public health insurance and care provided on the basis of that insurance we can distinguish four basic legal relationships. According to the Ministry of Health, the legal relationship between the person paying premiums for health insurance and the health insurance company, as the recipient of the paid amounts for public health care, is a public law relationship. As regards the relationship between the insured party and the health insurance company, the Ministry takes the legal opinion that this is a private law relationship with significant public law elements. The Ministry of Health points out that the legal relationship between the health insurance company and the health care provider was already recognized by the Constitutional Court as clearly a private law relationship, though with a higher degree of legal regulation, which is usual in commercial law. In the opinion of the Ministry of Health, the legal relationship between the patient and the health care provider is *prima facie* a private law relationship, even though the public interest is projected into it through not inconsiderable regulation by legal regulations ... Overall one can say, simplifying slightly, that public health funds are funds of a public character until the moment of reallocation, and therefore public law regulations (e.g., the Administrative Procedure Code) also apply to them. From the moment of reallocation, when the health insurance company receives in its account, not the amount paid by the insured person, but the actual premium for the insured person (allocation), the amount of which is determined according to a reallocation key based on age and sex, they are funds of a private law character.” Regulatory fees have a private law aspect, but there is undoubtedly also a public law aspect, i.e.,

the purpose for introducing them (optimizing the use of public health insurance funds) and certain related institutions, e.g., a fine for not collecting regulatory fees. This is an instrument whose primary purpose is to optimize the allocation of funds within the system. According to the brief from the Ministry of the Health, “the introduction of regulatory fees is the first small step in a comprehensive reform of health care, the aim of which is not to deny citizens’ rights under Art. 31 of the Charter, but to ensure that it will be better implemented and fulfilled in the long term. At present the seven substantive aims of the statutes that are the pillars of this reform are in the stage of legislative comment proceedings.

69. The set of changes in health care implemented by the Act on Stabilization of Public Finances is sufficiently complicated and interconnected with other changes (e.g., in the tax system), that no single part of it can be annulled without the government getting an opportunity to adopt changes in a different manner, pursuant to the requirements of the Constitutional Court. The changes are so extensive that many parties involved in health care (in particular, individual health care service providers) have taken steps to implement particular provisions (e.g., technical equipment for collecting regulatory fees). It would not correspond to the principle of good administration (as recognized by the Constitutional Court and legal science - cf. *Principy dobré správy, sborník příspěvků z konference* [Principles of Good Administration, Collection of Conference Papers, Masaryk University Brno 2006), if such steps were de facto penalized by subsequently being made obsolete. The Ministry of Health also points to the particular danger that “potential annulment of regulatory fees with immediate effect would bring. The introduction of regulatory fees, as implemented by Part Forty of Act no. 261/2007 Coll., “not only does not in any way restrict the availability of essential care (the amount of fees is de facto marginal, in terms of the consumption basket of a family with average, but also considerably below average income), but, on the contrary, removing certain inefficient expenses in the treatment process will optimize allocation of the limited financial means from public health insurance, which will unavoidably improve, not lower the availability of health care.” Another important aspect that contributes to making the institution of regulatory fees constitutionally consistent with Art. 31 of the Charter is the introduction of a limit on regulatory fees of CZK 5,000 per year. In view of the fact that this will include supplemental payments for medical preparations, the introduction of this limit will have markedly positive consequences for the not negligible group of chronically ill patients who now pay supplemental fees often totaling over CZK 10,000 per year, by increasing the availability and lowering the financial burden of essential health care. The new regulations de facto expands the material scope of health insurance by certain regulatory fees and supplemental fees for medications paid over the amount of CZK 5,000 per year. The limit thus strengthens solidarity between the healthy and the ill in the Czech environment, which has previously been insufficiently emphasized.” The Ministry of Health also argues in favor of the opinion that making health care payment-free is only one of the attributes of its availability and points out that the European Social Security Code (no. 90/2001 Coll.) and other international conventions clearly make it a the priority to ensure material availability [of health care] for citizens regardless of social status, not that it be formally payment-free. The evidentiary function of regulatory fees, and especially of the limit/cap, is to support ensuring the availability of health care for all citizens of the Czech Republic. The Ministry of Health then recapitulates and



evaluates the development thus far of setting payments for health care through the List of Services with Point Values. It points to the need to regulate the setting of payments for medical preparations out of public health care beginning 1 January 2008, because the existing legal framework was annulled as of 1 [sic, 31?] December 2007 by Constitutional Court judgment Pl. ÚS 36/05. The Ministry of Health concludes that the new legal framework is fully consistent with the requirement of the European Council's Transparency Directive, no. 89/105/EHS, and of the Constitutional Court, to set payments and prices for medical preparations on the basis of clearly specified criteria, in a transparent and predictable manner, with a possibility for judicial review of the entire proceeding.

70. On 19 February 2008 the Constitutional Court received a "Brief from the Ministry of Health Regarding the Petition to Annul a Statute - Supplement.["] In this supplement the Ministry of Health recapitulates the historical developments before the fees were introduced, and points out that "since 1990 basically all governments tried to create a method to introduce fees." Beginning with the steps taken by ministers Pavel Klener, Martin Bojar, Petr Lom, Luděk Rubáš, Jan Stráský, Josef Kubinyi, Marie Součková, Milada Emmerová and David Rath. According to the Ministry of Health, "the previous Minister of Health, David Rath, before taking the office of minister, as president of the Medical Association, he proposed introducing patient fees, at the same or higher level as is provided now - 20 % of the price of outpatient services, CZK 50 for emergency care, CZK 200 for a doctor's house call, etc."

71. The Ministry of Health also presents a geographic comparison, including tables of regulatory fees in Europe, specifically Austria, Ireland, France, Germany, Switzerland, Norway, Sweden, Great Britain, Portugal, Slovakia (previously and today), Hungary, Croatia, Bulgaria, Latvia and Estonia. The table indicates that fees are zero in Spain, Italy (except for hospitalization and specialist visits), Poland, Lithuania and Romania.

72. The Ministry of Health also conducts "a comparison with the entire system of law in health care," points to the case law of the Constitutional Court, in particular judgments file no. Pl. ÚS 35/95, Pl. ÚS 23/98 and Pl. ÚS 14/02 (promulgated as no. 207/2003 Coll.), and presents its interpretation of legal regulations and the Constitutional Court's case law in relation to Art. 31 of the Charter. Finally, the Ministry analyzes the contested legal regulation provided by § 16 and § 166 of Act no. 48/1997 Sb., as amended by later regulations, with emphasis on the purpose of the regulation, presents "the consideration de lege lata and the consideration de lege ferenda" and concludes that "fundamental changes in the system can be introduced progressively, both while respecting rights guaranteed by the Constitution, and also in times of abundance." If these changes were conducted at a time of crisis, which insisting on the current framework would undoubtedly lead to, it would cause instability. The present regulation, and any regulation under consideration, does not cause any instability. It proceeds from nervousness in the system and the environment, through stability, to a particular development. Based on conceptual studies, and respecting the considerations of de lege ferenda, the reform tries to optimize the health care system within the bounds of what is possible. The entrance gate to this optimization is introducing fees."

## VI.

### Petitioners; Responses to the Briefs

73. On 18 December 2007, the petitioners - the group of 67 deputies - sent their response, disagreeing with the briefs from the chairman of the Chamber of Deputies and the chairman of the Senate. They point above all to the fact that parties to proceedings before the Constitutional Court are the chambers of Parliament, not their chairmen - they only represent the chambers externally. According to the response, the chairmen are not entitled to themselves create the will of the chamber that they preside over, but they can only convey and express that will - created according to the rules set forth by the Constitution and by statute - to the outside. If the chairman of a chamber of Parliament does not submit a draft brief of the party to the proceeding to the house for approval, he can disclose to the Constitutional Court, by virtue of his office, only factual and undisputed circumstances concerning discussion of the bill. Evaluation of the approved statute and the petition for the Constitutional Court to annul it beyond that limit is not a relevant statement by the chamber, but only the personal opinion of its chairman.

74. The petitioners criticize the brief provided by the Chairman of the Senate, Přemysl Sobotka, because in it the chairman interprets the Senate's position on the contested Act, although the Senate did not even debate discuss it in a plenary session, because the Senate voted not to discuss the bill.

75. The petitioners also question the relevance of the brief from the chairman of the House of Representatives, Miloslav Vlček, on the grounds that he is one of the group of deputies that submitted the petition to annul Act no. 261/2007 Coll. Thus, one and the same person is appearing on the sides of two parties to the proceeding - the petitioner, and at the same time, the body that issued the contested regulation. Thus, Miloslav Vlček, as a deputy, claims that Act no. 261/2007 Coll. is unconstitutional, whereas, as the chairman of the Chamber of Deputies, he finds no procedural or content-based defects in the adopted Act.

76. In their response, the petitioners dispute the brief from the chairman of the Chamber of Deputies, which criticizes the petition to annul the Act for "vague application of the principle of predictability of law." On the contrary, the petitioners claim that they raise objections of violation of specific provisions of the Constitution, namely Art. 41 of the Constitution (circumventing the legislative initiative), Art. 6 of the Constitution (political decisions emerge from the will of the majority manifested in free voting), Art. 15 of the Constitution (the legislative power of the Parliament) and Art. 89 par. 2 of the Constitution (enforceable decisions of the Constitutional Court are generally binding).

77. The petitioners do not agree with the fact that the brief from the chairman of the Chamber of Deputies trivializes the technical legislative principles contained in the Legislative Rules of the Government. They note that this is highly surprising when it is the government, which itself made the legislative rules, that is the proponent of the bill. The petitioners are convinced that gross violation of these very tradition and time-tested principles for the creation of laws can have

devastating effects on the level of legal certainty and thereby on the constitutionally protected foundations of a law-based state.

78. The petitioners also dispute the brief from the chairman of the Chamber of Deputies as regards the nature of regulatory fees, and point to the public information brochure in which the Ministry of Health advises citizens “how to plan their ‘health budget’ and their expenses.”

79. As regards Senate chairman’s brief, which defended the practice of adopting comprehensive statutes that collect a set of unrelated partial legal regulations connected by an essential unifying idea by pointing to similar statutes that were adopted in connection with the establishment of regions (Acts no. 132/2000 Coll. and no. 320/2002 Coll.), the response objects that these statutes differ by their markedly more intensive thematic and teleological tightness, and are much more limited in scope than Act no. 261/2007 Coll.

80. On 17 January 2008, the petitioners - the group of 67 deputies - sent the Constitutional Court their position on the brief from the Ministry of Health of 19 December 2007, with which they fundamentally disagree. The main part of this petitioners’ position disputes the arguments of the Ministry of Health concerning regulatory fees in health care and concerning the new regulation for setting coverage and prices of medications. The petitioners dispute the opinion of the Ministry of Health that “through their petition, the petitioners are trying to implement their own political program, which did not find sufficient support,” and assert that the petitioner does not seek implementation of a political program before the Constitutional Court. The petitioners disagree with the opinion that this is “a private law relationship with significant public law elements”; in their opinion, the relationship is of a public law character. The petitioners also disagree with the opinions of the Ministry of Health concerning “optimization of allocation of funds within the system,” they dispute the arguments on the trend of aging of the population and its effect on the system and scope of health care, disagree with the statement of the Ministry of Health as regards interpretation of the provision on a penalty of CZK 50,000, the limit of CZK 5,000, interpretation of the relationship between health care being payment-free and its availability, and, finally, disagree with the arguments concerning the new regulation of reimbursements and prices of medical preparations, formally and in terms of content. The petitioners conclude that “if the government continues to present its reform aims in such huge and incongruous bills, in the opinion of the petitioners, the consequences will be fatal for the harmony, good organization, and predictability of the law and legal certainty in the Czech Republic.”

81. Finally, on 7 March 2008, the petitioners sent a filing in which they conclude that the resolution of 8 January 2008, file no. Pl. ÚS 24/07, not only separated out this matter for independent treatment, but also granted their “request for priority treatment of the matter on the grounds of urgency.” They also address the so-called “add-ons” in relation to the parts of the contested Act that are being discussed in this proceeding. As regards their objections concerning legislative procedure, according to the petitioners the judgment in the matter file no. Pl. ÚS 24/07 does not present the obstacle of *rei iudicatae* for this proceeding. Further, in relation to registration fees, the petitioners conclude that calling the payment a

“fee” is deceptive, and they describe as “the height of absurdity” the legal regulation of the fine that a health insurance company can impose on a health care facility that did not collect the regulatory fee.

## VII.

### Evidentiary Material Obtained by the Constitutional Court from Public Sources

82. As supporting documentation for its decision, the Constitutional Court obtained stenographic records from sessions of the Chamber of Deputies, the Senate, and their committees, as well as their resolutions and the Chamber of Deputies publications freely available in the digital library on the websites of the Chamber of Deputies and the Senate of the Parliament of the Czech Republic, at [www.psp.cz](http://www.psp.cz) and [www.senat.cz](http://www.senat.cz).

## VIII.

### Description of the Legislative Process of Adopting Act no. 261/2007 Coll.

83. From the statements of both chambers of the Parliament of the Czech Republic, attached annexes, and from documents available electronically, the Constitutional Court determined the following:

- The government presented the government bill to the Chamber of Deputies on 24 May 2007 (publication 222/0). The bill was distributed to the deputies on 25 May 2007. The organization committee of the Chamber of Deputies recommended discussing the bill on 24 May 2007. It appointed Mgr. Bohuslav Sobotka as reporter and proposed assigning the bill for discussion to three committees: 1. the health care committee, 2. the social policy committee, 3. the budget committee.
- The first reading took place on 6 and 7 June 2007 at the 15th session of the Chamber of Deputies. The bill was assigned for discussion to the above-mentioned committees (resolution no. 335).
- The Chamber of Deputies health care committee discussed the bill on 20 June 2007, and adopted no resolution. The social policy committee discussed the bill on 2 July 2007, and its resolution recommended rejecting the bill. The budget committee discussed the bill on 8 August 2007, and its resolution recommended rejecting the bill.
- The bill went through the second reading in the Chamber of Deputies in general and detailed discussion on 14 and 15 August 2007 at its 18th session. The amending proposals were processed as publication 222/3, which was distributed on 16 August 2007.
- The third reading in the Chamber of Deputies took place on 21 August 2007 at the 18th session. The bill was adopted; out of 200 deputies present, 101 deputies voted to adopt it, and 99 votes were against.
- On 31 August 2007, the Chamber of Deputies passed the bill to the Senate as publication 106/0. The Senate scheduled the publication for its 8th session, and discussed it on 19 September 2007. In resolution no. 192 the Senate expressed its will not to discuss the bill.
- The Act was delivered to the President of the Republic for signature on 25 September 2007, and the President signed it on 5 October 2007.
- The Act was promulgated on 16 October 2007 in the Collection of Laws, part 85,

as number 261/2007 Coll.

## IX.

### Hearing before the Constitutional Court

84. In the hearing before the Constitutional Court, held on 1 April 2008 and 16 April 2008, the parties to the proceeding and the secondary parties maintained their positions, contained in their filing to the Constitutional Court. The Constitutional Court heard as witnesses the Prime Minister and Deputy ing. Mirek Topolánek, and the Minister of Health, MUDr. Tomáš Julínek. In his testimony, Prime Minister and Deputy ing. Mirek Topolánek spoke about the course of discussion of the contested legal regulations in the Chamber of Deputies of the Parliament of the CR and the amending proposal made to it, as well as the purpose and aim with which the government approached the discussed part of stabilization of the public budgets. Minister of Health MUDr. Tomáš Julínek gave the same testimony as in the written *amicus curiae* brief that he sent to the Constitutional Court, and explained the aims and goals of the reform, the regulatory purpose of the regulatory fees, and the financial effects of collecting these regulatory fees on the financing of the health care system.

## X.

### Constitutionality of Competence and the Legislative Process

85. The Constitutional Court already dealt with evaluating the constitutionality of competence and the legislative process, in relation to the objection that the statute was inconsistent, the Senate's decision not to discuss the bill was unconstitutional, and the objection that the legislative rules of the government were violated, in a proceeding which resulted in Constitutional Court judgment of 31 January 2008, file no. Pl. ÚS 24/07 (promulgated as no. 88/2008 Coll.). Therefore, for the sake of brevity, as regards that proceeding and the reasoning of that judgment, we can refer in full to parts X, X/a, X/b and X/d of Constitutional Court judgment of 31 January 2008, file no. Pl. ÚS 24/07.

86. The Constitutional Court had the same starting points and reached the same conclusion as in judgment file no. Pl. ÚS 24/07 of 31 January 2008, in relation to the objections of "lack of a close relationship between the amending proposals and the subject matter of the statute and the exceeding of the statutory framework for submitting technical legislative proposals in the third reading of a bill" (for more detail see X/c of the reasoning in judgment file no. Pl. ÚS 24/07 of 31 January 2008). The Constitutional Court is of the opinion that this is not a case of exceeding the framework outlined by the original draft of the statute and including a circle of norms that are not related to reform of public finances and the financing of health care. In judgment file no. Pl. ÚS 56/05 of 27 March 2008 (at: <http://usoud.judikatura.cz/>) the Constitutional Court considered the issue of the "formal wording of a legal regulation," which would "mean the danger that the same regulation would be adopted again, only with the difference that all requirements of the legislative process would be observed." In judgment file no. Pl. ÚS 56/05 the Constitutional Court reached the conclusion that "in the

adjudicated matter the formal procedural aspects of review recede from the point of view of the principle of proportionality to the requirements of the principles of the material law-based state, legal certainty, and effective protection of constitutionality.” In the presently adjudicated matter the situation is similar; we cannot overlook the fact that the petitioners and the secondary parties have no reservations about the content of the contested statutory provisions, the so-called “add-ons,” as a whole, and that their adoption was also motivated by fear of periculi in mora beginning 1 January 2008.

## XI.

### Consistency of the Content of the Contested Statutory Provisions with the Constitutional Order

87. As regards evaluation of whether the content of the contested statutory provisions is consistent with the constitutional order, the petitioners placed the Constitutional Court in a situation that is characterized by the petitioners’ claim that although “requiring payment for ‘hotel services,’ i.e. setting fees for accommodation and food in a hospital need not go beyond the bounds of constitutionality,” they nevertheless seek “annulment” of the entire, newly-introduced system of regulatory fees. Thus conceived, the filing leads to the fact that it contests both provisions against which the petition presents constitutional law arguments, and provisions against whose constitutionality, as presented in the above-mentioned manner, not material or constitutional law arguments are made. By arguing against the “newly introduced system or regulatory fees as a whole,” the petitioners also contest provisions whose application cannot interfere in rights guaranteed by the Charter, because they do not impose any obligations on the bearers of those rights, like, e.g., the contested § 16a par. 2 and 3 of the Act on Public Health Insurance. These circumstances led the Constitutional Court to review whether the content was consistent with the constitutional order only of those contested provisions concerning “the entire, newly-introduced system of regulatory fees” that, in terms of content, logically and systematically come into consideration for evaluation of constitutionality and regarding the unconstitutionality of which the petitioners or secondary parties raise constitutional law arguments in this regard. The merit of the matter is in the question of whether - in the words of the petitioners - “requiring payment for virtually all health care” is or is not constitutional.

88. In deciding, the Constitutional Court could not overlook the fact that the part of the contested Act that is adjudicated in this proceeding is an integral content component of the stabilization of public budgets. In this regard it focused its attention on the principle of restraint and minimizing interference and on the question of the Constitutional Court’s authority to make a cassation decision. Similarly as in judgments file no. Pl. ÚS 24/07 and file no. Pl. ÚS 2/08 (promulgated as no. 166/2008 Coll.), the Court believes that, even if it finds sufficient grounds to deny the petition after merely finding the answers to this circle of questions, it is appropriate not to decide, citing grounds of procedural economy, without performing a rationality test, i.e., considering - even if in terms of the optical viewpoint and the structure of the judgment’s reasoning - the seemingly closing, but from a juristic viewpoint undoubtedly primary substantive

question - whether the contested legal framework violates any provision of the Constitution or of the Charter, or whether it interfered in any right protected by the Charter. Thus, this means restraint and minimization of interference, the rationality test, or the consistency of the contested legal regulation with the provisions of the Constitution or of the Charter.

89. The Constitutional Court points out that in judgment file no. Pl. ÚS 14/02 (promulgated as no. 207/2003 Coll.) it expressed a certain restraint in relation to evaluation of the entire regulation of health care, pointing out, among other things, that it “is aware that these questions are part of the entire complex of public health care issues, which is based on from the applied constitutional principles and which should, in its overall framework, react to the solutions that are standard in developed democratic countries and internationally agreed or recommended positions.” In judgment file no. Pl. ÚS 12/94 (promulgated as no. 92/1995 Coll.) - although it concerned the sphere of social security - the Constitutional Court stated that the decision whether to prefer the viewpoint of solidarity or give priority to the principle of equivalence is “reserved to the legislature, which cannot act arbitrarily, but in setting preferences must take into account the public values being pursued.”

90. The Constitutional Court, aware of the interconnection of all parts of the contested legal regulation and the unifying element provided precisely by the intent to stabilize the public budgets, could not do otherwise in this matter than to pick up on the conclusions stated in judgments file no. Pl. ÚS 24/07 and file no. Pl. ÚS 2/08, in particular as regards the “wide space for the legislature to decide on the subject, measure and scope of taxes, fees and financial penalties ‘and on the political responsibility’ of the legislature.” In judgment file no. Pl. ÚS 2/08, the Constitutional Court stated, for the sphere of social rights, that “under Art. 5 of the Constitution the political system of the Czech Republic is founded on the free and voluntary formation of and free competition among those political parties which respect the fundamental democratic principles. Political decisions emerge from the will of the majority manifested in free voting. The decision-making of the majority shall take into consideration the interests of minorities (Art. 6 of the Constitution of the CR). Therefore, the Constitutional Court concludes that if the petitioners, as representatives of the legislative branch, believe that the legal regulation they contest is inappropriate or has negative consequences, they can seek change within political competition, not within judicial review of constitutionality, which, by definition, must be limited only to questions of a constitutional law nature. If the Constitutional Court were to grant the petition and decide itself, instead of the legislature, it would violate not only the cited provisions of the Constitution of the CR, but it would make the competition of political parties unnecessary. It is primarily their task, based on the mandate they receive from the voters and the political priorities set accordingly, to present the most suitable methods for implementing the social rights enshrined in Chapter Four of the Charter. Of course, this is always in terms of the possibilities of the state budget, supported by the results of state management, for which they also bear political responsibility, and within the limits provided by the relevant articles of the Charter of Fundamental Rights and Freedoms. “Evaluating the question of purposefulness, suitability, and social justice of a legal regulation in this area is solely in the power of the legislature, in whose activities the Constitutional Court

cannot interfere, except in cases where unconstitutionality is determined. These are questions that are essentially political, where the entire sphere of so-called social rights falls.”

91. The Constitutional Court of course also took into consideration that reform of the health care system in this phase has not yet been finished, and that Minister of Health Tomáš Julínek, as a witness, testified that other related bills will be prepared in the near future. The Constitutional Court now adds that if it acted in too activist a manner in relation to any reform, including reform of health care, it would certainly create case law that would a priori close the door on any reform attempts. The Constitutional Court also takes into account the fact that the effects of reform cannot be evaluated until after the mechanisms created can begin to function, and adds that, in terms of evaluating the constitutionality of the contested provisions, it has authority only to decide on the fundamental principles, not on a particular factual situation.

92. After grounds were found for maintaining the maximum degree of restraint generally in relation to the contested legal regulation as a whole, the Constitutional Court, for the reasons analyzed above, moved on to the reasonableness test. It chose the version of the test outlined in the part of judgment file no. Pl. ÚS 83/06 (promulgated as no. 116/2008 Coll.) adopted by the plenum without a dissenting opinion, according to which the principle of proportionality “need not always be the main criterion for deliberation about the constitutionality of a statutory provision. This is because the principle of proportionality is applied especially in the area of human rights and fundamental freedoms (Chapter Two of the Charter); however, in the area of economic, social, and cultural rights, we must take into account Art. 41 par. 1 of the Charter, which opens wide space for the legislature in choosing various solutions. In view of Art. 41 par. 1 of the Charter, a statutory regulation need not be in a strict proportionality relationship to the aim which regulation pursues, i.e. it need not be a measure which is essential in a democratic society, as is the case, for instance, with other rights, which one can claim directly from the Charter (but cf., e.g., Art. 27 par. 1, 2, and 3 of the Charter and the rights set forth there, which are not limited by Article 41 par. 1). In this regard, a statutory regulation will pass the test of constitutionality if it can be determined to pursue some legitimate aim, and that does so in a manner that can be seen as a reasonable means to achieving it, although it need not be the best, most suitable, most effective, or wisest means (reasonableness test - cf. also judgment file no. Pl. ÚS 61/04, promulgated as no. 16/2007 Coll.).” In any case, such a procedure is not unique. “American theory speaks of the rational-basis test, according to which a norm will always be valid if it is in a reasonable relationship to some public aim, and is not obviously the result of arbitrary distinctions” (cf. M. Bobek, P. Boučková, Z. Kühn (eds.), *Rovnost a diskriminace [Equality and Discrimination]*, Praha 2007, pp. 47-48).

93. Before proceeding to the reasonableness test, the Constitutional Court considered the nature of social rights and their different nature, given by Article 41 par. 1 of the Charter. Analogously as in judgment file no. Pl. ÚS 2/08, it states that these rights “are not unconditional in nature, and they can be claimed only within the confines of the laws (Art. 41 par. 1 of the Charter) ... Within these bounds the legislature has a relatively wide ability to regulate the implementation of



individual social rights, including the possibility to amend them.”

94. The Constitutional Court also considered other unique aspects of the nature of social rights. In judgment Pl. ÚS 2/08, it stated that social rights “depend, in particular, on the state’s economic situation. The level at which they are provided reflects not only the state’s economic and social development, but also the relationship between the state and the citizen, based on mutual responsibility and recognition of the principle of solidarity.”

95. Realizing that “in contrast to legal science ... or practical dogmatics, other fields that concern themselves with law, without considering practical aims, such as legal history, comparative law, and legal philosophy, are of a supporting nature” (cf. L. Heyrovský, *Dějiny a systém soukromého práva římského* [History and System of Private Roman Law], VI. edition, Bratislava 1927, pp. 9-10), the Constitutional Court, first looked from the perspective of these disciplines at the circumstances in which the right to protection of health and provision of health care were formulated, under which it is, was, or was not introduced in the constitutional order in the developed European States, and finally how it was in reality applied in the practice of the Czech lands, and how the organization of health care developed. These are substantial grounds which give rise to what the unique features of social rights will be, as summarized in the judgment.

96. In terms of legal history, the Constitutional Court considered the question of the development and relationship between patient and doctor, the formation of the institution of social rights, and both its constitutionally guaranteed and factual fulfillment. In the times of the oldest legal documents, a doctor’s assistance, without any guarantee on the care provided, was paid by the patient. This is testified to by, e.g., in the modern renumbering, § 215 of the code of the ancient Babylonian ruler Hammurabi from the 18th century B.C., under which “if a doctor performed a difficult operation using a bronze knife on a full citizen and heals the full citizen, or, with a bronze knife, opens the orbital arch of a full citizen and heals the eye of a full citizen, he shall take ten shekels of silver,” or § 216, which provides that a doctor’s compensation in the case of a member of the full citizen class shall be five shekels of silver. The Code of Hammurabi also contains other casuistic provisions of the “doctor’s tariff” and regulates a doctor’s criminal liability for a flawed medical procedure (cf. J. Klíma, *Nejstarší zákony lidstva. Chamurapi a jeho předchůdci* [The Oldest Laws of Humanity. Hammurabi and his Predecessors], Academia, Praha 1979, p. 139). Similarly, for the Czech lands, there are sources, beginning with the Middle Ages, testifying to the fact that medical care and medications were also paid by a patient without any guarantee of protection of health. This situation continued to the end of the first half of the 20th century (further, see, e.g., P. Svobodný, L. Hlaváčková, *Dějiny lékařství v českých zemích* [History of Medicine in the Czech Lands], Triton Praha 2004, pp. 31, 46, 50).

97. Social rights, or rights connected with the provision of medical care, were not introduced in European constitutions until the 20th century. It first happened in the so-called Stalinist Constitution of the Unions of Soviet Socialist Republics, adopted by the 8th Extraordinary Congress of Soviets of the USSR on 5 December 1936, or in Chapter X, Art. 120. Under that article, “Citizens of the USSR have the

right to material security in old age, as well as in case of illness and invalidity. This right is secured by the extensive development of social insurance of workers and employees on the state account, payment free doctor's help for workers, and an extensive network of spas that are available for use by the working people." (Cf. the translation in K. Malý, *Prameny ke studiu dějin státu a práva socialistických zemí I. SSSR 1917-1945* [Sources for the Study of the History of the State and Law in Socialist Countries I. USSR 1917-1945], Praha 1987, p. 128) The cited Stalinist Constitution from 1936 also enshrined the principle that "In the USSR, work is the obligation and honor of every citizen capable of work, on the principle: 'He who doesn't work, let him not eat!'" Legal history judges the provisions of the Constitution on Social Rights from 1936 to the effect that "it was an expression of the endless insolence of communist propaganda, which successfully confused the world's democratic and, especially, anti-fascist public (including through this constitution, promoted as a true picture of the Soviet environment). None of these provisions had an appropriate real effect; everything was cruelly inconsistent, not only with the reality of practice, but mostly also with the relevant statutory or sub-statutory regulations" (cf. D. Pelikán, *Dějiny ruského práva* [History of Russian Law], C.K. Beck [sic, should be C.H.] , Praha 2000, p. 77). In the Czech lands the right to protection of health was first enshrined in § 29 par. 13 of the Constitution of the Czechoslovak Republic no. 150/1948 Coll. (the "1948 Constitution"). The cited § 29 of the 1948 Constitution read: (1) Everyone has a right to protection of health. All citizens have a right to medical care and for security in old age as well as during incapacity to work and inability to support themselves. (3) These rights are ensured by laws on national insurance, as well as by public health and social care. The adoption of this provision was preceded by formulation of the principles of health care policy in the Košice government program and the program of the government created in the 1946 elections. "The health care policy of the most influential party (the Communist Party) was in large part based on projects developed during the war by communist doctors. It vehemently promoted Soviet models, although in a form modified in the spirit of central European traditions of social medicine (cf. Svobodný, Hlaváčková, *Dějiny lékařství v českých zemích* [History of Medicine in the Czech Lands], p. 219). Finally, from the regulations preceding the current legal framework we must mention Art. 23 of the Constitution no. 100/1960 Coll., under which: (1) All workers have the right to protection of health and to medical care, as well as the right to material security in old age and during incapacity to work . (2) These rights are ensured by the care taken by the state and social organizations to prevent illness, the entire organization of health care, the network of medical and social facilities, the continually expanding payment-free medical care, as well as organize care for safety at work, sickness insurance, and retirement security." However, in the year when Act no. 20/1966 Coll., on Care for the Health of the People, was adopted "the proclamation that "the right to health care is one of the fundamental civil rights" expressed, more than the real situation, only the wishes "of the party and the government." In further balancing in 1970 the leading figures in our health care recognized a number of problems that, according to them, arose from long-term neglect of investment, the "inheritance" from the capitalist economy, surviving features in the relationship between doctor and patient. It is characteristic that most of the problems in the new health care system were seen in the sphere of economics, not politics (cf. Svobodný, Hlaváčková, *Dějiny lékařství v českých zemích* [History of Medicine in the Czech Lands], p. 221). Expert medical literature considers the

situation in health care in the 1980s to have been critical, with reference to the fact that this was known by official representatives and critics outside and inside the regime, including the speakers of Charter 77, in documents on health care from the years 1983-1985.

98. The Constitutional Court also considered the petitioners' argument, presented at the hearing on 1 April 2008, that the framers of the Constitution, before adopting the Charter, weighed whether to expressly include "payment-free" in Art. 31 of the Charter or not. According to the petitioners, because the "payment-free" alternative was chosen, Art. 31 cannot be interpreted against its meaning, in the spirit of the alternative that was, in the end, not chosen by the framers of the Constitution.. The Constitutional Court notes that, especially in the area of social rights, under certain conditions a conflict could arise between the will of the framers of the Constitution and the political reality of the time. "If, in certain countries, a constitution does not correspond to political reality, it is not because one or another institution or one or another form are not viable, but because the spirit of that constitution is (temporarily) foreign to the political conditions of a given country." (B. Mirkine-Guetzevitch, *Les Constitutions de l'Europe nouvelle*, II. édition [The Constitutions of Modern Europe, 2nd edition], Paris 1930, p. 53).

99. The Constitutional Court cannot fully agree with the petitioners' claim that a number of constitutions from European states enshrine the right to ...health care in various degrees. A comparative study shows that this right tends to be constitutionally guaranteed in various degrees in the constitutions of states that joined the European Union in 2004. The right is not guaranteed, e.g., in the Netherlands or Sweden; in other countries, e.g., France or Belgium, only a right to a doctor's assistance is guaranteed, but not a right to payment-free doctor's assistance. In this regard, mention is often made of the Italian Constitution of 1947, which, in Art. 32 "guarantees free medical treatment to the poor" (cf. the translation in: V. Klokočka, E. Wagnerová, *Ústavy států Evropské unie* [The Constitutions of European Union States], LINDE Praha 1997, p. 191). From a comparative standpoint, the closest example to this matter is undoubtedly the Slovak one, which, of course, the petitioners themselves point to, though with the emphasis on the dissenting opinions of Judges Ludmila Gajdošíková and Eduard Bárány. In the cited judgment, file no. Pl. ÚS 38/03 of 17 May 2004, no. 396/2004 Coll. with an analogous version of Art. 40 of the Slovak Constitution and Art. 31 of the Czech Charter, the Constitutional Court of the Slovak Republic ruled on an analogous petition concerning "requiring payment for a certain part of the provision of health care provided on the basis of health insurance, such as services and activities which are closely related to health care provided on the basis of health insurance, but are not an immediate component of it." The Constitutional Court notes that in the comparative law part the cited judgment of the Constitutional Court of the Slovak Republic also considered the arguments in the judgment of the Constitutional Court of the Czech Republic no. Pl. ÚS 14/02. The Constitutional Court of the Slovak Republic finally, in the statement of law of its judgment Pl. ÚS no. 14/94 (promulgated as no. 396/2004 Coll.) stated the assumption that "payment free care under Art. 40 of the Constitution has its "scope," i.e. that not everything is provided payment-free."

100. For legal philosophy considerations, the Constitutional Court turned primarily to the field of medical ethics. Here it first states that the Hippocratic oath addresses the ethical aspects of the exercise of the medical profession, and the oath does not contain an obligation to provide medical care payment-free. The Constitutional Court is aware of the difference between ideal medicine, i.e. medical procedures in accordance with the newest developments in science and technology and available medicine, i.e., the situation in practical medicine. The specialized literature states that in centuries of science and technology the distance between ideal and available medicine has increased. It concludes “we cannot assume that the mathematics of mercy could permanently solve the conflict between ideal and available medicine. This is because the initial weighing exchanged economic problems for ethical ones .... The state’s economy is a limiting factor on available medicine, not the only one, but unquestionably a significant one. A wealthy state simply has the resources to reduce the conflict between ideal and available medicine to the lowest possible level .... The problem of ideal and available medicine really does not affect ‘only’ patients on dialysis, but in various forms and levels of urgency affects absolutely everyone .... The society-wide permeation of this issue and the required level of information are prerequisites for the purposeful and effective engagement of healthy citizens to the benefit of the needy” (cf. H. Haškovcová, *Lékařská etika [Medical Ethics]*, Galén Praha 1994, pp. 81-89).

101. The Swiss essayist Jürgen Thorwald wrote on this topic that “doctors must give politicians the correct numbers” (see J. Thorwald, *Pacienti [Patients]*, Osveta, Bratislava 1975). “The fundamental contradiction of health care in the Czech Republic today is the ability to provide a patient care at an international standard, but strongly limited by financial possibilities” (see Svobodný, Hlaváčková, *Dějiny lékařství v českých zemích [The History of Medicine in the Czech Lands]*, p. 222). The report “Economic Survey of the Czech Republic 2008” published by the Organization for Economic Cooperation and Development (OECD) states that “in the first phase of reform, small regulatory fees were introduced, a step that the OECD recommended in its previous evaluation, and which should help limit the need for health care” (see Policy Brief, OECD, April 2008).

102. For the foregoing reason, the Constitutional Court concluded that the reasonableness test in the case of social law is methodically different from a test that evaluates proportionality with fundamental rights, “because social-economic aspects play a much greater role here.” The rationality test, especially in a situation where the Constitutional Court concluded that a judgment [sic - petition?] could be denied for reasons of maintaining restraint, has a more orientational and supportive role here.

103. In combination with the requirements arising from Art. 4 par. 4 of the Charter we can describe 4 steps leading to a conclusion that a statute implementing constitutionally guaranteed social rights is or is not constitutional: 1) defining the significance and essence of the social right, that is a certain essential content. In the presently adjudicated matter, this core of a social right arises from Art. 31 of the Charter in the context of Art. 4 par. 4 of the Charter. 2) evaluating whether the statute does not affect the very existence of the social right or its actual implementation (essential content). If it does not affect the

essential content of the social right, then

3) evaluating whether the statutory framework pursues a legitimate aim; i.e. whether it does not arbitrarily fundamentally lower the overall standard of fundamental rights, and, finally

4) weighing the question of whether the statutory means used to achieve it is reasonable (rational), even if not necessarily the best, most suitable, most effective, or wisest.

104. Only if it is determined in step 2) that the content of the statute interferes in the essential content of a fundamental right should the proportionality test be applied; it would evaluate whether the interference in the essential content of the right is based on the absolutely exceptional current situation, which would justify such interference.

105. Thus, it follows from the nature of social rights that the legislature cannot deny their existence and implementation, although it otherwise has wide scope for discretion.

106. The essential content (core) of Art. 31, second sentence of the Charter is the constitutional establishment of an obligatory system of public health insurance, which collects and cumulates funds from individual subjects (payers) in order to reallocate them based on the solidarity principle and permit them to be drawn by the needy, the ill, and the chronically ill. The constitutional guarantee based on which payment-free health care is provided applies solely to the sum of thus collected funds.

107. As indicated by the evidence presented, the fees introduced by the Act regulate access to health care that is paid from public insurance, whereby they limit excessive use of it; the consequence is to increase the probability that health care will reach those who are really ill. Thus, through the fees, the legitimate aim of the legislature is met, without the means used appearing unreasonable.

108. Therefore, the contested legal framework did not deny the essential content of the constitutionally guaranteed fundamental right, as it was described above, and the statutory framework did not deviate from pursuing a legitimate aim, and is not obviously unreasonable. Therefore, we can conclude that the contested legal framework did not exceed the given criteria.

109. The Constitutional Court, applying the rationality test, evaluated the relationship between Art. 31, which includes the right to protection of health and payment-free health care, with the aims and purposes that the legislature held up for itself by adopting the contested legal framework. In evaluating the suitability of the chosen institutions “one must conclude that the state has an obligation to provide citizens sufficient protection from factors that endanger their health and public health care“ (see K. Klíma and collective of authors, *Komentář k Ústavě a Listině* [Commentary on the Constitution and the Charter], March 2005, p. 861). “The state’s obligation to protect health and everyone’s right to protection of health also corresponds to everyone’s obligation to respect measures adopted to protect health” (see V. Pavlíček and collective of authors., *Ústava a ústavní řád České republiky II. Práva a povinnosti*, [The Constitution and Constitutional Order

of the Czech Republic II. Rights and Obligations] 2nd ed., Praha 1999, p. 251). The rationality test evaluates whether the contested legal framework does not bring disproportionate, even if - as will be explained below - constitutional interference in the relationships between the patient, the health care facility, and the health insurance company, to which these parties became accustomed in the period before the present legal framework went into effect.

110. The Constitutional Court considers it determined that the purpose of the legislature's original intentions concerning regulation was an emphasis on such organization of the health care system as would ensure higher quality actual implementation of Art. 31, first sentence of the Charter, that is, the provision of health care at an adequate place and time and of better quality. This aim is also to be achieved by the contested legal framework leading citizens to behave with greater solidarity with others, that is, with those who need greater health care. The Constitutional Court points out that it said, in judgment Pl. ÚS 2/08, that "the degree in which the principle of responsibility and solidarity manifests itself in the legal order of a particular state is also determined by the nature of that state (e.g., as a social state). The degree to which the solidarity principle is recognized depends on the level of ethical understanding of cohabitation in society, its cultural level, but also the individual's sense of justice and belonging with others, and sharing their fate at a particular time and place. From the individual's viewpoint, solidarity can be seen as internal or external. Internal solidarity is given by the emotional closeness of the relationship to others; it is spontaneous, and appears primarily in the family and other partnerships. As a rule the state does not interfere in this relationship, or in only a very limited manner (see family legal relationships governed by the Act on the Family). External solidarity lacks this emotional closeness, and therefore the individual's consent to apply it is more reluctant. This is, for example, solidarity between rich and poor, between capable and less capable, between healthy and ill. In this area the state exercises its sovereign power role very actively. The solidarity principle is used for reallocation, i.e. the transfer of resources from some to others - the needy."

111. As part of the reasonableness test, the Constitutional Court weighted whether the principle expressed in Art. 4 of the Declaration of the Rights of Man and of the Citizen in 1789, that "liberty consists in the power to do anything that does not injure others," applies to the area of social rights, and concluded that formalistic insistence on payment-free medicine for individuals using an expansive concept could actually lead to lowering the level of payment-free medical care paid out of public insurance, in the real sense of the word, for all members of society. At the time of this decision, the Constitutional Court does not consider it proven that introducing regulatory fees would clearly make it impossible to reach the aim pursued; moreover, witness testimony indicates the contrary. Minister of Health Tomáš Julínek thus stated, e.g., that "unused medications worth four billion are being returned to pharmacies" and that, after the contested Act went into effect, "the number of prescriptions in the Czech Republic declined by forty percent ... including the regulatory fees, both in outpatient care and in the provision of medicines, CZK 1.75 billion was saved in the first quarter." An a priori condemnation that presumed, without a certain amount of respect for the work of experts who prepared the reform plan, that achieving the aim pursued is impossible, would be - as discussed further below - to deny the possibility of any

empirical arguments pro futuro.

112. It will be the obligation of the legislature, after analyzing the effect of regulatory fees, to evaluate for every individual fee whether it does not affect the existence or exercise of a right arising from Art. 31 of the Charter, whether it pursues a legitimate aim, and whether a particular fee is a reasonable means to achieving that aim, also together with evaluating the effects on the ability [to pay] of various groups of payers of regulatory fees in connection with rights to financial or other material profits established by statutes from other areas of law than statutes implementing Art. 31 of the Charter. The legislature must then make decisions based on this evaluation, including possibly derogatory (or amending) ones. However, the existing review of a statutory regulation permits the Court to base its reasoning only on abstract constitutional law arguments, not on the actual effects of a statute, which it is not possible to determine individually in proceedings before the Constitutional Court.

113. It is not appropriate for the Constitutional Court to draw derogatory consequences already at this point and in a blanket manner (i.e. in relation to all regulatory fees), because this analysis does not (yet) exist. It would be equally inappropriate for the Constitutional Court to now conduct this analysis itself, as part of the presentation of evidence in a proceeding on abstract review of a norm. In consequence, the Constitutional Court would thereby pro futuro (despite the principle of restraint) concede that it would, in every individual case of a petition filed shortly after a particular statute went into effect, analyze what effects it has (or its individual provisions have), from various imaginable points of view. However, the Constitutional Court would thereby get into a dangerous trap, not only because it would have to rely on the executive (or legislative) branch when obtaining documentation for such an analysis, but primarily because it would thereby (when implementing the analyses immediately after a new legal regulation of anything is adopted) clearly step into the political ring, and, would become a mere reviewer or analyzer of the effects of legal regulations. Thus, it is the primary obligation of the legislature to adapt a reform legal situation (even if transitional) to factual findings that will be made in the process of applying statutory provisions. All the more so, if specific impermissible effects of reform of public finances were found to exist for certain groups of residents definable by common elements, not just for random individuals.

114. It is evident from the foregoing that abstract review of a statute cannot theoretically review and reliably rule out all its imaginable effects in the personal sphere of the addressees of norms. However, such possible individual interference can, of course, still be corrected using standard procedures, including a constitutional complaint.

115. If - on the basis of analysis of a legal framework conducted by the legislature or presented to it by the executive branch for evaluation - it became evident that that framework - even if only component parts thereof - deviated from the criteria raised above, the Constitutional Court would not hesitate to intervene if the legislature did not act; its intervention would then be true protection of constitutionality, and not the disclosure of a political position.

116. The Constitutional Court also weighed whether the statutory means used to achieve a legitimate aim are reasonable. As the Constitutional Court already stated in its judgment file no. Pl. ÚS 2/08, “with social rights we can say that their common limitation is precisely the fact that they are not, unlike the fundamental rights and freedoms, directly enforceable based on the Charter. Their limitation lies precisely in the need for statutory implementation, which, of course, is also a condition for concrete implementation of individual rights.” Under Art. 31, second sentence, the Charter gives the right to payment-free health care and health care aids on the basis of public insurance, under conditions specified by statute. We can conclude from linguistic analysis of Art. 31 par. 2 of the Charter that its conditions would be fulfilled by, e.g., a statute that would increase every citizen’s payments of health insurance premiums by, e.g., an amount of CZK 416.66 per month, with the simultaneous establishment of a bonus ranging from CZK 30 to CZK 5,000 per month, graduated according to whether and how often an insured person visited a doctor, was hospitalized, or presented a prescription to a pharmacist. In evaluating the implemented model, the Constitutional Court weighted and compared primarily whether the resulting effect for the expenses of the theoretical budget of a citizen of the Czech Republic, who is protected by Art. 31, second sentence, is different in the case of the contested legal framework and the hypothetical model described above, and concluded that there would be no difference in economic consequences.

117. According to the contested Act, a “regulatory fee” is the income of a health care facility. However, this provision cannot be interpreted out of the context formed by the synallagmatically connected system of rights and obligations of the three participating subjects, i.e. the patient, the health care facility, and the health insurance company. Hypothetically we can certainly imagine the alternative that the “regulatory fee” in the same amount would be conceived as part of the insurance premium for health insurance, and the place of payment would be the health insurance company, which would subsequently, contractually or by law, increase the payment to the relevant health care facility by the amount of this insurance premium, which, incidentally, would not even have to be collected as a collection debt. This model, which would not conflict with linguistic interpretation of Art. 31 of the Charter, would, however, have the same consequences for the patient as the existing model, which is based on the principle that the payment is made directly to the final recipient. As the regulatory fee is part of the financing of the health care system, it will thus also be reflected in the relationship between the health care facility and the health insurance company, i.e. it will affect not only the management of the health care facility, but also of the health insurance company.

118. Finally, the Constitutional Court evaluated the relationship between the aim of the reform and the social right, with emphasis also on whether, if the contested legal regulation gives priority to the interest in protecting health under Art. 31, first sentence, of the Charter, possible interference in the social right and the purpose of Art. 31, second sentence, of the Charter is minimized. The Constitutional Court did not find that regulatory fees have a generally “strangling effect” and realistically make health care or health care aids inaccessible for anybody. In concrete individual cases one can proceed under § 16a par. 2 let. d) of the Act on Public Health Insurance, under which the regulatory fee is not paid by



an insured person who presents a decision, notice, or confirmation, no more than 30 days old, issued by a body providing assistance in material need, about the benefit payment that is provided to him under a special regulation. We also cannot overlook the limit of CZK 5,000 specified by § 16a par. 1 of the Act on Public Health Insurance. In the context of relationships based on internal solidarity, we cannot neglect to mention the institutions of the mutual support obligation between parents and children, the support obligation between other relatives, the support obligation between spouses, alimony for a divorced spouse, a contribution for the support and payment of certain expenses for an unmarried mother under Part Three of Act no. 94/1963 Coll., on the Family, as amended (the “Act on the Family”). Nor can we overlook the provision of the Act on the Family on parental responsibility, or, e.g., the obligations of a child living in a common household with its parents under § 31 par. 3 and 4 of the Act on the Family.

119. Here the Constitutional Court - although it is deciding on the petition to annul the contested Act for procedural reasons, i.e. after separating out two parts of the petition to be treated separately, in three scheduled proceedings - is aware, as already state above, of the existence of the mutual ties and interconnectedness of individual provisions of the contested Act, or the legal regulations and norms amended or supplemented by the Act or newly adopted (see Art. 88 of this judgment). The Constitutional Court also specifically took this interconnectedness into account in, e.g. judgment file no. Pl.ÚS 2/08, where, when deciding on the annulment of providing sickness insurance benefits for the first three days of incapacity to work by the contested statute, it stated that, in contrast to this annulment, “of course, the obligation to pay so-called regulatory fees remained unaffected.” The proceeding did not rule out the possibility that stabilization of the public budgets, besides potentially adding to the expense side of the theoretical budget of a citizen of the Czech Republic, on the contrary, in various alternatives, would increase the income side, e.g., in the form of reducing taxes, increasing pensions, changing the level or conditions for allocation of social benefit payments, in a number of cases also by the limit of CZK 5,000, etc. Thus, we can summarize that, generally, from the point of view of Art. 31 and Art. 4 par. 4 of the Charter, the regulatory fees provided by the Act are within the limit that preserves the essence and significance approach to dignified health care paid from public health insurance, and these payments do not create a barrier that limits this access (they do not have a “strangling effect”), also in context with benefits provided from the social security system.

120. We must point out, that the basis for possible interference by the Constitutional Court into such a complex issue cannot be a formal conclusion without regard to the material and factual side of the matter. That material aspect is the criterion of the intensity of the effects that the evaluated legal regulation can have on the exercise of the right to payment-free health care on the basis of public health insurance. Thus, evaluation of the principal permissibility of the institution of regulatory fees takes place at the level of evaluating the factual nature of the obligations that the evaluated regulation imposes on individuals. In this regard the most important deliberation is whether the obligation imposed, in this case financial payment, is, in its intensity, i.e. its amount, independently, or in the aggregate, a consequence for the right of the individual that goes against the meaning of the guarantees provided by the Charter. Such a fact was not

determined from the presentation of evidence before the Constitutional Court.

121. The Constitutional Court thus concluded that the contested legal framework of regulatory fees will stand up to the test of rationality, or in terms of conditions provided by law. In this regard, and now especially in relation to reform of the health care system, or the area of social rights, the Constitutional Court - although it is addressing this issue, thus defined, for the first time - points out, among other things pro futuro, that within the intentions of judgment file no. /l. ÚS 11/02 (promulgated as no. 198/2003 Coll.) a reason for which “the Constitutional Court can reverse its own case law is a change in the social and economic situation in the country, or a change in its structure, or a change in the society’s cultural expectations. Another possibility is a change or shift in the legal environment created by sub-constitutional legal norms that, in the aggregate, influence the approach to constitutional principles, without, of course, exceeding them, and, above all, do not limit the principle of democratic statehood (Art. 1 par. 1 of the Constitution of the CR). Another possibility for changing the case law of the Constitutional Court is an amendment or supplement to those legal norms and principles that form binding points of reference for the Constitutional Court, i.e. those that are contained in the constitutional order of the Czech Republic, except, of course, in the case of amendments that violate the limits provided by Art. 9 par. 2 of the Constitution, i.e. changes to the essential requirements of a democratic, law-based state.” For the adjudicated matter that means that the Constitutional Court does not approach evaluation of questions related to social rights in a static manner, but with exceptional emphasis on what the situation is at the time of its decision.

122. In connection with the abovementioned wider context, the Constitutional Court began with the fact that Art. 31, par. 2 of the Charter guarantees citizens, on the basis of public insurance, the right to payment-free health care, and to health care aids, under conditions provided by statute, and, under Art. 4 par. 4 of the Charter, was aware that - as already indicated above - that the statutory conditions cannot go so far as to affect the very essence and significance of the right to payment-free health care.

123. Therefore, the Constitutional Court considered the purpose of introducing regulatory fees and the use of the income from collected regulatory fees, keeping in mind the question of whether introducing regulatory fees could have been a fundamental step that would transform payment-free health care under Art. 31 of the Charter into paid health care.

124. First of all, we must emphasize that the purpose of introducing the regulatory fees was regulation of patient behavior in relation to health care facilities and obtaining medications in pharmacies, as well as the behavior of patients vis-à-vis each other. As already state, the aim of this regulation is to allow quality health care and medicines to be provided to those who really need it, and at the same time to strengthen solidarity among patients, or potential patients. A regulatory element can have different forms and effects in practice. Certainly there is a marked attempt, in the context of the Act on Stabilization of Public Budgets to optimize the drawing of public funds, and thereby, through regulation, to limit overuse of medical care or waste and inefficiency in obtaining medicines. However,

the subjective aspect of regulation is also a substantial factor. Besides the fact that it should lead to the cited change in behavior in relation to use of health care services and supplies, it reflects the fact that, although there is a right to payment-free health care, a health care facility is paid for health care, similarly as a pharmacist for medicine, by a third party - the health insurance company. The solidarity principle is reflected in a bilateral relationship, both as regards the person who shows solidarity with another, and as regards the person with whom solidarity is shown. On one side is someone who should not request unlimited health care that he does not need in the extent requested, and on the other side someone who should realize that the provision of health care precisely to him, funds from public health insurance are reallocated so that he draws more from them than someone to whom health care was not provided.

125. As regards the second question, i.e. whether payment-free health care was transformed into paid health care, the Constitutional Court primarily points out that it interpreted the terms “health care” and “payment-free health care” in the past. In its judgment of 4 June 2003 file no. Pl. ÚS 14/02, it said that “the prohibition of direct payment thus primarily concerns the actual performance of payment-free health care.” In the matter under file no. Pl. ÚS 14/02 the Constitutional Court denied a petition from a group of deputies of the Chamber of Deputies of the Parliament of the Czech Republic seeking annulment of part of the second sentence in § 11 par. 1 let. d) of Act no. 48/1997 Coll., on Public Health Insurance, in the version then in effect, the words “or in connection with provision of that care.” It also concluded that “nothing prevents direct payment from the insured parties being collected for health care provided beyond the framework of conditions for payment-free health care.” The dissenting opinion of Judges Vojtěch Cepl, Vladimír Čermák, Vojen Güttler, Pavel Holländer, Jiří Malenovský, Jiří Mucha, and Antonín Procházka indicates that, according to the dissenting judges, “Art. 31 authorizes the law to determine the conditions for provision of payment-free “health” care, not of care that is not health care but is part of meeting a person’s essential needs independently of protecting health. In this regard the Act exceeded the framework of the constitutional order because it make it impossible to collect direct payments from insured persons for care that is not health care, and which, by itself, does not serve to protect the health of the insured person. It thus creates non-objective and unreasonable differences between insured persons to whom such payment-free health care is provided, and those insured persons to whom it is not provided, although both categories are forced to satisfy the corresponding needs independently of health care that may be simultaneously provided.”

126. The Constitutional Court already considered “payment-free” status in the past in connection with interpretation of Art. 33 of the Charter. In its judgment of 13 June 1995 file no. Pl. ÚS 25/94 (promulgated as no. 165/1995 Coll.) it stated that “payment-free education undoubtedly means that the state bears the expense of establishing schools and school facilities, but it does not require so-called tuition for their maintenance, i.e. provision of education at the elementary and secondary level for payment ... According to the interpretation of the concepts of the right to payment-free education that the petitioners submitted, the state should ensure payment free provision of everything that is directly connected to attendance at elementary and secondary schools, i.e., e.g., provision of indoor shoes, a satchel, pencil case, writing supplies, gym uniform, etc. It is obvious that payment-free

education cannot mean that the state will bear all expenses that citizens incur in connection with exercising the right to education. Thus, the state can require payment of some expenses in connection with exercising the right to education, and the government is undoubtedly entitled to such steps. This does not, under any circumstances, cast doubt on the principles of payment-free education at elementary and secondary schools” (cf. Collection of Decisions of the Constitutional Court of the CR, vol. 3, 1995, no. 31, p. 238). In this judgment the Constitutional Court distinguished between payment-free education and related activities that also require expenditures but are not directly a teaching or educational process. Analogously, the Constitutional Court now adds that health care and financing of it is only an important subset of the financing of the health care system, and that without a functioning health care system it would certainly not be possible to provide quality health care.

127. The Constitutional Court is aware of the multi-functionality of a regulatory fee, because, in addition to the regulatory element, there is a utilitarian viewpoint, consisting of the fact that regulatory fees help a health care facility, in addition to providing payment-free health care, to function better, provide related services, or improve personnel aspects and the level of the environment in which health care is provided, and so on. In view of the multi-functionality of a regulatory fee, we cannot always with certainty clearly answer the question how the regulatory fee collected from a particular patient was applied, because the combined funds from regulatory fees paid may be used differently, case by case, for the cited purposes, or possibly other alternatives. From the evidence presented, the Constitutional Court does not find it proven that by paying a regulatory fee a patient would pay health care or health care aids directly and exclusively.

128. From this viewpoint, the Constitutional Court first addressed the regulatory fee provided in § 16a par. 1 let. f) of the Act on Public Health Insurance. It also took into account that the petitioners themselves acknowledge that requiring payment for “hotel services,” i.e. setting fees for accommodation and food in a hospital, need not exceed the bounds of constitutionality.” In the case of performance under § 16a par. 1 let. f) of the Act on Public Health Insurance it is quite obvious that this cannot concern payment-free health care or health care aids under Art. 31 of the Charter, but other, concurrently provided, related services. Here we can fully accept the abovementioned arguments of the dissenting judges, also because the majority opinion, in discussing the petition conducted under Pl. ÚS 14/02 did not accept it as part of the reasoning of the judgment because it considered it to “deviate from the task that the Constitutional Court faces in connection with the petition from the group of deputies.” In the opposite case - taken ad absurdum - Art. 31 of the Charter would also establish an entitlement for payment-free accommodation or hospitality services outside medical facilities, regardless of whether they were provided in connection with health care. In this part, on the assumption that § 16 par. 1 let. f) of the Act on Public Health Insurance is not also contested on other grounds (conformity of the legislative process) this would be an obviously unjustified petition.

129. Within the abovementioned outline, the Constitutional Court considered the constitutionality of introducing regulatory fees in other cases specified in § 16a of

the Act on Public Health Insurance. As documented by the example of fees under § 16a par. 1 let. f) of the Act on Public Health Insurance, the essential point is not the name of the payment, but primarily its purpose. The Constitutional Court took into consideration that on one hand - as regards the term “fee” - there are various definitions of fees, and it is recognized that “the concept of fees in the financial expert sense does not always match the concept of fees in the financial legal sense” (see K. Čákr, *Poplatky [Fees]*, in: *Slovník veřejného práva československého*, III.[Dictionary of Czechoslovak Public Law], Brno 1934, p. 204); on the other hand the term “fee” was and is used to identify payments which are not, by nature, public law payments. Thus telephone “fee,” e.g. under § 1 of government directive no. 16/1925 Coll., on payments from telephone fees “is understood to mean call charges, both call charges for calls placed from public telephones and call charges for long distance calls”; in the present legal framework the phrase “late fee” (§ 517 par. 2 of the Civil Code) has become quite standard, yet it is quite clearly a private law institution. Thus, it is evident that the term “regulatory fees” is not precise in terms of legal terminology meaning, but it corresponds to a certain shift in meaning of the term “fee” to the term “payment.” The Constitutional Court also considered the question of whether a “regulatory fee” is not a “price.” The term “price” is also defined differently in economic theory and legal terminology. The Constitutional Court concluded first of all that a “regulatory fee” is not a price under Act no. 526/1990 Coll., on Prices, as amended, because it is not negotiated during the purchase and sale of goods, nor is it determined according to a special regulation for purposes other than sale (§2 of the Act on Prices) and the Act cannot be applied to it, because under § 4 of the Act, it does not apply to compensation, reimbursement, fees, compensation of damages and expenses and interest governed by special regulations. Generally, it is typical that a price is an equivalent for a thing, product, performance, work, or service. A “regulatory fee” is at first glance not an equivalent, and cannot be payment for health care provided, because then the amount of it could not be the same for treatment of a fever by a general practitioner or a complicated health care service by a specialist. All cases of regulatory fees mean a payment from a patient to a health care facility *sui generis* under the principle *do ut facias*. In this regard the Constitutional Court took into consideration a certain parallel between medicine and other free or artistic professions, and concluded that a doctor or a health care facility also performs related activities which it could not do without and without which it would not be able to provide medical care at all. Health care facilities conduct activities such as, e.g., administrative work, legal assistance, liability insurance, transportation, cleaning, etc. to ensure their operation and preparedness to provide health care. We cannot overlook the fact that e.g., remuneration for lawyers is traditionally based on distinguishing the remuneration for the legal assistance provided, reimbursement of cash expenses, and an administrative flat fee. The Constitutional Court found no reason why this model could not also be constitutionally usable in the case of doctors or medical facilities. The fact that payment is made as performance *do ut facias* also expresses the share in the contribution to health care facilities for related activities, according to who uses their services most. The Constitutional Court found nothing unjust in this principle, and adds that the principle of equivalence and is expressed in the contested legal framework in the setting of a limit for payments under § 166 par. 1 of the Act on Public Health Insurance. The Constitutional Court adds that Art. 31 of the Charter assumes that health care and health care aids will be paid precisely out

of public health insurance, but it does not create an obligation for public health insurance to pay everything that is not health care or a health care aid. The consequences of this constitutional interpretation of Art. 31 of the Charter and its full reflection in Art. 31 of the Charter by the anticipated statute would lead to using funds from public health insurance in the event, and only in the event, of health care and health care aids really guaranteed by the Charter. The Constitutional Court does not find the fact that payment under the principle *do ut facias* is described inappropriately in legal terminology to be grounds for the contested provisions to be unconstitutional. In the Constitutional Court's opinion, in terms of the recognizability and understandability of a statute it is not important what a particular institution is called, but whether it can be understood from the statute what rights and obligations the parties to the legal relationships governed by the statute have, or how the possibility to become familiar with the statute in the sense of the maxim *scire leges hoc non est verba earum tenere sed vim ac potestatem* is met.

130. The Constitutional Court analogously considered the issue of a "regulatory fee" and "supplemental payment for medicines." In this case too the Constitutional Court examined the essence and purpose of these payments. In the first place it took into consideration that "payment for a prescription" had a tradition in the Czech lands, even at a time when payment-free medical care was guaranteed by the Constitution. This payment arises from the principle *do ut des* and also cannot be evaluated without weighing the synallagmatic interconnection of the rights and obligations of the patient, the pharmacy facility, and the health insurance company. With this payment, the place of payment is a pharmacy, but in the system of financing the purpose of paying a regulatory fee is largely reflected in lowering the supplemental payment for medicines. The price decision of the Ministry of Health of 20 December 2007, which sets the conditions for price regulation of medical preparations and foods for special medical purposes, the methods of price regulation for medical preparations and foods for special medical purposes, details for price regulation of medical preparations and foods for special medical purposes by a maximum price, the rules for price regulation of medical preparations and foods for special medical purposes, the requirements for proposals to set a maximum price of medical preparations and foods for special medical purposes, amending or annulling it, and rules for setting the maximum price for services by a shop with medical preparations and foods for special medical purposes (the "price decision"); in Part V. par. 5 it provides that the price of a preparation regulated by a maximum price (with specified exceptions) must be additionally reduced by an amount calculated according to the formula : "regulatory fee for issuance of a medical preparation \* (0.25\*(ARCTG(MP/50-2,5)+1.6)) where MP = manufacturer's price (or importer's price) less VAT." Thus, it is evident from that process, and from the deepening depression of the percent of the maximum commercial mark-up, as indicated in Part V. par. 3 of the price decision, that the introduction of regulatory fees found its intended effect in the overall mechanism of setting the resulting price of a medical preparation, where the pharmacy facility, although it is the place of payment, keeps basically only a minimal amount out of the regulatory fee collected. The witness, Minister of Health Julínek, in his answer to a question about the amount of the regulatory fee that the pharmacies keep as profit, answered that there is "none," precisely with regard to the reduction of price of a medical preparation and "administration of

the fee.” With this type of regulatory fee as well, a very important factor is the regulatory function, thus meeting the legitimate aim cited above. As indicated by the evidence presented, the purpose of the regulatory fee is to guide patients to a responsible approach to obtaining medicines, so that a patient will obtain on a doctor’s prescription only the medicines that he needs and uses, not in order to - which, as generally known, has previously happened - have an opportunity to obtain supplies of them or to pick them up in a pharmacy only to give the doctor who prescribed them the impression that he was undergoing treatment, but did not use the medicines or return them to the pharmacy. The expected effect of more economical handling of medicines can already be seen in the period since the contested legal regulation went into effect. The ceiling of CZK 5,000 is, with medicines as well, an important element that supports solidarity with patients who, before the contested legal regulation went into effect, paid higher amounts in supplemental payments. The Constitutional Court considered it proven by the testimony of the Minister of Health that the effects of this form of solidarity have already been seen in practice, in specific cases of the serious ill, since the contested legal regulation went into effect. The Constitutional Court did not find the existence of a supplemental payment for medicines or the universal application to be fundamentally unconstitutional, again in a situation where a “strangling effect” did not arise.

131. The Constitutional Court found that imposing penalties on a health care facility for failure to collect fees and the authority of a health insurance company to impose this penalty were constitutional. As already stated, health care is provided within the health care system, without which it could not be provided at good quality, or perhaps at all. A health care facility does not have a right under Art. 31 of the Charter, that is held by the citizen, or the patient. A health care facility is a health care provider, and a subject in the health care system, which also fulfills organizational, economic, financial, employer, scientific-research, educational, etc. functions. The fact that a health care facility does not collect regulatory fees is a transgression, the object of [making it one] is the interest in the functioning and protection of the health care system. A certain analogy can be found, e.g. in the penalties imposed for violating the rules of economic competition or in the regulation of consumer protection. In these areas as well, a public law penalty is imposed for violation of obligations that consist of unfair distortion of a private law relationship. The consequences of not fulfilling the obligation to collect regulatory fees can appear, e.g., in distortion of access to health care facilities or a reduction in quality where a health care facility that does not collect fees exceeds its patient capacity. The Constitutional Court adds that it is up to the legislature, to choose which subject it will give the power to impose a public law penalty, if the penalty is imposed as the result of a proper administrative proceeding and the imposition of a penalty is subject to judicial review, which the contested legal regulation meets.

132. Moreover, in this regard the Constitutional Court evaluated only whether payment-free health care paid out of public insurance continues to be available, and concluded that, at least with regard to § 16a par. 2 let. d) of the Act on Public Health Insurance and to the limit of CZK 5,000 provided by § 16a par. 1 of the Act on Public Health Insurance, that is the case. The Constitutional Court did not find the legal regulation of regulatory fees to be unconstitutional; however, it will be

up to the legislature to monitor the effects of the regulation, evaluate them, and correct the legal regulation if necessary to that availability of health care will continue to be ensured for all, because indirect restriction of access to payment-free health care paid out of public insurance could lead to violation of Art. 31 of the Charter.

133. The Constitutional Court also considered the petitioners' objections relating to the amended version of § 17 par. 5 of the Act on Public Health Insurance. The petitioners' claim that this provision is inconsistent with the existing case law of the Constitutional Court because it involves individual regulation is not pertinent. This situation is clearly not comparable to the one that the Constitutional Court evaluated in judgment file no. Pl. ÚS 36/05. The contested § 17 par. 5 authorizes the Ministry of Health to issue a list of health care services with point values. According to the text of the contested provision, that list, in view of the parties it applies to, which is not individualized in any way, is supposed to have the nature of a normative act, not an individual administrative one. The contested provision, which reads "The Ministry of Health shall issue, by decree, a list of health care services with point values," does not fundamentally differ from, e.g., the analogous provision in the Act on Attorneys, under which the Ministry of Justice is authorized to determine the remuneration and reimbursements of an attorney, which was done by a decree, which, in the event of non-contractual remuneration, also provides a list a of services and a tariff value for the circle of attorneys registered in the register of attorneys, not individually specified. The method that the legislature selected is standard, and not questioned in analogous cases. A case such as the petitioners have in mind would exist if the Ministry of Health were authorized to issue a list that had different point values for individual health care services that were different, e.g., for St. Anne's Hospital in Brno than for other hospitals in the Czech Republic. The Constitutional Court adds that if the Ministry of Health acted thus *ultra vires* and issued an individualized decree that was not a generally binding legal regulation, but a hidden individual administrative act, it would certainly be appropriate to object to such a decree; however, the Constitutional Court did not find the statutory authorization to be unconstitutional.

134. In conclusion, we can summarize that the Constitutional Court had no reason to annul the contested parts of the Act for being unconstitutional in content in any of the abovementioned spheres. Of course, in order to deny the petition it would have been independently sufficient for the Constitutional Court to conclude either that, for reasons of restraint and minimizing interference, there is no room for a derogatory judgment, or that the contested legal regulation is not unconstitutional, because in its opinion the contested legal regulation was adopted within the framework set forth by Art. 4 par. 4 of the Charter and it met the rationality test. Thus, theoretically the Constitutional Court basically had to choose whether to choose for the reasoning of its decision only one of the groups of reasons, or all of them. After deciding, in the specific matter, which concerns the very serious issues of life and health, for a more comprehensive approach, and thus weighing reasons from all spheres, it adds that, among them, it gives hierarchical priority, including within the intent of the judgment in the matter file no. Pl. ÚS 24/07 and file no. Pl. ÚS 2/08 - having in mind the interconnected content and unifying context of the Act on Stabilization of Public Budgets and noting that the decision to separate this matter and the matter conducted under file no. Pl. ÚS 2/08 was of a purely



procedural nature - grounds that led it to restraint and minimization of interference. The fact that the contested legal regulation was not found to be unconstitutional and that it meets the reasonableness test leads to the conclusion that interference by the Constitutional Court in analogous matters could come into consideration only in case of flagrant caprice, arbitrariness and unreasonableness by the legislature, which - as was repeatedly said and indicated - was not found in this matter.

## XII.

135. Based on all the cited facts, the Constitutional Court denied the part of the petition reviewed as file no. Pl. ÚS 1/08 [§ 70 par. 2 of Act no. 182/1993 Coll.].

**Instruction: Decisions of the Constitutional Court cannot be appealed (§ 54 par. 2 of the Act on the Constitutional Court).**

Brno, 20 May 2008

### **Dissenting opinion of Judge František Duchoň**

The Constitutional Court has already explained, in judgment Pl.ÚS 14/02, that: “Under Art. 31 of the Charter everyone has the right to the protection of his health. Citizens shall have the right, on the basis of public insurance, to payment-free health care and to health care aids under conditions provided for by law.” That law is Act no. 48/1997 Coll., on Public Health Insurance (the “Act”), which governs public health insurance and the scope and conditions under which health care is provided on the basis of the Act (§ 1 of the Act). The Act makes it obligatory for a citizen to have insurance, the content of which is provided by the Act. In setting the content of the insurance relationship, the legislature is bound by the constitutional order, primarily the material scope of the constitutional right to protection of health. In regulating public health insurance, the law cannot exceed this material framework for “protection of health” and can regulate only the provision of care that serves to “protect health” (prohibition of arbitrariness). The insured person transfers to the insurance company, for payment, the risks that he may incur through danger to his health or interference in his health. In contrast, the insurance premium cannot be used to pay for things, procedures, interventions or services that do not serve to protect the health of the insured person, but to satisfy other needs, e.g., in securing living conditions.”

In my opinion, introducing the so-called “regulatory fees” for health care covered by public health insurance, and a fee for every item on a prescription, is inconsistent with Art. 31 of the Charter. Most citizens must thus pay another, even if relatively low, amount, just to be allowed into the system (i.e., into a health care facility). Thus, regulatory fees are by nature an “entry fee,” that a citizen must pay in order to be allowed entry into a health care facility. This has led to a situation where the right constitutionally guaranteed in Art. 31 of the Charter was

to a certain extent denied by the legal regulation introducing so-called “regulatory fees.” In this regard I cannot do otherwise than to refer to judgments file no. Pl.ÚS 35/95 and Pl.ÚS 14/02.

In my opinion, in a situation where medical care is provided to residents of the Czech Republic payment-free, on the basis of public insurance (Art. 31 of the Charter), the so-called “regulatory fees” represent only a fiscal attempt to collect as much money as possible from the greatest possible number of subjects. Evidence of this is the fact that the fees were implemented universally (with the exceptions set forth here) so that they must also be paid by those subjects for whom public health insurance is paid by the state (pensioners, minor children).

If the aim of introducing these fees was supposed to be preventing or limiting the abuse of health care services, it is not logical that they were also introduced for those subjects where it is, on the contrary, desirable that they not avoid health care (pregnant women, minor children). No such “regulation” is permitted in those cases. It is especially illogical, and in a way “immoral,” to have so-called “regulation” where, after a citizen passes through the entry sieve, i.e. receives examination or treatment from a doctor and a medicine prescription, he must pay in the pharmacy an additional CZK 30 for each item on the prescription, including for medicines with a supplemental payment.

Introducing regulatory fees does not fulfill the role of “the patient’s co-participation in medical care,” as is declared, but only allocates additional money into the system, as demonstrated above. Or, in the classic words: “This method of a patient’s co-participation in the costs of health care is somewhat unfortunate.”

This legal regulation is also inconsistent with Article 1 of the Charter, under which all people are free, have equal dignity, and enjoy equality of rights. There are certain groups of people for whom introducing these fees created a considerably burdensome social situation. Moreover, I consider it undignified to run around sometimes large health care facilities looking for a box office where one can buy a “ticket” to the health care system.

As to the details, I join in the dissenting opinion prepared by Judge J. Nykodým, because I agree one hundred percent with his conclusions. I consider it unnecessary to repeat or further develop his constitutional law analysis of this issue.

### **Dissenting Opinion of Constitutional Court Judge Vojen Güttler**

First of all, I refer to the dissenting opinion of Judge JUDr. Jiří Nykodým, in which I join.

I myself state the conclusion of that opinion as follows:

I. 1) Regulatory fees (RFs) are introduced universally, for practically all groups of the population. They apply to pensioners with only pension income, and to small children. This must be seen in the overall context of rapidly increasing prices for energy, rent, food, etc. The opinion that a fee of CZK 30 is affordable for everyone is deceptive, because older people (and small children) often have to consult a

doctor, sometimes several times a month, so they will pay CZK 30, plus additional fees for every prescription item and supplemental payments for medicines, several times.

2) The declared aim of the fees is to limit unnecessary doctor visits. It is then not logical to pay fees for prescription medicines; if a doctor prescribed a medicine, then the doctor visit and the resulting prescription were not unnecessary.

3) The universality of the RFs is the basic reason why the RFs, as regulated in § 16a of Part 40 of Act no. 261/2007 Coll., directly conflict with Article 31 of the Charter of Fundamental Rights and Freedoms. This article does establish the right to payment-free health care based on public health insurance, under conditions provided by law. However, the law may not go so far as to violate the essence and significance of any fundamental right (Art. 4 par. 4 of the Charter). However, that is exactly what happened in the adjudicated matter. Thus, the argument in the Constitutional Court's judgment, that the essential content of Art. 31 was not violated, is incorrect and unconvincing, for the abovementioned reasons. For the same reason, in the present matter, we also cannot refer to Article 41 par. 1 of the Charter.

II. The provision of § 16a par. 4 of the Act states that a RF is income of the health care facility that collected it. This is a mere declaration that does not correspond to reality; strictly speaking, this will be income of the health insurance company (and thus a disguised form of contribution by the insured persons / patients to the system of statutory health insurance). This occurs because of the following reasons.

a) The explanatory report to the original proposal from the Ministry of Health (presented to the government on 27 April 2007) says that the growth in income of outpatient and inpatient health care facilities will be taken into account in the negotiation proceeding between providers (i.e. doctors) and health insurance companies on coverage of health care in 2008; in other words, the insurance companies will deduct from payments to doctors the fees that doctors are required to collect from patients. This was confirmed by the director of the General Health Insurance Company (VZP) Dr. Horák, in an interview for the program Radiožurnál on 7 March 2008 and by the witness Minister Julínek in a hearing before the Constitutional Court on 16 April 2008. (Note: This does not apply to general practitioners, as they are paid by the insurance companies, by the so-called "head-count" system, i.e. according to the number of patients registered with them, regardless of how many patients they actual treat or examine.)

b) A regulatory fee is not, in fact, income of the health care facility, also in view of § 16a par. 6 and 8 of the Act. They give doctors an obligation to give insurance companies information about the RFs collected, and to collect the fees from patients; if they do not do so, the insurance company can even impose (repeatedly) a fine on the doctor, of up to CZK 50,000, which becomes the company's income. None of this would make logical sense if the regulatory fee was the income of the health care facility.

c) The right of health insurance companies to impose fines on health care facilities if they do not collect regulatory fees also violates the constitutional principle of equality and the prohibition of discrimination (Art. 1, 3 par. 1 of the Charter) and violates the right to own property (Art. 11 par. 1 of the Charter). This is because the relationship between insurance companies and health care facilities is a private

law relationship (civil law), whose parties are equals. It is absurd for the law to assign to one party to a private law relationship the right to impose fines on the other party, even if it is for violation of a legal obligation (note: which - as describe above - is in and of itself nonsensical, if, under the same statute, this is income of the health care facility).

d) In this situation, it is obvious that health care facilities de facto become - in conflict with the text of the Act - collection agents and accountants for the health insurance companies, without entitlement to remuneration for this extra work. The absurdity of the situation is heightened by the fact that the health care facility will report the collected RFs for tax purposes.

These reasons lead me also to conclude that the Constitutional Court should have annulled § 16a (and the related § 16b) of the Act, due to inconsistency with Art. 31, Art. 1, Art. 3 par. 1 and Art. 11 par. 1 of the Charter of Fundamental Rights and Freedoms.

III. As regards § 17 par. 5 of the Act, I refer in full to the dissenting opinion of JUDr. Jiří Nykodým.

IV. Beyond the framework of this text, I add several individual comments to the reasoning of the Constitutional Court's judgment.

Regarding point 119 - the Constitutional Court's judgment completely distorts the purpose of Constitutional Court judgment file no. Pl. ÚS 2/08, which stated that the obligation to pay so-called regulatory fees remained untouched. This was a judgment that "renewed" the payment of sickness insurance benefits for the first 3 days of illness. The point of judgment Pl.ÚS 2/08 was that previously, patients did not receive insurance benefits for the first 3 days of illness, and in addition had to pay regulatory fees; that is precisely what the judgment criticized.

Regarding point 125 - As regards judgment file no. Pl. ÚS 14/02, it is absolutely impossible to draw from the dissenting opinions (in which I shared) any argument for preserving the RFs, as they are established in the cited Act.

Regarding point 127 - I have already stated above that the RFs collected by a health care facility are not, in fact, its income, because the health insurance companies take them into account, i.e. in practice they reduce the payments they make to the health care facilities.

Regarding point 131 - The opinion that it is up to the legislature, which subject it will authorize to impose public law sanctions ... (here: to impose fines on health care facilities) is completely unacceptable. Here I refer to point II., let. c) of this dissenting opinion. The opinion presented in the judgment completely overlooks fundamental civil law principles, because it ignores the fact that there is a relationship of equals between an insurance company and a health care facility.

## Dissenting opinion of Constitutional Court Judge Pavel Holländer

The term “fee” is used in legal terminology to identify a public law payment, the purpose of which is to serve as motivation for the subject seeking a certain service by a public authority (i.e., pursuing the aim of the service being reputable, non-abuse of public power, e.g., with court fees in the judicial system), and also plays the role of a partial economic equivalent for the public authority’s services (as stated in a classic of Czech civil procedure V. Hora, *Československé civilní právo procesní. Díl II.* [Czechoslovak Civil Procedure Law. Part II.], Praha 1923, p. 71, according to which, on the one hand the judiciary “may not be a profit-generating enterprise,” and on the other hand there should not be “litigiousness, abuse of the court and court proceeding, and thus damage to the whole.”). An illustration of these purposes is the express formulation of them in the explanatory report to the government bill proposing the Act on Court Fees (publication 476), adopted by the Czech National Council on 5 December 1991 and promulgated as no. 549/1991 Coll.: “The task of legal regulations that regulate the calculation and collection of court fees is also to ensure, through appropriate levels of fees, coverage of part of the expenses that the state incurs by maintaining a judiciary, and also to limit the filing of certain poorly formed petitions to open court proceedings. It is also their role to encourage the obligated parties to fulfill their obligations vis-à-vis their fellow citizens and other subjects.”

The majority vote relativizes the definition of the term “fee” with references to expert sources, or some legal regulations. However, the study by K. Čakrt, *Poplatky [Fees]*, in: *Slovník veřejného práva československého, III* [Dictionary of Czechoslovak Public Law, III], Brno 1934) contains precisely the opposite claim than the authors of the majority opinion ascribe to it. The possible difference between the term “fee” in the expert financial sense and the financial legal sense changes nothing about the study’s basic thesis, according to which a fee is a public law payment. Although the argument based on government directive no. 16/1925 Coll., on payments from telephone fees, is somewhat archaic today, again, its content is precisely the opposite of what is claimed. This involved a public law payment - so, under § 1 par. 2 of the government directive, “telephone fees are understood to mean: 1. subscriber fees which telephone subscribers pay in exchange for the state giving them a telephone station to use; 2. call charges, both for calls placed from public call boxes and for long distance calls; 3. acceptance and registration fees, which are paid for the grant of a concession to establish a private telephone, and equivalents for lost telephone fees.” Finally, even the argument based on § 517 par. 2 of the Civil Code cannot be considered appropriate. A late payment fee, which is established in that provision, is not a price, but a penalty.

From the nature of the matter (as is clarified in the dissenting opinion of Dr. Jiří Nykodým to the same judgment, file no. Pl. ÚS 1/08), the relationship between the patient and the health care facility is not a public law relationship, but a private law one, so the payment in question is not and cannot be a “fee,” but a price. I note (as was repeatedly stated in the Constitutional Court’s case law - file no. Pl. ÚS 39/01, Pl. ÚS 5/01), that from a general viewpoint, the Act on Prices considers acceptable reasons for introducing price regulation to be jeopardizing the market by the effects of limiting economic competition or an extraordinary market

situation (§ 1 par. 6 of Act no. 526/1990 Coll., on Prices, as amended by later regulations). In this regard, the legal framework fully corresponds to the paradigms of democratic economic thinking (see P. A. Samuelson, W. Nordhaus, *Ekonomie [Economics]*, Praha 1991). In other words, grounds for a constitutionally acceptable price regulation exist when the market does not spontaneously generate prices (e.g., when a dominant competitor is present), but the grounds cannot, by definition, be the “reputability of a private law act.” Under Art. 31 of the Charter of Fundamental Rights and Freedoms (the “Charter”), interpretation of which must take into account Art. 41 par. 1 and also Art. 4 par. 4 of the Charter - otherwise Art. 31 of the Charter would be empty from a constitutional viewpoint, without normative content, or only a delegating provision (see file no. Pl. ÚS 23/98) - the legislature is thus authorized to classify health care in terms of its being covered by public health insurance, or covered by direct payments (also with the possibility of contractual insurance). This legal opinion also follows from judgment file no. Pl. ÚS 14/02, under which the prohibition on accepting direct payments applies primarily to the performance of payment-free health care itself, as well as the provision of that care, i.e., again, payment-free care, while nothing prevents collecting direct payment from insured persons for health care provided beyond the framework of conditions for payments-free care. In the Constitutional Court’s opinion, expressed in the judgment, § 11 par. 1 let. d) of the Act on Public Health Insurance emphasizes only protection of the sphere of payment-free health care from attempts to violate its integrity and narrow its scope.

Likewise, in relation to Art. 31 of the Charter we can imagine direct payment for services (again, with the possibility of contractual insurance) that are not a direct component of health care (see, analogously, judgment file no. Pl. ÚS 25/94, in which the Constitutional Court stated, regarding Art. 33 par. 2 of the Charter: “It is obvious that payment-free education cannot mean that the state will bear all expenses that citizens incur in connection with exercising the right to education. Thus, the state can require payment of some expenses in connection with exercising the right to education, and the government is undoubtedly entitled to such steps. This does not, under any circumstances, cast doubt on the principles of payment-free education at elementary and secondary schools.”). However, in my opinion, the regulation in question cannot be subordinated under any of these alternative interpretations of Art. 31 of the Charter. In response to a question concerning the purpose of the legal regulation of regulatory fees posed by the author of this dissenting opinion at the hearing held on 16 April 2008, the witness Ing. Mirek Topolánek, Prime Minister of the Czech Republic, referred to the need to economically rescue the public health insurance system. In his response he did not cite as another purpose of regulatory fees ensuring (paying) services related to health care that are not directly part of it (e.g., administrative costs). Similarly, in response to a question from Judge JUDr. Balík concerning activities related to health care (providing food and clothing in hospitals, paying for doctor’s travel on public transportation to visit patients - note that house calls are part of outpatient care under § 18 par. 1 of Act no. 20/1966 Coll. - cleaning of doctors’ offices, equipment repair), the witness MUDr. Tomáš Julínek, the Minister of Health, stated that these cases do not involve health care as such, and referred to the shortcomings of Act no. 20/1966 Coll., and did not connect covering payment of these services with the purpose of regulatory fees. I must note that, according to the explanatory report to the draft Act on Stabilization of Public Budgets

(publication 222), and according to the presentation by the Minister of Health in the Chamber of Deputies of the Parliament on 6 June 2007, the purpose of regulatory fees is to limit overuse of health care, to introduce an instrument for people to become aware of its value, and, in the case of fees for hospital care the purpose is to partly cover the expenses connected to hospitalization. (“Regulatory fees are not only an instrument to limit waste of funds from public health insurance. They are a psychological breakthrough, and the first step in health care reform, which should strengthen and equalize the doctor-patient relationship, and will also lead citizens to be more responsible when making use of health care, which, even when payment-free, is not for free.”)

However, the construction introduced by the Act introduces contradictions. A fee is a public law payment - this concept of its legal nature corresponds not only to the legislative description (regulatory), but also to the aims declared by its government proponents. If we accepted a construction under which the relationship between a patient and a health care facility (health care provider) is thus a public law relationship and not a private law one (e.g., for the nature of the fees and for the public law nature of health insurance, from which health care is paid), then that construction conflicts with the fact that public law fees are the income of private subjects (health care providers).

The judgment responds to these unclear points with the claim that regulatory fees are a concept (category) *sui generis*. This argument is reminiscent of a passage from the famous book by Patrick Ryan, “How I Won the War,” the Goodbody sidestep. It is reminiscent of the actions of a chess player who moves a knight off the board and acts as though he is continuing the game according to the original rules. If I move the knight off the board, I cannot continue to claim that I am continuing the game according to the original rules; I must at least try to define new rules. However, that did not happen in the present matter.

Because of the foregoing, i.e. because of the fact that the Constitutional Court’s legal opinion stated in judgment file no. Pl. ÚS 25/94, cannot be applied to evaluate the legal regulation in question, I consider it to be inconsistent, not only with Art. 31 of the Charter, but also with the maxim of certainty, understandability, and clarity, which the Constitutional Court, in settled case law, includes in the protection of a law-based state (Art. 1 par. 1 of the Constitution).

However, let us hypothesize a situation reminiscent of the joke about Radio Yerevan. A listener asked the station if it was true that Ivan Ivanovich Ivanov won a hundred thousand rubles in the lottery. He received the following answer - Yes, it’s true, but not completely precise. That, is, it wasn’t Ivan Ivanovich Ivanov, but Mikhail Mikhailovich Mikhailov, and it wasn’t a hundred thousand rubles, but a bicycle, and you can’t exactly say that he won it in the lottery, but that someone stole it from him when he left it standing outside the pub ....

So, in our case, let us assume that the fee is not a fee, but a price; let us also assume that the purpose for introducing it, as declared by the norm-creator and explicitly stated in the text of the Act (“regulatory fee”) is a misunderstanding, and it is not a matter of ensuring serious private will in a private law relationship, but partial payment of health care paid outside public health insurance. Let us also assume that § 16a of the Act on Public Health Insurance is a special provision in

relation to § 13 and 15 of the Act, which, under Art. 31 of the Charter is that legal provision that provides partial coverage of health care provided, or the “conditions” under which “citizens have a right to payment-free health care on the basis of public health insurance,” or to payment of the remaining costs of health care from the public health insurance system.

The purpose and significance of Art. 31 of the Charter and one of the social rights guaranteed by the constitutional order and enshrined in it, is to ensure for all citizens (and, under Art. 3 par. 1 of the Charter, regardless of their social origin or property) a level of health care that preserves human dignity through a public health insurance system that should be based on harmonizing the principles of individual insurance and social solidarity. I must repeat that interpretation of Art. 31 of the Charter must take into account both Art. 41 par. 1 and also Art. 4 par. 4 of the Charter.

Otherwise, from a constitutional viewpoint, Art. 31 of the Charter would be empty, without normative content, or only a delegating provision. When the majority vote argues in favor of the constitutionality of “regulatory fees” in health care on the basis of historic illustrations of how health care was paid for (the Code of Hammurabi, payment of medical care and medicines in the Middle Ages “without any guarantee of health,” etc., this is really an a-historical argument. Historical justification carries weight today only on condition that the contexts (cultural, social, or technical, economic, etc.) for the creation and functioning of the compared institutions are also comparable. Otherwise, that argument must be considered deceptive, or, in Aristotelean terminology, sophistic. Moreover, that historical excursion also contains incorrect data. For example, it states that “Social rights, or rights connected with the provision of medical care, were not introduced in European constitutions until the 20th century. It first happened in the so-called Stalinist Constitution of the Unions of Soviet Socialist Republics, adopted by the 8th Extraordinary Congress of Soviets of the USSR on 5 December 1936, or in Chapter X, Art. 120.” We can assume, that if the authors of the majority opinion had drawn on sources other than the works of D. Pelikán, they could not then avoid, e.g., the Weimar Constitution of 1919, which enshrines social rights in Art. 141 et seq., and Art. 151 et seq., and in Art. 161 expressly establishes the state’s obligation to establish a system of statutory insurance in order to protect health, as well as other aims (capacity to work, protecting motherhood, old age, illness, etc.). In any case, a system of statutory health insurance was introduced in Germany by a special statute adopted by the Imperial Assembly on 15 June 1883, with effect as of 1 December 1884. The Imperial Decree of 17 November 1881, which preceded it, contains this purpose for statutory health insurance: “it would be necessary to correct social damage not only by repression of socially undemocratic excesses, but by the same degree of positive support for the well-being of workers”; the purpose of introducing statutory health insurance is supposed to be ensuring “internal peace,” and the new system “is based on the moral basis of Christian national coexistence.”

One could suggest to the authors of the majority opinion, from a doctrinaire viewpoint, to refer, rather than to the writings of D. Pelikán, to one of the creators of modern European democratic constitutionalism, Georg Jellinek, and his famous work, *System der subjektiven öffentlichen Rechte* [System of Subjective Public



Rights] (1892), in which Jellinek introduces into European constitutionalist thinking the category of positive status (*status civitatis*) - in contrast to negative status - which presents the constitutional position of an individual, containing his subjective, public rights for certain performance vis-à-vis the state (among them, he includes the issue of “public health care” - cited from the 2nd edition, Tübingen 1905, p. 115).

However, let us return from wandering through history to current realities. The provision of § 16a of the Act on Public Health Insurance establishes a number of “regulatory fees.” In terms of Art. 31 and Art. 4 par. 4 of the Charter, it is necessary to review whether, in the aggregate, it does not create a barrier for certain groups of citizens, limiting their access to dignified health care. This viewpoint for review arises from the maxim that the Constitutional Court stated in judgment file no. Pl. ÚS 42/2000 in connection with evaluating the constitutionality of the election system for elections to the Chamber of Deputies of the Parliament of the Czech Republic: “However, in the opinion of the Constitutional Court, in this particular case, i.e. in the matter at hand, increasing the number of election regions ..., setting the lowest number of mandates in a region ... and the method of calculating the shares and allocating a mandate with the modified d’Hondt formula ... in its aggregate represents a concentration of integration elements which result in abandoning the continuum, still capable of registering at least an inclination to the proportional representation model.”

A legislative solution to the negative effects of introducing “regulatory fees” in one of the possible contexts is § 16b par. 1 of the Act on Public Health Insurance, under which, if the total amount paid by the insured person, or on his behalf by his legal representative, for regulatory fees under § 16a par. 1 let. a) to d) and for supplemental payments for prescribed medical preparations or foods for special medical purposes, partially covered by health insurance, paid in the Czech Republic, exceeds the limit of CZK 5,000 in a calendar year, the health insurance company is required to pay the insured person or his legal representative the amount by which that limit was exceeded. The limit includes supplemental payments for partially covered medical preparations or foods for special medical purposes only in the amount of the supplemental payment for the cheapest medical preparations or foods for special medical purposes available on the market, containing the same medical substance and taken in the same manner. This does not apply if the prescribing doctor wrote on the prescription that the prescribed medical preparation cannot be replaced (§ 32 par. 2); in that case, the full amount of the supplemental payment counts toward the limit.

Under § 17 par. 6 of the Act on Public Health Insurance, a negotiation proceeding with representatives of the General Health Insurance Company of the Czech Republic and other health insurance companies and the relevant professional associations of health care providers, as representatives of contractual health care facilities, will agree on the value of points, the amounts of compensation for health care paid from health insurance, and regulatory limits for the following calendar year, and if no agreement is reached on regulatory measures, the Ministry of Health shall decide by decree. That decree is no. 383/2007 Coll., whose appendix no. 2 for health care provided by general practitioners for adults and general practitioners for children and youth, provides in point D 1.1: “If the

average payment for medical preparations and health care aids prescribed by a health care facility, calculated per one insured person, exceeds by more than 20% the nation-wide average payment for prescribed medical preparations and health care aids, the health insurance company is entitled to apply a regulatory withholding up to 25% of the excess. The average payments per one insured person includes supplemental payments for medical preparations where the prescribing doctor ruled out replacement under § 32 par. 2 of the Act.” (sic! - underlined by P. H.) The regulation is analogous, or even stricter, for specialists (appendix no. 3 to decree no. 383/2007 Coll., point D 1.1): “If a health care facility reaches average costs for one individual insured person for prescribed medical preparations and health care aids in the relevant six months of 2008 that is more than 110% of the average payments for one individual person for prescribed medical preparations and health care aids in the relevant six months of 2007, the health care company may, after the end of 2008, reduce reimbursement to the health care facility by 40% of the increased expenses for prescribed medical preparations and health care aids (over 110%), in the manner described in the contract between the health care facility and the health insurance company.

The average payments for one individual insured person includes supplemental payments for medical preparations where the prescribing doctor ruled out replacement under § 32 par. 2 of the Act.” (sic! - underlined by P. H.)

This means that ensuring dignified health care under the existing legal regulation is to the detriment of the provider! Yes, the doctor, or the health care facility, would have to pay it from his/its own funds. Commenting on the unconstitutionality of such a legal regulation, the Constitutional Court said the following in judgment file no. Pl. ÚS 3/2000 on rent regulation: “as a result of the existing legal framework, there are social groups or persons in our society today who pay from their own funds something which, in the interest of fulfilling Art. 11 of the International Covenant on Economic, Social and Cultural Rights, is supposed to be ensured by the state.

In terms of § 17 par. 6 of the Act on Public Health Insurance, in connection with point D 1.1, appendices no. 2 and 3 of decree no. 383/2007 Coll. the “limit” under § 16b par. 1 of the Act on Public Health Insurance appears to be more a deceptive institution than a realistic guarantee of access to dignified health care.

The majority opinion also argues in this regard with reference to § 16a par. 2 let. d) of the Act on Public Health Insurance, under which a regulatory fee is not paid by an insured person who presents a decision, notice, or confirmation, no more than 30 days old, issued by a body providing assistance in material need, about the benefit payment that is provided to him under a special regulation. For those who do not meet these conditions, according to the majority opinion, we can “conclude that introducing regulatory fees” is “unpleasant” for them, but “does not make their humble existence impossible,” or, regulatory fees do not have “a general strangling effect” and “do not realistically make health care or health care aids inaccessible for anybody.”

Let us illustrate this conclusion with the example of an old-age pensioner. Under § 2 par. 2 let. a) of Act no. 111/2006 Coll., on Assistance in Material Need, as

amended by later regulations, a person is in material need if, after deducting appropriate expenses for housing, his income does not reach the minimum living amount. Under § 24 par. 1 let. b) of the Act, the minimum living amount for persons whose efforts to increase income by working are not reviewed (who, under § 11 par. 3 let. b) include old-age pensioners), is the minimum subsistence amount increased by half of the difference between a person's living minimum and subsistence minimum. Under § 2 and § 5 par. 1 of Act no. 110/2006 Coll., on the Living and Subsistence Minimum, as amended by later regulations, an individual's living minimum is CZK 3,126 per month, and an individual's subsistence minimum is CZK 2,020 per month. It follows that the condition for acknowledging the status of material need for an old-age pensioner is a situation where his pension does not exceed the appropriate housing expenses by CZK 2,623 (that means CZK 87.43 per day for food, clothing, hygienic need, transportation, or other living needs). In view of the relationships of an amount of ca. CZK 90 to current prices of food, clothing, hygienic need, transportation, or other living needs, I believe that for persons (pensioners) whose income is not much above the limit of material need, introducing regulatory fees is a real barrier to access to dignified health care.

Finally, the basic argument in the judgment's reasoning is a restrictive definition of the proportionality test when evaluating the constitutionality of statutory measures governing social issues, consisting of the "reasonableness test," or a procedure in which it is considered sufficient for a statutory framework to be constitutional if "at the time of this decision, the Constitutional Court does not consider it proven that introducing a regulatory fees would clearly make it impossible to reach the aim pursued," and "an a priori condemnation that presumed, without a certain amount of respect for the work of experts who prepared the reform plan, that achieving the aim pursued is impossible, would be ... to deny the possibility of any empirical arguments pro futuro."

This conclusion in the judgment can be compared against the testimony of MUDr. Tomáš Julínek, according to the record of the public session of the plenum of the Constitutional Court of 16 April 2008. The deputy chairwoman of the Constitutional Court, JUDr. Wagnerová, asked the following question concerning legislative analysis of the legal framework being prepared: "Did you investigate the effects of introducing individual or all these fees on individual social groups or social classes, specifically, families with children, seniors with average pensions, specifically seniors in various facilities, old-age homes, as the ugly saying goes, and with what result. If you conducted such an analysis, do you have available that analysis, studies, etc. on the effects on individual social groups?" The witness answered: "We had to rely on macroeconomic assumptions, i.e. in comparable countries, according to income structure, i.e. the level of fees, which we set at thirty crowns, is lower than in the countries that clearly declared or found in their studies that the fee does not make health care inaccessible. That was the first matter. Others are, of course, studying individual groups and measures that prevent the accumulation of fees, and these include the limit and that provision about material need. However, far more important, in the Czech Republic, until the end of 2007, before the Act, called the backpack, was adopted, the social situation and participation of patients in the Czech health care system was not tracked." In response to that, deputy chairwoman of the Constitutional Court JUDr. Wagnerová commented, "so you did not conduct an analysis," to which the witness

commented, “because it was not possible.” (sic! - underlined by P. H.) JUDr. Wagnerová’s next question then addressed the legislative intentions concerning the five thousand crown limit, to which MUDr. Tomáš Julínek stated: “the Ministry of Health, my advisers and deputies, are experts on health care, the best in the country that we have. They proposed this method. But because I know that in the CR we cannot get information about salaries and pensions into the health care system, as, for example, in other countries, this method would not work. It is possible, if it worked, that we could set it up that way. At the same time, I would like to state that, when I say that I will evaluate these fees after half a year, that means also evaluating that limit, whether it is set correctly and whether there are not individually ... some errors.”

The extensive quotes from the protocol of the hearing of 16 April 2008 indicate that setting limits for regulatory fees in relation to their affordability for certain groups of people was not based on any empirical analysis, was based on suppositions and the assumption of subsequent evaluation of the effects of the regulation. The majority’s claim, that “an a priori condemnation that presumed, without a certain amount of respect for the work of experts who prepared the reform plan, that achieving the aim pursued is impossible,” then sounds somewhat surprising when contrasted with the court’s factual findings. I believe that because of the foregoing the legal regulation did not meet even the minimum requirements of the proportionality test that are contained in the judgment’s reasoning.

Thus, Art. 31 in connection with Art. 4 par. 4 of the Charter creates space for the legislature to adopt a statutory regulation for partial payment of health care outside the system of public health insurance, although after meeting the following safeguards:

- in the aggregate these payments may not present a barrier to access to dignified health care,
- the establishment of these payments may not be a surprise, so it must contain mechanisms and sufficient time to prepare for them (by a state-established, or at least state-controlled insurance system and sufficient time between the regulation becoming valid and going into effect).

Due to the foregoing, I consider the contested provisions of the Act on Public Health Insurance to be inconsistent, not only with Art. 1 of the Constitution, but also with Art. 31 in connection with Art. 4 par. 4 of the Charter.

### **Dissenting Opinion of Constitutional Court Judge Jan Musil**

I disagree with the verdict of denial and with the reasoning in judgment file no. Pl. ÚS 1/08. Under § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, I am filing a dissenting opinion to the judgment:

1. I believe that the entire Act no. 261/2007 Coll., on Stabilization of Public Budgets, should have been annulled, because it was not adopted in a constitutionally prescribed manner. It follows logically from this, that those parts

of the Act separated out for an independent proceeding under file no. Pl. ÚS 1/08 (financing health care from public health insurance), should also have been annulled.

2. I explained the grounds that lead me to that conclusion in detail in the dissenting opinion that I filed, together with Judge Pavel Rychetský to judgment file no. Pl. ÚS 24/07 (concerning the tax part of the Act on Stabilization of Public Budgets), to which I refer in full. The parts of the Act evaluated in this proceeding suffered all the defects set forth in that dissenting opinion.

3. Thus, only in summary, I repeat that the manner of discussing and passing the entire Act no. 261/2007 Coll., on Stabilization of Public Budgets, violates the elementary and essential requirements for a statute so grossly that this violated the very principle of a law-based state enshrined in the preamble and in Article 1 par. 1 of the Constitution. Likewise, this violated the principles of the separation of powers and state democracy (Preamble and Article 1 par. 1, Article 2 par. 3 of the Constitution) and the principle of protection of minorities in political decision-making (Article 6 of the Constitution).

4. In my opinion, introducing regulatory fees in connection with the provision of health care also violated Article 31 of the Charter of Fundamental Rights and Freedoms (the “Charter”), which guarantees payment-free standard health care for participants in public health insurance.

5. By using the linguistically quite certain and exact adjective “payment-free” in Article 31 of the Charter, the framers of the constitution clearly stated their intent to ensure for citizens general access to health care without any payment whatsoever. Using mere linguistic interpretation, one can conclude quite unambiguously that the constitutional framers did so consciously, and that by choosing this language they wanted to distinguish completely payment-free health care from other cases of social rights contained in other provisions of Chapter Four of the Charter, which guarantee the fulfillment of a social right only “in the appropriate scope” (e.g., Article 26 par. 3, and Article 30 par. 1 of the Charter). It goes against the elementary rules of linguistic interpretation to interpret the adjective “payment-free” health care as “paid” health care, including in a situation where the payment is to apply only to part of the health care.

6. In my opinion, it goes against the principle of being payment-free, if a patient to be subject to regulatory fees at the very point of “entry” into the health care system. For a certain group of the socially handicapped (even if only for a small part), even small fees can create a barrier that these citizens will not be able to overcome, and they will not receive even basic health care - despite the fact that they were participants in the health care system, and took part (sometimes all their lives) in financing it on an ongoing basis.

I do not consider satisfactory the argument in point 118 of the judgment’s reasoning, that this “exclusion” of a citizen from the public health insurance system can be prevented by means of social care [obtaining confirmation of material need under § 16a par. 2 let. d) of the Act on Public Health Insurance]. Such bureaucratic procedures are very burdensome for ill people; they can

postpone necessary treatment, and, especially, this “begging” for payment-free health care for reasons of material need is degrading and undignified. The right to preservation of human dignity is protected by Article 10 of the Charter.

7. I cannot agree with the opinion in points 92 and 93 of the judgment’s reasoning that introducing regulatory fees by law is allegedly covered by the license contained in Article 41 par. 1 of the Charter. Article 41 par. 1 does state that the social rights therein “can be claimed only within the confines of the laws implementing these provisions,” but, after all, that cannot be interpreted to mean that the legislature can deny a constitutionally enshrined right and set up the de facto opposite of it. In my opinion, the legislature does not have the right to “implement” the right to payment-free health care by introducing paid health care. Even the “wide space for the legislature in choosing various “solutions” cited in point 92 of the judgment’s reasoning does not allow the legislature to set up the opposite of what is explicitly enshrined by a constitutional norm.

8. I fully acknowledge that a realistic view of the matter, taking into account the exceptionally expensive nature of health care, as well as the fact that in the wide range of health care services we can distinguish those that are completely essential for protecting health and those which, on the contrary, are not essential, or can be replaced by other means, allows for certain segments of health care to be subject to payment by patients, even in the present constitutional situation. However, that can apply only to “above standard” services (e.g., cosmetic surgery), food and accommodation in hospitals, or surcharges for selected medicines. In contrast, basic (standard) health care and medicines are supposed to be provided completely payment-free.

9. I do not agree with the thesis in point 102 of the judgment’s reasoning that allegedly “the a judgment could be denied [sic - petition?] for reasons of maintaining restraint” and that therefore further constitutional law testing (namely, the proportionality test) was conducted somehow “in addition” and perhaps need not have followed at all (analogous arguments are presented in point 134 of the judgment’s reasoning). This reasoning is apparently guided by the consideration that the selected regulation requiring payment for health care is a “political question,” the solution of which is exclusively within the discretion of the legislature and thus is not subject to review by the Constitutional Court. In my opinion, that conclusion is incorrect on principle. Certainly, we must recognize that social rights, in contrast to “classic” civil and political rights, display various unique features, and also that protecting them is more complicated. However, contemporary legal knowledge, as well as case law here and abroad, today mostly recognize that social rights enjoy constitutional law and international law protection, and are so-called justiciable; this is undisputed with the “core” commitments of social rights (cf., e.g., Kratochvíl, Jan: *Judikovatelnost sociálních práv: nějaké mezery?* [Justiciability of social Rights: Any Gaps?] *Právník* [The Lawyer], no. 11/2007, pp. 1161-1188). It would be not only a degradation of social rights, but also a denial of their constitutional law nature for the Constitutional Court to even think about denying its protection to these social rights.

Insofar as the judgment’s reasoning refers to Constitutional Court judgments file no. Pl. ÚS 24/07 and Pl. ÚS 2/08, that analogy is not appropriate, because the

presently adjudicated subject matter is different (those opinions concern the issues of taxes and sickness insurance).

10. I consider the arguments in points 96 and 97 of the judgment's reasoning to be completely inappropriate and a-historical. What sense does it make to compare modern social rights of today's citizens, based on diametrically different social conditions, with the slavery-era Code of Hammurabi from the 18th century B.C.? Why is it necessary to compare the contemporary Czech legal framework to the Stalinist Constitution of the USSR from the 1930s or to previous Czechoslovak constitutions from the times of the communist regime? If the Constitutional Court considered it desirable to conduct a certain historical comparison, it would have been more appropriate to state that the entire concept of social rights, including the right to dignified health care is the fruit of the European Christian and Humanist tradition. Its beginnings can be laid at the end of the 19th century; it reached its greatest flowering in the second half of the twentieth century, e.g., in the Scandinavian countries, in Germany, France, and other western European countries, where it contributed to the long-term stability and prosperity of the entire society. The scope of these social rights is very different in individual countries; thus, it is obvious that in recent times the concept of a social state has gone through a certain crisis, creating the need for legislative and economic reforms.

11. If the Czech constitutional framers decided to enshrine in the Charter of Fundamental Rights and Freedoms a wide range of economic, social, and cultural rights, typical for the concept of a social state, it undoubtedly did so in the belief that these rights are essential for really full-status citizenship, for every citizen's ability to "live the life of a civilized being according to the standards prevailing in society" (British sociologist T. H. Marshall in his essay *Citizenship and Social Class*, 1950). The guarantee of a certain minimum scope of consumption and a guarantee of a certain degree of social certainty are considered an essential prerequisite for a dignified life. A social state, founded on the modern mechanisms of civic solidarity (exceeding the traditional forms of family, tribal, or group solidarity), e.g., on health care insurance financed partly from public funds, balances conflicts of interest and mutes sharp social conflicts, whereby it also de facto contributes to the smooth functioning of a market economy. On a cultural level, the social state is founded on humanitarian ideals such as protection of the weak and support for the needy. The marked benefits of the social state are seen in strengthening internal social cohesiveness, which is essential to the ability to counter threats to civilization.

12. The Czech constitutional framers enshrined a very high standard of social rights in the Charter, in some respects higher than foreign standards. One example of this high standard is precisely the right to payment-free health care being evaluated here. Of course, this internationally "above standard" framework is possible, and is not a relevant argument for today's legislature, referring to different foreign models, to not observe the qualitatively higher level of the Czech constitutional framework, strengthening citizens' rights.

If some Czech political representatives hold the opinion that the present level of constitutionally enshrined social rights in the Czech Republic is too high,

economically unsustainable, and requires reform, they of course have the opportunity to seek a constitutional change, through the political process. In open political discussion one can, of course, present expert, substantiated arguments that payment-free health care is unsustainable - despite the fact that the gross national product and the overall wealth of the society are increasing, and despite the fact that the health insurance system is experiencing multi-billion crown surpluses.

We can certainly recognize that such arguments may receive the strong voter support that will be needed to push through constitutional amendments. However, in my opinion, we cannot permit the "re-writing" of constitutional regulations using ordinary laws, especially in a situation where the parliamentary discussion in the Czech Republic on these issues takes place in an untrustworthy manner, is not supported by substantiated, and even an elementary social consensus is not reached.

13. The somewhat unclearly formulated consideration in point 98 of the judgment's reasoning, that in formulating Article 31 of the Charter there may have been conflict "between the will of the legislature and the political reality of the time" is certainly not a constitutional law argument in favor of introducing regulatory fees in health care.

14. I cannot agree with how the judgment's reasoning evaluates certain factual circumstances connected to the introduction of regulatory fees and the results of presentation of evidence conducted before the Constitutional Court by the testimony of Prime Minister Mirek Topolánek and Minister of Health Tomáš Julínek.

I, personally, was not convinced that the "evidence presented" indicated that regulatory fees limit overuse of health care paid from public health insurance, as is claimed in points 107 and 124 of the judgment's reasoning. This thesis of "overuse" of social rights is among the favorite, ideologically tinted catchphrases of the critics of social rights; but I did not notice that any convincing evidence of this claim was presented to the Constitutional Court (e.g., statistical data based on a significant sample of the population and a sufficiently long observation period). The claims presented on the reduced number of doctor visits or number of medicines collected from pharmacies after the introduction of regulatory fees are based on a very short observation period, do not take into account the factor of "stocking up" on medicines at the end of 2007, and do not rule out the possible interpretation that the decline in the number of doctor visits and consumption of medicine could also have undesirable causes (the "transfer" of an actual illness, non-treatment of persons who really need it).

I also think that there has not been evidence to support the claim in point 130 of the judgment's reasoning, that "the effect of more economical handling of medicines can already be seen" or that "the effects of this form of solidarity have already been seen in practice, in specific cases of the seriously ill, since the contested legal regulation went into effect." These claims at most support the facts that fewer medicines were picked up and that certain citizens already met the conditions for reimbursement of payments over CZK 5,000, but not that this is a manifestation of increased economy or that the higher payments were or will be



actually returned to the patients.

15. I am not convinced that the evidence presented supports a claim that introducing regulatory fees ensures “higher quality actual implementation of Article 31 of the Charter“ (point 110 of the judgment’s reasoning), which is, among other things, drawn as a consequence of introducing the limit on regulatory fees of CZK 5,000 per year.

For me, the thesis that this will “strengthen solidarity among patients” in point 124 of the judgment’s reasoning, brings a somewhat surprising aspect into the entire concept of social rights. Until now, I believed (apparently natively), that social rights are more an expression of solidarity between the health and the ill, the young and the old, the strong and the weak, not an expression of solidarity between the ill and those even more ill.

16. The Constitutional Court has already interpreted the term “payment-free” medical care” in two of its plenary judgments (Pl. ÚS 35/95 and Pl. ÚS 14/02). The interpretation of that term in the presently adjudicated matter deviates from those previous judgments.

A change of a previous legal opinion is possible, but the condition in § 13 of the Act on the Constitutional Court must be observed, i.e. at least nine judges of the Constitutional Court present must vote in favor of the change. That did not happen in this matter, because only eight judges voted to adopt the judgment.

17. From a technical legislative viewpoint I consider it nonsense to describe these regulatory payments as fees. The payments are the income of a health care facility, but the legal relationship between a patient and a health care facility is not a public law, but a private law relationship. Thus, this is more of a price, but it lacks any equivalence whatsoever with the health care service or medicine paid for.

Nor does this payment acquire a public law character by the claimed transfers of money between health insurance companies and health care facilities or pharmacies. The alleged regulation of the flow of money between these subjects, which is supposed to take into account the income from regulatory fees, is so complicated and non-transparent, that the legal regulation adopted violates the maxim of certainty, understandability and clarity of a legal norm that belongs to the framework of a law-based state under Article 1 par. 1 of the Constitution. In my opinion, this constitutional norm too was violated in this matter.

18. I also consider unconstitutional the amended § 16a par. 6 to 8 of Act no. 48/1997 Coll. These provisions contain an obligation for health care facilities and pharmacies to collect regulatory fees and disclose relevant records and accounting data to health insurance companies; if they do not fulfill these obligations, a health insurance company can fine them up to CZK 50,000. In my opinion, these provisions are inconsistent with Article 1 of the Charter, which enshrines equal rights, and with Article 11 par. 1 of the Charter, which protects the right to own property, and provides that the property rights of all owners enjoy the

same statutory content and protection.

Health insurance companies, on one side, and health care facilities and pharmacies, on the other side, are private law subjects, whose legal relationships are set contractually. Their contracts do not indicate a commitment to collect regulatory fees, moreover one intended for the fee recipient itself, not the right of an insurance company to impose fines for failure to collect these amounts. I cannot agree with the opinion expressed in point 131 of the judgment's reasoning that "it is up to the legislature, which subject it will give the power to impose a public law penalty." It goes against the logic of the matter and the principles of a law-based state for the law to entrust the power to impose a public law penalty, in the form of a relatively palpable monetary fine, to one of the parties of a civil law relationship, which, of course, has an interest in the content of that relationship.

19. I cannot share "the respect for the work of experts who prepared the reform plan," expressed in point 111 of the judgment's reasoning. These experts (maybe?) presented to the legislature and to the public the subsequently implemented idea that one of the ways to solve the problems of financing Czech health care is to require payment for premature babies in incubators, and for health care for small children and seniors; this achieved income which is quite negligible in terms of the overall scope of financing health care. Citizens would apparently prefer that these experts provide a satisfactory explanation of the macro-structural problems of Czech health care, e.g., the question of why the share of expenses for medicines in the Czech Republic, in the level of tens of billions of crowns, is almost a third of total expenses for health care from public funds, and why that share is roughly double that in other developed western states.

Of course, these are questions that it is not in the competence of the Constitutional Court to evaluate, just as words about respect for the work of experts do not belong in the text of the Constitutional Court's judgment.

### **Dissenting Opinion of Constitutional Court Judge Jiří Nykodým**

I find the reasoning of the judgment's verdict of denial lacking in constitutional law arguments that would thoroughly deal with the petitioners; petition for annulment of so-called regulatory fees due to their inconsistency with Art. 31 of the Charter of Fundamental Rights and Freedoms (the "Charter"). The text does say that "the merit of the matter lies in the question of whether - in the petitioners' words - 'making virtually all health care subject to payment' is or is not constitutional," but it does not compare this question with the constitutional law framework, and resorts to a historical excursion whose primary theme is the unquestioned fact that in the past medical care was always paid for.

In its practice, the Constitutional Court has interpreted the term "payment-free" in terms of Chapter Four of the Charter, which governs economic, social and cultural rights. It did so primarily in judgment Pl. ÚS 35/93, where it considered a petition seeking the annulment of Article I. of Act no. 190/1993 Coll., which amended § 4 par. 1 of Act no. 29/1984 Coll., on the System of Elementary and Secondary Schools

(the Act on Schools), as amended by later regulations. This article replace the sentence “Education is payment free,” in § 4 par. 1 of Act no. 29/1984 Coll. with the sentence, “in schools that are part of the system of elementary and secondary schools, citizens have the right to payment-free education, unless the law provides otherwise.” The Constitutional Court annulled the part “unless the law provides otherwise” of this provision, and stated as the main reason that, although under Art. 41 par. 1 of the Charter the rights provided in Art. 33 par. 2 of the Charter, i.e. the right to payment-free education in elementary and secondary schools, can be exercised only within the bounds of statutes that implement this provision; we can hardly think that preserving the bounds of fundamental rights and freedoms would be compatible with the unconditionality, questioned by a statutory exception, of the right to payment-free elementary and secondary education. In the related judgment Pl. ÚS 25/94 the Constitutional Court considered a petition to annul government directive no. 15/94 Coll., on payment-free provision of textbooks, instructional texts and basic school supplies. In this directive the government set the scope in which pupils are provided payment-free textbooks, instructional texts and basic schools supplies. The Court denied the petition, and stated in the reasoning that payment-free education cannot consist of the state bearing all expenses that citizens incur in connection with exercising the right to education. Thus, the state can require payment of part of the expenses related to exercise of the right to education, and the government is undoubtedly authorized to do so. This does not, under any circumstance, cast doubt upon the principles of payment-free education at elementary and secondary schools. In these two judgments the Constitutional Court defined the term “payment-free” generally such that making this right subject to a statute does not mean that a statute can completely rule out the payment-free statutes. A statute can specify what is payment-free and what is not.

The Constitutional Court then decided within the intent of that opinion in other judgments, which directly concerned health care, judgment Pl. ÚS 35/95, where it ruled on the annulment § 11 par. 4 of Act no. 20/1966 Coll., on Care for the Health of the People, as amended by Czech National Council Act no. 548/1991 Coll., § 1, § 2 par. 2 and 3 and § 13 par. 3 and 5 of Czech National Council Act no. 550/1991 Coll., on General Health Insurance, as amended by Act no. 161/1993 Coll. and Act no. 59/1995 Coll., the Health Care Code, issued by directive of the government of the Czech Republic no. 216/1992 Coll., as amended by directive no. 50/1993 Coll. and directive no. 149/1994 Coll., decree no. 467/1992 Coll., on health care provided for payment, as amended by decree no. 155/1993 Coll. and decree no. 426/1992 Coll., on payment for medications and technical health care equipment, as amended by decree no. 150/1994 Coll., and in judgment Pl. ÚS 14/02, where it ruled on the annulment of part of the second sentence of § 11 par. 1 let. d) of Act no. 48/1997 Coll., on Public Health Insurance and Amending and Supplementing Certain Related Acts, as amended by later regulations, the words “or in connection with provision of that care.” The judgment does not fully deal with the reasons why the Constitutional Court deviated from its previous legal opinion, by which it is bound, and, under § 13 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, the “Act on the Constitutional Court,” can deviate from it only if at least nine of the judges present agree.

In this regard the reasoning refers to judgment Pl. ÚS 11/02 (published in the Collection of Laws as no. 198/2003 Coll.) and cites part of its statement of law: “The first possibility where the Constitutional Court can reverse its own case law is a change in the social and economic situation in the country, or a change in its structure, or a change in the society’s cultural expectations. Another possibility is a change or shift of the legal environment created by sub-constitutional legal norms that, in the aggregate, influence the approach to constitutional principles, without, of course, exceeding them, and above all do not limit the principle of democratic statehood (Art. 1 par. 1 of the Constitution of the CR). Another possibility for changing the case law of the Constitutional Court is an amendment or supplement to those legal norms and principles that form binding points of reference for the Constitutional Court, i.e. those that are contained in the constitutional order of the Czech Republic, except, of course, in the case of amendments that violate the limits provided by Art. 9 par. 2 of the Constitution, i.e. changes to the essential requirements of a democratic, law-based state.” This somewhat innocently fails to mention, that the part of the sentence cited in the judgment is preceded by this sentence: “If the Constitutional Court itself, as a constitutional body, i.e. a public authority, is not to act arbitrarily, the prohibition of which also applies to the Court, because even the Constitutional Court, or it especially, is required to respect the framework of a constitutional state, in which arbitrariness is to the public authorities, it must feel bound by its own decisions, which it can reverse through its case law only under certain conditions. This postulate can be described as an essential requirement of a democratic, law-based state (Art. 1 par. 1 in connection with Art. 9 par. 2 of the Constitution of the CR).” Yet this judgment does not change anything, nor can it change anything, on the legal condition stated in § 13 of the Act on the Constitutional Court.

The Constitutional Court found itself in a unique situation that evidently had not yet occurred in its practice - the majority wanted to deviate from a previously expressed position (which the judgment acknowledges, when it refers to judgment Pl. ÚS 11/02), but it did not have the qualified majority to change an existing position of the Constitutional Court. A minority was in favor of derogation of the contested provisions, but it also did not have a qualified majority for such a decision. Of course, it was not possible to do anything other than to deny the petition, but as regards the reasoning, there was no space to take specific positions on the consistency of the statutory regulation with the constitutional order. There was space only to state that the existing position of the Constitutional Court regarding the basis of the problem presented could not be changed, and, at the same time, it was not possible to reach a qualified majority for annulling the Act, and it was only precisely this fact that was the grounds to deny the petition. Only thus would it perhaps be possible to conclude that the Constitutional Court could, sometime in the future, intervene against a reviewed regulation with a derogatory decision, as indicated in points 113 and 115 of the judgment, because otherwise the obstacle of *rei iudicatae* stated in § 35 of the Act on the Constitutional Court would apply. Insofar as the judgment’s reasoning takes particular positions about the constitutionality of the reviewed legal regulation, they are the positions of a majority, but not a qualified majority, and therefore they cannot be legally binding, and are only the opinions of the judges who voted to deny the petition, just as the dissenting opinions are only the opinions of judges

who voted against the petition.

The judgment's reasoning is internally inconsistent. On the one hand, it states that, "However, the existing review of a statutory regulation permits the Court to base its reasoning only on abstract constitutional law arguments, not on the actual effects of a statute, which it is not possible to determine individually in proceedings before the Constitutional Court" (point 112 in the judgment's reasoning), and on the other hand it refutes the petitioners' objections about the unconstitutionality of the reviewed regulation with individual findings, such as the testimony of the Minister of Health or the Prime Minister. The reasoning says that the Constitutional Court "did not find that regulatory fees had a generally 'strangling effect,' and realistically make health care or health care aids inaccessible for anybody" (point 118 of the judgment's reasoning), without answering the question of on what basis it was possible to reach such a conclusion, and, on the contrary, it states, as the abovementioned sentence indicates, that the reasoning cannot be based on the Act's actual effects. The same can be said about the arguments relating to fees for prescription items, where the argument used is the testimony of the Minister of Health that the "expected effect of more economical handling of medicines" (point 130 of the judgments' reasoning), without reviewing at the abstract level whether this measure is or is not with the constitutionally guaranteed payment-free care, especially in a situation where the universal introduction of fees for prescription items in fact completely eliminated the possibility that a patient would be entitled to at least one medicine from each category that would be fully paid from public insurance.

Likewise, dealing with the petitioners' argument that the constitutions of a number of European states also enshrine the right to health care, in varying degrees, contributes no fundamental arguments concerning the petitioners' objection that introducing fees in health care is inconsistent with the constitutional order of the Czech Republic. None of the constitutions of the developed European Union states guarantees citizens a right to payment-free health care. If fees are paid in these countries, it is because these states do not constitutionally guarantee their citizens completely payment-free health care paid out of public health insurance. In this, the situation in these countries is fundamentally different from our situation. It is then not decisive what the petitioners argue in this regard.

Even the judgment's deliberations in terms of medical ethics, referring to the Hippocratic oath, which does not contain a commitment to payment-free health care, do not sound convincing, because they do not solve the question of payment, but one can quite certainly conclude from the oath that a doctor commits to providing medical care, and cannot condition it on the payment of some sort of regulatory fees, as is happening in many health care facilities that introduced turnstiles. I dare say that something like this never even occurred to Hippocrates. In this context it is probably worthwhile to review the Hippocratic oath, because it has a certain importance, primarily an ethical one, in relation to the subject which the judgment discusses: "I will prescribe regimens for the good of my patients according to my ability and my judgment and never do harm to anyone. I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan; and similarly I will not give a woman a pessary to cause an abortion. In every house where I come I will enter only for the good of my patients. All that may come to my

knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal.” The point is that one can conclude from the oath that providing health care cannot be conditioned on a fee paid in advance.

I agree that, “The state’s economy is a limiting factor on available medicine, not the only one, but unquestionably a significant one. A wealthy state simply has the resources to reduce the conflict between ideal and available medicine to the lowest possible level.” That was said in Constitutional Court judgment Pl. ÚS 14/02, which this judgment cites, although its conclusions and the conclusions of the dissenting judges, with which I fully agree, do not support the idea of introducing universal fees for health care and means of medical treatment, as I will attempt to explain below.

The judgment finds a fundamental conflict between the position of the petitioners, who admit that requiring payment for “hotel services,” i.e. setting a fee for accommodation and food in a hospital, “need not exceed the bounds of constitutionality,” and the fact that they simultaneously propose annulling § 16a par. 1 let. f). However, the judgment’s arguments simplify the entire problem. Under the cited provision, a fee is to be paid, among other things, for institutional care, which includes, e.g., a stay in an anesthesiology-resuscitation unit, or a child’s stay in an incubator, neither of which involves hotel services.

At a general level, one can agree that what is decisive for evaluating the actual nature of a payment is not the name of the payment, but its purpose, although the name used in a legal regulation should respect the terms established in the law, as I will discuss below. Of course, I consider completely unacceptable explaining the purpose of a regulatory fee as payments for other expenses incurred by a health care facility. The judgment literally states that, “In this regard the Constitutional Court took into consideration a certain parallel between medicine and other free professions (e.g. law, tax advising, veterinary medicine, architecture, etc.) or artistic professions (music composition, visual arts, theater, etc.), and concluded that a doctor or a health care facility also performs related activities which it could not do without and without which it would not be able to provide medical care at all. Activities such as, e.g., administrative work, legal assistance, liability insurance, transportation, cleaning, etc.” I believe that the Constitutional Court does not reach the obvious points that are generally known. The income of a health care facility is primarily income from a health insurance company, and that, of course, serves to cover the facility’s operating expenses, so we can certainly conclude that if a fee is the income of a health care facility, a certain part of it, just like a certain part of the income from health insurance companies, is used for these expenses. Moreover, these arguments completely deviate from the framework of the legal regulation. These expenses are calculated in the Ministry of Health decree no. 134/1998 Coll., which issues a list of health care services with point values, as amended by later regulations, so they are included in the remuneration that the health care facility receives from public health insurance funds.

In my opinion, the majority opinion of the plenum of the Constitutional Court, according to which the legal regulation of regulatory fees is not fundamentally

unconstitutional, is unacceptable. I will try to explain the reasons that lead me to a position completely opposite from the one stated in the judgment's reasoning.

For overall evaluation of the petition to annul regulatory fees, from a constitutional viewpoint, it is necessary to review whether Art. 31 of the Charter, in its full text, represents a fundamental right for payment-free health care and to health care aids on the basis of public insurance, or whether it is only a constitutional norm that has a different normative content. References to mere semantic differences in the Charter, by themselves, cannot stand, when the title of Chapter Two states only "Human Rights ..." but the subtitle for Part One already includes "Fundamental Human Rights..." It is necessary to distinguish the normative content under each conceptual term. From this viewpoint, it is a fact that the Charter includes provisions on human rights that have differing normative content.

First of all, it is human rights that arise directly from human existence, and only that fact is the basis for defining their constitutional content and scope. This involves values that contain the fundamental rights for preserving a person's integrity and ensuring his dignity, e.g., the right to life, inviolability of the person, and personal freedom. Such rights are inherent, inalienable, non-prescriptible, and not subject to repeal (Art. 1 of the Charter). Limitations may be placed upon them under the conditions under conditions prescribed by the Charter, and only by law (Art. 4 par. 2 of the Charter). These are fundamental rights.

In contrast, human rights and freedoms contained in Chapter Four as "Economic, Social and Cultural Rights" (semantically now without the adjective "fundamental") require the cooperation of other factors in order to be implemented; they do not apply directly, as abovementioned rights. This fact is completely obvious with Art. 31, second sentence, of the Charter. Here the right to payment-free health care and to health care aids is narrowed to the scope of public insurance, and is thus dependent on the payment of insurance premiums. The entire Chapter Four is, in aggregate, dependent on the economic and social status that the state achieves, and the related level of living standards. This right falls under the regime of Art. 4 par. 1 of the Charter, where obligations can be imposed only on the basis of law, within its bounds, and only while preserving the fundamental human rights.

The normative content of the constitutional of Art. 31 of the Charter is also limited by Art. 41 par. 1 of the Charter, because it can be enforced, as a right, only within the bounds of laws that implement this provisions. These laws are Act no. 20/1996 Coll., on Care for the Health of the People, as amended, and Act no. 47/1997 Coll., on Public Health Insurance. The Act on Care for the Health of the People, in § 11 par. 2 and 3, positively and negatively roughly defines the scope of payment-free care such that it is provided without direct payment on the basis of general health insurance, in the scope provided by special regulations, or on the basis of contractual health insurance. Health care that exceeds the framework provided by special regulations is provided for full or partial payment, and a list of examples is provided. Under § 11 par. 1 let.d) of the Act on Public Health Insurance, an insured person has a right to health care without direct payment if it was provided in the scope and under the conditions specified by the Act. It specifies that a doctor or

other expert worker in health care, or a health care facility, cannot accept any payment from the insured person for this health care, subject to penalties provided in the Act, and under § 11 par. 1 let. e) of the Act on Public Health Insurance the insured person also has a right to medical preparations and foods for special medical purposes without direct payment, if they are medical preparations and foods for special medical purposes paid out of health insurance and prescribed in accordance with the Act.

Thus, it is possible to provide by statute the definition of the content and scope of conditions for, and the manner of providing a citizen's right to payment-free health care. The Charter guarantees every citizen the right to payment-free care paid from public health insurance funds. This is a right, guaranteed in the constitutional order, to have health care in the scope of resources available to public health insurance provided for remuneration that is fully covered by these funds. The Constitutional Court spoke on the interpretation of Art. 31 of the Charter in this regard in its judgment Pl. ÚS 35/95: "Here the right to payment-free health care and to health care aids is narrowed to the scope of public insurance, and is thus dependent on the payment of insurance premiums."

Thus, it is appropriate to consider the nature of the payment that the contested provision regulates. The Act says that every insured person, or his legal representative, is required, in connection with the provision of enumerated covered care, with certain exceptions provided in the Act, to pay the health care facility that provided the care a regulatory fee in the amount set. The term "fee" is used to identify this payment. In legal terminology, "fee" means the payment obligation of an individual or legal entity in connection with the activity or a public authority (state or municipality), made in connection with the exercise of public power in his/its interest. Article 11 of the Charter provides that taxes and fees can be imposed only on the basis of the law, and it must be emphasized that the determining feature of taxes and fees is that they go into the public budget. It is obvious that this is not that kind of payment. Health care facilities and pharmacies are not state bodies, nor are they institutions to which the state transferred some of its authority in order to ensure its functions or secure resources (collection of taxes or fees) in the area of public budget administration. These are private law subjects that, among other things, based on a contractual relationship with a health insurance company, provide health care that is paid by public health insurance. Thus, we can conclude that this payment is not a fee in the abovementioned sense.

Under the Act, a regulatory fee is the income of the health care facility that collected it. At the same time, however, it must inform the health insurance company, when providing an accounting of the health care provided, information about the amount of the fee, individualized to the particular insured person to whom the fee relates. Moreover, it can be penalized by the health insurance company for not collecting a fee, with a fine of up to CZK 50,000. In addition, if the total amount paid by an insured person for regulatory fees in a health care facility and for supplemental payments for medicines exceeds CZK 5,000 in the current year, the health insurance company is required to pay the insured person the amount by which that limit is exceeded. That is thus a payment out of public funds. The explanatory report attached to the original proposal from the Ministry



of Health, which was presented to the government on 27 April 2007, states that health insurance companies' expenses of paying the amounts over the limit and the administration thereof will be "more than compensated for by limiting the consumption of health care that is not necessary given the insured person's state of health." The explanatory report also states that the increase in income of individual health care facilities will be taken into account in the case of outpatient and inpatient health care facilities in the negotiation proceeding between the providers and health insurance companies on the payments for health care in 2008.

On the one hand the Act describes the regulatory fee as income of a health care facility, i.e. a private law subject, but on the other hand, if these private subjects are paid more than the specified limit in fees by a single insured person, the insurance company will pay that person the overpayment over that limit out of public funds, to which these fees are not supposed to flow, according to the literal text of the Act. If the fee is income of a health care facility, and is not compensated by reducing the payments that the insurance company makes to the health care facility, then it is quite unquestionably cash payment for health care paid into the hands of a purely private law subject and within a purely private law relationship, which is also testified to by the recipient's obligation to report the fees collected and pay tax on them under the Income Tax Act. The "fees" thus introduced are in fact a sovereign measure in the nature of a price that interferes in a private law relationship, despite the fact that the costs for payment of health care provided in that relationship are already covered by public health insurance. To evaluate the constitutionality of the introduction of regulatory fees of this nature, the decisive element is their inconsistency with the text of Art. 31 of the Charter. That is unambiguous to the effect that a citizen has a right, on the basis of public health insurance, to payment-free health care and health care aids under conditions provided by law. That means that the care that is fully covered by public health insurance must be provided payment-free, and the law may provide which care will be covered by public insurance only partly, or not at all.

The Constitutional Court stated the same position in judgment Pl. ÚS 14/02, where it analyzed the content of § 11 par. 1 let. d) of the Act on Public Health Insurance, with the words: "Care means 'health care without direct payment,' and no other. The prohibition also concerns connection with provision of that care, i.e., again, payment-free care. However, the text of the Act also indicates that nothing prevents direct payment being collected from insured persons for health care provided beyond the framework of the conditions for payment-free care." In the same judgment, it then analyzed the content of Art. 31 of the Charter thus: "Under Art. 31 of the Charter everyone has the right to the protection of his health. Citizens shall have the right, on the basis of public insurance, to payment-free health care and to health care aids under conditions provided for by law." That law is Act no. 48/1997 Coll., on Public Health Insurance (the "Act"), which governs public health insurance and the scope and conditions under which health care is provided on the basis of the Act (§ 1 of the Act). The Act makes it obligatory for a citizen to have insurance, the content of which is provided by the Act. In setting the content of the insurance relationship, the legislature is bound by the constitutional order, primarily the material scope of the constitutional right to protection of health. In regulating public health insurance, the law cannot exceed this material framework for "protection of health" and can regulate only the

provision of care that serves to “protect health” (prohibition of arbitrariness). The insured person transfers to the insurance company, for payment, the risks that he may incur through danger to his health or interference in his health. In contrast, the insurance premium cannot be used to pay for things, procedures, interventions or services that do not serve to protect the health of the insured person, but to satisfy other needs, e.g., in securing living conditions.

Of course, the Act establishes regulatory fees universally for all beneficiaries of public health insurance, except for groups of beneficiaries named in the Act, who do not have to pay the fee. This universal introduction of the fee for the provision of health care covered by public health insurance and the fee for every item on a prescription thus rules out fulfillment of the constitutionally guaranteed right for the provision of payment-free health care in a scope provided by law, because a citizen who is not listed among the persons who do not pay the regulatory fee cannot receive any health care to which he is not required to contribute in the form of the regulatory fee. Thus, the legal framework in fact imposes on this, by far largest group of citizens who are insured by public health insurance, the requirement that, in addition to paying public health insurance, they pay another payment in order to get any treatment at all. Yet this group includes, e.g., pensioners and children under 18. It is impermissible for a right guaranteed by a constitutional regulation to be essentially denied by a statute, as the contested legal norm has done. The Constitutional Court, in two of its plenary decisions (Pl. ÚS 35/95 and Pl. ÚS 14/02), has spoken unambiguously on the question of interpretation of the term “payment-free medical care,” stating that it means health care without direct payment.

It is precisely the latter two groups of citizens that are most afflicted by the contested regulation, and it must have been clear in advance that this would be the case. As a result of this regulation, these groups of persons covered by public health insurance are exposed to a difficult situation if they fall ill with an illness that demands greater medical care and, especially, medicines and medical preparations. Their situation is not addressed by the highly disputable § 16b par. 1, which permits compensation for expenses for regulatory fees and supplemental payments for medicines, because they must first pay the funds, and get them back with a considerable time delay. Moreover, the compensation includes only the amount of supplemental payment for the least expensive medical preparation available on the market, but it is precisely the supplemental payments for medicines that are the greatest expenditures. The situation in which these groups of citizens find themselves is a violation of their fundamental right to human dignity, which is enshrined in Art. 1 of the Charter, under which people have equal dignity. Moreover, it must be emphasized that the state was fully aware of the unique situation of pensioners and children, who, understandably, do not pay public health insurance, when it provided by statute that the state itself makes the health insurance payments for this group. By subjecting them to payments, it is now denying that principle.

As regards the fee for every item on a prescription, it is not quite clear why this fee should be paid for medicines with a supplemental payment. Is a medicine such a different commodity that the price does not fulfill the ordinary regulatory function and it is therefore necessary to regulate its sale by an additional special

fee? Medicines are not the only goods whose price is regulated on the basis of a price decision, but for no other good with a regulated price is the sale regulated by a fee that would raise the seller's income across the board. Analyses using complicated mathematical formulas have no real aim other than to disguise the fact that a customer who buys a medicine partly covered by public health insurance is supposed to pay to the seller primarily the increased value added tax. Entrepreneurs in the pharmacy business thus have an exclusive position vis-à-vis other entrepreneurs, who must deal with the increased tax themselves, perhaps to the detriment of their sales mark-up. Thus, other entrepreneurs are placed in an unequal position compared to them.

Nor can I accept the argument that justifies the introduction of fees per item on a prescription by a reduction in drawing funds from public health insurance for medicines whose price is lower than the regulatory fee or is close to it. This effect could easily be achieved by removing medicines in that price category from the list of medicines fully or partly covered by public insurance, which, in and of itself, would not be inconsistent with constitutionally guaranteed payment-free care, because that measure would only apply to certain kinds of medicines, and would not lead to universally canceling payment-free care.

A health care facility has the obligation to collect regulatory fees, and if it does not do so, the health insurance company can impose a fine of up to CZK 50,000. The judgment does not deal at all with the proposal to annul this provision due to inconsistency with the constitutional order. Yet it is evident that this provision is inconsistent with Art. 11 par. 1 of the Charter, under which everyone has the right to own property. Thus, it is a right, and not an obligation. Therefore, if someone has the right under the law to acquire property, he cannot be penalized for giving up that right. Moreover, this provision is inconsistent with Art. 1 of the Charter, under which people have equal rights. Therefore, in a private law relationship, the law cannot impose a unilateral obligation on one party vis-à-vis the other, moreover, one sanctioned by a high fine that has no basis in a contractual relationship. Health insurance companies, on one side, and health care facilities, on the other side, are private law subjects that have concluded a contract on the provision of health care. That contract does not contain a commitment by the health care facility to collect fees for health care purely for itself. Thus, it is a violation of the equality of the contracting parties if the law requires one party to collect certain amounts that are purely its income, and gives the other party the right to impose fines for failure to collect these amounts, with which, of course, it has absolutely nothing in common, because they are not its income, and the only connection here is the right of the insured person, if the limit set by law is exceeded, to require the return of the overpayment above that limit out of public insurance funds. Of course, this is the right of a subject other than the health care facility, and thus there is no reason to burden the health care facility, on a statutory basis, with obligations that are tied to the rights of third parties. Likewise, of course, it would be a violation of the right of equal status if the health care facility were required to collect fees for the benefit of the health insurance companies, as another payment by insured persons into the system of public health insurance, unless this collection were made on the basis of a contractual relationship with, and remunerated by, the insurance company.

I do not at all wish to claim that all health care must be provided payment-free. In judgment Pl. ÚS 35/95 the Constitutional Court addressed this question as follows: “Insofar as the petitioners claim inconsistency with the Charter in the fact that a second limiting factor was established unconstitutionally, i.e. the amount of financial resources for payment of health care, this limiting factor is directly contained in Art. 31, second sentence, of the Charter, where the entitlement of citizens to payment-free health care and health care aids is tied to the constitutional requirement and the framework of public insurance. The public insurance system, like every insurance system, is limited by the amount of funds that are obtained from the obligation to pay premiums for public health insurance.” However, care covered by public insurance must be payment-free for everyone who participates in that insurance. In the same judgment, it also stated that “Defining the statutory definition of the content and scope of conditions and the manner of providing the citizen’s right to payment-free care is possible only by law.” Thus, it is possible to provide by law which items of medical care are fully covered by public health insurance, which partly, and which not at all; it is the same with coverage of medical preparations and food for special purposes. However, at the same time there must be a possibility for voluntary insurance that could pay expenses for treatment that will not be covered by public health insurance funds. The fact that the state, at least since 1995, has not been able to prepare a law that would determine which health care was fully or partly covered by health insurance, and thus also define care that is not covered by those funds at all, so as to balance the public health insurance budget, although it has been obvious for several years that expenses are higher than incomes, cannot be a reason to violate the constitutional order. In judgment Pl. ÚS 35/93 it defined the possibilities of this legal regulation so that making this right subject to conditions provided by law does not mean that the law can completely rule out payment-free care. The law may specify what is payment-free and what is not.

The provisions of § 16a and § 16b of the Act, which introduce regulatory fees for the provision of health care, are inconsistent with Art. 31 of the Charter, because they exclude the overwhelming majority of persons insured by public health insurance from payment-free provision of that care covered by public health insurance funds, although the constitutional order guarantees them that right. They are also inconsistent with Art. 11 par. 1 of the Charter, because [they] penalize the right to give up property, and with Art. 1 of the Charter, because [they] establish an inequality in rights between contractual parties to a private law relationship and places a substantial group of citizens, specifically pensioners and children under 18, into undignified conditions. It is therefore appropriate to annul them.

The petitioners also criticized § 17 par. 5 of the Act, which authorizes the Ministry of Health to issue a list of health care services with point values in the form of a decree. The list of services with point values sets the price that the providers charge insurance companies for health care provided to their clients, on the basis of a contract on the provision and payment of health care, concluded between the health care provider and the relevant health insurance company. Under the new regulation, a price appendix to this contract, which is concluded for a definite period, is negotiated each year; it sets the amount of remuneration according to

the price in the list of services.

Under the regulation in effect until the end of 2007, the list of health care services with point values was prepared in negotiation proceedings with representatives of the General Health Insurance Company of the Czech Republic and other health insurance companies, the appropriate professional associations of health care providers, as representatives of the contractual health care facilities, professional organizations established by law, expert scientific societies, and insured persons' interest groups. If a contract was concluded, the list of health care services with point values was presented to the Ministry of Health to be evaluated for consistency with legal regulations and the public interest. If the result of the contract was consistent with legal regulations and the public interest, the Ministry of Health issued it as a decree. If there was no contract, or if the Ministry of Health found that the contract was not consistent with legal regulations or the public interest, the Ministry of Health itself decided on a list of health care services with point values and then issued it in the form of a decree.

The currently valid regulation differs from the previous one in that it contains a provision authorizing the Minister of Health to issue the list in the form of a decree, without making a decision first. The final consequence of that is that the Ministry of Health can determine the price for medical services in the form of a generally binding regulation, and the parties to the private law relationships, the providers on the one hand and the insurance companies on the other hand, cannot defend themselves against it in any way. The Act preserves the negotiation proceeding, but the new regulation permits the Ministry of Health to not observe it, as the Ministry's conclusion that a contract is not consistent with legal regulations or the public interest is not subject to any review, because it does not have to issue any decision about it, and [can] directly issue a list of health care services with point values in the form of a generally binding legal regulation. This opens room for complete arbitrariness and corruption, because the individual parties to contractual relationships can influence Ministry employees, perhaps even the Minister himself, behind the scenes, when they set the price per points for individual health care services. In the current legal situation, the affected subjects also cannot seek judicial protection.

Based on the authorization in § 17 par. 5 of the Act, the Ministry regulates by decree, i.e. a generally binding legal regulation, the rights and obligations of precisely individualized subjects, which is typical for acts of application of law. It thereby deviates from one of the fundamental material elements of the term "law" (legal regulation), which is generality. On the question of ruling out judicial review in the case of an individual legal regulation, the Constitutional Court said in judgment file no. Pl. ÚS 40/02: "An individual framework contained in a legal regulation that deprives the addressees of the possibility of judicial review of the fulfillment of general conditions of a normative framework with a particular subject, and that lacks transparent and acceptable justification in relation to the possibility of general regulation, must be considered inconsistent with the principles of a law-based state (Art. 1 of the Constitution), in which the separation of powers and judicial protection of rights are immanent (Art. 81, Art. 90 of the Constitution)."

Under Art. 36 of the Charter everyone may, through the legally prescribed procedure, assert his rights before an independent and impartial court or, in specified cases, before another body, and anyone who claims that his rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision, unless otherwise provided by law. However, judicial review of decisions affecting the fundamental rights and freedoms listed in the Charter may not be removed from the jurisdiction of the courts. Setting prices per point of medical services is interference in the individual rights of subjects that conclude a contract, under which they provide performance to each other. Thus, it is interference in a private law relationship, which is justifiable by the legitimate requirement to keep public funds under control, but it cannot be applied in a manner that creates conditions for completely suppressing the right of the affected private law subjects, at least in some form, to turn to a court. Therefore, the authorization provision is inconsistent with Art. 36 of the Charter.

### **Dissenting Opinion of the Chairman of the Constitutional Court, Pavel Rychetský**

The dissenting opinion that I am filing under § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, dissents both from the verdict, which denied the petition to annul part of Act no. 261/2007 Coll., on Stabilization of Public Budgets, separated out for independent proceedings under file no. Pl. ÚS 1/08 (the so-called health care part of the “collection Act”), and from the arguments of the majority of the plenum of the Constitutional Court, insofar as it claims that introducing so-called regulatory fees in health care is constitutional. Here are the reasons for my dissenting opinion:

1) The Constitutional Court’s standard procedure in abstract review of a norm is to test whether the contested norm is constitutional, and the first step of that is normally to review whether the process by which the norm was adopted was constitutional. Only if the contested norm survives that first review step does the Constitutional Court review the norm on the merits, for consistency with the constitutional order, using the tests of proportionality, purposefulness, inviolability of fundamental human rights and freedoms, etc. In my opinion, in this case the contested Act did not survive the first step of the standard test, and should have been annulled. I have already explained the detailed reasons for my dissenting opinion in my joint dissenting opinion with Judge to judgment file no. Pl. ÚS 24/2007 and therefore I refer to it in full.

2) However, even if the contested Act as a whole survived the review of the constitutionality of the adoption process, in my opinion the Constitutional Court should have annulled all provisions relating to the introduction of s-called regulatory fees in health care, and the amended provision § 17 par. 5 of Act no. 48/1997 Coll., on Public Health Insurance. In this case, the Constitutional Court’s obligation was primarily constitutional law evaluation of the introduction of a statutory obligation to provide cash payment for every item of health care, universal introduction of regulatory fees for stays in a health care treatment facility, as well as the introduction of a mandatory payment into the hands of

pharmacy operator for every item on a medical prescription. Despite the wide scope of the reasoning in the negative judgment, the arguments in it are concentrated solely in the level of general considerations on the applicability of the proportionality and reasonableness tests, with an emphasis on the principle of restraint and minimizing interference in the legislative will. These general considerations in the judgment's reasoning then culminate in the conclusion that "the Constitutional Court also takes into account the fact that the effects of reform cannot be evaluated until after the mechanisms created can begin to function, and adds that, in terms of evaluating the constitutionality of the contested provisions, it has authority only to decide on the fundamental principles, not on a particular factual situation." (see point 91). However, this consideration goes beyond the mission (and responsibility) of the Constitutional Court which, on the contrary, is supposed to precisely define the constitutional limits within which legislation must stay, and exceeding which is grounds for the Court's derogatory intervention. Thus, the judgment, which I oppose with this dissenting opinion, avoids the essential thing - conflict with Art. 31 of the Charter of Fundamental Rights and Freedoms and all the current case law of the Constitutional Court, which, moreover, cannot be successfully overcome, without applying § 13 of the Act on the Constitutional Court (which the plenum of the Constitutional Court did not do in this case). Insofar as the judgment conducts a debate with the constitutional category of payment-free health care, applying historical deliberations from the Code of Hammurabi, through medieval sources, to quotations from the history of medicine (in the aggregate, proving that medical services were always paid), it does so quite inappropriately and unnecessarily (see points 96 and 97) - none of the parties or judges of the Constitutional Court questions that medical care is paid, and not in a negligible amount, but, of course, within the Czech legal order exclusively within the framework of public health insurance. The basis of the arguments on which the majority of the plenum of the Constitutional Court basis its denial verdict and the conclusion that the contested part of the Act is not unconstitutional is concentrated in points 103 to 108 of the reasoning. It correctly states that legal norms that affect the sphere of social rights must observe the significance and essence of social law (its essential content) and cannot exceed the defined constitutional limit so much that they would eliminate this right or the possibility of exercising it. Only after that do the tests of legitimacy (purposefulness) and reasonableness (rationality) of the contested legal regulation come up. Of course, it is precisely this process that leads me to a completely different conclusion - that the contested norm is obviously unconstitutional. The essential core of the second sentence of Article 31 of the Charter is "everyone's right to payment-free health care on the basis of public health insurance," which the Constitutional Court has already interpreted repeatedly. In judgment file no. Pl. ÚS 35/95, the Court explicitly stated that "the entitlement of citizens to payment-free health care and to health care aids is tied to the constitutional requirement and framework of public insurance." The Constitutional Court repeated this constitutional safeguard in its judgment file no. Pl. ÚS 14/02, when it found constitutional § 11 par.1, let. d) of Act no. 48/1997 Coll., on Public Health Insurance, which forbade health care facilities and doctors to accept any kind of payment for health care, "even in connection with providing that care." Now, however, we see the conclusion that "The essential content of Art. 31, second sentence of the Charter is the constitutional establishment of an obligatory system of public health insurance, which collects and cumulates funds

from individual subjects (payers) in order to reallocate them based on the solidarity principle and permit them to be drawn by the needy, the ill, and the chronically ill. The constitutional guarantee based on which payment-free health care is provided applies solely to the sum of thus collected funds.” (point 106) Thus, we learn that the constitutional order no longer guarantees everyone’s right to payment-free health care (in the words of the Charter), but, on the contrary, the constitutional guarantee is provided exclusively (solely and only) to the public law system of health care, apparently as a new subject of constitutionally guaranteed rights and freedoms. Of course, the careful reader of the judgment will not fail to observe that the authors of this new and unworn opinion apparently are not completely convinced about it, because after concluding that the Act does not affect the essential contest of the social right (the only bearer of which they identified as the health care insurance system) they also proceeded to the remaining three steps in the test of constitutionality. They then easily overcome the doctrine of non-repealability of a guaranteed social right, because they ascribe this social right only to the subject called the “insurance system,” and not to those who, under the first sentence Art. 31 of the Charter, have a right to protection of health, and under the second sentence, a right to payment-free health care. By introducing the statutory obligation to pay regulatory fees for health care really did not annul the right of the system to collect and cumulate funds, or its actual implementation. Of course, the right of all participants in the health care insurance system to payment-free health care, as it was previously provided to them, was completely annulled. The legitimacy of the aim is then seen in “an emphasis on such organization of the health care system as would ensure higher quality actual implementation,” which “the Constitutional Court considers ... determined” (see point 110). Of course, it is difficult to debate this point using constitutional law, and I refer only to the already mentioned opposite claim of the same judgment in point 91, that “the effects of reform cannot be evaluated until after the mechanisms created can begin to function.” Insofar as today’s arguments of the narrow majority of the plenum of the Constitutional Court in the reasoning (see, in particular, points 112 to 115) even concludes that the Constitutional Court cannot, within abstract review of a law, evaluate its effects on the norm’s addressees, then in fact it deprives the Constitutional Court of its elementary and irreplaceable role. What else does The Constitutional Court do in abstract review of norms but [review] whether an evaluated norm, when applied, does not violate the fundamental principles of the constitutional order, and, especially, constitutionally guaranteed human rights and freedoms. In this case the authors of the majority opinion, on the one hand take all four steps of the traditional test for evaluating the constitutionality or unconstitutionality of a contested norm, but thanks to this deliberation, it is “de-boned” of the substantive method of the constitutional judiciary. The resulting conclusion necessarily appears purely self-serving. Otherwise, the judgment would have to analyze, for every regulatory fee, the legal form, purpose, and, especially, the nature of the payment - what services the fee is prescribed for. And, of course, also the effect of the fee on the sphere of constitutionally guaranteed rights of the subjects on whom it was imposed. Instead, it calls on the legislature and the executive branch to take these steps (see points 113 to 115). In the test of purposefulness the majority of the plenum of the Constitutional Court could have determined that the explanatory report to the government bill of the contested Act, the only purpose for introducing so-called regulatory fees in health care is explicitly stated to be the attempt to “limit the



abuse of health care” by insured persons. This conclusion was also confirmed in the presentation of evidence during the hearing, by the questioning of Minister of Health Julínek, who, as a witness, stated that “the regulatory nature of the fees also functions psychologically, so that people consider whether a visit to a doctor or hospitalization is not unnecessary.” The Charter of Fundamental Rights and Freedoms, in Art. 31, gives everyone the right to protection of health, stating that “citizens shall have the right, on the basis of public insurance, to payment-free health care and to health aids, under conditions provided for by law.” The Act on Health Insurance then imposes an obligation for payments for health insurance, and, with precisely named groups of citizens who are insurance payers (e.g., unprovided for children, pensioners, and others) it provides in § 7, that their contribution to public health insurance is paid by the state. Nevertheless, in the contested part of the Act, even these payers are not exempt from the obligation to pay regulatory fee, although in the logic of the current health insurance system, in their case the fees should also be paid by the state. The obligation to pay regulatory fees would thus stand only in the case of fees for so-called hotel services during a stay in inpatient health care facilities, although even in that case the legislature should have, in the spirit of the constitutional imperative under Art. 31 of the Charter distinguished cases where a patient receives only health care and not hotel services (e.g., in the case of a stay in an intensive care unit or placing an infant in an incubator). Art. 31 of the Charter states clearly that “citizens shall have the right, on the basis of public insurance, to payment-free health care.” That means that the care which is fully covered by public health insurance must be provided payment-free. The law can specify, which care will be fully covered by public insurance, which partly, and which not at all. Instead, in this case the legislature adopted a norm that universally and without differentiation sets the fee obligation on practically all kinds of health care and all insured persons without differentiation. All forms of interpretation (grammatical, systematic, logical and teleological) of the contested part of the Act on Stabilization of Public Budgets just like the result of presentation of evidence, confirmed that fees are paid for health care, and their purpose is to limit abuse of that care by insured persons. Of course, such a regulation is obviously unconstitutional, and the Constitutional Court had an obligation to annul it regardless of the declared principle of restraint and minimization of interference.

In point 119 the judgment states “thus, we can summarize that, generally, from the point of view of Art. 31 and Art. 4 par. 4 of the Charter, the regulatory fees provided by the Act are within the limit that preserves the essence and significance approach to dignified health care paid from public health insurance, and these payments do not create a barrier that limits this access (they do not have a “strangling effect”), also in context with benefits provided from the social security system.” Of course, we cannot tell from the judgment how it arrived at that, although dozens of individuals and organizations (e.g., the National Council of Persons with Health Disabilities, the Union of the Physically Disabled) have already turned to the Constitutional Court, documenting, at least with specific groups of people, the precise opposite. Moreover, the universal introduction of regulatory fees in health care is inconsistent with Art. 1 par. 2 of the Constitution, under which the Czech Republic is required to observe its international commitments. The plenum of the Constitutional Court was aware of the position of the

ombudsman, from which I quote:

“In connection with introducing regulatory fees for medical care under § 16a par. 1 of Act no. 48/1997 Coll., on Public Health Insurance, as amended by later regulations (the “Act on Public Health Insurance”), in relation to petitioners for international protection, the ombudsman, non-governmental organizations, and doctors who come into contact with that clientele noticed serious problems with the accessibility of medical care, or with medicines for this group of people. We can consider it impermissible for the objective inability to pay fees in individual cases limit the petitioner in the use of medical care, or for doctors who do not collect the fees (again, in a situation where the applicant objectively does not have the funds to pay the fee) to be exposed to the risk of sanctions under § 16a par. 8 of the Act on Public Health Insurance.

Under the Act on Asylum, in airport intake centers, and at intake centers that are considered by a legal fiction to be airport intake centers (today, the intake center Velké Přílepy), pocket money should not be paid at all (87a par. 3 of the Act on Asylum). At the same time, asylum applicants can be held in these facilities up to 120 days. During a stay in a residential center, pocket money is given only to those applicants who receive food (at present, they are given an amount of CZK 16 per person per day). The amendment no. 379/2007 Coll., by adopting § 46a, expanded the legal possibilities for keeping applicants in an intake center. However, at the same time, pocket money is not paid for the period when an applicant is not in a residential center, e.g., when hospitalized. Applicants who receive a financial contribution in the amount of the minimum living amount instead of food are not given pocket money. Applicants may not legally work until one year after proceedings concerning giving them international protection have begun. When living in private accommodations, the applicants can then receive a financial contribution of 1.3 to 1.6 times the minimum living amount, for a maximum of three months.

In view of these limits on applicants’ legal income, certain categories of them are not able to pay fees for medical care. It is unfortunate that this applies especially precisely to applicants who, for various reasons (chronic disease, serious illness requiring hospitalization, advanced age, etc.), need increased medical care, or groups that are objectively at higher risk of illness (which, generally, includes children attending schools). Health care facilities have an obligation to collect fees, or subsequently attempt to collect them, if applicable, by judicial proceedings (otherwise they risk receiving an administrative penalty), where the amount originally owed can increase several times because of additional items. It cannot be considered ethical for person who, for objective reasons, cannot obtain the funds to pay fees from legal sources, to get into problems with payment of fees (and in the present situation that cannot be ruled out). In this regard, I must also mention the obligations arising for the CR under EU law, especially from Council Directive 2003/9/ES (“Directive 2003/9/ES”), which specifies minimum norms for accepting asylum seekers. Under Art. 15 (Health care) par. 1 of the Directive: “Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care.” Under Art. 13 (General rules on material reception conditions and health care): 1. Member States shall ensure that material reception conditions are available to applicants

when they make their application for asylum. 2. Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. Member States shall ensure that that standard of living is met in the specific situation of persons who have special needs, in accordance with Article 17, as well as in relation to the situation of persons who are in detention.”

3) Peripherally, I must also point to the fact that, in conflict with settled doctrine, the legislature uses for these payments the term “fee,” which has been for centuries the term for public law payments to a public authority in connection with the exercise of its public power. However, in this case the term “fee” hides a payment between two private law subjects in a relationship where one party (the subject doing business in the health care field) provides a certain kind of service (health care) for payment, which is paid for the recipient of that service by a health insurance company. Thus, this is in fact a universal, unilateral price measure, which - regardless of the principle of free creation of prices and the free will of contracting parties, and, moreover, subject to penalty - sets a universal price surcharge on health care that, in the constitutional order, is provided payment-free, on the basis of public insurance. The plenum’s majority opinion deals with this fact in points 116 and 117 of the judgment’s reasoning in a manner that completely defies the elementary constitutional law criteria, and therefore it is worth quoting from it here: Hypothetically we can certainly imagine the alternative that the “regulatory fee” in the same amount would be conceived as part of the insurance premium for health insurance, and the place of payment would be the health insurance company, which would subsequently, contractually or by law, increase the payment to the relevant health care facility by the amount of this insurance premium.” Yes, hypothetically one can imagine virtually anything; of course, the Constitutional Court would have to - also hypothetically - acknowledge that, in that case, where the state pays the insurance premium for an insured person it would also pay the increased payments (although apparently only hypothetically). Because it does not do so, in that case the Constitutional Court would have to annul the regulatory fees, and give the legislature space for a constitutional fulfillment of this hypothetical construction. Moreover, the judgment tries to deny the logical conclusion that this is de facto a price measure. Yet, it argues by analogy with the decree of the Ministry of Justice that sets the tariffs for non-contractual remuneration of an attorney for legal services. Yet, payments for an attorney’s legal services are undoubtedly by nature prices.

4) A separate chapter - which, of course, cannot be logically explained at all - is the introduction of an obligation to pay a regulatory fee to a pharmacy for each item of medicine on a prescription. This fee is naturally not for an item of health care, but a payment in a purely private law relationship that is identically with sale in a shop. In this case the majority of the plenum avoids constitutional law arguments, and concludes that “it is evident from the evidence presented that the pharmacy facility, although it is the place of payment, keeps basically only a minimal amount out of the regulatory fee collected.” (point 130). If I set aside the fact that nothing like that came out of the evidence presented, I cannot avoid the question, what constitutional law relevance would such a finding have? None, of course! The judgment’s remaining arguments concerning this fee are then limited to the importance of the regulatory function, which is supposed to lead patients to

“a responsible approach to obtaining prescription medicines.” Logically the inescapable conclusion is that the doctors who write prescriptions are irresponsible people and can be led to practice medicine responsibly only by the patient - apparently under the effect of a fee which, however, the Constitutional Court did not find to be “strangling” - see points 118 and 130 (again without documented arguments) and without taking into account the accumulation of the introduced fees, and, especially, to everyone’s constitutionally guaranteed right to have his human dignity respected under Art. 10 par. 1 of the Charter.

5) I believe that the Constitutional Court also had an obligation to annul § 17 par. 5, inserted into Act no. 48/1997 Coll., on Public Health Insurance. This provision authorizes the Ministry of Health to issue a list of health care services with point values by decree. However, under the previous legal framework, the list of health care services and their point values was assembled in a negotiation proceeding among health insurance companies, professional associations of health care providers, expert scientific societies and insured persons’ interest groups. Only after the negotiation proceeding ended could the Ministry of Health issue a decision that either approved the agreement, or, on the contrary, stated that the agreement conflicted with legal regulations or the public interest, and then issue a list of health care services by decree. The ministry’s decision was subject to independent judicial review, which could be sought by the affected subjects. The new legal regulation meets the elements of unconstitutionality, because it removes the possibility of judicial review in an area as important as setting the price of a point for medical services. Of course, such a regulation is in conflict with Art. 36 par. 1 of the Charter, under which everyone may assert his rights before an independent court. The arguments of the majority of the plenum in the judgment’s reasoning, according to which this situation is analogous with a decree from the Ministry of Justice determining remuneration and reimbursement to an attorney (see point 121) is inappropriate - that regulation leaves setting the amount of an attorney’s remuneration to the contractual free will of the parties, and only secondarily offers tariff remuneration where an attorney and client do not reach an agreement.

#### **Dissenting Opinion of Constitutional Court Judge Eliška Wagnerová**

1. My dissenting opinion is aimed at both the verdict and the reasoning of the judgment. Today I also refer in full to my dissenting opinions to the two previous judgments concerning the so-called reform of public finances - i.e. in the matters Pl. ÚS 24/07 and Pl. ÚS 2/08. I also join those parts of the dissenting opinion of my colleague, J. Nykodým, in which he recapitulates the Constitutional Court’s current case law on the question of “payment-free” status tied to those “rights” guaranteed in Chapter Four of the Charter, which are subject to the requirements of an Act adopted under Art. 41 par. 1 of the Charter, and to the arguments concerning the evaluation of the constitutionality of § 17 par. 5 of Act no. 48/1997 Coll. on Public Health Insurance, and I also join in the dissenting opinion of my colleague P. Holländer, concerning evaluation of § 17 par. 6 of that Act, and further in the scope of the parts stated below, with the kind consent of both my respected colleagues.

## I.

### Activism That Denies Binding Procedure

2. I believe that the Constitutional Court's current case law on interpretation of payment free status in the abovementioned sense, summarized in the dissenting opinion of J. Nykodým, could have been further developed by today's judgment toward closer investigation of the nature of economic, social, and cultural rights, and if there were no further development, it should have been respected in its present form. Nothing about this requirement can be changed by the claim in point 121 of the judgment, that the Constitutional Court "is addressing this issue, thus defined, for the first time," which also cannot be described as apodictic, because it simply does not correspond to real and verifiable facts. I am led to demand respect for the existing case law by the fact that procedural conditions under § 13 of the Act on the Constitutional Court were not created (the judgment was accepted by only eight votes, although the Act requires nine votes to change a legal opinion previously stated in a judgment), nor were any of the constitutionally material conditions stated in judgment Pl. ÚS 11/02, which are to prevent the Constitutional Court itself from acting with constitutionally prohibited arbitrariness, found (or even looked for). Although the majority opinion refers to that judgment in point 121, it does not say what situation arose that would permit abandoning the existing case law. Moreover, the eight-member majority of the plenum did not even address the statutory procedural requirement for a change in case law.

3. For me, this activism smacks of self-servingness, which, instead of the requirement that the plenum of the Constitutional Court proceed in a constitutional manner, relies on some sort of "highest point of reference," which projects health care reform into the Act which, only because it is part of the "reform," becomes immune from proper review in terms of the constitutional order (see below). It is noteworthy that the eight-member majority renounces activism and presents its position as an expression of disciplined self-restraint (see points 88, 92 and others). I will try to prove the contrary, with the words of the former head of the Israeli Supreme Court, Aharon Barak: "I define an activist judge as one who, from the variety of alternatives that he has available, chooses the one that changes existing law more than the other possibilities, and I define a judge who practices self-restraint as one who, from all possibilities, chooses the one that, more than the others, preserves the existing situation . ... So, e.g., in a situation where precedent exists, an activist judge is one that deviates from it, while a self-restraining judge is the one who preserves it." And a few pages later we read: "It makes no sense to claim that an activist judge is by definition a liberal judge and that a self-restraining judge is a conservative one. Whatever meaning is ascribed to the terms 'liberal' and 'conservative,' an activist judge can be a conservative one, if the change that he makes produces new conservative positions. Similarly, a self-restraining judge can be a liberal, if, in preserving what exists, he preserves the liberal values embodied in the existing rule." In the conclusion of the work, the author states his conviction that in the "choice between truth and truth" we must clearly give priority to the stability of case law. He sees justification for this conclusion in, among other things, the fact that a judge must weigh his decision both in terms of its benefits, and in terms of the extent of damage [it causes]. He must ask himself whether the advantage of the solution adopted (even a

theoretically more just one) outweighs the damage caused by frustration from unmet expectations in relation to the decision” (Barak, Aharon, *Judicial Discretion*, Yale University Press, 1987, pp. 148, 150-151, 259).

4. For the foregoing reasons, in connection with the sensitive nature of the subject matter discussed today, and also because previous case law, measured by the number of previous decisions, can be considered rich and invariable, I maintain that today’s decision has damaged the credibility of the Constitutional Court of the CR, as an institution that has been built over fifteen years, that is intended to see to the observance of constitutionality, the immanent element of which is also seeking to promote elementary general fairness, and today we cannot yet estimate how deep the damage will be. In my opinion, because of all the cited, serious failings the opinions stated in the judgment cannot be considered to function as precedent or to create the obstacle of *rei iudicatae*.

## II.

### Are Social Rights Not Institutional Guarantees?

5. A “right” guaranteed by Art. 31. of the Charter is only seemingly a fundamental right, if we understand a fundamental right to be a public, subjective right, from which one could directly derive an individual’s “entitlement” in relation to a public authority, whether in the form of entitlement to have the right respected, or in the form of an entitlement to have it protected. If there is not, from that point of view, a fundamental right, there is certainly, generally speaking, a principle that is part of the objective law formed by the constitutional order, and which is at the same time unquestionably a part of the value decisions made by the particular framers of the constitution. However, in this case we can look for even more close-fitting and specific characteristics of the decision by the constitutional framers, which they formulated as a citizen’s right to payment-free health care and health care aids on the basis of public insurance, which is usually called an institutional guarantee. European legal science considers that to be a constitutional law guarantee of the institutes (institutions) of public, state, political, religious and private life, which the framers of the constitutional consider so valuable that they wanted to protect them from changes by the legislature, in a scope set forth in the constitutional order, which determines their very essence (see Ossenbühl, Fritz, *Die Interpretation der Grundrechte in der Rechtsprechung des Bundesverfassungsgerichts* [Interpretation of Fundamental Rights in the Case Law of the Federal Constitutional Court], in *NJW* 46/1976, p. 2100 et seq., and similarly, a wealth of other foreign literature).

6. The constitutional law guarantee of a particular institution pursues the political aim consisting of maintaining a certain objective order in one of the abovementioned areas of life so as to preserve its structure and function. In this case, constitutional law has fixed the framework in that area of the lives of members of the society that is connected with protection of their health. Obviously, Art. 31 of the Charter, in terms of structure, requires preserving health care on the basis of public insurance (which, of course, does not rule out the law allowing the existence of private insurance under conditions defined by law, which, however, under the current constitutional framework, can only be a sort of

complementary offer, which, of course, no one who would otherwise be entitled to use it can be forced to use). In terms of function, Art. 31 of the Charter, in the extent to which it enshrines payment-free health care (better stated, in fact this is only to rule out the possibility of requiring further payments for the provision of health care, in addition to the payments already made through health insurance), must be interpreted as a kind of guarantee of social statehood in an area as sensitive as protection of health. At the same time, applying payment-free status only to the provision of health care itself and to health care aids, functions as a limit on the payment-free requirement in terms of the constitutionally guaranteed institution. In other words - payment-free status can certainly be expanded further simply by the will of the legislature, but in deliberations about restricting payment-free status the legislature is bound by the limit that follows from the essence of the constitutionally guaranteed institution.

7. It is precisely concerning the payment-free provision of health care that we must maintain the interpretation provided by the Constitutional Court's existing case law; the formal (procedural) conditions for changing it have not arisen, nor have any material conditions been determined (see above). Of course, the contested statutory regulation ignores the interpretation of "payment-free" repeated provided by the Constitutional Court of the CR, insofar as it introduced so-called "fees" paid directly in connection with the provision of health care by doctors and in pharmacies. (As regards evaluation of the issue of the so-called "fees," which are actually not so completely fees, and payments are made for a purpose or purposes that remained hidden even from the creators of the Act - see the answers of the witness, Minister T. Julínek, to questions from my colleague, Constitutional Court Judge J. Nykodým - I join in all the reservations that my colleague, professor P. Holländer raised on this topic in his dissenting opinion. I can perhaps only add that the judgment itself, which supports "fees," with a certainty that it certainly did not draw from the evidence or from real world facts (described by all the media for many months), on the basis of several purposes, from a regulatory function, to a contribution to the technical operation of a doctor's office or health care facility, is a perfect illustration of the ironic advice of the great poet, and trained lawyer, J. W. Goethe, to colleagues in the legal profession: "Im Auslegen seid frisch und munter! Legt ihr's nicht aus, so legt was unter.")

8. If so-called "fees" are required for health care (whether from a doctor or in the form of fees for medicines) by payment (income) to a private person (doctor, health care facility, pharmacist), on which, of course, the provision of health care is conditioned, one cannot seriously claim that health care is provided solely on the basis of public insurance. In reality it is provided, first of all, against payment provided to a private person, and provision of that payment is the decisive factor for whether it is even possible to subsequently draw on the public insurance that was paid for. Because there are two different recipients for the two payments (a doctor or health care facility and an insurance company), the fees cannot in any way be seen as a kind of co-participation by insured persons in the public insurance (even if unconstitutional). Thus, the concept chosen by the Act has disturbed the entire structure of the institution of health care, which must, at the behest of the constitutional framers be provided on the basis of public insurance.

9. Therefore, I can conclude that the concept of fees chosen by the Act is clearly inconsistent both with the structure and with the function of the constitutional guarantee of the institution of a right to payment-free health care on the basis of public insurance contained in Art. 31 of the Charter, and therefore the relevant contested provisions of the Act should have been annulled due to inconsistency with that provision of the Charter.

### III.

#### Constitutional Immunity for Reform Laws?

10. Insofar as the judgment claims in point 91 that “if it acted in too activist a manner in relation to any reform, including reform of health care, it would certainly create case law that would a priori close the door on any reform attempts,” in connection with the admission in the conclusion (point 134), that among the various motives due to which it was not possible to annul the contested statutory provisions “it gives hierarchical priority” to reasons that lead it to restraint, and then states in different words that when attempting reform it is necessary for the requirements of constitutional conformity for the contested Act be softer and recede “just a little bit” into the background. It is appropriate to ask if in future any statute is identified by the executive (any executive) as a reform statute, will it receive a more indulgent constitutional law evaluation? Personally, I believe that such an innovative approach has no support in the constitutional order.

11. It also follows from the judgment’s reasoning (points 92, 93) that the statutory regulation of social rights should only be subject to the so-called rationality test, with reference to the American theory (the rational-basis test), which the judgment interprets in a “Czech manner.” The judgment does not address whether the reviewed statutory regulation, although at first connected with a social right, does not interfere in one of the fundamental rights that can be described as public subjective rights (e.g., human dignity, the right to life, and personal integrity), and whether it is not therefore necessary to apply a stricter test. Here I refer to what my colleague professor P. Holländer says in his dissenting opinion about the amount of the so-called “subsistence minimum,” and I agree with his evaluation. I also fully agree with my colleague P. Holländer’s evaluation of the historical analysis parts of the judgment, and only add that the need to ensure health care for the population was recognized in North America (in Canada) as early as the beginning of the 20th century. Point 56 of the Canadian Supreme Court case *Chaoulli v. Quebec (Attorney General)*, decision of 6 September 2005, says: “Government involvement in health care came about gradually. Initially limited to extreme cases, such as epidemics or infectious diseases, the government’s role has expanded to become a safety net that ensures that the poorest people have access to basic health care services. The enactment of the first legislation providing for universal health care was a response to a need for social justice.”



#### IV.

#### Values of Civilization as the Basis for a Concept of Justice

12. In relation to the group of socially weak seniors it is completely obvious that the contested Act is unconstitutional, if one evaluates it using common sense.

13. It is obvious that even a relatively young person, let alone a senior, cannot secure proper health care out of the minimum subsistence amount calculated by my colleague, P. Holländer at CZK 87.43 per day (food, clothing, hygienic supplies, transportation, communication services, and other things), or from an amount a few dozen crowns higher, and is thus realistically exposed to the danger of damage to health, danger to life, and, above all, his human dignity is brutally devastated. All these are consequences for these groups of people (and certainly others as well; see the dissenting opinion of the Constitutional Court Chairman, P. Rychetský), which, in my opinion, are the direct consequence of the unconstitutional and thoroughly immoral requirements of the Act, which did not consider ensuring the accessibility of health care for persons who fall into these social groups.

14. I am of the opinion that there is also a suspicion of age discrimination in relation to the group of seniors with low income, because this group is subject to the same regime as the remaining population, although the position of its members is not comparable (regarding this concept of equality, see judgment Pl. ÚS 11/02). It is constitutionally unacceptable that the so-called health reform was, as confirmed by the witness, Minister T. Julínek, adopted without any prior analysis at all of its effects on various social groups, because the state quite light-heartedly experimented to the detriment of individuals (classifiable in social groups), which led to violation of their fundamental rights. In other words, the state did not live up to its obligation to respect these fundamental rights, or, if appropriate, protect them. If, according to the witness, this analysis was not possible, one must ask, where did the Ministry of Health get the information (repeatedly presented in the media) that it is precisely seniors who burden or “abuse” the health care system with unnecessary doctor visits and waste of medicines? If this was an estimate, what was it based on?

15. Respect for age is a value of our civilization that is manifest, not only in the constitutional law guarantee of material security for seniors (see Art. 30 par. 1 of the Charter). Our civilization and concept of humanism are built on recognition of this value. In Czech culture the “purpose” of respect for age is explained, almost didactically, and without any moralizing, literally “simplistically” by Jan Neruda’s poem, “Grandfather’s Bowl.” It vividly gives those who mock morality itself, that do ut facias, here the reason why, even from a very egotistical and pragmatic viewpoint, it is advantageous to set a good example for one’s offspring, if I am to respond to this phrase, used in the judgment without being supported by the evidence (point 128). We also find respect for old age, as a cultural-civilizational value, in the religions from which our civilization grew (the fourth of the Old Testament’s Ten Commandments, supplemented in the third book of Moses, where the commandment is expanded to include respect for old people in general : “Thou shalt rise up before the hoary head, and honor the face of the old man” (Lev. 19:32). However, since the twentieth century, after the state began to intervene in various areas of life (often for good reasons, and based on experience), it is also up

to the state, i.e. up to its bodies (the legislature, as well as the state administration, interpreting and applying legal regulations), by their activities to maintain the cultural or civilizational heritage, as the state took over services that were previously provided by the family or the community. After all, the general understanding of justice grows from these civilizational values, and they find their culmination in the modern concept of fundamental rights.

## V.

### Regulation Conducted from the Table; Judgment from the Ivory Tower

16. In this situation, it is not even surprising that the total amount of funds that comes into the system from public health insurance was not even made public before steps to reform health care were taken. Likewise, it was not made public how these funds are allocated and what they are used for, at least as proportions of the total amount collected. However, the eight-member majority of the plenum joined in the ministerial claim that health care reform was necessary, but it did not obtain evidence for that claim, because then the Constitutional Court allegedly “instead of fulfilling the role of the protector of constitutionality, would become a mere reviewer or analyzer of the effects of legal regulations” (point 113), which, in this context, is an exceptionally cynical conclusion that denies the purpose of the very institution of abstract review of norms (although I favor proceedings on specific review of norms in a number of my works, I cannot deny the functional existence of the former proceeding).

17. As a result, the judgment (point 113) quite unacceptably abandons any review of the effects of the Act on individuals’ fundamental rights, and leaves the legislature to possibly correct its course in the future, if problems are found “in the process of applying the statutory provisions.” The majority adopting the judgment obviously did not at all consider the understanding of fundamental rights in civilized Europe, that the very idea of fundamental rights is anti-utilitarian, and protects every individual without regard to his “social necessity.” Fundamental rights apply Kant’s maxim of the person as an end in himself, a person who cannot be turned into an instrument, even for the “good of the whole, the good of future generations, etc.” It follows from the Kantian ideal, reflected in the fundamental human rights and in the idea of a human being endowed with dignity that arises from his very human essence, that one cannot set off one life against another, the life of one old man or old woman against the life of an entire, now young, generation. However, the legislature, confirmed by the eight-member of the plenum of the Constitutional Court, seemingly built on the maxim that “when you chop down the forest (implement reforms), chips will fly (interference in the fundamental rights of an undetermined and un-sought number of persons).” Through this lens, the lives of health of individuals, and even less their human dignity, could not be relevant factors for possible correction of the legislature’s flawed decision.

## VI. Conclusion

18. This approach also clearly contrasts with the approach taken by constitutional courts in established democratic states. So, e.g., the Canadian Supreme Court, in the matter *Chaoulli v. Quebec (Attorney General)*, decision of 6 September 2005, states in point 86: “Under the charters, the government is responsible for justifying measures it imposes that impair rights. The courts can consider evidence concerning the historical, social and economic aspects, or any other evidence that may be material.” Point 87 states: “[c]ourts do not have to define goals, choose means or come up with ideas. They do not have to create social policies; they just have to understand what the other branches have created. No special expertise is required for such an understanding.’ ... When the courts are given the tools they need to make a decision, they should not hesitate to assume their responsibilities. Deference cannot lead the judicial branch to abdicate its role in favour of the legislative branch or the executive branch.” Finally, point 89 states: “The courts have a duty to rise above political debate. They leave it to the legislatures to develop social policy. But when such social policies infringe rights that are protected by the charters [the provincial charter of rights and the federal charter of rights - author’s comment], the courts cannot shy away from considering them. The judicial branch plays a role that is not played by the legislative branch. Professor Roach described the complementary role of the courts vis à vis the legislature as follows ‘Judges can add value to societal debates about justice by listening to claims of injustice and by promoting values and perspectives that may not otherwise be taken seriously in the legislative process.’” In conclusion, point 90 states: “From this perspective, it is through the combined action of legislatures and courts that democratic objectives can be achieved.”

19. An institutional guarantee of health care provided without other significant payments, i.e. only on the basis of public insurance, like the Czech version established in Art. 31 of the Charter, as described above, reflects an idea of values that is common to states that we can describe as developed democracies, whether European states, or, e.g., Canada. This claim will stand despite the fact that the breadth of the guarantee, i.e. the breadth of implementing its social function, is variously modified (from payment-free provision of health care in the narrow sense of the word, or also hospital services, to moderate financial co-participation in health care graduated by income, age, and health of the treated person, or to the payment of hospital services, or to participation in payment for medicines, again, all graduated with regard to the abovementioned aspects of the social needs of the treated person, etc., and all with the possibility to obtain private insurance for the supplemental payments required on the grounds of financial co-participation).

This common value is implemented despite the fact that the constitutions of most of these states do not contain an express guarantee of the institution of socially considerate provision of health care on the basis of public insurance. Nevertheless, health care, as a service provided on the basis of payments into public insurance is an undisputable, constitutionally guaranteed standard, and sensible definition of groups of the population to whom care is provided payment-free is also a standard,

for various constitutional reasons. It may be the functioning of legal and social statehood combined with human dignity, the direction taken by Germany, or, e.g., protection of life, and the bodily integrity and safety of persons - e.g., Canada. The fact that this is a shared value is confirmed by a comparative study obtained by the Canadian Supreme Court in the abovementioned matter.