2012/05/15 - PL. ÚS 17/11: PHOTOVOLTAIC POWER PLANTS

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

The Plenum of the Constitutional Court, consisting of the Chairman Pavel Rychetský and Judges Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů (judge rapporteur), Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, and Miloslav Výborný, ruled, without a hearing, on a petition from a group of senators from the Senate of the Parliament of the Czech Republic, represented by Jan Kalvoda, attorney, with his registered office at Bělohorská 262/35, Prague 6, seeking the annulment of § 7a to 7i, and in § 8 the words "with the exception of inspection of levies and the administration thereof" of Act no. 180/2005 Coll., on the Support of Electricity Generation from Renewable Energy Sources and amending certain Acts (the "Act on Support of Use of Renewable Sources"), as amended by later regulations, Art. II., point 2 of the transitional provisions of Act no. 402/2010 Coll., which amends Act no. 180/2005 Coll., on the Support of Electricity Generation from Renewable Energy Sources and amending certain Acts (the "Act on Support of Use of Renewable Sources"), as amended by later regulations, § 6 par. 8, § 7a, § 14a, in § 20 par. 1 let. a) the words "with the exception of allowances acquired free of charge," § 20 par. 15, § 21 par. 9 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, as amended by later regulations, and Article II point 2 of Act no. 346/2010 Coll., which amends Act no. 586/1992 Coll., on Income Tax, as amended by later regulations, and other related Acts, with the participation of the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic, as parties to the proceedings, and the Municipal Court in Prague, as a secondary party to the proceedings, with the consent of the parties to waive a hearing, as follows:

The petition is denied.

REASONING

I. Recapitulation of the Petition

1. On 11 March 2011 the Constitutional Court received a petition from a group of senators from the Parliament of the Czech Republic seeking the annulment of § 7a to 7i, in § 8 the words "with the exception of inspection of levies and the administration thereof" of Act no. 180/2005 Coll., on the Support of Electricity Generation from Renewable Energy Sources and amending certain Acts (the "Act on Support of Use of Renewable Sources"), as amended by later regulations, Art. II point 2 of the transitional provisions of Act no. 402/2010 Coll., which amends Act

no. 180/2005 Coll., on the Support of Electricity Generation from Renewable Energy Sources and amending certain Acts (the "Act on Support of Use of Renewable Sources"), as amended by alter regulations, § 6 par. 8, § 7a, § 14a, in § 20 par. 1 let. a) the words "with the exception of allowances acquired free of charge," § 20 par. 15, § 21 par. 9 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, as amended by later regulations, and Article II point 2 of Act no. 346/2010 Coll., which amends Act no. 586/1992 Coll., on Income Tax, as amended by later regulations, and other related Acts.

2. The petitioners claim that the statutory provisions cited above are inconsistent with the constitutionally guaranteed right to own property under Art. 11 of the Charter of Fundamental Rights and Freedoms, with Art. 17 par. 1 of the EU Charter, or the right to protection from interference with peaceful enjoyment of property under Art. 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, with the right to conduct business under Art. 26 of the Charter of Fundamental Rights and Freedoms and Art. 16 of the EU Charter; with the essential requirements of a democratic, rule of law state under Art. 9 par. 1 of the Constitution, because all the contested provisions of the Act suffer from retroactive effect; and with the constitutional principle of equality before the law under Art. 1 and 3 of the Charter of Fundamental Rights and Freedoms.

3. In points 13-21 the petitioners summarize the facts relating to the statutory conditions concerning support of use of renewable sources.

4. In points 22-37 of the petition, the petitioners focus on the amendment of Act no. 180/2005 Coll., on the Support of Electricity Generation from Renewable Energy Sources and amending certain Acts (the "Act on Support of Use of Renewable Sources"), as amended by later regulations ("Act no. 180/2005 Coll."), and Act no. 586/1992 Coll., on Income Tax, as amended by later regulations ("Act no. 586/1992 Coll."), which, in their opinion, are directed against the intent of the European Union and the Czech legislature, because they limit and then eliminate aid to producers of energy from renewable sources.

5. In the fifth part of the petition (points 38-53) entitled "The grounds of the petition" the petitioners define the Czech state as a democratic rule of law state and cite Constitutional Court judgments relating to this issue.

6. In chapter VI the petitioners specifically address the amended Act no. 180/2005 Coll. and state that after the amendment this Act is inconsistent with the principle of equality under Art. 1 and 3 of the Charter, with the right to own property and peaceful enjoyment thereof, with the right to conduct business under Art. 26 of the Charter, and is also inconsistent with the essential requirements of a democratic, rule of law state under Art. 9 of the Constitution. They find inequality before the law, under Art. 1 of the Charter and Art. 26, in particular in the fact that Act no. 402/2010 Coll., which amends Act no. 180/2005 Coll., on the Support of Electricity Generation from Renewable Energy Sources and amending certain Acts (the "Act on Support of Use of Renewable Sources"), as amended by later regulations ("Act no. 402/2010"), and certain other Acts, imposed an obligation to pay a levy on solar electricity in the period from 1 January 2011 to 31 December

2013 on those solar energy producers whose plants were put into operation from 1 January 2009 to 31 December 2010. However, those producers who put plants into operation from the day when Act no. 180/2005 Coll. went into effect, or earlier, i.e. from 2005 to 31 December 2008, are not burdened with the levy. Inequality also lies in the fact that the burden of the levy is imposed only on some, arbitrarily selected solar energy producers, but not on producers of energy from other renewable sources; they are not levy payers. The selection in burdening levy payers is groundless, arbitrary, and not supported by a public interest. The entire sector of production of energy from renewable sources, standing on the same starting line (see judgment file no. Pl. ÚS 2/02), is, without any relationship whatsoever to the public interest (not solely a fiscal interest), arbitrarily divided into a group of businesses, to whom the statutory aid is provided, and a group to whom it is denied. This also reveals the legislature's unequal approach to the right to conduct business under Art. 26 of the Charter. Thus, arbitrarily placing a levy burden on certain groups must be seen as unfairly competitive interference by the legislature into the freedom of the affected parties under Art. 26 of the Charter. As regards the right to peaceful enjoyment of property, the subject matter of constitutional protection under Art. 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms is both existing property and a legitimate expectation of acquiring property. The addressees of Act no. 180/2005 Coll. received from the state authorities at most significant assurance that they could expect to acquire property in the form of revenues from energy production within the intent of this Act, which did not anticipate a burden on some of them through a levy as imposed by the contested amendment. This expectation was a legitimate expectation.

7. Chapter VII of the petition challenges the form of Act no. 357/1992 Coll., on Inheritance and Gift Tax and the Real Estate Transfer Tax, as amended by later regulations ("Act no. 357/1992 Coll."), after the amendment implemented by Article III of Act no. 402/2010 Coll., which introduces a tax on allowances acquired free of charge. According to the petitioners, such taxation of emission allowances is contrary to EU law, which establishes a scheme for greenhouse gas emission allowance trading in Directive 2003/87/EC. Article 10 of the Directive gives member states an obligation to allocate, for the period beginning 1 January 2008, at least 90% of the total quantity of allowances free of charge, in accordance with an approved national allocation plan. The national allocation plan for the Czech Republic was approved by the European Commission by a decision of 26 March 2007 and was subsequently adopted in Government Directive no. 80/2008 Coll., on the National Allocation Plan for the trading period 2008-2012. The national allocation plan cannot be changed without the prior consent of the European Commission; thus, the free allocation of allowances for greenhouse gas emissions cannot be lowered below 90% of the total quantity of allowances. Therefore, the operators of facilities that are part of the system of trading with greenhouse gas emission allowances legitimately expect that their property rights will be protected in a manner that is consistent with the national allocation plan for the period 2008-2012, in particular with a view to their planned long-term investment into making their facilities more ecologically friendly. Therefore, any unpredictable significant interference that is applied in an irrationally short time to the conditions based on which these operators make their investment decisions has a suffocating effect, which the Constitutional Court pointed to in its past decision making. Thus, the

arbitrary introduction of taxation of greenhouse gas emission allowances, made contrary to the legitimate expectations of operators of facilities that are part of the system of trading greenhouse gas emission allowances, unconstitutionally interferes in the protected right to own property. From a public law viewpoint, the contested legislation is inconsistent with Act no. 526/1990 Coll. on Prices, as well as with Act no. 265/1991 Coll., which provides the competence of administrative authorities in the area of prices, and possibly with Act no. 151/1997 Coll. on the Valuation of Property. It is not clear what the ministry's new competence to "publish" the market value of an allowance means. Allowances are not an extra-commercial asset, because they are subject to trading; in such a case price regulation always constitutes interference in property rights, and therefore prices can be regulated only on the basis of a statute. However, the jurisdiction of the Ministry of the Environment in the area of prices is not provided by either Act no. 526/190 Coll., on Prices, or by Act no. 265/1991 Coll., which provides the competence of administrative authorities in the area of prices, in view of the fact that the Ministry, regardless of its insufficient jurisdiction in the area of prices, is not supposed to set the market price of allowances through a decision, but merely to publish it. The petitioners also point out, that the legal essence of allowances is exclusively in the public law sphere, because it is an authoritative consent to emit a particular amount of greenhouse gasses in a given year. However, the contested provisions are based on a principle that is completely ruled out in the public law sphere, the private law actions of persons subject to private law, because a gift is the subject of a gift agreement. The assumption that the state, in the exercise of state power, i.e. in authoritative decision making on the rights and obligations of third parties, acts under private law and will transfer state property (which allowances are not) free of charge, is also contrary to Act no. 219/2000 Coll., on State Property, and also lacks the elementary logic of a constitutional basis. Apart from the foregoing, the contested provisions of the amendment to Act no. 357/1992 Coll. are also an instance of true retroactivity, because the new norm taxes already issued emission allowances, for the years 2011 and 2012, but for the production of electricity in a facility that produced electricity as of 1 January 2005 or later.

8. In chapter VIII the petitioners state that exemption from income tax under § 4 par. 1 let. e) or § 19 par. 1 let. d) of Act no. 586/1992 Coll., annulled by Article II point 2 of Act no. 346/2010 Coll., was not related to the legislature's decision to support energy based on renewable sources from 2005, but was provided to taxpayers after the tax reform in 1992 and obviously pursued the public interest expressed in Article 7 of the Constitution, the state's interest in prudent use of natural resources and protection of natural wealth. Thus, in this regard exemption from taxes is stable legislation, based on the Constitution, which implies that it is also a stable component of the legal awareness of the addressees of this legal regime. Thus, this legislation was part of the legitimate expectation of the addressees of the Act, who based on it their business plans in the renewable energy sector. Thus, a consequence of the contested amendment and its legislative implementation is interference in the legitimate expectations of the levy payers, but also the establishment of inequality among its addressees; the criterion here is again the period when the production facility was placed in operation. All the addressees established their businesses on the same assumption, and under the existing legislation; some used the exemption in full, others in part, some were

denied it. This is, again, arbitrariness by the legislature, which could have chosen a transition period so that levy payers setting up their business any time when the previous legislation was in effect could have taken advantage of the tax exemption equally and during the same period.

9. In conclusion, the petitioners summarize that the contested provisions, in connection with other related amendments, are of a clearly prohibitive and discriminatory nature, although the Czech Republic has not yet met its commitment to achieve a 13% share of energy from renewable sources in 2020; for 2010 the target was an 8% share, and judging by the reports of the Energy Regulatory Office (§ 7 of Act no. 180/2005 Coll.) this target was not achieved. The petitioners believe that the foregoing indicates the substance of the legislature's intent, implemented through the contested amendments. It is not a clearly formulated public interest, but the pursuit of a purely fiscal and prohibitive intent in relation to an otherwise formally supported sector, which is implemented through arbitrary legislative interference by the legislature. It also interferes in the international obligations from the EU accession treaties by which the Czech Republic is bound. The manner in which the contested statutory provisions interfere in the already existing rights of the addressees of the statutory aid, which they formally preserve, but simultaneously directly eliminate (they impose the levy, impose tax and remove exemption from income tax), is constitutionally unacceptable. This is not only due to the interference in the principle of equality and property rights, or legitimate expectation, through the retroactive amendments, but also due to their internal inconsistency. The new taxation of the allowances by gift tax is, moreover, a violation of the constitutional rule that taxes may be imposed only by statute, and entrusts the definition of a tax basis to the executive branch, without setting criteria for them. It is evident that the legislature served the short-term, practical (fiscal) goals of the executive, justified by the public interest, to the detriment of higher values, which are the inviolability of the fundamental individual rights and confidence in the exercise of power of the state. The petitioners are convinced that no economic or fiscal goal justifies such interference in the requirements of a democratic, rule of law state. In view of all the abovementioned legal and economic arguments, the petitioners believe that the contested parts of Act no. 402/2010 Coll. and Act no. 346/2010 Coll. are capable of causing serious consequences for the Czech Republic, namely in the form of a decline in its credit rating, which indicates the riskiness of doing business and quantifies the probability that the country will meet its obligations. The petitioners are also convinced that there is a realistic danger of international arbitration proceedings by subjects that will be affected by the contested laws, and that the consequences of such arbitration could seriously affect the economy of the Czech Republic. The petitioners consider that, apart from reviewing the constitutionality of the contested provisions, as proposed above, it is appropriate to investigate them in context with the original regime for supporting energy from renewable sources, with other uncontested amendments, with the administrative practice in the Czech Republic, and with the context of the international obligations of the Czech Republic.

II.

10. On 30 September 2011 the Constitutional Court received a petition from the Municipal Court in Prague seeking the annulment of § 7a to 7i of Part III of Act no.

180/2005 Coll. and point 2 of Art. II of Act no. 402/2010 Coll. In view of the fact that the Constitutional Court, in the present matter, is addressing a petition identical to the one from the Municipal Court in Prague, the later petition seeking the annulment of the cited statutory provisions was denied by the Constitutional Court under § 43 par. 2 let. b) of the Act on the Constitutional Court, on grounds set forth in § 43 par. 1 let. e) of that Act on 15 November 2011 as impermissible (§ 35 par. 2 of the Act on the Constitutional Court) on the grounds of lis pendens. At the same time, the right of the Municipal Court in Prague to take part in the present matter as a secondary party (§ 35 par. 2, the sentence after the semi-colon, of the Act on the Constitutional Court) was recognized.

11. On 28 July 2011 the Constitutional Court also received an AMICUS CURIAE BRIEF from consultants for Platforma pro OZE [Platform for Renewable Energy Sources], which brings together Czech and foreign entrepreneurs and investors in the field of renewable energy sources. Because Platforma pro OZE is an initiative without legal entity status, the brief was filed by its consultants. Another amicus curiae brief was delivered to the Constitutional Court on 23 November 2011, by the Association for Protection of small and Medium-sized Producers of Electricity from Renewable Sources. This association also sent the Constitutional Court a response to the statement (not sent to it by the Constitutional Court) from the Prime Minister of the Government of the CR and the Ministry of Finance regarding the petition, and asked that their response be included in the file.

12. The Constitutional Court was also addressed on 5 August 2011 by RNDr. Jiří Svoboda, CSc, DSc., who stated that, together with the constitutional complaint filed in the matter of seeking annulment of Act no. 180/2005 Coll., he petitions to be granted secondary party status in the present matter. The Constitutional Court informed J. Svoboda that it is up to Panel IV of the Constitutional Court whether to suspend the matter file no. IV. ÚS 2316/11 and submit it to the Plenum of the Constitutional Court, which can deny the petitioner's petition seeking annulment of the statutory provisions on the grounds of lis pendens and grant him secondary party status in the matter file no. Pl. ÚS 17/11. In a submission dated 28 August 2011 J. Svoboda informed the Constitutional Court that in his case considerations of lis pendens are not justified, as he is proposing the annulment of the statutory provisions in question on completely different grounds than the petitioners. To illustrate the variety of opinions on balancing the public interest in state aid for investment in this field, the Constitutional Court here presents the position of J. Svoboda, who, unlike the petitioners, considers that a payback period of less than fifteen years is contrary to the purpose of the statute and abandons protection of society, which bears an enormous cost in the construction and operation of PPPs [photovoltaic power plants].

13. On 25 January 2012 the Constitutional Court received a submission from Black & Bush Projekt 1, s.r.o., which is the plaintiff in proceedings conducted before the Regional Court in České Budějovice, file no. l0 Af 69/2011, 10 Af 112/2011 and l0 Af 137/2011, in which it seeks annulment of a decision by the Financial Directorate in České Budějovice ref. no. 2956/11-1200, of 30 June2011, and bases its complaint on the inconsistency of § 7a to § 7i of Act no. 180/2005 Coll. with the constitutional order of the Czech Republic. The Regional Court in České Budějovice suspended these proceedings under § 48 par. 1 let. b) of Act no. 150/2002 Coll., the

Administrative Procedure Code, as amended, on the grounds that the matter was being submitted to the Constitutional Court.

III. The Course of the Proceeding and Recapitulation of Statements from the Parties and the State Organs Contacted

14. In accordance with § 69 of the Act on the Constitutional Court, the Constitutional Court called on the Chamber of Deputies of the Parliament of the Czech Republic (the "Chamber of Deputies") and the Senate of the Parliament of the Czech Republic (the "Senate") to submit statements on the petition.

15. The Chamber of Deputies, speaking through its Chairwoman, Miroslava Němcová, pointed to the unclear formulation of the proposed judgment in the petition, or certain contested parts of the statutes in the petition from the group of Senators, including after the proposed judgment was amended on 3 June 2011. The Chairwoman of the Chamber of Deputies also states that the provisions contested by the petitioner were discussed in the Chamber of Parliament as part of Chamber of Deputies publication no. 145. This publication included the contested provisions relating to Act no. 180/2005 Coll., and also relating to Act no. 357/1992 Coll. The provisions relating to Act no. 586/1992 Coll. were discussed as part of Chamber of Deputies publication no. 158. As regards Chamber of Deputies publication no. 145, the government submitted the draft of the statute in question to the Chamber of Deputies on 14 October 2010. This original government bill did not contain the contested provisions; those were incorporated into it by the comprehensive amending proposal arising from the discussions in the committee assigned to review it. The first reading of the bill took place on 29 October 2010 at the 7th session of the Chamber of Deputies. The bill was assigned for review to the Economics Committee, which, in that discussion, adopted the abovementioned comprehensive amending proposal, contained in committee resolution no. 34 of 2 November 2010 (publication no. 145/1). The second reading of the bill took place on 3 November 2010. Amending proposals were submitted in the detailed debate that were later included in a summary of amending and other proposals (publication no. 145/2). The third reading took place on 9 November 2010. The bill was approved as amended by the comprehensive amending proposal of the Economics Committee; in vote no. 140, out of 159 deputies present, 123 were in favor and 12 were against. The bill was passed on to the Senate, which discussed on 8 December 2010. The Senate did not adopt any resolutions on this draft of the Act. The Act was subsequently signed by the appropriate constitutional officials and promulgated in the Collection of Laws in part 144 as number 402/2010 Coll. The contested provisions were also contained in the abovementioned Chamber of Deputies publication no. 158 – the government bill of the Act amending Act no. 586/1992 Coll. The government submitted this publication on 29 October 2010. Upon the government's proposal, the Chairwoman of the Chamber of Deputies declared a state of legislative emergency under § 99 of Act no. 90/1995 Coll., and assigned the bill to the Budget Committee for discussion. On 2 November 2010 the Budget Committee issued resolution no. 65 (publication no. 158/1). The second reading of the bill took place on 2 November 2010 at the 8th meeting of the Chamber of Deputies. The third reading of the bill took place immediately after the second reading. In that reading, Budget Committee resolution no. 65 was first voted on, and then voting on the bill took place; the Chamber of deputies approved the bill, when, in vote no. 30, out of 145 deputies present, 103 were in favor and

40 were against. On 3 November 2010 the bill was passed on to the Senate, which discussed it on 12 November 2010. The Senate approved the bill in the wording passed on by the Chamber of Deputies. The bill was then signed by the appropriate constitutional officials and was promulgated in the Collection of Laws in part 127 as number 346/2010 Coll. In this situation, it is up to the Constitutional Court to review the constitutionality of the subject provisions in connection with the petition, and to issue the appropriate decision. The Chairwoman of the Chamber of Deputies also stated that she agreed to waive a hearing before the Constitutional Court in this matter.

16. The Senate, through its Chairman, Milan Štěch, stated that the provisions of Act no 180/2005 Coll. and Act no. 357/1992 Coll. that are proposed to be annulled were part of the bill that was passed on to the Senate on 11 November 2010. The Senate Organization Committee assigned this bill for discussion, as publication no. 379 (in the 8th term) to the Committee for the Economy, Agriculture and Transport, as the guarantee committee, and to the Committee for Regional Development, Public Administration, and the Environment. The Committee for the Economy, Agriculture and Transport discussed the bill at its meeting on 7 December 2010 and did not adopt any resolutions. The Committee for Regional Development, Public Administration, and the Environment discussed the bill at its 2nd meeting on 7 December 2010 and also did not agree on any resolutions. The Senate discussed the bill at its 2nd meeting on 8 December 2010. It had a quorum, but did not adopt any resolution. With 66 senators present, 21 senators voted in favor of the bill in the version passed on by the Chamber of Deputies, and 16 were against; analogously, none of the amending proposals made in detailed discussion were adopted. The bill was passed under Art. 46 par. 3 and published in the Collection of Laws as no. 402/2010 Coll. The provision of Act no. 357/1992 Coll. proposed to be annulled was part of the bill that was passed on to the Senate on 3 November 2010. The Senate Organization Committee assigned this bill for discussion, as publication no. 366 (in the 7th term), to the Committee for the Economy, Agriculture and Transport. The Committee for the Economy, Agriculture and Transport discussed the bill at its 34th meeting, held on 11 November 2010, and adopted resolution no. 384, wherein it recommended that the Senate pass the bill in the version passed on by the Chamber of Deputies. The Senate discussed the bill at its 25th meeting, held on 12 November 2010, and by resolution no. 604 approved the bill, in the version passed on by the Chamber of Deputies; in vote no. 7, out of 77 senators present, 43 senators voted in favor of passing it, 29 senators were against, and 5 senators abstained from voting. This Act was then published in the Collection of Laws as no. 346/2010 Coll. The fact that the Senate did not pass any resolution regarding the bill contained in publication no. 379 reflects the overall atmosphere around the discussion of this bill in the Senate bodies, because there was not even a clear recommendation from the committees to the full Senate. The discussions, and especially the fact that the Senate did not adopt any resolution regarding this material, indicated that there was no majority opinion in the Senate regarding the bill being discussed. However, despite the reservations and legal doubts, no motion was made to deny the bill. The statement concludes that even after the change of the proposed judgment on 3 June 2011, the proposals are not quite clearly formulated. Peripherally, one notes that as regards the fourth proposal (annulment of point 2 Art. II of Act no. 346/2010 Coll.), this concerns an already processed transitional provision that was to ensure that the exemption from income tax could

be applied in tax returns due 31 March 2011, alternately due 30 June 2011, that, is when of Act no. 346/2010 Coll. was already in effect, without the taxpayer having to rely on the constitutional principle of legitimate expectation and predictability of law for the 2010 tax period. Thus, for those subject to the statute, it was firmly set that they could still apply the tax exemption for 2010. The Chairman of the Senate also stated that he agrees to waive a hearing before the Constitutional Court in this matter.

17. The Constitutional Court, under § 48 par. 2 of the Act on the Constitutional Court, called on the government of the Czech Republic to state its position on the petition. The government, through the Prime Minister, stated its position on the petition, saying that the rapid development of energy from renewable sources caused an increase in the expenses for financing it and had subsequent negative social and economic effects. These effects began to appear at the end of 2008 during the early stage of the global economic crisis, and in 2009 the situation in the field of electricity production from renewable sources changed so much that it became necessary, in the public interest, to reevaluate the state's position on aid for electricity production from renewable sources. The main change was a marked reduction in the cost of photovoltaic panel technology in 2008 and 2009, which, combined with the favorable exchange rate for the Czech crown and the favorable business environment led to a "solar boom." In view of the foregoing, as well as the fact that the Czech Republic's legislation governing public aid for energy production from renewable sources is based on the principle of transferring the greater part of financial aid to the end user and the state budget, there was a real danger that the costs of financing the aid in the existing scope would be so disproportionate, in relation to the goals declared by Act no. 180/2005 Coll., that it was necessary to reevaluate the existing policy of state aid so that the expected negative effects would not occur, and so that the aid system would reflect the fact that business conditions had changed fundamentally as a result of the decrease in entry investment costs. Therefore, it was necessary, in the public interest, to use all legitimate means to reevaluate the existing level of financial aid for electricity production from renewable sources (in particular, from sunlight) and at the same time preserve all the abovementioned fundamental rights and guarantees arising for investors in facilities for electricity production from renewable sources on the basis of Act no. 180/2005 Coll. One of the steps to limit the scope of state aid for electricity producers from renewable sources was utilization of the right to impose taxes, fees, and other similar payments. The legislature used this right to adopt the parts of Act no. 346/2010 Coll., and of Act no. 402/2010 Coll. that are being contested by the petitioners. The contested taxing provisions led only to a de facto temporary reduction in state aid (the financial components), which is fully within the intent of Directive 2001/77/EC, as well as European Commission notice 2008/C82/01 "Community guidelines on state aid for environmental protection." Regarding the contested provisions contained in Act no. 402/2010 Coll., the Prime Minister is convinced that the arguments in the attached statements from the Ministry of Industry and Trade of the CR and the Ministry of Finance of the CR are a sufficient basis to state that the contested provisions were passed in the public interest, are not the result of irrational behavior by the legislature or accidental changes (errors) during the legislative process, and that they have been chosen, in a rational relationship to the purpose of the amended statutes, in order to achieve those aims. Thus, one can state that the contested parts of Act no. 402/2010 Coll.

do not interfere in the fundamental rights, enshrined by the abovementioned Act, of producers of electricity from renewable sources (investors), nor in the principles for aid of the production of energy from renewable sources incorporated in Directive 2001/77 EC, European Commission notice 2008/C82/01 "Community guidelines on state aid for environmental protection," and in Act no. 180/2005 Coll., nor do they interfere in their constitutionally guaranteed rights. The legitimate expectations connected with protection of their property – i.e. legitimate expectations arising from the guarantee of a long-term return on investments – was not affected by the contested parts of Act no. 402/2010 Coll., nor did the claimed violation of Article1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms take place. The contested parts of Act no. 402/2010 Coll. also did not affect any legitimate expectation concerning the level of revenue, because revenue is an accounting category that must always be assessed individually, under Ministry of Finance decree no. 500/2002 Coll., as amended by later regulations. At the same time, it must be emphasized that any investor expectation of profit was never guaranteed by Act no. 180/2005 Coll., and has no basis in it. Thus, the fact that the contested parts of Act no. 402/2010 Coll. will in fact affect the degree of investor profits (it will be affected on the expense side, as the expenses will increase by the newly imposed tax obligation) is not relevant in terms of evaluating their constitutionality. The assumption that each investor in energy production from renewable sources should and could have anticipated (legitimately expected) a possible reduction in the level of state aid arises from the text of the preamble to Directive 2001/77/EC (point 16), which states: "It is, however necessary to adapt, after a sufficient transitional period, support schemes to the developing internal electricity market. ... This framework would enable electricity from renewable energy sources to compete with electricity produced from non-renewable energy sources and limit the cost to the consumer, while, in the medium term, reduce the need for public support." The consequence of the adoption of the contested parts of Act no. 402/2010 Coll. is (from the point of view of "new" investors – i.e. those that put their facilities into operation from 1 January 2009 to 31 December 2010) is only a temporary effect on the level of profit (an increase in expenses by the newly introduced tax obligation) and the subsequent increase in the payback period for their investment. However, the system of aid and the principles for setting regulated prices, governed by Act no. 180/2005 Coll., continue to guarantee investors adequate conditions for them to achieve a simple payback period of 15 years for return on their investment. The contested parts of Act no. 402/2010 Coll. also did not affect the right to own property under Article 11 par. 4 of the Charter of Fundamental Rights and Freedoms, because that article protects material rights, which do not include income from income-earning activity (cf. e.g., judgments Pl. ÚS 12/94, Pl. ÚS 7/03). The contested parts of Act no. 402/2010 Coll. also did not violate the principle of equality. In this regard the Prime Minister points to the Constitutional Court's case law on this issue (e.g., judgments Pl. ÚS 22/92, Pl. ÚS 33/96, Pl. ÚS 16/93, Pl. ÚS 36/93, Pl. ÚS 7/03 and others), and in context with that only to the public interest, often cited above, in the adoption of the contested parts of the Acts. In the context of the foregoing and the attached evidentiary materials, one can summarize that the effects of all the contested provisions cannot have a "suffocating" effect on producers of electricity from renewable sources. They are not steps that would lead to such a change in the property of the affected subjects that they would thwart the very essence of

the property of the affected subjects, nor are they steps that would make it impossible to achieve the guaranteed benefits for which certain subjects had legitimate expectations. The contested provisions are undoubtedly the result of a political decision, which, however, is constitutional, was made in accordance with economic principles, and took into consideration the starting context of legislative regulation of aid for electricity production from renewable sources. Finally, the Prime Minster points to the necessary interconnectedness of the issue of state for energy production from renewable sources with European Union law, which also had to be taken into account in connection with the "solar boom," or in connection with the abrupt difference in initial investment costs between "old" and "new" investors in solar power plants. In view of the situation described above, the government, or the legislature, had to take into account European Commission notice 2008/C82/01 "Community guidelines on state aid for environmental protection." This document indicates that operational aid for energy production from renewable sources (purchase prices, green bonuses) can be considered compatible with the common market only if it covers the difference between expenses for energy production from renewable sources and the market price for a given type of energy, whose amount is limited to a minimum, and is non-discriminatory and proportional. However, a lack of response from the government (or the legislature) to the "solar boom" – i.e. leaving the level of state aid for all recipients producing solar electricity at the same level – would very likely mean that the European Commission would designate such state aid, in relation to "new" investors, as incompatible with the common market under Art. 87 par. 3 let. c) of the EU Treaty. That would then mean that the overcompensated "new" investors would have to retroactively return the state aid provided to them, and would have negative consequences for their property situation.

18. Regarding the contested provision contained in Act no. 346/2010 Coll., i.e. the proposal to cancel the "tax holiday," the government states that the bill was discussed, as part of a "reform package" in a state of legislative emergency. The stenographer's record from the first day of the Senate's 25th session, held on 12 November 2010 indicates that there was extensive discussion about the proportionality and correctness of using the institution of legislative emergency (or, the procedures under § 118 of Act no. 107/1999 Coll., on the Rules of Procedure of the Senate) when discussing the submitted bills, which led to the Senate's democratically passed decision to accept the request from the Prime Minister to discuss the submitted bills (including the bill in question) in shortened proceedings. The bill, which amends Act no. 586/1992 Coll. (Senate publication 366) was provided justification by the Minister of Finance, subjected to substantive discussion (in the guarantee committee and in the full Senate), and subsequently passed. These facts are contained in the stenographer's record of the procedures from the first day of the Senate's 25th session. Thus, in this case as well, one can state that procedural rules, as well as democratic principles for decision making were observed. One can also state that the procedure under § 118 of Act no. 107/1999 Coll., on the Rules of Procedure of the Senate, was not misused in order to circumvent proper legislative procedure, and that the opposition in the Senate was not in any way deprived of its rights.

19. The Ministry of Trade and Industry stated in its statement on the petition, that the petitioners did not present evidence of the claimed "arbitrariness or extreme

conduct by the legislature," nor was evidence presented of "inconsistency with the principle of equality." On the contrary, the Ministry of Trade and Industry believes that the instruments that have to be used to protect the nation's economy and citizens were always carefully weighed, while meeting the principles of rationality and proportionality, and always on the basis of the public interest. The cited levy concerns solar electricity produced in the period from 1 January 2011 to 31 December 2013 in facilities put into operation in the period from 1 January 2009 to 31 December 2010, i.e. in a period when there was a marked decline in the costs of acquiring sunshine collectors, and thus, there were greater advantages provided on the part of the state to business investing in that period, compared to business that invested in the previous period. The present levy on solar electricity (26% with support in the form of the purchase price) was calculated to continue to guarantee a fifteen year period for return on investments, which is guaranteed by law. Thus, it was not chosen accidentally, and certainly is not extreme. Because of the abovementioned facts and the sudden reduction in investment expenses for the construction of solar power plants the period for return on investment was gradually shortened, which did not correspond to the legislature's original intent. The period for return on investment was shortened from the original 15 years to 8-9 years. It is evident from the foregoing that legislative changes were, and must have been, expected and justified, and not an expression of arbitrariness. Thus, the addressees of Act no. 180/2005 Coll. can continue to expect revenues from the production of energy in solar power plants thanks to state subsidies, within the intent of this Act and subject to observance of the fundamental principle that the investments will be recouped within 15 years. Insofar as the petitioners state, in point 10, that the contested statutory provisions are inconsistent with "right to conduct business" (Art. 26 of the Charter, Art. 16 of the Charter EU), it must be pointed out that the right to conduct business, and therefore the opportunity to invest in the given sector, continues to be guaranteed, and is not restricted, it is only the question of how advantageous investment in this sector will be that fluctuates, which is also standard in other fields of business. The statutory measures also do not in any way violate the principle of equality before the law; on the contrary, they accentuate this equality, in that this branch is subsidized by the state and energy prices are supported more than other branches of our economy, due to greater emphasis on the interest in production of solar electricity. In conclusion, the Ministry of Industry and Trade points out that the petitioners do not in any way document the alleged considerable economic consequences that affect the property of the addressees of the contested parts of the statutes and establish the CR's property liability. Likewise the claim that the CR's rating declined in connection with the adopted measures appears to be speculative. The Ministry of Trade and Industry believes that if the CR's rating fell, it would be if no measures were adopted, because the negative effects tied to, for example, increased expenses for electricity would affect all electricity consumers – including the largest consumers, which are the backbone of Czech industry.

20. The Ministry of Finance stated in its statement that the legislation governing renewable sources was submitted with the aim of stopping pointless increases in the expenses to support the production of electricity from renewable sources, in particular due to high support for solar power plants, and to limit the effects of that support on the Czech industry, economy and households. Insofar as the petitioners conclude that application of the norm, which reduced the degree of

redistribution in the branch for addressees who began to develop their activities in the field before the Act went into effect, is inconsistent with their legitimate expectations because the legislative situation changes during the course of their doing business, one cannot agree with their conclusion. The law changes practically constantly, and as regards application, it is certainly not possible to apply old legislation until such time as an addressee of a norm ceases doing business in a field or liquidates certain substantive property on which a business was based. The Ministry of Finance emphasizes that the Energy Regulatory Office (the "ERO") was, and still is, competent to set purchase prices and green bonuses, on the basis of § 6 par. 1 of the Act on Support of Use of Renewable Sources, as in effect until 31 December 2010. In setting prices, the ERO is bound by the condition provided in § 6 par. 4, that being that purchase prices may not be more than 5% lower than the purchase prices in effect in the year when the new prices are being determined. However, the point of this condition is to limit the executive branch, in this case represented by the ERO, with the result that the ERO is not entitled to annual lower purchase prices by more than 5%; however, this does not in any way limit the legislature, which may intervene to lower the purchase price, or even obligate the ERO to have the possibility of decreasing purchase prices by more. Thus, if the legislature may, and at the time the contested regulations were adopted could have, through its authority, reduced purchase prices, then it undoubtedly could have implemented an action that has the same economic consequences as the reduction of these purchase prices (i.e. it could have adopted legislation for a levy together with legislation governing subsidies to cover increased expenses). Thus, no statutory provision forbids the legislature from intervening in regulation. The Ministry of Finance states that the extreme decrease in investment expenses resulted in the fact that the regulatory means that the legislature gave to the ERO were not sufficient to replace an aging regulation with a regulation that would correspond to the new objective facts. Therefore, the legislature itself had to take regulatory steps in this branch. It is evident from the foregoing that for the addressees the legislative changes were, and must have been, expected, justified, and not an expression of arbitrariness, because they were tied to a change in objective facts due to which the original regulation became obviously incorrect. This concept of legitimate expectations corresponds with the concept that is accepted in settled European case law, under which "if a prudent and circumspect trader could have foreseen that the adoption of a Community measure is likely to affect his interests, he cannot plead that principle if the measure is adopted. [This is so] particularly in an area such as that of the common organisation of the markets, the objective of which involves constant adjustment to reflect changes in economic circumstances" (see, inter alia, judgments of the European Court of Justice C-104/97 P, 265/85, C-22/94, C-104/97, C-37/02 and C-38/02, C-17/03 and C-63/93). Thus, the legitimate expectations of subjects were not violated; on the contrary, if the state had not taken appropriate measures, the rights and legitimate expectations of other subjects would have been clearly affected. The petitioners conclude that the inconsistency with the right to conduct business comes from the imposition of an extreme burden on levy payers, at the level of 26% or 28 %. They conclude that this measure has a "suffocating" effect, and that further conduct of business in this field is not possible. However, according to the Ministry of Finance, this regulation does not "destroy" the payer's asset base (see Pl. ÚS 29/08 of 21 April 2009), because it merely reduces the operator's original support, which was set so that period for return on investment would be closer to

15 years, which is the limit that is contained in the current legislation, and was also contained in the previous legislation. Nor can one speak about “arbitrary selection of solar energy producers versus producers of energy from other renewable sources” (they are not payers of the levy), because overpayment of solar power plants by distributors (final consumers) was restricted, so, on the contrary, discrimination against other renewable sources was removed. Thus, the selection of levy payers is not unjustified or arbitrary, and the public aim that is pursued by the Act (protection of the national economy and minimization of negative social effects), is clearly evident. For these reasons one must conclude that the given legislation is not arbitrary or discriminatory, as the petitioners claim. Likewise, it is consistent with the principle of equality, because that principle undoubtedly does not require the equality of everyone with everyone else, but only the requirements that the law not distinguish one group from another without grounds. In this case the distinguishing criterion is clearly declared and justifiable. Regarding the proposal to cancel the taxation of allowances acquired free of charge, the Ministry of Finance states that Government Directive no. 80/2008 Coll., on the National Allocation Plan for the Trading Period 2008-2012 is merely a promise of acquiring allowances to operators of facilities that emit greenhouse gases, on the assumption that the statutory conditions have been met. Emissions allowances actually become the property of the operators every year at the moment when specific quantities of allowances are credited to the operators’ accounts. This means that when since amendment no. 402/2010 Coll. went into effect, i.e. as of 1 January 2011, only allowances acquired in the future will be taxed. Based on these facts it must be said that the legislation in question cannot be retroactive, either with real or false retroactivity, because it is directed only at facts that arise after 1 January 2011. The Ministry of Finance also disagrees with the petitioners’ objection that the legislation is inconsistent with Art. 11 par. 5 of the Charter, because not only taxes, but also the conditions on which the amount of tax is determined, must be set by statute. The Ministry of Finance points out that the Act on Inheritance and Gift Tax and the Real Estate Transfer Tax merely states that the Ministry of the Environment will publish the average market value of an allowance, but not that the Ministry of the Environment determines (sets) the market value of an allowance for tax purposes. This is because The Ministry of the Environment merely publishes the average market value of an allowance already created by the market itself. In this case, the tax base is set only by statute, so the petitioners’ objection is not relevant in this regard. Taxing allowances acquired free of charge does not violate the acquisition of them free of charge, guaranteed by the legal order, not does it violate provisions of EU directives. Likewise, there is also no reduction or other change to the allocation or allowances approved by the national allocation plan. States that also tax allowances obtained free of charge include Great Britain, Greece, and Spain. Thus, taxing allowances acquired free of charge is not contrary to European Union law.

21. The Constitutional Court also requested the Energy Regulatory Office to provide information regarding the changes in the period for return on investment, the level of revenues, and the level of purchase prices (§ 6 par. 1 of Act no. 180/2005 Coll.) in individual past years from the date that Act no. 180/2005 Coll. went into effect, regarding factors that could affect the performance of guarantees under § 6 par. 1 of Act no. 180/2005, regarding, in the future, preserving the levels of revenues per unit of electricity from renewable sources after the introduction of the levy with

support through purchase prices for a period of 15 years from the year that facilities were put into operation, regarding regulation of purchase prices under § 6 par. 4 of Act no. 180/2005 Coll., and regarding the decrease of entry costs (especially the prices of photovoltaic panels) since Act no. 180/2005 Coll. went into effect.

22. The Energy Regulatory Office sent the Constitutional Court a statement, including graphs and charts, from which it concluded that, even after including the effect of the levy on the profitability of investment, the IRRs (internal rate of return) achieved are above the levels of WACC (weighted average costs of capital) and the period of recovery below the set level of 15 years, regardless of the method of financing individual projects. As regards the development of purchase prices for all announced categories of photovoltaic energy in 2006-2012, it shows an increasing trend corresponding to § 6 par. 1 let. b) point 2 of Act no. 180/2005 Coll.: i.e. taking into account the index of prices of industrial producers. In contrast, the development of specific investment costs under Appendix no. 3 to Decree no. 475/2005 Coll., which implements certain provisions of Act no. 180/2005 Coll. shows a declining trend. According to the statement from the Energy Regulatory Office, the purchase price is then calculated to guarantee a non-negative net project value (NPV > 0) and an IRR (Internal Rate of Return) equal to or higher than the expected model WACC (Weighted Average Costs of Capital) so as to maintain the fifteen year period for return on investment. For completeness, the Energy Regulatory Office states that most projects in renewable energy sources (including photovoltaic power plants) achieve a considerably shorter period for return on investment; only small hydroelectric power plants approach the limit of 15 years. In this regard, the Energy Regulatory Office emphasizes that introducing a withholding tax has no effect on § 6 par. 1 of Act no. 180/2005 Coll., which governs the principles that must be observed when setting the level of purchase prices. Purchase prices for the years 2009 and 2010 were set according to these principles at a time when introducing the levy was not yet even being considered – in the autumn of 2008 and 2009. The decision to introduce the levies was not made until the autumn of 2010 and applies only to photovoltaic power plants put in operation from 1 January 2009 to 31 December 2010. The setting of purchase prices for 2011 and subsequent years was not in any way affected by the levy. Also, the Energy Regulatory Office does not have statutory authority to take fiscal measures into account retroactively in setting purchase prices; moreover, there would be no statutory way to re-set purchase prices at the point when the provision on levies on solar electricity ceases to be in effect (and, even if it were possible, the regulation of purchase prices against fiscal measures would completely eliminate these measures). The Energy Regulatory Office states that revenues, as such, were not affected by implementation of the levy on solar electricity, because the entitled subjects still receive roughly the same revenue that they are entitled to in accordance with the relevant provisions of Act no. 180/2005 Coll., (by the logic of the matter, fiscal measure affect the disposition of this gross revenue). Based on the foregoing viewpoint, the Energy Regulatory Office was not in any way forced to adopt specific measures as a result of the provision introducing the levy on solar electricity going into effect. The Energy Regulatory Office concludes that on the basis of the abovementioned legislation it could not react to the situation when specific investment costs for establishing these energy sources fell sharply year to year as a result of the decrease in costs of photovoltaic panels by more than 40% in

2009 by correspondingly reducing the purchase price for electricity from these sources, because Act no. 180/2005 Coll. authorized it to reduce the purchase price for electricity for new sources year to year by only 5%. Because of this, newly built photovoltaic power plants were at a considerable advantage compared to other kinds of renewable sources, where subsidies were set optimally.

23. The Constitutional Court sent the statements from the parties and state administration authorities to the petitioners and the secondary part, and gave them an opportunity to respond.

24. In their response the petitioners declared that insofar as the state justifies the sudden legislative changes from 2010 that interfere in the constitutionally guaranteed rights of investors in photovoltaic power plants ("PPP") on the basis of the public interest, it is evident that for a long time it neglected the protection of this alleged public interest, and did not update "outdated legislation" at a time when it was not yet necessary to interfere in the rights of owners of already operational PPPs. The petitioners believe that the resulting situation cannot be applied to burden PPP operators, because it is exclusively the result of the actions, or rather omissions, of the state. The petitioners do not question the state's authority to take measures to protect the public interest; however, such measures must be proportional and may not exceed constitutional law bounds. However, according to the petitioners, as a result of introduction of the levy, the levy payers are paying from their own funds the costs of the state energy policy (or state measures to prevent the growth of electricity prices for end consumers). Yet, the Constitutional Court has repeatedly stated that it is not acceptable for a certain selectively determined group of private subjects to bear the effects of social policy chosen by the state. The petitioners agree with the Prime Minister's statement, who said that investors in renewable energy sources were never guaranteed a level of profit. However, the investors were expressly guaranteed a level of support per unit of electricity produced, and this guarantee and investor expectations were violated by introduction of the levy. These guarantees, which bind the state vis-à-vis investors through the constitutional principle of protection of legitimate expectations, have been contained in the law from 2005 to the present day. In that situation, the investors' expectations that the state will maintain the guarantees cannot be described as disproportionate or illegitimate. Insofar as the Ministry of Finance and the Prime Minister cast doubt on the legitimate expectations of PPP investors that the level of support will be maintained, they have not supported this with any evidence; neither do the Ministry of Finance's arguments about the predictability of changes in conditions for existing installations and the widespread awareness of their necessity appear persuasive. In the response, the petitioners also point to the fact that in the past there was systematic growth in electricity prices, yet it did not lead to any response by the state. Thus, it is evident that insofar as the state, in the past, did not find a pressing public interest and did not prevent the fundamental growth in the price of electricity, the threat of these prices increase was also not the true cause for introducing the levy and subsidies at the end of 2010. Even if there were a legitimate public interest of the state in limiting the increase of electricity prices, the fundamental disproportion between the relatively negligible consequence of this measure (reducing electricity price by ca. 5%) on the overall price of electricity, compared to the fundamental interference in PPP investors' property rights (a levy of 26-28%) indicates that in

this case the public interest could not exceed the intensity of the legitimate expectations of investors, all the more so as year to year price increases exceeding 10% are not unusual in the case of other energy commodities, with a fundamental financial effect on their consumers. In this regard the petitioners emphasize that the support paid to producers of electricity from renewable sources did not have to have a direct relationship to the price of electricity for the end consumers, as is repeated several times in the statements from the Prime Minister and both ministries. It was the legislature's decision to impose the burden of financing support for the development of renewable sources only on end consumers of electricity, and it was in no way restricted from financing electricity from renewable sources from completely different sources. In their response, the petitioners question the statistics on which the Ministry of Finance bases its conclusion (e.g. point 299.) that the period for return on investment was radically shortened to 8-9 years. In the model situation of a PPP with installed output of 1MW and investment costs and other economic parameters determined according to ERO decrees, the period for recovery of investment in the PPP did not fall below 13 years, even before introduction of the levy. Thus, it was only 2 years shorter than the guaranteed recovery period. This also corresponds to the usual period for paying off bank loans used for construction of PPPs, which was in the range of 13-15 years. Thus, the two-year deviation from the maximum fifteen year period intended by the statute cannot in any case justify the additional burden that the levy represents for PPP investors. Unlike the Ministry of Finance, the petitioners are also convinced that introducing the levy is a measure that is at least falsely retroactive. It involves false retroactivity in its unacceptable form, i.e. contrary to Art. 1 and Art. 9 of the Constitution. The petitioners add that false retroactivity is, according to the judgment in file no. Pl. US 53/10, in accordance with the principle of protection confidence in the law if it is suitable and necessary to achieve an aim pursued by a statute and if, when balancing overall the "disappointed" confidence and the importance and urgency of the reasons for the legal change, the limits of what is tolerable are preserved. As described above, these requirements were not met in the case of introduction of the levy. In particular, use of a retroactive measure was not necessary in relation to the aim pursued by the state; other measures could have been used to meet the aim pursued, which would, in accordance with Art. 4 par. 4 of the Charter of Fundamental Rights and Freedoms, better preserved the essence and significance of the affected fundamental rights. The petitioners emphasize that from a substantive point of view the levy also shows certain signs of true retroactivity. Introduction of the levy violated the guarantee of a minimum level of support for PPPs. The content of that guarantee was a stable level of support for 15 years after putting a facility into operation. If there is to be a change in the level of support for part of this period, based on the date when the PPP was put into operation, it is a change of facts that already occurred in the past, and thus true retroactivity of the law, because economically the situation is equivalent to shortening the guarantee. According to the petitioners, from a constitutional viewpoint the levy cannot be seen as a tax measure under Art. 11 par. 5 of the Charter of Fundamental Rights and Freedoms, but as a reduction in the set level of support. Thus, in view of the foregoing, in reviewing the constitutionality of the levy, one cannot apply the conclusions and case law of the Constitutional Court concerning limited review of tax measures and emphasizing that the legislature has wide scope for discretion in the field of taxes. Nor is it appropriate to apply the less strict test of proportionality applied by the

Constitutional Court in the area of taxes, or other mandatory payments for the benefit of the state. The constitutionality of the levy must be measured by the general three-level proportionality test that the Constitutional Court defined in, for example, its judgment of 13 August 2002, in the matter file no. Pl. ÚS 3/02. The petitioners add that, in view of the nature of the values affected by the levy, which include property rights and the essential requirements of a democratic rule of law state, it is also not appropriate to apply to this case the less strict "reasonableness test" used by the Constitutional Court in reviewing violations of economic and social rights. Insofar as the Ministry of Industry and Trade states on pages 8 and 9 of its statement that there was no violation of the principle of equality between individual PPP operators, because the rational basis for distinguishing between them are the reduced investment costs for PPPs in 2009 and 2010, according to the petitioners it overlooks the fact that there are fundamental differences between specific projects of individual PPP operators, in particular in investment costs, individual contractual conditions, methods of financing, technologies, etc., but a selected group of these investors is still being discriminated against by the introduction of the levy. Thus, the criterion of the period when a PPP was put into operation cannot stand as grounds for the legislature's discriminatory approach. This also applies to giving a greater advantage to producers of electricity from other kinds of renewable sources, to whom the entire support according to the statute is paid. The level of support was not re-assessed at all, even though this support too is substantially reflected in the final price of electricity. In their response to the position of the Energy Regulatory Office, the petitioners state that, although the Energy Regulatory Office mentions the method of calculating a discounted period for return on investment, in its statement, in the calculations of the return on investment in PPPs it quite self-servingly provides only the simple period for return on investment, which is logically considerably shorter than the discounted period for return on investment; moreover, the table on page 4 of the statement incorrectly calculates using the already cancelled five-year holiday from income tax, which also shortens the length of the resulting period for return on investment. Therefore, the petitioners emphasize that the criterion of preserving the guarantee of a fifteen-year period for return on investment must clearly be evaluated using the discounted period for return on investment, and the calculations presented by the Energy Regulatory Office thus lack relevance. In this regard the petitioners refer to appendix no. 4 of their statement of 12 December 2011, which contains a model calculation of the discounted period for return on investment in a PPP, fully in accordance with the abovementioned method of the Energy Regulatory Office. It is clear from this calculation that even if introducing the levy did not lead to clear violation of the guarantee of a fifteen year period for return on investment, as a consequence of introducing the levy that period was extended to the very limits of the period guaranteed by law. In that case, it cannot be ruled out that for a number of investors the introduction of the levy also violated the guarantee of a fifteen-year period for return on investment, because the period for return on investment can vary between identical projects. In his filing of 14 May 2012, the petitioner's attorney stated that he does not insist on a hearing in the matter.

25. The Municipal Court in Prague, as a secondary party, stated that it has nothing to add to the petition from the group of senators, because it does not find it economical or effective to repeat the arguments already made in it. The Municipal

Court in Prague also stated that it agrees to waive a hearing in this matter before the Constitutional Court.

IV. Text of the Contested Provisions

26. Contested provisions of Act no. 180/2005 Coll.:
PART III
LEVY ON SOLAR ELECTRICITY
§ 7a
Subject matter for the levy on solar electricity
The subject matter for the levy on solar electricity (the "levy") is solar electricity produced in the period from 1 January 2011 to 31 December 2013 in a facility put into operation in the period from 1 January 2009 to 31 December 2010.

§ 7b
Subjects of the levy
Payers of the levy are producers that produce solar electricity.
Payers of the levy are operators of transmission systems and operators of regional distribution systems.

§ 7c
Levy basis
The basis of the levy is the amount, net of value added tax, paid by the levy payer (remitter) in the form of a purchase price or green bonus to the levy payer (remitter) on solar electricity produced in the levy period.

§ 7d
Exemption from the levy
Solar electricity produced in an electric power plant with installed output up to 30 kW, placed on a roof construction or outer wall of a single building connected to the ground through a firm foundation listed in the real estate register is exempt from the levy.

§ 7e
Levy rates
The levy rates from the levy basis are, if paid in the form of purchase price, 26%, green bonus, 28%.

§ 7f
Levy period
The levy period is the calendar month.

§ 7g
Method of collecting levy
The levy payer is required to withhold or deduct the levy from the levy basis.
The levy payer is required to transfer the levy from the levy basis within 25 days after the end of the levy period; it is required to submit accounting of the levy by the same deadline.

§ 7h
Levy administration
Levies are administered by the regional financial bodies.
Levies are administered according to the tax procedure code.

§ 7i
Budgetary definition of the levy
Levies are income of the state budget.

§ 8 – the words “with the exception of inspection of levies and the administration thereof”

27. Contested provisions of Act no. 402/2010 Coll.
Article II, point 2
For the levy periods of January and February 2011 the levy payer is required to transfer the levies and submit an accounting under § 7g of Act no. 180/2005 Coll., in the wording in effect from the day this Act goes into effect, by the deadline for transferring the levy and submitting an accounting for the levy period of March 2011.

28. Contested provisions of Act no. 357/1992 Coll.
§ 6 par. 8
The acquisition, free of charge, of emission allowances for greenhouse gases in 2011 and 2012 for production of electricity in a facility that, as of 1 January 2005 or later produced electricity for sale to third parties and in which, out of the activities to which trading with emission allowances for greenhouse gases applies, only combustion of fuels by the electricity producer takes place (an “allowance acquired free of charge”) is subject to gift tax.

§ 7a
Tax basis for allowances acquired free of charge
The basis for gift tax for allowances acquired free of charge is the average market value of an emission allowance for greenhouse gases as of 28 February of the relevant calendar year multiplied by the number of allowances acquired free of charge for the production of electricity for the relevant calendar year.
The Ministry of the Environment shall publish the average market value of an emission allowance for greenhouse gases as of 28 February of the relevant calendar year in a manner that permits remote access.

§ 14a
Rate of gift tax for allowances acquired free of charge
The rate of gift tax for allowances acquired free of charge is 32%.

§ 20 par. 1 let. a)
The words “with the exception of allowances acquired free of charge”

§ 20 par. 15
The acquisition of the number of allowances acquired free of charge that corresponds to the ratio of the average amount of electricity produced from the

combined production of electricity and heat to the total amount of electricity produced in the years 2005 and 2006 is exempt from gift tax.

§ 21 par. 9
In the case of allowances acquired free of charge, the taxpayer is required to submit a tax return for gift tax to the territorial tax administrator by 31 March of the relevant calendar year. This tax return includes the taxpayer's information regarding the ratio of electricity produced and ratio of heat produced to the total emissions of greenhouse gases for the calendar year 2005 and following years.

29. Contested provisions of Act no. 346/2010 Coll.
Article II, point 2
Exemption under § 4 par. 1 let. e) or § 19 par. 1 let. d) of Act no. 586/1992 Coll., in the wording in effect until the day when this Act goes into effect, shall be used for the last time for the tax period that began in 2010.

V. Petitioner's Active Standing

30. The petition seeking the annulment of § 7a to 7i, in §8 the words "with the exception of inspection of levies and the administration thereof" and Art. II, point 2 of the transitional provision of Act no. 180/2005 Coll., § 6 par. 8, § 7a, § 14a, in § 20 par. 1 let. a) the words "with the exception of allowances acquired free of charge," § 20 par. 15, § 21 par. 9 of Act no. 357/1992 Coll., and Article II point 2 of Act no. 346/2010 Coll., was submitted by a group of twenty senators from the Senate of the Parliament of the Czech Republic, i.e. in accordance with the conditions contained in § 64 par. 2 let. b) of the Act on the Constitutional Court. Thus, in this matter we can state that the conditions for the petitioner's active standing have been met.

VI. Constitutionality of the Legislative Process

31. In accordance with § 68 par. 1 of the Act [on the Constitutional Court], in a proceeding to review statutes or other legal regulations, the Constitutional Court is require to review whether the contested legal regulation was passed and issued in a constitutionally prescribed manner.

32. It was determined from the webpages of the Chamber of Deputies of the Parliament of the Czech Republic that the government submitted the bill of Act no. 180/2005 Coll. to the Chamber of Deputies on 13 November 2003. The bill was approved on 23 February 2005; in vote no. 513 out of 166 deputies present 103 were in favor of the bill and 44 were against. The bill was passed on to the Senate, which discussed it on 31 March 2005 and by resolution no. 98 approved the bill in the wording passed on by the Chamber of Deputies. The Act was not signed by the President by the statutory deadline. The passed Act was delivered for signature to the Prime Minister on 2 May 2005. The Act was promulgated on 5 May 2005 in the Collection of Laws in part 66 as number 180/2005 Coll.

33. The government submitted the bill of Act no. 420/2010, which amended, among other statutes, Act no. 180/2005 Coll. and Act no. 357/1992 Coll., to the Chamber of Deputies on 14 October 2010. The bill was passed on 9 November 2010;

in vote no. 140 out of 159 deputies present 123 were in favor of the bill and 12 were against. The bill was passed on to the Senate, which discussed it on 8 December 2010. The Senate did not adopt any resolution regarding this bill. The Act was signed by the President on 15 December 2010 and promulgated on 26 July 2004 in the Collection of Laws in part 144 as number 402/2010 Coll.

34. The government submitted Act no. 346/2010 Coll., which amended Act no. 586/1992 Coll., to the Chamber of Deputies on 29 October 2010; at the government's request, the Chairman of the Chamber of Deputies declared a state of legislative emergency. The bill was discussed in shortened discussion and was passed on 2 November 2010 by resolution no. 119. On 3 November 2010 the bill was passed on to the Senate, which discussed and approved it on 12 November 2010 in the wording passed on by the Chamber of Deputies. The Act was signed by the President on 23 November 2010 and was promulgated on 8 December 2010 in the Collection of Laws in part 127 as number 346/2010 Coll.

35. The petitioners state that Act no. 346/2010 Coll. was discussed in a state of legislative emergency, which disqualifies the legislative process. The majority of the Chamber of Deputies justified the need for a state of legislative emergency by reference to § 99 of Act no. 90/1995 Coll., on the Rule of Procedure of the Chamber of Deputies on the basis that "the state is in danger of considerable economic damage." However, according to the petitioners, the assumption that the existence of a valid statute could be a cause of direct extensive danger conceptually deviates from the regime of legislative emergency, and conditions for declaring it did not exist. The petitioners also point out the extreme shortening of the statutory periods for discussion between readings in the Chamber of Deputies; thus, the legislative process provided the deputies conditions on the very limit of ability to substantively discuss the draft. Likewise, because this was undoubtedly at the government's initiative, the rules of government legislation were ignored and the matter was submitted without being discussed by the Legislative Council of the Government.

36. In relation to the objection that there were unconstitutional defects in the legislative process in the Chamber of Deputies, it is necessary to refer to the conclusions in judgments file no. Pl. ÚS 55/10 of 1 March 2011 (80/2011 Coll.) and file no. Pl. ÚS 53/10 of 19 April 2011 (119/2011 Coll.), which do not construe the approval procedure in a state of legislative emergency as an unconstitutional procedure per se, but emphasize the full context of the discussion of a contested draft. The Constitutional Court's derogation authority does not arise automatically (objectively) in the event of any kind of doubts concerning the justification for a state of legislative emergency, but only in a situation where the core of democratic parliamentary discussion is materially affected, which can be evaluated only in relation to the positions of the actors in parliamentary (chamber) debate. Whereas in the petitions in file no. Pl. ÚS 55/10 and file no. Pl. ÚS 53/10 a minority of deputies (the political opposition) objected that there was insufficient scope for legal and political debate, i.e. that it was impossible to influence the majority decision through possible persuasive minority arguments, in relation to the draft of the subsequently promulgated Act no. 346/2010 Coll., the political opposition (a group of deputies) did not raise this objection and did not submit a petition to the Constitutional Court, although it did do so in relation to other statutes. Only one

conclusion is possible from the foregoing, that in the case of the material discussed in the relevant publication it does not consider the results of parliamentary debate in the state of legislative emergency to be flawed, with reference to possible impermissible limitation of the parliamentary rights of the political minority. The purpose of the constitutional function of a parliamentary opposition is not always, in all circumstances, to take a position that differs from the government majority, nor can it be expected, in the course of time, face to face with reality, to not change its opinion on the material being discussed. It is not the task of the Constitutional Court – based on requests from members of another parliamentary chamber – to provide protection for the rights of a parliamentary minority that itself – in relation to specific material – does not consider the result of discussion of the material in the Chamber of Deputies to be unconstitutional.

37. The stenographer's record of the first day of the Senate's 25th session, on 12 November 2010, shows that the President, in the name of the government, by a letter dated 27 October 2010, asked the Senate to discuss the bill according to Senate publication no. 366 (the bill of the Act that amends Act no. 586/1992 Coll.) in so-called "shortened" debate, under § 118 of Act no. 107/1999 Coll., on the Rules of Procedure of the Senate. Under this provision, the Senate may discuss a bill passed on by the Chamber of Deputies in shortened debate if the bill was discussed in the Chamber of Deputies in shortened debate under Act no. 90/1995 Coll., on the Rules of Procedure of the Chamber of Deputies, and if the government so requested. A motion under § 118 par. 1 of the Rules of Procedure of the Senate was approved: registered 78, quorum 40, for 43, against 34. The abovementioned judgment, file no. Pl. ÚS 55/10 of 1 March 2011 (80/2011 Coll.), emphasized, in point 104 of the reasoning, that in that matter, file no. Pl. ÚS 55/10, the Constitutional Court ruled on a petition in which a group of opposition deputies sought the annulment of a contested statute immediately after it was passed, on the grounds that it was deprived of its constitutionally guaranteed rights within the legislative process. "However, a different situation would arise if a group of deputies submitted a similar petition after a longer interval, i.e. not until several months, or even years, after a statute was passed. That interval could be seen as (subsequent, given by silence) consent from the affected deputies with the steps taken by the parliamentary majority. At the same time, such a step would no longer enable realistic protection of the violated rights of the affected deputies, because Parliament would decide on the statute in changed circumstances, perhaps at a time when the proportion of political forces in its chambers had changed." Judgment file no. Pl. ÚS 53/10, then clearly stated, on the question of doubts concerning the composition of the Senate in the period between the elections and the Senate's first session, that composition of the Senate had changed from its first session (§ 24 par. 2 and § 26 of the Rules of Procedure of the Senate), which also began its term of office (cf. resolution of 1 March 2011 file no. Pl. ÚS 47/10). Until this day its previous term of office continues, and it is thus sitting in its previous composition, which, however, has no effect on the continuing mandates of senators who are finishing their terms. Regardless of the date of the following first meeting, their mandate expires at the end of their electoral term under Art. 25 let. b) of the Constitution [see point 138 of the cited judgment]. In this regard the Constitutional Court considers it evident that part of the petition in the present matter that casts doubt on legislative procedure in relation to Senate publication no. 366 cannot succeed. As the Constitutional Court determined, the draft was approved by the

Senate on 12 November 2010, and Act no. 346/2010 Coll. was promulgated on 8 December 2010. The petition in file no. Pl. ÚS 17/11 was not submitted until 11 March 2011, when the petition was delivered to the Constitutional Court. The Constitutional Court considers this situation to be an "interval of several months" under judgment file no. Pl. ÚS 53/10, when it is no longer possible to provide protection for the rights of a minority of legislators (senators) by derogation from a statute. No objective obstacle on the part of the petitioner was found to exist that would have made it impossible to submit the petition without unnecessary delay after the discussion and promulgation of the contested statute, as was done by the group of deputies in matters file no. Pl. ÚS 53/10 and file no. Pl. ÚS 55/10. There petitions with arguments relating to the misuse of the institution of legislative emergency were submitted as early as 9 December 2010, although the contested statutes had only been promulgated in the Collection of Laws on 8 December 2010. Act no. 346/2010 Coll. was promulgated in part 127 of the Collection of Laws on the same date.

38. Beyond the foregoing, it is evident that another limit set forth in judgment file no. Pl. ÚS 55/10 is considerably affected, that being the question of the proportion of political forces in the chambers of Parliament, and changes in it. Insofar as the Constitutional Court did not in the past find anything unconstitutional about the question of the composition of the Senate in the interim period after elections and before the Senate's first session (file no. Pl. ÚS 53/10), it must be stated that the Constitutional Court would potentially have to include in its possible future deliberations the different composition (including the proportion of political forces) of the Senate at the time the petition was filed. Finally, it would also have to weigh the different role of the Senate (and the institution of shortened debate) in the legislative process in relation to the Chamber of Deputies (and the institution of legislative emergency), in which the fundamental political conflict takes place between the government majority and the opposition, and which de constitutione lata has the final word in the legislative process (Art. 47 of the Constitution, also Art. 50 par. 2 of the Constitution). The difference in the present matter also arises from the fact that the petitioners in the matters file no. Pl. ÚS 53/10 and file no. Pl. ÚS 55/10, i.e. the group of opposition deputies primarily affected by the institution of legislative emergency, based on their constitutional-political deliberation, did not themselves file a petition seeking the annulment of Act no. 346/2010 Coll., although they had the opportunity to do so, which they used in analogous situations (cited above). Insofar as the legislative procedure in both chambers of Parliament is primarily supposed to make possible for the persons involved in it "realistic evaluation and discussion by Parliament of a bill (judgment of 31 January 2008 file no. Pl. ÚS 24/07, part X/a; N 26/48 SbNU 303; 88/2008 Coll.; Pl. ÚS 53/10 of 19 April 2011, point 106), it was not found in the proceeding that application of § 118 par. 1 of the Rules of Procedure of the Senate would rule out meeting this requirement.

39. The Constitutional Court states that the legal regulations that are the subject of the present review were passed and promulgated within the bounds of constitutionally provided competence and in a constitutionally prescribed manner.

VII. The Constitutional Court's Legal Review

40. The petition is not justified, as regards the alleged unconstitutionality of the content of the contested provisions.

41. In view of the structure of the petitioner's objects and the content of the contested statutory provisions, the Constitutional Court divided its review into three parts. First, it considers the question of the constitutionality of introducing a levy on solar electricity (amendment of Act no. 180/2005 Coll. by Act no. 402/2010 Coll. and the transitional provisions of Act no. 402/2010 Coll.), second it reviews the constitutionality of imposing gift tax on the acquisition of allowances free of charge (amendment of Act no. 357/1992 Coll.), and finally Article II., point 2 – the transitional provision of Act no. 346/2010 Coll., which repeals future exemption from income tax under § 4 par. 1 let. e) or § 19 par. 1 let. d) of Act no. 586/1992 Coll. (income from operating solar facilities).

VIII. Review of the Contested Provisions of Act no. 180/2005 Coll. and Act no. 402/2010 Coll.

(Levy on Solar Electricity)

42. Under § 7a of Act no. 180/2005 Coll., solar electricity produced in the period from 1 January 2011 to 31 December 2013 in a facility put into operation in the period from 1 January 2009 to 31 December 2010 is subject to the levy on solar electricity.

43. The Constitutional Court took as proven the situation, not disputed by the petitioners or state administration bodies, that led to amendment of Act no. 180/2005 Coll., Act no. 357/1992 Coll. and Act no. 576/1992 Coll. The situation was that the rapid development of energy production from renewable sources caused an increase in the costs of financing it, which led to reevaluation of the state's existing position on state aid for energy from renewable sources. According to the government's statement these steps were quite legitimate and taken in the public interest on the grounds of averting social-economic effects while preserving all rights and guarantees for investors in facilities for the production of energy from renewable sources on the basis of Act no. 180/2005 Coll. In contrast, the petitioners claim that the adopted legislation is inconsistent with the constitutionally guaranteed right to own property guaranteed by Article 11 of the Charter of Fundamental Rights and Freedoms, inconsistent with the freedom to conduct business under Art. 26 of the Charter of Fundamental Rights and Freedoms and Art. 16 of the Charter EU; with the essential requirements of a democratic rule of law state under Art. 9 par. 1 of the Constitution, because all the contested provisions of the Act suffer from retroactive effect; and with the constitutional principle of equality before the law under Art. 1 and 3 of the Charter of Fundamental Rights and Freedoms.

44. The levels of the price for electricity from renewable sources and green bonuses are set forth in § 6 of Act no. 180/2005 Coll., under which the Office shall set in advance for each calendar year the purchase prices for electricity from renewable sources (the "purchase prices") independently for individual types of renewable sources and green bonuses so that, for facilities put into operation after the day when this Act when into effect, with the support through purchase prices a

period for return on investment of fifteen years was achieved, on condition of meeting technical and economic parameters, which are, in particular, costs per installed unit of output, the efficient use of the primary energy in a renewable source, and the period of using a facility, and which are provided by the implementing legal regulation, and at the same time the level of revenue per unit of electricity from renewable sources would be preserved, with support through purchase prices during a period of 15 years from the year when a facility was put into operation, as a minimum, taking into account the index of industrial producer prices. For facilities that were put into operation before the day when the Act went into effect, the minimum level of purchase prices set for the year 2005 under existing legal regulations, taking into account the index of industrial producer prices, is to be maintained for a period of 15 years. In setting purchase prices and green bonuses, the Office takes as its starting point the different costs for the acquisition, connection and operation of individual types of facilities, including developments over time. The purchase prices set by the Office for each following calendar year may not be lower than 95% of the value of purchase prices in effect in the year when the new prices are being decided; this does not apply for the setting of purchase prices for the following calendar year for those types of renewable sources for which, in the year when the decision on the new purchase prices is being made, a period for return on investment shorter than 11 years is reached; when setting purchase prices, the Office shall act according to paragraphs 1 to 3.

45. The Constitutional Court states that although § 6 of Act no. 180/2005 Coll., setting the level of prices for electricity from renewable sources and green bonuses, is not affected by amendment of Act no. 420/2010 Coll., it is unquestionable that, as a result of inserting the new § 7a and following provisions, which introduce the levy on solar electricity, in essence there was a change in the level of support that is provided to operators of photovoltaic power plants.

VIII./a On objections of Retroactivity

46. The following must be said regarding the objection that the contested provision is retroactive. Act no. 420/2010 Coll. went into effect on 1 January 2011. The amended § 7a par. 1 of Act no. 180/2005 Coll. expressly sets the subject matter of the levy, which is "solar electricity produced in the period from 1 January 2011 to 31 December 2013." In terms of the existing constitutional bounds for tax legislation interpreted by the Constitutional Court, strictly speaking this is not retroactivity in any sense of the word. E.g., judgment file no. Pl. ÚS 9/08 of 12 July 2011 (point 15) interpreted the connection between the date of entry into effect of a legal regulation and a tax period. Judgment file no. Pl. ÚS 9/08 concerned retroactivity, false retroactivity, in view of the fact that the statute entered into effect during the tax period to which the tax obligation that it created was tied. However, in the present matter it is evident that the tax period, or the period in which the electricity subject to the levy is produced, begins only on the date when the legal regulation goes into effect, i.e. that electricity produced before the Act went into effect is not subject to the levy at all.

47. However, at the same time the Constitutional Court had to take into account the specific issues of the regulated market with electricity from renewable

sources, and especially the guarantees contained in § 6 par. 1 of Act no. 180/2005 Coll. Because there is evidently a special connection between the levy under § 7a et seq. of Act no. 180/2005 Coll. and the overall scheme for promoting production of electricity from renewable sources, it was necessary to review the question of possible retroactivity of the legislation in terms of the guarantees lasting for a fifteen year period under § 6 par. 1 let. b) point 1 of Act no. 180/2005 Coll.

48. in this regard the Constitutional Court states that § 7a to 7i of the contested Act fundamentally have the effects of false retroactivity, because, as a result of them, in future there will be a reduction in support, by precisely the amount represented by the levy, to producers for whom the fifteen year period of guarantees under § 6 par. 1 of Act no. 180/2005 Coll. began to run before Act no. 420/2010 Coll. went into effect.

49. Under these particular conditions the Constitutional Court discussed the petitioners' objections in the light of its legal conclusions on questions of false retroactivity, precisely with regard to inserting the period under § 7a into the period arising under § 6 par. 1 let. b) point 1 of Act no. 180/2005 Coll.

50. In its case law, the Constitutional Court has repeatedly defined the concepts of true and false retroactivity (retroactive effect) of legal norms (cf., in particular, judgment file no. Pl. ÚS 21/96, to the detailed reasoning of which we can refer in this context, and parts of which are also extensively quoted by the petitioners; also, judgment of 12 March 2002 file no. Pl. ÚS 33/01, N 28/25 SbNU 215, 145/2002 Coll.). True retroactivity exists in a case where a legal norm causes the creation of legal relationships before the time when it goes into effect, under conditions that it specified after the fact, or when there is a change in legal relationships that were created under the previous legal framework, before the new statute goes into effect (cf. Tichý, L. K časové působnosti novely občanského zákoníku. [On the effectiveness in time of the amendment to the Civil Code.] Právník [The Lawyer], no. 12, 1984, p. 1104, Procházka, A. Základy práva intertemporálního se zřetelem k § 5 obč. zák. [Fundamentals of intertemporal law in view of § 5 of the Civil Code], Brno, 1928, p. 70, Tilsch, E. Občanské právo. Obecná část. [Civil Law. General Part] Praha, 1925, p. 75). In the case of false retroactivity the new statute does not establish legal consequences for the past, but it legally classifieds facts that arose in the past as a condition for a future legal consequences, or modifies for the future legal consequences that were established under previous regulations (cf. Procházka, A. Retroaktivita zákonů [Retroactivity of laws]. in Slovník veřejného práva [Dictionary of Public Law. Vol. III, Brno, 1934, p. 800, Tilsch, E. Občanské právo. Obecná část. [Civil Law. General Part] Praha, 1925, p. 78).

51. As the Constitutional Court already stated in its judgment file no. Pl. ÚS 53/10 of 19 April 2011 (119/2011 Coll. – dissenting judges Balík, Janů, Kůrka and Lastovecká), the Constitution does not contain an explicit prohibition on retroactivity of legal norms in all areas of the law; however, this arises from the principle of a rule of law state under Art. 1 par. 1 of the Constitution, as its elements include the principle of legal certainty and protection of the citizen's confidence in the law (cf. judgment of 8 June 1995 file no. IV. ÚS 215/94, N 30/3 SbNU 227, judgment of the Constitutional Court of the Czech and Slovak federal Republic of 10 December 1992 file no. Pl. ÚS 78/92; Coll. of Decisions of the

Constitutional Court of the CSFR, 1992, no. 15). This prohibition fundamentally applies only to instances of true retroactivity, not false retroactivity. The latter type of retroactivity is, in contrast, generally permissible. The content of this prohibition as a constitutional principle is not ruling out any and all retroactive functioning of a legal norm, but only such as concurrently interferes in the principles of protection of confidence in the law, legal certainty, or acquired rights (cf. judgment file no. Pl. ÚS 21/96; judgment of 13 March 2001 file no. Pl. ÚS 51/2000, N 42/21 SbNU 369, 128/2001 Coll.; judgment of 6 February 2007 file no. Pl. ÚS 38/06, N 23/44 SbNU 279, 84/2007 Coll.). Only in such a case is a legal norm inconsistent with Art. 1 par. 1 of the Constitution. At the level of the constitutional order this starting point can also be emphasized in the wording of Art. 40 par. 6 of the Charter, which even expressly permits true retroactivity to the benefit of an individual. Under this provision, if there are different criminal law frameworks at the time that a crime is committed and at the time when it is being judged, the crime is judged according to the legal framework that is more advantageous to the perpetrator.

52. These principles are also a criterion for possibly permitting exceptions to the prohibition on true retroactivity, some of which the Constitutional Court has specified in its case law. For example, in its judgment file no. Pl. ÚS 21/96 it stated that there can be no justified confidence in the law (in the permanence of the legal order) if a legal subject must, or had to, expect retroactive regulation. It described the application of a legal norm that was deeply inconsistent with fundamental, generally recognized principles of humanity and morality as being just such a situation. However, it also noted the legal opinion that "retroactive effect of a law on civil law relationships could also be justified on the grounds of the public order, especially if there were an effect on absolutely mandatory regulations that were issued as the result of a particular borderline situation of the transformation of values in a society" (Tichý, L. quoted from point 144, p. 1102). It identified another case where true retroactivity was permissible, that of the non-application of a legal regulation to facts that arose during the time that it was in effect, if the Constitutional Court found that regulation to be inconsistent with the legal order and application of the regulation in a vertical legal relationship, i.e. a legal relationship between the state and an individual, or exceptionally in horizontal relationships, would violate the individuals' fundamental right (cf. judgment of 18 December 2007 file no. IV. ÚS 1777/07, N 228/47 SbNU 983, point 19, judgment of 8 July 2010 file no. Pl. ÚS 15/09, 244/2010 Coll., points 53 and 54).

53. Whereas true retroactivity of a legal norm is permissible only exceptionally, we can say that false retroactivity is generally permissible. In this case legal theory acknowledges, in contrast, exceptions when false retroactivity is not permissible, in view of the principle of protecting confidence in the law. Such a situation exists if "it interferes in confidence in the factual elements, and the importance of legislative wishes for the public does not exceed, or does not reach the level of the individual's interest in the continued existence of the previous law" (Pieroth, B. Rückwirkung und Übergangsrecht. Verfassungsrechtliche Maßstäbe für intertemporale Gesetzgebung, Berlin, 1981, pp. 380-381, cf. also the decision of the German Constitutional Court of 19 December 1961 file no. 2 BvR 1/60; BVerfGE 13, 274, 278). This opinion is also reflected in the settled case law of the German

Constitutional Court, according to which false retroactivity is consistent with the principle of protecting confidence in the law if it is suitable and necessary in order to achieve an aim pursued by the law, and, if, in an overall balancing of the "disappointed" confidence and significance and urgency of the reasons for the legal change, the limits of what is tolerable are preserved (cf. decision of the German Constitutional Court of 7 July 2010 file no. 2 BvL 14/02, point 58).

54. In connection with the question of permissibility of false retroactivity, we must also mention the concept of legitimate expectation, the relevant essence of which is a property interest that falls under the protection of Art. 11 par. 1 of the Charter and Art. 1 of the Protocol (cf. judgment file no. Pl. ÚS 2/02; judgment of 1 July 2010 file no. Pl. ÚS 9/07, 242/2010 Coll., points 80 et seq.) This provision sets forth everyone's right to peaceful enjoyment of his property. Under the settled case law of the European Court of Human Rights, the term "possessions" contained in this provision must be interpreted as having an autonomous meaning which is not limited to ownership of material goods and is independent from the formal classification in domestic law (judgment of 22 June2004 in the matter of Application no. 31443/96 – Broniowski v. Poland, point 129). It can include both "existing property" and property rights, including receivables, based on which the plaintiff can claim that he has at least a "legitimate expectation" of acquiring certain property rights. Regarding this principle, in accordance with the case law of the European Court of Human Rights, the Constitutional Court stated that "from [it] has clearly emerged the conception of the protection of legitimate expectations as a property claim, which has already been individualized by an individual legal act, or is individualizable directly on the basis of legal rules" (judgment of 8 March 2006 file no. Pl. ÚS 50/04 (N 50/40 SbNU 443, 154/2006 Coll., also judgment file no. Pl. ÚS 2/02). Art. 1 of the Protocol could be violated by the legislature if an amendment to a statute made impossible the acquisition of property to which certain subjects had a legitimate expectation (cf. judgment file no. Pl. ÚS 2/02).

55. Finally, the Constitutional Court points to its conclusions in judgment file no. Pl. ÚS 21/96, under which the annulment of old legislation and adoption of new legislation is necessarily tied to interference in the principles of equality and protection of citizen's confidence in the law, which, however, is a consequence of protecting another public interest or fundamental right or freedom. However, the legislature's decision on how to resolve the chronological conflict between old and new legislation is not, from a constitutional viewpoint, an accidental matter or a matter of arbitrariness, but a matter of weighing conflicting values. Thus, a decision on the kind of legislation solution for the chronological conflict of legislation should result from evaluating the conflict of values from the viewpoint of proportionality, taking into account a transition period. Proportionality can be described thus: that the higher degree of intensity of a public interest, or protection of fundamental human rights and freedoms, justifies a greater degree of interference by new legislation in the principles of equality and citizens' confidence in the law. Any limitation of a fundamental right must, under Art. 4 par. 4 of the Charter, preserve its essence and significance. Thus, when evaluating a legislative solution for a chronological conflict, a role is played not only by the degree of difference between the old and new legislation, but also by other facts, such as the social urgency of introducing the subsequent legislation.

56. In view of the fact that the Constitutional Court basically reached the conclusion that there is false retroactivity present in § 7a to 7i, § 8 in the phrase "with the exception of inspection of the levy and administration thereof" and Art. II, point 2 of the transitional provisions of Act no. 180/2005 Coll., it also had to deal with the question of whether it was permissible. Although false retroactivity is basically permissible, we cannot a priori rule out the possibility that, in light of the principle of legal certainty and protection confidence in the law, the interest of the individual in the continued existence of the existing legislation will outweigh the public interest expressed by the legislature in changing it. Thus, the Constitutional Court had to evaluate whether there was, on the part of the affected PPP operators, such a constitutionally relevant interest in preserving the existing statutorily provided prices for electricity from renewable sources and green bonuses without being further reduced by the levy, as would prevail against the public interest in lowering it, if the two were weighed against each other. In this matter the Constitutional Court did not find such an interest on the part of the PPP operators, for the reasons given below.

VIII./b International Comparison of Judicial Conclusions

57. The Constitutional Court notes first, that in order to understand the overall issue of the use of photovoltaic energy in other countries of the European Union, the USA, and China, it familiarized itself with the Renewables Global Status Report (GSR), published at the request of the UN by REN21 (Renewable Energy Policy Network for the 21st century, www.ren21.net). Since 2005 REN21 has published reports to comprehensively summarize the global situation in renewable energy from renewable sources. The most recent report, from 2011, was published in August 2011 (see http://www.ren21.net/REN21Activities/Publications/GlobalStatusReport/tabid/5434/Default.aspx). This is the most comprehensive global report that summarizes available statistical data, reports and specialized notifications from government, non-government, and international institutions and industrial associations. According to the report, the photovoltaic industry had an exceptional year, when global production and markets more than doubled from 2010. It is estimated that there was a global increase in output of 17 GW (compared to less than 7.3 GW in 2009), whereby the overall total output reached about 40 GW, seven times as much as five years earlier. The report also points out that some of the existing advantageous tariff policies (FIT, feed-in-tariffs) in the world are now being re-evaluated. In particular, many countries are reworking their photovoltaic tariff policies, in order to slow the rapid increase in the number of facilities, which, in many cases, far exceeded expectations, due to an unprecedented drop in prices in the solar photovoltaic industry (the price of photovoltaic panels) in 2009-2010. As the Constitutional Court learned, none of the countries in the group being examined (Slovakia, Germany, Austria, Poland, Bulgaria and Spain) retroactively changed the conditions for production of electricity from renewable energy sources; nonetheless, the case law of the constitutional and supreme courts of these countries, as discussed below, already addressed the conditions under which one cannot maintain the requirement of not changing the legislative framework regarding already existing legal relationships.

58. For example, the German Constitutional Court, in the matter of the constitutionality of the Act on Renewable Energy Sources, in resolution file no. 1 BvQ 28/10 of 23 September 2010, stated that false retroactivity means that the validity of legal facts, the formation of legal relationships and their legal consequences that occurred before the new statute went into effect will be evaluated according to the previous law. However, if a previously formed legal relationship still exists, then, as of the date that a new statute goes into effect, the legal consequences of that existing legal relationship, arising after the new statute went into effect, will be evaluated according to that new statute. The limits of constitutional permissibility of false retroactivity are exceeded only if the false retroactivity chosen by the legislature is unsuitable or unnecessary for achieving the aim of the statute or if the permanent interests of the affected persons outweighed the legislature's reasons for legislative change. A general expectation of citizens that the law will remain unchanged is not constitutionally protected. In resolution file no. 1 BvR 3076/08 of 18 February 2008 (BVerfGE 122, 374 ff) the German Constitutional Court stated that § 19 EEG 2009 does have retroactive effects, as it applies to bioenergy facilities put in operation before the statute went into effect (i.e., before 1 January 2009), but the plaintiff could not have believed in the permanent, unchanging existence of § 3 par. 2 EEG 2004. In any case, § 19 par. 1 EEG 2009 pursues the legitimate aim of preventing unnecessarily high financial burdens on operators of distribution networks, and, ultimately on consumers (i.e. clients) of electricity, who, as a result of the balancing mechanism incorporated in Act EEG 2009, must pay "differential" costs, precisely due to the division of one or more large bioenergy facilities into several smaller facilities.

59. The settled case law of the Italian Constitutional Court, not concerning energy matters, sets forth a requirement, in the area of limiting public expenditures, to observe the legal framework that arises from EU law; the national legislature may intervene in expenditures through reduction measures if the economic situation requires (a national deficit), with one limitation, that being clear arbitrariness and obvious irrationality of the changes being made (ex plurimus judgment no. 120/2008 of 14 April 2008). As regards exemption and benefits in the area of tax law, regulation is left fully up to the legislature and its free discretion in the field of tax legislation; constitutional law review is directed toward obvious arbitrariness and irrationality (ex plurimus judgment no. 431/1997 of 16 December 1997).

60. The Austrian Constitutional Court (Verfassungsgerichtshof – VfGH), in its decision file no. G 6/11-6 of 16 June 2011 VfGH, denied a petition to declare unconstitutional legal regulation that lowered the age limit for entitlement to family welfare contributions from 26 years to 24 years for dependent children (with certain tax implications). The Court concluded that the legislature is given wide discretion in this area, and continuing the line of its previous case law it stated that confidence that the current legal framework will not change does not enjoy constitutional protection. As the background report indicates, the contested legislation was adopted precisely for budgetary reasons.

61. The Polish Constitutional Court, in judgment file no. P 24/05 of 25 July 2006, in which it reviewed § 9 par. 3 of the Energy Act, which permitted the Minister of the Economy to issue orders requiring energy businesses to purchase electricity and

heat from unconventional and renewable sources, stated: “The energy industry is subject to the law of a regulated market. Access to sources of energy is fundamental for the existence of society and individuals, just as it is for the sovereignty and independence of the state, i.e. for ensuring the freedoms and rights of persons and citizens. The ownership of energy sources creates a presumption that the general well-being of the Republic of Poland, which is set forth in Art. 1 of the Constitution, will be met. The field of energy management thus connects various constitutional values and principles, which include: freedom to conduct economic activity (Art. 22 of the Constitution), the safety of citizens and the principle of sustainable national development (Art. 5 of the Constitution) and protection of the environment (Art. 74 par. 1 and 2 of the Constitution). The contested provision is one of the elements through which the state authority exercises its influence on the energy industry for the purpose of economic efficiency, which must be brought into compliance with the constitutionally expressed needs relating to achieving general well-being. Both the particular nature of the energy market, as a regulated market, and the abovementioned constitutionally expressed needs authorize limiting the freedom to conduct economic activity in this branch of the economy.

62. The Supreme Court of Spain also addressed the issue of retroactivity; in connection with legislation governing electricity from renewable sources, specifically government directive no. 661/2007, it ruled in several cases that were announced together on 9 December 2009 (147/2007 - Eolic Cat Associacio Eolica de Catalunya; 149/2007 - Nueva Generadora del Sur; 151/2007 - Consultora de Financiación Integral y Asociados y Alferglass a 152/2007 - Tarragona Power). The Spanish Supreme Court generally states, in accordance with the case law of the Constitutional Court, that the principle of legal certainty cannot be identified with complete absence of change in the legal framework. The legislature is given a certain degree of discretion, including as regards applying changes in implementation of energy policy (just as with, e.g., tax legislation). In the abovementioned decisions the Supreme Court, with reference to Act no. 54/1997, on the Electricity Sector (del Sector Eléctrico), pointed out that the Act authorizes the government to introduce methods, calculations, and updates to compensation for renewable energy, based on objective, transparent, and non-discriminatory criteria. According to the Supreme Court, the legislation in question requires the government to ensure reasonable profit during the lifetime of these installations; the Act defines reasonable profit as a return of investment in view of the value of money on the capital markets. In other words, the government may amend legislation in this area as it considers appropriate, on the condition that installations subject to the special regime will not be materially affected as regards return on their investments (in that case the life of the facilities was set at 25 years and reasonable profit, based on an expert report, at 7% after deducting taxes). The Supreme Court accepts the argument of protecting the public economic interest. In connection with the consequences of retroactivity, the Supreme Court ruled that retroactivity as such does not, under any circumstances, make the new legislation invalid. Nevertheless, if, for example, facilities subject to amended legislation suffer losses as a result of these measures, that can be a basis for state liability for damages.

63. The Croatian Constitutional Court, in decision file no. U-I-3610/2010 of 15 December 2010, in which it considered the across the board reduction of all pensions by 10% of previously paid amounts, stated that the legislature has the legislative authority to amend the legislative framework of pension insurance for purposes of adapting it to the changed economic and social situation in the country, or for purposes of stabilizing it, i.e. creating conditions for a long-term sustainable pension system, including adopting measures aimed at achieving savings in public finance and stabilizing expenses in the state budget. The right to a pension does not mean the right to a particular amount of pension. The possible loss of a certain part (percentage) of a pension or other pension payment drawn until that time, which may result from legislative measures that newly determine the previous rights of pension insurance, also does not mean a priori that there is a breach of the essence of the right to a pension during the period when the possible loss of a particular part of the previous pension amount is the result of a new general definition and is proportional in terms of its effects.

64. Among the relevant case law of the United States. Supreme Court on this issue, we can point to the most important cases, which are considered to be United States v. Darusmont and United States v. Carlton. In United States v. Darusmont, 449 U.S. 292 (1981), where it reviewed changes in the income tax law passed in October 1976, which applied to transactions performed after 1 January 1976, the U.S. Supreme Court stated the basic principle that permitted retroactivity: "Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute." The most cited case in the area of retroactive application of United States tax legislation is United States v. Carlton, 512 U.S. 26 (1994). The majority opinion stated the standard that is to be used in these cases: the requirement of due process applicable to tax laws with retroactive effect is therefore the same as the one that is applied to retroactive economic legislation: "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."

VIII./c Related Legal Conclusions

65. The Constitutional Court notes, in particular, that the present legal issue cannot be viewed without taking into account the concrete economic situation in the country during which the legislature adopted the restrictive measures contested by the petitioners. These economic reasons are explained extensively in the statements from the government and the relevant ministries, which the petitioners were made familiar with; therefore, the Constitutional Court does not consider it necessary to discuss them again beyond discussion in the description of the petition above.

66. In this regard, the Constitutional Court emphasizes that the country's economic situation, that is, the reasons, which undoubtedly consist of the state's efforts to avert negative economic consequences of the decision that the legislature made on an assumption that no longer corresponds to economic reality, from a constitutional viewpoint cannot in and of themselves justify adopting a legislative framework that would retroactively interfere in the right to own property of a certain group of subjects. However, with the addition of other conditions described below, such actions by the legislature can be considered compatible with the constitution.

67. The Constitutional Court addressed the issue of reduction of state support and legitimate expectations in point 159 of judgment file no. Pl. ÚS 53/10 of 19 April 2011, cited above, as follows: "setting a contribution from the state budget for a particular purpose and for a particular group of persons always depends on the degree to which the legislature find that it is purposeful, in other words, the public interest in providing it. This applies especially in the case of a contribution that is purely a benefit from the legislature, without being tied to the fulfillment of a certain fundamental right or freedom. The subjects affected cannot rely on the expectation that the legislature will not re-evaluate the amount in time. One also cannot overlook the related responsibility of the Government and the Parliament for the state of public finances, which is also tied to the legislature's authority to adapt expenses in the state budget to its realistic possibilities and current needs by changing the legislative framework for mandatory expenditures …."

68. In the present matter, the Constitutional Court considers as primary the fact that according to the statements from the Energy Regulatory Office and the Ministry of Industry and Trade, even after the adoption of the provisions contested by the petitioners, support for use of renewable sources of energy remains in place, in a scope that ensures producers of electricity from renewable sources the statutory guaranteed level of revenue per unit of electricity, with support through purchase prices for 15 years; at the same time, a period for return on investment of 15 years from putting a facility into operation is guaranteed. The Constitutional Court received, together with the statement from the Government of the CR, appendices that indicate that these statutory guarantees for producers of electricity from renewable sources will be preserved. From that point of view, the petitioners' arguments, which question the government's claim of a period of 8-9 years for return on investment before introduction of the levy, are not relevant. In any case, the petitioners' statements and the calculation they submitted corresponding to the Energy Regulatory Office decrees indicate that for a typical PPP project of 1 MW the period for return on investment was at the level of 13 years, and when the levy was introduced it approached the limit of 15 years. According to the petitioners, this also corresponds to the usual period for payment of bank loans issued for construction of PPPs, which was in the range of 13-15 years. Thus, it is evident that the statutory guarantee of a fifteen year period for return on investment observed by the Constitutional Court, whether simple or actual (as in the model example submitted by the petitioners), was maintained. Insofar as the petitioners speak of the markedly negative economic effects of the contested provisions, one can state that these claims are not sufficiently supported by evidence on their part.

69. However, what the petitioners categorically reject is the government's claim that the level of revenues per unit of electricity was preserved. The requirement to preserve the level of revenue per unit of electricity from renewable sources, with support through purchase prices for a period of 15 years from the year a facility is put into operation as a minimum, taking into account the index of industrial producer prices, is set forth in § 6 of Act no. 180/2005 Coll. The petitioners believe that, in the PPP context, this guarantee cannot be seen as a guarantee of revenues in the sense of an accounting item, as the Prime Minister states in his statement, but as a guarantee of income level.

70. The Energy Regulatory Office submitted to the Constitutional Court a table depicting the revenues (as Internal Rate of Return) and the simple period for return on investment for new sources for PPPs. From this table, the Energy Regulatory Office calculated that, even after including the effect of the levy on the profitability of investments, the IRRs achieved are at the level of WACC (weighted average costs of capital) and the periods for return on investment will not fall below the level of the set limit of fifteen years, regardless of the financing methods for individual projects. The revenue percentage for the years 2009 to 2010, after including the levy, ranges, depending on the installed output of the PPP, from 6.94% to 10.22%, and the simple period for return on investment is in the range of 10-12 years. The Energy Regulatory Office also states that the fact that in some years an investment is not able to produce sufficient cash flow to cover the payments of interest and principal of a loan that is provided for a shorter period than the expected period for return on investment does not mean that the investment does not have the expected period for return on investment – there is merely a problem with cash flow, which is caused by various demands on it during the life of the investment, not by the fact that the investment as a whole could not be recouped.

71. Thus, the Constitutional Court agreed with the conclusion that the consequence of the adoption of the contested parts of Act no. 402/2010 Coll., from the point of view of investors who put facilities into operation in the period from 1 January 2009 to 31 December 2010, is only a temporary effect on profit levels, caused by an increase in expenses by the newly introduced levy requirement and the resulting lengthening of the period for return on their investments. However, the system of support and the principles for setting regulated prices, governed by Act no. 180/2005 Coll. continue to guarantee investors the conditions necessary to achieve a simple period of 15 years for return on their investments. Thus, in relation to the period for return on investment, the change is reflected only in the fact that it will be achieved in a longer time span (but still according to the statute) than the producers of electricity from renewable sources expected. However, from the viewpoint of legal certainty and protection confidence in the law, this factual consequence must be placed on the level of mere reliance that state support for the use of renewable sources of energy will not be changed in the future. However, such confidence cannot be granted protection from a constitutional viewpoint (cf. Constitutional Court judgment Pl. 53/10, point 160). In view of the same calculations submitted by the Energy Regulatory Office, it is evident that not only the question of simple return on investment (under the statutory guarantees), but also the further question of reasonable profit from doing business in a regulated market must be related to the full period of the expected twenty-year lifespan of

photovoltaic panels. In this regard, compare the already cited conclusions of the Spanish Supreme Court, which, in its evaluation, assumed the panels had a lifespan of 25 years.

72. In light of the foregoing, the Constitutional Court could not agree with the petitioners' objection that the requirements for application of false retroactivity were not met by the introduction of the levy. In the present matter, the Constitutional Court believes that the choice of statutory provisions aimed at limiting state support was based on justified grounds, which were, on the one hand, the rapid growth of energy production from renewable sources, resulting in the growth of costs for financing it, and, on the other hand, the decline in costs for photovoltaic installations. As the government said in its statement, in view of the fact that the legislative framework for public support of energy production from renewable sources in the Czech Republic is based on the principle of transferring a great part of the support financing to the end consumer and the state budget, there was a realistic danger that the costs of financing the support at existing levels would be obviously disproportionate in relation to the aims declared in Act no. 180/2005 Coll. From that viewpoint, the Constitutional Court considers completely legitimate the aims pursued by the contested provision, i.e. on the one hand averting negative social-economic effects, consisting primarily of a considerable increase in electricity prices for end consumers, and, on the other hand, of regulation of state support that responded to the extreme decline in investment costs. The means that were selected to achieve this aim appear to be reasonable and appropriate, because, as indicated by the submitted documents, the levy on solar electricity was set so as to continue to guarantee the fifteen-year period for return on investments, which is guaranteed by law. Thus, this is not an extreme measure, and the production of energy from renewable sources continues to be considerable subsidized from the state budget and supported through purchase prices.

73. The Constitutional Court also considered the objection that introducing the levy discriminates against producers of solar energy whose plants were put into operation from 1 January 2009 to 31 December 2010 compared to producers who put their plants into operation from the day that Act no. 180/2005 Coll. went into effect, or earlier, i.e. from 2005 to 31 December 2008. According to the petitioners, the group of levy payers defined by the Act is established without justification and arbitrarily, and is not supported by a public interest.

74. The Constitutional Court has interpreted the constitutional principle of equality in a number of its decisions (e.g., judgments in matters file no. Pl. ÚS 16/93, Pl. ÚS 36/93, Pl. ÚS 5/95, Pl. ÚS 33/96, Pl ÚS 15/02). In them, it agreed with the concept of equality as expressed by the Constitutional Court of the CSFR in its judgment of 8 October 1992, file no. Pl. ÚS 22/92 (published as no. 11 in the Collection of Decisions of the Constitutional Court of the CSFR). In it, the Constitutional Court of the CSFR viewed equality as a relative category that requires the removal of unjustified differences. Therefore, the principle of equal rights must be understood to mean that legal differentiation in the approach to certain rights may not be an expression of arbitrariness; however, it does not mean that any person must be granted every right. This conclusion also follows from Articles 1 to 4 of the general provisions of the Charter. Article 1 of the Charter,

violation of which is expressly alleged, cannot be interpreted in isolation from the other general provisions, Articles 2 to 4 of the Charter; they must be seen as a single whole. It is evident from these general provisions that the legislature did not conceive of fundamental protected values named in Article 3 of the Charter as absolute. This is also reflected in Article 4 of the Charter, which directly assumes the existence of statutorily provided obligations and limitations, but also in Article 2 par. 3 of the Charter, which anticipates the possibility of imposing certain obligations or limitations. Likewise, international human rights instruments, and many decisions by international review bodies, are based on the idea that not every unequal treatment of different subjects can be classified as violation of the principle of equality, i.e. as illegal discrimination against one group of subjects compared to others. In order for violation to exist, a number of conditions must be met: various subjects who are in the same or comparable situations are treated in a different manner, when no objective and reasonable grounds for the different treatment exist. The Constitutional Court thus rejected an absolute concept of the principle of equality, and also further: “the equality of citizens cannot be understood as an abstract category, but as a relative equality, as conceived by all modern constitutions” [Pl. ÚS 36/93 (ÚS 1, 179)]. It thereby shifted the principle of equality into the area of constitutional acceptability of aspects for distinguishing subjects and rights. It sees the first aspect in ruling out arbitrariness. The second aspect arises from the legal opinion stated in the judgment file no. Pl. ÚS 4/95 (ÚS, 3, 209): “inequality in social relationships, if it is to affect fundamental human rights, must reach an intensity that casts doubt, at least in a particular regard, on the very essence of equality. This generally happens if the violation of equality is connected with the violation of another fundamental right, e.g. the right to own property under Art. 11 of the Charter, one of the political rights under Art. 17 et seq. of the Charter, etc.” [likewise, see Pl. ÚS 5/95 (ÚS, 4, 217-218)]. The second aspect for evaluating the unconstitutionality of a legal regulation that establishes inequality is thus the resulting violation of one of the fundamental rights and freedoms.

75. Thus, a particular legislative framework that gives advantages to one group or category of persons compared to others cannot in and of itself, without anything further, be said to violate the principle of equality. The legislature has a certain discretion to decide whether to establish such preferential treatment. It must take care to see to it that the preferential approach is based on objective and reasonable grounds (a legitimate legislative aim) and that there is a reasonable relationship between the aim and the means used to achieve it (legal advantages) (see. e.g., decisions of the European Court of Human Rights in the cases Abdulaziz, Cabales and Balkandali of 1985, § 72; Lithgow, of 1986, § 177; and Inze, of 1987, § 41). In the area of civil and political rights and freedoms, which is immanently characterized by the obligation of the state to refrain from interfering in them, there is generally only minimum space for preferential (i.e. basically active) treatment with certain subjects. In contrast, in the area of economic, social, cultural and minority rights, in which the state is partly obligated to take active measures that are supposed to eliminate blatant aspects of inequality between various groups in a complicatedly socially, culturally, professionally, or otherwise stratified society, the legislature logically has much greater room for exercising its idea of the permissible bounds of de facto inequality within it. Therefore, it chooses preferential treatment much more often.

76. In this regard the Constitutional Court refers to the statement from the Energy Regulatory Office, which stated that, on the basis of the legislative framework in effect at the decisive time, it could not respond to the situation of considerable year to year decline in specific investment costs for the establishment of these facilities as a result of the decline in prices of photovoltaic panels by more than 40% in 2009 by using a corresponding reduction in the purchase price of electricity form these sources, because, on the basis of Act no. 180/2005 Coll., it was authorized to lower the purchase price of electricity for new sources by only 5%. Because of this, newly built photovoltaic power plants had a significant advantage compared to other kinds of renewable sources, for which support was set at an optimal level. In view of the foregoing, the Constitutional Court concluded that insofar as the legislature, based on calculations that show reduced investment costs for PPPs in 2009 and 2010, introduced a new legal institution – the levy – only in relation to producers of solar energy, and only those whose plants were put into operation from 1 January 2009 to 31 December 2010, one cannot but see that criterion as rational and consistent with the Constitution. The Constitutional Court also did not agree with the petitioners that this intervention is disproportionate (measured by the percentage of the difference between savings in electricity prices for the end customer and the amount of the levy). This mathematical concept of the proportional relationship between the alleged interference in their property rights and the measures adopted by the legislature, as presented by the petitioners, cannot be accepted, because of the distorted oversimplification. As regards the amount of the levy, that is setting the limit above which the levy would no longer be constitutional, the Constitutional Court must again state that in such fiscal issues it is necessary to respect the will of the legislature to adopt its chosen measures; it is also necessary to require that there be a legitimate statutory aim implemented through reasonable means and that obvious arbitrariness be prevented ruled out. The Constitutional Court has already addressed the legitimacy of the aim pursued by the contested provisions and the reasonableness of the chosen means in point 72 above. As regards ruling out arbitrariness, the Constitutional Court evaluates the size of the financial burden on the affected subjects; that is, it evaluates whether there is interference in rights that would exceed the limit above which subjecting PPP operators to an additional levy and other financial instruments would exceed the bounds of constitutionality. After considering the fact that, even after introduction of the levy, PPP operators will still have a fifteen-year period for return on their investment, the Constitutional Court did not find the additional burden on PPP operators through the levy on solar electricity to be arbitrary.

77. The Constitutional Court believes that, for the foregoing reasons, it is not appropriate to submit the legislative framework in question to the three-step test cited by the petitioners, which the Constitutional Court defined in, for example, judgment file no. Pl. ÚS 3/02 of 13 August 2002 (N 105/27 SbNU 177; 405/2002 Coll.). That principle is based on the premise that interference in fundamental rights or freedoms can occur, even if the constitutional framework does not anticipate it, when they conflict with each other or when they conflict with another constitutionally protected value that does not have the character of a fundamental right and freedom (a public good) (cf. Constitutional Court judgment of 9 October 1996, file no. Pl. ÚS 15/96; publ. in Ústavní soud České republiky,

Sbírka nálezů a usnesení [The Constitutional Court of the Czech Republic, Collection of Decisions], C. H. Beck, vol. 6, p. 99). In the present matter, the Constitutional Court does not see the dominant problem as being the collision of two or more fundamental rights or constitutionally protected values, but a questioning of the constitutionality of a statute that does not interfere in constitutionally guaranteed rights and freedoms, but causes the reduction of state support that was envisioned by a previous statute. One cannot agree with the petitioners that the level of support set by that statute would rule out, in the future, any new statutorily imposed tax burden (regulation). Such a requirement that the legislative framework be unchangeable has no support in the valid legislative framework; as the Constitutional Court stated above, in the particular context of the present matter the effects of the measure involved are only those of false retroactivity.

IX. Review of the Contested Provisions of Act no. 357/1992 Coll. (Gift Tax on Allowances Acquired Free of Charge)

78. The subject matter of gift tax is, under § 6 par. 8 of Act no. 357/1992 Coll., the acquisition, free of charge, of allowances for emission of greenhouse gases in 2011 and 2012 for the production of electricity in a facility that, as of 1 January 2005 or later, produced electricity for sale to third parties and in which, out of the activities to which trading in allowances for emission of greenhouse gases applies, only combustion of fuels by the electricity producer takes place (an "allowance acquired free of charge").

79. According to the petitioners, taxation of emission allowances is inconsistent with EU law, which regulates trading in emission allowances for greenhouse gases in Directive 2003/87/EC. Article 10 of the Directive gives member states an obligation to ensure, for the period beginning 1 January 2008, the allocation of at least 90% of the total quantity of emission allowances free of charge, in accordance with an approved national allocation plan. Thus, the arbitrary introduction of taxation of emission allowances for greenhouse gases, made inconsistently with the legitimate expectations of operators of facilities included in the system of trading in emission allowances for greenhouse gases unconstitutionally interferes in the protected right to own property.

80. The national allocation plan for the Czech Republic was approved by the European Commission by decision of 26 March 2007, and was subsequently adopted in Government Directive no. 80/2008 Coll., on the National Allocation Plan for the Trading Period 2008-2012.
80/2008 Coll.

GOVERNMENT DIRECTIVE
of 25 February 2008
on the National Allocation Plan for the Trading Period 2008-2012
Pursuant to § 8 par. 5 of Act no. 695/2004 Coll., on Conditions for Trading in Emission Allowances for Greenhouse Gases and Amending Certain Acts:
§ 1
This declares the National Allocation Plan setting the total quantity of allowances

that will be issued in each calendar year of the trading period 2008-2012 (the "trading period"), and the number of allowances that will be allocated to individual facilities operators in each calendar year of the trading period.
Appendix no. 1 to this directive sets the total quantity of allowances that will be issued in each calendar year of the trading period. Appendix no. 2 to this directive sets the number of allowances that will be allocated to individual facilities operators in each calendar year of the trading period.

§ 2
This directive goes into effect on the day it is promulgated.
This directive ceases to be in effect as of 1 January 2013.
Prime Minister:
Ing. Topolánek /signed/
Deputy Prime Minister and Minister of the Environment:
RNDr. Bursík /signed/
Appendix 1
The total quantity of allowances that will be issued in each calendar year of the trading period

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Appendix 2
The number of allowances that will be allocated to individual facilities operators in each calendar year of the trading period

81. Regarding the petitioners' objections pointing to the lack of jurisdiction of the Ministry of the Environment in the area of prices, and the related public law nature of allowances, which is inconsistent with the private law nature of the provisions in question (gift tax), the Constitutional Court refers to the detailed statement from the Ministry of Finance, with which it agrees. Under § 7a par. 2 of Act no. 357/1992 Coll., the Ministry of the Environment shall publish the average market value of an allowance as of 28 February of each calendar year in a manner permitting remote access. Under § 16 par. 1 let. j) of Act no. 695/2004 Coll., on the Conditions for Trading in Emission Allowances for Greenhouse Gases, the Ministry of the Environment shall publish the expected market value of an allowance. Thus, Act no. 357/1992 Coll. merely provides that the Ministry of the Environment shall publish the average market value of an allowance, but not that the Ministry of the Environment determines the market value of an allowance for tax purposes. Insofar as the petitioners object that the new norm taxes already issued emission allowances, here too the Constitutional Court agreed with the conclusion submitted by the Ministry of Finance, that Government Direct no. 80/2008 Coll., on the National Allocation Plan for the Trading Period 2008-2012 is merely a promise regarding the acquisition of allowances to operators of facilities that emit greenhouse gases, on the assumption that they meet the statutory conditions. The acquisition of emission allowances by the operators occurs each year at the moment when a particular number of allowances is allocated to the operators' accounts. This means that as of the date when amendment no. 402/2010 Coll. goes into effect, i.e. as of 1 January 2011, only allowances acquired in the future will be taxed, so the provision is not even falsely retroactive. As regards the question of the legitimate expectations of the affected subjects, one can only refer to the

conclusions that the Constitutional Court stated regarding the issue of the levy on solar electricity.

X. Review of the Contested Provisions of Act no. 346/2010 Coll. (Cancellation of the Exemption from Income Tax)

82. The petitioners state that the legislative framework in question, valid since 2002 expresses the state's interest in the prudent use of natural resources and protection of natural wealth (Art. 7 of the Constitution) and, as such, is a part of the legitimate expectation of the addressees of the statute, who established their business plans in the field of energy from renewable sources on that basis. Thus, the contested amendment and the manner in which it was implemented in legislation interferes in the legitimate expectations of levy payers, but also establishes inequality between the addressees; here again the criterion is the period when a production facility was put into operation.

83. According to the background report to Act no. 346/2010 Coll., the contested provisions respond to the need to eliminate, through all legal means, the no longer justified indirect support for the production of electricity from ecological sources, in particular from solar facilities, and therefore they tighten the tax regime for ecological sources and facilities so as to end the exemption for income from the operation of ecological facilities. The legislation also aims to meet an important public interest (preserving stable energy prices, not increasing the public debt, etc.), which could, in the spirit of the Constitutional Court's case law, also justify potential interference in the legitimate expectations of levy payers.
84. Thus, it is evident that the reasons and aims of the contested legislative framework, which annulled the exemption from income tax for the operation of solar facilities – § 14 par. 1 let. e) and § 19 par. 1 let. d) of Act no. 586/1992 Coll. – are identical with the reasons and aims of the legislative framework establishing the levy on solar electricity; therefore, in this part the Constitutional Court refers to 65-77 of the reasoning of this judgment, which fully apply to this issue. For completeness, the Constitutional Court adds in this regard that the exemption from income tax was also annulled for other ecological facilities. Levy payers could use this exemption for the last time for the tax period that began in 2010, which means that the change also applies to payers who put ecological sources and facilities into operation before the amendment went into effect.

XI. Conclusion
85. In the present matter, the Constitutional Court believes that the choice of statutory provisions aimed at limiting state support for the production of solar energy is in the hands of the legislature, provided the guarantees are preserved. The principle of legal certainty cannot be considered to be a requirement for an absolute absence of change in the legislative framework; that is also subject to other social-economic changes and demands on the stability of the state budget.

86. In this regard the Constitutional Court has not overlooked the fact that it was the state that guaranteed, by statute, a fifteen-year period for return on investment and the level of revenue per unit of electricity from renewable sources,

and thereby motivated the affected subjects to engage in business in the field of energy from renewable sources. However, as stated above, the Constitutional Court also considers it legitimate for the legislature, after an objectively determined change of situation in investment into PPPs, to regulate support for the production of energy from renewable sources so as to maintain the balance between inputs and revenues established by the original version of Act no. 180/2005 Coll., which was expressed in the fifteen year period for return on investment and a fixed level of revenues. However, despite having requested a number of supporting documents and technical data concerning the issue, the Constitutional Court has not unambiguously concluded, nor can it, in an abstract review, that these statutory guarantees have been met in every individual case, after the introduction of the levy and other provisions contested by the petitioners.

87. Thus, at the level of an abstract review of a norm, it is evident that the legislature, when adopting the contested provisions, applied a reasonable basis for distinguishing producers to whom the contested legislation does and does not apply. That basis is the objectively determinable considerably reduced investment costs for establishing PPPs in 2009 and 2010. At this level other business and economic parameters of individuals PPPs are not decisive, including individual contractual conditions, financing methods, or choice of technology. The solar electricity sector continues to receive more subsidies from public funds than other sectors. We can only point out that the state subsidy policy for PPPs consisted (and consists) of an effort to compensation precisely these high costs for acquiring the appropriate technology, in view of their technical development. In this regard, market regulation in the form of a levy will stand, because it is based on a specific change in market conditions, both in relation to the long-term ability to return on investments, which is a question that cannot be decided in advance, and in relation to the long-term preservation of revenues. There was no determination in the proceeding before the Constitutional Court that "revenue" under § 6 par. 1 of Act no. 180/2005 Coll. means a specific amount of "simple" profit. In any case, this is a question of interpretation of simple law, i.e. in terms of protection of property rights it does not reach the intensity of a constitutional law issue.

88. The Constitutional Court emphasizes that in an abstract review of constitutionality it cannot objectively prove or hypothetically model all the conceivable situations that the contested provisions may create in individual cases. Thus, the subject matter of review cannot be specific cases of individual producers, where, in view of specific circumstances, in view of the degree of business and economic risk, the Constitutional Court may make its evaluation more precise in future (cf., e.g., Pl. ÚS 9/07, point 54). The Constitutional Court considers it a matter of course, and decisive for determining the law, that it is always necessary to begin with the individual dimensions of each individual case, which are based on the determined facts. Many cases and their specific circumstances may be very complicated and atypical; however, that does not release the general courts from the obligation to do everything they can to find a fair solution, even if it appears complicated. Obviously, one cannot rule out the possibility that in individual cases one of the contested provisions will have liquidatory effects ("suffocating effects") on a producer, or will interfere in the very essence of the producer's property, contrary to Art. 11 of the Charter – i.e., unconstitutionally. Then it will be necessary to review both the observance of the

guarantees under § 6 par. 1 of Act no. 180/2005 Coll. on a long term (fifteen-year) basis, and the immediate (ongoing) effects of the contested provisions, so that entitlements in an exceptional case will be protected.

89. In this regard the Constitutional Court emphasizes that, in view of the factual effects that the levy under § 7a et seq. of Act no. 180/2005 Coll. creates in the regulated solar electricity market, especially in view of the strong nature of the levy, which could theoretically (although this was not subject to proof in this proceeding) have liquidatory effects through the inability of producers to meet their otherwise ongoing obligations (described above as inadequate cash flow), which were established even before the Act went into effect, one can also require the legislature to ensure a mechanism that will permit an individual approach to producers who, even if they anticipated the adoption of certain future restrictions when evaluating their business risks, could not predict the exact form and immediate effects of these restrictions. Insofar as Act no. 180/2005 Coll. itself does not contain such a special mechanism, the Constitutional Court considers it necessary to interpret the legal order in a manner that could prevent potential liquidatory effects of the levy under § 7a et seq. of Act no. 180/2005 Coll. Such possible interpretations are provided by, for example, the institution of deferment under § 156 et seq. of Act no. 280/2009 Coll., the Tax Procedure Code, as amended by later regulations, which, in the interpretation considered by the Constitutional Court would permit, in exceptional and justified cases, at the request of the tax subject, deferment of payment of the levy by the payer, or paying it in installments. The statement from the Ministry of Finance requested by the Constitutional Court regarding the current interpretation and application of § 156 and § 157 of the Tax Procedure Code on the levy of § 7a et seq. of Act no. 180/2005 Coll. indicates that this institution can also be used by payers of the levy on solar electricity. This statement by the Ministry of Finance includes the following: “The Tax procedure Code […] permits the tax (levy) administrator to use the institution of deferment based on its own authority, i.e. without a prior application. However, in view of the possibility of taking action itself (submitting an application) to induce the tax administrator to consider the fulfillment of conditions for deferment, as well as in view of the principle vigilantibus iura scripta sunt, the taxpayer should not have unlimited reliance that the tax administrator will act ex officio. […] In the case of the levy on solar electricity, it is only the levy payer who has an obligation to pay the levy. In addition, it also has an obligation to withhold or collect the levy. […]The institution of deferment, by its nature, cannot be applied to withholding of the levy. […] A somewhat different situation arises in a case where the levy payer, instead of withholding, exercise the possibility to collect the levy from a levy payer. Collection differs from withholding in that collection is not done independently of payment of a purchase price or green bonus (i.e., usually ex post). This construction permits the levy payer (remitter) to pay the levy payer the purchase price or green bonus without withholding the levy from it. […] If the levy payer obtained deferment of payment, it could defer collection of the levy from the payer. […] The foregoing indicates that if the levy payer chooses to collect the levy (it is not in any way limited therein by law), in the event of deferment the grounds set forth in § 156 par. 1 let. a) and c) of the Tax Procedure Code might apply on the part of the payer. In the application, the levy payer could argue that it requests deferment of the levy in order to delay the time when it will collect the levy from a levy payer that would otherwise suffer

serious detriment, or would cease doing business. Of course, the prerequisite for this is the cooperation of the payer itself; it will then be reviewed whether these conditions were objectively met." There is also a possibility for the levy payer (remitter) to initiate action with the levy administrator to waive charging interest on deferment in accordance with § 157 par. 7 of the Tax Procedure Code. Another possible example of mitigating the effects of the levy mentioned in the Ministry of Finance's statement is "application of the institution of extending a deadline (§ 36 of the Tax Procedure Code), where the tax (levy) administrator's discretionary authority is introduced by the general criterion of 'serious reasons.' Based on this institution, the levy payer can request an extension of the deadline for submitting accounting, to which the deadline for payment of the levy is tied. It can also argue, as with deferment, that by postponing the payment of the levy it can postpone the point when it collects the levy from a payer that would otherwise find itself in a difficult position." Thus, in view of the statement from the Ministry of Finance, the Constitutional Court reached an interpretation of the abovementioned provisions of the Tax Procedure Code according to which the tax administrator has an obligation to create coordinated practical procedures, in justified cases, aimed at payment of the levy by collection, not withholding, on the part of the levy payer, with the aim of giving the taxpayer access to the institutions of deferment, making the payment in installments, or extending the deadline. Specifically, the aim of this process is to allow a PPP operator to survive a period when, due to inadequate cash flow, caused by paying the levy, it would not be able to survive in the business environment and would be forced to terminate its business.

90. The Constitutional Court summarizes, that although the contested provisions reduced the support provided to PPP operators, for the foregoing reasons this was not such interference as would violate the constitutionally guaranteed rights of the affected subjects, whether property rights or the freedom to conduct business, or would fail to observe the essential requirements of a democratic rule of law state, as the petitioners believe. In view of the sample calculations submitted in the proceeding before the Constitutional Court, we can conclude that the expected fifteen year period for return on investment was not fundamentally jeopardized by the adoption of the contested provisions; this is the position of the government, and was not persuasively cast in doubt by the petitioners.

91. Because all parties, as well as the secondary party to the proceeding, consented to waive a hearing before the Constitutional Court, and because in the Constitutional Court's opinion a hearing cannot be expected to clarify the matter further, a hearing was waived (§ 44 par. 2 of the Act on the Constitutional Court).

92. On the basis of the foregoing, the Constitutional Court found that the contested provisions are not inconsistent with the constitutional order of the Czech Republic, and therefore denied the petition under § 70 par. 2 of the Act on the Constitutional Court.

Instruction: Decisions of the Constitutional Court cannot be appealed.

Brno, 15 May 2012