2010/03/30 - PL. ÚS 2/10: FREEDOM OF INFORMATION

HEADNOTES

The key hypothesis is that one cannot (naturally) rule out a priori the possibility that in a particular case protection of a fundamental right will outweigh the cited values, i.e. that there will not be a "pressing social need" to limit the fundamental right ("this hypothesis"). That is precisely why it is necessary to review, in each particular matter (according to the circumstances of the particular matter), whether the condition of the necessity for limiting an individual's fundamental right or freedom in a democratic society has been met.

However, the contested norm is clearly inconsistent with this hypothesis. It does not permit reviewing in every particular case (in view of the circumstances of the given matter) the existence of a "pressing social need" for limiting a fundamental right (i.e. the necessity of limiting the fundamental right). The contested norm indicates that – in the event of the existence of a statute and a legitimate aim of limiting an individual's fundamental right to information (provision of a decision that has not entered into effect), i.e. values cited in Art. 17 par. 4 of the Charter and Art. 10 par. 2 of the Convention – these values will always (automatically) be given priority over the individual's fundamental right to freedom of expression in the form of the right to information; thus, the contested norm (a priori) breaches the individual's fundamental right in every case. Thereby it also (considering all consequences) denies the common knowledge [arising from, among other things, the Constitutional Court's case law; cf. e.g., the judgment in the matter file no. Pl. ÚS 15/96 of 9 October 1996 (N 99/6 SbNU 213; 280/1996 Coll.)], that constitutional values (including constitutional rights) are prima facie equal. Thus, the contested norm basically turns the requirement that limitation of an individual's fundamental right or freedom in a democratic society must be necessary into a non-reviewable postulate, because, taken comprehensively, it rules out review of the requirement in view of the circumstances of a particular case.

In this regard we must point out that freedom of expression – including, under Art. 10 par. 1 of the Convention, the freedom to receive information – is one of the most important foundations of a democratic society; therefore, its guarantees are especially important. One cannot fail to see that the right to information as the collection of information is a fundamental preparatory step (among other things) especially in journalism, and is an inherent, protected part of the freedom of the press. The functioning of the press includes the creation of forums for public discussion. However, this function is not limited to the media and professional journalists. In different situations it creates space for public discussion, e.g. in relation to non-governmental organizations, but also in relation to individuals. Thus, the purpose of that activity, i.e. collecting information, can be considered one of the basic elements of an informed society. A civic society plays an important role in discussion of public issues. There is no doubt that a decision that has not entered into effect may address a

matter of public interest; persons requesting information are, or at least may be, involved in the legitimate collection of information about these matters. Their aim may be to impart such information to the public, and thereby contribute to public discussion, which is not only legitimate, in a democratic law-based state, but also necessary. Thus, the monopoly on information that a court enjoys is a form of censorship sui generis. The censorship of this information monopoly may lead to interference in the exercise of the scrutiny that belongs to civic society, as it may have a function analogous to that of the press.

Thus, the Constitutional Court emphasizes that it will be necessary in each individual matter to review (depending on the circumstances of the particular case) whether the requirement that a limitation of an individual's fundamental right to information must be necessary has been met, i.e. including a limitation on the right to provide a decision that has not entered into effect.

Yet, public discussion of a matter being handled by a court need not necessarily (automatically) interfere in the independence or impartiality of the judiciary. There is a presumption that a judge (e.g. the deciding judge in an appeal on a matter that has not yet been concluded with legal effect) has abundant personal qualities (otherwise he would not have been appointed as a judge) that guarantee his ability to decide a matter independently and impartially, including independently of any opinion ultimately expressed in the public sphere. Moreover, the case law of the European Court of Human Rights is of a similar opinion (cf., e.g. the abovementioned judgment in the matter Campos Dâmaso v. Portugal.)

Public discussion of a matter that is addressed by a judgment that has not entered into effect may, on the contrary, contribute to independent and impartial decision making, because sometimes it can reveal the existence of impermissible influences on judicial decision making. That is one of the purposes of the fundamental right to information as a derivative of freedom of expression. A legitimate aim of public discussion is public scrutiny of the performance of justice, adjudication in the light of day, not in the darkness of a non-public trial. In contrast, insufficiently public adjudication can reduce the authority of the judiciary, because it may generate public suspicion that "there's something to hide" (in the sense of committing injustice). The proper exercise of state authority is not possible in a democratic state without public confidence. Thus, the element of confidence is also a functional requirement for the exercise of democratic state power, and therefore it is necessary to protect confidence in the acts of the state authority; confidence in judicial decision making is among the fundamental extra-legal attributes of a law-based state [cf. judgment file no. IV. ÚS 525/02 of 11. 11. 2003 (N 131/31 SbNU 173)]. The Convention for the Protection of Human Rights and Fundamental Freedoms itself describes the authority of the judiciary as a public interest – one capable of limiting a fundamental right or freedom – in Art. 10 par 2. Thus, the state authorities must take into consideration what expectations they raise through their conduct and activities. The censorship of an information monopoly (in the form of a blanket prohibition on providing decisions that have not entered into effect) may result in interference in the functions of public

scrutiny, which belongs to not only the press, but also civic society, and as a consequence may also violate the authority of the judiciary. Ruling out public scrutiny a priori (without limitation) by not providing decisions that have not entered into effect would therefore express inadequate understanding of the purpose of the fundamental right to information and the freedom of expression in relation to state authority and inadequate reflection of the purpose of public scrutiny of the state power. A court too is a body of power that exercises power in a state, so it is subject to public scrutiny.

Moreover, that too is a reason for the constitutional imperative at the end of Art. 96 par. 2 of the Constitution, that "Judgments shall always be pronounced publicly." A judgment is basically a written form of what has already been publicly pronounced (cf. also the text below); thus, if a blanket prohibition on providing judgments that have not entered into effect were to be rationally justifiable on the grounds of protecting the independence and impartiality of the judiciary, then – logically – a prohibition on public pronouncement of a judgment (at the first level) in general would also have to be valid, on the same grounds.

There is also an opinion that in private law relationships the state should not even be a person obligated to provide information, and that if a judgment that has not entered into effect addresses a private law relationship between the state (thus in the same position in a court proceeding as any other party) and a natural person or legal entity, the state should not have – ever – an obligation to provide judgments that have not entered into effect.

However, that conclusion does not match the abovementioned constitutional law arguments, which are based on the fact that conflict between constitutional values must be resolved in view of the particular circumstances of each case.

That opinion is also based on the inapt premise that the state, in the position of a party to a proceeding before a general court in a private law dispute, is asked to provide a judgment that has not entered into effect on the grounds of its participation in the court proceeding. However, the fundamental rights (including the right to information) are subjective public rights, so the addressee of the obligations (i.e. to observe these rights and protect them, i.e. to take positive action) is the state authority. The state is asked to provide a judgment that has not entered into effect as a bearer of state authority, because the information requested (the judgment that has not entered into effect) is the outcome of the decision making authority, i.e. the outcome of the exercise of state authority (not of private law actions). Therefore, in the event of an obligation to provide such information the state would not bear any greater degree of responsibility than the other party to the proceeding; such an obligation on the state – as the sovereign power – is based on completely different legal grounds, which do not relate to its legal position as a party to a proceeding in the private law dispute itself.

The conclusion that the addressee of the fundamental right to information under Art. 17 of the Charter of Fundamental Rights and Freedoms is not the state, as a party to a private law court proceeding, but the state, as the bearer

of state authority, is also not inconsistent with the opinion that not only a court, but also any other state body – e.g. appearing previously as a party to a court proceeding – will have an obligation to provide a judgment that has not entered into effect, if the requesting party requests it, and it will have the requested information at its disposal. The addressee of the fundamental right to information under Art. 17 of the Charter of Fundamental Rights and Freedoms is the state (as the bearer of state authority), not a court or other state body. Thus, if there is a right to the provision of information and a corresponding obligation on the state to provide the information, then in terms of the significance and purpose of that right it is not decisive which state body provides the requested information. That other state body (in the case of the petitioner, the Ministry of Finance) will act as a body of state authority, just like a court; both cases involve a body of the same state. This also shows the difference from a hypothetical situation where the party in the civil law proceeding would not be the state, but, e.g. two individuals; in that case it would not be possible to request information (a judgment that had not entered into effect) from a party to the proceeding, i.e. from a private individual.

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We can also state that, as regards the significance and purpose of the fundamental right to information, it is not (basically) important whether the judgment that has not entered into effect concerns a private law dispute (e.g. between the state, as an owner, and a third party or parties) or a public law matter. The significance and purpose of the right to information is public scrutiny of the exercise of state (including judicial) authority; by the logic of the matter that authority is exercised – and is thus subject to legitimate scrutiny– not only in decision making on public law matters, but also in decision making in private law disputes. A public interest can also be seen – as the Constitutional Court stated, e.g. in judgment file no. I. ÚS 260/06 of 24 January 2007 (N 10/44 SbNU 129) – in the state's activities in managing state assets; managing state assets is done, among other things, by concluding private law contracts, which can, in future, lead to private law disputes. The actions of a state company can be classified as actions in the public interest on the grounds

that the company does business through using assets entrusted to it by the state.

The opinion that the state, in private law relationships, should not even be a party obligated to provide information, is thus in conflict with the hypothesis that managing state assets (i.e., including private law relationships where the state is a party) is undoubtedly a public interest (based on the fact that this involves managing funds collected from taxpayers, wherefore they are legitimately entitled to scrutinize it; regarding this, cf. also the maxim of priority of the individual before the state, as a requirement of a state governed by the rule of law), so the significance and purpose of Art. 17 of the Charter and Art. 10 of the Convention apply to it.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REOPUBLIC

The Plenum of the Constitutional Court, consisting of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, ruled on 30 March 2010 on a petition from Mgr. F. K., Ph.D., seeking the annulment of the word "effective" [i.e., that have entered into effect] in § 11 par. 4 let. b) of Act no. 106/1999 Coll., on Freedom of Information, as amended by later regulations, joined with a constitutional complaint against a decision of the Supreme Administrative Court of 29 April 2009 ref. no. 8 As 50/2008-75, as follows:

The word "effective" in provision of § 11 par. 4 let. b) of Act no. 106/1999 Coll., on Freedom of Information, as amended by later regulations, is annulled as of the day this judgment is promulgated in the Collection of Laws.

REASONING

I.
Course of the proceeding and recapitulation of the petition

1. On 17 July 2009 the Constitutional Court received the petitioner's petition, seeking annulment of the decision of the Supreme Administrative Court of 29 April 2009 ref. no. 8 As 50/2008-75 on the grounds that it violates his fundamental right to information under Art. 17 of the Charter of Fundamental Rights and Freedoms (the "Charter").

In that matter, the Municipal Court in Prague, by decision of 18 June 2008, ref. no. 9 Ca 4/2007 43, denied the petitioner's complaint against a decision by the Minister of Finance of 30 October 2006, ref. no. 10/99 897/2006-RK, which denied

the petitioner's appeal against a decision by the Minister of Finance of 29 September 2006, ref. no. 22/92219/2006/3341IK-255, and also confirmed that decision on partial refusal of information, or non-provision of court decisions, that had not yet entered into effect, in complaints against persons acquiring property transferred for payment by the Fund of Children and Youth "in liquidation" under Act no. 364/2000 Coll., on Annulment of the Fund of Children and Youth and on the Amendment of Certain Acts, as amended by later regulations. The petitioner filed a cassation complaint against this decision by the Municipal Court, but that was denied by the contested decision of the Supreme Administrative Court. The Supreme Administrative Court concluded that, as regards decisions that have not entered into effect, these decisions too must be included in the decision-making activity of courts (if effective judgments [i.e. those that have entered into effect] are decision-making activity of courts, there is no reason for judgments that have not yet entered into effect to not also be part of that activity; on the contrary). The provision of § 11 par. 4 let. b) of the Information Act thus clearly prevents obligated subjects from providing any information on the decision-making activity of courts (with the exception of providing information in the form of effective decisions). All the more so, then, this provision of the Act prevents providing information on the decision-making activity of courts in the form of decisions that have not yet entered into effect. The Supreme Administrative Court also stated that it is not up to it to pronounce basic evaluations about whether the regulation of § 11 par. 4 let. b) of the Information Act, in the wording in effect as of 23 March 2006, is well-chosen or not, but it stated that it is not inconsistent with the right to information guaranteed by the constitutional order, in particular Art. 17 par. 5 of the Charter of Fundamental Rights and Freedoms. Limiting the right to information on the decision-making activity of courts is not, in principle, based on refusing the public access to any information whatsoever on the decision-making activity of courts (cf. providing information in the form of effective decisions). This limitation is limited by the requirement to not interfere during a trial – in the interest of each matter being adjudicated objectively and impartially– in a court's actual decision-making activity (including decision-making activity in the form of decisions that have not yet entered into effect), and is also limited by necessary measures in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary [Art. 10 par. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention")]. Thus, the exercise of freedom of speech and the right to information can be limited by statute, including in the interest of preserving the authority and impartiality of the judiciary.

2. The core of the constitutional complaint is the question of how to interpret § 11 par. 4 let. b) of Act no. 106/1999 Coll., on Freedom of Information, as amended by later regulations, (also the "Act on Freedom of Information" or the "Information Act") applying constitutional principles and the bounds set forth in Art. 17 and Art. 4 par. 4 of the Charter of Fundamental Rights and Freedoms, in the particular matter of the complainant's application for the provision of court decisions that have not entered into effect. The Ministry of Finance refused to provide the complainant copies of decisions in cases in which it was a party, citing the fact that

they had not entered into effect. The complainant believes that the decisions, as results of the decision making activity of courts are – with statutory, narrowly-defined exceptions – public. This is all the more so if information about them is requested by a public authority that was involved in a dispute over state property in the foregoing proceedings. In the complainant's opinion, the question of whether a decision has entered into effect is not a criterion that can meet the material requirements for limiting the right to information under Art. 17 par. 4 of the Charter of Fundamental Rights and Freedoms. Such a limitation betrays not only the complainant's fundamental political right, but also the historical meaning and purpose of the public nature of judicial decision making, which is meant, in the long term, to contribute to confidence in the predictability, transparency and fairness of the justice system itself.

3. Together with the constitutional complaint, the complainant filed a petition seeking annulment of part of § 11 par. 4 let. b) of the Act on Freedom of Information, specifically the word "effective" [that have entered into effect].

4. The first panel of the Constitutional Court found no grounds to reject the petitioner's constitutional complaint under § 43 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, (the "Act on the Constitutional Court"), because application of the contested provision led to the fact that is the subject matter of the constitutional complaint. The formal prerequisites for review under § 43 par. 1 have been met and the constitutional complaint was not found to be manifestly unfounded under § 43 par. 2 let. a) of the cited Act. Therefore, the first panel, pursuant to § 78 par. 1 of the Act, suspended the proceeding on the constitutional complaint (by decision of 4 January 2010 file no. I. ÚS 1885/09) and submitted the petition for the annulment of the abovementioned provisions to the Plenum of the Constitutional Court for a decision pursuant to Art. 87 par. 1 of the Constitution of the Czech Republic (the "Constitution").

II.
Recapitulation of the briefs from the parties

5. In accordance with § 69 of the Act on the Constitutional Court, the Constitutional Court requested statements from the parties to the proceeding – both chambers of Parliament.

6. In its brief, the Chamber of Deputies only recapitulated the legislative process leading to the adoption of the Act containing the contested provision, and stated that the legislative assembly acted in the belief that the adopted Act is consistent with the Constitution and our legal order. In the conclusion it consented to waive a hearing.

7. In its brief, the Senate recapitulated the legislative process leading to the adoption of the Act containing the contested provision. It stated, among other things, that the Senate approved an amending proposal to § 11 par. 4 let. b) of the Act on Freedom of Information that substantively expanded the proposed statute so

that requesters of information could be provided all effective court decisions, instead of effective judgments, as proposed. None of the comments made on the content of the Act during discussion in the Senate mentioned any doubts concerning the constitutionality of limiting provision of court decision only to those that had entered into legal effect. The Senate discussed the draft, containing the contested part of § 11 par. 4 let. b) of the Act on Freedom of Information, within the bounds of its constitutionally provided competence and in a constitutionally prescribed manner. During its deliberations the Senate did not find the statutory provision to be inconsistent with Art. 17 par. 4 of the Charter of Fundamental Rights and Freedoms. The Senate agreed to waive a hearing.

8. The Constitutional Court also requested (pursuant to § 48 par. 2 a § 49 par. 1 of the Act on the Constitutional Court) a brief from the Ministry of Justice, which, however, did not respond by the deadline given.

III.
The text of the contested provision of the Act

9. The text of § 11 par. 4 let. b) of the Act on Freedom of Information reads: "The obligated subjects also will not provide information on the decision making activity of courts, with the exception of effective judgments."

IV.
The petitioner's active standing

10. The petitioner's active standing to submit the present petition can be derived from § 74 of the Act on the Constitutional Court. The petitioner thus meets the conditions for active standing to submit the present petition to the Constitutional Court.

V.
The constitutionality of the legislative process

11. Under § 68 par. 2 of the Act on the Constitutional Court, the Constitutional Court – apart from to reviewing whether a contested statute is consistent with constitutional acts – determines whether a statute was adopted and issued within the bounds of constitutionally provided competence and in a constitutionally prescribed manners.

12. In view of the fact that the petitioner did not claim any defects in the legislative process of that the legislature exceeded its constitutionally provided competence, following the principles of procedural economy it is not necessary to review this issue in detail, and it will suffice, apart from taking into account the briefs presented by the Chamber of Deputies and the Senate, to formally verify the conduct of the legislative process from publicly available information at http://www.psp.cz.

13. The contested wording of § 11 par. 4 let. b) was inserted into the Act on Freedom of Information by an amendment made by Act no. 61/2006 Coll., which amends Act no. 106/1999 Coll., on Freedom of Information, as amended by later regulations, Act no. 121/2000 Coll., on Copyright, on Rights Related to Copyright, and on the Amendment of Certain Other Acts (the Copyright Act), as amended by Act no. 81/2005 Coll., and Act no. 128/2000 Coll., on Municipalities (Municipal Establishment), as amended by later regulations, (Chamber of Deputies Publication no. 991). The Act was passed by the Chamber of Deputies on 14 October 2005. The Senate returned the Act to the Chamber of Deputies with amending proposals (resolution no. 250), but the Chamber of Deputies maintained the original draft of the Act (resolution no. 2153). The Act was promulgated in the Collection of Laws in part 26 as number 61/2006 Coll. Thus, the Constitutional Court states that the Act was adopted and issued within the bounds of constitutionally provided competence and in a constitutionally prescribed manner.

VI.
The Constitutional Court's review

VI. a)

14. The petitioner first submits to the Constitutional Court the alternative that § 11 par. 4 let. b) of the Act on Freedom of Information could be interpreted to mean that it does not prohibit providing court judgments that have not entered into effect. The petitioner considers the contrary interpretation (followed, among others, by the Supreme Administrative Court in its judgment of 29 April 2009 ref. no. 8 As 50/2008-75), to be "too restrictive."

15. In the proceeding, the petitioner first presented the question of interpretation of § 11 par. 4 let. b) of the Act on Freedom of Information as to whether it really prohibits or does not prohibit providing judgments of courts that have not entered into effect.

16. The Constitutional Court concluded that § 11 par. 4 let. b) of the Act on Freedom of Information cannot be interpreted constitutionally as regards the possibility of providing, for information, judgments of courts that have not entered into effect. This is because in § 11 par. 4 let. b) of the Act on Freedom of Information the legislature uses a definitive list. Thus, providing information on the decision making activity of courts is possible only in the form of judgments that have entered into effect. Using an argument a contrario, that (indirectly) gives rise to a prohibition on providing information about other decision making activity, i.e. including judgments that have not entered into effect. Otherwise, the permission in the text, to provide information on the decision making activity of courts only in the form of decisions that have entered into effect, would cease to make any sense. A contrary interpretation could not be accepted even by applying the rule of applying a constitutional interpretation, because – as is also clear from the Constitutional Court's case law [cf. d.g. judgment file no. Pl. ÚS 72/06 of 29 January 2008 (N 23/48 SbNU 263; 291/2008 Coll.), point 31] – this rule is applicable

only in the situation whether there are two (or more) possible interpretations of a legal regulation; otherwise this would logically not be legal interpretation, but creation of a statute. For completeness, the Constitutional Court states that this (only possible) interpretation cannot be a restrictive interpretation (as the petitioner erroneously believes), because it is based on the literal (and definitively formulated) wording of § 11 par. 4 let. b) of the Act on Freedom of Information. Restrictive interpretation means that the wording is meant by the legislature to have a narrower effect than would correspond to the literal wording, thus the expression used indicates more than the legislature actually had in mind.

17. In this regard the Constitutional Court refers to the relevant part of the reasoning in the abovementioned judgment of the Supreme Administrative Court: "On 23 March 2006, § 11 par. 4 let. b) of the Information Act, in the wording in effect at the time in question, entered into effect; under that provision, obligated subjects shall not provide information on the decision making activity of courts with the exception of effective judgments. The amendment of the Information Act (Act no. 61/2006 Coll.) added to the text of the original § 11 par. 4 let. b) of the Information Act ("obligated subjects also shall not provide information on the decision making activity of courts") a clear obligation for obligated subjects, with effect as of 23 March 2006, to make available effective judgments. However, this is not an insignificant explanation of § 11 par. 4 let. b) of the Information Act only to the effect that obligated subjects must make available court judgments that have entered into effect. This amendment also has serious consequences for the definition of the term "decision making activity of the courts" in relation to the scope of the obligation of the appropriate subjects to provide information. Written versions of judgments are always a result of the decision making activity of the courts, necessarily bearing information about that activity in a particular matter (the verdict and the reasoning of the judgment). Therefore, decision making activity under § 11 par. 4 let. b) of the Information Act must also be considered to include not only the actions of courts in proceedings and their actions aimed at determining the facts of a matter and its legal review, but also the actual decision making of the courts, i.e. the decision on the merits. The text "obligated subjects also shall not provide information on the decision making activity of courts, with the exception of effective judgments" indicates that judgments that have entered into effect, i.e. the results of the decision making activity of courts in the form of effective judgments are, as exceptions to that activity, by law necessarily a component of the decision making activity of courts (thus, effective judgments are included in the concept of the decision making activity of courts). As regards judgments that have not entered into effect, here too we must conclude that these too must be included in the decision making activity of the courts (if effective judgments are decision making activity of the courts, there is no reason for judgments that have not yet entered into effect to not also be part of that activity; on the contrary). The provision of § 11 par. 4 let. b) of the Information Act clearly prevents obligated subjects from providing any information on the decision making activity of the courts (with the exception of providing information in the form of effective judgments). All the more so, then, this provision of the Act prevents providing information on the decision making activity of the courts in the form of decisions that have not yet entered into effect. This is because, if information on the decision making activity of the courts as such is subject to the statutory exception (with the exception of decisions that have entered into effect), then

information about this activity, in judgments that have not yet entered into effect, also cannot be provided (argumentum a contrario, which reveals the meaning of a legal norm following the rules of formal logic) ….”

VI. b)

18. Thus, in terms of the content of the petition, the question arose of the constitutionality of the norm itself that forbids providing judgments that have not entered into effect, but at the same time permits providing judgments that have entered into effect (also referred to as the “contested norm.”).

19. In the cited judgment the Supreme Administrative Court concluded that the contested legal norm was constitutional.

20. In contrast, the petitioner, to support his conclusion that the contested norm is constitutional, states basically the following. The request to provide judgments that had not yet entered into effect, which the petitioner intended to use as a source for interpretation of the law and a source of legal arguments, could not, in any way, have interfered in the judicial proceeding or in the actual decision making activity of the court. If making available judgments that have not yet entered into effect were to endanger a court’s decision making activity, then for the same reason such judgments should not and could not even be publicly announced. If a conflict could actually occur between the right to protection of the person and the right to protection of personal data or privacy, it is necessary to look for a solution first through other, less restrictive legal institutions or legal norms, and only if that were unsuccessful to apply a provision limiting the right to information. In the case of, e.g. the right to protection of personal data or privacy, a provision providing sufficient protection of these rights is contained in the Act on Freedom of Information in § 8a, which refers to legal regulations that regulate such protection. Further sufficient protection or “insurance” is contained in § 12 of the Act on Freedom of Information. The Supreme Administrative Court’s argument that these, as yet ineffective, judgments could undergo considerable change as a result of review, is relevant, but the requester must take that fact into account, and treat the information accordingly. In such a case, the requester must know that a judgment that has not entered into effect is not unchangeable, and is not final, but that cannot be a reason to deny providing that judgment as information. Decisions published as a source for legal interpretation are not only final decisions, but also, for example, dissenting opinions, whether those of the abovementioned court or, e.g. the European Court of Human Rights. Moreover, even a judgment that has entered into effect need not be the final decision in a case, because it can be annulled, e.g. by a decision of the Supreme Court or the Constitutional Court. Insofar as a judicial proceeding is governed by the principle of being public, and a judgment is announced publicly, without exception, information concerning a court proceeding that has not been concluded with legal effect is de facto made public (whether during the proceeding itself or by announcement of the judgment) and the judgment itself is merely a written form of what has already been announced.

VI. c)

21. The Constitutional Court – not bound by the reasoning of the petition, but only by the requested judgment – turned to a review of the constitutionality of the contested norm.

22. Under Art. 17 par. 1 of the Charter, "the freedom of information and the right to information are guaranteed." Under Art. 17 par. 2 of the Charter, "Everyone has the right to express his views in speech, in writing, in the press, in pictures, or in any other form, as well as freely to seek, receive, and disseminate ideas and information irrespective of the frontiers of the state." Under Art. 17 par. 5 of the Charter, "State bodies and territorial self-governing bodies are obliged, in an appropriate manner, to provide information with respect to their activities. Conditions therefore and the implementation thereof shall be provided for by law."

23. Under Art. 10 par. 1 of the Convention, "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers …."

24. The provision of § 11 par. 4 let. b) of the Act on Freedom of Information does not permit providing information on the decision making activity of the courts in the form of judgments that have not entered into effect. It thereby interferes in an individual's fundamental right to information (under Art. 17 of the Charter) and in the fundamental freedom of an individual to receive information (under Art. 10 of the Convention) and limits them.

25. In this regard it is appropriate to also point to the more general case law of the European Court of Human Rights concerning the right to information. We can refer to the decision on the permissibility of a complaint Sdružení Jihočeské matky v. the Czech Republic of 10 July 2006, Application no. 19101/03, which consists of an express recognition of the applicability of Article 10 of the European Convention in cases of rejection of an application for access to public or administrative documents (cf. the Parliamentary Institute: Access of non-governmental non-profit organizations to the courts in selected EU member states in cases when a large number of persons is in danger of discrimination, available at http://www.psp.cz/cgi-bin/win/kps/pi/prace/pi-5-269.pdf). We can also cite the judgment in the matter Campos Dâmaso v. Portugal of 24 April 2008, Application no. 17107/05, in which protection was given to a reproduction of a complaint made by a journalist, in view of (among other things) the right (of the public) to receive information under Art. 10 of the Convention.

26. After all, even the Supreme Administrative Court does not question, in the contested judgment, that the contested norm interferes in Art. 17 of the Charter and Art. 10 of the Convention.

27. However, not every limitation of an individual's fundamental right is unconstitutional. This is expressly anticipated by Art. 17 par. 4 of the Charter: "The freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures that are necessary in a democratic society for protecting the rights and freedoms of others, the security of the state,

public security, public health, or morals." Art. 10 par. 2 of the Convention is similar: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

28. In other words, interference in the rights arising from Art. 17 of the Charter and from Art. 10 par. 1 of the Convention violates the Charter and the Convention if it does not meet the requirements set forth in Art. 17 par. 4 of the Charter and in Art. 10 par. 2 of the Convention. Thus, it must be determined whether the interference was "provided for by law," whether it pursued one or more legitimate aims enshrined in these provisions, and whether it was "necessary in a democratic society" in order to achieve these aims.

29. In view of § 11 par. 4 let. b) of the Act on Freedom of Information, there is no dispute that the interference is "provided for by law" under Art. 17 par. 4 of the Charter and Art. 10 par. 2 of the Convention.

30. The Constitutional Court also considers the condition of a legitimate aim to have been met. The interference in question can be viewed as serving to protect values cited in Art. 17 par. 4 of the Charter and in Art. 10 par. 2 of the Convention. Thus far the Constitutional Court agrees with the reasoning in the cited decision of the Supreme Administrative Court.

31. Nonetheless, the Constitutional Court is of the opinion that the contested norm does not meet the condition of the necessity of limiting an individual's fundamental right or freedom in a democratic society.

32. The European Court of Human Rights has consistently held the opinion that the adjective "necessary" in Article 10 par. 2 of the Convention contains the existence of a "pressing social need" [see the judgment in the matter Lingens, 1986, cited, e.g. in Constitutional Court resolution file no. IV. ÚS 606/03 of 19 April 2004 (U 23/33 SbNU 453)].

33. The key hypothesis is that one cannot (naturally) rule out a priori the possibility that in a particular case protection of a fundamental right will outweigh the cited values, i.e. that there will not be a "pressing social need" to limit the fundamental right ("this hypothesis"). That is precisely why it is necessary to review, in each particular matter (according to the circumstances of the particular matter), whether the condition of the necessity for limiting an individual's fundamental right or freedom in a democratic society has been met.

34. This also arises from the Constitutional Court's case law. For example, in judgment file no. IV. ÚS 154/97 of 9 February 1998 (N 17/10 SbNU 113) the Constitutional Court stated that, "In a conflict between the political right to information and dissemination thereof with the right to protection of the person

and private life, that is, fundamental rights that are on the same level, it will always be up to the independent courts to carefully review, taking into account the circumstances of each particular case, whether one right was not given unjustified priority over the other right."

35. After all, this hypothesis was also stated by the administrative court regarding this issue, specifically the Municipal Court in Prague, in its decision of 23 February 2007 file no. 10 Ca 144/2005 (available in the ASPI system), which the Supreme Administrative Court cited in the abovementioned decision. The Municipal Court stated pertinently in this context that "Any conflict between the right to information and another fundamental human right … must be evaluated according to the particular matter, which of these rights should be given priority in the particular matter … Therefore, the requirement to provide anonymous effective decisions in matters of a certain kind cannot be generally rejected on the grounds that this is information about 'the decision making activity of courts' …, but it is necessary to clearly determine the necessity and particular reason leading to restricting the right to the information, and to evaluate whether in the given matter the limitation of this right is necessary."

36. This hypothesis also follows from the case law of the European Court of Human Rights. For example, in the judgment in the matter Campos Dâmaso v. Portugal of 24 April 2008, Application no. 17107/05 (available in the ASPI system) [addressing a case where a journalist published the text of a complaint before it was officially submitted in a proceeding] it was stated: "32. Thus, the court must now determine whether the disputed interference is commensurate with 'pressing social need,' whether it was appropriate to legitimate aims that were pursued, and whether the grounds which the domestic authorities cite to justify it appear 'relevant and sufficient' … 33. As regards the circumstances of the adjudicated matter, the Court first stresses that the article based on which the complainant was convicted obviously dealt with the question of public interest … 35. It is necessary to determine whether, in the particular circumstances of the adjudicated matter, the interest in informing the public outweighed 'obligations and responsibilities' …." In that judgment the European court of Human Rights pointed out that "31. Above all, we cannot assume that matters handled by the courts cannot be subject to previous or simultaneous debates elsewhere, whether in professional journals, the national press, or by the public as such. The mission of the media to disseminate such information and ideas corresponds to the public's right to receive them." That opinion can also be applied to the present adjudicated matter, because it concerns only the submission of a judgment that has not yet entered into effect to a person merely requesting information (a contrario publishing it in the newspapers and subsequent debate about it, as was the case in the judgment in Campos Dâmaso v. Portugal). We can also cite the well-known judgment of the European Court of Human Rights in the matter Sunday Times v. the United Kingdom of 26 April 1979 (cf., e.g., Berger, V.: Judikatura Evropského soudu pro lidská práva / Case Law of the European Court of Human Rights, 1st Czech edition, IFEC, Prague, 2003, pp. 477-482), which concerned an injunction on publishing information on civil law trials in progress that was issued against that periodical. In that judgment, the European Court of Human Rights concluded that the interference in freedom of expression did not correspond to a pressing social need that would outweigh the public interest in freedom of expression; in terms of Art. 10 par. 2 of the

Convention it was not based on sufficient grounds, and was not proportionate to the aim pursued or necessary in a democratic society in order to maintain the authority of the judiciary. The last cited case addressed by the European Court of Human Rights applies all the more so to the presently adjudicated matter which involves – as was already stated – merely providing a decision that has not entered into effect to a person requesting information (in contrast to publishing it in newspapers and possible critical commentary therein).

37. This hypothesis was also stated, for example, in the recommendation of the Committee of Ministers of the Council of Europe Rec(2003)13 on the provision of information through the media in relation to criminal proceedings (cf., e.g.: "…Considering the possibly conflicting interests protected by Articles 6, 8 and 10 of the Convention and the necessity to balance these rights in view of the facts of every individual case, with due regard to the supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention …" – cited from the abovementioned judgment in the case Campos Dâmaso v. Portugal).

38. However, the contested norm is clearly inconsistent with this hypothesis. It does not permit reviewing in every particular case (in view of the circumstances of the given matter) the existence of a "pressing social need" for limiting a fundamental right (i.e. the necessity of limiting the fundamental right). The contested norm indicates that – in the event of the existence of a statute and a legitimate aim of limiting an individual's fundamental right to information (provision of a decision that has not entered into effect), i.e. values cited in Art. 17 par. 4 of the Charter and Art. 10 par. 2 of the Convention – these values will always (automatically) be given priority over the individual's fundamental right to freedom of expression in the form of the right to information; thus, the contested norm (a priori) breaches the individual's fundamental right in every case. Thereby it also (considering all consequences) denies the common knowledge [arising from, among other things, the Constitutional Court's case law; cf. e.g., the judgment in the matter file no. Pl. ÚS 15/96 of 9 October 1996 (N 99/6 SbNU 213; 280/1996 Coll.)], that constitutional values (including constitutional rights) are prima facie equal. Thus, the contested norm basically turns the requirement that limitation of an individual's fundamental right or freedom in a democratic society must be necessary into a non-reviewable postulate, because, taken comprehensively, it rules out review of the requirement in view of the circumstances of a particular case.

39. In this regard we must point out that freedom of expression – including, under Art. 10 par. 1 of the Convention, the freedom to receive information – is one of the most important foundations of a democratic society; therefore, its guarantees are especially important. One cannot fail to see that the right to information as the collection of information is a fundamental preparatory step (among other things) especially in journalism, and is an inherent, protected part of the freedom of the press. The functioning of the press includes the creation of forums for public discussion. However, this function is not limited to the media and professional journalists. In different situations it creates space for public discussion, e.g. in relation to non-governmental organizations, but also in relation to individuals. Thus, the purpose of that activity, i.e. collecting information, can be considered

one of the basic elements of an informed society. A civic society plays an important role in discussion of public issues. There is no doubt that a decision that has not entered into effect may address a matter of public interest; persons requesting information are, or at least may be, involved in the legitimate collection of information about these matters. Their aim may be to impart such information to the public, and thereby contribute to public discussion, which is not only legitimate, in a democratic law-based state, but also necessary. Thus, the monopoly on information that a court enjoys is a form of censorship sui generis. The censorship of this information monopoly may lead to interference in the exercise of the scrutiny that belongs to civic society, as it may have a function analogous to that of the press. Obstacles created for the purpose of preventing access to information in the public interest may also deter those who work in the media and similar areas from seeking information. As a result, they would not be able to continue to fulfill their role of public inspection, and their ability to provide accurate and reliable information would be negatively affected. Stated somewhat more specifically, for example, in relation to a criminal proceeding, the Committee of Ministers of the Council of Europe adopted recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings, in which it correctly points out that, due to the right of the public to receive information, the media have the right to inform the public, and it also emphasizes the importance of reporting on criminal proceedings, which the media do for the purpose of informing the public and making it possible for the public to exercise its right to scrutiny of the functioning of the criminal justice system. Moreover, the appendix to the recommendation includes, among other things, the public's right to receive information through the media on the activities of bodies active in criminal proceedings, which includes the right of journalists to freely report on the functioning of the criminal justice system (cf. the judgment of the European Court of Human Rights in the matter Campos Dâmaso v. Portugal, cited above). There is no reason not to thing that these arguments can be applied mutatis mutandis not only to the press, but also to the ability of a civic society to have access to information in the public interest.

40. Thus, the Constitutional Court emphasizes that it will be necessary in each individual matter to review (depending on the circumstances of the particular case) whether the requirement that a limitation of an individual's fundamental right to information must be necessary has been met, i.e. including a limitation on the right to provide a decision that has not entered into effect.

VI. d)

41. The opinion that the prohibition on providing decisions that have not entered into effect is justified by the constitutional value of protecting the independence and impartiality of the judiciary has been answered with the arguments stated above (see point 33 et seq. of this judgment). It is not possible to rule out a priori the possibility that, in a particular case, protection of a fundamental right to such information will outweigh another protected constitutional value, i.e. that there will be no "pressing social need" to limit the fundamental right. Here we cannot fail to see that constitutional values (including constitutional rights) are prima facie equal (see point 38 of this judgment). It is also necessary to reflect the case

law of the European Court of Human Rights, under which one cannot a priori assume that matters handled by the courts cannot be the subject matter of previously or simultaneous debate elsewhere, whether in professional journals, the nationwide press, or in public as such (see point 36 of this judgment).

42. Yet, public discussion of a matter being handled by a court need not necessarily (automatically) interfere in the independence or impartiality of the judiciary. There is a presumption that a judge (e.g. the deciding judge in an appeal on a matter that has not yet been concluded with legal effect) has abundant personal qualities (otherwise he would not have been appointed as a judge) that guarantee his ability to decide a matter independently and impartially, including independently of any opinion ultimately expressed in the public sphere [moreover, judges swear an oath that they will, in accordance with the best of their knowledge and conscience, make decisions independently and impartially – cf. § 62 par. 1 of the Act on Courts and Judges and also § 79 par. 1 of Act no. 6/2002 Coll., on Courts, Judges, Trainee Judges, and State Administration of Courts, and on the Amendment of Certain Other Acts (the Act on Courts and Judges)]. Moreover, the case law of the European Court of Human Rights is of a similar opinion (cf., e.g. the abovementioned judgment in the matter Campos Dâmaso v. Portugal: "Besides that, the matter could not be decided by any judge who was not a career judge, which reduced the risk that articles like the article affected in the original trial would influence the outcome of the trial ... The court in Esposende itself recognized that publishing the disputed article did not in anyway interfere with the investigation … Moreover, the government did not specify how publication of the disputed article could have interfered in the investigation …").

43. Nevertheless, public discussion of a matter that is addressed by a judgment that has not entered into effect may, on the contrary, contribute to independent and impartial decision making, because sometimes it can reveal the existence of impermissible influences on judicial decision making. That is one of the purposes of the fundamental right to information as a derivative of freedom of expression. A legitimate aim of public discussion is public scrutiny of the performance of justice, adjudication in the light of day, not in the darkness of a non-public trial. In contrast, insufficiently public adjudication can reduce the authority of the judiciary, because it may generate public suspicion that "there's something to hide" (in the sense of committing injustice). The proper exercise of state authority is not possible in a democratic state without public confidence. Thus, the element of confidence is also a functional requirement for the exercise of democratic state power, and therefore it is necessary to protect confidence in the acts of the state authority; confidence in judicial decision making is among the fundamental extra-legal attributes of a law-based state [cf. judgment file no. IV. ÚS 525/02 of 11. 11. 2003 (N 131/31 SbNU 173)]. The Convention for the Protection of Human Rights and Fundamental Freedoms itself describes the authority of the judiciary as a public interest – one capable of limiting a fundamental right or freedom – in Art. 10 par 2. Thus, the state authorities must take into consideration what expectations they raise through their conduct and activities. The censorship of an information monopoly (in the form of a blanket prohibition on providing decisions that have not entered into effect) may result in interference in the functions of public scrutiny, which belongs to not only the press, but also civic society, and as a consequence may also violate the authority of the judiciary. Ruling out public scrutiny a priori

(without limitation) by not providing decisions that have not entered into effect would therefore express inadequate understanding of the purpose of the fundamental right to information and the freedom of expression in relation to state authority and inadequate reflection of the purpose of public scrutiny of the state power. A court too is a body of power that exercises power in a state, so it is subject to public scrutiny.

44. Moreover, that too is a reason for the constitutional imperative at the end of Art. 96 par. 2 of the Constitution, that "Judgments shall always be pronounced publicly." A judgment is basically a written form of what has already been publicly pronounced (cf. also the text below); thus, if a blanket prohibition on providing judgments that have not entered into effect were to be rationally justifiable on the grounds of protecting the independence and impartiality of the judiciary, then – logically – a prohibition on public pronouncement of a judgment (at the first level) in general would also have to be valid, on the same grounds.

45. One can also reason that any public discussion (especially specialized), criticizing judgment that have not entered into effect, not groundlessly, can certainly, through well-founded arguments, contribute to a just outcome in a continuing court proceeding. That can hardly be seen as interference in the independence and impartiality of the judiciary; moreover, under § 82 par. 2 of the Act on Courts and Judges, as amended by later statutes, a judge is required to complete continuing education to increase his specialized legal and other knowledge necessary to properly perform his office.

46. The hypothetical opinion defending – on the grounds of protecting the independence and impartiality of the judiciary – a general prohibition on providing judgments that have not yet entered into effect, and at the same time permitting the provision of judgments that have entered into effect, also runs into the logical reasoning that even judgments that have entered into effect can realistically be changed; that happens relatively often through extraordinary remedies, a constitutional complaint, or a complaint to the European Court of Human Rights.

VI. e)

47. There is also an opinion that in private law relationships the state should not even be a person obligated to provide information, and that if a judgment that has not entered into effect addresses a private law relationship between the state (thus in the same position in a court proceeding as any other party) and a natural person or legal entity, the state should not have – ever – an obligation to provide judgments that have not entered into effect; if the state is asked to provide a judgment that has not entered into effect based on participation in a proceeding, then the state – in such a case – would have to bear a greater degree of responsibility than the other party. However, the degrees of responsibility are provided by the Civil Procedure Code, and are the same for both parties to a private law dispute.

48. However, that conclusion does not match the abovementioned constitutional law arguments, which are based on the fact that conflict between constitutional

values must be resolved in view of the particular circumstances of each case.

49. That opinion is also based on the inapt premise that the state, in the position of a party to a proceeding before a general court in a private law dispute, is asked to provide a judgment that has not entered into effect on the grounds of its participation in the court proceeding. However, the fundamental rights (including the right to information) are subjective public rights, so the addressee of the obligations (i.e. to observe these rights and protect them, i.e. to take positive action) is the state authority. The state is asked to provide a judgment that has not entered into effect as a bearer of state authority, because the information requested (the judgment that has not entered into effect) is the outcome of the decision making authority, i.e. the outcome of the exercise of state authority (not of private law actions). Therefore, in the event of an obligation to provide such information the state would not bear any greater degree of responsibility than the other party to the proceeding; such an obligation on the state – as the sovereign power – is based on completely different legal grounds, which do not relate to its legal position as a party to a proceeding in the private law dispute itself.

50. . That opinion is also based on the inapt premise that the state, in the position of a party to a proceeding before a general court in a private law dispute, is asked to provide a judgment that has not entered into effect on the grounds of its participation in the court proceeding. However, the fundamental rights (including the right to information) are subjective public rights, so the addressee of the obligations (i.e. to observe these rights and protect them, i.e. to take positive action) is the state authority. The state is asked to provide a judgment that has not entered into effect as a bearer of state authority, because the information requested (the judgment that has not entered into effect) is the outcome of the decision making authority, i.e. the outcome of the exercise of state authority (not of private law actions). Therefore, in the event of an obligation to provide such information the state would not bear any greater degree of responsibility than the other party to the proceeding; such an obligation on the state – as the sovereign power – is based on completely different legal grounds, which do not relate to its legal position as a party to a proceeding in the private law dispute itself. That other state body (in the case of the petitioner, the Ministry of Finance) will act as a body of state authority, just like a court; both cases involve a body of the same state. This also shows the difference from a hypothetical situation where the party in the civil law proceeding would not be the state, but, e.g. two individuals; in that case it would not be possible to request information (a judgment that had not entered into effect) from a party to the proceeding, i.e. from a private individual.

51. After all, the obligation to provide a judgment that has not entered into effect can hardly (by the nature of the matter) be a violation of the principle of equal weapons, equal procedural standing under the Civil Procedure Code. It is an act outside the civil court proceeding, not related to it in any way. It is the implementation of a public law obligation based on a different legal regulation than a private law norm (this obligation is established by administrative and constitutional law). Even if the foregoing were not so, that would not in any way interfere in the procedural rights of a party to a proceeding under the Civil Procedure Code. The significance and purpose of the principle of equal weapons,

equal rights and obligations in a civil (or other) proceeding before a state body is to guarantee the conditions for a just outcome to the proceeding; that might not happen if one of the parties were at a disadvantage in the process (typically, by lack of an opportunity to present its own statement, evidence, etc.). However, the present matter is obviously not such a case.

52. We can also state that, as regards the significance and purpose of the fundamental right to information, it is not (basically) important whether the judgment that has not entered into effect concerns a private law dispute (e.g. between the state, as an owner, and a third party or parties) or a public law matter. The significance and purpose of the right to information is public scrutiny of the exercise of state (including judicial) authority; by the logic of the matter that authority is exercised – and is thus subject to legitimate scrutiny– not only in decision making on public law matters, but also in decision making in private law disputes (the latter case also involves authoritative decision making on the rights and obligations of persons that, e.g., could be abused, etc.). In terms of the teleology of Art. 17 of the Charter and Art. 10 of the Convention, the difference between deciding private law disputes and public law matters can rest only in the degree (not in the principle) of the interest taken by the public, because that can often be higher in the case of a matter of public interest; the public will then not only scrutinize the conduct of the court, but will also have an interest in knowing, or evaluating the facts about what happened before the court proceeding began, e.g. about the state's management of finances. A public interest can also be seen – as the Constitutional Court stated, e.g. in judgment file no. I. ÚS 260/06 of 24 January 2007 (N 10/44 SbNU 129) – in the state's activities in managing state assets; managing state assets is done, among other things, by concluding private law contracts, which can, in future, lead to private law disputes. In the cited judgment the Constitutional Court approved of the opinion of the Supreme Administrative Court in the proceeding in question, under which the actions of a state company can be classified as actions in the public interest on the grounds that the company does business through using assets entrusted to it by the state. In the cited judgment the Constitutional Court also pointed to specialized literature that states that the term "public institution managing public funds" under the Act on Freedom of Information (and thus a subject obligated to provide information) can also include companies established by the state.

53. The opinion that the state, in private law relationships, should not even be a party obligated to provide information, is thus in conflict with the hypothesis that managing state assets (i.e., including private law relationships where the state is a party) is undoubtedly a public interest (based on the fact that this involves managing funds collected from taxpayers, wherefore they are legitimately entitled to scrutinize it; regarding this, cf. also the maxim of priority of the individual before the state, as a requirement of a state governed by the rule of law), so the significance and purpose of Art. 17 of the Charter and Art. 10 of the Convention apply to it. Moreover, the idea that the state should not even be a person obligated to provide information in private law relationships does not thoroughly reflect the significance and purpose of sub-constitutional regulations either. Until the amendment of the Act on Freedom of Information by Act no. 61/2006 Coll., an obligated subject under the Act on Freedom of Information included "a public institution managing public funds." The legislature thereby explicitly emphasized

that the issue of managing public funds is in the public interest, that it is subject to public scrutiny. A legal definition of "public funds" is found in § 2 let. g) of Act no. 320/2001 Coll., on Financial Scrutiny in Public Administration and on the Amendment of Certain Other Acts (the Act on Financial Scrutiny): "public finances, things, property rights, and other property values belonging to the state or other entity set forth in letter a)." Although the cited amendment of the Information Act deleted the phrase "managing public funds" (§ 2 par. 1), it was explained, e.g. in judgment file no. I. ÚS 260/06 (see above), that the purpose was to guarantee the right to information related to the functioning of a public institution, regardless of whether it was managing public funds or not. It is also necessary to realize that the opinion that the state should not even be a person obligated to provide information in private law relationships opens the potential for corruption and other similar negative phenomena.

54. It remains to add that the purpose of providing judgments that have not entered into effect may also lie in the predictability of court decisions, and may also be a source of interpretation of the law, i.e. a source of legal arguments. By the logic of the matter, nothing about this is changed by the fact that these judgments may be changed later. After all, even a judgment that has entered into effect may be annulled, and judges' dissenting opinions to the majority opinion are published.

VI. f)

55. However, the Constitutional Court also found another reason supporting the conclusion that the contested legal norm is unconstitutional.

56. The cited legal regulation does not meet the requirement that a limitation on an individual's fundamental right or freedom in a democratic society must be necessary, because it will not infrequently be possible to achieve the legitimate pursued aim (protection of the cited values) by using a different means, one that does not limit a fundamental right to such an extent (i.e. denying the fundamental right to freedom of speech will not be necessary). Thus, the contested norm does not (in a comparison of the conflicting constitutional values) meet the requirement of necessity, i.e. the requirement to compare the legislative means that interferes in a constitutional value with another measure that permits achieving the same aim, but does not affect the constitutional value.

57. Stated somewhat differently, in this regard the contested norm cannot stand, given its inconsistency with Art. 4 par. 4 of the Charter, which mandates preserving the essence and significance of rights and freedoms when applying provisions concerning limitations on them. If everybody has a right to information, then a statute that limits the right to seek out and disseminate information (Art. 17 par. 4 of the Charter), may not essentially annul (negate) that right, and thereby eliminate it. Thus, the contested norm does not respect the principle of minimizing interference in the fundamental rights and freedoms when limiting them and maximizing the preservation of the essential content of a fundamental right.

58. In this regard we can point to § 7 of the Act on Freedom of Information, under

which, if information requested in accordance with legal regulations (Act no. 412/2005 Coll., on Protection of Classified Information and on Security Clearance) is designated as classified information, which the requester is not authorized to access, the obligated subject shall not provide it. Under § 8a of the Act on Freedom of Information, an obligated subject shall provide information concerning personality, statements of a personal nature, an individual's privacy, and personal data only in accordance with legal regulations governing protection thereof (for example, § 11 to 16 of the Civil Code, § 5 and 10 of Act no. 101/2000 Coll., on Personal Data Protection and on the Amendment of Certain Acts). Under § 9 of the Act on Freedom of Information, if the requested information is a business secret (§ 17 of Act no. 513/1991 Coll., the Commercial Code), the obligated subject shall not provide it. Under § 10 of the Act on Freedom of Information, an obligated subject shall not provide information on the financial situation of a person who is not an obligated subject, obtained on the basis of laws on taxes, fees pension or health insurance, or social security. The provision of § 11 of the Act on Freedom of Information enshrines other limitations to the right to information; for example, paragraph 2 let. c) prohibits providing information if that would violate the protection of third parties to material that is subject to copyright. The provision of § 12 of the Act on Freedom of Information states that an obligated subject shall implement all limitations to the right to information by providing the requested information together with accompanying information, after removing such information as is required to be removed by law (the right to refuse information exists only during the period that the grounds for refusal exist; in justified cases the obligated subject shall verify whether the grounds for refusal still exist). Thus, § 12 of the Act on Freedom of Information contains a rule of selection; this corresponds to the requirement that a justified limitation on access to information always be applied only in the smallest necessary degree. Only this provision fulfills and guarantees the requirement to minimize interference in a fundamental right or freedom, not the contested norm, which basically denies the fundamental right to information – in the case set forth therein - completely.

59. Here we can also refer to the background report to these provisions of the Act on Freedom of Information. The report states: "Excepted from this rule is information that the draft Act expressly rules out or limits as necessary. This involves, in particular, information that is, based on law, designated as classified, or information that would violate the protection of personality and individuals' privacy … These provisions govern exceptions from the right to information that is expressed in the foregoing provisions. Limitation of the right to information is constitutionally established. The Charter of Fundamental Rights and Freedoms permits protection information from being provided "in the case of measures that are necessary in a democratic society for protecting the rights and freedoms of others, the security of the state, public security …" (Art. 17 par. 4 of the Charter), or expresses positively everyone's rights to protection of personality and protection from unauthorized public revelation of personal data (Art. 10 of the Charter). The Act guarantees these exceptions (limitations) by defining criteria for determining information that the obligated subject may not or need not provide." (cf. www.psp.cz).

VI. g)

60. The petitioner also argues by citing the end of Art. 96 par. 2 of the Constitution, "Judgments shall always be pronounced publicly." In this regard, it makes the logical objection that the judgment is only a written form of what has already been pronounced publicly.

61. In this regard the arguments of the Supreme Administrative Court are considerably unpersuasive. The Court basically limits itself to declaring that providing information about a judgment and the requirement to pronounce a judgment publicly are two completely different legal institutions.

62. However, the Supreme Administrative Court thereby overlooks the maxim of internal consistency of the legal order. A legal order founded on the principles of unity, rationality, and internal consistency of content necessarily carries an imperative to look at comparable legal institutions the same way, even if they are governed by different legal regulations or even different branches [cf. e.g., Constitutional Court judgment file no. Pl. ÚS 72/06 of 29 January 2008 (N 23/48 SbNU 263; 291/2008 Coll.), point 50]. The Supreme Administrative Court itself relied on analogous principles in its case law. For example, in judgment file no. 2 Afs 81/2004 (available at www.nssoud.cz) it stated, likewise, that "a legal order founded on the principles of unity, rationality, and internal consistency of content necessarily carries an imperative to look at comparable legal institutions the same way, even if they are governed by different legal regulations or even different branches." In judgment file no. 5 Afs 138/2004 (available at www.nssoud.cz) the Supreme Administrative Court stated that "We cannot accept an interpretation under which a substantial difference exists between a public law guarantee and a private law guarantee; that follows from the decision of the expanded panel of the Supreme Administrative Court (1 Afs 86/2004, available at www.nssoud.cz)."

63. There is no doubt that the purpose of the constitutional requirement to pronounce all judgments publicly and the purpose of providing even a judgment that has not entered into effect is similar; i.e. to permit the participation of the public as a guarantee of public scrutiny of the judiciary. The Constitutional Court already considered this in the foregoing text of this judgment (point 44).

64. As the Constitutional Court already stated in its judgment file no. Pl. ÚS 28/04 of 8 November 2005 (N 205/39 SbNU 171; 20/2006 Coll.), "The general legal consciousness traditionally perceives the right to have a matter adjudicated publicly as an instrument of public scrutiny of the judiciary. The purpose of a public trial 'is so that everyone can see for himself that justice is carried out by the state, and through this scrutiny by the audience any partiality by judges becomes impossible' (cf. the entry "Public," in Riegrův slovník naučný [Rieger's Dictionary], IX, Prague 1872, p. 997). In the Czech lands this was for a long time considered to be the only purpose of a public trial. The case law of the First Republic Czechoslovak Supreme Court repeatedly states that the 'aim that the law pursues through the provision of trial hearings being public is that a court proceeding not be conducted without enabling public scrutiny thereof. In this one aim for having trial proceedings be public there is, under law, no difference between a hearing before a jury and a hearing before a panel [of judges], and the

law does not aim, even with a jury, to permit a strong impression of the audience's mood to influence the jury in the jury room" [cf. decision no. 4336/1932 in: F. Vážný, Rozhodnutí Nejvyššího soudu československé republiky ve věcech trestních [Decisions of the Supreme Court of the Czechoslovak Republic in Criminal Cases] ("Vážný"), XIII, 1932, p. 568]. The First Republic Supreme Court similarly concluded that 'the purpose of the law is public scrutiny of the performance of justice, adjudication in the light of day, not in the darkness of a secret trial. Thus, the concept of a public hearing is presented as the opposite of secrecy, and it is only a question of practicality, to what extent the public can be provided access to proceedings, while preserving the inviolable postulate that detrimental influences affecting the lawful conduct of a trial and the persons taking part in it are impermissible" (cf. decision no. 1729/1925, in: Vážný, VI, 1925, p. 549)."

65. Thus, in this regard the petitioner must be considered to be correct that, from the point of view of the end of Art. 96 par. 2 of the Constitution, a priori ruling out the possibility of providing judgments that have not entered into effect to a person who requests them cannot stand.

VII.

66. For all these reasons the Constitutional Court granted the petition, and annulled the word "effective" in § 11 par. 4 let. b) of Act no. 106/1999 Coll., on Freedom of Information, as amended by later regulations, as of the day this judgment is promulgated in the Collection of Laws, due to inconsistency with Art. 17 par. 1, 2, 3, 4 and 5, and Art. 4 par. 4 of the Charter of Fundamental Rights and Freedoms, and with Art. 10 par. 1 and 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

67. For certainty, the Constitutional Court adds that the arguments and conclusions in this judgment do not apply to judgments that were annulled or amended [note: in that case there is no "judgment" under § 11 par. 4 let. b) of Act no. 106/1999 Coll., on Freedom of Information, as amended by later regulations, because an annulled or amended judgment will not, de jure, exist – in the scope in which it was annulled or amended.

Dissenting opinions were submitted under § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, to the judgment of the Plenum, by Judges Vlasta Formánková, Pavel Holländer, Jiří Mucha, Jiří Nykodým, Pavel Rychetský and Michaela Židlická, and to the reasoning of the judgment by Judge Dagmar Lastovecká.

1. Dissenting opinion of Judges Pavel Holländer, Vlasta Formánková, Jiří Mucha, Jiří Nykodým and Michaela Židlická to the verdict of the judgment

The Constitutional Court decided to annul § 11 par. 4 let. b) of Act no. 106/1999 Coll., on Freedom of Information, as amended by later regulations, in a proceeding on specific review of a norm. In the matter file no. I. ÚS 1885/09 (reference to be

added after the proceeding ends), where the complainant seeks annulment of the Supreme Administrative Court judgment of 29 April 2009 ref. no. 8 As 50/2008-75, it joined, under § 74 of Act no. 182/1993 Coll., as amended by later regulations, with a constitutional complainant a petition seeking annulment of the statutory provision in question.

The Constitutional Court has spoken on the purpose of specific review of norms in a number of its decisions. In resolution file no. Pl. ÚS 51/05 of 3 March 2009 (to be published in volume 52 of the Collection of Decisions of the Constitutional Court) it formulated a fundamental hypothesis in this regard: "The purpose of specific review of norms under § 74 of the Act on the Constitutional Court is to protect the subjective fundamental constitutional rights. A proceeding on annulment of a statute or other legal regulation that a complainant may file under this provision is of an accessory nature."

The complainant filed a complaint with the Municipal Court in Prague against a decision by the Ministry of Finance of 30 October 2006 ref. no. 10/99 897/2006-RK, which denied the complainant's appeal against a decision by the Ministry of Finance of 29 September 2006 ref. no. 22/92219/2006/3341IK-255, and confirmed the decision on partial denial of information, i.e. non-provision of court judgments in cases of complaints against persons acquiring property transferred for payment by the Fund of Children and Youth "in liquidation" under of Act no. 364/2000 Coll., which had not yet entered into effect. The Municipal Court in Prague, by judgment of 18 June 2008 ref. no. 9 Ca 4/2007 43 denied the complaint, and the Supreme Administrative Court subsequently denied a cassation complaint against that judgment by the Municipal Court.

The complainant thus under of the Act on Freedom of Information requested provision of the judgment that had not entered into effect from the party to the proceeding (the Czech Republic, in whose name the Ministry of Finance acted), in a civil suit.

Under § 11 par. 4 let. b) of the Act on Freedom of Information, obligated subjects shall not provide information on the decision making activity of the courts, with the exception of judgments that have entered into effect. Under § 2 par. 1 and 2 of the act, obligated subjects that have an obligation under the Act to provide information related to their function are state bodies, territorial self-government units and their bodies and public institutions; obligated subjects are also those subjects to whom the law entrusted decision making on rights, legally protected interests or obligations of individuals or legal entities in the public administration sphere, only in the extent of their decision making activity.

Under § 21 of the Civil Code, if the state is a party of civil law relationships, it is a legal entity. According to doctrine, "there is no doubt that the state, as an owner, has the same rights and obligations as other owners" (J. Švestka, J. Spáčil, M. Škárová, M. Hulmák a kol., Občanský zákoník I. Komentář [The Civil Code I. Commentary]. Prague 2008, p. 261), or, "if the state enters legal relationships as a person in the same position as other parties to those relationships, if in those relationships it pursues its interests by relying on the principle of the free will of the parties … the state becomes a party to private law, or civil law relationships"

(K. Eliáš a kol., Občanský zákoník. Velký akademický komentář. 1. svazek [The Civil Code. Long Academic Commentary. vol. 1], Prague 2008, p. 199–200).

If the state is a party to a civil trial under § 7 of the Civil Procedure Code (the "CPC"), it takes part in court hearings and decision making of the dispute or other legal matter arising from civil law, labor, or commercial relationships, and under § 18 of the CPC it has the rights arising from the principles that all parties to a proceeding are equal.

It follows that the state, in the position of a party to a civil court proceeding, is legal entity, and not a subject of state authority with a sovereign position, wherefore in that position it is not an obligated party under of the Act on Freedom of Information. The opposite interpretation would breach the principle that all parties to a civil court proceeding are equal, and thus would also affect their rights arising from Art. 37 par. 3 of the Charter of Fundamental Rights and Freedoms [regarding the state's position as a subject of fundamental rights – e.g. property rights– see, a contrario, the opinion of the Plenum in file no. Pl. ÚS-st. 9/99 of 9 November 1999 (ST 9/16 SbNU 372)]. If the majority vote here points to the state's Janus-like appearance, we can object that this is manifest in its various roles (the role of public law subject and a private law subject); however, if it acts in one of these roles, it cannot be regarded from the point of view of the other. This difference in no way prevents exercising the rights arising from the Act on Freedom of Information vis-à-vis the state as a public law corporation in matters of public ownership [see, a fortiori, also judgment file no. III. ÚS 686/02 of 27 February 2003 (N 30/29 SbNU 257)], if there are no grounds to refuse to provide information or priority of a lex specialis, which in this matter is the Civil Procedure Code.

Based on the foregoing, we are of the opinion that in the adjudicated matter the requirements for reviewing a petition under § 74 of the Act on the Constitutional Court were not met, because the essential reason – regardless of the arguments applied by the courts – for the decisions contested by the constitutional complaint must be found in § 2 of the Act on Freedom of Information. If one must conclude that in this case the state acted as a legal entity in a civil law relationship, then it does not meet the requirement of public law status of an obligated person under the cited Act, and thus application of § 11 par. 4 let. b) no longer comes into consideration.

Beyond the framework of those arguments, we also state the opinion that the European Court of Human Rights case law cited by the majority vote does not apply to the present matter. Both cases, Campos Dâmaso v. Portugal and the Sunday Times v. the United Kingdom, do not concern the obligation of the state (the courts) to provide judgments that have not entered into effect to third parties in an ongoing, unfinished court proceeding; rather, they provide for protection of the freedom of the press to provide information about ongoing court proceedings, and within that also protection of their sources of information. However, they do not, in any case, give rise to an obligation on the state (the courts) to act positively – deliver judgments that have not entered into effect beyond the scope set forth by the codes of procedure.

The consequences of the judgment are a breach of the principle that the

Constitutional Court formulated in judgment file no. Pl. ÚS 41/02 of 28 January 2004 (N 10/32 SbNU 61; 98/2004 Coll.), and under which in a case of conflict of laws governing the rights and obligations of the state and its bodies (the Act on Protection of Classified Information, the Act on Freedom of Information, etc.) and laws governing the process of the courts in civil court proceedings, in criminal proceedings, and in administrative court proceedings, the procedural codes have the status of legi speciali. In that matter – based on the principle of necessity – the Constitutional Court reasoned on the basis of the fact that the aims of the Act on Protection of Classified Information are ensured in a court proceeding by particular procedural institutions. Likewise, in the present matter, freedom of access to information (to a judgment that has not entered into effect) in a court proceeding is ensured by the procedural institution of public pronouncement of the judgment.

Finally, the majority vote considers "key" the hypothesis "that one cannot (naturally) rule out a priori the possibility that in a particular case protection of a fundamental right will outweigh the cited values, i.e. that there will not be a "pressing social need" to limit the fundamental right ("this hypothesis"). That is precisely why it is necessary to review, in each particular matter (according to the circumstances of the particular matter), whether the condition of necessity for limiting an individual's fundamental right or freedom in a democratic society has been met." This gives rise to discretion for a court (or another state body of state authority, or public institution) to decide whether to provide or not provide a judgment that has not entered into effect, discretion which is – under the Administrative Procedure Code – subject to judicial review. Thus, under the banner of "scrutiny of the state" we are witness to its proliferation, cancerous proliferation of the process, with such paradoxical consequences that, for example, an administrative court will review the actions of a court in a criminal matter.

The cited reasons lead us to disagree with the verdict of the judgment in the matter file no. Pl. ÚS 2/10 and to submit this dissenting opinion.

2. Dissenting opinion of Judge Pavel Rychetský to the verdict of the judgment

This dissenting opinion, which I am filing under § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, dissents from the verdict whereby the majority of the Plenum of the Constitutional Court removed from § 11 par. 4 let. b) of the Act on Freedom of Information the word "effective." In this case, the core of the adjudicated issue is a conflict between two interests protected by the constitutional order. On one side the right to free access to information (and the correlated obligation of the state to make it available), which is a complementary derivative of the fundamental right to free speech and the freedom to obtain and disseminate information. On the other side is the principle enshrined in the Charter that this right may be limited by law in the case of measures that are necessary in a democratic society for protecting the rights and freedoms of others, the security of the state, public security, public health, or morals. From that point of view, there is no doubt that limiting the right to free speech in relation to the judiciary only to proceedings that have been completed with legal effect is impermissible, because at a general level this does not involve

any of the constitutional limits that permit limiting the freedom of speech. However, I conclude that when interpreting the right to access to information, which is not exactly identical to the right to free speech and the right to disseminate information, we cannot overlook the text of Art. 17 par. 5 of the Charter of Fundamental Rights and Freedoms, which requires state bodies and territorial self-governing bodies "in an appropriate manner, to provide information with respect to their activities," and "Conditions therefor and the implementation thereof shall be provided for by law." In this case, the legislature, by giving a definitive list of exceptions from the obligation of state bodies to provide information about its activities, removed, for the judiciary "information on the decision making activities of the courts, with the exception of judgments that have entered into effect." It seems quite obvious to me that this statutory limitation on access to information pursues the aim of protecting the integrity, independence, and impartiality of a court proceeding as one of the fundamental constitutionally protected values of a democratic state governed by the rule of law. Moreover, I do not see this statutory exception as a prohibition on dissemination information or on public discussion of ongoing court proceedings, but only as a statutory instruction to the courts, not to take part in such discourse in any way during the time that a court proceeding is ongoing. Informing the public, and its access to information, are sufficiently ensured by the general laws governing the public nature of a court proceeding in all procedural regulations (the Criminal Procedure Code, the Civil Procedure Code, and the Administrative Procedure Code). I conclude that the majority of the Plenum of the Constitutional Court did not sufficiently appreciate this feature, as it argues broadly in the judgment why a law without the limitation in question would be desirable. One cannot disagree with these arguments, and even I do not consider a legal framework that makes accessible to the public even court judgments that have not entered into effect to be unconstitutional – on the contrary, that is undoubtedly the most user friendly law on the right to information. However, the role of the Constitutional Court is not to seek the optimal forms of a sub-constitutional right (that is exclusively the domain of the legislature), but, in accordance with the principle of judicial restraint, merely to annul those norms that are inconsistent with the constitutional order, where the inconsistency cannot be removed through constitutional interpretation of the law. I did not find the contested provision to have such inconsistency.

3. Dissenting opinion of Judge Dagmar Lastovecká to the reasoning of the judgment

I agree with the essential grounds in the reasoning of the judgment concerning the possibility of providing judgments that have not entered into effect in terms of fulfilling the fundamental rights enshrined in Article 17 of the Charter. Providing judgments that have not entered into effect in a situation where there is no pressing social need to limit a fundamental right under Art. 17 par. 4 of the Charter permits, in specific cases, giving the public more precise, undistorted information.

I also respect the opinion expressed in the reasoning of the judgment concerning the need for scrutiny of the exercise of state power (which is, in any case, the significance and purpose of the right to information), and in a certain degree also

the exercise of the judicial power.

I submit this dissenting opinion only to certain passages in the reasoning of the judgment, the arguments contained, e.g., in points 39, 42, and 43, and especially in point 45.

Scrutiny of the exercise of the judicial power through the provision of information may not, under any circumstances, interfere in the constitutional value of the independence and impartiality of the judiciary, which is stated in point 42 of the judgment, but only with the words “public discussion of a matter being handled by a court need not necessarily (automatically) interfere in the independence or impartiality of the judiciary.”

In my opinion, the abovementioned points, by accentuating public discussion, and not just specialized discussion, which “may contribute to a just outcome in a continuing court proceeding,” recognize a certain possibility that public discussion will affect the subsequent decision making activity of the courts. Although I do not criticize the possibility for public discussion, even in relation to the exercise of the judicial power, I am convinced that judges cannot and must not be influenced in any way by such discussion in their decision making activity.

In that regard, I also see a certain inconsistency in the cited passages of the reasoning with point 42, as well as with the citation given in point 64: “In this one aim for having a trial proceeding be public there is, under law, no difference between a hearing before a jury and before a panel [of judges], and the law does not aim, even with a jury, to permit a strong impression of the audience’s mood to influence the jury in the jury room.”