2010/01/19 - PL. ÚS 16/09: EQUALITY OF PARTIES IN PROCEEDINGS ON PRELIMINARY INJUNCTION

HEADNOTES

The principle of "equal weapons" is a part of the right to a fair trial. Each party to the proceedings is to be given an adequate opportunity to present their case, including evidence, under conditions which do not place such a party in a position considerably less advantageous than that of the counterparty. The principle of equality of parties to the proceedings also operates in relation to proceedings on ordering a preliminary injunction as a partial element of judicial proceedings, this in particular with regard to the possibility of imposing an obligation which may, in a material fashion, affect the legal standing of the sued party. If then an obligation is to be imposed by a preliminary injunction, the parties to the proceedings must have the possibility to apply, to a comparable scope, before a court, their statements and objections in relation to the petition for ordering a preliminary injunction, which will be in a relevant way reflected in the deliberation of the court in relation to the assessment of the legitimacy of the petition.

From the principle of equality of parties to the proceedings, however, it is not possible to infer an abstract postulation that all parties to the proceedings must at each moment of the proceedings have concurrently available certain procedural means. On the contrary, in the case of some procedural means, their nature and purpose mean that their application may be available to one party only. This is what also takes place in the case of a petition for preliminary injunction, since such a measure serves to ensure that the claim will be possible to deal with, and that the potential provision of judicial protection will be effective. For example, the non-delivery of a decision on rejection or dismissal of a petition for ordering a preliminary injunction to the defendant thus does not represent any violation of the principle of equality of parties to the proceedings. However, since a preliminary injunction is capable of significantly interfering with the fundamental rights and basic freedoms of a party to the proceedings, the statutory arrangement of proceedings on ordering a preliminary injunction thus must create procedural space, so that, while reflecting the purpose of the preliminary injunction, a real possibility of protecting their rights in relationship to the ordered preliminary injunction is preserved at the same time for the party to the proceedings concerned, this in particular with regard to the fact that judicial proceedings are not limited by any time frame, which means that a preliminary injunction may produce effects over a not insignificant period of time until a legally effective conclusion of the proceedings is reached.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

On 19 January 2010, the Constitutional Court Plenum, composed of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský (Justice Rapporteur), Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, adjudicated on a petition by the trading company TV PRODUCTS CZ, s. r. o., company ID (IČ) 26061333, with a registered office at Rybná 669/04, 110 00 Prague 1, for annulment of § 76g and § 220 para. 3 of Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations; with participation by the Chamber of Deputies and the Senate of the Parliament of the Czech Republic as parties to the proceedings; as follows:

I. The provisions of § 220 para. 3 of Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, in the part which allows an alteration of a resolution whereby a court of first instance has dismissed or rejected a petition for issuing a preliminary injunction or whereby proceedings on such a petition have been discontinued, in the context of the currently valid and effective Civil Procedure Code, are in conflict with the principle of equality of parties to the proceedings in accordance with Art. 37 para. 3 of the Charter of Fundamental Rights and Basic Freedoms and Art. 6 para. 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms.

II. The provisions of § 220 para. 3 of Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, shall be annulled as of 1 April 2011.

III. As long as § 220 para. 3 of Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, remains effective, the same shall not apply to a resolution whereby a court of first instance has decided to reject or dismiss a petition for issuing a preliminary injunction or whereby proceedings on such a petition have been discontinued.
IV. The petition for annulment of § 76g of Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, shall be rejected.

REASONING

I.
Recapitulation of the petition

1. The corporate petitioner, through a timely and duly filed constitutional complaint, demanded that the Constitutional Court by a Judgment annul a resolution of the High Court in Prague dated 27 May 2008, ref. No. 3 Cmo 52/2008-

52, for alleged violation of Art. 36 para. 1 and Art. 37 para. 3 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter referred to only as the "Charter") and Art. 96 para. 1 of the Constitution of the Czech Republic (hereinafter referred to only as the "Constitution"). The proceedings on the constitutional complaint are administered under file No. II. ÚS 2100/08. The corporate petitioner, with the petition for annulment of the above-specified resolution, also demanded that § 76g and § 220 para. 3 of Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, be annulled for conflict of the same with Art. 37 para. 3 of the Charter and with Art. 96 para. 1 of the Constitution.

2. By an action dated 3 January 2008, the companies Studio Moderna, s. r. o. and Studio Moderna SA demanded, against the corporate petitioner and the companies BESTSELLER, s. r. o. and Nodus Technologies, spol. s r. o., the imposition of an obligation to refrain from using specified designations or operating specified Internet pages. The action was accompanied by a petition for issuing a preliminary injunction, whereby the corporate plaintiffs demanded the imposition of most of the obligations contained in the proposed verdict. In relation to the corporate petitioner, the petition for the imposition of obligations by a preliminary injunction was identical with the proposed verdict itself. By a resolution dated 10 January 2008, the Municipal Court in Prague rejected the petition for issuing the preliminary injunction. This decision was delivered only to the legal representative of the corporate plaintiffs. On 30 January 2008, the corporate plaintiffs filed an appeal against this decision, which was subsequently amended with filings dated 21 March 2008 and 1 April 2008. The High Court in Prague, through the decision so contested, decided to grant the petition for issuing a preliminary injunction in relation to all the companies sued. On 30 June 2008, the decision specified above was delivered to the corporate defendant (TV PRODUCTS CZ, s. r. o., i.e. the corporate petitioner in the proceedings before the Constitutional Court).

3. The essence of the argumentation of the corporate petitioner is, in brief, the statement that as a result of its elimination from the second instance of the assessment of the case (appellate proceedings) in the matter of the petition for issuing a preliminary injunction, under the circumstances that the court of first instance had rejected the petition, the plaintiff receives improper protection, since the plaintiff may in their petition claim anything concerning violation of their rights by the defendant in the first as well as second instance, and the defendant is in this not provided with any protection, or possibility of defence against such declarations and decisions, this not even when the court itself doubts the legitimacy of the claims of the plaintiff. The corporate petitioner believes that by the repeated statement from the petitioner of the preliminary injunction, the principle of decision making in the first instance, to decide on the petition for ordering a preliminary injunction without hearing the parties to the proceedings, in accordance with § 75c para. 3 of the Civil Procedure Code, is being de facto violated, as a result of which the corporate defendant was completely "omitted" from said proceedings. Thus, the corporate petitioner has not been given the opportunity to challenge the decision of a body of first instance, to produce other declarations and explanations in its defence, nor to respond to individual statements from the court under the circumstances of the petition being rejected by the court of first instance. If, by contrast, the court of first instance were to

satisfy the plaintiff, the corporate petitioner would have the same rights in the appellate proceedings as the plaintiff. The corporate petitioner further stated that in the appellate proceedings there is no reason to promote the endeavour for maximum protection of the petitioner (unlike in proceedings before a court of first instance) under the circumstances of the plaintiff already having been denied provision of such protection through a dismissive resolution. Such a conclusion cannot be based even on a hypothetical consideration of the fact that the defendant could, in a manner not specified in detail, obstruct the preliminary injunction, when the same has not been ordered in the first instance, and the plaintiff could have informed the court of all decisive facts beforehand. In this relation, the corporate petitioner controverts legal conclusions by the Constitutional Court contained in the resolution dated 3 December 2007, file No. IV. ÚS 2959/07, in which the Constitutional Court did not reach a conclusion on violation of fundamental rights resulting from not delivering decisions on rejection or dismissal of a petition for ordering a preliminary injunction to the defendant. For the reasons specified above, the corporate petitioner claims that its exclusion from the appellate proceedings constituted a violation of the principle of equality of parties to the proceedings in accordance with Art. 36 para. 1 and Art. 37 para. 3 of the Charter, and Art. 96 para. 1 of the Constitution (in the constitutional complaint, the provisions specified above are incorrectly designated as Art. 69 para. 1 of the Constitution). The corporate petitioner also believes that such exclusion constitutes a violation of the principle of two-instance nature of the proceedings, to which they added that this principle must be evaluated from the viewpoint of the principle of equality of parties to the proceedings. The point is that the Civil Procedure Code does not make it possible for the defendant to file a proper remedy against the order of the preliminary injunction in the appellate proceedings, while the petitioner is granted the right of appeal against the decision in full.

4. The constitutional complaint was associated with a petition for annulment of § 76g and § 220 para. 3 of the Civil Procedure Code. In relation to the argumentation specified above, the corporate petitioner declares that the provisions of § 76g of the Civil Procedure Code, according to which the defendant does not learn about the rejection or dismissal of a petition for a preliminary injunction and about the possibility on the part of the plaintiff of filing an appeal, result in negation of the principle of equality of the parties to the proceedings to the detriment of the defendant. If the right is acknowledged for the petitioner to file an appeal against the decision and to express their opinion on the same, with which the court of appeal deals and on which they decide, then the same right should be awarded in appellate proceedings also to a person on whom an obligation is to be imposed through a preliminary injunction. Furthermore, the corporate petitioner states that as a result of § 220 para. 3 of the Civil Procedure Code, the court is obliged to proceed in such a way that they make it impossible for the defendant to execute their right to demand a review of the decision whereby an obligation is imposed on the same. In contrast to the petitioner, the defendant is thus denied the right to utilise all ordinary and extraordinary remedies. In this, the application of both provisions may directly result in an irremediable intervention into the right of the party to the proceedings to equal treatment and the right to a fair trial. That is, if a preliminary injunction is ordered, the defendant will have the opportunity to express their opinion on the case later; however, their statements will be assessed

in the context of the proceedings and decision making in the matter as such, replied to by the plaintiff, and will not influence or circumvent the very existence of ordering the obligation.

II.
Course of proceedings before the Constitutional Court and recapitulation of statements from the parties to the proceedings

5. By a resolution dated 23 June 2009, ref. No. II. ÚS 2100/08-49, the second panel of the Constitutional Court reached the conclusion that by applying § 76g and § 220 para. 3 of the Civil Procedure Code, a circumstance originated which is the subject of the constitutional complaint, wherefore, in accordance with Art. 87 para. 1, clause a) of the Constitution, the second panel advanced the petition by the corporate petitioner concerning annulment of the contested provisions to be decided by the Plenum of the Constitutional Court.

6. The Constitutional Court requested file documentation and invited the parties to the proceedings to submit statements concerning the petition for annulment of the contested provisions. The Constitutional Court also requested the Ministry of Justice to submit an opinion, this with respect to the Ministry's competence in relation to courts.

7. The Senate, in their opinion signed by the President of the Senate, Přemysl Sobotka, summarised the legislative process in the Senate in relation to the bill of an act amending the Civil Procedure Code, whereby the wording of this act was amended with § 76f (later re-designated by Act No. 135/2006 Coll. as "§ 76g") and § 220 para. 3, and which was, following its approval, published as Act No. 59/2005 Coll.

8. In its statement signed by Miroslava Němcová, the Vice-chairperson, the Chamber of Deputies summarised the legislative process in relation to Act No. 59/2005 Coll., as well as to Act No. 135/2006 Coll. In this connection it was stated that both amendments to the Act had been approved by the necessary majority of members of the Chamber of Deputies, signed by the appropriate constitutional representatives and properly promulgated. At the same time, she expressed the opinion that the legislative assembly acted in the conviction that the adopted act is in accord with the Constitution and the legal order.

9. In its statement, the Ministry of Justice admitted that in the case of ordering a preliminary injunction by a court of appeal upon an appeal by the petitioner, such a decision will be legally effective without an appeal against the same being made available to a person on whom an obligation is being imposed. However, the chairperson of a panel is nevertheless obliged, in accordance with § 77 para. 2 of the Civil Procedure Code, to revoke a preliminary injunction when the reasons for which the same has been ordered no longer exist. A party on whom something is imposed by a preliminary order is entitled to file, at any time, a petition for revoking the preliminary injunction, stating that reasons for which the same had been ordered ceased to exist or have never existed.

10. In relation to the alleged conflict between the contested provisions and Art. 37 para. 3 of the Charter, the Ministry stated that proceedings on ordering a preliminary injunction represent de facto a securing institute sui generis, and not adversary proceedings, when the possibility of the continuance of the preliminary injunction is tied to filing a petition for commencement of proceedings on the merits, in which a binding decision on the rights and obligations of the parties to the proceedings will be adopted. All principles expressed in constitutional acts must, in specific proceedings, always be assessed as a whole, and not evaluated individually. In the given case it is necessary, in the opinion of the Ministry of Justice, to conclude that the principle expressed in Art. 36 para. 1 of the Charter takes precedence over the principle of "equal weapons" which will be fully applied in the proceedings on the merits. Unless this provision is to be a mere proclamation of a right of individuals, also the sense of the same must be achievable in practice; such sense undoubtedly consists of making it possible for individuals to realistically attain their rights in judicial proceedings. If, however, there were no effective means in existence for temporary settlement of relationships between the parties until the time when a binding decision is issued, then it could happen that a judge would grant a plaintiff their rights, but in fact such rights would not be enforceable, be it voluntarily or by execution of a decision. In conclusion, the Ministry of Justice declared its conviction that the contested provisions are in accordance with the constitutional order.

11. The Constitutional Court, in accordance with § 44 para. 2 of Act No. 182/1993 Coll. on the Constitutional Court, dispensed with an oral hearing, since the Constitutional Court concluded that further clarification of the matter could not be expected from the same, and the parties to the proceedings expressed their approval with dispensation of such an oral hearing.

III.
Proposed verdict of the petition and wording of the contested legal regulation

12. The corporate petitioner demands through its petition that § 76g and § 220 para. 3 of the Civil Procedure Code in the wording in force be annulled.

13. The provisions of § 76g of the Civil Procedure Code read as follows: "If the petition for ordering a preliminary injunction has been rejected or dismissed or if the proceedings on the petition have been discontinued, the resolution shall be delivered only to the petitioner. A counterpart of the resolution must be sent to the petitioner, or to a representative of the same, within a term of 3 days from the date of promulgation or publication of the resolution."

14. The provisions of § 220 para. 3 of the Civil Procedure Code read as follows: "If conditions are not given for confirmation of the resolution whereby a preliminary injunction has been decided on, or another resolution whereby the merits of the matter have not been decided upon, or for annulment of the same in accordance with § 219a para. 1, the court of appeal shall alter the same."

IV.
Constitutional conformity of the legislative process

15. In accordance with § 68 para. 2 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by Act No. 48/2002 Coll., the Constitutional Court, in proceedings on annulment of acts and other legal regulations, ascertains whether the contested act or another legal regulation was adopted and issued within the confines of the powers set down in the Constitution and in the constitutionally prescribed manner. In this assessment, the Constitutional Court proceeded from the statements by the parties to the proceedings, as well as from publicly accessible information sources at www.psp.cz and www.senat.cz.

16. From the sources specified above, the Constitutional Court ascertained that the bill of the act (Print of the Chamber of Deputies No. 643, the Chamber of Deputies, 4th election term, 2002-2006) which was later promulgated under No. 59/2005 Coll., whereby alterations are made to Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, and several other acts, whereby the contested provisions of § 76g (prior to the alteration made by Act No. 135/2006 Coll., whereby alterations are made to some acts in the sphere of protection against domestic violence, originally designated as § 76f) were incorporated into the Civil Procedure Code, and the provisions of § 220 para. 3, was approved by the Chamber of Deputies on 26 November 2004 by resolution No. 1399 (voting No. 169). Of the 189 members present, 183 voted for the bill and 3 voted against it. The Senate discussed the bill of the act (Senate Print No. 467, the Senate, 4th term of office, 2002-2004) on 5 January 2005, and by resolution No. 31 (voting No. 13) expressed its will not to deal with the bill of the act. Of the 64 Senators present, 41 Senators voted for adopting such a resolution, whilst 5 voted against it. On 13 January 2005, the act was delivered to the President of the Republic who signed the same on 20 January 2005.

17. The bill of the act (Print of the Chamber of Deputies No. 828, the Chamber of Deputies, 4th election term, 2002-2006) which was promulgated under No. 135/2006 Coll., whereby alterations are made to some acts in the sphere of protection against domestic violence, was approved by the Chamber of Deputies after having been returned by the Senate (Senate Print No. 197, the Senate, 5th term of office, 2004-2006) on the basis of resolution No. 312 dated 26 January 2006 (voting No. 28) with proposed amendments. On 14 March 2006, the Chamber of Deputies, by resolution No. 2267 (voting No. 142), insisted on the wording of the bill as had been submitted to the Senate. Of the 176 members present, 139 voted for the bill, and 15 voted against it. The act was delivered to the President of the Republic on 22 March 2006 and signed on 31 March 2006.

18. With respect to the fact that the corporate petitioner did not claim any defect in the legislative process or any excess in the legislature's powers determined by the Constitution, and with respect to the principle of procedural economy, the Constitutional Court has not further examined the constitutional conformity of the legislative process, and satisfied itself with the above-specified formal verification

of the course of the same on the basis of the sources named above.

V.
Evaluation of the petition by the Constitutional Court

19. The Constitutional Court has dealt with the alleged conflict between the contested provisions and the principle of equality of parties to the proceedings pursuant to Art. 37 para. 3 of the Charter.

20. A preliminary injunction represents a procedural means which makes it possible, even prior to a decision of an ordinary court on the merits of the case, to impose an obligation on the party to the proceedings, if it is necessary to temporarily alter circumstances affecting the parties, or when there is a misgiving that execution of a judicial decision would be endangered. The purpose of the preliminary injunction is, therefore, a temporary regulation of rights and obligations, which does not preclude that protection of the rights of the party to the proceedings will be provided by the final decision in the case, but it ensures that such a final decision could actually be of real significance (cf. resolution dated 23 February 2005, file No. IV. ÚS 601/03, available at http://nalus.usoud.cz).

21. Even though the preliminary injunction constitutes only a provisional regulation of legal relationships, it is a decision which, as also results from the settled case law of the Constitutional Court, is capable of interfering with the fundamental rights and basic freedoms of an individual (cf., for example, Judgment dated 10 November 1999, file No. II. ÚS 221/98, N 158/16 SbNU 171, or Judgment dated 21 November 2001, file No. IV. ÚS 189/01, N 178/24 SbNU 327). Imposition of a certain obligation in this manner may, depending on the subject of the proceedings before the ordinary court, affect in a material way the legal standing of the party to the proceedings, as well as interfere with their fundamental rights and basic freedoms. Typically, this may be restriction of the ownership rights of a party to the proceedings by a preliminary injunction as a result of determining an obligation to refrain from certain disposal of the subject of the proceedings. A preliminary injunction, however, may represent an intervention into rights relating to the right to judicial and other legal protection. In this connection, the Constitutional Court wishes to remark that the fundamental rights contained in Chapter Five of the Charter are reflected not only in relationship to the evaluation of the judicial proceedings as a whole; it is also necessary to assess, through such a prism, the individual sections of the proceedings before the ordinary courts. In this, it is not absolutely necessary that the requirements resulting from the individual constitutionally guaranteed procedural rights operate at the same intensity in all sections of the same. Restriction of fundamental procedural rights, however, cannot be arbitrary, and must have consideration for the fact that the purpose of the judicial proceedings is provision of protection to the subjective rights of an individual. Violation of procedural rights of a party to the proceedings may thus be negatively reflected in other fundamental rights of such a party, while such interference may be of a direct, and from the viewpoint of further proceedings, irremediable nature (cf. resolution dated 30 October 2006, file No. IV. ÚS 394/06, available at http://nalus.usoud.cz).

22. The principle of equality of parties to the proceedings represents the crucial principle of a fair trial. It is normatively expressed in particular in Art. 37 para. 3 of the Charter and Art. 96 para. 1 of the Constitution and, at the level of subconstitutional law, it is established for civil proceedings in § 18 of the Civil Procedure Code, and it is also reflected in a number of other provisions of this Act. This constitutional principle guarantees the equal position of parties to the judicial proceedings as for the rights which are granted by the legal order to the parties to a certain type of proceedings (cf. Judgment dated 21 August 2008, file No. II. ÚS 657/05, available at http://nalus.usoud.cz). In a similar way, this principle is also interpreted in the settled case law of the European Court of Human Rights, which considers the principle of "equal weapons" to be a part of the right to a fair trial pursuant to Art. 6 para. 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to only as the "Convention"). From this principle this Court infers that each party to the proceedings is to be given an adequate opportunity to present their case, including evidence, under conditions which do not place such a party in a position considerably less advantageous than that of the counterparty (Judgment dated 27 October 1993 in the case of Dombo Beheer B. V. v. the Netherlands, No. 14448/88, clause 33).

23. On the basis of the above postulations, the Constitutional Court states that the principle of equality of parties to the proceedings also operates in relation to proceedings on ordering a preliminary injunction as a partial element of judicial proceedings, this in particular with regard to the possibility of imposing an obligation which may, in a material fashion, affect the legal standing of the sued party. If then an obligation is to be imposed by a preliminary injunction, the parties to the proceedings must have the possibility to apply, to a comparable scope, before a court, their statements and objections in relation to the petition in question, which will be in a relevant way reflected in the deliberation of the court in relation to the assessment of the legitimacy of the petition.

24. The position of the parties to the proceedings on ordering a preliminary injunction at the level of ordinary (subconstitutional) law shows a number of specific features in comparison with proceedings on the merits of the case. In accordance with § 74 para. 2 of the Civil Procedure Code, the parties shall include, in addition to the petitioner, also such persons that would be parties if the merits of the case were addressed. In proceedings before a court of first instance, however, the petition is not delivered to other parties to the proceedings. The point is that the court decides on such a petition without ordering a public hearing, and delivery to other parties to the proceedings takes place merely when the court grants the petition (at least in part).

25. The contested provisions of § 76g of the Civil Procedure Code thus establish an exception to the general regulation of delivering resolutions in accordance with § 168 para. 2 of this act, since even though an appeal is admissible against such a decision, delivery is not made, in the case of discontinuance or dismissal of the petition for ordering a preliminary injunction or in the case of discontinuance of proceedings on such a petition, to parties other than the petitioner. According to the declaration of the corporate petitioner, there is a conflict between § 76g of the Civil Procedure Code and Art. 37 para. 3 of the Charter as a result of restriction of the opportunity to apply a remedy against the resolution whereby a preliminary

injunction is ordered. The fact is that a party to the proceedings may file an appeal against a resolution by a court of first instance, which, however, in the case that a court of first instance has not granted the petition, means that such an appeal may only be filed by the petitioner. The point is that the resolution by the court of first instance was delivered only to such a party. However, the Constitutional Court did not identify itself with the above-specified argumentation, and thus the Court did not approve of the alleged conflict of this provision with the principle of equality of the parties to the proceedings.

26. The fact is that from the principle of equality of parties to the proceedings, it is not possible to infer an abstract postulation that all parties to the proceedings must at each moment of the proceedings have concurrently available certain procedural means. On the contrary, in the case of some procedural means, their nature and purpose mean that their application may be available to one party only. This is what also takes place in the case of a petition for preliminary injunction, since such a measure serves to ensure that the claim will be possible to deal with, and that the potential provision of judicial protection will be effective. When the legislature made it possible, in cases which are regulated by the very contested § 76g of the Civil Procedure Code, for the plaintiff to be able to apply a remedy against a decision of the court of first instance, the course of their action was justified by the interest in effective protection of the subjective right of the plaintiff. By delivering the decision of the court of first instance also to the defendant, the above procedural activity on the part of the plaintiff would be signalled to the defendant, and a certain time allowance would be provided to them for acts which could obstruct the effectiveness of a potentially subsequently issued preliminary injunction (resolution dated 3 December 2007, file No. IV. ÚS 2959/07, available at http://nalus.usoud.cz). Therefore, the non-delivery alone of such a decision to the defendant, which in essence secures the effectiveness of an appeal by the plaintiff, does not represent any violation of the principle of equality of parties to the proceedings. In this, such interpretation would have no sense not only in relation to the interest of the plaintiff, but also in relation to the defendant, since the defendant could hardly have any interest in filing an appeal against a resolution whereby the court has rejected the petition for issuing a preliminary injunction (such an appeal would have to be found subjectively inadmissible). Moreover, from the viewpoint of the principle of equality of parties to the proceedings, it is necessary to point out that the defendant may submit their opinion – within judicial proceedings – concerning any statement or evidence which is applied by the plaintiff in relation to the petition for a preliminary injunction, and which could be of any significance to the decision of the ordinary court on the merits of the case. For the reasons above, the Constitutional Court has not found any conflict between § 76g of the Civil Procedure Code and the principle of equality of parties to the proceedings in accordance with Art. 37 para. 3 of the Charter.

27. As for the contested provisions of § 220 para. 3 of the Civil Procedure Code, these provisions establish that in the case of non-compliance with conditions given for confirmation of the resolution whereby a preliminary injunction has been decided on, or another resolution whereby the merits of the matter have not been decided upon, or for annulment of the same in accordance with § 219a para. 1, the court of appeal shall alter the same. The Constitutional Court in this connection

points out that unconstitutionality of such provisions is not claimed generally in order to restrict the possibility of cassation of the decision by the court of appeal to cases in accordance with § 219a para. 1 of the Civil Procedure Code, but only in relation to such cases when the appeal is directed against the decision on a preliminary injunction, which, in accordance with § 76g of the Civil Procedure Code, is not delivered to other parties to the proceedings. Therefore, the Constitutional Court has examined the contested provisions only to such extent.

28. As is specified above, a preliminary injunction is capable of significantly interfering with the fundamental rights and basic freedoms of a party to the proceedings. Complying with the obligations resulting from the principle of equality of parties to the proceedings means that, within the scope of judicial proceedings, a possibility must be guaranteed of applying their claims in such a way that no procedural party is considerably disadvantaged from the viewpoint of the ordinary court's own evaluation within the scope of the proceedings. The statutory arrangement of proceedings on ordering a preliminary injunction thus must create procedural space, so that, while reflecting the purpose of the preliminary injunction, a real possibility of protecting their rights in relationship to the ordered preliminary injunction is preserved at the same time for the party to the proceedings concerned, this in particular with regard to the fact that judicial proceedings are not limited by any time frame, which means that a preliminary injunction may produce effects over a not insignificant period of time until a legally effective conclusion of the proceedings is reached.

29. Evaluating the conformity of § 220 para. 3 of the Civil Procedure Code in relation to the proceedings on ordering a preliminary injunction from the viewpoint of the principle of equality of parties to the proceedings in accordance with Art. 37 para. 3 of the Charter thus requires that there is an answer to the question whether current legal regulation makes it possible, for a party to the proceedings on whom an obligation has been imposed by a preliminary injunction, to apply their claims and objections to a similar scope as pertains to the petitioner, irrespective of whether the preliminary injunction has been ordered by a court of first or second instance. The Constitutional Court concluded that it is not so.

30. Prior to this, the Constitutional Court examined whether the possibility for applying the statement by the defendant does or may exist during the actual appellate proceedings, this in particular from the viewpoint of § 210 para. 1 and § 214 para. 2, clause c) of the Civil Procedure Code. Both provisions relate to appellate proceedings, and, in essence, they create the opportunity for other parties to the proceedings to be able to apply their statements in the proceedings. According to the former of the above-specified provisions, the chairperson of a panel will deliver the appeal to other parties only when the judgment or resolution on the merits is concerned. In other cases, as in that of the preliminary injunction, the court does not deliver the appeal. As for the above-specified provisions, the Constitutional Court repeatedly stated, in connection with decision making on an appeal only against a verdict on compensation for costs of proceedings, that even though the same "does not imply the obligation of the court to deliver to other parties transcripts of appeal directed against decisions not on the merits, this, however, does not mean that the court of first instance cannot do so on the basis of a deliberation (constitutionally conforming) on the suitability and effectiveness

of such a measure with respect to the circumstances of the case or specific nature of the matter" (Judgment dated 26 September 2005, file No. IV. ÚS 310/05, N 180/38 SbNU 443). The Constitutional Court expressed a similar point in relation to the possibility of not ordering proceedings in accordance with § 214 para. 2, clause e) of the Civil Procedure Code in the case that the appeal relates solely to the costs of proceedings. In the given case, however, the situation is different from that concerning the case of the appellate proceedings relating merely to compensation for costs of proceedings.

31. As was stated earlier, the preliminary injunction creates a precondition for effective protection of subjective rights of a party before a court. The effectiveness of such protection is given by the fact that through such a measure determination of an obligation against the defendant may be attained speedily, as a result of which it is possible to prevent endangerment of subsequent execution of a judicial decision, or it is possible to prevent possible negative consequences in the legal sphere of the petitioner, which could occur as a result of the impossibility to execute their rights until the decision of the court is made on the merits of the case. The requirement of expeditiousness as well as the element of surprise, from the viewpoint of foreseeability of imposing a preliminary injunction on the concerned party to the proceedings, permits effectiveness of the above-specified procedural means. Eliminating such requirements would render impossible the effectiveness of such means in the judicial protection of subjective rights, and thus would be negatively reflected in the fundamental right to judicial protection in accordance with Art. 36 para. 1 of the Charter, which anticipates the existence of legal means for effective protection of subjective rights. If the court sent to other parties to the proceedings the appeal against the decision of the court of first instance, whereby they did not grant the petition for ordering a preliminary injunction, or if the same ordered proceedings pursuant to § 214 para. 2, clause c) of the Civil Procedure Code, the court, in a number of cases, would factually eliminate realistic attainment of protection of rights in the form of a preliminary injunction, since the defendant could by their actions render attainment of the purpose of the same impossible. Such a course of action by the ordinary court is, therefore, unfeasible due to the nature of the preliminary order, and it may be concluded that through interpretation and application of § 210 para. 1 and § 214 para. 2, clause c) of the Civil Procedure Code, it is not feasible, with regard to the purpose of the preliminary injunction, to ensure a possibility for the defendant to apply their procedural rights.

32. In this, the opportunity for applying claims and objections by the defendant is not given even subsequently after the decision by the court of appeal, whereby a preliminary injunction is ordered. Not even a possible impulse to revoke the preliminary injunction by a court pursuant to § 77 para. 2 of the Civil Procedure Code may be considered as adequate procedural means. This provision in principle preconditions the continuance of the preliminary injunction by the continuance of reasons for which the same has been ordered. According to these provisions, the court is obliged to revoke the preliminary injunction if, according to their opinion, reasons for ordering the same cease to exist. From the above it is evident that any impulse in relation to the court could not attain a review of the lawfulness of the preliminary injunction at the time of ordering the same, since, according to the above-specified provisions, the court evaluates the current continuance of such

conditions, and not whether such conditions were given at the time of ordering the same.

33. Under these circumstances the Constitutional Court thus states that the present legal arrangement does not establish room in a procedural sense for the party to the proceedings, on whom, as a result of an alteration to the resolution of the court of first instance, the court of appeal, in accordance with § 220 para. 3 of the Civil Procedure Code, imposed an obligation by a preliminary injunction so that they are able, within a scope similar to the plaintiff, to protect their rights in proceedings before the court. As a result of the legal arrangement, therefore, a conflict with the constitutional principle of equality of parties to the proceedings is established at the level of ordinary (subconstitutional) law, which may, in the case of application of such a legal arrangement, lead to violation of a fundamental right of the party to the proceedings resulting from the above-specified principle.

34. The Constitutional Court from the viewpoint of Art. 37 para. 3 of the Charter did not reach the conclusion that preclusion of the possibility to annul the decision of the court of first instance on a preliminary order pursuant to the contested § 220 para. 3 of the Civil Procedure Code, may be itself considered unconstitutional. In the case that the court of first instance has not granted – at least in part – the petition for ordering a preliminary injunction, it is however the very impossibility of cassation of such a decision by the court of appeal, in the absence of other means of protecting the right of the sued party to the proceedings, that prevents the provision of protection to their fundamental right in the proceedings before the ordinary courts pursuant to Art. 4 of the Constitution. The contested provisions are, for the reasons above, in conflict with the principle of equality of parties to the proceedings in accordance with Art. 37 para. 3 of the Charter and likewise with Art. 6 para. 1 of the Convention.

VI.
Formulation of the verdict of the derogative judgment and legal consequences of the same

35. The Constitutional Court concluded that, with respect to the above-specified reasons, § 220 para. 3 of the Civil Procedure Code is in conflict with Art. 37 para. 3 of the Charter and Art. 6 para. 1 of the Convention. In relation to this, however, the Constitutional Court again states that the reasons for declaring this conflict relate merely to cases in which an appeal is directed against a resolution of a court of first instance, when a petition for ordering a preliminary injunction has been rejected or dismissed, or whereby proceedings on the petition have been discontinued, and the court of appeal reaches a conclusion that this resolution is to be altered in such a way that the petition is at least partially granted. The Constitutional Court is aware of the fact that the reason for derogating relates only to a partial legal norm contained in such a provision, yet, however, with respect to the powers of the same, the Court is not to re-formulate, by a derogative verdict, such provisions, for example, in such a manner that they would only proceed to annulling the same regarding such a section as relates explicitly to the preliminary injunction, i.e. in the section defined by the words “resolution whereby a preliminary injunction has been decided on, or…” (cf. Judgment dated 30

November 2004, file No. Pl. ÚS 15/04, N 180/35 SbNU 391, 45/2005 Coll.). Besides, if the Constitutional Court annulled this provision only with respect to the words “resolution whereby a preliminary injunction has been decided on, or…”, then the decision on the preliminary injunction would continue to be subsumable under the fragment of the text of § 220 para. 3 of the Civil Procedure Code, since it is undoubtedly a “resolution whereby the merits of the matter have not been decided upon”. Partial derogation would thus not lead to removal of the unconstitutional condition. In addition, an unwanted consequence of such derogation would also be removal of the possibility for an alteration of the contested resolution also in the situation when, in the first instance, the petition for issuing a preliminary injunction has been granted at least partially, the resolution has been delivered to the obligor and the same filed an appeal against such a resolution. The reason for derogating in no case applies to such a procedural situation.

36. It is up to the legislature to decide upon which legal arrangement of decision making on a preliminary injunction they will adopt, such as would remove the constitutional deficit defined by this Judgment. The Constitutional Court again emphasises that such a deficit arises in the context of the whole legal arrangement regarding a preliminary injunction in the Civil Procedure Code, and here was manifest by a complete absence of the right to be heard and the complete absence of opportunity for legal defence for the sued party against the preliminary injunction, whereby an obligation was imposed on such a party only by a court of second instance, as opposed to the petitioner, and as opposed to a situation which would arise if the preliminary injunction were ordered by the court of first instance. The Constitutional Court wishes to add to this that this Judgment cannot be interpreted in such a way that the only possible solution is absolutisation of the possibility for cassation of a decision of a court of first instance in the appellate proceedings in question. In such a sense, the legislature is not limited, and other solutions taken by the legislature can be imagined, for example extension of reasons for filing a petition for revoking a preliminary injunction in accordance with § 77 para. 2 of the Civil Procedure Code, or establishment of brand new procedural means whereby the obligor could make themself being heard in the case of a preliminary injunction ordered, submitting their view on the matter, and reviewing the preliminary injunction ordered within a short period of time. A combination may also be taken into account with a possibility of reconsideration in the case of a remedy proposed by the petitioner against rejection of a petition for ordering a preliminary injunction by a court of first instance, and thus with subsequent creation of an opportunity for the defendant to file an appeal with a court of second instance. The Constitutional Court, only for the sake of completeness, also mentions the possibility of expanding an appeal on a point of law to include situations when a preliminary injunction is ordered by a court of second instance through an alteration to the resolution of the court of first instance; this solution is, however, probably not suitable in terms of the system and with respect to the requirements of expeditiousness of the proceedings on a preliminary injunction. The Constitutional Court adds that attention should also be paid to a comprehensive reassessment of the procedural legal arrangement of preliminary injunctions, with a thorough reflection of constitutional principles and constitutionally guaranteed fundamental rights, in particular the differentiation of functions and purposes of various preliminary injunctions in various types of proceedings, and thereto corresponding procedural difference between the

individual types of preliminary injunctions. The present legal arrangement, also in comparison with the legal arrangement in other countries, appears to be misbegotten.

37. The Constitutional Court here, in an exemplificative manner, refers to procedural legal arrangements in neighbouring countries that are close to the Czech Republic from the viewpoint of legal culture. Austrian Rules of Distress (Exekutionsordnung, RGBl 1896/79, § 378 to 402), for example, establish particular procedural means of defence not only for the plaintiff who was not satisfied, but also the defendant, on whom an obligation was imposed by a preliminary injunction; this is called a caveat (Widerspruch) and recourse (Rekurs). Both of these methods make it possible, in various procedural situations, for the defendant to be heard and to be able to bring about review of the preliminary injunction (in a brief and simplified form, a caveat is pertinent in instances when the defendant had no possibility to submit their opinion on the given case prior to the ordering of the preliminary injunction; recourse concerns instances when they did have such an opportunity, or if the petition has been rejected – then the right of recourse pertains to the plaintiff). German Civil Procedure Code (Zivilprozessordnung), dated 30 January 1877, RGBl. p. 83, newly promulgated in the wording dated 5 December 2005, BGBl. I p. 3202, § 916 to § 945), in a similar fashion also differentiates between several procedural means for the defence of both parties to a dispute against the decision on a preliminary injunction – an appeal (Berufung), a caveat (Widerspruch) of the defendant against the resolution on ordering a preliminary injunction or an "immediate complaint" (sofortige Beschwerde) by the plaintiff against the resolution on rejection of the petition. Even here, the above-mentioned caveat is an instrument through which the defendant enforces their right to be heard in a situation when the same has not been made possible for them prior to the decision being taken (i.e. in this case, prior to the ordering of the preliminary injunction).

38. For reasons of significance of the above-specified provisions for decision making by courts of appeal and due to the fact that the reason for derogation of this provision applies only to some of the cases of application of the same, the Constitutional Court has decided, in accordance with § 70 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by Act No. 48/2002 Coll., that the above-specified provisions shall be annulled as late as on 1 April 2011. Through this, sufficient space is created for the legislature to adopt a constitutionally conforming legal arrangement. Until such a date, the above-specified provision remains applicable, with the exception of cases which are related to the reason for derogation of such a provision, that is in which application of such provisions would lead to violation of a fundamental right of the parties to the proceedings concerned in accordance with Art. 37 para. 3 of the Charter and Art. 6 para. 1 of the Convention.

39. In this connection, the Constitutional Court adds that assessing the conformity of an act or other legal regulation in proceedings under § 64 et seq. of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, is not reflected only at the level of validity of a legal regulation, but also at the level of applicability of the same. The Constitution in itself does not restrict protection of fundamental rights and basic freedoms, in the case that the reasons for violating

the same consist of application of an unconstitutional legal norm, merely to annulment of such a legal norm by the Constitutional Court, but anticipates reflection of legal conclusions of the Constitutional Court also in relation to the application of such a legal norm by bodies of public power. This conclusion is clear from constant case law of the Constitutional Court, which also allows review of an annulled act upon a petition by an ordinary court in accordance with Art. 95 para. 2 of the Constitution in the case that such a court reaches a conclusion on such an act being in conflict with the constitutional order (Judgment dated 10 January 2001, file No. Pl. ÚS 33/2000, N 5/21 SbNU 29, 78/2001 Coll.; Judgment dated 6 February 2007, file No. Pl. ÚS 38/06, N 23/44 SbNU 279, 87/2007 Coll.; Judgment dated 29 January 2008, file No. Pl. ÚS 72/06, N 23/48 SbNU 263; 291/2008 Coll.). In such an instance, it is not decisive whether the given act has been annulled, but whether the legal norm contained in the wording of the same is still applicable and whether assessing the issue of constitutionality is a necessary precondition for a decision by a court on the merits of the case.

40. Thus also in the given case it is not possible to neglect that in proceedings on annulment of acts and other legal regulations, the Constitutional Court decides first of all on the constitutionality of the given legal norm. If, in proceedings based on a petition in accordance with Art. 95 para. 2 of the Constitution, the Constitutional Court decides on the constitutionality of acts which have already been annulled, then the result of the verdict on a conflict with the constitutional order is non-applicability of the given statutory provisions (Judgment dated 7 April 2009, file No. Pl. ÚS 35/08, 151/2009 Coll.). It is thus evident that this effect must also apply to cases when the issue consists of assessing the constitutionality of an act which is still valid. Despite the establishment of a later date for annulling the contested provisions, the ordinary courts are entitled to not apply § 220 para. 3 of the Civil Procedure Code in cases when such an application would mean a change of the resolution of the court of first instance which has rejected or dismissed a petition for ordering a preliminary injunction or whereby proceedings on such a petition have been discontinued, in such a sense that, as a result of such a change, the petition would be at least in part granted. The point is that by applying this provision, they would actually violate a fundamental right of the defendant resulting from the principle of equality of parties to the proceedings pursuant to Art. 37 para. 3 of the Charter.

41. Therefore, the Constitutional Court concludes that § 220 para. 3 of the Civil Procedure Code is in conflict with Art. 37 para. 3 of the Charter and Art. 6 para. 1 of the Convention, and thus the Constitutional Court has decided, in accordance with § 70 para. 1 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by Act No. 48/2002 Coll., that such a provision shall be annulled, and the Constitutional Court has postponed the enforceability of such a verdict, in accordance with § 58 para. 1 of the Act on the Constitutional Court, to a later date so that the legislature is provided with the necessary space for adopting a comprehensive constitutionally conformal legal arrangement. Since a postponement in the enforceability of a derogative verdict, while the reason for derogating is at the same time continuously present, causes great tension in the application practice, the Constitutional Court has been forced to remove such tension by an interim arrangement in the form of an interpretative verdict under clause III. Finally, the Constitutional Court has rejected, in accordance with § 70

para. 2 of the Act on the Constitutional Court, the petition for annulment of § 76g of the Civil Procedure Code as unjustified.

Note: Decisions of the Constitutional Court cannot be apopealed.

Dissenting opinion of Justice Ivana Janů

In accordance with the provisions of § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, I hereby submit this dissenting opinion aimed against verdicts I, II and III, as well as against the reasoning of Judgment file No. Pl. ÚS 16/09.

The Judgment reaches the conclusion that § 220 para. 3 of the Civil Procedure Code, in a section which permits an alteration to a resolution of a court of first instance on rejection of a petition for ordering a preliminary injunction, on dismissal of the same or on discontinuance of the proceedings, is in conflict with the principle of equality of parties to the proceedings and, therefore, annuls the same. I believe that annulment of these provisions was not appropriate, since the principle of "equal weapons" may be secured by constitutionally conforming interpretation of the current legal arrangement. Nevertheless, I do not claim that the legal arrangement regarding preliminary injunctions and issues related thereto in the Civil Procedure Code is faultless, but merely I hold the opinion that the section of the same which is the subject of this Judgment, might have been interpreted in a constitutionally conforming manner, and that it was not necessary to annul § 220 para. 3 of the Civil Procedure Code, this in accord with the settled case law of the Constitutional Court, expressing the principle of priority of constitutionally conforming interpretation over derogation – see, for example, Judgment file No. Pl. ÚS 4/99, dated 16 June 1999 (N 93/14 SbNU 263; 192/1999 Coll.): "The Constitutional Court, in proceedings on annulment of acts or other legal regulations, proceeds from the principle of priority of constitutionally conforming interpretation over derogation, according to which, in a situation when a certain provision of a legal regulation permits two differing interpretations, of which one is conforming with constitutional acts and international treaties in accordance with Art. 10 of the Constitution, and the other is in conflict with the same, there is no reason for annulling such a provision. When applying the same, it is the task of all state bodies to interpret the given provisions in a constitutionally conforming manner [see Judgments in case file No. Pl. ÚS 48/95 (ÚS, 5, 171) and Pl. ÚS 5/96 (ÚS, 6, 203)]".

A preliminary injunction is an institute that is applied in situations in which it is impossible to wait until the end of the proceedings, but in which it is necessary, even prior to the decision being made on the merits of the case, to adopt certain provisional measures, since otherwise it would be imminent that the decision on the merits, whereby the proceedings will be completed, will no longer be of real importance for the settlement of the relationship between the parties (in Czech civil proceedings, a preliminary injunction has developed from an erstwhile arrangement of securing distraint and interim measures). The course of action on

the part of the court resulting in issuing a preliminary injunction – be it prior to commencement of the proceedings or on the basis of § 102 of the Civil Procedure Code during the course of the same – is part of civil judicial proceedings, and, therefore, it is necessary to apply to it the requirements resulting from the right to a fair trial, including equality of weapons, to which the majority opinion refers.

A petition for ordering a preliminary injunction is decided upon by a chairperson of a panel (or a panel; see § 102 para. 3 of the Civil Procedure Code) without hearing the parties (§ 75c para. 3 of the Civil Procedure Code), which means the court not only does not request a hearing to which the court would summon the parties, but the court does not even deliver to parties other than the petitioner the petition on the basis of which they would be able to give an opinion concerning the same. The petition for ordering a preliminary injunction is decided upon by the court only on the basis of data contained in the petition, this in such a way that they either dismiss the same (for defects preventing continuation of the proceedings in accordance with § 75a of the Civil Procedure Code or for failure to provide financial security in accordance with § 75b of the Civil Procedure Code), or discontinue the proceedings on such a petition (on the grounds of the petition being withdrawn or for lack of procedural conditions), or reject the petition (if the same is not justified), or they order a preliminary injunction. When the court orders a preliminary injunction, the court will deliver the resolution not only to the petitioner, but also to other parties, possibly to a third party on whom an obligation was imposed by such a preliminary injunction; these persons may then defend themselves through an appeal. If the court rejects or dismisses the petition for ordering a preliminary injunction, or discontinues the proceedings on the same, the resolution, in accordance with § 76g of the Civil Procedure Code, is delivered only to the petitioner. The petitioner may contest such a decision by an appeal. Acts of the court of first instance in appellate proceedings are regulated by § 208 et seq. of the Civil Procedure Code. Provisions of § 210 para. 1 of the same imply that an appeal against resolutions of a procedural nature must be delivered by a court to such parties to whose rights and obligations they relate, unless the same is not appropriate and effective with respect to the nature of the case. The majority opinion – with reference to an "element of surprise, from the viewpoint of foreseeability of imposing a preliminary injunction" – infers that "due to the nature of the preliminary order" (perhaps the word "injunction" was actually meant), procedure in accordance with § 210 para. 1 of the Civil Procedure Code is impossible, as this would factually eliminate realistic attainment of protection of procedural rights (clause 31).

I believe that such a concept is not accurate and that it too much absolutises the element of surprise in ordering a preliminary injunction. This element, however, is important only in cases when a person on whom an obligation is to be imposed by a preliminary injunction actually could obstruct through their conduct the purpose of the preliminary injunction. However, such circumstances in the case being adjudicated have not occurred. As is clear from the constitutional complaint and reasoning of the Judgment, the contents of the preliminary injunction should consist of "the imposition of an obligation to refrain from using specified designations or operating specified Internet pages". I do not know how the defendant could obstruct the purpose of the preliminary injunction with just this specific content if the court of first instance, in appellate proceedings, proceeded

in accordance with § 210 para. 1 of the Civil Procedure Code. I do not consider deliberations on indispensability of the element of surprise in this dispute to be apposite also due to the fact that a preliminary injunction was part of the indictment. Therefore, I am convinced that neither the circumstances of the case nor the nature of the matter disallowed a course of action in accordance with § 210 para. 1 of the Civil Procedure Code. With respect to the principle of "equal weapons" and contradictory nature, the court of first instance should have delivered the appeal in accordance with this provision to the defendant (complainant) and should have made it possible for them to submit an opinion concerning the same. Through this, their right to a legal hearing would have been exercised.

Naturally, I do not deny that there are situations in which delivery of appeal to the defendant could obstruct the purpose of the preliminary injunction. In such case it is not possible to proceed in accordance with § 210 para. 1 of the Civil Procedure Code, but even this does not mean that the defendant would be deprived of effective remedy. I believe that such a remedy consists of a petition for revoking a preliminary injunction in accordance with § 77 para. 2 of the Civil Procedure Code. The majority opinion denies such a nature of the same saying that "any impulse in relation to the court could not attain a review of the lawfulness of the preliminary injunction at the time of ordering the same, since, according to the above-specified provisions, the court evaluates the current continuance of such conditions, and not whether such conditions were given at the time of ordering the same."

I am convinced that it is not possible to interpret § 77 para. 2 of the Civil Procedure Code in such a way, and besides, that the same has never been interpreted in such a manner in practice. The point is that the court is to proceed to revoking a preliminary injunction not only when reasons for ordering the same cease to exist, but also when the court subsequently discovers that such reasons were not present. For example, J. Rubeš says on this issue: "A preliminary injunction may, however, be revoked also when it is subsequently found that the expected reasons are not present. The court, when ordering a preliminary injunction, had to satisfy itself with a testimonial from which the reasonableness of the need to order a preliminary injunction ensued. Therefore, it is possible that at a later time, or also when presenting evidence on the merits of the case, it will be discovered that preconditions for ordering a preliminary injunction were not given (…)" Rubeš, J. in Handl, V. – Rubeš, J. Občanský soudní řád. Komentář / The Civil Procedure Code. Commentary, 1st volume. Prague: Panorama, 1985, p. 342. Equally the same author in Rubeš, J. et al. Občanský soudní řád. Komentář / The Civil Procedure Code. Commentary, 1st volume. Prague: Orbis, 1972, p. 260. At present, similarly Javůrková, N. in David, L. – Ištvánek, F. – Javůrková, N. – Kasíková, M. – Lavický, P. et al. Občanský soudní řád. Komentář / The Civil Procedure Code. Commentary, 1st volume. Prague: Wolters Kluwer ČR, a. s., 2009, p. 341; or Winterová, A. in Winterová, A. et al. Občanský soudní řád s vysvětlivkami a judikaturou / The Civil Procedure Code with Explanatory Notes and Case Law. 2nd edition. Prague: Linde Praha, a. s., 2005, p. 142; cf. also Drápal, L. in Bureš, J. – Drápal, L. – Krčmář, Z. et al. Občanský soudní řád. Komentář / The Civil Procedure Code. Commentary, 1st volume. 7th edition. Prague: C. H. Beck, 2006, p. 320. If § 77 para. 2 of the Civil Procedure Code is interpreted in line with this

settled interpretation – and not in such a way in which it was newly and surprisingly interpreted by the majority opinion of the Plenum – I can see no reason why a petition for revoking a preliminary injunction could not be considered an effective remedy.

For the sake of completeness, I wish to add that a practical difference between the petition for revoking a preliminary injunction ordered within appellate proceedings on one hand and an appeal against a resolution on ordering a preliminary injunction by a court of first instance on the other, will not have dramatic effects on the defendant. If I leave aside special preliminary injunctions in accordance with § 76a and 76b of the Civil Procedure Code, the resolution on ordering a preliminary injunction is enforceable by promulgation, possibly by delivering the same to a party on whom an obligation is thus imposed (§ 76d of the Civil Procedure Code). Enforceability is not based on legal effectiveness, and, therefore, a possible appeal does not suspend enforceability of the preliminary injunction in accordance with § 206 of the Civil Procedure Code. From this viewpoint, the position of the defendant is not worse if the same can defend themself only as late as through a petition to revoke the preliminary injunction. In addition, if loss or other detriment was caused to such a party by a preliminary injunction, such a person will have the right to compensation for the same against the petitioner in accordance with § 77a of the Civil Procedure Code.

On the basis of these deliberations, I am convinced that there was no reason for annulling § 220 para. 3 of the Civil Procedure Code. The purpose of such a provision was to accelerate the proceedings by limiting cassational decision making by the court of appeal to a minimum of cases where the appeal is aimed against a decision of a procedural nature. In this connection I wish to remark that the expeditiousness of proceedings is an important constitutional value which must not be neglected.

Besides, I believe it is disputable whether annulment of this provision is at all capable of achieving the objective pursued by the Judgment. The majority opinion perhaps expects that the result of a justified appeal will be annulment of the resolution of the court of first instance on dismissal or rejection of the petition for ordering a preliminary injunction or on discontinuance of the appellate proceedings (however, the Judgment does not specify according to which provision the court of appeal is to decide so). A cassational decision of the court of appeal will have to be delivered to the parties. Here, the Judgment perhaps believes that – with respect to the "element of surprise, from the viewpoint of foreseeability of imposing a preliminary injunction" – delivery will be made only to the petitioner. This I deem to be disputable as § 76g of the Civil Procedure Code surely does not apply to the delivering of a cassational decision by a court of appeal. Deliveries in appellate proceedings are regulated by § 225 of the Civil Procedure Code, which, however, does not at all limit the range of persons to whom delivery is to be made. It is thus possible to infer that delivery will be made to all parties (see § 74 para. 2 of the Civil Procedure Code), not only to the petitioner of the preliminary injunction. The element of surprise, which forms the basis for the whole reasoning of the majority Judgment, therefore completely comes to naught.

It may be thus summarised that it was not necessary to annul § 220 para. 3 of the Civil Procedure Code, since the valid Civil Procedure Code offers sufficient possibilities of ensuring the principle of equality of parties to the proceedings before law, as is required by Art. 37 para. 3 of the Charter.